REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

Mixed Claims Commission United States-Venezuela

17 February 1903

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

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

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

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

ARTICLE I

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

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

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

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

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

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

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

ARTICLE II

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

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

ARTICLE III

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

ARTICLE IV

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

ARTICLE V

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

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

ARTICLE VI

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

Washington, D. C. February 17, 1903

[SEAL] John HAY

[SEAL] Herbert W. BOWEN.

PERSONNEL OF AMERICAN - VENEZUELAN COMMISSION

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

RULES OF AMERICAN - VENEZUELAN COMMISSION

I

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

The caption of each case shall be:

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

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

II

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

III

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

IV

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

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

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

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

V

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

VI

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

VII

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

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

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

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

VIII

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

OPINIONS IN THE AMERICAN - VENEZUELAN COMMISSION

DIX CASE [1]

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

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

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

BAINBRIDGE, *Commissioner* (for the Commission):

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

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

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

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

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

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

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

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

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

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

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

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

[1] Moore's Arbitrations, 3712.

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

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

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

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

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

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

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

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

DE GARMENDÍA CASE

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

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

BAINBRIDGE, *Commissioner* (for the Commission):

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

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

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

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

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

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

[Translation]

COMMITTEE OF EXAMINING ACKNOWLEDGMENT OF DEBTS

Caracas, February 27, 1890.

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

The President, JOSÉ M. LARES

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

CARACAS, *February 26, 1891.*

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

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

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

Received on account $ 10,000 described as above.

Carlos G. DE GARMENDÍA

Between the lines the word " been ".
Correct.

C. G. DE G.

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

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

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

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

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

Article 9 of the contract provides as follows:

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

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

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

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

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

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

[Translation]

Caracas, January 9, 1880.

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

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

P. ARNAL

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

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

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

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

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

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

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

HENY CASE

(By the Umpire:)

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

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

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

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

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

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

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

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

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

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

Caracas, March 15, 1893. E. HENY

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

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

The United States of America on behalf of Emerich Heny now presents to this Commission a claim, inclusive of the two claims designated above, amounting in the aggregate with interest to $ 38,714.30.

Article 1 of the protocol constituting the Commission confers jurisdiction over —

" all claims owned by citizens of the United States of America against the Republic of Venezuela which have not been settled by diplomatic agreement or by arbitration between the two Governments, and which shall have been presented to the Commission hereinafter named by the Department of State of the United States or its legation at Caracas. "

It is evident from the record that Heny never became the real owner of " La Fundación." Subsequent to his marriage he assumed the management of the estate and became in all matters pertaining to it the general agent and representative of the Benitz heirs. It seems at that time the plantation was run down and out of repair. Heny says:

Upon my marriage I entered into a contract with the said heirs by which I undertook the management and cultivation of the said plantation on my own account and with my individual capital. From that time until 1892, when the events hereinafter related occurred, I invested, in addition to my labor and services, the sum of $ 12,606.80 of my own money in improving and developing said plantation.

An instrument is put in evidence bearing date May 1, 1892, which reads as follows (translation):

We, Emilia B. de Benitz, a widow; Matilda Benitz, Adolf Benitz, Emilia Benitz, Gustavo Benitz, unmarried, residing in this city, of more than 21 years of age, and

sole heirs — conjointly with Bertha Benitz de Heny, wife of E. Heny — of Mr. Carlos Benitz, declare that, owing as we do Mr. E. Heny the sum of 12,606 pesos sencillos and 80 centesimals, besides other sums that we owe to sundry other creditors of our estate " La Fundación," to the amount of 26,833 pesos and 33 centesimals, for money supplied by said Heny for the improvement, maintenance, and cultivation of our sugar-cane estate called " La Fundación," situate at Las Tejerías jurisdiction, of the municipality of Consejo, district of Ricaurte, of the State of Miranda, the boundaries of which are in conformity with the title of property which, as heirs to our principal, Mr. Carlos Benitz, is in our possession and is registered under Nos. 38 and 41 of the first and second protocols, of the first quarter, under date of March 11, 1878, we hereby assign, cede, and transfer, in favor of the said Mr. E. Heny, all of the rights and actions that correspond to us or may to us correspond in future in said property " La Fundación," as a guarantee to said Heny for any loss he may sustain in the capital he has invested in said estate, Heny remaining bound to answer for the other debts incurred by said estate, which he is to pay off when we make, as we now make, formal cession in his favor of our credits in said estate. To the accomplishment of what is herein agreed to we bind our present and future property, in accordance with the law.

I, E. Heny, of over 21 years of age, wedded to Bertha Benitz, residing in this city, do accept the above transfer and bind myself to carry out my share of this agreement.

Caracas, May 1, 1892.

Emilia B. DE BENITZ
Matilda BENITZ
Adolf BENITZ
Emilia BENITZ
Gustavo BENITZ
E. HENY

This contract between the Benitz heirs and Heny is neither a mortgage nor a sale of the estate. Somewhat deficient in form, the contract is in substance that known to the civil law as an antichresis, whereby a creditor acquires the posession and right of reaping the fruits and other revenues of real property given him in pledge as security for a debt. The creditor does not become the proprietor of the immovables pledged, but he may take the profits of the estate, crediting annually the same to the interest and the surplus to the principal of the debt, and being bound to keep the estate in repair and pay the taxes. It is analogous to the vadium vivum of the early English law and the Welsh mortgage, which has now gone entirely out of use in common-law countries. Under the civil law the antichresis gives the creditor, not the title to but a possessory interest in, the real property pledged. (4 Kent's Com., 138n; Livingston *v.* Story, 11 Pet., 351; Walton's Civil Law in Spanish-America, art. 1881.)

A pledge or pawn (Pfandrecht) in the modern Roman law, according to Bar's definition, is a real, or possessory, right to follow a thing in the hands of third parties for the satisfaction of a personal claim. * * *

A whole estate may be thus pledged and in such cases the pledge covers not only what is on the estate at the time, but what may afterwards be added to it, even though the parties at the time have no knowledge of such addition. (Wharton, Conflict of Laws, sec. 314, citing Savigny, VIII, sec. 366.)

By the common Roman law a person can hypothecate his entire estate as an aggregate — i. e., all things which he has in bonis at the particular time and those he will possess in future. (*Ibid.*, sec. 320.)

We have here the measure and extent of Heny's individual interest. Up to May 1, 1892, he had advanced the Benitz heirs out of his own capital the sum of 12,606.80 pesos. Clearly the purpose and intent of this contract was to secure Heny for the advances made and to be made by him on account of the estate. To provide this security, the heirs of Carlos Benitz pledged to Heny the estate

of " La Fundación " and its appurtenances. Thereafter Mr. Heny, though not the holder of the legal title to the estate, did have a real or possessory right therein, which entitled him to compensation against third parties who, by their wrongful acts, might impair his security, to the extent at least of his actual interest in the property.

Anyone having an interest in land is liable to suffer injury with respect to this right; and accordingly, if his right, however limited it be, is injured, he may recover compensation equal to his individual loss. The general rule may be said to be that the extent of the injury to the plaintiff's proprietary right, whatever it may be, furnishes the measure of damages. (Sedgwick on Damages, sec. 69.)

In the contract with the heirs, Mr. Heny agreed to pay the other debts of the estate; but there is in the record no allegation or proof that he did so. They can not be considered, therefore, as included in the advances made by Heny to the estate.

General Fernandez certifies that the pro rata supplies furnished to his army by the plantation called " La Fundación," amounted to 143,098 bolivars. These supplies consisted of crops, horses, cattle, lumber, merchandise, tools, and money. All of this property as appurtenances of the estate was in Heny's possession under the contract with the Benitz heirs, constituting part of his security for the 12,606.80 pesos invested by him in the property. It represented the " fruits and other revenues " of the estate which he had the right to apply to the satisfaction of his claim. The property taken or destroyed exceeded in value the amount of his lien. If the Government of Venezuela is liable for the taking and destruction of this property, Mr. Heny is entitled to an award for an amount equal to his individual loss. To this should be added, as involved in the claim, compensation for the proportionate loss sustained by his wife, Bertha Benitz Heny, one of the Benitz heirs, who is by virtue of her marriage a citizen of the United States.

The " Legalista " revolution of September, 1892, ultimately proved successful in establishing itself as the de facto Government of Venezuela. The same liability attaches for encroachment upon the rights of neutrals in the case of a successful revolutionary government, as in the case of any other de facto government.

The validity of its acts, both against the parent State and its citizens or subjects, depends entirely upon its ultimate success. If it fail to establish itself permanently, all such acts perish with it. If it succeed and become recognized, its acts from the commencement of its existence are upheld as those of an independent nation. (Williams *v.* Bruffy, 96 U. S., 176.)

The liability of a government for encroachment upon neutral property has been clearly stated in Shrigley *v.* Chile decided by the United States and Chilean Commission of 1892, as follows:

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

This rule has been followed in the case of Ford Dix decided by this Commission[2].

The certificate of General Fernandez is sufficient evidence that the property taken from " La Fundación " was under the authorization of the military authorities for the use and services of the revolutionary army.

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[1] Moore's Arbitrations, 3712.

[2] *Supra*, p. 119.

The learned counsel for Venezuela urges that the contract between Heny and the Benitz heirs is void because it consisted in the transfer of rights to real property for which record in the registry is an indispensable requisite in Venezuela. (Civil Code, art. 1888.) But this position is believed to be untenable. Certainly the contract was valid as between the parties, whether recorded or not. And whatever may be the requirement and effect of a registration law as affecting the rights of innocent third parties, it can have no possible bearing to excuse the acts of a mere trespasser or tort feasor.

The foregoing renders unnecessary any discussion of the second claim. But it may be remarked that the evidence shows that at the time of its destruction the property lay in the track of actual war.

An award should be made in this case for the sum of $ 10,085.40 (being the equivalent of 12,606.80 pesos) and the further sum of $ 1,753.25 (the proportionate loss sustained by Bertha Benitz Heny) in all the sum of $ 11,838.65 in United States gold, with interest thereon at 3 per cent per annum from March 15, 1893, the date of the presentation of the claim to the Venezuelan Government to December 31, 1903, the anticipated date of the final award by this Commission.

In so far as any claim or claims of the heirs of Carlos Benitz other than Bertha Benitz Heny are involved herein, they should be dismissed for want of jurisdiction, without prejudice to their prosecution in a proper forum.

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

The United States of America, on behalf of Emerich Heny, presents to this Commission a claim for the sum of $ 38,714.30. interest inclusive.

E. Heny, claimant, was born in Germany in 1846, emigrated to the United States in 1867, was naturalized as an American citizen in 1872, and two years later moved to Venezuela, where he has since resided. In 1883 he married in Caracas Miss Bertha Benitz, daughter and heir of Carlos Benitz, then deceased. The heirs of the latter acquired by inheritance from their father a rural property situated in " Las Tejerías ", and called " La Fundación." After his marriage Heny became the manager of this estate.

The claim is based upon the following grounds:

First. During the months of September and October 1892, the so-called " Legalista " revolution, which afterwards became the regular government, destroyed the plantations of the estate of " La Fundación," confiscated horses, cattle, and other valuable property, and obtained sums of money as loans, the total of these items amounting, as it is affirmed, to the sum of 143,098 bolivars. General Antonio Fernandez, on March 7, 1893, signed a document, in his character of " chief of the army of the center during the ' Legalista ' revolution," declaring that " the total sum of the advances made to the revolutionary army by the estate called ' La Fundación, ' property of Mr. Benitz's heirs and managed by Mr. E. Heny, amounted to the sum of 143,098 bolivars." This document appears to be legally executed by its signer.

Second. During the months of November and December 1899, forces of the " Revolución Restauradora," then already constituted as government, passed and repassed over the estate " La Fundación," cutting large quantities of sugar cane under cultivation for forage, a battle actually taking place upon the property causing damages to the said plantation. The amount claimed on this account is 12,000 bolivars.

Third. The honorable agent for the United States presents as proof that his claim belongs to the American citizen, Mr. E. Heny, a private document executed by the widow and children of Carlos Benitz, his heirs, dated in Caracas on May 1, 1892, in which it appears that there being due to Mr.

E. Heny the sum of 12,606.80 pesos venezolanos, and to other creditors of the same estate " La Fundación," the sum of $ 26,833, for advances made by said Heny for the improvement, maintenance, and cultivation of the said plantation, they assigned and transferred to E. Heny all rights and interests that correspond or might thereafter correspond to them in the said estate " La Fundación " as a guaranty against any loss that Heny might sustain of the capital invested by him in the estate; Heny being also bound to respond for all other claims against the estate, which he undertook to pay in consideration of the transfer made to him of all the rights and interests in the said property.

Fourth. E. Heny addressed on March 15, 1893, the minister of finance and public credit, as follows:

> E. Heny, merchant and resident of this city, on behalf and as representative of the heirs of Mr. C. Benitz, beg to state respectfully that said heirs are creditors of the Government for the sum of 143,098 bolivars for advances made to the revolution in the district Ricaurte, State of Miranda, as is proven by the annexed voucher consisting of 1 folio, signed by Gen. Antonio Fernandez, which I present to you in accordance with the Executive resolution of 28th of November last.

When this claim was presented to the board of public credit it was admitted in favor of Benitz heirs for one-half of the total amount claimed, and the Government offered in payment bonds of " Deuda de la Revolución," which the claimants declined to accept for reason of its depreciated price in the market. Subsequently E. Heny addressed the Department of State at Washington on May 9, 1901, presenting in his own name and for his account two claims which had arisen as the results of the acts committed by the revolutionary forces in the estate " La Fundación " in 1892 and 1899, and other damages suffered.

The petitioner in that document styles himself owner of the plantation " La Fundación."

The honorable Acting Secretary of State, David J. Hill, in his note of April 29, 1901, addressed to Mr. Heny's attorney, Charles A. Hansmann, in answer to the claim presented by said attorney against the Government of Venezuela for damages caused by the destruction, occupation, and confiscation of Heny's property by military forces of the Venezuelan Government and by revolutionary troops, determined and specified that Mr. Heny should produce the contract made with Benitz heirs by virtue of which he was managing the plantation, or any other proof that the property taken and destroyed belonged to him. To comply with this requirement the claimant has presented to the Commission the private agreement executed on May 1, 1892, by the widow and children of Mr. Benitz, deceased.

The honorable agent for the Venezuelan Government objects to the efficacy of this contract or private document as establishing the proof of ownership in favor of Heny, of property rights in the estate " La Fundación " as to third parties, inasmuch as said document lacks official certification as to the exactness of the date and has not been authenticated and recorded in the public register's office of the district where the estate is situated, in conformity with the law. In proof of his assertion the honorable agent has produced two deeds marked " A " and " B ;" the first of which, dated March 8, 1878, refers to the purchase of the estate " La Fundación " by Mr. Carlos Benitz, and the second, dated November 28, 1898, in which it appears that Mr. E. Heny, acting as attorney for Juan Remsted, on July 2, 1896, by deed duly recorded in the city of La Victoria in the public register's office, bought, for said Remsted, from the widow and children of Mr. Benitz, the plantation called " La Fundación " for the sum of 80,000 bolivars, with an agreement of resale for the same amount to Messrs. Benitz within a stipulated term. It also appears from the last-

mentioned deed that the Benitz heirs, after having availed themselves of the privilege of repurchasing the estate " La Fundación " by paying to Remsted the sum of 80,000 bolivars, and thus having reacquired the ownership of said estate, the same heirs of Benitz, and among them Bertha Benitz, acting under the authorization of her husband, E. Heny, made a new sale to Mrs. Altagracia H. de Ortega Martinez, of the same plantation, free of all incumbrances for the sum of 36,000 bolivars, reserving to them the privilege of repurchasing within the term of one year, and Messrs. Benitz remaining as tenants of the plantation. This deed, signed by E. Heny, as attorney for J. Remsted, is authenticated before the mercantile court of first instance of the Federal district on the 28th of November, 1898, and was recorded in the public register's office of the district Ricaurte, on December 2 of the same year.

It appears from the foregoing that the question of the rights that Mr. Heny alleges to have acquired in the real property, " La Fundación," prior to the dates on which the acts committed by the Government and revolutionary forces took place, and which rights he claims as arising from the private contract between himself and Benitz heirs, is in itself a question which treats of the rights acquired in a real property situated within the territory of the Republic. All questions relating to real property are necessarily governed by the local law of the place where the property is situated, lex loci rei sitæ:

> As everything relating to the tenure, title, and transfer of real property (immobilia) is regulated by the local law, so also the proceedings in courts of justice relating to that species of property, such as the rules of evidence and of prescription the forms of action and pleadings, must necessarily be governed by the same law.
>
> Thus real property is considered as not depending altogether upon the will of private individuals, but as having certain qualities impressed upon it by the laws of that country where it is situated, and which qualities remain indelible, whatever the laws of another State or the private dispositions of its citizens may provide to the contrary. That State where this real property is situated can not suffer its own laws in this respect to be changed by these dispositions without great confusion and prejudice to its own interest. Hence it follows as a general rule that the law of the place where real property is situated governs as the tenure, title, and descent of such property. (Lawrence's Wheaton's Elements of International Law, pp. 196, 116, Part II, Chap. II.)

The contract made between the heirs of Benitz and Heny, in May 1892, is not a contract of sale by which the dominion of the real estate is transferred in conformity with the laws that govern such contracts, because in order to be so considered required the explicit statement that the real estate was given in sale for a stated price; and furthermore, the local law required that in order to be valid as to third parties the document must be recorded at the register's office of the district where the said real estate is situated. Neither is it a mortgage contract, because, although the word guarantee is employed, it lacked one of the two essential legal conditions that characterize the mortgage, and that is the publicity which is obtained according to the law by employing the essential formality of registering in the proper office of the place where the real estate is situated. From the terms of the said contract the only inference which might be drawn is that it was the intention of the parties to celebrate an antichresis, giving to the creditor the right of reaping the fruits of the estate delivered to him, with the obligation of annually crediting the value thereof against the interest, if any was due to him, and any remaining balance against the principal standing to his credit; but besides the terms, which characterize a contract of antichresis, being imperfectly defined in the said contract, because there is no stipulation that the creditor acquired the right to reap the fruits, with the obligation of crediting the value thereof against the interest and prin-

cipal due him, in order that this contract of antichresis might be valid against third parties, it was necessary that the formality of registry should likewise be complied with as being essential for its effectiveness.

The said document, such as it is, only established a subsidiary guaranty between the debtor and the creditor, which did not cancel Heny's credit against the Benitz heirs, neither transferred to Heny any actual right in the real estate belonging to said Benitz heirs, because that transfer to make it effective against third parties would have had to be made public and made in accordance with the law governing the tenure, the title, and the transfer of the real property in the place of its situation. The law in such cases, demands as an essential requisite for the transfer of rights in real estate, to produce effect against third parties, the recording thereof in the office of the public register in the respective district.

The Benitz heirs, owners of the estate " La Fundación," in 1892, became direct creditors of the Government of Venezuela, by reason of the acts damaging said estate and committed by the forces of the " Revolución Legalista," and the said heirs, as regards their relations to the Venezuelan Government, being as they were, the only owners of the estate called " La Fundación " as per public title, duly recorded, and it was in virtue of this ownership only that General Fernandez executed to the Benitz heirs an acknowledgment of their credit against the Government of Venezuela, and it was for the same reason that E. Heny, presented to the minister of finances and public credit, as attorney of the Benitz heirs, and on behalf of said heirs, owners of the estate " La Fundación " against the said Government, the claim for the amount of this credit.

This opinion is confirmed by the remarkable circumstance that four years after the celebration of the private agreement between the Benitz heirs and Heny, the Benitz heirs appear on record as signing a deed of sale of the estate " La Fundación " in favor of Mr. Juan Remsted, and the same Mr. Heny accepted the said sale as attorney for Remsted without making any reservation as to the rights which he had acquired in the income and value of the estate, as security for the payment of his personal credit against the Benitz heirs. This acceptance of the transfer of the real estate to a third party given by Heny implies one of two conclusions: Either Mr. Heny had been paid by the Benitz heirs on or before that date the amount personally due to him or by such act he released his rights against the estate " La Fundación " which the Benitz heirs had accorded him as a guaranty for any loss that he might incur because of his prior investments in the said estate. In either case all legal rights or privileges established by the private contract of 1892, in reference to the estate " La Fundación," even considering said contract as antichresis, became null and void, and without effect whatsoever.

It appearing proven by the public deed presented by the honorable agent of Venezuela, dated November 28, 1898, that the estate " La Fundación " was again sold to Mrs. A. H. de Ortega Martinez, by the same heirs of Benitz as owners, this evidence destroys Heny's pretension to the payment of the damages caused to the real estate " La Fundación " in 1899, which constituted the second part of his claim, because on that date the said estate did not belong to him.

The circumstance which is argued that the estate " La Fundación " was cultivated and developed with Mr. Heny's money does not establish any juridical bonds between him and the Venezuelan Government, as relating to the damages caused to the property by Government or revolutionary troops, as such damages can only be claimed of the Venezuelan Government by such parties who by duly registered and authenticated titles appear as the legitimate owners of the damaged property. To admit as competent for recognition as a claimant before this Commission, anyone who may advance money for the

cultivation and development of estates or property belonging to Venezuelan citizens, would be equivalent to bringing before this Commission all foreigners who make a business of advancing money to the owners of real property either by private contracts or by virtue of contracts in which a mortgage on the property so benefited is given, a common practice between the foreign merchants established in this country and Venezuelan proprietors and agriculturists.

In consequence, my opinion is that this claim should be disallowed.

BARGE, *Umpire:*

A difference of opinion arising between the Commissioners for the United States of America and the United States of Venezuela this case was duly referred to the umpire.

The umpire having fully taken into consideration the protocol, documents, evidence, and arguments, and likewise all other communications made by the two parties, and having carefully and impartially examined the same, has arrived at the decision embodied in the present award.

As to the first claim of the claimant:

Whereas it is clearly proven that in the months of September and October 1892, during the so-called " Legalista " revolution, at the hacienda " La Fundación," the plantations of that estate were partially destroyed; horses, cattle, and other valubale property confiscated, and sums of money obtained as loans by the troops of the revolutionary party for the use and service of the revolutionary army under the authorization of the military chiefs;

And whereas the revolution proved ultimately successful in establishing itself as the de facto Government so that the liability of the Venezuelan Government for these acts can not be denied;

And whereas Emerich Heny, who has proved himself a citizen of the United States of America, claims that the sum owed by the Venezuelan Government as restitution for the above-mentioned acts is due to him, and as proof of his rights in the above-mentioned damages, confiscated properties and loaned moneys produces an instrument bearing date of May 1, 1892, and containing a contract between himself and the heirs of Carlos Benitz, who, according to the evidence produced before the Commission, were on the date of the above-stated facts the owners of the said estate " La Fundación."

Whereas, therefore, it has to be considered to what extent this contract gives the claimant any right to the claim in question.

Whereas this contract reads as follows (translation):

We, Emilia B. de Benitz, a widow; Matilda Benitz, Adolfe Benitz, Emilia Benitz, Gustavo Benitz, unmarried, residing in this city, of more than twenty-one years of age, and sole heirs, conjointly with Bertha Benitz de Heny, wife of E. Heny, of Mr. Carlos Benitz; declare that owing as we do to Mr. E. Heny, the sum of $ 12,606 pesos sencillos and 80 centesimals, besides other sums that we owe to sundry other creditors of our estate " La Fundación," to the amount of 26,833 pesos and 33 centesimals, for money supplied by E. Heny, for the improvement, maintenance, and cultivation of our sugar-cane estate called " La Fundación," situated at Las Tajerías, jurisdiction of the municipality of Consejo, district of Ricaurte, of the State of Miranda, the boundaries of which are in conformity with the title of property which, as heirs of our principal, Mr. Carlos Benitz, is in our possession and is registered under Nos. 38 and 41, of the first and second protocols, of the first quarter, under date of March 11, 1878 (1878), we hereby assign, cede, and transfer in favor of the said Mr. E. Heny, all the rights and actions that correspond to us or may to us correspond in future in said property, " La Fundación," as a guaranty to said Heny for any loss he may sustain in the capital he has invested in said estate, Heny remaining bound to answer for the other debts incurred by said estate, which he is to pay off when we make, as we do now make, formal cession in his favor of our credits in said estate; to the accomplish-

ment of what is herein agreed to, we bind our present and future property, in accordance with the law.

E. Heny, over 21 years of age, wedded to Bertha Benitz, residing in this city, do accept the above transfer and bind myself to carry out my share of the agreement.

Caracas, May 1, 1892.

Emilia B. DE BENITZ
Matilda BENITZ
(And others in interest)

And whereas it is clear that in this contract, stating that they owe the claimant Heny the sum of 12,606 pesos sencillos and 80 centesimals, as invested by him in the estate " La Fundación," and that they owe besides 26,833 pesos and 33 centesimals to sundry others whom they call " creditors of our estate La Fundación," thereby indicating that this sum as well was invested in said estate, the heirs of Carlos Benitz wanted to give a guaranty to Heny for any capital invested by him in that estate and at the same time wished to be freed from the other debts incurred by said estate, and therefore transferred to him, Heny, their credits in that estate, whilst he agreed to answer for all the debts;

Whereas, certainly this contract is neither a mortgage nor a sale of the estate and, lacking the characteristic stipulations of an antichresis, can not properly be counted to that species of contracts, to which, in substance, it seems to bear most resemblance;

Whereas, however — whatever may be the technical deficiencies of the instrument — whilst interpreting contracts upon a basis of absolute equity, what the parties clearly intended to do must primarily be considered;

And whereas, it was clearly the intention of parties that no one but the claimant should have a right to expropriate anything belonging to this estate, nor to profit by the revenues, at all events so long as his interest in the estate should last, which interest the heirs wished to guarantee; and whereas this interest existed as well in the sum invested by him in the estate as in the debts he assumed and which he might pay out of the estate, the credits and debits of which were equally transferred to him by the owners; whereas, therefore, according to this contract at the moment the facts which obliged the Venezuelan Government to restitution took place, the only person who directly suffered the " detrimentum " that had to be repaired was the claimant E. Heny;

Whereas, it being true that according to the principles of law generally adopted by all nations and also by the civil law of Venezuela; contracts of this kind only obtain their value against third parties by being made public in accordance with the local law — in this claim before the Commission, bound by the Protocol, to decide all claims upon a basis of absolute equity, without regard to objections of a technical nature or of the provisions of local legislation, this principle can not be an objection, and even when made this objection may be disregarded without impairing the great legal maxim, locus regit actum, as equity demands, that he should be indemnified who directly suffered the losses, and it not being the question here who owned the estate " La Fundación," but who had the free disposition over and the benefit and loss of the values for which restitution must be made, and who, therefore, in equity, owns the claim for that restitution against the Venezuelan Government.

Whereas then, it being stated that the American citizen E. Heny owns a claim against the Government of the United States of Venezuela for the partial destruction of the plantations, the confiscation of horses, cattle, and other valuables, and the imposing of loans upon the estate " La Fundación " during the " Legalista " revolution in 1892, it now remains to state, what sum may in equity be claimed on this ground;

And whereas the claimant, to prove the correctness of the sum, produces an official certificate of Gen. Antonio Fernandez, civil and military chief of the State of Zulia, and chief of the second division of the army of the center during the " Legalista " revolution, which certificate was thereafter recognized by said General Fernandez, and the correctness of its contents affirmed before the court of the first instance in civil and commercial matters of the Federal district, by him as well as by two other sworn witnesses; and whereas this certificate reads as follows:

CIVIL AND MILITARY HEADQUARTERS OF THE STATE OF ZULIA,
Maracaibo, March 7, 1893.

Citizen Gen. Antonio Fernandez, civil and military chief of the State of Zulia, and chief of the second division of the army of the center during the Legalista revolution certifies: That the statement at the foot of this document sets forth the pro rata supplies furnished the army of the revolution by the plantation called " La Fundación," situated at Las Tejerías, the property of the heirs of Señor Carlos Benitz, whose general agent and representative is Señor E. Heny.

Twenty-four tablons [1] of sugar cane, at 2,000 bolivars each, 48,000 bolivars; 12 tablons malojo, at 800 bolivars, 9,600 bolivars; 4 saddle horses, at 800 bolivars each, 3,200 bolivars; 1 tablon maize, at 600 bolivars; 2 cart horses, at 800 bolivars each, 1,600 bolivars; 1 breeding mare, 400 bolivars; 1 mare with her colt, 480 bolivars; 11 yoke of oxen, 8,800 bolivars; 1 single ox, 400 bolivars; lumber prepared for building and other uses, 1,200 bolivars; 3 kilometers of fences with their posts destroyed, 1,600 bolivars; in money, forced loans of 1,458 bolivars; and from the business house at " Las Tejerías," 33 cattle, each 120 bolivars, 3,960 bolivars; merchandise and tools from same store, 8,000 bolivars; for loss of time in consequence of the war, 48,000 bolivars; chief steward paid for Antonio Fernandez at the rate of 600 bolivars for eight months, 4,800 bolivars; sum total, 92,498 bolivars.

And whereas by this certificate evidence is given of the facts therein mentioned;

And whereas the estimation of the therein-mentioned values has to be recognized as just, being the authentic estimate of the authority that expropriated said values for the benefit of the army;

And whereas it is thus stated that claimant furnished to the army:

	Bolivars
24 tablons of sugar cane, at 2,000 bolivars each	48,000
12 tablons malojo, at 800 bolivars each	9,600
1 tablon maize	600
4 saddle horses, at 800 bolivars each	3,200
2 cart horses, at 800 bolivars each	1,600
1 breeding mare	400
1 mare with her colt	480
11 yoke of oxen	8,800
1 single ox	400
Lumber prepared for building and other uses	1,200
In money, forced loan	1,458
And from the business house in Las Tejerías on the estate " La Fundación ":	
33 cattle, each 120 bolivars	3,960
Merchandise and tools from same store	8,000
Chief steward paid for Antonio Fernandez, at the rate of 600 bolivars per month for eight months	4,800
Total	92,498

This sum has to be paid as a restitution to the claimant by the Venezuelan Government, and to it should be added the value of 3 kilometers of fences and posts destroyed by the military authority and estimated by that authority at 1,600 bolivars, making altogether 94,098 bolivars;

[1] One tablon = about 10,000 square varas.

Whereas the claimant further claims 48,000 bolivars for loss of time in consequence of the war, which sum is also mentioned in the above-cited certificate;

And whereas this certificate, although being evidence of the facts therein stated, which were the cause of the debits incurred by the Government, and containing the estimate by the proper authorities of the values claimant was deprived of, it is, however, not in itself a causa, and does not create a debit where the causa is wanting;

And whereas the interruption of the ordinary course of business is an invariable and inevitable result of a state of war under which all inhabitants, whether citizens or aliens, have to suffer; and whereas losses incurred by reason of such interruption are not subject to compensation by the Government within whose territory the war exists;

Whereas, therefore, loss of time in consequence of the war, is not a loss whereupon compensation can be equitably demanded; this part of the claim has to be disallowed.

In view of the foregoing an allowance is made in this claim for the sum of 94,098 bolivars, or, with interest thereon at 3 per cent per annum from March 15, 1893, the date of the presentation of the claim to the Venezuelan Government, to December 31, 1903, the anticipated date of the final award by this Commission.

And as to the second claim:

Whereas claimant claims 12,000 bolivars for 4½ tablons of growing sugar cane, confiscated and set aside for the food of the soldiers and taken and destroyed on the estate " La Fundación " during the months of November and December 1899; and whereas the Venezuelan Government produced a deed authenticated before the mercantile court of first instance of the Federal district, on the 28th of November, 1898, and recorded in the public register's office of the district of Ricaurte, on December 2 of the same year; and whereas in this instrument it is stated that on the 25th of November, 1898, the heirs of Carlos Benitz and among them Bertha Benitz, acting under the authorization of her husband E. Heny, made a sale to Mrs. Altagracia H. de Ortega Martinez, of the same estate, " La Fundación," free of all incumbrances, for the sum of 36,000 bolivars, with an agreement of resale within the term of one year.

And whereas it is proven thereby that on the 28th of November, 1898, the claimant Heny, without reserve as to any of his own rights authorized his wife, Bertha Benitz, to partake in a sale of the said estate free of all incumbrances and that this sale was effected; whereas, therefore, on that date Heny lost or abandoned whatever rights he might have had in this estate or its appurtenances and revenues;

And whereas no proof is given that the claimant acquired or recovered any right in the estate or its appurtenances and revenues later than this 28th of November, 1898; whereas, therefore, it is not proven that the claims against the Government of Venezuela for restitution for losses suffered on the estate " La Fundación " during the months of November and December 1899, is owned by the claimant, this claim ought to be disregarded.

BOULTON, BLISS & DALLETT CASE

Equitable demands may be received under the protocol as " claims."

An award will be made in favor of parties who under an implied contract have rendered services to the Government.

PAÚL, *Commissioner* (for the Commission):

The United States presents the claim of Boulton, Bliss & Dallett, against the Government of Venezuela, for the sum of 257,027.02 bolivars, for services rendered.

The claimants are the owners of the " Red D " line which runs between New York and several ports of the Republic of Venezuela.

The claim is founded on services rendered to the Government of the Republic, for carrying the mail from the Venezuelan ports to New York from April 1, 1897, to December 31, 1902, and also on the interest of the stated sums in which such services are annually estimated.

The claimants acknowledge that no espress contract exists fixing a rate of compensation, but that the mail has been carried by their steamship line, at the request of employees of the Government of the Republic, and under the promise that they should be paid a just and reasonable compensation.

The agents of Boulton, Bliss & Dallet, in Caracas, have presented, from time to time, memorials, to the Government of Venezuela, indicating the weight of the bags that were carried; and in a letter dated March 9, 1899, the said agents complained that until such date negotiations have not been entered upon, with a view to arriving, at a contract.

In view of the facts, as they appear from the documents submitted with the claim, it is necessary, owing to the special nature of the same, to determine if they really consitute a proper basis for presenting a claim to be examined and decided by this Commission.

In accordance with Article I of the protocol of Washington, it is incumbent upon this Commission to examine and decide —

All claims owned by citizens of the United States of America against the Republic of Venezuela, which have not been settled by diplomatic agreement or by arbitration between the two Governments. (See p. 000).

It is not opportune to make any comments with regard to the limitations and pertinancy that enter as elements for the qualification of the claims submitted to the jurisdiction of the Commission as established by the terms of said article of the protocol; but it is necessary to fix the meaning of the word "claim" so as to be able to infer if the demand presented, in the name of Boulton, Bliss & Dallett, properly constitutes a claim.

The word " claim," in its most general meaning and in its juridic sense is equivalent to a pretension to obtain the recognition or protection of a right, or that there should be given or done that which is just and due.

In the meaning of the word " claim " there is therefore included any kind or character of demand which involves a principle of justice and equity, and this in the abstract applies to the jurisdictional faculties of this Commission and the circumstances, which in accordance with the especial terms of Article I of the protocol limits that jurisdiction. The amplitude of the phrase " all claims " makes it possible that even the demands which are unforeseen by the law, or which, by the absence of proper agreements lack juridical foundation entitling them to be examined and confirmed under the proceedings of an ordinary court, must be considered by this Tribunal of exceptional jurisdiction which has to decide them upon their merits and upon a basis of absolute equity.

In accordance with the reasoning, the claim presented by the honorable agent of the United States, in the name of Boulton, Bliss & Dallett, possesses the necessary qualification to be examined and decided by this Commission under the principles of justice and equity which should guide its judgments.

The rendering of services, is the fundamental fact of the claim in question. These services consist in the carrying of the mail by the steamships of the " Red D " line from April 1, 1897, to December 31, 1902. The special nature of this service required, in order to establish the juridical bond, which creates obligations and rights between the two parties, the existence of an agreement or mutual understanding which will establish the precise price which must

be paid. The efficacy of the convention or agreement is of primary consideration in this kind of operation. Without it the claim for services does not exist but is only a gratuitous service. This last position was the one that Boulton, Bliss & Dallett maintained before the Government of Venezuela for near half a century, from the date that the vessels, between New York and the Venezuelan ports began their running, until the 2nd of March, 1897, on which date the minister of fomento was notified to the effect that from 1 April of that year they would charge the Venezuelan Government for the carrying of mail bags, not only to the ports of Venezuela that the steamers visit, but to Curaçao, United States and Europe, the following set prices: Eight bolivars per gross kilogram of letters and cards, and 0.50 of bolivar per gross kilogram of printed matter.

The agents of the line indicated in the same letter of March 2, 1897, that the bags should be weighed, on board of the steamers, before the agents of the Government and the agents of the line in each port, advising the weights to the respective post-office for its record.

On January 15, 1898, the ministry of fomento issued, under No. 2281, a resolution ordering the La Guaira post-office master, to give to the agents of the " Red D " line a note of the weight of the bags sent by the American steamers, and on March 6, 1899, and December 10, 1900, the same ministry, on the petition of Messrs. Boulton & Co,, repeated its instructions in order to give the said agents, through the corresponding post employees, the note of the weight of the bags embarked on board the steamers of the line.

Two elements tend to define the relations established between Messrs. Boulton, Bliss & Dallett and the Venezuelan Government, with reference to the transportation of the mail, as it appears from the notes exchanged between the two parties, since March 1897. The first is that Boulton, Bliss & Dallett should charge the Government, from April 1 of the same year, 8 bolivars per gross kilogram of letters and cards, and 0.50 of bolivar per kilogram of printed matter and samples; and the second, that the Government virtually accepted the said tariff from the moment that it ordered its post-office employees to take the weight of the bags and send it each time to Boulton & Co., as it was requested by them, in order to make the liquidation of the amount which the Government should have to pay for the service. These two elements are enough to deduce in justice the following conclusion: The Government of Venezuela owes to Boulton, Bliss & Dallet, for carrying the mail on the steamers of the " Red D " line, from April 1 1899, to December 31, 1902, the resulting sum of the two factors agreed by both parties, gross weight in kilograms of letters and cards, and gross weight in kilograms of printed matter and samples, and the sum of 8 bolivars per kilogram for letters and cards, and 0.50 of bolivar per kilogram of printed matter and samples.

This could be a simple arithmetical calculation which would not embarrass the Commission, but one of the factors is lacking, namely, the separate weight of the letters, and printed matter, as the bags which the post-office employees weighed contained, indiscriminately, letters, cards, printed matter, and samples, and has been taken by Messrs. Boulton & Co. to establish their account with the Covernment, making an arbitrary distribution of a sixth part for letters and cards and five-sixths part for printed matter and samples. There has not been presented before this Commission any proof or information which may establish that such distribution is equitable and well founded, and in consequence the real weight of letters and cards, and that of printed matter and samples, remains undetermined in the total sum which the gross weight of the bags represents in the period of five years and nine months comprised in their claim.

It is opportune to point out the difference exhibited by the first letter of Boulton & Co., date of June 14, 1898, which gives as gross weight of the bags which were carried by the steamers during a year from April 1, 1897, to March 31, 1898, the sum of 62,661.149 grams, in comparison to that of May 9, 1899, corresponding to the preceding year, which makes the weight of the bags to be 24,091.076 grams, a less weight in one year of quite the two-thirds. There must exist a grave error in the first calculation, since from April 1, 1898, to April 1, 1899, the business conditions of the country were the same as those of the preceding year, without the existence of any special motive to which such extraordinary diminution of volume and weight of the United States and Europe's mail could be attributed. This observation is conformed by the facts belonging to the following years, which have a reasonable proportion as it is proven by the following figures:

	Grams
From April 1, 1898, to April 1, 1899	24,091.076
From April 1, 1899, to April 1, 1900	18,398.396
(Time of war.)	
From April 1, 1900, to December 31, 1900	15,070.630
From December 31, 1900, to December 31, 1901	15,479.608
From December 31, 1901, to December 31, 1902	14,176.231
(Period of war.)	

As the Commission has no means of ascertaining the precise data which establish clearly the gross weight of the two classes in which the different kinds of mail were proposed to be divided, as accepted by the Venezuelan Government, and considering also that the figures given for the gross weight of the bags of the year 1897 to 1898 are not in proportion with the weight of the following years and the absence of any document to prove the exactness thereof; and furthermore, as this claim has to be decided only on the proofs and information presented by both parties on the basis of absolute equity; and taking also in consideration that Messrs. Boulton & Co., agents, in this city, of the "Red D" line, have several times made proposals to the Venezuelan Government to execute a contract fixing an annual sum for the carrying of the mail, it is my opinion that it is necessary to estimate the average of the accounts as made up by the agents of Boulton, Bliss & Dallett for the last five years. That average gives the sum of 29,474 bolivars, which I consider admits of a reduction to the sum of 25,000 bolivars, as the natural rebate which all debtors are entitled to, when the creditor fixes the price for services rendered, especially when they amount to a considerable sum extending over a period of years.

Having thus determined the annual price for carrying of the mail and calculating the time elapsed from April 1, 1897, to December 31, 1902, or five years and nine months, the value of the service comes to the sum of 143,750 bolivars.

With reference to the interest the circumstances set forth in this opinion makes it apparent that the claim is presented under conditions which do not justify the allowance of interest.

Therefore, an award is hereby made in favor of Boulton, Bliss & Dallett for the sum of 143,750 bolivars, equivalent in American gold, at the average rate of exchange, to $ 27,644.23.

The Alliance Case

The registry or other custom-house document is only prima facie evidence as to the ownership of a vessel in some cases, but conclusive in none. Property in a ship is a matter to be proved like any other fact by competent testimony.

A vessel driven by stress of weather into a port other than that for which she is destined is not subject to the application of local laws which would render it liable to penalties or unnecessary detention, and damages for its unreasonable detention will be allowed.

Interest allowed on claim from date of its presentation.

BAINBRIDGE, *Commissioner* (for the Commission):

The steamer *Alliance* was built at Curaçao in 1895 for Leonard B. Smith, a native citizen of the United States then domiciled in that island. She was 59 feet 4 inches in length, 12 feet 10 inches in breadth and 5 feet in depth, with a capacity of 41 tons, and cost the sum of $ 12,030.03. Smith registered the *Alliance* as a Dutch ship, and she carried the Dutch flag until February 1897. He then made arrangements to use the ship in the trade between Santo Domingo and Curaçao, but found that it would be necessary to register her as a Dominican ship in order to be permitted to trade along the Dominican coast. The memorialist says:

To comply with said laws still further the papers were taken out in the name of Carlos A. Mota, a citizen of Santo Domingo, who, however, never acquired any real interest in the *Alliance*, his title being purely nominal, and the vessel continued to be still the property of myself solely.

The Dominican registry, given February 20, 1897, is, in part, as follows:

The President of the Republic to all to whom these presents may come, greeting: The citizen Carlos A. Mota, having proved that he is the lawful owner of the Dominican steamer *Alliance*, its captain being at present the citizen, Martin Senior, and said owner, C. A. Mota, having furnished the bond required by law, I, therefore, grant him this letter of marque, etc.

On June 15, 1897, the *Alliance* sailed from Santo Domingo under the Dominican flag with clearance for Curaçao.

On the morning of the 20th she was discovered on the shoals of the bar at Maracaibo flying a signal of distress. Epitasio Ríos, one of the pilots of the port, thus describes her condition at the time:

We descried from San Carlos a vessel with the flag hoisted, asking for assistance, on the shoals of the bar, near the place where the bark *Bremen* lies a wreck. I immediately left to send her the proper assistance, reached where she was at about 8 o'clock in the morning, and at once observed that the vessel, as well as her crew, was running the greatest risk. The vessel is a small steamship, bearing the name *Alliance*; she had the Dominican colors hoisted; her fuel being exhausted it was necessary to break the windows to the cabin, 1 cask and some cots, with which, and even empty bags, her engine could get up 40 pounds of steam, which enabled us to arrive at San Carlos, where the commander of that fortress supplied her with firewood, provisions, and water, of all which elements the vessel was absolutely in want, and with which we could come that very day to Maracaibo. The steamship was at that moment leaking in consequence of the blows she had sustained by touching on the shoals of the bar.

Upon the arrival of the *Alliance* at Maracaibo, she was seized by the collector of the port on suspicion of unlawful traffic in fraud of the revenues of Venezuela. Proceedings were had before the captain of the port and the national court of finance of Maracaibo, which court on August 14, 1897, after a full investigation,

decreed that the *Alliance* and her cargo were freed from sequestration and to be returned to the owners. An appeal from this decree was taken by the Government to the high court at Caracas, which on November 12, confirmed the decree of the lower court. The high court held that " an uncontrollable force drove the *Alliance* into the harbor and that nothing had been adduced to show that there was the slightest intention to violate any of the laws of the Republic or defraud the revenues." This decree of the high court was published in Caracas on December 1, 1897. The *Alliance* was restored to the agent of Mr. Smith on January 11, 1898. In the court proceedings the value of the ship and cargo is stated to be 28,472.40 bolivars, equivalent to $ 5,475.46 United States gold.

On April 15, 1898, a claim was presented to the Government of Venezuela by the United States, through its legation at Caracas, on behalf of Leonard B. Smith as owner of the *Alliance*. The claim was summarized as follows:

Expenses incurred by reason of the seizure and detention of the *Alliance*	$ 3,439.32
Damages to the steamer resulting from detention	2,000.00
Interest on investment at 1 per cent per month during detention . . .	800.00
Total	6,239.32

Leonard B. Smith died intestate at Curaçao December 16, 1898, leaving him surviving his widow, Clara M. Smith, and three sons, Arthur B. Smith, Leonard G. Smith, and Ralph G. Smith, as his only heirs and next of kin, in whose behalf the claim is now presented to this Commission. In addition to the original demand, the sum of $ 1,007 is asked for accrued interest.

Replying on April 26, 1898, to the diplomatic note of the United States legation presenting this claim, the minister of foreign relations of Venezuela interposed two grounds of non-liability:

First. That the *Alliance* was proved to be a Dominican ship, a nationality other than that of the claimant.

Second. That the action taken by the Venezuelan authorities in the seizure and detention of the vessel was in line of the strict performance of their duties under the law of Venezuela for the protection of the revenues, and that no claim can be sustained growing out of the necessary observance of the local law.

The honorable agent for Venezuela refers the Commission to the diplomatic note of the minister of foreign relations as his own answer to the claim.

The first objection is rather suggested than urged by the Venezuelan Government. Nevertheless as touching the jurisdiction of the Commission over the claim, it must be fully considered. The record shows that upon her arrival at Maracaibo, the *Alliance* was carrying the Dominican flag; that she had a Dominican registry, based upon a showing that Carlos A. Mota, a citizen of Santo Domingo, had proved that he was the lawful owner of the Dominican steamer *Alliance*, and as such owner had furnished the bond required by law; that this registry had been obtained with the knowledge and by the connivance of Smith through his agent and representative at Santo Domingo, Jáime Mota. But whatever may have been the morality of this proceeding, it is not conclusive against the American ownership of the vessel:

> The registry or enrollment or other custom-house document is prima facie evidence only as to the ownership of a ship in some cases, but conclusive in none. The law even concedes the possibility of the registry or enrollment existing in the name of one person, whilst the property is really in another, Property in a ship is a matter in pais, to be proved as fact by competent testimony like any other fact. (Wharton, Int. L. Dig., sec. 410, citing U. S. *v.* Pirates, 5 Wheat., 184. U. S. *v.* Amedy, 11 Wheat., 409, and other cases.)

If as a matter of fact the *Alliance* was owned by a citizen of the United States, she was American property and possessed of all the general rights of any property of an American. (*Ibid.*)

The evidence of ownership is to the effect that the *Alliance* was built for L. B. Smith at Curaçao by Felipe Santiago, as shown by the builder's certificate; that the Dominican registry was secured in order to enable the vessel to trade along the Dominican coast; that Carlos A. Mota never acquired any real interest in the ship, his title being purely nominal; that the vessel actually continued to be the sole property of L. B. Smith, and that at the close of the investigation by the Venezuelan court she was returned to Mr. Smith's possession.

The second objection interposed by the Government of Venezuela to this claim is succinctly stated in the following paragraph of the reply of the minister of foreign relations:

> The steamer *Alliance* was detained by the captain of the port in accordance with a provision of the fiscal code which the authorities deemed applicable to the case in view of the manner in which the ship arrived. A ship which enters the waters where a State has jurisdiction, can not, if it is a merchant ship, be exempt from the disposition and rules in regard to Territorial jurisdiction. Fiore recognizes this in his celebrated work (Nouveau Droit International Public, 815), and Calvo is explicit on this point, 451. F. de Martens in his recent treatise on International Law is even more categoric, when he states (Vol. II, 56) that the merchant ships anchored in a port or the waters of a foreign State are subject to the laws and local authorities. The steamer *Alliance*, even though it may have arrived in distress, entered the territory where Venezuelan legislation was in force.

The minister argues that the authorities of the port would have been grossly derelict in their duty if they had not instituted the process and detained the vessel; and that no claim can be sustained for losses growing out of the necessary and proper observance of the local law.

With due respect, however, the vital question presented here is whether the *Alliance*, although within Venezuelan waters, was, under all the circumstances, subject to the laws and local authorities. There can hardly be any doubt that the ship arrived at the bar of Maracaibo in great distress. Her condition at the time is graphically described in the testimony of the pilot, Epitasio Ríos, quoted herein. Furthermore, she bore with her upon her arrival in port the following pass from the commander of the fortress of San Carlos:

> June 21, 1897.
>
> Allowed to go to Maracaibo, having made forcible arrival on account of lack of coal and provisions.
>
> The Commander in chief of the port. Manuel PAREJO

Under these conditions, the exemption of the *Alliance* from Territorial jurisdiction is clear. The identical question here involved was considered in the case of the brig *Enterprise*, decided by the American and British Claims Commission of 1855. The Commissioners, although disagreeing on other grounds, were unanimous upon the proposition that, as a general rule:

> A vessel driven by a stress of weather into a foreign port is not subject to the application of the local laws, so as to render the vessel liable to penalties which would be incurred by having voluntarily come within the local jurisdiction. The reason of this rule is obvious. It would be a manifest injustice to punish foreigners for a breach of certain local laws, unintentionally committed by them, and by reason of circumstances over which they had no control. (Moore, p. 4363.)

In the case of *The Gertrude* (3 Story's Rep., 68), Mr. Justice Ware says:

It can only be a people, who have made but little progress in civilization, that would not permit foreign vessels in distress, to seek safety in their ports, except under the charge of paying import duties on their cargoes, or under penalty of confiscation, where the cargo consisted of prohibited goods * * *.

Nor did the laws of Venezuela impose upon the authorities of the port any duty contrary to the principles of civilized jurisprudence or the dictates of humanity and hospitality. Law XXIV of the Finance Code in force at the date of the arrival of the *Alliance*, and which is the same as Law XXV of the existing code, provides in its first article that:

the formalities prescribed by the law for the entrance of vessels coming from a foreign country into the ports of the republic shall not be enforced in the cases of forcible arrivals, which are the following: Damages on board, sickness of the crew, whether contagious or not, and acts of God absolutely preventing it from proceeding on the voyage.

Articles 2, 7 and 8 of the same law prescribe the formalities that must be pursued by the administrative authorities of the port to obtain the proofs of the real causes of the arrival, and to assist the vessel, passengers, and cargo with all necessary means of protection and security during the enforced stay of the ship in port on account of repairs or other reasons in connection with the forcible arrival. Article 16 orders that —

the motives of the forcible arrival having terminated the administrator of the custom-house shall deliver the license of navigation and other papers to the captain, giving him two hours to sail out.

And article 17 provides that —

in cases where the cause of forcible arrival is not proved any ship coming from a foreign port and found to be anchored, without any justifiable reasons, in a port for which it was not cleared shall be liable to the penalties prescribed by Law XX of said code.

Only in the cases *where the cause of forcible arrival is not proved* and a ship is found to be anchored in a port *without any justifiable reasons* is it the duty of the administrator of the custom-house, in conformity with article 17 above quoted, to pass all documents to the judge of finance in order to initiate the corresponding trial.

In view of the evidence of the pilot Ríos, the wording of the pass given by the commander of San Carlos, the disabled condition of the vessel, and the testimony of the crew, which must have been taken by the captain of the port as required by law, can it be said that the cause of the forcible arrival of the *Alliance* was not proved, or that she was anchored in the port of Maracaibo without any justifiable reasons? And if not, there was no probable cause under the law of the country for the action of the port authorities and the subsequent judicial proceedings. The liability of the Government of Venezuela for the ascertainable loss or injuries resulting from the seizure and detention of the *Alliance* is, both upon reason and authority, established.

The claim is believed to be considerably exaggerated. The board of survey which examined the steamer upon her arrival at Curaçao on January 15, 1898, estimated " the complete repairs of said boat at the amount of two thousand dollars, so as to make her seaworthy." But it is to be remembered that the *Alliance* arrived in port at Maracaibo in a battered and disabled condition. Large sums of money are alleged to have been expended by claimants' intestate because of the seizure, but no vouchers therefor are put in evidence, although the claim was made within two months after the return of the ship to her owner

An award will be made in this claim for the sum of $ 2,500, United States gold, with interest at 3 per cent per annum from April 15, 1898, the date of the presentation of the claim to the Venezuelan Government, to December 31, 1903, the anticipated date of the final award by this Commission.

THE MARK GRAY CASE

Claim disallowed for damages caused by the unavoidable detention of a vessel because of the want of facilities for towage from the harbor when the government had granted a monopoly to a company to perform this service and had subsequently appropriated the only vessel in possession of the company to its own use.

BAINBRIDGE, *Commissioner* (for the Commission):

The United States presents the claim of J. S. Emery & Co., managing owners of the American schooner *Mark Gray*, against the Republic of Venezuela in the sum of $ 1,537.50, and interest amounting to $ 338.25.

The *Mark Gray*, W. A. Sawyer, master, was chartered on October 15, 1895, by Messrs. Kunhardt & Co., to carry a cargo of railroad material from New York to Maracaibo, Venezuela. The charterers agreed to pay all vessel's port charges at Maracaibo, including pilotage, lighterage, consul's fees, interpreter's fees, etc., and towage over the bar, and demurrage, beyond the lay days for loading and discharging cargo, at the rate of $ 30 per day for every day's detention by default of the charterers.

The schooner arrived at Maracaibo on December 11, 1895, finished discharging her cargo on the 28th, and could have left port two days later had she been able to obtain towage; but in the absence of any towboat in the port the vessel was delayed at Maracaibo until February 17, 1896, when she finally got to sea by resorting to the unusual custom of sailing over the bar. When Captain Sawyer, after discharging cargo, inquired of the consignees and the towing agents for a tug, he was informed that the towboat was away in the service of the Government and that no definite information could be given as to when she would return.

On January 18, 1896, the captain wrote to Mr. A. Boncayolo, the charterers' agent at Maracaibo, as follows:

SIR: I beg to call your attention to the fact that for several days past the schooner *Mark Gray*, under my command, has been ready for sea but has been unable to leave for lack of towage. I must appeal to you as consignee of said vessel in this port and as agent of the charterers, Messrs. Kunhardt & Co., of New York, to furnish me with towage as provided for in my charter party. The agreement respecting towage in the charter party is as binding as that providing for the payment of freight or any other consideration specified in that document and the charterers of the vessel are not to be considered as having complied with their obligations until said vessel shall have been towed over the bar. I beg to call your attention, as charterers' agent, to these facts, protesting at the same time against the injury to the vessel's interests caused by this delay.

W. A. SAWYER
Master American Schooner Mark Gray

On January 27, 1896, Captain Sawyer made formal protest before the United States consul at Maracaibo —

against the charterers, Messrs. Kunhardt & Co., of New York, against the contractor for towage at Maracaibo, against the Government of Venezuela, and against all and every person and persons whom it may or doth concern, and against all and every accident, matter, and thing, had and met with as aforesaid, whereby and by reason whereof, the said schooner, or her interests, shall appear to have suffered or sustained damage or injury.

It appears from the record that the Venezuelan Government had granted a monopoly of the business of towing vessels across the bar at Maracaibo, and that the grantee of the privilege used in that business but one tugboat, which, at the time its services were required by the *Mark Gray,* was employed in the service of the Government itself.

The learned counsel for the United States urges on behalf of the claimants, that the Venezuelan Government has made itself directly responsible for the demurrage and loss in this case, by granting the towage monopoly and then preventing the towage company from rendering the service by taking for the Government's own use the single tugboat operated by the company.

But the right of the Government of Venezuela to grant the franchise in question, by virtue of its proprietary interest in and exclusive jurisdiction over its territorial waters, is indisputable. And it is difficult to perceive wherein the Government, by making the grant, assumed any liability for the acts or omissions of the grantee. If such liability arises from the terms of the grant, that fact does not appear in evidence before the Commission. The protest of Captain Sawyer states:

> That according to the agreement made by the contractor for towage with the Government of Venezuela, the said contractor is bound to keep tugs constantly ready for service at the Maracaibo bar.

A showing that the contractor did not keep tugs constantly at the bar is rather proof of his failure to observe his agreement with the Government than of the Government's liability to those who may have suffered from such failure, which is the claim made here.

Nor does the fact that the Government was employing in its service the only tugboat used by the contractor for towage fix a liability upon Venezuela for losses sustained by those who were unable, because of its employment by the Government, to secure the service of the tug. That circumstance may, indeed, have occasioned a loss to the claimants; but if so, it was not injuriously brought about by any violation of their legal rights and is damnum absque injuria.

The claim must be disallowed.

AMERICAN ELECTRIC AND MANUFACTURING CO. CASE

Owner is entitled to compensation for the seizure by the Government of property which it appropriates to its own use during a revolution for military purposes, and which is damaged while in its possession.

Claim for damages suffered by reason of the bombardment of a city, the bombardment being the necessary consequence of a legitimate act of war on the part of the Government, disallowed.

PAÚL, *Commissioner* (for the Commission):

The claim of the American Electric and Manufacturing Company against the Venezuelan Government is based on two distinct groups of facts. The first is the taking possession of by the Government of the State of Bolívar on May 26, 1901, of the telephone office and service of the line for the use and convenience of the military operations during the battle, which took place in Ciudad Bolívar, until the 29th of said month, against revolutionary troops, and the damages which the property so occupied suffered in consequence thereof, owing to acts of destruction performed by the revolutionists. The amount claimed for such damages is the sum of $ 4,000.

The second group of facts consists in the damages suffered by the telephonic line in August 1902, during the bombardment of Ciudad Bolívar by the vessels of the Venezuelan Government, the claim on this account being for $ 2,000.

By the documentary evidence presented it is proven that when the loyal troops of the Government were fighting the rebels of Ciudad Bolívar, Gen. Julio Sarria, constitutional President of the State, ordered the absolute interruption of all the telephonic service with the exception of the instruments which connected the house of said general with the military commander; the administrator of the custom-house; the marine custom's office; the police inspector's office; the telegraph office, and such other places as are stated in the note which he sent to Mr. Eugenio Barletta, manager of the company, dated May 26, 1901, and ordered also the occupation of the central office of the company, and stationed near the machinery an armed guard, which remained there until the town was evacuated by the Government troops.

It is also proven that the revolutionary forces destroyed the posts and wires of the lines and caused damages in the central office, destroying the switch boards and forcing the employees to abandon the office.

The general principles of international law which establish the nonresponsibility of the Government for damages suffered by neutral property owing to imperious necessities of military operations within the radius of said operations, or as a consequence of the damages of a battle, incidentally caused by the means of destruction employed in the war which are not disapproved by the law of nations, are well known.

Nevertheless, the said principles likewise have their limitations according to circumstances established by international law, as a source of responsibility, when the destruction of the neutral property is due to the previous and deliberate occupation by the Government for public benefit or as being essential for the success of military operations. Then the neutral property has been destroyed or damaged by the enemy because it was occupied by the Government troops, and for that reason only.

It is the seizure of private property for the public use and its loss or destruction while so employed, whether by the enemy of the Government, that entitles the owner to payment. Even if it be morally certain that the enemy would himself take the property and use it, depriving the owner of it forever, still, its destruction by the Government entitles the party to compensation. (See Grant's case, 1 Ct. Claims, p. 41; and observations of Ch. J. Taney in Mitchell *v.* Harmony, 13 Howard, 115.) We must hold, even in such case, that the public has received the value of the property, by embarrassing its enemy by its destruction, and is bound to make just compensation. It can never be just that the loss should fall exclusively on one man, where the property has been lawfully used or destroyed for the benefit of all. (Putegnat's Heirs *v.* Mexico, 4 Moore Int. Arb., 3720.)

The seizure of the office and telephonic apparatus by the Government at Ciudad Bolívar, required as an element for the successful operations against the enemy, the damages suffered and done by the revolutionists as a consequence of such seizure, gives to the American Electric and Manufacturing Company the right to a just compensation for the damages suffered on account of the Government's action.

The claimant company, exhibiting evidence of witnesses, pretends that the damages caused amount to the sum of $ 4,000, but it must be taken into consideration that the witnesses and the company itself refer to all the damages suffered by the telephonic enterprise from the commencement of the battle which began on the 23d of May, whilst the seizure of the telephonic line by the Government which is the motive justifying the recognition of the damages, only took place on the 26th, which reduces in a notable manner the amount

for damages which has to be paid by the Government and therefore the damage is held to be estimated in the sum of $ 2,000.

With reference to the second section of the claim for the sum of $ 2,000 for damages suffered by the telephonic company during the bombardment of Ciudad Bolívar in August, 1902, these being the incidental and necessary consequences of a legitimate act of war on the part of the Government's men-of-war, it is therefore disallowed.

No interest is allowed for the reason that the claim was never officially presented to the Venezuelan Government.

In consequence thereof an award is made in favor of the American Electric and Manufacturing Company for its claim against the Venezuelan Government in the sum of $ 2,000 American gold.

LASRY CASE

Under the interpretation of the protocol the Commission not limited in adjudication of claims to such evidence only as may be competent under technical rules of common law. Evidence taken under sanction of an oath administered by competent authority will be accorded greater weight than unsworn statements, informal declarations, etc.[1]

BAINBRIDGE, *Commissioner* (for the Commission):

This claim is submitted upon the following documents:

First. Two letters of claimant, both dated May 16, 1901, addressed to the Department of State, in which he sets forth that he is a naturalized citizen of the United States, domiciled in Venezuela; that on November 11, 1899, the troops of General Colmenares, a detachment of General Castro's army, entered Belen, where claimant resided and was engaged in business as a merchant and farmer, took away his cattle and horses, and looted the better part of the goods and provisions in his business establishment; and he summarizes his alleged losses as follows:

	Gold
29 head of cattle, at $ 20 per head	$ 580
Merchandise	15,000
2 saddle horses, at $ 125 each	250
Cash	50
Total	15,880

Second. A statement signed by various parties claiming to be residents of Belen before the jefe civil of the parish to the effect that on the 11th day of November, 1899, the cattle Mr. Lasry had in his pasture were taken by the forces of General Colmenares and that the better part of the goods stored in his establishment was looted by said forces; and furthermore that Mr. Lasry had always attended to his business without mixing himself in the politics of the country, or in anything else which could affect his condition as a neutral tradesman.

Third. A statement signed on October 3, 1901, by J. Benody and J. A. Parmente in the presence of the secretary of the United States legation at Caracas to the effect that Isaac J. Lasry was, during the revolution existing in Venezuela in November 1899, practically ruined by the sackage of his

[1] See the German - Venezuelan Commission (Faber Case) in Volume X of these *Reports*.

mercantile house established at Belen, a village in the State of Carabobo, and the confiscation of all his material goods — such as money, beasts, cattle — by the forces of the Government of Venezuela.

Fourth. Copy of certificate of naturalization of Isaac J. Lasry in the court of common pleas for the city and county of New York, on October 26, 1893; and copy of passport issued to Isaac J. Lasry on March 22, 1898, by the United States legation at Caracas.

It is to be observed that no legally competent evidence under the rules of municipal law is here presented, either as to the fact or amount of the alleged loss. The learned counsel for Venezuela urges that the facts upon which the claim is founded are not proved as the common law requires, and that it should therefore be disallowed.

Article II of the protocol constituting this Commission provides:

> The commissioners, or umpire, as the case may be, shall investigate and decide said claims upon such evidence or information only as shall be furnished by or on behalf of the respective Governments.

The Commission, then, is not limited in the adjudication of the claims submitted to it to only such evidence as may be competent under the technical rules of the common law, but may also investigate and decide claims upon information furnished by or on behalf of the respective Governments. It has indeed been found impossible in proceedings of this character to adhere to strict judicial rules of evidence. Legal testimony presented under the sanction of an oath administered by competent authority will undoubtedly be accorded greater weight than unsworn statements contained in letters, informal declarations, etc., but the latter are under the protocol entitled to admission and such consideration as they may seem to deserve.

The information furnished as to this particular claim is both meager and unsatisfactory. The statement of the claimant that the suffered some loss, and the manner thereof is corroborated by the declarations of various residents of Belen, but none of the latter gives an estimate of the amount of the loss sustained by Mr. Lasry. Belen is referred to by the declarants as a little town or village in the State of Carabobo. Lasry states that " the better part " of his stock of merchandise was taken by the soldiery, and he gives the value of the part taken as $ 15,000 gold, manifestly an exaggeration.

The Commissioners regarding the fact as shown that Lasry sustained some loss, but unable to accept his uncorroborated estimate of the value of the property taken, have agreed to make an allowance in this claim of the sum of $ 2,000, without interest, as being under all the cricumstances the nearest approach possible to an equitable determination.

Flutie Cases

Recitations in the record of naturalization proceedings are binding only upon parties to the proceedings and their privies. The Government of the United States and that of Venezuela are not parties, and such recitations are not conclusive upon either of these governments.

International tribunals competent to decide their own jurisdiction.

Certificate of naturalization an element of proof subject to be examined according to the principle of locus regit actum. Certificates of naturalization made in due form presumed to be true, but when it becomes evident that statements therein contained are incorrect this presumption must yield to the truth.

Certificate of naturalization decided to have been granted by fraud or mistake

because evidence showed that claimant did not " reside " in the United States for the statutory period immediately preceding issuance of such certificate, and claim dismissed without prejudice.

BAINBRIDGE, *Commissioner* (for the Commission):

For reasons hereinafter made apparent, it is deemed advisable to consider these two claims together.

The memorial of Elias Assad Flutie, subscribed and sworn to on March 7, 1903, before William J. Marshall, a notary public in and for the county of Middlesex, State of Massachusetts, states:

1. That the said Elias A. Flutie is a native of Syria, 27 years of age; that he came to the United States in the year 1892, and was naturalized a citizen of the United States on the 2d day of July in the year 1900, in the district court of the United States of America for the eastern district of New York, sitting in the city of Brooklyn, in proof whereof said claimant produces with his memorial a certified copy of said certificate of naturalization, marked " Exhibit A," and that claimant is now a citizen of the United States, and a resident of the city of Wilkesbarre, State of Pennsylvania.

2. That about the year 1899 claimant went temporarily to the city of Yrapa, in the Republic of Venezuela, to establish a business as a general merchant, returning shortly afterwards to the United States, leaving said business in charge of his brothers; that said business was conducted for the period of one year without interruption, resulting in a large profit to the claimant; that claimant returned to Venezuela from time to time to supervise the conduct of said business; that he was at all times the sole person interested in said business; that his stock in trade was worth about $ 30,000; that all of claimant's books of account and records of what stock he had were destroyed, but that he is able to state from memory what amount of stock there was on hand and he attaches an inventory thereof marked " Exhibit B; " that he employed as clerks to assist him in said business his two brothers, Julian and Abraham Flutie, and also two other persons named Victor Ferralle and José R. Romero.

3. That the claimant returned from the United States in August 1900, and from that time claimed citizenship in the United States and the protection of the United States Government; that prior to his return to Venezuela, a revolution broke out in that Republic; that at various times after his return, between September 1900, and March 1902, he was the victim of forced loans, destruction of property, false arrests, and illtreatment in connection therewith, received partially at the hands of the Government officials and troops, and partially at the hands of the insurgents; that his store was raided on repeated occasions, he himself was repeatedly arrested and lodged in jail, and kept for indefinite periods, and released only upon his consenting to make the demanded forced loans, or when the officers of the Government had in the meantime obtained from his store such goods and money as they demanded. The memorial states seventeen specific instances of such alleged illegal acts on the part of the officers of the Government, and seven similar unlawful acts on the part of the revolutionists; that because of said acts of violence all of claimant's property to the value of $ 30,000 in United States gold was confiscated, lost, or destroyed; and that on June 7, 1901, the claimant, together with his wife and children, was forced to leave the country.

4. Claimant demands from the Government of Venezuela as a just recompense for the injuries he has suffered, for loss of property, the sum of $ 30,000,

and for illtreatment the sum of $ 50,000; in all the sum of $ 80,000 in United States gold coin.

The memorial of Emilia Alsous Flutie, subscribed and sworn to on March 31, 1903, before Arthur L. Turner, a notary public in and for Luzerne County, State of Pennsylvania, states:

1. That the said Emilia Alsous Flutie is a native of Syria, 25 years of age; that in the city of Carúpano, in the Republic of Venezuela, on the 22d day of July, 1897, she was married to Elias Assad Flutie, according to the rites of the Roman Catholic Church, having previously, to wit, on the 25th of April, 1896, been married by the civil authorities of said Republic to said Elias A. Flutie; that her husband was naturalized a citizen of the United States of America on the 2d day of July, 1900, in the district court of the United States for the eastern district of New York, sitting in the city of Brooklyn; that a duplicate of his certificate of naturalization is attached to her memorial marked " Exhibit A;" that by virtue of the naturalization of Elias Assad Flutie, as a citizen of the United States, claimant is a citizen thereof, and that she is now a resident of the city of Wilkesbarre, State of Pennsylvania.

2. That from the month of September, 1900, to the month of June, 1901, claimant was with her husband in the city of Yrapa, Venezuela; that apart from her husband's business and in her own name, for her own separate benefit, claimant used to carry on a small trade in toilet articles, etc.: that her stock in trade was worth $ 1,500; that claimant was unable to preserve any documents showing her actual stock, but is able to state from memory what amount of stock she had on hand, and attaches to her memorial an inventory thereof marked " Exhibit B " which sets forth the amount and cost value of the articles; and that she was the sole person interested in said business.

3. That during the year 1900 and 1901, there was a revolution in progress in Venezuela, in the course of which she was subjected, at various times, to such illtreatment, at the hands of both the Government officials and the insurgents, that she became ill; that as a result of such illtreatment her health has been permanently impaired; that toward the close of December, 1900, certain Government officials arrested and imprisoned claimant's husband, and in his enforced absence, said officials tried to criminally assault claimant, and were driven off by the claimant at the point of a pistol; that they took possession of all goods which belonged to claimant, and after having destroyed some, took the remainder away with them, said property being of the value of $ 1,500 gold; and that on June 7th, the claimant, together with her husband and children, was forced to leave the country, sailing from Yrapa at night during a heavy tropical tempest in a small sailboat of about 5 tons burden, which afforded absolutely no shelter, and that after four days of such exposure they at length reached the island of Trinidad.

4. Claimant demands as a just recompense for her loss of property the sum of $1,500, and for the illtreatment she has suffered the sum of $ 20,000, in all the sum of $ 21,500 in United States gold coin.

The two claims aggregate the sum of $ 101,500 gold.

The only testimony introduced is that of the claimants themselves and of Abraham and Julian Flutie, brothers of Elias A. Flutie.

It appears from the evidence that the claimants were suspected by the Venezuelan authorities of unlawful traffic in fraud of the revenues, but the charges of smuggling are denied by the claimants and the arrests are alleged to have been without just foundation. It is a fact, not without significance, however, that although the alleged outrages extended over a period of nearly a year, the evidence does not show that during that time any notice of them

was brought to the attention of the consular officers or diplomatic representative of the United States in Venezuela.

But, in view of the position taken by the Commission relative to these claims, a further discussion of their merits is unnecessary.

Article I of the protocol constituting this Commission confers jurisdiction over —

all claims owned by citizens of the United States of America against the Republic of Venezuela which have not been settled by diplomatic agreement or by arbitration, between the two Governments.

This Commission has no jurisdiction over any claims other than those owned by citizens of the United States of America. The American citizenship of a claimant must be satisfactorily established as a primary requisite to the examination and decision of his claim. Hence the Commission, as the sole judge of its jurisdiction, must in each case determine for itself the question of such citizenship upon the evidence submitted in that behalf.

The citizenship of claimants is as fully a question of judicial determination for the Commission in respect to the relevancy and weight of the evidence and the rules of jurisprudence by which it is to be determined as any other question presented to this Tribunal, subject only to the provisions of Article II of the protocol that the commissioners, or umpire, as the case may be, shall investigate and decide claims upon such evidence or information only as shall be furnished by or on behalf of the respective Governments.

The jurisdiction of the Commission over both of these claims depends upon the American citizenship of Elias A. Flutie. The evidence of Flutie's citizenship in each case is a copy of the record of his naturalization on July 2, 1900, in the district court of the United States for the eastern district of New York. The record recites that Flutie had produced to the court such evidence and made such declaration and renunciation as are required by the naturalization laws of the United States, and that he was accordingly admitted to be a citizen thereof.

This certificate of naturalization, as the record of a judgment of a high court, is prima facie evidence that Elias A. Flutie is a citizen of the United States. It is not, however, conclusive upon the United States, or upon this Tribunal.

In the case of Moses Stern (13 Op. Atty. Gen., 376) the Attorney-General of the United States, Mr. Akerman, said:

Recitations in the record (i. e., of naturalization) of matters of fact are binding only upon parties to the proceedings and their privies. The Government of the United States was no party, and stands in privity with no party to these proceedings. And it is not in the power of Mr. Stern, by erroneous recitations in ex parte proceedings, to conclude the Government as to matters of fact.

In the circular of Mr. Fish, Secretary of State, dated May 2, 1871, he says:

It is material to observe that according to the opinion of the Attorney-General in the case above mentioned, the recitations contained in the record of naturalization, as to residence, etc., are not conclusive upon either this or a foreign Government; but that when such recitals are shown, by clear evidence, to be erroneous, they are to be disregarded. (Foreign Relations, 1871, p. 25.)

Such is still the position taken by the Department of State.

As for the naturalization laws to which you allude, they are of direct concern to this Department only so far as they affect the international status of those who become naturalized. As you are aware, the Department's regulations require every naturalized citizen when he applies for a passport to make a sworn statement concerning his own or his parents' emigration, residence, and naturalization; and when-

ever the naturalization appears to have been improperly or improvidently granted, it is not recognized under the Department's rules. (Mr. Hay, Secretary of State, to Mr. Sampson, June 21, 1902. Foreign Relations, 1902, p. 389.)

The record of a judgment rendered in another State may be contradicted as to the facts necessary to give the court jurisdiction; and if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist. (Thompson *v.* Whitman, 18 Wall. U. S., 457.)

In Pennywit *v.* Foote (27 Ohio St., 600), the court said that a judgment offered in evidence —

may be contradicted as to the facts necessary to give the court jurisdiction, and if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist, and this is true either as to the subject-matter or the person, or in proceedings in rem as to the thing.

The functions and authority of an international court of arbitration are clearly expressed by Mr. Evarts, Secretary of State, in a communication relative to the United States and Spanish Commission of 1871, which Mr. Evarts declared to be —

an independent judicial tribunal possessed of all the powers and endowed with all the properties which should distinguish a court of high international jurisdiction, alike competent, in the jurisdiction conferred upon it, to bring under judgment the decisions of the local courts of both nations, and beyond the competence of either Government to interfere with, direct, or obstruct its deliberation. (Moore's Arbitrations, p. 2599.)

He says, furthermore, that the tribunal had authority —

to fix, not only the general scope of evidence and argument it will entertain in the discussion both of the merits of each claim and of the claimant's American citizenship, but to pass upon every offer of evidence bearing upon either issue that may be made before it. (Moore's Arbitrations, p. 2600.)

In Medina's case, decided by the United States and Costa Rican Commission of 1860, Bertinatti, umpire, says:

An act of naturalization, be it made by a judge ex parte in the exercise of his voluntario jurisdictio, or be it the result of a decree of a king bearing an administrative character; in either case its value, on the point of evidence, before an international commission, can only be that of an element of proof, subject to be examined according to the principle locus regit actum, both intrinsically and extrinsically, in order to be admitted or rejected according to the general principles in such a matter. * * *

The certificates exhibited by them (the claimants) being made in due form, have for themselves the presumption of truth; but when it becomes evident that the statements therein contained are incorrect, the presumption of truth must yield to truth itself. (Moore's Arbitrations, 2587.)

Whatever may be the conclusive force of judgments of naturalization under the municipal laws of the country in which they are granted, international tribunals, such as this Commission, have claimed and exercised the right to determine for themselves the citizenship of claimants from all the facts presented.

(Medina's case, *supra*; Laurent's case, Moore's Arbitrations, 2671; Lizardi's case, *ibid.*, 2589; Kuhnagel's case, *ibid.*, 2647; Angarica's case, *ibid.*, 2621; Criado's case, *ibid.*, 2624.)

The present Commission is charged with the duty of examining and deciding all claims owned by citizens of the United States against the Republic of Venezuela. It is absolutely essential to its jurisdiction over any claim presented to it to determine at the outset the American citizenship of the claimant. And

the fact of such citizenship, like any other fact must be proved to the satisfaction of the Commission or jurisdiction must be held wanting.

Notwithstanding the certificates of naturalization introduced in evidence here, the Commission is not satisfied that Elias Assad Flutie is a citizen of the United States, or that it has under the protocol any jurisdiction over these two claims.

Section 2170 of the Revised Statutes of the United States provides that:

> No alien shall be admitted to become a citizen who has not for the continued term of five years next preceding his admission resided within the United States.

This law is not construed to require the uninterrupted presence within the United States of the candidate for citizenship during the entire probationary period. Transient absence for pleasure or business with the intention of returning does not interrupt the statutory period or preclude a lawful naturalization at the expiration thereof. But the law does require the candidate to " reside " within the United States for the continued term of five years next preceding his admission.

No alien who is domiciled in a foreign country immediately prior to and at the time he applies to be admitted to citizenship can be lawfully naturalized a citizen of the United States.

Domicile is residence at a particular place accompanied with an intention to remain there; it is a residence accepted as a final abode. (Webster.) Domicile in Venezuela during a certain period precludes for the same period residence in the United States within the meaning and intent of the statutes of naturalization.

A man's domicile, as involving intent, is often difficult of ascertainment. But publicists and courts regard certain criteria as establishing the fact.

> If a person goes to a country with the intention of setting up in business he acquires a domicile as soon as he establishes himself, because the conduct of a fixed business necessarily implies an intention to stay permanently. (Hall, Int. Law, 517.)
>
> If a person places his wife and family and " household gods " * * * in a particular place, the presumption of the abandonment of a former domicile and of the acquisition of a new one is very strong. (4 Phillimore's Int. Law, 173.)
>
> If a married man has his family fixed in one place and he does business in another, the former is considered the place of his domicile. (Story, Conflict of Laws, Ch. III, sec. 46.)
>
> The residence of a man, says Judge Daly, is the place where he abides with his family, or abides himself, making it the chief seat of his affairs and interests. (Quoted in Medina's case, supra.)
>
> The apparent or avowed intention of constant residence, not the manner of it, constitutes the domicile. (Guier *v.* O'Daniel, 1 Binney, 349.)
>
> Intention may be shown more satisfactorily by acts than declarations. (Shelton *v.* Tiffin, 6 How. U. S., 163.)

These are the criteria of domicile, recognized by both international and municipal law. Concurrently existing in this case, they fix the domicile of Elias A. Flutie prior to and on July 2, 1900, in the Republic of Venezuela.

The evidence bearing upon the residence of Elias A. Flutie is the following:

Elias A. Flutie states that he is a native of Syria, 27 years of age (in 1903); that he came to the United States in 1892; that during the years 1899, 1900 and 1901, his occupation was that of a merchant and his residence was in the city of Brooklyn, in the State of New York, where he had resided for several years past; that about the year 1899 he went temporarily to the city of Yrapa in Venezuela to establish a business as a general merchant, returning shortly afterwards to the United States, leaving said business in charge of his brothers; that he had temporarily left his family in Yrapa in charge of his brothers, and

visited them from time to time for a greater or less period; that he made frequent trips to Yrapa to supervise the management of his business, returning each time to his home in Brooklyn; that he was naturalized a citizen of the United States on July 2, 1900; that in August, 1900, he returned to Venezuela where he remained until compelled to flee from the country in June, 1901.

In Flutie's testimony there is no intimation that he was ever in Venezuela prior to "about 1899," when he went there "temporarily" to establish the business at Yrapa, where he "temporarily" left his family whom he visited from time to time "for a greater or less period." Indefiniteness, evasion, a manifest shaping of his statements to accord with the supposed necessities of his case, and a suppression of material facts characterize all his testimony on the subject of his residence and discredit it.

Emilia Alsous Flutie testifies (on March 25, 1903), that she had known Elias A. Flutie for seven and one-half years. Her acquaintance with him must have begun therefore about September, 1895. She swears that she was married to him by the civil authorities of Venezuela on the 25th day of April, 1896, and that she was married to him again, according to the rites of the Roman Catholic Church, on July 22, 1897, at Carúpano, Venezuela; that during part of the year 1899 she resided at Carúpano, Venezuela, going from Carúpano to Yrapa, Venezuela, in the latter part of that year, where she resided until June, 1901; that in both Carúpano and Yrapa she was engaged in the sale of laces, fancy needlework, and fancy goods.

Abraham A. Flutie testifies that he has known Mrs. Emilia Flutie since July, 1897, when she was married to his brother by Father Pedro Ramos, and that the business at Yrapa was established in July or August, 1899.

Julian A. Flutie testifies that the business at Yrapa was conducted under the name of Flutie Hermanos, although it belonged entirely to Elias A. Flutie; that the first met Mrs. Emilia Flutie on the 8th of July, 1897, when he was introduced to her by his brother Elias, who told him that he had been civilly married to her on April 25, 1896; that on July 22, 1897, his brother was married to her according to the rites of the Roman Catholic Church at Carúpano, Venezuela; that he was best man at the wedding, and the ceremony was performed by Rev. Antonio Ramos. He says that in June, 1901, Mrs. Flutie became so frightened, both for her own safety and that of her children, that she was forced to leave the country.

As it does not appear in evidence that Mrs. Flutie was ever in the United States until she went there with her husband in 1901, it is apparent that Elias A. Flutie must have left the United States as early as September, 1895; it is proven that he was married in Venezuela in April, 1896, and remarried there in July, 1897, and by his own statement he was established in business there in 1899.

Flutie claims that for several years prior to July 2, 1900, he resided in the United States, and that subsequent to about 1899 he made frequent trips to Venezuela to visit his family for greater or less periods and to supervise the management of his business, returning each time to his home in Brooklyn.

The Commission is satisfied from all the evidence before it in these cases that the reverse is true; that Flutie resided in Venezuela from at least the fall of 1895 up to July or August, 1899, at or near Carúpano, and after that time at Yrapa; that he may have made trips to the United States, and undoubtedly did make one there shortly before July 2, 1900, returning to his home and family and business in Venezuela shortly afterwards, that is to say, in August, 1900; from which time there is neither allegation nor proof in the record nor any fair implication therefrom that he ever intended voluntarily to return to the United States.

Naturalization in the United States, without any intent to reside permanently therein, but with a view of residing in another country, and using such naturalization to evade duties and responsibilities to which without it, he would be subject, ought to be treated by this Government as fraudulent. (14 Op. Atty. Gen., 295; Wharton, Int. Law Dig., sec. 175.)

The evidence presented in these cases convinces the Commission that Elias A. Flutie did not " reside " in the United States for the continued term of five years nor any considerable portion thereof prior to the 2nd day of July, 1900; that the facts necessary to give the court jurisdiction did not exist, and therefore that the certificate of naturalization was improperly granted.

It follows that these claimants have no standing before the Commission as citizens of the United States, and their claims are therefore dismissed for want of jurisdiction, without prejudice, however, to their presentation in a proper forum.

UNDERHILL CASES

(By the Umpire:)

Claim of J. L. Underhill, as successor in interest of her deceased husband, G. F. Underhill, disallowed because of failure on her part to show succession in interest.

Damages allowed for unlawful detention of claimant, J. L. Underhill, in Venezuela by the governmental authorities refusing to furnish passport.

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

I am unable to agree with my honorable colleague in regard to this claim.

At the time of the alleged transfer of the waterworks, Underhill was not, in my judgment, enjoying that freedom from restraint and equality of position as a contracting party which are necessary to give validity to every contract. Furthermore it appears to me that Mrs. Underhill is entitled in propria persona to an award for her unlawful detention.

As this claim must go to the umpire, however, it is unnecessary to discuss in detail the evidence upon which the foregoing opinion is based.

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

Both of these cases represent a claim for an indemnity amounting to $ 232,316.28 for personal injuries, insults, abuses, and unjust imprisonment. The claim of George Freeman Underhill includes an indemnity for having been forced to sacrifice, or abandon, his property; having been obliged to leave the place of his residence.

George Freeman Underhill died in the city of Havana, Cuba, on the 26th of October, 1901, and his widow, Jennie Laura Underhill, presented on the 17th of June of this year, to the Department of State in Washington, a supplementary memorial as administratrix of the estate of her deceased husband, although it is not proven that she had obtained from the surrogate's court of the county of New York, State of New York, the appointment to said charge.

Underhill's death put an end to any claim that could arise from personal injuries, insults, or other offenses, because these facts require, to serve as a reason for an indemnity, to be preceded by the consequential trial for responsibility against the perpetrator of said offense, and Underhill, as it is proven, limited himself, in his lifetime, to entering an action of responsibility against Gen. José Manuel Hernandez, in the city of New York, and both the circuit court and the Supreme Court of the United States, decided that General Hernandez's acts were not of such nature as to be properly brought within

the jurisdiction of the United States courts. This last judgment of the Supreme Court took place seven years before Underhill's death, and during all those years he never tried to enter before the Venezuelan courts any action of responsibility for the alleged personal offenses, all rights of civil action thus perishing with his own death.

Besides these considerations, it appears, as evidently proven that Underhill never was subjected to any personal illtreatment, nor to any imprisonment from the moment of the taking of the city of Bolívar by General Hernandez, as chief of the revolutionary forces called "Legalista," until Underhill's departure for Trinidad. The facts mentioned by Underhill in his memorial addressed to the Department of State, and which facts took place on the 11th of August, 1892, in reference to his wife and himself, only prove that there existed an excited feeling of the people of Ciudad Bolívar who tried to prevent the sailing of the Underhills, husband and wife, on the steamer *El Callao*, with the chiefs of the party vanquished at the battle of Buena Vista on the previous day, and while there was not in the city any regularly established authority.

It is not true, as it is asserted by the memorialist, that in consequence of said happenings, he was put in prison with his wife, as from his own statement and those of the witnesses produced by him, it appears that from the wharf the Underhills, husband and wife, went to their hotel, and stayed in it until their departure from Ciudad Bolívar.

The report made by the commander of the U.S. man-of-war *Kearsarge*, Mr. A. T. Crowninshield, and addressed to Rear-Admiral J. G. Walker, dated at Trinidad on the 18th of November, 1892, after having obtained from the United States consul at Ciudad Bolívar and from other respectable gentlemen of the same city, all named by the commander in his report, all the necessary information to arrive at the truth of what had occurred at Ciudad Bolívar to the Underhills, very clearly says that far from having the Underhills suffered any humiliating treatment of any kind from General Hernandez they were, on the contrary, protected by him from the feeling of general hostility existing against Underhill amongst all classes and all citizens of Ciudad Bolívar, according to the very words of the commander of the *Kearsarge*.

This feeling was strengthened by the knowledge that Mr. Underhill had entertained at his residence General Carreras and other officers of the Government's army the day before their departure from Ciudad Bolívar, when they went out to meet the revolutionary forces, which were approaching the city under the command of General Hernandez; [and further] I could not find any evidence to support the statement of Mr. Underhill that he was confined in his own house by orders of the new Government; or that guards were placed about his residence, as he states, for several weeks.

From August 11 to September 23, Mr. Underhill made repeated applications to General Hernandez to leave Ciudad Bolívar by every steamer, but permission was invariably refused; first, on the ground that it would be unsafe for Mr. Underhill to leave on one of Mr. Mathison's steamers; second, that the presence of Mr. Underhill was necessary in order to operate the aqueduct. A passport was, however, offered to Mr. Underhill, provided he would obtain some reliable merchant in Ciudad Bolívar to give security for his return, but this proposition Mr. Underhill declined.

It must be noticed that no mention is made in this report of the commander of the *Kearsarge* of the complaints that, later on, Mrs. Underhill has pretended to adduce, in reference to herself, for illtreatment and unjust imprisonment, as a ground to claim the sum of $ 100,000; but it does appear as proven that General Hernandez did offer to said lady a passport for Trinidad, which was delivered on September 27, and she embarked on board the steamer *Bolívar* on the 2nd of October, next.

In regard to the claim of Mr. Underhill for an indemnity for having been forced to sell his rights of exploitation of the aqueduct of Ciudad Bolívar, having to leave the city, it will be sufficient to read the contents of his letter of September 24, 1892, addressed by said Underhill to Gen. J. M. Hernandez, in answer to his official note, No. 278, in regard to the importance given by that civil and military chief of the city, to the work of putting in activity the service of the aqueduct, to maintain the supply of water to the city, in accordance with the contract entered into by Underhill with the Government. In said letter are found the following expressions:

On the 14th of July, when I was obliged to cease pumping, it was my intention to start up again as soon as the works had become dry. But since the occurrence of the 11th of August, and the insults I have received, and your refusal to give me a passport on any steamer that has sailed from this port during the term of six weeks, I have come to the following decisive conclusion pertaining to the aqueduct: I shall never run the aqueduct for the city of Bolívar again.

I left the works in perfect order on the 14th day of July, and so they can be found to-day, unless made otherwise by malicious hands.

If it is your right to take possession of that business, you must know and can act accordingly. All buildings outside of the pump house are my private property. My stock and tools contained in the office building are also my private property.

A few days after the date of this letter, on the 18th of October of the same year, Underhill celebrated a contract of sale, in favor of Mr. R. Tomassi, yielding to this latter all his rights in the aqueduct of Ciudad Bolívar for the sum of 6,500 pesos, which he received in cash; this contract of sale appears as made of his own and free will.

It is to be noted, as an appreciation of the character of those facts, the final part of the judgment of the Supreme Court of the United States in the suit brought by Underhill against General Hernandez:

We agree with the circuit court of appeals that the evidence upon the trial indicated that the purpose of the defendant in his treatment of the plaintiff was to coerce the plaintiff to operate his waterworks for the benefit of the community and revolutionary forces, and that it was not sufficient to have warranted a finding by the jury that the defendant was actuated by malice or any personal or private motive, and we concur in its disposition of the ruling below. The decree of the circuit court is affirmed. [1]

For the above reasons I am of the opinion that the claim of the widow Underhill, per se, and as administratrix of the estate of her deceased husband, should be entirely rejected.

GEORGE F. UNDERHILL CASE

BARGE, *Umpire*:

A difference of opinion having arisen between the Commissioners of the United States of North America and the Republic of Venezuela, this case was duly referred to the umpire.

The umpire having fully taken into consideration the protocol as well as the documents, evidence, and arguments, and likewise all the communications made by the two parties, and having impartially and carefully examined the same, has arrived at the following decision:

Whereas in this case there are presented to the Commission two separate claims: One of George Freeman Underhill for an indemnity for personal injuries, insults, abuses, and unjust imprisonment as well as for forced sacrifice

[1] 168 U. S., 250.

of a property, and one of Jennie Laura Underhill for damages for detention, these claims have to be examined separately, and may be separately decided upon.

The claim of George Freeman Underhill arises out of facts and transactions which took place in the months of August, September, and October, 1892;

Now, whereas Underhill died on the 26th day of October, 1901; and

Whereas, the first ingredient necessary to make a claim is a claimant, it has to be considered by whom this place as a claimant is now legally filled; and

Whereas, whatever may be the law or the opinion as to the transition of the right to claims that arise from personal injuries, insults or other offences, it has at all events to be stated in these cases as well as in cases of claims for financial damages to whom this right to claim was legally transferred by the claimant's death;

Whereas further in this case the only person who claims this right is Jennie Laura Underhill, the deceased's widow; and

Whereas Jennie Laura Underhill declares that she is entitled to administer upon her late husband's estate, but

Whereas no proof whatever of this statement is to be found in the documents laid before the Commission;

Whereas, on the contrary, she stated on the 17th of June, 1903, that she on that day only " was about to make application to the surrogate's court of the county of New York, State of New York, for letters of administration thereon", whilst up to this day (October, 1903) no evidence as to the result of this application has reached the Commission; and

Whereas it does not appear whether claimant at his death left a last will or not; whereas, at all events, nothing about the contents of such a last will, if existing, is known to the Commission; and

Whereas it is merely stated in the exhibit that Underhill married in 1886, and that in that year his wife went with him to Ciudad Bolívar, but not where they married or under which law or on what conditions, the Commission has no opportunity to investigate and testify which right might result for Underhill's widow out of the fact of this previous marriage; whilst out of the declaration sworn to by Jennie Laura Underhill on the 22nd of November, 1898, that at that date and at the time of its origin, the entire amount of her claim belonged solely and absolutely to her, it seems to appear that during the marriage there was no community of financial interests whatever established by law or by acts between Underhill (now deceased) and his (then) wife, Jennie Laura Underhill.

Whereas, therefore, no evidence exists for the rights of Jennie Laura Underhill to appear as a claimant in the place of her deceased husband; and

Whereas, as it was said before, no one else claims this rights before the Commission. the claims of George Freeman Underhill have to be dismissed for want of a claimant.

JENNIE L. UNDERHILL CASE

BARGE, *Umpire*:

A difference of opinion having arisen between the Commissioners of the United States of America and the United States of Venezuela, this case was duly referred to the umpire.

The umpire having taken fully into consideration the protocol and also the documents, evidence, and arguments, and likewise all the communications made by the parties, and having impartially and carefully examined the same, has arrived at the following decision:

Whereas Jennie Laura Underhill on or about the 23d day of November, 1898, filed with the Department of State of the United States of America a memorial whereby she claimed damages against the Government of the United States of Venezuela in the sum of $ 100,000 for facts that had occurred in 1892, which claim, however, was never presented by the Department of State of the United States of America to the foreign office of the United States of Venezuela; and

Whereas this claim was presented to this Commission by the honorable agent of the United States of America on June 16, 1903; and

Whereas the honorable agent of the United States of Venezuela opposed this claim in his answer dated July 9, 1903;

Whereas at the 16th of July, 1903, a brief prepared by the attorneys of the claimant was submitted by the honorable agent of the United States of America " in replication," as he says, " to the answer of the Venezuelan Government in the above-entitled case, thus making this brief the replication of the United States of America to the answer of the United States of Venezuela;

Whereas, further on, claimant says in her claim filed at the State Department: " I claim for assault, insult, abuse, and imprisonment; " and

Whereas the honorable agent of the United States of America, in the first brief, stated that the claim was for damages for personal injuries, insults, abuse, and false imprisonment.

But whereas the brief of attorneys, that has to be regarded as the replication of the United States of America after the answer of the United States of Venezuela was given, formally states that the claim arises out of unlawful arrest and imprisonment, and afterwards repeats, " Her claim is entirely for damages for detention of her person," it is shown that, after the replication, the claim has to be looked upon as a claim for unlawful arrest and detention (which opinion seems to be enforced by the opinion of the honorable Commissioner of the United States of America, when stating his inability to agree with the honorable commissioner for the United States of Venezuela, he declares that it appears to him that Mrs. Underhill " is entitled to an award for her unlawful detention "); and

Whereas perhaps practically the admitting of the other causes named in the claim and in the first brief would be of no great influence, as the evidence shows that, whatever may or might have been proved to have happened to claimant's husband, George Underhill, there is no proof of any assault, insult, or abuse as regards Jennie Laura Underhill, except what happened in the morning of the 11th of August, 1892, when an irritable and exasperated ungoverned mob — which believed the Underhills to be partial to the very unpopular party with whose chiefs and officials they were on the point to escape from the city, which conviction was not without appearance of reason, fostered by the fact that the Underhills entertained the commanding general and chiefs of that party on their departure to fight the then popular party called " Legalista " — prevented her leaving the city and assaulted, insulted, and abused her, for which assault, insult, and abuse of an exasperated mob in a riot, the Government — even when admitting that on that morning there was a de facto government in Ciudad Bolívar (quod non) — can not be held responsible, as neither according to international, national, civil, nor whatever law else anyone can be liable for damages where there is no fault by unlawful acts, omission, or negligence; whilst in regard to the events of the morning of August 11, 1892, there is no proof of unlawful acts, omission, or negligence on the part of what then might be regarded as local authority, which was neither the cause of the outrageous acts of the infuriated mob nor in these extraordinary circumstances could have prevented or suppressed them); still,

equity to the contending parties seems to require that, after the replication of the honorable agent of the United States of America, unlawful arrest and detention be looked upon as the acknowledged cause of this claim.

Now whereas in investigating the evidence laid before the Commission in this claim, it has to be remembered that, if it be true, what the honorable agent of the United States of America remarked about the deposition of General Hernandez (chief of the government in Ciudad Bolívar after 16th of August, 1892), viz, that this gentleman, notwithstanding his honor, integrity, and high position, had been so intimately connected with the acts out of which this claim arises, that he could scarcely be expected to be able to make an unbiased statement in regard to it, at least the same reflection must be borne in mind respecting the memorials and depositions of Jennie Laura Underhill and her husband, which form the main part of the evidence; and

Whereas, according to the brief of the attorney's, the claim arises out of unlawful arrest and imprisonment from August 11, 1892, to September 27 of that same year; and

Whereas the evidence shows, that on the 11th day of August, although the mob shouted: " to the carcel with the Underhills," the Underhills were not arrested and brought to the carcel, but fled in the Union Hotel, where the mob did not follow them, but where a guard was placed before the door, whilst the evidence does not show whether this guard was placed there to protect the Underhills by preventing the mob to enter the hotel, or to prevent Mr. Underhill from leaving the house;

Whereas, further on, Mrs. Underhill herself declares that in the afternoon of that same day: " she hastened from the hotel (where she just before declared herself to be imprisoned) went to the prefect's office, and afterwards, together with her husband, left that place and returned — not to the hotel, where she declared she was imprisoned — but to her home;" and

Whereas, as evidence shows, claimant declared before the United States circuit court, eastern district of New York, that on the 26th of September " she went to General Hernandez in person, to his house; " that afterwards " she went to the Government building and saw Hernandez there; "

Whereas, therefore, no evidence is to be found of claimant being arrested and imprisoned; but on the contrary her own declarations rather show that there scarcely can be question of imprisonment whilst she could leave the hotel and leave the house.

The investigation of the evidence laid before the Commission compels it to come, in regard to claimant, to the same conclusion as that to which it arrived in regard to her husband.

The Commander, Crowninshield, of the United States Navy (after investigating the case on the place itself and almost immediately after the facts occurred, and after hearing the prominent citizens of Ciudad Bolívar by him enumerated — for the most part foreigners) that no evidence of imprisonment could be found;

Wherefore the charge against the Government of Venezuela of claimant's unlawful arrest and imprisonment must be rejected.

But as, furthermore, claimant claims award for damages on the charge of detention of her person;

And whereas, without any arrest and imprisonment, detention takes place when a person is prevented from leaving a certain place, be it a house, town, province, country, or whatever else determined upon; and

Whereas it is shown in the evidence that claimant wished to leave the country, which she could not do without a passport being delivered to her by the Venezuelan authorities; and that from August 14 till September 27

such a passport was refused to her by General Hernandez, then chief of the Government of Ciudad Bolívar, the fact that claimant was detained by the Venezuelan authorities seems proved; and

Whereas, whatever reason may or might have been proved to exist for refusing a passport to claimant's husband, no reason was proved to exist to withhold this passport from claimant; and

Whereas the alleged reason that it would not be safe for the Underhills to leave on one of Mr. Mathison's steamers can not be said to be a legal reason, for if it be true that there existed any danger at that time, a warning from the Government would have been praiseworthy and sufficient. But this danger could not give the Government a right to prevent Mrs. Underhill from freely moving out of the country if she wished to risk the danger; whilst on the other hand it might have been said that the steamer being a public means of transfer, it would have been the duty of the Government to protect the passengers from such danger on the steamers when existing.

Whereas, therefore, it is shown that Mrs. Underhill was unjustly prevented by Venezuelan authorities from leaving the country during about a month and a half, the claim for unlawful detention has to be recognized.

And whereas for this detention the sum of $ 2,000 a month — making $ 3,000 for a month and a half — seems a fair award, this sum is hereby granted.

TURINI CASE

(By the umpire:)

Damages allowed successors in interest of a contractor who, although contract was violated by both parties, before any renunciation of the contract by the Government of Venezuela, performed certain work in pursuance thereof.

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

On July 28, 1896, a contract was executed between the secretary of public works of the United States of Venezuela, fully authorized by the President of the Republic, and Giovanni Turini, sculptor, residing in New York City and a naturalized citizen of the United States, whereby it was agreed:

1. On the part of Giovanni Turini that he would execute for the Government of Venezuela three statues, one equestrian of Gen. José Antonio Páez, another of Liberty, and a third of Bolívar, the latter destined to be presented by the Government of Venezuela to the city of New York; that he would deliver the statues of Páez and Liberty on board ship at the port of New York two months before the day set for the inauguration of the same, being for the first statue April 2, 1897, and for the second July 5, 1897; that these two monuments would be made in conformity with the Executive decrees of July 3 and 4, 1896, in reference thereto, and also in conformity with the sketches of said statues delivered by Turini to the secretary of public works; that the equestrian statue of Bolívar would be a replica or copy of the statue of Bolívar erected in the Plaza Bolívar in Caracas, with one change, that the dimensions of the one to be built should be one-fourth larger than natural size; that the materials for the pedestal as well as the statue would be of the same kind as those used for the aforesaid monument, which was to serve as a model; that Turini would deliver the statue of Bolívar to the representative of Venezuela at New York, would engrave on the pedestal such inscription as the Government of Venezuela might suggest to him, and would place such statue in New York at the spot to be designated.

2. On the part of the Government of Venezuela that it would pay Turini for the execution of the three statues the sum of $ 43,000 gold or 227,900

bolivars, in seventeen monthly payments of $ 2,300 or 12,190 bolivars per month, besides one monthly payment of $ 3,900 or 20,670 bolivars; that the first monthly payment would be made August 1, 1896, and that it would pay the freight and expenses of erection of the status of Páez and Liberty.

It was further agreed that at the time of shipment of the statues of Páez and Liberty, the Venezuelan consul at New York must certify that they had been properly executed, were in good condition, and well packed.

Pursuant to this contract —

1. Turini executed the statue of General Páez, together with the pedestal; performed considerable direct work upon the statue of Liberty and that of Bolívar, the models of both being completed ready to be cast in bronze; and completed the pedestal for the statue of Liberty.

2. The Government of Venezuela paid to Turini altogether the sum of $ 8,130, the last payment being made in April, 1897, in the sum of $ 1,850.

By the terms of the contract the Government of Venezuela was to pay seventeen monthly installments of $ 2,300, beginning August 1, 1896, besides one monthly payment of $ 3,900. The contract was broken by Venezuela within four months from August 1, 1896, by its failure to make the stipulated payments. Nevertheless, Turini proceeded with the work and appears to have accepted the payment of $ 1,850 made in April, 1897. But any failure of Turini to complete and deliver the statues at the time specified in the contract was clearly due to the prior failure of the Venezuelan Government to make the monthly payments as provided therein. This provision in the contract may have been and probably was the very reason why Turini agreed to complete and deliver the statues within the times specified.

In 1898 the Venezuelan Government claimed that it could not and would not accept the statue of Bolívar because the National Society of Sculpture of New York declared the statue to be without artistic merit; and also that fearing the statue of General Páez might be lacking the "necessary artistic requisites," it should be submitted to the judgment of a jury of artists, without the award of which the Government could not take into consideration Mr. Turini's claim.

But Turini did not agree to execute for Venezuela a statue of Bolívar which would be acceptable to the National Society of Sculpture of New York; nor did he agree to execute a statue of General Páez, subject to the judgment of a jury of artists. He agreed to execute statues of Páez and of Liberty, in conformity with the Executive decrees of July 3 and 4, 1896, in reference thereto, and in conformity with the sketches of said statues delivered by him to the secretary of public works. He agreed to execute a statue of Bolívar which would be a replica or copy of the one in the Plaza Bolívar in Caracas, the dimensions, however, to be one-fourth larger than natural size.

It is not claimed that Turini's work does not comply as to artistic merit with his agreement; but it is sought to measure it by standards other than those expressed in the contract. If the Venezuelan Government desired work done acceptable to the National Society of Sculpture of New York, or subject to the approval of a jury of artists, it should have so stipulated. Nor can it be assumed that Mr. Turini would have agreed to do such work at the price designated in the instrument before us.

The duty of the Commission is to determine the rights and obligations of the parties under the contract as it is — not as it might have been. And the true measure of damages in a case like this, where one engaged in the performance of a contract is prevented by the employer from completing it, is the difference between the price agreed to be paid for the work and what it would

have cost the party employed to complete it, deducting, of course, the amount already paid.

Here the price agreed to be paid is the sum of $ 43,000, of which $ 8,130 have been paid. The evidence shows that it will cost about the sum of $ 11,000 to complete the work. The difference is the sum of $ 23,870. Interest should be allowed on this sum at the rate of 3 per cent per annum from January 1, 1898, to December 31, 1903, the anticipated date of the final award by this Commission.

The estate of Giovanni Turini is therefore entitled to an award in the sum of $ 28,166.60 gold.

Giovanni Turini died August 27, 1899, and thereafter on September 9, 1899, letters of administration of his estate were duly granted to his widow, Margaret Turini, by the surrogate of the county of New York.

At the time of Turini's death his estate was and still is liable for the following debts which were incurred by him in carrying out his contract with the Government of Venezuela:

(1) To the Gorham Manufacturing Company the sum of $ 6,319, with interest thereon at 6 per cent per annum from July 1, 1897.

(2) To Joseph Carabelli, the sum of $ 3,095, with interest thereon at 6 per cent per annum from October 22, 1898.

(3) To the Lyons Granite Company, the sum of $ 2,358.45, with interest at 6 per cent per annum from October 1, 1898.

The above-named parties, as intervenors in this claim, should be protected to the extent of their proportionate interests, in the distribution, of the award herein made to the estate of Giovanni Turini, deceased.

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

This claim is presented by the Government of the United States on behalf of the administratrix and heirs at law of Giovanni Turini, deceased; the Gorham Manufacturing Company and Joseph Carabelli, jointly interested, for breach of a written contract. The amount of the claim is $ 28,579.55, interest included.

Giovanni Turini, now deceased, was a naturalized citizen of the United States. The Gorham Manufacturing Company is a corporation existing under the laws of the State of Rhode Island, and a citizen of the United States; and Joseph Carabelli is a naturalized citizen of the United States.

The claim arises out of the following facts:

On July 28, 1896, an agreement was made between the secretary of public works of the United States of Venezuela, fully authorized by the President of the Republic and Giovanni Turini, sculptor, residing in the city of New York, represented by Messrs. J. Boccardo & Co., for the execution of three statues: One equestrian of Gen. José Antonio Páez; another one of " Liberty," both to be erected in the city of Caracas; and a third one of General Bolívar, destined to be presented to the city of New York by the Venezuelan Government.

Turini bound himself to execute the aforesaid statues for the amount of $ 43,000 gold, payable by the Government of Venezuela, at the city of Caracas, to whomsoever should be authorized to represent Turini, in seventeen monthly payments of $ 2,300 per month, and one monthly payment besides, of $ 3,900; the first monthly payment to be made at the office of Messrs. J. Boccardo & Co., on the 1st day of August, 1896.

Turini also bound himself to deliver the statues of Páez and of Liberty, on board ship, at the port of New York, two months before the day set for the inauguration of the same, being for the first statue the 2nd day of April, 1897, and for the second the 5th day of July, 1897. These monuments had to be made

in conformity with the decrees of the Executive of the 3d and 4th days of July of the same year, 1896, in reference to the same, and also in conformity with the sketches of said statues delivered by Turini to the secretary of public works. The statue of Bolívar was to be a replica, or copy of the one erected in the Plaza Bolívar at Caracas, with one change, to wit, that it should be one-fourth larger than natural size. The material for the pedestal as well as for the statue to be of the same kind as those used for the aforesaid monument, which would serve as a model.

It was also agreed that at the time of the shipment of the two monuments, destined to Caracas, the Venezuelan consul at New York had to certify that the same had been properly executed and were in good condition and well packed.

The memorial of Turini shows that pursuant to said contract he executed the statue of General Páez, together with its pedestal, and the same had been ready for delivery many months. He also states that the performed considerable direct work upon the statue of Liberty and on the statue of General Bolívar; the models of both statues being completed and ready to be cast in bronze; and that the pedestal for the statue of Liberty was also completed, but by reason of the nonpayment of the moneys, as stipulated in the contract, further work on these statues was suspended.

Turini acknowledges that he had received from the Government of Venezuela the sum of $ 8,130 gold on account of his contract, the last payment having been made in April, 1897, by General Crespo (then president), and being the sum of $ 1,850. Under the contract Turini should have received, in April, 1897, the sum of $ 20,700.

In the execution of the contract Turini incurred a liability to the Gorham Manufacturing Company, and the memorialists affirm that they had received from him an assignment to the extent of $ 9,000 of the payments due him under the contract, with power to collect same. Turini also affirms that he incurred other liabilities, in and about the prosecution of the work, to Joseph Carabelli, amounting to $ 3,095.97, for which sum Carabelli obtained an assignment, copy of which has been submitted to this Commission.

Margaret Turini, as administratrix of Giovanni Turini, deceased, on the 27th of August, 1899, addressed the Secretary of State of the United States of America. On the 11th of May, 1903, a supplemental memorial was filed with the Department of State, in which, after making an exposition of the indebtedness incurred by the said Giovanni Turini, in carrying out his contract with the Government of Venezuela, with the Gorham Manufacturing Company, Joseph Carabelli, and the Lyons Granite Company, and other expenses incurred by the said Turini for plaster and modeling and labor, affirms that the statue of General Páez has been cast in bronze by the Gorham Manufacturing Company, and since 1897 has been ready for delivery; that the model of the statue of Liberty is at the factory of the Gorham Manufacturing Company, ready to be cast in bronze; that the model for the statue of General Bolívar was fully completed by the said Giovanni Turini in his lifetime. That its artistic merits were passed upon by the Municipal Art Commission of the City of New York, as appears by letter of its president to the said Turini, dated May 25, 1899; that said Turini received in all from the Government of Venezuela the sum of $ 8,130, leaving an unpaid balance amounting to the sum of $ 34,870. That it has been estimated that it would cost the sum of about $ 11,000 to complete the statues of Liberty and Bolívar, and in case the Venezuelan Government should prefer not to have the statues completed, deducting the sum of $ 11,000 from the $ 34,870, there would be a balance due of $ 23,870, to which should be added either interest thereon from January 1, 1898, or the interest

on the said debts incurred to the Gorham Manufacturing Company, Joseph Carabelli, and the Lyons Granite Company, which item of interest, in the aggregate, amounts to the sum of $ 3,623.36, and added to the said sum of $ 23,870, makes a total sum of $ 27,493.36.

As it appears from the above-stated facts, the points submitted to the decision of this Commission spring from the contract celebrated between the Government of Venezuela and Giovanni Turini for the execution of certain sculptorial works, and the case must be disposed of as being that of the administratrix and the heirs at law of Giovanni Turini, sufficiently authorized to prosecute this claim against the Government of Venezuela.

The assignments obtained by the Gorham Manufacturing Company and Joseph Carabelli only give to the creditors the right to collect the amount of their credits from what the Government of Venezuela might have to pay to the administratrix and heirs at law of Giovanni Turini for the responsibilities incurred by said Government by reason of the contract celebrated with Turini.

In his answer, the honorable agent of the Government of Venezuela refers to the merits of a memorial submitted to him by the minister of public works, containing the recital of the facts recorded in his department in reference to the above-mentioned contract with Turini, and the sundry incidents occurred thereon. The honorable agent of the United States, in his replication, admits that in that memorial the statement of facts is essentially in accord with that made in the brief submitted on behalf of the United States in this matter.

From the narrative of those facts it appears that several months after the beginning of the work which Turini undertook to execute, the Venezuelan consul in the city of New York, charged with the inspection of the statues, reported on June 22, 1897, to the Venezuelan Government that he had seen the model in clay of the statue of Bolívar uncompleted; that they were working on the bronze casting of the statue of Páez, and were making the miniature in clay of the statue of Liberty, and consequently he could not judge of the artistic merits and other conditions of the works.

Turini, on July 12, 1897, addressed a private letter to the President of the Republic, asking for the payment of $ 10,000 promised him, inasmuch as to that date there was due him more than $ 20,000. This letter was answered by the minister of public works, who informed him that the President would personally attend to his request, and would give a favorable solution to it, as soon as the financial situation would allow it.

The terms of that correspondence prove sufficiently that the suspension of payment of several monthly sums did not constitute a breach of contract, because Turini did not take the delay of payment as a resolutory cause, nor did he stop the execution of the work for that motive in order to put forward his claim against the Government of Venezuela. At this stage of events, and in the month of September of the same year, the Government of Venezuela had notice that the National Society of Sculpture of the City of New York refused to give its approval to the clay model of the liberator's statue, and consequently that the board of parks of the same city would not give its permit for the erection of the statue as then modeled. The Venezuelan Government having requested Turini to advise the reason of the rejection of the model, to send information about all the particulars pertinent to the execution of the statues, and about the report of the National Society of Sculpture, he answered that, having invited the said society to examine the model in clay of the liberator's statue, he was notified one month after that the statue could not be accepted; but that he succeeded in removing such difficulties after speaking with Mr. Strong, the president of the park commission, who agreed to have the statue accepted, provided it was an exact copy of the original existing in Caracas; and, finally,

that in that same month he would finish the new model in plaster, and the statue should not be cast until approved by the artists.

The terms of the official report addressed by the National Society of Sculpture to the board of public parks of New York, reads as follows:

> That the clay model of the statue of Bolivar, such as it appears at the sculptor's study, does not have the conditions of artistic excellence required to be erected in a public place or park of the city, and consequently does not recommend its acceptance.

After these facts Turini sent on November 20, 1897, a demonstrative account of the sums he pretended the Government of Venezuela owed him for his contract, to wit:

	Bolivars
For the statue of General Páez	106,000
For the statue of Liberty	71,900
For the statue of the Liberator	50,000
Total	227,900

From that total sum Turini made the deduction of 50,000 bolivars for the statue of the Liberator, being in doubt at that time of the acceptance of the model by the board of public works of New York, and having to wait for the Government's order to cast it in bronze. Turini also stated that he had received the sum of 43,125 bolivars, leaving a balance of 134,775 bolivars for the statues of Páez and Liberty which he said would soon be finished and ready to be delivered on board ship.

It was not until May 25, 1899, that C. T. Barney, president of the Artistic Municipal Commission, sent a letter to Turini informing him that in session of the day before the commission had approved the new model of the statue of General Bolívar, and on July 31 of the same year, the Government of Venezuela addressed Turini in reference to a note of Messrs. Olney & Comstock, Turini's attorneys, about the acceptance by the Artistic Commission of New York of the modified model of the statue of Bolívar, and gave its conformity for its execution. One month after this authorization, on the 27th day of August 1899, Giovanni Turini died in the city of New York, leaving the statue of General Páez cast in bronze by the Gorham Manufacturing Company and ready for delivery with its pedestal constructed by Joseph Carabelli; leaving also two clay models of the statue of Liberty and of General Bolívar, and a granite pedestal with inscriptions thereon, for the statue of Liberty, constructed by the Lyons Granite Company.

From the aforesaid, and a just appreciation of the facts, come forth the following conclusions:

First. There was no breach of the contract on the part of the Government of Venezuela by the nonpayment of the stipulated monthly sums, as alleged, because Turini, with perfect knowledge of that fact, did not make it a cause of breach, and pursued the execution of the work, relying on the promises which were made to him that the payment of the sum overdue, in conformity with the agreement, should be paid as soon as the financial situation would allow it. It must be taken into consideration that the price of an artistic work is not properly due until finished and accepted as satisfactory by the person who ordered the execution of the same, and that the monthly advances offered to Turini on account of the prices of the statues were only a facility afforded Turini in order to help him in the performance of his duties as enterpriser, and he was at any time at liberty to renounce and not take advantage of it.

Second. The incidental and very important event of the refusal of the clay model of the liberator's statue by the board of public parks of New York, which took place in August of the year 1897, having as a motive for such refusal the circumstance that the clay model of the statue of Bolívar, such as it appeared in the sculptor's study, did not have the conditions of *artistic excellence* required in such monuments to be erected in a public place or park, *had the consequence of interrupting the final execution of the Liberty and Liberator's statues*, giving occasion to considerable correspondence between the Government of Venezuela and Turini *about the securities asked for by the said Government in reference to the artistic merits of all the statues, and was also the cause of a proposition made by Turini to the Venezuelan Government on November 20, 1897, to withdraw from the whole amount of his contract the sum of 50,000 bolivars, price estimated by him for the statue of General Bolívar, and of an offer to deliver the statues of General Páez and Liberty, all completed and free on board at the port of New York of the sum of 134,775 bolivars*, deduction having been made of 43,125 bolivars already received by him.

Afterwards, on the 22d of March, 1899, another proposition was made by Mr. Oldrini, Turini's attorney, to the Venezuelan Government regarding the delivery of the statue of General Páez and its pedestal, not on board, but at the factory, and to deliver the pedestal of the statue of Liberty, the clay model of this last, and its casted parts, Turini keeping the clay model of Bolívar's statue, all for the sum of $ 25,000 to be paid: $ 15,000 cash down and the balance in monthly installments, without taking into consideration the $ 8,130 already paid to Turini. *To this proposition* the Government of Venezuela answered on the 2d day of June, 1899, formulating *a counter proposition*, to wit: To pay $ 15,000 for the statues of General Páez and Liberty all completed, in partial monthly payments of $ 3,000 from the last day of said month of June. This counter proposition was not accepted by Turini's attorneys, and on the 31st of July the Government addressed again Messrs. Olney & Comstock, after the receipt of the final approval by the New York Artistic Commission of the new clay model of the statue of General Bolívar, requesting that sketches or reproductions of the models for the statues of General Páez and Liberty be sent for examination as to the artistic conditions of the one and the other, in order to make a definite arrangement about their prices and payments. In the meantime Messrs. Olney & Comstock, on behalf of Turini, addressed the Government of Venezuela, *promoting the execution of the contract under the following conditions:* That the Government would accept the three statues referred to in the original contract for the price stipulated of $ 43,000, less $ 8,130 already paid, and the balance of $ 34,870 to be paid $ 15,000 cash down and $ 19,870 in monthly payments of $ 3,000 each. To this last *proposition* the Government did not give any answer, and the death of Turini, which occurred one month later, on the 27th of August, 1899, caused the whole affair to remain at a standstill. As this matter stood at the time of the death of Giovanni Turini it is apparent that there was not any definite understanding established between the Government of Venezuela and Giovanni Turini, neither about the acceptance of the models for the statues of General Páez and Liberty, nor about the price to be paid for the execution of the same; there was only an understanding for the casting in bronze of the statue of General Bolívar by reason of the acceptance by the Venezuelan Government of the modified model executed by Turini and approved by the president of the Municipal Art Commission of the city of New York.

Third. The death of Giovanni Turini, which took place before the completion of the statues of Liberty and General Bolívar, is a resolutive cause of the original contract between the Government of Venezuela and Turini in reference to the execution, pending at the time of Turini's death, of the statues of Liberty

and the Liberator. That resolutive cause entitled the administratrix and heirs at law of Turini to be paid, in proportion to the price agreed, for the work done, and for the value of materials employed and expenses incurred thereon, provided the work done and materials employed were of some use to the other party. In reference to the pedestal for the statue of Liberty, constructed by the Lyons Granite Company, it is not apparent that it could be of any use to the Government of Venezuela to have it without the statue, because in the matter of statues the material of the pedestal is of very secondary importance. The work executed by Turini in modeling the statues of Liberty and of the Liberator, and also the expenses incurred in such works, which amounted to the sum of $ 1,250, must be recognized as good title for compensation. For that motive and in consideration of the sum of $ 8,130 received by Turini during his lifetime, on account of the whole price of the statues and pedestals, a deduction of $ 5,000 must be made from the $ 8,130 as compensation for the personal work of the sculptor and expenses incurred by him in the modeling of said statues, thus leaving the sum of $ 3,130 to be disposed of as determined in the following conclusions.

Fourth. The completion by Giovanni Turini of the statue of General Páez and its pedestal, entitles the administratrix and heirs at law of Giovanni Turini to the payment of the price of that work by the Government of Venezuela, provided, that the sculptural work should be in perfect accordance with the terms specified in article 5 of the original contract between the minister of public works of the Venezuelan Government and Giovanni Turini, dated on the 28th of July, 1896, and besides that the materials employed and the artistic execution prove satisfactory, as is necessary in all works of this kind.

The Commission not having at its disposal the necessary elements to decide on these technical points, nor being able to fix the price for the statue of General Páez and its pedestal in proportion to the full amount of the contract, it is advisable to refer both parties in this claim to the following decision:

The Government of Venezuela is not obliged to receive the pedestal for the statue of Liberty, nor to pay its value, but a compensation is granted in favor of the administratrix and heirs at law of Giovanni Turini, in the sum of $ 5,000, to be deducted from the $ 8,130 received by the cujus, for his labor and the expenses incurred in modeling the statues of Liberty and General Bolívar; the clay models for both statues to become the property of the Government of Venezuela.

The Government of Venezuela and the administratrix and heirs at law of Giovanni Turini are bound to appoint, by mutual agreement, an expert, or a commission of three experts, named one by each party and the third by the two experts named. And said expert or commission will proceed to examine whether the statue of General Páez and its pedestal, are constructed in accordance with the terms of article 5 of the aforesaid contract, dated July 28, 1896, and if they give sufficient satisfaction in regard to their material and artistic merits, the Commission will fix in such case the value of the monument in proportion to the total amount fixed in the original contract for the three statues and the two pedestals, two of which had to be put on board ship by Turini at the port of New York, and the third one to be erected at Turini's expense in Central Park, New York City. After fixing in such manner the sum that the Government of Venezuela should have to pay to the administratrix and heirs at law of Giovanni Turini for the value of the statue of General Páez and its pedestal, the Government of Venezuela is entitled to deduct from that the sum of $ 3,130, as balance due by the administratrix and heirs at law of Turini on the sum of $ 8,130 already paid by the Venezuelan Government during the lifetime of Turini; and the assignees, the Gorham Manufacturing Company

and Joseph Carabelli, are entitled to exercise their rights for collecting from the Government of Venezuela, from the balance due to the administratrix and heirs at law of Giovanni Turini, if any, up to the amount of $ 6,319 on the part of the Gorham Manufacturing Company, and of $ 3,095 on the part of Joseph Carabelli. Any balance left for the price definitely fixed by the decision of the experts, to belong to the administratrix and heirs at law of Giovanni Turini.

In no other way, it appears to me, can this Commission dispose of the claim.

BARGE, *Umpire:*

A difference of opinion arising between the Commissioners of the United States of America and the United States of Venezuela, this case was duly referred to the umpire.

The umpire having fully taken into consideration the protocol and also the documents, evidence, and arguments, and likewise all other communications made by the two parties, and having impartially and carefully examined the same, has arrived at the decision embodied in the present award.

Whereas, on July 25, 1896, an agreement was made between the secretary of public works of the United States of Venezuela, fully authorized by the President of the Republic, and Giovanni Turini, sculptor, citizen of the United States of America, residing in the city of New York, represented by Messrs. J. Boccardo & Co., Caracas, which agreement reads as follows:

Conditions agreed upon between the secretary of public works of the United States of Venezuela, fully authorized by the President of the Republic, and Giovanni Turini, sculptor, residing at the city of New York, Dongan Hills, Richmond County, of the United States of North America, represented by Messrs. J. Boccardo & Co., merchants of this city, as it will be further stated, for the execution of three statues, one equestrian of General José Antonio Páez, another one of La Libertad, both to be erected in the city of Caracas; and a third one, El Libertador, destined to the city of New York.

First. Giovanni Turini binds himself to execute the aforesaid statues for the amount of $ 43,000 gold, or, say, 227,000 bolivars, which is its equivalent at the rate of exchange of 5 bolivars and 30 centimos to 1 dollar, which amount the Government of Venezuela will pay at the city of Caracas to Turini, or whomsoever shall be authorized to represent him, in seventeen monthly payments of $ 2,300 per month, or 12,190 bolivars, and one monthly payment besides of $ 3,900, or, say, 20,670 bolivars.

Second. Giovanni Turini names as attorneys with power to represent him in this city, Messrs. J. Boccardo & Co., merchants of the same. Said power accompanies this agreement so as to enable them to represent said Turini before the National Government in this arrangement, and to collect the payments for his account in accordance with the obligations this Government binds itself.

Third. The first monthly payment will be made at the office of Messrs. J. Boccardo & Co., the 1st day of August next.

Fourth. Turini binds himself to deliver the statue of Páez and of La Libertad on board ship at the port of New York, two months before the day set for the inauguration of the same, being for the first statue the 2d day of April, 1897; and for the second, the 5th day of July, 1897.

Fifth. These monuments will be made in conformity with the decrees of the Executive of the 3d and 4th of July of the present year in reference to the same, and also in conformity with the sketches of said statues Turini has delivered to the secretary of public works.

Sixth. The equestrian statue of El Libertador, which the National Government offers or presents to the city of New York to replace the one existing at present in that city at the Central Park, will be a replica or copy of the one erected to the memory of the said Libertador in the Plaza Bolívar of this capital with only one change, that the dimensions of the one to be built will be one-fourth larger than natural size. The materials for the pedestal as well as for the statue will be of the same kind as those used for the aforesaid monument, which will serve as a model.

Unique condition: Giovanni Turini binds himself to deliver this monument to the representative of Venezuela at New York, who will be opportunely named or appointed in the course of the month of December, 1897, said Turini binding himself also to engrave on the pedestal the inscriptions the Government of Venezuela may suggest to him.

Seventh. Giovanni Turini is under obligation to place for his account in New York, and at the spot that will be designated, the statue of El Libertador.

Eighth. In the price of $ 43,000 the freight from New York to Caracas is not included, nor the expenses for the erection of the monuments to Páez and La Libertad.

Ninth. At the time of the shipment of the two monuments at New York the Venezuelan consul at that city will have to certify that the same have been properly executed and to be in good condition and well packed.

A duplicate copy of this agreement, both of the same tenor, has been drawn at Caracas the 28th day of July, 1896.

G. TURINI
Per J. BOCCARDO & Co.
H. PEREZ B.

And whereas Giovanni Turini died on the 27th of August, 1899, and his widow, Margaret Turini, who was legally instituted administratrix of his inheritance, brought a claim against the United States of Venezuela, based on the contract as cited here above, in which claim the Gorham Manufacturing Company and Joseph Carabelli, holding rights as citizens of the United States of America, appear as intervenors, there must be considered whatever claims may arise out of the above-mentioned agreement on behalf of the heirs of Giovanni Turini.

And whereas it appears from the evidence brought before the Commission that the Government of Venezuela did not fulfill the conditions of article 1 of the agreement, failing to make the stipulated monthly payments;

And whereas the same evidence shows that Giovanni Turini did not fulfill the conditions of article 4 of the agreement, not having ready for shipment at the port of New York on the 2nd day of February, 1897, the statue of Páez with pedestal, which failure can not in equity be said to be excused by the failure of the Venezuelan Government to meet the monthly payments at the time indicated, as this latter fact did not prevent Turini from entering into a contract with the Gorham Manufacturing Company for the casting in bronze of the said statue, whilst even in May, 1897, it did not prevent him from agreeing with Carabelli about the making of the pedestal that should have been ready before February 2 of that year;

And whereas the evidence clearly shows that neither of the two parties had the intention to make this mutual failure a resolutive cause, but each requiring to attain the object of the agreement — Venezuela the statues according to contract and Turini the payment — both, to meet the changed circumstances, almost up to the date of Turini's death, interchanged propositions for a solution of the difficulties that arose out of the nonfulfillment of some conditions of the existing contract.

Whereas it is hereby clearly shown that the original contract was not regarded by them legally dissolved (annulled) the death of Turini should in equity be regarded by parties as the resolutive cause, and therefore the administratrix and heirs at law are entitled to be paid in proportion to the price agreed for the work done and the value and materials employed and expenses incurred thereon, providing the work done and materials employed are of some use to the other party; and whereas it is proved that the statue of Páez, with its pedestal (for which the sculptor fixed $ 20,000, this seeming a fair estimate when considering

the price established for the three statues in regard to the conditions announced in the decrees of their erection), had been ready for delivery many months before November, 1898; that Turini had completed the models of the statues of Liberty and Bolívar, and that the pedestal of the statue of Liberty was also completed; that the expense incurred for plaster and labor in modeling the two statues of Liberty and Bolívar amounted to the sum of $ 1,250, and that the sum of $ 3,500 may be regarded as a just compensation for the personal work of the sculptor on both models;

And whereas the pedestal of Liberty without its statue can not be said to be of any use to the Government of Venezuela, because a pedestal has to be regarded as being in harmony with the figure placed on it and from an artistic point of view, forming with the statue one whole monument; and whereas the statue of Páez, with its pedestal, as well as the models of the statues of Liberty and Bolívar, certainly can be of some use to the Government quite apart from the very varying and very personal opinions on their artistic value;

Whereas, therefore, the United States of Venezuela are indebted to the heirs of Turini, for the statue of Páez and pedestal, $ 20,000; for making the models of the statues of Liberty and Bolívar (which models become the property of Venezuela), $ 3,500; for material and labor in modeling these statues, $ 1,250, making together the sum of $ 24,750.

Whereas, however, Turini, during his lifetime already received for his work from the Government of Venezuela the amount of $ 8,130, the Venezuelan Government owes the inheritance of Turini the sum of $ 16,620, with interest at 3 per cent per annum from the 1st of January, 1898 — the date on which, according to the agreement, the money was due — until the 31st of December, 1903, the anticipated date of the final award by this Commission, making together the sum of $ 19,611.60, which sum is therefore allowed to the administratrix and heirs at law of Giovanni Turini, deceased.

And whereas, further, at the time of Turini's death, the estate was and still is liable for the following debts, which were incurred by him in carrying out his agreement as to the statue of Páez, viz:

1. To the Gorham Manufacturing Company the sum of $ 6,319, with interest thereon at 6 per cent per annum from July 1, 1897.

2. To Joseph Carabelli the sum of $ 3,095, with interest thereon at 6 per cent per annum from October 1, 1898.

The above-named parties, intervenors in this claim, should be protected to the extent of their proportionate interest in the distribution of the award herein made to the estate of Giovanni Turini, deceased.

KUNHARDT & CO. CASE

(By Bainbridge, Commissioner:)

While the property of a corporation in esse belongs not to the stockholders individually or collectively, but to the corporation itself, it is a principle of law universally recognized, that upon dissolution the interests of the several stockholders become equitable rights to proportionate shares of the corporate property after the payment of the debts. The rights of the creditors and shareholders to all the property of the corporation, including choses in action, are not destroyed by dissolution or liquidation.

Claimants, as citizens of the United States, and the equitable owners of their proportionate share of the property of the dissolved corporation, have a standing before the Commission to claim indemnity for such losses as they may prove they have sustained by reason of the wrongful annulment of the concession.

The extent of interest of the claimants not ascertainable because of the want of proof of amount of liabilities, and therefore claim dismissed without prejudice.

(By Paúl, Commissioner:)

The interest acquired by claimants by investing their money in shares of the corporate stock is a private transaction and creates no judicial bonds between the claimants and the Government of Venezuela during the existence of the corporation.

The shareholders of a corporation are not co-owners of the property of the corporation during its existence; they only have in their possession a certificate which entitles them to participate in the profits and to become owners of proportional parts of the property of the corporation when the latter is by final adjudication dissolved or liquidated.

This corporation has not been dissolved or liquidated in accordance with the laws of Venezuela, and therefore the claimants have no standing to claim before the Commission. Claim should be dismissed without prejudice.

(By the Commission:)

Neutral property destroyed by soldiers of a belligerent with authorization, or in the presence of their officers or commanders, gives a right to compensation whenever the fact can be proven that said superiors had the means of preventing the outrage and did not make use of them.

BAINBRIDGE, *Commissioner* (for the Commission):

Kunhardt & Co., claimants herein, are a copartnership doing business in the city of New York, and composed of Henry R. Kunhardt, George W. Kuhlke, and Franz Mueller. Kunhardt and Kuhlke are native citizens of the United States. Mueller was born in Germany in 1859, but was duly naturalized as a citizen of the United States on June 12, 1896, in the district court of the United States for the southern district of New York.

On behalf of Messrs. Kunhardt & Co. the United States presents two separate and distinct claims.

COMPAÑÍA ANÓNIMA TRASPORTES EN ENCONTRADOS

The memorial states that:

On the 24th of February, 1897, a contract was entered into by and between the minister of public works of Venezuela, J. M. Ortega Martinez, and Gen. Joaquín Valbuena U. for the construction of a wooden wharf and other works of public utility in the port of Encontrados, on the Zulia River, in the State of Zulia, Venezuela. By the said contract and in consideration of the building and maintaining of the wharf and other structures by Valbuena, the Government of Venezuela granted to Valbuena, his heirs and successors, the exclusive right for fifteen years to collect tolls from the ships or boats for loading and unloading at said port, a duty not to exceed 75 centimos for every hundred kilograms gross weight of merchandise. The grantee, his heirs or successors, were given the right of ownership over the wharf and its belongings during said term of fifteen years, upon the expiration whereof the wharf and all other works were to become the property of the nation.

The contract by its terms could be transferred to another person or company, national or foreign, with the approval of the Government of Venezuela.

This contract was ratified by the Congress and the national Executive on April 2, 1897, and published in the Gaceta Oficial.

On 15 December 1897, Valbuena, with the consent of the President of the Republic, assigned all his rights under the contract to Frederico Evaristo

Schemel, who, on December 16, 1897, with the consent of the President of the Republic, assigned all his rights under the contract to Bernardo Tinedo Velasco.

Tinedo completed the wharf and other structures in accordance with the terms of the contract. On May 10, 1898, the department of public works appointed Victor Brigé, an engineer, to examine the work, and on July 14, 1898, Brigé reported to the Government that the wharf and other structures conformed to all the requirements of the contract, whereupon said work was accepted on behalf of the Government.

On March 14, 1899, with the approval of the national Executive in the council of ministers, the department of public works authorized Tinedo to assign all his rights under said contract to the company known as " Compañía Anónima Trasportes en Encontrados." This company was formed in Maracaibo on April 10, 1899, by an agreement entered into by Bernardo Tinedo V., Rafael Tinedo, Carlos Rodriguez, and other citizens of Maracaibo, for the purpose of assuming the rights and liabilities of the Valbuena contract. By its articles of agreement it was provided that said company should remain in existence until the expiration of the fifteen years during which the right to collect the tolls was granted to Valbuena and his successors. The capital of the company was 300,000 bolivars, divided into 400 shares of 750 bolivars each. Said shares were issued for full value to the members of said company.

On April 18, 1899, pursuant to the authorization given him by the department of public works, Tinedo, in consideration of the sum of 300,000 bolivars, conveyed to the " Compañía Anónima Trasportes en Encontrados " the wharf and other structures, together with all the rights and privileges under the contract, and said company assumed all the duties and liabilities imposed by said contract. This conveyance was registered in the office of the register of Maracaibo on April 22, 1899.

On or about July 1, 1899, Messrs. Kunhardt & Co. became the owners of an interest in the " Compañía Anónima Trasportes en Encontrados " amounting to 243,750 bolivars, represented by 325 certificates of stock, each certificate representing one share of a par value of 750 bolivars.

On November 15, 1900, the national Executive of the Republic, through the department of public works, adopted the following resolution:

It is resolved,

As the agreement entered into on the 24th of February, 1897, between the department and the citizen, Joaquín Valbuena Urquinaona, for the construction of a wharf in the port of Encontrados, has not been fulfilled in all its parts, the supreme chief of the Republic has declared said contract void.

Let it be known and published.

For the national Executive: J. OTAÑEZ M.

This resolution was published in the Gaceta Oficial November 16, 1900.

The memorialists allege that this resolution, whereby the Valbuena contract and concession were annulled, was without legal or other cause or justification, and wrongfully deprived the stockholders of the company, and in particular Kunhardt & Co., as owners of over three-fourths of said stock, of the property to which they were legally entitled and in which they had invested funds to the amount of 243,750 bolivars upon the faith of the promise of the Government of Venezuela as set forth in said contract and concession; that since November 15, 1900, the Venezuelan Government has prevented said company from collecting the toll to which it was and is justly entitled under the terms of the said contract and has thereby rendered worthless the wharf and other structures erected at Encontrados, and the contract and concession under which the same were built, all in contravention of the terms of said contract; that on January 19, 1901,

the shareholders of said company, including Kunhardt & Co., protested against the action of the Executive in said attempted cancellation of the contract and in the subsequent proceedings in pursuance of said cancellation, but that the Venezuelan Government has continued to prevent the collection of the tolls and has refused to allow said company to exercise its rights under the contract.

Kunhardt & Co., claim that, by reason of said wrongful action of the Government of Venezuela, they have been damaged in the sum of 243,750 bolivars, equivalent to $ 46,875 in United States gold, being the value of their stock in the Compañía Anónima Trasportes en Encontrados prior to November 15, 1900, and they claim indemnity in that amount.

The learned counsel for Venezuela in his answer declares that this claim is unfounded in every aspect; that the corporation Trasportes en Encontrados was organized solely by citizens of Venezuela; that claimants were not in any manner interested in its organization, and that if they became the owners of various shares of stock issued by said company, it was a voluntary act on their part; that if any claim could arise against the Government of Venezuela on account of the annulment of the contract of February 24, 1897, only the managers of the company, or the receiver in case of dissolution, could institute the suit; that the claimants, taking advantage of their status as foreigners by making this claim are using an extraordinary remedy not available to the other shareholders of the company.

Article 163 of the Código de Comercio of Venezuela recognizes three kinds of mercantile companies:

(1) *La compañía en nombre colectivo*, in which all the members administer the business themselves or by means of an agent chosen by common accord. The liability of each member is unlimited. It corresponds to a general partnership.

(2) *La compañía en comandita*, in which one or more of the members are bound only to the amount of their investment. There are two kinds of companies *en comandita:* (*a*) Simple and (*b*) divided into shares. It is similar to what is known in England and the United States as a limited partnership.

(3) *La compañía anónima*, in which the capital is managed by shareholders who are responsible only to the value of their shares. It is the legal entity known to the common law as a private corporation.

Any number of persons not less than seven may by agreement associate themselves into a " compañía anónima." No previous authorization is necessary. It is a corporation created under general charter. The law requires that the articles of agreement (contrato de sociedad), in writing, whatever the number of shareholders, must be made in duplicate, one copy of which is to be filed in the office of the register and the other in the records of the company. (Art. 195.)

The powers, capacities, and incapacities of a corporation under the civil law are similar to those under the English and American corporation law.

The Compañía Anónima Trasportes en Encontrados was organized April 10, 1899, by nine citizens of Maracaibo and its articles of agreement filed in the registry as provided by law on April 13, 1899.

The articles of agreement declare the objects and purpose of the corporation to be the acquisition of the rights and privileges granted by and the assumption of the obligations of the contract executed between the National Government and Gen. Joaquín Valbuena on February 24, 1897. The capital of the company is fixed by said articles at 300,000 bolivars. On April 18, 1899, Bernardo Tinedo Velasco, the then owner of the concession, pursuant to the authorization of the Government, duly transferred to the company all the rights and privileges

which had been acquired by him as concessionary under said contract. The consideration of the transfer is declared to be 300,000 bolivars.

H. R. Kunhardt states in an affidavit dated May 20, 1903, that as a partner of the firm of Kunhardt & Co. he purchased on or about July 1, 1899, 325 certificates of the stock of said compañía of the par value of 750 bolivars each, amounting to 243,750 bolivars, or $ 46,875 American money; that the reasonable value of said 325 certificates on November 15, 1900, was $ 46,875, and that during the year from September 12, 1899, to September 20, 1900, the company declared and paid dividends on said stock amounting to over 10 per cent on the par value of each share of stock.

The capital of the Compañía Anónima Trasportes en Encontrados was represented by the alleged value of the contract and concession of February 24, 1897. It is claimed that the executive action of November 15, 1900, annulling the contract renders worthless the wharf and other structures erected at Encontrados and the contract and concession under which the same were built. In other words, it took away the company's capital. Paragraph 2 of article 204 of the Código de Comercio provides that when the capital of a company has been diminished two-thirds, the company is necessarily put in liquidation if the shareholders do not prefer to refund the same or limit the capital to the existing balance, provided the latter is sufficient to obtain the objects of the company. Article 42 of the reglamento of the company provided that when any of the cases expressed in paragraph 2 of article 204 of the Código de Comercio should exist the company could be dissolved.

When the capital of the corporation was practically destroyed by the taking away of that which represented it, the company was dissolved by operation of law and the by-laws above cited.

While the property of a corporation in esse belongs not to the stockholders individually or collectivity, but to the corporation itself, it is a principle of law universally recognized that, upon dissolution, the interests of the several stockholders become equitable rights to proportionate shares of the corporate property after the payment of the debts. The rights of the creditors and shareholders to the real and personal property of the corporation, as well as to its rights of contract and choses in action, are not destroyed by dissolution or liquidation. But in such case the creditors of the corporation have a right of priority of payment in preference to the stockholders.

The principal asset of the Compañía Anónima Trasportes en Encontrados was the Valbuena concession. Under it the Government of Venezuela for a consideration agreed to give the grantee, his heirs, or successors the rights and privileges therein designated for a period of fifteen years. It is fundamental that if one party to a contract wrongfully violates it he becomes liable to the other for such damages as the latter may sustain by reason of the breach, and this is true " whether such party be a private individual, a monarch, or a government of any kind." [1]

Article 691 of the civil code of Venezuela recognizes and declares that a property right may rest in contract. If the rights granted under the contract of February 24, 1897, were wrongfully taken away by the Government of Venezuela, compensation is justly due from that Government — first, to the Compañía Anónima Trasportes en Encontrados, or, second, upon the dissolution of said company, to its creditors and shareholders.

Messrs. Kunhardt & Co., as citizens of the United States and the equitable owners of their proportionate share in the property of the dissolved corporation,

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[1] See opinion of Sir Henry Strong and Hon. Don M. Dickinson in the Salvador Commercial Co. case. For. Rel. U. S., 1902, p. 871.

have a standing before this Commission to make claim for indemnity for such losses as they may prove they have sustained by reason of the wrongful annulment of the concession.

The claim of Kunhardt & Co. is based upon the alleged value of the concession when called as being 300,000 bolivars, and it is urged on their behalf that they have been damaged to the reasonable value of their interest in the company as measured by their ownership of 325 shares of the capital stock of a par value of 750 bolivars each, or the total value of 243,750 bolivars, equivalent to $ 46,875 in United States gold.

But the real interest of Kunhardt & Co. is an equitable right to their proportionate share of the corporate property after the creditors of the corporation have been paid. An important, and indeed, an essential element of proof to determine the actual measure of the claimant's loss is entirely wanting here. No evidence of the amount of the corporate debts is presented, although the existence of corporate indebtedness is apparent. The protest of January 19, 1901, states that:

> The prejudices are very grave which the company, its stockholders, and many others who have interest in it, suffer from the Executive resolution which declared the contract base of this company " canceled." And said protest is made on behalf of the company, its stockholders, and others connected with it.

Who but creditors of the corporation can be parties in interest to this contract other than the company and its stockholders?

The value of the corporate shares and the extent of a shareholder's interest in the corporate property are absolutely dependent upon the relation which the assets of the corporation bear to its liabilities.

The absence of such a showing in this case renders impossible the determination of Kunhardt & Co.'s interest in the concession or the amount of loss they have sustained by its annulment. The claim must, therefore, be here disallowed, but without prejudice to the corporation, its creditors, and stockholders, or to the interest of these claimants therein.

EL MOLINO

The memorials state:

(*a*) The firm of Kunhardt & Co., are, and since September 12, 1897, have been, the owners of an estate known as " El Molino," situated in the district of Barquisimeto, State of Lara, Venezuela. Said firm invested in the purchase and improvement of this property the sum of $ 35,000. The estate was used for the raising of sugar cane and the manufacture of sugar, the raising of corn and fodder, and for pasturing milch cattle and oxen. Since June 5, 1899, the estate has been in charge of J. Adolphus Ermin, as administrator and agent of claimants, and from said date to December 22, 1899, the firm received from the estate a monthly income exceeding 400 bolivars.

On the night of December 23, 1899, certain troops of the army of General Castro, under the immediate command of General Lara, entered upon and took forcible possession of said estate and encamped thereon for some time. During this period the troops seized for rations the cattle upon the estate and foraged their horses upon the growing crops, destroying all the corn and sugar cane growing upon the estate; took for their own use the horses, donkeys, and mules which were on the estate, and upon the departure of the troops they had killed or taken away all the live stock and destroyed all the growing crops; had injured and destroyed the wire fencing and greatly damaged the sugar house and sugar machinery.

As a direct result of the occupation of the estate by the troops of General Lara, the firm of Kunhardt & Co. sustained damages to the extent of 81,900 bolivars, equivalent to the sum of $ 15,750 in United States gold. An appraisal of the property lost and an assessment of the damages done were made by competent appraisers familiar with the property and its value. The report of said appraisers shows the loss sustained by claimants to be as follows:

	Bolivars
85 selected milch cattle, several of them American, an average of 240 bolivars each	20,400
3 teams of donkeys, with their harness, at 1,200 bolivars per team	3,600
9 mules, at 500 bolivars each	4,500
18 horses, at 500 bolivars each	9,000
Damage to the residence	8,000
3 carts and their harness, at 400 bolivars each	1,200
Damage to the wire fence	2,000
300 tares of corn fodder, at 24 bolivars each	7,200
250 tares of sugar cane, at 40 bolivars each	10,000
Injury to the engine room and loss of the zinc of the engine house	16,000
Total	81,900
Or in United States money	$ 15,750

Said appraisement was verified by the appraisers before Señor R. M. Delgado, judge of the municipal court of the city of Concepción, on April 16, 1901.

(*b*) The claimants allege that since the occupation of " El Molino " by the troops in December, 1899, as above described, the district in which said estate is situated has been in a condition of civil disturbance, which has prevented them from restocking, replanting, or in any way making use of said estate, which, it is claimed, is highly adapted to agricultural use, and except for the civil disorder which has prevailed, would be exceedingly productive; that previous to the occupation of December, 1899, the estate yielded a net annual profit of $ 924; that the Government of Venezuela has failed to suppress said condition of civil disturbance, by reason whereof claimants have lost the use and occupation of said estate to their damage, in the sum of $ 3,054.33.

(*c*) In a supplemental memorial, dated May 20, 1903, claimants allege that they have sustained further losses and damages by reason of additional depredations committed by Government troops upon said estate, " El Molino; " that in order to maintain said estate and reduce as much as possible the damages suffered in respect thereto, the agent of claimants kept on the estate a small number of milch cattle and endeavored to raise hay and corn; that during the first part of the year 1902 the Government troops destroyed all the crops on said estate and seized five milch cattle, and that on the 2d day of April, 1903, said troops seized thirteen milch cattle from said estate, to the additional injury of claimants in the sum of $ 1,407.61.

(*d*) In a supplemental memorial dated June 22, 1903, claimants filed a " justificativo " in proof of loss and damages sustained by them in respect to said estate in addition to that shown in their previous memorials, in the sum of $ 2,635.77 gold.

The entire amount claimed for injuries sustained in connection with the hacienda " El Molino " is the sum of $ 22,847.71 United States gold.

The responsibility of a government for the appropriation of neutral property in time of war has been clearly stated in Shrigley's case[1] decided by the United States and Chilean Claims Commission of 1892, as follows:

[1] Shrigley *v.* Chile, Moore's Arbitrations, p. 3712.

(*a*) Neutral property taken for the use or service of armies by officers or functionaries thereunto authorized gives a right to the owners of the property to demand compensation from the government exercising such authority.

(*b*) Neutral property taken or destroyed by soldiers of a belligerent with authorization, or in the presence of their officers or commanders, gives a right to compensation, whenever the fact can be proven that said officers or commanders had the means of preventing the outrage and did not make the necessary efforts to prevent it.

The evidence submitted in support of this claim satisfactorily shows that the Government troops under the immediate command of General Lara entered upon and confiscated property of the estate "El Molino" in December, 1899, and at various times thereafter. A reasonable compensation is therefore due to claimants from the Government of Venezuela for the losses thus sustained. But that portion of the claim based upon the loss of the annual profits of the estate by reason of the civil disorder which prevailed in the district does not appear to be well founded. The situation of claimants' property in that regard did not differ from that of other property within the same district, and no government is immune from the occurrence of civil commotions. There is also in the last two memorials an obvious duplication of the claim for the 13 milch cattle taken early in April, 1902. Several items of the claim appear to be excessive and the evidence of value is not wholly satisfactory.

The Commissioners have agreed upon an award in favor of Kunhardt & Co. on his branch of their claim in the sum of $ 13,947 gold coin of the United States.

PAÚL, *Commissioner*:

The United States of America presents in this case two individual claims on behalf of Kunhardt & Co. — one for the sum of $ 46,675 for damages arising from the cancellation ordered by the Government of Venezuela of a certain contract and the other for damages to the estate "El Molino" for the amount of $ 22,847.71.

The first claim is based upon the fact that Kunhardt & Co., being owners of a portion of the 400 shares stock capital of a corporation named "Trasportes en Encontrades," they consider themselves entitled to obtain directly from the Government of Venezuela the payment of damages which they allege they have suffered by the decree issued by said Government canceling the Encontrados contract.

The honorable agent for Venezuela, in his answer to this claim, maintains that the claimants have no right, as stockholders of an anonymous corporation, to set forth an action against the Government of Venezuela to obtain an award for damages caused by the annulment of a concession granted by said Government to a citizen of Venezuela and transferred afterwards to an anonymous corporation domiciled in Venezuela, and whose rights, properties, and titles are legally represented by its own manager during the existence of the corporation, or by its liquidators if the same has been put in liquidation.

The contract celebrated in April, 1897, between the minister of public works and Joaquín Valbuena Urquinaona, a citizen of Venezuela, had for its object the construction of a wooden wharf and other works in the port of Encontrados, on the river Zulia, in the State of Zulia. It was transferred two years after to an anonymous corporation called "Trasportes en Encontrados" formed by Venezuelan stockholders with Venezuelan capital, and the price of acquisition of the rights of the grant was paid by the corporation to the owner of the concession from its own funds.

The corporation appointed in its first general assembly of shareholders a board of directors and a manager, all Venezuelans, and chose as its domicile

the city of Maracaibo, capital of the State of Zulia, being, consequently, a domestic corporation of Venezuela.

By the deed of the aforesaid transfer, which was recorded in the subsidiary office of the register of Maracaibo on the 22d of April, 1899, the corporation assumed all rights, exemptions, and privileges arising from the grant, and bound itself to the terms of the article 16 of the contract, which reads as follows:

> That any doubt or dispute arising from the interpretation of this contract should be decided by the courts of the Republic according to its laws, and they could not in any case be a motive for an international claim.

Can it be admitted as belonging to Kunhardt & Co., shareholders of the domestic corporation " Trasportes en Encontrados," the right to claim damages arising from the breach of a contract that does not belong to them, but which is the exclusive property of the corporation " Trasportes en Encontrados?"

Being the fundamental fact for this claim the wrongful annulment of a grant, the claimants necessarily must be the owners of such grant, and said owner, or his legal representative, is the only person entitled to claim restitution, indemnity, or compensation for the value of the property which has been taken from him. There is only one grant; the agreement between the Government of Venezuela and the grantee originates juridical ties only between the two contracting parties. That grantee was originally a Venezuelan named Joaquín Valbuena Urquinaona. Subsequently all the rights and privileges of said contract were transferred and assigned Frederico Evaristo Schemel, and on or about December 16, 1897, said Schemel transferred and assigned all his rights and privileges under said contract and concession to Bernardo Tinedo Velasco. This Tinedo Velasco assigned to the corporation " Trasportes en Encontrados " all his rights and liabilities. By this last transfer the moral person, also a Venezuelan, named " Compañía Anónima Trasportes en Encontrados," became the only owner of said rights, and this fact was expressly notified to the Government of Venezuela, who gave its authorization and conformity to the transfer by a decision of the department of public works of March 14, 1899.

The juridical ties created by the original contract between the Government of Venezuela and Joaquín Valbuena Urquinaona were, by the last transfer, finally established between the said Government and the " Compañía Anónima Trasportes en Encontrados." No juridical ties of any kind exist between Messrs. Kunhardt & Co. and the Venezuelan Government arising from the aforesaid contract.

The interest acquired by Kunhardt & Co. by investing their money in shares of the corporation is a private transaction between them and the corporation and does not create any juridical ties between the Government of Venezuela and them as shareholders during the existence of the corporation.

The shareholders of an anonymous corporation are not co-owners of the property of said corporation during its existence; they only have in their possession a certificate which entitles them to participate in the profits and to become owners of proportional parts of the property and values of the corporation when this one makes an adjudication as a consequence of its final dissolution or liquidation.

The Venezuelan Commercial Code in article 133 expressly determines that an anonymous corporation constitutes a juridical person distinctly separated from its shareholders. Article 204 of the same code provides that when the managers find that the social capital has reduced one-third they should call a general meeting of shareholders to decide whether the corporation ought to liquidate, and in section 2 of the same article it is provided that if the reduction of a capital is of two-thirds the corporation shall be put necessarily in liquidation,

if the shareholders do not prefer to renew the capital or to limit the social capital to the existing funds, provided it would be sufficient to fill the object of the corporation.

The documents in evidence do not show any proof that the corporation "Trasportes en Encontrados" has been put in liquidation, neither has it dissolved in accordance with the commercial law and the statutes of the same corporation. The representation of all its rights, and its juridical person remain the same as they were at the last general special meeting held on January 19, 1901, being that representation exercised by its board of directors. At the same meeting the shareholders limited their action to intrust the managers of the company with the formulation of a protest against *the annulment of the contract, to leave in safety the integrity of its rights and for all the prejudices and damage caused to the company, its stockholders, and others connected with it, in order to make them of value in the manner and at the time they believe opportune.*

Nothing appears to have been done by the managers or board of directors of the corporation "Trasportes en Encontrados" to liquidate the same nor to adjudicate any part of the corporation's property to the shareholders.

The integrity of the rights of the corporation remain in the corporation itself, and its exercise is specially and legally intrusted, by the common law, by the provisions of the commercial code, and by the social contract, to the manager and the board of directors. Therefore the said rights can not be exercised by any other person than the directors of the corporation.

Messrs. Kunhardt & Co. have no legal capacity to stand before this Commission as claimants for damages originated by a breach of a contract whose rights and obligations are only mutually established between the Government of Venezuela and the corporation "Compañía Anónima Trasportes en Encontrados."

The case of the claim of the Salvador Commercial Company and other citizens of the United States, stockholders in the corporation which was created under the laws of Salvador, under the name of "El Triunfo Company (Limited)," and the other one of the Delagoa Bay Railway Company,[1] to which the attention of the Commission has been called by the honorable agent of the United States, have been carefully examined, and they do not present any likeness to the present claim.

By the aforesaid considerations I consider that this first claim for damages, amounting to $ 46,875, must be disallowed, without prejudice to the rights of the corporation "Compañía Anónima Trasportes en Encontrados," its stockholders, and others connected with it.

In reference to the second claim, amounting to $ 22,847.71, for damages to the estate "El Molino," owned by Messrs. Kunhardt & Co., I entirely agree with the honorable Commissioner for the United States, in the appreciation of the evidence and the responsibility of the Government of Venezuela.

An award is therefore agreed to in favor of Kunhardt & Co. for the sum of $ 13,947 United States gold.

Orinoco Steamship Company Case

(By the Umpire:)

Interpretation of the meaning of the word "owned" in the protocol.

Claims to be prosecuted by a government must be claims of such government both in origin and ownership. This rule, however, may be expressly changed by treaty.

Commission had jurisdiction to examine and decide all claims "owned" by citizens of the United States at the time of the signing of the protocol.

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[1] See For. Rel. U. S., 1902, pp. 838 *et seq.*

A concession to the predecessor in interest of the claimant to use for foreign commerce certain waterways reserved exclusively for coastwise trade, and a stipulation that a like privilege should be granted to no other person, did not vest such a right in the claimant to alone navigate these channels as would prevent the Government from subsequently enacting legislation to revoke and annul the former law reserving these waterways exclusively for coastwise trade.

A stipulation in a concession from a government, that all doubts and controversies arising as to the interpretation and execution of the agreement shall be submitted to the local tribunals, and shall never be made the subject of international intervention, bars the concessionary from the right to seek redress before any other tribunals.

A stipulation in the concession that it might be assigned to third parties by giving previous notice to the Government makes it obligatory upon the concessionary to give such previous notice to the Government, otherwise any assignment of the rights and privileges acquired under the concession is absolutely void as against said Government.

Claims for compensation for the use by the Government of the property subsequent to the assignment are enforcible.

Claim for repairs necessitated by the ill treatment of the property while in the hands of the Government disallowed for want of evidence to show in what condition property was delivered.

Closure of ports and waterways during revolt by constituted authorities can not be considered as a blockade unless the rebels have been recognized as belligerents. The right to close portions of the national territory to navigation is inherent in all governments.

Granting permission to others, while refusing it to claimant, to run steamers during the closure of the Orinoco River does not give rise to any right to make a claim, when the Government had good grounds to believe that claimant was in sympathy with the revolutionary movement, although this was not a fact.

Claim for counsel fees in prosecution of case disallowed.

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

Inasmuch as, by reason of a disagreement between the Commissioners, this claim is to be submitted to the umpire, to whom in such case the protocol exclusively confides its decision, the Commissioner on the part of the United States limits himself to the consideration of certain questions which have been raised by the respondent Government, affecting the competency of the Commission to determine this very important claim.

It may be presumed that in framing the convention establishing the Commission the high contracting parties had clearly in view the scope of the jurisdiction to be conferred upon it and deliberately chose, in order to define that scope, the words most appropriate to that end.

Article I of the protocol defines the jurisdiction of the Commission in the following terms:

> All claims owned by citizens of the United States of America against the Republic of Venezuela which have not been settled by diplomatic agreement or by arbitration between the two Governments, and which shall have been presented to the Commission hereinafter named by the Department of State of the United States or its legation at Caracas, shall be examined and decided by a Mixed Commission, which shall sit at Caracas, and which shall consist of two members, one of whom is to be appointed by the President of the United States and the other by the President of Venezuela. It is agreed that an umpire may be named by the Queen of the Netherlands.[1]

The protocol was signed at Washington on behalf of the respective Governments on the 17th of February, 1903. In view of the explicit language of the article quoted above, it would seem too clear for argument that the contracting

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[1] See *supra*, p. 115.

parties contemplated and agreed to the submission to this tribunal of all claims not theretofore settled by diplomatic agreement or by arbitration which were on that date owned by citizens of the United States against the Republic of Venezuela.

The Orinoco Steamship Company is a corporation organized and existing under and by virtue of the laws of the State of New Jersey. It is the successor in interest, by deed of assignment dated April 1, 1902, of the Orinoco Shipping and Trading Company (Limited), a company limited by shares, organized under the English companies acts of 1862 to 1893, and duly registered in the office of the register of joint-stock companies, London, England, on the 14th day of July, 1898. Among other of the assets transferred by the said deed of assignment were " all franchises, concessions, grants made in favor of the Orinoco Shipping and Trading Company (Limited) by the Republic of Venezuela, particularly the concession granted by the Government of Venezuela for navigation by steamer from Ciudad Bolívar to Maracaibo, originally made by the national Executive with Manuel Antonio Sanchez, and approved by Congress on the 8th day of June, 1894," and " all claims and demands existing in favor of the Orinoco Shipping and Trading Company (Limited) against the Republic of Venezuela." The claims and demands referred to constitute in the main the claim here presented on behalf of the Orinoco Steamship Company.

The learned counsel for Venezuela contends that:

> At the time when the acts occurred which are the basis of the claim, the Orinoco Steamship Company did not exist and could not have had any rights before coming into existence, and in order that it might be protected to-day by the United States of America it would be necessary, in accordance with the stipulations of the protocol, that the damages in the event of being a fact should have been suffered by an American citizen, not that they should have been suffered by a third party of different nationality and later transferred to an American citizen; such a proceeding is completely opposed to equity and to the spirit of the protocol.

In the case of Abbiatti *v.* Venezuela, before the United States and Venezuelan Claims Commission of 1890, the question arose whether the claimant, not having been a citizen of the United States at the time of the occurrences complained of, had a standing in court; and it was held that under the treaty claimants must have been citizens of the United States " at least when the claims arose." This was declared to be the " settled doctrine." Mr. Commissioner Little, in his opinion, says:

> As observed elsewhere, the infliction of a wrong upon a State's own citizen is an injury to it, and in securing redress it acts in discharge of its own obligations and, in a sense, in its own interest. This is the key — subject, of course, to treaty terms — for the determination of such jurisdictional questions: Was the plaintiff State injured? It was not, where the person wronged was at the time a citizen of another State. The injury there was to the other State. Naturalization transfers allegiance, but not existing State obligations.

It is to be observed that in attempting to lay down a rule applicable to the case the Commission is careful to make the significant reservation that the rule enunciated is " subject, of course, to treaty terms." It does not deny the competency of the high contracting parties to provide for the exercise of a wider jurisdiction by appropriate terms in a treaty. And that is precisely what has been done here. The unequivocal terms employed in the present protocol were manifestly chosen to confer jurisdiction of all claims owned (on February 17, 1903) by citizens of the United States against the Republic of Venezuela presented to the Commission by the Department of State of the United States or its legation at Caracas. Under these treaty terms, the key

to such a jurisdictional question as that under consideration is the ownership of the claim by a citizen of the United States of America on the date the protocol was signed.

The present claim, together with other assets of the Orinoco Shipping and Trading Company (Limited), was acquired by valid deed of assignment by the Orinoco Steamship Company, a citizen of the United States, on April 1, 1902, long prior to the signing of the protocol, and is therefore clearly within the jurisdiction of this Commission.

Pursuant to the requirements of the convention, the Commissioners and the umpire, before assuming the functions of their office took a solemn oath carefully to examine and impartially to decide according to justice and the provisions of the convention all claims submitted to them. Undoubtedly the first question to be determined in relation to each claim presented is whether or not it comes within the terms of the treaty. If it does, the jurisdiction of the Commission attaches.

> Jurisdiction is the power to hear and determine a cause; it is coram judice whenever a case is presented which brings this power into action. (United States *v.* Arredondo, 6 Pet., 691.)

Thenceforward the Commission is directed by the protocol and is bound by its oath carefully to examine and impartially to decide in conformity with the principles of justice and the rules of equity all questions arising in the claim, and its decision is declared to be final and conclusive.

The jurisdiction exercised by this Commission is derived from a solemn compact between independent nations. It supersedes all other jurisdictions in respect of all matters properly within its scope. It can not be limited or defeated by any prior agreement of the parties litigant to refer their contentions to the local tribunals. Local jurisdiction is displaced by international arbitration; private agreement is superseded by public law or treaty.

As to every claim fairly within the treaty terms, therefore, the functions of this Commission, under its fundamental law and under its oath, are not fulfilled until to its careful examination there is added an impartial decision upon its merits. It can not deny the benefit of its jurisdiction to any claimant in whose behalf the high contracting parties have provided this international tribunal. Jurisdiction assumed, some decision, some final and conclusive action in the exercise of its judicial power, is incumbent upon the Commission. Mr. Commissioner Gore, in the case of the *Betsy*, before the United States and British Commission of 1794, well said:

> To refrain from acting, when our duty calls us to act, is as wrong as to act where we have no authority. We owe it to the respective Governments to refuse a decision in cases not submitted to us; we are under equal obligation to decide on those cases that are within the submission. (Moore's Arbitrations, 2290.)

Finally the protocol imposes upon this tribunal the duty of deciding all claims "upon a basis of absolute equity, without regard to objections of a technical nature, or of the provisions of local legislation." Clearly the high contracting parties had in view the substance and not the shadow of justice. They sought to make the remedies to be afforded by the Commission dependent not upon the niceties of legal refinement, but upon the very right of the case. The vital question in this, as in every other claim before this tribunal, is whether and to what extent citizens of the United States of America have suffered loss or injury; and whether and to what extent the Government of Venezuela is responsible therefor.

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

The Orinoco Steamship Company (Limited) demands payment of the Government of Venezuela for four claims, as follows:

First. For $ 1,209,701.05, which sum the claimant company reckons as due for damages and losses caused by the Executive decree of October 5, 1900, said decree having, as the company affirms, annulled its contract-concession celebrated on May 26, 1894. The company deems as a reasonable value of the contract $ 82,432.78 per annum.

Second. For $ 147,638.79, at which the claimant company estimates the damages and losses sustained during the last revolution, including services rendered to the Government of the Republic.

Third. For 100,000 bolivars, of $ 19,219.19, overdue on account of the transaction celebrated on May 10, 1900.

Fourth. For $ 25,000 for counsel fees and expenses incurred in carrying out said claims.

The aforementioned claims are held by the Orinoco Steamship Company, a corporation of American citizenship, organized and existing under and pursuant to the provision of an act of the legislature of the State of New Jersey as assignee and successor of the Orinoco Shipping and Trading Company (Limited), of English nationality, organized in conformity with the respective laws of Great Britain.

And, in fact, it has always been the Orinoco Shipping and Trading Company (Limited), which has dealt and contracted with the Government of Venezuela, as evidenced by the documents and papers relating thereto. In case the aforementioned claims be considered just and correct, the rights from which they arise were originally invested in the juridical character (persona jurídica) of the Orinoco Shipping and Trading Company (Limited); and its claims are for the first time presented to the Mixed Commission by and on behalf of the Orinoco Steamship Company, as its assignee and successor, by virtue of an assignment and transfer, which appears in Exhibit No. 3 annexed to the memorial in pages 51 to 59 of the same, and in the reference to which assignment we shall presently make some remarks.

Before stating an opinion in regard to the grounds of said claims, the Venezuelan Commissioner holds that this Commission has no jurisdiction to entertain them. Said objection was made by the honorable agent for Venezuela prior to discussing the claims in themselves, and as the Venezuelan Commissioner considers such objection perfectly well founded he adheres to it and will furthermore state the powerful reasons on which he considers said objection to be founded.

It is a principle of international law, universally admitted and practiced, that for collecting a claim protection can only be tendered by the Government of the nation belonging to the claimant who originally acquired the right to claim, or in other words, that an international claim must be held by the person who has retained his own citizenship since said claim arose up to the date of its final settlement, and that only the government of such person's country is entitled to demand payment for the same, acting on behalf of the claimant. Furthermore, the original owner of the claims we are analyzing was the Orinoco Shipping and Trading Company (Limited), an English company, and that which demands the payment is the Orinoco Steamship Company (Limited), an American company; and as claims do not change nationality for the mere fact of their future owners having a different citizenship, it is as clear as daylight that this Venezuelan-American Mixed Commission has no jurisdiction for entertaining said claims. The doctrine which I hold

has also been sustained by important decisions awarded by international arbitrations.

Albino Abbiatti applied to the Venezuelan-American Mixed Commission of 1890, claiming to be paid several amounts which in his opinion the Government of Venezuela owed him. The acts alleged as the grounds for the claims took place in 1863 and 1864, at which time Abbiatti was an Italian subject, and it appears that subsequently, in 1866, he became a United States citizen. The Commission disallowed the claim, declaring its want of jurisdiction to entertain said claim for the following reasons:

Has the claimant, then, not having been a citizen of the United States at the time of the occurrences complained of, a standing here? The question is a jurisdictional one. The treaty provides: " All claims on the part of corporations, companies, or individuals, citizens of the United States, upon the Government of Venezuela * * * shall be submitted to a new commission, etc." Citizens when? In claims like this they must have been citizens at least when the claims arose. Such is the settled doctrine. The plaintiff State is not a claim agent. As observed elsewhere, the infliction of a wrong upon a state's own citizen is an injury to it, and in securing redress it acts in discharge of its own obligations and, in a sense, in its own interest. This is the key — subject, of course, to treaty terms — for the determination of such jurisdictional questions: Was the plaintiff State injured? It was not, where the person wronged was at the time a citizen of another state, although afterwards becoming its own citizen. The injury there was to the other state. Naturalization transfers allegiance, but not existing state obligations. Abbiatti could not impose upon the United States, by becoming its citizen Italy's existing duty toward him. This is not a case of uncompleted wrong at the time of citizenship, or of one continuous in its nature.

The Commission has no jurisdiction of the claim for want of required citizenship, and it is therefore dismissed. (Opinions United States and Venezuelan Claims Commission, 1890. Claim of Albino Abbiatti versus The Republic of Venezuela, p. 84.) [1]

In the case mentioned Abbiatti had always owned the claim; but as he was an Italian subject when the damage occurred, the Commission declared it had no jurisdiction to entertain said claim, notwithstanding that at the time of applying to the Commission he had become a citizen of the United States.

Article 1 of the protocol signed at Washington on February 17 of the current year says, textually, as follows:

All claims owned by citizens of the United States of America against the Republic of Venezuela which have not been settled by diplomatic agreement or by arbitration between the two Governments, and which shall have been presented to the Commission hereinafter named by the Department of State of the United States or its legation at Caracas, shall be examined and decided by a mixed commission, etc.[2]

Owned when? we beg to ask, in our turn, as in the above inserted decision. Owned ab initio; that is to say, owned since the moment when the right arose up to the moment of applying with it to this Mixed Commission. The verb " to own " means to possess, and as used in the protocol signifies " being the original proprietor; " therefore it will not suffice that the claim be possessed by a citizen of the United States at the time the protocol was signed; the jurisdiction of this Commission requires that the right should have arisen in the citizen of the United States and that said citizen shall never have failed to be the owner of such a right. Thus and thus only could the Government of the United States protect the claimant company; thus, and on such conditions alone, would this Commission have jurisdiction to entertain said claims.

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[1] Moore's Arbitrations, p. 2347.

[2] See *supra*, p. 115.

If the clause, " All claims owned by citizens of the United States of America," etc., were considered doubtful, and consequently should require interpretation, it ought undoubtedly to be given in accordance with the aforementioned universal principle — the basis of this statement — and not in opposition to it. Derogation of a principle of law in a judicial document has to be most clearly expressed; otherwise, the principle prevails, and the protocol must be interpreted accordingly.

While in some of the earlier cases the decisions as to what constituted citizenship within the meaning of the convention were exceptional, it was uniformly held that such citizenship was necessary when the claim was presented as well when it arose. Numerous claims were dismissed on the ground that the claimant was not a citizen when the claim arose. The assignment of a claim to an American citizen was held not to give the Commission jurisdiction.

An American woman who was married in July, 1861, to a British subject in Mexico was held not to be competent to appear before the Commission as a claimant in respect of damage done by the Mexican authorities in November, 1861, to the estate of her former husband, though her second husband had in 1866 become a citizen of the United States by naturalization. On the other hand, where the nationality of the owner of a claim, originally American or Mexican, had for any cause changed, it was held that the claim could not be entertained. Thus, where the ancestor, who was the original owner, had died, it was held that the heir could not appear as a claimant unless his nationality was the same as that of his ancestor. The person who had the " right to the award " must, it was further held, be considered as the " real claimant " by the Commission, and, whoever he might be, must " prove himself to be a citizen " of the government by which the claim was presented. (Moore's International Arbitrations, vol. 2, p. 1353.) [1]

In the memorial (No. 4) it is affirmed that 99 per cent of the total capital stock of The Orinoco Shipping and Trading Company (Limited) was owned by citizens of the United States of America, but this circumstance, even if it were proved, does not deprive said company of its British nationality, on account of its being organized, according to the referred-to memorial, under the English companies acts of 1862 to 1893 and duly registered in the office of the register of joint stock companies, London, on the 14th of July, 1898. The fact is that limited companies owe their existence to the law in conformity to which they have been organized, and consequently their nationality can be no other than that of said law. The conversion of said company, which is English, into the present claimant company, which is North American, can have no retroactive effect in giving this tribunal jurisdiction for entertaining claims which were originally owned by the first-mentioned company, as that would be to overthrow or infringe fundamental principles.

Naturalization not retroactive. — Without discussing here the theory about the retroactive effect of naturalization for certain purposes, I believe it can be safely denied in the odious matter of injuries and damages. A government may resent an indignity or injustice done to one of its subjects, but it would be absurd to open an asylum to all who have, or believe they have, received some injury or damage at the hands of any existing government, to come and be naturalized for the effect of obtaining redress for all their grievances. (Moore, vol. 3, p. 2483.)

The three quotations inserted hold and sanction the principle that, in order that the claimant might allege his rights before a mixed claims commission organized by the government of his country and that of the owing nation, it was necessary that the claim always belonged to him and that he should never have changed his nationality. And this principle demands that this Com-

[1] See also *ibid.*, pp. 2334, 2753, and Italian - Venezuelan Commission (Corvaia Case) in Volume X of these *Reports*.

mission should declare its want of jurisdiction, whether the two companies be considered as different juridical characters (personas jurídicas) and that the claimant is a successor of the other, or whether they be considered as one and the same, having changed nationality.

I now beg to refer to another matter — to the analysis of the judicial value of the deed of assignment.

In the first number of the exhibit " the Orinoco Shipping and Trading Company " appears selling to " the Orinoco Steamship Company," which is the claimant, the nine steamships named, respectively, *Bolívar*, *Manzanares*, *Delta*, *Apure*, *Guanare*, *Socorro*, *Masparro*, *Héroe* and *Morganito*. These steamships were destined for coastal service, or cabotage, some to navigate the rivers Guanare, Cojedes, Portuguesa and Masparro from Ciudad Bolívar up to the mouth of the Uribante River (Olachea contract of June 27, 1891), and others to navigate between said Ciudad Bolívar and Maracaibo, and to call at the ports of La Vela, Puerto Cabello, La Guaira, Guanta, Puerto Sucre, and Carúpano (Grell contract, June 8, 1894). This line was granted the option of calling at the ports of Curaçao and Trinidad.

While the Government fixes definitely the transshipment ports for merchandise from abroad, and while they are making the necessary installations. (Contract, art. 12.)

However, the coastal trade can only be carried on by ships of Venezuelan nationality, in conformity with article 1, Law XVIII, of the Financial Code, which provides that —

Internal maritime trade of cabotage or coastal service is that which is carried on between the open ports of Venezuela and other parts of the continent, as well as between the banks of its lakes and rivers, in national ships, whether laden with foreign merchandise for which duties have been paid or with native goods or productions. (Comercio de Cabotaje, p. 87.)

And if we further add that the steamers were obliged to navigate under the Venezuelan flag (art. 2 of the Grell contract), as in fact they did, the result is that said steamers are Venezuelan by nationalization, wherefore the assignment of said steamers alleged by the Orinoco Shipping and Trading Company (Limited) to the claimant company is absolutely void and of no value, owing to the fact that the stipulations provided by the Venezuelan law (herewith annexed) for the validity of such an assignment were not fulfilled.

Law XXXIII (Financial Code)

ON THE NATIONALIZATION OF SHIPS

ART. 1. The following alone will be held as national ships:
First. * * *
Second. * * *
Third. * * *
Fourth. Those nationalized according to law.

ART. 6. * * * The guaranty given for the proper use of the flag must be to the satisfaction of the custom-house. The property deed must be registered at the office of the place where the purchase takes place, and if such purchase is made in a foreign country a certificate of the same, signed by the Venezuelan consul and by the harbor master, shall have to be sent, drawn on duly stamped paper.

ART. 12. When a ship, or an interest therein, is to be assigned, a new patent must be obtained by the assignee, after having presented the new title deeds to the custom-house and receiving therefrom the former patent, stating measurements and tonnage therein contained, in order to obtain said patent.

The assignment of the aforementioned steamer is, as to the Government of Venezuela, void and of no value or effect whatever.

In Exhibit No. 2 " the Orinoco Shipping and Trading Company (Limited) " appears assigning several immovable properties situated in the Territorio Federal Amazonas of the Republic of Venezuela to the claimant company, and the title deed has not been registered at the subregister office of said Territory, as prescribed by the Venezuelan Civil Code in the following provisions:

ART. 1883. Registration must be made at the proper office of the department, district, or canton where the immovable property which has caused the deed is situated.

ART. 1888. In addition to those deeds which, by special decree, are subject to the formalities of registration, the following must be registered:

First. All acts between living beings, due to gratuitous, onerous, or assignment title deeds of immovable or other property or rights susceptible of hypothecation.

In Exhibit No. 3, the Orinoco Shipping and Trading Company (Limited) appears assigning the Olachea contract of June 27, 1891, and the Grell contract of June 8, 1894. In assigning the first of these the approval of the Venezuelan Government was not obtained, either before or after, thereby infringing the following provision:

This contract may be transferred wholly or in part to any other person or corporation upon previous approval of the National Government.

In assigning the second the stipulation provided in article 13 of giving previous notice to the Government was infringed. If any argument could be made in regard to the annulment of the latter assignment, there is no doubt whatever in regard to the annulment of the former, whereas in the foregoing provision the Government reserves the right of being a contracting party in the assignment, and consequently said assignment, without the previous consent of the Government, is devoid of judicial efficacy.

The assignment of those contracts is, therefore, of no value for the Government of Venezuela.

The fifth paragraph of the same refers to the assignment which " the Orinoco Steamship and Trading Company (Limited) " intended to make to " the Orinoco Steamship Company " of all claims and demands existing in favor of the party of the first part, either against the Republic of Venezuela or against any individuals, firms, or corporations. This transfer of credits, which are not specified nor even declared, and which has not been notified to the Government is absolutely irregular, and lacks judicial efficacy with regard to all parties except the assignor and assignee, in conformity with article 1496 of the Civil Code, which provides as follows:

An assignee has no rights against third parties until after notice of the assignment has been given to the debtor, or when said debtor has agreed to said assignment.

The foregoing article is, in substance, identical to article 1690 of the French Civil Code, and in reference thereto Baudry-Lacantinerie says that —

Les formalités prescrites par l'art. 1690 ont pour but de donner à la cession une certaine publicité, et c'est pour ce motif que la loi fait de leur accomplissement une condition de l'investiture du cessionnaire à l'égard des tiers. Les tiers sont réputés ignorer la cession, tant qu'elle n'a pas été rendue publique par la signification du transport ou par l'acceptation authentique du cédé; voilà pourquoi elle ne leur devient opposable qu'à date de l'accomplissement de l'une ou de l'autre de ces formalités. (*Précis de Droit Civil*, t. III, p. 394, numéro 624.)

Quelles sont les personnes que l'article 1690 désigne sous le nom de tiers, et à l'égard desquelles le cessionnaire n'est saisi que par la notification ou l'acceptation

authentique du transport? Ce sont tous ceux qui n'ont pas été parties à la cession et qui ont un intérêt légitime à la connaître et à la contester, c'est-à-dire: 1. le cédé; 2. tous ceux qui ont acquis du chef du cédant des droits sur les créanciers chirographaires du cédant.

1. *Le débiteur cédé.* — Jusqu'à ce que le transport lui ait été notifié ou qu'il l'ait accepté, le débiteur cédé a le droit de considérer le cédant comme étant le véritable titulaire de la créance. La loi nous fournit trois applications de ce principe. (Baudry-Lacantinerie, work and vol. quoted, p. 395. See also Laurent, *Principes de Droit Civil*, vol. 24, p. 472.)

I do not expect that the foregoing arguments will be contested, having recourse to the following provision of the protocol:

The Commissioners, or in case of their disagreement, the umpire, shall decide all claims upon a basis of absolute equity, without regard to objections of a technical nature or of the provisions of local legislation. [1]

If such a broad sense were given to this clause in regard to all cases as to bar any consideration for Venezuelan law, it would not only be absurd, but monstrous. Such, however, can not be the case. How could a claim possibly be disallowed on the grounds of the claimant being a Venezuelan citizen without invoking the Venezuelan law, which bestows upon him said citizenship? How in certain commissions could Venezuela have been exempted from having to pay for damages caused by revolutionists if the judical principles which establish such exemption had not been pleaded? Said clause provides that no regard shall be had to objections of a technical nature, or of the provisions of local legislation, whenever such objections impair principles of equity, but when, in compliance with said principles, to disregard those objections would be to overthrow equity itself, and equity has to be the basis for all the decisions of this Commission. In the present instance conformity exists between the one and the others. And in merely adding that the majority of the cited provisions are in reference to contracts, it is understood that their basis has been equity and not rigorous law. On the other hand, if this Commission were to decide upon paying an award for a claim which the claimant company is not properly entitled to, through not being the owner thereof, it would be a contention against the precepts of equity.

In view, therefore, of the substantial irregularities of the deed of assignment and transfer, the Government of Venezuela has a perfect right to consider " the Orinoco Shipping and Trading Company (Limited) " as the sole owner of the claims analyzed, and whereas said company is of British nationality, this Venezuelan-American Mixed Commission has no jurisdiction to entertain the claim mentioned.

The incompetency of this Commission has been perfectly established. I shall now analyze the claims themselves. The Orinoco Steamship Company holds that the Executive decree promulgated on October 5, 1900, allowing the free navigation of the Macareo and Pedernales channels, annulled its contract concession of May 26, 1894, which contract the claimant company considered as granting it the exclusive right to carry on foreign trade through said channels. The company states as follows:

Since said 16th day of December, A.D. 1901, notwithstanding the binding contract and agreement between the United States of Venezuela and the Orinoco Shipping and Trading Company (Limited) and your memorialist as assignee of said company, to the contrary, said United States of Venezuela, acting through its duly constituted officials, has authorized and permitted said Macareo and Pedernales

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[1] *Supra*, p. 115.

channels of the river Orinoco to be used and navigated by vessels engaged in foreign trade other than those belonging to your memorialists or its predecessors in interest, and has thus enabled said vessels to do much of the business and to obtain the profits therefrom which, under the terms of said contract-concession of June 8, 1894, and the extension thereof of May 10, 1900, should have been done and obtained solely by your memorialist or its said predecessor in interest, and much of said business will continue to be done and the profits derivable therefrom will continue to be claimed and absorbed by persons and companies other than your memorialists, to its great detriment and damage. (Memorial, p. 106.)

Let us state the facts such as they appear in the respective documents.

On July 1, 1893, the Executive power issued a decree in order to prevent contraband which was carried on in the several bocas (mouths) of the river Orinoco, to wit:

ART. 1. Vessels engaged in foreign trade with Ciudad Bolívar shall be allowed to proceed only by way of the Boca Grande of the river Orinoco; the Macareo and Pedernales channels being reserved for the coastal service, navigation by the other channels of the said river being absolutely prohibited.

On May 26, 1894, the Executive power entered into a contract with Mr. Ellis Grell, represented by his attorney, Mr. Manuel Antonio Sanchez, wherein the contractor undertook to establish and maintain in force navigation by steamers between Ciudad Bolívar and Maracaibo in such manner that at least one journey per fortnight be made, touching at the ports of La Vela, Puerto Cabello, La Guaira, Guanta, Puerto Sucre, and Carúpano. Article 12 of this contract stipulates as follows:

While the Government fixes definitely the transshipment ports for merchandise from abroad, and while they are making the necessary installations, the steamers of this line shall be allowed to call at the ports of Curaçao and Trinidad and any one of the steamers leaving Trinidad may also navigate by the channels of the Macareo and Pedernales of the river Orinoco in conformity with the formalities which by special resolution may be imposed by the minister of finance in order to prevent contraband and to safeguard fiscal interests; to all which conditions the contractor agrees beforehand.

On October 5, 1900, the national Executive promulgated the following decree:

ARTICLE I. The decree of the 1st of July, 1893, which prohibited the free navigation of the Macareo, Pedernales, and other navigable waterways of the river Orinoco is abolished.

Did the 1894 contract grant the Orinoco Shipping and Trading Company (Limited) an exclusive privilege to engage in foreign trade with the use of said Macareo and Pedernales channels? The perusal of article 12 above referred to will suffice without the least hesitation to answer this question negatively. The fact is that the company's contract-concession is for establishing the inward trade between the ports of the Republic, from Ciudad Bolívar to Maracaibo, and the company's steamers were only granted a temporary permission to call at Curaçao and Trinidad, *while the Government fixed definitely the transshipment ports for merchandise from abroad, and while they were making the necessary installations.*

It would be necessary to overthrow the most rudimental laws of logic in order to hold that a line of steamers established to engage in coastal trade or cabotage, navigating on the Macareo and Pedernales channels, which are free from internal navigation, should have the privilege of engaging in foreign trade through the mentioned channels. The decree of July 1 of 1893, promulgated with a view to prevent contraband in the channels of the river Orinoco and on the coast of Paria, is not a stipulation of the contract concession of the Orinoco Shipping and Trading Company (Limited), and therefore the Govern-

ment of Venezuela could willingly abolish it, as, in fact, it did abolish it on October 5, 1900. Neither is it reasonable to suppose that the Government at the time of celebrating the referred-to contract alienated its legislative powers, which, owing to their nature, are inalienable. On the other hand, a privilege, being an exception to common law, must be most clearly established, otherwise it does not exist. Whenever interpretation is required by a contract it should be given in the sense of freedom, or, in other words, exclusive of privileges.

Furthermore, it is to be remarked that the Orinoco Shipping and Trading Company (Limited) has never complied with either of the two contracts — the Olachea and the Grell contracts — particularly as refers to the latter, as evidenced by a document issued by said company, whereof a copy is herewith presented, and as evidenced also by the memorial (No. 15).

On May 10, 1900, a settlement was agreed to by the minister of internal affairs and the Orinoco Shipping and Trading Company (Limited), in virtue whereof the Government undertook to pay the company 200,000 bolivars for all its claims prior to said convention, having forthwith paid said company 100,000 bolivars, and at the same time a resolution was issued by said minister granting the Grell contract (May 26, 1894) a further extension of six years.

The company holds that the decree of October 5, 1900, annulled its contract and also annihilated the above-mentioned prorogation, and that, as the concession of said prorogation had been the principal basis of the settlement for the company to reduce its credits to 200,000 bolivars, said credits now arise in their original amount.

It has already been proved that the referred-to Executive decree of October 5, 1900, did not annul the Grell contract, and this will suffice to evidence the unreasonableness of such contention. It must, furthermore, be added that the settlement and the concession for prorogation are not the same act, nor do they appear in the same document; therefore it can not be contended that the one is a condition or stipulation of the other. Besides, the concession for prorogation accounts for itself without having to relate it to the settlement; whereas in the resolution relative to said prorogation the company on its part renounced its right to the subsidy of 4,000 bolivars which the Government had assigned to it in article 7 of the contract.

The Venezuelan Commissioner considers that this Commission has no jurisdiction to entertain the claims deduced by the Orinoco Steamship Company, and that, in case it had, said claims ought to be disallowed.

BARGE, *Umpire*:

A difference of opinion arising between the Commissioners of the United States of North America and the United States of Venezuela, this case was duly referred to the umpire.

The umpire having fully taken into consideration the protocol, and also the documents, evidence, and arguments, and also likewise all other communications made by the two parties, and having impartially and carefully examined the same, has arrived at the decision embodied in the present award.

Whereas the Orinoco Steamship Company demands payment of the Government of Venezuela for four claims, as follows:

First. $ 1,209,700.05, as due for damages and losses caused by the Executive decree of October 5, 1900, having by this decree annulled a contract concession celebrated on May 26, 1894;

Second. 100,000 bolivars, or $ 19,219.19, overdue on account of a transaction celebrated on May 10, 1900;

Third. $ 147,638.79 for damages and losses sustained during the last revolution, including services rendered to the Government of the Republic;

Fourth. $ 25,000 for counsel fees and expenses incurred in carrying out said claims.

And whereas the jurisdiction of this Commission in this case is questioned, this question has in the first place to be investigated and decided.

Now, whereas the protocol (on which alone is based the right and the duty of this Commission to examine and decide " upon a basis of absolute equity, without regard to the objections of a technical nature or of the provisions of local legislation "), gives this Commission the right and imposes the duty to examine and decide " all claims owned by citizens of the United States of America against the Republic of Venezuela which have not been settled by diplomatic agreement or by arbitration between the two Governments, and which shall have been presented to the Commission by the Department of State of the United States or its legation at Caracas," it has to be examined how far this claim of the Orinoco Steamship Company possesses the essential qualities to fall under the jurisdiction of this Commission.

Now, whereas this claim against the Venezuelan Government was presented to this Commission by the Department of State of the United States of America through its agent;

And whereas it has not been settled by diplomatic agreement or arbitration;

And whereas the Orinoco Steamship Company, as evidence shows, is a corporation created and existing under and by virtue of the laws of the State of New Jersey, in the United States of America,

There only remains to be examined if the company owns the claim brought before the Commission.

Now, whereas almost all the items of this claim — at all events those originated before the 1st of April, 1902 — are claims that " the Orinoco Shipping and Trading Company (Limited)," an English corporation, pretended to have against the Government of Venezuela;

And whereas on the said April 1, 1902, the said English company, for the sum of $ 1,000,000, sold and transferred to the American company, the claimant, " all its claims and demands either against the Government of Venezuela or against individuals, firms, and corporations," these claims from that date prima facie show themselves as owned by the claimant.

Whereas further on it is true that, according to the admitted and practiced rule of international law, in perfect accordance with the general principles of justice and perfect equity, claims do not change nationality by the fact that their consecutive owners have a different citizenship, because a state is not a claim agent, but only, as the infliction of a wrong upon its citizens in an injury to the state itself, it may secure redress for the injury done to its citizens, and not for the injury done to the citizens of another state.

Still, this rule may be overseen or even purposely set aside by a treaty.

And as the protocol does not speak — as is generally done in such cases — of all claims of citizens, etc., which would rightly be interpreted " all claims for injuries done to citizens, etc.," but uses the usual expression " all claims owned by citizens," it must be held that this uncommon expression was not used without a determined reason.

And whereas the evidence shows that the Department of State of the United States of America knew about these claims and took great interest in them (as is shown by the diplomatic correspondence about these claims presented to the commission in behalf of claimant), and that the plenipotentiary of Venezuela, a short time before the signing of the protocol, in his character of United States envoy extraordinary and minister plenipotentiary, had corre-

sponded with his Government about these claims, and that even as late as December 20, 1902, and January 27, 1903, one of the directors of the claimant company, J. van Vechten Olcott, wrote about these claims, in view of the event of arbitration, to the President of the United States of America, it is not to be accepted that the high contracting parties, anxious, as is shown by the history of the protocol, to set aside and to settle all questions about claims not yet settled between them, should have forgotten these very important claims when the protocol was redacted and signed.

And therefore it may safely be understood that it was the aim of the high contracting parties that claims such as these, being at the moment of the signing of the protocol *owned* by citizens of the United States of North America, should fall under the jurisdiction of the Commission instituted to investigate and decide upon the claims the high contracting parties wished to see settled.

And therefore the jurisdiction of this Commission to investigate and decide claims owned by citizens of the United States of North America at the moment of the signing of the protocol has to be recognized, without prejudice naturally of the judicial power of the Commission, and its duty to decide upon a basis of absolute equity when judging about the rights the transfer of the ownership might give to claimant against third parties.

For all which reasons the claims presented to this Commission on behalf of the American company, " the Orinoco Steamship Company," have to be investigated by this Commission and a decision has to be given as to the right of the claimant company to claim what it does claim, and as to the duty of the Venezuelan Government to grant to the claimant company what this company claims for.

Now, as the claimant company, in the first place, claims for $ 1,209.701.05 as due for damages and losses caused by the Executive decree of October 5, 1900, this decree having annulled a contract-concession celebrated on May 26, 1894, this contract-concession and this decree have to be examined, and it has to be investigated:

Whether this decree annulled the contract-concession;

Whether this annulment, when stated, caused damages and losses;

Whether the Government of Venezuela is liable for those damages and losses;

And, in the case of this liability being proved, whether it is to claimant the Government of Venezuela is liable to for these damages and losses.

And whereas the mentioned contract concession (a contract with Mr. Ellis Grell, transferred to the Venezuelan citizen, Manuel A. Sanchez, and approved by Congress of the United States of Venezuela on the 26th of May, 1894) reads as follows:

The Congress of the United States of Venezuela, in view of the contract celebrated in this city on the 17th of January of the present year between the minister of the interior of the United States of Venezuela, duly authorized by the chief of the national executive, on the one part, and on the other, Edgar Peter Ganteaume, attorney for Ellis Grell, transferred to the citizen Manuel A. Sanchez, and the additional article of the same contract dated 16th of May instant, the tenor of which is as follows:

Dr. Feliciano Acevedo, minister of the interior of the United States of Venezuela, duly authorized by the chief of the national executive, on the one part, and Edgar Peter Ganteaume, attorney for Ellis Grell, and in the latter's name and representation, who is resident in Port of Spain, on the other part, and with the affirmative vote of the government council have celebrated a contract set out in the following articles:

ART. 1. Ellis Grell undertakes to establish and maintain in force navigation by steamers between Ciudad Bolívar and Maracaibo within the term of six months, reckoned from the date of this contract, and in such manner that at least one journey

per fortnight be made, touching at the ports of La Vela, Puerto Cabello, La Guaira, Guanta, Puerto Sucre, and Carúpano, with power to extend the line to any duly established port of the Republic.

ART. 2. The steamers shall navigate under the Venezuelan flag.

ART. 3. The contractor undertakes to transport free of charge the packages of mails which may be placed on board the steamers by the authorities and merchants through the ordinary post-offices, the steamers thereby acquiring the character of mail steamers, and as such exonerated from all national dues.

ART. 4. The contractor shall draw up a tariff of passages and freights by agreement with the Government.

ART. 5. The company shall receive on board each steamer a Government employee with the character of fiscal postmaster, nominated by the minister of finance, with the object of looking after the proper treatment of the mails and other fiscal interests.

The company shall also transport public employees when in commission of the Government at half the price of the tariff, provided always that they produce an order signed by the minister of finance or by one of the presidents of the States. Military men on service and troops shall be carried for the fourth part of the tariff rates. The company undertakes also to carry gratis materials of war, and at half freights all other goods which may be shipped for account and by order of the National Government.

ART. 6. The General Government undertakes to concede to no other line of steamers any of the benefits, concessions, and exemptions contained in the present contract as compensation for the services which the company undertakes to render as well to national interests as those of private individuals.

ART. 7. The Government of Venezuela will pay to the contractor a monthly subsidy of four thousand bolivars (4,000) so long as the conditions of the present contract are duly carried out.

ART. 8. The National Government undertakes to exonerate from payment of import duties all machinery, tools, and accessories which may be imported for the use of the steamers and all other materials necessary for their repair, and also undertakes to permit the steamers to supply themselves with coal and provisions, etc., in the ports of Curaçao and Trinidad.

ART. 9. The company shall have the right to cut from the national forests wood for the construction of steamers or necessary buildings and for fuel for the steamers for the line.

ART. 10. The officers and crews of the steamers, as also the woodcutters and all other employees of the company, shall be exempt from military service, except in cases of international war.

ART. 11. The steamers of the company shall enjoy in all the ports of the Republic the same freedom and preferences by law established as are enjoyed by the steamers of lines established with fixed itinerary.

ART. 12. While the Government fixes definitely the transshipment ports for merchandise from abroad, and while they are making the necessary installations, the steamers of this line shall be allowed to call at the ports of Curaçao and Trinidad, and any one of the steamers leaving Trinidad may also navigate by the channels of the Macareo and Pedernales of the river Orinoco in conformity with the formalities which by special resolution may be imposed by the minister of finance, in order to prevent contraband and to safeguard fiscal interests; to all which conditions the contractor agrees beforehand.

ART. 13. This contract shall remain in force for fifteen years, reckoned from the date of its approvation, and may be transferred by the contractor to another person or corporation upon previous notice to the Government.

ART. 14. Disputes and controversies which may arise with regard to the interpretation or execution of this contract shall be resolved by the tribunals of the Republic

in accordance with the laws of the nation, and shall not in any case be considered as a motive for international reclamations.

Two copies of this contract of the same tenor and effect were made in Caracas the seventeenth day of January, 1894.

Feliciano ACEVEDO
Edward P. GANTEAUME

ADDITIONAL ARTICLE. Between the minister of the interior of the United States of Venezuela and Citizen Manuel A. Sanchez, concessionary of Mr. Ellis Grell, have agreed to modify the eighth article of the contract made on the 17th day of January of the present year for the coastal navigation between Ciudad Bolivar and Maracaibo on the following terms:

ART. 8. The Government undertakes to exonerate from payment of import duties the machinery, tools, and articles which may be imported for the steamers, and all other materials destined for the repairs of the steamers; while the Government fixes the points of transport and coaling ports, the contractor is hereby permitted to take coal and provisions for the crew in the ports of Curaçao and Trinidad.

Caracas, 10 May, 1894.

José R. NUÑEZ
M. A. SANCHEZ

And whereas the mentioned executive decree of October 5, 1900, reads as follows:

DECREE

ARTICLE 1. The decree of the 1st of July, 1893, which prohibited the free navigation of the Macareo, Pedernales, and other navigable waterways of the river Orinoco is abolished.

ART. 2. The minister of interior relations is charged with the execution of the present decree.

Now, whereas in regard to the said contract it has to be remarked that in almost all arguments, documents, memorials, etc., presented on behalf of the claimant it is designated as a concession for the exclusive navigation of the Orinoco River by the Macareo or Pedernales channels, whilst in claimant's memorial it is even said that the chief — and indeed the only — value of this contract was the exclusive right to navigate the Macareo and Pedernales channels of the river Orinoco, and that, according to claimant, this concession of exclusive right was annulled by the aforesaid decree, and that it is for the losses that were the consequence of the annulment of this concession of exclusive right that damages were claimed.

The main question to be examined is whether the Venezuelan Government, by said contract, gave a concession for the exclusive navigation of said channels of said river, and whether this concession of exclusive navigation was annulled by said decree.

And whereas the contract shows that Ellis Grell (the original contractor) pledged himself to establish and maintain in force navigation by steamers between Ciudad Bolivar and Maracaibo, touching at the ports of La Vela, Puerto Cabello, La Guaira, Guanta, Puerto Sucre, and Carúpano, and to fulfill the conditions mentioned in articles 2, 3, 4 and 5, whilst the Venezuelan Government promised to grant to Grell the benefits, concessions, and exemptions contained in articles 7, 8, 9, 11 and 12, and in article 6 pledges itself to concede to no other line of steamers any of the benefits, concessions, and exemptions contained in the contract, the main object of the contract appears to be the assurance of a regular communication by steamer from Ciudad Bolivar to Maracaibo, touching the duly established Venezuelan ports between those two cities. For the navigation between these duly established ports no concession

or permission was wanted, but in compensation to Grell's engagement to establish and maintain in force for fifteen years (art. 13) this communication, the Venezuelan Government accorded him some privileges which it undertook to grant to no other line of steamers.

Whereas, therefore, this contract in the whole does not show itself as a concession for exclusive navigation of any waters, but as a contract to establish a regular communication by steamers between the duly established principal ports of the Republic, the pretended concession for exclusive navigation of the Macareo and Pedernales channels must be sought in article 12 of the contract, the only article in the whole contract in which mention of them is made.

And whereas this article in the English version, in claimant's memorial, reads as follows:

> While the Government fixes definitely the transshipment ports for merchandise from abroad, and *while* they are making the necessary installations, the steamers of this line shall be allowed to call at the ports of Curaçao and Trinidad, and any one of the steamers leaving Trinidad may also navigate by the channels of the Macareo and Pedernales of the river Orinoco, etc.

It seems clear that the permission in this article — by which article the permission of navigating the said channels was not given to the claimant in general terms and for all its ships indiscriminately, but only for the ships leaving Trinidad — would only have force for the time till the Government would have fixed definitely the transshipment ports, *which it might do at any moment* and *till* the necessary installations were made, and not for the whole term of the contract, which, according to article 15, would remain in force for fifteen years.

And whereas this seems clear when reading the English version of the contract, as cited in the memorial, it seems, if possible, still more evident when reading the original Spanish text of this article, of which the above-mentioned English version gives not a quite correct translation, from which Spanish text reads as follows:

> ART. 12. Mientras el Gobierno fija definitivamente los puertos de trasbordo para las mercancías procedentes del extrangero, y mientras hace las necesarias instalaciones, las será permitido á los buques de la línea, tocar in los puertos de Curaçao y de Trinidad, pudiendo además navegar el vapor que salga de la última Antilla por los caños de Macareo y de Pedernales del Río Orinoco, previas las formalidades que por resolución especial dictará el Ministerio de Hacienda para impedir el contrabando en resguardo de los intereses fiscales; y á los cuales de antemano se somete el contratista.

(The words " el vapor que salga de la última Antilla," being given in the English version as " any one of the steamers leaving Trinidad.")

It can not be misunderstood that this " el vapor " is the steamer that had called at Trinidad according to the permission given for the special term that the " while " (mientras) would last; wherefore it seems impossible that the permission given in article 12 only for the time there would exist circumstances which the other party might change at any moment could ever have been the main object, and, as is stated in the memorial, " the chief and, indeed, only value " of a contract that was first made for the term of fifteen years, which term later on even was prolonged to twenty-one years.

And whereas therefore it can not be seen how this contract-concession for establishing and maintaining in force for fifteen years a communication between the duly established ports of Venezuela can be called a concession for the exclusive navigation of the said channels, when the permission to navigate these channels was only annexed to the permission to call at Trinidad and would end with that permission, whilst the obligation to navigate between the ports of Venezuela from Ciudad Bolívar to Maracaibo would last.

And whereas, on the contrary, all the stipulations of the contract are quite clear when holding in view the purpose why it was given, viz, to establish and maintain in force a communication between the duly established ports of Venezuela, i. e., a regular coastal service by steamers.

Because to have and retain the character and the rights of ships bound to coastal service it was necessary that the ships should navigate under Venezuelan flag (art. 2), that they should have a special permission to call at Curaçao and Trinidad to supply themselves with coal and provisions (art. 8), which stipulation otherwise would seem without meaning and quite absurd, as no ship wants a special permission of any government to call at the ports of another government, and to call at the same foreign ports for transshipment while the government fixed definitely the transshipment ports (art. 12). In the same way during that time a special permission was necessary for the ship leaving Trinidad to hold and retain this one right of ships bound to coastal service — to navigate by the channels of Macareo and Pedernales — which special permission would not be necessitated any longer than the Government could fix definitely the Venezuelan ports that would serve as transshipment ports, because then they would per se enjoy the right of all ships bound to coastal service, viz, to navigate through the mentioned channels.

What is called a concession for exclusive navigation of the mentioned channels is shown to be nothing but a permission to navigate these channels as long as certain circumstances should exist.

And whereas, therefore, the contract approved by decree of the 8th of June, 1894, never was a concession for the exclusive navigation of said channels of the Orinoco; and whereas the decree which reopened these channels for free navigation could not annul a contract that never existed;

All damages claimed for the annulling of a concession for exclusive navigation of the Macareo and Pedernales channels of the Orinoco River must be disallowed.

Now, whereas it might be asked, if the permission to navigate by those channels, given to the steamer that on its coastal trip left Trinidad, was not one of the " benefits, concessions, and exemptions " that the Government in article 6 promised not to concede to any other line of steamers, it has not to be forgotten that in article 12 the Government did not give a general permission to navigate by the said channels, but that this whole article is a temporary measure taken to save the character and the rights of coastal service, to the service which was the object of this contract, during the time the Government had not definitely fixed the transshipment ports; and that it was not an elementary part of the concession, that would last as long as the concession itself, but a mere arrangement by which temporarily the right of vessels bound to costal service, viz, to navigate said channels, would be safeguarded for the vessel that left Trinidad as long as the vessels of this service would be obliged to call at this island, and that therefore the benefit and the exemption granted by this article was not *to navigate by said channels, but to hold the character and right of a coastal vessel, notwithstanding having called at the foreign port of Trinidad*; and as this privilege was not affected by the reopening of the channels to free navigation, and the Government by aforesaid decree did not give any benefit, concession, and exemption granted to this concession to any other line of steamers, a claim for damages for the reopening of the channels based on article 6 can not be allowed. It may be that the concessionary and his successors thought that during all the twenty-one years of this concession the Government of Venezuela would not definitely fix the transshipment ports, nor reopen the channels to free navigation, and on those thoughts based a hope that was not fulfilled and formed a plan that did not succeed, but it would be a

strange appliance of absolute equity to make the government that grants a concession liable for the not realized dreams and vanished "*chateaux en Espagne*" of inventors, promoters, solicitors, and purchasers of concessions.

But further on — even when it might be admitted that the reopening of the channels to free navigation might furnish a ground to base a claim on (quod non) — whilst investigating the right of claimant and the liability of the Venezuelan Government, it has not to be forgotten that, besides the already-mentioned articles, the contract has another article, viz, article 14, by which the concessionary pledged himself not to submit any dispute or controversies which might arise with regard to the interpretation or execution of this contract to any other tribunal but to the tribunals of the Republic, and in no case to consider these disputes and controversies a motive for international reclamation, which article, as the evidence shows, was repeatedly disregarded and trespassed upon by asking and urging the intervention of the English and United States Governments without ever going for a decision to the tribunals of Venezuela; and as the unwillingness to comply with this pledged duty is clearly shown by the fact that the English Government called party's attention to this article, and, quoting the article, added the following words, which certainly indicated the only just point of view from which such pledges should be regarded:

> Although the general international rights of His Majesty's Government are in no wise modified by the provisions of this document to which they were not a party, *the fact that the company, so far as lay in their power, deliberately contracted themselves out of every remedial recourse in case of dispute, except that which is specified in article 14 of the contract*, is undoubtedly an element to be taken into serious consideration when they subsequently appeal for the intervention of His Majesty's Government;

And whereas the force of this sentence is certainly in no wise weakened by the remark made against it on the side of the concessionary, that "the terms of article 14 of the contract have absolutely no connection whatever with the matter at issue, because 'no *doubt* or *controversy* has arisen with respect to the *interpretation and execution* of the contract,'" but that what has happened is this, "that the Venezuelan Government has, by a most dishonest and cunningly devised trick, defrauded the company to the extent of *entirely nullifying* a concession which it had legally acquired at a very heavy cost," whereas, on the contrary, it is quite clear that the only question at issue was whether in article 12, in connection with article 6, a concession for exclusive navigation was given or not — ergo, a question of doubt and controversy about the interpretation;

And whereas the following words of the English Government addressed to the concessionary may well be considered:

> The company does not appear to have exhausted the legal remedies at their disposal before the ordinary tribunals of the country, and it would be contrary to the international practice for His Majesty's Government formally to intervene in their behalf through the diplomatic channel unless and until they should be in a position to show that they had exhausted their ordinary legal remedies with a result that a prima facie case of failure or denial of justice remained;

For whereas, if in general this is the only just standpoint from which to view the right to ask and to grant the means of diplomatic intervention and in consequence casu quo of arbitration, how much the more where the recourse to the tribunals of the country was formally pledged and the right to ask for intervention solemnly renounced by contract, and where this breach of promise was formally pointed to by the government whose intervention was asked;

Whereas, therefore, the question imposes itself, whether absolute equity ever would permit that a contract be willingly and purposely trespassed upon by one party in view to force its binding power on the other party;

And whereas it has to be admitted that, even if the trick to change a contract for regular coastal service into a concession for exclusive navigation succeeded (quod non), in the face of absolute equity the trick of making the same contract a chain for one party and a screw press for the other never can have success:

It must be concluded that article 14 of the contract disables the contracting parties to base a claim on this contract before any other tribunal than that which they have freely and deliberately chosen, and to parties in such a contract must be applied the words of the Hon. Mr. Finley, United States Commissioner in the Claims Commission of 1889: "So they have made their bed and so they must lie in it." [1]

But there is still more to consider.

For whereas it appears that the contract originally passed with Grell was legally transferred to Sanchez and later on to the English company the Orinoco Shipping and Trading Company (Limited), and on the 1st day of April, 1902, was sold by this company to the American company, the claimant;

But whereas article 13 of the contract says that it might be transferred to another person or corporation upon previous notice to the Government, while the evidence shows that this notice has not been previously (indeed ever) given; the condition on which the contract might be transferred not being fulfilled, the Orinoco Shipping and Trading Company (Limited), had no right to transfer it, and this transfer of the contract without previous notice must be regarded as null and utterly worthless;

Wherefore, even if the contract might give a ground to the above-examined claim to the Orinoco Shipping and Trading Company (Limited) (once more quod non), the claimant company as quite alien to the contract could certainly never base a claim on it.

For all which reasons every claim of the Orinoco Steamship Company against the Republic of the United States of Venezuela for the annulment of a concession for the exclusive navigation of the Macareo and Pedernales channels of the Orinoco has to be disallowed.

As for the claims for 100,000 bolivars, or $ 19,219.19, overdue on a transaction celebrated on May 10, 1900, between the Orinoco Shipping and Trading Company (Limited) and the Venezuelan Government:

Whereas these 100,000 bolivars are those mentioned in letter B, of article 2 of said contract, reading as follows:

(B) One hundred thousand bolivars, which shall be paid in accordance with such arrangements as the parties hereto may agree upon on the day stipulated in the decree 23d of April, ultimo, relative to claims arising from damages caused during the war, or by other cause whatever;

And whereas nothing whatever of any arrangement, in accordance with which it was stipulated to pay, appears in the evidence before the Commission, it might be asked if, on the day this claim was filed, this indebtedness was proved compellable;

Whereas further on, in which ever way this question may be decided, the contract has an article 4, in which the contracting parties pledged themselves to the following: "All doubts and controversies which may arise with respect to the interpretation and execution of this contract shall be decided by the tribunals of Venezuela and in conformity with the laws of the Republic, without such mode of settlement being considered motive of international claims," while it is shown in the diplomatic correspondence brought before the Commis-

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[1] Woodruff *et al. v.* Venezuela, Opinions United States and Venezuelan Claims Commission, 1890, *infra*, Moore's Arbitrations, p. 3564.

sion on behalf of claimant, that in December 1902, a formal petition to make it an international claim was directed to the Government of the United States of America without the question having been brought before the tribunals of Venezuela, which fact certainly constitutes a flagrant breach of the contract on which the claim was based;

And whereas, in addition to everything that was said about such clauses here above it has to be considered what is the real meaning of such a stipulation;

And whereas when parties agree that doubts, disputes, and controversies shall only be decided by a certain designated third person, they implicitly agree to recognize that there properly shall be no claim from one party against the other, but for what is due as a result of a decision on any doubts, disputes, or controversies by that one designated third; for which reason, in addition to everything that was said already upon this question heretofore, in questions on claims based on a contract wherein such a stipulation is made, absolute equity does not allow to recognize such a claim between such parties before the conditions are realized, which in that contract they themselves made conditions sine qua non for the existence of a claim;

And whereas further on — even in case the contract did not contain such a clause, and that the arrangements, in accordance to which it was stipulated to pay were communicated to and proved before this Commission — it ought to be considered that if there existed here a recognized and compellable indebtedness, it would be a debt of the Government of Venezuela to the Orinoco Shipping and Trading Company;

For whereas it is true that evidence shows that on the 1st of April, 1902, all the credits of that company were transferred to the claimant company, it is not less true that, as shown by evidence, this transfer was never notified to the Government of Venezuela;

And whereas according to Venezuela law, in perfect accordance with the principles of justice and equity recognized and proclaimed in the codes of almost all civilized nations, such a transfer gives no right against the debtor when it was not notified to or accepted by that debtor;

And whereas here it can not be objected that according to the protocol no regard has to be taken of provisions of local legislation, because the words " the commissioners, or, in case of their disagreement, the umpire, shall decide all claims upon a basis of absolute equity, without regard to objections of a technical nature, or of the provisions of local legislation," clearly have to be understood in the way that questions of technical nature or the provisions of local legislation should not be taken into regard when there were objections against the rules of absolute equity; for, in case of any other interpretation, the fulfilling of the task of this Commission would be an impossibility, as the question of American citizenship could never be proved without regard to the local legislation of the United States of America, and this being prohibited by the protocol, all claims would have to be disallowed, as the American citizenship of the claimant would not be proved; and as to technical questions it might then be maintained (as was done in one of the papers brought before this Commission on behalf of a claimant in one of the filed claims) that the question whether there was a proof that claimant had a right to a claim was a mere technical question;

And whereas, if the provisions of local legislation, far from being objections to the rules of absolute equity are quite in conformity with those rules, it would seem absolutely in contradiction with this equity not to apply its rules because they were recognized and proclaimed by the local legislation of Venezuela;

And whereas, the transfer of credits from " the Orinoco Shipping and Trading Company " to " the Orinoco Steamship Company " neither was

notified to, or accepted by the Venezuelan Government, it can not give a right to a claim on behalf of the last-named company against the Government of Venezuela:

For all which reasons the claim of the Orinoco Steamship Company (Limited) against the Government of Venezuela, based on the transaction of May 10, 1900, has to be disallowed.

In the next place the company claims $ 147,038.79, at which sum it estimates the damages and losses sustained during the last revolution, including services rendered to the Government of Venezuela.

Now, whereas this claim is for damages and losses suffered and for services rendered from June, 1900, whilst the existence of the company only dates from January 31, 1902, and the transfer of the credits of " the Orinoco Shipping and Trading Company (Limited) " to claimant took place on the 1st of April of this same year, it is clear from what heretofore was said about the transfer of these credits, that all items of this claim, based on obligations originated before said April 1, 1902, and claimed by claimant as indebtedness to the aforenamed company and transferred to claimant on said April 1, have to be disallowed, as the transfer was never notified to or accepted by the Venezuelan Government. As to the items dating after the 1st of April, 1902, in the first place the claimant claims for detention and hire of the steamship *Masparro* from May 1 to September 18, 1902 (one hundred and forty-one days), at 100 pesos daily, equal to 14,100 pesos, and for detention and hire of the steamship *Socorro* from March 21 to November 5, 1902 (two hundred and twenty-nine days), 22,900 pesos, together 37,000 pesos, equal to $ 28,401.55;

And whereas it is proved by evidence that said steamers have been in service of the National Government for the time above stated;

And whereas nothing in the evidence shows any obligation on the part of the owners of the steamers to give this service gratis, even if it were in behalf of the commonwealth;

Whereas therefore a remuneration for that service is due to the owners of these steamers:

The Venezuelan Government owes a remuneration for that service to the owners of the steamers;

And whereas these steamers, by contract of April 1, 1902, were bought by claimant, and claimant therefore from that day was owner of the steamers:

This remuneration from that date is due to claimant.

And whereas in this case it matters not that the transfer of the steamers was not notified to the Venezuelan Government, as it was no transfer of a credit, but as the credit was born after the transfer, and as it was not in consequence of a contract between the Government and any particular person or company, but, as evidence shows, because the Government wanted the steamers' service in the interest of its cause against revolutionary forces; and whereas for this forced detention damages are due, those damages may be claimed by him who suffered them, in this case the owners of the steamers;

And whereas the argument of the Venezuelan Government, that it had counterclaims, can in no wise affect this claim, as those counter claims the Venezuelan Government alludes to, and which it pursues before the tribunals of the country, appear to be claims against the Orinoco Shipping and Trading Company, and not against claimant;

And whereas it matters not whether claimant, as the Government affirms and as evidence seems clearly to show, if not taking part in the revolution, at all events favored the revolutionary party, because the ships were not taken and confiscated as hostile ships, but were claimed by the Government, evidence

shows, because it wanted them for the use of political interest, and after that use were returned to the owners: For all these reasons there is due to claimant from the side of the Venezuelan Government, a remuneration for the service of the steamers *Masparro* and *Socorro*, respectively, from May 1 to September 18, 1902 (one hundred and forty-one days), and from April 1 to November 5, 1902 (two hundred and nineteen days, together three hundred and sixty days);

And whereas, according to evidence since 1894 these steamers might be hired by the Government for the price of 400 bolivars, or 100 pesos, daily, this price seems a fair award for the forced detention:

Wherefore for the detention and use of the steamers *Masparro* and *Socorro* the Venezuelan Government owes to claimant 36,000 pesos, or $ 27,692.31.

Further on claimant claims $ 2,520.50 for repairs to the *Masparro* and $ 2,932.98 for repairs to the *Socorro*, necessitated, as claimant assures, by the ill usage of the vessels whilst in the hands of the Venezuelan Government.

Now, whereas evidence only shows that after being returned to claimant the steamers required repairs at this cost, but in no wise that those repairs were necessitated by ill usage on the side of the Government;

And whereas evidence does not show in what state they were received and in what state they were returned by the Government:

And whereas it is not proved that in consequence of this use by the Government they suffered more damages than those that are the consequence of common and lawful use during the time they were used by the Government, for which damages in case of hire the Government would not be responsible;

Where the price for which the steamers might be hired is allowed for the use, whilst no extraordinary damages are proved, equity will not allow to declare the Venezuelan Government liable for these repairs:

Wherefore this item of the claim has to be disallowed.

Evidence in the next place shows that, on May 29 and May 31, 1902, 20 bags of rice, 10 barrels of potatoes, 10 barrels of onions, 16 tins of lard, and 2 tons of coal were delivered to the Venezuelan authorities on their demand on behalf of the Government forces, and for these provisions, as expropriation for public benefit, the Venezuelan Government will have to pay;

And whereas the prices that are claimed, viz, $ 6 for a bag of rice, and $ 5 for a barrel of potatoes, $ 7 for a barrel of onions, $ 3 for a tin of lard, and $ 10 for a ton of coal, when compared with the market prices at Caracas, do not seem unreasonable, the sum of $ 308 will have to be paid for them.

As for the further $ 106.40 claimed for provisions and ship stores, whereas there is given no proof of these provisions and stores being taken by or delivered to the Government, they can not be allowed.

For passages since April 1, 1902, claimant claims $ 224.62, and whereas evidence shows that all these passages were given on request of the Government, the claim has to be admitted, and whereas the prices charged are the same that formerly could be charged by the " Orinoco Shipping and Trading Company," these prices seemed equitable;

Wherefore, the Venezuelan Government will have to pay on this item the sum of $ 224.62.

As to the expenses caused by stoppage of the steamer *Bolívar* at San Felix when Ciudad Bolívar fell in the hands of the revolution —

Whereas this stoppage was necessitated in behalf of the defense of the Government against revolution;

And whereas no unlawful act was done nor any obligatory act was neglected by the Government, this stoppage has to be regarded, as every stoppage of commerce, industry, and communication during war and revolution, as a

common calamity that must be commonly suffered and for which government can not be proclaimed liable;

Wherefore, this item of the claim has to be disallowed.

And now as for the claim of $ 61.336.20 for losses of revenue from June to November, 1902, caused by the blockade of the Orinoco:

Whereas a blockade is the occupation of a belligerent party on land and on sea of all the surroundings of a fortress, a port, a roadstead, and even all the coasts *of its enemy*, in order to prevent all communication with the exterior, with the right of " transient occupation " until it puts itself into real possession of that port of the hostile territory, the act of forbidding and preventing the entrance of a port or a river on its own territory in order to secure internal peace and to prevent communication with the place occupied by rebels or a revolutionary party can not properly be named a blockade, and would only be a blockade when the rebels and revolutionists were recognized as a belligerent party;

And whereas in absolute equity things should be judged by what they are and not by what they are called, such a prohibitive measure on its own territory can not be compared with the blockade of a hostile place, and therefore the same rules can not be adopted;

And whereas the right to open and close, as a sovereign on its own territory, certain harbors, ports, and rivers in order to prevent the trespassing of fiscal laws is not and could not be denied to the Venezuelan Government, much less this right can be denied when used in defense not only of some fiscal rights, but in defense of the very existence of the Government;

And whereas the temporary closing of the Orinoco River (the so-called " blockade ") in reality was only a prohibition to navigate that river in order to prevent communication with the revolutionists in Ciudad Bolívar and on the shores of the river, this lawful act by itself could never give a right to claims for damages to the ships that used to navigate the river;

But whereas claimant does not found the claim on the closure itself of the Orinoco River, but on the fact that, notwithstanding this prohibition, other ships were allowed to navigate its waters and were dispatched for their trips by the Venezuelan consul at Trinidad, while this was refused to claimant's ships, which fact in the brief on behalf of the claimant is called " unlawful discrimination in the affairs of neutrals," it must be considered that whereas the revolutionists were not recognized belligerents there can not properly here be spoken of " neutrals " and " the rights of neutrals; " but that

Whereas it here properly was a prohibition to navigate;

And whereas, where anything is prohibited, to him who held and used the right to prohibit can not be denied the right to permit in certain circumstances what as a rule is forbidden;

The Venezuelan Government, which prohibited the navigation of the Orinoco, could allow that navigation when it thought proper, and only evidence of unlawful discrimination, resulting in damages to third parties, could make this permission a basis for a claim to third parties;

Now, whereas the aim of this prohibitive measure was to crush the rebels and revolutionists, or at least to prevent their being enforced, of course the permission that exempted from the prohibition might always be given where the use of the permission, far from endangering the aim of the prohibition, would tend to that same aim, as, for instance, in the case that the permission were given to strengthen the governmental forces or to provide in the necessities of the loyal part of the population;

And whereas the inculpation of unlawful discrimination ought to be proved;

And whereas, on one side, it not only is not proved by evidence that the ships

cleared by the Venezuelan consul during the period in question did not receive the permission to navigate the Orinoco in view of one of the aforesaid aims;

But whereas, on the other side, evidence, as was said before, shows that the Government had sufficient reasons to believe claimant, if not assisting the revolutionists, at least to be friendly and rather partial to them, it can not be recognized as a proof of unlawful discrimination that the Government, holding in view the aim of the prohibition and defending with all lawful measures its own existence, did not give to claimant the permission it thought fit to give to the above-mentioned ships;

And whereas therefore no unlawful act or culpable negligence on the part of the Venezuelan Government is proved that would make the Government liable for the damages claimant pretends to have suffered by the interruption of the navigation of the Orinoco River, this item of the claim has to be disallowed.

The last item of this claim is for $ 25,000, for counsel fees and expenses incurred in carrying out the above examined and decided claims;

But whereas the greater part of the items of the claim had to be disallowed;

And whereas in respect to those that were allowed it is in no way proved by evidence that they were presented to and refused by the Government of the Republic of the United States of Venezuela, and whereas therefore the necessity to incur those fees and further expenses in consequence of an unlawful act or culpable negligence of the Venezuelan Government is not proved, this item has, of course, to be disallowed.

For all which reasons the Venezuelan Government owes to claimant:

	United States gold
For detention and use of the steamers *Masparro* and *Socorro*, 36,000 pesos, or	$ 27,692.31
For goods delivered for use of the Government	308.00
For passages	224.62
Total	28,224.93

While all the other items have to be disallowed.

APPENDIX TO THE CASE OF THE ORINOCO STEAMSHIP COMPANY

Memorial, Brief of United States agent, Answer of Venezuelan agent, Replication of United States agent. (See original Report, pp. 97-141 — not reproduced in this series.)

IRENE ROBERTS CASE

A government is responsible for the acts of violence and pillage committed by its troops when under the command of their officers.

Claim duly presented on behalf of claimant is not barred by lapse of time before final adjudication or settlement. [1]

Award of $ 5,000, in addition to actual damage, made for losses that must have been contemplated by the wrongdoers.

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[1] See *infra*, p. 223, (Spader Case) and the Italian - Venezuelan Commission (Contini Case, Giacopini Case, Tagliaferro Case) in Volume X of these *Reports*.

BAINBRIDGE, *Commissioner* (for the Commission):

William Quirk, a native citizen of the United States, came to Venezuela in 1867, to engage in the business of raising sea-island cotton. He first rented a small plantation known as "Guayabite," which he worked successfully for about eighteen months. Satisfied that the soil and climate of Venezuela were adapted to the culture of a fine quality of cotton, he succeeded in April, 1869, in interesting several merchants of Caracas, who advanced him money, with the aid of which in that year he raised a profitable crop, and returned the borrowed capital with interest at 12 per cent.

In the latter part of 1869, the firm of H. L. Boulton & Co., of Caracas, contracted with Mr. Quirk to raise sea-island cotton on a larger scale. The agreement was that Boulton & Co. were to provide Quirk with sufficient capital which, added to his own, would enable them to raise the crop and ship it to Liverpool, the net proceeds to be divided equally between them. Pursuant to this agreement a part of the estate known as "Tocorón" in the State of Aragua was rented. Boulton & Co. state:

"Upon this property we found nothing but a house in a very dilapidated condition and the lands most suited to us in a state of forest, for the most part, and the rest covered with tall grass, called gamblot. The first thing we had to do was to make the house habitable for Quirk and his family, then fence in our property, cut down the forest, pluck up the gamblot by the roots, so that it should not destroy the cotton, and repair to a certain extent, sufficiently to preserve our crop, the water courses."

They brought from the United States all the necessary implements and machinery and thirty-four laborers familiar with the methods of cotton raising. The prospects were so favorable that Boulton & Co. finally agreed with Quirk to continue the planting of cotton for three years, two of which they were to participate in and the third to be for Quirk's sole account. On April 19, 1871, they had already taken off the principal part of the crop and were preparing to take in a second, and arrangements were entered into to plant the crop of 1872.

This was the situation when on April 19, 1871, about 300 regular soldiers under the command of General Rodriguez, and constituting part of the army of General Alcántara, the civil and military governor of the State of Aragua, came to Tocorón, took prisoner and tied with a rope Quirk's bookkeeper; took from the stables 6 horses and a mule belonging to Quirk; entered the dwelling house, which they searched; used threatening and abusive language toward Quirk and his family; compelled his wife to deliver up claimant's revolver, and then left the premises, threatening to return and kill the claimant and destroy the place. Mr. Quirk claimed the protection of his flag and besought the officer in command to desist, but was told by the latter that he was "carrying out strictly the orders of General Alcántara." After this outrage Quirk considered it unsafe for himself or his family to remain at Tocorón, and he left the next day for Caracas. There he claimed the protection of the President, General Guzmán Blanco, who told him that he could not interfere with or control General Alcántara. Quirk then returned to Tocorón, disposed of his household furniture at a sacrifice, and brought to Caracas his machinery, farming utensils, and his American employees. An inventory and appraisement of the immovable property on the plantation was made on May 5, 1871, by order of the local court, and a valuation placed thereon of 21,265 pesos. The property taken by the troops on April 19 was valued at 1,725 pesos. In June, 1871, Mr. Quirk returned with his family to the United States, where he died on May 25, 1896.

On November 4, 1871, the Government of the United States, through its legation at Caracas, presented to the Venezuelan Government a claim on behalf of William Quirk for the losses and injuries sustained by him as a result of the events above narrated. The claim was the subject of an extended diplomatic correspondence between the two Governments, but no settlement thereof was ever reached.

The United States now presents to this Commission, on behalf of Frances Irene Roberts, administratrix of the estate and sole heir at law of William Quirk, deceased, a claim for the crop and immovable property at Tocorón, based upon the appraisement made in May, 1871; for the value of the property taken away by the troops on April 19, 1871; for the loss upon household and other furniture; for the profit that would have been made on the crop of 1871, and for indirect losses; said claim amounting in the aggregate to the sum of $ 187,168.03.

The learned counsel for Venezuela in his answer does not controvert the main facts upon which this claim rests, but he raises the following objections:

1. That it does not appear from the proof adduced that the Venezuelan soldiers who caused the injury obeyed orders of their superior officers or that the latter could have prevented the injury; and that therefore the responsibility of the authors of the deed ought to have been first followed up.

2. That Mr. Quirk was only the manager of the estate for Boulton & Co., and that he ought, therefore, in order to fix equitably the amount of the claim, to have produced the contract which he had entered into with said firm.

3. That the claim is barred by the lapse of time.

It is probably true that acts of pillage committed by soldiers absent from their regiments and not under the direct command of their officers do not affect the responsibility of their Government, and that such acts are considered as common crimes.[1] But this was not the fact here. Quirk complained on the day following the outrage directly to General Alcántara, and stated to him that the officer commanding the soldiers had replied to his appeal that his property and himself be respected, that he (the officer) was "carrying out strictly the orders of General Alcántara." It is clear from all the evidence that the troops were acting directly under the command of General Rodriguez, who in turn was acting directly under the orders of the civil and military governor of the State.

The second objection was also raised by the Venezuelan Government in the course of the diplomatic correspondence regarding this claim. The United States minister in a note dated April 30, 1872, addressed to the minister of foreign relations, transmitted a letter to him from Messrs. Boulton & Co., setting forth that no written contract existed between them and Mr. Quirk. The learned counsel for the United States attaches to his replication in this case a letter of Boulton & Co., dated January 9, 1872, addressed to the United States minister at Caracas, Mr. Pile, showing the arrangement with Quirk to be that already herein set forth. It provides for a joint enterprise in the raising of sea-island cotton in Venezuela on a somewhat extended scale. Boulton & Co. were to put into the enterprise the principal part of the capital, and were to receive in return not interest on money loaned, but profits produced by capital invested. Quirk was to add thereto his more limited capital, as well as his wider knowledge and experience of the business in a general super-

[1] See the Netherland - Venezuelan Commission (Henriquez Case) in Volume X of these *Reports*.

vision of the enterprise, and to receive in return not wages or salary for services rendered, but a moiety of the net proceeds of the crop produced.

The Commission has jurisdiction over all claims owned by citizens of the United States of America against the Republic of Venezuela which have not been settled by diplomatic agreement or by arbitration between the two Governments. This claim has remained unsettled for over thirty years. It was diligently prosecuted by the Government of the United States in a diplomatic correspondence extending from November 4, 1871, to April 22, 1875, but no final agreement upon the subject was ever reached. The claim arose subsequent to the Commission of 1866, and it did not fall within the jurisdiction of the Commission of 1889. There has been no opportunity for its adjudication by arbitration prior to its submission here. It was brought to the attention of the Venezuelan Government within a few days after its inception. The essential facts which fix the liability of Venezuela were not then and are not now denied. The contention that this claim is barred by the lapse of time would, if admitted, allow the Venezuelan Government to reap advantage from its own wrong in failing to make just reparation to Mr. Quirk at the time the claim arose.

The questions for determination here are the fact of Mr. Quirk's individual loss or injury, the liability of the Venezuelan Government therefor, and the amount, if any, of compensation due.

It is urged that the relation existing between Quirk and Boulton & Co. was that of debtor and creditor. But the tenor of Boulton & Co.'s letter introduced in evidence hardly sustains this contention. The interests of each in the joint enterprise appear to have been distinct and are so regarded in this decision. Boulton & Co. state that they make " no mention of their own losses," as they prefer to put forth " no claim in their own name against the Government of Venezuela." The citizenship of Boulton & Co. is not shown in evidence, and this Commission can not assume jurisdiction of any claim for their losses put forth in the name of a citizen of the United States.

On the other hand, Mr. Quirk was not merely the manager of Boulton & Co. He invested his own capital in the enterprise and was entitled to one-half the profits. The specific amount of his investment is not stated, but from all the evidence it is believed that a reasonably accurate estimate of his pecuniary losses can be made. The property taken by the troops on April 19, 1871, is claimed as his own, and its value is proved to have been 1,725 pesos. For loss on his furniture and his personal expenses he claims the sum of 5,000 pesos. It appears from Boulton & Co.'s letter that on the date of the injury the principal part of the crop of 1871 had been taken off and preparations were then making for the second crop. An allowance of 2,000 pesos is believed to be a reasonable valuation of Mr. Quirk's share in the profits of this crop. Upon the total sum of 8,725 pesos, interest is allowed at the rate of 3 per cent per annum from January 1, 1872, to December 31, 1903, making the sum of 17,100 pesos equivalent to the sum of $ 13,154.61 United States gold.

But the responsibility of Venezuela does not end here. The testimony is uniformly to the effect that Mr. Quirk was a peaceable and law-abiding man, engaged in an enterprise of pratical benefit to the State as well as to himself. Even General Alcántara on April 27, 1871, certifies to Quirk's " perfect impartial and circumspect conduct," as pertaining to his condition as a foreigner. The evidence is equally clear and uncontroverted that the attack upon him and his family was wholly without justification or excuse. The act was committed by duly constituted military authorities of the Government. It was never, so far as the evidence shows, disavowed or the guilty parties punished. Under these circumstances well established rules of international law fix a liability

beyond that of compensation for the direct losses sustained. Other consequences are presumed to have been in the contemplation of the parties committing the wrongful acts and in that of the Government whose agents they were. The derangement of Mr. Quirk's plans, the interference with his favorable prospects, his loss of credit and business, are all proper elements to be considered in the compensation to be allowed for the injury he sustained.

To the amount hereinbefore designated is added, in view of the considerations above mentioned, the sum of $ 5,000. An award will therefore be made in this claim for the sum of $ 18,154.61 in gold coin of the United States.

JARVIS CASE

Payment of bonds issued in consideration of services rendered in support of an unsuccessful revolution against the constituted government of a country with which the United States is at peace, cannot be enforced.

A subsequent contract made in aid or furtherance of the execution of one infected with illegality, partakes of its nature, rests upon an illegal consideration, and is equally in violation of the law.

The decision of the political department of the United States Government that no conclusive evidence as to the existence of a de facto government exists, must be accorded great weight as to the fact, and in any event is conclusive upon its own citizens.

BAINBRIDGE, *Commissioner* (for the Commission):

The memorial states:

1. That on or about the 14th day of April, 1863, the Republic of Venezuela did, for value received, duly make, execute, and deliver unto one Nathaniel Jarvis, a native citizen of the United States, its bonds or certificates of indebtedness in the amount of $ 81,000, consisting of 81 bonds of $ 1,000 each, bearing interest at the rate of 7 per cent per annum, payable semiannually, part thereof maturing within five years from the date thereof and the balance within ten years from said date.

2. That thereafter the said Nathaniel Jarvis, being then still the lawful holder and owner thereof, did, for value, duly indorse and deliver the aforesaid bonds unto his nephew, Nathaniel Jarvis, jr., a native citizen of the United States, who remained the lawful owner and holder thereof until the time of his death, which occurred on the 10th day of January, 1901; that the said Nathaniel Jarvis, jr., left a last will and testament, by which he devised and bequeathed all his property to his two daughters, the claimants herein, whereby said claimants became the lawful owners and holders of said bonds.

3. That said bonds were at their maturity duly presented for payment, but that payment of both principal and interest has been most unjustly withheld from the claimants and their predecessors in interest by the Republic of Venezuela, without any legal, equitable, or moral excuse or justification, and that there was on April 14, 1903, justly due and owing to claimants by the Republic of Venezuela on the said bonds the sum of $ 307,800, principal and simple interest.

4. That no other person has any interest in the claim, excepting that claimants' attorney and counsel, Anderson Price, and one Charles N. Dally are contingently entitled for services to a share or part of the recovery, and that 26 of said bonds have been lost or mislaid and are not now in the possession of claimants.

The bonds upon which this claim is based are in the following form;

[Translation]

REPUBLIC OF VENEZUELA

Treasury of the Province of Caracas. For 1,000 dollars.

Bond in favor of Mr. Nathaniel Jarvis, or to his order, for one thousand dollars, money of the United States, payable in the term of five (ten) years counted from this date.

The interest at the rate of seven per cent per annum, which may accrue to the aforesaid sum, shall be paid every six months, the whole in conformity with the resolution of the treasury department issued to-day.

Caracas, April 14, 1863.

The Comptroller

A. EYZAGUIRRE

The Treasurer

M. R. LANDS

The resolution referred to in the bonds is in the following terms:

DEPARTMENT OF THE TREASURY,

Caracas, April 14, 1863.

Resolved, It appears from the proceedings that Mr. Nathaniel Jarvis, a citizen of the United States of North America, lent to His Excellency Gen. José Antonio Páez, in 1849, the sum of 23,500 hard dollars, in the value of a steamer named *Jackson* or *Buena Vista*; and also, that of 15,450 hard dollars in the amount of 3,000 equipments and 100,000 balled cartridges, the payment moreover having been stipulated with said Jarvis of the amount of 2,458 hard dollars, for various indemnities, all amounting to the sum of 41,408 hard dollars. And the Government, considering that the service rendered by Mr. Jarvis in the period mentioned was very opportune, since its object tended to defend the cause of morality under the auspices of the illustrious citizen, overthrowing the ominous domination that oppressed the Republic, and, moreover, that it would not be just or right that that foreigner who so generously contributed to aid, with uncommon disinterestedness, the triumph of the same cause, whose principles this day prevail under the administration of a great number of citizens who fought for it, should suffer damages for the default of the payment of a claim, to a certain point sacred; and, finally, that the application of said objects to the end designed is justified, the Government resolves that the credit which Mr. Nathaniel Jarvis claims, with, moreover, the interest of 7 per cent per annum, be admitted. Instruct the auditor-general to notify the treasury of this province to accredit in its account the sum expressed of 41,408 hard dollars, and the interest previous to the liquidation thereof, which shall be satisfied when the embarrassed circumstances of the national exchequer will permit it.

For His Excellency:

ROJAS

It is a copy.

The subdirector of the department of the treasury.

J. A. PEREZ

Briefly stated, the facts are that Gen. José Antonio Páez, who had been from 1830 to 1838 the first President of Venezuela, was in 1849 in exile. In that year he undertook an expedition to overthrow the then existing Government of Venezuela. It was in aid of this enterprise that Nathaniel Jarvis, a citizen of the United States, rendered General Páez the opportune service referred to in the foregoing resolution, in the loan of the steamer *Jackson* or *Buena Vista*, the munitions of war and advances of money designated. But the expedition was unsuccessful, and the steamer, munitions, and General Páez

himself were captured by the Government within a few weeks. Páez was imprisoned for a time and then was again sent out of the country. He went to New York where he remained until 1858, when he was invited to return to Venezuela. In 1860 he was accredited as minister to the United States. Returning to Venezuela in 1861 he was, on August 29, proclaimed at a public meeting of the citizens of Caracas "supreme civil and military chief of the Republic."

On September 10, 1861, he took possession of the Government as supreme chief of Venezuela and issued a decree containing the following:

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

The Páez government continued until June, 1863. It was never recognized by the United States as the government of Venezuela. In a dispatch to Minister Culver, dated November 19, 1862, Mr. Seward, Secretary of State, said, referring to the disordered condition of Venezuela:

> The United States deem it their duty to discourage that (revolutionary) spirit so far as it can be done by standing entirely aloof from all such domestic controversies until, in each case, the State immediately concerned, shall unmistakably prove that the government which claims to represent it is fully accepted and peacefully maintained by the people thereof.

And furthermore:

> This Government has thus far seen no such conclusive evidence that the administration you have recognized (i. e., the Páez government) is the act of the Venezuelan State as to justify acknowledgment thereof by this Government.

On April 24, 1863, ten days after the Jarvis bonds were issued, the treaty of Coche was signed between the representatives of Páez and Falcón providing for a national assembly, which convened on June 17 following and appointed General Falcón President. The Falcón government was subsequently officially recognized by the United States.

It is to be observed at the outset of the consideration of this claim that the bonds themselves show that they were issued "in conformity with the resolution of the Treasury Department," issued on the same date. The resolution thus referred to in the bonds states that the consideration upon which they were based was the opportune service rendered by Mr. Jarvis to General Páez in 1849, which service "tended to defend the cause of morality under the auspices of the illustrious citizen, *overthrowing the ominous domination that oppressed the Republic*," and declares that "it would not be just nor right that that foreigner who so *generously contributed to aid*, with uncommon disinterestedness, the triumph of the same cause, whose principles this day prevail under the administration of a great number of citizens who fought for it, should suffer damages for the default of the payment of a claim to a certain point sacred." In view of this fact it is idle to argue that "if an inquiry could now be made as to whether the debt represented by the Jarvis bonds was a legal one it would establish a dangerous precedent," and that "no one would be safe in buying and selling national bonds." The Jarvis bonds and the resolution of April 14, 1863, are indissolubly united, and, construed together, inform the world of the insufficient basis upon which they stand.

These bonds, then, were issued in consideration of the opportune service and generous aid rendered by Nathaniel Jarvis to General Páez in 1849, in the latter's attempt to overthrow the then existing Government of Venezuela. There is not the slightest doubt about that. Nor is there the slighest doubt but that Mr. Jarvis's opportune service and generous aid to General Páez in 1849 were in violation of his duty to his country and in disobedience to its laws. Under the Constitution of the United States a treaty between the United States and a foreign government is part of the supreme law of the land. In 1849 the treaty concluded January 20, 1836, between the United States and Venezuela was in full force and obligatory upon both nations; and by the first article of that treaty it was declared that —

there shall be a perfect, firm, and inviolable peace and sincere friendship between the United States of America and the Republic of Venezuela, in all the extent of their possessions and territories, and between their people and citizens, respectively, without distinction of persons or places.[1]

The only Venezuela known to international law in 1849 was the recognized Government of that country and with it the Government of the United States was at peace under the treaty. This treaty was binding upon Mr. Jarvis as a citizen of the United States, and he could lawfully do no act nor make any contract in violation of its provisions.

It was also provided in the second section of Article XXXIV of the treaty of January 20, 1836, that —

If any one or more of the citizens of either party shall infringe any of the articles of this treaty, such citizen shall be held personally responsible for the same, and harmony and good correspondence between the two nations shall not be interrupted thereby, each party engaging in no way to protect the offender, or sanction such violation.[2]

It would seem to be a fair inference from the wording of a resolution of April 14, 1863, and from all the evidence here presented, that Jarvis furnished General Páez with the ship *Jackson*, the 3,000 equipments, and 100,000 balled cartridges from the United States. Referring to his preparations for the expedition of 1849, General Páez in his autobiography says (vol. 2, p. 469):

Además de los recursos indicados, contaba con un buen vapor de guerra y fusiles *que debían venir de los Estados Unidos.*

It is undisputable that Nathaniel Jarvis, a citizen of the United States, and presumably within its jurisdiction, supplied General Páez with a vessel and munitions of war intended for use in a military expedition or enterprise against a Government and people with whom the United States Government was at peace. The inference is strong, if not irresistible, that Jarvis violated the neutrality laws of the United States in such measure as to have rendered himself liable to a criminal prosecution therefor. (Rev. Stats., secs. 5283 and 5286.)

The language of the resolution of April 14, 1863, with regard to Mr. Jarvis's opportune service and generous contribution to the aid of the Páez cause in 1849, precludes the consideration of the original transaction as a mere commercial venture on the part of Jarvis, such as might have been undertaken without a violation of the laws of neutrality. Mr. Jarvis was, according to the evidence, in Caracas at the time the bonds were issued, and the resolution undoubtedly expresses the basis on which he was then urging his claim as well as the true basis of the original obligation.

[1] Treaties and Conventions between the U. S. and Other Powers, 1776-1887, p. 1119.

[2] *Idem*, p. 1128.

It is not deemed necessary, however, to determine whether Jarvis violated the letter as well as the spirit of the neutrality laws of the United States. He did violate the treaty then existing between the United States and Venezuela. He did violate the established rule of international law, that when two nations are at peace all the subjects or citizens of each are bound to commit no act of hostility against the other.

In Dewutz *v.* Hendricks, 9 Moore C. B., 586 (S. C. 2 Bing., 314), it was held to be contrary to the law of nations for persons residing in England to enter into engagements to raise money, by way of loan, for the purpose of supporting subjects of a foreign state in arms against a government in friendship with England, and no right of action attached upon any such contract.

In Kennett *v.* Chambers (14 How., 38), the Supreme Court of the United States held that a contract by an inhabitant of Texas to convey land in that country to citizens of the United States, in consideration of advances of money made by them in the State of Ohio, to enable him to raise men and procure arms to carry on the war with Mexico, the independence of Texas not having been at that time acknowledged by the United States, was contrary to the latter's national obligations to Mexico, violated the public policy of the United States, and could not be specifically enforced by a court of the United States. In the course of his opinion in this case, Chief Justice Taney said:

> The intercourse of this country with foreign nations, and its policy in regard to them, are placed by the Constitution of the United States in the hands of the Government, and its decisions upon these subjects are obligatory upon every citizen of the Union. He is bound to be at war with the nation against which the war-making power has declared war and equally bound to commit no act of hostility against a nation with which the Government is in amity and friendship. This principle is universally acknowledged by the laws of nations. It lies at the foundation of all government, as there could be no social order or peaceful relations between the citizens of different countries without it. It is, however, more emphatically true in relation to citizens of the United States. For, as the sovereignty resides in the people, every citizen is a portion of it and is himself personally bound by the laws which the representatives of the sovereignty may pass, or the treaties into which they may enter, within the scope of their delegated authority. And when that authority has plighted its faith to another nation that there shall be peace and friendship between the citizens of the two countries, every citizen of the United States is equally and personally pledged. The compact is made by the department of the Government upon which he himself has agreed to confer the power. It is his own personal compact as a portion of the sovereignty in whose behalf it is made. And he can do no act, nor enter into any agreement to promote or encourage revolt or hostilities against the territories of a country with which our Government is pledged by treaty to be at peace, without a breach of his duty as a citizen, and the breach of the faith pledged to the foreign nation. And if he does so, he can not claim the aid of a court of justice to enforce it. The appellants say in their contract that they were induced to advance the money by the desire to promote the cause of freedom. But our own freedom can not be preserved without obedience to our own laws, nor social order preserved if the judicial branch of the Government countenanced and sustained contracts made in violation of the duties which the law imposes, or in contravention of the known and established policy of the political department, acting within the limits of its constitutional power.

But it is strongly urged here that the nature of the original consideration is immaterial; that the claim is upon the bonds of 1863, not upon the contract of 1849; and that the act of the Venezuelan Government in 1863 in recognizing the obligation and issuing its bonds in payment thereof was the sovereign act of an independent nation and was final and conclusive and binding upon the Venezuelan people and all succeeding governments of that country.

Differences of opinion may possibly exist as to the political ethics which would justify a temporary ruler in paying his personal debts with national obligations; but certainly none can exist as to the legal proposition that a subsequent contract made in aid and furtherance of the execution of one infected with illegality partakes of its nature, rests upon an illegal consideration, and is equally in violation of the law. The opportune service rendered by Jarvis in 1849 in violation of law created no legal obligation on the part of Páez, much less on the part of the Government of Venezuela. And a past consideration which did not raise an obligation at the time it was furnished will support no promise whatever. (3 Q.B., 234; Harriman on Contracts, 33; Bouvier's Law Dict., title Consideration.)

Essentially the argument of claimants is that the bonds are specialties, importing a valid consideration, and that their issuance as the act of the Venezuelan Government is binding upon it. The claimants have endeavored to show that the power in virtue of which the bonds were issued was the medium through which the authority of the States was conveyed and by which it was bound. In this they have failed. So far as the claimants are concerned, the issuance of the Jarvis bonds was not the " act of the Venezuelan Government." It is doubtless true that the question whether the Páez government was or was not the de facto government of Venezuela at the time the bonds were issued is one of fact. But the decision of the political department of the United States Government on November 19, 1862, that there was no such conclusive evidence that the Páez government was fully accepted and peacefully maintained by the people of Venezuela as to entitle it to recognition must be accorded great weight as to the fact, *and is in any event conclusive upon its own citizens.* And certainly the evidence that the Páez government was " submitted to by the great body of the people " was no stronger on April 14, 1863, when the Jarvis bonds were issued and, when as a matter of historical fact, it was encompassed by its enemies and tottering to its fall.

The language employed by Mr. Hassaurek in his opinion in the cases of the *Medea* and *Good Return* (3 Moore Int. Arb., 2739), decided by the United States and Ecuadorian Commission of 1865, may not inappropriately be quoted here. He says:

> A party who asks for redress must present himself with clean hands. His cause of action must not be based on an offense against the very authority to whom he appeals for redress. It would be against all public morality and against the policy of all legislation if the United States should uphold or endeavor to enforce a claim founded on a violation of their own laws and treaties and on the perpetration of outrages committed by an American citizen against the subjects and commerce of friendly nations. * * * As the American Commissioner I could not sanction, uphold, and reward indirectly what the law of my country directly prohibits. * * * He who engages in an expedition prohibited by the laws of his country must take the consequences. He may win or he may lose; but that is his own risk. He can not, in case of loss, seek indemnity through the instrumentality of the government against which he has offended.

The claim must be disallowed.

WOODRUFF CASE

(By the Umpire):

A provision in a contract made with a nation to the effect that all doubts and controversies, arising by virtue of the contract, should be referred to the local courts of Venezuela and decided according to its laws, and that such doubts or controversies, as well as the decisions of the Venezuelan courts thereon, shall never be

made the subject of an international claim, is binding upon the party making such an agreement, and in the absence of a showing that resort was had to the Venezuelan courts for relief, and justice there unduly delayed or denied, the claim can not be considered by an international commission.

This, however, without prejudice to the rights of the claimant's own country to intervene internationally in the case of a denial or the undue delay in the administration of justice.

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

On or about the 8th of January, 1859, the Government of Venezuela granted to José M. Rojas, Juan Marcano, John J. Flanagan and William Hatfield Clark a concession to build a railroad from Caracas to Petare, with the privilege of extending it to Guaranas and Guatire, and authorized the organization of a company or corporation for the purpose of building and equipping said road. Pursuant to this concession a company was organized in Caracas known as the " Compañía del Ferrocarril del Este," or " Company of the Railway of the East," which corporation acquired and held all the rights, powers, privileges, and franchises granted or pertaining to the said line of railway from Caracas to Petare, and its extensions, theretofore held by the parties named in the original concession. The capital stock of the company was fixed at 400,000 pesos for that part of the line from Caracas to Petare, the company having the right to increase this amount in case the road was extended beyond the latter point. The Government of Venezuela was an original subscriber to the capital stock of the company, taking 500 shares and agreeing to pay therefor into the treasury of the company the sum of 50,000 pesos; one-half of said amount was to be paid when all the material for the building of the road should be delivered in Venezuela, and the other half thereof when the railroad should be completed to Petare and open to the public.

On July 10, 1860, a contract was entered into in Caracas by and between Flanagan, Bradley, Clark & Co., a copartnership, successors in interest to John J. Flanagan, William Hatfield Clark, and James F. Howell, of the one part, and José M. Rojas and Juan Marcano, of the other part, which provided:

ARTICLE 1. Flanagan, Bradley, Clark & Co. sell, assign, and transfer by these presents to the Eastern Railroad Company all the materials now in this country for the construction of the said railroad upon the following conditions:

ART. 2. The said Rojas, as president, and Juan Marcano, as treasurer of the Eastern Railroad Company, will issue to order of Flanagan, Bradley, Clark & Co. $ 90,000, United States currency, in first-mortgage bonds, secured by a first mortgage on the said railroad and all the buildings, effects, and lands which may now or hereafter belong to the said company as per grant of the Government of Venezuela bearing date January 8, 1859.

Article 5 of the contract provided that within one month from its date Rojas and Marcano would deliver to Flanagan, Bradley, Clark & Co. $ 55,000 of said bonds, whereupon said firm would deliver to Rojas and Marcano the invoices of all the materials for the building of the railroad.

Article 6 provided that whereas Flanagan, Bradley, Clark & Co. were indebted to Congreve & Son for a balance on the iron then in the hands of Boulton & Co., in La Guaira, if they did not settle said amount within ninety days from the date of the contract, Marcano was to pay said balance and hold as his own the remaining $ 35,000 of bonds and apply the iron to the building of the road.

On the 24th of July, 1860, pursuant to said contract, José M. Rojas, as president, and Juan C. Marcano, as treasurer of the " Compañía de Ferrocarril

del Este," executed a mortgage upon the railway, with all its buildings, cars, effects, tools, lands, and all that belonged or might thereafter belong to said company, to secure the bonds provided for in article 2 of the contract. This mortgage is declared to be the only mortgage on said property, and was registered on the date of its execution. On the same date the company issued 90 coupon bonds of $ 1,000 each, United States currency, bearing 9 per cent interest. The bonds were in both Spanish and English and read as follows:

Republic de Venezuela — Caracas (Sur America)
Number —— — $ 1,000

COMPAÑÍA DEL FERROCARRIL DEL ESTE

Eastern Railroad Company's first-mortgage 9 per cent coupon bond

This bond of one thousand dollars, United States currency, is one of a series of ninety of like tenor and date issued to Flanagan, Bradley, Clark and Company by the Eastern Railroad Company and payable to bearer at the office of said railroad company, in the city of Caracas, on presentation of the coupons as they become due, which represent the principal and interest, at nine per cent per annum, and become due: July 1, 1862, $ 323.33; July 1, 1863, $ 260.66; July 1, 1864, $243.41; July 1, 1865, $ 226.16, and July 1, 1866, $ 208.92.

These bonds are secured by a first mortgage upon said Eastern Railroad from the city of Caracas to Petare and all its buildings, fixtures, equipments, appurtenances, and all the lands belonging to said railroad company as per grant from the Government of Venezuela in the original charter (about 3,500 fanegadas) and bearing even date herewith. If any one of the coupons become due and remains unpaid for ninety days the whole shall be due and collectable upon a wish of a majority of the bondholders.

El Presidente — José M. Rojas

El Tesorero — J. C. Marcano

(Coupons annexed after signatures.)

Of the 90 bonds thus issued 35 were held by Marcano as security for the debt due Congreve & Son for the iron rails, according to the provisions of article 6 of the contract. This left 55 bonds remaining, of which number only 46, according to the memorial, were delivered to Flanagan, Bradley, Clark & Co. The remaining 9 were retained by Rojas and Marcano. The memorialist alleges that he is the holder and owner for valuable consideration of 40 of said bonds and that he is entitled to claim the indemnity in respect of the other 6.

On the 19th of December, 1863, the Government of Venezuela acquired all the rights of the railroad company through a cession made to it by the company, and continued in the sole possession of the road until the 20th day of April, 1864, when the Government transferred the railroad and everything connected therewith to one Arthur Clark, a subject of Great Britain, said Clark agreeing to deliver into the treasury of Venezuela $ 80,000 in amount of legitimate public debt of the Government. Subsequently the contract with Clark was annulled or abrogated at the instance of the Government of Venezuela, and the control and dominion over said enterprise and over the property and franchises of the corporation were resumed by the Government.

This claim was presented to the Commission appointed under the treaty of 25 April, 1866. The Commission caused the papers to be returned to the United States legation, with the following indorsement thereon:

Dismissed this day from further consideration for want of the original bonds, or a legalized copy thereof not presented, and further documents equally required, but in no wise affected or invalidated by said action.

The claim was also presented to the Commission appointed under the treaty of December 5, 1885; and this Commission upon consideration and in relation to the claim made upon its docket the following entry: " Dismissed without prejudice to other prosecution of the claim."

The learned counsel for Venezuela insists in his answer that this claim is res adjudicata. But this position can hardly be sustained in view of the fact that the first Commission expressly declared the claim was in no wise to be affected or invalidated by its action in dismissing the case; and that an examination of the grounds on which the second Commission based its dismissal shows that it was because the Commissioners were of the opinion that " the cause of action has been misconceived and proofs therefor not supplied that otherwise might have been forthcoming." The claim is clearly one owned by a citizen of the United States of America which has not been settled by diplomatic agreement or by arbitration, and hence within the jurisdiction of this Commission under the terms of Article I of the protocol.

Various legal technicalities have been and still are insisted upon in relation both to the presentation and the defense of the claim. It is not deemed necessary to review these here. Substantially the facts are that Flanagan, Bradley, Clark & Co. sold, assigned, and transferred to the Eastern Railroad Company all the materials for the construction of said railroad which they had bought or contracted for and brought to Venezuela with which to build the road. In consideration thereof Rojas and Marcano, acting for the Eastern Railroad Company, issued to Flanagan, Bradley, Clark & Co. the 90 bonds of $ 1,000 each, payable to bearer, and as security for the same executed a mortgage on the property thus sold and also on all other property of the railroad company. Of the 90 bonds thus issued only 46 were actually delivered to Flanagan, Bradley, Clark & Co., and these 46 bonds undoubtedly represent the estimated value of the property owned by that firm and sold in the manner indicated to the railroad company. Besides the 660 tons of iron rails, for which they owed Congreve & Son and on account of which debt 35 of the bonds were retained by the company, the property delivered by said firm to the company consisted of a locomotive weighing 18 tons, a first-class passenger car, a second-class passenger car, 6 box cars, 4 platform cars, and a hand car.

This was in 1860. Three years later the railroad company transferred to the Government all the property, rights, privileges, and franchises of the company, and on April 20, 1864, the Government as " sole owner of the enterprise of the Railroad of the East," transferred to Arthur Clark all appertaining to the road, and in consideration thereof Clark agreed to deliver to the minister of the treasury of Venezuela within six months 80,000 and odd dollars of the legitimate debt of the Government.

It is a fact not without significance that the amount of " legitimate debt of Venezuela " agreed to be paid to the Government by Clark corresponds with the estimated valuation of the railway material represented by the outstanding bonds, deducting the 9 bonds which appear to have been retained by Rojas and Marcano out of the 90 issued. It would seem not an unfair inference that Venezuela recognized an obligation as to the bonds or as to the material which the bonds represented, and that the conveyance to Clark was subject to his obtaining the outstanding bonds and delivering them to the Venezuelan Treasury. Clark indeed made an offer of £ 3,500 for the bonds through the Venezuelan consul in London on September 16, 1864, to John Bradley. The consul, Mr. Hemming, says:

To enable him to do this (i. e., carry on the Eastern Railway), the Government have to take up the bonds held by you, and to facilitate matters so that they may at

once begin the work, Mr. Clark authorized me to offer you £ 3,500 sterling for all the bonds in question.

But Clark failed to comply with his contract with Venezuela and it appears to have been afterwards annulled and the property reverted to the Government.

The Government paid Congreve & Son for the rails the sum of 19,264.39 pesos, and the company, on December 19, 1863, turned over the 35 bonds retained on that account to the Government. Liability for the other property delivered by Flanagan, Bradley, Clark & Co. and represented by the 46 bonds outstanding rested upon the same basis, namely, that Venezuela received the property, but no arrangement as to this property was made with the holders of the bonds and, as shown, the contract with Clark was abrogated.

It is true the bonds were secured by the mortgage given by the railroad company, but the bonds are the real indicia of the indebtedness. The Government after December 19, 1863, held the mortgaged property and the claimant elected to rely upon the responsibility of the Government instead of on the security. This he had a perfect right to do.

I am of opinion that an award should be made in this claim in accordance with the foregoing views. As to interest, the legal rate only should be allowed after the bonds had matured.

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

Henry Woodruff claims from the Government of Venezuela the payment of the value of 46 bonds, representing the sum of $ 46,000, issued by a corporation called "Railway of the East," which originated from a concession granted by the Government of Venezuela on January 10, 1859, in favor of Messrs. Juan Marcano, José María Rojas, and Flanagan and Clark, and also claims the interest on said bonds at 9 per cent per annum, from July 24, 1860, amounting to $ 176,182.42, making a total sum of $ 222,182.42.

The same claim for the amount represented by the bonds and interest thereon was presented by Woodruff, consecutively to the two mixed commissions created by the conventions agreed upon between Venezuela and the United States of America on April 25, 1866, and December 5, 1885. Both commissions dismissed Mr. Woodruff's claim for want of sufficient proofs in which the responsibility of the Government of Venezuela could be found, but without prejudice for the claimant to prosecute other actions in protection of his rights. This decision, in neither of the two cases, recognized for its cause the lacking of jurisdiction of both commissions to examine and decide upon the claim presented, although Mr. Findlay, Commissioner on the part of the United States, was of the opinion that the Commission of 1889 was lacking in jurisdiction in this case, for reasons mentioned in his opinion, in which he decided that the claim should be disallowed. He states, in his separate decision, the merits of the case as follows:

> As far as these claims (Henry Woodruff and Flanagan, Bradley, Clark & Co., Nos. 20 and 25) are based upon a breach of contract or upon bonds issued in furtherance of the enterprise, we are of opinion that the claimants, by their own voluntary waiver, have disabled themselves from invoking the jurisdiction of this Commission, and for that reason, as well as that the cause of action has been misconceived, and proofs therefore not supplied that otherwise might have been forthcoming, we will disallow the claims and dismiss the petitions without prejudice.[1]

Consequently, by a vote of the majority of the members of the Commission of 1890, charged with the revision of the awards of the Mixed Commission of

[1] Opinions American - Venezuelan Claims Commission, 1890, p. 450.

1867 that dismissed the claims of Woodruff and Flanagan, Bradley, Clark & Co., both claims were dismissed anew.

The protocol signed at Washington the 17th day of February, of this year, which created the present Commission, establishes in the first article its jurisdiction, limiting the same to the claims owned by citizens of the United States of America against the Republic of Venezuela that have not been settled by diplomatic arrangement or by arbitration between the two Governments; and that are presented through the Department of State or through the United States legation at Caracas. Two requisites are thus necessary for this Commission to examine and decide on a claim owned by an American citizen: First, That it had not been settled by diplomatic arrangement or by arbitration between the two Governments; and, second, that it be presented through the Department of State of the United States or through its legation at Caracas.

What is understood by a claim having been settled or not by arbitration between the two Governments? In my opinion a claim that has been the object of an arbitration between the two Governments and which has been disallowed by a judgment of the arbitral commission charged with its examination, not having found merits enough on which an award against the Government of Venezuela could be founded, has been settled. In no other way could the object of these international commissions be considered as reached, and which object is to decide in a definite manner the disputes arising between the citizens of one of the two countries against the other, causing trouble and complaints in the political relations of both countries. For these reasons treaties and conventions are made and signed, giving exceptional faculties to mixed courts composed of judges appointed by the high contracting parties, and in such virtue the convention made between Venezuela and the United States on the 25th of April, 1866, distinctly contains in its article 5 the following stipulation:

> The decisions of this Commission and those (in case there may be any) of the umpire, shall be final and conclusive as to all pending claims at the date of their installation. Claims which shall not be presented within the twelve months herein prescribed, will be disregarded by both Governments, and considered invalid.[1]

And by article 11 of the convention between the same Governments, of December 5, 1885, which had for its object the revision of the awards of the previous commission, and to examine and decide on all claims owned by corporations, companies, or individuals, citizens of the United States, against the Government of Venezuela, which may have been presented to their Government or legation in Caracas before the 1st of August, 1868, it was agreed that "the decisions of the Commission organized under this present convention shall be final and conclusive as to all claims presented or proper to be presented to the former Mixed Commission."

The explanation given by the Commission of 1890, in the dismissal of the Woodruff claim, that it was so dismissed without prejudice of other actions of the claimant, does not mean that it was left pending between the two Governments. If this meaning should be given to the mentioned decision it would be contrary to the intended object of the Mixed Commission, which special object was to finally settle all the pending claims of corporations, companies, or individuals, citizens of the United States, against the Government of Venezuela.

As it has already been said, the Woodruff claim was not the object of a declaration of lack of jurisdiction by any of the two commissions, but of lack

[1] Treaties and Conventions between the U.S. and Other Powers, 1776-1887, p. 1143.

of any foundation that could justify it, and to pretend now that the present Commission should examine anew the same claim for demand of payment from the Venezuelan Government of the nominal value of the same bonds issued by the " Eastern Railway Company " and the interest thereon, changing only the reasons or motives in which the claimant pretends to base the responsibility of the Government of Venezuela, trying to make that responsibility arise from facts and circumstances that were known to the claimant at the time he presented it to the two previous mixed commissions, it would be to consent in the indefinite duration of the claims, as there would not be one claimant that, having had his claim disallowed, could not present it anew, making new arguments on facts not mentioned in the previous trials. Such action would completely destroy the high mission of the arbitration courts, specially in the international disputes that from their nature require the greatest efficiency in the stability of the judgments and their definite settlement.

The Commissioner for Venezuela does not consider as indispensable, after what has been said, to make a study of the new foundation on which Mr. Woodruff bases the same claim presented for the first time against the Government of Venezuela, to the Commission of 1867, thirty-five years ago. The appreciation of the merits of the new arguments has been already made with a high spirit of equity and with a learned criticism by the Hon. Mr. Findlay, Commissioner for the United States in 1890, in his opinion on this case. I have only to add that the claimant has not presented the proof of any new fact that could in any way change the estimation made by the Commission of 1890, and which caused the dismissal of the claim; on the contrary, this Commission has had occasion to examine the documents existing at the department of fomento, in which is found the decision of the meeting of the shareholders of the Eastern Railway Company, dated at Caracas, on December 19, 1863, and by which said railway was surrendered to the Venezuelan Government, and I have not found in that decision any data showing that said Government did directly accept the responsibility for the payment of the bonds issued by said corporation in favor of the first contractors of the works, that were also the grantees of the same and subscribers for the larger part of the shares. I have also perused the communication addressed on September 14, 1865, by said Henry Woodruff to the secretary of foreign affairs, in which he says:

I have been informed by the Government that my right on the lands, iron rails, fixed effects, and road materials was perfect and indisputable, and it is so by the mortgage of security. Not having the conditions of the mortgage complied with, I have, consequently, perfect right to the ownership of the property. Will the Government now consent so that all things included in the mortgage, after due notice, be sold at public auction to the best bidder and the proceeds applied to the payment of the bonds? I only ask for the consent to exercise a right that has not only been acknowledged by the Government, but insisted on its exercise when they acted against third party. When the interested parties are perfectly in accord in the acknowledgment of the rights, it would not only be insane but an offense to incur the necessary delay and expenses for the judicial foreclosure of a mortgage.

Mr. Woodruff well knew in 1866 his right on the mortgage that secured the payment of the bonds, and he made no use of that right in the subsequent years, though the Government of Venezuela presented no difficulty for the enforcing of such right through the courts. He abandoned the property that was given him as security, and knowing all the particulars in reference to the bonds, he presented his claim to the Commission of 1867, pretending to base the responsibility of the Government of Venezuela on a breach of contract, and alleged a lack of documents that he affirmed were in the possession of the Government of Venezuela, while it appears, from the above-mentioned records.

that on October 8, 1864, Mr. Woodruff asked for copies of the deed by which Messrs. J. M. Rojas and Juan Marcano made a cession of the enterprise to the Government, and of the inventory of the railway made in consequence of said cession. The opinion of Mr. Findlay could be quoted here: "We see no reason why immediate and effective proceedings might not have been taken to foreclose or sell the road under the mortgage, which contained full power of sale."

Instead of taking this advice or resorting to any legal step to enforce his claim, either against Clark or under the mortgage, he (Mr. Woodruff) assumes at the outset the position that Venezuela, by what we may call the Rojas-Marcano retrocession had obliterated or rather merged the corporation, and in doing so had assumed the liability of paying the face value of its bonds, with accrued interest to date.

> Venezuela had nothing more than an equity of redemption, and had any individual received the assignment it would never have been contended that he became personally liable for the debts of the concern. * * *
>
> Venezuela neither issued nor indorsed the bonds in question. They were issued by the parties themselves, and unless business is done on different principles in Venezuela than in other parts of the world we must believe that Flanagan, Bradley, Clark & Co., by virtue of the potential ownership of a majority of the stock and their general relations to the enterprise under the construction contract, must have had an equal voice with their associates in the issue of the bonds. When they received them, at least, there could have been no pretense that Venezuela was responsible. Neither by the terms of the concession nor by any contract or connection, direct or remote, express or implied, with the transaction has she assumed any responsibility. * * * Why the claimant did not proceed to make good his debt out of the mortgage security he held, instead of pursuing the claim against the Government upon the theory of merger, is altogether unexplained either by the papers or anything that was said at the arguments.[1]

Has not this claim been already settled by arbitration?

This court of equity could also consider the question whether the bonds represented a nominal value equivalent to the real amount of the debt which caused them to be issued, as it must be remembered that said bonds were issued by agreement between Flanagan, Bradley, Clark & Co., both as original grantees of the enterprise and as contractors, that were to receive a number of shares that represented the largest part of the capital of the company, in payment of their credit as constructors; and that when the 90 bonds for $ 1,000 each were issued Messrs. Rojas and Marcano retained 35 of them that represented the credit of C. Congreve & Co., of New York, amounting to $19,264.39 (Venezuelan pesos), owed to them for rails. This sum represented one-half of the nominal value of the bonds. Neither Flanagan, Bradley, Clark & Co., nor Woodruff presented to the previous commissions, nor has the latter presented to this, any proof that the nominal value of the bonds correspond to the just value of the effects and materials for which payment they were a security. All these considerations were, doubtless, the reasons why the Commission of 1890 considered in justice and equity without foundation the pretension to make the Government of Venezuela responsible for the value of the bonds in question and for the interest thereon, and caused the claim of Henry Woodruff to be disallowed.

For the above reasons it is my opinion that said claim has already been the object of a judgment of the Mixed Commission of 1890 and was dismissed for lack of foundation, and therefore this Commission should entirely disallow

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[1] Opinions American - Venezuelan Claims Commission, 1890, p. 445.

it for want of jurisdiction to reconsider a case that has been already definitively settled by the Arbitral Commission of 1890.

BARGE, *Umpire*: [1]

A difference of opinion having arisen between the Commissioners of the United States of America and the United States of Venezuela, this case was duly referred to the umpire.

The umpire having fully taken into consideration the protocol and also the documents, evidence, and arguments, and likewise all the communications made by the two parties, and having impartially and carefully examined the same, has arrived at the following decision:

Whereas in this case the United States of America presents the claim of Henry Woodruff to recover the face value of 46 bonds of $ 1,000 United States currency each, together in the sum of $ 46,000, with interest at 9 per cent per annum from July 24, 1860; and

Whereas these 46 bonds form part of the 90 bonds of $ 1,000 United States currency which José M. Rojas and Juan Marcano, as president and treasurer of what they called the "Eastern Railroad Company," issued by order of Flanagan, Bradley, Clark & Co., and which bonds were secured by a first mortgage on the said Eastern Railroad and all the buildings, effects, and lands which may now or hereafter belong to said company as per grant of the Government of Venezuela, bearing date of January 8, 1859; and

Whereas this grant was made by the same contract by which the Government of Venezuela did grant to said Juan Marcano and others a charter for the construction of a railroad from the city of Caracas to Petare, with the privilege of extending the same, and authorizing the organization of a company or corporation for the purpose of building and equipping the same; and

Whereas on the 19th of December, 1863, said José M. Rojas and Juan Marcano made a cession of all the rights of the railroad company to the Government of Venezuela, which the Government transferred the same to one Arthur Clark by contract of the 20th of April, 1864, this contract being annulled later on and the right of the railroad company returning thereby to the Government.

Whereas therefore the question of the liability for the bonds issued through the so-called "Eastern Railroad Company" and secured by mortgage on all the belongings of said company, involving the questions on the rights and duties of this company, and the scope of the transfer of these rights and duties from the company to the Government, from the Government to Arthur Clark, and from Arthur Clark back to the Government, centers in the question about the original rights and duties of said company arising from the contract by which the concession for the railroad and the permission for the organization of the company was granted, this contract has in the first place to be contemplated.

Now whereas article 20 of this contract reads as follows:

> Doubts and controversies which at any time might occur in virtue of the present agreement shall be decided by the common laws and ordinary tribunals of Venezuela, and they shall never be, as well as neither the decision which shall be pronounced upon them, nor anything relating to the agreement, the subject of international reclamation;

And whereas this claim to recover from the Venezuelan Government the face value of the bonds issued through the president and treasurer of the Eastern Railroad Company based on the hypothesis of a transferring of the rights and duties of that company to the Government of Venezuela, doubts

[1] For a French translation see: Descamps - Renault, 1903, p. 343.

and controversies on the liability of the Venezuelan Government in this question must be regarded as doubts and controversies which occur in virtue of said agreement, and certainly are " relating to that agreement."

Wherefore they must be considered as being meant by the contracting parties never to be transferred for adjudication to any tribunal but to the ordinary tribunals of Venezuela, and to be there determined in the ordinary course of the law; and

Whereas bondholders — at all events the original bondholders from whom the later owners and possessors derive their rights — before accepting these bonds knew — certainly ought to know, and must be supposed to know — on what foundation stand the power and the solidity to which they give credit by accepting these bonds;

Whereas at all events those who accept bonds of a company or corporation know — certainly must be supposed to know — the statutes and conditions from which this company or corporation derives its powers and rights and — as to these bonds — to have adhered to them in regard to the bondholders as well as in regard to the company or corporation the articles of the fundamental agreement have to be applied.

Furthermore, whereas certainly a contract between a sovereign and a citizen of a foreign country can never impede the right of the Government of that citizen to make international reclamation, wherever according to international law it has the right or even the duty to do so, as its rights and obligations can not be affected by any precedent agreement to which it is not a party;

But whereas this does not interfere with the right of a citizen to pledge to any other party that he, the contractor, in disputes upon certain matters will never appeal to other judges than to those designated by the agreement, nor with his obligation to keep this promise when pledged, leaving untouched the rights of his Government, to make his case an object of international claim whenever it thinks proper to do so and not impeaching his own right to look to his Government for protection of his rights in case of denial or unjust delay of justice by the contractually designated judges;

Whereas therefore the application of the first part of article 20 of the aforesaid agreement is not in conflict with the principles of international law nor with the inalienable right of the citizen to appeal to his Government for the protection of his rights if it is in any way denied to him, equity makes it a duty to consider that part of article 20 just as well as all other not unlawful agreements and conditions of said contract wherever that contract is called upon as a source of those rights and duties whereon a claim may be based.

Now, whereas it might be said, as it was said before, that by the terms of the protocol the other party, viz, the Government of Venezuela, had waived her right to have questions arising under the agreement determined by her own courts, and had submitted herself to this Tribunal it is to be considered that even in the case of this claim as a claim against the Venezuelan Government, owned by an American citizen, being a claim that is entitled to be brought before this Commission, the judge, having to deal with a claim fundamentally based on a contract, has to consider the rights and duties arising from that contract, and may not construe a contract that the parties themselves did not make, and he would be doing so if he gave a decision in this case and thus absolved from the pledged duty of first recurring for rights to the Venezuelan courts, thus giving a right, which by this same contract was renounced, and absolve claimant from a duty that he took upon himself by his own voluntary action; that he has to consider that claimant knew, at all events ought to have known, when he bought the bonds or received them in payment, or accepted them on whatsoever ground, that all questions about liability for the bonds

had to be decided by the common law and ordinary tribunals of Venezuela, and by accepting them agreed to this condition; and

Whereas it does not appear that any appeal of that kind was ever made to the Venezuelan courts, it must be concluded that claimant failed as to one of the conditions that would have entitled him to look on his claim as on one on which a decisive judgment might be given by this Commission; and

Whereas, therefore, in the consideration of the claim itself it appears out of the evidence itself, laid before the Commission, that claimant renounced — at all events adhered to the renunciation of — the right to have a decision on the claim by any other authority than the Venezuelan judges and pledged himself not to go — at all events, adhered to the promise of not going — to other judges (except naturally in case of denial or unjust delay of justice, which was not only not proven, but not even alleged) and that by the very agreement that is the fundamental basis of the claim, it was withdrawn from the jurisdiction of this Commission.

Wherefore, as the claimant by his own voluntary waiver has disabled himself from invoking the jurisdiction of this Commission, the claim has to be dismissed without prejudice on its merits, when presented to the proper judges.

SPADER ET AL. CASE

Claim barred by prescription.[1]
A right unasserted for over forty-three years can hardly be called a claim.

BAINBRIDGE, *Commissioner* (for the Commission):

William V. Spader, claimant herein, states that he is a citizen of the United States of America, and that he is the only child and sole heir-at-law of Mary Elizabeth Franken Spader, deceased, who was the sole legatee under the last will and testament of María Josepha Brion Franken, who was one of the legatees and beneficiaries under the last will and testament of Louis Brion, usually known as Admiral Louis Brion, who died on the 21st day of September, 1821.

The memorial sets forth certain claims against the Republic of Venezuela in favor of Admiral Louis Brion for services rendered by the latter in the cause of Venezuelan independence. Admiral Brion left his estate to his brother, who died shortly afterwards intestate and unmarried, and to his three sisters, María Josepha, Carlota and Helena. María Josepha Brion married Morents E. Franken in Curaçao, and after her husband's death removed to the United States, where she died in 1859, bequeathing all her estate to her daughter, Mary Elizabeth Franken, who married Krosen T. B. Spader. Mary E. Spader was naturalized as a citizen of the United States April 29, 1865. Charlotte Brion married Joseph Foulke, a merchant of New York. She died in 1846.

William V. Spader claims that he and the other proper parties, heirs of Admiral Brion and citizens of the United States, are entitled to be paid by and to receive from the Republic of Venezuela the two-thirds part of the indebtedness of the Republic of Venezuela to the estate of Admiral Brion.

It appears from the record that this claim originated between the years 1810 and 1821. Citizens of the United States had, or appear to have had, interest in the claim prior to 1846. It was first brought to the attention of the United States Government, so far as the evidence shows, on November 1, 1889. No reason or explanation is given for delay in presentation. It was

[1] See the Italian - Venezuelan Commission (Gentini Case, Giacopini Case, Tagliaferro Case) in Volume X of these *Reports*.

submitted to the Commission created by the Convention of December 5, 1885, between the United States and Venezuela. The Commission dismissed it without prejudice, for want of jurisdiction. It does not appear in evidence when or in what manner the claim was ever otherwise brought to the attention of the Government of Venezuela.

A right unasserted for over forty-three years can hardly in justice be called a " claim."

> Prescription [says Vattel] is the exclusion of all pretensions to right — an exclusion founded on the length of time during which that right has been neglected.
>
> All these sorts of prescription by which rights are acquired or lost are grounded upon this presumption, that he who enjoys a right is supposed to have some just title to it, without which he had not been suffered to enjoy it so long; that he who ceases to exercise a right has been divested of it for some just cause; and that he who has tarried so long a time without demanding his debt has either received payment of it, or been convinced that nothing was due him. (Domat, Civil and Public Law, Bk. III, Tit. VII, sec. 4.)
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> The same presumption may be almost as strongly drawn from the delay in making application to this Department for redress. Time, said a great modern jurist, following therein a still greater ancient moralist, while he carries in one hand a scythe by which he mows down vouchers by which unjust claims can be disproved, carries in the other hand an hourglass, which determines the period after which, for the sake of peace and in conformity with sound political philosophy, no claims whatever are permitted to be pressed. The rule is sound in morals as well as in law. (Mr. Bayard, Secretary of State, to Mr. Muruaga, Dec. 3, 1886. Wharton, Dig. Int. Law, Appendix, vol. 3, sec. 239.)
>
> While international proceedings for redress are not bound by the letter of specific statutes of limitations, they are subject to the same presumptions as to payment or abandonment as those on which statutes of limitation are based. A government can not any more rightfully press against a foreign government a stale claim which the party holding declined to press when the evidence was fresh than it can permit such claims to be the subject of perpetual litigation among its own citizens. It must be remembered that statutes of limitations are simply formal expressions of a great principle of peace which is at the foundation not only of our own common law but of all other systems of civilized jurisprudence. (Wharton, Dig. Int. Law, Appendix, vol. 3, sec. 239.)

It is doubtless true that municipal statutes of limitation can not operate to bar an international claim. But the *reason* which lies at the foundation of such statutes, that " great principle of peace," is as obligatory in the administration of justice by an international tribunal as the statutes are binding upon municipal courts.

In the case of Loretta G. Barberie *v.* Venezuela, decided by the United States and Venezuelan Commission of 1889, Mr. Commissioner Findlay said:

> A stale claim does not become any the less so because it so happens to be an international one, and this tribunal in dealing with it can not escape the obligation of an universally recognized principle, simply because there happens to be no code of positive rules by which its action is to be governed.[1]

The claim is disallowed.

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[1] United States and Venezuelan Claims Commission, 1889-90, Opinions, p. 79; Moore's Arbitrations, p. 4203.

TORREY CASE

Punitive damages not allowed for arrest by mistake where apology for such arrest is promptly made. Damages, however, for personal inconvenience during period of arrest allowed in the sum of 250 dollars.

PAÚL, *Commissioner* (for the Commission):

Charles W. Torrey claims from the Government of Venezuela the sum of $ 10,000 for damages caused by unjust arrest at the port of La Guaira, on May 3, 1876, and for personal ill treatment in connection therewith.

The memorialist bases his pretension on the following facts:

Early in the year 1876 he went to Curaçao for health and pleasure. Shortly after his arrival there he concluded to go to Venezuela to see the country and visit its capital, Caracas. After remaining in Caracas for about a week, he concluded to return to Curaçao by the English royal mail steamer *Severn*. On the 9th of May, 1876, after having obtained a passport with all the necessary visés by the authorized officers of the Venezuelan Government in Caracas, he started for La Guaira, where he intended taking the steamer *Severn* back to Curaçao. With him at the same time were a Mr. Bartram and Dr. Elbert Nostrand, also citizens of the United States. The steamer was lying out in the stream and the three embarked on a boat belonging to said steamer to reach it. While on the way to said steamer they were hailed from shore and ordered back and commanded to report to the civil officer in charge at La Guaira. This officer ordered them all to be imprisoned in the common jail. Torrey claims that he was lodged in a cell with many low prisoners, his cell containing no other accommodation or furniture than a common table and a set of wooden stocks. His request to remain at the hotel under guard, although he was suffering from an attack of inflammatory rheumatism, was arbitrarily refused, and he was taken to jail, and kept in said prison for four hours. He was released through the immediate exertions of the United States consul at La Guaira and the United States representative at Caracas, and he took the steamer bound for Curaçao the same evening at 7 o'clock.

Among the documents presented there is a copy of the communication addressed on the 12th of June, 1885, by the honorable Secretary of State, T. F. Bayard, to Mr. Torrey in reference to his claim, which in itself is sufficient to fix the appreciation that this Commission must make about the fact of the unjust arrest suffered by Mr. Torrey for a few hours in the port of La Guaira. Said communication reproduces the opinion of Mr. Evarts, Secretary of State, contained in a letter addressed by him to the said claimant on April 5, 1877, after having examined the voluminous diplomatic correspondence caused by this affair. This opinion was as follows:

> Though the Department would have preferred that the apology for your arrest should have come directly from that functionary [President Guzmán Blanco], the fact that he ordered his chief of police to make it may be regarded as sufficient. Your complaint may, however, be taken into consideration when diplomatic intercourse with Venezuela shall be resumed, but you [Mr. Torrey] must not expect that this Department will authorize a demand for vindictive damages.

Mr. Bayard, in the same communication, adds:

> Under the circumstances of the case as herein presented, further diplomatic intervention in your behalf is thought to be neither expedient or proper. The Department must, therefore, regard the matter as practically closed, unless you can show to it that the apology made was not a sufficient atonement for the injury done to you, or that an error has accrued to your prejudice in the Department's decision.

This decision need not, however, prejudice your ultimate rights if you see fit to present and support a claim before any international tribunal which may hereafter be organized to take cognizance of cases arising since the award of the late Caracas Commission.

As it appears from the above communications, and as it is plainly shown by the voluminous correspondence between the two departments of foreign affairs of both governments, the incident of the four hours' arrest of the American citizen, Charles W. Torrey, in the port of La Guaira was the act of a local officer, and was due to special circumstances of that epoch, in which act there was no intention to hurt, by any means the person of an American citizen, and, on the contrary, the same gave occasion for the President of the Republic, Gen. Guzmán Blanco, as soon as he knew of said arrest to order by telegraph that the prisoners be put at liberty, thus:

Gen. J. J. YEPEZ:

Those gentlemen should not have taken passage to Curaçao when their passports were for the United States of America, but I have reason to confide in them; thus, I expect you will put them at liberty, stating to them that you are sorry for what has happened. The steamer has my permission to leave as soon as those gentlemen are on board.

GUZMÁN BLANCO

In view of the foregoing, and regarding the compensation to be given in this case as limited to reparation for the personal inconvenience and discomfort suffered by the claimant during his brief detention, an award will be made in the sum of $ 250 United States gold.

GAGE CASE

(By the Umpire:)

Damages for insults and threatened ill treatment during time of lawful arrest allowed.

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

This claim arises out of the arrest of the claimant, Gage, and one Fred. R. Bartlett, citizens of the United States at La Guaira, on the evening of December 26, 1900.

The arrest was made by the mayor of La Guaira, who had been a fellow passenger of the parties named on the afternoon train from Caracas, on the ground that the conduct of Messrs. Gage and Bartlett during the trip had been prejudicial to good order, as tending to cause a disturbance of the peace. The testimony as to whether the arrest was warranted or not is conflicting, although it must be said the weight of the evidence is to the effect that the conduct of these men was lacking in discretion. It is not deemed necessary, however, to discuss the evidence upon this point in detail. The claim turns primarily upon the occurrences subsequent to the arrest.

The complaint sworn to by both Gage and Bartlett on December 29, 1900, states:

Arriving at the jail we were placed in a small, dirty, dingy room with eight or ten prisoners and with no accommodations of any kind. Our money and valuables were taken from us as we were registered and searched. Shortly after one of the prisoners offered us a bench and we sat down and conversed quietly together and addressed no remarks to anyone.

After having been seated for about fifteen minutes the chief of the prison guard entered the room and roughly ordered us off the bench, and taking the bench in his

hands raised it over Mr. Gage's head and threatened to kill him if he made the slightest protest, abused us, and then left the room. While we were in the prison we asked permission of the chief of the guard and his aids to communicate by telephone with the American consul in La Guaira or the American minister at Caracas. This request was absolutely refused, and we were told that the American consul had been at the jail, but why we did not see him was not explained.

They were released without any trial about half past 7 that evening, their money and valuables being returned to them. Their imprisonment lasted about two and one-half hours.

The citizen or subject of a state who goes to a foreign country is, during his stay in the latter, subject to its laws and amenable to its courts of justice for any crime or offense he may commit in contravention of the municipal laws, nor can the government to which he owes allegiance and which owes him protection properly interpose unless justice is denied him or unreasonably delayed. This principle, however, does not interfere with the right and duty of a state to protect its citizens when abroad from wrongs and injuries; from arbitrary acts of oppression or deprivation of property, as contradistinguished from penalties and punishments, incurred by the infraction of the laws of the country within whose jurisdiction the sufferers have placed themselves.

It would seem too clear for argument that the denial to a foreigner, arrested for an alleged infraction of the municipal law, of the opportunity to communicate with the representatives of his government is an arbitrary act of oppression, amounting, in itself, to a denial of justice. While amenable to the municipal law, the accused is entitled to a speedy and impartial trial, under every civilized code, and to such assistance in securing a prompt and impartial trial, or in other ways as it may be within the province of the representatives of his government to render.

The responsibility of a government for the acts of its administrative officials, injuriously affecting the rights of aliens, is beyond question.

> Presumably, therefore, acts done by them [says Hall] are acts sanctioned by the state, and until such acts are disavowed, and until, if they are of sufficient importance, their authors are punished, the state may fairly be supposed to have identified itself with them.[1]

The conduct of the jefe civil and the police officers at La Guaira in connection with the arrest and detention of Mr. Gage was promptly brought to the attention of the Venezuelan Government by the Government of the United States through its legation at Caracas, and such apology and reparation required as were deemed justified under the rules of international law herein stated. So far as the evidence shows, however, the acts of the civil authorities were not disavowed nor were their authors punished.

For these reasons I am of opinion that an award should be made in this claim.

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

I regret to disagree with the opinion of the honorable Commissioner of the United States in this case.

The evidence presented is in itself sufficient to prove that George E. Gage misdemeaned himself during his trip from this city to the port of La Guaira, and that he well deserved the punishment inflicted on him upon his arrival at La Guaira by the civil authority, who was a witness to Gage's doings.

Said punishment, which was only an arrest of two and one-half hours, is sanctioned by law, and it is within the power of civil authorities to administer

[1] Hall's International Law, 4th ed., p. 226.

such in a summary way, without previous former trial, in cases of disorderly behavior in public places, or in cases of misdemeanor against other persons. This last was the case of Gage, which happened to be witnessed by the authority. The ill treatment and incommunication with his minister or consul, of which he complains he was a victim during his arrest, only appears from the statement of the claimant, whose truthfulness in the present case is doubtful, considering that in the memorial presented by him he goes so far as to distort Dr. N. Zuloaga's declaration, who, according to Gage, said, " In case of an international claim he would side with his Government regardless of truth." The deposition of Elias de León, who was present as interpreter at the interview between Doctor Zuloaga and Gage, states the contrary, and he assures that Doctor Zuloaga said:

> This matter is not worth raising an international question, but if it comes to this, I am a Venezuelan in the first place, and I will be at the side of my Government and will accomplish my duty.

There is a very substantial difference between fulfilling one's duty and being regardless of truth, a difference which the claimant does away with, with a deliberate purpose of diminishing the weight of the declaration of a person who is perfectly truthful by temperament as well as by education, and who had been the gratuitous victim of Gage's sneers and misbehavior which caused him to be arrested.

I am of opinion that the claim of George E. Gage must be disallowed.

BARGE, *Umpire*:

A difference of opinion having arisen between the Commissioners of the United States of North America and the United States of Venezuela, this case was duly referred to the Umpire.

The Umpire, having fully taken into consideration the protocol and also the documents, evidence, and arguments, and likewise all the communications made by the two parties, and having impartially and carefully examined the same, has arrived at the decision embodied in the present award.

Whereas the claimant claims for damages for false arrest and imprisonment, unlawful detention and personal indignities connected therewith; and

Whereas it appears from the declaration of the witnesses, General García, civil chief of the parish of La Guaira, Dr. N. Zuloaga, Dr. A. M. Díaz, Dr. F. Hernandez Tovar, and E. Ochoa, that the claimant, in a first-class carriage of the Caracas and La Guaira Railway, in which he traveled together with the witnesses, behaved in a way as if he were intoxicated and indulged in actions that were liable to disturb the public peace, which declarations do not seem to be sufficiently contradicted by the declaration of the conductor of the railway, who only from time to time walked through the carriages and was not, as the other witnesses were, in his constant society, nor by the declaration of the consul of the United States of North America at La Guaira, who only saw him two and one-half hours later; and

Whereas, therefore, the act of the police officer who ordered claimant to be arrested and put into jail for disturbing public order can not be said to be unlawful, the charge of false arrest and imprisonment can not be admitted.

Whereas, furthermore, the prisoner was let free after about two and a half hours of detention; and

Whereas, in case of a detention by the police in behalf of public safety of a person who in a state of intoxication has disturbed and may be feared furthermore to disturb the public peace, a detention of little more than two hours

can not be said to be excessively long, the charge of unlawful detention seems, in case of lawful arrest, not to be founded; and

Whereas the claimant further complains that his request to communicate with the American consul at La Guaira or the American minister at Caracas was refused;

Whereas, however, for this refusal there is only the statement of claimant and his former coclaimant, Mr. Bartlett, whilst out of the letter of the minister of foreign affairs of the United States of Venezuela to the minister of the United States of North America of April 2, 1901, it might be concluded that instead of a formal refusal there might have been only a delay commanded by circumstances, and whilst, on the other hand, it is proved that claimant was let free after about two hours of detainment in consequence of — or in every case posterior to — communications between the Venezuelan authorities and the North American consul at La Guaira and the North American minister at Caracas, the fact of absolute refusal seems doubtfully proved. The rule " in dubiis pro reo " must be here applied in favor of the authorities charged with the unjust refusal.

As to the complaint that the claimant was placed in a small, dirty, dingy, stinking room, this is met by the declaration on behalf of the Venezuelan authorities that he was conducted to the only establishment of correction in La Guaira, whereas it has to be kept in mind that this kind of establishments will almost nowhere seem comfortable for persons of claimant's social position.

As regards the further ill treatment claimant complains of.

Whereas for this likewise the only evidence is the statement of the claimant and his former co-claimant, Mr. Bartlett, but

Whereas it has to be considered that, from the nature of the facts as to the treatment of prisoners by their gaoler, it will always be difficult to find other witnesses besides the prisoners themselves; and whereas it has further to be considered that not only the Venezuelan authorities did not deny the facts, but that there is no trace of these authorities investigating the facts and thus trying to undo the charge that was brought up against them; and

Whereas this Commission has to investigate and decide the claims that are brought before it only upon such evidence and information as shall be furnished by or on behalf of the respective governments;

It seems that the sworn declaration of the claimant and Mr. Bartlett, as presented in their behalf by the United States Government, not contradicted or debilitated by any other evidence or by any intrinsic defect, can not be set aside; and

Whereas the ill-treatment by the officials for which the government is liable, and on which the claim is founded, exists in insults and in menaces that were not carried out, a sum of $ 100 seems a just reward, which sum is hereby allowed to the claimant.

ANDERSON CASE

The word " owned " as used in the protocol must refer to claims of American citizens owned at the time of the signing of the protocol.

BAINBRIDGE, *Commissioner* (for the Commission):

At the time of the Venezuelan war for independence, Domingo Hernandez and María Simana García, Spanish subjects, were compelled to emigrate from Venezuela and their properties therein were confiscated by the Government. In payment for the properties thus taken the Government of Venezuela on

December 21, 1846, issued to these parties several bonds, bearing interest at 3 per cent per annum from June 22, 1847. The parties named removed to the city of Humacao, island of Porto Rico, where they died, leaving part of said bonds to Fernando Hernandez y García, who died in February, 1896, leaving said bonds to his son, Fernando Hernandez y Miguene. On the 18th of June, 1903, the latter conferred —

a general and special power of attorney, drawn as required by law, in favor of Mr. Joseph Anderson, jr., resident of Porto Rico, citizen of the United States of America, and a lawyer by profession, so that he might, in the name and as representative of the appearing party, and as owner of said 5 bonds, which he cedes and transfers to him in the legal way, *so that he may claim the payment* of the same, including the corresponding interest before the Commission named to that effect.

The United States now present to the Commission on behalf of Joseph Anderson, jr., a claim, based on said 5 bonds, amounting to 37,250 pesos, principal and interest.

The convention constituting this Commission signed at Washington on the 17th of February, 1903, provides:

" All claims owned by citizens of the United States against the Republic of Venezuela * * * shall be examined and decided by a mixed commission," etc.

Claims owned when? Clearly the object of the convention was to provide a method of settlement by arbitration of claims against the Republic of Venezuela owned by citizens of the United States at the time of its negotiation. No other claims could have been within the contemplation of the high contracting parties, and jurisdiction of no other claims is conferred by the convention upon the Commission.

It is neither proved nor even alleged that this claim was owned by a citizen of the United States on or prior to February 17, 1903. The claimant Anderson did not become the owner of it until June 18, 1903, if, indeed, from the evidence presented here he can rightly be said to be the owner at all.

The claim is therefore dismissed, without prejudice, for want of jurisdiction.

THOMSON-HOUSTON INTERNATIONAL ELECTRIC CO. CASE

Commission has no jurisdiction to decide claims against municipalities.

PAÚL, *Commissioner* (for the Commission):

This company, as claimant, presents itself to this Commission, pretending that the Government of Venezuela should be made directly responsible for the payment of the balance of a credit against the municipality of the city of Valencia, amounting to 48,005.28 bolivars up to May 30, of this year, for the service of public electric lighting for previous years and continued up to date by said company, under its contract.

Among the documents presented there is a copy of the original contract between the national executive and Miguel J. Dooley, dated September 21, 1887, granting to the latter, for the term of 25 years, the exclusive right to establish in the territory of the Republic the electric-light system, the grantee having to make special arrangements with the different municipalities for the establishment of the electric lighting in their respective localities.

From the copies of divers arrangements made with the municipal board of Valencia, annexed to the memorial, it appears that said corporation acknowledges as correct the balance due to the company, presented for collection, and

found, in accordance with the corporation's books, said corporation claiming at the same time that the company owed, on its side, up to June 26, 1902, the sum of 2,333.35 bolivars for municipal taxes of 1,000 bolivars per annum levied by said corporation on the electric light company, from October 15, 1901. The Thomson-Houston International Electric Company denies to the municipality of Valencia the right to levy an annual tax for the exercise of their industry, basing their arguments on the terms of the original grant of the national government, that in article 4 it states that the said industry would be exempt of the payment of any national, state, or municipal taxes.

The account kept by said company with the municipality of Valencia, up to May 31, 1903, has been presented to this Commission, and said account shows that the company has been receiving lately (in the months of February, March, April and May) cash payments on account amounting to 21,280 bolivars, and the company from the month of March reestablished the public lighting service of 50 arc lights that had been suspended from June, 1902, until February, 1903. This circumstance proves that the business relations between the Thomson-Houston International Electric Company and the municipality of Valencia were in activity by a mutual agreement, and it can not be understood why said company pretends to claim from the national government the payment of the balance of a current account kept with a municipality of one of the federal states whilst the interested parties kept in activity the credit and debit of their account.

This Commission ought to dismiss this claim for lack of jurisdiction, without prejudice to the claimant.

BULLIS CASE

Every nation whenever its laws are violated by any one owing obedience to them, whether he be a citizen or alien, has a right to inflict the prescribed penalties upon the transgressor, if found within its jurisdiction, provided always that the laws themselves and the penalties prescribed are not in derogation of civilized codes.

BAINBRIDGE, *Commissioner* (for the Commission):

Henry C. Bullis, a native-born citizen, of the United States in August, 1900, and for nearly two years previous thereto, was employed as chief mechanical and electrical engineer by the Electric Light Company of Maracaibo, Venezuela. Some of the employees of the company were sympathizers with the revolutionary party then making preparations for an uprising. Quantities of bombs, cartridges, and other munitions of war were brought to the electric-light works, stored there, and taken from there for distribution throughout the city to members of the revolutionary party. Some of the bombs were found by the Venezuelan authorities at the electric-light works in a room to which Bullis had a key, and in his private residence several firearms and a quantity of cartridges for Mauser rifles were found.

Bullis was arrested charged with a violation of the laws of Venezuela. He was tried in the municipal court of Santa Bárbara, convicted, and on November 8, 1900, was sentenced to an imprisonment of three months in the public jail. The case was appealed to the district court of Maracaibo, and the sentence of the lower court was affirmed on November 26, 1900, the court stating in its judgment, that " the guilt of said Henry C. Bullis is plainly proven." Through the intervention of the United States legation at Caracas, Bullis was liberated two weeks before the expiration of his sentence.

A claim is here presented on behalf of Bullis in the sum of $ 50,000 for wrongful arrest and imprisonment.

A careful examination of the evidence presented in this case convinces the Commission that Bullis was arrested, tried, and convicted in strict accordance with the laws of Venezuela, to which he was at the time subject, and in conformity with the usual procedure of its courts; that his trial was not unnecessarily delayed; that he was provided with counsel; that he was allowed to communicate with the representative of his Government; that there was no undue discrimination against him as a citizen of the United States, nor was there, in his trial, any violation of those rules for the maintenance of justice in judicial inquiries which are sanctioned by international law. It does not appear that he was subjected to any unnecessarily harsh or arbitrary treatment during his imprisonment.

The respondent Government has incurred no liability to this claimant. Every nation, whenever its laws are violated by anyone owing obedience to them, whether he be a citizen or a stranger, has a right to inflict the prescribed penalties upon the transgressor, if found within its jurisdiction; provided always that the laws themselves, the methods of administering them, and the penalties prescribed are not in derogation of civilized codes.

The claim must be disallowed.

MONNOT CASE

Where reasonable inquiry would have revealed that no suit would lie on the par of the Government for property alleged to have been wrongfully imported, an action for the damages caused by such suit will lie.

BAINBRIDGE, *Commissioner* (for the Commission):

The claimant is a native citizen of the United States. In November, 1899, he established a store at Amacura, British Guiana, for the purpose of supplying men employed by him in collecting balata gum, as well as for the sale of supplies and a general trading business. The town of Amacura is located in the territory awarded Venezuela by the Paris court of arbitration. On December 4, 1900, during Monnot's absence from Amacura, a commissioner of the collector of customs at Ciudad Bolívar came to Amacura, seized claimant's goods, and closed his store. A suit was initiated against Monnot before the judge of finance in Ciudad Bolívar on the charge of smuggling certain merchandise, but it was shown at the trial that the last shipment of goods received by him was on October 19, 1900, while the territory was still in British possession; whereupon a decree of dismissal was entered in the action on February 8, 1901, and upon appeal to the supreme court of finance in Caracas the judgment of the lower court was affirmed on March 16, 1903. The claimant states that in January, 1901, his representative having been expelled from Amacura, the Venezuelan authorities took and sold the greater part of his goods and removed the balance from his store; that as he had no means of supplying the large gangs of men employed by him with goods, and who were largely indebted to him for advances in cash and supplies, they took advantage of the situation and ran away, taking with them the gum they had gathered. He also claims that he had engaged men for the season of 1901 and was unable to put them to work, and as a consequence lost the profits for that year.

Mr. Monnot summarizes his claim as follows:

(1) Value of goods seized as per inventory	$ 2,433.97
(2) Amount lost in advances made to balata gatherers who ran away	5,974.07
(3) Value of the balata gum stolen by said men, 64,800 pounds, at 50 cents per pound	32,400.00
(4) Salaries paid to employees since December, 1900. to February, 1901, 3 months, at $ 225 per month	675.00
(5) One breech-loading shotgun and one revolver taken from my representative	135.00
(6) Expenses occasioned by the case, such as traveling	2,500.00
(7) Attorney's fees in Ciudad Bolivar, as per receipt, 7,800 bolivars	1,500.00
(8) Indemnity for personal time, attention, inconvenience, etc., occasioned in defense of the case	10,000.00
(9) Indemnity for the loss of the gathering season 1901, for which arrangements and contracts had been made	52,000.00
(10) Indemnity for the loss of all business prospects of my enterprise at Amacura	100,000.00
	207,618.04
Or less amount obtained by sale of goods remaining, sold by order of the court of Hacienda, paid my agent at Ciudad Bolívar, November 4, 1901	936.92
	206,681.12

The learned counsel for Venezuela interposes as a defense to this claim that the proceeding of the revenue officers in seizing the claimant's goods was in perfect accord with local legislation. But it is evident from the record in the case that a reasonable inquiry would have disclosed the fact that Monnot had imported the goods prior to the time the Government of Venezuela took possession of the territory. Mr. Monnot's representative testifies that at the time he made " energetic protests " against the seizure.

Only partial restitution was made to the claimant after the dismissal of the case. He is entitled to compensation for the proximate and direct consequences of the wrongful seizure of his property. In the similar case of Smith *v.* Mexico, decided by the United States and Mexican Commission of 1839 (4 Moore International Arbitrations, 3374), an award was made for the value of property lost or destroyed, pending the judicial proceedings, with a reasonable mercantile profit thereon.

Items 1, 4, and 5 of his claim are allowed. To this amount is added the sum of $ 2,000 for expenses incurred by him in consequence of the suit. From this total of $ 5,233.97 must be deducted the sum of $ 936.92, the amount obtained by sale of the goods restored by order of the court. Interest is allowed upon the balance of $ 4,297.05, at 3 per cent per annum, from December 4. 1900, to December 31. 1903, the anticipated date of the final award by this Commission.

As to the remaining items of the claim, the evidence is insufficient to establish any liability therefor on the part of the Government of Venezuela, and they are hereby disallowed.

BANCE CASE

A receiver in bankruptcy only acts as administrator of the property of the bankrupt party, and individual credits can not be considered as the private property of any creditor.

Claim dismissed without prejudice.

PAÚL, *Commissioner* (for the Commission):

Dr. J. B. Bance, as receiver in the bankruptcy of Ernesto Capriles. claims from the Government of Venezuela, on behalf of Weeks. Potter & Co., Seabury

& Johnson, and Johnson & Johnson, American creditors of this bankruptcy, the sum of 15,576 bolivars, which is the proportionate amount corresponding to them in a credit of 200,000 bolivars, held by Capriles against the Venezuelan Government, which credit is now judicially in the hands of the receiver for its collection.

The failure only deprives the bankrupt party of the administration of his property, which then goes to his creditors, represented by the receiver, but in no way does it alter the essence of the property, rights, and actions, which continue to belong to the said bankrupt until an agreement is arrived at, and, failing this, until the final liquidation and adjudication of the property amongst the creditors in proportion to their claims and according to their rank as judicially classified.

Ernesto Capriles, being a Venezuelan, all his property, rights, actions, and liabilities in the bankruptcy case are governed by the Venezuelan law, and are subject to the procedure and decision of the tribunal under which the bankruptcy is investigated.

The receiver, representing the creditors, only acts as administrator of the property of the bankrupt party, and it is not possible to consider any individual credits from the total estate as the private property of any one creditor.

For the above-mentioned reasons the collection of a credit originally owned and still owned by a Venezuelan citizen can not be admitted before this Commission, and therefore this claim must be dismissed for want of jurisdiction, without prejudice to the claimant as representative of the creditors of Capriles in his capacity of receiver.

UPTON CASE

Prayer that Government be compelled to acknowledge on its records claimant's performance with requisites of his contract with Government dismissed for want of jurisdiction.

The taking of private property for public use involves an obligation to compensate the owner.

A person assumes all risks, as well as advantages, of his residence abroad.

BAINBRIDGE, *Commissioner* (for the Commission):

On December 23, 1892, the Government of Venezuela granted a concession to José Trinidad Madriz for the "canalización y navigación por vapores calado del Río Tocuyo," and on the day following Madriz assigned said contract and concession to José Rafael Ricart. On May 1, 1897, the claimant herein, a native citizen of the United States, bought from Ricart, previously authorized by the Government to make the transfer, said concession and all rights and privileges connected therewith and granted thereby. It is alleged that all the foregoing instruments were duly recorded as provided by law.

The claimant avers that the concession referred to is of great value, to wit, more than $ 1,000,000, and that if in the future by reason of insurrection or other cause the Government of Venezuela shall violate the terms of said contract, or revoke it in fact or by obstruction to its operation, he would be damaged in that sum. He states, however, that he has heretofore ever found the Government inclined to recognize and in fact recognizing its obligations under and the validity of said contract. He alleges that he has fully complied with all the terms, conditions, and requirements of the concession on his part.

He asks as a preliminary item of his claim that this Commission shall establish as of record for the future the fact and decision confirming the acts of memo-

rialist, and directing the Government of Venezuela to make acknowledgment upon its official records of his compliance with the terms of the contract.

In regard to this item of the claim, it is sufficient to state that the Commission has no jurisdiction to grant the relief asked. It is clearly not a " claim " within the meaning and intent of the protocol of February 17, 1903, constituting this Commission.

The remaining items of the claim are enumerated as follows:

(*a*) Loss of the launch *Protector*	$ 3,500.00
(*b*) Loss of steel lighter	4,002.25
(*c*) Loss of steamer *Parupano*	8,714.75
(*d*) Loss of 575 sacks of coffee and all chattels at El Salto de Diablo	10,015.00
(*e*) Loss of money by expulsion of colonists	3,988.43
Total	30,220.43

(*a*) The steam launch *Protector* was bought by the claimant for his use in making trips from Puerto Cabello to the Tocuyo River and along the coast and had been thus used for a year or more. The boat was 40 feet long, 8½ feet beam, and 3½ feet draft. In 1900, while the claimant was in the United States, certain revolutionists armed and equipped a steamer on Lake Valencia and used her to molest the Government, whereupon Gen. Federico Escarra, administrator of the maritime customs at Puerto Cabello, seized the *Protector* against the protest of claimant's agent for the purpose of putting her on flat cars on the English railroad to take her to Lake Valencia, where, armed with Government guns and troops, she was to be used against the steamer of the revolutionary party. In transporting the launch to the railway she was so badly damaged by careless or inefficient handling as to be rendered totally useless.

Claimant alleges that she could not be repaired at Puerto Cabello, and that although he has diligently endeavored to do so, he has been unable to sell the boat or any part thereof; and he claims for her destruction the sum of $ 3,500.

It appears from the evidence that the Government paid the expenses of removing the launch from the streets of Puerto Cabello to a vacant lot where, it is alleged, the boat has remained absolutely useless ever since.

The seizure of the launch may have been justified by the necessities of the State, but it was a taking of private property for public use and involved the obligation of just compensation to the owner. The evidence is sufficient as to the fact of the taking of the boat and that as a result thereof it was rendered useless. But as the launch appears to have some value, and as it still remains the property of the claimant, an award of $ 3,000, with interest thereon at 3 per cent per annum from October 15, 1900, to December 31, 1903, is hereby made as compensation for the loss or damage sustained by the claimant upon this item.

(*b*) The claimant states that he is the owner of a duplicate steel hull with boiler intended for a flat-bottomed stern-wheel steamer or for use as a lighter, which was, in 1902, mounted on blocks and covered in the yard of the electric-light company at Puerto Cabello. In July of that year the military authorities of the Government, in order to resist an attack by revolutionists upon the city, constructed a line of barricades, and finding the said hull near the line of defense, filled it with, and piled thereon and about it, stones, rocks, and sand of great weight. It was discovered later that the weight thus put upon it greatly damaged the hull, and, upon complaint of the agent of the claimant, the stones, sand bags, etc., were removed by the Venezuelan authorities.

Memorialist asserts that said hull was rendered useless and that without it the boiler is a complete loss, and he asks an award in the sum of $ 4,002.25.

The evidence of various parties cognizant of the facts is presented showing the condition of the hull prior to its being used in the manner and for the purpose above described and the injury sustained, the witnesses stating that the hull was rendered useless for the purpose for which it was intended, and that the repairs will cost as much as to build a new one.

The same principle is applicable here as in the foregoing item. The right of the State, under the stress of necessity, to appropriate private property for public use is unquestioned, but always with the corresponding obligation to make just compensation to the owner thereof. It is believed, however, from all the evidence here presented, that the sum of $ 2,000, with interest thereon at 3 per cent per annum from July 15. 1902, to December 31, 1903, will fully compensate Mr. Upton for whatever loss or damage he has sustained on this item of his claim.

As to the remaining items of this claim it is evident from the claimant's own statement that the losses set forth in his memorial arose from the disturbed condition of the country, due to the civil war then existing in Venezuela, and not from any acts of the Venezuelan Government or its agents, specially directed against the claimant or his property. Under these circumstances the claimant's privileges and immunities were not different from those of other inhabitants of the country. He must be held, in going into a foreign country, to have voluntarily assumed the risks as well as the advantages of his residence there. Neither claimant nor his property can be exempted from the evils incident to a state of war to which all other persons and property within the same territory were exposed. As to these items, therefore, the claim must be disallowed.

DEL GENOVESE CASE

Award made in favor of claimant for back payments and for work done under contractual obligation, but no interest allowed on delayed payments because of written waiver of claimant.

PAÚL, *Commissioner* (for the Commission):

This claim is based on a breach of a contract entered into by Virgilio del Genovese, the claimant herein, and the Government of Venezuela, through its department of public works, on the 26th day of January, 1897, for the extension of West Ninth street, in this city.

The various items of the claim are as follows:

		Bolivars
First. Balance due, under contract, on account of sections first and second, completed and accepted, as per statement of director of the bureau of roads, etc., April 11, 1903		158,704.05
Second. Extra stonework and filling on sections first and second made necessary by increased length of culverts		32,370.53
Third. For work done to date of this claim (June 29, 1903) on section 3, which has not been fully completed because of failure on the part of the Government of Venezuela to make payments for completed works, as agreed, as follows:		
Total amount agreed to be paid on account of said section, as per article 3 of the contract	203,358.51	
Less amount necessary to complete unfinished portion of the work	4,000.00	
		199,358.51

		Bolivars
Fourth. Damages for delays due to arbitrary stoppages of the work by Venezuelan authorities (1,049 days, at 250 bolivars per day)		262,250.00
Fifth. Damages for indignities suffered and loss of mules, etc., March 2, 1903		25,000.00
Sixth. Interest for payments in arrears at 6 per cent per annum, as follows:		
Section 1. Balance due under contract, but not including extra work, 73,074.05 bolivars, from March 28, 1898, to date, in round numbers	21,600	
Section 2. Balance due under contract, not including extra work, 86,630 bolivars, due since June 19, 1900, 3 years, in round numbers	15,593	
Sections 1 and 2. Extra work done and accepted by Government, amounting to 32,370.53 bolivars	5,826	
		43,019.00
Grand total		720,702.09

From the examination of the documents joined to this claim and by the papers mentioned by the department of public works in its report referred to by the honorable agent for Venezuela in his reply, made before this Commission, the following facts appear proved:

That the Government of Venezuela on January 26, 1897, through the department of public works, made a contract with Mr. Virgilio del Genovese, for the extension of West Ninth street of this city. By article 2 of said contract del Genovese bound himself to begin the work on the construction of the culvert of the stream "Las Tinajetas" and its filling; that upon completion of this work he was to begin the construction of the culvert of the stream "El Tajamar" and its filling, and, this second part of the work completed, to begin that of the stream "Los Padrones" and its filling.

Article 3 of the same contract stipulated the total value of the work to be executed by del Genovese in the sum of 423,492.62 bolivars, distributed in the following way:

	Bolivars
First section	133,494.05
Second section	86,630.00
Third section	203,358.57

Article 5 stipulated that on the completion of each section the contractor should notify the department of public works so as to obtain the acceptance; that the payment of each one of the sections was to be made by weekly installments, to begin when the completed section had been received by said department, the office of which should determine the amount of each weekly installment. The progress of the work was to be regulated by the department of public works in such manner that the second section was to be constructed at the same time the payments for the first were being made, and the third section during the payments of the second, but the payment for no section should have begun until the preceeding had been liquidated; the payment for the third section to be made in a period proportionate to that of the two former, in relation to their respective estimates.

Article 8 stipulated that the work was to be inspected by an engineer appointed by the department of public works, and no trenches for foundations were to be filled in without the order of said employee.

Article 9 provided that the Government reserved to itself the right to modify the plans and other conditions of the work, and the differences which such modification could have produced in relation to the estimate should be calculated at the prices established in the sheet of conditions.

By article 10 the Government of Venezuela allowed Mr. del Genovese the importation free of custom duties of the machines and tools required for the construction of the work, and also granted to him the exoneration of one-half of the dues of the breakwater pier at La Guaira, and one-half of the freight on the La Guaira and Caracas Railway for the said machinery and tools, and for the cement to be used in said work.

From the information asked by the director of the section of roads and aqueducts of the department of public works on the 11th of April of this year it appears that the Government of Venezuela owes to Virgilio del Genovese the sum of 158,704.5 bolivars, balance of the price of the work executed for the extension of West Ninth street of this city, with specification of the price of the sections completed and delivered, according to the contract, and of the sums received by del Genovese on account of section first, as per the orders of payment issued in his favor by the department of public works on the national treasury, and personal payments made to del Genovese by the said department.

Mr. del Genovese found correct the liquidation made by the department of public works of the balance due him for the price of the two sections, first and second, completed and delivered. On August 6, 1900, Mr. del Genovese addressed to the secretary of public works a note, a copy of which has been presented, in the following terms:

Caracas, August 6, 1900.

Citizen Minister of Public Works:

I have the honor to address myself to you in order to advise you that, having completed, since the 19th of June of the current year, the work of the second section, according to the provisions of the contract which I celebrated with the Government of the Republic, I complied with the duty of communicating same to that department, begging that it should proceed, as was natural and just, to accept the work, but up to date this has not been done in spite of all my exertions, verbally and in writing to that end.

As it is now forty-eight days since said work was completed, without its having been accepted officially, which causes me serious material damages and moral uneasiness, I find myself in the indispensable and unavoidable position of requesting once more that you will be pleased to order whatever may be necessary for the official delivery of said work at the earliest possible moment.

I take the liberty of submitting to you, that if the consideration that, in accordance with the provisions of the contract, the value of the first section should be paid to me on the delivery of the second, this consideration ought no longer to delay the said acceptance, because my previous conduct may serve you as a guaranty that I shall know how to appreciate the difficult situation of the Government, and that I shall lend myself gladly to a just and equitable arrangement for the purposes of said payment, since my greatest desire is to begin the work on the third section in order to comply with what I have bound myself in said contract, and that the honor may be mine that this Government, which has given so many proofs of honesty, of progressive spirit, and of the desire to protect the honest and industrious people, and for which I have so much sympathy, may continue satisfied with me.

It is not beside the point to indicate to you that, according to the weekly reports which I have furnished to your department, I have given work daily to some forty laborers who are waiting for me to begin the third section in order to once more have an occupation and bread for themselves and their families.

Confident that all which I have submitted will determine your department to accede to my just request, believe me,

Your obedient servant, Virgilio DEL GENOVESE.

It can be seen, by the terms of this letter, the contractor considered in accordance with the contract an obstacle for the acceptance of the second section of the work by the department of public works, the fact of the first section not having been paid for, and by his own request the said department consented, as it appears from the documents presented, to receive said second section, continuing the periodical payments to del Genovese during the remainder of 1900, 1901 and 1902, to the amount of 21,600 bolivars for the first section, as shown by the liquidated account.

It has not been proved that there had been a breach of contract on the part of Venezuela, as the delay in the payment of the weekly installments that should have been made to del Genovese for the price of the two sections completed and delivered, were tolerated by him, and as it has already been stated, he said to the Government that the delay should not be a cause to stop the acceptance of the second section of the work, his past conduct being a guarantee that he knew how to appreciate the economical difficulties of the Government, and that he would gladly accept a just and equitable arrangement for the payment of said delayed installments.

The circumstance that the contractor again addressed the Government of Venezuela a letter dated March 20, of the current year, acknowledging that the work on the third section had been suspended for two years on account of the political state of the country, and that he was ready to resume said work, evidently proves that he was willing to suspend said work without being justified to make the Government of Venezuela responsible for a breach of contract which he now pretends to establish.

Regarding the balance due to Virgilio del Genovese by the Venezuelan Government, for the price of the first section and the whole price of the second section, amounting to the sum of 158,704.05 bolivars, it appears as shown in an account furnished to Mr. del Genovese under date of April 11, 1903, by the director of the bureau of roads, etc., in the department of public works, that the Government of Venezuela admitted to be due to the claimant, the said sum of 158,704.05 bolivars to that date.

From the evidence presented by the memorialist, it is proven that some extra work in the sum of 32,370.53 bolivars, specified in the affidavit sworn to by the civil engineer, J. Luch, executed by the contractor at the unit price specified in the sheet of conditions, really amounts to that sum and must be allowed.

From the documentary evidence presented by the claimant and also from the other documents recorded in the department of public works, which has been put at the disposal of this Commission for its examination, it is apparent that said department of public works was informed by del Genovese several times that he had prosecuted the work in its third section and, especially in his note of March 16, 1903, he informed the secretary of public works that on that date the work on the third section had been resumed. There exists in the record some orders from the secretary of public works, authorizing del Genovese to introduce free of duties a number of barrels of cement to be employed in the execution of the third section of the extension of West Ninth street. The memorialist admits that some work remains yet to be done for the conclusion of the third section, which he estimates, in conformity with the opinion of two contractors of public work, named José Rodriguez and Daniel Martinez Poleo, could be done for the sum of 4,000 bolivars.

This Commission, desiring to obtain all the necessary information about the value of the work that remained to be done for the completion of the third section, asked and obtained the learned opinion of Dr. Carlos Monagas, a Venezuelan engineer. After having taken in consideration that opinion, and

the careful examination of all the evidence presented by both parties, the Commission arrives at the conclusion that the sum of 30,000 bolivars must be deducted from the amount of 203,358.51 bolivars to be paid for said third section, as per article 3 of the contract.

The damages claimed for the stoppages of the work amounting to the sum of 262,250 bolivars, and the interest at 6 per cent per annum on the balance due for the price of the first and second sections which the claimant puts forth for 43,019 bolivars, must be disallowed, because the stoppage of the work has not been caused by arbitrary action of the Government of Venezuela, but by the natural consequences of the civil war, which were admitted by the same contractor as justified, as it appears from his correspondence with the department of public works.

The damages for indignities suffered and for loss of mules, etc., on March 2, 1903, amounting to 25,000 bolivars, can not be taken into consideration, as the fact on which this part of the claim is founded appears to consist in an act of highway robbery that can not affect the responsibility of the Government of Venezuela.

For the aforesaid reasons an award is made in favor of Mr. Virgilio del Genovese for the sum of $ 70,083.28 United States gold, without interest.

La Guaira Electric Light and Power Co. Case

Claim for breach of contract by municipal corporation disallowed as against General Government because of dual entity of public corporation. It acquires property and makes contracts therefor as an individual, and the National Government can not therefore be held accountable.

Bainbridge, *Commissioner* (for the Commission):

It appears from the evidence that on October 19, 1893, the municipal council of La Guaira, in ordinary session, approved a contract granting to one Luis J. García the privilege of establishing an electric-light plant in that city. The contract was executed on behalf of the city by " Rafael Ravard, chairman of the municipal council of the district of Vargas, sufficiently empowered by this corporation, " and by Luis J. García, " a resident of this city," on the other part.

On October 11, 1895, Luis J. García transferred to his brothers, Juan B. and Antonio García, all the rights and privileges possessed by the former under the contract. Juan B. García and others incorporated the claimant company under the laws of the State of West Virginia on October 17, 1895.

By the fourth article of the contract of 1893, it was provided that the work to establish the plant was to begin within six months and to be finished within ten months. The twelfth article provided that the contract was to run twenty-five years and the municipality bound itself not to grant to anyone for the district of Vargas equal or better rights for the public lighting or to make any contract relating to any illumination.

In April, 1894, Luis J. García was granted an extension of six months to begin the work of installing the plant; again, in March, 1895, another extension of four months was granted him by the municipal council, and still another extension of six months on June 8, 1895.

The minutes of the municipal council of La Guaira, under date of December 27, 1897, show an entry to the effect that all efforts of that body and of the mayor have been useless to obtain the fulfillment of the contract made with

Luis J. García. On December 31, 1897, the municipal council approved a contract with F. Martinez Espino & Co., of Caracas, for the establishment of electric lighting.

On January 23, 1900, in the court of first instance at Petare, in a certain action entered by the La Guaira Electric Light and Power Company against the municipal council of the Vargas district, a settlement of said litigation was effected and made of record whereby F. Martinez Espino & Co. transferred to the La Guaira Electric Light and Power Company all the rights and privileges of the contract executed December 31, 1897, with the council of the Vargas district, and as a compensation for this transfer the La Guaira Electric Light and Power Company recognized the right of Espino & Co. to receive 5 per cent of the shares issued by the cessionary company; and by the fourth article of the settlement the municipal council of the Vargas district and J. B. García, as attorney for the La Guaira Electric Light and Power Company, " agreed to rescind the contract which with the same purpose was executed under date of October 19, 1893, between the said municipal council and Luis J. García, remaining only in force the one caused by this cession." In November, 1897, the municipality had brought suit in the court at Petare for the cancellation of the contract of October 19, 1893. And as indicating the scope of the settlement effected on January 23, 1900, the following is quoted from the judicial record:

> This tribunal gives its approval to this transaction (i. e., the settlement), interposing for its greatest force its authority and judicial decree; and resolves, according to the request, to make appear in the file that the action entered by the municipal council of the Vargas district against the La Guaira Electric Light and Power Company for the abrogation of a contract about electric light, that this settlement has been entered into.

The fifth article of the contract with Espino & Co., referred to in the settlement as being the only one thereafter remaining in force, reads as follows:

> The work for installation of the company must be started six months from date of this contract (i. e., December 31, 1897) and ended six months after started. This time could be extended for cause of superior force. The failure to comply within the time stipulated will make this contract abrogated.

However, it was agreed in the settlement effected in court on January 23, 1900, that —

> as a natural result of this transaction the parties hereto have agreed that the time stipulated in the contract transferred will begin to count from this date.

At an extra session of the municipal council of the department of Vargas, held on January 24, 1901, a resolution was passed that the contract with the La Guaira Electric Light and Power Company had ceased de facto, according to the fifth article thereof.

On February 25, 1901, the municipal council of La Guaira ratified a contract for electric lighting, executed on December 12, 1899, with Messrs. Perez and Morales.

On March 6, 1901, J. B. García, as attorney for the La Guaira Electric Light and Power Company, protested against the action of the municipal council in canceling the contract of which said company was cessionary, as per the judicial settlement of January 23, 1900, and against the refusal of the council to grant the extensions requested for beginning the work, and claiming that the state of civil war and latterly the earthquake of October 29, 1900, had prevented compliance with the contract and rendered necessary the extensions of time asked. He insisted in the protest that, supposing the company were in

fault, the council " could only have an action to ask for the abrogation of the contract before the courts of justice, as the contract is mutual."

Substantially upon the foregoing facts a claim is presented here on behalf of the La Guaira Electric Light and Power Company against the Republic of Venezuela for the sum of $ 1,500,000. But the memorialist states:

> The company is willing, however, on condition that the Republic of Venezuela and the municipalities concerned act in a friendly spirit, paying damages sustained through actual destruction of property, and regranting its charter so that its rights may be extended for a period to compensate for the interruption and destruction of its business, that then the loss of profits specified shall be waived and the sum of $ 150,000 for actual loss of property in that event received.

The memorial is couched in somewhat vague and indefinite terms. Various interruptions of the company's service are alleged and certain unpaid indebtedness from the municipality to the company is set forth. An alleged arrest of all the employees of the company on one occasion and their detention " in the calaboose " over night is charged, and it appears that J. B. García was arrested on April 4, 1898, and confined for a period of twenty-four days, the only excuse for his confinement being that he was a political suspect. Since February 23, 1899, said García has been a citizen of the United States. As nearly as can be ascertained from all the evidence presented the injuries to property complained of occurred during the years 1897, 1898 and 1899, prior, it is to be observed, to the settlement of differences between the company and the municipality effected and made of record in the court of first instance at Petare on the 23d of January, 1900.

The contract of the claimant company then in force was declared null and void de facto " according to the fifth article thereof " by the municipal council on January 24, 1901.

The protest of the company made on March 6, 1901, was against the refusal of the council to grant extensions requested for beginning and executing the work as provided by that article. It is not claimed that the contract had been complied with, but that the state of civil war and the earthquake of October 29, 1900, had prevented compliance and rendered necessary the extensions asked. The protest seeks to " reserve all the rights of the company about the matter, to make them valuable before the tribunals of the Republic against the said municipal council."

Except as hereinafter stated, the Government of Venezuela does not appear in any contract or proceeding relating to this company. The parties to the various contracts and judicial proceedings were the municipal council of the district of Vargas and the claimant. But it is sought here to hold the National Government liable for the acts of the municipality as one of the political subdivisions of the State. No evidence is introduced to fix such liability by reason of special legislative or administrative control exercised by the National Government over the municipality. The learned counsel for the United States argues that by the protocol constituting this Commission all citizens of the United States who possessed claims were given the right of recourse against the entity which entered into this international agreement, and that under this agreement the various political subdivisions of the Government of Venezuela were included; and further, that there is in this case no remedy but against the Federal Government, which by signing the protocol has obligated itself to redress the wrongful acts of municipalities as well as other constituted parts of its power.

The argument, however, overlooks the dual character of municipal corporations; the one governmental, legislative, or public; the other proprietary or private.

In their public capacity a responsibility exists in the performance of acts for the public benefit, and in this respect they are merely a part of the machinery of government of the sovereignty creating them, and the authority of the State is supreme.

But in their proprietary or private character their powers are supposed to be conferred, not from considerations of state, but for the private advantage of the particular corporation as a distinct legal personality. (Bouvier Law Dict., Rawle's ed., Vol. II, 453.)

Those matters which are of concern to the State at large, although exercised within defined limits, such as the administration of justice, the preservation of the public peace, and the like, are held to be under legislative control, while the enforcement of municipal by-laws proper, the establishment of gas works, waterworks, construction of sewers, and the like, are matters which pertain to the municipality as distinguished from the State at large. (*Ibid.*)

The contract between the municipal council and the claimant company for the establishment of the electric-light plant was entered into by the former solely in the exercise of its proprietary functions as a distinct legal personality. Its act was in nowise connected with its governmental or public functions as a political subdivision of the State. So far as the contract is concerned, the municipality is to be regarded as neither more nor less than a private corporation and as such could sue or be sued in respect thereof. (Dillon's Mun. Corp., sec. 66.)

It is fundamental that citizens or subjects of one country who go to a foreign country and enter into contracts with its citizens are presumed to make their engagements in accordance with and subject to the laws of the country where the obligations imposed by the contract are to be fulfilled, and are ordinarily remitted to the remedies afforded by those laws for the redress of grievances resulting from breaches or nonfulfillment of such contracts.

It is only when those laws are not fairly administered, or when they provide no remedy for wrongs, or when they are such as might happen in very exceptional cases as to constitute grievous oppression in themselves, that the State to which the individual belongs has the right to interfere in his behalf. (Hall, Int. Law, p. 291, sec. 87.)

In order to bring this claim within the jurisdiction of the Commission, it was, in our judgment, incumbent upon the claimant to show a sufficient excuse for not having made an appeal to the courts of Venezuela open to it, or a discrimination or denial of justice after such appeal had been made. As the claim stands it is merely a dispute between a citizen of the United States and a citizen of Venezuela in regard to their respective rights under the terms of a certain contract. It has not the necessary basis for an international reclamation. The case is very different from one in which the Government itself has violated a contract to which it is a party. In such a case the jurisdiction of the Commission under the terms of the protocol is beyond question. All that is decided here is that the Commission has no jurisdiction of the claim of the La Guaira Electric Light and Power Company in its present status, and the said claim, except as hereinafter stated, is hereby dismissed on that ground without prejudice to the rights of either the claimant company or the municipality concerned.

But it appears in evidence that on July 7, 1894, the National Government made a contract with Luis J. García "for himself and for the company which he may organize" by which the said García or his company agreed to provide electric light for the custom-house and other public buildings at La Guaira, the Government agreeing to pay to García or to the company for such service the sum of 2,000 bolivars monthly. The claimant herein alleges that there is

due from the National Government according to this contract for services rendered from July 1 to December 1, 1897, the sum of $ 2,307.69. This indebtedness is not denied by the Government of Venezuela, and an award is therefore made for said sum with interest thereon at 3 per cent per annum from December 1, 1897, to December 31, 1903, the anticipated date of the final award by this Commission.

RUDLOFF CASE

INTERLOCUTORY DECISION

(By the Umpire:)

The protocol requiring that claims shall be considered upon the basis of absolute equity, the Commission in doing equity has the right to examine and determine whether the provision of a contract requiring all disputes to be submitted to the local courts is equitable under the circumstances, and, in this case, the contract provision being found to work inequitably, jurisdiction of the claim is entertained.

DECISION ON MERITS

(By the Commission:)

A contract entered into by the minister of public works of the nation and the governor of the Federal District duly authorized by the Chief Executive of the nation, is to be considered as a contract made by the National Government, especially where the National Government entered into an agreement as to free entry of materials for the fulfillment of the contract.

Consequential damages disallowed.

Award made for value of property arbitrarily destroyed.

No sufficient evidence as to value of concession having been submitted, claim for loss on this ground disallowed.

BAINBRIDGE, *Commissioner* (claim referred to umpire on preliminary question of jurisdiction:)

The Government of Venezuela demurs to the jurisdiction of the Commission in respect to the above-entitled claim, and bases its demurrer on the following grounds:

First. That on May 6, 1901, Sofia Ida Wiskow Rudloff and Frederick W. Rudloff sued the nation before the Federal court in order to compel it to pay them, in their capacities as heirs of Henry J. Rudloff, the sum of 3,698,801 bolivars for damages originating in an alleged breach of the contract entered into between their predecessor in interest, the said Henry J. Rudloff and the Government of Venezuela, for the construction of a market building in Caracas. It is argued that as the claimants sought the jurisdiction of the tribunals of Venezuela to submit to them their claim, a voluntary and deliberate act on their part, they have submitted themselves to the provisions of local legislation, both substantive and adjective, in all and everything that might pertain to the suit; that the Federal court has assumed jurisdiction over and decided the claim; that the parties have both appealed from the decision of the court and the court of appeals has taken cognizance of the matter, that article 216 of the Code of Civil Procedure in force provides: " If the discontinuation is limited to the proceedings, it can not be had without the consent of the opposite party", and that the defendant Government not having given its consent for the discontinuance in the manner in which the claimants have done so, the claimants

can not withdraw the claim from the jurisdiction from the Federal court in order to submit it to the Commission.

Second. That article 12 of the aforesaid contract provides that:

> The doubts and controversies that may arise on account of this contract shall be decided by the competent tribunals of the Republic in conformity with the laws and shall not give reason for any international reclamations,

and that the case of a denial of justice can not be alleged because the court of first instance has decided the case favorably to the claimants, and the jurisdiction of the tribunals of the Republic has not been exhausted in the litigation.

These two grounds of demurrer will be considered here in the order stated, but it is to be remarked at the outset that the Commission as a court of last resort is the sole and conclusive judge of its own jurisdiction. Mr. Webster, then Secretary of State, said, in relation to the United States and Mexican Commission of 1839, that it was

> essentially a judicial tribunal with independent attributes and powers in regard to its peculiar functions,

and that

> its right and duty, therefore, like those of other judicial bodies, are to determine upon the nature and extent of its own jurisdiction, as well as to consider and decide upon the merits of the claims which might be laid before it.[1]

The determination by the Commission of the objections to its jurisdiction raised by the Government of Venezuela, as above set forth, is clearly within the scope of its delegated authority.

In determining the first objection, certain material facts must be borne in mind. On the 6th of May, 1901, the claimants brought suit in the chamber of first instance of the Federal court against the Government of Venezuela. The suit proceeded to trial and judgment which was entered on the 14th of February, 1903. On February 16, 1903, the attorney-general, on behalf of the Government, appealed from the judgment, and on the same day the claimants appealed from it. The case thus remains pending in the courts.

The parties to an action pending in court may always by agreement submit the whole or any part of the matter or matters in issue to arbitration. Indeed, the submission to arbitration, in the absence of collusion or fraud, is favored by courts upon broad grounds of public policy. This principle of arbitration enters into and forms a part of every civilized code of jurisprudence, and to this rule the jurisprudence of Venezuela is no exception. Article 493 of the Venezuelan Code of Civil Procedure provides:

> In any condition of the case in which the parties may signify a wish to have it submitted to arbitrators, the course of proceeding shall be suspended and the case immediately passed over to those named.

The rule above stated is the same, so far as it touches the question here, where the arbitration is between nations and the submission concerns a private claim. Only the Government of the claimant, acting in his behalf, enters into the agreement for arbitration.

In this case the parties to the action pending in the local tribunals are on the one hand the claimants, citizens of the United States as plaintiffs, and the Government of Venezuela on the other as defendant. Have these parties litigant agreed to submit the cause to the arbitration of this international tribunal? If they have, the agreement is binding upon both.

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[1] Moore's Arbitrations, 1242; Senate Ex. Doc. 320, 27th Cong., 2d sess., 185.

The appeal was taken by both parties from the judgment of the lower court on February 16, 1903. On the following day the Government of Venezuela signed the protocol constituting this Commission, and by that act agreed to submit to the arbitrament of this tribunal:

> All claims owned by citizens of the United States of America against the Republic of Venezuela which have not been settled by diplomatic agreement or by arbitration between the two Governments.

Nothing could be clearer than the language thus employed to define the scope of the jurisdiction conferred, or than that the jurisdiction conferred is inclusive of such a claim as this one of the Rudloff heirs against the Venezuelan Government. The signing of the convention by the two Governments was in the solemn exercise of the highest prerogative of sovereignty, and it is the duty of the Commission to so interpret the terms of the convention, and, under its oath, so to act as to give effect to the intention, thus unequivocally expressed, of the high contracting parties.

Vattel, speaking of the interpretation of treaties, says:

> The interpretation which renders a treaty null and without effect can not be admitted. It ought to be interpreted in such a manner as it may have its effect, and not to be found vain and nugatory. (Vattel, book 2, ch. 17, sec. 283.)

The claim presented here is a claim owned by citizens of the United States of America against the Republic of Venezuela. It has not been settled by diplomatic agreement or by arbitration. The Government of Venezuela has in the most solemn manner agreed to submit such claims to the jurisdiction of this Commission, under the plain terms of the convention of February 17, 1903. The claimants, availing themselves of the action of their Government in their behalf, agree to submit their claim to the jurisdiction of this Commission by its presentation here.

The identical objection to the jurisdiction was urged in the case of Selwyn *v.* Venezuela before the British and Venezuelan Claims Commission now in session at this capital. In sustaining the jurisdiction of the Commission, Plumley, umpire, said:

> International arbitration is not affected jurisdictionally by the fact that the same question is in the courts of one of the nations. Such international tribunal has power to act without reference thereto, and if judgment has been pronounced by such court to disregard the same, so far as it affects the indemnity to the individual, and has power to make an award in addition thereto or in aid thereof, as in the given case justice may require. Within the limits prescribed by the convention constituting it, the parties have created a tribunal superior to the local courts.[1]

In fact the law which governs this Commission, and which it must apply in the exercise of its functions, is not the municipal law of either of the contracting nations, but it is that paramount code which is obligatory upon both.

Says Hall (4th Ed., p. 1):[2]

> International law consists in certain rules of conduct which modern civilized states regard as being binding on them in their relations with one another with a force comparable in nature and degree to that binding the conscientious person to obey the laws of his country, and which they also regard as being enforceable by appropriate means in case of infringement.

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[1] See p. 323; see also the Italian - Venezuelan Commission (Martini Case) in Volume X of these *Reports*.

[2] See the German - Venezuelan Commission (Kummerow *et al.*, opinion of Umpire) in Volume X of these *Reports*.

These rules of conduct recognize the right and duty of a state to protect its citizens or subjects at home or abroad, and the corresponding obligation of a state to make due reparation and give just compensation for injuries inflicted upon another state, or upon its citizens or subjects. And whenever two independent nations have by solemn compact provided a forum to determine the extent of the injuries inflicted by the one upon the other, and the means of redress therefor, the legislation of neither of the contracting parties can interpose to limit or defeat the jurisdiction of that forum in respect of any matter fairly within the purview of the compact. The two Governments have for the purposes expressed created a tribunal superior to the local courts —

an independent judicial tribunal possessed of all the powers and endowed with all the properties which should distinguish a court of high international jurisdiction, alike competent, in the jurisdiction conferred upon it, to bring under judgment the decisions of the local courts of both nations, and beyond the competence of either Government to interfere with, direct, or obstruct its deliberations. (Moore, 2599.)

The second objection to the jurisdiction of the Commission raised by the Government of Venezuela is based upon article 12 of the contract, which reads as follows:

The doubts or controversies that may arise on account of this contract shall be decided by the competent courts of the Republic, in conformity with the laws, and shall not give reason for any international reclamation.

The memorial states that, pursuant to an order of the national Executive, the governor of the Federal district placed the contract in question before the municipal council, who, on September 8, 1903, by a decree, declared it null, and authorized the governor to take possession of the market and demolish the work done by Rudloff, and that this decree was carried out by the public functionaries, notwithstanding the protests of Mr. Rudloff. For the purpose of this preliminary inquiry as to jurisdiction, the statements in the memorial are to be considered as true, the sole question for the present being whether, if true, this Commission can take cognizance of the claim.

In regard to that portion of article 12 of the contract inhibiting international reclamation, it is perfectly obvious that under established principles of the law of nations such a clause is wholly invalid. A contract between a sovereign and a citizen of a foreign country not to make matters of differences or disputes arising out of an agreement between them or out of anything else the subject of an international claim, is not consonant with sound public policy and is not within their competence. In the case of Flanagan, Bradley, Clark & Co. *v.* Venezuela, before the United States and Venezuelan Commission of 1890, Mr. Commissioner Little said:

It (i.e., such a contract) would involve, pro tanto, a modification or suspension of the public law, and enable the sovereign in that instance to disregard his duty toward the citizen's own government. If a state may do so in a single instance, it may in all cases. By this means it could easily avoid a most important part of its international obligations. It would only have to provide by law that all contracts made within its jurisdiction should be subject to such inhibitory condition. For such a law, if valid, would form the part of every contract therein made as fully as if expressed in terms upon its face. Thus, we should have the spectacle of a state modifying the international law relative to itself. The statement of the proposition is its own refutation. The consent of the foreign citizens concerned can, in my belief, make no difference — confer no such authority. Such language as is employed in article 20, contemplates the potential doing of that by the sovereign toward the foreign citizen for which an international reclamation may rightfully be made under ordinary circumstances. Whenever that situation arises — that is, whenever a wrong occurs of such a character as to justify diplomatic interference — the government of the

citizen at once becomes a party concerned. Its rights and obligations in the premises can not be affected by any precedent agreement to which it is not a party. Its obligation to protect its own citizen is inalienable.[1]

The contingency suggested by Commissioner Little appears to have happened in the case of Venezuela, since article 139 of the constitution of 1901 provides that the inhibitory condition against international reclamation shall be considered as incorporated, whether expressed or not, in every contract relating to public interest, and essentially the same provision was embodied in article 149 of the constitution of 1893. These constitutional provisions and legislative enactments of like nature are, however, clearly in contravention of the law of nations; they are pro tanto modifications or suspensions of the public law, and beyond the competence of any single power. For every member of the great family of nations must respect in others the right with which it is itself invested. And the right of a State to intervene for the protection of its citizens whenever by the public law a proper case arises can not be limited or denied by the legislation of another nation. Mr. Justice Story says:

> The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation within its own jurisdiction. And however general and comprehensive the phrases used in our municipal laws may be, they must always be restricted in construction to places and persons upon whom the legislature have authority and jurisdiction. (The *Apollon*, 9 Wheaton, 362.)

The subject of international reclamation is by its very terms outside the legislative jurisdiction of any one nation. And it is, furthermore, an utter fallacy to assert that this principle is an encroachment upon national sovereignty. That nation is most truly sovereign and independent which most scrupulously respects the independance and sovereignty of other powers.

Neither is it within the power of a citizen to make a contract limiting in any manner the exercise by his own government of its rights or the performance of its duties. A state possesses the right and owes the duty of protection to its citizens at home and abroad. The exercise of this right and the performance of this duty are as important to the state itself as the protection afforded may be to the individual. The observance of its obligation is fundamental and vital to every government. An injury to one of its citizens is an injury to the state, which punishes for infraction of municipal law and demands redress for violation of public law upon broad grounds of public policy. The individual citizen is not competent by any agreement he may make to bind the state to overlook an injury to itself arising through him, nor can he by his own act alienate the obligations of the state toward himself except by a transfer of his allegiance.[2]

There remains to be considered that portion of article 12 of the contract which provides that —

> the doubts and controversies that may arise on account of this contract shall be decided by the competent courts of the Republic in conformity with the laws.

Assuming, for the purposes of the examination, but in no wise admitting, that this portion of the article refers to such a case as is presented here, it must be apparent that the obligations of the article bore equally and reciprocally upon both parties to the contract — upon the Government of Venezuela as well as upon the claimants — and that when the Government, without resort

[1] Opinions of Commission of 1889-90, p. 451; Moore's Arbitrations, p. 3566.

[2] See also upon this point the Italian - Venezuelan Commission (Martini Case, opinion of Umpire) in Volume X of these *Reports*.

to the tribunals of the Republic, declared the contract null, the claimants were absolved from all obligations, if any had theretofore existed in that behalf.

In the great case of the Delagoa Bay Company,[1] the Government of the United States said, in reply to a similar objection raised by Portugal, that it was not within the power of one of the parties to an agreement first to annul it and then to hold the other party to the observance of its conditions, as if it were a subsisting engagement. It is contrary to every principle of natural justice that one party to a contract may pass judgment upon the other, and this is no less true when the former is a government and the latter is a foreign citizen. Public law regards the parties to a contract as of equal dignity, equally entitled to the hearing and judgment of an impartial and disinterested tribunal.

> The acts of a sovereign [says Mr. Wheaton, a very high authority], however binding on his own subjects, if they are not conformable to the public law of the world, can not be considered as binding on the subjects of other states. A wrong done to them forms an equally just ground of complaint on the part of their government, whether it proceed from the direct agency of the sovereign or is inflicted by the instrumentality of his tribunals. (Wharton's Int. Law Dig., sec. 242.)

It is undoubtedly true that citizens or subjects of one country who go to a foreign country and enter into contracts with its citizens are presumed to make their engagements in accordance with and subject to the laws of the country where the obligations of the contract are to be fulfilled, and ordinarily can have recourse to their own government for redress of grievances only in case of a denial of justice. But as was forcibly stated by Mr. Cass, Secretary of State of the United States:

> The case is widely different when the foreign government becomes itself a party to important contracts, and then not only fails to fulfill them but capriciously annuls them, to the great loss of those who have invested their time, and labor, and capital from a reliance upon its own good faith and justice.[2]

It is just such a " widely different case " that is presented here. It is just such a case that is within the terms of Article I of the protocol, defining the jurisdiction of this Commission. And in my judgment the Commission can not refuse to take cognizance of this claim without disregarding its solemn oath —

> carefully to examine and impartially decide according to justice and the provisions of said convention all claims submitted to it in conformity with its terms.

Prima facie, the memorial presents the case of a wrongful annulment, by the arbitrary act of the Venezuelan Government, of a contract to which it was a party, injuriously affecting the rights of the other party thereto, who was a citizen of the United States. Manifestly, the first part of article 12 of the contract relates solely to questions growing out of the agreement itself, and can not be construed to apply to a claim resulting from the capricious annulment of the agreement by one of the parties. Such a claim does not rest upon any doubts or controversies arising out of the contract, but is based upon the fact that the claimants have been deprived of valuable rights, moneys, property, and property rights by the wrongful act of the Government of Venezuela, which they were powerless to prevent and for which they claim compensation. The " doubts and controversies " referred to in article 12 obviously relate to questions affecting the interpretation of the contract, to questions whether it was being or had been complied with, and the like. As to such matters the parties, by that article, mutually agreed to have recourse to the local tribunals. But when the Government, on whatever grounds of policy, saw fit to abrogate

[1] Moore's Arbitrations, p. 1865.
[2] Wharton, International Law Dig., sec. 230, Vol. II, p. 615.

the contract itself, and then to appropriate or to destroy the property or the property rights of the claimants, it must be held to have done so subject to the obligation to make full and adequate reparation and in full recognition of the right of the claimants, as citizens of the United States, to seek the intervention of their Government for their protection.

The term " property " embraces every species of valuable right and interest, including real and personal property, easements, franchises, and hereditaments.

Property is again divided into corporeal and incorporeal. The former comprehends such property as is perceptible to the senses, as lands, houses, goods, merchandise, and the like; the latter consists in legal rights, as choses in action, easements, and the like. (Bouvier's Law Dict., Rawle's ed., Vol. II, p. 781.)

The law of Venezuela recognizes that property rights may rest in contracts. Article 691 of the civil code provides:

La propiedad y demás derechos se adquieren y transmiten por sucesión, por donación y por efecto de los contratos.

The taking away or destruction of rights acquired, transmitted, and defined by a contract is as much a wrong, entitling the sufferer to redress, as the taking away or destruction of tangible property; and such an act committed by a government against an alien resident gives, by established rules of international law, the government to which the alien owes allegiance and which in return owes him protection, the right to demand and to receive just compensation. Such an act constitutes the basis of a " claim " clearly within the meaning and intent of the convention constituting this Commission.

In addition to the foregoing it may be said the presence of article 12 in the Rudloff contract is obviously due to the constitutional and legislative provisions requiring it. The protocol, which is the fundamental law of this tribunal, however, provides that:

The Commissioners, or, in case of their disagreement, the umpire, shall decide all claims upon a basis of absolute equity, without regard to objections of a technical nature or the provisions of local legislation.

I am of the opinion that this claim is within the jurisdiction of this Commission, and that its careful examination and impartial decision constitute a solemn duty which the Commission can not with propriety either evade or ignore.

PAÚL, *Commissioner* (claim referred to umpire on preliminary question of jurisdiction):

The honorable agent for the United States presented to this Commission a memorial signed by Sofia Ida Wiskow de Rudloff and Frederick W. Rudloff, citizens of the United States, and heirs of Henry Frederick Rudloff, deceased, in which memorial said heirs claim from the Republic of Venezuela the payment of the sum of 3,698,801 bolivars, with interest, for the loss of capital and damages caused by the abrogation of certain contract made between said Henry Frederick Rudloff and the minister of public works and the mayor of the Federal district, published in the Official Gazette, No. 5717, of February 8, 1893, which contract had for its object the construction of a new market building in the San Jacinto square, this city.

The honorable agent for Venezuela, in his reply to the above-mentioned memorial, presented to this Commission, as a previous and special question to be decided, the exception against jurisdiction, based on the following reasons:

That on May 8, 1901, the same claimants, represented by Dr. Ascanio Negretti, sued the Venezuelan Government before the Federal court for the

payment of the same amount and on the same basis that they now present to this Commission;

That the claimants having chosen the jurisdiction of the Federal court and submitted themselves to its decision, it is evident that they also accepted the dominion of the local legislation, substantive as well as adjective, in connection with the action brought by them against the Government of Venezuela, with the special circumstance that, by article 12 of the contract presented as evidence by the claimant, the contracting party agreed that —

all doubts and disputes arising by reason of said contract should be decided by the tribunals of the Republic, and said disputes could never give reason for international reclamations.

That the hall of the first instance of the Federal court having taken cognizance of and decided the said action, and both parties having appealed from its decision, the same Federal court in its hall of the second instance has this matter under its judicial notice at the present time; and Venezuela, that is to say, the defendant party, not having consented to the withdrawal of the suit from the jurisdiction of that high tribunal in order to have it submitted to this Commission, the latter consequently lacks jurisdiction; and, finally, that the case of denial of justice could not be alleged, since, not only has the court of the second instance not yet given a judgment that could cause definite execution in the case, but the decision rendered by the first instance of the Federal court was favorable to the claimants.

The question of jurisdiction in this case evidently is a matter of interpretation of the terms of the first article of the protocol dated February 17, 1903, signed at Washington by the Secretary of State of the United States of America and the plenipotentiary of Venezuela, that had for its object to submit to arbitration all the claims not settled, owned by citizens of the United States against the Republic of Venezuela.

The exact terms of said article are as follows:

All claims owned by citizens of the United States of America against the Republic of Venezuela which have not been settled by diplomatic agreement or by arbitration between the two Governments, and which shall have been presented to the Commission hereinafter named, by the Department of State or its legation at Caracas, shall be examined and decided by a mixed commission which shall sit at Caracas, etc.

The general terms in which this article defines the jurisdiction of this tribunal are apt to be interpreted in such a way that the scope of the faculty intended to be given to the Commission comprised all claims owned by citizens of the United States against the Republic of Venezuela that had been the object of diplomatic correspondence between the two Governments without having reached a final settlement, or that were unknown to both Governments; but this amplitude of jurisdictional scope does not in any way interfere with the principles of common law and sound logic, which naturally exclude, because of nature and peculiar circumstances, certain questions or pretensions of those parties that consider themselves entitled to claim from the Republic of Venezuela from being presented, examined, or decided by this Commission. For instance, the above-mentioned article does categorically state that those questions or claims of citizens of the United States against the Republic of Venezuela that had already been submitted to the ordinary tribunals of the country and had been the object of definite executory judgment, and against which there has not been invoked as a basis for a new and different claim a denial of justice or evident injustice were excluded from the jurisdiction of this Commission, and notwithstanding that these claims could not be considered as settled by *diplomatic agreement or by arbitration between both Governments*, it is an indisputable fact that

such questions or pretensions do not constitute a claim susceptible of submission to the examination and decision of this Commission.

In the meaning of the word " claim " it is indispensable to admit as a consubstantial element the idea of controversy between the Government of Venezuela and the claimant. That controversy, as in the present case, arises from a contract, and has been submitted for its definite decision to the jurisdiction of a tribunal of the Republic, which, according to the laws of the country and by the special articles of the same contract, has full jurisdiction to decide whether or not there exist responsibilities and obligations in favor of either party, and the stage of the proceedings of the action in that case determine that it is not a claim of a Government against another Government to obtain satisfaction for a damage caused to the interests of one of its citizens, but it enters upon that condition of every question which is the object of a civil action in which concur all the elements and means accorded by the laws for the dilucidation and protection of the rights of both parties.

The Washington protocol could not have for its object the withdrawal from the decision of the tribunals of the Republic the judicial disputes that had been already submitted to them when it is natural to suppose that it had no other object than to facilitate, by means of the Mixed Commission, the definitive decision of those claims that had been already object of diplomatic dissension between the two Governments and about which a settlement had not been reached by agreement or arbitration. The act of making nugatory the laws of the Republic which are a part of its constitutional statute in regard to contracts and in regard to the jurisdiction of its tribunals, thus opposing the terms of the express contractual conditions that oblige the parties to submit all questions arising from said contract to the courts of the country without same ever becoming a cause for international claims, would have been a transgression on the legitimate powers with which the plenipotentiary of Venezuela was invested, which powers could never have made ineffectual the constitutional precepts established in the fundamental charter of 1901 that was in force at that date of the signing of the protocol. It is not then possible to admit an interpretation of the terms of said protocol that is not in perfect accordance with the fundamental basis of the national sovereignty exercised through its tribunals of justice, and in accordance with the universal principles that establish as supreme law to the parties in contracts and obligations, the judicial ties established by themselves in the exercise of their free will, and as a law to the contract.

It was in the exercise of this liberty, it was in the observance of the laws of the Republic that were known to Sofia I. W. de Rudloff and Frederic Henry Rudloff which laws they were obliged to comply with, as well as to the very special clause 12 of the said contract, on which they found their claim; and it was also in view thereof, that the Department of State of the United States of America, which under its constant rule of nonintervention in disputes arising form contracts between its citizens and foreign countries until after having availed themselves of all the remedies which the laws of such country afforded for the protection of their rights, instructed the claimants to make use of their right before the tribunals of Venezuela, and in accordance with those instructions said claimants presented to the Federal court their demand for damages against the Government of Venezuela. While this action exists, and while all the remedies afforded by our laws in their various instances are not exhausted, and while there is not used as a basis of a claim the fact of denial of justice or evident injustice in the judicial proceedings and in the final judgment of the Federal court, there does not exist any claim with reference to this matter that could be a subject for examination by this Commission.

It is true that the parties have the right, by article 216 of the code of civil proceedings, to desist from any action brought before a tribunal. The same article establishes that such desistance can not take place without the consent of the other party; and article 492 of the same code, quoted by the honorable agent for the United States in his reply, stipulates that when at any stage of the case the parties manifest that they have submitted themselves to the decision of umpires, the course of the action be suspended and the pleadings and proceedings be immediately delivered to the umpires, it reveals by its own terms that such a statement should be made explicit, and by both parties, before the tribunal where the action was pending, and by no means could such a manifestation be deduced from the more or less exact interpretation of the terms of the protocol. When the protocol was signed at Washington the said action was pending before the Federal court, and had it been the intention of the Government of Venezuela, notwithstanding the conditions stated in the constitution of the Republic, and the clause of the contract which is the cause of the demand, and the natural jurisdiction of a high court of the Republic in the action brought by the same plaintiffs, such an exception would have to have been the object of an especial statement in the terms of the protocol, as happened in the Venezuelan-Mexican protocol signed by the same plenipotentiary of Venezuelan, Mr. Bowen, on the 26th day of the same month of February.

Said Venezuelan-Mexican protocol expressly states:

> It is understood that if before the 1st of June, 1903, the claims of Mexico above mentioned are settled by agreement between the claimants and the Government of Venezuela, or decided in favor of said claimants by the court of Venezuela, said claims shall not be submitted to the arbitration agreed upon in the preceding articles.[1]

This exception was caused by the circumstances that the representatives of the high contracting parties knew of the existence of the demand entered in action by the firm of Martinez del Río & Bros. before the high Federal court, and both representatives thought it indispensable to specify a date and a condition that would contribute to fixing the jurisdiction of the Mixed Commission in the special case of the above-mentioned claim, it being in limine litis submitted for its decision to a court that fully exercised that jurisdiction, and which the parties could not avoid without a special, express, and definite declaration.

For the above-stated reasons, it is my opinion that while there exists a demand in action brought by the same claimant before the Federal court for the same object mentioned in the memorial presented to this Commission, which judgment is still pending by reason of an appeal made by both parties to the hall of the second instance of the same court from the decision pronounced by the hall of the first instance, there does not properly exist a claim against the Government of Venezuela which could be submitted to the jurisdiction of this Commission by the Rudloff heirs, and consequently this Commission has absolutely no jurisdiction and ought to reject the pretension of the applicants.

INTERLOCUTORY DECISION OF THE UMPIRE ON JURISDICTION

BARGE, *Umpire.*

A difference of opinion having arisen between the Commissioners of the United States of North America and of the United States of Venezuela about

[1] See the Mexican - Venezuelan Commission (Article VI of the Protocol of February 26, 1903) in Volume X of these *Reports.*

the question of jurisdiction in this case, this question was duly referred to the umpire for an interlocutory decision.

The umpire having fully taken into consideration the protocol, and also the opinions and arguments of the Commissioners, as well as the documents, evidence, and arguments, and likewise all the communications made by the two parties, and having impartially and carefully examined the same, has arrived at the following decision:

Whereas the protocol, whereupon solely and wholly rests the jurisdiction of this Commission, says that all claims owned by citizens of the United States of North America against the Republic of Venezuela which have not been settled by diplomatic agreement or by arbitration between the two Governments, and which shall have been presented to this Commission by the Department of State of the United States or its legation at Caracas shall be examined and decided by this Commission; and

Whereas claimants in the first place are citizens of the United States, and, secondly, own a claim against the Republic of Venezuela, which claim has not been settled by diplomatic agreement or by arbitration between the two Governments, whilst in the third place it has been duly presented to this Commission by the Department of State of the United States through its agent.

This claim certainly prima facie shows itself as standing under the jurisdiction of this Commission.

Now, whereas the Government of Venezuela, by its honorable agent, opposes that in article 12 of the contract entered into by the predecessor in interest of the claimants, the parties stipulated that the doubts and controversies which might arise by reason of it should be decided by the tribunals of the Republic, it has to be considered that this stipulation by itself does not withdraw the claims based on such a contract from the jurisdiction of this Commission, because it does not deprive them of any of the essential qualities that constitute the character which gives the right to appeal to this Commission; but that in such cases it has to be investigated as to every claim, whether the fact of not fulfilling this condition and of claiming in another way, without first going to the tribunals of the Republic, does not infect the claim with a *vitium proprium*, in consequence of which the absolute equity (which, according to the same protocol, has to be the only basis of the decisions of this Commission) prohibits this Commission from giving the benefit of its jurisdiction (for as such it is regarded by the claimants) to a claim based on a contract by which this benefit was renounced and thus absolving claimants from their obligations, whilst the enforcing of the obligations of the other party based on that same contract is precisely the aim of their claim; and

Whereas the evidence of such a *vitium proprium* can only be the result of an examination of the claim in its details, the jurisdiction of the Commission as to the examination of the case is not impeached by the above-mentioned clause, leaving open for the decision of the Commission the question whether this clause, under circumstances sufficiently evidenced after investigation, forbids the Commission in absolute equity to give claimants the benefit of this jurisdiction as to the decision;

Wherefore this argument does not seem conclusive against the jurisdiction of this Commission.

Whereas, furthermore, the Government of Venezuela, by its honorable agent, opposes that this same claim, being already the object of a suit before the Federal court, it can not, in accordance with article 216 of the code of civil procedure, be withdrawn from the jurisdiction of that court without the consent of the opposite party, which consent is here failing, it has to be considered that;

Whereas, even admitting the facts as stated by the Government of Venezuela, this argument does not seem to go against the provisions of the protocol, which states that the Commission shall decide all claims without regard to the provisions of local legislation and which at all events does not except claims in litigation, when it speaks about " All claims owned by citizens, etc.; " whilst it should be borne in mind that this protocol is the fundamental law for this Commission and the only source of its jurisdiction; and in which way soever the provisions of the protocol might be discussed in view of the principles of right — international as well as right in general — the adage should not be forgotten, " *dura lex sed lex*," and it must be remembered that this protocol under what circumstances soever originated, is an agreement between two parties, and that the Commission, whose whole jurisdiction is only founded on this agreement, has certainly above all to apply the great rule, " *pacta servanda*," without which international as well as civil law would be a mere mockery; whilst, on the other hand, it is not to be forgotten that this Commission, in the practice of its judicial powers, may find that the *absolute equity*, which according to that same protocol has to be the *only* basis for its decision, forces it to take into consideration, whether conflict with the provisions of local legislation as well as with previous agreements between parties, may infect the claim with that *vitium proprium* in consequence of which that same absolute equity prevents the Commission from making use of the jurisdiction as to the decision:

Whereas, therefore, the arguments opposed do not seem to impeach the prima facie arguments that speak for the jurisdiction of the Commission under the protocol, this jurisdiction has to be maintained and the claim has to be submitted to it.

(DECISION OF CLAIM ON ITS MERITS)

BAINBRIDGE, *Commissioner:*

On the 1st day of February, 1893, a contract was entered into by and between the minister of public works and the governor of the Federal district, sufficiently authorized thereto by the chief of the Executive power, parties of the first part; and Henry F. Rudloff, civil engineer, a citizen of the United States of America, residing in Caracas, party of the second part, whereby:

Rudloff agreed to construct for his own account or through a company, either national or foreign, a building of iron and masonry, principally for a public market on the place where then stood the market of " San Jacinto," including the park " El Venezolano," and the grounds and buildings annexed to said market. He was to construct the building for the market according to the plans presented by him to the minister of public works; he was to commence the work of construction eleven days after the signing of the contract, and to finish the work within two years; he was granted the buildings and grounds above referred to; he was to take exclusive charge of the management and collecting of the proceeds of the market, and the policing of the same from the day on which he commenced the work; the duration of the contract was to be eighteen years.

Rudloff agreed to pay to the municipality of Caracas the following sums: From the first to the fourth year, 75,000 bolivars per year, or for the four years 300,000 bolivars; and from the fifth to the eighteenth year 120,000 bolivars per year, or for the period of fourteen years the sum of 1,680,000 bolivars; a total for the eighteen years of 1,980,000 bolivars. Rudloff agreed to pay these sums to the municipality on daily payments of 205 bolivars and 50 centimos; he agreed to offer yearly at public auction the localities of the market, and the buildings with all its fixtures and utensils was to belong to the municipality

without the necessity of any legal transfer, upon the expiration of the eighteen years; free entry through the custom-house of La Guaira was granted for all the materials, fixtures, and tools necessary for the construction of the market, and free use of water for the construction and for the use of the building. The enterprise was not to be subject to any kind of taxes, ordinary or extraordinary, by whatever terms they may be denominated, during the term of the contract, and neither the National Government nor the municipality was to construct or allow to be constructed any other public market in Caracas. Article 12 of the contract provided that the doubts or controversies that may arise on account of the contract shall be decided by the competent tribunals of the Republic, in conformity with the laws, and shall not give reason for any international reclamation.

The foregoing contract was published in the Official Gazette, No. 5717, dated February 8, 1893.

On February 11, 1893, pursuant to the contract, the market to " San Jacinto " and the grounds and buildings appertaining thereto were ceded and delivered to Rudloff by public functionaries thereunto authorized, and the work of construction of the new building was begun.

The evidence shows that on April 30, 1893, the governor of the Federal District entered Rudloff's office, took possession of his books, and made an examination of them, contrary to the provisions of the constitution and laws of Venezuela. Against this unlawful act Rudloff protested to the minister of the interior on the following day.

The fifth article of the contract provided that Rudloff should take exclusive charge of the market and the policing of the same from the day on which he commenced work. Trouble arose with reference to this provision of the contract almost immediately, Rudloff contending that it meant simply that he was to see that the market was kept clean and in a sanitary condition; the municipality, that Rudloff was to pay the salary and rations of the police guards detailed in the market. This controversy was finally referred to the Executive, who decided that Rudloff must pay, which, under protest, he did; whereupon the force of policemen at the market was largely increased.

On July 15 the governor of the Federal District personally ordered the workmen engaged upon the building to suspend the work, threatening with arrest anyone who dared to continue. Through his representative, Mr. Rudloff immediately protested to the minister of public works against the governor's action.

On September 9 the governor informed Mr. Rudloff that the municipal council in its last meeting had declared void the contract for the market and that he would take possession the next day, as in fact he did take possession by armed force on September 10, 1893. The work which had been done by Rudloff was subsequently demolished.

On September 26, 1893, Rudloff addressed himself to the Government of the United States through the Department of State and presented his claim against the Government of Venezuela. In its reply, dated December 22, 1893, through the United States minister at Caracas, the Department of State was of the opinion that the action of the Venezuelan authorities was arbitrary and unjust; but the claimant was advised that before he could invoke the official intervention of the United States it should he made to appear that he had sought redress in the courts of Venezuela and that justice had been there denied him.

On May 8, 1901, the claimants, as successors in interest to Henry Rudloff, began suit against the Government of Venezuela in the chamber of first instance of the Federal court. A decision was rendered on the 14th of February, 1903, favorable to the claimants so far as the existence and validity of the contract

and the liability of the Government were concerned; but holding that the amount to be adjudged should be determined by the just estimate of experts, pursuant to the provision of the Civil Code. An appeal was taken from this decision by the parties litigant on the 16th of February, 1903.

In consequence of the protocol signed at Washington on February 17, 1903, for the submission to arbitration of all unsettled claims owned by citizens of the United States against the Republic of Venezuela, the claimants have presented their claim to this Commission.

Before proceeding to answer the claim upon its merits here, the learned counsel for Venezuela entered a plea to the jurisdiction of the Commission upon the following grounds:

First. That the action was still pending in the tribunals of the Republic.

Second. That article 12 of the contract stipulates that the doubts and controversies which might arise by reason of it should be decided by the local courts, and that the contract could never give rise to an international reclamation.

A difference of opinion existing between the Commissioners, the question of jurisdiction was duly submitted to the umpire, who, in an interlocutory decision, sustained the jurisdiction of the Commission to examine the claim.

Answering to the merits, the honorable agent for Venezuela denies the claim in all its parts for the following reasons:

First. Because the nation was not a party to the contract entered into by the predecessor in interest of the claimants.

Second. Because the acts which they say were committed in violation of such contract were done by municipal authorities.

Third. Because in federal republics munipalities are autonomous entities and juridicial personalities, capable of contracting rights and obligations, and for whose acts in the matter of contracts the State can not be responsible.

Fourth. Because the damages claimed are in the greater part remote, unascertained, and indirect damages for the recovery of which the civil law gives no right.

Fifth. Because the contractor violated the contract made with the municipality in the first place, disposing during the time when he was in charge of the market of the whole of its rents.

The objection that the National Government was not a party to the contract can hardly be sustained in view of the fact that the contract itself shows that it was entered into by the minister of public works and the governor of the Federal District sufficiently authorized by the chief of the Executive power. It is indeed contended that the extent of the national interest consisted in the cession of certain Government lands to the contractor, Rudloff. But the general tenor of the agreement indicates the active participation of the executive authority therein, granting the right of free entry of all materials and tools through the Federal custom-house of La Guaira and the guaranty that neither the National Government nor the municipality would allow any other market to be constructed in Caracas.

It would seem that a sufficient answer to the first as well as to the second and third objections raised by the Government of Venezuela lies in the fact that the Federal District was not at the time of this contract an autonomous entity, but rather a political subdivision of the State directly subject to the executive authority. The decision of the chamber of first instance of the Federal court is, of course, not conclusive upon the Commission, but upon this question of fact it may be cited as authoritative. The court says:

With reference to the authority which the Chief of the Executive power of the nation had to enter by himself into the contract with Rudloff, it is unquestionable

that it was sufficient through the ample powers which it exercised by virtue of the triumph of the revolution of 1892, of which Gen. Joaquin Crespo was the chief, so that in signing the contract by the minister of public works and the governor of the Federal District, these functionaries were the simple agents of the Chief of the Republic who was at the same time, according to the Federal system, the superior chief of the Federal District; [and further] that at the date of the signing of the contract the Federal District had no autonomy, the functions thereof being filled by the Chief of the Republic, who, by appointing discretionally the ministers, the governor of the Federal district, and the members of the executive council, made all these functionaries dependent on his authority, and therefore without any power to control his acts.

In view of the foregoing the responsibility of the National Government for the acts of the governor of the Federal District and of the municipal council is clear. It is equally clear that those acts were wrongful, arbitrary, and unjust. If any consideration of public policy required the abrogation of the Rudloff concession, the proper judicial proceedings should have been taken to that end, and in conformity with law. The seizure of Rudloff's books and correspondence the imprisonment of his manager, the interference with his workmen, and other hostile acts, were wholly unjustifiable and lawless. Moreover, it is not apparent by what right the National Government, acting through the governor of the Federal District, could annul the contract with Mr. Rudloff. The jurisprudence of civilized states and the principles of natural law do not allow one party to a contract to pass judgment upon the other, but guarantee to both the hearing and decision of a disinterested and impartial tribunal. These encroachments upon the legal rights of their predecessor in interest entitle the claimants herein to a just indemnification.

The claim is summarized as follows:

	Bolivars
Estimated income from rentals for eighteen years	8,168,500
Amount spent in construction and expense	78,232
Amount paid for policemen's wages	8,645
Damages to credit	600,000
	8,855,377
Less cost of building, interest, maintenance, and payment of municipal rents, as per contract	5,156,576
Total damages	3,698,801

The amount claimed is the sum of 3,698,801 bolivars, equivalent to the sum of $ 711,307.90 in United States gold.

The learned counsel for Venezuela contends, not without reason, that the damages thus claimed are in their greater parts remote, unascertained, and indirect.

The contract provided that Rudloff should have during the period of eighteen years therein designated the exclusive management and the collection of the proceeds of the market, and that he was to offer yearly at public auction the localities. It contained no agreement for the payment to him by the Government or the municipality of any sum whatever. The adventure was on his part wholly speculative, and his income therefrom was dependent upon the sale of localities, the payment of the rentals by the lessees, the success or failure of his management, and other indeterminate contingencies. Under these circumstances any estimate of the pecuniary advantages derivable from the contract is necessarily conjectural. Damages to be recoverable must be shown with a reasonable degree of certainty, and can not be recovered for an uncertain loss. All that the claimants pretend to prove here, all indeed that from the

nature of the case it is possible for them to prove, is that their predecessor in interest might have obtained the income claimed if the Government had not broken the contract. They are necessarily unable to prove with reasonable certainty that he could or would have obtained it. The case presented here is not that of the loss of the prospective profits of an established business, nor is it that of the loss of the ascertained profits derivable from a contract unperformed. It is simply that of the loss of the expected profits of a business venture wrongfully prevented of fulfillment by the defendant Government, and for these expected profits the claimants can not recover, because they are wholly unable to show that a profit would have been made. It is true the general rule of damages for the deprivation of real property is the value of its use — the rental value. But it has been held by respectable authority that when the defendant destroyed a building in course of construction by the plaintiff, the prospective profits which the plaintiff might have made by renting the building are not recoverable. (Bingham *v.* Walla Walla, 3 Wash., 68.) The damages claimed in this item are speculative and contingent, and can not form the basis of an award.[1]

The claim for " loss of credit " is not supported by sufficient evidence, and indeed the damages alleged in that respect, as involving the intervention of the will of the other parties, are too remote and consequential.

But it by no means follows from the foregoing considerations that these claimants are remediless. The evidence is perfectly clear that Rudloff possessed, in virtue of his contract, valuable property rights; that he entered upon the performance of the contract; acted in all matters relating thereto in conformity with its terms, invested upon the faith of it a considerable amount of capital and was apparently ready and willing to comply fully with its obligations. The evidence is also clear that he was denied the protection of the law, was ruthlessly interfered with and harassed, and finally, without a hearing, or judicial procedure of any sort, was by force of arms deprived of his property and of the rights vested in him under the contract. These acts of hostility and oppression were committed by the constituted authorities of the Government and evidently in the execution of its plans. In the commission of this wrong against an alien resident, the Government of Venezuela must be held to have assumed the responsibility of making just reparation; and for the wrong thus committed against one of its citizens the Government of the United States, on behalf of the claimants, is entitled to an award justly commensurate with the injuries sustained.

GRISANTI, *Commissioner* (for the commission):

On the 1st of February, 1893, the minister of public works and the governor of the Federal District entered into a contract, sufficiently authorized therefore by the Chief of the Executive Power on one part, and on the other with Henry F. Rudloff, civil engineer, citizen of the United States of America, in virtue of which contract Rudloff undertook —

"to construct on his own account or through a company, either national or foreign, a building of masonry and iron, principally for a public market, on the same place which is at present occupied by the market called " San Jacinto," including the square called " El Venezolano," and the grounds and buildings adjoining the actual market, the properties of the municipality (or the Government)." (Art. I.)

[1] See discussion as to speculative damages in Oliva Case (Italian - Venezuelan Commission) and Sanchez Case (Spanish - Venezuelan Commission), Volume X of these *Reports*.

The building ought to have been constructed according to the three plans which the contractor had already presented to the minister of public works. (Art. 2.)

Rudloff undertook to commence the construction of the building eleven days after signing the contract, and to finish the work within the following two years of the same date, allowing him an extension of time of six months. (Art. 3.)

The National Government and the city of Caracas granted to the contractor the buildings and the grounds mentioned in article 1 for the time fixed for the duration of the contract. (Art. 4.)

The contractor should take exclusive charge of the management and collection of the proceeds of the market and management of the police of the same from the day of commencing the work. (Art. 5.)

The duration of the contract was fixed for eighteen years, counting ten days after being signed. (Art. 6.)

The contractor bound himself to pay the municipality of Caracas 1,980,000 bolivars during the eighteen years mentioned, as follows: From the first to the fourth year, inclusive, 75,000 bolivars par annum, and from the fifth to the eighteenth year 1,680,000 bolivars, at the rate of 5,000 bolivars fortnightly. (Art. 7.)

It is evident that on February 11, 1893, Rudloff was placed in possession of the market of San Jacinto and other premises mentioned in Art. 1, and that on that same day he commenced the construction works.

On the 11th of the following May the governor of the Federal District demanded of Rudloff payment for the police which rendered services at the market, adducing therefore the referred-to contract, said payment having been satisfied by Rudloff, compelled to it by the mentioned authority, and having previously protested against the same.

In September, 1893, the governor of the Federal District submitted the mentioned contract entered into with Rudloff, to the consideration of the municipal council, and said corporation in an accord, issued on the 8th of the month and year just mentioned, resolved:

> First. That the aforementioned contract be declared void; second, that the governor be authorized to take possession forthwith of the market and organize it in conformity with the provisions of the ordinance of February 20, 1884, in force with regard to markets, and with the others agreeing therewith; third, to accord for the demolishment of the works carried out in the Plaza de El Venezolano.

This resolution was complied with in all its parts; that is to say, the contract was annulled and the construction of works done by Rudloff was demolished.

The non-jurisdiction of the Commission was alleged by the honorable agent for Venezuela and held by the honorable Commissioner for Venezuela, Doctor Paúl, and the honorable umpire, in his decision of October 24, decided in favor of the jurisdiction of the Commission, and consequently the case was submitted to it.

In view of the aforementioned statement, perfectly in accordance with convincing documents and proved facts, the Venezuelan Commissioner proceeds to draw his conclusions.

The market is a work belonging to the municipality, but the national Executive appears as contracting it, represented by the minister of public works, together with the governor of the Federal District.

The municipal council of the Federal District had no right to annul of its own free will the referred-to contract in the resolution of November 13, 1895; because, as the municipality was one of the contracting parties, it could not at

the same time judge as to the validity or nullity of the same. To obtain said nullity the municipality should apply for a lawsuit to the competent tribunals.

The contract was not submitted to the National Congress in its regular sessions of 1894, for its approval or disapproval, as required by the constitution then in force, and required also by the one actually in force; but it is not just that said omission should be ascribed to the contractor, Rudloff, but to the national Executive, to whom the compliance of said formality corresponded.

It is evident that the Government of Venezuela owes the claimants an indemnification for having suddenly put a stop to a contract which their legator, Henry F. Rudloff, was carrying out; but the undersigned thinks that the amount they demand, of 3,698,801 bolivars, is exceedingly exaggerated, and he agrees to grant them an indemnification of $75,745 United States gold.

TURNBULL, MANOA COMPANY (LIMITED), AND ORINOCO COMPANY (LIMITED) CASES

(By the Umpire:)

A party to a contract containing a covenant obligating the other party to perform certain obligations, has no right to declare the contract null and void, and must apply to the courts to have it set aside.

In order that a party to a contract containing the clause that " any questions or controversies which may arise out of this contract shall be decided in conformity with the laws of the Republic and by the competent tribunals of the Republic" may make a claim before an international tribunal for damages for its breach, he must first go before the local courts and obtain a judgment that this breach of the contract took place.

A contract containing the clause " any questions or controversies which may arise out of this contract shall be decided in conformity with the laws of the Republic and by the competent tribunals of the Republic," can not be declared void by one of the parties thereto for the nonfulfillment of any of the covenants, and it remains legally existing until so declared by the local tribunals, and another contract made with another party to take effect in case the first contract should become void has no value unless the first contract has been declared by the local tribunals to be inoperative, and no damages will lie for the supposed breach of the second contract.

A claim based upon the payment to the government of a sum of money for rights which the government could not concede, and which rights the claimant was prevented from enjoying by said government, will be allowed for the sum so paid with legal interest from the date of payment.

(These claims were filed separately but grouped in the decision.)

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

On the 22nd day of September, 1883, a contract was celebrated in the city of Caracas, Venezuela, in the words and figures following, to wit:

[Translation]

The minister of fomento of the United States of Venezuela, duly authorized by the President of the Republic, of the one part, and Cyrenius C. Fitzgerald, resident of the Federal territory Yuruari, of the other part, have concluded the following contract:

ARTICLE I. The Government of the Republic concedes to Fitzgerald, his associates, assigns, and successors for the term of ninety-nine years, reckoning from the date of this contract, the exclusive right to develop the resources of those territories, being national property, which are hereinafter described.

(1) The island of Pedernales, situated to the south of the gulf of Paria, and formed by the gulf and the Pedernales and Quinina streams.

(2) The territory from the mouth of the Araguao, the shore of the Atlantic Ocean, the waters above the Greater Araguao to where it is joined by the Araguaito stream; from this point, following the Araguaito to the Orinoco, and thence the waters of the upper Orinoco, surrounding the island of Tortola, which will form part of the territory conceded, to the junction of the José stream with the Piacoa; from this point following the waters of the José stream to its source; thence in a straight line to the summit of the Imataca Range; from this summit following the sinuosities and more elevated summits of the ridge of Imataca to the limit of British Guayana; from this limit and along it toward the north to the shore of the Atlantic Ocean, to the mouth of the Araguao, including the island of this name, and the others intermediate or situated in the delta of the Orinoco, and in contiguity with the shore of the said ocean. Moreover, and for an equal term, the exclusive right of establishing a colony for the purpose of developing the resources already known to exist, and those not yet developed of the same region, including asphalt and coal; for the purpose of establishing and cultivating on as high a scale as possible agriculture, breeding of cattle, and all other industries and manufactures which may be considered suitable, setting up for the purpose machinery for working the raw material, exploiting and developing to the utmost the resources of the colony.

ART. II. The Government of the Republic grant to the contractor, his associates, assigns, and successors, for the term expressed in the preceding article, the right of introduction of houses of iron or wood, with all their accessories, and of tools and of other utensils, chemical ingredients, and productions which the necessities of the colony may require; the use of machinery, the cultivation of industries, and the organization and development of those undertakings which may be formed, either by individuals or by companies which are accessory to or depending directly on the contractor or colonization company; the exportation of all the products, natural and industrial, of the colony; free navigation, exempt from all national or local taxes, of rivers, streams, lakes, and lagoons comprised in the concession, or which are naturally connected with it; moreover, the right of navigating the Orinoco, its tributaries and streams, in sailing vessels or steamships, for the transportation of seeds to the colony, for the purpose of agriculture, and cattle and other animals, for the purpose of food and of development of breeding; and, lastly, free traffic of the Orinoco, its streams and tributaries, for the vessels of the colony entering it and proceeding from abroad, and for those vessels which, either in ballast or laden, may cruise from one point of the colony to another.

ART. III. The Government of the Republic will establish two ports of entry at such points of the Colony as may be judged suitable, in conformity with the Treasury Code.

The vessels which touch at these ports, carrying merchandise for importation, and which, according to this contract and the laws of the Republic, is exempt from duties, can convey such merchandise to those points of the colony to which it is destined and load and unload according to the formalities of the law.

ART. IV. A title in conformity with the law shall be granted to the contractor for every mine which may be discovered in the colony.

ART. V. Cyrenius C. Fitzgerald, his associates, assigns, or successors are bound:

(1) To commence the works of colonization within six months, counting from the date when this contract is approved by the Federal council in conformity with the law.

(2) To respect all private properties comprehended within the boundaries of the concession.

(3) To place no obstacle of any nature on the navigation of the rivers, streams, lakes, and lagoons, which shall be free to all.

(4) To pay 50,000 bolivars in coin for every 46,000 kilograms of sarrapia and cauche which may be gathered or exported from the colony.

(5) To establish a system of immigration which shall be increased in proportion to the growth of the industries.

(6) To promote the bringing within the law and civilization of the savage tribes which may wander within the territories conceded.

(7) To open out and establish such ways of communication as may be necessary.

(8) To arrange that the company of colonization shall formulate its statutes and establish its management in conformity with the law of Venezuela, and submit the same to the approbation of the Federal Executive, which shall promulgate them.

ART. VI. The other industries on which the law may impose transit duties shall pay those in the form duly prescribed.

ART. VII. The natural and industrial productions of the colony, distinct from those expressed in Article V, and which are burdened at the present time with other contracts, shall pay those duties which the most favored of those contracts may state.

ART. VIII. The Government of the Republic will organize the political, administrative and judicial system of the colony, also such armed body of police as the contractor or the company shall judge to be indispensable for the maintenance of the public order. The expense of the body of police to be borne by the contractor.

ART. IX. The Government of the Republic, for the term of twenty years, counting from the date of this contract, exempts the citizens of the colony from military service and from payment of imposts or taxes, local or national, on those industries which they may engage in.

ART. X. The Government of the Republic, if in its judgment it shall be necessary, shall grant to the contractor, his associates, assigns, or successors a further extension of six months for commencing the works of colonization.

ART. XI. Any questions or controversies which may arise out of this contract shall be decided in conformity with the laws of the Republic and by the competent tribunals of the Republic.

Executed in duplicate, of one tenor and to the same effect, in Caracas, September 22, 1883.

Señor Heriberto Gordón signs this as attorney of Señor Cyrenius C. Fitzgerald, according to the power of attorney, a certified copy of which is annexed to this document.

[SEAL] M. CARABAÑO
Minister of Fomento
Heriberto GORDÓN

The foregoing contract was approved by the Congress on May 23rd, 1884, and a copy thereof with the approbation was published in the Official Gazette, No. 3257, on May 29th, 1884, and it was afterwards published in and among the laws and decrees of Venezuela. (Recopilación, Vol. XI, p. 98.)

On the 19th of February, 1884, an extension of six months was granted to Fitzgerald to commence the work of colonization, the extension to count from March 22 of that year. (Official Gazette, No. 3182.)

On June 14, 1884, Cyrenius C. Fitzgerald granted and assigned said contract-concession to the Manoa Company (Limited), a corporation created, organized and existing under and by virtue of the laws of the State of New York.

On August 24, 1884, one J. M. Laralde, government secretary, in the absence of the citizen governor of the territory of Delta, certifies to the arrival at Pedernales on that date of the North American steamer *Wandell*, with Mr. Thomas A. Kelly, superintendent of the Manoa Company (Limited), C. E. Fitzgerald, engineer of the same company, and other employees thereof.

On September 21, 1884, Luis Charbone, national fiscal supervisor, temporarily in charge of the government of the Federal territory of Delta, certified that the

Manoa Company (Limited) had commenced the erection of a building and to colonize at the mouth of the river Arature on the 10th of that month, "in conformity with what is established in the contract celebrated between the General Government and Mr. C. C. Fitzgerald on the date of the 22nd of September 1883."

On the 14th of November, 1884, the following certificate was given:

FEDERAL TERRITORY OF THE DELTA,
OFFICE OF THE GOVERNMENT OF THE TERRITORY.

I, Manuel M. Gallegos, governor of the Federal territory of the Delta, on petition of Mr. Thomas A. Kelly, resident administrator of the Manoa Company (Limited), domiciled in Brooklyn, Phoenix Building, 16 Court street, United States of America, certify that on the 24th of August of the present year arrived at this port on the steamer *Wandell* the above-mentioned Mr. Thomas A. Kelly, Mr. C. E. Fitzgerald, engineer of said company, and various employees of the same, so complying with the stipulations of article 5 and of the prorogation authorized on the 19th of February of this year of the contract celebrated with the Federal executive by Mr. C. C. Fitzgerald, of whom the above-mentioned Manoa Company is the successor.

Pedernales, November 14, 1884, 21st of the law and 26th of the Federation.

Manuel M. GALLEGOS

On the 7th of October, 1884, the following resolution was issued from the ministry of fomento (Official Gazette, No. 3345):

Resolved, The Cabinet having considered the solicitude of Mr. Heriberto Gordón, attorney for the Manoa Company (Limited), in which he asks, whether there is any contract, anterior or posterior, which impairs or limits the rights which the said company has acquired as successor to the contract celebrated with Mr. C. C. Fitzgerald on the 22d of September 1883, the President of the Republic has seen fit to declare that the Manoa Company (Limited) has perfect right in accordance with the contract to exploit the products which are to be found within the limits of the lands comprised in this concession.

Communicate it and publish it.

For the National Executive: Jacinto LARA

In May, 1885, the Manoa Company (Limited) shipped by the brig *Hope* a consignment of about 338,068 kilograms of asphalt mining and refining machinery, material for houses and wharves, and a steam launch for work on piers, etc. Under date of May 23, 1885, the minister of fomento addressed a note to the minister of hacienda asking for order of exemption of duties on shipment per brig *Hope* under the terms of the Fitzgerald contract.

On March 4, 1885, the Manoa Company, by C. C. Fitzgerald, its president, notified the Venezuelan Government that the agitation of the boundary dispute between Great Britain and Venezuela seriously interfered with the plans of the company in the development of the concession. Fitzgerald stated that he had been notified by the agents of the British Government that the latter would not permit the development of the resources of or the establishment of industries in such part of the concession as was claimed by it, and would maintain a force for the purpose of hindering trespass thereon. In view of this Fitzgerald requested of the Venezuelan Government a clear statement of the guarantees to be expected in the future as to any interference with the company's rights because of such invasion, and that whatever the result of the negotiations between England and Venezuela, the time lost thereby by the company should not be counted against the company.

On the 1st day of January, 1886, Gen. Guzmán Blanco, envoy extraordinary and minister plenipotentiary of the United States of Venezuela to various courts of Europe, on the one part, and of the other George Turnbull, American

citizen, residing in New York, 115 Broadway, and then in London, entered into a contract at Nice; ad referendum, of which articles 1 to 11 were identical with the articles of corresponding numbers in the Fitzgerald contract, with change of names of concessionary. Article 12 of the Turnbull contract is as follows:

This contract shall enter into vigor in case of becoming void through failure of compliance within the term fixed for this purpose of the contract celebrated with Mr. Cyrenius C. Fitzgerald the 22nd of September, 1883, for the exploitation of the same territory.

On the 9th of September 1886, the following resolution was issued from the ministry of fomento (Official Gazette, No. 3852):

UNITED STATES OF VENEZUELA,
MINISTER OF FOMENTO, DIRECTION OF TERRITORIAL RICHES,

Caracas, September 9, 1886.

Twenty-third year of the law and twenty-eighth of the federation:

Resolved, Señor Heriberto Gordón, with power from C. C. Fitzgerald, celebrated on the 22d of September, 1883, with the National Government, a contract for the exploitation of the riches existing in lands of national property in the Great Delta, and the works ought to have been begun within six months from the aforesaid date. In spite of such time having elapsed without commencing the works the Government granted him an extension of time for the purpose; and inasmuch as said contractor has not fulfilled the obligations which he contracted, as stated in the report of the director of national riches, specifying in reference as to article 5 of the contract in question, the councilor in charge of the presidency of the Republic, having the affirmative vote of the Federal council, declares the insubsistency or annulment of the aforesaid contract.

Let it be communicated and published.

By the National Executive: G. PAZ SANDOVAL

On the 10th of September, 1886, the following resolution was issued from the ministry of fomento (Official Gazette, No. 3852):

UNITED STATES OF VENEZUELA,
MINISTRY OF FOMENTO, DIRECTION OF TERRITORIAL RICHES,

Caracas, September 10, 1886.

Twenty-third year of the law and twenty-eighth of the federation.

Resolved, By disposition of the citizen Federal councilor of the Republic and with the affirmative vote of the Federal council is approved the contract celebrated by the illustrious American, Gen. Guzmán Blanco, envoy extraordinary and minister plenipotentiary of Venezuela to various courts of Europe, with Mr. George Turnbull for the exploitation of the Delta of the Orinoco, of the following tenor:

Gen. Guzmán Blanco, envoy extraordinary and minister plenipotentiary of the United States of Venezuela to various courts of Europe of the one part, and of the other George Turnbull, American citizen, residing in New York, 115 Broadway, and at present in London, have settled and arranged to celebrate the following contract ad referendum:

(Here follow articles 1 to 11, inclusive, which are identical with the articles of corresponding numbers in the Fitzgerald concession, with change of names of concessionary.)

ART. 12. This contract shall go into effect in case of the becoming void through failure of compliance within the term fixed for this purpose of the contract celebrated

with Mr. Cyrenius C. Fitzgerald, the 22d day of September, 1883, for the exploitation of the same territory.

Done three of one tenor to a single effect in Nice the 1st of January, 1886.

GUZMÁN BLANCO

[L. S.] Geo. TURNBULL

Let it be communicated and published.

For the Federal Executive: G. PAZ SANDOVAL

The Guzmán Blanco-Turnbull contract was approved by act of Congress on the 28th of April, 1887 (Official Gazette, No. 4048).

On the 13th of March, 1888, the following resolution was issued from the ministry of fomento (Official Gazette, No. 4290:)

UNITED STATES OF VENEZUELA,
MINISTRY OF FOMENTO, DIRECTION OF TERRITORIAL RICHES,

Caracas, 13th of March, 1888.

Resolved, Señor George Turnbull having purchased 500 hectares of waste lands, situated on both banks of the Caño Corosimo, Manoa district of the Federal territory of Delta, and acquired the ownership, in conformity with the law, of the mine of iron denominated Imataca, situated in the said lands, the President of the Republic, with the vote of the Federal council declares, on the petition of the interested party, that the said mine and lands constitute a property apart from the concession made to said Turnbull according to the contract celebrated on the 1st of January, 1886, and consequently is not submitted to the conditions and obligations of the said contract, but is governed by the decree regulating the law of mines in force.

Let it be communicated and published.

For the Federal Executive: Manuel FOMBONA PALACIO

On the 14th of March, 1888, the ministry of fomento issued the following document (Official Gazette, No. 4292):

The President of the Republic, with the vote of the Federal council:

Whereas it appears that Señor George Turnbull has applied to the Government to grant definite title of ownership of a mine of iron, which, by virtue of the right secured to him by article 23 of the decree regulating the law of the matter, he has accused before the governor of the Federal territory of Delta, which mine is found situated in the Manoa district of the same territory, 1,000 meters from the left margin of the Caño Corosimo starting from a point distant 2,500 meters from its debouchment in the Orinoco, upon a hill called Loma del Monte which runs east and west and whose geographical position is latitude north 8 degrees 29 minutes, longitude west 61 degrees 18 minutes, Greenwich — accusation which has been confirmed by the presentation of the provisional title of said mine issued with date of the 30th of October of the year last past by the governor of the territory, and the requisites provided by the decree regulating the law of mines, dictated the 3rd of August, 1897, having been fulfilled — has ordered to concede to Señor Turnbull the ownership of the said mine in all the extension which belongs to it and in respect to all the deposits of iron comprised in the same, in conformity to the denunciation of law made before the said governor. The present title shall be recorded in the respective office of registry, and give right to the concessionary and his successors, for the term of 99 years, to the exploitation and possession of the said mine, with the restrictions of law, and without burden imposed on its mineral products, which are found in the case determined article 40 of the regulating decree already mentioned.

Given, signed, sealed, and countersigned, in the Federal palace at Caracas, March 14, 1888, twenty-fourth year of the law and thirtieth of the federation.

Hermógenes LOPEZ

Countersigned: The minister of fomento.

Manuel FOMBONA PALACIO

UNITED STATES OF VENEZUELA,
MINISTRY OF FOMENTO, DIRECTION OF TERRITORIAL RICHES,

Caracas, 13th of March, 1888.

The law of public lands and the decree regulating the law of mines in force, having been complied with in the accusation made by Mr. George Turnbull, of 500 hectares of public lands for use in the exploitation of the mine of iron which he possesses, denominated Imataca, situated on both margins of the Caño Corosimo, in the district Manoa of the Federal territory of Delta, the President of the Republic, with the affirmative vote of the Federal council, has disposed that the corresponding title of adjudication shall be issued.

Let it be communicated and published.

For the Federal Executive: Manuel FOMBONA PALACIO

On the 14th of March, 1888, the ministry of fomento issued the following document:

UNITED STATES OF VENEZUELA,
MINISTRY OF FOMENTO, DIRECTION OF TERRITORIAL RICHES.

Having observed the formalities prescribed in the law of June, 1882, and in the decree regulating the law of mines in force, the National Executive, with the affirmative vote of the Federal council, has declared the adjudication, with date of the 3rd instant, in favor of the citizen, George Turnbull, of 500 hectares of waste lands which form the superfices of the mine of iron which said Señor George Turnbull possesses, denominated Imataca, which lands he acquires for uses of the exploitation of said mine, and are situated in the jurisdiction of the Manoa district of the Federal territory of Delta. The land surveyed is bounded on its four sides by lands of national property, conceded by contract to Señor George Turnbull. The 500 hectares surveyed are divided in two sections: 100 hectares to the north of the stream Corosimo, which commences near the village of Manoa and which comprise part of a hill which runs east and west; and 400 hectares to the south of said stream, including part of the Imataca range denominated " Loma del Monte", where is situated the mine of iron owned by Señor Turnbull. The adjudication has been made for the price of 7,100 bolivars in coin, equivalent to 20,000 bolivars of the 5 per cent national consolidated debt, which the purchaser has made over to the office of the board of public credit; and the Government having disposed that the title of ownership of said lands be issued, the subscriber, the minister of fomento, declares, in the name of the United States of Venezuela, that, by virtue of the completed sale, the dominion and ownership of said lands is from now transferred in favor of the purchaser, Señor George Turnbull, with the respective declarations expressed in articles 6, 7, and 8 of the law cited, which, in their letter and contents authorize the present adjudication, and whose terms must be considered as clauses decisive in this respect.

Caracas, 14th of March, 1888.

Twenty-fourth year of the law and 30th of the federation.

Manuel FOMBONA PALACIO

On the 28th of June, 1888, the following resolution was issued from the ministry of fomento (Official Gazette, No. 4382):

UNITED STATES OF VENEZUELA,
MINISTRY OF FOMENTO, DIRECTION OF TERRITORIAL RICHES,

Caracas, 28th of June, 1888.

Resolved, The requirements of the decree regulating the law of mines in force, having been complied with, by Señor George Turnbull in the accusation of the mine

of asphalt which he has discovered in the district Guzmán Blanco of the Federal territory delta on the borders of the Pedernales channel, on the island of the same name; and having been presented the provisional title of ownership of the mine issued by the governor of aforesaid Federal territory delta, in conformity with article 9 of the aforesaid decree, the President of the Republic, with the vote of the Federal council, resolves: That the definitive title of ownership to the above-cited mine of asphalt for ninety-nine years shall be issued in favor of Mr. George Turnbull.

Let it be communicated and published.

For the Federal Executive: CORONADO

On the 30th day of June, 1888, the following document was issued by the ministry of fomento:

The President of the Republic, with the vote of the Federal council:

Whereas it appears that Señor George Turnbull has petitioned the Government to issue definite title of ownership of a mine of asphalt which, by virtue of the right conceded by article 23 of the decree regulating the law of the matter, he has accused before the governor of the Federal territory Delta, which mine is situated in the district Guzmán Blanco of the territory mentioned, on the shores of the stream of Pedernales on the island of the same name, upon a visible extension of 1,300 meters in length by 500 in width, which runs northeast to southwest, and whose geographical position is as follows: Latitude north, 10 degrees, 11,7; longitude 62 degrees, 12, 24 west of the meridian of Greenwich; which accusation he has proved by the presentation of the provisional title to said mine, issued under date of the 9th of January of the current year by the governor of the territory; and the requisites provided by the decree regulating the law of mines of August 3, 1887, having been fulfilled, has disposed to concede to Señor George Turnbull the ownership of the said mine in all the extensions which belong to it and in respect of all the deposits comprised in the same, in conformity with the denunciation of law made before the said governor.

The present title shall be registered in the respective office of registry, and give right to the concessionary and to his successors, for the term of ninety-nine years, to the exploitation and profit of the said mine, and without that burden on its products imposed on any mine by reason of being in the case determined by article 40 of the regulating decree already mentioned.

Given, signed, sealed, and countersigned in the Federal palace in Caracas, the 30th of June, 1888, twenty-fifth year of the law and 30th of the federation.

Hermógenes LOPEZ

Countersigned: The minister of fomento.

Vicente CORONADO

On the 3d day of October, 1888, the ministry of fomento issued the following document:

THE UNITED STATES OF VENEZUELA,
MINISTRY OF FOMENTO, DIRECTION OF TERRITORIAL RICHES.

The formalities prescribed in the law of June 2, 1882, concerning the matter having been observed, the National Executive, with the affirmative vote of the Federal council, has declared the adjudication of this date in favor of Señor George Turnbull of 200 hectares of public lands, destined for the uses of the exploitation of a mine of asphalt which the purchaser possesses, situated in the district Guzmán Blanco of the Federal territory Delta, in the island of Pedernales, and whose boundaries are: Upon the north, groves of mangrove trees and the mine of asphalt which Señor Turnbull actually exploits; upon the south, uncultivated waste lands and the lake denominated Angosturita; upon the east, plains and groves of mangroves; upon the west, agricultural plantations pertaining to various residents of Pedernales, and also some groves of mangroves. The adjudication has been made for the price of 2,970 bolivars in coin, equivalent to 8,000 bolivars of the 5 per cent national consolidated debt,

which the purchaser has made over in the office of Public Credit; and the Government having disposed that the title of ownership of said lands shall be issued, the undersigned, the minister of fomento, declares in the name of the United States of Venezuela that by virtue of the completed sale the dominion and ownership of said lands is henceforth transferred in favor of the purchaser, Señor George Turnbull, with the respective declarations expressed in article 6, 7, and 8 of the law cited, which in their letter and contents authorized the present adjudication, and whose terms must be considered as clauses decisive in the matter. Caracas, October 3, 1888. Twenty-fifth year of the law, and 30th of the federation.

Vicente CORONADO

On the 18th of June, 1895, the following resolution was issued by the ministry of fomento (Official Gazette, No. 6433):

UNITED STATES OF VENEZUELA,
MINISTRY OF FOMENTO, DIRECTION OF TERRITORIAL RICHES,

Caracas, June 18, 1895.

Resolved, On April 28, 1887, the national Congress approved the contract ad referendum which was made in Nice the 1st day of January, 1886, by Gen. Guzmán Blanco, envoy extraordinary and minister plenipotentiary to several courts of Europe, and the North American citizen, George Turnbull. The Government had undertaken in that contract to grant for a term of ninety-nine years to the aforesaid George Turnbull the right to exploit the riches found in a large portion of the grand delta of the Orinoco and an exterior portion of territory in Guayana, Lower Orinoco, including the islands of Tortola and Aragua, together with all the franchises in connection with the colonization, exploitation, and development of the aforesaid territories. The national Executive, on its part, has complied with all the obligations incurred upon as per the contract, and it being evident that the cessionary citizen, George Turnbull, during the eight years elapsed since the celebration of the said contract, excepting some steps taken for the exclusive benefit of his own convenience, has not complied with any of the obligations stipulated, neither has he exercised any act in favor of the interests of the nation, nor by any means profitable to the development of the natural riches of the regions that were the object of the concession, the President of the Republic considering as injurious and fruitless to the nation the concession granted to the citizen George Turnbull, has decided to declare the annulment of the contract ad referendum, signed at Nice the 1st day of January, 1886, which was approved by the Executive of the Republic on September 10th of the same year, comprising in the same case of nullity and insubsistency of the aforesaid contract the concession of the " Imataca " iron mine, definitive title to which was issued March 13, 1888, and the concession of the asphalt mine situated in the island of Pedernales, the definitive title of which was issued June 28 of the same year, as well as any other rights, titles, or concessions deriving from the said contract.

Let this be communicated and published.

By the national Executive: Jacinto LARA

On the same day, to wit, the 18th day of June, 1895, the ministry of fomento issued the following resolution (Official Gazette, No. 6433):

UNITED STATES OF VENEZUELA,
MINISTRY OF FOMENTO, DIRECTION OF TERRITORIAL RICHES,

At Caracas, June 18, 1895.

Resolved, After having considered in the cabinet the petition addressed to this ministry by the Manoa Company (Limited), which among other things solicits the ratification, confirmation, and execution in its favor of all the rights and privileges

conceded to Cyrenius C. Fitzgerald on the 22nd day of September, 1883, by the contract declared insubsistent on the 9th day of September, 1886, the President of the Republic, after examination of the same, has declared the caducity, for reason of want of faithful compliance with its obligations and stipulations of the concession of George Turnbull, and has substituted therefor in the same rights and privileges the aforesaid contract, and has seen fit to dispose and authorize the said Manoa Company (Limited), within six months reckoning from the date of this resolution, to renew its works of exploitation in order to the greater development of the natural riches of the territories embraced in said concession, hereby confirming it in all the rights stipulated and granted to said Fitzgerald by the said contract of September 22, 1883. And the said Manoa Company (Limited) shall report to the national Executive from time to time through the organ of this ministry all of the works carried on by it in execution of said contract, in order that the Government may be enabled to judge of its compliance with the obligations of said contract in conformity with the spirit and the magnitude of its stipulations.

Communicate and publish.

By the national Executive: Jacinto LARA

On the 10th of July, 1895, a resolution was issued by the ministry of fomento as follows (Official Gazette, No. 6451):

UNITED STATES OF VENEZUELA,

MINISTRY OF FOMENTO, DIRECTION OF TERRITORIAL RICHES,

Caracas, July 10, 1895.

Resolved, After having considered in the council of ministers the petition addressed to this office by the Citizen George Stelling, vice-president of the board of directors of the National Anonymous Company called " Mines of Pedernales," requesting the modification of the resolution issued on June 19, last, by which the general concession granted to the Citizen George Turnbull was declared null, in order to except from the said annulment the mine of Pedernales and the 200 hectares of public lands belonging to the aforesaid company, the President of the Republic, after studying the document filed by the petitioner and taking into consideration:

First. That in accordance with article 28 of the mining law under which the definitive title to the asphalt mine of the Pedernales Island was granted, said title " can be transferred to any person able to contract."

Second. That as per article 50 of the same laws and the documents filed by the petitioner on November 19, 1890, date on which Citizen George Turnbull transferred to the National Company " Mines of Pedernales " the above referred mining concession and the 200 hectares of public lands needed for its exploitation, the definitive title issued had not been voided or annulled inasmuch as the cessionary had been exploiting the mine therein mentioned; and finally, that the National Company " Mines of Pedernales " obtained the property through a good title, has been possessing in good faith and has been and is now exploiting the said asphalt mine, as per evidence shown in the documents which were filed, so that respecting the said mine the failure of fulfillment on the part of the concessionary, upon which the said resolution of June 10 of the present year is based, is not applicable; does hereby resolve in equity and justice that the said resolution of June 19 last, in which the contract celebrated with the Citizen George Turnbull was declared null, does not in any way affect the rights, legitimately acquired, of the asphalt mine of the Pedernales Island, nor the 200 hectares of land destined to its exploitation by the National Anonymous Company, called " Mines of Pedernales," which company shall, consequently, be at liberty to go on with the works of the aforesaid mine and the 200 hectares of public land referred to.

Jacinto LARA

On November 20, 1896, the following resolution was issued from the ministry of fomento (Official Gazette, No. 6877):

UNITED STATES OF VENEZUELA,
MINISTRY OF FOMENTO, DIRECTION OF TERRITORIAL RICHES,

Caracas, November 20, 1896.

Resolved, Having considered at the council of ministers the petition addressed to this department by Citizen George Turnbull, therein proving — as per the documents attached thereto — that the said George Turnbull lawfully obtained the definitive title to the iron mine called " Imataca," situate on both banks of the Caño Corosimo of the Manoa district of the Federal territory Delta; that he complied with the requirements of the land laws, and paid for the price of the adjudgment of 500 hectares of land which comprise the superficial area of said mine; that by virtue of George Turnbull having acquired the aforesaid mine and lands, the national Executive, by resolution of March 13, 1886, declared that said mine and lands constitute a separate property from the Manoa concession granted to the above-mentioned Turnbull as per contract made January 1, 1886, not being subject therefor, to the obligations of the aforesaid contract, but which will be ruled by the decrees regulating the mining laws; that it is also proved that the above-mentioned Turnbull has maintained the aforesaid mine in exploitation, according to the legal regulation, and finally, that at the Ciudad Bolívar custom-house the mining taxes were paid corresponding to the 500 hectares which formed said mining concession; the citizen President of the Republic has thought fit to decide: that the resolution of this department of June 18, 1895, published in the Official Gazette of June 19 of the same year, marked No. 6433, declaring the annulment of the contract made January 1, 1886, with the above-mentioned Turnbull for the exploitation of a portion of the Delta of the Orinoco, does in no way affect the rights legitimately acquired by him to the " Imataca " iron mine, which is hereby excluded from the aforesaid resolution, together with the 500 hectares of land forming its superficial area, and, consequently, the citizen George Turnbull, remains authorized to continue the exploiting of the mine and public lands referred to.

Let it be notified and published.

For the national Executive: Manuel A. Díaz

On the same day the following resolution was issued by the minister of fomento (Official Gazette, No. 6877):

UNITED STATES OF VENEZUELA,
MINISTRY OF FOMENTO, DIRECTION OF TERRITORIAL RICHES,

Caracas, November 20, 1896.

Resolved, Having considered at the council of ministers the petitions addressed to this department by the Citizens J. A. Radcliffe, J. A. Bowman, James P. Elmer, Francisco de P. Suarez, Luis Aristigueta Grillet, George N. Baxter, and Ellis Grell, in behalf and by authority of the companies called " Manoa Company, Limited," " Orinoco Mining Company", and " Orinoco Company, Limited," as well as to reports and other documents filed; the citizen president of the republic, wishing to put an end to the difficulties which have presented themselves preventing the exploitation of the delta of " the Orinoco concession," otherwise known as " The Manoa," referred to in the resolutions of June 18, 1895, has thought fit to recognize as valid the transfer made by the " Manoa Company, Limited " to the " Orinoco Company, Limited " of all its rights and title to and in the aforesaid concession with the exception of the " Imataca Iron Mine," situate on both banks of the Caño Corosimo in the Manoa district of the old Federal territory Delta and the 500 hectares of public lands which comprise its superficial area, as well as the asphalt mine called " Minas de Pedernales," situate in the island of the same name, together with the 200 hectares destined for its exploitation. He acknowledges, likewise, as valid

the work and all other acts of the " Orinoco Company, Limited " (successor to the " Manoa Company, Limited ") done and performed by them in fulfillment of the terms of the resolution of June 18, 1895, and the President of the Republic disposes that the said company be granted the exemption from payment of custom-house duties on machinery and other effects, imported through the Ciudad Bolívar custom-house destined to the works of said concession; and, finally, that all the facilities be granted to the interested parties for the aforesaid exploitation providing such facilities be not in opposition to the laws and resolutions of the Republic in force.

Let it be notified and published.

For the national Executive: Manuel A. Díaz

On the 10th of October, 1900, the following resolution was issued by the ministry of fomento (Official Gazette, No. 8053):

UNITED STATES OF VENEZUELA,

MINISTRY OF FOMENTO, DIRECTION OF TERRITORIAL RICHES,

Caracas, October 10, 1900.

Resolved, Considering that the contract celebrated September 22, 1883, with Cyrenius C. Fitzgerald, and on which the Orinoco Company, Limited, now bases its rights for the exploitation of the natural riches in the Delta of the Orinoco and colonization of the land conceded, has now no legal existence, for that it was declared void for failure of performance of what was in it stipulated; that in April, 1887, the national Congress approved a contract celebrated with the North American citizen, George Turnbull, in the same regions and with the same clauses, and in all equal with that of the Manoa Company, Limited, (cessionary of Fitzgerald) declared void, which was also for the same clauses declared in caducity on the 18th of June, 1895; and that on the same day of the said month and year, this office issued an Executive resolution restoring to the Manoa Company, Limited, the rights and privileges conceded by the original contract with Fitzgerald in 1883; and

Considering (first) the contract celebrated with C. C. Fitzgerald having been declared void for failure of compliance with article 5th, this can not be considered in vigor without the intervention of a new contract approved by the national congress; (second) that the legislature of the State of Bolívar, in its ordinary session of 1899, adopted a joint memorial to the national congress, declaring that the company cessionary of the contract celebrated with Fitzgerald had not complied in its fourteen years of existence with any of the clauses established in article 5 of the said contract and that this interferes with the interests of the Venezuelans for exploiting the natural products of that region of the Republic; and (third) that according to the notes and reports forwarded to this office by the authorities of the different places of the region to which refers the concessions already mentioned, all concur in the failure of performance of the same and of the palpable evils which it occasions, as well to the national treasury as to the individual industries.

The supreme chief of the Republic has seen fit to dispose: That the mentioned contracts are declared insubsistent.

Let it be communicated and published.

For the national Executive: Ramón Ayala

The following provisions of the constitution of Venezuela adopted in 1881 and in force on September 22, 1883, are pertinent to the consideration of these claims. Similar provisions are found in the later constitutions of the Republic.

By paragraph 15, article 13, of this constitution the States of the Federation agree to cede to the Government of the Federation the administrations of the mines, public lands, and salt deposits, to the end that the former shall be governed by a system of uniform exploitation and the latter for the benefit of the people.

Title 5, section 1, article 66, provides in relation to the powers of the Executive:

Besides the foregoing powers of the United States of Venezuela, he, with the deliberative vote of the Federal Council, shall exercise (inter alia) the following:

PAR. 2. Administer the public lands, the mines and the salt deposits of the States by delegation of an authority from the latter.

PAR. 6. Celebrate contracts of national interest in accordance with the laws and submit the same to the legislature for its approval.

Title 5, section 2, article 69, provides in relation to the ministers as follows:

The ministers are the natural and public organs of the President of the United States of Venezuela. All his acts shall be subscribed by them, without which requisite they shall not be complied with nor executed by the authorities, by employees, or by private individuals.

Among the powers of the Congress enumerated in Title 4, section 5, article 43, is the following, paragraph 17:

To approve or reject the contracts concerning national works which the President, with the approval of the Federal council, shall make, without which requisite they shall not become effective.

Of the high Federal court the constitution in Title 6, section 2 of article 80, provides, paragraph 9a, that it shall —

Take jurisdiction of the controversies which result from the contracts or negotiations which the President of the Federation may celebrate.

The act of Congress of May 7, 1881, providing for the organization of the high Federal court, prescribes in regard to the said court that it shall have the power (inter alia):

To take jurisdiction in the first and sole (única) instance —
First. Of the judicial matters comprised in the attributions 1, 2, 3, 4, and 9 of article 80 of the constitution, and in No. 30 of article 13.

These three claims are so intimately related in respect of the facts and circumstances out of which they arise that they are herein considered together.

The Fitzgerald contract of September 22, 1883, was executed in strict conformity with constitutional requirements. It was signed on behalf of the Government by the minister of fomento, "duly authorized by the President of the Republic." It was approved by the Federal council. It was submitted for approval to the National Legislature, and was by it approved, on the 23d day of May, 1884, and it received the formal sanction and signature of the President on May 27, 1884. It was published in the Official Gazette, No. 3257, on May 29, 1884.

The instrument thus solemnly executed constituted a bilateral contract, giving rise, as between the parties thereto, to certain mutual rights and obligations. The Government of Venezuela granted to Fitzgerald, his associates, assigns, and successors, for the term of ninety-nine years, reckoning from the date of the contract, the exclusive right to develop the resources of the territories designated; and, for an equal term of years, the exclusive right of establishing a colony for the purpose of developing the resources already known to exist, and those not yet developed of the same region, including asphalt and coal. The Government agreed that a title in conformity with the law should be granted to the contractor (Fitzgerald) for every mine which might be discovered in the colony. Fitzgerald agreed to perform the stipulations of Article V in respect to exploration and colonization therein set forth. The parties mutually

agreed that any questions or controversies which might arise out of the contract should be decided in conformity with the laws of the Republic and by its competent tribunals. The constitution of the Republic provided that the high Federal court had jurisdiction of the controversies which might result from the contracts celebrated by the President.

Fitzgerald assigned the contract-concession to the Manoa Company, Limited, on June 14, 1884. The evidence shows that the company, within the time stipulated in the contract and its prorogation of February 19, 1884, commenced the work of exploitation and colonization. It proceeded with the work until in the spring of 1885 it encountered serious difficulties resulting from a domestic revolution headed by General Pulgar, and from the aggression of the British Government upon the territories included within the concession. The company duly notified the Venezuelan Government of these difficulties.

In December, 1885, one George Turnbull, a citizen of the United States, entered into negotiations with Gen. Guzmán Blanco, ex-President of Venezuela, and at that time occupying the position of envoy extraordinary and minister plenipotentiary of Venezuela to various courts of Europe, and these negotiations resulted in the signing at Nice on January 1, 1886, of an ad referendum contract substantially of the same purport and tenor as the Fitzgerald contract, granting to Turnbull the same rights and privileges in the territories designated as had previously been conceded to Fitzgerald and his assigns, and containing the provisions that it should become effective in case of the becoming void through failure of compliance within the term fixed for this purpose of the Fitzgerald contract for the exploitation of the same territory.

The time fixed for beginning the work of colonization in the Fitzgerald contract expired on September 22, 1884, prior to the Guzmán Blanco-Turnbull agreement, and no evidence is presented here of any complaint by the Government of Venezuela of nonfulfillment with its terms on the part of the concessionaries prior to that date, nor is any evidence presented of authority on the part of Guzmán Blanco in his capacity as envoy extraordinary and minister plenipotentiary to various courts of Europe to enter into the contract with Turnbull for a concession for the public lands and mines — that power being by the constitutional provisions above quoted vested in the President of the Republic. The article recognizes the then existence and validity of the Fitzgerald concession. But in view of the well-known dominant influence of Guzmán Blanco in Venezuelan affairs at the time, and the practical certainty of its ratification the obvious effect of the Turnbull agreement was to work grave injury to the interests and credit of the Manoa Company, Limited.

On the 9th of September, 1886, by Executive resolution issued through the ministry of fomento, " the councilor in charge of the Presidency, having the affirmative vote of the Federal council," declared the insubsistency or annulment of the Fitzgerald concession upon the ground that the contractor had not fulfilled the obligations of the contract as stated in the report of the director of the national riches, specifically referring to the provisions of Article V thereof. One day later an Executive resolution declared the approval of the Guzmán Blanco-Turnbull contract of January 1, 1886; and said contract was approved by Congress on April 28, 1887.

It is perfectly evident that the question whether or not the Manoa Company, Limited, had fulfilled the obligations of the contract, or any controversies as to that fact, was a question or controversy arising out of the contract, determinable, according to law and the agreement of the parties, only by the competent tribunals of the Republic. The Government of Venezuela, being a party to the contract, was not competent to decide such a controversy. The jurisprudence of civilized States and the principles of natural justice do not

allow one party to a contract to pass judgment upon the other. If the Government had any reason to believe that the grantees of the concession —

had, by misuser or nonuser thereof, forfeited their rights, then it should have itself appealed to the proper tribunals against the said grantees, and there, by due process of judicial proceedings, involving notice, full opportunity to be heard, consideration, and solemn judgment, have invoked and secured the remedy sought. (Salvador Commercial Co. Case. — For. Rel. U. S., 1902, p. 871.)

Nemo debet esse judex in propia sua causa.

Moreover, the Executive resolution of September 9, 1886, annulling the Fitzgerald contract, was an illegal assumption of power. Under the constitution of Venezuela the Executive was clothed with no such prerogative. Jurisdiction of controversies arising out of contracts celebrated by the President was vested solely in the high Federal court. (Par. 9, art. 80, Const. and Law of May 7, 1881.)

The decree, in the absence of legal authority in the Executive to issue it, was an absolute nullity.

The decision of the high Federal court under identical constitutional provisions rendered August 23, 1898, in the case of the New York and Bermudez Company would seem to be conclusive upon the point. That company claimed under a contract similar to that under consideration here. On January 4, 1898, the contract of the New York and Bermudez Company, for alleged failure of performance by the concessionary, was declared null by Executive resolution. The matter was brought by petition of the company before the high Federal court, which, by its judgment of August 23, 1898, declared that —

the Executive resolution passed by the National Government, dated the 4th of January of the present year, declaring broken and determined the contract of which the New York and Bermudez Company is concessionary, is null and void.

The court says in its opinion:

The only point for our investigation is whether or not the Executive resolution which has given rise to the petition of the representative of the New York and Bermudez Company constitutes an act of usurped authority.

Notwithstanding the Executive resolution of September 9, 1886, the Fitzgerald contract remained subsistent and effective to vest in the grantees all the rights and privileges therein designated. And it follows that the subsequent approval of the Guzmán Blanco-Turnbull contract could not operate to invest Turnbull with the same rights and privileges, inasmuch as the Government could not grant to Turnbull the rights which it had previously granted to and which were legally existing in the grantees of the Fitzgerald contract.

It appears from the evidence that on March 14, 1888, the President of the Republic, with the affirmative vote of the Federal council, declared the adjudication in favor of George Turnbull of 500 hectares of land which forms the superficies of the "Imataca" iron mine, under the formalities of the law relating to waste lands of June 2, 1882. The adjudication was made for the price of 7,100 bolivars in coin, equivalent to 20,000 bolivars of the 5 per cent national consolidated debt, which it is alleged Turnbull made over to the office of the board of public credit; and the Government having disposed that the title of ownership of said lands be issued, the minister of fomento declared in the name of the United States of Venezuela that by virtue of the completed sale the dominion and ownership of said lands was transferred in favor of the purchaser, George Turnbull.

On the same day, the President of the Republic, with the vote of the Federal council, pursuant to the provisional title to the " Imataca " mine, issued by the governor of the Federal territory Delta on October 30, 1887, to George Turnbull, and in accordance with the provisions of the decree regulating the law of mines, dictated August 3, 1887, conceded to George Turnbull the ownership of said mine in all the extension which belongs to it and in respect of all the deposits of iron comprised in the same; giving to the said Turnbull as concessionary and his successors for the term of ninety-nine years the right to the exploitation and possession of said mine.

On the 30th of June, 1888, the President of the Republic, with the vote of the Federal council, conceded to George Turnbull a definitive title to the mine of asphalt situated in the district of Guzmán Blanco in the Federal territory Delta on the island of Pedernales, " the requisites provided by the decree regulating the law of mines of August 3, 1887, having been fulfilled."

On October 3, 1888, the national Executive, with the affirmative vote of the Federal council, declared the adjudication in favor of George Turnbull of 200 hectares of public lands, " destined for the exploitation of a mine of asphalt which the purchaser possesses," situated in the district of Guzmán Blanco of the Federal territory Delta in the island of Pedernales. The adjudication was made for the price of 2,970 bolivars in coin, equivalent to 8,000 bolivars of the 5 per cent national consolidated debt, which Turnbull is alleged to have made over to the office of public lands; and the Government having disposed that the title of ownership of said lands shall be issued, the minister of fomento declared in the name of the United States of Venezuela that by virtue of the completed sale the dominion and ownership of said lands was henceforth transferred in favor of the purchaser, George Turnbull.

It is difficult to perceive in what manner these grants to George Turnbull can be sustained, in view of the fact that at the time they were made the Fitzgerald contract had not been judicially declared forfeited and was in full force and effect. The lands and mines described in the Turnbull titles are within the territory designated in the Fitzgerald concession. The Government of Venezuela by the latter instrument conceded to Cyrenius C. Fitzgerald, his associates, assigns and successors for the term of ninety-nine years, the exclusive right to develop the resources of —

> the island of Pedernales [and] the territory from the mouth of the Araguao, the shore of the Atlantic Ocean, the waters above the Greater Araguao to where it is joined by the Araguaito stream; from this point, following the Araguaito to the Orinoco, and thence the waters of the upper Orinoco, surrounding the island of Tortola, which will form part of the territory conceded, to the junction of the José stream with the Piacoa; from this point following the waters of the José stream to its source; thence in a straight line to the summit of the Imataca Range; and from this point following the sinuosities and more elevated summits of the ridge of Imataca to the limit of British Guayana; from this limit and along it toward the north shore of the Atlantic Ocean, and, lastly, from the point indicated, the shore of the Atlantic Ocean to the mouth of the Araguao, including the island of this name and the others intermediate or situated in the delta of the Orinoco, and in contiguity with the shore of the said ocean.

Moreover, and for an equal term of years, the Government of Venezuela conceded to the grantees of the Fitzgerald contract —

> the exclusive right of establishing a colony for the purpose of developing the resources already known to exist and those not yet developed of the same region, including asphalt and coal, etc.

And, furthermore, the Government of Venezuela agreed with Fitzgerald, his associates, assigns and successors that —

a title in conformity with the law shall be granted to the contractor for every mine which may be discovered in the colony.

If the grants to Turnbull are valid, then the language of the Fitzgerald franchise is meaningless, for on any such theory the Government of Venezuela could by piecemeal take away from the grantees of the Fitzgerald concession and give to others every right or privilege therein conferred. It is perfectly clear that the Government, having in 1883 transferred the exclusive right of developing and exploiting the resources of the territory in question to Fitzgerald and his assigns, could not in 1888 transfer to Turnbull the right to any part of their sources of that same territory, for the plain and simple reason that the Government could not transfer what it did not possess. That he who is prior in time is stronger in right is a maxim of both the civil and the common law. The Fitzgerald concession of September 22, 1883, not having been declared forfeited by any competent judicial authority, after notice, hearing, and judgment, was in 1888 a legally subsisting and valid agreement, binding upon both the parties to it, vesting in the grantees the exclusive right of exploitation of the Delta territory and the island of Pedernales and imposing upon the Government of Venezuela the obligation to grant a title in conformity with the law to Fitzgerald or his assigns for every mine discovered in the colony. The Turnbull titles of 1888 were in derogation of these prior rights and obligations and vested in the grantee no rights whatever. They were altogether null and void.

The hostile and arbitrary acts of the Government, which the Manoa Company (Limited), assignee of the Fitzgerald contract, was wholly powerless to prevent, were calculated to and, it is alleged, did paralyze the operations of the company, impaired its credit, and prevented the further prosecution of its work of exploitation. So matters stood until, on the 18th of June, 1895, the Government declared the annulment of the Turnbull contract of January 1, 1886, and the definitive titles to the Imataca iron mine and the Pedernales asphalt mine, which had been issued to Turnbull in 1888, and on the same date the Government reaffirmed the Fitzgerald contract of September 22, 1883, and authorized the Manoa Company (Limited), within six months from that date, to renew its works of exploitation in order to the greater development of the natural riches of the territory embraced in said concession, requiring the company to report to the National Executive from time to time through the ministry of fomento all of the works carried on by it in execution of the contract.

These resolutions of June 18, 1895, in no wise changed the legal status of the various interested parties. The Fitzgerald contract had never been legally annulled. The Guzmán Blanco-Turnbull contract of January 1, 1886, and the Turnbull titles of 1888 had never been legally effective, but were invalid ab initio. The resolution in favor of the Manoa Company, however, amounted to an authorization by the Venezuelan Government to the renewal of the work of exploitation and colonization, a permission of which the company promptly availed itself, as its reports presented in evidence here clearly show.

On the 10th of July, 1895, the Government, at the instance of the National Anonymous Company, " Mines of Pedernales," resolved that " the resolution of June 19 (18) last, in which the contract celebrated with the citizen, George Turnbull, was declared null," did not in any way affect the rights legitimately acquired of the asphalt mine of the Pedernales Island, nor the 200 hectares of land destined to its exploitation by the National Anonymous Company, called " Mines of Pedernales," which company was, consequently, at liberty to go

on with the works of the aforesaid mine and the 200 hectares of public land referred to.

On the 20th of November 1896, upon the petition of George Turnbull, the President of the Republic thought fit to decide that the resolution of June 18, 1895, declaring the annulment of the contract made January 1, 1886, with the above-mentioned Turnbull for the exploitation of a portion of the Delta of the Orinoco, did in no way affect the rights legitimately acquired by him to the " Imataca " iron mine, which was thereby excluded from the aforesaid resolution, together with the 500 hectares of land forming its superficial area, and, consequently, the citizen, George Turnbull, remained authorized to continue the exploitation of the mine and public lands referred to.

These resolutions are merely reassertions of the original Turnbull titles of 1888, and, like their originals, are in plain derogation of the prior and subsisting rights of the grantees of the Fitzgerald concession, and altogether null and void. The National Anonymous Company, " Mines of Pedernales", could not have occupied the position of innocent purchaser, inasmuch as the Fitzgerald contract had been for many years a matter of public record.

On the 16th of October, 1895, the Orinoco Company was organized under the laws of the State of Winconsin, and on the following day the Manoa Company (Limited), conveyed to the said Orinoco Company the property described in the Fitzgerald concession until September 21, 1982, excepting, however, the Pedernales asphalt mine and the Imataca iron mine. On February 4, 1896, the Orinoco Mining Company was incorporated under the laws of the State of Wisconsin, and on February 10, 1896, the Orinoco Company conveyed to the Orinoco Mining Company all its rights in the concession as transferred to it by the Manoa Company (Limited), (i. e., reserving and excepting the Pedernales asphalt mine and the iron mine of Imataca).

The Orinoco Mining Company on October 1, 1896, filed in the office of the secretary of state of the State of Wisconsin an amendment to its articles of association, changing its name to Orinoco Company (Limited); and on October 17, 1896, the Manoa Company (Limited) and the Orinoco Company certified to the transfer of title of all the lands, rights, interests, privileges, and immunities originally granted by the Fitzgerald contract (except as to the asphalt and iron mines) to the said Orinoco Company (Limited). The Manoa Company (Limited), on May 15, 1895, conveyed to William M. Safford the location of the Imataca iron mine; and the same company had on October 17, 1895, conveyed to Samuel Grant the Pedernales asphalt deposits. These conveyances are evidently explanatory of the reservations and exceptions as to the said properties in the transfer above set forth.

On November 20, 1896, the President of the Republic of Venezuela, " wishing to put an end to the difficulties which have presented themselves, preventing the exploitation of the Delta of the Orinoco, otherwise known as the 'Manoa,' referred to in the resolutions of June 18, 1895," recognized as valid the transfer made by the " Manoa Company (Limited) " to the " Orinoco Company (Limited) " of all its rights and titles to and in the said concession, with exception of the mine of iron, " Imataca," situated on both banks of the stream Corosimo, in the Manoa district of the old Federal territory Delta, and the 500 hectares of public lands which comprise its superficial area, and of the mine of asphalt called " Minas de Pedernales," situated on the island of the same name, together with the 200 hectares of public land destined for its exploitation. He acknowledged likewise as valid the work and other acts of the " Orinoco Company (Limited) " (successors to the " Manoa Company (Limited) " done and performed by them in fulfillment of the terms of the resolutions of June 18, 1895, and disposed that the said company be granted the exemption

from payment of custom-house duties on machinery and other effects imported through the Ciudad Bolívar custom-house destined to the works of said concession; and that all facilities be granted to the interested parties for the aforesaid exploitation, providing such facilities be not in opposition to the laws and resolutions of the Republic in force.

On December 30, 1896, James A. Radcliffe, receiver of the Manoa Company (Limited), William M. Safford and George N. Baxter, trustees, conveyed to the Orinoco Company (Limited), its successors and assigns, the contract and concession of September 22, 1883. The deed recites that at a special term of the supreme court of the State of New York, a court of general jurisdiction, sitting in the county of Kings, on the 3d day of March, 1896, it was, among other things, ordered, adjudged, and decreed by the said court in a certain action then pending, and which was commenced on the 14th day of February, 1896, between Randolph Stickney and the Manoa Company (Limited) for a sequestration of the property of said company, pursuant to the laws of the State of New York, that the said James A. Radcliffe be appointed permanent receiver of said Manoa Company (Limited), and that by its judgment of November 11, 1896, said court ordered the said receiver to sell at public auction all the rights, title, and interest of said Manoa Company (Limited) in and to said concession to the highest bidder and make report of said sale to the court, and that said receiver did on the 28th day of November, 1896, sell said property to William M. Safford and George N. Baxter, they being the highest bidders; and that said report of the receiver was afterwards confirmed and the receiver ordered to make a deed to the parties named, which was done; and that the said Safford and Baxter declared that they bid in said property as trustees for the Orinoco Company (Limited), and that the said Safford and Baxter in the execution of said trust joined in said deed to the Orinoco Company (Limited).

The Orinoco Company (Limited), on July 22, 1897, entered into a contract with the Orinoco Iron Company, a corporation organized under the laws of the State of West Virginia, whereby it granted to the said iron company the right to mine and ship any and all deposits of iron ore on the Fitzgerald concession which it had the right to exploit under its contract for the unexpired term thereof in consideration of certain stipulated royalties. The president of the Orinoco Iron Company was Albert B. Roeder, its secretary was Benoni Lockwood, jr., and its treasurer was James E. York.

It appears from the evidence that on the 30th day of March, 1895, George Turnbull, then residing in London, entered into a contract with one Joseph Robertson, of London, as trustee of a syndicate thereafter to be formed and called the Orinoco Iron Syndicate (Limited), under the English companies acts of 1862 to 1890, the object of which syndicate was to examine, test, and work the " Imataca " iron mine and to output and market iron ore, timber, and other commercial products on the land during the period of one year from the date of their shipment of the first cargo therefrom; if the said syndicate should be satisfied with the result of their trial, they were to register a limited company under said acts within twelve months for the purpose of acquiring the said property, which Turnbull agreed to lease and convey with his whole rights and interests therein and the ores and minerals therein and thereunder. The syndicate was bound on or before January 15, 1896, to intimate to Turnbull whether or not they intended to go on with the formation of said company. The Orinoco Iron Syndicate was afterwards formed and, on September 18, 1895, adopted the agreement between Turnbull and Robertson of March 30, previous.

The English company, the Orinoco Iron Syndicate (Limited), chartered the schooner *New Day* and shipped therein to Venezuela its employees, machinery.

material, and supplies. The *New Day* proceeded to Manoa, where on January 20, 1896, the machinery, materials, and supplies were landed. For failure to land at the proper port of entry, Ciudad Bolívar, the *New Day* and her cargo were denounced by Gen. Joaquín Berrio, the then administrator of customs at said port, and proceedings were instituted in the national court of hacienda of Ciudad Bolívar against the schooner, her captain, and the Orinoco Iron Syndicate (Limited), resulting in a judgment on May 9, 1896, imposing a fine upon the syndicate of 249,985.17 bolivars. This judgment was affirmed on September 24, 1896, by the high Federal court. On November 14, 1896, the court of hacienda decreed the embargo of all the rights, shares, and belongings which the Orinoco Iron Syndicate had in the lands and mines of Manoa. On October 18, 1898, the said court ordered the sale, by public auction, of the rights of exploitation acquired by the Orinoco Iron Syndicate (Limited) in the iron mines of Manoa, situated on both banks of the Corosimo stream, so as to pay with the product the duties owing, according to the liquidation made to the national treasury and to General Berrio, denouncer and apprehender of the contraband introduced, and the other expenses and costs of suit; that the said right of exploitation acquired in the iron mine of Manoa by the said company had been appraised by experts appointed for that purpose at 200,000 bolivars; that the rights which the company had in the mine of Manoa included 500 hectares of surface according to the acknowledgment of right made by the National Executive in a resolution of November 20, 1896.

Pursuant to the above-cited order of the court of hacienda the judicial sale took place in the said court on November 18th, 1898. Benoni Lockwood, jr., being the highest bidder at the sale, was declared the purchaser of the property sold upon his offer of 120,000 bolivars, to be paid within fifteen days from the date of sale. Robert Henderson was nominated the depositary. The court declared that the condition stipulated in Lockwood's proposition being complied with he should be put in possession of the auctioned rights, and that a certified copy in due form of the sale should be issued to him to serve as title of property. The time for payment was extended to December 20. On December 19, Carlos Hammer, with power of attorney from Benoni Lockwood, jr., paid into the court the sum of 120,000 bolivars, the purchase money of the Manoa or Imataca mine, and demanded a certificate of sale. The court declared well and duly performed the payment of the purchase money and ordered that the proper certificate be issued to Lockwood, and that he be given, in virtue of his title, the actual possession of said mine. The power of attorney executed by Lockwood to Hammer states that the purchase of the mine was made by him in the name of and representing the Orinoco Company (Limited), and that in consequence the title of the property must be made out in favor of said company, to which corporation the rights exclusively belonged by virtue of the purchase made by him.

In its memorial the Orinoco Company (Limited) alleges that it adopted this course with the object of quieting its title to the " Imataca " iron mine as against the claims of George Turnbull.

On November 29, 1898, Benoni Lockwood, jr., in consideration of the sum of $23.026, to him paid by the Orinoco Company (Limited), conveyed to the said company all his rights, title, and interest in and to the " Imataca " iron mine, meaning and intending to convey all his rights, title, and interest in and to the premises purchased by him at a judicial sale at Ciudad Bolívar on the 18th day of November, 1898.

Mr. Turnbull protested against the judicial sale under the execution issued from the national court of hacienda at Ciudad Bolívar, and on November 21, 1898, filed a petition in the second hall of the high Federal court at Caracas

that the proceedings relative to the case in the said court of hacienda be remitted to the second hall of the high Federal court for review; and, therefore, the latter court on February 21, 1899, held that Turnbull had proven by authentic documents which he had exhibited and which were in the expediente that he was the legitimate owner of the mine referred to, and that the said court declared without force the auction sale carried out with reference to the iron mine " Imataca," and that said mine was affected by said rule. But afterwards, upon appeal to the third hall of the high Federal court, the foregoing judgment of the hall of second instance was, on May 6, 1899, reversed, and declared to be revoked " en todas sus partes " (in all its parts).

In the month of May, 1899, George Turnbull brought an action in the court of first instance of the Federal District, civil division, against Benoni Lockwood, jr., the Orinoco Iron Company, and Gen. Joaquín Berrio for damages resulting from the condemnation proceedings and sale at Ciudad Bolívar, alleging that the English syndicate — the Orinoco Iron Syndicate — had had no right whatever in the Imataca mine, and that therefore the execution against said mine was illegal and the sale thereunder void. Benoni Lockwood, jr., having declared before the court at Ciudad Bolívar that he was acting on behalf of the Orinoco Company (Limited) Turnbull afterwards joined said company in the action, in order, as the court states, " that it should be declared that said company had no right of action against him nor claim over his mine Imataca by virtue of the so-called auction sale which took place at Ciudad Bolívar before the national judge of hacienda since the English syndicate had no rights." On jurisdictional grounds the claims against Berrio were withdrawn. The cause then proceeded, counsel for the remaining defendants answering in obedience to the directions of the court, but not in any respect accepting the jurisdiction and the validity of the proceedings.

The court then sustained its jurisdiction against Lockwood and the American company and entered judgments as follows: On the claim for damages that the proof for Turnbull was insufficient, and judgment was accordingly entered for Benoni Lockwood, jr., and the corporation sued; and as to the second part of the action, the court held that as George Turnbull has, with the documents registered in the sub-office of the Federal District and dated the 14th and 19th of March, 1888, issued by the President of the Republic, proved his ownership of an iron mine situated at Manoa, in the State of Guayana, and also his ownership of 500 hectares of unreclaimed lands which form the superficies of the iron mine denominated Imataca, and by the resolution of the 20th of November, 1896, that the said lands and mine constitute a property, legally acquired by Turnbull, apart from the Manoa concession which had been declared forfeited; and as the Orinoco Company (Limited) opposed this title by a title given by an auction on the 18th of November, 1898, before the judge of hacienda of Ciudad Bolívar, which auction took place in virtue of an execution against the Orinoco Iron Syndicate (Limited) an English syndicate, and as in this respect the court was of opinion that the said title is not sufficient to lessen the rights and privileges which Turnbull has as proprietor in the said mine, because in the first place it did not appear that Turnbull intended to grant his property or any part thereof to any company, and much less was it proved before the judge and auctioneer that the Orinoco Iron Syndicate (Limited) had rights over the mine now in dispute, because for that purpose it would first have been necessary to have sought for the title from which the existence of those rights was derived in order to make the auction sale feasible, and to furnish the purchaser such knowledge of what he was buying, that in the presence therefore of the title shown by plaintiff and that set in opposition by the American company the court declared that it must maintain George Turnbull in the rights and privileges granted by

law to legal owners and give judgments against the Orinoco Company (Limited) holding that said company had no rights of action against Turnbull and no rights to enforce on his mine, Imataca, by reason of the title herein referred to.

The foregoing judgment was rendered in the hall of the tribunal of the first instance, civil division of the Federal District, in Caracas, on June 7, 1900. On July 27, 1900, in the magistrate's court of Ciudad Bolívar, it was decreed:

That having considered the application of the judge of the district of Dalla Costa, dated the 20th instant, in which, as the executing officer of a judgment of the civil division of the court of first instance, he asks the assistance of armed forces to enable him to execute the said judgment, by the reason of the resistance on the part of parties required and condemned to deliver possession of the Imataca mines, situated in the jurisdiction of Della Costa, and also considering the representation of Mr. Juan Padrón Uztáriz, as the attorney of George Turnbull, in whose behalf the delivery of said property is to be made under said judgment, this civil and military court, in conformity with the legal prescriptions in the matter of civil authorities aiding the judicial, as is proper in this case, doth order that there shall be placed at the disposal of said judge of the district of Della Costa, 20 armed men under the command of Colonel Uscategui, belonging to the military force of this place, in the name of the State, to enforce said judgment.

Accordingly, on August 4, 1900, proceedings were taken as set forth in the following certificates:

Juan E. Pino, acting secretary of the judge of the district in commission, certifies that pursuant to the measures adopted by the mandate of execution, given on the 19th day of June, 1900, by the judge of the civil court of the first instance in the Federal District, there is found an act as follows: In the Manoa region of the Della Costa district, on the 4th of August, 1900, there was constituted a judge of the said district at the iron mine of Imataca, on the side of the mountain, in which location is found the principal location of said mine. And in view of the objection made by the representatives of the Orinoco Company (Limited) to the transfer of the effects belonging to George Turnbull, then proceeded to comply with the mandate and execution given on the 19th of June, 1900, by the judge of the court of first instance in the civil court of the Federal District, by taking formal possession of said mine and all its appurtenances in the presence of the witnesses José Maria Escobar and Augosto Parejo Gaines. The court being held at the above-mentioned place, the above-mentioned judge solemnly declared, in the name of the Republic and by the authority of the law, that George Turnbull, represented by Juan Padrón Uztáriz, is placed in possession of the immovables, consisting of 400 hectares to the north of the Corosimo River and 100 hectares to the south of the same river, conforming to the title of the said property given the 14th of March, 1888, and reaffirmed the 20th of November 1896. Having accomplished which, the court was afterwards transferred to the banks of the Corosimo River, where were found the buildings and other appurtenances of the above-mentioned mining establishment, and it was again declared, equally in the name of the Republic and by authority of the law, that the owner, George Turnbull, is placed in possession of the following property: The railroad line that goes to the mine, its rolling stock and other appurtenances; a large house and two small living houses; two sheds covered with zinc; two small houses covered with zinc; a house and six sheds of straw for laborers, and about 3,500 tons of iron ore situated at the above-mentioned river and taken out of the mine. There presented themselves H. H. Verge and P. Mattei manifesting, the first in his character as superintendent of the Orinoco Company (Limited), and the second authorized by George B. Boynton, who protested in the most solemn manner against the above-mentioned acts, and in consequence made a written protest, in accordance with the above action. Furthermore, the court imposed on all those present the obligation that they are to respect all acts legally done and to abstain and avoid any act that might impede or interfere with the owner, George Turnbull, or his representative, in exercising the rights that they are entitled to.

In a communication addressed to the Secretary of State of the United States, dated December 18, 1900, G. E. Hinnau, " of counsel for George Turnbull," states that the court of first instance in the Federal District at Caracas, being a duly constituted court of competent jurisdiction, had, on June 9, 1900, finally and conclusively adjudicated and by decree confirmed the tenor of the resolution of the Government of Venezuela, finding, as in said resolution recited, that the title to the Imataca mines was vested in said Turnbull, and that no other person had or possessed any right, title, or interest therein, and having no such title, any possession adverse to said ownership was unlawful; and that from such findings and a mandate and decree thereon made by said court, dated the 19th day of June, 1900, there is no appeal; that pursuant to the adjudication and mandate of said court, and in the enforcement and effectuation thereof, the proper authorities on the 4th day of August, 1900, placed said Turnbull, through his agent, Juan Padrón Uztáriz, in possession of the property and its appurtenances; and that the court, for the purpose of thereinafter maintaining Turnbull in the lawful maintenance of such property, ordered and decreed by perpetual injunction that all persons be thereafter enjoined and restrained from impeding or interfering with the rights of said Turnbull in and to said mines and property.

It is, however, to be observed that the judgment of the civil division of the court of first instance of the Federal District is res adjudicata solely upon the issue properly before it for its determination; that the Orinoco Company (Limited) was a party to the proceedings in said court only in its capacity as grantee of the rights and interests, if any, obtained by Benoni Lockwood, jr., by virtue of the judicial sale at Ciudad Bolívar on November 18, 1898, under the execution against the Orinoco Iron Syndicate (Limited); that the judgment of the court was that " in the presence of the title shown by plaintiff (Turnbull), *and that set in opposition by the American company* (to wit, as the record shows ' a title given by an auction on the 18th of November, 1898, before the judge of hacienda of Ciudad Bolívar '), the tribunal must maintain George Turnbull in the rights and privileges granted by law to legal owners," and that " the company has no rights of action against him (Turnbull), and no rights to enforce on his mine, Imataca, *by reason of the title herein referred to.*" In other words, the court held that the Turnbull titles of March, 1888, were to be sustained in opposition to the title obtained by Benoni Lockwood, jr., in virtue of the judicial sale, declared invalid, of November 18, 1898.

It is evident from the record that the prior valid and subsisting rights of the Orinoco Company (Limited) as cessionary of the Fitzgerald contract of September 22, 1883, were not before the civil division of the court of first instance of the Federal District in the case of *George Turnbull* v. *Benoni Lockwood, jr., et al.*, and therefore that they are in no manner affected or determined by the judgment of said court in that action. Rulings of courts must be considered always in reference to the subject-matter in litigation and the attitude of the parties in relation to the point under discussion.

Moreover, as has been shown heretofore, jurisdiction of the Fitzgerald contract vested, constitutionally, in the high Federal court alone.

On the 10th of October, 1900, it was, through the ministry of fomento, resolved:

Considering that the contract celebrated September 22, 1883, with Cyrenius C. Fitzgerald, and on which the Orinoco Company (Limited) now bases its right for the exploitation of the national riches in the Delta of the Orinoco and colonization of the lands conceded, has now no legal existence, for that it was declared void for failure of performance of what was in it stipulated; that in April, 1887, the National Congress approved a contract celebrated with the North American citizen, George Turn-

bull, in the same regions and with the same clauses and in all equal with that with the Manoa Company (Limited) (cessionary of Fitzgerald), declared void, which was also for the same causes declared in caducity on the 18th of June, 1895; and that on the same day of the said month and year this office issued an executive resolution restoring to the Manoa Company (Limited) the rights and privileges conceded by the original contract with Fitzgerald in 1883; and

Considering (first) the contract celebrated with C. C. Fitzgerald having been declared void for failure of compliance with article 5, this can not be considered in vigor without the intervention of a new contract approved by the National Congress; (second) that the legislature of the State of Bolívar, in its ordinary session in 1899, adopted a joint memorial to the National Congress, declaring that the company concessionary of the contract celebrated with Fitzgerald had not complied in its fourteen years of existence with any of the clauses established in article 5 of the said contract, and that this interferes with the interests of the Venezuelans for exploiting the natural products of that region of the Republic, and (third) that according to the notes and reports forwarded to this office by the authorities of the different places of the region to which refers the concession already mentioned, all concur in the failure of performance of the same and of the palpable evil which it occasions, as well to the national treasury as to the individual industries, the supreme chief of the Republic has seen fit to dispose:

That the mentioned contracts are declared insubsistent.

Let it be communicated and published.

For the National Executive: Ramón Ayala

The evidence presented here discloses that in the joint memorial adopted by the legislative assembly of the State of Bolívar, it was by that body resolved:

Article 1. To solicit the National Congress to order the necessary dispositions to the end that shall be petitioned by the competent organ, and shall be declared by the high Federal court the rescission of the contract celebrated by the National Executive with the citizen, Cyrenius C. Fitzgerald, his associates, assigns, and successors, the 22nd of September, 1883, which was approved by the Congress in session the 23rd of May, 1884.

It is furthermore significant that in the National Congress on April 7, 1899, the special commission appointed to consider and report concerning the resolution of the legislative assembly of the State of Bolívar with reference to the Fitzgerald contract, reported to the citizen president of the chamber of deputies proposing to the chamber that it remit said resolution to the National Executive, in order that it resolve what is convenient, but that on April 26, 1899, when the chamber of deputies considered in session the foregoing report, the deputy, Doctor Martinez, proposed —

That at the end of said report, where it says, "in order that it resolve what is convenient," it shall say: "*In order that they be submitted to the high Federal court, to the end that that tribunal shall resolve the affair in conformity with justice.*"

And this proposition was voted approved.

Clearer and more conclusive evidence (except the constitutional provision itself) could not be required than the foregoing action of the chamber of deputies on April 26, 1899, and the decision of the high Federal court in the New York and Bermudez case hereinbefore cited, to demonstrate that jurisdiction of the Fitzgerald contract vested solely in the high Federal court, and that such executive resolutions as those of September 9, 1886, and of October 10, 1900, declaring said contract insubsistent are illegal assumptions of power and null and void.

The question whether or not the grantees of the Fitzgerald concession had fulfilled its conditions was remitted by the agreement itself to the competent tribunals of the Republic, to be there determined in conformity with the laws.

But it may be remarked that the evidence shows that various high officials of Venezuela, including the governor of the Federal territory of the Delta, certify that within the time limit of the contract the concessionaries had commenced the work of exploitation "in conformity with what is established in the contract." When the Government on June 18, 1895, authorized the Manoa Company (Limited) to renew its work of exploitation and colonization the reports made by the company to the Government presented in evidence show that the company actively resumed the prosecution of the enterprise. Furthermore, it is to be observed that complaints of nonfulfillment of the Fitzgerald contract come with small grace from the Government of Venezuela. Evidence is not wanting here that shortly after the signing of the alleged contract between Guzmán Blanco and George Turnbull in Europe the Government of Venezuela ordered the governor of the Federal territory of Delta to require the Manoa Company (Limited) to suspend its operations. The hostile, arbitrary, and vacillating course of the Government toward the grantees of the Fitzgerald concession from the illegal annulment of their contract on September 9, 1886, to the equally illegal annulment on October 10, 1900, was calculated to paralyze every effort to fulfill their obligations, destroy their credit, create expensive litigation, and involve in financial ruin every person induced to invest his capital in the company's enterprises in reliance upon the good faith of the Venezuelan Government. Enterprises of pith and moment require for their successful prosecution and depend upon the stability of rights the protection of law, the sacredness of obligations, and the inviolability of contracts. Of all these elements necessary to success the grantees of the Fitzgerald contract were deprived by the arbitrary acts of the Venezuelan Government, which in equity and justice can not now be heard to complain that the said grantees did not, in the presence of such obstacles and in opposition to the unlawful exercise of superior force, fulfill their obligations.

The twelfth article of the collusive Guzmán Blanco-Turnbull contract of January 1, 1886, shows that George Turnbull had full knowledge of the exclusive rights and privileges possessed by the grantees of the Fitzgerald concession within the territories described. With this knowledge Mr. Turnbull's efforts then and thereafter were persistently directed toward the dispossession of said grantees from the rights lawfully vesting in them by virtue of that contract. His status throughout the history of this remarkable case has been that of a mere stranger and trespasser seeking to devest the prior lawful and subsisting titles vesting by and through the Fitzgerald concession.

> And it is a common maxim that he who has the precedency in time has the advantage in right; not that time, considered barely in itself, can make any such difference, but because the whole power over a thing being secured to one person, this bars all others from obtaining a title to it afterwards. (1 Fonbl. Eq., 320.)

The basis of Mr. Turnbull's claim against the Government of Venezuela presented to this Commission is the alleged interference with and deprivation of the titles obtained by him in 1888 to certain lands and mines. But these titles were knowingly sought and secured by him in derogation of the rights of the grantees of the Fitzgerald concession. His titles were void and his possession unlawful *ab initio*.

Mr. Turnbull complains of the Venezuelan Government:

First. That by reason of certain acts of said Government he was prevented from either improving or selling his said property, and that he thereby sustained a loss of upward of $50,000.

Second. That by reason of certain other acts of the Venezuelan Government he was deprived of the consideration agreed to be paid him under his contract

of the Orinoco Iron Syndicate for the lease of said property, and was unable to make any other contracts with respect thereto, or to develop or take the products of said mines, and was thereby damaged to the extent of £140,000.

Third. That by reason of certain acts of the Venezuelan Government he was deprived of the use and occupation of said property, and prevented from concluding any contracts, or to use, develop, lease or, sell said property, or the minerals or product thereof, from November 20, 1896, to June 8, 1900, and was thereby damaged in the sum of $500,000.

Fourth. That between the years 1893 and 1900 he expended and caused to be expended the sum of $120,000 in the United States and England in travel, legal disbursements, fees to the Government of Venezuela, legal expenses of negotiating, promoting, and procuring six several contracts for the leasing, testing, and sale of said property, all of which contracts were made ineffectual and void by reason of the spoliation of titles to said property by said Government and the withholding of the use, possession and occupation thereof.

The Manoa Company (Limited) in its memorial alleges respecting the damages and injuries caused said company by the acts of the Government of Venezuela:

First. That if by reason of the force and effect of the resolutions of September 9. and September 10, 1886, and the act of Congress of April 28, 1887, or of any or either of them, said company was divested of its rights, titles, and interests in and to the Fitzgerald concession. it was damaged thereby in the sum of $5,000,000.

Second. But that if the said resolutions and act did not have that effect, it was, by their consequences, prevented from the development and exploitation of the resources thereof, and the receipts of the rents, revenues, royalties, and profits which it would have derived therefrom between the date thereof when its rights thereto had been repudiated by the Government, and the date of the resolution of June 18, 1895, when its said rights were confirmed, reaffirmed, ratified, acknowledged, and re-established; which rents, revenues, royalties, and profits said company estimates, in view of all the then existing conditions and circumstances of the case, would have amounted to the sum of $300,000.

Third. That if the resolution of July 10, 1895, by its force and effect devested said company of its right, title, and interest in or to the mine of asphalt, it was damaged in the sum of $250,000; but that if it did not have that effect or operation then the said company was damaged thereby in the nominal sum of $1,000.

Fourth. That by the effect thereof as a slander of its title to the entire concession and each and every part of it, by the assertion immanent in that resolution and an obvious implication from it that the title and rights of the said company to its entire concession were liable at any time to be arbitrarily and summarily devested and annulled in like manner, either totally or in fragments, at the discretion or caprice of the Executive authority and without due process of law, it was damaged in the sum of $2,000,000.

Fifth. That if the resolution of November 20, 1896, by its force and effect divested said company of its rights, title, and interest in or to the mine of Imataca and its appurtenant lands, it was damaged thereby in the sum of $1,000,000; but that if it did not have that effect, then said company was damaged thereby in the nominal sum of $1,000.

The Orinoco Company (Limited) complain of the Government of Venezuela:

First. That on account of the acts and doings of said Government and its officers touching the sale under execution issued from the national court of hacienda at Ciudad Bolívar, and for the damages caused by it and them to said

company by the deprivation of said company of its lawful possession of the mine of Imataca under the claim that the Government had a lien thereon in consequence of the judgment in said court against the Orinoco Iron Syndicate; and by the exaction and appropriation of the purchase price thereof and the costs, expenses, and disbursements caused thereby, and the ejectment from and deprivation of said mine, that said company was damaged in the sum of $125,000.

Second. That by reason of the Executive resolution of the 10th of October, 1900, declaring insubsistent the contract of September 22, 1883, the company lost the profits of a certain contract entered into by it with Charles Richardson and his associates for the lease of the asphalt mine on the island of Pedernales, and was thereby damaged in the sum of $100,000.

Third. That by reason of said resolution the company lost the opportunity of completing an agreement with Messrs. Moore, Schley & Co. for the exploitation of the Imataca iron mine, and was damaged thereby in the sum of $100,000.

Fourth. That the company on the 10th day of October, 1900, had concluded negotiations with Messrs. Power, Jewell & Duffy, of Boston, whereby it was stipulated that for a certain consideration the said parties should pay into the treasury of said company as and for a working capital with which to prosecute its intended operations on the concession the sum of $2,800,000, but that by reason of the Executive resolution of October 10, 1900, the said parties refused to execute the proposed contract and abandoned the same, whereby the company lost the benefit and advantage thereof and was damaged in that sum.

Fifth. That, if under the constitution and laws of the Republic of Venezuela, the resolution of October 10, 1900, had the effect to devest said company of its rights, titles, and interests in and to the contract of September 22, 1883, the company was damaged in the sum of $10,000,000; and if it be otherwise and said resolution was an act of usurped authority beyond the competence of the Executive power, then the company was damaged thereby in the aggregate of the damages mentioned as having been occasioned thereby; but that the company advisedly limits its claim against the Republic of Venezuela for the damages occasioned by said resolution of October 10, 1900, to the sum of $1,000,000, for which it demands the judgment and award of this tribunal.

Sixth. That if it be considered that by force of the constitution and laws of Venezuela the Orinoco Company (Limited) has been devested of its rights, titles, and interest in and to certain land and mining concessions granted by the Government since the date of the resolution of October 10, 1900, the company makes claim on that account for the reasonable value thereof which it alleges upon information and belief exceeds the sum of $1,000,000; but if it be considered that the said land and mining concessions are of no force or validity as against the elder patent and paramount title of said company under its contract, then the company claims only nominal damages for and on account of the granting of the same in manner and firm but without legal effect upon the right of said company to have and exploit the same.

In view of all the foregoing I am of the opinion:

First. That the contract-concession entered into on the 22nd day of September, 1883, by and between the Government of Venezuela and Cyrinius C. Fitzgerald, granting to the said Fitzgerald, his associates, assigns, and successors for the term of ninety-nine years the exclusive right to develop the resources of certain territories therein described, and the exclusive right of establishing a colony for the purpose of developing the resources already known to exist

and those not yet developed in the same region, and other rights, privileges, and immunities therein specifically enumerated, is and since the 29th day of May, 1884, has been a valid subsisting contract, lawfully vesting in the grantee Cyrenius C. Fitzgerald, his associates, assigns, and successors all the rights, privileges, and immunities in the said contract set forth.

Second. That George Turnbull obtained no rights of property, either in the concession as a whole, under and by virtue of the alleged contract of January 1, 1886, or to the lands and mines of Pedernales and Imataca, under and by virtue of his alleged titles.

Third. That the Fitzgerald contract-concession being subsistent, the Manoa Company (Limited) is entitled to an award generally for the wrongful interference with and deprivation of the exercise of its rights and privileges under the said contract-concession by the Government of Venezuela from the 9th day of September, 1886, to the 18th day of June, 1895, justly commensurate with the loss or injury sustained thereby; and in particular to an award for damages, however nominal, for injuries sustained relative to the Pedernales asphalt mine and to the iron mine of Imataca.

Fourth. That the Fitzgerald contract-concession being subsistent, the Orinoco Company (Limited) is entitled to an award generally for the wrongful interference with and deprivation of the exercise of its rights and privileges under the said contract-concession by the Government of Venezuela, from the 10th day of October, 1900, to the 14th day of January, 1901, justly commensurate with the loss or injury sustained thereby; and in particular to an award for the amount paid into the national court of hacienda on the 19th day of December, 1898, together with interest on said sum at the rate of 3 per cent per annum from said date to the 31st of December, 1903, the anticipated date of the final award by this Commission.

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

" The Manoa Company (Limited) " sets forth a claim against the Republic of Venezuela, the memorial of which ends as follows:

> Your orator claims, however, that by the effect thereof as a slander of its title to the entire concession and each and every part of it, by the assertion immanent in that resolution and an obvious implication therefrom, that the title and rights of the said company to its entire concession was liable at any time to be arbitrarily and summarily devested and annulled in like manner, either totally or in fragments, at the discretion or caprice of the Executive authority and without due process of law; that it was in fact damaged in the sum of $2,000,000 and more; and if said resolution of November 20, A.D. 1896, by its force and effect divested said company of its said right, title, and interest in or to said mine of Imataca and the appurtenant lands aforesaid, that it was damaged thereby in the sum of $1,000,000; but if it did not have that effect or operation, then that said company was damaged thereby in the nominal sum of $1,000.

On September 22, 1883, a contract was celebrated between the Government of Venezuela and Cyrenius C. Fitzgerald, approved by the National Congress on May 23, 1884, whereby was conceded unto said Fitzgerald, his associates, successors, and assigns, for the term of ninety-nine years, the exclusive right to exploit the resources of the territories of national property referred to in Article I of said contract; as also the exclusive right for the same term to establish a colony, to develop the resources known, and also those as yet not exploited in said region, including asphalt and coal; for the purpose of establishing and cultivating on as high a scale as possible agriculture, breeding of cattle, and other industries and manufactures which may be considered suitable, setting

up for the purpose machinery for working the raw material, exploiting and developing to the utmost the resources of the colony.

Fitzgerald undertook to commence the works of colonization within six months, counting from the date when said contract was approved by the Federal council (art. 5) — that is to say, from the date of its being granted (September 22, 1883) — the Government having promised that, if in its judgment it should be necessary, it should grant to the contractor a further extension of six months for commencing the said works (art. 10).

On the 7th day of February, 1884, Dr. Heriberto Gordón, acting as Mr. Fitzgerald's attorney, requested that said Mr. Fitzgerald should be conceded the further extension of time referred to in said article 10; and by resolution of the 19th of the same month it was so conceded, to be counted from the 22d of the following March.

In the course of said extension of time — on the 14th of June — Fitzgerald assigned the contract to " the Manoa Company (Limited)," and on April 10, 1886, seven months and ten days after said extension had elapsed. Doctor Gordón, attorney for said company, addressed a petition to the minister of agriculture (fomento), the last part of which (pp. 64, 65, and 66 of the record) is as follows:

Therefore, in compliance with instructions given me by " the Manoa Company (Limited)," I beg to apply to the Benemérito general, President of the Republic, through your respectable organ, beseeching him most entreatingly and urgently to declare by resolution that to " the Manoa Company (Limited)" are not imputable the circumstances which have prevented it, up to the present, from carrying out works in accordance with the contract celebrated between the Government and C. C. Fitzgerald on September 22, 1883, of which it is an assignee; and that, therefore, said contract is in force, and the company in possession of all its rights, as in the extensions accorded will not be computed the time elapsed up to the present.

Throughout all of said solicitude, and particularly in the above-inserted paragraph, " the Manoa Company (Limited) " confesses through its attorney, Doctor Gordón, that at that date (April 10, 1886), a long time after the extension had expired, it had not commenced to fulfill the contract, and likewise admits considering it annulled. And considering only in fact that the company held such an opinion, can it be accounted for that the company should request the Government to promulgate a resolution declaring *that the causes which had prevented it from carrying out the contract are not imputable to it; that therefore the contract is in force and the company in possession of all its rights, as in the extensions accorded will not be computed the time elapsed.*

The above-mentioned petition was followed on September 9 by this resolution, to wit:

Resolved, Señor Heriberto Gordón, with power from Señor C. C. Fitzgerald, celebrated on the 22d of September, 1883, with the National Government a contract for the exploitation of the riches existing in lands of national property in the Grand Delta, and the works ought to have been begun within six months of the aforesaid date. In spite of such time having elapsed without commencing said works, the Government granted him an extension of time for the purpose; and inasmuch as said contractor has not fulfilled the obligations which he contracted, as stated in the report of the director of territorial riches, specifying in reference to article 5 of the contract in question, the councilor in charge of the presidency of the Republic, having the affirmative vote of the Federal council, declares the insubsistency or annulment of the aforesaid contract.

In any other case the lawfulness of said resolution would be doubtful, but in the present one it is not; firstly, because " the Manoa Company (Limited) " has authentically declared the facts whereon it is based; secondly, because said

company tacitly acknowledged the annulment of the contract; and, lastly, because the company itself made the National Government a judge as to the enforcement or termination of the contract, when requesting it to declare the enforcement of said contract, whereby it authorized the Government ipso facto to promulgate its annulment.

As an explanatory argument of the unlawfulness of the above-inserted resolution, quotation is made of the judgment passed by the high Federal court on August 23, 1898, declaring the insubsistency and nullity of the Executive resolution of January 4, of said year, whereby the contract of the " New York and Bermudez Company " was declared terminated and void.

Without discussing said decision, which in our opinion is erroneous, as shown by the reasonings contained in the voto salvado of three of the judges (Official Gazette, No. 7421, dated September 17, 1898), we shall undertake to establish that the case of the " New York and Bedmudez Company " and that of " the Manoa Company (Limited) " are entirely different, whereas the claimant company, in the aforementioned petition, authentically confessed the insubsistency of its contract, the forfeiture of its rights, and requested the National Government to ratify the same, which confession and petition the " New York and Bermudez Company " did not make. And the most obvious evidence of the difference between the two cases is that " the Manoa Company (Limited) " did not apply to the high Federal court to request that the resolution of September 9, 1886, be declared void.

" The Manoa Company (Limited) " alleges as the principal cause for preventing it from fulfilling the obligations contracted, the British invasion, for, according to the claimant company's statement, the British authorities were apt to hinder its use and full power over a considerable portion of the territory marked out in Article I of the contract.

In an article inserted in the *Evening Post*, New York, dated February 10, 1896, we find the following account:

Mr. Fitzgerald especially attributes the subsequent misfortunes, decadence, and collapse of the Manoa Company solely to the British invasion.

But there are some peculiar facts in this connection. Mr. Fitzgerald, when requested to point out on the map the location of the sawmill, indicated it as above specified. Now, that particular spot is to the westward of the Schomburgk line; and every one familiar with the geographical aspects of British claims in the Guiana controversy knows that they never extended in the interior so far as to approach any part of the course of the Orinoco River.

Moreover, the Anglo-Venezuelan diplomatic correspondence appertaining to McTurk's proceedings of 1884 shows that his assertion of British jurisdiction did not extend farther west than the Amacuro River, i. e., the coast limit of the Schomburgk line. Guzmán Blanco, as Venezuela's plenipotentiary in London, reviewed in a note to Lord Salisbury, dated July 28, 1886, all the circumstances of the McTurk affair, and in it there is no allusion to forcible British acts west of Amacuro. In his communication Guzmán Blanco cites a note written by McTurk, *from the right bank of the Amacuro*, to Mr. Thomas A. Kelly, resident manager of the Manoa Company, *stating that he* (McTurk) *had received notice that the company was going to erect a sawmill at the mouth of the Barima*, and warning him against such encroachment. This seems to establish that the British Government's interference with the Manoa Company in 1884 had in view only the prevention of the company's intended programme for intrusion east of the Schomburgk line, and involved no interference with the sole improvements made by the company up to that on the grant.

Accordingly there was nothing to deter the Manoa corporation from pushing forward its *mercantile, agricultural, commercial, manufacturing, shipping, and mining business* in territory exclusively Venezuelan, with the Orinoco sawmill settlement as a basis. Besides, the really valuable portions of the concession for the purposes of immediate development (including the Pedernales asphalt property) were those which lay

to the west of the Schomburgk line, and which could have been worked in absolute security of ownership under the laws of Venezuela.

An affidavit of Mr. Jerome Bradley, ex-president of the Manoa Company (Limited), rendered on October 21, 1886, filed at the United States circuit court in Brooklyn (case of Everett Marshall *v.* The Manoa Company *et al.*) reads as follows, to wit:

I have read the affidavit of C. C. Fitzgerald, verified July 30, 1887. It is untrue that I was informed by his (Fitzgerald) son George, upon the latter's return from Venezuela, that the lumbering operations upon said grant were discontinued in 1884 owing to the interference of the British Government claiming the territory; but, on the contrary, I allege that the same were discontinued for the reason that the Manoa Company did not pay, and had not the means to pay, the few men employed by them to cut lumber and transport it to the sawmill; that the sawmill spoken of was not upon that portion of said grant to which a claim was made by the British Government. The said sawmill was distant from that portion of the grant over 50 miles. (Taken from an insertion of Mr. Turnbull's appended to this claim.)

This shows that the British invasion is only a pretext alleged by the claimant company so as to conceal the real cause of its collapse, which was its inability to raise funds for commencing the works of colonization and fulfilling the other obligations to which it was bound under the contract. Moreover, the company never protested against the aforementioned resolution (although said company asserts to the contrary) nor applied to the Federal court to demand its annulment. Said company was well aware that on lawful grounds it was at a loss; that the executive act was based on true facts and in conformity with justice.

On January 1, 1886, Gen. Guzmán Blanco, envoy extraordinary and minister plenipotentiary of Venezuela to various courts of Europe, celebrated a contract on behalf of Venezuela with Mr. George Turnbull, the same as that as the Manoa Company (Limited); but said contracts, besides requiring for its legal validity the approval of the President of the Republic with the affirmative vote of the Federal council, as also the sanction of Congress (Article 66, attribution 6 of the constitution of 1881), in article 12 stipulates as follows:

This contract shall enter into vigor in case of the becoming void through failure of compliance within the term fixed for this purpose of the contract celebrated with Mr. Cyrenius C. Fitzgerald the 22d of September, 1883, for the exploitation of the same territory.

The referred to contract was approved by the Federal council on September 10, 1886, and by Congress on April 28, 1887; that is to say, after the Manoa Company's contract became void; therefore the Turnbull contract did not deprive said company of the rights it had forfeited and which the Republic of Venezuela had newly acquired.

On June 18, 1895, and at the request of the Manoa Company (Limited), the National Government issued a resolution, ordering that—

due authorization be given to the said Manoa Company (Limited), within six months, reckoning from the date of this resolution, to renew its works of exploitation in order to the greater development of the natural riches of the territories embraced in said concession; hereby confirming it in all its rights stipulated and granted to C. C. Fitzgerald by the contract of September 22, 1883; and the said Manoa Company (Limited) shall be bound to report to the national Executive from time to time through the organ of this ministry of all and every work done by it in execution of said contract in order that the Government may be enabled to judge of its compliance with the obligations of said contract in conformity with the spirit and the magnitude of its stipulations.

The contract of the Manoa Company (Limited), being insubsistent through it not complying the obligations thereunder, and also in view of the contents of the Executive resolution dated September 10, 1886, could not, in virtue of the Executive resolution already inserted, revive said contract, but had to be issued anew in conformity with the National Constitution of 1893; that is to say, that it had to be celebrated by the President of the Republic with the affirmative vote of the Government council and with the approval of Congress. Article 44 of the constitution which establishes the duties of Congress, contains, under No. 16 the following:

To approve or deny such contracts of national interest as the President of the Union may have celebrated, and without which they can not be carried out into effect.

The Executive resolution of June 18, 1895, was, and is, absolutely inefficacious for giving existence to a contract that had become void ten years before.

The claimant company presents as a proof of the subsistence of its contract a resolution issued by the minister of fomento on February 26, 1886, which in no wise refers to said contract but to another, as I shall forthwith show. Hence the text of the resolution:

UNITED STATES OF VENEZUELA,
MINISTRY OF FOMENTO,
DIRECTION OF TERRITORIAL RICHES,

Caracas, 26 February 1886

Year twenty-second of the law and twenty-seventh of the federation.

Resolved, In view of the petition of Citizen Heriberto Gordón, as attorney to C. C. Fitzgerald, assignee of the contract for colonization and exploitation of a part of the waste lands of the former State of Guayana, celebrated on May 21, 1884; the President of the Republic, with the vote of the Federal council, has resolved: That for the effects of the extensions of time fixed for the performance of said contract, the time elapsed since the 11th of June, 1885, up to this day, be not computed, and that consequently the mentioned contract continue in force and the concessionary is in possession of all his rights.

Let it be published.

For the Federal Executive: J. V. GUEVARA

This resolution refers to the contract celebrated by Dr. Heriberto Gordón on his own behalf for colonizing the waste lands situated in the former State of Guayana, which are comprised within the limits expressed in Article I.

The Manoa contract was celebrated on September 22, 1883, and approved by the National Congress on May 23, 1884; the Gordón contract was celebrated on May 20, 1884, and its approval by the legislature took place in the 12th of June of the same year.

Owing, no doubt, to a mistake, which I have corrected, the claimant company has adduced the mentioned resolution as evidence.

" The Manoa Company " considers itself as being the owner of the Imataca iron mine and the Pedernales asphalt mine, alleging such ownership in view of article 4 of the contract; and whereas in 1888 the Government of the Republic conceded the definite title to said mines to Mr. George Turnbull, who previously fulfilled the formalities of law in force at the time, said company pretends to be dispossessed and on the ground of such erroneous opinion lays one of its claims.

The memorial states as follows:

Afterwards, on or about the 13th day of March, A.D. 1888, the authorities of the Republic conceded and issued to said Turnbull, in form of law but without right the

definite title to the said iron mine of Imataca; and afterwards, on the 28th day of June of that year, they conceded and issued unto him in like manner and form the definite title to said mine of asphalt; and afterwards put said cessionary in possession thereof and of the lands comprising the superficial area of the same and intended for their use in the exploitation thereof; the definite title of which lands also said authorities about the same time conceded to said Turnbull.

All of said arbitrary acts and doings were accomplished without notice to said company or other process, legal proceeding, or opportunity to them to be heard, and were in manifest derogation of its rights.

The basis which the claimant company pretends to have for the series of mistakes contained in the two foregoing paragraphs is article 4 of the contract, to wit:

ART. IV. A title in conformity with the law shall be granted to the contractor for every mine which may be discovered in the colony.

The claimant company holds that, in virtue of said clause, every mine discovered in the territory described in article 1 of the contract belongs to it, whoever the discoverer may be. A gross absurdity, which baffling interest alone could have led the claimant company to believe. The Government of Venezuela undoubtedly celebrated the contract which is being subject to analysis, with a view to develop the natural riches and colonization of the mentioned territory, and according to the curious meaning given to article 4 by the company, the exploitation of the mines depended exclusively on their will, so that if said company did not wish to discover any, nobody could denounce one, even if he discovered it.

Furthermore, the article provides that a title should be granted in conformity with the law to the enterpriser on every mine he discovered; that is to say, that if the company discovered a mine, it had, in order to obtain said title, to comply with the legal formalities.

Since 1883, when the Manoa contract was signed, up to 1887, when Turnbull obtained his title to the iron mine of Imataca and to the asphalt mine of Pedernales, five mining codes were in force in Venezuela, to wit: one of March 13, 1883; one of November 15, 1883; one of May 23, 1885; one of May 30, 1887; and an organic decree of the latter issued on August 3, 1887.

All of said codes are based on the principle that mines are the property of the State wherein they are situated, the administration alone of the same being in charge of the Federal Executive; therefore it has to be taken for granted that whosoever wishes to exploit a mine, even he who discovers the same on his own grounds, must previously obtain a corresponding title thereto. For such obtainment the following formalities, briefly stated, have to be complied with:

Whoever may intend to exploit mines shall notify the president of the State or the governor of the territory wherein the mines discovered are located, so that they may be entered in the register which must be kept by the secretaries of said functionaries. (Art. 11.)

The petition for a concession shall be published once only in the official gazette of the State or territory, as the case may be, or in default thereof in the paper of largest circulation, or if the latter does not exist either, it will suffice to post placards or advertisements in the municipality where the mines are located during thirty days. (Art. 12.)

In every petition for mines addressed to the president of the State or to the governor, accordingly, the number of mines requested must be expressed, as also the district, municipality, or colony wherein such are contained; if these are not private, municipal, or waste lands, the name must be stated of the engineer or public surveyor who is to measure them and make out the plans, which acts

will take place after having published a notice to that effect in the press, in order to inform the adjacent neighbors thereof, so that they may assist at said acts. Plans made only by engineers or surveyors having a title, will be considered authentic and will alone produce legal effect in the matter of mensuration and plans contained in the records of mines. (Art. 16.)

Once the mensuration takes place, the record, together with the plans made, is turned over to the mining inspector for him to verify the acts, which in its turn, and in addition to his report, is all forwarded to the ministry of fomento. (Art. 17.) Thereupon, and in view of the record and its merits, the national Executive decides as to whether it will or will not grant the concession. (Art. 19.)

The Manoa Company (Limited) should have complied with all said formalities in order to obtain a title to the aforesaid mines, and it did not do so. The only judicial effect which can be attached to article 4 of the contract is the right of the company to be preferred when in competition with any other discoverer, in conformity with articles 13, 14, and 15 of the referred-to law.

Article 13 provides that—

> Those who think to have a right to oppose others who have petitioned for mining concessions in virtue of the preceding articles, may present their petitions to the president of the state or to the governor of the territory. These petitions will be registered in the same order of their presentation, stating the day and hour thereof, and the only notification to the parties concerned therein will be published in the official gazette three times in the course of a month, or placards and advertisements will be posted as mentioned in the foregoing article.
>
> On the expiration of said thirty days, and the formalities provided in the preceding articles having been fulfilled, the president or governor, as the case may be, will decide with regard to the petitions for concessions, and his resolution will refer also to the merits of oppositions, if such oppositions have been made.
>
> After said decision has been given no oppositions will be admitted, and the favored party or parties will be authorized by the president or governor accordingly, to proceed to the exploration and other preparatory acts required for putting the record in a condition to be considered, and to enable him to issue or deny a title of concession, reporting the same to the national Executive. (Art. 15.)

The provisions quoted are those of the law of November 15, 1885.

If, as before stated, whenever a person discovers a mine in his own territory he must, in order to obtain a title thereto, comply with the formalities provided under the respective law, all the more reasons why the claimant company should have complied with the same is that under the contract of September 22, 1883, no other right to the territory designated in article 1 was conceded to it than that of exploiting the natural riches therein contained.

In the opinion of the Venezuelan Commissioner, as the claimant company has no title of ownership of the aforesaid mines nor made any opposition to Turnbull when he attempted to acquire them, the claim of said company in regard to such mines is absolutely groundless.

" The Manoa Company (Limited)," has not shown that it fulfilled the obligations imposed under the contracts of September 22, 1883, and consequently it is deprived of any right to claim for losses sustained through the annulment of said contract. In effect, it would be the most flagrant violation of equity — which has to be the basis for the decisions of this tribunal — to acknowledge the rights which a contract concedes to a contractor without considering that said contractor has not fulfilled the obligations he was under, and that these are correlative to said rights.

Lastly, " The Manoa Company (Limited)," raises its claim to the exorbitant amount of $2,000,000 without producing the slightest evidence to prove that the losses alleged amount to that sum. I am firmly convinced that this high

tribunal has to be extremely exigent and conscientious in examining and appreciating to evidence produced in support of claims, as otherwise it might inadvertently serve the unbounded avarice of unscrupulous claimants.

GEORGE TURNBULL

Let us now analyze Mr. Turnbull's claims.

One is for $500,000, at which amount the plaintiff reckons the damages and losses which a judicial proceeding against "the Orinoco Iron Syndicate" caused him.

This part of the claim is perfectly groundless, as the said proceeding was quite legal, and the most decided and efficacious protection was tendered by the Government of Venezuela to Mr. George Turnbull's interests.

At the national court of finance at Ciudad Bolívar a judgment of confiscation was given against the English schooner *New Day*, of which the captain was John W. Baxter, on account of having discharged at Manoa a cargo that had been transshipped at Barbados from the steamers *Java*, *Yucatan*, *West Indian*, and *Spheroide*, and which cargo had been shipped at London and Liverpool by the Orinoco Iron Syndicate (Limited) to the port of Ciudad Bolívar, addressed to that same company, the manager of which was Mr. George Turnbull. And whereas Manoa is not a port authorized for foreign trade, nor had the schooner obtained a permit to discharge goods therein, the fact was denounced at the national court of hacienda, and said court, in the exercise of its legal duties, passed the corresponding judgment thereon. Said judgment having been finally determined, a sentence was delivered declaring that the schooner *New Day*, together with its boat, tackle, and other appurtenances, were liable to the penalty of confiscation, as also was the cargo discharged at Manoa, in conformity with No. 6, article 1, law 21 of the Code of Hacienda, to wit:

ARTICLE 1. *The objects which are liable to the penalty of confiscation are those* included in each of the following cases:

First. * * *
Second. * * *
Third. * * *
Fourth. * * *
Fifth. * * *

Sixth. The cargo of any vessel which attempts to load or discharge, or which is found loading or discharging, or which may have loaded or discharged, in ports not equipped therefor, along the coasts, in bays, inlets, rivers, or on desert islands, with permission and authorization of the law in the premises, and the vessel, together with all its tackle and appurtenances, and the canoes, boats, lighters, or other vessels which may be used for the purpose, shall suffer the same penalty.

That same judgment condemned Capt. John W. Baxter to pay *mancomún et in sólidum* with "the Orinoco Iron Syndicate (Limited)," as the owner and shipper of the cargo, the fiscal duties in addition to the double of these duties, etc. Said condemnation is contained in the provisions of No. 3, article 2, of the cited law 21, to wit:

ART. 2. Besides the loss of the merchandise or effects which may have been the subject of the suit brought to declare the confiscation, and the boats and other vessels, wagons, beasts of burden, and lashings, as the case may be, the transgressors shall incur the following penalties:

First. * * *
Second. * * *
Third. In the sixth case the captain of the vessel and the owner of the cargo, together with the loaders or unloaders, shall jointly and severally (*mancomún et in*

sólidum) suffer a fine of twice the custom dues, and the captain shall suffer an imprisonment of from six to ten months.

The above quoted sentence was confirmed by the high Federal court in the following terms:

The minutes of the procedure having been analyzed by this department, it is noted: That the evidence clearly shows that the facts denounced by the administrator of the custom-house at Ciudad Bolívar; that all the extremities of law have been correctly complied with; that the sentence has not been applied for; that therein the penalties of law have been enforced; and that the fisc is not prejudiced; wherefore in conformity with paragraph 2, article 34 of the law of confiscation in force, administering justice, authorized thereto by the law, this procedure is approved in all its parts. (Official Gazette, No. 6829, October 2, 1896.)

This sentence effected, and as the value of the ship and cargo did not suffice to cover the penalties imposed, the rights acquired for exploitation of the iron mine of Imataca by " the Orinoco Iron Syndicate (Limited) " were denounced and offered for sale.

Mr. Turnbull, finding his ownership over the Imataca mine endangered in view of the aforesaid sale, applied to the Government, requesting protection of his rights, and it was forthwith and most fully accorded in a resolution issued on December 10, 1898, by the ministry of agriculture, industry, and commerce (the name at that time of the ministry of fomento), with that view, as affirmed by the claimant himself in his memorial.

Said resolution was telegraphed to the judge of hacienda at Ciudad Bolívar, but arrived after the sale of the aforementioned rights of exploitation had taken place. Turnbull appealed to the court against the sale, and the Federal court decided that the appeal was unlawful.

Subsequently, Turnbull sued Messrs. Benoni Lockwood, jr., and the Orinoco Company (Limited) before the primary court of the Federal District for damages and losses through their bidding at the sale of his Imataca mine, and furthermore sued said company for the annulment of the definite title derived from the sale. On June 7, 1900, a sentence was passed on this case, declaring that " the Orinoco Company (Limited) had nothing to claim against him (Turnbull), nor had it any rights to claim on his Imataca mine with regard to the title already mentioned."

The reasons assigned and the documents quoted prove most evidently that Mr. George Turnbull has no right whatever to demand anything of the Government of Venezuela on account of the claim analyzed. On the contrary, the Government of the Republic always readily sought to protect Mr. Turnbull's interests. In order that this claim might be partially legal, it would have been necessary that the claimant had acknowledged that the sentence passed on the Orinoco Iron Syndicate (Limited) by the national court of hacienda at Ciudad Bolívar, and confirmed by the high Federal court, was notoriously unjust or was a denial of justice; this Mr. Turnbull has not even attempted to do, and if he had, it would have been impossible for him to prove it, as said sentence is entirely in conformity with Venezuelan laws.

Mr. George Turnbull alleges that his having been deprived of the Imataca mine since the annulment of his contract (resolution of June 18, 1895) until his said Imataca mine was excluded from such annulment (resolution of November 10, 1895), impeded him from celebrating any contract and from developing and receiving the benefits of the mines, and that thereby he lost £140,000.

Turnbull ascribes the aforesaid loss to the fact that " the Orinoco Iron Syndicate (Limited) " rescinded its contract celebrated with him for exploiting the Imataca mine. This assertion is denied by the authentic facts which

were related while analyzing those alleged as the grounds for the former claim. In fact, it is evident that the above-mentioned syndicate did not rescind its contract on account of the reasons assigned, but that it dispatched the schooner *New Day* to Manoa with machinery and other articles necessary for making assays for the exploitation of the Imataca mine, but, as said ship was found to be discharging its cargo at a port not authorized for foreign trade, the corresponding lawsuit was brought against it, and the final sentence thereof declared that the ship and cargo, together with its tackle and appurtenances, had incurred the penalty of confiscation; all having been complied with in conformity with Venezuelan law. According to Turnbull himself, his affairs with said syndicate were rescinded, owing to the referred to calamity. If such a calamity occurred through Turnbull's fault he ought to take upon himself the injurious consequences thereof; if the same occurred through the syndicates fault, it had no right to rescind the contract, and Turnbull could demand of it payment for damages and losses. In consequence thereof the claim under analysis is deprived of all legal grounds.

There is another general feature common to all of Mr. Turnbull's claims, and that is the want of evidence in regard to the damages he pretends to have suffered, and which he reckons at really fabulous amounts. With regard to the detention of three of his ships during one month, effected by a Government official, he does not even mention his name, and the claimant affirms that as soon as the Government heard of this, they replaced the said employee and put the ships at liberty, which means that the Government tendered their protection to Mr. Turnbull's interests. And as regards the stealing and destruction effected in 1893, of the tools and machinery placed at the mines by the claimant, he himself declares that such injurious acts were committed " *by certain individual who were revolting against the Government,*" which shows that such acts were an infringement of common law, and that Turnbull should have applied to the courts of justice to denounce or report the perpetrators thereof and demand of them lawful civil atonement.

THE ORINOCO COMPANY (LIMITED)

This company claims to be paid $125,000 for damages alleged to have been caused through its having bought the Imataca mine, at a judicial sale before the court of hacienda at Ciudad Bolívar, and through the court of common pleas of the Federal District having declared in a sentence issued on June 7, 1900, that the mine belonged to Turnbull.

When analyzing the claims of said Turnbull, we minutely stated everything relative to the confiscation suit brought against " the Orinoco Iron Syndicate (Limited) " before the national court of hacienda at Ciudad Bolívar, and we fully showed the lawfullness of said tribunal's proceedings, for which reason we shall briefly demonstrate the entire want of grounds for this claim.

This want of grounds for the claim and its wrongfulness are evidenced in the memorial itself, which, on the other hand, shows, besides, the negligence and unskillfulness wherewith the company and its representatives carried on the whole affair. The fact is that in said memorial it is admitted that Mr. Benoni Lockwood, jr., took no care to ascertain, before becoming a purchaser, what rights were about to be sold, or whether such rights actually belonged to the Orinoco Iron Syndicate (Limited), against whom said action was brought, and said gentlemen thought, without reading the respective titles, that " said syndicate was assignee of all of the rights which had been claimed by said Turnbull to said premises, and being assured and advised by said Berrio, and supposing and believing that said sentence was a lien upon, and that the pur-

chaser of said premises at said sale would therefore acquire, all the rights of said Turnbull or said syndicate to the possession, development, or exploitation of said mine, and the title of ' the Orinoco Company (Limited) ' thereto be effectually and finally quieted as against the same, etc.," he became a purchaser thereof. All of which evidently proves that Lockwood fell into a series of deplorable mistakes, and " the Orinoco Company (Limited) " holds the inconceivable absurdity that Venezuela must indemnify it for the injurious consequences thereof.

Mr. Baxter, the direct representative of " the Orinoco Company (Limited)," did not share in Mr. Lockwood's mistakes, as having powerful reasons to doubt that " the Orinoco Iron Syndicate (Limited) " was the owner of the mine, and in doubt also as to whether said sale were legal he refused to deliver to Lockwood the 120,000 bolivars, which was the price of the sale, and did not effect said payment until much later, having done so in virtue of an agreement which the claimant says he made with Gen. Celis Plaza and General Berrio, etc. We repeat that, in the fourth paragraph of the memorial, destined to expound and support this claim, its insubsistency is shown.

The high Federal court in its last sentence pronounced the unlawfulness of the recourse to appeal against said sale which Turnbull had pretended, and then said Turnbull brought an action against Benoni Lockwood, jr., and " the Orinoco Company (Limited)," in which case a definite sentence was passed on June 7, 1900, its dispositive part being as follows, to wit:

> For the above reasons the tribunal administering justice in the name of the Republic declares groundless the part of the action brought for injury and damages by George Turnbull against Benoni Lockwood, jr., American citizen, resident in New York, and " the Orinoco Company (Limited)," an American corporation organized in conformity with the laws of the State of Wisconsin, as is shown by the power produced, and of effect the other part in which the said Turnbull asks that it be declared that " the Orinoco Iron Company " has no right of action against him, and has no rights to enforce on his mine Imataca. No special order is made as to costs.

No claim arising from said sentence is just, except to prove that the same is notoriously unjust; furthermore, " the Orinoco Company (Limited) " was satisfied with said decision, since it did not attempt the recourse to appeal against it, which is granted under article 185 of the code of civil procedure, and which provides as follows, to wit: " On all definite sentences issued in first instance appeal is given, except when special disposition is made to the contrary. "

And lastly, the real purchaser is Mr. Benoni Lockwood, jr., and not " the Orinoco Company (Limited); " whereas if by said sale the company sustained damages whatever, it ought to claim compensation of the former, and not of the Government of Venezuela.

It is extremely surprising that the sale having been for 120,000 bolivars, the company should inconsiderately raise this claim to $125,000.

It has most clearly been shown that the claim analyzed entirely lacks grounds, and therefore must be disallowed.

The second claim of " the Orinoco Company (Limited) " is supposed to arise from the executive resolution issued on October 11, 1900, whereby the nullity and insubsistency of the Fitzgerald contract of September 22, 1883, was declared.

" The Orinoco Company (Limited) " sets forth this claim as assignee and successor of the " Manoa Company (Limited) " in regard to the Fitzgerald contract. From a judicial point of view the position of both companies is identical, and consequently the reasons which I exposed on analyzing said contract suffice for rejecting, as I absolutely do reject, this claim.

I therein proved that the resolution of September 9, 1886, is quite legal:

First, because the " Manoa Company (Limited) " confessed authentically the facts which are the grounds thereof; secondly, because the company itself acknowledged the forfeiture of the contract; and, lastly, because it made of the Government a judge as to the subsistency of said contract, which, having been annulled, could not revive through a resolution, but was essentially necessary that it should be issued anew, fulfilling all the requisites and formalities wherewith it was originally issued.

REMARKS IN REFERENCE TO " THE MANOA COMPANY (LIMITED) " AND TO " THE ORINOCO COMPANY (LIMITED) "

The Venezuelan Commissioner can not accept the alternative and doubtful form in which the aforementioned companies set forth some of their claims.

" The Manoa Company (Limited) " states, that if by reason of the force and effect of said resolution of September 9, 1886, the Fitzgerald concession was annulled the company estimates the damages sustained at a certain amount; but that if said resolution did not attain legal efficiency, then the compensation demanded amounts to a different sum. And in the same way it sets forth its claims for the Imataca and Pedernales mines.

" The Orinoco Company (Limited) " adheres to the same alternative form in setting forth its claims regarding the contract and aforesaid mines.

Such a form is inadmissible according to the spirit and meaning of the protocol in the first place, because every claimant must set forth his claims in categorical and not in doubtful terms, as the Commission entirely lacks jurisdiction to decide as to the validity or nullity of a contract and of titles of ownership, and because it has been organized to entertain claims of United States citizens for obtaining indemnification for damages and losses caused by acts of the Government, or of Government officials; wherefore, whenever this Commission examines the lawfulness or unlawfulness of a resolution of the Government from which a claim derives, it is with a sole view of awarding an indemnification in case of said resolution being unlawful, and of denying it if it is lawful; but this Commission entirely lacks jurisdiction for declaring a resolution inefficacious and making its effects void.

The Government of Venezuela in organizing the mixed commissions appointed judges, and not authorities capable of annulling its acts.

For the same powerful reasons the writer does not admit the arguments of the honorable commissioner on the part of the United States, Mr. Bainbridge, especially those affirming the existence of the Fitzgerald contract and those denying validity to the titles of ownership of the Imataca and Pedernales mines issued by the Government of Venezuela.

In virtue of the reasons stated, the opinion of the Venezuelan Commissioner is that the claims marked Nos. 45, 46, and 47 set forth by George Turnbull, " the Manoa Company (Limited)," and " the Orinoco Company (Limited)," respectively, must be absolutely disallowed.

BARGE, *Umpire:*

A difference of opinion arising about these three claims between the Commissioners of the United States of North America and the United States of Venezuela, they have duly referred to the umpire, and as they all have the same origin and follow the same order of facts the umpire thought it well to consider them jointly, and having fully taken in consideration the protocol, and also the documents, evidence, and arguments, and likewise all the other communications made by the parties, and having impartially and carefully examined the same, has arrived at the decision embodied in the present award.

Whereas in the month of September, 1883, the Government of Venezuela entered into a contract with Cyrenius C. Fitzgerald for the exploitation of the natural products of a certain extent of territory, which contract reads as follows:

The minister of fomento of the United States of Venezuela, duly authorized by the President of the Republic, of the one part, and Cyrenius C. Fitzgerald, resident of the Federal Territory of Yuruary, of the other part, have concluded the following contract:

ARTICLE I. The Government of the Republic concedes to Fitzgerald, his associates, assigns and successors, for the term of ninety-nine years, reckoning from the date of this contract, the exclusive right to develop the resources of those territories, being national property, which are hereinafter described.

1. The island of Pedernales, situated to the south of the Gulf of Paria and formed by the gulf and the Pedernales and Quinina streams.

2. The territory from the mouth of the Araguao, the shore of the Atlantic Ocean, the waters above the Greater Araguao, to where it is joined by the Araguaito stream; from this point, following the Araguaito to the Orinoco, and thence the waters of the upper Orinoco, surrounding the island of Tortola, which will form part of the territory conceded, to the junction of the José stream with the Piacoa; from this point following the waters of the José stream to its source; thence in a straight line to the summit of the Imataca range; from this summit following the sinuosities and more elevated summits of the ridge of Imataca to the limit of British Guayana; from this limit and along it toward the north to the shore of the Atlantic Ocean to the mouth of the Araguao, including the island of this name and the others intermediate or situated in the delta of the Orinoco and in contiguity with the shore of the said ocean. Moreover, and for an equal term, the exclusive right of establishing a colony for the purpose of developing the resources already known to exist and those not yet developed of the same region, including asphalt and coal; for the purpose of establishing and cultivating on as high a scale as possible agriculture, breeding of cattle, and all other industries and manufactures which may be considered suitable, setting up for the purpose machinery for working the raw material, exploiting and developing to the utmost the resources of the colony.

ART. II. The Government of the Republic grant to the contractor, assigns, and successors, for the term expressed in the preceding article, the right of introduction of houses of iron or wood, with all their accessories, and of tools and of other utensils, chemical ingredients and productions which the necessities of the colony may require; the use of machinery, the cultivation of industries, and the organization and development of those undertakings which may be formed, either by individuals or by companies, which are accessory to or depending directly on the contractor or colinization company; the exportation of all the products, natural and industrial, of the colony; free navigation, exempt from all national or local taxes, of rivers, streams, lakes, and lagoons comprised in the concession or which are naturally connected with it; moreover the right of navigating the Orinoco, its tributaries and streams, in sailing vessels or steamships, for the transportation of seeds to the colony for the purpose of agriculture, and cattle and other animals for the purpose of food and of development of breeding; and lastly, free traffic of the Orinoco, its streams and tributaries, for the vessels of the colony entering it and proceeding from abroad, and for those vessels which, either in ballast or laden, may cruise from one point of the colony to the other.

ART. III. The Government of the Republic will establish two ports of entry, at such points of the colony as may be judged suitable, in conformity with the treasury code.

The vessels which touch at these ports, carrying merchandise for importation, and which, according to this contract and the laws of the Republic, is exempt from duties, can convey such merchandise to those points of the colony to which it is destined and load and unload according to the formalities of the law.

ART. IV. A title in conformity with the law shall be granted to the contractor for every mine which may be discovered in the colony.

ART. V. Cyrenius C. Fitzgerald, his associates, assigns, or successors are bound:

1. To commence the works of colonization within six months, counting from the date when this contract is approved by the Federal council in conformity with the law.

2. To respect all private properties comprehended within the boundaries of the concession.

3. To place no obstacle of any nature on the navigation of the rivers, streams, lakes, and lagoons, which shall be free to all.

4. To pay 50,000 bolivars in coin for every 48,000 kilograms of sarrapia and cauche which may be gathered or exported from the colony.

5. To establish a system of immigration which shall be increased in proportion to the growth of the industries.

6. To promote the bringing within the law and civilization of the savage tribes which may wander within the territories conceded.

7. To open out and establish such ways of communication as may be necessary.

8. To arrange that the company of colonization shall formulate its statutes and establish its management in conformity with the laws of Venezuela, and submit the same to the approbation of the Federal Executive, who shall promulgate them.

ART. VI. The other industrial productions on which the law may impose transit duties shall pay those in the form duly prescribed.

ART. VII. The natural and industrial productions of the colony, distinct from those expressed in Article V and which are burdened at the present time with other contracts, shall pay those duties which the most favored of those contracts may state.

ART. VIII. The Government of the Republic will organize the political, administrative, and judicial system of the colony, also such armed body of police as the contractor or company shall judge to be indispensable for the maintenance of the public order. The expense of the body of police to be borne by the contractor.

ART. IX. The Government of the Republic, for the term of twenty years, counting from the date of this contract, exempts the citizens of the colony from military service, and from payment of imposts or taxes, local or national, on those industries which they may engage in.

ART. X. The Government of the Republic, if in its judgment it shall be necessary, shall grant to the contractor, his associates, assigns, or successors a further extension of six months for commencing the works of colonization.

ART. XI. Any questions or controversies which may arise out of this contract shall be decided in conformity with the laws of the Republic and by the competent tribunals of the Republic.

Executed in duplicate, of one tenor and to the same effect, in Caracas, 22nd September, 1883.

Señor Heriberto Gordón signs this as attorney of Señor C. Fitzgerald, according to the power of attorney, a certified copy of which is annexed to this document.

[SEAL] M. CARABAÑO
Minister of Fomento
Heriberto GORDÓN

And whereas the term fixed in Article V, 1, of this contract, on the petition of Fitzgerald, was extended to six months more, to count from the 22d of March, 1884;

And whereas during this term, v. g., on the 14th of June, 1884, this concession was transferred from Fitzgerald to " the Manoa Company (Limited); "

And whereas on the 9th of September, 1886, a resolution of the Federal Executive declared this contract " insubsistente ó caduco; "

And whereas on the 28th of April, 1887, the Congress approved a contract passed in Nice on the 1st of January, 1886, between Guzmán Blanco, envoy

extraordinary and minister plenipotentiary of the United States of Venezuela to various courts of Europe, and George Turnbull, which contract reads verbally as the above-mentioned contract with Fitzgerald, except that an Article XII was added, reading as follows:

This contract shall enter into vigor in case of the becoming void through failure of compliance, within the term fixed for this purpose, of the contract celebrated with Mr. Cyrenius C. Fitzgerald the 22d of September, 1883, for the exploitation of the same territory;

And whereas on these contracts, respectively, are based the claims of " the Manoa Company (Limited)," all the claims but one of " the Orinoco Company (Limited)," and the claims of George Turnbull, it has to be considered what rights to claim for damages against the Venezuelan Government these contracts give to the claimants, " the Manoa Company (Limited)," " the Orinoco Company (Limited)," and George Turnbull, and what obligations on the side of the Venezuelan Government to grant to the said claimants what they claim for can be based upon these contracts:

First, as to the Fitzgerald contract, purchased by the " Manoa Company (Limited)," as being prior in date;

Whereas this contract in due form was lawfully performed, all its stipulations, of course, were binding upon both contracting parties as long as the contract legally existed.

Now, whereas claimants' claims center in the assertion that this contract was unlawfully annulled by the Venezuelan Government, and while it is for losses suffered in consequence of this unlawful annulment that damages are claimed, it has to be examined —

Whether the contract was unlawfully annulled; and, if so,

Whether this unlawful action gives a right to the claimant to claim for damages and imposes a duty on the Venezuelan Government to grant what is claimed;

Now, whereas the incriminating act of the Venezuelan Government is the resolution of the Federal Executive of September 9, 1886, this resolution has to be considered. It reads as follows:

El Señor Heriberto Gordón, con poder del Señor C. C. Fitzgerald, celebró el 22 de Setiembre de 1883 con el Gobierno Nacional un contrato para explotar las riquezas que se encuentran en terrenos de propiedad nacional en el Gran Delta, debiendo empezar los trabajos dentro de seis meses contados desde la fecha expresada, y aunque trascurrido este término sin dar principio á ellos, el Gobierno le concedió una prórroga para verificarlos; y como el indicado contratista no ha cumplido las obligaciones que contrajo, según se expresa en el informe del Director de Riqueza Territorial especificados en el mismo, refiriéndose al articulo 5 del contrato en que se determinen; el Consejero Encargado de la Presidencia de la República, con el voto afirmativo del Consejo Federal declara insubsistente ó caduco el expresado contrato.

Comuníquese y publíquese.

Por el Ejecutivo Federal: G. PAZ SANDOVAL

Reading this resolution it is clear that the contract was declared " insubsistente ó caduco " for the reason that the contracting party (claimant) had not done what in Article V of the contract he pledged himself to do.

Now, whereas this Article V reads as stated above, and whereas it is quite clear by evidence, not only that the claimant on the said 9th of September 1886, had not complied with one of his obligations; whereas even at the end of the prolongation of six months that was granted as a term to begin the works of colonization this colonization can not be said to have begun, as the

sending of an engineer and some employees on the 24th of August can not be said to be " commencing the works of colonization " (even if the then governor of the Federal Territory of the Delta, on the petition of the claimants' administrator stating the arrival of these employees, added the words " so complying with the stipulation of Article V," because this authority could only state the facts, and was not the legal authority to judge whether by these facts claimant complied with the stipulation of the contract); whereas further on the original contractor himself, director of the claimant company, stated even as late as September, 1885, that claimant had not commenced the works of colonization;

That claimant had not established a system of colonization;

That claimant had not promoted the bringing within law and civilization the savage tribes which might wander within the territory conceded;

That claimant had not opened up and established any ways of communication, and that claimant had not even arranged that the company of colonization should formulate its statutes.

And whereas the claimant company itself as late as April 10, 1886, stated in a petition to the Government of Venezuela that it had not realized the works it was pledged to realize by the contract;

But that by the same evidence is shown that the claimant company, through its pecuniary position, could not have realized what by contract it was pledged to do, as, according to the company's president himself, the company from October, 1885, to November, 1886, never had in cash more than $6, and in that time did not spend a farthing for the execution of the contract, while during all that time the drafts drawn by the company's Venezuelan attorney, Mr. Heriberto Gordón, were protested, as they could not be paid, with the exception of two for $400 each, which were paid by Mr. Safford, and not by the company's cash;

And whereas evidence shows that in January, 1885, stockholders resolved for the execution of the contract to issue $5,000,000 in bonds, which in November of that year were secured by mortgage on the concession, and for which even until November, 1886, not a penny was received by the company, that even the printing of the bonds could not be paid, and that Fitzgerald, who had sold the concession for 44,750 shares of $100 nominal each, in July, 1886, was willing to sell them for a few thousand dollars. The facts alleged as a reason for declaring the contract " insubsistente ó caduco " are proved, and it is clearly shown by evidence that on the 9th of September, 1886, the claimant company had in nowise fulfilled any of the duties imposed by the contract.

Now, whereas it is settled that there were sufficient reasons to declare the contract " insubsistente ó caduco," it has to be seen if by the declaration of the Federal Executive the contract really was annulled. And then it has to be remembered that the question could be and really has been put whether No. 1 of Article V of the contract was a condition, the nonfulfillment of which would retroact, so that it were as if the contract had never existed — in which case the resolution would be a simple act whereby it was stated that the contract did not exist, that it was " insubsistente " — and the contract would really not exist;

Or whether this No. 1 — as all the other numbers of Article V — was an obligation, the nonfulfillment of which would be a sufficient reason for making the contract " caduco " — that is to say, to annul the contract that was till then really existing — which annulment, according to the general principles of equity, accepted by the laws of almost all the civilized nations, could not be executed by one of the parties, but had to be pronounced by the proper judge.

Now, whereas Article V expressly says that the concessionary, his associates, assigns, and successors " se obligan " (pledge themselves) to begin within a

certain time, and whereas they could not begin without a concession, because they would have had no right to work according to the concession on the Government grounds granted by the concession if they had not this concession; and whereas they could not have this concession, the contract by which it was granted not existing;

It seems evident that according to the will of contracting parties (the supreme law in this matter) this No. 1 of Article V, as all the other numbers of this article, was an obligation and not a condition;

Wherefore the mentioned executive decree can not be regarded as a mere declaration that the contract was " insubsistente," but has to be regarded as an act by which the Government declared it " caduco " — that is to say, " annulled it " — which act could never have the effect of really annulling the contract, because in cases of bilateral contracts, the nonfulfillment of the pledged obligations by one party does not annul the contract ipso facto, but forms a reason for annulment, which annulment must be asked of the tribunals, and the proper tribunal alone has the power to annul such a contract — this rule of the law of almost all civilized nations being in absolute concordance with the law of equity, that nobody can be judge in his own case.

This annulment is superfluous, of course, when both parties agree that the contract is annulled because the obligations were not fulfilled, and the executive decree in question can not be regarded as anything more but a communication on the part of the Government that it thought the contract was ended, to which the other party could agree or not agree as it thought fit; and if it did not think this fit the contract would subsist until its annulment was pronounced by the proper tribunal.

In consequence of all the beforesaid we stand here before the case of a contract between two parties, of which one, disregarding all the pledged obligations, gave more than sufficient reason for the annulment of the contract, while the other acted as if the contract were annulled by its own declaration of that annulment, in that way disregarding (as if not existing any longer) an always still lawful existing contract.

Now, it might be asked, if absolute equity without regard to technical questions would allow to one of the parties the right to a claim based on a contract, the existence of which is, it is true, unjustly denied by the opposing party, but all the stipulations of which contract were trespassed by that same demanding party.

But there is more to consider.

It has not to be forgotten that the contract in question has an Article II reading as follows:

> Any questions or controversies which may arise out of this contract shall be decided in conformity with the laws of the Republic and by the competent tribunals of the Republic;

which article forms part of the contract just as well as any of the other articles, and which article has to be regarded just as well as any of the other articles, as the declaration of the will of the contracting parties, which expressed will must be respected as the supreme law between parties, according to the immutable law of justice and equity: pacta servanda, without which law a contract would have no more worth than a treaty, and civil law would, as international law, have no other sanction than the cunning of the most astute or the brutal force of the physically strongest.

It has to be examined, therefore, what parties intended by introducing this article in the contract; and in how far does it interfere with the claims herein examined?

Now, whereas it is clear that in the ordinary course of affairs, when nothing especially was stipulated thereupon, all questions and controversies arising for reason of the contract would have to be decided by the competent tribunals and in conformity with the laws. There must be looked for some special reason to make this stipulation, and to induce parties to pledge themselves expressly to a course of action they would without this special pledge be obliged to follow just as well. There must be a meaning in the article which makes the judges by law judges by contract as well; and this meaning can be no other but that parties agreed that the questions and controversies that might arise for reason of the contract should be decided only by the competent tribunals of the Republic, and therefore not by the judges of the country, of the other party, if he be a foreigner, nor by arbitration either national or international, while it is not to be overlooked that it is not said in the contract that *the claims* of one party against the other should be judged (that is to say, allowed or disallowed) by the mentioned judge only, but that only these judges should decide about the *questions and controversies* that might arise; which decision of course implies the decision about the question whether the interpretation of the contract by one of the parties, or that party's appreciation of facts in relation to the contract were right, and therefore could be a good reason for a claim for damages, so that properly speaking there could be no basis for a claim for damages, but the decision of these expressly indicated judges about this question or controversy.

Wherefore if one of the parties claims for damages sustained for reason of breach of contract on the part of the other party, these damages can, according to the contract itself, only be declared due in case the expressly designed judges had decided that the fact, which according to the demanding party constituted such a breach of contract, really constituted such a breach, and therefore formed a good basis whereon to build a claim for damages. Parties have deliberately contracted themselves out of any interpretation of the contract and out of any judgment about the ground for damages for reason of the contract, except by the judges designed by the contract; and where there is no decision of these judges that the alleged reasons for a claim for damages really exist as such, parties, according to the contract itself, have no right to these damages, and a claim for damages which parties have no right to claim can not be accepted. Parties' expressly expressed will, and their formal pledge that for reason of the contract no damages should be regarded as due by those declared due by the indicated judges, must be respected by this Commission, when judging about a claimed based on such a contract, just as well as all the other stipulations of that contract, and therefore it can not declare due damages that parties in that contract solemnly themselves declared not to be due.

And whereas all the claims of the Manoa Company (Limited), as well as all the claims but one of the Orinoco Company (Limited) are claims for damages based on points that are questions and controversies arisen for reason of the Fitzgerald contract;

And whereas not one decision of the competent tribunals of Venezuela about these questions and controversies that would make these damages due was laid before the Commission, while according to the contract itself between parties only such damages should be due which were asked on such grounds as would have been declared good grounds by these tribunals, the Commission can not declare due the damages claimed which the parties, by contract, declared not to be due.

And therefore it can not allow these claims.

Now, as to the claims of George Turnbull.

Whereas, as was shown above, on the 1st of January, 1886, on the 11th of

September, 1886, and on the 27th of April, 1887, the Fitzgerald contract was as yet legally existing, the Republic of Venezuela could not dispose on behalf of Turnbull of what it already had disposed on behalf of another, and therefore, Turnbull obtained no right whatever of property in the concession under and by virtue of the contract confirmed by Congress on the 27th of April, 1887;

And whereas the mines of Pedernales and Imataca formed part of the still existing Fitzgerald concession, Turnbull's alleged titles to these mines are equally void;

And as all his claims are based on this void contract and these void titles, they can not be allowed.

Lastly, as to the claim of " the Orinoco Company (Limited)," that is not based on the Fitzgerald concession.

Whereas evidence shows that on the 19th of November, 1898, Carlos Hammer, with power of attorney from Benoni Lockwood, jr., in the name of and representing " the Orinoco Company (Limited)," paid to the Venezuelan Government the sum of 120,000 bolivars for rights purchased on a judicial sale on November 18, 1898, which rights, as evidence shows, the Republic could not dispose of, and out of the possession of which rights claimant was expelled by the proper authorities of that Republic;

This unduly received sum of 120,000 bolivars has to be restored to him who unduly paid it.

Wherefore the Republic of the United States of Venezuela shall have to pay to " the Orinoco Company (Limited) " the sum of 120,000 bolivars, or $23,076.93, with interest at 3 per cent per annum from the 19th of November, 1898, to the 31st of December, 1903.

The American Electric and Manufacturing Co. Case

(By the Umpire:)

A clause contained in a contract that " doubts and controversies which may arise in consequence of this contract shall be settled by the courts of the Republic in conformity with its laws " does not preclude the claimant from demanding damages from the Government for the breach by it of a collateral promise.

The breach of a promise to do an illegal act can not be made the basis of a claim, and a promise by the Government to annul an existing contract containing the clause that " doubts and controversies that may arise in consequence of this contract shall be settled by the courts of the Republic and in conformity with its laws " is a promise to do an illegal act.

Grisanti, *Commissioner* (claim referred to umpire; no opinion by the American Commissioner):

The American Electric and Manufacturing Company deduces a claim against the Republic of Venezuela, adducing as the grounds for it, the facts stated in its memorial, some of which denoting most importance, will presently appear in this statement.

In May, 1887, the Government of Venezuela made a contract in virtue of which they granted Aquilino Orta —

the right to establish telephonic communication within the towns and cities of the Republic and between the same; also in the country districts and country villages and between both; and further, to extend the same communication outside of Venezuela by such means as he may deem most suitable.

In July, 1883, the Government of Venezuela had signed another contract which had the same object, with the Intercontinental Telephone Company of New Jersey, represented by Mr. J. A. Derrom.

After several assignments the claimant company became an assignee of the contract signed with Orta, and at the time of fulfilling the same by establishing some telephonic lines entered into competition with the Intercontinental Telephone Company of New Jersey, in which competition the claimant company was defeated, and ended in its transferring the contract to its competitor.

This simple statement, strictly adhering to the truth, is an abridged record of the case. On what principle, then, of justice or equity can " the American Electric and Manufacturing Company " rely for its claim. From what juridical postulate or from what legal precept does liability arise for Venezuela to indemnify damages caused by the defeat in that struggle of enterprises, considering the political economy as the most efficacious means of ameliorating and rendering products cheaper and developing industrial progress?

The American Electric and Manufacturing Company pretends to found its claim on the grounds of article 8 of its contract, which is worded as follows:

> The Government shall not grant similar concessions to any other person or company, nor shall it permit additions to contracts interfering with the present one, during a period of nine years, which shall be reckoned from the date on which it is signed, and may be extended for three years longer, at the option of the Government.

The foregoing article was not infringed, as the Government of Venezuela did not grant any concession that impaired or collided with the right of the claimant company.

It is also adduced as the grounds for the claim that the Government authorities of Venezuela assured the claimant company that as soon as its telephone plant should be in operation the concession of 1883 would be revoked.

Of this assertion, which is inverisimil, not the least proof has been produced; and in case such promise had been given, not being legal, it could not give rise to any right. On the other hand, the principal reason assigned for said revocation, which was the poor service of the Intercontinental Telephone Company of New Jersey, is denied by the real facts, as it defeated the claimant company in competition.

It is the opinion of the Venezuelan Commissioner that on the strength of the reason stated the claim specified, which the American Electric and Manufacturing Company deduce, should be disallowed.

BARGE, *Umpire:*

A difference of opinion having arisen between the Commissioners of the United States of America and the United States of Venezuela this case was duly referred to the umpire.

The umpire having fully taken into consideration the protocol and also the documents, evidence, and arguments, and likewise all the comunications made by the two parties, and having impartially and carefully examined the same, has arrived at the following decision:

Whereas the claimant in this claim was the proprietor of a contract made between the Government of Venezuela and one Aquilino Orta about the establishment of telephonic communication, and claims for damages suffered by him through the fault of the Venezuelan Government in his enterprise to realize the object of this contract;

And whereas article 10 of this contract reads as follows:

> Doubts and controversies that may arise in consequence of this contract shall be settled by the courts of the Republic in conformity with its laws

the honorable agent of the United States of Venezuela opposes that before coming to this Commission the claimant company ought to have attempted to recover the pretended damages before the judges chosen by itself with its contractor.

Whereas, however, it is clearly shown by the evidence before the Commission that at the moment Aquilino Orta made said contract with the Venezuelan Government that Government was bound by a prior contract with another party, which contract, if not annulled, would make so much as void the contract passed with said Orta, wherefore, as is shown in the evidence, the claimant company and his predecessors did not cease to ask for the annulment of the prior contract, basing their demand on the pretended promise of the Government to annul that contract, and wherefore the honorable agent of the United States of America in his replication (which replication at the same time bears the character as a brief on behalf of the claimant) cites: " The failure on the part of the Venezuelan Government to fulfill its promise with respect to this cancellation of the (prior) concession " as cause of claimant's losses for which damages are claimed;

Whereas, therefore, not the contract, but the pretended promise from which the contract had to deduce its value, shows itself as cause of this claim, no article of the contract seems apt to interfere with the question of jurisdiction about a claim originated in the nonfulfillment of a promise by which only that contract would obtain its full force and proper value;

Wherefore the fact that the claimant company did not first go to judges chosen by itself in this contract does not disable it to come to this Commission for decision in a claim, originated in pretended promises whereon the force of the contract depended.

And now as to the main question:

Whereas article 1 of the contract made in 1887 with Aquilino Orta, afterwards transferred to the claimant, reads as follows: " The Government grants to Aquilino Orta the right to establish telephonic communication *within the towns and the cities* of the Republic and *between the same*; also in the *country districts* and the *country villages* and *between both*," etc., while article 1 of a contract made in 1883 between the same Government and one J. A. Derrom (law of 31 July, 1883), reads as follows: " The Intercontinental Company of Telephone pledges itself to establish telephonic lines in the *interior of the cities* and *between the principal cities and communities* of the Republic where this may be deemed necessary," being followed by these words of article 3:

" The Government pledges itself during the time of fifteen years, beginning from this date, not to give equal concession to any other person or company." It is clearly shown that the concession given to Aquilino Orta was in flagrant opposition with the rights granted to the Intercontinental Company, and that the contract with Orta could never obtain its main effect as long as this contract with Derrom existed, wherefore the cancellation or the annulment of this prior contract was the condition sine qua non for the contractors of the later contract to attain the main effect of their act; and

Whereas the evidence laid before the Commission shows that claimant and his predecessors were well aware of this fact, as they never ceased to appeal to the Government for the revocation of the contract under which the Intercontinental Telephone Company was operating; while it may be regarded as very characteristic for the way the contract with Orta was looked upon by its possessors that this contract a few months after its origin, being already transferred into the hands of the fourth possessor — this fourth possessor (the American Telephone Company, Consolidated, from which the claimant company

afterwards purchased it) — refused to pay it with $100,000, but agreed, as the evidence says, " only to give in payment thereof one million two hundred and fifty thousand dollars in shares," thus valuing its own shares at the very outset of the enterprise at less than 8 per cent; and

Whereas further on the former legal attorney of the American Telephone Company, who transacted the purchase of the contract by that company (from which, the company, the claimant company, in turn purchased its rights), declared under oath, as the evidence shows, that " it was with the explicit understanding that *the Intercontinental Company was to be entirely removed* that the American Telephone Company undertook to establish the telephone business in that country (Venezuela)."

By all these facts it is clearly shown that to the knowledge of the claimant company and its predecessors the contract with Orta was in flagrant opposition with the prior contract made with Derrom, and could not have its main effect without the annulment of this prior contract, which annulment the possessor of the Orta contract pretended and pretends was promised to them by the Venezuelan Government, and that therefore not the contract itself but the nonfulfillment of the promise that had to give the contract its force — or, as the honorable agent of the United States puts it in his answer, " the failure on the part of the Venezuelan Government to fulfill its promise with respect to the cancellation of the Intercontinental Telephone Company " is to be regarded as the cause of this claim.

And whereas no direct proof of this promise is to be found in the evidence:

But whereas the fact that the Government decided to make the Orta contract in flagrant opposition with the prior Derrom contract, and the fact that the Government has not contested the different protests of the claimant company and its predecessors as to the nonfulfillment of this promise, might seem to point to the probability of such promise having been (at least orally) given.

Whereas, on the other side, the facts —

First. That the Government never interrupted the acts of the Intercontinental Telephone Company when this company continued to carry out the prior contract;

Second. That no proof of any sign of difficulties between the Government and the Intercontinental Telephone Company is given except the complaint of the company not reducing their tariffs;

Third. That the Government, on the contrary, always behaved in respect to the Intercontinental Telephone Company in a way which made the claimant company and its predecessors speak about the Intercontinental as about " the favored company " and complain of the Government's predilection for that company, and which even made the honorable agent of the United States of America point tc " the favors shown to the Intercontinental Telephone Company " as to one of the reasons for the ultimate sacrifice of the undertaking of the claimant company and its predecessors; seem to speak for the improbability of the Venezuelan Government ever intending to cancel the prior contract in favor of the second, and consequently for the improbability of any formal promise as to that cancellation — for all which reasons the fact that the Government of Venezuela promised to the claimant company and its predecessors the cancellation of the Derrom contract can not in equity be said to be sufficiently proved.

Whereas further on article 8 of the Derrom contract reads in the same words as article 10 of the Orta contract:

Doubts and controversies that may arise in consequence of this contract shall be settled by the courts of the Republic in conformity with its laws,

and

Whereas, therefore, even if, as claimant assures, the Government wanted to finish up with the Derrom concession, and for that reason promised its cancellation, this promise would be a promise to do an illegal act; as the Government as well as the other party was bound to this article, and therefore to the laws of the country, which laws, in complete accord with general principles of law, would not allow the Government to cancel the contract on its own authority, but would require that the annulment be declared by an adverse judgment between the contracting parties.

For which reason such a promise, even when proved to have been given, would not give rise to any right as being illegal, and with relation to the contract (which without it would be void of its main value) would stand as a condition explicitly given orally and implicitly contained in the contract, which condition, according to the laws of the country as well as according to the general principles of law, would be null, and make null the contract that depends on it.

Whereas, therefore, whatever may be or might have been the wrong of the Government in making a contract in flagrant contradiction with a prior contract, or in promising to do an illegal deed so that the later contract might have its force, absolute equity forbids to recognize a right to a claim founded either on the breach of a contract that could only get its force by the fulfillment of a promise to do an unlawful deed, or on the nonfulfillment of this unlawful promise itself.

The claim of the American Electric and Manufacturing Company has to be disallowed.

RAYMOND ET AL. CASE

(By Bainbridge, Commissioner):

The expenditure of money in necessary repairs of a vessel creates a lien thereon in favor of the party advancing the money and the lien follows the vessel no matter into whose hands she may fall.

The acceptance of an assignment in payment of the debt thus contracted releases the lien.

(By Grisanti, Commissioner):

The assignment of property in payment of a debt amounts to a sale of said property, and the acceptance of such an assignment releases the debtor.

BAINBRIDGE, *Commissioner* (for the Commission):

It appears from the evidence that on May 1, 1867, one Charles M. Burns, a subject of Great Britain, being indebted to Ovide de Sonneville, a French subject, in the sum of $35,000, executed and delivered to the latter at New Orleans a mortgage or bottomry bond upon a certain steam vessel owned by Burns, called the *Irene*. At the same time Burns gave De Sonneville power of attorney to sell the vessel or to make contracts for the affreightment or charter party thereof, and to collect all sums that may be due said steamship.

De Sonneville took possession of the vessel and made a voyage first to Barbados, and thence to the island of Trinidad. Near Barbados the *Irene* collided with another steamer, and in order to pay for the repairs rendered necessary by the accident, De Sonneville, on October 9, 1868, borrowed from Charles Raymond, a citizen of the United States, the sum of $2,500.

At Trinidad, on September 12, 1869, De Sonneville, as attorney in fact of Charles M. Burns, entered into a contract with one George Fitt, as representative of the Venezuelan Government, for the charter of the *Irene* for a period of not less than sixty days at the stipulated rate of $100 per day. The contract provided that the Government should be responsible for all expenses and risks of the steamer, and that in case she were lost or suffer any very severe damage that might render her useless, then her value, fixed at $30,000, should be paid to De Sonneville. Fitt paid De Sonneville the sum of $5,000 at the time of the contract in order to free the vessel from obligations which caused her detention at Port of Spain, and this sum De Sonneville agreed to credit upon the amount the ship might earn under the charter. The contract also stipulated that the *Irene*, " being of English nationality," could not be engaged in a naval combat or be used for any operations from which the law of nations prohibits a foreign vessel.

On November 20, 1869, the Government of Venezuela notified De Sonneville that the charter having expired he might take possession of the *Irene*, and that his account for the charter would be liquidated. De Sonneville, however, refused to receive the steamer because of serious injury suffered by the vessel in one of her boilers on October 17 previous, and insisted that the Government of Venezuela either repair the injury or pay the price stipulated in the contract for the vessel. On November 27, 1869, De Sonneville, " in the name and representation of Charles M. Burns, subject of Her Britannic Majesty," made a protest before the register at Puerto Cabello, and on December 1, 1869, " as attorney of Mr. Charles Burns, a subject of Her Britannic Majesty," he made protest before the British vice-consul at Puerto Cabello in regard to the action of the Venezuelan authorities and the injuries sustained by the steamer *Irene*, " the exclusive property of said Charles M. Burns."

On December 15, 1869, De Sonneville addressed a communication to Venezuelan minister of war and navy, stating that he was obliged to leave the *Irene* in the possession of the Government until the contract was complied with, and considering it in the service of the Republic, but suggesting that a commission be appointed to examine it, and if found in the same state in which it was delivered he would receive it back, and that if, on the contrary, the commission should find that repairs were needed they should be made at the cost of the Government.

De Sonneville eventually abandoned the ship, and for many years continued to urge his claim upon the Government. In 1873 he instituted proceedings in the high Federal court, but the suit was subsequently withdrawn. All of his efforts to obtain an adjustment of his claim proved fruitless.

In 1878, De Sonneville made a holographic will, in which he declared himself indebted to Charles Raymond in the sum of $2,500, with interest, and desired that after his death his property should be used to satisfy said indebtedness, and particularly setting forth that if the other property left by him should not be sufficient for that purpose, the necessary sum should be appropriated out of any recovery made on his claim against Venezuela occasioned by the loss of the *Irene*. He left to Florence Raymond, daughter of Charles Raymond, the sum of $5,000, and the surplus to his brother and sister in France.

In April, 1890, De Sonneville executed an assignment to Raymond of all his " present and future properties " in order to pay the indebtedness due the latter. The assignment states that " the properties which I give him in payment are the following: " — enumerating some fourteen different pieces of property, but not including the claim against the Government of Venezuela. De Sonneville died on June 15, 1893.

A claim is now presented here on behalf of the heirs of Charles Raymond as follows:

Value of vessel, as stipulated in contract	$30,000
127 days' hire of vessel, from September 15, 1869, to January 20, 1870, when abandoned	12,700
130 tons of coal, at $12 per ton	1,566
	44,260
Credit payment on account, September 12, 1869	5,000
Balance due January 20, 1870	39,260
Interest at 3 per cent from January 20, 1870	39,260
Total	78,520

Notwithstanding the fact that De Sonneville made the contract with the representative of Venezuela for the charter of the *Irene* as attorney in fact of Charles M. Burns, and subsequently made his protests in the name and representation of Burns as the owner of the steamer, it is quite evident that Burns' interest in the boat was merely nominal. The debt of Burns to De Sonneville secured by the bottomry bond was $35,000. The valuation placed upon the boat in the contract with Fitt was $30,000. The obvious intention of the parties to the bond was to cancel Burns's obligation, and the explanation given of the transaction is that Burns's nominal ownership would entitle the *Irene* to fly the English flag, under which it was desired she should sail. De Sonneville was at any rate in lawful possession, duly empowered by Burns to make out of the sale or use of the vessel the amount of the debt; and the question at the base of De Sonneville's claim is his beneficial interest in the contract with the Government of Venezuela and the rights accruing to him from its breach. Apparently that interest did not exceed the amount which, under the bond and power given by Burns, he was entitled to receive from the use or sale of the vessel, leaving Burns no equitable interest whatever in any claim arising out of the contract.

De Sonneville was a French subject, and the Commission has no jurisdiction of his claim against Venezuela, except in so far as by proper assignment or transfer it may have become the property of citizens of the United States. The contention made here on behalf of the claimants is that they are owners of De Sonneville's claim, either —

First, as a whole under the assignment of 1890; or,

Second, under the will of 1878, of so much of the claim as the amount of De Sonneville's indebtedness to Raymond, with interest, and the amount of the bequest to Florence Raymond.

The assignment of April 29, 1890, recites the indebtedness due to Raymond, and states: " In order to pay that debt I hand over to him all my present and future properties, as I have no heirs," and that " the properties which I give him in payment are the following: " enumerating fourteen different pieces of property.

These properties are represented in the assignment to be worth 25,000 bolivars, free from all incumbrances, annuity, or mortgage. It is alleged that frequent attempts were made after De Sonneville's death to realize on the properties specifically enumerated in the assignment, but without success, and that although at one time the said properties may have had some value, it consisted principally in the coffee groves, which have since become ruined, and that these properties are at present absolutely worthless.

Among the properties which De Sonneville " gave in payment " by the assignment, the claim against Venezuela does not appear. There is certainly no reason to infer that De Sonneville intended to include it, inasmuch as the

estimated value of the property enumerated exceeded the amount of the debt. The general terms are controlled by the specific enumeration, which evidently expresses the definite intention of the assignor, and to which in construction the conveyance must be limited. Expressio unius exclusio alterius. The position that the Raymond heirs are owners of the De Sonneville claim as a whole under the assignment is clearly untenable.

The alleged holographic will of De Sonneville bears date November 15, 1878. Substantially it states that, desiring as far as possible to repair the losses he has occasioned to his excellent friend, Mr. Charles Raymond, of New Orleans, by the want of punctuality on the part of the Republic of Venezuela toward himself, he declares himself indebted to Raymond or to his legitimate heirs in the sum of $2,500, which Raymond had delivered to him at the English island of Barbados, in October 1868, to cover the expenses of repairs which had been occasioned by the collision of another steamer with his own; that if the debt should not be paid before his death he desired that his property should be used for its payment, and that the surplus should then become the property of his goddaughter, Florence Raymond, and that, being a creditor of the Republic of Venezuela of a debt occasioned by the charter of a steamer, the said credit, after its recovery, he wished to be distributed as follows: If the properties left by him were not sufficient to pay the debt, with interest, of Charles Raymond, the necessary sum should be employed for that purpose out of the money, and to his goddaughter, Florence Raymond, the sum of $5,000 should be paid, the surplus to go to his brother and sister in France.

Two witnesses certify to the foregoing instrument and that De Sonneville had declared to them that in case of his death he desired the disposition made therein to be put into effect by the French consular authorities.

There is no evidence presented that this instrument was ever legally proved as the last will and testament of De Sonneville, or that there has ever been an administration of his estate. A will must be proved before a title can be set up under it, and, so far as the adequacy of its execution is concerned the probate must be according to the law of the testator's last domicile. In the absence of such proof, the document in question must be held inoperative to pass any rights whatsoever. The probate jurisdiction of this Commission is believed to be extremely limited.

The evidence shows that, in order to make the repairs rendered necessary by the collision of the *Irene* with another steamer near Barbados, De Sonneville borrowed from Raymond on October 9, 1868, the sum of $2,500. The expenditure of this money in necessary repairs in a foreign port created a lien in Raymond's favor upon the vessel. The presumption of law is that when advances are made to the captain in a foreign port upon his request for the necessary repairs or supplies to enable his vessel to prosecute her voyage, or to pay harbor dues, or for pilotage, towage, or like services rendered to the vessel, they are made upon the credit of the vessel as well as upon that of her owners. It is not necessary to the hypothecation that there should be any express pledge of the vessel, or any stipulation that the credit should be given on her account. (The *Emily B. Souder v.* Pritchard, 17 Wall., 666. Hazlehurst *v.* The *Lulu*, 10 Wall., 192. Merchants' Mut. Ins. Co. *v.* Baring, 20 Wall., 159.)

It is notorious (The Ship *Virgin*, 8 Pet., 538) that in foreign countries supplies and advances for repairs and necessary expenditures of the ship constitute, by the general maritime law, a valid lien on the ship. * * *

In Wilson *v.* Bell, 20 Wall., 201, the Supreme Court of the United States say:

> The ordering, by the master, of supplies and repairs on the credit of the ship is sufficient proof of such necessity to support an implied hypothecation in favor of the material man or the lender of money, who acts in good faith.

Under the foregoing principles of maritime law it is clear that Raymond held a lien upon the *Irene* for the advances made by him at De Sonneville's request, and expended by the latter in the necessary repairs. Raymond's lien followed the ship when the Venezuelan Government took possession of her under the charter party of September 12, 1869.

It is the very nature and essence of a lien that, no matter into whose hands the property goes, it passes " cum onere." (Burton *v.* Smith, 13 Pet., 464.)

In Myer *v.* Tupper, 1 Black, 522, it was held that where respondents purchased without notices of a lien for repairs or supplies in a foreign port their want of caution in this respect could not deprive the libellants of a legal right they had done nothing to forfeit.

Mr. Raymond, therefore, might have pressed his remedy against the Government of Venezuela in virtue of his lien upon the vessel to the extent of his interest in case of the violation of the contract under which the Government obtained possession, or he could rely upon the personal responsibility of De Sonneville for the debt. It is quite evident that Raymond chose the latter of these alternatives. His claim against De Sonneville appears to have been in the hands of Venezuelan lawyers for a number of years. Finally, on April 29, 1890, De Sonneville, in order to discharge the debt to Raymond, executed the assignment transferring thereby specified pieces of property " which represent 25,000 bolivars value, free from all incumbrances, annuity, or mortgages." And one Ascanio Negretti, lawyer, " with power of attorney from Charles Raymond," accepted this transfer. In accordance with law, this assignment was registered in the registry of Altagracia de Orituco on May 16, 1890, and also in the French legation at Caracas on October 21, 1891. The valuation of 25,000 bolivars placed upon the property thus transferred in satisfaction of the debt is included in the instrument signed by both De Sonneville and the representative of Raymond, and must be regarded as a part of the agreement. It equals, if it does not excel, the amount due at the time.

The acceptance of this transfer discharged the debt of De Sonneville to Raymond and canceled any claim which Raymond might have had against the Government of Venezuela in virtue of his lien upon the steamer. The lien could not exist after the debt was paid. As the assignment of the property specified was received in discharge of a money debt due from De Sonneville, it is in judgment of law to be considered as the same thing as if De Sonneville had actually paid money to the amount agreed upon in the assignment as being the value of the property transferred. The subsequent depreciation in value can not operate to revive the debt.

The claim must, therefore, be disallowed.

GRISANTI, *Commissioner:*

Elizabeth Wild Raymond, widow of Charles Raymond, deceased, Anna J. Raymond, Elizabeth E. Raymond, Letitia J. Raymond, Florence A. Raymond, Edwin J. Raymond, Charles J. Raymond, and Victoria R. Gauce (née Raymond), children of said Charles Raymond, deceased, claim of the Government of Venezuela payment for $ 78,520 as capital and interests of a credit which they, sole heirs at law of the mentioned Charles Raymond, deceased, pretend holding against Venezuela.

The history of the claim is as follows:

On September 12, 1869, a contract was signed at Port of Spain between George Fitt, acting on behalf of the citizen Gen. José Ruperto Monagas, at that time President of Venezuela, and Ovide De Sonneville, acting as proxy for Mr. Charles M. Burns, owner of the British vessel *Irene*, in virtue of which

contract Fitt chartered said vessel *Irene*, having on board 130 tons of coal for the service of carrying troops on account of the Government of Venezuela. (Art. 1.)

Ovide De Sonneville received from George Fitt $5,000 with which he paid the debts of the vessel in Port of Spain, and for which debts she was there detained. (Art. 2.)

Both contracting parties agreed that if the Government of Venezuela decided to buy the vessel the price should be $30,000; if not, the vessel would continue chartered at the rate of $100 per day, for a term of not less than sixty days, it being a formal condition of said contract that the Government of Venezuela on the expiration of said term, or other term which the parties might agree to extend, should, on returning Sonneville the vessel, pay him for the 130 tons of coal above referred to, at the price the same should happen to have at the port of the Republic where the return takes place; also that he should be paid such amount as both parties might consider necessary for conducting said vessel to the harbor of Port of Spain, and also the extra pieces lost or worn out. (Art. 3.)

In the $100 per day stipulated as the rent for the *Irene* none of her expenses were included therein, all of which were on account of the Government of Venezuela, and if the vessel, during the time of her leaving Port of Spain up to that on which she was returned to Sonneville, should be lost or suffered very serious injuries, such as to make her useless, Sonneville should be paid her value, which beforehand was fixed at $30,000, and would forthwith be the property of the Republic. If the injury sustained by the vessel were of easy repair, the Government of Venezuela had the option of returning her, previously making the necessary repairs at their own expense. (Art. 4.)

On November 23, 1869, a note was addressed to Sonneville by the Jefe de estado mayor general in Puerto Cabello to the following effect:

> The term of the contract for chartering the vessel *Irene* having expired, and the war being over, the citizen general president in campaign orders me to notify you thereof, so that you may this day take charge of the mentioned vessel under formal inventory, and afterwards call at the general headquarters to settle your charter account, balance of coal missing to make up the 120 tons and agree as to the amount required for your sailing to Port of Spain.

On November 24, Sonneville answered, denying to receive the vessel if the very serious injury suffered by the vessel in one of her boilers on October 17 were not repaired, unless the Government should choose to pay the price fixed on the vessel.

Afterwards a discussion followed between the Government of Venezuela and Sonneville in reference to the case, and steps were taken by the latter to apply to the French Government, and pretending to apply to the British Government also, for them to second his motion in the claim against Venezuela. On April 29, 1890, Sonneville issued a document wherein he declares to be a debtor to Charles Raymond for the amount of 12,500 bolivars, which he acknowledged to have received from him to settle his (Sonneville's) account with the consignee of the British vessel *Irene*, and in payment for that amount he assigned to him the sole possession of several properties perfectly specified in the aforementioned document.

The principal grounds whereon Messrs. Raymond lay their claim are the following:

> In the year 1890, as above stated, Mr. De Sonneville assigned all his property to Mr. Charles Raymond, predecessor in interest of the present claimants. Neither Mr. Charles Raymond nor Mr. Sonneville were paid any sum of money on account of the claim.

To the judge of the lawfulness or unlawfulness of this claim the following point must, above all, be examined:

Is, or is not, the mentioned claim included in the dedition which Sonneville made in payment to Charles Raymond, contained in the document drawn at Caracas on April 29, 1890, and registered in the subaltern registry office of the Monagas district on the 16th of May of the same year? In other words, did Sonneville transfer to Raymond the referred-to credit against Venezuela by virtue of said dedition in payment?

The Venezuelan Commissioner is of opinion that the question put must be answered negatively without the least vacillation. Consequently the claim not being expressly included in the dedition in payment, it is excluded from the same because in all contracts, such as this, which have the object of alienation of property, it is an essential requisite that the goods alienated be perfectly determined.

I must not let the fact go by, that some Venezuelan lawyers of undeniable knowledge argued that on the strength of the foregoing contract Charles Raymond was the owner of the claim; but such is an error, and errors have no authority, however respectable the persons who fell into them.

This erroneous opinion is undoubtedly derived from the generality of the terms with which the dedition of payment commences. Sonneville says:

* * * And to pay that amount (the 12,500 bolivars) I deliver him all my present and future property, as I have no heirs, and have on the other hand my gratitude bound to Mr. Charles Raymond, to whom I am attached not only by the ties of friendship but also by those of spiritual relationship.

But the amplitude and vagueness of this clause are perfectly determined and limited by the phrase following forthwith: " The goods which I give him in payment for my debt are the following, " then said goods are specified. The former generality must be interpreted in the light of this limitation, without which it would be deprived of judicial and even rational value. If there existed only the clause, " I deliver him my present and future goods," the contract would completely lack legal value. The fact is, that when the dedition in payment has the object, as in the present case, of extinguishing a pecuniary debt, no difference exists between the former and an ordinary sale; both contracts are identical. Therefore the consent of the contracting parties is an essential requisite for the existence of every contract, which must be in regard to the thing or price when it refers to buying or selling, and in regard to the debt and thing transferred for payment if it refers to a dedition in payment, and without determining these two elements consent is impossible because it lacks matter, and consequently the existence of the contract would also be impossible. Wherefore, if the dedition in payment refers to " present and future goods," with no other explanation, it would never have attained judicial existence. Neither Sonneville would have known what he gave, nor Raymond what he received; and consent requires knowledge — consent can not be given to what is not known.

If the principles and reasons stated were laid aside and it were attempted to hold that the claim being the property of Sonneville he had the will to transfer it to Raymond, such assignment could have no effect against the Government of Venezuela, owing to its lack of visible existence.

Another question:

Was or was not the credit of 12,500 bolivars extinguished in virtue of the assignment, which, according to the public document above, refers to Charles Raymond, held against Sonneville?

It most certainly was. That is the natural, judicial effect of an assignment, and as the one in question is pure and simple — that is to say, that it is not subject to any conditions, either suspensive or resolutory — the mentioned extinguishing effect took place definitively and perpetually from the very moment of signing the contract.

It is alleged that no price was able to be got for the sale of the property assigned in payment, and that it fell to ruin. This fact is very unlikely, as the transaction was carried out in 1890, at a time when Venezuela reached its greatest material prosperity. The property assigned in payment consisted of coffee plantations, and at that time the hundredweight of this grain was worth ——.[1] But even admitting such allegation to be a fact, it could not revive the credit, as its extinction was complete and forever.

Before closing, the writer begs to state a few more remarks which he considers unnecessary but not irrelevant.

In the charter party of the vessel *Irene*, Sonneville appears acting as proxy for Charles M. Burns, British subject; the latter then is the real charterer and the only owner of the rights acquired as such.

When Sonneville thought that France might tender him some protection he addressed the French consul at Caracas (December 12, 1888); then the Venezuelan-French Mixed Commission, which at that time was sitting here (April 6, 1890); then the minister for foreign affairs of the French Republic (May 8, 1890), requesting his help and advising the latter besides that if the intervention of his Government be considered unlawful he should forward the documents to the minister of foreign affairs of Great Britain with the view already mentioned. The request having purely and simply been denied by the French Government and the documents returned to Sonneville, the claim arises out of the hands of the present solicitors, not out of its own dust, as the Phœnix of the fable, but out of nothing — that is to say, out of a dedition in payment which is not contained in it.

In virtue of the reasons explained, it is the opinion of the Venezuelan Commissioner that the referred-to claim must be entirely disallowed.

VOLKMAR CASE

Compensation can not be demanded for neutral property accidentally destroyed in the course of civil or international war.

BAINBRIDGE, *Commissioner* (for the Commission):

The claimant is a native citizen of the United States, residing in the city of Puerto Cabello, Venezuela. In the year 1892 he was the sole owner of the electric light plant of that city. On the 22nd, 23rd, and 24th of August, 1892, the forces of General Crespo, who was engaged in a revolution, ultimately successful, against the then existing government, attacked the city of Puerto Cabello, and during the engagement the power house, lines, lamps, and machinery of the claimant suffered damage amounting, as claimed, to the sum of 84,160 bolivars, for which sum, with interest, an award is asked.

The evidence presented in support of this claim is amply sufficient to prove the fact and nature of claimant's loss, but it fails to establish any liability on the part of the Government of Venezuela therefor. It is perfectly clear that the losses complained of were the result of military operations in time of flagrant

[1] Left blank in original.

war, and for such losses there is, unfortunately, by established rules of international law, no redress. Such losses are designated by Vattel as " misfortunes which chance deals out to the proprietors on whom they happen to fall," and he says that " no action lies against the State for misfortunes of this nature, for losses which she has occasioned, not willfully, but through necessity and by mere accident in the exertion of her rights."

As a principle of international law, the view that a foreigner domiciled in the territory of a belligerent can not expect exemption from the operations of a hostile force is amply sustained by the precedents you cite and many others. Great Britain admitted the doctrine as against her own subjects residing in France during the Franco-Prussian war, and we, too, have asserted it successfully against similar claims of foreigners residing in the Southern States during the war of secession. (Mr. Evarts, Secretary of State, to Mr. Hoffman, July 18, 1879. Wharton's Int. Law Dig., sec. 224.)

" The property of alien residents," says Mr. Frelinghuysen, Secretary of State, " like that of natives of the country, when 'in the track of war,' is subject to war's casualties." (Wharton's Int. Law Dig., vol. 2, sec. 224, p. 587.)

The rule that neutral property in belligerent territory is liable to the fortunes of war equally with that of subjects of the State applies in the case of civil as well as international war. In Cleworth's case, decided by the American and British Claims Commission of 1871, a claim was made for the value of a house destroyed in Vicksburg by shells thrown into the city by the United States forces during the bombardment. The Commissioners said: " The United States can not be held liable for any injury caused by the shells thrown in the attacks upon Vicksburg." And the same principle was applied in the case of James Tongue *v.* The United States to a claim for property destroyed by the bombardment of Fredericksburg on the 11th, 12th, and 13th days of December, 1862. (Moore Int. Arb., 3675.)

In view of the foregoing considerations the claim must be disallowed.