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HAND — GENEVA AWARD

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Geneva Award.

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[Hand, C. H.]

GENEVA AWARD.

SOME OF THE REASONS WHY THE SUFFERERS OF LOSS BY "ALABAMA" DEPREDATIONS CANNOT JUSTLY BE EXCLUDED BY THE GOVERNMENT FROM A HEARING BEFORE THE TRIBUNAL CHARGED WITH DISTRIBUTION OF THE AWARD, BECAUSE THEY WERE UNDERWRITERS.

FIRST.

The legal right of the underwriter to reclamation for destruction of insured property, equally with that of the original owner for destruction of uninsured property, is indisputable. Indeed, the strength of his right is made the excuse for his special exclusion.

The contract of marine assurance is, in substance, the same in all commercial countries, and it is distinguished from other insurance by two characteristics which deserve attention.

Immediately upon the happening of a certain extent of loss or injury, the marine underwriter pays to his assured a "total loss," upon the basis of the full value of the property lost or injured. There is no abatement or delay for recovery from savings or reclamations. And the merchant is supplied with prompt indemnity against serious interruption of his business and adventures, as well as against loss of the specific property insured.

In correspondence with this duty, the underwriter acquires the absolute right to every hope or possibility of salvage or reclamation from, or by reason of, the property

or its destruction or injury. In short, he at once replaces to the original insured owner the full value of his adventure (including, as a rule, the cost or premium of insurance), and thenceforth becomes owner, with every right and liability incident to that relation. And as this legal change of ownership may date back to the fact of disaster upon the seas or on distant and difficult coasts, its operation sometimes transfers, from the assured to him, heavy burdens of expense in addition to the total loss paid by him.

It will be seen, at a glance, of what consequence to the merchant, and the interests of commerce, these peculiarities of the contract are. An open effort to cancel or disregard them would meet with no favor in any commercial court or country, or with any body of respectable merchants. And the obligation and right are so dependent upon each other, and closely interwoven together, that war upon the one must, in the end, be war upon the other.

That these duties and rights of the underwriter have the sanction of elementary and universally recognized principles of commercial law, will appear by reference to the treatises on insurance of Mr. Parsons, Mr. Phillips, or Mr. Arnould, or to any other approved text book. And national reclamations, for injury or destruction to the insured property, are included in the rights which thus pass to the underwriter. (See Randall v. Cochran, 1 Ves. 98; Comegys v. Vasse, 1 Pet. Rep. 193; Rogers v. Hosack's Executors, 18 Wend. Rep. 318; Gracie v. New York Ins. Co. 8 Johns. Rep. 237.) In the language of Mr. Webster: "There is no more universal maxim of law and justice "throughout the civilized and commercial world, than that "an underwriter, who has paid a loss on ship or merchan-"dise to the owner, is entitled to whatever may be received "from the property. His right accrues by the very act of "payment. And if the property or its proceeds be after-"wards recovered, in whole or in part, whether the recov-"ery be from the sea, from captors, or from the justice of "foreign states, such recovery is for the benefit of the un-"derwriter" (4 Webster's Works, page 156).

It is hardly neceesary to add that such a contract, so well and widely known, and so clearly defined in law and usage, and the parties to which are so competent to guard their own interests in the making it, is not the proper subject of violation or *ex post facto* perversion. Every risk underwritten during our civil war was underwitten with full knowledge, on the part of both merchant and underwriter, of these elemental rights and duties; a knowledge which forbids repudiation of them by either party, or, we may add, by the Government which assumed to protect them both.

SECOND.

The trust or agency of the Government of the United States, in the presentation and collection of the claims, is equally undeniable.

It is the duty of a civilized Government to seek redress, for its citizens, for wrongs attributable to other nations. Repressing private effort to enforce redress, the sovereign undertakes this species of international litigation. And within reasonable bounds, he is responsible to every citizen to fairly prosecute his just rights. The theory that National intervention is in any sense a favor, to be granted or withheld at pleasure, is opposed to the fundamental principles of free representative Government.

The Government of the United States, in express terms, took upon itself this agency in behalf of claimants, underwriter and uninsured owner, for losses by "Alabama" depredations. From time to time, as vessels and cargoes were destroyed by the cruisers, and paid for by underwriters, the latter transmitted to the State department their claims, accompanied by full proofs of the facts of destruction, and of the precise values destroyed. In each case the Secretary

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of State responded, with an acknowledgment of their receipt by him, and a substantial acceptance of the trust or duty of transmitting the claim "to the United States Minister at London, with a view to such reparation as may be justly due." (See letters of Hon. Wm. H. Seward, Secretary of State, to Underwriters, from October, 1863, onward, throughout the period of depredation.) And lest any claim should fail to be so intrusted to this agency, the State department, by circular or notice, dated September 22d, 1865, requested all other claimants, "without any delay," to "forward to this department statements of their claims."

Certainly it is not to be questioned that the Government received from the "Alabama" claimants, underwriter and uninsured owner, their claims, in a manner and upon terms, precluding denial of the trust and agency. The claims were private property, not available to the Government for any purpose other than to duly advocate them, as representative of the claimants. And from the time of receiving the first claim, in the fall of 1863, down to the final award, the Government distinctly occupied towards the claimants that precise relation, without suggestion to them of a pretense on its part to the contrary.

The Government had not, and could not have, a trace of title to either of the merchant ships or cargoes destroyed, or to any reclamation for the destruction. Every claimant had the clear right, and was by all action of the Government toward him rightly induced, to regard the Government as his representative, and to rely upon its good faith in that capacity.

In discharge of this duty of agent or representative of private claims, the Government, as it received them, did transmit them to the United States Minister at London, and cause them to be presented and urged against the British Government. As so transmitted and urged, they were specific claims of, and in the name of, the private claimants, underwriter as well as uninsured owner, for

destruction of specific private property, with details of destruction and values destroyed; and they were by the Government of the United States, to and against the British Government, formally and solemnly declared and insisted upon as "just and valid." (See the Diplomatic correspondence.)

In addition to these direct private claims, there afterward grew up or were brought forward other claims, on the part of the Government itself, for war expenses and the like, and on the part of citizens, for increased cost of insurance and the like, all which were, and throughout the proceedings were treated as, "indirect claims" for consequential damages. It was not pretended or suggested that these displaced the direct claims. On the contrary, they were stated as supplementary or additional grievances, for which other or additional reparation could be asked. And it would be safe to challenge the production of any communication by the Government of the United States, to either the British Government or private claimants, which supports the idea that the private claims were so displaced.

Shortly before the making of the "Alabama" treaty, President Grant, in his message (December 5, 1870), recommended to Congress a purchase from ("settlement" with) these private claimants, "so that the Government shall have the *ownership of the private claims*, as well as the responsible control of all the demands against Great Britain." Such an official recognition by the Government, of the true "ownership," as distinguished from "responsible control," should, of itself, estop the Government from disavowal of either.

The claims thus specifically made by and received from claimants, underwriter and uninsured owner, and presented *eo nomine* against Great Britain, were beyond question, by the record of the Government and between the two Governments, as well as in the minds of all men, part, and a substantial part, of the "claims growing out of acts committed by the aforesaid vessels, and generally known as the Alabama claims," which, by the terms of the treaty of

Washington, were "referred" to the Tribunal of Arbitration. (See article 1 of the treaty.)

Accordingly these claims, as claims of private claimants, whether underwriter or uninsured owner, and with the proofs supplied by them, were laid before the Tribunal and there advocated, by the representatives of the United States, as grounds of pecuniary allowance of damage to be awarded against Great Britain. The proceedings before the Tribunal, the cases and arguments on either side, and the deliberations and rulings of the arbitrators upon them, deal with the private claims in harmony with this idea. Respect for our country and for ourselves as citizens forbids us to attribute to the Government or its representatives a purpose to deal with them otherwise; to make an insincere exhibit of the claims in order, not to have them allowed and paid, but to obtain by means of them money for wholly different uses.

If it were supposable that such a purpose was entertained, it was a secret purpose, so far as regarded the court and its record, and Great Britain and the claimants. It would be unjustifiable toward each and all of them, and could have no proper place in or bearing upon the proceedings, and no possible relation to the award, otherwise than as ground for vacating it.

THIRD.

The case presented by the Government of the United States before the Tribunal plainly shows the different kinds of claim in detail, and which of them were presented by the Government in its own right, and which as representative for private claimants.

The claims, as stated by the American Commissioners, may be classified as follows: (1st.) "The claims for direct "losses growing out of the destruction of vessels and their

"cargoes by the insurgent cruisers." (2d.) National expenditures. (3d.) Loss by transfer of commercial marine to the British flag. (4th.) Enhanced payments of insurance (premiums). And (5th) cost of prolongation of the war. (See Case of United States, part 6.)

"The claims for direct losses growing out of the destruction of vessels and their cargoes may be further sub-divided into:" (1st.) Claims for destruction of Government property; (2d.) Claims for the destruction of property under the flag of the United States; (3d.) Claims for injuries to persons growing out of destruction to vessels. (See same.)

A detailed statement was submitted, "showing the cruiser which did the injury, the vessel destroyed, the several claimants for the vessel and for the cargo, the amounts insured upon each, and all the other facts" necessary to a decision. (See same.) And in this statement were contained the claims of all claimants for property destroyed, whether underwriter or individual owner, as claims held by them and prosecuted in their behalf.

It will hereafter be seen that the second, third, fourth and fifth general divisions of claim, as stated in the case, were excluded by the Tribunal, leaving only the first (for "direct losses growing out of the destruction of vessels and their cargoes") as the basis of a recovery. And so far from contesting the right of underwriter claimants of this class, the British Government conceded that "the American insurance companies, who have paid the owners as for a total loss, are, in our opinion, entitled to be subrogated to the rights of the latter, upon the well-known principle that an underwriter who has paid as for a total loss, acquires the rights of the assured in respect of the subject-matter of insurance." (See counter-case of Great Britain, vol. 2, p. 385.)

FOURTH.

It is also undeniable that the "gross sum" awarded by the Tribunal was for, and only for, the direct damages sustained by the claimants, whether underwriter or uninsured owner, for specific property destroyed by certain specified vessels.

In the outset (June 19, 1872) the Tribunal decided and declared that the *indirect claims* "do not constitute, upon "the principles of international law applicable to such "cases, good foundation for an award of compensation or "computation of damages between nations, and should, "upon such principles, be *wholly excluded from the con-"sideration of the Tribunal in making its award.*"

Thereupon the representative of the United States Government stated to the Tribunal that this decision against the admissibility of claims for "first, the losses in the trans-"fer of the American commercial marine to the British "flag; second, *the enhanced payments of insurance*, and, "third, the prolongation of the war, is accepted by the "President of the United States, as determinative of their "judgment upon the important questions of public law in-"volved. The agent of the United States is authorized to "say that consequently *the above-mentioned claims will not "be further insisted upon before the Tribunal by the United "States, and may be excluded from all consideration in "any award that may be made.*"

As a final barrier against the possible reappearance, whether by accident or design, of the indirect claims, the Tribunal, upon suggestion of the representatives of the British Government, caused to be entered upon their record (June 27, 1872) the declaration "that the several *claims for indirect damages*" "*are and from henceforth shall be wholly excluded from the consideration of the Tribunal.*"

It is not seen how there could well have been a record more clear and irresistible to the effect, that not one dollar of the sum awarded was the result, or for account, of the

indirect claims, whether of the United States or its citizens, or can honestly be applied to their use. And whatever claim or purpose may aim at such diversion is far more decisively "indirect" and "inadmissible" than the claims themselves were decided to be.

It then appears that, by the decisive act of the tribunal, conclusive upon both the Governments who were before it, the "*consideration of the tribunal*" and the "*making its award*" were carefully and rigidly *limited to the direct claims.* None other were or could be elements of the sum awarded. To no intelligent and honest mind will it occur that any other can be admitted to partake of the award. Much less will it occur to such a mind that the defeated party revive the excluded claims can for secret use against its own citizens, by any profession of acceptance of the adverse decision from which there was no appeal.

What were the "direct claims," which were thus the sole support and justifying cause of the award, has already sufficiently appeared. They were the claims, intrusted to the Government by private claimants, underwriter and uninsured owner, for property directly destroyed by the cruisers, including some like claims (insignificant in amount) of the Government itself, for property of its own so destroyed. The damages involved in them were the same as, by settled rules of law, would be claimable between private litigants. And legal rules of legal right and property were appealed to by the parties, and were respected by the tribunal in its proceedings and judgments.

The representatives of the United States, in their case, presented "a detailed statement of all the claims which "have as yet come to their knowledge, for the destruction "of vessels and property," showing "the cruiser which "did the injury, the vessel destroyed, the several claimants "for the vessel and for cargo, the amounts insured on each, "and all the other facts necessary to enable the tribanal to "reach a conclusion as to the amount of the injury com- "mitted by the cruiser."

The reply on the part of the British Government, con-

ceded that underwriters occupied the place of their assured, and were entitled to the same reclamation as would have been due to the original owner if uninsured, but insisted that in some instances both had been admitted as claimants for the same loss.

And this allegation was met, on the part of the United States, with the statement, that, as prepared and submitted, the list of claims exhibited the values destroyed, and "*the* "*several claimants*" for such values or any parts of them, and that "a simple examination of the papers" would show where "such double claims were made, and it will " be found that very few if any of such claims exist, ex- " cept in case of some of the whaling ships which were " destroyed by the Shenandoah, there being none of this " class of double claims in the case of merchant ships or " property destroyed on merchant ships."

Thus it is matter of record, that before this great international Tribunal, not only were the claims of underwriters presented against Great Britain, as entitled to allowance and payment, but they were by the latter conceded to be rightful claimants for the values insured by them. And the record moreover contains the statement, on the part of the Government of the United States, that, with few and unimportant exceptions, the other direct claims presented by it were not in conflict with those of the underwriters.

A tribunal like this, composed as it was, and proceeding to deal before the civilized world upon matters of difference between two great commercial nations, would not have been the fitting place to venture upon defiance of universally recognized principles of commercial law. The experiment would have been dangerous in its effect upon the award, as well as upon the reputation of those who tried it.

The Tribunal, after hearing the proofs and arguments, finally adjudged Great Britain responsible for the property destroyed by the "Alabama," "Florida," and "Shenandoah," and their tenders, limiting the responsibility for the "Shenandoah," to the period after her arrival at Melbourne. And this adjudication, in harmony with the entire proceed-

ings, was a strict detailed finding of separate legal liability, for certain acts of specified vessels, upon the facts separately applicable to the case of each vessel.

Of necessity and by the very tenor and terms of the finding, the idea of general alliance or complicity of Great Britain with the rebellion, is plainly inadmissible as a foundation of the award. It had already been disposed of by the *amende honorable*, in the treaty itself, accepted by the United States, "for the escape under whatever circum-" stances of the Alabama and other vessels from British " ports, and for the depredations committed by those ves-" sels," and again by the express terms of the treaty (Art. 7), which defined the issue to be " whether Great Britain has " by any act or omission *failed to fulfill any of the duties*," &c., and finally by the formal judgment of the Tribunal excluding the indirect claims, whose chief apology or support must be found in that idea. The case of the United States itself had defined the ground of liability to be, that " Great Britain *failed* to perform those *duties*, both gen-" erally and specifically, as to each of the cruisers, and that " such *failure* involved the liability to remunerate the " United States for losses thus inflicted upon them, upon " their citizens, and upon others protected by their flag." (See the Original Case of the United States, Part 1.)

But it is enough to say, that a judgment of this definite and detailed character did not and could not rest upon a foundation of general or intentional complicity or alliance with the rebellion. It was the reverse of a judgment in favor of a nation for war, or participation in war, by another nation, and on the contrary was in truth, what every one supposed it to be, a recovery for specific neglects or violations of neutral duty.

The only task remaining to the Tribunal, after the rendering of this judgment, was to assess, or cause to be assessed, the damages called for by the judgment. This the treaty authorized to be done either by the Tribunal itself, which, if it thought proper, might " award a sum in gross, ' to be paid by Great Britain to the United States, for all

"the claims referred to it" (Article 7), or through a board of assessors, appointed to assess the amounts in detail.

These were simply two methods of reaching one and the same result; the ascertainment of the legal direct damages suffered by claimants, from destruction of their property, by the vessels for which Great Britain was held responsible. That the choice of mode involved any result so startling and offensive to all notions of plain dealing and good faith, as the extinction or confiscation of the rights of these claimants, or the conversion to other uses of the damages flowing from the destruction of their property, was never suggested to the claimants nor Great Britain nor the court. The suggestion, if made, would have been sufficient ground for adopting that method which would most certainly preclude the possibility of pursuing it. And no such extraordinary consequences can, upon any fair and honest construction, attend the selection between these two modes of assessment.

The representatives of the United States Government presented to the Tribunal, as reasons for preferring the award of a sum in gross, the lapse of time since the losses were sustained. The original "*wrongs to the sufferers* by "the acts of the insurgent cruisers have been increased by "the delay in making reparation. *It will be unjust to im-* "*pose further delay and the expense of presenting claims* "*to another tribunal, if the evidence*, which the United "States have the honor to present for the consideration of "these arbitrators, *shall prove to be sufficient to enable them* "*to determine what sum in gross would be a just compensa-* "*tion* to the United States for the injuries and losses of "which they complain" (American Case, p. 480). Increase of loss to the "sufferers," by delay and expense of a separate assessment, and sufficiency of the proofs submitted to the Tribunal, are the arguments put forward by the United States Government, to induce the selection of a gross award by the Tribunal itself.

If we could imagine that any purpose of confiscation of the award or its proceeds was then entertained, it certainly

was not betrayed in this statement of reasons, which, on the contrary, is irreconcilable with such a purpose.

What were the "original wrongs to sufferers by acts of insurgent cruisers," for which Great Britain owed "reparation?" They were by the tribunal adjudged to be, and to be only, the destruction of specific property by direct act of the cruisers. Who were the sufferers? None other than the lawful owners, whether underwriter or uninsured owner, of the property destroyed. What was the evidence alleged "to be sufficient to enable" the tribunal to ascertain the gross amount of damages to which these sufferers were entitled? Simply the proofs of destruction and values destroyed, supplied by the private claimants, underwriter and uninsured owner, to the Government of the United States, and by it, as their agent or representative, presented to and used before the tribunal.

It is incredible that this plea of the United States in behalf of these "sufferers," and this use of their rights of reclamation, for their property destroyed, and of the evidence" supplied by them, in support of these rights, can now be made the basis of an arbitrary denial of those rights and conversion of the money obtained by means of that evidence.

Upon the question of the amount of damages, which should constitute the gross sum to be awarded, the Government of the United States presented to the tribunal detailed lists or bills of particulars, alphabetically arranged by name of each vessel destroyed, with the exact original sum claimed for that destruction and interest computed on this original sum, and asked that the footing of these sums and interest be the amount awarded.

The British Government submitted counter-statements, criticising estimates and items, objecting to interest, and arriving at a less sum total.

The tribunal decided to allow interest and, from the two sets of estimates and statements, arrived at their own computation of damages. And all items for "prospective injuries," "costs of the pursuit of the cruisers," "double

claims for the same loss," and "gross freights" exceeding "net freights," were disallowed.

In no case, and by no act of the tribunal or in its proceedings, was there a discrimination between underwriter and uninsured owner. The legal right of each was fully recognized, and the legal damages of both were reckoned in all the statements and computations. The only basis and test of computation was the value destroyed, and there was no practical difference between these two species of owners, except that as a rule the values claimed by underwriters were more accurately stated and better proved, by means of the documents upon which they had themselves paid the same values to their assured.

By this process, and with the aid of the evidence supplied by the private claimants, the tribunal was enabled to arrive "at an *equitable compensation for the damages which have been sustained*," and declared that "it is preferable to adopt the *form of adjudication* of a sum in gross, rather than to refer the subject of compensation for further discussion and deliberation to a board of assessors." And it decreed "$15,500,000 in gold as the indemnity to be paid by Great Britain to the United States for the satisfaction of all the claims referred to the consideration of the tribunal."

The record of the tribunal would seem too plain to admit of reasonable doubt of its purport. All claims, direct and indirect, were before it for final determination. The indirect claims were in the outset pronounced against, rejected, and excluded from consideration. The direct claims were taken up and considered, and limited to the legal damages directly caused by certain specified vessels. The computation of these damages was then discussed and carefully considered until (after elimination of certain duplicated and indirect items) "an equitable compensation for the damages which have been sustained" was arrived at. And then a final decree was made awarding this compensation, and pronouncing such allowance to be the end of all the questions and differences submitted.

The language of the award furnishes no apology for a contention that the compensation awarded is a fund de-

livered to the Government of the United States in its own right, or for indefinite general account of all claims, whether or not "presented to the notice of, or made, preferred, or laid before the tribunal." The declaration that all these claims were "finally settled, barred, and inadmissible," was simply the agreed result of the award by the terms of the treaty submitting them to the arbitration.

There is no room for equivocation as to what claims were barred as "inadmissible," and what were intended to be satisfied by the compensation awarded. The solemn adjudication of the tribunal having "wholly excluded" the "indirect" claims "from the consideration of the tribunal in making its award," the Government of the United States recorded its recognition of the finality of the exclusion in the explicit statement that the "above mentioned claims will not be further insisted upon before the tribunal by the United States, and may be excluded from all consideration in any award that may be made." Thenceforth, the indirect claims, by whomsoever made, and whatever their foundation or merit, had no place in the proceedings, except to be "barred" as "inadmissible."

If it be true that an agent received secret instructions to prevent counsel from binding the Government to any special mode of distribution, it cannot alter the case. No such instructions were before the court or the adverse party. Nor could they qualify the record, or convert the rights of private citizens to public use, or change the duty of the Government or its public position and action, or annul the decree obtained by it in the open light of day, upon the faith of this position and action. Neither the writer of the letter, nor the receiver of it, nor the counsel upon whom it reflected, could control the court or its decisions, or the just construction and effect of those decisions. The allowance of certain claims and rejection of all others by the authorized tribunal at Geneva, stamped upon the money resulting from this allowance its true character, which could not be effaced or changed by a department at Washington, or by covert diplomacy between it and its own sub-agent, except at the cost of the national honor.

The sum awarded was, by the award itself, expressed to be "compensation for the damages sustained," and these "damages" were, by the judgments of the tribunal and throughout the proceedings before it, computed as, and limited to, direct losses by actual destruction of specific property, whether of underwriter or uninsured owner. And the choice of a "sum in gross," in preference to a detailed assessment, was not only advocated by the Government of the United States as a method to avoid unnecessary delay and expense, but is in the award described as a "*form of adjudication.*"

Having due regard to the facts, and remembering the avowed purposes for which it was asked by the United States and selected by the tribunal, it should not be necessary to treat as serious the idea that the "form of adjudication" was designed, or can operate, to reverse or nullify emphatic and deliberate judgments of the tribunal upon the different classes of claim, and the limits and character of the damages to be computed, or to convert the "equitable compensation, for the damages" which were allowed, into a charity fund, for arbitrary bestowal upon claims which were disallowed, or were never before the tribunal, or originate in the hope of such a bestowal.

FIFTH.

Mutual underwriting societies stand upon the same footing in all points of merit or equity as uninsured owners.

Leaving out of view, for the moment, the facts and the record and great principles of right which forbid exclusion, it will still appear that there is not even the shadow of excuse for discrimination against these societies.

The principal New York mutual marine companies have, as such, prosecuted their business with success and

credit, since about the year 1842, when they were chartered. During that period of over thirty years, the great number of interested and intelligent merchants, dealing with them, have had abundant opportunity to test the reality and value of their mutuality and abundant power to correct any failure to carry it into effect.

The plan of organization is prescribed by the charters, and is perfectly intelligible, and a brief explanation of it will be attempted.

Each society, receiving premiums, undertaking risks and paying losses and expenses, transacts its business through each year, and, at the end of the year, a statement is made by the trustees of the society, in which receipts or assets are compared with expenditures and liabilities. The surplus, if any, is ascertained, and forms a percentage upon the premiums of the year, and each dealer, or premium payer, receives a scrip certificate for his proportionate share or percentage of it. The funds, represented by this scrip, remain with the society until, by the yield of new scrip from the business of subsequent years, the society can safely redeem it. The principal is then paid off to the scrip holder and meanwhile he receives six per cent. upon it. If the business of a later year proves disastrous, this scrip (until redeemed) is liable to make good the deficiency or to abatement on account of it.

One of the New York societies has, for many years, been able to pay off its scrip at the end of three or four years. Annually, there has been an issue of scrip to the dealers of the last preceding year, and a redemption of the oldest scrip, issued to the dealers of the third or fourth preceding year. With other societies the periods vary, but the principle and practice is the same in all.

In neither of the societies is there, or can there be, stock or stockholder, or a dollar of property not held for account of the dealers or premium payors. And that the accountability has been honestly and scrupulously satisfied is best proven by the history of the societies, through the thirty

years of their existence, and their firm hold upon the confidence of the merchants.

In truth and in effect, these societies are nothing else than organizations, in and by means of which the many merchants have combined with each other their risks, savings and reclamations. There is no conceivable just discrimination, against their equity, in favor of that of the single and uninsured merchant, whose wealth or great extent of business have enabled him to be his own insurer, and to add to his gains what would have been the cost of insurance.

The aggregate losses and reclamations of such an association of merchants are of the same character, and entitled to the same consideration, as are those of their single favored competitor. Their inability to separately encounter risks of loss, and consequent association to meet their risks collectively, can, by no possible rule of justice or equity, operate to annihilate their aggregate legal rights. No rule of justice or equity, applicable to the one owner, has not the same application to the combination of owners.

Such of the assured as brought into the association "Alabama" risks have shared, to the fullest extent, in all savings and reclamations from the property of their associates; and an effort on their part to exclude these associates from the like participation in "Alabama" reclamations, would be dishonorable as well as unlawful. It should carry with it its own instant condemnation. Every payor of what are termed war premiums to one of these societies burdened the other dealers (upon inland or other risks not exposed to capture) with a share of his losses and dangers. And he has also received back from the common fund, so made up by all the associates, a substantial percentage of all premiums paid by him. A demand on his part, for the money awarded upon claims of the society, is opposed not only to the record, but to every rule of fair play and justice. And when the further demand is made that the money, justly due to one of these societies, shall be made the prey, not merely of a small part of those who have

been associated in it, but of similar claimants, who never dealt with or were associated in it at all, the demand reaches monstrous proportions of unreason and injustice.

The argument that high rates of premium were charged, and should now be rectified, is mainly untrue in fact, and, in any event, is clamor rather than argument. In the case of one of the largest of the underwriter claimants, the average rate of premium, charged upon all risks during the five years of war, did not exceed two and one-half per cent. The average rate, upon all risks (comparatively few in number), of capture only, averaged less than two per cent., except in one year when it slightly exceeded three per cent. A few exceptional cases of exceptional charge, for peculiarly hazardous risks do not make a rule for guidance. When the Shenandoah was known to have burned several whaling vessels, and to be in pursuit of the Behrings Straits fleet, those who, at that late day, wished to transfer the imminent danger from themselves to the underwriter, could hardly expect to do so upon ordinary terms of compensation. It was not unlike the case of one who delays to insure his house until the block is on fire. The duty of adjusting the terms of admission to the mutual societies was intrusted to the proper officers, and their action, at the time and with the facts before them, is not now lawfully or properly the subject of review. But the aggregate of these exceptional cases forms only a slight part of the aggregate of the capture risks only. And in the case at least of the company referred to, those who obtained them received from the society, in cash payment of losses, sums exceeding the aggregate of their premiums, and, in addition thereto, received dividends for a large percentage of these premiums. By actual figures they were gainers from the association, and should be the last to deny justice to their associates, who thus far have lost by the fellowship. And when truly understood and presented, it is found, in every case, that the plan of the association furnishes the only just, safe and honest guide for dealing with its affairs.

In short, the rule of law is the only rule of equity on this subject. The vast majority of individual members have no security for their rights, except through the association, and the maintenance of its lawful rights. The losses paid by the mutual societies for "Alabama" depredations, equally with other losses, fell upon the entire common fund, made up by all the associates, upon terms of express and well understood contract, requiring the restoration to that common fund of all savings and reclamations. And those who ask separate consideration for themselves, or ask to share in the reclamations of societies of which they were not members, ask that to which they can upon no theory be honestly entitled. Few in number, but clamorous in pursuit of special gain, they confuse the judgment of those who listen to them. The many thousands, whom they seek to wrong, rely upon the just and legitimate representation of their rights, through the societies, and are silent.

SIXTH.

Any distribution of the sum awarded, upon terms excluding legal holders of rights of reclamation, for the damages allowed, from a fair and equal hearing before the auditing and distributing tribunal, would be partial, arbitrary and unjust. It would be inconsistent with the honor of the nation and good faith toward the Tribunal and Great Britain, as well as toward the claimants. And no such distribution can discharge the Government of its trust, or supply for its treasury an acquittance entitled to respect in the future.

It is incumbent upon the administrators of civilized Governments to render to private citizens, in respect of their private rights, the same justice, and upon the same principles, as would be decreed by courts of justice between private litigants. And in some instances this duty is

recognized to the extent of subjecting national ships (as is the case with Great Britain) to the ordinary admiralty jurisdiction and salvage decrees, upon equal terms with the property of private merchants. Anything other or less than this justice is injustice, and is subversive of the system of responsible Government, administered for the due maintenance of law and order.

If the gross sum, awarded by the Geneva Tribunal, were intrusted to a depositary or agent other than a Government, shielded by its mere sovereignty from ordinary judicial process, no intelligent mind will doubt what would be the safe and honest line of duty of the depositary. He would frankly recognize the truth, that the sum deposited was not his own money, nor disposable at his own will and pleasure. He would examine the record to learn what claims were before the Tribunal, and which of them were "excluded" as "inadmissible," and which were "considered" and estimated in making the award.

Finding that, in express terms, the Tribunal had limited its computation and award of damages to specific property, directly destroyed by acts of specified vessels, he would confine his attention to the claims of those asserting title to that property and the rights of reclamation for its destruction. He would thus obtain the clear and reliable guidance of definite boundaries of claim and claimant, outside of which no part of the sum awarded could justly or properly be demanded. If he found within those boundaries, conflicting estimates of value, or conflicting claims to the same value, he would insure justice to the claimants, and a safe and honorable discharge for himself, through the intervention of some competent judicial authority, proceeding to hear the parties interested and to determine their respective rights, in accordance with established principles of law.

It would not occur to him to pay out the money upon claims, or for purposes, which did not enter into the consideration of its award, nor to warp the distribution of it by prejudices or favoritisms respecting the character or

condition of distributees. Nor would he be advised that a process of judicial distribution, crippled by arbitrary conditions, and denying a fair and equal hearing to lawful claimants, would be pleadable by him against the further demands of those claimants. If however, he sought to defy or evade these plain rules of right conduct, the attempt would expose him to speedy correction by the courts of justice.

It is believed to be the clear and unavoidable duty of the Government to freely do what such a private depositary would be compellable to do. It has no other or greater rightful power in the premises than he would have. And the assertion of other or greater power would be protected solely by the inability of the courts of justice to deal with a sovereign wrong-doer, and would be simply unlawful despotism.

Considerations founded upon capricious or superficial notions of irregular equity, in opposition to conceded fundamental principles of legal right, are inapplicable. There is no equity, known to the law or to any court of equity, which does not obey and respect those principles, or which, upon any pretext whatever, confiscates the property of one to the use of another, or permits the collector of damages, flowing from the destruction of such property, to regard his collections as a fund for his own use, or for expenditure upon favorites, or upon any other than those lawfully entitled.

The money awarded at Geneva is compensation for the destruction of private property, the ownership of which is for the most part undisputed, and, where disputed, can be judicially determined. The collection of the money by the United States does not and cannot change the character of the compensation, nor the just legal rights of the claimants to it. And the distribution of it is matter of honor and good faith, not of charitable or other caprice.

It cannot be necessary or useful to combat the idea, that misjudgment or misfortune, in the conduct of business,

can properly entitle to participation those who would otherwise be disentitled. The property and rights of the one are as sacred and unimpeachable as of the other.

In proportion as an underwriter comprehended the danger to American commerce from "Alabama" depredations, and the duty to afford relief by combined effort, he was first and freest in accepting the risks, with all perils, rights and benefits naturally and justly incident to such acceptance. The course pursued by him tended to the safety of commerce, and should not subject him to reproach or hostile judgment, in comparison with a competitor who, for any reason, declined or hesitated to pursue the same course, and perhaps chanced to be loser upon the one risk, or few risks, which he was induced to accept. And it would be fully as just and reasonable to make the same discrimination between the uninsured owner of one ship or cargo destroyed by the "Alabama" and the uninsured owner of many ships or cargoes, one of which was so destroyed.

In truth, every argument of this kind simply leads back to the original and only safe guide in dealing with property questions. Departure, in any direction, from great principles of legal right, as approved and administered by the courts of justice, can result only in arbitrary injustice, discreditable to the nation, and injurious to the best interests of its citizens.

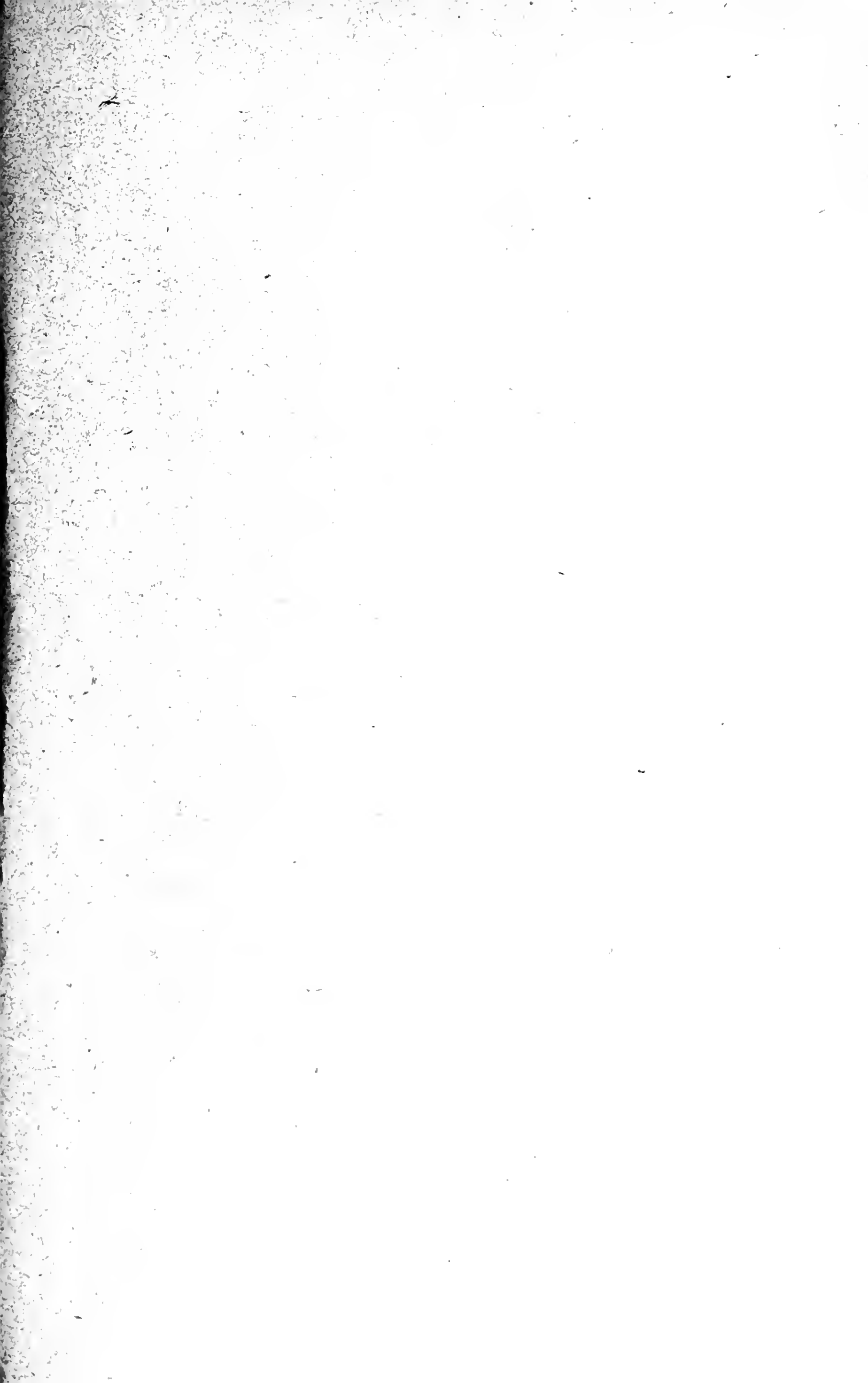
The eloquent and unanswerable protests of Senators Thurman, Conkling and Bayard, and their associates in the Senate, and of Representatives Poland, Tremain, Potter and Woodford, and their associates in the House, during the debates of the first session of the forty-third Congress, expose this injustice so clearly and fully that there should be no need of further discussion of it. And the declaration of Senator Bayard, that it cannot prevail except "at the cost of the honor of the Government of the United States," will command general concurrence from those who take the pains to understand the subject.

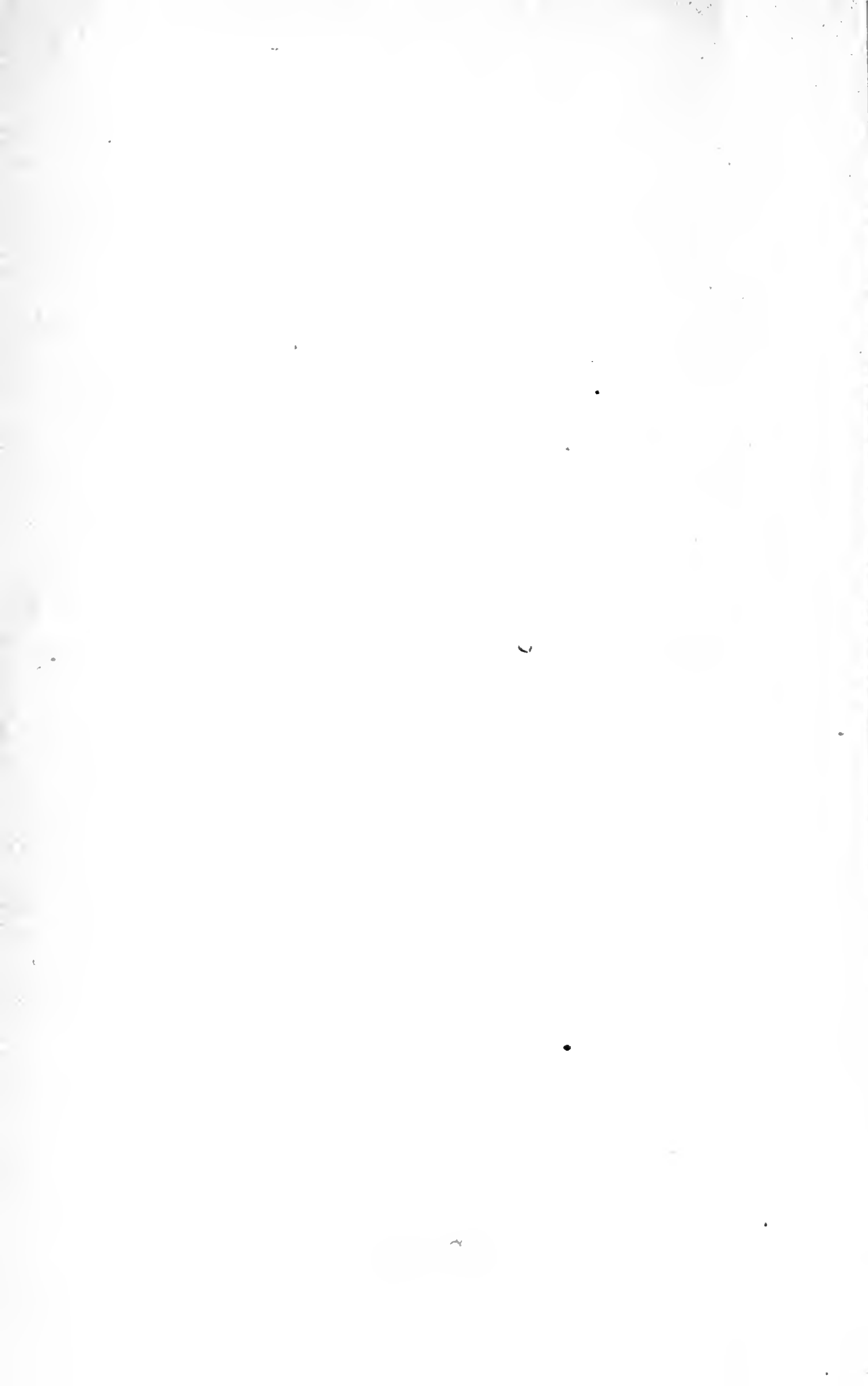
Underwriter claimants can rest assured that their right to a fair hearing, before the distributing court or commis-

sion, is supported by every consideration of law and justice and national good faith. The terms upon which they undertook the risk of the "Alabama" depredations undoubtedly vested in them the reclamations. They promptly and honorably fulfilled their part of the contract by payment of the losses caused by the depredations. The Government, in their name and behalf, took charge of their reclamations, and has recovered and collected the damages flowing from them. It cannot deny to them their just and lawful share of the damages recovered. If, through misinformation or misconception, so clear a wrong and so evident a breach of good faith prevails for the moment, it will nevertheless remain a duty and necessity of the Government to give subsequent redress. Its treasury will obtain, through such an injustice, no voucher or acquittance which can hereafter be respected or available. And its ultimate justice will not persist in refusing to account, for the proceeds of private rights, with those whose just and legal title to them is so certain and clear that it cannot be avoided, except by express prohibition of access to the court or tribunal, intrusted with distribution of the proceeds.

New York, February, 1876.

C. A. HAND.





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