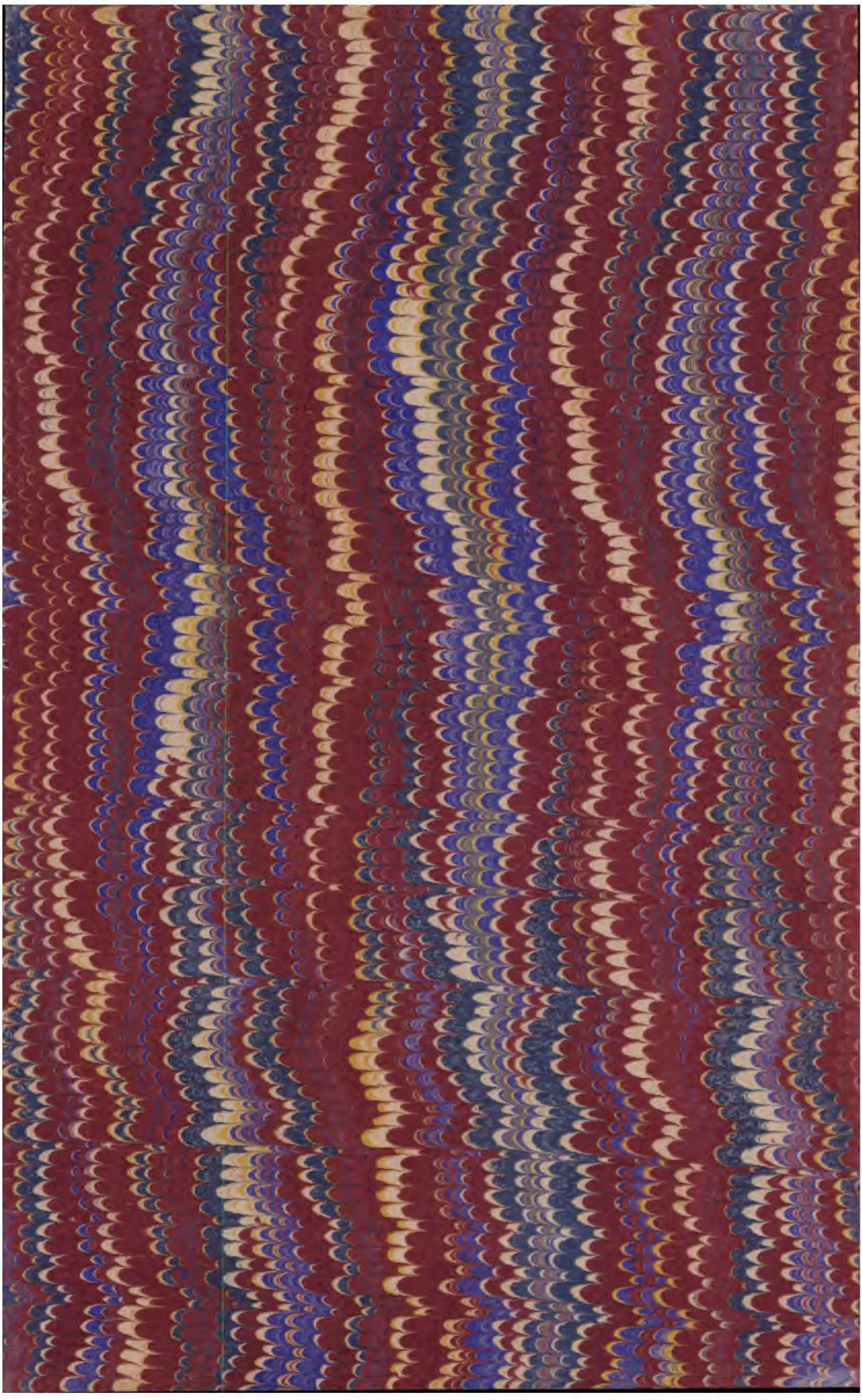

REPORT

OF

FRENCH-VENEZUELAN MIXED CLAIMS COMMISSION OF 1902.

PREPARED BY

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WASHINGTON:

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1906.

PREFACE.

This work is a supplement to the volume entitled "Venezuelan Arbitrations of 1903," prepared by the same editors and published as Senate Document No. 316, Fifty-eighth Congress, second session. The protocol, by virtue of which the Commission acted, whose proceedings are reported herein, was dated February 19, 1902; but the Commission sat at Caracas at the same time with the Commissions appointed under the protocols of February, 1903, and, as will be observed, its work and the questions submitted to it partook largely of the same nature and character.

In the preparation of this volume the editor desires to present his full acknowledgment for assistance received from Mr. W. T. S. Doyle; Mr. W. B. Turner, printing clerk of the Senate; Mr. O. T. Cartwright, of the State Department; and Mr. C. J. Kappler.

The opinions herein reported were kindly furnished by the Umpire, Hon. Frank Plumley; the Venezuelan Commissioner, Dr. José de Jesús Paúl; and the French Commissioner, Count E. de Peretti de la Rocca. The headnotes were in all cases prepared by Mr. Plumley.

JACKSON H. RALSTON.

WASHINGTON, D. C., *September 25, 1906.*

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FRENCH-VENEZUELAN MIXED CLAIMS COMMISSION OF 1902.

PROTOCOL.

Los suscritos, el Señor H. Maubourguet, Plenipotenciario de los Estados Unidos de Venezuela, y el Señor Th. Delcassé, Diputado, Ministro de Negocios Extranjeros de la República Francesa, debidamente autorizados por sus respectivos Gobiernos, han convenido en lo siguiente:

ARTÍCULO I.

Al propio tiempo que nombren sus Ministros en París y Caracas, los Gobiernos Venezolano y Francés designarán cada uno un árbitro y elegirán por tercero en discordia al Excelentísimo Señor F. de Leon y Castillo, Marqués del Muni, Embajador Extraordinario y Plenipotenciario de Su Majestad el Rey de España cerca del Presidente de la República Francesa.

Los dos primeros árbitros se reunirán en Caracas inmediatamente después de la entrega por el Ministro de Francia al Presidente de los Estados Unidos de Venezuela de sus credenciales, á efecto de examinar, de concierto, las demandas de indemnizaciones presentadas por Franceses, por daños sufridos en Venezuela con motivo de los acontecimientos revolucionarios de 1892. Las demandas de indemnizaciones que no pudieren arreglarse amigablemente entre estos dos árbitros serán sometidas por ellos al tercero en discordia.

Les soussignés, M. H. Maubourguet, Plénipotentiaire des États-Unis du Vénézuéla, et M. Th. Delcassé, Député, Ministre des Affaires Étrangères de la République Française, dûment autorisés par leurs Gouvernements respectifs, sont convenus de ce qui suit:

ARTICLE I.

En même temps qu'ils nommeront leurs Ministres à Paris et à Caracas, les Gouvernements Vénézuélien et Français désigneront chacun un arbitre et choisiront, pour tiers arbitre, Son Excellence M. F. de Leon y Castillo, Marquis del Muni, Ambassadeur Extraordinaire et Plénipotentiaire de Sa Majesté le Roi d'Espagne près le Président de la République Française.

Les deux premiers arbitres se réuniront à Caracas, aussitôt après la remise par le Ministre de France au Président des États-Unis du Vénézuéla de ses lettres de créance, à l'effet d'examiner, de concert, les demandes d'indemnités présentées par de Français pour des dommages subis au Vénézuéla du fait des événements insurrectionnels de 1892. Les demandes d'indemnités qui ne pourraient être réglées à l'amiable entre ces deux arbitres seront soumises par eux au tiers arbitre.

Si no se hubiere estatuido nada definitivamente, ya por los dos árbitros, ya por el tercero, dentro del plazo de un año contado desde la llegada del árbitro francés á Caracas, el Gobierno Venezolano entregará al Gobierno Francés, para distribuirse por él entre los derecho-habientes, un millón de bolivares en deuda diplomática del 3%, mediante el cual pago quedarán definitivamente arregladas todas las reclamaciones motivadas por los sucesos revolucionarios de 1892.

S'il n'a pas été définitivement statué, soit par les deux arbitres, soit par le tiers arbitre, dans un délai d'une année à compter de l'arrivée de l'arbitre français à Caracas, le Gouvernement Vénézuélien remettra au Gouvernement français, pour être réparti par ses soins entre les ayants droit, un million de bolivares en dette diplomatique 3 p. 100, moyennant quel versement toutes les réclamations du fait des événements insurrectionnels de 1892 seront définitivement réglées.

Artículo II.

Las demandas de indemnizaciones extrañas á las que son objeto del artículo I, pero que estén fundadas en hechos anteriores al 23 de mayo de 1899, serán examinadas de concierto por el Ministro de Relaciones Exteriores de Venezuela y por el Ministro de Francia en Caracas. Si dentro de un plazo de seis meses, contado desde la entrega de las credenciales del Ministro de Francia en Caracas, no se pusieren de acuerdo sobre el monto de las indemnizaciones que hayan de concederse, las demandas serán sometidas por ellos al tercero en discordia designado en el artículo precedente.

El Ministro de Relaciones Exteriores de Venezuela y el Ministro de Francia en Caracas podrán delegar, cada uno en lo que le concierna, la ejecución de las disposiciones que preceden en el árbitro nombrado por su Gobierno.

Si varias demandas de indemnizaciones fundadas en hechos diferentes se presentaren por el mismo reclamante y una de ellas estuviere en el caso de someterse al procedimiento establecido en el presente artículo, las demás se juntarán á ella para ser objeto de de un arreglo único.

Article II.

Les demandes d'indemnités autres que celles qui sont visées à l'article 1er, mais fondées sur des faits antérieurs au 23 mai 1899, seront examinées de concert par le ministre des affaires étrangères du Vénézuéla et par le ministre de France à Caracas. Si dans le délai de six mois à dater de la remise des lettres de créance du ministre de France à Caracas, ils ne tombent pas d'accord sur le montant des indemnités à allouer, les demandes seront soumises par eux au tiers arbitre désigné à l'article précédent.

Le ministre des affaires étrangères du Vénézuéla et le ministre de France à Caracas pourront déléguer, chacun en ce qui le concerne, pour l'exécution des dispositions ci-dessus, l'arbitre nommé par leur gouvernement.

Si plusieurs demandes d'indemnités, fondées sur des faits différents, sont présentées par le même réclamant et que l'une d'entre elles soit dans le cas d'être soumise à la procédure établie au présent article, les autres y seront jointes, pour faire l'objet d'un règlement unique.

Queda entendido que este procedimiento,como el adoptado para las reclamaciones de 1892, no se instituye sino á título excepcional, y no invalida la convención del 26 de noviembre de 1885.

ARTÍCULO III.

El tercero en discordia decidirá sin apelación.

Las indemnizaciones se pagarán al Gobierno Francés en títulos de la deuda diplomática del 3% dentro de los tres meses que sigan al acuerdo ó al fallo.

ARTÍCULO IV.

El Gobierno Venezolano pedirá al Congreso que inscriba en el Presupuesto de Gastos las sumas necesarias para el pago de las mensualidades atrasadas de la deuda diplomática, y los tenedores de títulos de esa deuda deberán, por lo demás, participar de todas las ventajas que resulten para ellos de la estricta aplicación de las leyes venezolanas orgánicas sobre la materia.

El presente Arreglo será ratificado y las ratificaciones se canjearán en París ó en Caracas cuanto ántes se pueda y á más tardar el 30 de abril de 1902.

En fé de lo cual, los suscritos, debidamente autorizados por sus Gobiernos respectivos, han extendido el presente acto y puesto en él sus sellos.

Hecho por duplicado en París el 19 de febrero de 1902.

Il est entendu que cette procédure, comme celle qui est adoptée pour les réclamations de 1892, n'est instituée qu'à titre exceptionnel et n'infirme pas la convention du 26 novembre 1885.

ARTICLE III.

Le tiers arbitre décidera sans appel.

Les indemnités seront versées au Gouvernement Français, en titres de la dette diplomatique 3 % dans les trois mois qui suivront l'entente ou le prononcé de la sentence.

ARTICLE IV.

Le Gouvernement Vénézuélien demandera au Congrès d'inscrire au Budget des dépenses les sommes nécessaires au payement des mensualités arriérées de la dette diplomatique, les porteurs de titres de cette dette devront d'ailleurs bénéficier de tous les avantages qui résultent pour eux de la stricte application des lois vénézuéliennes organiques sur la matière.

Le présent Arrangement sera ratifié et les ratifications en seront échangées à Paris ou à Caracas le plus tôt que faire se pourra et au plus tard le 30 avril 1902.

En foi de quoi, les soussignés, dûment autorisés par leurs Gouvernements respectifs, ont dressé le présent acte et y ont apposé leurs cachets.

Fait à Paris, en double exemplaire, le 19 février 1902.

H. MAUBOURGUET. [L. S.]
DELCASSÉ. [L. S.]

PERSONNEL OF COMMISSION.

Umpire.[a]—Hon. FRANK PLUMLEY, of Northfield, Vt.
French Commissioner.—Count E. DE PERETTI DE LA ROCCA.
Venezuelan Commissioner.—Dr. JOSÉ DE JESÚS PAÚL.
Secretary to Umpire.—Mr. CHARLES A. PLUMLEY.
French Secretary.—M. PAUL WALTZ.
Venezuelan Secretary.—Dr. J. F. PADRÓN USTÁRIZ.

[a] By the protocol the Marquis del Muni, ambassador extraordinary and plenipotentiary of Spain to France, was appointed, but, he declining, Hon. Frank Plumley was finally selected.

CLAIM OF HEIRS OF JULES BRUN.—No. 1.[a]

HEAD NOTES.

A state of war, a battle, or a skirmish excuses only those casualties which are unavoidable.

A city not in revolt, but temporarily occupied by insurgent forces, is entitled to receive from the Government the *utmost care and protection* not inconsistent with the retaking of the town from the insurgent forces, and is subject only to the *inevitable* contingencies attending such an undertaking.

There is a presumption that the Government will do its duty in this regard; but it is met, if not overcome, by a presumption which arises from a refusal of the Government in such a case to permit the use of its judicial processes to settle the exact facts easily ascertainable.

If there is a claimant rightfully in the case, however informally present, it is sufficient to permit and to require a disposition of the case on its merits and all parties will be fully bound by the decision.

Where the claimant is the mother, a widow, and the claim is for the unlawful killing of her son, the measure of damages is the amount which will meet the pecuniary loss she has sustained where there is no ground for exemplary damages.

The protocol constituting this commission having provided that the award be paid in bonds of the diplomatic debt of 3 per cent of Venezuela, which are at present greatly reduced in market value, the umpire can not because of this augment the actual damage or the actual debt in making his award. Such a course would be unjust to the respondent Government and to every holder of these debts. The umpire is not competent to do this under the protocol.

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[a] EXTRACT FROM THE MINUTES OF THE SITTING OF MAY 27, 1903.

Proceeded to examination of claim presented in the name of the heirs of Mr. Brun (Jules), late superintendent of the French Company of Venezuelan railroads.

Doctor Paúl observes that this claim is not presented by a representative of Mr. Brun and in his opinion this fact would suffice for its not being taken into consideration by the commission. He adds, besides, that the death of Mr. Brun was caused by purely accidental means and that in no manner can it serve as a basis for a claim of indemnity against the Venezuelan Government.

Mr. de Peretti replies that in presenting this claim the French Government is substituted in place of the heirs whose interests it takes in hand, the mother of Mr. Brun being aged and infirm.

Moreover, the responsibility of the Venezuelan Government appearing to him well established he accords an indemnity of 500,000 bolivars.

It is therefore decided that this claim be reserved for the umpire to examine.

Doctor Paúl inquires of his colleague upon what basis he has estimated the amount of the indemnity which he thinks is due the heirs of Mr. Brun. Mr. de Peretti replies that in view of the rejection by his colleague of the present claim he does not feel obliged to disclose the reasons which have led him to fix the amount of 500,000 bolivars. However, he is willing to state that this amount, which is exactly estimated by the French Company of Venezuelan railroads as an equitable compensation for the injury done to the family of its superintendent, represents almost precisely in capital the annual salary that Mr. Brun earned by his labors.

OPINION OF THE VENEZUELAN COMMISSIONER.

This claim is wanting every document proceeding from the lawful heirs or successors to Jules Brun formulating a claim against the Government of Venezuela for the death of said gentleman, so that all such elements are lacking as are indispensable for taking into consideration either the lawfulness of the personality of the claimant or the sum to which the claim is made to amount.

Among the papers presented by the French arbitrator there only appears a telegram dated the 4th of June, 1898, addressed by Mr. Hanotaux to the French legation in Caracas running as follows:

Take steps necessary to protect eventual rights of the Brun family, assuring guarantee of the French personnel of the company.

There are also presented two rough copies of writing corresponding to two notes addressed to the minister of foreign affairs of Venezuela on the 4th and 12th of June, 1898, by Mr. Quiévreux, inviting him to ask the local authorities of the State of Zulia to tender their assistance to the officials of the "Compagnie Française de Chemins de Fer Vénézuéliens," with the purpose of establishing the exact truth of the events that took place at Santa Bárbara on the day Mr. Brun was wounded.

In reply to one of these notes the minister of foreign affairs on the 11th of June of the same year expressed himself to be willing to take it into consideration, foreseeing that the fact of his not considering it might lend itself to interpretations alien from the views of the Government as to the death of a truly appreciated person, which had had its origin in a regrettable accident during the progress of battle.

The fact of the wound of Mr. Brun, with which the communications of the consul of France deal, occurred under circumstances of such a nature so precise, so evident, and so indisputably accidental that all investigation after the death of the wounded gentleman became unnecessary. The very employees of the company, personal witnesses of the fact, narrate with all its details the unfortunate accident of the wound of Mr. Brun, and the commissioner for the Government of Venezuela will take precisely those declarations into consideration to weigh the reason and justice of the alleged claim.

Mr. J. B. Peysselon, representative of the "Compagnie Française de Chemins de Fer Vénézuéliens," after the death of Mr. Brun, in a statement which he ratified before the consular agent of France at Maracaibo, relates the facts as follows:

From the 4th day of May the village of Santa Bárbara, the place of our residence, was occupied by a revolutionary troop. On Sunday, the 8th, the legal troops, transported by the steamer *Progreso*, arrived at midday at the village. Under these circumstances we must foresee a battle in the streets. This foresight ordered us to immediately close all the doors and blinds of our dwelling house. While I was closing a window overlooking the square Mr. Brun was closing that of his sleeping room, which overlooks Santo Domingo street.

At the same moment the musket volleys began in this street; the window was already closed; but Mr. Brun had no time to remove his hand from the lock when the bullet of an arm of precision pierced the blind through, twisted the lock in an extraordinary way, pierced Mr. Brun's hand through and through and threw the chips on his breast. Mr. and Mrs. Crinière, who inhabit the house of the director, attended Mr. Brun on this sad circumstance. I immediately went out to the square to call a physician. I met with 20 armed men of the Government, and the only person known to me to whom I could apply was Gen. Eleazar Montiel, the head of the party. As the physician had not arrived, I went out for a second time and saw the same Montiel with Messrs. Bellais and Acosta, his lieutenants, and another troop of the Government. When the first panic was over, Drs. J. Rosales and J. Cohen could be called, and immediately came to attend our friend.

Mr. A. Crinière, bookkeeper of the company at Santa Bárbara, declares before the same consular agent:

We were anxious, because we heard and saw nothing. When at midday the report circulated that the steamer *Progreso* was at the entrance of Santa Bárbara, a great movement took place, and we saw a white flag at the station. This inspired us with some confidence, and we thought that the two parties would come to an understanding. Unfortunately it did not happen so, and at the same time a lively musket firing broke out in Santo Domingo street. It was the soldiers from Maracaibo that arrived at the bottom of the village and attacked the forces of Generals Figuera and Pozo in the rear. Immediately Messrs. Brun, Peysselon, and myself ran to close the doors and windows to protect ourselves from the bullets. I had already heard the noise of something like mortar falling behind me. It was a bullet that had pierced through the window of the hall overlooking the square which had two flags. Almost at the same time I heard Mr. Brun cry, "I am wounded." We all ran to him to help him and saw his right hand horribly mutilated by a bullet. All of this passed like a thunderbolt. We rendered the first attentions required by so serious a wound, and, the musket firing having ceased, Mr. Peysselon ran in search of a physician. I followed him and saw soldiers of the legal forces with the French flag over their heads guarding the entrance of the office in the street, which did not prevent them from preparing to fire at us; but fortunately Mr. Peysselon had sufficient presence of mind to cry: "French company," which produced the effect of changing their bad intention, and Mr. Peysselon was able to go out.

From the medical inspection made by Dr. J. Cohen and reported to the consular agent at Maracaibo, it appears that Mr. Brun, immediately after the incident, presented a wound in his right hand, with the following circumstances: On the palm side of the hand the wound presented an extent of from 7 to 8 centimeters and a strange appearance that showed that it had been produced not only by the bullet, but also by the violent pressure of a hard body, with half-cutting edges, which intersected the skin, the muscles, and the arterial arc. It also appears that the physician, in view of the dangerous nature of the wound, proceded to render the patient, in company with Dr. Paminas Rosales, all such attention as medical science prescribed; that these cares continued during all the days 9, 10, 11, and 12, in which nothing particular occurred, the treatments being made regularly and with a great attention; that on the 12th, at 11 a. m., Mr. Brun was embarked on board the steamer *Progreso* for his transportation to Maracaibo without showing theretofore any alteration; that at 4 o'clock that day Doctor Cohen proceeded, on board the *Progreso*, to dress the wound, and

found in the purulent focus formed at the side of the wound on the dorsal face of the hand a complete absence of gleet and three gangrenous points on the dorsal face of the thumb; that such symptoms inspired him with the fear of a great danger, for which reason he notified the acting representative of the rights of the company what he had seen and ordered a certain preventive method. The patient was well until 7, when in a violent manner the fever made its invasion with a strong delirium and all the consequences attending an infection; that everything was attempted, but in vain, for neither scientific cares nor those of friendship were enough to avoid the catastrophe that took place at 8.45, when the patient died of a purulent infection of violent invasion, which could not be overcome.

The corpse having been carried to Maracaibo on the same steamer *Progreso*, the government of the State of Zulia, upon learning the regrettable event, thought it to be its duty to join, as it did in effect, in the sorrow produced in the State by the death of Mr. Brun, and decided among other manifestations to assist at the act of the burial of the corpse of the esteemable gentleman, who lost his life on account of a lamentable accident.

Another proof given by the government of the sympathy with which it was inspired by the fate of Mr. Brun appears from a note addressed by Gen. J. M. Gomez, chief of the third military circumscription of the Republic to Mr. Julio d'Empaire, in charge of the consular agency of France in the city of Maracaibo.

In that note a copy is inclosed of that which in the name of Mr. Brun, while suffering in his bed the consequence of his wound, was addressed on the 12th of May, 1898, by Mr. J. B. Peysselon, inspector of the exploitation, to Gen. Mamerto D. González, military agent of Gen. García Gomez in the Santa Bárbara district. Mr. Peysselon's note runs thus:

Compagnie Française de Chemins de Fer Vénézuéliens. Line from San Cárlos to Mérida. Direction of the exploitation. L. R. No. 658. Santa Bárbara, 12th May, 1898. General Mamerto D. González. My dear sir: As the agent of the company, and Mr. Brun being unable to do so himself, I thank you for the restoration of order and for having taken the proper measures for the bringing of the steamer *Santa Bárbara*. It would be highly agreeable to us to see you among us protecting our persons and our interests. I am with all consideration,

Your respectful servant,

J. B. PEYSSELON,
Inspector of the Exploitation.

This note, under the circumstances under which it was written, Mr. Brun being already wounded, order being restored in the place by the forces commanded by Gen. Mamerto González, and the steamer *Santa Bárbara*, that had been taken by the revolutionaries, being returned to the company, throws sufficient light to make one consider as ungrounded the attacks which Mr. Peysselon desired to adduce with the purpose, after the death of Mr. Brun, of giving the accident hap-

pening to the latter a character of aggression against the building of the company, that is not in any way proved.

For all the reasons above stated the claim presented by the Commissioner of France on account of the death of Mr. J. Brun is destitute of any ground that may render it acceptable for any amount, and the Commissioner for Venezuela, therefore, entirely rejects it.

CARAÇAS, *May 27, 1903.*

OPINION OF THE FRENCH COMMISSIONER.

The 8th of May, 1898, M. Brun, superintendent of bridges and causeways on leave, director of the French company of Venezuelan railroads was grievously wounded by a discharge from Government troops which took place in the village of Santa Bárbara occupied by the insurgent forces. M. Brun, who was in his house, over which floated the French flag, had his hand shattered by a ball, at the moment when he was closing the shutters of the window of his room, and died four days later because of this wound. These facts have caused the lodgment by the French Government of the claim of 500,000 bolivars before the mixed commission appointed according to the protocol of the 19th of February, 1902. These facts are well established by the depositions of eyewitnesses and of the doctor who cared for M. Brun. The Venezuelan authorities have by their attitude confirmed their correctness, which the Venezuelan Government has never placed in doubt. At the sitting of the 27th of May, 1903, the mixed commission considered this claim.

Dr. Paúl rejected it, considering that it had not been presented by a representative of M. Brun and that this fact suffices for its not being taken into consideration at all by the commission; that the death of M. Brun had a cause purely accidental, and that it could not in any way serve as a basis for a demand of indemnity from the Venezuelan Government. I replied that the French Government had substituted itself for the presentation of this claim by the heirs whose interests it had taken in hand, the mother of M. Brun being aged and infirm, and that besides the responsibility of the Venezuelan Government seeming to me established I accorded a demand and indemnity in satisfaction of 500,000 bolivars.

It is said nowhere in the protocol that the claims must be presented by those having a right in themselves. It is at the same time conformable to international law and commanded by good sense and equity that the French Government present in its name the claims of those of its dependents who are not capable themselves of defending their rights, and nothing interferes with this. As for the responsibility of the Venezuelan Government, it is difficult to place it in

doubt, even holding to the principles generally admitted by international European law, the existence of which are often disregarded in affairs between the countries of Europe and certain South American republics, because of the social and political conditions of these countries.

Immediately after the decease of M. Brun M. Hanotaux, minister of foreign affairs, telegraphed the 4th of June, 1898, to M. Quiévreux, chargé d'affaires of France at Caracas, to take the necessary steps to safeguard the eventual rights of the family. M. Quiévreux the same day wrote to the minister of foreign relations of Venezuela, rendering homage to the correctness of the attitude of the high authorities at Maracaibo, whose evidences of sympathy were an undeniable proof of the confidence which M. Brun had inspired and of the services which he had rendered to the country in directing a great enterprise of public utility. Quiévreux made known that the local officials had not conducted themselves so well. The successor of M. Brun in the direction of the company could not obtain from the judge of the district permission to proceed according to the legal forms to make the different proofs relating to this dreadful incident and to the circumstances accompanying it.

The house of M. Brun, property of the company, was connected with the shops and storehouse for material and the central office. But the doors of the principal shop of the office of bookkeeping and the telegraph office were broken down after one of the discharges fired upon the property of the company had wounded M. Brun.

In conclusion M. Quiévreux asked relief from the Federal Government and that they kindly invite the local officers to lend their indispensable assistance to an investigation of this nature by the agents of the French company.

In his reply the minister for foreign affairs tried to establish theoretically that the judicial authorities were not obliged to proceed to any investigation. He added that the death of M. Brun and the breaking of the doors were simply accidents of war. The death of M. Brun could no more require compensation than that of a Venezuelan who, crossing a street in Paris in 1871, during the struggles of the Commune, was killed by a stray ball.

The representative of France in his reply called attention to such strange theory, as it seemed to him. He suggestively remarked that the terms of the letter of the minister had only strengthened his purpose to have an examination of the unfortunate incidents which had marked the taking of Santa Bárbara by the troops of the Government. It was inadmissible, he added, that the department of foreign relations should try, under cover of the authorities of international law, to liken the breaking of the doors of the buildings of the French company to the destruction of the hostile intrenchments, which would

lead one to suppose that the aforesaid buildings over which floated the French flag were occupied by revolutionary forces, but this hypothesis was so contrary to the real fact that the Venezuelan Government itself has not thought to claim it. M. Quiévreux said at the end of his letter—

I regret that it does not seem possible to your excellency that the judicial authorities of the district in which Santa Bárbara is situated should lend to the officials of the French company of Venezuelan railroads their aid in view of establishing the exact truth about the events which the national Government deplores with me. I see myself obliged, therefore, to make all my reserves for the case where the interested party having to formulate a precise claim upon the subject of this affair it would not be possible for them to base it upon the statements made according to the usual and legal forms. This will not be in accordance with their will or mine.

In spite of this courteous admonition the Venezuelan Government persists in its resolutions. This attitude proves clearly that it feared the consequences of a legal investigation and that it was ready to intrench behind technicalities more or less contestable upon explanations upon international law and upon comparisons not well justified. We are convinced besides that this eagerness to defend itself by the aid of citations of authorities of international law even before having been attacked, to reject a claim which was not yet presented, shows clearly that the Venezuelan Government itself confessed that a compensation for damages might be demanded of it under a just title. If it had been assured that an investigation conducted conformably to Venezuelan laws by the Venezuelan officials would have simply permitted to conclude upon the irresponsibility of the Government for the accident of the war no doubt but that it would have proceeded immediately to the aforementioned investigation. That would have established the responsibilities. That is what the Venezuelan Government wished to avoid. It has not recoiled before a denial of justice and it has thus condemned itself.

In the several trips I have made to Santa Bárbara for the purpose of forming personal opinions upon the French claims I have been able, although five years have passed since the events, to make some observations which have terminated by convincing me that the wounding of M. Brun could not be regarded as a simple accident of war. Accompanied by the commander of the French cruiser *Jouffroy*, by a representative of the French company, by the civil head of Santa Bárbara, and by some prominent men of the place, I visited the house where M. Brun was wounded. The window of the room situated on the first floor where this accident took place is pierced by several balls, the traces of which one sees clearly on the shutters of smooth wood and on the walls back of the chamber. Stray balls do not converge thus on a precise point. It is certainly a question of a volley fired intentionally upon a window which had just been closed and above which floated the French flag. According to the declarations which have been

made to me by the civil chief and by the notables who were at Santa Bárbara when the village was taken, the troops which fired came by a street perpendicular to the side of the house where the window of M. Brun was located. There were neither in the street nor in the house any insurgents, the presence of whom could have explained the shots, and the armed band was commanded by an officer, Mr. Montiel, and composed of soldiers who knew the house of M. Brun and M. Brun himself very well. The tone with which these declarations were made lead me to believe that the aggressors knew what they were doing and were led by a chief who profited from an occasion offered to satisfy a former grudge. The investigation asked for and refused under the conditions, which I have explained, would at least have permitted the Government of Venezuela to punish those who thus fixed its responsibility. These necessary explanations tend to transform the simple accident of war which the Venezuelan Government would like to content itself with deploring into a murder committed knowingly, perhaps premeditated, and in any case accompanied by acts of violence upon foreign property without any provocation or any resistance being able to excuse or even explain them. Can one equitably establish a parallel between a like instance and the fortuitous death of a Venezuelan who, in 1871, was hit by a stray ball while crossing a street during a combat going on between the insurgents and the army of Versailles? M. Brun, director of a public service, who was obliged to remain at his post, has been wounded in his house surmounted by a French flag by a volley intentionally aimed at his window by a party of regular soldiers who knew him without one's being able to find in it any excuse or provocation. The same soldiers then broke down the doors of the buildings which they invaded and can not give as an excuse for this violation of foreign property the necessity of driving insurgents from it and of making them cease their resistance.

The nature of the acts, the conduct of the local authorities, the attitude of the Venezuelan Government, and the result of a personal investigation have led me to judge that an indemnity was due the family of the victim. I have placed it at 500,000 bolivars, judging as an arbitrator who acts according to his conscience without allowing himself to be influenced by the quality of the parties which he has no mission either to attack or defend. I have estimated, and still estimate, after having heard my honorable colleague express his opinion, that this indemnity is an equitable reparation for the material damage suffered by the family of M. Brun. This sum represents in capital the annual salary of the director of the French company, who earned in pursuit of his duties from 20,000 to 25,000 bolivars. We should reach a much greater sum if we calculated the indemnity at the normal rate of interest in Venezuela, which is practically 12 per cent. We ought to consider besides that, according to the terms of the protocol, this

indemnity has to be paid in bonds of the diplomatic debts and not in gold. Thanks to this concession kindly granted by the French Government to the Venezuelan Government to permit it to pay its debts with greater facility, the figure of the indemnity finds itself singularly reduced in reality. The bonds issued by the Venezuelan Government have an actual variable value in fact which always rests far from their nominal value. In May, 1903, they underwent a depreciation of 30 per cent. To-day the Venezuelan Government, having proceeded to new issues to pay the indemnities accorded by the mixed commission, the depreciation reaches 70 per cent. The latter can only increase still more by future issues. It would be then, if the umpire should partake of the sentiment of the French arbitrator, scarcely the sum of 150,000 bolivars in gold which the heirs of M. Brun would receive from the Venezuelan Government.

December 15, 1903.

EXHIBIT ATTACHED TO THE OPINION OF THE FRENCH COMMISSIONER.

Under date of June 17 last, the mother of M. Brun, having learned that the Venezuelan arbitrator had raised a question of fact because the Brun claim was not directly presented by the interested parties, sent me the attached letter.

Mme. Brun, aged and infirm, has counted upon the French Government to sustain her claim against the Venezuelan Government. She declares that she approves what the ministry of foreign affairs has done in her interest and requests it to continue its proceeding in the same manner.

JUNE 28, 1904.

LODÈVE (HÉRAULT),
June 17, 1904.

M. DE PERETTI DE LA ROCCA,
French Arbitrator in Venezuelan Claims,
Ministry of Foreign Affairs, Paris, France.

SIR: I have learned that the Venezuelan arbitrator at Caracas has raised some difficulties with regard to the claim which I have for the death of my son, José Brun, director of the Company of French-Venezuelan Railways, assassinated at Santa Bárbara, Venezuela, because I have not acted myself, but I count upon what has been done by the French Government in maintaining my claim to follow its course.

I inform you then by the present that I give full approbation to what the ministry of foreign affairs has done, asking it to be pleased to maintain my claim in the manner in which it has supported it itself.

WIDOW BRUN (NÉE CARRED).

BOULEVARD DE L'HÔPITAL,
Maison Laurès, Lodève, Hérault.

ADDITIONAL OPINION OF THE VENEZUELAN COMMISSIONER.

As commissioner for Venezuela, I have held, as shown by the abstract of the oral proceedings had on May 27, 1903, that the commission should abstain from considering the merits of the documents produced, as at first glance it appeared that a claim for indemnification had not been properly entered against the Venezuelan Government by a citizen or a party in interest of French nationality, showing

his capacity as universal heir to M. Jules Brun, nor his legal title to receive any sum by way of indemnification. I also held that, from the examination of the documents then before me, no cause was shown to substantiate the alleged liability of the Venezuelan Government for the death of M. Brun, as the testimony of the eyewitnesses clearly proved that the death of the party was produced accidentally, was due to a casualty, at the time an armed conflict was taking place near his residence.

In support of the first point held in my opinion, I beg to call the attention of the honorable umpire to the precise language of article 1 of the protocol made in Paris on the 17th of February, 1902, to which the existence of the present commission is due, and supplemented by article 2, relating to claims submitted to the investigation and decision of said commission.

Both articles refer to *claims for indemnification presented by French citizens* only, and this commission can not, because more or less plausible reasons of similarity or inference are put forth, extend its limited powers to deal with other matters, except such as are *brought before it by French citizens* in the shape of a *claim demanding a stated indemnification.* Individual action is one of the requisites necessary to the possibility or faculty of the commission to deal with cases involving private interests of French citizens who claim as against the Venezuelan Government to have sustained damages or to be aggrieved parties.

Other questions exclusively affecting the Governments of both countries do not come within the scope of this commission, in the same manner that the diplomatic action of the Government taking in hand the representation and defense of the rights of its citizens does not extend so far as to create such rights nor to enforce them when the party concerned has not made use of such right nor yet to supersede the party when the party has not shown signs of existence. It is not amiss to quote, in this connection, the opinion of the learned commissioner, Mr. Little, in the claims of Narcissa de Hammer and Amelia de Brissot, before the commission created by the convention of December, 1885, between Venezuela and the United States:

> This of course, is not saying that the United States has no cause for reclamation on the account of the killing of her citizens—Captain Hammer and Mr. Brissot. It is only holding that under the terms of the convention the question is not submitted to us. It would be to go beyond the limits of just interpretation and to enter the forbidden domain of judicial legislation to say that *claims on the part of citizens* means or includes *claims growing out of the injuries to citizens.* (Moore, 2459-2460.)

All questions relating to the nationality of the claimant and to the legal status or judicial capacity of the person to receive an award grow out of the presentation of such person as a claimant, whether it is a real living person or a judicial person, which by law has a sup-

posed existence. On the other hand, the claim must state the amount claimed as a fair indemnification, such data as are furnished by the claimant being of great importance in the estimation of damages.

None of the requisites is found in the documents submitted to the commission, as such evidence only consisted of a collection of notes and depositions made by employees of the company and consular officers in regard to the death of M. Jules Brun. From the contents of said notes in regard to the consular action it appears that such action was reduced to soliciting immediately after the death of M. Brun the cooperation of the Venezuelan authorities for the *further investigation* of a fact then made sufficiently clear by the testimony of the only eyewitnesses to the accidental wounding, the employees of the company. Such extreme investigation was asked for the sole purpose of—

securing the possibility that the parties concerned may have to enter *a precise claim* on the subject, being thus enabled to base it upon proofs established according to legal proceedings.

The telegram of M. Hanotaux, minister of foreign affairs of France, to the French legation at Caracas reads as follows:

Prenez dispositions nécessaires pour sauvegarder droits éventuelles famille Brun.

[Translation.]

Take necessary steps to safeguard eventual rights of Brun family.

What is the meaning of the note of M. Quiévreux and of this telegram? That it might be possible for the interested parties to enter a *precise claim* on this subject and that the consular agent should endeavor to safeguard any eventual rights of the Brun family. Neither has the claim been made *precise*, nor is there anything to show that such rights of the Brun family have passed from their eventual condition to that of positive and distinct rights; nor has the French Government duly entered any such claim against the Venezuelan Government in behalf of the Brun family, nor yet has it deemed that the case has arrived when, by virtue of its sovereignty and in view of the testimony furnished by the employees of the company, witnesses to the wounding of M. Brun, said Government should demand a certain sum of money from the Venezuelan Government as an amend for a wrong done to the nation or as a penalty and under no circumstances by way of a humanitarian compensation or a charitable gift made to the Brun family. These courts can not measure in money the wrong done to a nation, as a nation, in case such wrong exists, nor have they been created to make grants in order to remedy the needs of a widow and orphans by reason of the accidental death of a beloved husband and father.

The honorable commissioner for France has lately produced as an annex to his opinion a letter from M. Brun's relict, dated on the 17th of June of last year—that is, one year after having presented and

examined the documents in the case which I had before me in Caracas when I gave my opinion on the case. Such letter lacks weight, as it only ratifies the proceedings adopted in this matter by the minister of foreign affairs of France, and it has been shown that such proceedings do not constitute a claim for an indemnification for a given sum in behalf of a given person. That which has had no existence can not be the subject of approval or ratification. That which lacks legal force because of the omission of an indispensable requisite to make the act or contract valid may be ratified or approved in order to make it valid. To do this, however, it is also indispensable that such act or contract should exist even in a weak condition. That which has never existed can not be ratified or revalidated, and the claim of Mme. Brun against the Venezuelan Government for indemnification did not exist either prior to or at the time of the signature of the protocol of February 17, 1902, nor yet during the six months provided by article 2, as an extension of the time granted for the presentation and the examination in the first place by the French and Venezuelan commissioners of *all claims for indemnification* growing out of events prior to May 23, 1899.

In consequence I maintain the first point of my opinion that, as no claim whatever for indemnification was presented in due time by or in behalf of a specified French citizen, this commission is not under obligation to examine the documents bearing on the case in point, as the commission has no authority in the premises, and that the claim must therefore be rejected.

In case the honorable umpire should deem it proper to examine the documents in reference on their merits and to weigh the proof of the facts in order to ascertain whether the conclusions arrived at by the honorable commissioner for France and the assertions contained in his memorandum in regard to the death of M. Jules Brun are justified, I have no need to go into a deep analysis of the testimony introduced to convince the honorable umpire of the slight connection there is between the opinion of my learned colleague and the conclusive proof shown by the testimony of the eyewitnesses, MM. A. Crinière, bookkeeper of the company and J. B. Peysselon, representative of the company after the death of M. Brun.

Mr. Crinière's *verbatim* testimony is as follows:

Dans la matinée du dimanche 8 mai, craignant un engagement sérieux des deux parties, nous arborions vers les dix heures du matin à la maison de la Direction des drapeaux nos couleurs françaises, dont deux à la fenêtre du salon donnant sur la place, par M. Brun lui même et aidé de Miguel Labarca, deux par moi dont un très grand sur la rue Santo Domingo; *c'est par cette rue que les soldats de la force légale ont entouré le village et où donnait la chambre* dans laquelle M. Brun a trouvé la mort en fermant une fenêtre. * * * Une vive fusillade éclate au même moment *dans la rue Santo Domingo*; c'était les soldats envoyés de Maracaibo qui *arrivaient par le fond du village*, et prenant par derrière les forces des genereaux Figuera et Pozo, immédiatement Messieurs Brun, Peysselon et moi, *nous*

précipitons pour fermer portes et fenêtres pour nous préserver des proyectiles. Déjà j'avais entendu comme un bruit de plâtre tomber derrière moi; c'était une balle qui avait traversé *la fenêtre du salon donnant sur la place et* munie des deux drapeaux (a window different from the one where a few moments later M. Brun was wounded) *et presque aussitôt* j'entendais Monsieur Brun s'écrier: Ah, je suis blessé, nous tous nous précipitons vers lui pour lui porter secours et lui voyons la main droite horriblement mutilée d'une balle. Tout ceci a duré l'espace d'un éclair. * * * J'ai été temoin de tous ces faits et je suis en possession du verrou de la fenêtre de la chambre de Monsieur Brun, et aussi d'une balle que j'ai ramassée *au milieu du salon* (not M. Brun's room); je les tiens à votre disposition et ils *prouveront surabondamment la véracité* de ces faits regrettables.

[Translation.]

On the morning of Sunday, May 8, fearing a serious fight between the two parties, we hoisted our French colors at about 10 a. m. over the company's house. Two of said flags were placed in the window of the parlor overlooking the square by M. Brun himself, assisted by Miguel Labarca, and two by me, the very large one in the window facing the street of Santo Domingo. It was by this street that the legal troops surrounded the village and which the window overlooked where M. Brun met his death in closing this window. A lively fusillade rang out at that moment on Santo Domingo street; it came from the soldiers sent from Maracaibo, who were arriving at the rear of the village, taking the forces of Generals Figuera and Pozo at their back. Messrs. Brun, Peysselon, and I at once proceeded to close doors and windows to protect ourselves from the missiles. I had already heard a noise behind me as of falling plaster; it was from a ball that had come through the parlor window that overlooked the square and from which hung the two flags; almost at the same instant I heard M. Brun cry out, "I am wounded." We all rushed to his aid and found his right hand horribly mangled by a ball. All this had happened in a flash. I have been a witness to these events and have in my possession the window bolt of M. Brun's room and also the ball which I picked up in the middle of the salon; they are entirely at your disposal and afford abundant proof of these lamentable facts.

Mr. Peysselon states:

Le dimanche 8, les troupes legales amenées par le vapeur *Progreso* arrivaient à midi et demi dans "le pueblo." Nous devions dans cette circonstance *prévoir une bataille dans* les rues. *Cette prévoyance nous commandait de fermer immédiatement toutes les portes et volets* de notre maison d'habitation; pendant que je fermais une fenêtre donnant sur la place, M. Brun *fermait celle de sa chambre donnant sur la rue Santo Domingo;* au même instant la *fusillade commençait* dans cette rue, *la fenêtre était déjà fermée,* mais Monsieur Brun n'avait encore pas eu le temps de quitter la main dessus le verrou, quand une balle d'arme de précision est *venue traverser le volet, tordre le verrou d'une façon extraordinaire, percer de part à part* la main de Mons. Brun, et lui projeter des éclats en pleine poitrine. * * * Mons. Brun est resté à Santa Bárbara jusqu'à la première occasion pour descendre à Maracaibo et il a été embarqué le jeudi matin vers les dix heures avec plus grands soins. Son état ne nous permettait pas de prévoir une issue aussi fatale et si prompte. Il est mort pendant la traversée, le même jour à 8 heures 45 minutes du soir. Tel est l'exposé sincère des faits dont j'ai été témoin oculaire jusqu'à l'embarquement de M. Brun.

[Translation.]

On Sunday, the 8th, the legal troops brought on the steamer *Progreso* arrived in the "pueblo" at half-past twelve, noon. Under such circumstances *we anticipated a fight in the streets. This led us to immediately* close all the doors and shutters of our dwelling house. While I was closing a window overlooking the square *M. Brun was closing that of his room facing Santo Domingo street; at the same moment firing began in this street; the window had been already closed, but* M. Brun had not had time yet to withdraw his hand from the bolt when a bullet from a rifle (*arme de précision*) came and *perforated the shutter, twisted the bolt in an extraordinary manner and pierced through the hand of M. Brun,* sending splints all over his chest. M. Brun remained in Santa Bárbara until the first opportunity to go down to

Maracaibo. He was embarked Thursday morning at about 10 o'clock with the greatest care. His state did not warrant our foreseeing such a fatal and sudden issue. He died during the trip on the same day at 8.45 in the evening. This is a sincere statement of the facts of which I was an eyewitness until M. Brun was put aboard.

After reading such sincere and truthful accounts given by two responsible parties, emloyees of the copmpany and fellow-countrymen of M. Brun, how can it be explained that the learned commissioner should in his opinion endeavor to construe a mere accident of war which the Venezuelan authorities were the first to deplore, as shown by the record of the case, into a murder *committed knowingly and perhaps with premeditation*, averring at the same time that the wound received by M. Brun was due to a shot from a *volley designedly aimed at the window by regular soldiers who knew him?* Where is the proof of so grave an accusation? Inferences like these, which originate in the mind preoccupied with the idea of finding guilt where there is only a *regrettable incident*, as indicated by the testimony of M. Crinière, can not fail to bring to the mind of an impartial and upright judge the conviction that such an assertion lacks all reasonable foundation.

So grave a charge against the Government of any country should be maintained by the most unquestionable proof. It should be alleged as a distinct fact and ground of reclamation and proved by evidence of the clearest character. Case of Johnson *v.* Mexico, before the Mexican Claims Commission, 1849. (Moore, p. 3032.)

As a proof of the correctness of his assertions M. de Peretti de la Rocca introduces in his memorandum a statement of the inspection he himself made of the house wherein M. Brun was wounded, when he went to Santa Bárbara on board of the French cruiser *Jouffroy*, in the course of a trip to Venezuela, five years after the incident. M. de Peretti states that according to the declarations made to him by the civil authority (*jefe civil*) and prominent persons who were in Santa Bárbara at the time the town was captured—

The troops that fired came through a street running at right angles to the side of the house where M. Brun's window lies, and that there were neither in the house nor in the street any revolutionists whose presence might explain the firing and that the armed troop was under the command of an officer by the name of Montiel and consisted of soldiers well acquainted with M. Brun's house and M. Brun himself.

This supplementary proof which, for lack of a better one, the honorable commissioner for France endeavors to introduce, a proof resting upon his personal investigation, lacks all force in the present instance as we, the commissioners, must give our several decisions in strict accordance with the proofs submitted ex parte, and we can not find other elements to form our opinion unless they are from the documentary evidence submitted to us. To act otherwise would be tantamount to changing the mission of arbitrator and become an earnest defender of one of the parties. In order to show how easy it is to err when the field of sober thought is left where the judge must preside to enter into the arena where the eager defense is made it suf-

fices to compare the text of the depositions of the eyewitnesses Crinière and Peysselon with the report of the French commissioner.

The witnesses state:

It was by *Santo Domingo street* that the soldiers of the legal troops *surrounded* the town, and M. Brun's room, where he was wounded when shutting a window, overlooks the street. * * * A lively fusillade rang out at that moment in *Santo Domingo street*. It came from the soldiers sent from Maracaibo, who *were arriving at the rear of the town* and taking the revolutionary forces at their back; immediately (we) proceeded to close doors and windows *to protect ourselves from the missiles*. Under such circumstances we anticipated a fight in the streets. This led us to immediately close all the doors and shutters of our dwelling house.

While I was closing a window (Peysselon states) overlooking the square, M. Brun was closing that of his room facing Santo Domingo street, and at the same moment the firing began in this street. The window had been already closed, but M. Brun had not yet had time to withdraw his hand from the bolt when a bullet from a rifle perforated the shutter, twisted the bolt in an extraordinary manner, and pierced the hand of M. Brun.

Now, do not these two depositions clearly show the imminent risk which all the persons living in the house were running that the missiles might come in through doors and windows, and for this reason they hastened to close them? And was it not precisely in obedience to the instinct of self-preservation that M. Brun went to the window in his room, which faced Santo Domingo street, when a lively fusillade rang out in this street, and while being precisely there with his hand still on the bolt, the window being closed, a bullet wounded his hand?

Neither the conclusions arrived at by the learned commissioner from France in the narrative of his ocular inspection nor his theory of the perpendicular line in the subject of the direction of projectiles in a fight, which grew to the proportions of a battle, can alter in the slightest degree the deep conviction produced by the depositions of Peysselon and Crinière that the wound received by M. Brun, which some days later brought about his lamented death, was an accident, and by no means the outcome of a malicious plan.

I beg to call the attention of the honorable umpire to the contents of the official communications addressed by the president of the State of Zulia, and by the commander of the Third military zone, where the town of Santa Bárbara belongs, to M. Jules d'Empaire, in charge of the French consular agency in Maracaibo, wherein such officers express their earnest regret on account of the death of M. Jules Brun, a French subject, produced by a wound received under sad and fortuitous circumstances.

With the last-named communication, the military commander of the zone also sends a true copy of a letter M. Peysselon, inspector of the company, addressed in behalf of M. Brun to the military commander of the district, the letter in question being *verbatim*, as follows:

Como agente de la compañía y por impedimento del Sr. J. Brun (this is four days after being wounded), doy á Vd. las gracias por el restablecimiento del órden y por haber tomado las disposiciones eficaces para la traida del vapor *Santa Bárbara*. Nos complacemos altamente verlo á Vd. entre nosotros para protejer nuestras personas y nuestros intereses.

[Translation.]

As the agent of the company and by reason of disability on the part of M. J. Brun, I beg to thank you for the restoration of order and for having taken effective steps for the coming of the steamer *Santa Bárbara*. We are highly pleased to see you among us to protect our lives and property.

Could it be possible that M. Brun would instruct M. Peysselon to thank the military commander of the district having under command the troops which made the attack on the town of Santa Bárbara, and to whose body the group of soldiers under the officer Montiel belonged, if M. Brun had not been satisfied that the wound he received and for which he was then suffering had not been entirely accidental?

I come to a close, confirming in all its particulars my former opinion, which I send with the present opinion, in which opinion I differ from my learned colleague, rejecting in full the claim that the Venezuelan Government must indemnify with any amount whatever the mother or family of M. Brun by reason of his death, which was entirely fortuitous and does not create any liability whatsoever on the part of said Government.

NORTHFIELD, VT., *February 1, 1905.*

ADDITIONAL OPINION OF THE FRENCH COMMISSIONER.

After having heard the additional opinion drawn up by my honorable colleague I ought to declare that his arguments have not in any wise weakened my convictions. In the first place, I maintain that one could not refuse the French Government the faculty of the right to interfere for Mme. Brun, aged and infirm, and consequently incapable of acting by herself. This would be contrary to humanity, to good sense, and to the protocol of 1902. It is superfluous to indicate in fact that the French Government would have failed in its duty in not presenting this claim, but it is important to remark here that it has not in doing this acted contrary to the obligations which the protocol places upon it. Article 2, which concerns the claims which we are considering, is formulated thus:

The demand of the indemnities other than those which are covered by article 1, but founded on acts anterior to the 23d of May, 1899, shall be examined in concert, etc.

It is not said that these demands will have to be presented by the claimants themselves, who are at liberty to have them presented to the arbitrators by advocates or by their natural representative which is the government of their country. In the mixed commissions established at Caracas by the protocols signed in 1903 at Washington did not each government have an agent charged with presenting the claims in its name? It is necessary to remark besides that in the particular case the French Government by a scruple which

can only honor it has not made itself the advocate of Mme. Brun. Nothing, however, forbade this, but it is content to serve as impartial intermediary. On the contrary, in denying the French Government the faculty of presenting this claim one goes against the spirit of the protocol, which has for its end the settlement of all the claims of French citizens, for one would oblige the French Government to reply to this claim by the diplomatic way now that the protocol has been signed, precisely in view of removing these difficulties from the ordinary course, to submit them to arbitration. In the second place, in my opinion, the responsibility of the Venezuelan Government rests plainly established by the incident which has led to the death of M. Brun. I remain pursuaded that M. Brun has not been the victim of a simple accident of war. The results of my personal investigation are not at all proofs, without doubt. I present them merely as the basis which has permitted me to form a conviction. I persist, moreover, in considering the refusal of the Venezuelan Government to proceed after the incident to an investigation upon the spot by its own officers as a valuable indication of the fear which the result of such an investigation would inspire in it.

OPINION OF THE UMPIRE.

The honorable commissioner for France asserts a claim of 500,000 francs, while the honorable commissioner for Venezuela rejects the claim in its entirety. Hence it comes to the umpire for his decision.

The unquestioned facts are that in the State of Zulia in the United States of Venezuela on May 8, 1898, there was a railroad extending from San Cárlos to Mérida and in San Cárlos was the village of Santa Bárbara about the harbor of the same name. That this railroad was operated by a certain French company, whose superintendent or director was Mr. Jules Brun. His residence and the shops and offices of the company were in said village of Santa Bárbara.

That for some time preceding the date mentioned there had been a revolt in the State of Zulia against the government of that State and of the Republic, and that these insurgents had taken possession of the country in the vicinity of San Cárlos and since May 4 had been in possession of the said village of Santa Bárbara. That the government was taking measures through military operations to dislodge the insurgents from this village and to defeat and disperse them; and for that purpose on Sunday, May 8, the Government troops arrived in the harbor of Santa Bárbara on the steamer *Progreso*, a little before noon of the day. That about 10 o'clock in the morning Superintendent Brun, his associates, and those who were occupants of the house with him, fearing an engagement between the two forces, placed conspicuously five French flags over their residence to attest its neutrality and

mark it for protection. Not far from 12, noon, a battle seemed imminent between the two forces and the inmates of this residence, including the superintendent, made haste to close the shutters of the house. While Superintendent Brun was engaged in closing the shutters of the window overlooking the public square he was wounded by a rifle ball coming from the gun of a Government soldier, which penetrated the shutter, struck the bolt and drove it into his right hand, the ball passing through. It proved to be a most serious injury, crushing the hand and bones and lacerating the arteries, so that he lost seriously in blood and had a very jagged wound. Four other rifle bullets penetrated the house, coming through the window practically at the same time with this one which wounded Mr. Brun. Almost immediately following the wound two of the inmates went to the door to call a physician and found standing very near the residence about twenty soldiers, certain minor officers, and General Montiel in charge. At substantially the same moment of the firing into the house as aforesaid the doors of the principal shop and the office of the bookkeeper and the telegraph office belonging to this company were broken down by the Government soldiers by the order of General Montiel.

There were summoned as soon as possible to the aid of Mr. Brun competent physicians and surgeons who gave him thereafter so long as he survived skillful care and attention. However, despite the best of care, gangrene supervened and Mr. Brun died from the effects of the wound on May 12, four days after the wounding.

May 14, two days after the death of Mr. Brun, the gentleman then in charge of the French company's Venezuelan railroad made application in writing to the citizen judge of that district, praying that judicial proceedings be had to ascertain the facts connected with the injury and death of Mr. Brun and the damage to the railroad property occurring at the same time. There was no reply to his request, but General Montiel evidenced a violent hostility to this request. Following this application there came letters from the chargé d'affaires of France at Caracas to the minister of foreign affairs of Venezuela, the first being written on June 4 and the second on June 12, asking the minister to request the local authorities of the State of Zulia to take the proper judicial steps to ascertain the exact truth of the events of May 8, resulting in the fatal wounding of Mr. Brun and the damage to the railroad property. The first communication was not answered, but to the second letter a reply was made, courteous and sympathetic, but claiming that the injury arose under such circumstances as to free the Government of Venezuela of all liability for the death of Mr. Brun and the damages to the railroad property and declining to accede to the request of the chargé d'affaires that the facts be ascertained by proper judicial inquiry.

It appears that in conversation the military authorities of Zulia explained the attack of the Government troops upon the property of the French company, on the ground that the company had revolutionists concealed in its office. This allegation is wholly denied by the representatives of the company.

Mr. Jules Brun was 38 years old at the time of his death, was unmarried, was a French citizen, and was superintendent of a railroad at a salary of 25,000 francs a year, and he left surviving him as next of kin his mother, a widow and a resident citizen of France, who still survives. It is in her interest that this claim is presented by the French Government.

It is not claimed by the honorable commissioner for Venezuela, nor has it been claimed in any of the correspondence between the company and the Government of Venezuela that either the French company or Mr. Brun had failed to observe proper neutrality; and no claim is made by the Venezuelan Government that anything done on May 8th by the military authorities was because of any aid given to the insurgent forces by the company or by anyone directly or indirectly in its behalf, so that the umpire takes no account of the claim of the military authorities of Zulia, stated above.

There are certain other matters of fact which will be especially adverted to in the progress of the opinion.

Reference may be had to the very able opinions of the honorable commissioners to learn their respective positions upon the facts as developed; and the umpire takes this opportunity to express his appreciation of their great value to him in considering and determining this claim and, as well, his obligation to the honorable commissioners for their valued answers to the interrogtories submitted by him to them.

The honorable commissioner for Venezuela contends that the occurrence was of such a nature, its circumstances so precise, so evident, that all investigation after the death of Mr. Brun concerning the manner of his death became unnecessary. That this evidence disclosed indisputably that the wound was an accident due to a casualty and at the time an armed conflict was taking place near his residence. In fact, that it was an ordinary hazard of war.

Out of the same facts the honorable commissioner for France finds that there are shown to have been no insurgents in the street near the house, the presence of whom would explain the shots fired, and that the troops who did the firing were at the time under command of a general of the national army, and that the bullets which struck the house and the bullet which wounded to his death Mr. Brun were the result of an unprovoked, unnecessary, and murderous attack on a well-known neutral who personally was held in high regard by the

citizens and officials. He considers the damage to the buildings of the company at the same time to be corroborative of this view.

The umpire does not see in the injury of Mr. Brun and of the property of the French company any certain indication of a deliberately hostile act to him or to the property. Indeed, the sorrow of the president of the State, of the chief of the national forces, and of the inhabitants generally was so marked and so sincere that to find such a fact as is alleged by the honorable commissioner of France would require very strong and positive proof—proof to a degree of which this case is wholly destitute.

The umpire is convinced, however, that there were no insurgent forces in the immediate vicinity of the house of Mr. Brun at the time of his being wounded. The umpire arrives at this conclusion by an analysis of all the facts which have come to his knowledge in this case. (a) When the firing had ceased, Mr. Peysselon ran from the house to call a doctor and Mr. Crinière followed to get water. Mr. Crinière saw some of the national troops near the entrance to the house, but he mentions no insurgents. (b) Mr. Peysselon said that their egress from the house was *immediately* after Mr. Brun was wounded and that he found himself "face to face with about twenty armed men of the Government * * *, General Montiel in command." As the doctor did not come, he went out a second time and saw General Montiel and two of his lieutenants, whom he names. But neither then nor before does he make mention of the insurgent forces, nor does he mention seeing any insurgent forces while going after the doctor or returning therefrom on either occasion. (c) The umpire fails to find any statement by anyone in any part of the papers of the claim suggesting the immediate presence of the insurgents at these premises at any time before, during, or after the battle. (d) It is accepted apparently by all parties, individual and governmental, that the shots in question were fired by Government troops. If there had been also present and engaged in an armed conflict insurgent troops and there had been at this point at the time in question a battle or even a skirmish in progress in which both were participating, there would have been always a serious question whether these shots were in fact from national or insurgent guns. (e) The fact that immediately following the injury there were twenty armed soldiers and a general in command at repose, apparently, near this building; that the general and his lieutenants, at least, remained there until such delay had occurred that a second attempt was made to call the doctor, are attitudes and facts which remove the probability that the shots which hit the house and wounded Mr. Brun were fired in the midst of battle against a contending or even a fleeing force. (f) When Peysselon or Crinière went out from the house there was no insurgent force in retreat, there was no national force pursuing. (g) There is an entire absence of all indicia

common to such an occasion, if there had been at this point a battle or even a skirmish. The umpire is satisfied, therefore, to a moral certainty that no battle took place around or near this house at the time in question, and that the firing which did occur and from which the fatal wound resulted was unnecessary, and was in the presence of a high officer in command of the military forces. From all of the facts in the case the umpire finds that the bullet wound thus inflicted was the proximate cause of the death of Jules Brun, that the injury came under circumstances engaging the responsibility of the respondent Government, and that it must be held in damages for such sum as in equity should be assessed therefor.

The umpire might hesitate to adopt these findings if it were not true, and had not been always true, that the respondent Government could ascertain and produce before this mixed commission the exact facts regarding the positions and movements of its own soldiers, and the position and movements of the insurgent forces at the time in question. Especial force attaches to this when it is known that the respondent Government was asked and urged by the representatives of the French company and by the representatives of the claimant Government to permit the use of its judicial processes and functions, in order that the truth might be established, but the privilege was denied them.

Hence against the very proper presumption that the Government of Venezuela will always do its duty by its own nationals and by its neutral friends resident within its domain may very properly be placed the presumption which arises when one is in possession of important truths essential to a judicial inquiry and elects not to produce them.

It must be remembered also that the village of Santa Bárbara was not in revolt. It was a loyal community temporarily under the control of an enemy—the insurgent forces. Within this loyal community were the shops and offices of a neutral company and the residence of the superintendent, also a neutral, whose conduct in Venezuela had been such as to gain and hold universal esteem. This property was then distinguished by a display of its national colors. Both the community and the company were the friends, not the enemies, of the Government and were both entitled to receive from the Government the utmost care and protection not inconsistent with the retaking of the town from the hands of the revolutionary forces and were subject only to the inevitable contingencies attending such an undertaking.

The umpire considers that in fixing responsibility upon the respondent Government he walks in the path of conscience, prompted by the spirit of justice and sustained by principle, by publicists, and by precedent. He invites the courteous attention of the honorable commissioners to the authorities and precedents which follow.

In the case of Terry and Angus between the United States of America and Mexico, Moore's Arb., 2995, the commissioners found that—

So far as the evidence discloses he had done nothing which could be construed into a violation of the neutrality which his position required. The destruction of the property was neither incidental nor a consequence of the military operations which the Mexican forces adopted to recover the possession of the city. That part of the city in which the property was located was wholly in the possession of the Mexican troops, and it does not appear that its destruction could in any manner facilitate their efforts to dispossess Colonel Childs of the part which was occupied by him.

This property was in Puebla in Mexico, which city had been taken possession of by the United States Army; and that portion of the United States Army left in command had been forced by the Mexican army, seeking to repossess itself of the city, into a remote part of the city from the property in question, and the property in question was wholly within the zone of the occupancy of the Mexican authorities. In view of these facts the commissioners also held that—

The destruction of the property of the claimants, under these circumstances, in the opinion of the board, constituted a valid claim for indemnity against the Mexican Republic. Moore's Arb., 2995.

See the case of Jaennaud *v.* United States, Moore's Arb., 3000, where it was held that the damage was not done "in battle or as a necessary and lawful military act." The cotton gin in which the cotton was stored which was burned "had not furnished a shelter from which the Confederates had fired or might thereafter fire upon the United States forces."

The evidence shows that the burning was a wanton act of the soldiers in the excitement of the moment, as they were marching back to their camp from a successful battle with the Confederates. It was without any justifiable excuse, in violation of order and discipline, and committed when marching back to camp under the command and in the presence of their officers, who by the usual and ordinary enforcement of military discipline might and could and should have prevented it, but who do not appear to have used any means whatever to prevent it.

In such a case we think that an allowance should be made. Moore's Int. Arb., 3000–1.

In the case of Alfred Jeannotat *v.* Mexico under the convention of July 4, 1868, Sir Edward Thornton, umpire, it was held by him that since—

the mischief is unnecessary and wanton, the responsibility must be accepted. * * * It does not appear that without the arrival of the military force which *ought to have protected the peaceable inhabitants of the town*, there would have been any inclination to commit such acts of violence. The umpire is therefore of opinion that compensation is due to the claimant from the Mexican Government. Moore's Int. Arb., 3673.

See also the case of Edward C. Du Bois against the Government of Chile, Moore's Arb., 3712–14.

See Turner's case, Moore's Arb., 3684–5.

See Hollenbeck's case, Moore's Arb., 3716–17.

In the case of George Pen Johnston *v.* Mexico, Moore's Arb., 3673, Sir Edward Thornton, umpire, held:

With regard to the damage alleged to have been done to the crops of cotton, barley, and oats by General Corona's forces in the spring of 1866, the umpire is of opinion that some damage was done, but not to the extent of the claim made, * * *; that as the defendants have not proved that the requirements of war rendered that damage necessary, it must therefore be considered to have been unnecessary; and that therefore the claimants are, on account of that damage, entitled to compensation.

Distinctions, however, should always be made in regard to the character of the people in the district of country which is militarily occupied or passed over. The people of the country in which you are likely to operate may be divided into three classes: First, the truly loyal, who neither aid nor assist the rebels except on compulsion, but who favor or assist the Union forces. Where it can possibly be avoided this class of persons should not be subjected to military requisitions but should receive *the protection of our arms.*

The preceding paragraph is taken from instructions by the commander in chief of the armies of the United States (Gen. Henry W. Halleck) to the commanding officer in Tennessee under date of March 5, 1863. Halleck's Int. Law, vol. 2, page 56.

The military commander of the legitimate government, in a war of rebellion, distinguishes between the loyal citizen in the revolted portion of the country and the disloyal citizen.

Common justice and plain expediency require that the military commander protect the manifestly loyal citizens, in revolted territories, against the hardships of the war as much as the common misfortune of all war admits.

Instructions for the government of armies of the United States in the field, April 24, 1863. Halleck's Int. Law, 55.

Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.

Military necessity admits of all direct destruction of life or limb of *armed* enemies, and of other persons whose destruction is incidentally *unavoidable* in the armed contests of the war. Ib., 41, par. 14–15.

Even in bombardments it is now deemed necessary to avoid as far as possible injuries to churches, museums, and hospitals, and not to direct the artillery upon the quarter inhabited by civilians, unless it is impossible to avoid them while firing at the fortifications and military buildings.

But had the guns of the besiegers been deliberately turned upon the dwelling houses of the bombarded town, or had an open or undefended villlage been fired into, the persons responsible for such proceedings would have been justly accused of barbarity, forbidden by modern usage. Lawrence, p. 344.

In further support of the finding of the umpire herein he cites Ralston, umpire in the Biajo Cesarino case, Venezuelan Arb. of 1903, 771. He also cites the De Lemos case, ib., 303.

The honorable commissioner for Venezuela contends that this case lacks the essential prerequisite of a claimant, who, being a French

citizen, by his individual action brings his claim before the commission, demanding a stated indemnification; and the honorable commissioner supports his contention by quoting from the learned opinion of Commissioner Little in the claims of Narcissa de Hammer and Amelia de Brissot before the United States and Venezuelan Commission, found in Moore's Int. Arb., 2459–2460.

In the case cited the two claimants were widows, respectively, of Captain Hammer and Mr. Brissot, deceased, and upon the manner of whose killing the claims arose. The widow de Hammer and the widow de Brissot were each Venezuelan born and of Venezuelan nationality until married, when by the laws of both countries they became American citizens and remained such until the death of their respective husbands, when they reverted to their original Venezuelan nationality and were Venezuelans when they appeared before the American-Venezuelan commission claiming compensation of Venezuela for the killing of their respective husbands. It was under these conditions that Commissioner Little gave his opinion as to the scope of the protocol constituting that commission, and, as the umpire understands it, these two claimants, widows as aforesaid and Venezuelans, were denied place before that commission, because they were Venezuelans and not Americans.

The difference between the case cited and the case before the umpire is easily seen. The *case* for this claim exists in the claim of Jules Brun, which occurred before May 23, 1899, and at the time of his death, and always since, the claimant, Mme. Brun, mother of the deceased, has been a French citizen, resident of France and entitled to invoke the aid of France, and under the protocol of February 17, 1902, to appear before the tribunal there constituted to present her claim. That she has now actually done this, although in an informal way, can not be fairly questioned. She will be estopped from any future right or claim against the respondent Government on account of the death of her son as fully and as completely as though she had appeared earlier in the case, and the respondent Government will be protected and the claimant Government barred as effectually in every particular as though matters had proceeded more precisely and more formally.

In a case like the present, where the judgment of the umpire is the sole arbiter of amounts, the facts upon which his judgment is to be predicated are essential, but the stated indemnification of the claimant is not especially important. It is a matter of regret that the umpire knows so little concerning important matters which would have greatly aided him in arriving at the sum to be assessed as damages, and he may easily err because of such ignorance.

He is of the opinion that he has jurisdiction of the parties and of the subject-matter and must make a decision upon the merits.

There remains to be determined the sum to be assessed against the respondent Government because of this unfortunate incident, and here occurs a wide divergence of views between the honorable commissioners. In the opinion of the umpire it is such an amount as will meet the pecuniary loss which the widowed mother has sustained through the death of her son. This is not the sum which put at interest would earn an amount equal to his annual wage. It is only her fair expectancy in his wage and from his accumulations, which, had he lived, would reach her from year to year. In the absence of all proof that he had accumulated aught, or that he had contributed anything to her comfort and support, there is for the umpire no rule of action but to assume the ordinary conditions as to accumulations and the ordinary willingness of a dutiful son to contribute generously to the comfort and happiness of his widowed mother in her declining years, where as in this case the deceased had no dependent family. Her age is not stated, but to be the mother of one born forty-five years since, she is a woman near "threescore years and ten" and her expectation of life is relatively short.

The honorable commissioner for France insists with much learning and ability that the sum which would otherwise be assessed by the umpire in this case must be augmented by the difference which now exists in the market value in gold of the Venezuelan diplomatic debt of 3 per cent which is the method of payment provided in the protocol. This proposition is seriously opposed and with marked ability by the honorable commissioner for Venezuela. If the umpire were to take the advice of the honorable commissioner for France in assessing this sum he must hold to the same rule where the amounts due are capable of exact ascertainment and in his award augment these fixed sums by the same ratio of increase. If he did not do this, he might cause serious inequity, by inequality, between the individual claimants now before him; and if he did do this, he would preserve equity by equality, among the claimants directly before him, but he would work injustice and inequity, by inequality, to every other holder of this diplomatic debt. He would reduce still lower the market value of such diplomatic debt to the manifest loss of all, and it would not be impossible to deprive the diplomatic debt of all value if each lowering rate per cent in this diplomatic debt of 3 per cent was followed by a proportionately increased assessment. Aside from the apparent unwisdom and inequity of such a holding, the umpire is satisfied that he is not competent under the protocol to do other than to ascertain as nearly as he can the actual sum due from the respondent Government in each particular case and to award that particular sum. Under the protocol it is not for him to determine the means or the methods of payment; this is wholly with the treaty-making power of the two

Governments, and it has been settled by the protocol in accordance with their high judgment.

It follows, therefore, that the sum to be assessed and awarded in this case and in all others before this umpire must be based on the damages actually sustained, and must be stated without reference to the way or market value of the means of provided payment.

In his best judgment the sum due from the respondent Government to the claimant Government for the benefit of Madame Brun is 100,000 francs, and the award will be prepared and signed for that sum.

NORTHFIELD, *July 31, 1905.*

CLAIM OF FRIERDICH & COMPANY.—NO. 2.[a]

HEAD NOTES.

The burden is upon the company to establish clearly and definitely that the respondent Government proceeded in an unlawful manner concerning the boat of said company after it arrived in the port of Güiria.

The initial wrong was all with the claimant company (a) in the engagement of an incompetent captain, with knowledge of his incompetency, (b) in the taking away of the ship's papers by a partner of the company, (c) in permitting the ship thus stripped of its papers to go out on the open sea, (d) in entering the harbor of Güiria under these circumstances.

The arrival of this ship in port under the circumstances attending it justified suspicion and examination of the real status of the schooner by the revenue officers of the port.

The schooner was not in the port of Güiria through any imperious necessity, but voluntarily. Such compulsion as existed was through the act or neglect of a member of the company; and its unjustifiable departure from the Port of Spain, its journey across the sea, and its entrance to the harbor of Güiria were wholly attributable to the company and its agents.

In order that there may be intervention on the part of France, there must be a legal wrong on the part of Venezuela.

If Venezuela conforms with its own laws in its own ports, and if these laws are such as are the product of civilization, then there is no error, hence no responsibility on the part of Venezuela and no right of intervention on the part of the claimant Government.

It appears that Venezuela acted in this respect through its regular officers and, until the contrary is clearly shown, the acts of these officers must be assumed to be regular and proper.

Such a presumption of regularity and propriety is a proper protection of the public and its interests.

Venezuela is also entitled to that presumption of good faith in favor of its public officers which ordinarily attends the acts of public officials.

So far as appears, the court in proceeding to condemn the schooner to pay a fine was acting within its jurisdiction and within its right, and until the contrary appears its acts will be presumed to be regular and its judgment righteous.

The laws of Venezuela in regard to such matters as are before the umpire in this case appear to be in harmony with the laws of other civilized countries.

That the Government at Caracas permitted the boat to be returned to its owners without exacting payment of the fine is not an admission on its part that its acts in reference to the schooner had been irregular and unlawful.

The question presented here is one of detention only, and the detention involves only the question of its reasonableness in point of time. Sufficient time to know all the facts, to assemble them before the court, and for the court to act upon them was a necessary adjunct of the situation.

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[a] EXTRACT FROM THE MINUTES OF THE SITTING OF MAY 12, 1903.

An examination of the claim of the Orinoco Asphalt Company, amounting to 176,080.10 bolivars, was next taken up. Doctor Paúl rejected it absolutely as without foundation. M. de Peretti, considering the schooner belonging to the company had been illegally detained at Güiria for thirty-four days, asks therefor an indemnity of 5,000 bolivars.

Doctor Paúl does not recognize the illegality of the measure in question. The arbitrators not having been able to come to an agreement, this claim will be likewise submitted to the umpire.

OPINION OF THE VENEZUELAN COMMISSIONER.

This claim, presented to the minister of foreign affairs of France by Mr. A. Sanary, who styles himself liquidator of the "Sociedad Betunes del Orinoco," is destitute of all documents proving the juridic personality of such company or the capacity of him who calls himself its liquidator as its trustee. What has been produced is a contract entered into in Paris, on the 2d of December, 1898, by which Messrs. Ernesto Nicolás Frierdich and Tácito Delort, on the one part, and Messrs. Courtant Bergerault and A. Cremer, on the other, agree upon constituting a commercial partnership on the part of Frierdich and Delort, and a silent partnership on the part of Bergerault and Cremer, the firm-name of which was to be "E. Frierdich & Co." Messrs. Frierdich and Delort only were authorized to manage and sign for the company. Besides, the fact on which the claim is based is only the detention sustained by the schooner *Love and Lulu* in the harbor of Güiria during thirty-seven days on account of a confiscation suit entered against her before the finance court for having arrived at that port without a matricula or register and other papers concerning her correct clearing, and in which suit she was condemned to pay a fine, she being released afterwards at the instance of the consul of Holland in Port of Spain, who claimed the preferential payment of debts contracted in said island, for which she was sold to the highest bidder there.

As is seen from the simple statement of these events, there exists no ground to demand an indemnity for the consequences of a suit brought in conformity with the laws on the matter, it being observed that it was Delort himself who denounced to the authorities at Guiria the want of papers of the schooner, alleging that they had been violently taken from the captain by his (Delort's) associate, Frierdich, when the vessel was leaving the island of Trinidad.

For the reasons expressed the arbitrator disallows the claim presented.

CARACAS, *May 12, 1903.*

OPINION OF THE FRENCH COMMISSIONER.

The liquidator of the French Society Frierdich & Co., known also by the name of the Orinoco Asphalt Society, claims of the Venezuelan Government an indemnity of 176,030.10 bolivars, because the latter having retained illegally in the port of Güiria the schooner of this society for thirty-nine days should be responsible for the complete ruin of the concern. The information which I have gathered at Trinidad and in Venezuela about this company has convinced me that the condition in which it operated did not bring about such a serious result. At the moment when the accident happened which

incited the claim it was already in insolvency. We can not argue, then, that the intervention of the Venezuelan administration, stopping the affairs of the company, obliged it to abandon its operation. If the *Love and Lulu* had not been detained at Güiria and could have been able freely to pursue her voyage, the fate of the enterprise would not have been changed. However, it seems to me that the administration of the custom-house of Güiria committed an abuse of power in retaining for more than a month, without reason, the schooner *Love and Lulu*, and I consider that the damage caused the owners of a boat of its towage by its lying idle for more than a month should be compensated by the granting of an indemnity of 5,000 bolivars. In fact, the nominal owner of the schooner, Mr. Tacite Delort, silent partner of the firm Frierdich & Co., was on board at the arrival of the boat at Güiria, and he himself implored the aid of the authorities of the port against the insubordinate crew. The absence of navigation papers was due to a case of *force majeure* (superior force) analogous to those which the Venezuelan law anticipated; the papers in question were besides delivered as soon as possible; and finally, the rigorous measure, the forfeiture and sale of the boat, ordered by the tribunal of Güiria, were carried out upon the order coming from Caracas. I have not taken into account a letter which Mr. Frierdich addressed to me the 28th of April, 1903, to request me to withdraw the claim presented under the firm-name of Frierdich & Co., because it was not Mr. Frierdich who presented this claim, but the liquidator of the company. Mr. Frierdich, resident in Venezuela, an insolvent, it appears, was on bad terms with his former partner, to whom he was indebted for quite a large sum. This situation and also, without doubt, the fear of displeasing the authorities of a country where he has definitely established his residence, and where he has married, explains sufficiently the proceeding of Mr. Frierdich. In these conditions, this proceeding (the sending of the letter) could not be taken into consideration. The indemnity of 5,000 bolivars, which I believe equitable, would be, it is necessary to note, diminished by more than half by the fact of payments in bonds of the diplomatic debt, accepted by the French Government, to the end of permitting the Venezuelan Government to pay its debts more easily.

PARIS, *August 26, 1904.*

ADDITIONAL OPINION OF THE VENEZUELAN COMMISSIONER.

As stated in my opinion preceding this additional opinion the detention of the schooner *Love and Lulu* by the authorities of the port of Güiria and the subsequent legal action thereon was due, as shown by the documents submitted, to the fact that said schooner arrived in the above-mentioned port without her register and other

papers which the laws of Venezuela require from vessels coming into a Venezuelan port from foreign ports. Only in case of showing proof that the arrival of said schooner at the port under said conditions was due to any of the unforeseen circumstances specified by law, could the schooner *Love and Lulu* be exempted from the penalty imposed by article 48 of the "Código de Hacienda" (Code of Fiscal Laws) of Venezuela then in force. The detention of the schooner lasted the time necessary for the investigation of the facts and the hearing of the testimony of her owner, whose defense was the allegation that the papers had been violently snatched from him in Trinidad by his partner, Mr. E. Frierdich, and that the schooner had sailed by order of the master and crew who did not obey his (the owner's) determination to discontinue the trip.

It is moreover shown by the same documents (see note of the consul for the Netherlands in Port of Spain, dated March 1, 1901, to the minister of the Netherlands in London) that the schooner *Love and Lulu* returned sometime afterwards to Port of Spain, where she was embargoed and sold under the hammer by the courts of the island, for the payment of the workingmen and other creditors. It is also shown by another communication bearing the signature of the consular agent for the Netherlands, under date of May 29, 1899, to F. A. Thompson, register, that on that date, a few days later than the 17th of May of the same year, when the schooner was released by the courts of Güiria, she had been already condemned by the courts of Port of Spain, and that it was on May 29, 1899, that the public sale was to take place.

The register was not the only document lacking the schooner when she came into the port of Güiria. As shown by the note of the consul for the Netherlands, under date March 1, 1901, already quoted, Frierdich, Delort's partner, also took in Trinidad from the master of the *Love and Lulu* the permit or clearance issued by the Venezuelan consul enabling the schooner to go into Venezuelan ports, the certificate issued by the same official showing that the ship had complied with all the requirements, and other papers.

Article 48 of the Fiscal Code (Código de Hacienda) then in force in Venezuela provides that should only the register be missing, then such measures as are provided by law shall be taken on board of the vessel, * * * and the fine of 5,000 bolivars shall not be levied and collected, nor shall the bond be demanded *when the master can prove* that the lack of the register is due to an accident which he could neither prevent nor foresee, such as *shipwreck, fire, or violence from an enemy or pirates.*[a]

[a] ART. 48. Cuando el buque traiga el sobordo y sus demás papeles despachados en forma por el Cónsul de la procedencia, y sólo le falte la patente de navegación, se tomarán á su bordo las precauciones prevenidas en el artículo anterior, y además de imponerse al Capi-

In the case of the schooner *Love and Lulu*, which came under the authorities of Güiria, upon whom devolved the duty of strictly complying with the law, the master did not suffer violence from enemies or pirates, but it was Mr. Frierdich himself, the partner of the plaintiff, Tácito Delort, who took the schooner's papers, and it was the master, Luis Rodriguez, who of his own accord resolved to sail without the indispensable documents which he left behind at the port whence he sailed.

Article 194 of the same code provides that the ship's master is guilty of an offense and is liable to a fine of 10,000 bolivars and other stated penalties whenever he does not produce the other documents, if during the trial, as provided, he fails to show that the absence of such documents is due to any of the unforeseen circumstances set forth in section 2 of article 48.[a] It was not shown, nor was any endeavor whatever made to show at the trial of the schooner *Love and Lulu* that the absence of the other papers was due to unforeseen circumstances of shipwreck, fire, or under duress from enemies or pirates. On the contrary, the proofs then adduced show the party responsible for the absence of the ship's papers to be a partner of Mr. Delort.

The Venezuelan courts by virtue of their rightful and well-established jurisdiction and in conformity with the laws under which they are established were authorized and under obligation to bring an action against the schooner *Love and Lulu* to hold her and to compel the settlement of the liability incurred by her master for gross offenses (*faltas graves*) expressly defined and punished by the Venezuelan laws.

From the above statement of the facts it appears that it was through the fault of the claimant, Mr. Delort, and through the fault of the master in command of the schooner *Love and Lulu*, and the fault of Mr. Delort's partner, Mr. E. Frierdich, that the schooner in question was subjected to legal proceedings before the fiscal court (tribunal

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tán la multa del artículo 194, número 1°, se le exigirá una fianza de cinco mil bolívares, si el buque fuere de vela, ó de diez mil si fuere de vapor, otorgada por él y por dos comerciantes abonados, á satisfacción del Administrador, la cual se hará efectiva en el caso de que el buque salga del puerto sin permiso de la Aduana, y de la antoridad política respectiva, sin perjuicio de las demás penas á que haya lugar.

No se impondrá la multa ni se exijirá la fianza cuando compruebe el Capitán que la falta de la patente provino de un accidente que no pudo prever ni evitar, como naufragio, incendio ó violencia perpetrada por enemigos ó piratas. En este caso se dará cuenta al Ministerio de Hacienda con todos los pormenores.

[a] ART. 194. El Capitán de un buque incurre en falta y paga multa en los casos siguientes:

1°. Cuando no presente la patente de navegación, pagará de cuatro mil á cinco mil bolívares en el caso del artículo 48; doblándose esta multa y haciéndose efectivas las demás penas á que haya lugar por la no presentación de los otros documentos, en el caso del artículo 47, si en el juicio respectivo no comprueba el Capitán que la falta proviene de alaguno de los accidentes fortuitos previstos en el inciso 2° del artículo 48.

de hacienda) of the port of Güiria, and to be held and condemned in conformity with the laws in the premises. It is to his own acts or negligence, to say the least, that the claimant owes, either directly or indirectly, the grievances or injury he complains of, if he ever did suffer any grievance or injury.

I beg to submit, together with this opinion, a letter duly authenticated, which was sent to Caracas to me in my capacity of commissioner, by Mr. E. Frierdich, a partner of the plaintiff, of the firm of Frierdich & Co., in liquidation, which letter shows, as does also the letter which the same Mr. Frierdich sent my learned colleague, that he has authorized no one to enter a claim against the Venezuelan Government by reason of the seizure of the schooner *Love and Lulu*, and that he does not consider that the authorities of the port of Güiria have given any cause in the present case to enter any claim whatever.

I beg to differ completely from the learned commissioner of France's opinion, that the letter in question must not be taken into consideration by reason of certain personal facts connected with the writer thereof, such as his being insolvent with his partners, and a resident of Venezuela married in the same country, and to be acting under fear of offending the authorities of the country where he resides. The contention that he is insolvent with his partners and the facts of his having his residence in Venezuela and having married a Venezuelan are not, in my opinion, of sufficient weight to destroy the testimony of a person bound no less than by the ties of business association to the claimant, who makes use of the name of the firm to enter the claim in question. As regards the charge of fear, so far no proofs have been offered to show the fact that Mr. Frierdich is susceptible to such fear nor that he is actually laboring under it.

In view of the foregoing, I come to a close supporting my opinion that the claim of the partnership Frierdich & Co., in liquidation, named "Société des Bitumes de l'Orénoque," has no grounds whatever and that under the circumstances it should be disallowed. And I beg the honorable umpire to grant my request.

NORTHFIELD, VT., *February 1, 1905.*

ADDITIONAL OPINION OF THE FRENCH COMMISSIONER.

The reading of the additional memoir of my honorable colleague has not changed my opinion on the two single points which I have thought I ought to mention in the above memoir and upon which I am not in agreement with Doctor Paúl. In the first place, it seems to me evident that the society of Frierdich & Co. being in insolvency it pertains to the liquidator, Mr. Sanary, whose powers to represent the aforesaid society are contained in the dossier.

Mr. Frierdich, insolvent debtor of his associates, proves by his proceedings that, not content with not paying his debts, he still tries to injure his creditors by preventing them from getting the benefit of an eventual indemnity. I am not called upon to consider this manner of action. I am content to refuse to Mr. Frierdich the right which he arrogates to himself of speaking in the name of a company at present in insolvency of which he is only the debtor. Consequently I think the arbitrators have to take no account of his letters.

In the second place, I consider that the custom-house of Güiria has caused, by retaining for thirty-nine days without reason the schooner *Love and Lulu*, an injury to her owners, whatever might have been the condition of the latter at that moment, a situation as to which I share, besides the opinion of my colleague. In fact, either the custom-house of Güiria proceeded according to the Venezuelan law in retaining this vessel and then should have inflicted the penalty provided by law, and in case of nonpayment should have proceeded to sell according to law, or indeed the law did not authorize the retention of this vessel after the delivery of the papers on board, and then it ought to have delivered her immediately to Mr. Delort. But it stopped the procedure entered upon, which seems to indicate that it had no longer a legal right to prosecute, but it continued to retain the boat, which it did not sufficiently protect against depredations and which it only surrendered thirty-nine days after the seizure.

I maintain, then, that the custom-house of Güiria committed an error; that this error entailed an injury upon the partnership of Frierdich & Co. in depriving it for more than a month of the use of this schooner, and that this injury would be equitably compensated by an indemnity of 5,000 bolivars.

NORTHFIELD, *February 3, 1905.*

OPINION OF THE UMPIRE.

The claimant company was organized in France and has unquestioned French nationality.

Tacite Delort and Ernesto Nicolás Frierdich are the active partners and managers of the company, and two other French gentlemen are silent partners.

The business of the company consisted of mining, refining, exporting, and marketing the products of a certain asphalt mine situated at Pedernales in Venezuela, about 70 miles from Port of Spain, Trinidad.

The company entered upon this business in 1898, and to aid in the importation of materials and men for the works and in the exportation of the asphalt to Port of Spain the company bought a schooner, *Love and Lulu*, which at the time of its purchase and thereafterwards was of Dutch nationality. It was registered in the name of Tacite Delort.

Owing to the character of the channel through which Pedernales was approached, it was necessary that the boat be of a peculiar build, which necessity was fully met by the *Love and Lulu.* Its purchase price was $2,100.

From the commencement of work at the mines to April 8, 1899, the company had exported and sold about 800 tons of asphalt.

On the date last named the *Love and Lulu* was in the harbor of Port of Spain and Mr. Delort and Mr. Frierdich were in the city of Port of Spain.

One Luis Rodriguez had been engaged as captain of the boat. This man could neither read nor write, had been previously a river pilot, did not understand the laws attending navigation, and objected to the service at the time of the engagement, because of his ignorance and of his fear that he would commit some blunder in the office. Notwithstanding the knowledge of the company of this ignorance he was made captain.

On said 8th of June, 1899, Mr. Delort learned that the schooner had received its clearance papers and was about to sail for Güiria. He desired to go with the boat when it sailed, but did not desire to go then. He undertook to detain the boat and obtained an order from the Dutch consul to the captain, directing him not to go. He was taken to the schooner and gave the captain the order of the Dutch consul; but the captain refused to recognize the authority of the consul and upon being ordered by Mr. Delort not to sail, the captain refused to recognize Mr. Delort's authority and proceeded to prepare to sail. It was about this time that Mr. Frierdich, the other manager, came to the schooner in a small boat and demanded of the captain, and received from him, all of the ship's papers. Mr. Delort attempted to prevent their delivery to Mr. Frierdich by personal intervention and the use of some violence, but the captain overcame Mr. Delort's resistance and delivered the ship's papers to Mr. Frierdich, as above stated. Notwithstanding that he had no papers permitting him to sail and against the continuing and earnest protest of Mr. Delort, and with him on board, the captain set sail for Güiria, which port he reached some time that day.

Immediately upon the arrival of the schooner at Güiria Mr. Delort informed the harbor master of that port of the condition of affairs, and on the next morning he made protest before the vice-consul of Spain at Güiria, and at the request of Mr. Delort the testimony of the captain and of the steward was taken.

Some time after April 11 Mr. Frierdich surrendered the ship's papers to the Dutch consul at Port of Spain and they were forwarded by special messenger to Güiria, reaching there about the 14th day of April, on which day they were brought to the attention of the customs officers of that port, and there being no Dutch consul at Güiria the

vice-consul of Spain, as the officer of a friendly nation, on the same day at the request of Mr. Delort visited the customs officials at Güiria and solicited of them and also of the captain of the port that the *Love and Lulu* be turned over to Mr. Delort. A formal refusal was made by these officers.

On April 17 the papers had been sent back to the Dutch consul at Port of Spain and he presented them to the Venezuelan consul of that port and formally asked the release of the *Love and Lulu* at Güiria.

Proceedings were instituted against the *Love and Lulu* before the proper tribunal at Güiria under articles 48 and 144 of the Maritime Code of Venezuela. A fine of 5,000 bolivars was duly imposed by the court and due notice was given of the sale of the schooner for the recovery of the fine.

Frierdich & Co. had no other boat than the *Love and Lulu* and not being able to obtain one at Port of Spain suited to the channel of Pedernales they could not transport supplies to the works or bring out the products of the mines, and, as a result, the asphalt works were abandoned and the workmen taken back to Port of Spain. The company had no means to pay the workmen for their labor or to answer the demands of their other creditors, and possession was taken by these creditors of such property of the company as they could find in order to secure their pay.

Pending the sale of the schooner at Güiria, the Dutch consul at Port of Spain asserted to the customs authorities at Guiria a prior and superior lien upon the schooner and demanded its return to Port of Spain to answer to this lien. It resulted that the Government of Venezuela, recognizing the validity of this claim, directed the return of the *Love and Lulu* to Port of Spain, and the schooner arrived there May 17. The fine has been in no part paid. No appeal was taken from the action of the tribunal imposing this fine, and it remains a final and unsatisfied judgment.

On the arrival of the *Love and Lulu* at Port of Spain it was seized under process issuing from the court of Port of Spain and was sold at public auction under such process. Before the sale, however, due notice was given by the Dutch consul to the proper parties in charge of the sale of the superior lien of his consulate, and he demanded payment of this amount before the purchaser could take possession of the schooner.

Later, proceedings in liquidation were instituted at Havre, France, and Mr. A. Sanary was constituted liquidator, and it is on his behalf, at his initiative, and for the benefit of the insolvent company and its creditors as such liquidator, that this claim is here presented.

Mr. Frierdich has filed with both of the honorable commissioners a protest against this claim, denying that there was any fault on the part of the authorities at Güiria at the time in question, or that any respon-

sibility attaches to Venezuela on account of what happened in connection with this schooner.

Quite a large sum of money is claimed by the company of Venezuela on account of its alleged fault, but in the opinion of the honorable commissioner for France there is a just claim for 5,000 bolivars only. He does not ascribe the insolvency of the company to the detention of the schooner at Güiria, and he limits his award to a sum which he regards as not excessive for the abuse of power which he holds was committed by the administrators of the custom-house at Güiria and through the action of the court in detaining the schooner for the time stated, which detention he considers unreasonable.

The honorable commissioner for Venezuela sees no error in the action of the Venezuelan authorities and refuses any compensation.

The honorable commissioners having failed to agree, they join in sending the claim to the umpire for his decision. They have rendered the umpire very efficient aid in their opinions, original and supplementary, and by their courteous answers to his interrogatories.

If the company has a right to claim anything of Venezuela, it is the loss of use of the schooner by its detention a certain length of time in the port of Güiria. This right of use or the rental value of the schooner can not be very large, since the value of the schooner as determined by its selling price was only $2,100. In order that the company should have a claim upon Venezuela, the burden is upon it to establish clearly and definitely that the respondent Government has proceeded in an unlawful manner concerning said boat since it arrived in that port on the 8th of April, 1899. A detention without reason is suggested, but certainly some detention was not only reasonable but necessary. It was at least six days before its papers arrived from Port of Spain which would permit the company to justify in any way the right of the schooner to be upon the seas or in this port of Venezuela. The spirit with which this claim is pressed by the company is manifest from the fact that the claim for detention covers the entire thirty-nine days which elapsed from the time the schooner sailed from Port of Spain and the day of its return to that port. This is so manifestly wrong that it raises a suggestion of insincerity on the part of the claimant which must necessarily affect the value of the company's assertions in other particulars.

The initial wrong was all with the claimant company. It began in the reckless and ill-advised engagement of a captain entirely unfitted for his place, of which unfitness they were advised by the captain himself. It continued in the serious quarrel which had some time developed between the two managers of the company and, so far as this case is concerned, first manifested itself in the open rupture at the schooner's side at Port of Spain on April 6, when the captain, apparently through the advice and approval of one of the managers,

openly defied the other, and where one of its managers was willing to see the schooner leave the port stripped of every essential paper to protect itself upon the seas, to become a floating derelict without right, opposed to the laws of all civilized nations and open to capture and condemnation without recourse or remedy. It was concluded when this same captain, ignorantly riding over the laws of every sea and the laws of every civilized port, sailed into the harbor of Güiria. The statements of Mr. Delort, made to the harbor master of the port and to the customs officials and before the consul of Spain, supported as they were in great part by the captain and whilom steward, were so improbable as to stagger belief and might well awaken just suspicions in the breast of the revenue officers of that port concerning the real status of the schooner.

Article 48 of the Fiscal Code then in force in Venezuela was:

> Should only the register be missing, then such measures as are provided in law shall be taken on board the vessel, * * * and the fine of 5,000 bolivars shall not be levied and collected, nor shall the bond be demanded when the master can prove that the lack of the register is due to an accident which he could neither prevent nor foresee, such as shipwreck, fire, or violence from an enemy or pirates. [a]

But more than the register was lacking. The clearance issued by the consul of Venezuela at Port of Spain was lacking. There were lacking, also, the certificate by the same consul of compliance on the part of the schooner with all the requirements of the law and all other papers ordinarily belonging to a ship that is about to sail or that is sailing on the seas. The master could not prove in excuse that he was in this plight through any lack of foresight or through any accident. By the statement of both Mr. Delort and the master it was essentially true that there had been no accident of any kind, and they were not in the port of Güiria through any imperious necessity which they could not meet and overcome. They were there voluntarily so far as the master was concerned, and such necessity as attended their situation and their presence was the act of one of the managers of equal power with the other; no stranger had intervened, no trespasser had done them any evil; their unjustifiable departure upon and across the seas and their entrance into the harbor of Güiria were wholly attributable and only attributable to the company, its managers and agents. Thus far Venezuela is not involved. Does it act without law afterwards or without legal right? If it does not, then, even if it may be considered as acting harshly, which the umpire does not assert, the Republic of France has no right of intervention; for before there is right of intervention there must be a legal wrong on the part of Venezuela. If it conforms with its own laws in its own ports, and if those laws are such as are the product of civilization, then there is no error, hence no responsibility upon the state and no right of intervention on

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[a] See footnote p. 34.

the part of the claimant Government. It appears that Venezuela acted in this respect through its regular officers and, until the contrary is clearly shown, the acts of those officers must be assumed to be regular and proper. There is a very proper presumption to this effect; and it is proper public policy and a proper protection of the public and its interests that such a presumption should attend the execution of official duties. (120 U. S. Sup. Ct., 605; 14 Johnson (N. Y.), 182; 19 Johnson (N. Y.), 345.)

The general presumption is that public officers perform their official duties, and that their official acts are regular. (American and Eng. Enc. of Law, 2d edition, Vol. 22, page 1267, citing in note 24, a long line of cases in England and the United States.)

Where some preceding act or preexisting fact is necessary to the validity of an official act, the presumption in favor of the validity of the official act is presumptive proof of such preceding act or preexisting fact. (Ib. 1269 and note 1 on same page, citing long line of supporting cases in the U. S. Sup. Ct. and in State courts.)

Similarly there is a presumption of good faith in favor of public officers. This presumption is applied to sustain the regularity of official acts in favor of individuals who rely thereon. (*Supra* and note 3, citing a line of decisions made by the United States Sup. Ct.)

A natural presumption attends them to that extent.

So far as appears, the court which proceeded to condemn the schooner to pay a fine was acting within its jurisdiction and within its right, and, until the contrary appears, its act will be presumed to be regular and its judgment righteous.

This presumption, supported by authorities above cited, applies equally to the actions and decisions of courts. It is only necessary to show that jurisdiction is clearly vested, and then the maxims or rules "Omnia præsumuntur rite esse acta" and "Omnia præsumuntur legitime facta, donec probetur in contrarium" apply. (See Am. and Eng. Enc. of Law, 2d edition, Vol. 22, pages 1270–71 and the cases cited under note 4 of page 1271, both from the United States Sup. Ct. and from many of the State courts.)

The acts of the court must, in the first instance, be presumed to be regular and in conformity with settled usage, and are conclusive until reversed by a competent authority. Williams *v.* U. S., 1 Howard (U. S. Sup. Ct.) 290.

Best, "Principles of the Law of Evidence," first American from the sixth London edition, Subsection IV, under head of "Presumptions in favor of validity of acts," the entire subsection and notes.

So far as has appeared before the umpire, the laws of Venezuela in regard to these matters are in harmony with the laws of other civilized countries, and it does not yet appear before the umpire wherein the fiscal court at the port of Güiria committed error in subjecting this schooner to the fine which had been voluntarily invited by its appearance in the condition which is proven and admitted.

That the Government at Caracas yielded later to the strenuous demand of the consul of Holland at Port of Spain rather than to withstand the demand is not to the umpire an admission on the part of the respondent Government that its acts in reference to the *Love and Lulu* had been irregular and unlawful.

From the facts appearing in this case the umpire is fully satisfied that Frierdich & Co. was practically defunct on the 8th of April, 1899, and that, regardless of the incident of the *Love and Lulu*, it would have met substantially the same subsequent conditions and would have ended in as complete and hopeless failure as in fact followed. This failure was in no especial sense hastened by the incident at Güiria, and the only burden which the detention of the *Love and Lulu* at Güiria placed upon the company was the sum which it had to pay for the use of the boat that took the workmen from its asphalt mines back to Trinidad; and this is, of course, a sum of no great significance.

Whether or not the action of the customs officers at Güiria and of the fiscal court were in fact regular and necessary is a matter of but slight pecuniary importance to the claimant company, and since it was the primary and potent cause of its own misfortunes in connection with this incident and by its own voluntary misconduct brought these inquiries, vexations, and expenses upon the customs officers and the court at Güiria, it is not in position to scrutinize very closely what the officers or court of Venezuela did or did not do.

Here may be applied with a certain degree of propriety one of the most important maxims of equity, viz, "He who comes into equity must come with clean hands."

It certainly has brought pecuniary indebtedness to Venezuela in virtue of what occurred at Güiria through its own fault, which it has not yet asked the privilege to discharge.

And in this connection the claimant company may properly consider the value of another of the maxims of equity, viz, "He who seeks equity must do equity."

As the question is presented here, it does not involve the final judgment of the court condemning the ship to a payment of the fine; nor any matter of restitution of the ship, for that occurred. It involves only the question of detention, and detention involves only the question of its reasonableness in point of time consumed, for a sufficient time to know all the facts and to assemble them before the court, and for the court to act thereon was a necessary adjunct to the situation. If the conditions on both sides are regarded as producing an equilibrium, justice is done, in the opinion of the umpire; and he so holds.

This claim is dismissed for want of equity in the claimant company, and the award will be drawn accordingly.

NORTHFIELD, *July 31, 1905.*

CLAIM OF HEIRS OF JEAN MANINAT.—NO. 3.[a]

HEAD NOTES.

The respondent Government is held liable for injuries suffered by a Frenchman in the presence of the general in command of a division of the Venezuelan army, it appearing that the party injured was in the presence of the commanding general by his personal order and that the injury was caused by a subordinate officer without justifying reasons.

The injury being found to be reprehensible in character and the respondent Government for reasons of state declining or neglecting to punish the guilty persons, it is chargeable with the actual damages suffered by the injured person and such further sum as is held to be sufficient to make proper amends to the claimant Government for this affront to it through one of its nationals.

It being found by the umpire that the person came to his death through the injuries thus suffered, but before February 19, 1902, it is held that such only of his brothers and sisters as are of French nationality can present a claim before this commission to recover for his death.

This tribunal does not exist because of damages suffered in Venezuela, except these be damages of Frenchmen, limited in this case to the next of kin of the deceased, who are themselves Frenchmen. If none be French, then the claim falls. It is not possible to hold other than that the national quality of the claimant in fact determines the jurisdiction of the commission.

It is elementary that the burden of establishing nationality is with the claimant. It can not be assumed or conjectured, but must be clearly proven.

Record proof is not essential if there be other that is convincing.

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[a] EXTRACT FROM THE MINUTES OF THE SITTING OF MAY 19, 1905.

We then took up the examination of the claim of the heirs of Mr. Jean Maninat.

The French arbitrator, considering on one hand that Mr. Jean Maninat has died as a result of a wound which the Venezuelan officer gave him, but, on the other hand, that Mr. Pierre Maninat does not prove sufficiently his grievance against the Venezuelan authorities in the course of his legal proceedings with his creditors, accords to the heirs of Mr. Jean Maninat a sum of 500,000 bolivars for the *ensemble* of damages which they have suffered for the reparations which were due them.

The Venezuelan arbitrator is of the opinion that Mr. Jean Maninat was cured of his wound when he was attacked by tetanus, from which he died; that none of the grievances formulated by him or his heirs is established by sufficient proofs; that besides Pierre Maninat, born in Venezuela, is a Venezuelan according to Venezuelan law, and that all his four sisters, were born without doubt also in Venezuela. Two are married to foreigners, and have consequently lost their French nationality. Wherefore he rejects absolutely the claim in question.

M. de Peretti replies that according to the French law M. Pierre Maninat and his sisters, save those two who have married foreigners, have conserved their French nationality, besides the fact that Mr. Jean Maninat, born in France, enjoyed incontestably French nationality justifies in his eyes the competency of the commission.

As he maintained his opinion previously expressed, it is agreed that the claim be submitted to the Hon. Frank Plumley, Northfield, Vt.

The marriage of a sister of the deceased to a Frenchman established her French nationality during marriage, which under French law remains after the death of her husband. There is some proof that she was born in France, none that she was born in Venezuela. Her French nationality being clearly established in her marriage, the burden shifts and rests upon Venezuela to show Venezuelan origin to divest her of the nationality attained through her marriage. This not being done by Venezuela, she is declared French and competent to present her claim as next of kin to her deceased brother for the damages suffered by her because of his death.

Both Governments must be assumed to have had definite knowledge of the serious disagreement between them in the matter of citizenship, yet they agreed upon the use of the expression "Frenchmen." To agree there must have been mutual assent and common understanding of the term employed. It is not suggested that either of the contracting parties yielded any point of its difference in this matter of citizenship. To agree, then, they must meet upon a common ground. This common ground must have been the plain where by the laws of *both* countries the claimant is a Frenchman.

Two interpretations being possible, that is to be taken which is least onerous upon the party to be charged with the service or with the loss resulting from the agreement.

There is also the rule that in conflict of laws the law of the place of domicile should prevail.

For France to intervene where the claimant is a Venezuelan by the laws of Venezuela and French under the laws of France would make the law of France superior to the law of Venezuela, which is not permissible between two sovereign nations.

The right of the respondent Government to regulate her own internal affairs by determining who are her citizens, which involves mutual protection and support, is too essential an attribute of sovereignty to be invaded or disturbed.

The rule of a nation requiring that one who is born in the country shall ordinarily be its citizen is a reasonable requirement.

To all the world but Venezuela France may follow each succeeding generation born in Venezuela but of French origin so long as her affections dictate or her laws require or permit; but not so as to Venezuela.

The effort of one of the sons to establish French nationality by acts of allegiance after the death of the injured person can not affect his right as a claimant here, as that depends in this case upon the national quality of the claimant at the time of the inception of the claim.

The next of kin found to be of French nationality, being a widowed sister, can properly sustain and maintain a claim for some pecuniary loss, although she was never dependent upon him for care or support and although there is no proof that he ever rendered either and no proof that she was ever so circumstanced as to need either.

In this case the greater portion of the damages assessed and made payable to the next of kin, found to be French, is because of the unatoned indignity to France through the injury received by one of her nationals.

This tribunal has no part in the final allotment or distribution of the sum awarded to France through the personality of the sister for whom France has a right of intervention. France has absolute dominion over the proceeds of the award, and with its distribution this commission has nothing to do.

OPINION OF THE VENEZUELAN COMMISSIONER.

Pedro Maninat, now a resident in Guatemala, presented to the minister of foreign affairs of France, on the 19th of August, 1901, a demand of indemnity against the Government of Venezuela for the sum of 2,000,000 francs, adducing as the ground thereof that in the year 1898, while he, with his brother Juan Maninat, was residing and estab-

lished in the city of Valencia, under the firm name of "Maninat Hermanos," with two branch houses, one at Tinaquillo and the other at San Cárlos, a revolution broke out; that his houses were robbed and submitted to requisitions; that his brother Juan Maninat was ill-treated and wounded in the presence of General Atilio Vizcarrondo, the second chief of the expeditionary army of the government of General Andrade, and died one month after that outrage; that Pedro Maninat himself was the victim of numerous persecutions, in the subsequent years, which compelled him to abandon the country and thus avoid attempts of murder.

Mr. Pedro Maninat adds that the conformity of the amount of his claim is proved by the following documents, deposited with the legation of France at Caracas:

A. Declaration written by his brother himself before his death and addressed to Mr. Quiévreux.

B. Declaration signed by thirty-three merchants, witnesses of the facts that took place at Tinaquillo.

B bis. Copy, certified and legalized by the legation at Caracas, of the final part of the declaration B, corroborating its contents.

C. D. E. F. Declaration of which the author of the outrage pretended to make use in order to make it appear that he had been attacked by the brother of Maninat. Extract of the certificate of birth. Report of the physicians. Certificate of death.

G. Petition of Mr. Pedro Maninat to Mr. Quiévreux asking him to ask for a certified copy of several writings forming part of the records relating to the bankruptcy of "Maninat Hermanos," existing in the archives of the court of the first instance in civil and mercantile matters at Valencia mentioned with indication of sheets, and which Maninat considers indispensable to ask for the intervention of the French Government and demand from the Government of Venèzuela the payment of a just indemnification, the justice and precision of which are irrecusably established in the documents asked for.

There also appears among the papers of these records a letter dated Lima, the 2d of March of the current year, signed by Justina Maninat, widow of Cossé, addressed to the minister of France in Venezuela, bringing to his knowledge that she is one of the sisters of the late Juan Bautista Maninat, whose claim initiated by him in 1898 and pursued after his death by his brother Pedro Maninat in 1901, must be in his possession. The signer of this letter asks the minister of France, at the same time, to kindly take note of the existence of her sister Clotilde Maninat de Saldías, domiciled in Lima, and in whose house she lives with her sister Juana Maninat, as well as of the existence of Josefina Maninat de Beguerisse, residing in Guatemala; and that, as they are the only persons entitled to the claim brought against the Government of Venezuela for the robberies, outrages, and chiefly for the

proved murder of their brother Juan, she asked, in her own name and in that of her sisters, to be informed as to the present state of said claim.

In this claim two orders of facts are intermingled *and confounded*, so as to give rise to a variety of questions, which, based only on the statement of the claimant, are destitute of all proof and ground. Some are relative to the wound received by Juan Bautista Maninat in the city of Tinaquillo on the 15th of April, 1898, and others to the suit of bankruptcy entered at Valencia in the year 1899, against the firm of "Maninat Hermanos" on account of the state of insolvency in which said firm was at the death of Juan Bautista Maninat, which took place on the 13th of May, 1898.

What is styled "claim initiated by Juan Bautista Maninat, in the year 1898, and continued after his death by his brother Pedro Maninat," is only a simple statement of facts narrated by the former to Mr. Quiévreux in a letter of seven pages, written in his own handwriting by Juan Bautista Maninat on the 26th of April, 1898, in which, already recovered from his wounds, gives him details as to the attempt of which he held that he was a victim on the 14th of April and asks in conclusion for the protection of the French Government for the punishment of those he considered guilty, and to the end that the fact of which he complained should not remain unpunished.

As appears proved by the letter dated the 26th of April of the same year, addressed by the consular agent at Valencia to the vice-consul of France in Caracas, Mr. Quiévreux, Mr. Juan Bautista Maninat was in a position by said date to come to Caracas, overrunning a distance of 150 kilometers, and to return soon after to Valencia. From the certificate produced by Messrs. Juan Bautista Posadas and Francisco Cisneros, medical doctors who examined at the request of the judge of the municipality of Tinaquillo, Juan Bautista Maninat, on the 16th of April, the following day after the occurrence, it appears that the wound situated on the left temporal auricular region had affected the skin and subcutaneous tissues, the respective auricular lap and a superficial part of the masseteric muscle, wherefore they declared it to be less dangerous.

From the certificate of death presented, issued by the competent official of the city of Valencia, the domicile of Juan Bautista Maninat, it appears that the latter died in said city on the 13th of May, twenty-eight days after the medical examination and sixteen days after his trip to Caracas, of traumatic tetanus, as was certified by Dr. J. R. Revenga. From what has been exposed it is inferred that the death of Juan Bautista Maninat was not caused by the wound he received at Tinaquillo, and that it was the consequence of a disease acquired, how and for what reasons it does not appear. The civil responsibility for indemnification of damages and prejudices in the cases of perpe-

tration of an offense constitutes a claim of the person damaged against the author of the damage and is brought simultaneously with the penal action or separately. There is no responsibility on the part of the government of a country for such facts, except in the case of denial of justice or of notorious injustice in the action brought by the party offended against the author of the offensive act. The suit for civil responsibility that may be brought by everyone that has sustained a damage in his person or interests against the author or authors of an offensive act was not entered by Juan Bautista Maninat or by his lawful heirs against the party suspected of responsibility for the damage done to the former.

The claim against the Government of Venezuela, which can only be based on a denial of justice, in the respective suits in which both the penal and the civil action have been evidenced and decided, simultaneously or separately, is therefore destitute of all ground that may render it admissible, for Juan Bautista Maninat, or the present claimants, who have not entered the civil action pertaining to them against General Atilio Vizcarrondo.

The civil action to be entered for the reparations and restitutions in the cases established by the penal law can not be decided without a firm sentence having been rendered in the penal action, when the former has been entered separately, and when it has been simultaneously entered, or when the party offended has become a party in the civil suit, then the condemnatory sentence, which imposes a punishment on the defendant, gives by itself to the party offended a right to the reparations owed him by the author of the offense.

The commission of an offense can only give rise, therefore, to reparation by means of a civil action, the offended party constituting himself a civil party in the respective penal process, or separately entering his action as plaintiff, in which latter case, that such reparations may be obtained, the exhaustion must precede of all ordinary and extraordinary remedies which the law offers the defendant against the sentence declaring him guilty.

Nothing of this appears proved by the documents produced before this commission.

The declaration which has been presented with several signatures of private individuals of Tinaquillo, and another of the judge of the municipality of the district of Falcón relating to the acts which occurred during the stay of the forces of Gen. Atilio Vizcarrondo at Tinaquillo, are destitute of all evidential force and are not authentic, for which reason, besides our being unable to take them into consideration, they are not proper as evidence that there has been any denial of justice against Mr. Juan Bautista Maninat while endeavoring to obtain before the court the condemnation to the payment of damages and prejudices against him whom he considered responsible for his wound,

as for that he would have been required to constitute himself as plaintiff in the respective process.

The local authorities proceeded to open the investigation ordered by the law immediately after the wound of Mr. Maninat had occurred, and the national Government, as appears from the notes interchanged between its minister of foreign affairs and the vice-consul of France, took, as soon as it was informed of the occurrence, all the steps leading to the investigation of the particulars of the case. It thus appears from the proceedings shown by the records kept in the court of the district of Falcón upon which the investigation of the fact was incumbent.

The Venezuelan arbitrator, therefore, finds no ground for the concession of an indemnity to the heirs of Juan Bautista Maninat, even if any of his sisters were of French nationality and had preserved it, for the wound received by the former, which wound was the object of investigation on the part of the competent officials who complied therein with the legal prescriptions, whilst it is not proved that Maninat ever brought on his part any action against those he considered responsible, and much less that the courts called to try and decide this demand of indemnification had committed any denial of justice or notorious injustice.

As to the acts mentioned by Mr. Pedro Maninat to justify the amount of his claim and relating to the bankruptcy suit entered before the competent tribunals of the State of Carabobo against the firm of "Maninat Hermanos," domiciled in Valencia, no faith-deserving evidence has been presented in support of the pretensions of Pedro Maninat; and, on the contrary, from the terms of the official notes of the vice-consul of France, Mr. Quiévreux, inserted in the records, it appears proved that said official always considered it to be his duty to remain alien to the reiterated demands of Pedro Maninat, that he should interfere in a commercial affair, exclusively submitted to the tribunals of the country and which could only be taken into consideration when there was a denial of justice, after the exhaustion of all the legal remedies. All the circumstances of that suit, presented by the claimant himself in different statements and letters, tend to prove the perfect regularity of the bankruptcy suit and the correctness of the proceedings followed by the tribunals that tried the case in conformity with the provisions of the commercial code. It is to be observed that it is proved by the certificate of birth existing in the parish church of Valencia that Pedro Maninat was born in that town in 1868, and that, therefore, he is of Venezuelan nationality, wherefore he can not claim from the Government of Venezuela before this commission.

For all the preceding reasons the claim of Pedro Maninat, amounting to the sum of 2,000,000 francs, is disallowed in all its parts, and like-

wise what Justina Maninat, widow of Cossé, pretends to adduce concerning the same claim must be rejected.

CARACAS, *May 19, 1903.*

NOTE BY THE VENEZUELAN COMMISSIONER.

The French arbitrator, as appears from the record of the proceeding, allowed for this claim the sum of 500,000 bolivars for the death of Maninat, which he considered to have been occasioned by the wound, and for the damages that death caused the commercial house. In the discussion to which this opinion gave rise the Venezuelan arbitrator argued that the person who had presented the claim was Pedro Maninat, a Venezuelan citizen by birth, as he could soon prove it by producing the certificate of birth existing in the city of Valencia; that the sisters, Clotilde Maninat de Saldías and Josefina Maninat de Beguerisse, even in case of their having been French on account of their birth in French territory, by the time of the facts on which the claim is based and thereafter, had lost their French nationality by their marriages with persons alien to that nationality. These circumstances did not modify the opinion of the French arbitrator and the decision was submitted to the umpire.

OPINION OF THE FRENCH COMMISSIONER.

M. Pierre Maninat and his sisters, Mdmes. Justine Cossé (née Maninat), Clotilde Saldías (née Maninat), Josephine Beguerisse (née Maninat), and Mlle. Jeanne Maninat, claim jointly an indemnity of 2,000,000 bolivars for the murder of their brother, M. Jean Maninat, who died in May, 1898, from the result of a wound received at the headquarters of the Government forces, for the damage which this death caused this house of commerce, Maninat Brothers, which had to liquidate its affairs after the departure of its head, for the requisitions and the confiscations upon the proprietors of this house by the Government and insurgent troops, for the persecutions and denials of justice of which M. Pierre Maninat was the victim in the years following in the course of the defense of his rights. I have reduced to 500,000 bolivars the indemnity which I believe in equity due to those interested. I have considered in the first place as not debatable that the Venezuelan Government is responsible for the death of M. Jean Maninat. The 15th of April, 1898, an officer sent by General Vizcarrondo, chief of the staff of General Crespo, presented himself at the home of M. Jean Maninat at Tinaquillo and requested him to hand over to him four drays, of which General Vizcarrondo had need to transport his ammunition. This Frenchman, who had already often loaned without remuneration a like aid to the Venezuelan authorities to further the reestablishment of public order and who had just been the victim of an armed invasion and of the theft of an amount of merchandise, showed himself ready to conform to this requisition on condition that General Vizcarrondo give him a written order. In this he only followed the precepts of good sense and conformed to the recommen-

dations given by the legation of France to its compatriots. Then he sent to the general one of his employees, who, far from obtaining a written order, was told to invite his employer to present himself without delay at headquarters. Being questioned by the general in the midst of his staff and summoned to obey, M. Maninat did not refuse, but renewed his demand for a written order. This very natural insistence exasperated this strange chief of staff. M. Maninat was insulted, maltreated, threatened with death, grievously wounded by a Venezuelan officer, and put in prison, from which he only got out by the intervention of the French representative at Caracas. If there had been on his part the least provocation, the authorities would not have failed to invoke it and apply the penal law in all its rigor. The prompt release of the prisoner, culpable merely of having spoken the language of reason, of defending his rights, and the absence of all further prosecution, sufficed to prove that the report of the victim is true in every point. No one, besides, has denied the accuracy and the public opinion at the time of the incident and, since I have been able to verify during my sojourn at Valencia, has been on the contrary unanimous in confirming it. In like manner the numerous witnesses and the certificates of the doctors who figured in the dossier confirm it, and also the authorized declaration of Mr. Quiévreux, representative of the French Government at Caracas, who received the visit of the victim some days after the incident. M. Jean Maninat was wounded by a blow from a saber, which laid open his face from the forehead to the ear and would have killed him if the straw hat which he wore had not lessened the violence of the blow. The wound was dressed, and M. Maninat was able to come to Caracas, but it was so little healed that the 13th of May M. Maninat died from traumatic tetanus. He surely would never have been attacked by this disease, which one can not contract except as a result of a wound, if he had not been wounded. One can affirm, then, that his death has certainly been caused by unqualified violence committed upon his person by a Venezuelan officer. It seems to me just that Venezuela indemnify the family of the victim of such treatment, which in all countries, even in time of war, would have raised a universal reprobation and led to an immediate reparation. It is necessary to consider in the second place that M. Jean Maninat was the elder of the family. His untimely death gave a blow the more disastrous to the house of Maninat Brothers, because of the circumstances, difficult for every commercial enterprise. Even in the hypothesis that the affairs of this company may have been jeopardized for some time, which is not in any way proven, but which would be very likely considering the state of the country, one ought to recognize that the disappearance of the head of the house was not calculated to ameliorate the situation of the firm. We know besides, by the report of the Venezuelan commission in bankruptcy, that the result

result, but it lacked penalty; besides it does not invalidate in any way the statement of the victim.

Moreover the Venezuelan commissioner holds that the claim of Pierre Maninat and his sisters is not admissible because they are Venezuelans by nationality, being born in Venezuela, but Jean Maninat, whose death and material losses are the exclusive grounds of the indemnity to be awarded, was born in France, of French parents, and never did acquire Venezuelan citizenship, nor did he lose his French nationality, which, on the other hand, no one has ever disputed. This in itself is sufficient, no matter what the condition of the heirs might be, to submit the claim to the commission appointed to hear and decide on French claims. But I consider that if one takes account of the character of the heirs, the mixed commission remains with jurisdiction. In fact, Pierre Maninat and his sisters were born in Venezuela, but of French parents; they enjoyed then two nationalities at once—at their birth Frenchmen, according to French law, Venezuelans according to Venezuelan law. This is indisputable, but when the protocol mentions "claims for indemnities entered by Frenchmen," this means claims presented by persons whose protection the French Government endeavors to insure, because they are recognized as French citizens by the French laws. The protocol does not specify in any manner that the laws of Venezuela should also recognize such persons as French citizens. On the contrary, all the protocols signed in Washington last year between Venezuela and the foreign powers have expressly established that local legislation was not to be taken into consideration. Besides, two of the sisters of Jean Maninat have assuredly lost their Venezuelan nationality and are exclusively French, since they have married Frenchmen, Messrs. Cossé and Beguerisse. Mlle. Jeanne Maninat has been away from Venezuela since her childhood and lives in Peru. M. Pierre Maninat has never declared himself Venezuelan and has always maintained the title of a Frenchman. He left Valencia without intention of returning and has settled at Guatemala. Finally, he has fulfilled his military obligation according to the French law, and the French consular agents at Caracas and Valencia, at Puerto Cabello and at Guatemala, have already written him on their registers of matriculation of French citizens. In an analogous case, that of M. Piton, Doctor Paúl has recognized without difficulty the jurisdiction of the mixed commission and M. Piton has obtained a large indemnity. As for the fourth sister, Madame Saldías, she has married a Peruvian and she has not lost her French nationality unless the Peruvian law accords the nationality of her husband. In this case she has also lost her Venezuelan nationality; but even as to this last mentioned, the only one among the heirs of M. Maninat whose nationality may be doubtful, the commission of arbitration is competent to accord to her an indem-

My colleague has not shared this opinion. He concludes first, from the fact that M. Jean Maninat did not succumb until twenty-eight days after having been wounded, that the wound received at Tinaquillo was not the cause of his death, which was "the result of a disease contracted no one knows in what manner nor from what causes." The certificate of Doctor Revenga attests, however, M. Jean Maninat has died from traumatic tetanus; that is to say, of tetanus following his wound. We know that tetanus is a disease which develops only in those who are wounded. It is then indubitable that the saber blow received by M. Maninat was the efficient cause of his death, since the death was caused by tetanus, and tetanus is the result of a wound; but even if one refuses to admit it contrary to the declaration of the Venezuelan doctor and also contrary to the evidence, it remains, nevertheless, that M. Jean Maninat has been struck under circumstances of which we are acquainted; that he was wounded by an officer at headquarters where he had been ordered to come and where nothing proves that he did not conduct himself conformably to the proprieties. Even if not followed by the death of its victim, this cowardly deed, which nothing renders doubtful and which no one thinks a benefit, would it not have called for an indemnity so much the more so as no procedure has been set in motion against the guilty one? Why then reject entirely the claim? Doctor Paúl then established that M. Jean Maninat not having invoked a civil action consequent upon or parallel with a penal action because of a tort of which he was the victim, the responsibility of the Venezuelan Government is not involved, that resulting only from a denial of justice, or notorious injustice. One can reply that none of the numerous strangers injured in the course of the Venezuelan revolution and beneficiaries to this right of indemnity accorded by the mixed commission have appealed to the justice of the country. All protocols of Washington, like the protocol of Paris, have had precisely for their end to take away, by an exception, entered upon by its own free will so far as concerns France, by the Venezuelan Government, foreign claimants from ordinary tribunals to international tribunals before whom Venezuela is represented. One can not refuse to M. Jean Maninat and his heirs the privilege granted to several million other foreign claimants who have been benefited by this exception justified by the circumstances. It is to be noted that the protocols do not speak merely of denials of justice. They concern every claim of whatever nature it may be. In fact, of about five hundred French claimants three only have claimed for denials of justice, the others, like the Maninats, not having commenced by recourse to the Venezuelan justice and having directly addressed themselves to the commissions of arbitration. As for the investigation ordered by the local authorities, not only does it not seem to have been done intending to bring about a serious

result, but it lacked penalty; besides it does not invalidate in any way the statement of the victim.

Moreover the Venezuelan commissioner holds that the claim of Pierre Maninat and his sisters is not admissible because they are Venezuelans by nationality, being born in Venezuela, but Jean Maninat, whose death and material losses are the exclusive grounds of the indemnity to be awarded, was born in France, of French parents, and never did acquire Venezuelan citizenship, nor did he lose his French nationality, which, on the other hand, no one has ever disputed. This in itself is sufficient, no matter what the condition of the heirs might be, to submit the claim to the commission appointed to hear and decide on French claims. But I consider that if one takes account of the character of the heirs, the mixed commission remains with jurisdiction. In fact, Pierre Maninat and his sisters were born in Venezuela, but of French parents; they enjoyed then two nationalities at once—at their birth Frenchmen, according to French law, Venezuelans according to Venezuelan law. This is indisputable, but when the protocol mentions "claims for indemnities entered by Frenchmen," this means claims presented by persons whose protection the French Government endeavors to insure, because they are recognized as French citizens by the French laws. The protocol does not specify in any manner that the laws of Venezuela should also recognize such persons as French citizens. On the contrary, all the protocols signed in Washington last year between Venezuela and the foreign powers have expressly established that local legislation was not to be taken into consideration. Besides, two of the sisters of Jean Maninat have assuredly lost their Venezuelan nationality and are exclusively French, since they have married Frenchmen, Messrs. Cossé and Beguerisse. Mlle. Jeanne Maninat has been away from Venezuela since her childhood and lives in Peru. M. Pierre Maninat has never declared himself Venezuelan and has always maintained the title of a Frenchman. He left Valencia without intention of returning and has settled at Guatemala. Finally, he has fulfilled his military obligation according to the French law, and the French consular agents at Caracas and Valencia, at Puerto Cabello and at Guatemala, have already written him on their registers of matriculation of French citizens. In an analogous case, that of M. Piton, Doctor Paúl has recognized without difficulty the jurisdiction of the mixed commission and M. Piton has obtained a large indemnity. As for the fourth sister, Madame Saldías, she has married a Peruvian and she has not lost her French nationality unless the Peruvian law accords the nationality of her husband. In this case she has also lost her Venezuelan nationality; but even as to this last mentioned, the only one among the heirs of M. Maninat whose nationality may be doubtful, the commission of arbitration is competent to accord to her an indem-

nity, since she presents herself only as the heir of a claimant who enjoyed exclusively French nationality.

Finally, we ought not to forget that according to the terms of the protocol an indemnity ought to be paid in bonds of diplomatic debts and not in gold. Thanks to this concession granted to the Venezuelan Government by the French Government to permit her to pay her debts with greater ease, the figure of indemnities accorded to Frenchmen finds itself singularly reduced in reality while the indemnities of other foreigners are payable in gold and do not undergo any decrease on the fixed amount. The bonds issued by the Venezuelan Government sustain at this moment a depreciation of 60 per cent of their nominal value. The result would be then, if the umpire shares the sentiment of the French arbitrator and recognizes for those interested an indemnity of 500,000 bolivars, a sum of 200,000 bolivars in gold would be paid to the heirs of M. Jean Maninat by the Venezuelan Government.

ADDITIONAL OPINION OF THE VENEZUELAN COMMISSIONER.

The claim under discussion was made by M. Pedro Maninat on April 19, 1901, as shown in his communication from the city of Lima, bearing said date, addressed to his excellency the minister of foreign affairs for France (Exhibit 3, document 59). Subsequent to this, in a letter dated at the said city of Lima on March 2, 1903, Justina Maninat, widow of Cossé, informed the French minister in Caracas, M. Wiener, that she was a sister of the deceased Juan Bautista Maninat, having an interest as such in the claim entered by Pedro Maninat, and that there were three other sisters, Clotilde Maninat de Saldías, resident in Lima; Juana Maninat, resident in the same city, and Josefina Maninat de Beguerisse, residing in Guatemala (Exhibit 3, document 62).

Among the documents delivered to the French commissioner subsequent to the meeting of May 19, 1903, when I rendered my opinion on the subject—documents which have now come to my notice—there are two letters dated at Lima on March 24 and April 22, 1903, bearing the signatures of Clotilde Maninat, wife of Saldías, and duly authorized by her husband, Eulogio S. Saldías; Justina Maninat, widow of Cossé, and Juana Maninat, who, of their own personal accord, and desirous of maintaining their legitimate rights, urge upon the French minister in Caracas the continuation to a successful issue of the claim entered by their brother, Pedro Maninat, now a resident of Guatemala, and formerly of Lima. Neither at the time of the meeting of May 19, 1903, nor in conjunction with the new documents produced, has any proof whatever been introduced showing that the aforesaid Josefina Maninat de Beguerisse, who, it is averred, resides in Guatemala, claims any sum whatever from the Venezuelan Government, nor that either the lady herself or her husband, Charles Beguerisse, may have given

their consent and authority to introduce their names and persons in this claim, an indispensable requisite to become a party to the case.

It becomes necessary to point out the several grounds, growing out of facts of very different nature, advanced by Pedro Maninat and his sisters Clotilde, Justina, and Juana, upon which rest their claim for the sum of 2,000,000 francs. Some of these grounds are made to originate at the death of M. Juan Bautista Maninat, which took place in May, 1898, as it is averred that his death was the result of a wound received by him in the general headquarters of the Government troops, and because of the damages sustained thereby by the firm of "Maninat Brothers," which it is claimed was compelled to go into liquidation after the death of the head of the firm. Other grounds are based upon certain requisitions and seizures made upon the property of the firm by both the Government and the revolutionary troops and upon the persecutions and denial of justice of which Pedro Maninat claims to have been the victim in subsequent years and while he was engaged in defending his rights.

The French commissioner in his opinion deems an indemnity of 500,000 bolivars to be a fair compensation for the heirs of Juan Maninat, by reason of the death of a brother and because of the damages suffered before and after his death; and as regards the denials of justice of which Pedro Maninat complains as having occurred during the proceedings originating in the failure of "Maninat Brothers," the commissioner does not deem the claim sufficiently substantiated to affect the responsibility of the Venezuelan Government and to justify a demand for indemnification.

Therefore our opinions as commissioners differ on points relating to the several questions directly connected with the wounding and death of M. Juan Bautista Maninat; to the persons of the claimants Pedro, Clotilde, Justina and Juana Maninat, and in the matter of the liability of the Venezuelan Government. All these questions must be investigated and decided by the light of the principles and precedents established by international law, the Venezuelan laws applicable to the case, and the sound and just consideration of such facts as are fully verified.

The learned commissioner for France makes the following statement on page 8 of his opinion:[a]

> The Venezuelan commissioner holds that the claim of Pedro Maninat and his sisters is not admissible, because they are Venezuelans by nationality, being born in Venezuela, but Juan Maninat, whose death and material losses are the exclusive grounds (*sujet*) of the indemnity to be awarded, was born in France of French parents and did never acquire Venezuelan citizenship, nor did he lose his French nationality, which, on the other hand, no one has ever disputed. *This in itself is sufficient, no matter what the condition of the heirs might be,* to submit the claim to the commission appointed to hear and decide on "French claims."

[a] Page 54.

According to the sound principles of international law, it is impossible to admit the opinion held by my learned colleague that, no matter what the condition or nationality of the claimants or heirs might be, it suffices that the bonds of kinship exist between them and the person wronged and that such person be or might have been of French nationality for the case to come under the claims commission, whose duty it is to hear and decide on "French claims."

The jurisdiction of this claims commission, according to the plain and precise terms of the Paris protocol of February 17, 1902, to which it owes its existence, can not embrace other claims for indemnification beyond those "entered by Frenchmen," it being, therefore, indispensable to prove that the nationality of the claimant was solely and exclusively French.

It can not therefore be held under any circumstances whatever that, no matter what the nationality of the claimant might be, the condition of being heir to a person who was a Frenchman at the time of his death is enough to bring such claim under the jurisdiction of this commission. In support of my opinion the following quotations are pertinent:

Sir Edward Thornton, umpire for the commission of the United States and Mexico, under the convention of July 4, 1868, makes the following statement:

> As therefore Mr. Lizardi's niece is not a citizen of the United States, and as she would be the beneficiary of whatever award the commissioners might make, the umpire is decidedly of the opinion that the case is not within the jurisdiction of the commission. Even if the uncle, Mr. Lizardi, had been a citizen of the United States, which the umpire does not admit, whatever may have been the merits of the case the jurisdiction of the commission would have ceased on the death of Mr. Lizardi. (Moore Int. Arb., Vol. 3, 2483.)

In the case of Elise Lebret before the Franco-American commission the counsel for the United States said:

> When the treaty pledges compensation by France to citizens of the United States it refers to those persons *only whose citizenship in the United States is not qualified or compromised by allegiance to France*, and that when the treaty pledges compensation by the United States to citizens of France reference is made to those persons *only who are not only citizens of France, but who are also not included among the citizens of the United States.*
>
> It can not be assumed of either government that it intended to compensate persons whom it claims as its own citizens, and that through the agency of another government. (Moore, Vol. 3, 2491; 48th Cong., 2d sess. Ex. Doc. 235 (Boutwell's Report), p. 129.)

It has been shown that there exist precedents of mixed commissions in which France was represented, when it was established that it does not matter whether the claim has been or may have been originally a French claim, if before or at the time the treaty was concluded it had ceased to be such, and that the holder of the claim can not invoke his government's mediation and protection.

The following principles were established by the commission created by the protocol concluded between the United States and France July 4, 1831, as the rules governing the commission:

It was of course indispensable to the validity of a reclamation before the commissioners that it should be altogether American. This character was held by them to belong only to cases where *the individual in whose name the claim was preferred had been an American citizen at the time of the wrongful act and entitled as such* to invoke the protection of the United States for the property which was the subject of the wrong, *and where the claim up to the date of the convention had at all times belonged to American citizens.*

It was necessary for the claimant to show not only that his property was American when the claim originated, but that the ownership of the claim was still American when the convention went into effect. * * * Nor could a claim that lost its American character *ever resume it if it had heretofore passed into the possession of a foreigner or of one* otherwise incapacitated to claim before the commission. (Moore, Int. Arb., vol. 3, 2388; Venezuelan Arbitrations of 1903, p. 74.)

As a precedent bearing upon the personal circumstances of the claimants, Pedro Maninat and sisters, that of Julio Alvarez against Mexico, and the opinion of Sir Edward Thornton, umpire, rendered October 30, 1876, may be cited, as well as that of Herman F. Wulff against Mexico. (Moore, note pp. 1353–1354).

* * * the umpire can not acquiesce in the arguments put forward by the counsel for the claimant, *whoever that claimant may be.* He is of the opinion that not only must it be proved that the person to whom the injury was done was a citizen of the United States, *but also that the direct recipients of the award are citizens of the United States, whether these beneficiaries be heirs or in failure of them creditors.*

The principle governing the matter under discussion of the nationality of the claimant is stated by Moore, page 1353, as follows:

* * * 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.

Juan Maninat did not establish any claim against the Venezuelan Government because of his wound, nor because of damages to or seizure of his property. During the twenty-eight days which elapsed between his wounding and May 8, 1898, when he was taken with traumatic tetanus, it only appears from a long letter in his own handwriting, consisting of 7 pages, addressed from Valencia on April 26, 1898, to M. Quiévreux, the French consul in Caracas, that having recovered from the wound he was about to give him details of the attempt at assassination to which he was a victim on April 15, in the presence of General Vizcarrondo, chief of the general staff of General Crespo, and *that he might perhaps state* (without affirming the fact, however), at the instigation of said General Vizcarrondo. After a minute statement of the facts leading to the wound and of the wound

itself, he asks the French consul for the mediation of the French Government, stating that the attack upon him was an insult and that the French colony of Valencia and the neighboring towns suffering from the evils of war were indignant and demanded justice to be done.

"If such deed should go *unpunished* our interests and our lives would be forever jeopardized," Maninat states at the end of the aforementioned letter.

This letter, as shown by note No. 19, gave rise to the official communication sent by M. Quiévreux, vice-consul of France in Caracas, to the minister of foreign affairs, transmitting the original letter of M. Juan Bautista Maninat; and somewhat later, May 24, the same consular officer wrote again to the above-mentioned minister, informing him of the death of M. Maninat, produced by the disease called traumatic tetanus. From that date to the day when the claim was entered by Pedro Maninat before the French minister, three years later, no other mention whatever was made of this matter.

From the documents submitted, it does not appear that Juan Bautista Maninat, the aggrieved party, who during his convalescence was able to personally enter a claim against the Venezuelan Government, did ever enter such claim, naming in money the compensation for the injury and the damages sustained by his person and his property; neither does it appear that the minister of foreign affairs of France had demanded from the Venezuelan Government an apology to the French nation as a nation, because of the wound received by Maninat, nor that it had been ever pretended to make the Government authorities responsible for a deed which the victim himself qualifies as an outrage to the French colony.

Moreover, it can not be claimed that because the wrong done to a citizen or subject of another nation involves a breach of international law, the nationality of the aggrieved party must be taken into consideration to maintain that the wrong survives, still preserving its original nature, and that it is a matter to be submitted to a court of the nature of the present court, even in the case that the aggrieved party be dead or has changed his nationality, or the right to indemnification is claimed by persons of a different nationality in the capacity of heirs or creditors.

Ralston, umpire for the Venezuelan and Italian Claims Commission created by the Washington protocol of February 13, 1903, in the case of Miliani against Venezuela, sets forth:

> While it remains true that an offense to a citizen is an offense to the nation, nevertheless the claimant before an international tribunal is ordinarily the nation on behalf of its citizen. Rarely ever the nation can be said to have a right which survives when its citizen no longer belongs to it. (Venezuelan Arbitrations of 1903, Ralston's Report, p. 762.)

Dealing with the same subject, the honorable umpire, Mr. Plumley, in the case of Stevenson against Venezuela, before the Venezuelan and

British Claims Commission, under the Washington protocol, February 13, 1903, makes the following statement:

> While the position of the learned agent for Great Britain is undoubtedly correct, that underlying every claim for allowance before international tribunals, there is always the indignity to the nation through its national by the respondent Government, there is always in commissions of this character *an injured national capable of claiming* and receiving money compensation from the offending and respondent Government. * * * To have measured in money by a third and different party the indignity put upon one's flag or brought upon one's country is something to which nations do not ordinarily consent.
>
> Such values are ordinarily fixed by the offended party and declared in its own sovereign voice, and is ordinarily wholly punitive in its character, not remedial, not compensatory. (Ralston's Report, pp. 450, 451.)

Juan Bautista Maninat having died without having entered during his life any pecuniary claim whatever against the Venezuelan Government because of the wound and damages sustained by him, no actually existing property or vested rights which might be considered as having survived his death and capable of conveyance and continuation were transmitted to his heirs. The award in the case of Oscar Chopin against the United States under the convention of January 15, 1890, can not be applied to the present claim. The Chopin claim was entered on behalf of Oscar Chopin himself and three other heirs to Jean Baptiste Chopin, formerly a French citizen, resident in Louisiana, and who died in 1870, leaving *as a portion of his estate the claim in question.* Boutwell's report refers to the award in favor of the claimants for a certain sum and makes the following comments:

> It may, however, be assumed fairly that the commission were of opinion that the children of Jean Baptiste Chopin, although born in this country, were citizens of France, and that, inasmuch as the death of Oscar Chopin occurred *after the ratification of the treaty and after the presentation of the memorial,* his right to reclamation had become so vested that it descended to his children, independently of the question of their citizenship in France. [a]

The claim first made before the Government of France by Pedro Maninat, three years after the death of Juan Bautista Maninat, and subsequently supported by his sisters, does not constitute the exercise of any rights of inheritance which at the time of Maninat's death were a portion of the estate, which could have been transferred to his sisters as heirs independently of the question of citizenship. The claim originated three years after the death of the *de cujus* and is solely based, as the French commissioner says, on the death and material losses sustained before and after such death.

The origin, the nature, and the moment when the pretension of the claimants came into life being so clearly and precisely established, and leaving aside the question of their capacity as heirs, as no property or right belonging to the estate of the deceased Juan Bautista Maninat is involved, we have to deal in the first place with the question of the

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[a] French and American Claims Commission, House of Representatives Ex. Doc. No. 235, Forty-eighth Cong., 2d sess. (Boutwell's Report), p. 83.

nationality of the plaintiffs who have entered the claim for indemnification, viz, Pedro, Juana, Justina, and Josefina Maninat, and later with the question of the right they may show as the wronged parties because of the death of their brother, and the liability such death may cause to the Venezuelan Government in view of the established facts only.

From the statements subscribed to by Pedro Maninat and by Clotilde Maninat de Saldías, by Justina Maninat, widow Cossé, and by Jeanne Maninat, marked with the numbers 5 and 8, which documents are a part of those submitted after the session of the commission on May 19, 1903, it appears from the confession of the deponents themselves that Pedro, Clotilde de Saldías, and Juana Maninat were born in Venezuelan territory, being, therefore, Venezuelans by birth according to Venezuelan laws.

As regards Josefina Maninat de Beguerisse, a resident of Guatemala, not only has the fact of her being born on French soil not been established because the proper entry in the respective registers of births has not been submitted as required, but she has not made any claim against the Venezuelan Government, nor does it appear that her husband has authorized the action which her sisters residing in Lima have taken in her behalf. A certificate signed by the chargé d'affaires of France in Guatemala has been produced to show that in the register of citizenship of the legation there exists an entry under No. 547, dated on July 24, 1903—that is to say, after the investigation and opinion of the arbitrators on this claim had been closed, May 19, 1903—to the effect that Charles Beguerisse was born in Puebla, a city of Mexico, in 1859, and was married in Panama to Josefina Maninat in 1886. Such entry does not in itself constitute a trustworthy proof of the French nationality of Charles Beguerisse, the husband of Josefina Maninat; but, on the contrary, the fact of Beguerisse's birth in a Mexican city shows *prima facie* that he is a Mexican citizen according to the principle *jure territorii* adopted by the Central and South American Republics.

Justina Maninat, widow Cossé, has not established her French nationality and the authenticated copy of her certificate of marriage in the city of Panama to José Cárlos Cossé, wherein it is stated that she is a native of Tarbes, France, is not the proof of such fact, but merely a reference made to it before the priest of the parish in Panama, and can not be substituted for the evidence afforded by the record of the certificate of birth in Tarbes, which the claimant could have well obtained since this claim was introduced, four years ago. In the absence of such document, which is the only evidence that could prove the fact of the birth in Tarbes, the presumption prevails of her birth in Venezuela, as well as that of all her sisters and brothers, except Juan Bautista, whose birth in Tarbes is shown by the certificate of the mayor

of that town. This certificate is among the documents lately submitted. As the above-mentioned Justina is at present the widow of Cossé, and was his widow on March 2, 1903, when she joined issue in the claim entered by her brother, Pedro Maninat, she comes under the provision of the Venezuelan laws, establishing that a Venezuelan woman married to a foreigner recovers her lost nationality when she becomes a widow.

Besides the confessions of the parties themselves, upon whom devolves the duty of establishing the facts of their nationality, stating that three of them were born in Venezuela (Pedro, Juana, and Clotilde de Saldías), the Venezuelan Government has submitted to me the respective certificates which I append to this opinion, establishing the fact that Pedro and Clotilde Maninat were born within Venezuelan territory. Clotilde Maninat having married Don Eulogio S. Saldías, a lieutenant in the Peruvian navy, has acquired the nationality of her husband.

Pedro Maninat, besides being a Venezuelan by birth, according to the Venezuelan laws, has submitted a certificate issued by the vice-consul in charge of the French legation in Caracas, by which it appears that on March 23, 1899, almost a year after the death of his brother, Juan Bautista, he appeared before the French vice-consul in the same city and made a declaration to the effect that he regretted not having complied with the military service of the class of 1883, requesting that a certificate be issued to him showing that he had made such avowal in order to secure, if needed, his return to France, binding himself to place himself immediately after his arrival in France at the disposal of the proper authorities, by whose decision in the matter he would abide. This act and the subsequent declaration made by him in Guatemala at the French legation as a French citizen—the fact of his having returned to France and fulfilled his military obligations not being established—clearly show that they were performed for the purpose of making out a case against the Venezuelan Government and to arm himself with a sham French citizenship—for the want of a legitimate citizenship of long standing—to use it against the country within which he was born. The case of Charles Piton, quoted by M. de Peretti de la Rocca, is in no way similar to the one under consideration either from the standpoint of proofs shown by M. Piton to establish his French citizenship, which was never contested, or from the circumstances attending his claim.

The French commissioner is of the opinion that this commission is competent to hear this claim, because, although Pedro Maninat and his sisters were born in Venezuela, they are the issue of French parents and had two nationalities at the moment of their birth—French, according to the French laws, and Venezuelan in accordance with the laws of Venezuela.

My learned colleague states:

This is indisputable, but when the protocol mentions claims for indemnities entered by "Frenchmen," this means claims submitted by persons whose protection the French Government endeavors to insure, because they are recognized as French citizens by the French laws. The protocol does not specify in any manner that the laws of Venezuela should also recognize such persons as French citizens. On the contrary, all the protocols signed in Washington last year between Venezuela and the foreign powers have expressly established that "local legislation" was not to be taken into consideration.[a]

Such is the opinion of my learned colleague. Now let us see what has been decided by the learned umpires upon whom has devolved the duty of determining the question of conflicting nationality at different times and in different commissions, decisions which, by reason of their uniformity and the enlightened doctrines they contain, have erected as principles of international law the ruling that, in case of conflicting laws creating a double citizenship; the law of the respondent nation controls, and also that, in cases of double citizenship, neither country can claim against the other nation, although it may claim against all other nations. Let me state at this juncture that there is no similarity between the Paris protocol of February 19, 1902, controlling this commission, and the protocols signed at Washington in 1903, quoted by my learned colleague in regard to the suppression of the "technicalities of local legislation." The Paris protocol does not deal with this question, and it is a well known fact that in the matter of authority or powers in themselves an exception to the general rules universally applied, such authority or powers must be expressly and formally stipulated, as was purposely done in the Washington protocols. The Paris protocol created a mixed arbitration court to hear and decide upon all claims for indemnification entered by French citizens, but did not except this commission from making its awards in strict accordance with the principles of international law generally admitted and with the local laws in such cases as they may properly apply. On the other hand—and this is merely a casual remark—the provision to which my learned colleague refers, stipulated in the Washington protocols, does not establish any distinctions between the local legislation of either of the contracting parties. Why should this discrimination in regard to local legislation be applicable only to Venezuela? What are the grounds for such strange interpretation?

In regard to conflicting citizenship the precedents and opinions quoted below may be submitted, deciding the point always in favor of the country against which the claim has been entered.

Commissioner Finlay in the case of Hammer et al. against Venezuela states the following:

Whatever rights the United States has in its power to bestow will unquestionably pass under the law establishing the status of citizenship in favor of nonresident aliens, including

[a] Page 54.

the right to take property by descent and succession and the right to prosecute any claim against the United States; but more than this cannot be done without interfering with the rights of other states and involving them and herself in conflicting claims of the most absurd character. (Moore, p. 2460.)

The reasons advanced by the American commissioner which were approved by the umpire, Count Corti, of the British-American Claims Commission, are *in toto* applicable to the question of a double citizenship. The opinion referred to is the following:

To treat his grievances (the claimant's grievances) against that other sovereign as subjects of international concern would be to claim a jurisdiction paramount to that of the other nation of which he is also a subject. Complications would inevitably result, for no Government would recognize the right of another to interfere thus in behalf of one whom it regarded as a subject of its own. It has certainly not been the practice of the British Government to interfere in such cases, and it is not easy to believe that either Government meant to provide for them by this treaty. (Alexander v. U. S. Moore, p. 2531.)

The same rule is found in Cogordan (Citizenship, p. 39), who has called attention to the eminently practical spirit of the English Government, as shown in the correspondence between Lord Malmesbury and Lord Cowley, ambassador in Paris, when, under date of March 13, 1858, he states that, if England did recognize as British subjects the children born in England of foreign parents, she did not pretend to protect them as such against the authorities of the country of such parents claiming them, particularly when they had voluntarily returned to such country; or, in other words, Frenchmen born in England would be protected in Germany, Italy, or any other country except France, where they could be legally called to serve in the army.

Tchernoff (Protection des Nationaux Résidant à l'Étranger p. 470) says:

Any person having a double citizenship can enjoy but one within the territory of each of the states which hold him as a subject. Such is the practice in England and Switzerland.

The foregoing opinions agree with those of the commissioner of the United States in the case of Elise Lebret before the Franco-American Commission, above mentioned. Notice should be taken of the opinions of Phillimore, Blackstone (Cooley's Vol. I, p. 369) 1, Hale's P. C., 68, Story's Conflict of Law, second edition, chapter III, section 48, and the Century Dictionary, all quoted by the Hon. Mr. Plumley in his learned decision as umpire in the case of Mathison against Venezuela before the British-Venezuelan Commission created by the Washington protocol of February 13, 1903 (Venezuelan Arbitrations, Ralston's Report, pages 433-434 and 435). See also the opinions of the above-mentioned umpire in the case of Stevenson against Venezuela (Moore, p. 442 et seq.) and Ralston, umpire of the Italian-Venezuelan Commission, in the case of Brignone, Miliani, and Poggioli against Venezuela (Venezuelan Arbitrations of 1903, Ralston's Report, pp. 710, 754, and 847).

Thus the conflict of double citizenship has been solved by eminent authorities, establishing that in the cases where such double citizenship occurs the law of the respondent or defendant nation prevails.

In the event of conflict of laws creating double citizenship, that of respondent nation must control.[a]

In cases of double citizenship neither country can claim the person having the same as against the other nation, although it may as against all other countries.[b]

This condition of double citizenship occurs in Pedro Maninat, born in Venezuela of French parents, a resident of Venezuela until the date of the death of his brother Juan Bautista Maninat, a deserter from the military service of the class of 1883, in France; in Juana Maninat and Clotilde Maninat de Saldías, both born in Venezuela, according to their own confession and documents produced; in Justina Maninat, widow Cossé, and Josefina Maninat de Beguerisse, who have not established their birth in French territory, as it is indispensable to do before this commission. The presumption in the case of the two latter is, on the contrary, that they were born in Venezuela, and that the husband of Josefina Maninat, Charles Beguerisse, by reason of his birth in Puebla, a city in Mexico, is a Mexican citizen, as well as his wife. I beg to call the attention of the honorable umpire most especially to the fact already mentioned that from the documents submitted there does not appear that Josefina Maninat de Beguerisse, nor her husband Charles Beguerisse, for a long time residents of Guatemala, claim any sum whatever from the Venezuelan Government, nor that they authorized their brothers and sisters to do so.

Justina Maninat, widow of Cossé, has recovered her Venezuelan nationality since the death of her husband—under the supposition that he was a French citizen, which has not been established—in conformity with the Venezuelan laws, which control in case of conflict of double nationality, according to the opinions and decisions above cited.

In view of the foregoing, I hold that this commission has no jurisdiction to hear and decide the claim entered by Pedro Maninat and sisters, as their Venezuelan nationality controls in the conflict of double citizenship, Venezuela being the respondent nation.

The plaintiffs have no legal rights whatever to claim, by reason of the death of Juan Bautista Maninat, damages directly suffered by their persons and property. It has been further established that Pedro Maninat, as well as his sisters, all of whom are of age, three of the sisters being married and for some years absent with their respective husbands from Venezuelan territory, have not depended for their means of sustenance upon the person and life of Juan Bautista Maninat, but, on the contrary, each and every one of them has had and still

[a] Brignone case, Ralston's Report, p. 710. [b] Miliani case, Ralston's Report, p. 754.

has independent means of living. They might be entitled to claim damages for the death of a person, if there is a party responsible for such death, whether the party be a private individual, a corporation, or a state, in case the damages resulting from such death could be properly established. Such would be the case when a destitute wife or minors or other persons, either ascendants or brothers are concerned and the proof can be established that they are destitute and suffer material damages by reason of the wanton killing of a kinsman. These grounds for action are lacking in the present claim, and they are essential in order to warrant the indemnification sought, but such damages have not occurred, nor have the brothers and sisters of Juan Bautista Maninat established the facts beyond all reasonable doubt. Under the circumstances the present claim for indemnification lacks the essential basis of such claims, the *damnum emergens*, as a consequence of the death of Juan Bautista Maninat, and such claim can not exist, because it deals with brothers and sisters who did not depend for their living upon Juan Bautista Maninat, nor upon his business abilities or pecuniary means.

The indirect damages which the mercantile firm of Maninat Brothers might have sustained through such death do not affect the sisters, who were neither partners of the firm nor had any share or profits in the business. Whatever business Pedro Maninat might have had as an active partner did not suffer any damages because of his brother's death, as it appears from the papers submitted that at the time of the death the commercial firm was bankrupt and that the surviving partner was compelled to admit such bankruptcy in view of the state of complete insolvency in which the firm had been for some time previous. The French commissioner has acknowledged this to be a fact in his opinion.

Now, in regard to the liability which it has been the endeavor to establish against the Venezuelan Government for the wound—not a very serious wound—received by Juan Bautista Maninat at Tinaquillo, and his subsequent death, which took place twenty-eight days after, superinduced by the disease called *traumatic tetanus*, which is not necessarily the consequence of a wound, but may be contracted through several causes, generally through being exposed to the water and other sources of infection, I beg to submit again the arguments advanced by me in my opinion rendered at the session of the commission, May 19, 1903, which I send herewith translated into English, and wherein I deny such liability as wholly unfounded, and entirely reject the merits of the claim for indemnification for 2,000,000 bolivars against the Venezuelan Government.

NORTHFIELD, VT., *February 3, 1905.*

ADDITIONAL OPINION OF THE FRENCH COMMISSIONER.

After having read the additional memoir presented by my honorable colleague, I can only maintain the conclusions of the prior memoir. I will add, however, some observations which seem to me allow on my part certain consideration of this additional memoir.

In the first place Doctor Paúl remarks that one of the five heirs of the late Jean Maninat, Madame Josephine Beguerisse (née Maninat), has not presented any claim against Venezuela. I know this, but since the four other heirs have presented a claim the default of the fifth invalidates the claim in no wise. It will belong only to the French Government if the umpire accords an indemnity to the Maninat heirs to divide it conformably to French laws, among those of the latter who may have availed themselves of their rights at the proper time.

In the second place, my honorable colleague, returning to the question of nationality, declares that Mr. Pierre Maninat and his sisters, born in Venezuela, have not according to the protocol of 1902 a right to present a claim against the Venezuelan Government. With regard to this, I could only reproduce the argument already presented in my memoir. I request, moreover, the umpire to kindly revert to text of the aforesaid protocol, to which in section 1, page 4, of his additional memoir, Doctor Paúl gives an interpretation which I can not admit. Article 1 speaks in effect merely of claims presented "by the Frenchmen." This term is very comprehensive—"Frenchmen." It is not merely the "French citizens;" there are also French subjects, such as the Algerians or French protégés, such as the Tunisians—in a word, all those to whom the French Government extends its protection, because they are French according to French laws. The protocol says in no way that it is "indispensable to prove that the nationality of the claimants was solely and exclusively French." I have then been able to conclude with justice that it sufficed that the French Government consider an individual as French and deliver to him a certificate of French nationality that this individual be qualified to benefit from the provisions of the protocol of February 19, 1902. The precedents cited by my colleague prove only that there is not on this point any fixed rule and that international law is, as almost always, variable. I could call to mind many examples of a contrary jurisprudence without referring to distant date.

I have spoken of the case of Mr. Charles Piton. I maintain that the case is analogous to the present case. Mr. Piton was born in Venezuela of French parents, one of which was born there himself. Mr. Piton did not regularize his military position in France until long after the age required by the service. Mr. Piton has even exercised public Venezuelan functions at Venezuela and in foreign lands where he has been a Venezuelan consul, and yet my colleague has admitted

that he was of French nationality and that there could be given to him a large indemnity.

In another analogous case—the Massiani affair—(claim presented by heirs, enjoying two nationalities, of a Frenchman who was exclusively French), the French-Venezuelan mixed commission constituted by the protocol of Washington and presided over in 1903 at Caracas by Mr. Filtz, umpire, accorded also the indemnity demanded.

I ought to call to the attention of the umpire the inconvenience which could be presented from the point of view of the fixity of international law, which seems to disturb my colleague so much, by the establishment of two different jurisprudences, not only by two commissions so analogous and so bound together, but even by the same commission.

Doctor Paúl seems to desire to refuse to Pierre Maninat the character of a Frenchman, but Pierre Maninat is French according to French law, and the competent French authorities having delivered to him the necessary certificate the commission can not deny French nationality to this claimant. I beg the umpire to take notice that I do not refuse in any way to admit that Pierre Maninat enjoys equally Venezuelan nationality according to the Venezuelan law. I am content to maintain that, being French (it makes no difference to me if he has two nationalities), he can profit from the provisions of the protocol of 19th of February, 1902.

In the third place my colleague relies, in order to reject the Maninat claim upon the fact that Jean Maninat has not made the claim in form against Venezuela. It will suffice for me to call the attention of the umpire again to the reading of the letter of Jean Maninat of April 26, 1898, in which the interested party declares that not only he but the whole French colony demands justice. I will add that his death coming quickly has alone prevented him from forming his dossier. Besides, this death itself making the principal subject of the claim, one will grant that Jean Maninat would with difficulty have been able to make his claim himself.

In the fourth place my colleague quotes decisions rendered within the English and Italian-Venezuelan commissions. I am not acquainted with the cases in question and consequently can not judge of their degree of analogy with that before us. In a general way I consider that in a matter of arbitration precedents have no value. Equity, good sense, and the terms of the protocol are the only rules for the conduct of an arbitrator, who is not bound to conform to the contradictory opinions of his predecessors any more than to the particular law of the States, as the protocols of Washington have expressly declared.

In the fifth place Doctor Paúl maintains that the heirs of Jean Maninat have no right to make a claim for the death of their brother,

which would not have caused them direct damage. I will merely reply that Pierre Maninat was associated with his brother in the firm Maninat Brothers, and that the death of his elder brother will culminate the ruin of this house of commerce. Is not this a direct damage? Besides, is not the death alone under such conditions of a brother of whom one is the heir, even if one is not his partner, necessarily a cause of direct damage?

Finally, I maintain my opinion, supported by the declaration of the Venezuelan doctor, and upon the very sense of the words that the wound was indeed the cause of the death. It is evident that the infection would not have been produced and would not have brought on traumatic tetanus if there had not been any wound.

NORTHFIELD, *February 6, 1905.*

OPINION OF THE UMPIRE.

Juan Maninat was born at Tarbes, France, November 4, 1864, and died of traumatic tetanus May 13, 1898, at Valencia in Venezuela, unmarried, leaving as next of kin Rosa Clotilde Maninat, born at Valencia in Venezuela June 2, 1859, wife of Eulogio S. Saldías, a Peruvian, and now residing at Lima, Peru; Josefina Maninat, resident in Guatemala, said to have been born in France, the wife of Charles de Beguerisse, who was born in Mexico of parents having French nationality; Justina Maninat, said to have been born in Tarbes, France, who was married in Panama to Charles Joseph Cossé, the latter having been born at Bois-Colombes, France, August 9, 1856, now deceased, the said Justina residing at Lima, Peru; Juan Pedro de Jesús Maninat, born at Valencia in Venezuela, December 29, 1863, also Juana Maninat, born in Valencia and now residing in Lima, Peru. The father and mother of these Maninat heirs were both of French nationality and are both deceased. Pedro resided in France from the time when he was a year old to his nineteenth year, since which time until recently he has resided and done business in Venezuela. Juan came to Venezuela at some time not important to this inquiry, and later entered into a mercantile relation with Pedro, and they established their principal house at Valencia and had branches at Tinaquillo and San Cárlos. They were engaged in these enterprises at the time of the injury to Juan, hereinafter stated, but had suffered seriously from some compulsory loans to and requisitions by both the revolutionary party and the Government troops, and they also suffered much from theft and pillage and from injury to their property by the soldiers alike of the revolutionary forces and of the Government.

April 15, 1898, the Government troops stationed at Tinaquillo were under the command of General Vizcarrondo, chief of staff of General Crespo. An officer under General Vizcarrondo on that day

demanded of Juan Maninat certain supplies for his army in the nature of a requisition. Maninat refused the requisition except on the terms that an order be signed by the general, and for the purpose of obtaining this order Maninat sent an employee to the general at his headquarters. This employee was badly treated and was sent back to Maninat without the order requested but with peremptory orders to Juan Maninat to present himself at once before General Vizcarrondo at his headquarters, which order he obeyed. While Maninat was at the headquarters of the general and in his presence he was struck several times with the back of a machete by officers of the national army, was placed under arrest by the general and while under arrest and on his way to the place of his confinement he was given a severe machete wound on the side of the cheek by one of the officers then present. He was kept in close confinement by the military authorities at Tinaquillo and as late as the 18th of the month had not been permitted to meet his brother or the other members of the family who had come from Valencia to see and to assist him.

The minister of foreign affairs for Venezuela was officially informed of this matter by the French legation at Caracas on April 18, and it was officially asked that he be released from confinement, that there be an immediate investigation, a proper reproof administered to General Vizcarrondo by the Venezuelan Government, and proper satisfaction made to the injured man.

On April 19 Maninat was released from confinement on intervention from Caracas. On April 24, in a letter from Maninat, he speaks of himself as "a little recovered of his wound" and able to write to Consul Quiévreux, chargé d'affaires of France, relating the occurrences of April 15 and those which followed. In this communication he named the officer who inflicted the machete wound. All the facts necessary to a complete history of the case were easily ascertainable at that time. No reproof was administered to General Vizcarrondo or to his officers and no action was taken by Venezuela in reference to the punishment of the officer who inflicted the machete wound and no reparation was offered to France or to Maninat.

Pedro endeavored for a while to maintain the business of the company, but it resulted in failure and bankruptcy, and, later, the imprisonment of Pedro, and his release on terms that he abandon, permanently, a residence in Venezuela. He is now in Guatemala.

There is no record proof that any of these heirs were born in France except in the case of Juan. In the certificate of marriage, or the record thereof, of Justina, there is a declaration that she was born in Tarbes, France. Neither Josefina nor her husband has appeared as claimant or in anyway asserted or presented any claim against Venezuela or any right to claim anything because of the injury to or death of Juan.

In the joint letter of Clotilde Saldías, Justina Maninat, widow Cossé, and Juana Maninat, of date 1903, indited for use before the arbitrators at Caracas, it is stated that Justina and Josefina were born in France. In the letter of Pedro to the minister of France at Caracas, of date July 24, 1903, he states that Justina and Josefina are French by birth and have married Frenchmen. The records of both countries are silent, so far as appears in this tribunal, concerning the birthplace of these two ladies.

There is no proof that any of the brothers or sisters of Juan, except Pedro, ever received any benefits from or were in anyway dependent upon or connected with Juan.

The honorable commissioners failing to agree as to some of the facts in this case, and likewise failing to agree upon the rule to be drawn from those facts and applied, joined in sending this claim to the umpire for his decision. They have aided the umpire by very able opinions, stating the reasons for their respective holdings, and they have also given valued assistance to the umpire in their answers to his written questions.

The umpire is met at the outset with the conflicting claims of the honorable commissioners concerning the nationality of the claimants and its importance as a determinative factor in the case. The honorable commissioner for France is of the opinion that it is only necessary to establish the French citizenship of Juan Maninat at the time of his death to give jurisdiction to this tribunal. The honorable commissioner for Venezuela is equally certain that there must be a French citizen *in esse*, and having a demand for indemnity because of damages suffered on account of the injury to and death of Juan, in order that this mixed commission can have competency to make an award in relation thereto; hence, to settle this jurisdictional question is of primary importance. It is first to be observed that Juan Maninat is dead. He is not. Therefore, a tribunal organized under and in virtue of the convention of February 19, 1902, that it "might examine demands for indemnity presented by Frenchmen for damages sustained in Venezuela," does not exist because of damages which have been suffered in Venezuela but only in reference to damages suffered in Venezuela by Frenchmen who, as such, are claimants before this tribunal. In other words, it is not the injury done to Juan Maninat alone, but also damages suffered by Frenchmen, if such there be, through and because of the injury to and death of Juan, which give place to a claim under this protocol.

This particular reclamation rests upon the right of the next of kin of Juan to present a claim. Their ability to do so will depend upon the character of their citizenship; if any be French the claim stands; if all be Venezuelan there is no jurisdiction.

The opinion of the umpire given in heirs of Stevenson *v.* Venezuela, found in Ralston's Venezuelan Arbitrations of 1903, 438, is referred to and the attention of the honorable commissioners to this opinion is respectfully requested. It is based on a protocol of similar character in this regard, although it might be held to present a greater latitude to the claimant than the one now under consideration. The authorities referred to therein are relied upon by the umpire as sustaining him in this decision.

The honorable commissioner for France urges that in default of Frenchmen lawfully entitled to the award, the national treasury is competent to receive the same. Since this case is disposed of without reaching this proposition, the umpire does not stop to discuss it.

The language of the protocol is the work of skilled and erudite diplomatists. Every word is weighed and its force and significance are definite and certain. The language used in other protocols and its application by other tribunals are with them matters of common knowledge. The restrictive interpretation given by the umpire in this opinion follows a well-defined and quite generally constant line of decision by arbitral tribunals whenever the question has been raised and the terms of the convention were in spirit similar. It follows, that if a different rule had been desired by the high contracting parties, they would have employed words susceptible of a different interpretation. They certainly would not have made a different ruling impossible. To hold that any other than the national quality of the person presenting the claim is to determine the jurisdiction of this commission, is to declare that which is impossible under the language here used. Nothing is easier than to walk in the path so well defined by the able minds who planned and built it. Hence the rule here laid down that to be within the jurisdiction of this tribunal the claim must be presented by or for a Frenchman, *in esse*, who has sustained damages in Venezuela.

For the rules of construction and interpretation which have been of great service to the umpire, see Ralston's Venezuelan Arbitrations of 1903, pages 352 to 355, both inclusive.

It is agreed that Juan Maninat was of French nationality. His sisters Rosa Clotilde and Juana and his brother Juan Pedro were unquestionably of Venezuelan birth. Are Josefina Beguerisse and Justina, or is either of them, of undoubted French nationality? The umpire holds that the burden of establishing this essential fact is with the claimant; that such nationality is not to be assumed or conjectured, but proved. No authority needs to be quoted to sustain either of those propositions. They are elementary.

In this case there is no record proof concerning the place of birth of either Josefina or Justina, and there is no explanation made for its absence.

The case of Justina will first be considered.

In the record of her marriage she is set down as having been born in Tarbes, France. This is a declaration of fact essential to the record, made at a time when there could have been no ulterior purpose to subserve. In the joint written statement of Justina, Clotilde, and Juana, made in 1903 for the use of the arbitrators at Caracas, the birth of Justina is placed in France. In the letter of Pedro to the minister of France at Caracas, of date July 24, 1903, he states that Justina is by birth French.

Justina married Charles Joseph Cossé, who was unquestionably French, which fixed her nationality as French during his life, and by French law this nationality continued after the death of her husband, as she has done nothing since to divest her of such nationality. By Venezuelan law if she were of Venezuelan birth and Venezuelan at the time of her marriage to Cossé her Venezuelan nationality is restored to her after the death of her husband. But there is no proof that she ever was Venezuelan. There is incontestable proof that she was French by marriage and by origin, if not by birth. To strip her of her French nationality once attained by the law of both countries requires definite and satisfactory proof. If she were of Venezuelan birth, the respondent Government could easily have produced the record, as Valencia is near Caracas, and its records are easy of access.

In view of all the facts affirmative and negative the umpire has reached a conviction of moral certainty that Justina Maninat Cossé is of French nationality and competent to appear as a claimant before this tribunal.

Concerning Josefina Maninat Beguerisse, wife of Charles de Beguerisse, it is sufficient to say that she has not presented any claim before this commission and is not in any sense by any act or authority of hers a party thereto. She has apparently refrained from asking the intervention of France in her behalf in this matter, and her right to do so is wholly academic, and therefore unimportant to this tribunal.

It remains to determine whether the other next of kin, being without question French by French law, and Venezuelan by Venezuelan law, have rightful place before this commission.

A treaty is a solemn compact between nations. It possesses in ordinary the same essential qualities as a contract between individuals, enhanced by the weightier quality of the parties and by the greater magnitude of the subject-matter. To be valid, it imports a mutual assent, and in order that there may be such mutual assent there must be a similar understanding of the several matters involved. It can never be what one party understands, but it always must be what both parties understood to be the matters agreed upon and what in fact was the agreement of the parties concerning the matters now in dispute. In this case did Venezuela agree in the protocol that France

alone should name those who are Frenchmen, or did France agree in the protocol that Venezuela alone should make the selection; or does the protocol, being an agreement, imply that the word Frenchman as there used shall mean such only as are recognized by the laws of both countries? It is evident that the high contracting parties agreed on this point, and yet both parties knew that there was in fact a very essential difference in the holding of each country upon that question. How, then, could they reach a point of agreement? Only by meeting upon a ground common to both; and that common ground is the plain where by the laws of both countries the claimant is a Frenchman.

This process of reasoning seems to dispose of all genuine doubt as to what is meant by this term as used in the protocol; yet were there room for doubt the ordinary rules of interpretation would be efficient aids. Among others, there is the rule of interpretation that where the agreement is susceptible of two interpretations that interpretation is to be taken which is least onerous upon the party who must render the service or suffer the loss under the agreement.

(Woolsey, Intro. Int. Law, sec. 113. Bouvier Law Dict., vol. 1, p. 124. Ib., p. 1107; ib., p. 429; ib., 416. Bouvier Law Dict., vol. 1, p. 1106, citing 71 Wisconsin, 177.)

In a conflict of laws as to nationality the law of the place of domicile should prevail. Such was the opinion of the umpire in the Mathison case found in Ralston's Venezuelan Arbitrations of 1903, page 429, wherein are found his reasons therefor and the authorities supporting them, to which he respectfully refers without further allusion. A similar holding by him is found in the Stephenson case, same volume, page 438, and to that case, his reasons there given and his authorities there quoted or cited, he respectfully invites attention. * * * So far as they apply he adopts them to save unnecessary amplification here. He would add a quotation from Bluntschli in a note which he places in his Droit Public Codifié, sec. 374, wherein he says:

> Contrary to my former opinions, I think to-day that in case of conflict of law one ought, in favor of the liberty of emigration, to accord the preference to the nationality of fact—that is to say, to that which unites itself to the domicile.[a]

When by the law of the respondent Government the claimant is a Venezuelan, France may not intervene, as to do so would make her law superior to the law of Venezuela, which is not permissible as between two sovereign nations. The right of Venezuela, as the respondent Government, to regulate her own internal affairs and to determine who are her citizens, involving mutual protection and support, is too essential an attribute of sovereignty to be invaded or

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[a] Contrairement à mes opinions antérieures, je pense aujourd'hui qu'en cas de collision on doit, en faveur de la liberté d'émigration, accorder la préférence à la nationalité de fait, c'est-à-dire à celle qui s'unit au domicile.

disturbed. If the treaty bore unmistakable evidence that this attribute of sovereignty had been abdicated, it would be the duty of this tribunal to act accordingly, but it bears no such evidence.

When the nation insists that one who is native to the land shall under ordinary circumstances be a citizen, it is such a reasonable requirement that all nations should rest content. To all the world but Venezuela, France may follow each succeeding generation born in Venezuela, but of French origin, so long as her affections dictate or her laws require or permit, but to Venezuela, where the father established his domicile, raised his roof-tree, and reared his family, the sons and daughters there born are Venezuelans to all the world, until by emigration and selection they have foresworn allegiance to their native land and sworn allegiance to some other.

In this protocol France is permitted to intervene only on behalf of Frenchmen who are recognized as such by the laws of Venezuela, and whatever equities may exist between the claimants and Venezuela, none can be considered by this tribunal except those which are thus presented.

Pedro Maninat was born in Venezuela, passed a portion of his minority in France, attained his majority in Venezuela, and there remained by choice until several years after the happening of the events giving rise to this reclamation. Nothing which he has done since in the way of asserting French nationality affects his national quality at the time when this claim had its inception, since his right to appear in this tribunal is dependent upon the fact that he was a Frenchman when the injury was suffered of which he complains, and a Frenchman when this treaty was perfected.

Rosa Clotilde and Juana are either Venezuelans or Peruvians. They are not French in the meaning ascribed to that term by the umpire.

In the opinion of the umpire, therefore, Justina Maninat Cossé is the only next of kin of Juan who under the protocol of February 19, 1902, has that quality of French nationality which permits a claim for indemnity before this commission because of the injury to and death of her brother Juan.

Although alien born Juan Maninat had a right under the laws of Venezuela to the same protection as is granted to its nationals. He had promptly complied with the several military exactions consequent upon the disturbed condition of the nation, and in requiring the production of an order before complying with the requisition made upon him at this particular time he was taking only a proper precaution. When he entered the presence of the Venezuelan general it was the duty of that general to throw around him the protection of the Government and to make his person while there safe—absolutely safe. When he was wounded under the eye and within the power of this

general a gross outrage had been permitted, the office of the commanding general had been perverted or set at naught, and the respondent Government having intrusted this general to hold that office and stand in its stead in that community is responsible for the unlawful deeds done or suffered to be done by him. The presence of the national army and of an officer high in command should have brought to that village and to all of its inhabitants a sense of perfect security; that instead it brought to Juan Maninat threats, harsh treatment, imprisonment, and wounds, is clearly established. There results unquestioned, undebatable responsibility in the respondent Government. The extent of that responsibility alone remains to be determined.

Notwithstanding the apparent convalescence of Juan from his wound of May 15, the joint certificate of his two attending physicians, asserting his death from traumatic tetanus is proof that the convalescence was apparent only. The honorable commissioner for Venezuela speaks correctly of many causes for tetanus especially existing in torrid countries, but he has named no instance where traumatic tetanus has been certified by reputable physicians, except the primary cause was a wound or an external injury of the nature of a wound. The very name *traumatic* forbids. It is the adjective form of the noun *trauma*. Of *trauma* the Century Dictionary has this definition:

1. An abnormal condition of the living body produced by external violence, as distinguished from that produced by poisons, zymotic infections, bad habits, and other less evident causes; traumatism; an accidental wound as distinguished from a wound caused by the surgeon's knife while in operation. 2. External violence producing bodily injury; the act of wounding, or infliction of a wound.

Traumatic.—(1) Of or pertaining to wounds: as traumatic inflammation. (2) Adapted to the cure of wounds; vulnerary: as traumatic balsam. (3) Produced by wounds: as traumatic tetanus, etc.

Traumatism.—Any morbid conditions produced by wound, * * *

Tetanus.—It is occasioned either by exposure to cold or by some irritation of the nerves in consequence of local injury by puncture, incision, or laceration; hence the distinction of tetanus into idiopathic and traumatic.

Lacerated wounds of tendinous parts prove in warm climates a very frequent source of these complaints. In cold climates, as well as in warm, lockjaw (in which the spasms are confined to the muscles of the jaw or throat) sometimes arises in consequence of the amputation of a limb or from lacerated wounds.

Tetanic affections which follow the receipt of a wound or local injury usually prove fatal. * * * It is usually the sequel of wounds and injuries.

Witthaus and Becker, in their Medical Jurisprudence of Forensic Medicine, Toxicology, vol. 1, page 513, say that—

Tetanus is an infective bacterial disease, affecting chiefly the central nervous system and almost always, if not always, originating from a wound.

Tetanus, like erysipelas, is probably always traumatic and never strictly idiopathic. The wound may be so slight as to escape notice. When it follows such injuries as simple fracture, internal infection probably occurs, though such causes are extremely rare. It is said that the weather influences the development of tetanus, and that it is more common in the

tropics. There are also certain sections where tetanus is much more common than elsewhere and where it may be said to be almost endemic. * * * Tetanus usually appears about the end of the first week after a wound has been received, but it may not appear for a longer period, even three or four weeks, so that the wound may have been sometime healed. To connect tetanus with a particular wound, note (1) if there were any symptoms of it before the wound or injury, (2) whether any other cause intervened after the wound or injury which would be likely to produce it, and (3) whether the deceased ever rallied from the effects of the injury.

In the work of Allan McLane Hamilton and others, entitled "A System of Legal Medicine," Vol. II, page 585, it is said that—

Tetanus occurs most frequently in wounds accidentally inflicted, particularly in punctured and penetrating wounds, and in those in which a foreign body remains behind. Its existence is now believed to depend upon the presence of a special organism, the *Bacillus tetani*. A variable length of time is occupied in the period of incubation, according to the number of bacilli introduced (Watson Cheyne), the location of the point of infection, the anatomical characteristics of the surrounding tissues, and the capacity of the different tissues to yield the ptomaïnes under the influence of the bacillus. It is also probable that the degree of virulence governs, to a certain extent, both the duration of the stage of incubation and the severity of the attack. * * * and as the bacillus of tetanus requires the exclusion of oxygen in order to grow, it is evident that a punctured wound quickly closed offers just the conditions appropriate for the reproduction of the germ, if it has been introduced into the depths of the wound.

Trauma means, strictly speaking, a wound. The term is used justly as synonymous with an injury. Ib., 298.

When it comes to the actual trial of actions for personal injuries, there are two difficult questions, to the solution of which the testimony of the medical expert may be directed. One of these is how far the defendant's negligence is responsible for some subsequently developed infirmity or disease or, in other words, how far a given injury may be said to be the natural and proximate cause of a subsequently developed condition and therefore render the defendant liable for that condition.

The general rule is easily stated, to wit: if the subsequent disease or infirmity is one which would occur as the natural result of the injury, and it is not shown that any other independent cause existed of which it might have been the result, then the author of the original injury is liable for the subsequent disease or infirmity. Ib., 379.

From the foregoing authorities it easily develops that tetanus usually follows trauma, that it is a natural sequence of it, and that neither the severity of the laceration nor the length of time which had elapsed in this case after the wound was given, nor the apparent partial recovery have any significance in determining whether the traumatic tetanus stated by the physicians to be the cause of Juan's death was the result of the wound received on the 15th of May preceding. Tetanus from that wound was a natural result within the period which in fact elapsed between May 15 and the beginning of the tetanic attack. An early healing of the lacerated wound was an apt aid to tetanus. When the physicians in attendance ascribed Juan's death to traumatic teta-

nus, they said, in effect, that it was tetanus arising from wounds or external injuries. As no other wound or injury is even suggested, they also said, in effect, that the tetanus related back to the trauma inflicted by the machete of the officer upon Juan when he was under the care of the Government troops and in the presence of the commanding general. Since his death resulted through a line of natural sequences from a wound inflicted under the circumstances named, the responsibility of the respondent Government is the same as though death had been the immediate result of the machete stroke.

Whether the physicians who gave the certificate were intelligent and trustworthy is of course a proper inquiry. There is no question made by the respondent Government, and there is no indication in anything connected with the facts of this case which suggests the contrary.

It becomes, then, the duty of the umpire to hold that Juan Maninat came to his death because of a wound inflicted upon him under such circumstances as to impose responsibility upon the respondent Government.

In this case, unlike that of Jules Brun, there are other considerations than the loss which Justina de Cossé has suffered through the death of her brother Juan. There is no evidence that she was ever dependent upon him for care or support, or that he ever rendered either, or that she was so circumstanced as to need either, or that he was of ability or disposition to accord either. Therefore it is difficult to measure her exact pecuniary loss. There exists only the ordinary presumptions attending the facts of a widowed sister and a brother of ordinary ability and affection. Some pecuniary loss may well be predicated on such conditions. For this she may have recompense. But the more important feature of this case is the unatoned indignity to a sister Republic through this inexcusable outrage upon one of her nationals who had established his domicile in the domain of the respondent Government.

There was abundant reason, which France may well appreciate, why the respondent Government could not censure or punish the general in command or the officer who, in fact, made the attack upon Juan. The country was in the throes of a strong revolution, the supporting hand of every one loyal to the titular government was essential to its support. It could not meet successfully the possible results if it had undertaken to censure or punish the guilty parties. Silence and tacit acquiescence was the only position then open to the titular government. Since that period and prior to the sitting at Caracas of this mixed commission there had been no real opportunity for the two governments diplomatically to consider or pass upon the merits of this case, and it remained practically for this tribunal to speak the voice of regret and to tender atonement for a sad result. Justina de Cossé can be the medium of transmission of this atonement from the respondent Government to France and by a payment of money honorably answer

the just demands of the claimants and assure to the intervening Government the constant willingness of Venezuela to atone for this wrong by the only means now in her power.

The honorable commissioner for France disclaims all right to an award based upon the injuries directly attributable to the failure of Maninat Brothers as a claim consequent upon the death of Juan for reasons which he succinctly states; but he holds that some disastrous results following his death and the pillages and requisitions preceding his injury may properly move the generous impulses of the umpire when he comes to make up his award.

It is probable that the honorable commissioner for France and the umpire do not, in fact, really differ in their conception of what is equity in such a matter. But to plant an equity always requires the basic quality of a right in the party receiving, because of a wrong moving from the party to be charged with the onerous conditions of the equitable conclusion. Generosity is not equity; equity has no part in generosity. Equity exists when exactly the right thing is done between the parties. Neither more nor less than this is equity. A just conclusion only opens the door to equity. So far as the respondent Government is responsible for the wrongs suffered by the next of kin of Juan who have a right to the intervention of France because of their nationality, so far and so far only does equity require or permit action on the part of the umpire. In every respect other than this, he has no right either to add to nor subtract from. To act at all, he must find a right to claim on the part of the claimant, and a wrong to be redressed on the part of the respondent Government. Within those circumscribed limits he has liberty of and necessity for action; outside of those limits he is a trespasser. He can not be generous; he can only deal justly and equitably.

So far as the injuries to the Society of Maninat Brothers is concerned, the interest of Juan in the requisitions and pillages mentioned, which occurred prior to his death, it is sufficient to say that the claimants have had the preparation of this cause for presentation before this tribunal. No reason is given why this reclamation did not include a definite and precise statement under that head, if reimbursement was sought. It was surely capable of some degree of exactness in the statement and some degree of certainty in the proof. Neither has been attempted. By their own inattention and inaction they have deprived the umpire of all opportunity to know anything of this branch of their alleged injuries, and they must not ask him to conjecture and estimate when they might have permitted him a settled judgment, nor can they at all expect that he will add aught to his award because of these probable, but vaguely uncertain, losses which they project into this reclamation.

Because of the holding by the umpire that Pedro Maninat is a Venezuelan, it results necessarily that nothing can be considered in his behalf on account of failure of justice or denials of justice, if such occurred, succeeding the death of Juan and personal to him or to the mother of his wife, who attempted to assist him.

In naming one only of the Maninat heirs as competent to present a claim under the protocol of February 19, 1902, no inequity is done the other heirs. It does them no harm that she is not a Venezuelan, but of French nationality only. The laws of France governing the distribution of estates are not involved in this decision, neither are they invaded nor disturbed. This tribunal has no part in the final allotment or distribution of the sum which by the award herein is made payable to France, through the personality of Justina de Cossé, for whom that country has right of intervention. Over the proceeds of the award here made France has absolute dominion, so far as this tribunal is concerned, and in the perfect justice and equity of her procedure there can be complete content.

It is the judgment of the umpire that a just compensation which covers both aspects of this case is 100,000 francs, and the award will be prepared for that amount.

NORTHFIELD, *July 31, 1905.*

CLAIM OF ANTOINE FABIANI.—NO. 4.[a]

HEAD NOTES.

This claim came to the umpire after having been once heard and determined by the honorable President of the Swiss Federation, being submitted to him under the protocol of February 19, 1891, the first paragraph of which reads:

"The Government of the United States of Venezuela and the Government of the French Republic have agreed to submit to an arbitrator the claims of M. Antonio Fabiani against the Venezuelan Government."

Against the proposition that such an arbitrament and award is conclusive upon all parties the claimant urges that the Swiss arbitrator held that he had not jurisdiction over a large part of the claims and therefore was incompetent to consider and to pass upon them; that the Swiss arbitrator in fact extracted and subtracted from those claims such as he held were without his jurisdiction and only awarded concerning the rest.

The umpire holds, however, that no jurisdictional questions were before the Swiss arbitrator, none were urged by either party, and none in fact were determined; that all claims of Fabiani were in fact submitted by the protocol to the decision of the Swiss arbitrator and all were in fact decided by him.

That there were certain restrictions placed upon the Swiss arbitrator in the protocol which had the effect to limit the scope of the claims left undisposed of by the two Governments for decision by the Swiss arbitrator.

That under the protocol the Swiss arbitrator must first determine whether the Venezuelan Government was responsible for any damages to Fabiani; that this responsibility must be determined in view of the limitations of the protocol which were to the Swiss arbitrator his supreme law. These limitations were essentially that the decision was to be

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[a] EXTRACT FROM THE MINUTES OF THE SESSION OF MAY 30, 1903.

The claim of Antoine Fabiani was then taken up.

Doctor Paúl rejects it as having already been judged by the arbitral court of Berne, the award of which, in his opinion, has decided definitely on all the points of indemnity presented by M. Fabiani.

M. de Peretti, on the other hand, claims that the Swiss arbitrator has brushed aside all the points represented to-day by M. Fabiani as not being covered by the agreement of arbitration signed the 24th of February, 1891, by the two Governments. The President of the Swiss Confederation has, then, declared himself incompetent to examine the aforesaid points, which by this very fact have found themselves reserved for the examination of the commission instituted by the protocol of Paris. Consequently M. de Peretti admits the demand of M. Fabiani, which he recognizes to be well founded, and accords to him the sum which he claims.

Doctor Paúl declares that the decision taken by M. de Peretti, according to M. Fabiani the sum which he claims, has not been preceded by any discussion between the arbitrators upon the amount of the claim, which Doctor Paúl rejects for the reason already expressed—namely, that all the claims newly presented by M. Fabiani have become res judicata.

This claim will then be submitted to the examination of the umpire.

reached in accordance with "the laws of Venezuela, the general principles of the law of nations, and the convention in force between the two contracting powers."

The convention then in force between the two nations was that of November 26, 1885, and had especial reference to article 5 thereof. The force and effect of article 5 of said treaty was considered and determined by the Swiss arbitrator, and his interpretation thereof is conclusive, so far as the claim of Fabiani is concerned.

In order to determine the scope, depth, and breadth of that treaty, the Swiss arbitrator had to define the meaning of the expression "denials of justice" found in said treaty. His definition is conclusive upon the claim of Fabiani.

When the Swiss arbitrator decided the principles governing the claim submitted to him, he had decided affirmatively or negatively the different claims made in Fabiani's behalf, not in detail but in principle.

When France intervened in behalf of her national, his claim was no longer individual and private, but national.

Thenceforward it was national interests, not private interests, that were to be safeguarded. It was the national welfare and national honor which were to be considered. Should the general good of France at any time during the negotiations with Venezuela require a surrender of all of Fabiani's claims, France may make such surrender, or it may surrender a part thereof, and for such surrender Fabiani, if he has a claim anywhere, has it against his own Government.

When a nation intervenes in behalf of her national and finally consents to arbitration of the difference, the primary purpose of such arbitration is to remove the vexed question from the arena of diplomatic dissension and controversy. It is not to be considered that France would consent to submit to arbitration a part only of her national's claim, leaving large and important parts of it undisposed of, and to remain as vexatious questions between the two Governments.

Neither is it to be considered that Venezuela intelligently entered upon an arbitration of a question in dispute between the two Governments understanding that the effect of the agreement to arbitrate would be to hold her to make reparation for such an amount as might be held to be denials of justice by the arbitrator, while for all not so held she would later be compelled to again oppose them or to pay them or to arbitrate them.

Venezuela did not enter upon this arbitration by the Swiss arbitrator with the understanding that if he decided everything against Fabiani all that had originally been claimed would be left unsettled by his decision, and be restored to their primal state of existing claims for which the Government of France could intervene. Equally certain is it that she did not enter into the arbitration with the understanding that if any part of the claim were decided in her favor that part might yet be brought before another arbitral tribunal.

In that and in every similar international controversy the two Governments seeking an agreement look well for a common meeting point which is usually to be gained only by mutual concession and mutual remission of matters which *can yield* and when that common meeting point is reached to submit it to the arbitrator as the whole controversy; or as being all that which both parties will admit is the controverted question. Which mutual point of agreement is as much a matter of agreement between the high contracting parties as is the covenant to arbitrate itself and is an integral part of that covenant.

Each concession so made by one party cancels the one made by the other, so that outside the terms of the convention there is nothing left of the original contention. All which is excluded is concluded by the high contracting parties themselves. What is not found of the original controversy to be resting in the compromise is in oblivion.

Just how much is conceded and how much is retained is left for the determination of the arbitrator. It may be contended on the one hand there is nothing conceded, on the other hand that nothing is left; but the arbitrator is to decide how much is included

and how much is excluded, and, when he decides, that decision is *final and conclusive upon the whole of the original controversy.*

That which Fabiani claims to have been a subtraction by the Swiss arbitrator is in fact merely designating the different elements of his controversy which in effect the high contracting parties had agreed to eliminate and subtract in order to reach an agreement of arbitration.

So far as these concessions approaching and permitting an agreement to arbitrate finally affected the pecuniary interests of Fabiani they were in effect the especial tribute required of him by his Government to conserve its general good.

The honorable arbitrator of Berne on his own initiative eliminated nothing, subtracted nothing, and there was left for him nothing except to settle the meaning of the protocol and then to observe its effect and to point out which of the claims came within and which without the action of the rule agreed upon and prescribed to him by the two honorable Governments, settle the damages on what remained, and make award accordingly.

It follows that the protocol arranged between the honorable Governments of France and Venezuela February 24, 1891, succeeded by the award of the honorable President of the Swiss Federation December 15, 1896, were, acting together, a complete, final, and conclusive disposition of the entire controversy on behalf of Fabiani.

OPINION OF THE VENZUELAN COMMISSIONER.

Antonio Fabiani has presented before this commission a demand of indemnity amounting to 9,509,728.30 bolivars, for losses and damages comprised in the items which, he says, were eliminated by the Swiss arbitrator in his award rendered in the French-Venezuelan suit called the "Fabiani controversy," on the 30th of December, 1896, and by which award the Government of the United States of Venezuela was condemned to pay to Fabiani, by way of indemnity, in the terms of the protocol of the 24th of February, 1891, including all expenses, the total sum of 4,346,656.57 bolivars, with interest at the rate of 5 per cent a year from the date of the award.

Fabiani argues that the Swiss arbitrator deliberately subtracted from his decision, because they were not comprised in the terms of the protocol, certain sums demanded by him in his claim presented to said arbitrator and partly contained in seven separate tables, under the letters A, B, C, D, E, F, and G, which he presented to the arbitrator when the demand was formulated. These tables, as said by Fabiani himself, in his statement, page 629, had for their object to facilitate the investigations of the arbitrator and corresponded to the situation that had been created to him in Venezuela by the series of prejudicial acts on which he based his claim, and he adds, on that account, the following consideration:

Although the whole links together without solution of continuity, we have thought that it was convenient to keep a certain chronological order and take into consideration the time when the damages were caused and when they exercised their influence on our fate and on the destinies of our commercial establishments.

The demand entered by the Government of the French Republic, plaintiff, against the Government of Venezuela, defendant, before the

President of the Swiss Confederation, appointed arbitrator by a protocol signed in Caracas on the 24th of February, 1891, referred to the decision of said arbitrator the question as to whether—

according to the laws of Venezuela the general principles of the law of nations and the convention (of the 26th November, 1885) in force between the two contracting powers *the Venezuelan Government was responsible for the damages which Fabiani claimed he sustained through denials of justice,*

and the arbitrator was also charged with the duty of determining—

in case this responsibility was recognized, *as to all or part of the claims in question*, the amount of the pecuniary indemnity that the Venezuelan Government ought to pay into the hands of M. Fabiani, which payment would be made in funds of the Venezuelan 3 per cent diplomatic debt. (Arbitration protocol of 1891.)

The demand was entered to obtain the reparation of damages caused by denials of justice through acts imputed to the administrative and judicial authorities of the Republic of Venezuela, for which damages the state ought to be responsible and which comprised:

First. The reparation of the damage sustained;

Second. The gain frustrated;

Third. The interest calculated from the date of the damageable acts;

Fourth. The compound interest;

Fifth. The sacrifices made by the injured party for the maintenance of his industry;

Sixth. The prejudice deriving from the expense made and from the time lost to arrive at the execution of the sentences;

Seventh. The damages to be considered as the necessary consequence of the offenses;

Eighth. The damage done by the privation of work in the future; and

Ninth. The reparation of the moral prejudice.

The demonstrative table of the claims of Fabiani was annexed to the demand with determination of the several items for capital and capitalized interest, amounting to the total sum of 46,944,563.17 francs.

The Swiss arbitrator, in determining the object of the demand referred to his decision, fixed the reach that he considered necessary to attribute to the words "denial of justice," construing that the powers which signed the compromise had given to said words their widest meaning and had meant by them—

all the acts of judicial authorities which might imply a direct or disguised refusal to do justice.

Said arbitrator determinately says in the award in question: The duty of the arbitrator precisely consists in deciding whether Venezuela—

is responsible for the damages which Fabiani says to have sustained through denials of justice. * * * Thus the *object of the controversy* and its origin are acknowledged by the parties; it was on account of the refusal of the execution of the award of the 15th December, 1880, which Fabiani possessed against two debtors domiciled in Venezuela or on account

of the default of execution owing to the admission of illegal recourses that France took the interests of her native into her hands.

The Swiss arbitrator also declares that—

Venezuela does *not incur any responsibility* according to the protocol, on account of facts foreign to the judicial authorities of the respondent Government.

Fabiani now maintains, more than six years after the sentence of Berne became affirmed, that the Swiss arbitrator deliberately eliminated the *faits du prince*, because he considered them excluded from the terms of the protocol. It does not appear from the careful examination of that sentence that the arbitrator had eliminated any fact directly or indirectly connected with the fundamental *cause* of the suit and with *its object*, namely, *the denials of justice and the claims that Fabiani had presented*, pretending that the Government of the Republic was responsible for all of them. The arbitrator eliminated some of those claims, because the facts on which they were based did not make Venezuela incur any responsibility, as they were strange to the judicial authorities of the respondent state. The arbitrator expressly declares that some—

of those claims based on *faits du prince*, which are either changes of legislation or arbitrary acts of the executive power, are absolutely subtracted from his decision, wherefore he eliminates from the procedure all the allegations and means of proof relating thereto, as long as he can not reserve them to establish other concluding and connected facts relating to the denials of justice.

And the Swiss arbitrator adds thereupon, in the motives of the sentence, the following declaration:

It is certainly the denials of justice committed in the course of the proceeding for the execution of the award of the 15th of December, 1880, *and the eventual appreciation of their pecuniary consequences* that form the object of the present litigation. It is, however, necessary to remove another objection of the petition.

The judicial position of Fabiani in Venezuela was first liquidated by the compromise of the 31st of January, 1873. After a series of incidents Fabiani renounced the benefit of this act and signed the compromise that gave birth to the award of 1880. The plaintiff has stated that he adhered to this compromise under the empire of main force and that it did not cover *the prior denials of justice*. But he (the plaintiff) recognizes without hesitation (petition, p. 142, et seq) that Fabiani, who could have had the compromise annulled by the French courts, preferred to reserve the future of his commerce in Venezuela by exhausting all means of conciliation. Fabiani thus contented himself with the state of things created by the acceptance of the arbitrators' jurisdiction, and, besides, from that moment his judicial efforts in Venezuela only tended to the execution of the judgment of the 15th of December, 1880. The motive drawn from the *vis major*, which would have affected the compromise of 1880 and would remove farther back the starting point of *the denials of justice* comprised in the present instance can not be taken, therefore, into consideration. Denials of justice in virtue of which it would be possible to proceed against Venezuela for responsibility before the arbitrator could not have taken place before the introduction of the proceeding for the execution of the award of the 15th of December, 1880, or before the 7th of June, 1881, the date of the petition for the *exequatur* entered before the high federal court.

The arbitrator has not, therefore, admitted besides the *faits du prince* any of the facts foreign to the nonexecution and to the effects of the nonexecution of the sentence above referred to to be proved.

It is seen from the foregoing insertion that the arbitrator, exercising his wide powers of appreciation, left out of consideration any fact, whether a denial of justice, prior to the 7th of June, 1881, when the demand of execution of the sentence of Marseilles was entered before the high federal court, or those called *faits du prince*, that he could not reserve with a view to prove other concluding and connected facts relating to denials of justice. That elimination of proofs and allegations concerning facts entirely strange to the mission of the arbitrator, which precisely consisted in deciding—

whether Venezuela was responsible for the damages which Fabiani claimed he sustained through denials of justice,

does not constitute, on any reason of law or of procedure, a declaration of incompetence or of want of jurisdiction on the part of the arbitrator, with regard to some particulars of the demand, but only establishes that some of those particulars or the facts upon which they rested, were destitute of the conditions necessary for their being accepted *as the consequence of denials of justice*, and, therefore, for their being admitted by the arbitrator as elements of appreciation tending to cause Venezuela to be declared responsible for the damages that Fabiani claimed as the consequence thereof and as the object of the demand.

The Swiss arbitrator did not fail to appreciate some of those *faits du prince* which, while not establishing an intimate connection with the acts of denial of justice, contributed in the mind of the arbitrators to form appreciations as to the extent of the guilt and the amount of the damages recognized in favor of Fabiani. Such is collected from the motives of the sentence of the arbitrator, contained in page 30:

Different indications make one believe that the respondent Government openly hostilized Fabiani and that this position might incite or encourage the judicial authority, at least in the provinces distant from the capital and without the control of a watchful public opinion, *to ignore the rights of a foreign plaintiff*, to whom influential persons of the state would not conceal their hostility. Such is the official approval of the 21st August, 1883, given to the cession, consented by B. Roncayolo, of the contract of the La Ceiba Railway, *although it was notorious in Venezuela that that cession had for its object to diminish or annihilate the pledges of a creditor* (*faits du prince*). Such appears also to be the modification adopted by the legislation of the state of Falcón in articles 5 and 7 of the organic law of the judicial power in January, 1883 (*faits du prince*); *such was* also the withdrawal of the towing service which under the circumstances and at the time it was decided had to be interpreted as an act of reprisal directed against Fabiani (*faits du prince*).

It is not possible to fail to recognize, according to a sound logic, that the Swiss arbitrator gave those *faits du prince* all the importance that he was permitted to give them within the terms of the arbitration compromise; that he consciously appreciated them, inferring from them serious consequences to the extent of considering them as a *manifestation of the fact that the government openly antagonized Fabiani; encouraging and inciting the judicial authority* to perform the

acts considered by the arbitrator as denials of justice, and finally that they (the *faits du prince*) under the circumstances they occurred had to be considered as acts of reprisal directed against Fabiani.

In virtue of that appreciation the Swiss arbitrator established that the responsibility of Venezuela for the acts properly called of denial of justice was tantamount to, at least, the one deriving from "offenses and *quasi delicts*" and that it obliged Venezuela to compensate all the damage that might reasonably be considered as a direct or indirect consequence (*damnum emergens et lucrum cessans*); and it was in virtue of that appreciation that the arbitrator, when declaring the respondent Government responsible for all the consequences of the denials of justice imputable to the judicial authorities of Venezuela, determined the extent of those consequences in the widest manner, liquidating the return of damages and prejudices presented by the claiming government in the manner determined by chapter 6 of the award, page 42, estimating the direct damage and the moral prejudice, the indirect damage, the compound interest, the gain frustrated, the execution expenses, and the costs of the instance.

To prove, furthermore, with the very arguments of Fabiani that the actual purpose of the arbitration process at Berne, determined by the general terms of the compromise of the 24th of February, entered into between France and Venezuela, was to have the question decided as to *whether there had been any denial of justice*, for which decision the arbitrator had to appreciate *all the facts and all the incidents connected* with the suit, and, if there had been any, to fix the amount of the pecuniary indemnity corresponding to all or some of the claims presented by Fabiani, it suffices to reproduce the very statement presented by the claimant to the Swiss arbitrator, most properly determining the object of the suit. In page 4 of the *réplique* to the answer of the Government of Venezuela, Fabiani copies the statement of motives presented by the French Government concerning the demand of indemnity. Said insertion, taken from the note addressed by the legation of France in Caracas to the Government of Venezuela, runs as follows:

> In the opinion of the French Government, the reparation ought to comprise, at least, in the first place, the amount of the sums, in capital and interest, the collection of which would have been assured by the execution in due time of the sentences and, besides, the restitutions ordered by the judges and which would represent about one million five hundred thousand francs (1,500,000 francs), and, in the second place, damages and prejudices, *the figure of which would have to be discussed, for the damage caused to Fabiani in his credit and in his commerce.*

These three points are those comprised in Tables A, B, C, D, and E of the petition (pages 644, 747, 797, and 817 of the statement).

The French note adds (page 3 of the defense):

> As to the rest of his pretensions, a serious contradictory examination ought to determine in what measure they are grounded.

What are these pretensions? Fabiani proceeds. The affairs of the tugboats and of the La Ceiba Railway:

What was the reason of so much reserved a formula? Why those reticences? The explanation thereof will be found in the last paragraph of page 527 of our report. * * * That *as to the object of the litigation—that is to say, the claims of M. A. Fabiani that the Government of the United States of Venezuela and the Government of France have agreed to refer* to an arbitrator. (Treaty of Caracas of the 24th of February, 1891.)

In page 6 of the Réplique Fabiani says:

We shall only point out, 1st, that the note on the opening of the negotiations designates *all the commercial prejudices* that are now the object of Tables A, B, D, and E of the Report; 2d, that the same note makes known that the *rest of the pretensions* of Fabiani must be submitted to a serious and contradictory examination; 3d, that the amounts are *undetermined for all our* claims except for account A, the amount of which indicated under the reservation of the word "approximately" has not undergone other modifications than the increase of interest, the reparation of an omission (No. 7 of Table A), and the incorporation of dotal annuities.

In page 11 of the same Réplique:

It is important to observe that the word *claims*, twice enunciated *in the protocol, applies to the pecuniary claims and only to them.*

In page 13:

They shall have to decide, 1st, whether, according to the laws of Venezuela, the general principles of the law of nations and the convention in force between the two contracting powers, the Venezuelan Government *is responsible for the damages which Fabiani says to have sustained* through denial of justice; 2d, to fix, in case this responsibility should be recognized *for all or part of the claims in* question, the amount of the pecuniary indemnity which the Government of Venezuela ought to pay into the hands of M. Fabiani, which payment will be made in bonds of the Venezuelan 3 per cent diplomatic debt.

Such are the terms of the protocol. They are so clear and precise that they require no interpretation. They give the arbitrator the right to search out the denial of justice, *to point out to it where he may find it and disallow our* demand, if the denial of justice does not exist. *There is no more tedious a task than to have at every moment to demonstrate what is evident.*

In the same page:

Certainly the refusal of execution of the sentence exists in the process *as an important element* among the numerous denials of justice that we denounce against Venezuela; but the resistances of the Cabinet of Caracas, unwarranted both as to their form and reasons, its absolute refusal to agree to friendly negotiations, have led our Government not to sacrifice anything for the sake of peace and *to demand an express compromise conceived in general terms in order to protect all the rights, all the interests of the French citizen who asked for its protection.*

In page 16:

In our judgment the question may be considered from another point of view, that of the terms of the protocol, general terms which authorize the arbitrator to appreciate any denial of justice duly proved, and permit Fabiani to *present all the pecuniary claims relative* to damages sustained through *denials of justice.*

(The pecuniary reparation is the effect, the denial of justice is the cause).

If Fabiani formulates *claims* having *another cause than* the denial of justice, *or if it should not clearly appear that they are imputable to a denial of justice, the arbitrator shall purely and simply disallow them, because they will be without the limits of the protocol,*

that is to say, without the law and not without his competence; the protocol was the law);

and, if he recognizes the responsibility of Venezuela he will point out, in the proportions *his conscience may suggest him*, all the damages he may judge to be the direct and immediate consequence of the infractions committed by Venezuela.

It will be permitted to us to add that, even if the protocol instead of being conceived in general terms should have established *all the details of the litigious points*, it would not be necessarily inferred therefrom that every motive or claim that was not expressly enunciated in the protocol should be set aside, without any discussion, as being without the terms of that protocol.

If no other difference is the question, *or if the question is a difference posteriorly occurred between the parties;* if the new motives of demand, although they are not expressly specified in the protocol, *are found therein*, however, *virtually comprised, whether as an integral part of the litigious points designated*, or as a consequence thereof; if the source of those motives is found in the compromise; if the demand *is not different* from those which the compromise has foreseen and *the settlement of which it has had in view;* and, finally, if the motives they pretended to have set aside might later give place to the *same debates* as those enunciated in the protocol, *the arbiter may appreciate the merits of those motives and include them in his decision.*

The new Denizart arbitration No. 10 is not less precise. The arbitrators may take cognizance of the accessories of the instance and of all those incidents in such a manner connected with the case, that it would happen, if the judgment thereof were omitted, that the parties would always be divided by the *same question* that had been the object of the protocol.

Therefore, when *motives* of demand not expressly enunciated in the protocol are connected with the case itself in such a manner, that, if the judgment thereof were omitted, the parties would be left *in the presence of the same* litigation, the arbitrators are competent to take cognizance thereof. Might it not be added that, if they were openly set aside, the decision might be considered as rendered without the terms of the protocol?

It appears to us to be very difficult to imagine an arbitration in which *the motives* of demand, which they *pretend to have set aside under the pretext that the same are without the protocol*, may exhibit a greater connection with the facts that are found expressly enunciated therein. Not only they would be supported in this judgment on the same means and would require the same debates *as the motives*, the admissibility of which is not discussed, but it could not be ignored that *it would be impossible to soundly appreciate the merits of the other motives*, if the first denials of justice, *the causes which have been the motive and the purpose of the denials of justice and are*, therefore, *the essential part*, the ground of the suit, were not, after having constantly drawn the attention of the judge, to be considered as one of the litigious points submitted to his decision.

The evident purpose of the arbitration, which purpose is justified by the general terms of the treaty of the 24th of February, 1891, has been to decide *whether there has been denials of justice; to fix, if there has been any, the damages imputable to the denial of justice, not some damages, but all the damages that Fabiani claims to have sustained; to determine the amount of the reparation and to put a definitive end to the difference arisen between France and Venezuela.*

It is important that the decision to be rendered may, conformably to the noble and pacific formula of the peace tribunals, declare any new claim of Fabiani for denial of justice *inadmissible.*

Everything tends, therefore, to prove that the identity of the nature of the demand, the absolute similitude of the motives invoked, the links of absolute connection uniting the alleged new motives with all the others would recommend, if the protocol offered any

obscurity, *that questions the inadvisibility of which appears proved by all the circumstances of the suit should not be separated.*

In the statement of Fabiani, he says, in page 615, when dealing with the extent and justification of the damages and losses, the following:

If the arbitrator, after having examined and analyzed *our different motives of claim*, should be induced to recognize *that all those motives are justified* and that we have valued our damages without any exaggeration, Venezuela could congratulate itself at its insistence in having a little equitable mode of payment accepted, since the sums it would be obligated to deliver to us would not represent the actual amount of the indemnity that may be adjudged to us by the award; so that it would not be exact to say that the author of the infraction has paid and we have obtained the amount of the damage fixed by the arbitrator. And if it should be admitted that the judge, acting *either by way of elimination or by way of reduction*, should find that there is a reason *to restrict the measure of our damages*, valued in specie, when taking into consideration its conversion into 3 per cent bonds, at the price of those values, he could not, even if he should allow to us the whole of our demand in bonds, assure to us an integral restitution unless his valuations, *determined absolutely according to his conscience*, cause our claims to undergo a strong reduction.

Now, therefore, in short, if the arbitrator finds that our valuations have been made justly, measuring the damage sustained, he will regret when rendering his sentence not to be able to assure to us a restitution *in integrum*. And if he considers it equitable to make us sustain a reduction *in some of our claims, or even if he holds that some of them must be set aside*, he will find himself, despite of his taking into consideration the quotation of the bonds, in the presence of a true lesion, unless he considers himself to be in the case of reducing, *in a notable proportion*, the amount of our claim.

In page 622 of his statement, Fabiani, as if he prejudged the decision of the Swiss arbitrator, and as if he himself were dictating the award that this commission of arbitration must render upon his present claim, states the following:

The arbitrator being, as every tribunal, vested with a sovereign right of appreciation, with a real discretional power to fix the amount of the reparation without the obligation of expressing the motives that may induce him to give this sum instead of another, the arbitrator, we say, in allowing a lump sum is not obligated to render his award in accordance with the proofs furnished by the parties or to indicate the details of the various elements serving to determine the just measure of the damage. The compromise purely and simply vests him with the duty of *fixing the amount of the indemnity, if the responsibility of Venezuela is found to be grounded.*

The arbitrator acts with the plenitude of his independence, having no other guide than his lights and his love for justice, *he inquires; whether such a prejudice or such a damage* has been *the direct and necessary consequence of the infractions that have engaged the responsibility of the defendant*; from the moment his judgment and his conscience give him the conviction *that the prejudices and damages can not* be separated from the reproached infractions, *that they can not* have had other causes, he is dispensed with deviating into the labyrinth of more or less immediate or more or less remote consequences, and especially in our affair it will be easy for him *to convince himself that no intermediate fact* has come to divide *responsibilities;* that no occurrences alienate from the reproachable facts imputed to the author of the infraction *can have exercised or has exercised any influence, however small it may be*, on the disastrous *consequences of the facts charged.* It is those acts, namely, the illegal obstacles *opposed to the exercise* of our rights, the *faits du prince*, in the most brutal acceptation of this word, that constitute the *only cause of the losses we have sustained*, and it is impossible even to suggest that other causes would have produced the same losses and the same disastrous effects, if those *obstacles* and those *faits du prince* had not existed.

It may be that *the study of our affair, and the detailed examination of the numerous items of our claims* suggest to the arbitrator either the opinion that some of our claims *have no direct and immediate connection with the infractions* denounced, or the opinion that certain damages indicated by us *must be fixed at a less high figure. That is the right of the arbitrator, and the exercise of that right is subordinated only to the inspirations of his conscience.*

After these clear avowals and clear statement made by Fabiani of the object of the demand decided by the Swiss arbitrator, of the connection of all the points of the claim, of the possibility that some of those items of the claim might not have a direct or indirect connection with the infractions constituting denials of justice, of the power recognized in the arbitrator to proceed, by *elimination or reduction,* to fix the amount that Venezuela was to pay, in case its responsibility were established, setting aside everything that might not be considered as grounded within the general terms of the protocol, in order to arrive, *by accepting all or part of the claims in question,* at an end of the difference or demand between France and Venezuela, we can only regard as a chimera the pretention that the award of Berne left without a definitive decision any of the claims of Fabiani against Venezuela that were the subject of the suit. The grand total of the claim that Fabiani made amount to the sum of 46,944,563.17 francs, and the Swiss arbitrator fixed at the sum of 4,346,656.51 francs, was the object of the suit, the subject-matter of the analysis, the proofs and debates, as to what the arbitrator was to allow for denials of justice, if these were proved. *The facts debated* were all those that Fabiani alleged as the grounds of the different items of the claim; the powers of the arbitrator to judge and decide, those that the arbitration protocol of the 24th of February, 1891, conferred upon him, without limitations of appreciation; the law or norm to which he was to conform his judgment and the decisions of his conscience, the denial of justice on the part of Venezuela, duly established; the effect or result of that judgment and of that sentence being *the object of the demand,* the determination of the amount of the indemnity, recognizing *all or part of the claims in question* or declaring Venezuela exempted from responsibilities.

The arbitrator, exercising his sovereign powers of appreciation, eliminated, when fixing the amount of the indemnity, *points* or sums of the claim of Fabiani, because he considered them as absolutely excluded from his decision, as they rested on facts alien to the denial of justice. In making this elimination, *he judged, rejected, eliminated, or disallowed them* (these are synonymous words), because they did not represent effects or consequences of denials of justice, *the only cause which, according to the protocol, made Venezuela incur responsibilities.*

Amply exercising also his powers of appreciation, he considered some facts as denials of justice, he considered the responsibility of Venezuela aggravated by the existence of certain *faits du prince,* as indications of the hostile attitude of Venezuela against Fabiani and

motives of incitation for the judicial authorities to the denial of justice; and he made use of the means of proofs and allegations with the purpose to establish the existence of other concluding and connected facts relating to the denials of justice.

By the proceeding of elimination and reduction of the several sums to which Fabiani made his claim amount, the arbitrator fixed, as the total indemnity that Venezuela was to deliver to Fabiani, the sum of 4,346,656.51 francs for the following respects:

	Francs.
1. Roncayolo's debt	424,177.55
2. Income for pilot service for December, 1877, to the 15th of July, 1882	68,312.45
3. Income for towing service from 1880, 1881, to the 15th of July, 1882	254,166.51
4. Expenses for the execution of the sentences, including interest	200,000.00
5. Material and moral damage caused Fabiani by his bankruptcy	1,800,000.00
6. Indirect damage, compound interest, and an indemnity for the profit that Fabiani might have derived in his business from the investment of the sums 2 and 3, taking into consideration the realization of a mortgage for 120,000 francs	1,500,000.00
7. Costs of the international instance	100,000.00
Total	4,346,656.51

It is evidenced by the foregoing demonstration that the Swiss arbitrator decided all the connected points of the claim of Fabiani that are minutely determined in the nine paragraphs comprising the object of the demand, according to the classification made by the arbitrator in page 11 of the sentence, namely:

First, the reparation of the damage sustained;

Second, the gain frustrated;

Third, the interest calculated from the date of the damageable acts;

Fourth, the compound interest;

Fifth, the sacrifices made by the injured party for the maintenance of his industry;

Sixth, the prejudice deriving from the expense made and from the time lost to arrive at the execution of the sentences;

Seventh, the damages to be considered as the necessary consequences of the offenses;

Eighth, the damage done by the privation of work in the future, and

Ninth, the reparation of the moral prejudice.

The sentence of the Berne tribunal fixes the amount of the indemnity for all the aforesaid causes in a less sum than that established by Fabiani, the arbitrator using in this point his free power of appreciation, but admitting in principle all the conclusions of the demand.

Such is expressly declared by the sentence in its final paragraph C, Part VI, page 47, running as follows:

As to the cost of the present instance, the arbitrator, making it to appear that the conclusions of the petition are adjudged in principle, but that the exaggeration of the claims put forward has occasioned useless expense, charges the respondent Government with the

expense of the claiming government, liquidated at the sum of 100,000 francs, and compensates between the parties the expense of the arbitration.

For all the reasons above expressed the arbitrator for Venezuela is of opinion that, as there exists an award passed and affirmed on all and every one of the points comprised in the demand decided by the Swiss arbitrator, and originated by the claims of Antonio Fabiani against the Government of Venezuela, in accordance with the compromise entered into between said Government and the Government of France, on the 24th of February, 1891, every new demand of indemnity on the part of Fabiani referring or confined to the same claims that were the object of that protocol and of the subsequent suit and sentence, tried and rendered by the tribunal of arbitration at Berne, is inadmissible.

He, therefore, absolutely rejects the demand of indemnity which has given a motive for this opinion.

CARACAS, *May 30, 1903.*

NOTE BY THE VENEZUELAN COMMISSIONER.

The French arbitrator was of opinion that, as there was no sentence passed and affirmed on the points of this claim, he admitted it for its integral amount, and consequently, as appears from the records of the proceedings, it was referred to the decision of the umpire.

OPINION OF THE FRENCH COMMISSIONER.

Doctor Paúl has, without examining it deeply nor discussing the figures submitted by the claimant, rejected the claim presented by M. Antoine Fabiani as

having already been decided by the court of arbitration of Berne, the sentence of which has, in his opinion, passed definitely upon all the leading points of the indemnity presented by M. Fabiani.

The Venezuelan arbitrator considers that the President of the Swiss Confederation has eliminated a certain number of the points of the claim because the facts upon which these are founded, being foreign to the judicial authorities of the respondent State, do not make Venezuela responsible. This elimination does not constitute in his eyes a declaration of want of jurisdiction based upon the terms of the agreement of the 24th of February, 1891, but it would establish that these facts are not of a nature to justify the demands for indemnity. It is upon this theory that M. Lachenal would have definitely put them aside. Consequently M. Fabiani could not, according to Doctor Paúl, be admitted to present before the court of arbitration appointed by the protocol of the 19th of February, 1902, a new claim, his cause having been already entirely and definitely settled. Finally, my honorable colleague observes incidentally that M. Fabiani has waited six years since the award of Berne has been effective for setting up his new claim. On the contrary, from the reading of the award rendered the 30th of December, 1896, by the President of the Swiss Confederation,

I have concluded that the arbitrator had set aside all the points renewed to-day by M. Fabiani, not because they could not in anyway place the responsibility upon Venezuela, but only because they are not in accord with the agreement of arbitration signed the 24th of February, 1891, by the two Governments. M. Lachenal has then contented himself, in my opinion, to declare himself incompetent to examine the said claims, which by this very fact find themselves reserved for the examination of the court of arbitration instituted by the protocol of February 19, 1902. He has in no way decided that these main points, upon which he has refused to render a decision, could not form the object of any demand for indemnity. After having said in fact, on page 22 of the award:

> It results, from the evidence of the very text of the agreement and from the *ensemble* of the facts of the case, that the respondent Government is sued solely by reason of the non-execution by the Venezuelan authorities of the arbitral award rendered at Marseilles on the date of the 15th December, 1880, between Antoine Fabiani on one part, Benoit and André Roncayolo on the other part.

M. Lachenal adds, on page 25:

> In return Venezuela does not incur any responsibility, according to the agreement, on account of facts foreign to the judicial authority of the defendant State. The claims which the petition bases upon *faits du prince*, which are either changes of legislation or arbitrary acts of the executive power, are absolutely withdrawn from the decision of the arbitrator, who eliminates from the procedure all the allegations and means of proof relating thereto, as long as he could not reserve them to establish other concluding and connected facts relative to the denials of justice.

In his desire to state very precisely the object of the litigation following the agreement, M. Lachenal even fixed the date (June 7, 1881) after which the denials of justice ought to be produced in order that by their act it might be possible according to the agreement to again hold Venezuela to responsibility. Is this to say that for every denial of justice previous to this date M. Fabiani would not have been able to demand indemnity from the Venezuelan Government before any tribunal had it, like this one, the most extended jurisdiction? It would not be more unreasonable and more unjust to pretend that to refuse to M. Fabiani the right of a compensation from the fact of the main point of the claim which he raises again before this new court. The declaration of want of jurisdiction of the arbitrator is clear, but it does not constitute in any way a patent of irresponsibility for Venezuela because of arbitrary acts of its government prejudicial to M. Fabiani, who remained free to demand reparation before a court of which the jurisdiction would not be limited, as that of the court of Berne, by the terms of a restrictive compromise. Such is the case of the court of arbitration instituted by the protocol of the 19th of February, 1902, which regards in a general way, of whatever nature they may be, all the demands for indemnities presented by Frenchmen and founded on acts anterior to May 23, 1899.

This time the Venezuelan Government can not maintain, as in 1891, that only denials of justice of a special character can fix the responsibility upon Venezuela. Besides, a great number of claims presented to the courts of arbitration which sat last year at Caracas had precisely for a foundation, not denials of justice chargeable to the judicial power, but to *faits du prince* analogous to those of which M. Fabiani has been the victim, and there resulted for the Venezuelan Government condemnations to very extensive pecuniary reparations. Besides, one can not allege a grievance against M. Fabiani for having waited to present his new claim until a court of arbitration should have been formed to judge it. One knows, in fact, that the decision of the arbitrator of Berne, on the one hand, bears the date of the 30th of December, 1896, and, on the other, from 1895 to 1903 all the claims of the French against the Venezuelan Government have remained in suspense, the diplomatic relations between these two countries being themselves suspended. I consider in consequence that the plea of *res judicata* can not reasonably be invoked.

The main points of the claim presented by M. Fabiani have not been adjudged by the arbitrator of Berne. He has not been able then to declare that they did not permit absolutely any demands for indemnity. M. Lachenal has not raised the facts by reason of which M. Fabiani demands to-day some indemnities except as indications of the ill will of the executive power. He has thereby recognized their existence and established their injurious character. M. Fabiani then only uses a legitimate right in reclaiming before this new jurisdiction with unlimited power in whatever concerns the French claims previous to the 23d of May, 1899, an equitable reparation for the large damages which these acts have caused him.

In referring to the memoirs prepared by the interested party one is seized with astonishment at the multitude of arbitrary acts of every kind which M. Fabiani proves by his invincible arguments and authentic documents he has had to suffer since his establishment at Venezuela. During my sojourn in this country I have found, whether at Caracas or at Maracaibo, among established foreigners and the Venezuelans that no attachment with the Government prevents from being impartial, a unanimous agreement in recognizing that M. Fabiani had been pursued for long years by the hatred of the executive power of which the evident end was to strip him of his capital and the fruits of his labors without anything in the conduct and attitude of this foreigner justifying or even explaining such animosity. I have read with attention the memoir and the conclusions remitted by M. Fabiani. I have not found therein any inaccuracy nor any exaggeration. I have found to the contrary, as in the dossier of the proofs furnished in support, the constant care to be minutely precise. As moreover none of his demands have been contested in the founda-

tion and in the figures by the respondent Government, it has not appeared possible to me to put them aside or to reduce the amount. I have consequently accorded to M. Fabiani the indemnity which he claims.

Doctor Paúl has insisted on having stated in the minutes of the meetings of the commission that my decision had not been preceded by any discussion between the arbitrators upon the amount of the claim which he rejected for an interlocutory reason. It is really because my colleague has not discussed the figures presented by M. Fabiani that I have been under the obligation of accepting them as a whole. They have not seemed to me exaggerated, and the interested party has naturally not furnished me with the means of contesting them. I am, moreover, far from believing, if I may judge by the defense remitted to the arbitrator of Berne, that the Venezuelan Government has not been sorry to intrench itself behind the plea of *res judicata* by means of an interpretation of the award which seems to me inadmissible. Conscientiously, then, I judge that the Venezuelan Government ought to turn over to M. Fabiani as an indemnity a sum of 9,509,728.30 francs.

In conclusion, I think I ought to submit two considerations to the particular attention of the umpire.

First, one can notice in running through the memoir presented by M. Fabiani to the arbitrator of Berne and the award of M. Lachenal that all the figures asked by the claimant and retained by the arbitrator as comprised in or receiving their source in the award of Marseilles have been recognized as exact and admitted by M. Lachenal without any reduction. This observation is not without value and ought to remain present in the mind while one examines the figures presented in course of this claim. It is honorable for M. Fabiani, whose example in this is very rarely followed by foreigners who enter complaint against Venezuela.

Moreover, it is to be considered that according to the terms of the protocol indemnity ought to be paid in bonds of the diplomatic debt and not in gold. Thanks to this concession, granted by the French Government to the Venezuelan Government in order to allow it to pay its debts with greater ease, the amount of the indemnity becomes singularly reduced in reality. The bonds issued by the Government of Caracas have a real value, which is always very much less than their nominal value. In May, 1903, they reached a depreciation of 30 per cent. In December, 1903, they sank to 70 per cent of their value. For some months their real value seems to have stopped at 40 per cent of the nominal value. It would be, then, if the umpire should partake of the sentiment of the French arbitrator, a little less than 4,000,000 bolivars in gold which Fabiani would receive and the Government of Venezuela would have to remit.

August 2, 1904.

ADDITIONAL OPINION OF THE VENEZUELAN COMMISSIONER.

Before preparing the opinion I submitted at the sitting of May 30, 1903, which I submit herewith, translated into English, rejecting the claim filed by A. Fabiani against the Government of Venezuela for the amount of 9,509,728.30 francs, I made a complete investigation of the facts upon which the claimant bases his contention. It was after becoming thoroughly acquainted with the peculiar circumstances of the case and based on the reason contained in my opinion as aforesaid that I rendered the following decision:

That because there existed a condition of *res judicata* covering each and every one of the points contained in the case decided by the Swiss arbitrator, originating in the claims of Antoine Fabiani against the Government of Venezuela, in accordance with the convention made between the latter Government and that of France on February 24, 1891, any new claim for indemnification made by Fabiani is inadmissible if referring to or containing the same contentions which originated said agreement and the subsequent hearing of the case and sentence passed by the Arbitration Court of Berne.

The French commissioner, at the session above referred to, did not go beyond stating his opinion that the Swiss commissioner had laid aside all the points originating the claim entered anew by Fabiani as not included in the arbitration agreement signed on February 24, 1891, by the two Governments, and that the President of the Swiss Confederation having declared himself disqualified to examine the several complaints on the same grounds above mentioned, such contentions were therefore a proper subject of investigation by the commission created by the Paris protocol. M. de Peretti ended by admitting Fabiani's claim, acknowledging its sound basis, and granting the full amount of the claim.

In order to be able to fully understand the points relating to the convention made on February 24, 1891, between the French and the Venezuelan Governments, the object of said convention, the ends both Governments endeavored to attain, the extent of the arbitration agreement entered into, the claims that were to be properly admitted to the examination and decision of the umpire at Berne, and in order to properly establish if M. Fabiani may or may not introduce before this commission a new claim embracing facts and circumstances antedating said convention, but included in the arbitration agreement and submitted to examination and decision at Berne in compliance with the protocol of 1891, it becomes necessary to bring before us the precise language of said convention and the antecedents or official communications passed through diplomatic channels preceding such convention and which sufficiently explain the causes originating the arbitration agreement, the nature and circumstances of the facts or claims entered by M. Fabiani, and the action the French Government deemed proper to enter against the Government of Venezuela *in order to safeguard all*

the rights and all the interests of the French citizen who had invoked its protection.

I beg to submit herewith Spanish and English copies of the convention made in Caracas on February 24, 1891, between the representatives of the French and the Venezuelan Governments, the first paragraph of which contains the following language:

> The Government of the United States of Venezuela and the Government of the French Republic have agreed to submit to an umpire *the claims* of M. Antonio Fabiani against the Venezuelan Government.

It is not possible to find in any convention of like nature a clearer exposition or a wider scope as regards the object of the arbitration. The agreement was to submit to an umpire the claims of M. Antonio Fabiani—that is, the claims of M. Fabiani against the Government of Venezuela up to the date of the convention—and no doubt whatever can exist as regards this conclusion, as otherwise the object for which the convention was made would be defeated.

No limitation was placed upon any claims M. Fabiani might have had against the Venezuelan Government, nor can it be supposed that, the object of the convention being to finally close a long diplomatic process during which France had most energetically maintained the necessity of Venezuela submitting to arbitration Fabiani's claims, a protocol should be concluded between both countries, the terms of which, while agreeing to arbitration proceedings, should except certain portions of claims which kept their friendly relations disturbed. A foreign office as important and enlightened as that of France can not father such absurdities.

The first paragraph of the convention of February 24, 1891, having determined the original object of the arbitration—i. e., *Fabiani's claims*—Article I, which immediately follows, makes the following stipulation:

> The umpire shall * * * determine if in conformity with the laws of Venezuela, the general principles of the law of nations, and the convention in force between the two contracting powers, the Venezuelan Government is responsible for *the damages* which M. Fabiani *alleges to have suffered because of denial of justice.*

The clear and precise language of this article shows how far did both Governments consider it necessary to impress upon the umpire's mind in unequivocal terms that *the claims or damages*—that is, those to be submitted for his investigation—which M. Fabiani *alleged* to have suffered through denial of justice, were to be determined in conformity with the laws of Venezuela, the general principles of the law of nations, and the convention in force between the two contracting powers, in order to *fix the responsibility of the Venezuelan Government* according to such laws, principles, and convention.

"*The damages which M. Fabiani alleges to have suffered.*" According to such language, what is that which Fabiani alleges to have suf-

fered? Common sense will say "the damages." For what cause does Fabiani allege to have suffered such damages? Because of the denial of justice. How is the umpire to view the denials of justice which Fabiani alleges have originated the damages suffered, now submitted to the umpire's decision? According to the laws of Venezuela, the general principles of the law of nations, and the convention in force between the two powers. It is thus seen that the above-quoted article clearly specifies the three elements which constitute the object of the arbitration—i. e., the damages suffered by Fabiani in Venezuela, submitted to the umpire in the shape of claims, the cause of such claims or damages which Fabiani made solely dependent upon the denials of justice, and the standard which the umpire must follow to find out whether or not there has been a denial of justice as the fundamental and only basis of the claims or damages alleged by Fabiani at the time of the convention.

Article II of the convention reads as follows:

> To fix, should such liability be found, for *the whole of the claims in question or any portion thereof*, the amount of the pecuniary indemnification that the Venezuelan Government must make to M. Fabiani, which shall be paid in 3 per cent bonds of the diplomatic debt.

According to this article, the Berne umpire was to fix at a certain sum the amount of the pecuniary indemnification should it be found that Venezuela was liable for the *whole of the claims or any portion thereof* entered by Fabiani. That portion of the claim for which the umpire found Venezuela to be responsible, fixing the amount at 4,346,656.57 francs, was delivered to M. Fabiani in compliance with said Article II in 3 per cent bonds of the diplomatic debt. That portion of the claim for which the umpire found that Venezuela was not liable was rejected; and he also adjudged that there was no denial of justice as alleged by Fabiani to be the cause of damages of that portion of the claim rejected, and also declared that the amounts claimed for the justified damages were grossly exaggerated. He so declares in a conclusive manner in final Paragraph C, Part VI, page 47 of the original award, which reads as follows:

> As regards the expenses in this appeal, the umpire, *while declaring that the conclusions in the case are admitted in principle*, but that *the exaggeration of the claims made* has caused unnecessary expenses, estimates the liquidated expenses of the claimant Government against the respondent Government in the sum of 100,000 francs and divides between the two the arbitration expenses.

Such declaration, which the Berne umpire found indispensable to make, irrevocably fixes the true condition of Fabiani's claims, which were the subject of arbitration, in respect to the Government of Venezuela. The conclusions in the case were admitted in principle, but there was exaggeration in the claims made. Fabiani won the case, obtained a *gain de cause* as regards the liability of Venezuela as found by the umpire growing out of denials of justice which constituted the

main cause of the claims Fabiani endeavored to establish against Venezuela, but the claims made were found by the umpire to be exaggerated, so he reduced them to the amount given in the award.

The claims Fabiani has again presented to have examined by this commission are the same as those submitted to the Berne tribunal, the umpire then accepting in principle the conclusions in the case, but finding that the claims *were exaggerated.* My argument in regard to this issue is more fully expressed in my opinion of May 30, 1903.

I also beg to submit with this additional opinion copy of the diplomatic correspondence passed between the Governments signatory to the convention of February 24, 1891, in the years 1889 and 1890, preceding such convention, wherein it is shown that both Governments were animated by the purpose of definitively settling Fabiani's claims by means of the arbitration agreement made in 1891. I beg to call the honorable umpire's attention to the following paragraphs:

His excellency M. Blanchard de Farges, minister of France in Caracas, to Mr. P. Casanova, minister of foreign relations, note of December 31, 1889:

To judge from the very particular interest taken in France to settle this matter (Fabiani's claim) and the regrettable turn which unhappily has been formerly given to your excellency's administration and my arrival in Caracas, I hold the certainty that my Government would see in the manifestation of more favorable dispositions *as regards said claim* the clearest evidence of the desire of the eminent President of the Republic of Venezuela and of yourself to establish between the two countries a cordiality toward which all my efforts are bent.

Mr. P. Casanova, minister of foreign relations to his excellency M. Blanchard de Farges, note of January 14, 1890:

After the consideration of your excellency's note of December 31, ultimo, wherein, while referring to the interviews we have held in regard to several pending matters between the two Governments, but without expressing the grounds the French Republic may have to insist upon the *Fabiani claim,* rejected from its origin by Venezuela, your excellency proposes to have it submitted to arbitration, the President, desirous of exhausting all efforts in behalf of the desired good harmony between both countries, has directed me to state to your excellency that he is willing to accept such in principle, providing the umpire chosen be selected from the Presidents of the Latin-American Republics; that the question to be decided be "if this is the case provided for in article 5 of the French-Venezuelan convention of November 26, 1885;" and that in case Venezuela *should be condemned to pay any indemnification, in view of the legal proofs adduced in favor of the claimant,* such agreement to be submitted to the National Congress as provided by law, such indemnity to be paid in 3 per cent bonds of the diplomatic debt.

M. Blanchard de Farges to M. Marco Antonio Saluzzo, minister of foreign relations, note of May 20, 1890:

I have the honor to acknowledge receipt of your note dated on the 14th instant in reply to the one I delivered to your excellency on the 1st, regarding *Fabiani's claim.* * * *

As regards the second part of the communication I now have the pleasure to answer, I notice with pleasure that the Venezuelan Government does not further insist upon the condition that the election of the umpire to be appointed could not be made but in the person of the President of one of the Latin-American Republics.

In the matter of your refusal to agree in the condition which my Government now proposes through me asking *that the umpire's award shall deal only with the amount of the indemnity to be fixed for M. Fabiani*, I can not but earnestly deplore that you do not think you can grant us this point, and that you should permit that in this manner there should be perpetuated between the two countries an *element of dissension* to the obliteration of which I am satisfied I have done everything in my power.

Dr. Modesto Urbaneja, minister of Venezuela in Paris, to the minister of foreign relations of Venezuela, note of July 22, 1890:

Consequently, for greater clarity and to prevent that M. Fabiani should misconstrue the agreement, thus creating new difficulties, I told the minister (M. Ribot) that I was going to inform the Venezuelan Government of the agreement precisely in the following language:

That the French Government is willing to accept *that the question relative to M. Fabiani* be submitted to the President of the Federal Council of Switzerland as *arbitro juris;* first, to decide if this be the case provided for in article 5 of the French-Venezuelan convention of November 26, 1885; and, second, should the umpire decide that such is the case provided for in article 5, then the umpire is to *fix the sum that must be paid to M. Fabiani* in 3 per cent bonds of the diplomatic debt.

I have discussed the matter with the director of the cabinet, who has told me that, although the French Government agrees in the substance of the two points mentioned, it is not desired that they should be stated in such terms, because these would, to a certain extent, be little satisfactory to the French Government, *which has decidedly supported M. Fabiani's claim, entering it energetically* through diplomatic channels.

M. Blanchard de Farges to the minister of foreign relations of Venezuela, note of August 12, 1890:

Referring to the last communications passed between us dated May 14 and 20, ultimo, relating to the Fabiani matter, I have the honor to submit to your approval the inclosed draft of a statement which I have just received from the minister of foreign relations of the French Republic to serve as a basis to the arbitration already agreed upon "in principle" between the Venezuelan and French Governments.

In the event this draft, which is entirely in conformity, as I believe, with the last statements your excellency has made me in the name of your Government, should, as I have reasons to expect, be favorably accepted and that *forthwith an agreement should be entered definitively establishing arbitration under the terms which both parties should deem proper*, I have the pleasure to inform your excellency that I am authorized to withdraw the note M. St. Chaffray addressed to the Caracas cabinet as a consequence of the instructions sent him under date of December 24, 1888.

The draft mentioned in the foregoing note is couched in the same language as paragraph 1 and articles 1 and 2 of the convention signed by France and Venezuela on February 24, 1891. See the draft of statement at the foot of the note of M. de Farges.

The minister of foreign relations of Venezuela to M. de Farges, note of August 14, 1890:

I had the honor to receive your excellency's communication, dated day before yesterday, wherein, in reference to the *claim of M. Fabiani*, a draft of a statement which the Government of the French Republic has transmitted to you is submitted to the Government of Venezuela.

It is very satisfactory to the President of the Republic to learn that the Government of France, as was to be expected from its enlightened views and good will, accepts the employment of arbitration *to decide upon the foundation of such claim* and has authorized your excellency to withdraw the note of M. St. Chaffray, as Venezuela has urged as earnestly as

was consistent with its desire to clear the relations of both countries of the embarrassing position created by the purport of its contents.

The Government of Venezuela, on the other hand, has no difficulty in subscribing to the statement transmitted, with the understanding, however, that the final agreement resulting therefrom shall express, according to the proposition of Venezuela, *that to fix the amount of the indemnity*, should there be any, the umpire will rest his decision on the legal proofs *of the damages M. Fabiani claims to have suffered;* that such payment is to be made in the 3 per cent bonds of the diplomatic debt, as promised, and that the agreement is to be subject to the approval of the Congress of Venezuela.

Finally, your excellency can not fail to admit the necessity *to indemnify M. Fabiani, not for the damages he avers to have sustained and which he estimates at an extravagant figure, but for such damages as he has actually suffered*, the estimation of which does not depend upon his word devoid of all proof. The burden of the proof rests on him as the claimant.

As a complement to such important notes which give sufficient light on the question of the agreement for arbitration, showing besides that such agreement embodied all the claims of M. Fabiani existing at the time it was concluded, as it did not have any other original grounds except the so-called Fabiani claim, that the owner thereof made to the amount of an extravagant figure which was reduced to about one-tenth by the award of the Swiss umpire, I reproduce herebelow the argument (*exposición de motivos*) made by the French Government in regard to the claim for indemnification entered in behalf of Fabiani, addressed on August 3, 1887, by the French legation in Caracas to the Venezuelan Government (Answer of A. Fabiani before the Swiss umpire, page 4):

It is the opinion of the French Government that the indemnity must embrace, at least in the first place, the amount of the sums, both principal and interest, the collection of which would have been insured by the execution of the sentence in due and proper time, besides the restitutions ordered by the judges, amounting to about one million and three hundred thousand francs, and, in the second place, damages and interest, *the amount of which is to be discussed, for the wrongs made to Fabiani in his credit and in his business.*

As regards his other pretensions, a searching investigation and discussion should determine how far they are well founded.

The foregoing suffices to convince that the only and actual object of the arbitration agreement and of the subsequent investigation and sentence was no other than the claims of M. A. Fabiani, existing at the time of the agreement, which the Government of Venezuela and the Government of France agreed to submit to the Berne umpire for him to fix, should he find Venezuela's liability *for the whole of the claims or any portion thereof*, the amount of the pecuniary indemnity.

I do not deem it necessary to further dwell in this additional opinion on points so clearly and so well supported by evidence on the part of both Governments, that it is really inconceivable that M. Antoine Fabiani should pretend, after due execution of the award made by the Berne tribunal, by means of the payment made by Venezuela of 4,346,656.57 bolivars, since 1896 in bonds of the diplomatic debt, and its interest at the rate fixed of 3 per cent per annum, not to

be compensated for the damages which in 1891 he claimed the Venezuelan authorities had caused him to suffer, and which since 1888 gave rise to the active diplomatic correspondence passed between the two Governments and finally ending in the convention of February 24, 1891.

I close these statements reaffirming in all its particulars my opinion of May 30, 1903, by which I rejected the claim entered anew by M. A. Fabiani, based upon the same grounds originating the claim for indemnification which produced the arbitration agreement between France and Venezuela in the year 1891.

ADDENDUM.

I submit herewith the English translation of the award of the President of the Swiss Confederation in the claims of A. Fabiani, made by Dr. Delicio Abzueta, sworn interpreter in Venezuela, whose competency is well known to the honorable umpire.[a]

NORTHFIELD, VT., *February 6, 1905.*

ADDITIONAL OPINION OF THE FRENCH COMMISSIONER.

After having read the additional memoir presented by my honorable colleague, I can only maintain the conclusions of the prior memoir, which sums up the proper conclusions of the claimant in that which concerns the plea of the *res judicata*. They are based upon this precise declaration of the arbitrator of Berne, of which my colleague presents an exact translation:

> In return Venezuela does not incur any responsibility according to the compromise (agreement) on account of facts strange to the judicial authorities of the respondent State. The claims that the petition bases on *faits du prince*, which are either changes of legislation or arbitrary acts of the executive power, are absolutely subtracted from the decision of the arbitrator, who eliminates from the procedure all the allegations and means of proofs relating thereto as long as he can not reserve them to establish other concluding and connected facts relating to the denials of justice.

I think I ought to formulate, however, some observations which are suggested to me by the considerations set forth in this additional memoir.

In the first place, Doctor Paúl supports himself upon the text of the convention of the 24th of February, 1891, which is the agreement of arbitration, and upon the exchange of diplomatic correspondence which preceded this, in order to demonstrate that the intention of the two Governments was really to determine definitely all the claims of M. Fabiani against Venezuela. I do not deny this. I even add that the French Government, faithful to the spirit which had inspired the negotiations, did not cease to maintain this interpretation of the agree-

[a] A copy of the original text of the award appears on pp. 147 to 184, inclusive, post.

ment in the course of the discussions which were engaged in before the Swiss arbitrator. It was, to the contrary, the representative of the Venezuelan Government at Berne who, hoping to find in the terms of the convention, unfortunately ambiguous, the possibility for Venezuela eluding a part of her responsibilities, combatted this broad interpretation in several instances, and substituted for it a restrictive interpretation. In fact, while the conclusions of M. Fabiani, supported by the representative of the French Government—conclusions having in mind the denials of justice of the Venezuelan magistrates and, above all, the arbitrary acts (*faits du prince*) and the denials of justice imputable to the Federal executive—comprehended all the losses and all the injuries which had been caused him by the political, administrative, and judicial powers of Venezuela, the cabinet of Caracas in its "defense" presented a plea tending to restrict the sense and scope of the agreement, and develop this plea in bar on pages 1, 2, 3, 4, 5, 17, 86, 85, 101, and 102. Also to the precise conclusions of the *réplique* of M. Fabiani on the *faits du prince* the cabinet of Caracas opposed anew its plea in its rejoinder.

It is absurd and monstrous, from a judicial point of view, to maintain that the party signatory of an agreement, or one of them, have had in view to settle a question outside of the agreement. The arbitrator can examine and retain only that which forms the object of the agreement.

Further:

As long as the signers of the agreement have not given to this accord a more extended scope, the only denial of justice that the arbitrator ought to examine is that which the cabinet at Paris says was committed after the 6th of June, 1882, mentioned in article I of the protocol. Every other question is foreign to the agreement, and it can have no discussion upon the point of the departure of the litigation submitted to arbitration.

Can he who interpreted the agreement thus now pretend that all the claims of M. Fabiani have been definitely settled, seeing that it is precisely this restrictive interpretation which the arbitrator of Berne adopted? Consequently M. Lachenal has declared briefly in the quotation cited above, that he is incompetent according to the agreement to judge all the points which M. Fabiani submits to-day to the examination of this commission. The French Government had only to submit, since the sentence of the sovereign arbitrator, although one might consider it as not having been inspired by the spirit which had presided over the diplomatic negotiations, could not, however, be attacked as contrary to the letter of the protocol. But in execution of the arbitral award itself, M. Fabiani conserved the faculty of representing the leading points thus laid aside for want of jurisdiction, and not adjudicated before every new court of arbitration instituted by a protocol "more extended," to use the term employed by the cabinet of Caracas itself. This protocol with a more extended scope is exactly the protocol of the 19th of February, 1902, of which M. Fabiani has been

obliged, in the absence of diplomatic relations between France and Venezuela, to await the signing in order to present his new claim.

In the second place, Doctor Paúl has thought he ought, in order to make plain the sense of the protocol of the 24th of February, 1891, to present the diplomatic correspondence exchanged before the signing by the two Governments. I receive a double impression from the reading of these documents: First, I should be much astonished to judge them by the interpretation which he has given to the protocol, that M. Lachenal knew about this correspondence which did not form a part of the dossier, since I had not read it myself, then I state that the only necessity of recourse to this correspondence, to make plain the text of the compromise, determines clearly that this text was not sufficiently plain, and that from its ambiguous terms one could reasonably draw two different interpretations. I note, besides, anew that it is the Venezuelan Government which has not remained faithful to the spirit which presided over the negotiation, and that upon this point it received an advantage with the Swiss arbitrator. The same Government is desirous of pushing aside now the natural consequences of this restrictive interpretation of the protocol.

In the third place, my honorable colleague concluded with a quotation from the sentence of arbitration that, concerning the "exaggeration of the claims formulated," all the claims of M. Fabiani outside the main points recognized as admitting of indemnities have been definitely rejected by M. Lachenal. It suffices to read this phrase in order to notice that it concerns only the expenses of the proceeding. One could not rest himself upon an incidental expression, the sole end of which is to explain that useless expenses have been engaged in by demands arising from the framework of the protocol to try to reveal in the mind of the arbitrator intentions contrary to those which he has clearly expressed in the preamble of his award. Finally, Doctor Paúl thinks to find a last argument against the demand of M. Fabiani in the text of a letter written the 3d of August, 1887, three years and a half before the signing of the protocol by the legation of France at the ministry of foreign affairs of Venezuela. M. Fabiani has addressed to me on this subject a note, herewith attached, which I received at New York the 30th of last January, the conclusions of which I approve, and which I beg the umpire to kindly take into consideration.[a]

The affair Fabiani, such as it now exists, rests entirely upon arbitrary acts, denials of justice, and the fraudulent resolutions of the executive power of Venezuela which have caused injury to the plaintiff or created by the complete destruction of his only lien insurmountable obstacles to the collection of his enormous debts. The Swiss arbitrator, interpreting the convention of arbitration of February 24, 1891, has limited

[a] Exhibit to memoir of the French commissioner.—Letter from M. Fabiani.

his jurisdiction to the denials of justice imputable to the judicial authorities of Venezuela on account of the nonexecution by said authorities of the award rendered at Marseilles December 15, 1880. He has consequently eliminated from the procedure as being outside the protocol and he has not admitted proof of the arbitrary *faits du prince*, as also all the acts foreign to the inexecution and to the effects of the inexecution of the sentence before mentioned, acts and deeds which the claimant government had considered as coming within the terms of the protocol above cited. This decision of the arbitrator, rendered contrary to the conclusions of the French Government and conformable to the conclusions of the United States of Venezuela, is of a startling clearness as to everything leading to the determination of the object of the litigation and consequently of the object of the judgment. We have besides been able to observe the precautions taken by the judge in order to anticipate every equivocation and to reserve the rights of the claimant party for all the matters and points subtracted from his cognizance by his interpretation of the terms of the protocol. The conclusions of Fabiani upon the plea of *res judicata* have superabundantly demonstrated that these matters and points, founded upon facts foreign to the judicial authorities of the respondent state and to the nonexecution by the said authorities of the arbitral award of Marseilles, form the only object of the present litigation, and that they all refer to arbitrary *faits du prince* and to the losses and injuries which have been the consequence. But in the support of his restrictive interpretation of the agreement the Swiss arbitrator makes mention of a note from the French legation of August 3, 1887, cited by the respondent state, and that he has considered, right or wrong, as being able to give the measure of the points included by the protocol of 1891, although this may be anterior to this protocol by three and a half years. But this note of 1887, in reserving the surplus of the claims of Fabiani, would suffice to have the exception of the plea *res judicata* rejected if the decisive conclusions of the plaintiff could allow the least doubt in this regard to subsist. In fact, not only has the Swiss arbitrator abstained from passing upon the surplus reserved by the note of the 3d of August, 1887, and of which Fabiani, who attributed to the agreement of 1891 a much larger scope, had made the principal object of his memoir, but he has expressly eliminated it from the procedure and not offered proof, for reason that the said agreement had submitted to arbitration only the denials of justice imputable to the judicial authorities of Venezuela and the nonexecution by these authorities of the arbitral sentence of Marseilles.

To appreciate all the value of the reserves contained in the note of the French legation of August 3, 1887, it is sufficient to notice that these reserves concern the *faits du prince* and that at this time the President of Venezuela was still Gen. Guzmán Blanco, the responsible

author of the ruin of Fabiani. If we add that his minister of foreign affairs was the too celebrated Diego Bautista Urbaneja, the advocate and accomplice of the adversaries of the plaintiff, we shall understand that, in taking care, in view of an amiable agreement, to indicate the *ensemble* of the credits of Fabiani against the Roncayolos, the note of the 3d of August, 1887, may have correctly reserved in the following terms the rights of the plaintiff:

As for the surplus of his claims (which the dictamen translated thus : exceso de pretensiones, p. 106) a serious and analytical examination will alone determine just on what points they are founded.

What were the claims? Here is the reply of Fabiani in his *réplique*. The Venezuelan arbitrator having omitted in his mutilated citation the essential passages of the said response, one may judge it useful to reproduce them as a whole, *italicizing* that which has been cut out—that is to say, almost all:

What are these claims of Fabiani? The affair of the towage and that of the railroad. What was the cause of such a reserved formula? Why this reticence? One will find the explanation of it in the last paragraph of page 527 of our memoir. *The affairs of the towage and that of the railroad (that is to say, all the arbitrary acts—the denials of justice and faits du prince which these two affairs have created) could not even be indicated, Guzmán Blanco ruling. But our Government, anxious to reconcile the duty of protecting its nationals, with its eager desire to avoid a new rupture and grave complication, had forbidden, with our loyal assent, making allusion to denials of justice imputable to the chief of the executive power, reserving to us the free exercise of our rights if the propositions of an amiable settlement were repulsed. These reserves result from the paragraph quoted as to the surplus of the claims, etc.*

All the passage *italicized* has been omitted in the dictamen of the Venezuelan arbitrator. This suppression has had for a result to conceal that it was a question of arbitrary acts or *faits du prince* and to allow to be ignored the serious motive, which, for facilitating an amiable settlement, had caused in 1887 the reserving of the surplus, of which the Swiss arbitrator has refused to take note, because he was deeply possessed with the idea that the protocol of 1891 was affected by the same reservation.

These elisions once indulged in the dictamen is restrained to reproduce the phrase which begins thus:

There is for the object of the litigation, etc.

It is without any practical utility in the present affair, since, like all declarations relative to the losses and injuries of Fabiani, it expressed the opinion of the demandant Government on the sense and extent of the words *denials of justice* inserted in the agreement of February 24, 1891. But one is not ignorant that, upon the formal reply of Venezuela, these conclusions of the demand were put aside by the arbitrator of Berne, who, after having determined the *object of the litigation* and fixed the matter really submitted to his jurisdiction by the agreement cited, has eliminated from the procedure and has not admitted proof

of as being outside the terms of the protocol just this *surplus of claims of Fabiani*, which comprehended the arbitrary acts and the denials of justice or "*faits du prince*" upon which the present examination is founded; that is to say, all the facts foreign to the *judicial* authorities of Venezuela and to the nonexecution by the said authorities of the arbitral award of Marseilles. The State of Venezuela had itself twice proclaimed in its answer that these main points of the claim did not constitute the *matter of the litigation* remitted to the decision of the Swiss arbitrator, and in its rejoinder, that these same points foreign to the protocol, might form the object of a later examination, whenever the two Governments would sign a more extended protocol, which was realized on February 19, 1902. It is this reasoning which has convinced the arbitrator of Berne and which has led him to pronounce upon the above-mentioned points a declaration of want of jurisdiction, by which the rights now under discussion were safeguarded. It is not without interest to fill in another gap in the dictamen and to call, respectfully, the attention of the arbitrators to the last paragraph of page 527 of the memoir, which the Venezuelan arbitrator has not deigned to reproduce, although page 5 of the *réplique* has signalized it as being necessary to furnish explanation of the reserve made, as to the surplus of the claims of Fabiani. Here is the paragraph:

Our exposé has made known our complaints; the questions already so grave and so clear of denials of justice, of the refusal of execution of award, of the violent acts of agents of all classes, turn pale beside the acts, perfidious, malevolent, interested and contrary to all the principles of international law, of which we make with good right the whole responsibility to rest upon Gen. Guzmán Blanco, President of the United States of Venezuela. These numerous successive acts which did not spring from civil or penal justice and which for this same reason remain without the provisions of article 5 of the convention of 1885—these acts which constitute bold denials of justice ought we to pass them by in silence at the risk of compromising the sacred interests which we have the mission of safeguarding? Who would have dared to counsel us thus? It was then necessary to speak, to set forth the facts, to make them precise, above all to characterize them, to demonstrate the intention to injure. It was necessary to put in relief the interested passion, the blind hatred, the *faits du prince*, the culpable reticence which ought, following the theory and practice of the retaliation of faults caused us, to allow some vindictive interest. Very well! But here one sees the Venezuelan delegate jump; we see him compelled to squander the proofs of his loyalty for the name of the chief of state is Guzmán Blanco, and his minister of foreign affairs, specially chosen *ad hoc*, is no other than his famous uncle Diego Bautista Urbaneja!

This passage of the exposé explains clearly the surplus of claims of Fabiani. It has been explained since that the dictamen has passed it over in silence, because this surplus relative to the *faits du prince* was formally eliminated from the procedure by the Swiss arbitrator as foreign to the judicial authorities of the respondent State, and that the *ensemble* of the sentence of Berne, by the precautions taken in order to leave no doubt as to what was really judged, demonstrates that the said sentence has considered this surplus reserved as capable of forming and bound to form the object of a new litigation. The surplus of

the claims of Fabiani, as page 527 of the memoir demonstrates, has reference to the *faits du prince*, and, more particularly, to the arbitrary acts which have so sadly marked the two grave affairs of the towage and the railroad. This surplus then included all the arbitrary acts, all the denials of justice, and the fraudulent resolutions "*du prince*"—that is to say, all that comprises the object of the present examination. Pages 49 to 67 of the conclusions of the plaintiff prove this beyond peradventure. This long series of civil wrongs, intentionally injurious, has created insurmountable obstacles and of the nature of *force majeure* to the recovery of the credits of Fabiani. Independent of the arbitral award of Marseilles this unhappy work has been completed by the fraudulent annihilation of the strong and only lien of the creditor, and by the withdrawal of the service of the towage, by this abuse of right, veritable act of reprisal of a venal and passionate chief of state against a mandate of justice. These unheard of and wrongful deeds call for a restitution proportionate to the gravity of all these infractions.

In these conditions, in presence of the demonstration that the main point of the demand, eliminated from the procedure of Berne, as outside the terms of the protocol, concern the arbitrary acts, the denials of justice, *lato sensu*, or the *faits du prince*, which are the peculiar object of the present litigation; and, finally, in presence of the decision of the Swiss arbitrator, so clearly ordered to the manifest end of preventing every equivocation, as to the object of the litigation and as to what was really adjudged, one is led to recognize once more that the plea of *res judicata* is no less inadmissible than badly founded.

Convinced, moreover, that in order to know what was really adjudged by the arbitrator of Berne, it is necessary, first of all, to possess one's self of the contestation, such as the plea of the defendant determined it, confirmed by the judgment, then to consult the judgment which has sustained the plea, and which, by the interpretation of the protocol, has limited the object of the litigation and the jurisdiction of the judge, following the conclusions of the respondent State (denial of justice, committed since the 6th of June, 1882, by the judicial authorities of Venezuela) Fabiani can in all confidence rely upon his conclusions of the 24th of June, 1904, which have demonstrated indubitably that the object of the litigation determined by the arbitrator, conformably to the conclusions of the defendant and contrary to the conclusions of the prosecutor, and the decisions so clear and so precise of the Berne award, touching the matter of litigation thus determined, have refuted, in advance, for all and for each of the leading points of the present contest the plea of *rcs judicata* developed in the dictamen of the Venezuelan arbitrator.

The arbitrator of Berne has passed judgment upon the acts imputable to the judicial authorities of Venezuela in the course of the pro-

cedure of execution of the arbitral decision of Marseilles, and upon these acts only. It belongs, then, to the arbitrators to decide in their turn upon the arbitrary acts, the denials of justice, the *faits du prince*, and upon the losses and damages which have resulted therefrom.

OPINION OF THE UMPIRE.

The case of Antoine Fabiani came to the umpire because of the inability of the honorable commissioners for France and Venezuela to agree, as hereinafter stated more in detail.

His claim had been presented by the concerted action of these two Governments to the arbitrament and award of the honorable President of the Swiss Federation by virtue of and according to the terms of a compromise had by and between these honorable Governments, which was concluded February 24, 1891, and is of the language following:

Re Fabiani's claims:

The Government of the United States of Venezuela and the Government of the French Republic have agreed to submit to an arbitrator the claims of M. Antonio Fabiani against the Venezuelan Government.

It will be the duty of the arbitrator:

First, to decide whether, according to the laws of Venezuela, the general principles of the law of nations and the convention in force between the two contracting powers, the Venezuelan Government is responsible for the damages which M. Fabiani says to have sustained through denial of justice.

Second, to fix, in case such responsibility is recognized, as to all or part of the claims in question, the amount of the pecuniary reparation that the Venezuelan Government must deliver to M. Fabiani, and which will be paid in bonds of the 3 per cent diplomatic debt of Venezuela.

The two Governments have agreed to request the President of the Swiss Confederation to kindly take charge of this arbitration.

The present declaration will be submitted to the approval of the Congress of Venezuela.

Done in duplicate at Caracas, the 24th of February, one thousand eight hundred and ninety-one.

The "convention in force between the two contracting powers" was the treaty of November 25, 1885, by and between these two Governments; and, so far as the same has bearing or value in aid of the compromise above set forth, is here set out as follows:

CONVENTION.

The Government of Venezuela and the Government of the French Republic, being desirous of reestablishing between the two countries the friendly relations interrupted since 1881, have appointed to be their respective plenipotentiaries the following:

The President of the United States of Venezuela, Gen. Guzmán Blanco, envoy extraordinary in Paris, etc.

The President of the French Republic, the Count Tristan de Montholon, minister plenipotentiary of the second class in charge *ad int.* of the duties of the director of political affairs in the ministry of foreign affairs, etc.

Who, after having exchanged their respective powers, found in good and due form, have agreed upon the following articles: * * *

ARTICLE 5TH.

In order to avoid in future everything that might interfere with their friendly relations the high contracting parties agree that their diplomatic representatives will not interfere in the matter of claims or complaints of private individuals or on affairs cognizable by the civil or penal justice, according to the local laws, unless the question is a denial of justice or judicial delays contrary to use or to law, the noncompliance with a definitive sentence, or, finally, cases in which in spite of the exhaustion of legal remedies there is an evident infraction of the treaties or of the rules of the law of nations.

The claims presented before the honorable arbitrator of Berne on behalf of M. Fabiani aggregated 46,994,563.17 francs, extended over the years from 1878 to 1893, were assembled under the general term of denial of justice and included such as were imputable to the judicial authorities of Venezuela, its administrative authorities, and to damages suffered by him through the fault of its public powers, claiming for him both the direct and indirect damages under each head.

December 30, 1896, the award was made for 4,346,656.51 francs with interest at the rate of 5 per cent per annum from that date. The honorable arbitrator arrives at this sum in the manner hereinafter set forth.

The decision of the honorable arbitrator, together with his reasons therefor, was rendered in writing, which award reciting the essential facts, as well as the reasons of the honorable arbitrator, appears on pages 4748–4915, volume 5, Moore's History and Digest of International Arbitration.[a]

The sum of 42,647,906.66 francs represents that part of the total claim of M. Fabiani which was not allowed by the honorable arbitrator of Berne, and which was denied for the reasons given in his award.

It is claimed by M. Fabiani before this commission that of the sums denied allowance by the honorable arbitrator of Berne there are certain portions so disposed of by him as to be still in force against the respondent Government under the general terms of the protocol constituting this commission, aggregating 9,509,728.30 francs.

The reasons given by Fabiani before this present commission for ascribing present vitality to the claims now before this commission are, in substance, as follows:

The decision of the arbitral statement of Berne is, in effect, that all the chief points of the actual demands and the arbitrary acts "*faits du prince*" have been expressly formally eliminated by the Swiss arbitrator as subtracted from his decision by his interpretation of the terms of the protocol passed between the Government of the French Republic and the Government of Venezuela;

That the interpretation of the treaty of February 24, 1891, given by the said arbitrator, has placed the limit of the questions which the judge had the power to resolve, upon which he was authorized to decide, and which alone ought to make and which has made the object of his judgment;

That by the formal decision which has eliminated the cause and the object of the actual demand as not being included in the matter submitted to his jurisdiction the arbitrator [of

[a] Post pp. 147 to 184, inclusive.

Berne] has recognized that he had not the right to pass judgment upon the *"faits du prince"* and upon all the points by him eliminated from the procedure as not included in the terms of the protocol;

That in declaring them subtracted from his decision according to the protocol the arbitrator has passed judgment upon his own jurisdiction and has determined its limit;

That the doctrine and jurisprudence are for a long time unanimous upon this incontestable principle that a declaration of incompetency can never produce the effect of *res judicata* upon the foundation of the law;

That the *"faits du prince"* and all the points of the present instance [have] been expressly eliminated from the procedure by the decision of the arbitrator of Berne, because they were not included by the terms of the protocol, and consequently were subtracted from its competence; * * *

That he has eliminated it as not making a part of the matter remitted to his decision, and that he would not have been able to retain it without violating his own interpretation of the treaty of February 24, 1891; * * * The most scrupulous examination of the arbitral decision of December 31, 1896, determines that the arbitrator has strictly conformed to his interpretation of the protocol, and that he has not passed judgment by way of the declaration of right and responsibility upon any of the matters eliminated by him as subtracted from his right to judge by the terms of the protocol;

That consequently these matters not having been, and not having been able to be, the object of a decision upon the bases of law one could not pretend that

they are

res judicata;

That to be convinced of it it is sufficient to refer to the procedure before the President of the Swiss Confederation to the plea proposed by the defendant party against the actual demand as arises from the terms of the protocol, then to the former and reiterated decision which the arbitrator [of Berne] had rendered in giving to the protocol of February 24, 1891, the sense claimed by the United States of Venezuela and in eliminating from the procedure as subtracted from his decision—that is to say, from his jurisdiction—the *"faits du prince"* and all the points foreign to the inexecution and of the effects of the inexecution by the tribunals of Venezuela of the arbitral sentence of Marseilles of December 15, 1880—that is to say, precisely all the points upon which the arbitrators authorized by the treaty of February 19, 1902, are called upon to decide,

In execution of the protocol, whose terms gave, in Fabiani's opinion, plenitude of jurisdiction to the arbitrator [of Berne] and conferred upon him the right to decide upon all the denials of justice, whether they were imputable to the judicial authorities or to the administrative authorities of Venezuela (these latter naturally including the arbitrary acts or *"faits du prince"* attributable to the Federal executive) and upon all the damages which Fabiani *says* to have suffered through the fault of the public powers of this country, the French Government charges the claimant to present the demand before the President of the Swiss Confederation.

Fabiani established the general table of losses and prejudices of damages and interests, the responsibility of which he imputed to the public powers of Venezuela; but the defendant party, for reasons easy to suspect, preferred a solution which would leave the parties always divided by the difference which the French Republic had proposed to avoid in a complete fashion.

Fabiani, as results from the *ensemble* of his exposé before the arbitrator of Berne, had always considered the arbitrary acts and the denials of justice *"faits du prince"* imputable to the administrative authorities as the principal cause of his misfortunes in Venezuela.

Of the 505 pages of the said exposé of facts, more than two-thirds treated of the direct interference of the Federal executive in a conflict between foreigners, notably the following pages: 41 to 50, 52 to 55,

57 to 60, 69, 92 to 98, 100 to 103, 108 to 115, 123 to 124, 129, 131 to 139, 158 to 165, 174 to 178, 181, 183, 199 to 204, 206, 207, 242, 255, 259, 261 to 267, 272 to 274, 276, 284 to 290, 294, 297, 298, 300, 304, 305, 312 to 320.

It is Fabiani's—

conviction that the term "denial of justice," employed in the protocol included all denials of justice, those of the judicial authorities, and, above all, those imputable to the administrative and political authorities of Venezuela.

The Swiss arbitrator—

has given his interpretation of the terms of the protocol, determined exactly the object of the difference submitted to arbitration, and has expressly eliminated from the procedure, as subtracted from his decision, and consequently from his competency, all of the allegations and means of proof relative to claims founded upon the arbitrary acts of the executive powers or upon the *"faits du prince"* and upon all the *faits* foreign to the inexecution of the arbitral sentence of Marseilles of December 15, 1880.

In further support of his contention that the claims specified by him are still of vitality and force and competent to be passed upon by this commission, he quotes several passages from his exposé.

Page 542:

If we do not possess the formal and written avowal of our implacable enemy, we have, aside from his official acts, which bring prejudice to us, the acts, also official, perfidiously calculated to strangle us between two doors, if, trusting to false appearances of justice, we thought to make our rights of value.

The executive power coming to the aid of the judicial power to condemn us to powerlessness by the aid of fraudulent maneuvers, which resulted in the spoliation of October 26, 1885, is an undeniable fact which will not escape the scrutinizing eye of the judge.

Page 545:

The *ensemble* of our grievances against Venezuela engages the responsibility of the judges and of the public powers of this country. The judges have been guilty; they have surpassed themselves in the art of adapting the laws to the annulment of justice; the public powers have been unworthy; in any civilized country they would not have been able to escape chastisement; but in the long run we would have been able, perhaps, to triumph over their venality and ill-will if we had not been forced to struggle against the personal and interested hostility of the chief of state. This personal hostility, a veritable *"fait du prince,"* has established before us the case of *force majeure.*

Page 552:

The acts for which we reproach Gen. Guzmán Blanco are of the resort neither of the civil justice nor of penal justice of his country. These acts, veritable denials of justice, have been committed by the President of the Republic in this quality.

The laws of Venezuela, conformable, moreover, to the general principles of public law, authorize no action against the chief of state save in one of the three cases provided for by the constitution. But if these acts escape all civil or penal jurisdiction, this does not signify in any way that they engender no responsibility and that this responsibility can never produce its results. According to the law of nations, there is a responsibility which substitutes itself for the personal responsibility of the chief of state; it is that of the country which he represents, when the acts of the executive power constitute with regard to a foreign nation or its dependents, violations of the principles of public international law.

Pages 553 to 554:

But in our unfortunate affair, the "*faits du prince*," which have constituted denials of justice, are well established. We have no need to refer to them, nor even to group them, in order to enlighten the conscience of the arbitrator. Our general exposé relieves us from insisting. All these facts, taken together or separately, establish the direct intervention of the chief of state in a conflict between individuals to prepare, to consummate, a great injustice. If these considerations, which we believe in perfect harmony with the theory and practice of the law of nations among civilized countries, are accepted by the arbitrator, the iniquity of the judges, their denials of justice, and the question of retroactivity, relegated to the second place, will no longer offer anyithing but a secondary interest.

We have furnished all the proofs of the malevolent action of the chief of state, now direct, now indirect, continued for more than six years, striking us in front and behind, raising themselves before us as an insurmountable obstacle to paralyze us, when, in spite of his venality, justice was impressed for continuing his guilty work. If the arbitrator retains the "*faits du prince*," as these *faits* have had, as a consequence, a series of denials of justice. he will find, in these evident violations of the principles of the law of nations, the direct reply to the arguments of the cabinet of Caracas and the juridical elements of a decision which will retain the responsibility of Venezuela without its being even necessary to refer to the complicity of the judicial and administrative authorities of the country. And we are persuaded that this decision, having reference to all the *faits* since the origin of our troubles, and retaining all the violences of which we have been the object, will proportion the reparation of the prejudice caused to the premeditation, to the gravity, to the tenacity, and to the extent of the offense. However, need we insist upon the infractions and upon the denials of justice which, exclusive of the "*faits du prince*," might be of the resort of the civil or penal justice?

Fabiani follows these quotations with the statement that—

these extracts offer the advantage of determining the sense which he attaches to the words "denials of justice" according to the protocol, which, in his opinion, included not only denials of justice imputable to the judicial authorities, but still, and above all, denials of justice imputable to the Federal executive and all the arbitrary acts connected. That, in effect, if the plaintiff (Fabiani) recognized, as he still recognizes, the right of the sovereign appreciation of the judge, he counted that this right would be exercised upon the *ensemble* of his demand, and more especially upon the arbitrary acts of "*faits du prince*," denials of justice imputable to the Federal executive; that if the arbitrator (of Berne) has disposed of them otherwise, if he has interpreted the protocol in a way to limit and determine the object of the difference submitted to his decision, he has thereby still reserved the rights of the plaintiff (Fabiani) for all the matters which he has declared stranger to the object of the litigation and which he has eliminated from the procedure as subtracted, etc.

In signalizing the denials of justice of the magistrates of Venezuela in all that which had reference to the inexecution of the sentence of Marseilles, the demand for damage, and interest was founded especially upon the injurious results of the arbitrary acts and denials of justice of the Federal executive.

In these conditions it is natural that the plaintiff (Fabiani) should have anticipated an adjudication *en bloc*.

Fabiani urges that the honorable arbitrator of Berne, in proceeding to set forth his reasons and to separate the claims allowed from those disallowed, has "in effect" proceeded "contrary to custom, not to an adjudication *en bloc*, but to a detailed adjudication clear and precise," and—

has evidently held to anticipate every equivocation, to cut short all chicanery, and to reserve to the demandant party the free exercise of all his rights for all the matters and for all sums which he had just declared subtracted from his decision.

To elucidate the meaning, force, and effect of the acts of the honorable arbitrator of Berne and to bring out more clearly, as he would contend, the elimination and subtraction suggested, and to show that the reason therefor is as claimed by Fabiani, he quotes from the defense of the respondent Government made before the honorable President of the Swiss Federation, stating that such defense begins as follows:

The demandant party gives itself up continually from the beginning of its exposé to the interminable digressions which have no relation to the affair under discussion, in the diplomatic discussion maintained by the cabinets of Caracas and Paris upon the subject of the Fabiani claim. The object of this claim and its points of departure have been determined. The object is the denial of justice alleged by Fabiani for the nonexecution, according to him, of the arbitral sentence rendered in his favor at Marseilles December 15, 1880, analogous to the civil tribunal of the first instance and confirmed by the court of appeal of Aix, and the point of departure can not be any other than the decree by which on the date of June 6, 1882, the high Federal court of Venezuela gave executory force in the country to the sentence of the court of appeal of Aix.

Page 4:

That which is important to fix now is that all which is anterior to the decision of the high Federal court of the date of June 6, 1882, and the other digressions which the plaintiff has added to his exposé, do not constitute the matter of actual litigation. * * *

Moreover, the diplomatic discussion having determined that the Fabiani claim, which was about to be submitted to arbitration, was the claim presented and supported by the French Government, and not the claims which Fabiani should present ulteriorly, the compromise between the two Governments has for an end only the facts relating to the pretended denials of justice beginning from 1882.

In Fabiani's *réplique* to the defense of Venezuela, from which the following quotations are taken, he vigorously opposed this claim of Venezuela, and again explained the sense which he attached to the words "denials of justice."

Page 62:

Our voluminous memoir is occupied principally with Mr. Guzmán Blanco, whose name finds itself repeated on each page several times. The denials of justice, the violences, excesses, by us denounced in the memoir, are attributed to this cause almost exclusively —the passionate and interested hostility of Mr. Guzmán Blanco.

The judges who receive the price of their venality, the officials who harass us without ceasing, are represented by us as mere instruments of the chief of executive power.

On almost every page our accusations are very precise. We explain the numerous and grievous facts. We make known the prime mover, his financial dickerings with our adversaries, his acts of direct hostility, his fraudulent manœuvers to injure us, his odious outrages, his repeated denials of justice to conserve for his associates and himself the profits of the railroad. Guzmán Blanco (ex-Ceiba) and the cabinet of Caracas maintains a religious silence. Save in two citations, from our memoir it does not pronounce even once the name of Mr. Guzmán Blanco.

Page 63:

We understand the embarrassment of the cabinet of Caracas. The subject was rugged and the way very slippery. * * *

We retain in this debate not certainly Mr. Guzmán Blanco, whom international law defends against our investigations, but the chief of the executive power whose acts have engaged the responsibility of his country.

Venezuela ought to take account of the "*faits du prince*" and denials of justice imputable to its former master, as well as the denials of justice anticipated by the convention of November 26, 1885, in the affairs which are the resorts of the civil or penal justice.

The personal acts of the chief of executive power are, moreover, grave as the denials of justice imputable to a district judge, and even to a court of cassation.

The flagrant violation of the law of nations by the chief executive power of a country offers another interest for the peace of nations than the injury brought to the rules of international law by the brutality or the venality of some graduates of the University of Caracas.

Page 65:

The faithful executor of the constitution was held to demand without delay the respect of the Federal compact, and his calculated inaction constituted a denial of justice. In refusing to intervene and in shifting upon the high Federal court the obligation which was strictly incumbent upon him the executive power committed knowingly and with premeditation a denial of justice, the consequences of which have been decisive, and this denial of justice has had for an end to safeguard the personal interests of the chief of state.

Page 78:

If the denial of justice which we impute to the chief of executive power of Venezuela is established, the gravity of this infraction will occupy with good right the attention of the arbitrator. In fact more than half our memoir concerns the acts and deeds of Mr. Guzmán Blanco.

From these copious excerpts it is easily seen that the demandant, Fabiani, came before the Mixed Commission, sitting at Caracas in 1903, under the convention of February 19, 1902, with the claim that the act of the honorable arbitrator of Berne in dismissing the greater part of his case, was solely a jurisdictional decision, leaving unaffected, as though never presented to him, the claims thus dismissed.

The honorable commissioner for Venezuela rejected the case as presented in all and every part, for the reason that, in effect, the entire Fabiani controversy was submitted to the final and conclusive arbitrament and award of the honorable arbitrator of Berne by the high contracting parties in their protocol at Caracas of date February 24, 1891, and that when the controversy was submitted under said protocol and the honorable arbitrator of Berne had assumed and accomplished his important trust the entire Fabiani contention was at an end.

Since the honorable commissioner for Venezuela had not consented to discuss the figures presented by M. Fabiani, the honorable commissioner for France has regarded himself as "under the obligation of accepting them as a whole." The honorable commissioner for France also states:

As, moreover, none of his (Fabiani's) demands have been contested in the foundation and in the figures by the respondent Government, it has not appeared possible to me to put them aside or to reduce the amount. I have consequently accorded to M. Fabiani the indemnity which he claims.[a]

[a] Page 95.

The honorable commissioners, finding themselves hopelessly in disagreement, reserve this claim for the consideration and determination of the umpire, to whom it has been submitted with the very helpful opinions rendered by each, setting forth very clearly the points for and against the claims of Fabiani and his right thereon to be heard again before an arbitral tribunal.

First to be determined is the issue whether there is or is not aught to be produced before this tribunal of the matters once submitted to the arbitrament and award of the honorable arbitrator of Berne under the protocol effected by the two nations at Caracas, February 24, 1891.

An analysis of this treaty discloses, in its first paragraph, that--

> the Government of the United States of Venezuela and the Government of the French Republic have agreed to submit to an arbitrator the claims of M. Antonio Fabiani against the Venezuelan Government.

It will be observed, then, that the matter to be submitted for arbitration is the "*claims*" of Fabiani—not certain claims of Fabini, not a *part* of his claims, but his *claims*, which clearly and definitely includes *all his claims* against the respondent Government. It would not be more sure, more precise, had it been written "all of the claims of M. Antonio Fabiani," etc. This is the position taken by M. Fabiani himself, who presented all of his claims against the respondent Government to the honorable arbitrator of Berne, and urged upon him that it was his right and duty to consider, pass upon, and allow them as all coming within the terms of the protocol; and who, consistent with his former position, but respectful to an adverse decision, still insists that such was its true scope and spirit. Had nothing posterior to this first paragraph been written, the way of the claimant would have been easy and the hearing unrestricted. Such, however, was not the agreement of the two honorable Governments. Restrictions are imposed and must be heeded. When understood they must be respected and obeyed, for they are to the honorable arbitrator of Berne and to all who come after him the supreme law of his tribunal.

Two principal duties were presented to the arbitrator by the protocol of February 24, 1891.

He was, first, to decide under certain limitations, hereinafter to be stated, whether the Venezuelan Government was responsible for the damages which Fabiani claims to have sustained at its hands.

This was the logical course of procedure had no direction been given, but it is made obligatory and imperative by the terms of the convention. It is not permitted that the honorable arbitrator shall make his decision without the definitive aid of the high contracting powers. They do not consent that he pursue his own course and use his own tests in arriving at his conclusions upon the question thus submitted; neither do they admit that the honorable arbitrator may classify and designate the quality and character of the claims which are submitted

to his decision; on the contrary, they assume positively and finally to make for themselves and for him a definition which shall cover and include the claims of Fabiani, which, by agreement of the two parties, had been and then were before them, and were by this protocol to be passed into the hands of the honorable President of the Swiss Federation as arbitrator, and the phrase thus used by them for his guidance was neither obscure nor indefinite, but was one common to the tongues of nations, viz., "denials of justice." It did not comport with the wishes and purposes of these two Governments nor with the treaty relations then existing between them that this phrase should be interpreted and applied unaided by the terms of the convention constituting the tribunal. The arbitrator was directed to call to his aid and submit himself to the government and control of and was to render his decisions thereon according to—

the laws of Venezuela, the general principles of the law of nations, and the convention in force between the two contracting powers.

Through these three sources of information the arbitrator was to determine the responsibility of the respondent Government in the Fabiani controversy. This compelled an interpretation by the arbitrator of article 5 of the convention of November 26, 1885, which was the treaty then in force between the two contracting powers. When thus interpreted it settled its meaning finally and conclusively, as applied to the Fabiani controversy, and in that respect and to that extent, at least, it has conclusive and final force upon the question pending before the umpire. This is true because he was expressly directed and empowered to make this interpretation by the two powers whose treaty it was. His interpretation, thus made, determined for this case the scope and depth, the spirit and purpose, the meaning and effect of the limitations self-imposed by these two nations in their high compact regulating and defining the right of diplomatic intervention. It also effected a similar decision concerning the term "denials of justice," which term was employed in said treaty in connection with the limitation, by their own agreement, placed upon their future action in reference to the claims and claimants of each nation. This limitation upon diplomatic action was stated by the high contracting parties to be in the interest of peace, harmony, and concord between them, evidently believing, on their part, that such injuries and damages as might befall their respective nationals in the land of the other, which were not included in the terms of the convention, were better ignored than pursued; that the general and common welfare of the two nations was of chief importance, and could not wisely be jeopardized through international differences and diplomatic contentions not resting upon or growing out of the causes specifically assigned. For these laudable reasons and motives this

restriction was solemnly declared to be the settled conviction, purpose, and future policy of these two nations.

The protocol of February 24, 1891, was made not only in view of the existing treaty, but that there might be no question in the mind of the honorable arbitrator as to their purpose scrupulously to regard and be governed by its provisions in its application to the case in hand, the compromise incorporated its terms and made them fast to his conscience and judgment. Examination of his award and a careful review of his reasons therefor indicate clearly his thorough appreciation of the language and spirit of the compromise and the scope and purview of his trust.

Coincident with his interpretation of article 5 of the convention of November 26, 1885, correlated thereto and commingled therewith, there came the duty to interpret the meaning of the protocol of February 24, 1891, when it defined his limit of action to be within such circumscribed bounds as are contained in the laws of Venezuela and the general principles of the law of nations, as well as in the terms of article 5, above alluded to. He must determine whether the denials of justice, to be operative in the case before him, must be such as respond to each one of these tests; in other words, such as are not contrary to any one of them, or if responsive to any one, although opposed to the others, it is sufficient. He must determine the breadth of the reference to the laws of Venezuela, and, giving the reference its proper significance and limitations, must seek out and apply to the case before him the Venezuelan laws which he has held to be within the meaning of the reference, and he must summon before him and apply to the elucidation of the question so much of the law of nations as he deems applicable thereto.

The second line of action assigned him necessarily followed, depended upon, and was limited by his disposition of the first duty placed in his charge. If he found no responsibility in Venezuela for the damages claimed by Fabiani because of denials of justice, then his duty was done and the arbitration was closed when he made his declaration of such finding.

He can arrive at this conclusion by one of two ways, or by the meeting of both. It is one way if he finds there have been in fact no denials of justice. It is the other way if he finds denials of justice, but also finds that they are not such as attached responsibility to Venezuela. Either finding absolves Venezuela. If he holds Venezuela responsible in any part, it must be upon the bases that in his sound judgment there are denials of justice and that they are of a character to fix responsibility upon Venezuela. A concurrence of these two conditions must exist or the award must always be for Venezuela, and to the extent that there is nonconcurrence the award must be for Venezuela.

Examination of the award of the honorable arbitrator of Berne, and a study of the reasons he sets forth to justify his findings, discloses that he entered upon the discharge of his high duty with thorough appreciation of the character and the importance of his trust.

On page 22 of his award he said:

In the very first place it is important exactly to determine *the object of the controversy* submitted for arbitration. According to the compromise of the 24th of February, 1891, the question at issue is that of knowing whether, according to the laws of Venezuela, the principles of the law of nations and the convention of the 26th of November, 1885, in force between the two contracting powers, the Venezuelan Government is responsible for the damages which Fabiani says to have sustained for denials of justice. Even independently of the intention of the parties manifested during the negotiations to which the Franco-Venezuelan Convention of 1885 gave rise it evidently appears from the very text of the compromise and from the union of the facts of the case that the respondent Government is proceeded against only on account of the nonexecution by the Venezuelan authorities of the award rendered at Marseilles on the 15th of December, 1880, between Antonio Fabiani on the one hand and B. and A. Roncayolo on the other. The claimant Government even appears to acknowledge that the initial denial of justice is the decision of the 11th of November, 1881 (réplique, p. 2); and, as will hereinafter be seen, it is useless to investigate whether one must consider the decision of the 11th of November, 1881, rather than that of the 6th of June, 1882, as the starting point of the eventual responsibilities incurred in the sense of the compromise.

He decides that the act must be considered a denial of justice if it be such under the laws of Venezuela, the law of nations, or the convention of the 26th of November, 1885. He holds that the "absolute concordance of these juridical sources" is not necessary. This is a liberal construction and is very favorable to the claimant Government. After a careful study and an assembling of the laws of Venezuela, which he considers in point, and as a result of his study of them he holds that there is no essential or even notable difference between any of the three juridical sources and the others on this subject. He further holds that the convention of 1885 settles the right of diplomatic intervention between the two nations; that—

in fact an international act substituted on this point a purely national law (see Article X of the Venezuelan Constitution of 1881); and although the compromise reserves the application of the Venezuelan laws it only refers to such of those laws as are opposable to the claimant Government; now that of 1873 was modified for the French citizens in its Article V, at least, by a posterior convention, binding for the two States that sign a compromise.

His study of this branch of the case leads him to conclude and to hold that—

the only definition which it is possible to take into consideration in the Venezuelan law is that of articles 282 and 288 of the penal code of 1873, which assimilate with the denial of justice any act of a *judicial authority* constituting a refusal to execute a sentence rendered executory, an illegal delay in the dispatch of business, a default to render orders and sentences within the terms established, an undue extension or reduction of the terms established by the law or any delay in the determination of a process. The refusals of execution, the inobservance of peremptory terms, and the illegal delays with which the judges may be reproached in the exercise of their duties are therefore the three orders of facts characterizing the denial of justice in the legislation of Venezuela.

He then proceeds to consider and define the meaning of the phrase "denials of justice" and in that connection employs the language and reaches the decision which appears in a quotation taken from page 24 of his printed award, viz:

A direct definition of the denial of justice is not given by Article V of the French-Venezuelan convention. This text points it out only among the causes for diplomatic intervention, and one might even believe that it distinguishes it, in a certain way, from the other causes of intervention—delays, nonexecution of a definitive sentence, etc., or that it distinctly separates it from them. But without any necessity for examining whether the parties employed in the compromise the expression "dénégation de justice" as the exact equivalent of the expression "déni de justice," which is generally adopted by legislation, jurisprudence, and doctrine, it is permitted to affirm that Article V above mentioned fully assimilates with the "déni de justice" as to their effects, the illegal delays of the proceeding, the nonexecution of definitive sentences, the flagrant violations of the law committed under the appearance of legality. In all these cases the diplomatic intervention is declared admissible, provided the question may be any affair falling within the "competence of the civil or penal justice." The condition established by the decree of 1873, of the exhaustion of the legal resources before the courts, is not recalled in the convention of 1885, and it would be excessive to say that Article V *in fine* of this international act ("notwithstanding the compliance with all the legal formalities") refers to the actions for responsibility directed against the guilty authorities; these "legal formalities" mean those to the observation of which is subjected the performance of the judicial act that may have determined a denial of justice or one of the other causes for the diplomatic intervention; they are, therefore, prior to the denial of justice itself.

By reference to the general principles of the law of nations on the denial of justice, i. e., to the rules common to most legislations or taught by doctrines, one comes to decide the denial of justice comprises not only the refusal of a judicial authority to exercise its duties, and especially to render a decision on the petitions submitted to it, but also the obstinate delays on its part in rendering its sentences.

After citing numerous authorities to sustain his position the honorable arbitrator proceeds to say further concerning this same subject-matter, as found on pages 24 and 25, as follows:

In truth, the compromising powers appear to have desired to give the words "dénégations de justice" their widest extent (*justitia denegata vel protracta*) and include therein all the acts of judicial authorities implying a direct or disguised refusal to administer justice. Instead of textually reproducing the terms of the convention of 1885, they chose a general formula comprising within the limits of said convention the complaints for judicial grievances of Fabiani against Venezuela, which complaints, if they are valid, have, partially, at least, the extent of denials of justice, both according to Article V of this international act and according to the Venezuelan law and the law of nations. It was, in effect, the claims of Fabiani, communicated to his government, that must have inspired the wording of the compromise, and the duty of the arbitrator precisely consists in deciding whether Venezuela "is responsible for the damages which Fabiani says to have sustained for denials of justice."

It is not doubtful that at the time the compromise was signed the claims of Fabiani rested, i. e., both upon denials of justice *sensu stricto* and upon other facts, such as the denials of justice *sensu lato*, indicated in the convention of 1885.

In all of these findings he accepts and adopts the broadest and most liberal construction permissible under either of the juridical sources given him for guidance. In all this his holdings are very favorable to

the claimant government and give the controversy of Fabiani its widest possible application within the terms of the convention.

On page 25 the honorable arbitrator discusses, determines, and settles once for all the origin and the object of the Fabiani controversy, and he bases his decision upon the fact found by him that the object and origin were acknowledged by the parties—i. e., by "France and Venezuela"—to be as held by him. This is the finding referred to:

Thus, the object of the controversy and its origin are acknowledged by the parties. It was on account of the refusal of the execution of the award of the 15th of December, 1880, which Fabiani possessed against the two debtors domiciled in Venezuela, or on account of the default of execution owing to the admission of illegal means, that France took the interests of her native into her hands. The Venezuelan Government contests the right of its adversary to proceed against it for responsibility, not because it did not regard the judicial facts alleged by Fabiani, if they were true, as implying denials of justice, but because it sees the absence of denials of justice in the inaccuracy of these facts or in the desertion of the proceeding before the exhaustion of the legal resources. The parties, supporting themselves in the treaty of arbitration on the convention of 1885, have considered, although they only spoke, in the protocol, of "denials of justice," that the arbitrator could reserve as elements of the suit the facts falling within the scope of the above-mentioned convention and constituting denials of justice both according to the Venezuelan law and to the law of nations. In the judgment of the parties concerned, therefore, and according to the applicable texts, "denials of justice," in the sense of the protocol, mean all the direct or disguised refusals to judge, all illegal delays in the proceedings and nonexecutions of definitive sentences, provided the facts concern *affairs of the civil or penal justice*, are imputable to judicial authorities of Venezuela, and have taken place in spite of the compliance with all the legal formalities by the prejudiced party.

On page 26 of his award, he says:

It is certainly the denials of justice, committed in the course of the proceeding for the execution of the award of the 15th of December, 1880, and the eventual appreciation of their pecuniary consequences that form the object of the present litigation.

The claimant contended before the honorable arbitrator of Berne that Fabiani might go back of the award of December 15, 1880, to marshal his demands for indemnity, because, it was urged, he signed the compromise at Caracas under the dominion of *force majeure* and that it did not cover the prior denials of justice. But the honorable arbitrator considers this contention ill founded, holding, on page 26 of his award, that—

Fabiani, who could have had the compromise annulled by the French courts, preferred to conserve the future of his commerce in Venezuela by exhausting all means of conciliation. Fabiani contented himself with the state of things created by the acceptance of the arbitrator's jurisdiction, and, besides, from that moment, his judicial efforts in Venezuela only tended to the execution of the judgment of the 15th of December, 1880. The motives drawn from the *vis major*, which would have affected the compromise of 1880, and would remove further back the starting point of the denials of justice comprised in the present instance, can not be taken, therefore, into consideration. Denials of justice, in virtue of which it would be possible to proceed against Venezuela for responsibility before the arbitrator, can not have taken place before the introduction of the proceeding for the execution of the award of the 15th of December, 1880, or before the 7th of June, 1881, the date of the petition for *exequatur*, entered before the high federal court.

Similarly, the honorable arbitrator proceeds to dispose of the contention that there were denials of justice in reference to the award of December 15, 1880, and its execution from, substantially, June 18, 1881, and determines, after all, from the proper union of the facts and law, that there were no denials of justice until after June 6, 1882, the day on which such award was made executory in Venezuela by the decision of the high federal court of that country.

In regard to this he says:

The series of denials of justice begins almost from the very moment Fabiani endeavored to obtain at Maracaibo the execution of the award provided thenceforward by an order of *exequatur* in due form.

Notwithstanding the terms of the convention of February 24, 1891, wherein and whereby the high contracting parties invoked as an aid to the arbitrator the provisions of the convention then in force between them, the claimant Government raised before the honorable arbitrator of Berne the claim that Article V of said convention was not applicable to the Fabiani controversy, because all of his claims for indemnity had arisen before November 26, 1885, and that to apply it in such a case would be to give it retroactive effect, which is contrary to fundamental principles in the administration of justice. This contention the honorable arbitrator held to be ineffective for the reasons stated by him on pages 23 and 24 of his award, viz:

But in the present instance it is not Fabiani personally who is a party in the issue. The arbitration was concluded not between him, but between the French Republic and Venezuela. The claimant state is bound by the above-mentioned international act for all the international interventions to come. For the rest, it is expressly acknowledged that the convention is applicable to the present contestation by the compromise of the 24th of February, 1891; it is a law as between the two countries.

The nonresponsibility of Venezuela, as established by the honorable arbitrator of Berne, so far as and to the extent which he found such nonresponsibility, is clearly set forth by him on pages 25 and 26 of his award, viz:

In return Venezuela does not incur any responsibility, according to the compromise, on account of facts strange to the judicial authorities of the respondent State. The claims that the petition bases on "*faits du prince*," which are either changes of legislation or arbitrary acts of the executive power, are absolutely subtracted from the decision of the arbitrator, who eliminates from the procedure all the allegations and means of proof relating thereto, as long as he can not reserve them to establish other concluding and connected facts relating to the denials of justice.

In another place, on page 26, after having set the earliest limit when denials of justice could have place before him, as against the respondent Government, he says:

The arbitrator has not, therefore, admitted, besides the "*faits du prince*," all of the facts strange to the nonexecution and to the effects of nonexecution of the sentence above referred to, to be proved.

Having determined in his award in what particulars denials of justice consisted, and when they began, and how they arose, he proceeds to fix the measure of responsibility attaching to Venezuela therefor; and then to measure and assess the damages which had occurred because of such denials of justice.

On the 30th day of December, 1896, the honorable arbitrator of Berne renders his award and delivers the same in writing, with his reasons therefor, to the respective representatives of the claimant and the respondent Governments.

Following the award and its publication, the respondent Government entered upon the discharge of the requirements thereof and has fully complied therewith. The amounts so awarded and so paid have been accepted by M. Fabiani under the implied consent and approval of his government. No evidence is adduced, no suggestion is made, that, following the award, the Government of France, on its part, has filed with the Government of Venezuela any dissent to or protest against the decision of the honorable arbitrator, or has in any manner addressed itself to the respondent Government to ask a rehearing, a further hearing, or the opening of said cause in whole or in any part, or to manifest the unacceptability of the award as made or to express or to intimate any dissatisfaction therewith, or any purpose or desire on its part to have the Fabiani controversy regarded by the two governments as a pending and open question in any particular or in any part. In all respects, and in every respect, so far as appeared before the umpire, there has been apparent assent to, acceptance of, and acquiescence in the award on the part of the Government of France, and, on its part, an apparent treatment of the Fabiani incident and controversy as satisfactorily, finally, and conclusively closed. Such, also, has appeared to be the position of the Government of Venezuela in relation thereto. Neither does it appear before the umpire that Fabiani, prior to the sitting of the honorable commission at Caracas, had evidenced to the Government of Venezuela through his own Government or otherwise, that he regarded the decision at Berne as setting at rest a part only of his claim or that he asked of his Government or expected of his Government further intervention on his behalf in reference to the same. Nothing appears in the case to indicate that the Fabiani controversy has been treated or considered diplomatically between the two governments, as to any phase thereof, since the award at Berne, nor that the same was referred to as such when the convention of February 19, 1902, was in progress or under consideration; and the umpire understands the claim to be that it is within the terms of that convention solely because, and only because, of the unrestricted character of those terms; because, and only because, this commission is said to be open to the claims of Frenchmen, without having any words

of definition or restriction other than the nationality of the claimant and the time of its origin.

The umpire is compelled respectfully to dissent from the proposition made by Fabiani that such parts of his claims as were not allowed by the honorable arbitrator were not allowed through the lack of competency to dispose of them through lack of jurisdiction over them. It is the opinion of the umpire that the honorable arbitrator had complete and absolute dominion over the whole Fabiani controversy; that it was given him by the purposed and carefully considered concordant action of the two Governments by their compromise of February 24, 1891, in order that a matter which for some years had vexed and troubled them might thereby attain eternal rest and be no longer a disturbing element, a serious cause of dissension between them.

Concerning this the honorable commissioner for France in his supplementary opinion has said:[a]

> In the first place Doctor Paúl supports himself upon the text of the convention of the 24th of February, 1891, which is the agreement of arbitration, and upon the exchange of diplomatic correspondence which has preceded this, in order to demonstrate that the intention of the two Governments was really to determine definitely all the claims of M. Fabiani against Venezuela. I do not deny this. I even add that the French Government, faithful to the spirit which had inspired the negotiations, did not cease to maintain this interpretation of the agreement in the course of the discussions which were engaged in before the Swiss arbitrator. It was, to the contrary, the representatives of the Venezuelan Government at Berne who, hoping to find in the terms of the convention unfortunately "ambiguous," the possibility for Venezuela of eluding a part of her responsibilities, combated this broad interpretation in several instances and substituted for it a restrictive interpretation.

There is, then, no disagreement between the parties that the purpose of the compromise of February 24, 1891, was to settle the whole matter contained in the Fabiani controversy. The contention before the umpire rests upon a different basis. The respondent Government claims that not only was the purpose of the compromise as stated, but also that this purpose was effected and the Fabiani incident closed.

Fabiani claims that because of the holding of the honorable arbitrator of Berne that denials of justice as such applied to matters judicial; that in the case before him denials of justice were only found in the nonexecution of the sentence of Marseilles; that they began after June 6, 1882; that there was no recourse by Fabiani to judicial tribunals other than those connected with this sentence, and hence no other opportunity for denials of justice; that such "*faits du prince*" as bore so immediately or approximately upon the execution of said sentence as to have an appreciable effect thereon, were the only "*faits du prince*" to be considered under the compromise; that because of these decisions the purpose entertained by the two Governments at the time of their convention of February 24, 1891, to thereby settle through the arbitration there provided for all of the Fabiani contro-

[a] Page 103.

versy was frustrated, and that the honorable arbitrator, in effect, at least, eliminated and subtracted all else as not being within his competency under the protocol, and thereby especially reserved all these for the use of Fabiani under some later convention, the terms of which should be more liberal.

To the contrary, the honorable commissioner for Venezuela holds the opinion that in making the decisions referred to the honorable arbitrator proceeded strictly in accordance with the terms of the protocol, which, while submitting all the claims of Fabiani to his conclusive and final determination, required and permitted an award against the Government of Venezuela for such of those claims only as resulted from or grew out of the denials of justice, and for such of these only as found responsibility in such Government. He alleges as truth that the claimant Government before the Swiss arbitrator pressed with vigor and to the end that every item presented in Fabiani's tables of claims was properly classed as a denial of justice and was a just demand against the respondent Government under the terms of the protocol, and in general that the reparation to be made by the responding Government should be found by the arbitrator to comprise—

all the denials of justice, whether they were imputable to the judicial authorities or to the administrative authorities of Venezuela (these latter naturally including the arbitrary acts of *faits du prince* attributable to the Federal executive), and all the damages which Fabiani says to have suffered through the fault of the public powers of Venezuela,

and strenuously urges upon the arbitrator that he was given "plenitude of jurisdiction" to determine all of these questions. He also admits as truth that the responding Government, while insisting that the whole controversy of Fabiani was before the arbitrator for his final disposition and while denying emphatically that there had been "any denial of justice or any cause of resort to diplomatic intervention," asserts affirmatively that denials of justice are limited to judicial proceedings and do not at all include administrative, legislative, or executive acts.

It is thus the two Governments clash; it is thus they contend before the honorable arbitrator of Berne. But it is not over the question of jurisdiction; it is not over the question of his competency. Both admit his jurisdiction; both adhere to his competency. The contest is, first, over the right of the claimant Government to demand any sum in damages of the respondent Government on behalf of Fabiani under the protocol which involved two inquiries—first, the inclusiveness of the term "denial of justice" chosen concordantly to define the claims which are in dispute; second, the responsibility of the respondent Government. When this question of right was decided then the measure of damages came to be allowed, if any.

When in the course of his decision the honorable arbitrator of Berne sets aside a claim of Fabiani or eliminates it, it is because in principle and in law the arbitrator has first disallowed it and adjudged against it, through his sovereign power to decide the basic question submitted to him and over which the contest has been made. When he decides this basic question he settles the fate of and effectually determines a large part of the claims of Fabiani. He did not extract them from the *case*, he did not subtract them; he decided against them and disposed of them adversely, not in detail, but as not being claims for which, in principle, Venezuela was responsible under the terms of the protocol. He eliminated them from his consideration only when he reached the question of damages. Up to that point they had been before him and had been passed upon by him. Examination of the arbitrator's award shows that nothing escaped his attention, that everything submitted was carefully considered and adjudged. He allowed some things and disallowed others, over all of which he had rightful and exclusive dominion and sovereignty. He did just what Fabiani assured him he ought to do, and to the doing of which Fabiani, in advance of the arbitrator's action, bowed in assent.

That he may do Fabiani no injustice by this statement, the umpire will present a few excerpts from the *réplique* of Fabiani before the honorable arbitrator of Berne, and later from his exposé before the same person, and first from page 16 of his *réplique:*

In our opinion the question can be considered under another aspect, that of the terms of the protocol—general terms which authorize the arbitrator to retain all denials of justice *duly established,* and which permit Fabiani to present all pecuniary claims relative to damages sustained for *denial of justice.*

If Fabiani formulates claims *which have another cause than the denial of justice* or the *imputability of which to the denial of justice should not appear certain, the arbitrator will reject them, purely and simply as proceeding from the terms of the protocol,* the same as if he recognizes the responsibility of Venezuela he will retain in the proportions which his conscience shall dictate to him, all the damages which he shall judge to be a direct and immediate result of infractions committed by Venezuela.

It will be permitted us to add that even if the protocol, instead of being conceived in general terms, had given the full detail of all the litigious points, it would not be necessary to conclude from it that the whole motive of the claim not expressly enumerated in the compromise ought to have been brushed aside without discussion as being found outside the terms of the protocol.

If it is not a question of another difference, or of a difference arising posteriorly between the parties; if the new motives of claim although they may not be expressly specified in the protocol, find themselves, nevertheless, virtually included in it, whether as an integral part of the litigious points designated, or, as a consequence, if some of these motives of demand are found in the protocol; if the demand is no other than that which the protocol has foreseen and has had for a purpose to settle, and, finally, if the motives which one would wish to have set aside should later give place to the same debates as the motives set forth in the protocol, the arbitrator can appreciate the merit of these new motives and include them in his decision.

On page 615 of Fabiani's exposé he says:

In this situation if the arbitrator, after having examined and analyzed our different motives of claims, were led to recognize that all these motives are justified and that we have estimated our damages without any exaggeration, Venezuela would be able to felicitate herself upon her insistency in causing a mode of payment hardly equitable to be accepted, etc.

And if it should be admitted that the judge, proceeding *either by way of elimination* or by way of reduction, considers that there is reason to restrain the measure of our damages estimated by him upon the usual but converted monetary basis, etc.

On pages 616 and 617 of his exposé Fabiani says in part:

And if he considered it equitable to make a reduction in any of our claims *or if he considers that certain of them ought to* be laid aside, he will find himself, in spite of the taking into consideration the course of the bonds in the presence of a certain lesion, unless he is led to diminish in notable proportions the total amount of our claims.

On page 622 of his exposé Fabiani says in part:

The compromise confers upon him purely and simply the mission of fixing the amount of the *indemnity if he considers Venezuela responsible.* The arbitrator acts in the plenitude of his independence, having no other guide than his intelligence and his love for justice. He asks himself if such a prejudice or such a damage has been the direct and necessary consequence of the infractions which have engaged the responsibility of the defendant party.

On page 624 of his exposé Fabiani says:

It may be, however, that the study of our affair and the detailed examination of the numerous items of our claims suggest to the arbitrator either the opinion *that some of our claims have no direct and immediate connection with the infractions set forth* or the opinion that certain prejudices declared by us ought to be reduced to a lower figure. That is the right of the arbitrator, a right whose exercise is subordinate only to the inspirations of his conscience. We have not to prejudge his decision. We know that it will be conformable to justice and equity, but we are convinced that if some of our demands appear to him subject to a reduction the arbitrator, taking account both of the manner of payment and of the circumstances of the case, will accord to us by title of supplement of indemnity exemplary damages.

Fabiani urges the nonretroactivity of the treaty of 1885 through many pages of his exposé and claims that this date is thirty days after the last of the acts of violence upon which his claims rest. On page 522 of his exposé he declares that Article V of the convention of 1885 governs the future only; that Article III of the same convention is the one governing the past. In the course of this discussion Fabiani is appreciative of the magnitude and persistency with which Venezuela had opposed his claim, and of the possibility that if he had pressed his claim through the treaty of 1885 it might have been an insurmountable obstacle to the reestablishment of the good relations between the two countries and that therefore no treaty could have been consummated.

On page 526 of his exposé he begins a discussion of his claims in reference to the mixed commission which was provided for by the convention of November 26, 1885, to determine the liability of Venezuela for acts posterior to 1867-68 and anterior to the date of the convention, and in this communication he uses the following language:

Our claim having reference to acts posterior to 1867–68 and anterior to November 26, 1885, we evidently had the right to appear before the mixed commission. Why did we not do so? And, moreover, why did not the Venezuelan Government in the presence of the intervention of the minister of foreign affairs of the French Republic itself demand the sending to this mixed commission, which did not begin to do business until two years after? Let us examine the first and latter point. Venezuela, represented by Guzmán Blanco opposed an absolute non possumus. It denied formally the possibility of a claim on our part, and it contested even the existence of our right, pushed it aside without examination and with the most remarkable bad faith. The mixed commission, then, would not have been able to occupy itself with our affair. There is then arbitracio, because the discussion bears upon the admissibility, the extent, or the reality of the damages. When the right is litigable, and, above all, when it is absolutely contested, there is arbitrium. It is a case of arbitration, properly called, or of mediation.

In the matter of damages the mediator generally takes upon himself to give his opinion upon the question of right and leaves to the mixed commission the care of deciding upon the extent of damage. The mission of the arbitrator is determined by the protocol, and more often he is charged with the pronouncing upon the right and upon the act. We do not suppose that these rules can be seriously contested.

In discussing on page 529 of his exposé the convention of November 26, 1885, and in insisting upon the nonretroactivity of the terms of Article V, he says:

If, finally, the words and the intention did not lend to each other a mutual assistance for protesting against the idea of retroactivity, one would find himself in a strange situation. On the one hand a Government which stipulates in good faith and which for causes which are useless to refer to ignores that, during the rupture of international relations one of its nationals has been on a large scale the unfortunate victim of the hostility of the public powers of Venezuela, the Turk's head of an incensed chief of state, * * * is it necessary to recall that mental reservations ought to be energetically laid aside? In that which concerns us we have suffered too much in Venezuela not to protest against this attempt to make an attack upon the principle of the nonretroactivity of the laws. We hold essentially to prove to Mr. Blanco that his last blow has not succeeded. He has failed in discernment when he has not considered the convention of November 26, 1885, as his supreme work, destined to serve his anger and to create for us new difficulties. The conscientious study of our affair leaves no doubt upon the intention; * * * personal interest made him lose all interest in truth and justice. His diplomatic instrument came thirty days too late. And, besides, even had he signed it earlier our sad and venal enemy would not have been able to get any profit out of it. Our affair entered into all the cases reserved, and there is not a single one of our grievances which is outside the provision of Article V, as one may be convinced by the study of our exposé of facts.

On page 559 Fabiani says:

We believe that we have sufficiently demonstrated in our general exposé that whether by "*faits du prince*" or by insurmountable obstacles opposed by the judges and the public power to the execution of our sentences or by the successive denials of justice or by the numerous acts contrary to the right of nations, the responsibility of Venezuela finds itself directly engaged. There can be no divergences upon the *extent* of the power of the arbitrator in respect to all that which has reference to the appreciation of the circumstances and of the facts which ought to determine his conviction in favor of one or the other party. In that which concerns us we recognize this sovereign faculty, submitting ourselves without mental reservations to the intelligence, the prudence, and the conscience of our judge. We have full faith in the justice of our cause, in the reality and exactness of the facts which we have maintained, but we shall hold for true and just that which the judge shall recognize as true and just.

We leave, then, to the arbitrator to consider the facts which are submitted to him, according to the light of reason and justice, aided by the knowledge of the right and general duties of administration which his long practice in public or international affairs has given him. He knows that in virtue of principles admitted by doctrine and jurisprudence of all people he must in such a matter move in the plenitude of the independence of the judge who conforms only to his conscience.

In another part he says:

This part of our work being exclusively reserved for juridical development we are forbidden from entering into a discussion or even an indication of figures. We place the principles; if the arbitrator accepts them his experience and his proud intelligence in affairs will suggest to him the application which he ought to make to the different points of our pecuniary claim.

On page 575 of his exposé Fabiani says:

It will belong to the arbitrator to extend his judgment upon what shall appear to him legitimate or illegitimate, just or excessive, in the claims which we produce. * * * His intelligence, his prudence, his conscience will be the most sure guide for him, a guide formally provided for and authorized by the legislation of the two countries.

We know well that the party of which we demand the damages and interest will endeavor to diminish the amount of them. We see no inconvenience in accepting the discussion. We are, on the contrary, pursuáded that in going to the depths of things we shall win ground instead of losing it. The essential thing was to localize this discussion, to avoid theoretical controversies on the kind of damage, to prescribe in this affair at the beginning a distinction between direct and indirect damages, and to constrain the adverse party to confine itself exclusively to proving the exaggeration of our demand. It does not enter into our intention to examine here the different points of our claim. We have made in this regard a separate work, which will come before the eyes of the arbitrator. No figures ought to disturb a discussion of right already too long and which we are in haste to terminate. It is evident that *if the responsibility of Venezuela be retained* no doubt could be raised as to the absolute legitimacy of our claims in that which concerns the liquidation of our sentences in the sums of which the instance formed before the French tribunals ought to assure the recovery. * * * The *principle of the responsibility once admitted* it will belong to the arbitrator to scrutinize, to analyze our claims upon these three points *and to retain only the losses or the damages which shall appear to be justified.*

On page 794 of his exposé Fabiani says:

The arbitrator has the right of *sovereign appreciation.* We do not suppose that this principle can be contested. Without doubt an impartial and intelligent judge admits only that which appears to him legitimate; he *rejects the damages* which in his opinion have not a *direct lien* with the incriminating facts.

The intervention of France on behalf of Fabiani began not long after the treaty of 1885, and the first reference which is of importance, perhaps, contains the following statement by the French Government in regard to its claims for indemnification on account of Fabiani, addressed by the French legation in Caracas to the Venezuelan Government, on August 3, 1887:

It is the opinion of the French Government that the indemnity must embrace, at least in the first place, the amount of the sum, both principal and interest, the collection of which would have insured the execution of the sentence in due form and proper time, besides the restitutions ordered by the judges, amounting to about 1,300,000 francs; and, in the second place, damages and interest, the amount of which is to be discussed, for the wrongs done to Fabiani in his credit and in his business.

As regards his other pretensions, a searching investigation and discussion *should determine* how far they are *well founded*.

Perhaps the first explicit reference thereto on the part of Venezuela is found in the letter of Gen. Guzmán Blanco to his Government, of date November 14, 1889, in which, after referring to other matters with which he had been employed in his office as plenipotentiary, he says:

In that which has reference to the Fabiani claim, with which the Government has charged me recently, I have been able to do nothing to the day of my resignation, because I had not yet received the information which is necessary to the defense of our rights. The point is so grave that it implies *almost the annulment* of the treaty of 1885. The French Government demands that Fabiani be indemnified for something which remains due to him from his father-in-law, Roncayolo, in the liquidation of personal affairs in which they were associated. *Having opened thus* the breach in the treaty, we shall lose all the progress which we have made with it.

By his statement that the point is so grave that it almost implies the annulment of the treaty of 1885, and by the further statement that—

a breach being thus opened in the treaty, we shall lose all the progress which we have made with it—

it is quite evident that the claims presented covered more than denials of justice as understood by him, because these were recognized in the treaty referred to.

Reference to this claim next appears in the correspondence between the two Governments, beginning December 31, 1889, and continuing to August 14, 1890, which is set out in the additional memorandum of the honorable commissioner for Venezuela, accompanying his opinion to the umpire, from which it is learned that the Government of France had particular interest to settle the claim; that—

my Government would see, in the manifestation *of more favorable dispositions as regard said claim*, the clearest evidence of the desire of the eminent President of the Republic of Venezuela and of yourself to establish between the two countries a cordiality toward which all my efforts are bent.

This is from a communication from His Excellency, Mr. Blanchard de Farjes, minister of France in Caracas, to Mr. P. Cassanova, minister of foreign relations for Venezuela, of date December 31, 1889. It is further learned, from a study of the correspondence referred to, that France proposed arbitration; that Venezuela declared to France that it *rejected the Fabiani claim from its origin*, but that the President was desirous of exercising all efforts in behalf of the *desired good harmony* between both countries, and therefore accepted the proposal to arbitrate, *in principle*, providing the umpire be one of the Presidents of the South American Republics and that the question to be decided be—

if this is the case provided for in Article V of the French-Venezuelan convention of November 26, 1885, and that, in case Venezuela should be condemned to pay any indemnification,

in view of the legal proofs adduced in favor of the claimant, * * * such indemnity to be paid in 3 per cent bonds of the diplomatic debt.

Subsequently the President receded from his requirement that the arbitrator be a President of the Latin-American Republics. France asked that the award of the umpire deal only with the amount of indemnity to be fixed for M. Fabiani; in other words, that Venezuela concede the right to some indemnity, and urged upon Venezuela, inferentially, that by her refusing to consent to this proposition Venezuela was perpetuating an element of dissension between the two countries. This was the status in May, 1890. In July of the same year the minister of Venezuela in France informed the minister of foreign relations in Venezuela as follows:

Consequently, for greater clarity and to prevent M. Fabiani from misconstruing the agreement, thus creating new difficulties, I told the minister (M. Ribot) that I was going to inform the Venezuelan Government of the agreement precisely in the following language:

"That the French Government is willing to accept *that the question relative to M. Fabiani* be submitted to the President of the Federal Council of Switzerland as *arbitro juris*, first, to decide if this be the case provided for in Article V of the Franco-Venezuelan convention of November 26, 1885, and, second, should the umpire decide that such is the case provided for in Article V, then the umpire is to *fix the sum that must be paid to M. Fabiani* in the 3 per cent bonds of the diplomatic debt. I have discussed the matter with the director of the cabinet, who has told me that, although the French Government agrees to the substance of the two points mentioned, it is not desired that they should be stated in such terms, because these would to a certain extent be little satisfactory to the French Government, *which has decidedly supported M. Fabiani's claim, entering it energetically through* diplomatic channels."

It will be especially noted that, according to this communication, France agreed in substance to the two propositions as stated, but opposed their being submitted in the language suggested.

August 12, 1890, the minister of France at Caracas forwarded to the minister of foreign relations for Venezuela a draft of the protocol—

to serve as the basis of the arbitration already agreed upon "in principle" between the Venezuelan and French Governments—

which draft, in the language chosen by France, the umpire is assured by the honorable commissioner for Venezuela, is Articles I and II of the convention of February 24, 1891, as finally accepted by the two Governments.

Having thus brought upon the record the matters essential to the development of this claim, it is now ready to be considered in all its bearings for the final determination of the umpire upon its merits.

In the judgment of the umpire, the case may properly turn upon the answer to be given the inquiry, Was it the intent and purpose of the high contracting parties, in their agreement of February 24, 1891, by and through its terms to submit to the honorable arbitrator of Berne the entire Fabiani controversy?

When France intervened in behalf of her national, the claims of Fabiani were no longer individual and private claims; they became

national. The right to intervene exists in the indignity to France through her national. Thenceforward it is national interests, not private interests, that are to be safeguarded. It is the national honor which is to be sustained. It is the national welfare also which must be considered. In protecting Fabiani and his interests the general welfare must be kept in the foreground. To the extent that his interests and the common welfare of France are in accord his particular claims can be pressed, but no further. If at any time the general good of France requires a surrender of all his claims, such surrender it is expected France will make, and after that if Fabiani has a claim it is against his own Government, not against Venezuela. From the time her intervention began it was undoubtedly the constant purpose of France to remove as quickly and as effectually as possible this occasion of international dissension. It is not to be believed that France would consent to submit to arbitration a part only of a national's claim, leaving large and important portions of it undisposed of and to be still matters of international intervention. Nothing, nationally, is gained thereby. The dignity of the tribunal thus invoked, the eminent character of the parties litigant, the importance to these countries, greater than any possible interests of the national, that peace and harmony be the assured result of their action—all these considerations forbid the contemplation even of such a thought. Such is the approach to this question through the medium of general considerations. When view is had of this particular contention, the parties and the protocol, there is added light. Both of the high contracting parties affirm it to be their purpose to close the controversy by the arbitration. The protocol in effect so states. As it seems to the umpire, the honorable arbitrator so understood the scope, purpose, and intent of the protocol. The text of his award charged him with the duty—

first, to decide whether, according to the laws of Venezuela, the general principles of the law of nations, and the convention in force between the two contracting powers, the Venezuelan Government is responsible for the damages which M. Fabiani claims he sustained through denial of justice.

This duty was placed upon the honorable arbitrator for one of two reasons—either that his determination might end the controversy or simply as an academic proposition. The latter reason needs only to be stated to be denied.

It is also impossible for the umpire to accredit the two nations with the purpose and intent to consider such of the claims as the honorable arbitrator fails to recognize responsibility for in Venezuela as simply eliminated, subtracted, and reserved from the effect of the protocol, to remain as vital claims in the hands of France as a continuing cause of discussion and dissension between the two Governments, or to believe that Venezuela should have consented to arbitrate these

points of difference, knowing that when the award was made all of Fabiani's claims not held to be well founded were to be pending against her; knowing that for such as were held to be denials of justice she must make reparation *then* and for all such as were not so held she must oppose, or pay, or arbitrate at some later time.

It is impossible for the umpire to appreciate the reason for the prolonged diplomatic controversy over the terms of the protocol, the anxiety of France, on the one hand, that Venezuela should admit her liability in principle and arbitrate only the damages to be assessed, and, on the other hand, the tenacity with which Venezuela clung to her early offer to submit first this question—

if this is the case provided for in Article V of the French-Venezuelan convention of November 26, 1885—

had either of these Governments understood that the arbitration proposed was only a preliminary skirmish to feel the enemy's lines in order to prepare the way for the real battle which was to come after, or if both these Governments had not been controlled by a settled conviction that the award to be rendered was the end of the Fabiani controversy.

It can not be gainsaid that if the honorable arbitrator of Berne had accepted as correct the full contention of France before him he would have amerced the Government of Venezuela in the sum of 46,994,563.17 francs. This was her hazard when she trusted her cause to the arbitrator. If such had been his award, there was for Venezuela no redress. It can not be claimed that if the honorable arbitrator had included every item to the extent demanded that Venezuela had relief before any tribunal or that for her there could have been by any tribunal subtracted from the sum total a single figure or a single centime. If the present contention of Fabiani is correct, that there is a relief for him before this tribunal, then the respondent Government in an arbitration takes a hazard peculiar to itself of paying the award to the extent of the entire demand of the claimant Government, if such be the award, or a part thereof if successful in preventing an award for all, and then resisting at some later day or paying or arbitrating such elements of the claims as it had been successful in opposing before the first tribunal; while the claimant Government enjoys the privilege, peculiar to itself of consenting to such restrictions in the protocol as it can not avoid if it is to obtain arbitration, and later presenting to a tribunal not hampered by such restrictions the elements of its claim refused, because of the restrictions in the protocol at the first hearing.

If the judgment of the honorable arbitrator of Berne had been that under the protocol the Government of Venezuela had no responsibility, would it have resulted *that all the claims of Fabiani were left unsettled by his decision* and were restored to their primal state of

existing claims for which the Government of France could intervene? If not, then what claims would be held to be settled and what still pending? If the position of Fabiani is correct, which is the better result for the respondent Government in an arbitration, to defend successfully in part or in all or to lose in all or in part? Rather, which makes the respondent Government suffer most and longest, since in such a case there is for the defendant Government no surcease?

These inquiries have value only in the fact that by considering them one is irresistibly impelled to the sane and safe conclusion that, in every international controversy of like import with this, the two Governments honestly and carefully seek a common meeting point, which is to be gained usually, as in this case, by mutual concession and mutual remission of matters which *can yield*, and, when that common ground of consent is reached, to submit it as the *whole controversy;* or *as being all that both parties will admit is the controverted question*, and that this mutual point of agreement *is as much a matter of agreement* between the high contracting parties *as is the covenant to arbitrate itself is an integral part of that covenant gives it its final character and provides for it its name—which is compromise.* The process by which this agreement is reached being concessions by each, each concession cancels the other, so that, outside the protocol, of the original contention *there is left nothing. All of the original controversy* is found finally resting in the protocol *or in oblivion.* Thus, when Venezuela and France first compared their views on the Fabiani matter, France claimed that there was unquestioned liability on the part of Venezuela, and during the discussion named in general, at least, the grounds thereof, and the amount, in part, at least, that she should receive. Venezuela denied all liability in every particular. As they pursued their efforts to reach an agreement France admitted that there might be a question as to amounts, but no question as to the fact of responsibility, and proffered to Venezuela arbitration of the *amount.* Venezuela consented to arbitrate, provided that the arbitrator might be a President of a South American Republic, and provided also that the *question of liability* be the *first question* determined.

Later Venezuela tendered a recession from her demand that the arbitrator must be the Preisident of a South American Republic and consented that the President of the Swiss Federation might take charge of such arbitration, but insisted that the arbitrator be asked to decide, first, if this is the case provided for in Article V of the French-Venezuelan convention of November 26, 1885. Finding that arbitration could only be had by conceding this last point France made the concession in principle, but asked that it be not thus worded and in the end submitted for the acceptance of the Government of Venezuela the compromise substantially as it was when it became the treaty between them. *Nothing on either side of the claims thus conceded survived.*

They were all *mutually agreed* to be *perpetually abandoned*. It matters not that each of the agreeing parties believes that much, perhaps all, of its early contention is still left, and is comforted in the thought that nothing has been, in fact, conceded, and that all really exists under the terms agreed upon. This, however, remains *certain* that they have agreed to submit the *whole question* to the arbitrator. They may contend before him, on the one hand, that all is included, and, on the other hand, that nothing can be found under its terms. Concerning the meaning, form, and effect of their agreement, they may essentially and antipodally disagree, but that *they have agreed that their contention is all included within the terms of the protocol, is not, and never can be, a matter of disagreement.* That the compromise has been made in order that the arbitrator shall make a *final* and *conclusive* award upon the *whole* of the *original controversy* "not buried in mutual concession," *is the most solemn covenant of all.*

If France had made the award at Berne the subject of diplomatic protest before the convention of February 24, 1902, or, in connection with that event, had submitted its grievance, there would have been an opportunity for Venezuela to make answer through the same channels. If, after such diplomatic interchange of opinion, it had seemed best to resubmit the question which had once been heard, or any part thereof, it would come before the tribunal then constituted to hear it, with the knowledge on its part that the hearing had been consented to by both of the Governments involved therein. This protest it did not make. There is nothing to indicate that it desired so to do, or had aught to say why it should not accept as final and conclusive the award of the honorable arbitrator of Berne, unless it be found in the fact that Fabiani is permitted to present his claims, in the manner he has presented them, before this Mixed Commission. So far as the umpire is advised the Government of France has not assumed responsibility for, or attempted to dictate as to, the claims which might come before this tribunal. So far as he is advised, the actual relation of France is found in the fact that it has sought and obtained a tribunal where its nationals may be heard, but has not passed at all upon the claims, sought to refuse, or to limit; the presence of any who considered that they had an international grievance for which the Government of Venezuela had responsibility. It is believed by the umpire that this accounts for the presence of this claim before this tribunal. The large intelligence, the high honor, the scrupulous integrity, the sensitive perceptions of the diplomats of France are assurances to the umpire either that they have carefully and purposely presented this claim, regarding it as entirely outside of the attributes and relations given it by the umpire, or that it is wholly the work of an individual, who had presented his claim on his own initiative, because he feels that in the decision at Berne he suffered a too serious diminution in his honest damages

by the application of the rule established by the honorable arbitrator, and who hopes that there may be a chance for revision and reimbursement before the present tribunal.

The umpire holds further that the honorable Governments, in establishing the standard of measurement which was to be used by the honorable arbitrator of Berne in fixing the responsibility of the respondent Government, established at the same time the measure which, when applied by the arbitrator, was to determine alike the extent and the limit of Fabiani's claims. When, therefore, the honorable arbitrator made use of this standard, so provided him, the claims of Fabiani, by their own weight, fell within or without the line of demarkation so drawn. The honorable arbitrator, on his own initiative, eliminated nothing, subtracted nothing, from these claims; there was left for him nothing but first to settle the meaning of the protocol, and then to observe its effect, and to point out which of the claims came within, and which without, the *action* of the *rule* agreed upon and prescribed to him by the two honorable Governments. In other words, when he seems to eliminate or to subtract from the claims of Fabiani, or mayhap, so states in his arbitral decision, he is in fact simply pointing out and designating the different elements of the Fabiani controversy, which, in effect, the high contracting parties had agreed to eliminate and subtract in order to reach an agreement that permitted the protocol and the arbitration. The moment the honorable arbitrator of Berne settles the pivotal question of the protocol, by defining the term "denial of justice," around which the storm clouds of conflict quickly gathered and the battle was fiercely waged, these claims fell into the lethe prepared for all such by the two Governments when they agreed to and accepted the protocol of February 24, 1891.

It is also true that this was not the beginning of such eliminations and subtractions by and between these honorable Governments. They began November 26, 1885, in the solemn compact then made between them, and thenceforward these nations rested upon their valued agreement to include within their diplomatic cognizance and intervention the same matters only as are accepted in the protocol of 1891, which substantially, even emphatically, reaffirms this previous convention and applies it to the concrete case in hand, hence if there were any difficulty in understanding the protocol when standing alone, by the light of the treaty of 1885, such difficulties are all removed, and one is permitted to pass within the veil and catch the genuine spirit which inspired it, as we hear the thoughtful plenipotentiaries declare on the part of their respective Governments that it is done—

in order to avoid in the future *everything* which might interfere with their *friendly relations.*

What they agreed to in order to avoid in the future a disturbance of friendly relations was done February 24, 1891, in order to avoid

and to remove the very thing, which, until removed, did disturb the friendly relations of the two Governments; and in the agreement which was merged in the protocol such concessions as were made on the part of both Governments were the price which each paid for the restoration and continuance of friendly relations, so essential to the highest welfare of both nations. So far as these concessions affected the pecuniary interests of Fabiani they were the especial tribute required of him by his Government to conserve its general good. How great was this price was not known until the judgment of the arbitrator was obtained, defining the inclusiveness of the standard agreed upon. When that was known, in so far, if at all, as this limited his claims within what he could have obtained under an unrestricted submission, the draft had been made upon him in the interest of the common weal of his nation, which draft it was his patriotic duty to honor, and thereafterwards, toward the respondent Government, to seek no recourse.

The umpire may be permitted at this time to refer to decisions made in the courts and international tribunals and to the opinion of Count Lewenhaupt and to quote from the reasons given for the judgments rendered and the opinions held, the subject-matter being similar in many aspects to the present case. They illustrate and support the positions taken by the umpire and are, in his judgment, ample in principle and precedent.

There is the Machado claim before the mixed commission of the United States of America and Spain, of February 12, 1871, presented by memorial in 1871, being No. 3 of the claims before said commission. It was dismissed for want of prosecution December 20, 1873—

the commission reserving to itself the right to reinstate the said case on motion by the advocate for the United States, sufficient causes being shown in support thereof.

In 1879 he filed another memorial, being No. 129 upon the docket. March, 1880, the advocate for Spain moved to strike it from the docket on the ground that it was the same case as No. 3. The advocate for the United States contended that the claim was different, and claimed that the motion of the advocate for Spain might be dismissed.

The arbitrators being unable to agree, the question was referred to the umpire, Lewenhaupt, who, on July 12, 1880, rendered the following decision:

The umpire is of opinion that the question whether case No. 3 may be reopened has not been referred; that the question whether this claim, No. 129, is a new one or the same as No. 3 does not depend upon whether the items included be the same in both cases, but the test is whether both claims are founded on the same injury; that the only injury on which claim No. 129 is founded is the seizure of a certain house; that this same injury was alleged as one of the foundations for claim No. 3, and that in consequence claim No. 129, as being a part of an old claim, can not be presented as a new claim in a new particular. For these reasons the umpire decides that this case, No. 129, be stricken from the docket.

This case is found in Moore's Int. Arb. 2193. See also decisions similar in principle, Danford Knowlton & Co., and Peter V. King & Co., before the same commission, found in Moore's Int. Arb. 2193–2196. See Delgado case, Moore Int. Arb. 2196.

See the case of McLeod, Moore Int. Arb. 2419.

McLeod, a British subject, set up a claim against the United States of America for his arrest and imprisonment in the State of New York on a charge of murder committed at the destruction of the steamer *Caroline* in the port of Schlosser in that State on December 29, 1879. This claim was presented by the British agent to the commission under the convention between the United States and Great Britain on February 8, 1853. The agent of the United States maintained that the case was finally settled between the two Governments by Lord Ashburton and Mr. Webster in 1842. The British commission thought that the adjustment made between the two Governments was merely a settlement of certain national grievances and that any claim on the part of McLeod must be considered as one of the unsettled questions existing at the date of the convention of February 8, 1853. Mr. Upham, commissioner for the United States, was of a different opinion, and, among other things, says that two questions arise in the case:

I. Whether the settlement made by the Governments precludes our jurisdiction over the claim now presented.

II. Whether, independently of such exception, the facts show a ground of claim against the United States.

* * * No claims can be sustained before us except those which the Governments can rightly prefer for our consideration. With matters settled and adjusted between them, we have nothing to do.

A settlement by the Governments of the ground of international controversy between them, *ipso facto*, settles any claims of individuals arising under such controversies against the Government of the other country, unless they are especially excepted, as each Government by so doing assumes, as principal, the adjustment of the claims of its own citizens and becomes itself solely responsible for them. * * *

These subjects of difficulty and controversy between the two countries were thus fully and finally adjusted, so that the able and patriotic statesmen by whom this settlement was effected trusted, in the words of Lord Ashburton, "that these truly unfortunate events might thenceforth be *buried in oblivion*." * * *

In my view, the entire controversy, with all its incidents, was then ended; and if the citizens of either Government had grievances to complain of they could have redress only on their own governments, who had acted as their principals and taken the responsibility of making the whole matter an international affair and had adjusted it on this basis.

The umpire, Mr. Bates, sustained the position of the commissioner for the United States and rejected the claim.

John Emile Houard was arrested in Cuba and imprisoned without right, as it always appeared. Spain voluntarily released Mr. Houard and restored his property to him, requesting of the United States, as a condition of the pardon and restoration, that an end should thereby be put to all discussion concerning this case. This proposition was

accepted by the United States. Mr. Houard came before the international commission between the United States and Spain and claimed damages for the wrong done him through his imprisonment and the consequences naturally flowing therefrom. The umpire made the decision as follows:

> The umpire does not deem it consistent with the character of his office, nor required by the interests of either party, that the questions involved in the sentence, thus disposed of heretofore and intended to be closed by conditional pardon granted as the result of an international agreement, should now be reopened. (Moore's Int. Arb., 2429).

See Bours' case, Sir Edward Thornton umpire, Moore's Int. Arb., 2430.

Illustrative of the position which the United States Government has taken in reference to the finality and conclusiveness of awards by commissions and by arbitration, reference may be had to the action of that Government with Mexico under the convention of April 11, 1839. Under said commission three claims were rejected by the commissioners on their merits and four on the ground of jurisdiction. The umpire rejected five claims on their merits and six on jurisdictional grounds. After the termination of the commission attorneys for claimants whose demands had been rejected asked that the convention and all the proceedings under it be declared null and void, while the attorneys for the more fortunate claimants strongly objected to such a course.

The Government of the United States determined to treat as final and conclusive the decisions that had already been rendered and to enter into negotiations for the adjustment of the unfinished business. Under this decision there was a new claim convention of November 20, 1843, which by its first article provided that all claims of the citizens of Mexico against the United States and all claims of citizens of the United States against Mexico—

> which for whatever cause were not submitted to nor considered nor finally decided by the commission nor by the arbiter— (Moore's Int. Arb., p. 1249, note.)

under the convention of 1839 should be referred to a board of four commissioners.

Under the commission of 1839, wherein it was agreed that the decision of the umpire should be final and conclusive, and wherein the United States agreed forever to exonerate the Mexican Government from any further accountability for claims which would either be rejected by the board or by the arbitrator, or which, being allowed by either, should be provided for by the said Government in the manner before mentioned, there was presented the claim of Manuel de Cala, growing out of his imprisonment and the confiscation of his vessel and cargo. The American commissioner of 1839 allowed $52,000, the Mexican commissioner nothing, the umpire $5,867. It was alleged before the commission of 1849 that this award was made solely on account of the

confiscation of the vessel and the imprisonment of de Cala, and that the value of the cargo was by some unaccountable oversight wholly overlooked by the umpire. The commission ruled against it, saying:

This board has no means of knowing upon what grounds the decision of the umpire was made, nor has it any power of correcting his errors, mistakes, or omissions, even if there was clear evidence of the existence of such errors or omissions. The whole claim of de Cala was submitted to the umpire, and in his decision he recapitulated minutely the several items allowed by the American commissioners, and immediately states the amount for which, in his opinion, Mexico should be held responsible. * * * The board is of opinion that the decision of the umpire was final and conclusive, and that, by the terms of the convention of 1839, Mexico was released from any further claim or liability growing out of the transactions upon which it was founded. (Moore Int. Arb., 1274).

See the Leggett case, Moore Int. Arb., 1276 *et seq.*

In Moore Int. Arb., 1408, Sir Frederick Bruce says:

In civil courts an appeal lies to a superior tribunal; in international courts, which recognize no superior judge, fresh negotiations are opened, and a fresh commission appointed, to which the disputed cases are referred. * * *

I am of opinion that these claims must be submitted *de novo* to the actual commission, with a view to a fresh reexamination and decision on their merits.

Under the United States and Venezuela Claims Commission of 1868 gross frauds were alleged to be perpetrated, and a protest of the Venezuelan Government was filed with the Secretary of State for the United States of America February 12, 1869, alleging irregularity of the umpire and fraud in the proceedings and findings. After careful inquiry by the United States Government it was found that there had been fraud. The decisions were rejected and a new commission was formed by the joint action of both countries to rehear all of the cases.

Moore Int. Arb., 1660–1675.

Where a party, with full knowledge of the facts on which he relies for the impeachment of the award, has nevertheless accepted and executed the award, it will not be set aside because of the objections made by him. (2 Am. and Eng. Encycl. of Law, 789.)

A valid award creates a complete obligation, and need not be ratified by the parties in order to give it operative force. (Id., 806.)

But where an award is voidable, either because the arbitrators have exceeded their authority or because all matters submitted have not been considered by them, or for any other reason, the parties may ratify it expressly or by implication arising from their acts, and after such ratification they will be estopped from objecting to it. (Id., 806.)

The acceptance of the benefits of an award, as accepting the performance from the other party to the submission of the obligations imposed by the award, is a ratification and estops the party so accepting from afterwards denying its validity. (Id., 807, note.)

Acquiescence in an award has the effect of a ratification. (Id., 807.)

In a case before the Supreme Court of the United States entitled United States *ex rel.* Lutzarda Angarica de la Rua, executrix of Joaquín García de Angarica, deceased, plaintiff in error *v.* Thomas F. Bayard, Secretary of State (127 U.S., 251 (L. R., 32, 159)), there appears, in the course of the decision, this quotation from the answer of the Secretary of State for the United States:

And this respondent, further answering, saith that the said petition proceeds upon a ground which wholly ignores certain grave international elements and considerations that entered into the claim of the petitioner's testator so soon as the Government of the United States began and assumed to urge and prosecute the same, and that thenceforth the said claim became, in contemplation of law, subject to the will of the Government of the United States and entirely beyond the control of the said petitioner's testator.

On July 4, 1868, a convention was concluded between the United States of America and Mexico for the adjudication of claims of citizens of either country upon the Government of the other. Article II of the treaty contains this clause:

The President of the United States of America and the President of the Mexican Republic hereby solemnly and sincerely engage to consider the decision of the commissioners conjointly, or of the umpire, as the case may be, as absolutely final and conclusive upon each claim decided upon by them or him, respectively, and to give full effect to such decisions without any objection, evasion, or delay whatsoever. (15 Stat. L., 682.)

And also in Article V there appeared the following:

The high contracting parties agree to consider the result of the proceedings of this commission as a full, perfect, and final settlement of every claim upon either Government arising out of any transaction of a date prior to the exchange of the ratifications of the present convention; and further engage that every such claim, whether or not the same may have been presented to the notice of, made, preferred, or laid before the said commission, shall from and after the conclusion of the proceedings of the said commission, be considered and treated as finally settled, barred, and thenceforth inadmissible. (15 Stat. L. 684.)

This was a case of petition for mandamus, entitled United States *ex rel.* Sylvanus C. Boynton, plaintiff in error, *v*, James G. Blaine, Secretary of State. (U. S. Sup. Court Reports, 139, 306; L. R. 35, 183.)

The payment of the sum awarded had been withheld by the Government of the United States because that Mexico, while complying with the terms of the award and paying in accordance therewith, had solemnly protested to the Government of the United States that deliberate fraud had been practiced upon the commission and that without it there would have been no award against Mexico and asking that the United States Government consent to reopen the case and to set aside the award. This petition was brought to compel the Secretary of State to make payment of the sums due to the relator, notwithstanding the situation suggested.

President Hayes caused the charges of fraud to be investigated, and Mr. Evarts, then Secretary of State and a profound lawyer and eminent jurist, made a careful examination of all the matters concerned and submitted his conclusions to the President, of which we quote in part:

That neither the principles of public law nor considerations of justice and equity required or permitted, as between the United States and Mexico, that the award should be opened and the cases retried before a new international tribunal, or under any new convention or negotiation respecting the same; * * * that the honor of the United States required that these two cases should be further investigated by the United States to ascertain whether this Government had been made the means of enforcing against a friendly power

claims of our citizens based upon or exaggerated by fraud. (139 U. S. pp. 306–326; L. R. vol. 35 p. 186.)

In August, 1880, Secretary Evarts—

having been notified through the Mexican legation of the intention of the Mexican Government to commence suits to impeach and set aside the two awards, objected to such a proceeding as in contradiction to the whole purpose of the convention, as well as of explicit provisions thereof; and accordingly no further steps were taken in that direction. (Id. ibid.)

Chief Justice Fuller delivered the opinion of the court, and we quote briefly therefrom:

The Government assumed the responsibility of presenting his claim, and made it its own in seeking redress in respect to it.

The Chief Justice makes reference to Frelinghuysen *v.* Key (110 U. S., 63), in the following language:

In Frelinghuysen *v.* Key, while conceding the essential value of international arbitration to be dependent upon the *certainty and finality of the decision*, the court adjudged that this Government need not therefore close its doors against an investigation into the question whether its influence had been lent in favor of a fraudulent claim. It was held that no applicable rule was so rigid as not to be sufficiently flexible to do justice, and that the extent and character of any obligation to individuals, growing out of a treaty, an award, and the receipt of money thereon, were necessarily subject to such modification as circumstances might require.

Cornelius Comegys and Andrew Pettit, plaintiffs in error, *v.* Ambrose Vasse, defendant in error, before the United States Supreme Court, and reported in volume 26, page 193 (L. R. 7, 108), was a case growing out of the award of commissioners constituted under the treaty of the United States of America with Spain on the 22d of February, 1819. In the ninth article of the treaty it provides that the high contracting parties—

reciprocally renounce all claims for damages or injuries which they, themselves, as well as their respective citizens and subjects, may have suffered until the time of signing of this treaty. (8 Stat. L. 258.)

and they then proceed to enumerate in separate clauses the injuries to which the renunciation extends.

The eleventh article provides that the United States, exonerating Spain from all demands in future on account of the claims of their citizens to which these renunciations extended—

and considering them entirely *cancelled*, undertake to make satisfaction for the same, to an amount not exceeding five millions of dollars. (8 Stat. L. 260.)

To ascertain the full amount and validity of these claims a commission, to consist of three commissioners, was appointed, which within three years from the time of its first meeting should—

receive, examine, and decide upon the amount and validity of all the claims included within the descriptions above mentioned. (Id. ibid.)

There seems to be no especial agreement or covenant concerning the finality and conclusiveness of the awards, and they seem to stand upon

the common basis ascribed to awards in general. Mr. Justice Story of the Supreme Court delivered its opinion. Among other things decided by the court there appears this:

The object of the treaty was to invest the commissioners with full power and authority to receive, examine, and decide upon the amount and validity of the asserted claims upon Spain, for damages and injuries. Their decision, within the scope of this authority, is *conclusive and final.* If they pronounce the claim valid or invalid, if they ascertain the amount, *their award* in the premises *is not reexaminable.* The parties must abide by it, as the decree of a competent tribunal of exclusive jurisdiction. *A rejected claim can not be brought again under review,* in any judicial tribunal; an amount once fixed, is a *final* ascertainment of the damages or injury. This is the obvious purport of a language of the treaty.

See the case familiarly quoted as Frelinghuysen *v.* Key, found in the United States Supreme Court Reports 110, p. 63 (L. R. 28, p. 71), where the Supreme Court decided the awards to be final and conclusive as between the United States and Mexico until set aside by agreement between the two Governments, or otherwise, and that the United States had right to treat with Mexico for a retrial for particular awards because of the alleged fraudulent character of the proof given in their support, and that the President of the Senate might conclude another treaty with Mexico in respect to any claims allowed by the commission. Mr. Chief Justice Waite delivered the opinion of the Supreme Court, in which opinion we find and quote the following:

No nation treats with a citizen of another nation except through his government. The treaty, when made, represents a compact between the governments and each government holds the other responsible for everything done by their respective citizens under it. The citizens of the United States having claims against Mexico were not parties to this convention. They induced the United States to assume the responsibility of seeking redress for injuries they claim to have sustained by the conduct of Mexico, and as a means of obtaining such redress the convention was entered into, by which not only claims of citizens of the United States against Mexico were to be adjusted and paid, but those of citizens of Mexico against the United States as well. * * * Thus, while the claims of the individual citizens were to be considered by the commission in determining amounts, the whole purpose of the convention was to ascertain how much was due from one Government to the other on account of the demands of their respective citizens.

See also United States *v.* Throckmorton, 98 U. S. Sup. Court Reports, 61 (L. R. 25: 93); U. S. Appt. *v.* Diekelman, 92 U. S. Supreme Court Reports, 520 (L. R. 23: 742); Choctaw Nation, appellant, *v.* U. S., 119 U. S. Sup. Ct., 1 (L. R. 30: 306).

Chapter 18, Book 2, of Vattel on the Law of Nations, Chitty's Edition, treats of the mode of terminating disputes between nations, and the entire chapter is referred to by the umpire as furnishing, in his judgment, a basis for this case. The umpire will quote but limitedly. Section 326 says in part:

If neither of the nations who are engaged in a dispute thinks proper to abandon her right or her pretensions, the contending parties are, by the law of nature, which recommends peace, concord, and charity, bound to try the gentlest methods of terminating their differences. * * * Let each party coolly and candidly examine the subject of the dispute, and do

justice to the other; or let him whose right is too uncertain, voluntarily renounce it. There are even occasions when it may be proper for him who has the clearer right, to renounce it, for the sake of preserving peace—occasions which it is the part of prudence to discover.

Section 327 is entitled "Compromise," concerning which he says:

Compromise is a second method of bringing disputes to a peaceable termination. It is an agreement, by which, without precisely deciding on the justice of the jarring pretensions, the parties recede on both sides, and determine what share each shall have of the thing in dispute, or agree to give it entirely to one of the claimants on condition of certain indemnifications granted to the other.

Section 329 is entitled "Arbitration." Concerning this he says, in part:

When sovereigns cannot agree about their pretensions, and are nevertheless desirous of preserving or restoring peace, they sometimes submit the decision of their disputes to arbitrators chosen by common agreement. When once the contending parties have entered into articles of arbitration, they *are bound* to abide by the sentence of the arbitrators. *They have engaged to do this;* and the faith of treaties should be religiously observed. * * * For if it were necessary that we should be convinced of the justice of a sentence before we would submit to it, it would be of very little use to appoint arbitrators. * * * In order to obviate all difficulty, and cut off every pretext of which fraud might make a handle, it is necessary that the arbitration articles should precisely specify the subject in dispute, the respective and opposite pretensions of the parties, the demands of the one, and the objections of the other. These constitute the whole of what is submitted to the decision of the arbitrator; and it is upon these points alone that the parties promise to abide by their judgment. If, then, their sentence be confined within these precise bounds, the disputants must acquiesce in it. They can not say that it is manifestly unjust, since it is pronounced on a question which they have themselves rendered doubtful by the discordance of their claims, and which has been referred, as such, to the decision of the arbitrators. Before they can pretend to evade such a sentence, they should prove, by incontestable facts that it was the offspring of corruption or flagrant partiality.

Mr. Bayard, Secretary of State for the United States of America, a very eminent and able lawyer, acting in his office aforesaid, gave this official opinion on May 12, 1886:

Motions to open or set aside international awards are not entertained unless made promptly, and upon proof of fraudulent concoction or of strong after-discovered evidence. Wharton's Int. Law Digest, sec. 316, vol. 3, page 81.

The award not having been vacated, opened, or set aside during the lifetime of the former commission, and the claimant having done nothing since to waive his rights thereunder, it was further ruled that such award should be treated by our Government as a valid and conclusive ascertainment of his claim against New Granada. Wharton's Int. Law Digest, sec. 328, vol. 2, page 672.

Mr. Seward, Secretary of State for the United States, in correspondence July 17, 1868, referring to the *Alabama* claims and to an effort to adjust them which had been made by both Governments and reviewing the situation, says:

In the first place, Her Majesty's Government not only denied all national obligation to indemnify citizens of the United States for these claims, but even refused to entertain them for discussion. Subsequently Her Majesty's Government upon reconsideration proposed to entertain them for the purpose of referring them to arbitration, but insisted upon

making them subject of special reference, excluding from the arbitrators' consideration certain grounds which the United States deem material to a just and fair determination of the merits of the claims. The United States declined this special exception and exclusion, and thus the proposed arbitration has failed. Id., sec. 221, vol. 2, p. 568.

On page 569 of the same volume there is a statement by Mr. Frelinghuysen, Secretary of State, to Mr. Rosecrans, October 17, 1883, as to the action of the United States concerning arbitration, the finality of the decisions, and the solemnity of the agreement which authorizes the arbitration.

Mr. Fish, Secretary of State for the United States, to Minister Russell, of Venezuela, June 4, 1875, says in part:

That if a State, after having submitted a controversy regarding claims and debts due to individuals, to arbitration, whether by another State or by a commission, refuses to pay the award, it loses credit and leaves no alternative with other powers than that of refusing intercourse, or of an ultimate resort to war. Id., sec. 220, vol. 2, p. 550.

Mr. Frelinghuysen, Secretary of State for the United States, February 11, 1884, says in part:

The claims presented to the French commission are not private claims but governmental claims, growing out of injuries to private citizens or their property, inflicted by the government against which they are presented. As between the United States and the citizen, the claim may in some sense be regarded as private, but when the claim is taken up and pressed diplomatically, it is as against the foreign government a national claim.

Over such claims the prosecuting government has full control; it may, as a matter of pure right, refuse to present them at all; it may surrender them or compromise them without consulting the claimants. Several instances where this has been done will occur to you, notably the case of the so-called "French spoliation claims." The rights of the citizen for diplomatic redress are as against his own not the foreign government. * * * The commission is not a judicial tribunal adjudging private rights, but an international tribunal adjudging national rights. Id., sec. 220, vol. 2, p. 558.

Should the Government of the United States, either by its neglect in pressing a claim against the foreign government or by extinguishing it as an equivalent for concessions from such government, impair the claimant's rights, it is bound to duly compensate such claimant. Id., sec. 220, vol. 2, p. 566.

On a careful review of the history of this claim from its origin to this day, enlightened by study and reflection, fortified in principle, and controlled by reason, responsive to his conscientious conception of duty, the judgment of the umpire is clear and positive that the compromise arranged between the honorable Governments February 24, 1891, followed by the award of the honorable President of the Swiss Federation, December 15, 1896, were, "acting together," a complete, final, and conclusive disposition of the entire controversy on behalf of M. Antoine Fabiani. Therefore the claim presented before this tribunal, and, on disagreement of the honorable commissioners, coming to the umpire, and there entitled "Antoine Fabiani No. 4," is disallowed, and the award will be prepared accordingly.

NORTHFIELD, *July 31, 1905.*

EXHIBIT IN FABIANI CASE—AWARD UNDER CONVENTION OF 1891.[1]

Le Président de la Confédération Suisse, arbitre designé pour trancher le différend existant (Affaire Fabiani) entre Le Gouvernement de la République Française, partie demanderesse, et Le Gouvernement des Etats-Unis du Vénézuéla, partie défenderesse.

Vu les exposés et les conclusions des parties, ainsi que les preuves administrées.

Considérant qu'il en resulte:

A.—*En fait.*

I. Les Gouvernements de la République Française et des Etats-Unis du Vénézuéla sont convenus, par compromis signé à Caracas le 24 février 1891, de soumettre à l'arbitrage du Président de la Confédération Suisse, la question de savoir si, "d'après les lois du Vénézuéla, les principes généraux du droit des gens et la Convention (du 26 novembre 1885) en vigueur entre les deux Puissances contractantes, le Gouvernement vénézuélien est responsable des dommages que Fabiani dit avoir éprouvés pour dénégations de justice," et de charger l'abitre "de fixer, au cas où cette responsabilité serait reconnue pour tout ou partie des réclamations dont il s'agit, le montant de l'indemnité pécuniaire que le Gouvernement vénézuélien devrait verser entre les mains de M. Fabiani, et qui effectuerait en titres de la dette diplomatique de Vénézuéla 3 %."

L'arbitrage ayant été accepté, la procédure fut instruite par voie d'échange de mémoires et par l'administration de preuves tant littérales que testimoniales offertes par les Gouvernements intéressés.

II. Les faits allégués dans la *demande* sont les suivants:

M. Antoine Fabiani épousa, en avril 1867, la fille de M. Benoît Roncayolo, chef d'une maison d'armement de voiliers, à Marseille. Roncayolo suspendit ses paiements, le 31 août de la même année, et fut déclaré en état de faillite. Son gendre Fabiani, qui était alors avocat près la cour de Bastia, s'efforça de sauver la situation. Au bout de deux ans, il put informer son beau-père, établi à Maracaïbo, qu'il avait obtenu un concordat pour ce dernier; il paya lui même le dernier dividende de 10%.

Fabiani fixa son domicile à Marseille. Un oncle lui avança de fortes sommes d'argent, et lui-même chercha désormais à reconquérir la fortune perdue par Benoît Roncayolo. Dans ce but, et afin de conserver le monopole presque exclusif des rapports maritimes et commerciaux de Maracaïbo avec la France, monopole exercé naguère par Roncayolo, il acheta d'abord le navire *Pauline;* il développa ensuite ses affaires d'exportation et d'importation et affecta cinq trois-mâts à ce service, sans parler d'un puissant remorqueur destiné à la barre et au lac de Maracaïbo. Trois maisons furent successivement fondées au Vénézuéla, à Caracas, à Mara-

[1] The President of the Swiss Confederation was authorized by the federal committee November 1, 1892, to accept the post of arbitrator under the convention. (Rapport du Département Fédéral des Affairés Étrangères, 1892, p. 34.) A statement of the claim was filed, and a period was then fixed for the presentation of the Venezuelan answer. The French Government submitted a reply. These papers having been exchanged, an order was made by the arbitrator in regard to the taking of proofs. (Id. 1894, p. 38.

caïbo, à La Guayra; Fabiani y intéressa son beau-père et son beau-frère André Roncayolo, qui reçurent l'attribution de la moitié des bénéfices.

Mais bientôt Fabiani découvrit que les Roncayolo avaient commis des malversations à son préjudice, au Vénézuéla. Il se vit obligé d'interdire à son beau-père toute participation officielle aux opérations de la maison Fabiani et de restreindre les pouvoirs du fils Roncayolo. Le 7 décembre 1874, B. Roncayolo n'en renouvela pas moins, en son nom, le contrat de remorquage passé avec le Président de l'Etat vénézuélien de Zulia, en engageant la responsabilité de "ses" établissements de commerce fondés sous la raison sociale Antoine Fabiani et C^ie^. Fabiani arrêta net toutes les affaires d'exportation, prohiba tous tirages de traites, exigea la restitution de ses avances et la prompte liquidation de ses intérêts. Il dut néanmoins se convaincre que les Roncayolo travaillaient a "une spoliation qui serait facilitée par la vénalité des pouvoirs judiciaires du Vénézuéla." Il se disposait à recourir aux tribunaux français, les conditions de l'association ayant été arrêtées à Marseille, quand, sur les instances de Roncayolo fils, il consentit à une solution amiable du conflit.

La transaction, signée à cette occasion, date du 31 janvier 1878. Intervenue entre Antoine Fabiani et André Roncayolo, elle constat que B. Roncayolo n'a jamais fait d'apports en argent, elle défère au Tribunal de Marseille toutes les difficultés qui pourraient s'élever au sujet de son exécution, elle constitue Roncayolo fils débiteur de la somme de 617,895 fr. 10, valeur au 31 janvier 1878. D'autre part, la maison Roncayolo de Maracaïbo devait être remplacée par une succursale de la maison Fabiani, de Marseille, succursale qui serait dirigée par A. Roncayolo, à l'exclusion de toute ingérence de Roncayolo père.

Les anciennes irrégularités reprochées aux Roncayolo se renouvelèrent. Fabiani révoqua les pouvoirs de Roncayolo fils et lui substitua un sous-agent, auquel Roncayolo père s'empressa de marier sa fille cadette. Il y avait 6 à 700,000 fr. de traites à payer. Fabiani comprit que sa présence au Vénézuéla était nécessaire. Il partit le 3 novembre 1879, non toutefois sans avoir introduit instance à Marseille contre ses deux fondés de procuration; les tribunaux de Marseille étaient compétents, en effet, et du reste, B. Roncayolo avait écrit, le 14 juin 1879, que la justice vénézuélienne se laissait corrompre à prix d'argent.

Au Vénézuéla, Fabiani réclama, en toute première ligne, le paiement d'une somme de 105,458 fr. 75, représentée par cinq traites que lui avaient été délivrées, pour des transports d'émigrants, par les consuls du Vénézuéla à Marseille et à Ténériffe. MM. Roche et Cie., auxquels ces traites avaient été remises pour l'encaissement, refusérent de les restituer, sous prétexte qu'elles avaient été données en gage par acte du 6 mars 1877, acte frauduleux d'après la demande. Le dossier de ces traites avait d'ailleurs disparu et le cabinet de Caracas annula ses ordres de paiement antérieurs. Si Fabiani ne poursuivit pas l'affaire au criminel, c'est qu'on l'en dissuada vivement. Les Roncayolo, le directeur du Ministère des Finances et un comparse auraient collaboré à cette machination.

On méconnut également les droits de Fabiani, comme propriétaire du vapeur *Pauline*, pour services rendus à l'Etat par ce navire pendant la révolution qui ramena M. Guzman Blanco au pouvoir. B. Roncayolo avait touché 55,000 fr. sur ce qui était dû à Fabiani, au lieu des 30,000 fr. qu'il

avouait avoir perçus; le Ministère des Finances ne permit pas au véritable créancier de faire constater ce détournement.

Fabiani tenta en vain d'obtenir du tribunal de commerce de Caracas la nullité du gage invoqué par MM. Roche et Cie. La restitution des traites fut bien ordonnée, mais, aussitôt après, le tribunal rejeta une requête à fin d'exécution provisoire du jugement, par la raison que Fabiani, étranger au pays, devait, au préalable, fournir un cautionnement. Fabiani annonça qu'il était en mesure d'offrir toutes les garanties désirables, son vapeur *Pauline* étant arrivé à La Guayra. Mais, quand il voulut verser au dossier sa patente de navigation, il découvrit qu'elle était au nom de "Roncayolo-Fabiani" bien qu'elle lui eût été accordée à lui, comme propriétaire unique, en avril 1879. Il y avait là un audacieux abus de pouvoir commis par A. Roncayolo junior, au mépris de la transaction de 1878.

Le vapeur *Pauline*, réquisitionné par le Gouvernement vénézuélien pour aider à la répression d'une émeute, allait regagner son port d'attache. B. Roncayolo, comme représentant de Roncayolo-Fabiani, sollicitait le paiement d'une somme de 63,000 fr. due de ce chef. Fabiani s'y opposa et le montant de la réclamation, arrêté par l'Etat au chiffre de 57,780 fr., fut consigné en mains tierces pour le compte de la maison Antoine Fabiani de Maracaïbo, car, selon la demande, les Roncayolo étaient plus sûrs des autorités judiciaires de cette dernière ville que celles de Caracas. Au demeurant, M. Guzman Blanco, chef de l'Etat, qui était associé dans de grandes entreprises avec B. Roncayolo, son agent politique, s'apprêtait à intervenir directement dans le conflit.

De graves soucis appelant Fabiani à Maracaïbo, il s'y rendit en avril 1880, mais il y trouva presque vide la caisse de son agence; André Roncayolo l'avait pillé. Après bien des pourparlers et des démêlés avec celui-ci, Fabiani comprit qu'il serait obligé de capituler, tant le terrain était bien préparé contre lui à Maracaïbo.

En revanche, B. Roncayolo était de plus en plus en faveur auprès de M. Blanco, avec lequel il était intéressé dans la grosse affaire du chemin de fer de la Ceïba à Sabana de Mendoza; l'obstination que Fabiani mettait à défendre ses droits dérangeait des combinaisons politico-financières importantes. M. Stamman, ministre plénipotentiaire d'Allemagne à Caracas, aura, dit la demande, renseigné son Gouvernement sur les attentats et les injustices dont Fabiani fut victime durant ce séjour à Maracaïbo.

En attendant, on lui avait enlevé le service du remorquage, on s'était emparé de ses navires, et la cour suprême avait confirmé la sentence qui dépossédait Fabiani. Il ne restait plus à ce dernier qu'à retourner en France et à implorer la protection de son Gouvernement, si les autorités judiciaires et administratives du Vénézuéla continuaient à se liguer contre lui. C'est alors qu'un ami vint lui proposer de le sortir d'embarras, moyennant qu'il consentît à une révision de la transaction de 1878 par un arbitrage. Fabiani, cédant à la force majeure, accepta de suspendre toutes poursuites et actions, et de signer un compromis qui sauverait peut-être l'avenir de son commerce au Vénézuéla.

Le tribunal arbitral, réuni à Marseille, statua en date du 15 décembre 1880; ses décisions, aux termes du compromis, étaient exécutoires au Vénézuéla, sans délai et sans qu'on pût admettre contre elles aucun recours. La sentence qu'il rendit peut se résumer ainsi:

1°. Les comptes de Fabiani furent reconnus exacts; le débit d'André

Roncayolo fut fixé à la somme de 538,359 fr. 07 cent., toute réclamation lui étant interdite au sujet des dits comptes;

2°. L'enterprise du remorquage fut déclarée la propriété exclusive de Fabiani, depuis le 30 novembre 1877, comme aussi les vapeurs *Eclair*, *Mara*, *Pauline*, et les engins et accessoires destinés au service du remorquage. Fabiani fut autorisé à reprendre l'administration de ce service, "pour en régler la gestion à sa convenance, sans que M. Benoît Roncayolo, ni M. André Roncayolo, ni aucun tiers puissent s'y immiscer directement ou indirectement," l'insertion du nom de B. Roncayolo dans l'acte de concession "ayant été la conséquence d'une faute." B. Roncayolo était tenu cependant, à peine de dommages et intérêts, de laisser son nom figurer dans l'entreprise, si Fabiani le jugeait plus conforme à ses intérêts, ou si le Gouvernement vénézuélien se refusait à modifier la concession sur ce point;

3°. Tous les produits du remorquage, depuis le 30 novembre 1877, y compris les bénéfices du pilotage dès la même date, furent attribués à Fabiani; les personnes qui les avaient touchés avaient l'obligation de les lui restituer;

4°. B. et A. Roncayolo furent condamnés solidairement au coût de l'enregistrement de la sentence arbitrale et de ses annexes.

Le compromis liait Fabiani, de même que Roncayolo père et fils, qui y avaient adhéré tous les deux. La sentence, rendue par deux arbitres, qui étaient, l'un, le frère et créancier de B. Roncayolo, l'autre, l'oncle et créancier de Fabiani, fut enregistrée à Marseille le 17 décembre 1880 et déclarée exécutoire le 21 même mois par le président du tribunal de première instance de cette ville.

Les Roncayolo formèrent opposition à l'exécution de la sentence arbitrale, en requérant l'annulation du compromis de Caracas et la révocation de l'ordonnance d'exequatur. Déboutés par jugement du tribunal de première instance de Marseille, du 1er avril 1881, ils interjetèrent appel; mais la cour d'appel d'Aix confirma la décision du tribunal de Marseille par son arrêt du 25 juillet suivant, et il n'y eut pas de pourvoi en cassation.

Avant le prononcé de l'arrêt d'appel, Fabiani, qui était retourné en Europe, repartit pour Caracas dans le but d'introduire et de diriger la procédure d'exécution. Mais divers indices et renseignements lui firent craindre de nouvelles difficultés. Trois jours après son arrivée à Caracas vers la fin de mai 1881, Fabiani écrivit à M. Guzman Blanco pour lui annoncer que le paiement d'une somme de plus de 40,000 fr., réclamé au Gouvernement par B. Roncayolo, devait être effectué entre ses mains à lui, Fabiani, en vertu de la sentence arbitrale du 15 décembre 1880; il le priait, en même temps, de différer le paiement de la dite somme. Cette lettre demeura sans réponse. Le 7 juin 1881, il déposa au greffe de la haute cour fédérale l'original et la traduction du dossier de l'arbitrage, ainsi qu'une demande d'exequatur.

Il ne s'agissait, en l'espèce, que d'une simple formalité, à moins d'une véritable dénégation de justice de la part de la haute cour (art. 556 et suiv. C. proc. civ. vénéz.). Des renvois, des incidents, des intrigues retardèrent la solution de l'affaire. En fin de compte, bien qu'il eût été établi au cours des plaidoyers, par des documents irrécusables, que l'ordonnance d'exécution du président du tribunal de Marseille avait été confirmée aussi bien en appel qu'en première instance, la haute cour fédérale, le 11 novembre 1881, se déclara, par cinq voix contre quatre, incompétente pour donner force exécutoire à la sentence arbitrale, attendu, "qu'on ne peut considérer comme un tribunal de France la réunion des arbitres qui a eu

lieu à Marseille," et qu'une ordonnance judiciaire d'exécution "ne peut convertir en juges de la nation ceux qui ne le sont pas et en sentence d'un tribunal étranger ce qui est simplement le complément d'un contrat" (*Annexe 1*, de la défense, p. 23 et suiv.).

Les quatre juges formant minorité protestèrent, dans des "réserves" motivées, la sentence arbitrale satisfaisant, selon eux, à toutes les conditions prescrites par l'art. 557 du Code de procédure civile vénézuélien et son assimilation à un jugement ordinaire n'étant pas contestable.

Une nouvelle instance fut introduite, et, le 6 juin 1882, la haute cour fédérale, dont la composition avait partiellement changé dans l'intervalle, "déclarait exécutoire au Vénézuéla la sentence de la cour d'appel d'Aix." Fabiani, sur le conseil d'un ami, communiqua ce résultat à M. Blanco, qui, au lieu de respecter les décisions judiciaires intervenues, commença par mander à son ministre des finances de verser à B. Roncayolo une somme de 28,000 fr. due à Fabiani pour emploi récent du vapeur *Pauline* dans l'intérêt de l'Etat. Fabiani ne s'empressa pas moins, malgré l'hostilité du pouvoir, de requérir l'exécution effective du jugement arbitral. Il s'embarqua pour Maracaïbo; une inscription hypothécaire fut prise, dès le 14 juin 1882, contre B. et A. Roncayolo sur tous les droits leur appartenant dans le chemin de fer et sur la douane de la Ceïba, et une autre inscription, de 120,000 fr., sur la section Trujillo du chemin de fer. Mais les Roncayolo, soutenus au reste par le président de l'Etat de Trujillo, venaient, par un contrat frauduleux, de céder tous leurs droits à un tiers.

Le juge de première instance, à Maracaïbo, ordonna l'exécution de la sentence au bénéfice de laquelle se trouvait Fabiani; les Roncayolo demandèrent alors sa récusation. Il se récusa d'abord, puis se ravisant, débouta les opposants de leurs conclusions formulées contre sa dernière décision et décreta l'envoi en possession des navires, le 14 juillet 1882.

Sur ces entrefaites, Fabiani tomba malade de la fièvre jaune. La procédure d'exécution fut suspendue sans raisons plausibles; en particulier, le juge, qui n'aurait dû admettre aucun pourvoi contre le mandat d'exécution par lui décerné, accueillit, avec effet dévolutif seulement, il est vrai, l'appel interjeté contre son décret. Les adversaires de Fabiani recoururent au juge supérieur, qui attribua à l'appel un double effet, dévolutif et suspensif. Tout acte de procédure était interdit jusqu'à ce qu'il eût été prononcé en instance d'appel.

L'admission de l'appel à deux effets violait la loi, ainsi que la haute cour fédérale le reconnut, dans son arrêt du 8 décembre 1883, en déclarant que l'exécution avait été interrompue par "des recours illégaux lorsqu'il s'agit de l'exécution d'une sentence." Aux yeux de Fabiani, le juge-président de la cour supérieure était l'instrument des Roncayolo. Fabiani souleva le recours de fait devant la cour supérieure contre la décision de ce magistrat et le récusa du même coup. Il rentra bientôt après en Europe, en confiant la garde de ses intérêts à ses amis et représentants.

Trois motifs de récusation avaient été invoqués. Les ennemis de Fabiani, désireux d'en finir, parvinrent à faire modifier la constitution de l'Etat de Falcon-Zulia, dans le sens que, "pour les cas de récusation du juge supérieur, son suppléant n'aurait plus besoin d'être docteur en jurisprudence," et que, pour connaître de la récusation, la cour suprême formerait une liste d'avocats et de citoyens, parmi lesquels le gouverneur—qui était le frère d'un des avocats des Roncayolo—choisirait le suppléant.

Le juge-suppléant désigné pour statuer sur le premier motif de récusa-

tion, l'écarta, et se retira dès qu'il eut à se prononcer sur le deuxième. Il fut remplacé par une créature des Roncayolo et de leurs alliés, qui débouta Fabiani. Une troisième récusation ayant été proposée pour manifestation d'opinion le magistrat la déclara irrecevable, parce qu'une formalité de procédure ne fut pas remplie ensuite d'un oubli. La décision fut aussitôt frappée d'appel; il refusa d'admettre le pourvoi et la cour suprême fut saisie.

Entre temps, les autorités, à en croire les lettres des fondés de pouvoirs de Fabiani, considéraient les vapeurs de celui-ci comme leur bien. On escomptait l'annulation du mandat d'exécution et l'on se promettait d'écraser Fabiani en exigeant de lui le remboursement immédiat des recettes du remorquage, les frais judiciaires et les honoraires des avocats poursuivants.

Il y avait un moyen encore de conjurer les efforts des Roncayolo: provoquer l'intervention de l'exécutif fédéral, qui, d'après le sec. 17 de l'art. 13 de la constitution, devait veiller à l'exécution "des décrets et ordres" que les "tribunaux de la fédération rendraient dans l'exercice de leurs attributions et de leurs facultés légales." Le ministre de l'Intérieur, invité à agir, le 2 juillet 1883, répondit, le 9 même mois, que "l'Exécutif national a décidé que c'est à la haute cour fédérale qu'il appartient de faire observer ses dispositions et que c'est à elle que doit s'adresser l'intéressé."

Fabiani revint devant la haute cour. Mais, dans l'intervalle, pour détruire par anticipation l'effet d'une décision nouvelle, le Président de la République, M. Guzman Blanco, par une résolution du 21 août 1883, approuva la cession frauduleuse du contrat de chemin de fer de la Ceïba consentie par B. Roncayolo, soustrayant ainsi les biens d'un débiteur à l'action d'un créancier. Enfin, le 8 décembre 1883, la haute cour décida que le juge de première instance devait continuer une exécution illégalement arrêtée depuis le 14 juillet 1882.

Le 28 janvier 1884 le juge compétent décerna un mandat d'exécution, qui visait spécialement les droits et actions de B. Roncayolo dans le chemin de fer et sur la douane de la Ceïba. Cette décision du juge de Maracaïbo devait précipiter les événements. La *Gaceta Oficial*, du 21 février 1884, notifia que, par un contrat daté de la veille, le service du remorquage, des bouées et du pilotage dans la lagune et sur la barre de Maracaïbo, dont Fabiani venait d'être remis en possession paisible, était concédé à un prête-nom de B. Roncayolo. Or, ce contrat apparaissait comme un acte de vengeance; coïncidence singulière, il fut signé le jour même où M. Blanco avait dû résigner ses fonctions présidentielles entre les mains de son successeur.

Dès qu'on connut à Maracaïbo le contrat du 20 février 1884, qui causait un préjudice matériel et moral considérable à Fabiani, le crédit de celui-ci fut sérieusement ébranlé et sa maison menacée d'une catastrophe.

Bien plus, au même moment, le 23 février 1884, la cour suprême de Falcon-Zulia, soulevant un conflit de compétence, déniait à la haute cour fédérale le droit de faire exécuter la sentence arbitrale et ordonnait la transmission du dossier à un tribunal spécial, pour voir annuler l'arrêt du 8 décembre 1883.

Cet arrêt de conflit, suivant de si près le retrait du remorquage, mettait Fabiani en présence d'un tribunal qui n'avait jamais fonctionné et dont la composition était à la discrétion du pouvoir exécutif; il était d'ailleurs

entaché d'arbitraire, comme le Gouvernement et la haute cour l'avaient reconnu implicitement, l'un le 9 juillet, l'autre le 8 décembre 1883. Mais on espérait ramener ainsi la procédure à son point de départ, anéantir tous les actes postérieurs au 9 juillet 1883, et livrer Fabiani à des juges complaisants.

Le 4 mars 1884, le Gouvernement accordait en outre à B. Roncayolo, pour le chemin de fer de la Ceïba, une subvention mensuelle de 2,000 fr., qui, toute minime qu'elle fût, n'en était pas moins destinée à montrer où allaient les sympathies officielles. Le chemin de fer avait bien été cédé par Roncayolo six semaines auparavant, mais la cession, revêtue cependant de l'approbation du chef de l'Etat, s'évanouissait, car Roncayolo avait toujours été en fait le propriétaire de la ligne. Seulement, il n'avait plus rien à craindre de Fabiani, et, par un subterfuge, les droits de Roncayolo pouvaient être rendus illusoires, s'il le fallait, pour contrecarrer son adversaire.

Fabiani retourna au Vénézuéla en mai 1884. Le tribunal d'exception, qui aurait dû statuer d'office et sans délai sur l'arrêt de conflit, ne se réunissait point. L'influence de M. Blanco demeurait prépondérante et sa haine s'acharnait contre Fabiani. Tout était perdu, d'autant plus que, le 26 octobre 1885, B. Roncayolo devait céder à nouveau ses droits sur la ligne la Ceïba pour la somme de 298,600 fr., dont 178,600 déjà reçus, en sorte qu'il ne restait plus que 120,000 fr., juste la valeur de l'inscription hypothécaire incomplète, prise au nom de Fabiani le 16 juin 1883, et des terrains qu'on eût vendus pour rien au cours d'une expropriation forcée. Seule, une donation déguisée, ou toute autre machination, pouvait expliquer l'abandon, à ce prix, d'une ligne de 50 kilomètres, qui avait été construite à grand frais et qui devait donner, pour l'exercice de 1890 à 1891, un bénéfice net de près de 400,000 fr.

Le Gouvernement approuva ce transfert, bien qu'il fût notoire au Vénézuéla que Fabiani avait des réclamations très considérables à faire valoir contre les Roncayolo et que le contrat du 26 octobre 1895 dépouillât ses débiteurs. Il ne fallait pas, poursuit la demande, songer à intenter une action paulienne, devant les tribunaux de l'Etat de Trujillo, au fond des Cordillières, puisque après des années, Fabiani n'avait pu obtenir, à Caracas and Maracaïbo l'exécution de jugements inattaquables. Plus tard, B. Roncayolo réussit à se faire octroyer une autre concession de chemin de fer, qui a représenté, pour lui, un bénéfice annuel de 225,000 fr. en 1892

La demande rappelle encore que, le 21 novembre 1885, la France et Vénézuéla signèrent une convention pour la reprise des négociations diplomatiques et que Fabiani fut, quelque temps après déclaré en état de faillite au Vénézuéla, pour défaut de paiement immédiat d'un montant inférieur au tiers des sommes induement retenues par le Gouvernement défendeur. Elle cherche à prouver que la convention de 1885 est inapplicable au différend Fabiani et conclut à la réparation du dommage causé, pour faits du prince et dénis de justice, par les autorités administratives et judiciaires de l'Etat du Vénézuéla, dommage dont l'Etat est responsable, et qui comprend:

1°. La réparation du tort éprouvé;
2°. Le gain manqué;
3°. Les intérêts calculés dès la date des actes dommageables;
4°. Les intérêts composés;

5°. Les sacrifices faits par la partie lésée pour le maintien de son industrie;

6°. Le préjudice résultant des dépenses faites et du temps perdu pour arriver à l'exécution des sentences;

7°. Les dommages à considérer comme la suite nécessaire des délits;

8°. Le dommage causé par la privation du travail à l'avenir;

9°. La réparation du préjudice moral.

L'état des réclamations Fabiana est spécifié comme suit dans le demande en capital et intérêts capitalisés:

Etat A. Liquidation des sentences.

	Francs.
1°. Solde créditeur au 31 août 1879, réduit à	509,183.70
Intérêts	630,966.02
2°. Annuités totales en vertu du contrat de mariage du 20 avril 1867, du 24 avril 1877 à pareille date de 1892, la transaction de 1878 ayant liquidé la situation antérieure, en capital	150,000.00
Intérêts	96,701.00
3°. Perte éprouvée sur la vente de la moitié des marchandises qui restaient à liquider à Marseille—poste dû, d'après la transaction du 31 janvier 1878	24,296.72
Intérêts	33,926.58
4°. Recettes du pilotage, suivant sentence arbitrale:	
(*a*) du 1er décembre 1877 au 30 novembre 1878	16,000.00
Intérêts	21,428.58
(*b*) du 1er décembre 1878 au 30 novembre 1879	16,000.00
Intérêts	19,310.00
(*c*) du 1er décembre 1879 au 30 novembre 1880	16,000.00
Intérêts	17,311.32
(*d*) du 1er décembre 1880 au 30 novembre 1881	12,500.00
Intérêts	12,051.38
(*e*) du 1er décembre 1881 au 15 juillet 1882	7,812.45
Intérêts	6,981.23
5°. Indemnité pour emploi du vapeur *Pauline*, solde (abus de confiance B. Roncayolo), année 1879	25,000.00
Intérêts	31,517.50
6°. Indemnité pour serviçes rendus par les vapeurs de Fabiani (abus de confiance B. Roncayolo), année 1879	45,385.00
Intérêts	56,239.80
7°. Rémunération due pour vapeur *Pauline*, ensuite du sauvetage du navire anglais *Angel* (abus de confiance B. Roncayolo), année 1879	47,653.32
Intérêts	59,563.63
8°. Somme payée pour le compte de B. Roncayolo et comprise dans le montant des condamnations pécuniaires prononcées par le tribunal de commerce de Marseille, mais ne faisant pas double emploi avec des sommes dues en vertue de la transaction de 1878—année 1879	8,363.84
Intérêts	10,724.38

	Francs.
9°. Détournement d'une somme payée par l'Etat, pour vapeur *Pauline* (voyage de mai 1879 à La Guayra)	10,000.00
Intérêts	12,176.38
10°. Détournement d'une somme payée par l'Etat de Zulia pour vapeur *Pauline* (voyage à Coro), année 1879	9,100.00
Intérêts	11,080.49
11°. Frais du vapeur *Pauline* employé à la répression de l'insurrection de Pio-Rebollo (détournement B. Roncayolo), année 1880	28,000.00
Intérêts	31,716.67
12°. Intérêts 1% par mois du 1er juillet 1879 au 31 octobre 1880, perçus sur les 30,000 fr. de titres détournés par B. Roncayolo (p. 639 et 647 de la demande)	4,800.00
Intérêts	5,242.14
13°. Assurances du vapeur *Pauline* du 1er janvier 1880 au 15 juillet 1882, pendant la spoliation	19,333.33
Intérêts	19,238.45
14°. Produit net du remorquage en 1880	100,000.00
Intérêts	107,180.33
15°. Produit net du remorquage en 1881	100,000.00
Intérêts	94,453.13
16°. Produit net du 1er anvier jau 15 juillet 1882	54,166.51
Intérêts	48,403.73
17°. Somme détournée par les Roncayolo pour service des vapeurs, en 1879	42,550.00
Intérêts	38,023.10
18°. Somme allouée pour services du vapeur *Pauline* pendant l'insurrection d'avril et mai 1882	28,000.00
Intérêts	25,485.07
19°. Solde restant dû sur les 17,880 fr. alloués par l'Etat pour le vapeur *Pauline*, année 1880	9,780.00
Intérêts	10,084.94
20°. Frais judiciaires jusqu'au 30 juin 1882, reduits à	100,000.00
Intérêts	89,712.96
Total de l'Etat A	2,877,129.10
Déductions à faire avec intérêts, et comprenant, entre autres, une somme de 79,536 fr. 12 relative au poste No. 1 ci-dessus.	204,954.96
Montant du compte des sentences	2,672,174.14

Etat B. Cet état forme, plus ou moins, un supplément du précédent; il se réfère aussi en partie à des décisions judiciaires non connexes avec la sentence arbitrale, mais demeurées sans effet par la faute des pouvoirs publics du Vénézuéla.

	Francs.
1°. Versement du capitaine Santi non entré en caisse, année 1878	8,000.00
Intérêts	11,385.58
2°. Montant de traites fournies de Maracaïbo et Caracas sous la signature de Fabiani et non versé à la caisse de l'agence, année 1878	90,701.64
Intérêts	128,867.36

	Francs.
3°. Débours détournés par B. Roncayolo, année 1879	31, 009. 24
Intérêts	38, 545. 56
4°. Débit personnel de B. Roncayolo envers l'agence Fabiani, année 1879	24, 985. 80
Intérêts	30, 154. 74
5°. Déficit de caisse imputable à A. Roncayolo, 31 janvier 1879	29, 610. 44
Intérêts	39, 198. 47
6°. Prélèvements avoués et illicites de A. Roncayolo 31 mars 1880	35. 136. 44
Intérêts	43, 161. 83
7° Sur primes payés à la caisse générale des familles, 1er octobre 1879 et 1er mai 1881, de 4,000 fr. l'une, pour les risques résultant des voyages de Fabiani au Vénéznéla.	8, 000. 00
Intérêts	9, 038. 28
8°. 5 novembre 1880, frais de séjour à Caracas, avec famille..	11, 250. 00
Intérêts	12, 267. 78
9°. Même date, frais de voyage et retour avec famille.....	18, 000. 00
Intérêts	19, 629. 38
10°. 31 août 1880, frais de voyage et séjour à Caracas, avec M. Tedeschi, en juillet et août 1880.....	4, 800. 00
Intérêts	5, 339. 63
11°. 7 novembre 1882, frais de séjour à Caracas avec famille pendant 14 mois	37, 000. 00
Intérêts	35, 317. 65
12°. Frais de voyage aller et retour avec famille, 5 novembre 1882	18, 500. 00
Intérêts	17, 658. 80
13°. Crédits réels ou supposés faits induements par A. Roncayolo et dont le recouvrement a été impossible, année 1880	120, 000. 00
Intérêts	139, 657. 79
14°. Staries et surestaries de *Mathieu-Orenga*, du 24 mai au 15 août 1880, sur 166 tonnes de jauge, suivant tarif légal.	12, 948. 00
Intérêts	14, 535. 18
15°. Staries et surestaries du *César-Etienne*, 318 tonnes, du 24 juin au 1er octobre 1880	29, 910. 00
Intérêts	32, 968. 96
16°. Staries et surestaries des *Deux-Amis*, 24 juillet au 9 octobre 1880, 186 tonnes	13, 734. 00
Intérêts	15, 105. 91
17°. Staries et surestaries des *Deux-Amis*, 1er avril au 15 juillet 1882, 186 tonnes.....	18, 786. 00
Intérêts	16, 706. 92
18°. Remise à A. Roncayolo, 5 novembre 1880.....	4, 800. 00
Intérêts	5, 185. 24
19°. Complément de frais judiciaires de 1883 à 1886.....	160, 000. 00
Intérêts	135, 023. 56
20°. Perte des capitaux détenus par Roche & Cie et montant des traites d'immigration (assignations 23 mai 1877)...	347, 814. 32
Intérêts, y compris ceux du poste n° 21 ci-dessous...	583, 716. 68

	Francs.
21°. Frais judiciaires, etc. (les intérêts sont portés au numéro précédent)	28,000.00
Total de l'Etat B	2,386,451.18
Déductions consenties (avec intérêts)	234,304.96
Montant du compte *B*	2,152,146.22
L'Etat C concerne le service du remorquage; il se monte, valeur au 30 juin 1893, à la somme de	1,916,948.35

Le retrait du service du remorquage équivaut à une dénégation de justice, puisque le Gouvernement restituait, par l'intermédiaire d'un prête-nom, aux Roncayolo, une source de revenus annuels considérables que le jugement arbitral avait attribués à Fabiani. Le contrat de remorquage du 7 décembre 1874 avait été conclu pour une durée de dix ans; le non-renouvellement du contrat, en 1884, ne fut qu'un acte de représailles dirigé par les pouvoirs publics contre l'adversaire des Roncayolo.

		Francs.
Etat D...	En capital	4,200,000.00
	En intérêts	3,544,369.12

Les dommages et intérêts compris dans cet état correspondent aux sacrifices faits pour le maintien de l'industrie de Fabiani et au gain dont il a été frustré. Les frais généraux de la maison de Maracaïbo étaient de 52,720 fr. par an, soit plus de 350,000 fr. pour sept années. A cela il faut ajouter, par 172,571 fr. 93, les frais généraux de la maison de Marseille, par 102,660 fr. 18, les dépenses personnelles du ménage Fabiani, par 589,425 fr. 39, le compte d'agios et intérêts, plus le frêt de plusieurs milliers de tonnes perdu par suite du mauvais vouloir des autorités, soit 100,000 fr. au minimum, le déficit de 100,000 fr. sur le produit de la vente des navires, le maintien de l'industrie huilière exploitée par Fabiani (au moins 100,000 fr.), et d'autres pertes et sacrifices pécuniaires représentant un capital de plus d'un million et demi et de près de 2,800,000 fr. avec les intérêts calculés dès le 1er janvier 1883. D'un autre côté, Fabiani aurait pu, dans des conditions ordinaires, réaliser un bénéfice net de 200,000 fr. par an, si son commerce d'importation n'avait pas été arrêté par l'acte délictueux du 7 décembre 1874 jusqu'à la transaction de 1878 et repris ensuite dans des circonstances particulièrement difficiles. L'industrie huilière aurait rapporté, en outre, près de 200,000 fr. par an.

		Francs.
Etat E...	En capital	5,500,000.00
	En intérêts	2,847,995.01

Ce poste se réfère à la réparation du préjudice immédiat et direct, causé depuis le 30 avril 1886, époque à laquelle Fabiani était prêt à réduire amiablement ses réclamations aux pertes éprouvées, en éliminant tous les dommages et intérêts qui dérivaient des actes de M. Blanco. Celui-ci refusa d'entrer en matière. La faillite de Fabiani fut déclarée pour non-paiement d'une somme de 70,000 fr. au plus, alors qu'on lui devait des millions au Vénézuéla, et les juges de Maracaïbo allèrent même jusqu'à solliciter les présidents des tribunaux de première instance de Paris et de Marseille de faire publier l'avis de faillite dans les journaux les plus répandus de ces deux villes. Cette faillite a eu de désastreuses conséquences et le Gou-

vernement vénézuélien est responsable des déni de justice qui l'ont déterminée.

	Francs.
Etat F. Frais du procès international	200,000

Dans cette somme sont compris, entre autres, les frais d'installation de Fabiani et de sa famille, à Paris, depuis 1886.

A ces préjudices commerciaux vient s'ajouter le dommage éprouvé dans l'affaire du chemin de fer de la Ceïba; l'exécution des sentences aurait permis à Fabiani de se substituer, dès 1881, à ses débiteurs, en exerçant tous leurs droits et actions (concession de la ligne, exploitation de la douane, etc.). Cette entreprise, que Fabiani eût menée à bien, a produit, dans les conditions les plus défavorables, un bénéfice net supérieur à 250,000 fr. par an; le revenu net a été de 389,164 fr. 87 pour l'exercice 1890 à 1891 et il doit être aujourd'hui de plus d'un million. Or la concession était accordée pour une période de près d'un siècle.

La partie demanderesse récapitule ses états de dommages et intérêts et arrive aux totaux suivants, valeur au 30 juin 1893:

	Francs.
1°. Préjudices commerciaux	22,944,563.17
2°. Affaire de la ligne de la Ceïba	24,000,000.00
Total général	46,944,563.17

III. Dans sa *défense*, le Gouvernement vénézuélien relève d'abord le fait que l'objet du litige est "le déni de justice allégué par Fabiani, pour non-exécution, selon lui, de la sentence arbitrale rendu en sa faveur à Marseille, le 15 décembre 1880, homologuée par le tribunal civil de première instance et confirmée par la cour d'appel d'Aix; et le point de départ ne peut être autre que l'arrêt par lequel, à la date du 6 juin 1882, la haute cour fédérale du Vénézuéla à donné force exécutoire dans le pays à la sentence de la cour d'appel d'Aix."

Or la sentence arbitrale décidait: 1°, que l'entreprise du remorquage devait être mise sous le nom de Fabiani; 2°, que les vapeurs *Eclair*, *Mara*, et *Pauline* et tout l'outillage de l'entreprise du remorquage appartenaient à Fabiani; 3°, que, pour règlement de compte, André Roncayolo restait débiteur de Fabiani de la somme de 538,539 fr. 07 cent. Les faits antérieurs à la décision de la haute cour fédérale du 6 juin 1882 ne rentrent point dans l'objet du litige actuel, en sorte que toute la question à trancher tient, en somme, dans ces mots: la sentence arbitrale a-t-elle été exécutée conformément aux lois vénézuéliennes, et la suspension de la procédure d'exécution est-elle imputable aux autorités de l'Etat défendeur, ou à Fabiani?

En particulier, Fabiani a tort de considérer comme un déni de justice l'arrêt du 11 novembre 1881, émané de la haute cour fédérale. La jurisprudence française elle-même reconnait que l'arbitre volontaire étant un mandataire et non un magistrat, cette circonstance enlève à sa sentence le caractère d'un jugement proprement dit. Et si cet arrêt reposait sur de fausses appréciations juridiques, il ne faut pas oublier, qu'à la date du 6 juin 1882, la haute cour déclara les sentences françaises exécutoires, lorsque Fabiani eut déposé en forme authentique la décision de la cour d'appel d'Aix (art. 558 C. proc. civ. vénéz.).

Les clauses du compromis de Caracas, du 7 août 1880, qui, en prescrivant

l'exécution immédiate et sans recours possible au Vénézuéla, rendaient, d'après la demande, toute comparution inutile devant la haute cour fédérale, sont manifestement contraires aux principes généraux du droit, car aucun Etat ne renonce, en faveur des institutions d'un autre Etat ou de conventions entre parties, aux règles fondamentales de sa législation. L'*exequatur* doit être ordonné, dès lors, suivant la procédure fixée par la loi du pays dans lequel il est requis. La cour avait l'obligation de citer l'adversaire de Fabiani, et, s'il l'exigeait, de l'entendre.

Quant aux dénis de justice rentrant dans les termes du compromis, ils n'existent pas. L'arrêt du 6 juin 1882 a été exécuté; les tribunaux vénézuéliens ont accordé à Fabiani tout ce qu'il a réclamé; s'il y a eu des retards, c'est qu'il s'en produit dans toute exécution entravée par un défendeur qui cherche à faire valoir ses droits ou à gagner du temps, et que Fabiani les a provoqués lui-même, soit par des récusations intempestives, soit par son ignorance des lois applicables en l'espèce; et enfin, la sentence arbitrale e été exécutée en conformité du droit vénézuélien, jusqu'au moment où Fabiani déserta la procédure. Effectivement, le 6 juillet 1882, le juge Mendez ordonne l'exécution à Maracaïbo, sur requête de Fabiani. Les Roncayolo forment opposition, mais ils sont déboutés dès le 11 juillet, et le magistrat dispose: "Ce jour étant le quatrième depuis que l'ordonnance d'exécution a été rendue (art. 301 C. proc. civ.), un mandement sera adressé au juge du municipe de San-Raphaël en désignant les immeubles et autres objets que Roncayolo père et fils doivent remettre à Fabiani . . . . pour qu'il le mette en possession des dits objets, faisant usage de la force en cas de nécessité." Le 12 juillet, le tribunal du municipe de San-Raphaël met Fabiani en possession des vapeurs *Eclair, Mara* et *Pauline;* le 14 même mois, l'entreprise du remorquage passe entre ses mains. Si le juge de première instance admit l'appel d'André Roncayolo avec effet seulement dévolutif, si le juge supérieur l'accueillit, lui, à deux effets, et si l'exécution demeura naturellement suspendue jusqu'au jugement sur l'incident, il n'y a là rien d'illégal. Ce sont les récusations non motivées de Fabiani qui ont entraîné des retards, en arrêtant toute la procédure pendant près d'une année. Après avoir tenté, par trois fois, de récuser le juge supérieur, il récusait encore le président de la cour suprême qui venait d'autoriser son appel à l'égard de la sentence prononcée sur la troisième récusation.

En somme, Fabiani envisagea qu'il avait tout gain à interrompre la procédure et il n'exerça contre les juges dont il flétrit après coup les actes prétenduement illégaux et criminels, aucun des recours donnés par les lois nationales. Les erreurs qu'il a pu commettre n'engagent pas non plus la responsabilité de l'Etat défendeur; l'art. 2 du Code civil vénézuélien porte que "l'ignorance des lois ne dispense pas de l'obligation de les observer."

Fabiani affirme bien, sans preuves sérieuses, que le pouvoir exécutif fédéral intervenait abusivement dans la procédure d'exécution. Mais c'est lui-même qui sollicita l'intervention du Gouvernement, en se fondant sur une interprétation erronée du sec. 17 de l'art. 13 de la constitution. La séparation des pouvoirs existe au Vénézuéla comme en Suisse et ailleurs. Fabiani a été mal conseillé ou mal inspiré.

Le 10 juillet 1883, le fondé de pouvoirs de Fabiani s'adresse de nouveau à la haute cour fédérale pour qu'elle enjoigne au juge d'exécuter

l'arrêt du 6 juin 1882; le 8 décembre, la cour fait droit à ces conclusions. C'était, au dire de Fabiani, la condamnation du système de tergiversations inauguré par le juge supérieur; s'il en est ainsi, il devait procéder contre ce dernier en application de l'art. 341 du Code pénal vénézuélien, sous peine de perdre son recours. Les étrangers ne sauraient se réclamer de privilegés que les nationaux n'ont point. D'ailleurs, le 19 janvier 1884, le tribunal de Maracaïbo ordonne l'exécution des sentences françaises; le 8 février, le représentant de Fabiani requiert l'embargo sur les droits et actions de Roncayolo dans la douane et le chemin de fer de la Ceïba; le lendemain, le mandataire d'André Roncayolo forme opposition, en alléguant que la haute cour fédérale n'était pas compétente; le 13 février, le tribunal de première instance écarte la demande de l'opposant; le 23 cependant, sur requête d'André Roncayolo, la cour suprême de justice de l'Etat rend son arrêt de conflit, et, en se basant sur l'art. 50 C. proc. civ. vénéz., le tribunal suspend l'exécution.

Au lieu de faire trancher le conflit de compétence par le tribunal extraordinaire que prévoit l'art. 16 de la loi du 16 mai 1882, Fabiani abandonna la procédure, en prétextant qu'il chercherait en vain à obtenir justice au Vénézuéla. Or la cour suprême de l'Etat Falcon avait uniquement revendiqué (cfr. art. 89 de la Const. vénéz.) l'autonomie judiciaire d'un des Etats confédérés, comme elle en avait le droit; tant que la question de compétence n'était pas résolue, Fabiani ne pouvait se plaindre d'un déni de justice. Et il avait, au surplus, la faculté de rechercher le tribunal en dommages et intérêts, si l'arrêt de conflit avait été injustement rendu (art. 57 C. proc. civ. vénéz.). A ce moment, en effet, il n'avait pas d'action contre le Vénézuéla, mais contre la cour suprême de l'Etat Falcon. Il avait à suivre la voie que la loi trace aux étrangers comme aux nationaux; et il lui était interdit d'exiger une indemnité de la nation, avant d'avoir épuisé les recours légaux.

Relativement au service du remorquage, le Vénézuéla pouvait denoncer le contrat du 7 décembre 1874 pour son échéance; ce qu'il a fait, en disposant que le nouveau contrat n'entrerait en vigueur qu'à l'expiration des dix années de la concession antérieure, soit dès le 8 décembre 1884. L'Etat n'avait pas perdu son droit souverain, parce que Fabiani avait des contestations judiciaires au Vénézuéla avec des particuliers.

L'hypothèque prise sur la douane de Ceïba, même en admettant que les droits des Roncayolo—au reste, cédés à un tiers—fussent susceptibles d'hypothèque, ne pouvait produire d'effets légaux avant un jugement rendu sur l'opposition formée par le gouvernement de la section de Zulia. L'inscription hypothécaire, de 120,000 fr., radiée le 3 septembre 1887, par les syndics définitifs de la faillite Fabiani, n'entre plus en ligne de compte, d'autant plus qu'une inscription résultant d'une sentence étrangère ne saurait être la conséquence immédiate de celle-ci, mais seulement de l'*exequatur* accordé par les tribunaux nationaux. Quant au contrat du 21 octobre 1885, Fabiani devait l'attaquer au moyen de l'action paulienne, s'il le tenait pour frauduleux; il s'en est bien gardé, et il crie au déni de justice avant même d'avoir saisi les autorités judiciaires.

En outre, la convention franco-vénézuélienne de 1885 n'est nullement contraire au principe de la non-rétroactivité des lois. Conforme à tous égards aux lois antérieures (art. 10 de la Const., art. 5 du décret du 14 février 1873), elle ne donne ouverture à l'action diplomatique que lorsque

les étrangers ont épuisé les recours légaux. Le ministre de France à Caracas, dans sa note du 3 août 1887, a reconnu "que les réclamations élevées de ce chef (pour déni de justice) rentrent dans les prévisions de l'art. 5 de la convention du 26 novembre 1885." Cet acte est, de plus, réservé dans le compromis du 24 février 1891, et, s'il n'était pas applicable à l'affaire Fabiani, toutes les réclamations de ce dernier seraient, aux termes du décret du 14 février 1873, justiciables de la haute cour fédérale.

Le Gouvernement défendeur critique ensuite l'état de dommages et intérêts de la partie demanderesse. La plupart des indemnités réclamées sont exclues par les termes mêmes du compromis. Fabiani n'est, au demeurant, créancier, que des Roncayolo. La faute des autorités vénézuéliennes n'est pas mieux établie que la responsabilité de l'Etat. Toute la demande repose sur des affirmations de Fabiani qui n'ont aucune valeur, ni en fait ni en droit.

La défense conclut dès lors à ce qu'il plaise à l'arbitre de décider que le Vénézuéla n'est pas responsable des dommages que Fabiani dit avoir éprouvés pour dénégations de justice.

IV. Dans sa *réplique*, le Gouvernement demandeur constate, entre autres, qu'il appartient à l'arbitre de déterminer souverainement le point de départ des dénégations de justice prétendues par Fabiani, le compromis étant rédigé en termes très généraux. Le déni de justice est nettement défini à l'art. 288 du C. pén. vénéz., et la définition en est très large.

Il convient de remarquer encore que l'arrêt du 11 novembre 1881, qui est en contradiction flagrante avec celui du 6 juin 1882, équivaut à une dénégation de justice dont les conséquences ont été très graves; les motifs de cet arrêt sont inadmissibles. Il y a eu violation des art. 556 à 558 C. proc. civ. vénéz. et refus d'exécution d'une sentence définitive dans le sens de la convention du 26 novembre 1885. L'arbitre, en consultant le Diario de la haute cour fédérale, pourra vérifier même si elle a tenu du 12 au 31 octobre 1881, les deux audiences prévues par la loi (art. 111, ibid. et 288 C. pén. vénéz.).

Tout ce que dit la défense au sujet de l'opposition des Roncayolo et des récusations de Fabiani, est sans conluance au vu de l'arrêt de la haute cour fédérale du 8 décembre 1883, qui déclare que l'exécution des sentences françaises a été interrompue par des recours illégaux. Grâce à des retards contraires aux lois, Fabiani n'a pu mettre l'embargo sur les droits et actions de ses débiteurs. Il a fallu des années pour ne pas rendre une ordonnance d'exécution, qui devait être prononcée séance tenante.

Il n'était pas possible de rechercher, au préalable, en responsabilité le juge supérieur de Maracaïbo et la cour suprême de l'Etat de Falcon, puisque, depuis près de quatre ans, Fabiani réclamait vainement l'*exequatur* d'un jugement inattaquable.

Suit un "état définitif" des preuves invoquées.

V. Le Gouvernement défendeur insiste, dans sa duplique, sur la circonstance que des négociations auxquelles le compromis a donné lieu et de ses termes mêmes il résulte que cet acte se réfère exclusivement aux faits postérieurs à l'arrêt du 6 juin 1882. L'arrêt du 11 novembre 1881 était parfaitement correct, puisque l'homologation de la sentence arbitrale n'était pas définitive, le 7 juin précédent, date du dépôt de la requête à fin d'*exequatur*.

En ce qui concerne le conflit de compétence, ni Fabiani lui-même, ni sa

partie adverse ne sont adressé à la cour de cassation ou à la haute cour fédérale, pour provoquer la solution du conflit et ils n'ont pas fourni le papier timbré nécessaire à la procédure, qui a été abandonnée.

La duplique pose en principe: qu'il n'y a pas eu de déni de justice, pas plus d'après les lois vénézuéliennes que d'après l'art. 506, C. proc. civ. fr., ou les lois allemande et suisse; que l'Etat n'est point responsable des actes de ses fonctionnaires de l'ordre judiciaire, si cette responsabilité n'est formellement consacrée par la loi, et que le droit vénézuélien ne la proclame pas, tant que les étrangers lésés n'ont pas porté leurs demandes d'indemnité devant la haute cour fédérale; que l'intervention diplomatique enfin est inadmissible, aussi longtemps que les recours prévus par les lois territoriales n'ont pas été épuisés.

VI. Par son ordonnance de juillet 1895, l'arbitre a invité le Gouvernement demandeur à produire divers documents et renseignements complémentaires, et prescrit l'audition de différents témoins invoqués en demande. De ces témoins, trois seulement, MM. Plumacher, R. Seijas et F. Osio ont pu être entendus, en présence des parties, par les soins de M. le représentant des Etats-Unis d'Amérique à Caracas; il a fallu près d'une année pour recueillir ces témoignages. Des quatre autres témoins, l'un est décédé au cours du procès, deux n'ont pu être atteints et le quatrième a refusé de répondre aux questions qui lui étaient posées, vu sa qualité d'ancien Président de l'un des deux Etats en cause.

Une partie des documents et renseignements complémentaires requis par l'ordonnance de juillet 1895 ont été fournis. Il n'a pas été pris de conclusions contre l'authenticité des pièces produites de part et d'autre; l'arbitre appréciera librement, en conséquence, leur valeur probante et leur force obligatoire. Les difficultés soulevées par l'apport même des preuves littérales ont été écartées, ainsi que cela resort des déclarations des Gouvernements intéressés.

VII. La procédure a été declarée close par l'arbitre le 21 octobre 1896.

B.—*En droit.*

I.

Il importe, en toute première ligne, de déterminer exactement l'objet du différend soumis à l'arbitrage. Aux termes du compromis du 24 février 1891, la question litigieuse est de savoir si, "d'après les lois du Vénézuéla, les principes généraux du droit des gens et la convention (du 26 novembre 1885) en vigueur entre les deux puissances contractantes, le Gouvernement vénézuélien est responsable des dommages que Fabiani dit avoir éprouvés pour dénégations de justice." Indépendamment même de l'intention des parties manifestée durant les négociations auxquelles a donné lieu la convention franco-vénézuélienne de 1885, il résulte à l'évidence du texte même du compromis et de l'ensemble des faits de la cause, que le Gouvernement défendeur est actionné uniquement à raison de la non-exécution, par les autorités vénézuéliennes, du jugement arbitral rendu à Marseille, en date du 15 décembre 1880, entre Antoine Fabiani, d'une part, Benoit et André Roucayolo, d'autre part. L'Etat demandeur semble même reconnaître que la dénégation de justice initiale est l'arrêt du 11 novembre 1881 (*Réplique*, p. 2); et, comme on la verra plus loin, il est inutile de rechercher s'il faut considérer plutôt l'arrêt du 11 novembre 1881 que celui

du 6 juin 1882, comme point de départ des responsabilités éventuelles encourues dans le sens du compromis.

D'un autre côté, la signification du mot "dénégation de justice" veut être précisée. Il convient d'entendre par là toute acte qui devra être envisagé comme une dénégation de justice, soit d'après les lois du Vénézuéla, soit d'après les principes généraux du droit des gens, soit d'après la convention du 26 novembre 1885, le compromis n'exigeant pas la concordance absolue de ces trois sources juridiques et des différences essentielles, ou même notables, n'existant d'ailleurs pas entre elles sur la matière.

La législation vénézuélienne ne fournit pas une définition directe de la dénégation de justice. Cependant le décret du 14 février 1873, sur les droits et devoirs des étrangers, dispose à cet égard, dans son art. 5, que les étrangers ont le droit de recourir à l'intervention diplomatique "lorsque, ayant épuisé les recours légaux devant les tribunaux compétens, il apparait clairement qu'il y a eu déni de justice ou injustice notoire." Et les art. 282 et 288 du C. pén. vénéz., du 27 avril 1873, sont ainsi conçus: "Tout juge exécuteur d'une sentence rendue exécutoire, qui refusera ouvertement de l'accomplir, sera puni de la même peine édictée par l'article précédent (amende ou détention), sans préjudice des poursuites auxquelles il y aura lieu de procéder de ce fait (282). Les magistrats d'un tribunal agrégé et autres juges qui n'expédieront pas les affaires avec la célérité prescrite par les lois, qui ne dicteront point les ordonnances et sentences dans les délais impartis par ces mêmes lois, qui prorogeront ou abrégeront indument les délais accordés aux parties, ou qui, d'une manière quelconque, retarderont la solution des procès civils ou criminels, seront punis de la suspension de l'emploi pendant une durée de un à six mois"(288).

On peut prétendre que le décret de 1873 ne saurait être invoqué dans ce cas, attendu, qu'entre la France et le Vénézuéla, la question du droit à l'intervention diplomatique a été réglée par la convention précitée de 1885. En vérité, un acte international a été substitué, sur ce point, à une loi purement nationale (cf. art. 10 de la Const. vénéz. de 1881), et, bien que le compromis réserve l'application des lois vénézuéliennes, il ne vise que celles de ces lois opposables au Gouvernement demandeur; or, celle de 1873 a été modifiée, pour les ressortissants français, dans son art. 5 du moins, par une convention postérieure, obligatoire pour les deux Etats signataires du compromis.

S'il en est ainsi, la seule définition dont il est possible de tenir compte, en droit vénézuélien, est celle des art. 282 et 288 de Code pénal de 1873, qui assimilent à une dénégation de justice, tout faits, d'une *autorité judiciaire*, constituant un refus d'exécution d'une sentence rendue exécutoire, un rétard illégal dans l'expédition des affaires, un défaut de prononcer les ordonnances et sentences dans les délais fixés, une prorogation ou une réduction indue des délais établis par la loi, ou encore tout retard quelconque apporté à la solution d'un procès. Les refus d'exécution, l'inobservation de délais péremptoires et les retards illégaux qui peuvent être reprochés aux juges dans l'exercice de leurs fonctions sont donc les trois ordres de faits caractéristique de la dénégation de justice, dans la législation du Vénézuéla.

La convention du 26 novembre 1885 porte ce qui suit, en son art. 5: "Afin d'éviter à l'avenir tout ce qui pourrait troubler leurs relations amicales,

les hautes parties contractantes conviennent: que leurs représentants diplomatiques n'interviendront point en matière de réclamations ou de plaintes des particuliers dans les affaires qui sont de la compétence de la justice civile ou pénale, conformément aux lois locales; à moins cependant qu'il ne s'agisse de déni de justice ou de retard dans la procédure contraire à la coutume ou à la loi, ou d'inexécution d'un arrêt définitif, ou enfin de la violation évidente des traités ou des règles du droit des gens, malgré l'accomplissement de toutes les formalités légales." On a paru, dans la demande tout au moins contester l'applicabilité de la dite convention au litige actuel, en invoquant le principe de la non-rétroactivité des lois et en rappelant que l'affaire Fabiani remonte à une période antérieure à la date du 26 novembre 1885. Mais, en l'espèce, ce n'est point Fabiani personnellement qui est partie au procès; l'arbitrage est conclu non pas entre lui, mais entre la République Française et le Vénézuéla. L'Etat demandeur est lié par l'acte international susmentionné, pour toutes les interventions diplomatiques à venir. Au demeurant, la convention est expressément reconnue applicable à la présente contestation par le compromis du 24 février 1891; elle fait loi entre les deux pays.

Une définition directe du déni de justice n'est point donnée par l'art. 5 de la Convention franco-vénézuélienne; le texte le signale seulement parmi les causes d'une intervention diplomatique, et on pourrait même croire qu'il le distingue en quelque sorte des autres causes d'intervention—retards, inexécution d'un arrêt définitif, etc.—ou qu'il l'en sépare nettement. Mais, sans qu'il soit besoin d'examiner si les parties ont employé, dans le compromis, l'expression de "dénégation de justice" comme equivalent exact du terme de déni de justice, qui est généralement adopté par la législation, la jurisprudence et la doctrine, il est permis d'affirmer que l'art. 5 ci-dessus assimile pleinement au déni de justice, quant à leurs effets, les retards illégaux de procédure, l'inexécution d'arrêts définitifs, les violations flagrantes du droit commises sous l'apparence de la légalité; dans tous ces cas, l'intervention diplomatique est déclarée admissible, pourvu qu'il s'agisse d'affaires rentrant dans "la compétence de la justice civile ou pénale." La condition, posée par le décret de 1873, de l'épuisement des pourvois légaux devant les tribunaux, n'est pas rappelée dans la Convention de 1885, et il serait excessif de dire que l'art. 5 *in fine* de cet acte international ("malgré l'accomplissement de toutes les formalités légales") se rapporte aux actions en responsabilité dirigées contre les autorités fautives: ces "formalités légales" s'entendent de celles à l'observation desquelles est subordonné l'accomplissement de l'acte judiciaire qui peut avoir déterminé un déni de justice, ou l'une des autres causes de l'intervention diplomatique; elles sont, par conséquent, antérieures au déni de justice lui-même.

En consultant les principes généraux du droit des gens sur le déni de justice, c'est-à-dire les règles communes à la plupart des législations ou enseignées par la doctrine, on arrive à décider que le déni de justice comprend non seulement le refus d'une autorité judiciaire d'exercer ses fonctions et, notamment, de statuer sur les requêtes qui lui sont soumises, mais aussi les retards obstinés de sa part à prononcer ses sentences (cfr. arrêts du tribunal fédéral suisse des 11 juin 1880 et 7 mai 1884, dans le *Journal des Tribunaux*, année 1880, p. 801, et année 1884, p 402; Code de proc. civ. français, art. 506 et 507; Garsonnet, *Traité théorique et pratique*

de procédure, vol. I, p. 225 et 229; Huc, *Commentaire théorique et pratique du Code civil*, vol. I, n° 180; Holtzendorff, *Rechtslexikon*, article "Rechtsverweigerung;" Wetzell, *System des ordentlichen Civilprocesses*, 5me éd., p. 815 et 463; Laband, *Das Staatsrecht des Deutschen Reichs*, vol. II, nos 242 et 243; Holtzendorff, *Handbuch des Völkerrechts*, vol. II, p. 74 et note 5 p. 75).

En réalité, les puissances compromettantes semblent avoir voulu attribuer aux mots "dénégations de justice" leur signification la plus étendue (*justitia denegata vel protracta*) et y faire rentrer tous les actes d'autorités judiciaires impliquant un refus direct ou déguisé de rendre la justice. Au lieu de reproduire textuellement les termes de la Convention de 1885, elles ont choisi une formule générale embrassant, dans les limites de ladite Convention, les griefs judiciaires de Fabiani contre le Vénézuéla, griefs qui, s'ils sont fondés, ont, en partie du moins, la portée de dénis de justice, tant d'après l'art. 5 de cet acte international, que d'après les lois vénézuéliennes et le droit des gens. Ce sont, effectivement, les réclamations de Fabiani, communiquées à son gouvernement, qui devaient inspirer la rédaction du compromis; et la mission de l'arbitre consiste précisément à décider si le Vénézuéla est "responsable des dommages que Fabiani dit avoir éprouvés pour dénégations de justice."

Il n'est pas douteux, qu'à l'époque où le compromis a été signé, les réclamations de Fabiani reposaient, entre autres, à la fois sur des dénis de justice *sensu stricto*, et sur d'autres faits, tels que les dénis de justice *sensu lato* indiqués dans la Convention de 1885. Et l'Etat défendeur, après avoir cité une note du 3 août 1887, où la légation française à Caracas, réduisant les prétentions de Fabiani à "ce qu'elles comportent en droit," tout en réservant "le surplus," et invoquant à l'appui de sa demande en dommages et intérêts le "refus d'exécution des sentences," ainsi que le défaut "d'exécution des sentences en temps utile," — l'Etat défendeur ajoute ceci: "Le Gouvernement du Vénézuéla trouva sans fondement les prétentions de Fabiani à réclamer une réparation, parce qu'il n'y avait pas eu déni de justice, ni lieu de recourir à l'intervention diplomatique" (*Défense*, p. 3). Ainsi, l'objet du différend et ses origines sont reconnus des parties; c'est pour refus d'exécution du jugement arbitral du 15 décembre 1880 que Fabiani possédait contre deux débiteurs domiciliés au Vénézuéla, ou pour défaut d'exécution par suite de l'admission de moyens illégaux, que la France a pris en mains les intérêts de son national. Le Gouvernement vénézuélien conteste le droit de son adversaire de l'actionner en responsabilité, non point parce qu'il n'envisagerait pas les faits judiciaires allégués par Fabiani, s'ils étaient vrais, comme emportant des dénis de justice, mais parce qu'il voit l'absence de dénis de justice dans l'inexactitude de ces faits ou dans la désertion de la procédure avant l'épuisement des recours légaux. Les parties, en s'appuyant, dans le traité d'arbitrage, sur la Convention de 1885, ont, quoiqu'elles ne parlassent au compromis que de "dénégations de justice," considéré que l'arbitre pouvait retenir comme des éléments du procès les faits rentrant dans le cadre de la convention prérappelée et constitutifs de dénis de justice en droit vénézuélien comme d'après le droit des gens: de l'avis même des intéressés, dès lors, et conformément aux textes applicables, les dénégations de justice, dans le sens du compromis, s'entendent de tous refus directs ou déguisés de juger, de tous retards de procédure illégaux et de toutes inexécutions d'arrêts définitifs, moyennant que ces faits concernent des *affaires de la justice civile ou pénale*,

soient imputables à des *autorités judiciaires* du Vénézuéla et se soient produits "malgré l'accomplissement de toutes les formalités légales" par la partie lésée.

En revanche, le Vénézuéla n'encourt aucune responsabilité, selon le compromis, à raison de faits étrangers aux autorités judiciaires de l'Etat défendeur. Les réclamations que le demande fonde sur des "faits du prince," qui sont, soit des changements de législation, soit des actes arbitraires du pouvoir exécutif, sont absolument sous traites à la décision de l'arbitre, qui élimine de la procédure tous les allégués et moyens de preuve y relatifs, en tant qu'il ne pourrait pas les retenir en vue d'établir d'autres faits concluants et connexes relatifs aux dénégations de justice.

II. Ce sont bien les dénégations de justice, commises au cours de la procédure d'exécution de la sentence arbitrale du 15 décembre 1880, et l'appréciation éventuelle de leurs conséquences pécuniaires, qui forment l'objet du litige actuel. Il est cependant nécessaire de relever encore une objection de la demande.

La situation judiciaire de Fabiani au Vénézuéla fut liquidée, d'abord, par la transaction du 31 janvier 1878. Après une série d'incidents Fabiani renonçait au bénéfice de cet acte et signait le compromis qui a donné naissance à la sentence arbitrale du 15 décembre 1880. La partie demanderesse a exposé qu'elle avait adhéré à ce compromis sous l'empire d'une force majeure et qu'il ne couvrait pas les dénégations de justice antérieures. Mais elle reconnait sans détour (*demande*, p. 142 et s.) que Fabiani, qui aurait pu faire casser le compromis par les tribunaux français, préféra réserver l'avenir de son commerce au Vénézuéla en épuisant tous les moyens de conciliation; Fabiani se contentait ainsi de l'état de choses créé par l'acceptation de la juridiction arbitrale, et d'ailleurs, depuis ce moment, ses efforts judiciaires au Vénézuéla tendirent uniquement à l'exécution du jugement du 15 décembre 1880. Le motif tiré de la vis major, qui aurait affecté le compromis de 1880 et qui reculerait le point de départ des dénégations de justice comprises dans la présente instance, ne saurait donc être pris en considération. Des dénégations de justice, en vertu desquelles il serait possible de rechercher le Vénézuéla en responsabilité devant l'arbitre, n'ont pu se produire avant l'introduction de la procédure d'exécution de la sentence du 15 décembre 1880, soit avant le 7 juin 1881, date de la demande d'*exequatur* formée auprès de la haute cour fédérale.

Aussi l'arbitre n'a-t-il pas admis à la preuve, outre les "faits du prince," tous les faits étrangers à l'inexécution et aux effets de l'inexécution de la sentence prérappelée?

III. La procédure d'exécution, introduite par Fabiani au Vénézuéla, remonte aux premiers jours du mois de juin 1881; interrompue à plusieurs reprises par des incidents divers, elle fut définitivement suspendue par l'arrêt de conflit du 23 février 1884 et l'inaction du tribunal extraordinaire chargé par la loi de trancher la question de compétence que souleva la cour suprême de l'Etat de Falcon, en sorte, qu'à cette heure, la sentence arbitrale du 15 décembre 1880 n'est point exécutée. Les dénégations de justice, dont Fabiani peut avoir été victime, ont, en conséquence, dû se produire depuis le commencement de juin 1881 jusque dans les premiers mois de l'année 1884.

C'est par une requête à fin d'*exequatur* des 3 et 7 juin 1881 que Fabiani accomplit le premier acte de sa procédure; celle-ci n'était, suivant la

demande (p. 165), qu'une "simple formalité." Assurément, le compromis de 1880 stipulait que la sentence qui serait rendue par les arbitres deviendrait immédiatement exécutoire au Vénézuéla, sans qu'on pût admettre contre elle aucun recours. Mais les conventions des parties ne peuvent déroger à des règles d'ordre public, comme le sont celles relatives à l'exécution de jugements étrangers; cette matière se rattache à la souveraineté, et les principes qui la régissent sont du droit le plus strict (cfr. Calvo, *Le droit international théorique et pratique*, 5me éd., vol. III, p. 366). A d'autres égards, ce sont les lois territoriales qui déterminent exclusivement les formalités et conditions nécessaires pour obtenir l'*exequatur*. Ces formalités et conditions se trouvaient fixées, en l'espèce, par les art. 557 et 558 C. proc. civ. vénéz., et en particulier, par l'art. 558, ainsi conçu: "Pour que la sentence soit déclarée exécutoire, il faut citer le dixième jour la personne contre laquelle la sentence a été prononcée, et que les parties soient admises à discuter verbalement, en audience publique, ce qu'elles croient convenable pour la défense de leurs droits. La partie qui introduit l'affaire doit présenter la sentence en forme authentique." C'est à tort que la demande critique la procédure suivie par la haute cour fédérale, à laquelle s'était adressé Fabiani et qui a, de par l'art. 556 C. proc. civ. vénéz., "fonction de donner force exécutoire aux sentences rendues par des autorités étrangères;" la haute cour avait l'obligation de citer et d'entendre les adversaires de Fabiani, nonobstant les termes du compromis de 1880, et, ce faisant, elle ne s'est point rendue coupable d'une dénégation de justice.

Il n'est pas possible non plus de voir un déni de justice dans la décision sur incident, du 27 septembre 1881, car le fond de la contestation n'était pas abordé et il n'y a pas de contradiction insoluble entre elle et l'arrêt du 11 novembre, ni dans la circonstance que la haute cour n'a pas siégé, du 14 octobre 1881, jour de la clôture des débats, jusqu'au 31 même mois, l'art. 111 C. proc. civ. vénéz. ne prescrivant aux juges de rendre leurs sentences dans les deux jours à compter de celui où "sont terminés les exposés des parties," que "sous réserve de dispositions spéciales," auxquelles il a fallu recourir (*Annexe I*, de la défense, p. 20 et s.).

L'arrêt du 11 novembre 1881 ne constitue pas davantage un déni de justice, un refus déguisé de statuer. Fabiani s'adressait à la haute cour fédérale, pour qu'elle déclarât exécutoire au Vénézuéla l'ordonnance du président du tribunal de première instance de Marseille, du 21 décembre 1880, mise au pied de la sentence arbitrale du 15 même mois. Benoît et André Roncayolo contestaient la compétence de la cour et la valeur juridique de l'ordonnance du juge français. Au moment même où la procédure d'exécution fut introduite par Fabiani, celui-ci ne possédait, ni ne pouvait posséder, une copie authentique du jugement définitif dont il requérait l'exécution, puisque l'ordonnance du 21 décembre 1880, portée, par voie d'opposition devant le tribunal de première instance de Marseille puis confirmée le 1er avril 1881, mais déférée aussitôt après à l'instance supérieure, ne devenait définitive que par l'arrêt de la cour d'appel d'Aix du 25 juillet de cette dernière année.

Aussi longtemps que la question de la validité de l'ordonnance d'exécution du 21 décembre 1880 restait en suspens, la haute cour fédérale n'était pas tenue d'accorder l'*exequatur* requis. Il est vrai, qu'en "terminant ses plaidoiries," l'avocat de Fabiani a produit une expédition de

l'arrêt rendu par la cour d'Aix (*Annex I.*, de la défense, p. 18, 27, 32); mais le Gouvernement demandeur n'a mis sous les yeux de l'arbitre aucun texte légal qui pût faire considérer ce complément du dossier comme n'étant pas tardif, et Fabiani lui-même ne paraît pas y avoir attaché d'importance; effectivement, le 12 novembre 1881, il priait la haute cour fédérale de "donner exécution à l'arrêt de la cour d'appel d'Aix" du 25 juillet, après avoir été débouté, comme il le rappelle, des fins de sa requête tendant à obtenir l'*exequatur* de la sentence arbitrale déclarée exécutoire par l'ordonnance du 21 décembre 1880. Si l'arrêt d'Aix rentrait dans l'objet de la décision de la haute cour fédérale, du 11 novembre 1881, la nouvelle requête du lendemain aurait dû être forcément écartée, attendu qu'il y aurait eu *res judicata* sur ce point comme sur les autres; s'il n'y rentrait pas, la haute cour n'avait point, le 11 novembre 1881, l'obligation d'accorder l'*exequatur* à une sentence qui n'avait pas encore la valeur d'un jugement étranger passé en force de chose jugée. Partant, il est superflu de discuter le mérite des motifs invoqués à l'appui de l'arrêt précité de la haute cour fédérale, par la majorité des membres de celle-ci. Il ne pouvait, au reste, y avoir de dénégation de justice dans le cas particulier, spécialement en vertu de la Convention franco-vénézuélienne de 1885, qu'autant que toutes les formalités légales—soit, notamment, le dépôt régulier d'une sentence arbitrale munie d'une ordonnance d'exécution non frappée de recours—auraient été préalablement accomplies par Fabiani; ce qui n'a pas eu lieu, ainsi que les actes ultérieurs de la procédure permettent de la constater.

Il n'est pas indispensable de rechercher si l'arrêt de la Haute Cour fédérale, du 6 juin 1882, qui décréta l'exécution de l'arrêt de la cour d'appel d'Aix du 25 juillet 1881, a été rendu dans un sens favorable à Fabiani, parce qu'on redoutait, au Vénézuéla, que la question internationale ne fût posée. Cette décision n'implique évidemment aucune dénégation de justice; mais il convient d'examiner si ses effets n'ont pas été compromis d'une manière illicite par les autorités judiciaires de l'Etat défendeur.

Certains faits exposés en demande (p. 285 et s.) laissent supposer que l'arrêt du juin 1882 n'aurait donné qu'en apparence gain de cause à Fabiani et qu'on se réservait de rendre illusoire, à Maracaïbo, où elle devait être exécutée, la décision de la haute cour fédérale. Mais ces faits, que devaient prouver les déclarations de MM. Palacois et Rojas Paül, ne sont pas établis, l'un des témoins ayant refusé de répondre et l'autre n'ayant pu être atteint.

Quoi qu'il en soit, la série des dénégations de justice commence presque dès l'instant où Fabiani tenta d'obtenir, à Maracaïbo, l'exécution de la sentence arbitrale pourvue désormais d'une ordonnance d'*exequatur* en due forme; il sied de remarquer, avant tout, que la défense n'a pas même allégué que Fabiani n'eût point satisfait à toutes les "formalités légales" prévues par la Convention de 1885, pour arriver à l'exécution de ses sentences de la part des autorités judiciaires auxquelles il s'est adressé, et que celles-ci n'en ont pas signalé l'insuffisance ou l'absence.

L'existence de dénégations de justice, à compter de cette époque, résulte, entre autres, de l'arrêt de la haute cour fédérale, du 8 décembre 1883, reconnaissant que l'exécution a été arrêtée par "l'admission de recours illégaux" (*Annexe II*, de la défense, p. 187). Il est clair que l'incident soulevé à Maracaïbo par la partie adverse de Fabiani, à savoir que le juge-

ment à exécuter n'était pas la sentence arbitrale mais bien l'arrêt de la cour d'appel d'Aix, "était certainement absurde," comme le dit la défense (*Duplique*, p. 34); l'autorité judiciaire chargée de l'exécution aurait dû passer outre. Mais si André Roncayalo est débouté de son opposition, si le Tribunal de première instance au civil de Maracaïbo refuse de se récuser, le même tribunal n'en accueille pas moins, avec effet simplement dévolutif d'abord, l'appel interjeté contre ses décisions, pour le recevoir à double effet, sur l'ordre du juge supérieur.

Or, l'opposition et le pourvoi de Roncayolo devaient être écartés sans examen, ainsi que la haute cour fédérale l'a proclamé dans son arrêt du 8 Décembre 1883. En permettent aux adversaires de Fabiani d'entraver sans droit l'exécution des sentences françaises, les autorités judiciaires du Vénézuéla ont commis à l'encontre de ce dernier des dénégations de justice, consacrées essentiellement par l'admission de l'appel des Roncayolo avec effet suspensif; il y a eu refus déguisé de statuer. Et cette opinion est fortifiée encore par le fait de la démission du juge Mendez; il est au moins vraisemblable que ce magistrat, qui avait ordonné les premières mesures d'exécution, se sera démis de ses fonctions pour sortir d'une situation fausse dans laquelle il ne voulait pas assumer plus longtemps une part de responsibilité.

Le défendeur reproche vivement à Fabiani d'avoir causé lui-même de graves retards, à raison des demandes de récusation qu'il a présentées contre le juge supérieur. Abstraction faite du bien fondé de l'une au moins des causes de récusation (*Annexe II*, de la défense, p. 61 et s.; cfr. art. 59, § 18, et art. 60 C. proc. civ. vénéz.), et du désir tout naturel que devait éprouver Fabiani de ne pas accepter la justice d'un magistrat qui, tout en se rendant l'auteur d'illégalités manifestes, s'obstinait à exercer son mandat, il suffit de rappeler que toute la procédure était arbitrairement arrêtée, contrairement aux vœux de Fabiani, par l'admission de moyens irrecevables; la faute originaire retombait, en tous cas, sur les autorités judiciaires qui n'avaient pas repoussé *à limine* de semblables moyens.

Des mois se passaient sans qu'il fût possible à Fabiani d'exercer les droits dérivant pour lui de la sentence arbitrale du 15 décembre 1880. Il sollicita, sur ces entrefaites, l'intervention du pouvoir exécutif, en se basant sur la § 17 de l'art. 13 de la Constitution, par lequel l'Etat est tenu "d'accomplir et de faire accomplir et exécuter . . . . les décrets et ordres que . . . . les tribunaux de la Fédération rendraient dans l'exercice de leurs attributions et de leurs facultés légales." Cette démarche, longuement critiquée dans la défense, était à la fois prudente et correcte, puisque aussi bien l'ordonnance d'*exequatur* de la haute cour fédérale n'était pas respectée, et qu'en pareil cas le Gouvernement a le devoir constitutionnel d'assurer l'administration de la justice. Si même la § 17 de l'art. 13 précité n'avait point cette portée et si l'on se refusait à voir, avec la demande, de la malveillance ou de l'incurie dans la résolution du Pouvoir exécutif du 9 juillet 1883, l'arrêt de la haute cour fédérale du 8 décembre suivant prescrivit la continuation de la procédure d'exécution suspendue par des "recours illégaux," et décréta implicitement que toute la responsabilité des retards incombait aux autorités judiciaires qui étaient entrées en matière sur ces recours. En réalité, les retards considérables éprouvés par le procédure d'exécution sont bien le fait de juges, et si Fabiani a pu ou dû en

occasionner lui-même, il ne serait pas équitable de les lui imputer à faute, parce qu'il a tenté de modifier une situation contraire aux lois, qui était l'œuvre des tribunaux vénézuéliens.

Divers indices donnent à penser que le Gouvernement défendeur prenait ouvertement parti contre Fabiani, et que cette attitude pouvait inciter ou encourager l'autorité judiciaire, du moins dans des provinces éloignées de la capitale et soustraites au contrôle d'une opinion publique vigilante, à méconnaître les droits d'un demandeur étranger auquel des personnes influentes de l'Etat ne ménageaient point leur hostilité. Telle est l approbation officielle du 21 août 1883 donnée à la cession, consentie par B. Roncayolo, du contrat de chemin de fer de la Ceïba, bien qu'il fût notoire au Vénézuéla que cette cession avait pour but de diminuer ou d'anéantir les gages d'un créancier; telle paraît être encore la modification adoptée par la législation de l'Etat Falcon aux art. 5 et 7 de la loi organique du pouvoir judiciaire, en janvier 1883; tel sera aussi le retrait du service du remorquage qui, dans les circonstances et à l'époque où il fut décidé, devait être interprété comme un acte de représailles dirigé contre Fabiani.

Une nouvelle dénégation de justice, du caractère le plus grave, allait se produire. Le juge de première instance de Maracaïbo, se conformant à l'arrêt de la haute cour fédérale du 8 décembre 1883, avait ordonné la continuation de le procédure d'exécution, lorsque, le 9 février 1884, André Roncayolo demande que le dossier fût transmis à la cour suprême de l'Etat Falcon, qui, seule, était investie légalement de la juridiction en la matière. Cette requête fut repoussée, mais Roncayolo saisit directement la cour suprême; celle-ci, par arrêt du 23 du même mois, et d'office, "décida, en représentation du pouvoir judiciaire de l'Etat Falcon, de contester, comme elle le fait dès à présent, à la haute cour, par devant la cour de cassation, constituée en la forme susmentionnée, la compétence de connaître dans l'affaire de l'exécution de la sentence de la cour d'appel d'Aix, rendue exécutoire au Vénézuéla, dans la cause poursuivie par Antoine Fabiani contre André et Benoît Roncayolo."

Cet arrêt de conflit suspendait, une fois de plus, le cours de la procédure. Il se fondait sur l'art. 88 de la Constitution du 27 avril 1881, disposant que "tout ce qui n'est pas expressément attribué à la l'Administration générale de la Nation, par cette constitution, est de la compétence des Etats." L'autonomie judiciaire des Etats qui font partie de la Fédération vénézuélienne n'existe toutefois, d'après ce texte, qu'autant qu'elle n'est pas restreinte par la Charte du pays. Mais elle est limitée, notamment, par le § 17 déjà cite de l'art. 13 de la Constitution, par les art. 556 et suiv. du code de procédure civile, qui, bien que promulgués antérieurement, n'ont été abrogés—le gouvernement défendeur le reconnaît d'une manière implicite—ni formellement, ni virtuellement, par celle-ci, et par la loi constitutionnelle du 2 juin 1882 relative à l'organisation de la haute cour fédérale (cfr. Const. du 27 avril 1881, art. 80, chiffre 11).

C'est bien aussi la doctrine consacrée par la haute cour, dans ses deux arrêts du 6 juin 1882 et du 8 décembre 1883, ainsi que par le Gouvernement dans sa résolution du 9 juillet de cette dernière année. Assurément, une minorité des membres de la haute cour opina, et la défense a repris son argumentation, que la compétence de ce tribunal cessait dès le moment où il avait accordé l'*exequatur* aux sentences françaises. Cette théorie, cependant. est contredite par la loi organique du 2 juin 1882, qui

porte en son art. 8, chiffre 11, que la haute cour a mission de "provoquer la plus prompte administration de la justice—sans doute aussi de la justice qu'elle est appellée à prononcer—afin qu'elle soit strictement rendue par les juges et les tribunaux nationaux inférieurs" (cfr. ladite loi. art. 18, chiffres 4 et 5, art. 5, chiffre 9, combinés avec les art. 556 et suiv. C. proc civ. vénéz.). Et le ministre de l'intérieur, par sa résolution du 9 juillet 1883, a expressément déclaré que "c'est à la haute cour fédérale qu'il appartient de faire observer ses dispositions." Au surplus, le § 17 de l'art 13 de la Constitution existe; comme les autorités judiciaires supérieures, le pouvoir exécutif était averti des illégalités commises et il n'a rien fait pour les empêcher, ni alors, ni plus tard, quoiqu'il eût le devoir d'assurer l'exécution des "décrets et ordres" émanés des "tribunaux de la Fédération."

La partie défenderesse prétend bien que, raisonner ainsi, c'est confondre l'*exequatur*, matière fédérale, avec l'exécution, matière de la juridiction de l'Etat requis. L'exécution est déférée, à la vérité, aux autorités judiciaires des divers Etats de la Fédération, mais, en tant que chargées de faire exécuter des sentences étrangères ensuite de décisions de la haute cour, elles se trouvent placées sous le contrôle de ce tribunal et elles en apparaissent comme les organes d'exécution. Accepter une thèse différente équivaudrait à convertir en décrets illusoires les ordonnances d'*exequatur* de la haute cour, qui n'aurait aucun moyen dé leur prêter un effet quelconque et qui remplirait à cet égard des fonctions de pure forme. Il est plus logique, et il est dans l'esprit de la législation vénézuélienne, de considérer comme des juges et des tribunaux de la nation, placés sous la surveillance de la haute cour et agissant sur ses odres (loi organique de 1882, art. 8, chiffre 11), les autorités judiciaires auxquelles est déléguée, dans les Etats, l'exécution des jugements étrangers (*ibid.* art. 18, chiffres 4 et 5).

La cour suprême de l'Etat Falcon, en soulevant un conflit de compétence dans une procédure dont la partie adverse de Fabiani entravait le cours, pour un motif que l'Etat défendeur qualifie de "certainement absurd," a commis une dénégation de justice dans le sens du compromis; en encouragement l'opposition mal fondée d'un débiteur, elle a, sinon déterminé un refus de statuer, du moins provoqué un retard injustifié, et après tant autres faits de même nature, la décision qu'elle a prise a dû fortifier en Fabiani la conviction que l'évidence de son droit ne le protégeait pas contre l'arbitraire des juges.

Fabiani, dit la défense, dèserta la procédure; elle ajoute qu'il ne pouvait se plaindre de dénégations de justice aussi longtemps qu'il n'avait pas épuisé ses moyens d'action judiciaire au Venezuela, et provoqué, en particulier, une solution du conflit de compétence, ou invoqué les dispositions légales que permettent de faire condamner les magistrats fautifs à "rembourser les dommages et préjudices causés." Mais, d'abord, si Fabiani s'était prévalu de ces dispositions légales, il se serait heurté à l'objection que le tribunal extraordinaire, auquel est attribuée la connaissance des conflits de compétence et qui doit les trancher d'office, n avait pas rendu sa décision; ce tribunal ne s'est d'ailleurs jamais réuni. Ensuite, Fabiani avait des raisons de croire que, s'il ne pouvait obtenir justice au Vénézuéla contre des débiteurs étrangers au pays, il l'obtiendrait moins encore contre des autorités judiciaires mêmes de l'Etat.

liens"; qu'il avait "entendu de M. William Mollmann, précédemment employé dans la maison Roncayolo, ensuite employé du consulat américain, que M. Guzman Blanco et Benoit Roncayolo avaient des intérêts d'affaires ensemble et que M. Guzman Blanco aiderait Roncayolo en toute circonstance"; qu'au reste, "tout le monde à Maracaïbo, savait cela, et qu'on disait couramment parmi les étrangers que M. Roncayolo gagnerait le procès, puisqu'il avait la protection de M. Guzman Blanco"; qu'il est, lui, témoin, "positivement convaincu que M. Fabiani n'était pas bien vu par les tribunaux et autorités". Ces déclarations sont très générales, il est vrai, et ne reposent pas sur des faits précis dont M. Plumacher aurait eu la perception directe; elles n'en sont pas moins l'opinion d'un observateur compétent et désintéressé, en sorte, qu'à ce titre, elles ne laissent pas d'avoir une réelle valeur.

Enfin, la conviction morale de l'Arbitre est que les dénégations de justice qui se sont produites à l'encontre de Fabiani ont un caractère exceptionnel de gravité, en ce qu'elles ne sont pas la suite de simples négligences ou d'interprétations erronées de textes légaux, mais apparaissent comme intentionnelles. Certes, en droit commun allemand comme en droit français (cfr. *Wetzell*, op. cit., 3me éd. § 43; Holtzendorff, *Rechtslexicon*, article "Prozessleitung"; von Bar, dans l'*Encyklopädie der Rechtwissenschaft* d'Holtzendorff, 3me éd., p. 779; *Garsonnet*, op. cit., Vol. II, § 211 et vol. I § 55 *in fine; Aubry et Rau*, 4me éd., Vol. VIII, § 749, n° 2), il est de principe que le juge ne doit prendre en considération que les faits articulés et les moyens de preuve invoqués par les parties. Cependent la doctrine moderne va plus loin (cfr. Kohler, *Gesammelte Beiträge zum Civilprozess*, p. 361 et s.; *Encyclopädie der Rechtswissenschaft*, d'Holtzendorff, l. c.), et l'on admet, entre autres, que les tribunaux ordinaires peuvent retenir des faits assez notoires pour qu'ils jugent inutile d'en administrer la preuve (C. proc. civ. allem. art. 264; cfr. *Wetzell*, op. cit., § 43 ad note 30, et § 20, ad notes 40 à 43). A plus forte raison en est-il ainsi, en matiere d'arbitrage, surtout lorsque les parties n'ont point prescrit à l'arbitre la procédure à suivre (cfr. Wach, *Handbuch des deutschen Civilprocesses*, Vol. I, p. 73, et *Fuchsberger's Entscheidungen, Reichscivilprozessordnung*, Suppl.-Band, note 1 ad art. 866, et notes 4 et 6 ad art. 867 C. proc. civ. allem.)

L'Arbitre est investi d'un pouvoir discrétionnaire, limité seulement par l'obligation de se conformer aux principes essentiels de la procédure civile (Bluntschli, *Droit international codifié*, n° 495); il n'est pas forcé de s'en tenir aux allégués et moyens de preuve des parties, ni d'indiquer tous les éléments dans lesquels il puise sa conviction. La maxime des débats et le principe de la publicité, qui lient les juges permanets, et dont l'inobservation pourrait constituer un danger, ne lient pas dans la même mesure un arbitre, qui remplit des fonctions temporaires et qui est investi d'une magistrature de confiance.

Spécialement, lorsque le compromis est muet sur la question de la procédure à suivre, comme en l'espèce, on peut envisager que, dans l'intention même des parties, une grande liberté lui est laissée quant au choix des éléments dont il formera sa conviction. Cette conviction, dictée déjà par les résultats de l'administration de la preuve, a été renforcée, dans le sens marqué plus haut, par l'étude de documents que l'Arbitre s'est fait un devoir de consulter et d'apprécier au plus près de sa conscience.

Des dénégations de justice ayant été commises, à l'égard de Fabiani,

porte en son art. 8, chiffre 11, que la haute cour a mission de "provoquer la plus prompte administration de la justice—sans doute aussi de la justice qu'elle est appellée à prononcer—afin qu'elle soit strictement rendue par les juges et les tribunaux nationaux inférieurs" (cfr. ladite loi. art. 18, chiffres 4 et 5, art. 5, chiffre 9, combinés avec les art. 556 et suiv. C. proc civ. vénéz.). Et le ministre de l'intérieur, par sa résolution du 9 juillet 1883, a expressément déclaré que "c'est à la haute cour fédérale qu'il appartient de faire observer ses dispositions." Au surplus, le § 17 de l'art 13 de la Constitution existe; comme les autorités judiciaires supérieures, le pouvoir exécutif était averti des illégalités commises et il n'a rien fait pour les empêcher, ni alors, ni plus tard, quoiqu'il eût le devoir d'assurer l'exécution des "décrets et ordres" émanés des "tribunaux de la Fédération."

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L'art. 16 de la loi organique de la cour de cassation, du 16 mai, 1882, règle la composition du Tribunal extraordinaire (cour de cassation et haute cour fédérale siégeant ensemble) qui avait à liquider le conflit de compétence. Les art. 54 et suiv. du Code de procédure civile prescrivent que "l'autorité supérieure que cela concerne procédera aussitôt qu'elle aura reçu les actes des *juges*, à la détermination de la compétence dans les vingt-quatre heures, de préférence à toute autre affaire," et que "l'arrêt sur la compétence sera prononcé *sans citation* ni mémoires." Conformément à ces textes, l'arrêt du 23 Février 1884 ordonne (*Annexe II*, de la défense, p. 338) que "le dossier sera envoyé a la cour de cassation et la présente décision notifiée à la haute cour fédérale *aux effets de la compétence provoquée;*" la cour de cassation a reçu le dossier le 24 mars 1884 (*ibid*, p. 379) et Fabiani devait admettre que l'arrêt du 23 Février avait été communiqué immédiatement à la Haute Cour fédérale. Il n est nullement établi, ni même allégué, dans la défense, que le tribunal extraordinaire eût besoin, avant de pouvoir statuer, de renseignements complémentaires, qu'il est autorisé à réclamer en vertu de l'art. 55 du Code de procédure civile, ni qu'il se soit jamais réuni.

La procédure instituée par la loi du 16 mai 1882, et les art. 54 et suiv. du Code précité, qui sont applicables en l'espèce aux termes de l'art. 12 de la même loi, est une *procédure d'office*. La cour de cassation et la haute cour réunies devaient prononcer, dans les vingt-quatre heures à compter du 24 mars 1884, sur le conflit de compétence. En ne le faisant pas, elles se sont rendues coupables d une dénégation de justice bien caractérizée.

Quant à l'argument du Gouvernement défendeur (*Duplique*, p. 50), d'après lequel les art. 54 et 55 du Code de procédure civile ne seraient pas applicables, la procédure étant tracée par l'art. 16 de la loi organique de la haute cour fédérale, elle est réfutée par l'arrêt même du 23 février 1884; et le dit art. 16 ne corrobore pas davantage cet argument que les dispositions transitoires de la loi dont il s'agit.

Il n'y a pas lieu d'attacher plus d'importance à un autre moyen avancé dans la duplique: le tribunal extraordinaire dont il a été question n'aurait eu l'obligation de juger, qu'une fois que les parties auraient fourni "le papier timbré nécessaire" (*ibid.* p. 50). La formalité du timbre exigée par l'art. 16 de la loi organique du 2 juin 1882, se rapporte uniquement aux affaires traitées devant la haute cour fédérale; elle dérive d'un prescription légale qui ne peut être étendue, par analogie, aux conflits de compétence déférés au Tribunal extraordinaire souvent mentionné, car l'analogie, exclue en principe dans une pareille matière, l'est formellement par la nature même de la procédure déterminée aux art. 54 et suiv. du Code de procédure civile; on ne concevrait point, à défaut de disposition contraire expresse, que les parties eussent à supporter, en acquittement de droits de timbre, les frais d'une instance qui est ouverte d'office, à raison du fait de juges qui se sera ent déclarés faussement compétents ou dont la compétence aurait été contestée à tort par d'autres juges, et qui se déroule en dehors de toute participation des plaideurs. Fabiani, qui n'a pas été cité devant la cour suprême de l'Etat Falcon, qui ne pouvait ni ne devait être assigné devant le tribunal extraordinaire, était absolument étranger au conflit de compétence; ce tribunal avait l'obligation de statuer d'office, dans les vingt-quatre heures, sans que les parties eussent à accomplir quelque diligence ou formalité que ce fût.

En somme, Fabiani a été victime de plusieurs dénégations de justice, consommées par celle qu'implique l'inaction illégale de la cour de cassation et de la haute cour fédérale; cette dernière dénégation de justice seule suffisait à créer, au profit de Fabiani, le droit à l'intervention diplomatique et à lui assurer un recours en dommages et intérêts contre le Gouvernement défendeur, s'il doit être reconnu que celui-ci est responsable des fautes de ses autorités judiciaires et si Fabiani prouve qu'il a subi un préjudice de ce chef.

Dans les circonstances qui ont été exposées, l'intervention diplomatique était autorisée déjà par les termes formels de l'art. 5 de la Convention franco-vénézuélienne de 1885, et elle n'avait rien de contraire aux décisions de la doctrine (cfr. notamment, Holtzendorff, *Handbuch des Völkerrechts*, Vol. II, p 74; Fiore, *Droit international codifié*, nos 339 et 340; voir aussi, *Calvo*, op. cit., Vol. I, no 348; Pradier-Fodéré, *Traité de droit international public*, Vol. I, nos 402 et s.; *Bluntschli*, op. cit., no 380). Il serait, effectivement, inadmissible d'exiger de Fabiani qu'il eût fait, en outre, constater ces dénégations de justice notoires par les tribunaux vénézuéliens compétents, lui qui, pendant des années, avait demandé en vain l'exécution d'une sentence inattaquable et pourvue de l'*exequatur* requis par les lois territoriales, bien que les autorités administratives et judiciaires supérieures de surveillance eussent été averties des illégalités commises. L'inexécution des sentences françaises, provoquée par les magistratures inférieures, tolérée par la haute cour fédérale et le Gouvernement, consacrée par le tribunal extraordinaire, enlevait à Fabiani la disposition d une fortune considérable, l'entrainait dans des procès coûteux et sans issue, l'acculait finalement à la faillite et justifiait amplement une action internationale.

Il semble bien, à considérer la série des dénis de justice dont Fabiani avait le droit de se plaindre, et même l'une ou l'autre des décisions judiciaires qui lui donnèrent momentanément gain de cause en apparance, que ses adversaires étaient protégés, au Vénézuéla, par des influences assez puissantes pour entraver l'activité normale des tribunaux du pays. Cette hypothèse repose, au surplus, sur trois faits précédemment rappelés; approbation officielle du 21 août 1883, modification des art. 5 et 7 de la loi organique du pouvoir judiciaire de l'Etat Falcon, et retrait du service du remorquage. Elle est fortifiée encore par d'autres circonstances, parmi lesquelles il suffira de mentionner les suivantes:

Deux des troix témoins dont les déclarations ont été recueillies pendant l'instruction de l'affaire, en présence des parties, n'ont fourni aucun renseignement de nature à faire douter de l'impartialité des tribunaux vénézuéliens; mais le troisème témoin, M. E.-H. Plumacher, consul des Etats-Unis d'Amérique à Maracaïbo, qui a bien été chargé par intérim du consulat de France dans cette ville et qui fut un temps le mandataire spécial de Fabiani, contre lequel toutefois aucune cause de suspicion n'a été relevée et qui est le ressortissant d'un Etat non impliqué dans le litige actuel, a déposé devant le ministre d'une nation neutre, charge de l'entendre au nom de l'Arbitre: qu'il avait "l'impression", qu'en 1880, M. Guzman Blanco avait provoqué ou suggéré des démarches destinées à exercer une pression sur Fabiani, à l'occasion des démêlés de celui ci avec les Roncayolo; qu'à ce moment, "M. Blanco était le pouvoir dans le pays"; qu'il "arriva des choses qui donnèrent lieu de douter l'impartialité des tribunaux vénézué-

liens"; qu'il avait "entendu de M. William Mollmann, précédemment employé dans la maison Roncayolo, ensuite employé du consulat américain, que M. Guzman Blanco et Benoit Roncayolo avaient des intérêts d'affaires ensemble et que M. Guzman Blanco aiderait Roncayolo en toute circonstance"; qu'au reste, "tout le monde à Maracaïbo, savait cela, et qu'on disait couramment parmi les étrangers que M. Roncayolo gagnerait le procès, puisqu'il avait la protection de M. Guzman Blanco"; qu'il est, lui, témoin, "positivement convaincu que M. Fabiani n'était pas bien vu par les tribunaux et autorités". Ces déclarations sont très générales, il est vrai, et ne reposent pas sur des faits précis dont M. Plumacher aurait eu la perception directe; elles n'en sont pas moins l'opinion d'un observateur compétent et désintéressé, en sorte, qu'à ce titre, elles ne laissent pas d'avoir une réelle valeur.

Enfin, la conviction morale de l'Arbitre est que les dénégations de justice qui se sont produites à l'encontre de Fabiani ont un caractère exceptionnel de gravité, en ce qu'elles ne sont pas la suite de simples négligences ou d'interprétations erronées de textes légaux, mais apparaissent comme intentionnelles. Certes, en droit commun allemand comme en droit français (cfr. *Wetzell*, op. cit., 3me éd. § 43; Holtzendorff, *Rechtslexicon*, article "Prozessleitung"; von Bar, dans l'*Encyklopädie der Rechtswissenschaft* d'Holtzendorff, 3me éd., p. 779; *Garsonnet*, op. cit., Vol. II, § 211 et vol. I § 55 *in fine; Aubry et Rau*, 4me éd., Vol. VIII, § 749, n° 2), il est de principe que le juge ne doit prendre en considération que les faits articulés et les moyens de preuve invoqués par les parties. Cependent la doctrine moderne va plus loin (cfr. Kohler, *Gesammelte Beiträge zum Civilprozess*, p. 361 et s.; *Encyclopädie der Rechtswissenschaft*, d'Holtzendorff, l. c.), et l'on admet, entre autres, que les tribunaux ordinaires peuvent retenir des faits assez notoires pour qu'ils jugent inutile d'en administrer la preuve (C. proc. civ. allem. art. 264; cfr. *Wetzell*, op. cit., § 43 ad note 30, et § 20, ad notes 40 à 43). A plus forte raison en est-il ainsi, en matiere d'arbitrage, surtout lorsque les parties n'ont point prescrit à l'arbitre la procédure à suivre (cfr. Wach, *Handbuch des deutschen Civilprocesses*, Vol. I, p. 73, et *Fuchsberger's Entscheidungen, Reichscivilprozessordnung*, Suppl.-Band, note 1 ad art. 866, et notes 4 et 6 ad art. 867 C. proc. civ. allem.)

L'Arbitre est investi d'un pouvoir discrétionnaire, limité seulement par l'obligation de se conformer aux principes essentiels de la procédure civile (Bluntschli, *Droit international codifié*, n° 495); il n'est pas forcé de s'en tenir aux allégués et moyens de preuve des parties, ni d'indiquer tous les éléments dans lesquels il puise sa conviction. La maxime des débats et le principe de la publicité, qui lient les juges permanets, et dont l'inobservation pourrait constituer un danger, ne lient pas dans la même mesure un arbitre, qui remplit des fonctions temporaires et qui est investi d'une magistrature de confiance.

Spécialement, lorsque le compromis est muet sur la question de la procédure à suivre, comme en l'espèce, on peut envisager que, dans l'intention même des parties, une grande liberté lui est laissée quant au choix des éléments dont il formera sa conviction. Cette conviction, dictée déjà par les résultats de l'administration de la preuve, a été renforcée, dans le sens marqué plus haut, par l'étude de documents que l'Arbitre s'est fait un devoir de consulter et d'apprécier au plus près de sa conscience.

Des dénégations de justice ayant été commises, à l'égard de Fabiani,

par des autorités judiciaires du Vénézuéla, dans les cas exposés et les circonstances relatées ci-dessus, il y a lieu d'examiner si l'Etat défendeur en est responsable, et, dans l'affirmative, quelle est l'étendue de sa responsabilité.

C'est une question très controversée, en droit public, que celle de savior si un Etat répond du préjudice causé par ses agents, et spécialement par ses autorités judiciaires, à raison d'actes rentrant dans l'exercice de leurs fonctions.

En France, la doctrine et la jurisprudence sont divisées. La jurisprudence elle-même n'est pas unanime dans l'opinion, généralement consacrée toutefois, que les fautes commises par des fonctionnaires, dans les limites de leurs attributions légales, n'engagent pas la responsabilité de l'Etat, du moins d'une manière absolue et en l'absence de lois positives sur ce point (cfr. Fuzier-Herman, *Code civil annoté*, Vol. III, ad. art. 1382 et 1383, nos 767 et suiv.); mais la cour de cassation, par exemple, a reconnu, dans un arrêt du 1er avril 1845 (cfr. arrêts des 30 juillet et 16 août 1877, ainsi que *Pandectes françaises*, année 1896, IVme partie, p. 8, note 1, et *Laurent*, Vol. XX, no 592), que l'Etat, représenté par les differentes branches de l'administration publique, est passible des condamnations auxquelles le dommage causé par le fait, la négligence, ou l'imprudence de ses agents, peut donner lieu. En tout cas, les fonctionnaires de l'ordre judiciaire n'étant pas tenus de leur faute légère (cfr. *Fuzier-Herman*, op. cit., Vol. III, ad. art. 1382 et 1383, nos 505 et suiv.; *Demolombe*, Vol. XXXI, no 519; *Garsonnet*, op. cit., Vol. I, § 57, notes 12 et 18), la responsabilité de l'Etat ne pourrait s'étendre au-dela. La doctrine enseigne, de son côté, (*Aubry et Rau*, op. cit., Vol. IV, § 447, no 2; *Demolombe*, Vol. XXXI, no 63; *Baudry-Lacantinerie*, Vol. III, no 1352), que l'Etat, représenté par les divers ministères et administrations publiques, doit, à l'egal de tout commettant, répondre du préjudice occasionné par ses employés ou agents dans l'exercice de leurs fonctions ou services, indépendamment de l'existence d'une loi spéciale, ou encore (cfr. *Laurent*, vol. XX, nos 419 et s., 444, 591 et s.), que la responsabilité de l'Etat est exclue, lorsque le fonctionnaire agit, non comme préposé et instrument de l'Etat, mais comme accomplissant la mission sociale qui lui est déléguée.

S'il règne, en France, une assez grande incertitude, notamment en ce qui concerne la responsabilité de l'Etat pour les dommages causés par ces fonctionnaires de l'ordre judiciaire, et si cette responsabilité paraît plutôt devoir être déniée en thèse générale, il n'en est pas autrement en Allemagne. La question y est résolue négativement par Loening (*Die Haftung des Staates*, etc., 92 et s.), affirmativement par H.-A. Zachariae (*Zeitschrift für die gesammte Staatswissenschaft*, année 1863, p. 582 et s.), par Stobbe (*Handbuch des deutschen Privatrechts*, vol. III, § 201, N°. 6), par Gerber (*Grundzüge des deutschen Staatsrechts*, 2me éd., p. 207 et s.), par Bluntschli (op. cit., no 467), par Windscheid (*Pandecten*, vol. II, § 470, note 4; cfr. les auteurs cités dans cette note), avec cette réserve que Windscheid, dans la sixième édition de son traité, expose, en modifiant son opinion premiere, que la responsabilité de l'Etat, ensuite de préjudices imputables à ses fonctionnaires, n'est pas un principe de droit commun en Allemagne, et que, d'après Holtzendorff (*Encyklopädie der Rechtswissenschaft*, p. 1113), cette responsabilité n'est admissible que dans certains cas. Mais la jurisprudence allemande, qui était plutôt favorable à la solution affirmative jusqu'en 1884, applique

aujourd'hui la théorie du tribunal de l'Empire, selon laquelle l'Etat n'est responsable qu'en vertu d'une disposition légale expresse (*Entscheidungen des Reichsgerichts in Civilsachen*, vol. XI, p. 206; cfr. *Windscheid*, op. cit., vol. II, § 470, note 4).

Cette dernière théorie est adoptée par la jurisprudence et la doctrine suisses (cfr. Blumer-Morel, *Handbuch des schweizerischen Bundesstaatsrechts*, 2me éd., Vol. III. p. 230 et s.; Hafner, *Das schweizerische Obligationenrecht*, 2me éd., ad art. 64, note 4, ainsi que les arrêts du Tribunal fédéral cités dans ces deux ouvrages), tandis, qu'en Italie, la doctrine centraire semble prévaloir (cfr. *Fuzier Herman*, op. cit., Vol. III. ad, art 1382 et 1383, n° 786). On peut ajouter que les auteurs, qui ont fait du droit international leur spécialité, reconnaissent que l'Etat est responsable des dénis de justice commis par ses autorités judiciaires, à tout le moins lorsque, duement informé ou averti, il n'aura rien entrepris, ni pour en empêcher les effets, ni pour en suspendre le cours (C. p. Holtzendorff, *Handbuch des Völkerrechts*, Vol. II. p. 74; Fiore, *Droit international codifié*, nos 339 et 340; voir aussi, *Calvo*, op. cit., Vol. I. n° 348 *in fine;* Pradier Fodéré, *Traité de droit international public*, Vol. I. nos 402 et s.; *Bluntschli*, op. cit., n° 340).

En droit vénézuélien, la question est résolue par la loi; elle l'est également, entre les parties en cause, par la Convention de 1885.

Le décret du 14 Février 1873, sur les indemnités à allouer aux étrangers, n'a pas été abrogé par l'acte international précité, en ce qui touche les conditions générales de la responsabilité de l'Etat pour des dommages occasionnés par ses fonctionnaires; il dispose, en son art. 1er: "Tous les individus, soit nationaux ou étrangers, qui intenteront contre la *Nation* des actions en dommages et intérêts ou expropriations, provenant d' *actes d'employés de la Nation ou des Etats* . . . devront s'en tenir aux formalités établies par la présente loi"—formalités qui, entre la France et le Vénézuéla, sont réglées aujourd'hui, en ce qui concerne notamment les préjudices dérivant de dénis de justice, par la Convention de 1885. L'art. 7 prévoit que "la Nation aura le droit de se faire rembourser par l'employé responsable, ou par l'Etat duquel relèverait le dit employé au moment de la faute, la somme que le Trésor national débourserait par suite de l'arrêt condamnatoire." Il ressort de ces textes que le Vénézuéla reconnait expressément, en principe, sa responsabilité, pour des dommages imputables, soit à des fonctionnaires nationaux, soit à des fonctionnaires de l'un ou l'autre des Etats de la Fédération; cette responsabilité est directe, elle donne action contre l'Etat devant la Haute Cour fédérale. Quant aux fonctionnaires (*empleados*), la loi entend par là non point seulement les agents du pouvoir exécutif ou les préposés dans le sens de l'art. 1384 C. civ. f., mais toutes les autorités qui, investies d'une part de la puissance publique, représentent l'Etat et le personnifient. L'art. 9 du décret de 1873 le montre clairement: "Dans aucun cas, dit-il, on ne pourra prétendre que la Nation ou les Etats indemnisent à raison des dommages et intérêts ou expropriations qui n'auraient pas été causés par des *autorités léyitimes agissant en vertu de leur caractère public.*" Cette interprétation est confirmée, en outre, par le Code pénal du 27 Avril 1873, qui, après avoir traité, en ses art. 258 et 259, des infractions dont les *juges* peuvent se rendre coupables, ajoute, en son article 260: "Les *employés publics d'une autre administration quelconque*, etc."

En matière de responsabilité de l'Etat, il n'y a donc pas lieu d'établir de

distinction, en droit vénézuélien, entre les fonctionnaires de l'ordre judiciaire et ceux de l'ordre administratif, puisque la loi les assimile expressément les uns aux autres, et, qu'au même degré, bien que dans des sphères d'activité diverses, ils agissent au nom de l'Etat. Et, à un point de vue général, on ne voit pas pourquoi l'Etat répondrait, dans une mesure différente, des préjudices causés par ses fonctionnaires, selon que les auteurs du dommage seraient employés dans l'administration proprement dite ou dans la justice (cfr. *Stobbe*, op. cit., vol III, § 201, ad note 53; *H.-A. Zachariae*, op. cit., p. 637; *Windscheid*, op. cit., vol. I. § 59 *in fine; Blumer-Morel*, op. cit., vol. III, p. 230 et suiv.).

Un décret vénézuélien de même data que le précédent, sur les droits et les devoirs des étrangers, tout en disposant, en son art. 6, que "les étrangers n'ont le droit de demander des indemnités au Gouvernement" que, "dans les mêmes cas que les vénézuéliens"—ceci est toutefois modifié envers les Français par la Convention de 1885—proclaime aussi, en principe, la responsabilité de l'Etat défendeur pour les actes de ses fonctionnaires. Il la reconnait même expressément, à raison des faits illicites des autorités judiciaires, en réservant, dans son art. 5, la voie diplomatique pour les cas de "*déni de justice ou injustice notoire;*" et la condition de l'épuisement préalable de toutes les voies légales de recours a été supprimée par la Convention de 1885 à l'égard des Français.

Cette responsabilité directe de l'Etat, édictée par la législation vénézuélienne, n'est pas contraire au droit des gens; elle est, de plus, affirmée dans la Convention du 26 Novembre 1885, qui permet l'intervention diplomatique et consacre implicitement la responsabilité de l'Etat pour toute la série des irrégularités *judiciaires* énumérés dans l'art. 5 de ce document.

L'Etat, d'autre part, ne saurait décliner sa responsabilité par la motif que les fautes de ses agents ou fonctionnaires ne présenteraient pas un certain caractère de gravité (voir, d'ailleurs, sub. V ci-après). L'art. 1 du décret du 14 Février 1873, sur les indemnités à allouer aux étrangers, est couçu en terms si généraux, que l'Etat y apparait responsable exactement comme ses employés; et rien n'est plus rationnel, puisque l'acte dommageable est alors censé provenir de l'Etat lui-même (cfr. *H.-A. Zachariae*, op. cit., p. 632; *Stobbe*, op. cit., vol. III, § 201, note 53). Le déni de justice, sous quelque forme qu'il se produise, constitue un cas de responsabilité du fonctionnaire, partant, de l'Etat. Dès lors, Fabiani, victime de dénégations de justice duement prouvées, pouvait actionner le Gouvernement défendeur, sans observer d'ailleurs l'art. 5 du décret du 14 Février 1873 concernant les devoirs et les droits des étrangers, qui pose comme condition de l'intervention diplomatique, l'épuisement prealable "des voies légales auprès des autorités compétences" (cfr. Convention de 1885, art. 5); et la mesure de son action contre l'Etat est la même que contre les fonctionnaires fautifs.

V. Les dénégations de justice qu'a éprouvées Fabiani sont pour le moins des délits civils ou des quasi-délits. En droit moderne, l'auteur d'une faute aquilienne est, en principe, tenu de reparer *tout* le préjudice qui peut raisonnablement en être envisagé comme la conséquence directe ou indirecte (*damnum emergens et lucrum cessans*), certaines législations, comme celles de la France et de l'Allemagne, ne faisant pas dépendre la quotité des dommages et intérêts de la gravité de la faute, d'autres, comme le Code civil autrichien et le Code fédéral des obligations, n accordant la

réparation intégrale qu'en cas de dol ou de faute lourde. Au demeurant, les dommages et intérêts ne doivent pas être la source d'un profit pour celui qui les obtient (cfr. *Fuzier-Herman*, op. cit., vol. III, ad. art. 1382 et 1383, nos 1065 et suiv.; *Aubry* et *Rau*, vol. IV, § *445 et 446; Dololombe*, vol. XXXI, nos 685 et suiv.; *Laurent*, vol. XX, no 529; *Zachariae, Handbuch des französischen Civilrechts*, 7me édit., § *443 et 445; Windscheid*, op. cit., 6me ed., vol. II, § 451, no 1, 455, No. 5, 258, notes 10 et suiv.; *Stobbe*, op. cit., vol. III, § 200, no 6; Holtzendorff *Rechtslexicon*, article "Schadensersatz;" Holtzendorff, *Handbuch des Völkerrechts*, vol. II, p. 74, 75; *Motive* du projet du Code civil allemand, vol. II, p. 724 et suiv.; Schneider et Fick, *Das schweizerische Obligationenrecht*, 3me ed., notes ad. art. 50 et 51 C. féd. des obl.; *Hafner*, op. cit,, 2me ed., notes ad. art. 50 et 51 C. féd. des obl.; Rossel, *Manuel du droit fédéral des obligations*, p. 88 et suiv.)

En ce qui regarde spécialement les fonctionaires de l'ordre judiciaire, leur responsabilité embrasse, en droit commun allemand, tout le dommage résultant de leur dol ou d'une faute lourde de leur part; le point de savoir si cette responsabilité existe également dans les cas de faute légère est controversé, mais la solution affirmative prévaut (cfr. *Windscheid*, op. cit., vol. II, 470; Dernburg, *Pandekten*, 3me ed., vol. II, § 135; *Wetzell*, op. cit., § 36, note 14). La responsabilité du pouvior judiciare est aussi admise en France (C. proc. civ. fr., art. 505; cfr. *Garsonnet*, op. cit., vol. I, § 54; *Laurent*, op. cit., vol. XX, no 447), mais, comme il a été expliqué plus haut, elle n'est pas entraînée par une faute légère.

Au Vénézuéla, ce sont les art. 341, 255 à 259, 282, 288, 297 et 339 du Code pénal du 27 avril 1873 qui réglent, d'une manière spèciale, la matière de la responsabilité civile d'une autorité judiciaire. Les juges peuvent être actionnés en dommages et intérêts, non seulement ensuite de leur dol ou de leurs fautes lourdes, mais encore pour des fautes légères, et le texte de l'art. 341 semble indiquer que la réparation doit être complète dans tous les cas. Il n'est pas besoin, au reste, d'appuyer sur cette dernière question, attendu que les dénégations de justice dont se plaint Fabiani procèdent, à tout le moins, de fautes lourdes et que, dans ces circonstances, le préjudice à réparer s'entend, et du *damnum emergens*, et du *lucrum cessans;* il comporte, en outre, le tort moral comme le dommage matériel (*Laurent*, vol. XX, nos 393, 395 et suiv.; *Aubry* et *Rau*, vol. IV, § 445; *Huc*, op. cit., VIII, no 413; *Demolombe*, vol. XXXI, no 672; Code féd. des oblig., art. 55 et les ouvrages cités de *Schneider et Fick*, *Hafner* et *Rossel;* C. civ. autr. art. 1329, 1330). Relativement au dommage indirect cependant et à la nécessité d'établir un rapport de cause à effet entre le fait illicite et le dommage prétendu, le demandeur prouvera que, soit en consultant le cours ordinaire des choses, soit en s'attachant aux affaires de la partie lésée ou aux dispositions prises par elle, il est probable—non pas seulement possible—que celle-ci aurait réalisé tel ou tel profit si le fait illicite ne s'était pas produit, la preuve étant d'ailleurs soumise à des conditions moins strictes en cas de faute lourde ou de dol et le juge conservant une entière liberté d'appréciation.

Si l'on doit décider que le gouvernement défendeur est responsable des conséquences des dénégations de justice imputables aux autorités judiciares vénézuéliennes envers Fabiani, il reste à déterminer l'étendue de ces conséquences en application des principes exposés plus haut.

Le dommage matériel direct subi par Fabiani comprend les valeurs non

recouvrées et les biens perdus dont il serait rentré en possession, si la sentence arbitrale du 15 décembre 1880 avait pu être exécutée contre les Roncayolo; il comprend également, en principe, les frais de la procédure d'exécution (voir sub. VI., litt. *a*, chiffree 3). Fabiani n'eût-il pas été victime de dénis de justice, et l'exécution de la dite sentence n'eût-elle pas été entravée, puis, rendue illusoire, il aurait pu obtenir paiement de toutes les condamnations prononcées contre ses débiteurs. Effectivement, B. et A. Roncayolo étaient solvables jusqu'à concurrence au moins des restitutions diverses ordonnées par le jugement du 15 décembre 1880. Ce fait découle déjà de ce que le Gouvernment Vénézuélien n'a jamais allégué même que les réclamations de Fabiani fussent irrecouvrables contre les Roncayolo, et qu'il s'est borné à contester l'existence des dénégations de justice, ainsi que la responsabilité de l'Etat. En outre, B. Roncayolo, de la vue de la partie défenderesse, a été agrée par les pouvoirs publics du Vénézuéla, comme concessionnaire d'importantes entreprises, et il était fermier de la douane de la Ceïba. André Roncayolo a pu, lui, pendant plus de trois ans, tant en en son nom personnel que comme fondé de procuration de son père, faire les frais de nombreuses et coûteuses oppositions à l'exécution de la sentence arbitrale, choisir ses avocats parmi les juriconsultes notoirement les plus renommés du pays, sans compter qu'il s'était enrichi d'une somme de plus d'un demi-million de francs au détriment de Fabiani. Et c'est vraisemblablement pour mettre à l'abri des poursuites de leur créancier, les droits et intérêts considérables qu'ils avaient au Vénézuéla, que les adversaires de Fabiani ont empêché avec tant d'acharnement l'exécution de la sentence du 15 décembre 1880. La solvabilité de B. et A. Roncayolo, partant, la recouvrabilité des valeurs au remboursement desquelles ils avaient été condamnés, ne sauraient être sérieusement mises en doute, d'autant plus que, comme on vient de le dire, le Vénézuéla ne les a point déniées.

En dehors du dommage matériel direct, Fabiani a éprouvé un tort matériel et surtout moral très grave, en ce que les dénégations de justice ont porté à tous égards une profonde atteinte à sa situation personnelle et ont même été la cause de la faillite prononcée contre lui au Vénézuéla (voir sub. VI, litt. *a*, chiffre 6 ci-après).

Le dommage indirect enfin a sa source dans le fait que les sommes payables par les Roncayolo en vertu de la sentence arbitrale, ont été soustraites au créancier pendant un grand nombre d'années et qu'il n'a pu ni les employer dans son commerce, ni les faire fructifier d'une manière quelconque; il ne s'agit pas ici de bénéfices ou de pertes purement hypothétiques, dans lesquels certains publicistes (*Calvo*, op. cit., IV, 477) se refusent à voir "la matière d'une action pécuniaire de gouvernement à gouvernement," mais d'un manque à gagner dont les éléments reposent sur des faits concluants, et il serait souverainement contraire à l'équité et à la justice de n'en point tenir compte dans le présent procès (voir sub. VI, litt. *b*). Et maintenant, deux éventualités pouvaient se présenter; ou bien, les débiteurs de Fabiani s'acquittaient envers lui, ou bien, soit à l'amiable, soit par voie d'exécution, il se substituait à tous les droits de concessions, de douanes et autres qu'ils possédaient au Vénézuéla. Entre ces deux hypothèses, plausibles l'une et l'autre, il faut nécessairement choisir celle qui est la moins défavorable à l'Etat défendeur et qui est aussi la plus

admissible d'après le cours ordinaire des choses, c'est-à-dire l'hypothèse du paiement. Ceci d'autant plus qu'il n'a été ni offert, ni administré aucune preuve tendant à établir que cette hypothèse de la solution la plus normale du différend Fabiani-Roncayolo ne se serait point réalisée; il résulte même de l'exposé du gouvernement demandeur que les débiteurs de Fabiani avaient un intérêt majeur, s'ils étaient contraints d'exécuter la sentence arbitrale, à se libérer purement et simplement entre ses mains, plutôt qu'à se laisser enlever des droits d une valeur bien supérieure à celle des condamnations prononcées—sans parler même des obstacles auxquels se serait heurté sans doute le transfert de tout ou partie de ces droits à Fabiani, et sans apprécier l'efficacité des sûretés réelles obtenues au cours de la procédure d'exécution.

La question du mode de paiement de l'indemnité a été discutée dans la demande, mais elle n'est point litigieuse; le compromis l'a réglée d'une manière obligatoire pur les parties et pour l'Arbitre.

VI. La liquidation, d'après les principes ci-dessus, de l'état de dommages et intérêts présenté par le Gouvernement demandeur fournit les résultats suivants:

a. Dommage direct et tort moral.

(1) La sentence arbitrale fixait à la somme de 538,359 fr. .07, valeur au 31 janvier 1878, le débit de André Roncayolo envers Fabiani. Ce poste est réduit, en capital, d'après la demande à ..... Francs. 429,668.10

Il y a lieu de tenir comte d'un versement de 5,490.55

Reste 424,177.55

(2) Outer cette somme, due par A. Roncayolo, la sentence arbitrale confère à Fabiani le droit de réclamer "tous les produits, sans aucune exception et sans aucune réserve, donnés par l'entreprise du remorquage depuis le 30 novembre 1877, y compris les bénéfices du pilotage," dès la même époque, en tant que ces profits auraient été encaissés par B. ou A. Roncayolo; les autres condamnations dérivant de la sentence du 15 décembre 1880, ont été exécutées, au moins dans une certaine mesure, puisque Fabiani a repris, dès le mois de juillet 1882, soit avant le début des dénégations de justice, le service du pilotage et du remorquage, et que des preuves positives concernant les effets de l'inexécution de ces autres condamnations font défaut dans la procédure.

Du chef du dispositif précité de la sentence arbitrale, la demande porte au compte de "liquidation des sentences," en capital:

	Francs.
Recettes du pilotage du 1er décembre 1877 au 30 décembre 1878..	16,000.00
Recettes du pilotage du 1er décembre 1878 au 30 décembre 1879..	16,000.00
Recettes du pilotage du 1er décembre 1879 au 30 décembre 1880..	16,000.00
Recettes du pilotage du 1er décembre 1880 au 30 décembre 1881..	12,500.00
Recettes du pilotage du 1er décembre 1881 au 15 juillet 1882.....	7,812.45
Total	68,312.45

Le Gouvernement défendeur n'a ni contesté le bien fondé de cette dette, provenant des encaissements faits sans droit par la partie adverse de Fabiani, ni critiqué ces chiffres qui ne paraissent pas exagérés.

Il en est de même pour les restitutions qui se rapportent au remorquage; elles sont ainsi formulées dans la demande, en capital:

	Francs.
Produit net de l'année 1880	100,000.00
Produit net de l'année 1881	100,000.00
Produit du 1er janvier au 15 juillet 1882	54,165.51
Total	254,166.51

Le produit net évalué annuellement à 100,000 francs n'est qu'approximatiff; mais ce chiffre, qui n'a pas été contesté dans la défense, peut être admis au vu des documents produits. Quant aux "abus de confiance" et "détournements" des Roncayolo, qui ne visent pas directement le pilotage ou le remorquage, ils ne sont pas compris dans la sentence arbitrale, ni, par conséquent, dans le compromis de 1891.

(3) Il y a lieu d'ajouter au compte de "liquidation des sentences" les frais importants occasionnés par la procédure d'exécution depuis le 15 décembre 1880, frais que le Gouvernement demandeur fait figurer sous diverses rubriques de son état de dommages et intérêts; les autres frais judiciaires réclamés ne peuvent rentrer dans l'indemnité à fixer par l'Arbitre Ce poste embrasse les frais d'enregistrement de la sentence arbitrale, les frais de justice et de partie tant de la procédure devant les tribunaux français que devant les tribunaux vénézuéliens, soit que la party adverse de Fabiani eût l'obligation de les rembourser, soit qu'ils aient été causés inutilement à ce dernier.

Une somme, intérêts compris, de ..... fr.. 200,000

ne semble pas excessive, si l'on tient compte, entre autres, des nombreux et coûteux déplacements que la sauvegarde de ses droits a imposés à Fabiani, et même si l'on porte en déduction les frais qui peuvent être envisagés comme ayant été faits sans motifs légitimes.

Toutes les autres réclamations de l'état consacré à "la liquidation des sentences" sont étrangères au litige actuel; c'est le cas des "abus de confiance" et "détournements" dont il a été parlé plus haut, ainsi que des "annuités dotales" en vertu du contrat de mariage du 20 avril 1867, de la perte éprouvée sur la vente des marchandises d'après la transaction du 31 janvier 1878, etc. Ces sommes n'étant pas comprises dans la sentence arbitrale n'ont pu provoquer, de la part des tribunaux vénézuéliens, des dénégations de justice dont le Gouvernement défendeur serait responsable aux termes du compromis de 1891.

La question des intérêts est réservée (voir sub. litt. *b* ci-après).

(4) Parmi les réclamations figurant dans l'état B. dommages et intérêts, les seules qui puissent être prises en considération, dans l'espèce, sont celles mentionnées sous chiffres 11, 12 et 19 de l'exposé des faits qui précède; or elles sont entrées en ligne de compte, déjà lors de la fixation (voir sub. 3) des frais d'exécution de la sentence arbitrale. Les autres indemnités n'ont pas leur source dans ladite sentence, ni, par conséquent, dans son défaut d'exécution ensuite de dénégations de justice imputables aux tribunaux du Vénézuéla; il est superflu, dans ces conditions, de s'occuper des déductions consenties dans l'état B., attendu qu'elles ont trait à des postes éliminés par l'Arbitre.

(5) L'état C. se réfère au service du remorquage, et les dommages et intérêts qu'il comporte ont leur origine dans le retrait de ce service en

1884 Cette question a été tranchée à propos de celle des "faits du prince;" sans discuter même le point de savoir si le Gouvernement défendeur n'était pas en droit de dénoncer le contrat du 7 décembre 1874, il est évident que les gains dont Fabiani prétend avoir été frustré par cet acte, ne lui ont pas été enlevés à raison de dénégations de justice qui, seules, peuvent engager la responsabilité du Vénézuéla dans l'instance actuelle. Il s'agit ici précisément d'un de ces "faits du prince," sur la légitimité et les effets duquel l'Arbitre n'a pas à se prononcer; il ne lui était permis de l'apprécier que comme un indice des dispositions de l'autorite vénézuélienne envers Fabiani (voir sub. III. ci-devant).

(6) Un tort considérable, matériel et surtout moral (état E.), a été causé à Fabiani par sa déclaration de failite au Vénézuéla, la fermeture de ses établissements commerciaux à Maracaïbo, les embarras financiers dans lesquels il a été fatalement plongé et l'abandon forcé de ses entreprises. Ce dommage peut être envisagé comme la conséquence immédiate des dénégations de justice, puisque aussi bien Fabiani a été mis en faillite à Maracaïbo pour défaut de paiement de sommes inférieures de beaucoup à celles que l'exécution de la sentence arbitrale lui aurait fait recouvrer. Le Gouvernement défendeur ne conteste pas que Fabiani possédait des maisons prospères au Vénézuéla et à Marseille, du moins avant les démêlés judiciaires dont est né le présent litige; et les motifs de la sentence arbitrale, ainsi que d'autres éléments de la cause, montrent pue le ressortissant français, dont l'Etat demandeur a pris les intérêts en mains, était un négociant sérieux et honnête, auquel le recouvrement de ce que les Roncayolo lui devaient aurait permis d'escompter largement l'avenir. Sa faillite, déterminée par les dénégations de justice souvent rappelés, l'a profondément atteint, tant dans sa situation économique que dans sa personnalité tout entière, si bien que l'allocation d'une indemnité proportionnée au dommage subi s'impose de ce chef. Au reste, Fabiani, grâce à ses connaissances, à son activité, à ses moyens d'action, ne pouvait manquer, dans des conditions normales, d'accroitre encore la considération et le crédit dont il jouissait, de donner à ses entreprises un plus grand essor, et, très probablement, de faire, en sus du gain perdu et dont il sera parlé ci-après, d'autres bénéfices par l'exploitation d'autres sources de revenus; par la faute des autorités judiciares du Vénézuéla, il a perdu tout ensemble ses biens et son honneur, et il a traversé de très penibles épreuves. Ce sont là des circonstances exceptionnelles, dont il serait injuste de méconnaître la gravité et d'écarter les conséquences dommageables, en invoquant le caractère international de la contestation actuelle.

Des renseignements précis font nécessairement défaut, sur certains points, pour établir avec une exactitude absolue le montant de la réparation qui est légitemement due à Fabiani, dans les limites de l'état E de la demande. L'Arbitre, appréciant librement les faits de la cause, évalue à fr. 1,800,000 le chiffre des dommages et intérêts représentant le préjudice éprouvé, indépendament de celui reconnu sous litt. *b*.

b. Dommage indirect.

(1) Les dommages et intérêts réclamés dans l'état D correspondent aux sacrifices faits pour le maintien de l'industrie de Fabiani et au gain dont il a été frustré. La non-exécution de la sentence arbitrale, non-exécution provoquée par des denis de justice, a causé à Fabiani un préjudice indirect fixé dans la demande à la some de 4,200,000 francs; mais il importe de ne

pas confondre ce dommage avec celui dont il vient d'être aplér, sous litt. *a*, chiffre 6.

Aussi bien, il y a lieu d'admettre ici, à titre de compensation, uniquement l'équivalent du dommage qui peut être considéré comme une suite de l'impossibilité dans laquelle s'est trouvé Fabiani, à raison de l'inexécution du jugement du 15 décembre 1880, de faire fructifier les capitaux importants qui lui étaient dus et qu'il aurait recouvrés. Le moyen le plus sûr d'arriver à un évaluation certaine, eût été de consulter les livres de la maison Fabiani et de verifier jusqu'à quel point ses bénéfices avient successivement diminué par l'effet du refus déguisé, mais persistant, des autorités vénézuéliennes, de procéder ou de laisser procéder à l'exécution de la sentence arbitrale. Ces livres n'ont pas été produits, et, quoique le défaut de production de ces documents paraisse excusable, les indications fournies dans l'état D ne constituent pas des justifications suffisantes de toute l'indemnité réclamée. L'existence d'un dommage indirect n'en est pas moins indubitable. Ce préjudice consiste essentiellement, non pas dans les sacrifices, prouvés d'une manière incomplète, que Fabiani aurait faits pour le maintien de son industrie et dans des profits plus ou moins probables, mais dans la circonstance que les sommes dues en vertu de la sentence arbitrale sont demeurées inproductives pendant nombre d'années, de par les dénégations de justice commises à son encontre au Vénézuéla.

Dans la demande, on a ajouté constamment au capital des réclamations formulées, les intérêts composés qui rentrent plutôt dans les indemnités à allouer pour dommage indirect. Il convient, à ce propos, de faire observer que les arguments invoqués par le Gouvernement défendeur (*Défense*, p. 97 et suiv.) contre la prétention de la partie adverse d'exiger des intérêts ne sont nullement fondés; la renonciation que l'on oppose au Gouvernement de la République française ne concerne pas la présente contestation et ne saurait etre étendue au-delà de ses termes; de plus, les considérations juridiques développées à l'appui de la thèse de l'Etat vénézuélien ne sont pas concluantes, pour les motifs précédemment exposés et qui montrent que la mesure de la responsabilité de l'Etat est adéquate à celle de la responsabilité des autorités fautives elles-mêmes.

S'il en est ainsi, on doit reconnaître que Fabiani aurait pu faire fructifier, dans ses entreprises, les intérêts simples du montant des condamnations de la sentence arbitrale, dans l'éventualité où il n'aurait pas été victime de dénégations de justice. La capitalisation d'intérêts est autorisée en matière de comptes-courants et d'opérations analogues, parce que le législateur présume que, dans le commerce, l'argent ne reste pas improductif (cfr. art. 335, C. féd. des oblig. et *Laurent*, op. cit., Vol. XVI, n° 348). Mais Fabiani n'a droit à des intérêts composés que pour les réclamations admises sous litt. *a*, chiffres 1 et 2, qui s'élèvent à la somme totale de 746,656 fr. 51, car il n'en saurait être question, ni à l'égard des 200,000 francs alloués pour frais judiciaires, ni à l'égard de l'indemnité ferme de 1,800,000 francs accordée sous litt. *a*, chiffre 6. Les interêts composés de la somme de 746,656 fr. 55 ne représentent toutefois pas, dans l'opinion de l'Arbitre, le gain intégral dont Fabiani a été frustré par le non-recouvrement des sommes comprises dans la sentence arbitrale. Si Fabiani avait pu tirer parti de ces sommes et les employer dans son négoce, il est vraisemblable qu'il aurait fait des bénéfices supérieurs aux intérêts composés de

ce capital pendant le laps de temps durant lequel il serait autorisé à les porter en compte. Ainsi qu'il résulte de circonstances déjà relatées, il avait des maisons de commerce prospères, son crédit était bien établi, ses ressources étaient considérables, toutes ses entreprises paraissaient assurées d'un rapport exceptionnellement élevé; les dénégations de justice dont il a été la victime lui ont causé les pertes très graves qui viennent d'être rappelées. Ici, de nouveau, l'Arbitre doit apprécier librement, suivant la conviction qu'il a pu se former, et il juge équitable d'évaluer à Fr. 1,500.000 le dommage indirect subi par Fabiani, en tenant compte de la réalisation de l'hypothèque de 120,000 francs.

(2) Sur les préjudices commerciaux de Fabiana viendrait se greffer, suivant la demande, le dommage éprouvé dans l'affaire du chemin de fer de la Ceiba. Comme le montrent les considérations développées sous chiffre V *in fine*, il n'est point établi que B. et A. Roncayolo ne se seraient pas libérés, afin précisément d'arrêter toute procédure dirigée contre des droits et actions d'une grande valeur It n'est pas prouvé davantage que le transfert de ces droits et actions, à défaut même de paiement, se serait nécessairment, et pour leur totalité, effectué au profit de Fabiani. L'hypothèse sur laquelle repose cette réclamation de 24,000,000 de francs ayant été écartée, il convient de faire complétement abstraction de l'indemnité qui s'y rapporte.

c. En ce qui concerne *les frais de la présente instance*, l'Arbitre, constatant que les conclusions de la demande sont adjugées en principe, mais que l'exagération des réclamations formulées a entraîné des dépens inutiles, met les frais du Gouvernement demandeur, liquidés à la somme de Fr. 100,000—à la charge du Gouvernement défendeur et compense entre les parties les dépens de l'arbitrage.

VII. De ce qui précède, il résulte que le chiffre intégral de l'indemnité allouée s'établit comme suit:

	Francs.
1. Débit A. Roncayolo	424, 177. 55
2. Recettes du pilotage	68, 312. 45
3. Recettes du remorquage	254, 166. 51
4. Frais d'exécution	200, 000. 00
5. Dommage causé par la faillite	1, 800, 000. 00
6. Dommage indirect	1, 500, 000. 00
7. Frais du demandeur	100, 000. 00
En tout	4, 346, 656. 51

Par ces motifs.

PRONONCE:

Le Gouvernement des Etats-Unis du Vénézuéla paiera à Fabiani, à titre d'indemnité, dans les termes du compromis du 24 Février 1891, tous frais compris, la somme totale de *quatre millions trois cent quarante-six mille cinquante-six francs cinquante et un centimes* (Fr. 4, 346, 656. 51), avec intérêts à cinq pour cent l'an dès la date de la présente sentence.

Les dépens de l'arbitrage sont compensés entre les parties.

Ainsi fait à Berne, le trente Décembre 1896.

A. LACHENAL,
Président de la Confédération suisse.

CLAIM OF PIERI DOMINIQUE & CO.—No. 5.[a]

HEAD NOTES.

Prevention by the chief of the custom-house at Carúpano of the beneficial use of the tramway enterprise by the claimant was without right and the injuries resulting are properly chargeable to the respondent Government.

Suspension of the tramway traffic by order of the municipal council of Carúpano is equally without right, and the injuries resulting are properly chargeable to the respondent Government through this municipal division thereof.

Suspension of the tramway traffic by order of the municipal council of Carúpano that the private aqueduct company might use its streets to lay the pipe lines of the company whereby serious injury resulted to the claimant must be met with a proper recompense by the city and is here properly chargeable to the claimant Government through and because of said municipality.

The defects and faults of the street following and resulting from the laying of these pipe lines by the aqueduct company, after their condition was known to the city and they were accepted in that condition, and which defects and faults resulted in serious injury to the claimant, the damages resulting are properly chargeable to the respondent Government through this municipality, having special reference to the fact that the claimant had resumed use of the streets on the formal statement of the municipality that they were in proper condition therefor.

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[a] EXTRACT FROM THE MINUTES OF THE SITTING OF MAY 12, 1903.

The arbitrators proceeded then to the examination of the claim presented by Messrs. Pieri and Nasica, of which the different parties are the object of the following decisions:

The claim of Mr. Nasica, amounting to 1,500,000 bolivars, is rejected by the commission; the claim of the Messrs. Pieri & Co., amounting on the one hand to 3,730,000 bolivars and on the other for acts posterior to May 23, 1899, to 280,400 bolivars, is accepted in its *ensemble* for 600,000 bolivars by M. de Peretti.

The French arbitrator considers that the continual hindrances brought by the municipal authorities of Carúpano to the exploitation of the line of tramways have rendered the latter so difficult that the rescission of the contract ought to be pronounced. In exchange for the indemnity which he demands for the concessionary the city of Carúpano will remain in possession of the line, of the depot, and of the cars which constitute the actual material existing.

M. de Peretti adds that he has been able during his trip to Carúpano to prove that the last war had completely stopped the exploitation; the line, of which the rails have been torn up in several places, is cut in two by four barricades; the depot, which has served as a military hospital, is partly demolished and the cars have almost all been put out of service.

Doctor Paúl is in favor of according only 20,000 bolivars to Mr. Pieri for the destruction of the printing office and 150,000 bolivars for the damage caused to the company of tramways by the last war and for the abandonment which M. Pieri had to make to the municipality of Carúpano of the concession of the tramway, of the depot, and of the material which makes up the exploitation of the said line. He refuses to acknowledge for the interested party the right to an indemnity from the fact of his dispute with the municipal authorities.

Doctor Paúl presents the reading of the memoir containing the arguments upon which he bases his opinion. After the discussion, the arbitrators each maintaining his opinion, it is agreed that this claim will be submitted to the umpire.

The arrest and imprisonment of the claimant on the oral order of the civil chief without warrant, his detention for twenty-four hours in prison, and his subsequent discharge on payment of the jail fee without intervention of court or tribunal of any character is wholly unjustifiable and is a proper subject of indemnity.

The losses accruing to the claimant through the sale of his houses not being the direct and approximate result of any cause for which the respondent Government is responsible no damages can accrue.

Because the claimant Government and the respondent Government agreed in the protocol constituting this commission that payment of awards made should be in the 3 per cent diplomatic debt of Venezuela and because that such diplomatic debt has a value at present very much below par, it is urged by the claimant Government that the umpire add a sufficient amount to his award to make it as valuable to the claimant as though the award was payable in gold. This interference with the solemn compact made between the two nations is justified on the part of the claimant Government upon the ground of the inequality which exists between it and the other governments which have recently had arbitral relations with the respondent Government. The arrangement for payment in the one case permitted a long delay in payment, without interest. This arrangement requires immediate payment through its diplomatic debt with interest at a low rate. The inequity, therefore, is not very pronounced, and if it were the umpire regards himself incompetent to make the award suggested.

OPINION OF THE VENEZUELAN COMMISSIONER.

These claims amount to 5,510,400 francs, made up as follows:

	Francs.
Claim of Pieri Dominique	3,730,000
Claim of A. L. Nasica	1,500,000
Claim of Pieri Dominique & Co	280,400
Total	5,510,400

In the records of these claims there are connected two claims for indemnity against the Government of Venezuela, presented on the 6th of July, 1895, to the governor of Martinique by L. Nasica for the sum of 1,500,000 francs and by Pieri Dominique for the sum of 3,730,000 francs, for outrages committed against their persons and property by the people and authorities of Carúpano, on the 21st of June, 1895. Besides, other documents have been presented according to which Pieri Dominique & Co. claim the sum of 280,400 francs for several acts originated by the war during the years 1901 and 1902 in the city of Carúpano, and which, it is alleged, caused damage to the Tramways Enterprise, the property of Pieri Dominique.

Paragraph 3, article 2, of the proctocol of Paris, dated the 19th of February, 1902, provides—

that, if several claims for indemnities based on different facts are presented by the same claimant, *and one of them is in the case of being submitted to the proceeding established in article 2*, the other shall be added to it to be the object of one only settlement.

The two claims for indemnity presented by Pieri Dominique are based, the one on facts that took place in the years 1895 to 1896 and

the other on different facts occurred in 1901 to 1902; but, as the former is in the case of being submitted to the proceeding established in article 2 of the protocol, the latter must be the object of the simultaneous examination of this commission, that one same decision may be rendered concerning both of them.

The claim of A. L. Nasica is based on the following:

Annex No. 55:

	Francs.
1. The destruction of a printing press and the robbery of all the material and merchandise	600,000
2. The blows and wounds received	600,000
3. The physical and moral sufferings undergone on account of the persecution of which he was a victim	300,000
Total	1,500,000

That of Pieri Dominique:

	Francs.
1. The abandonment of the Tramways Enterprise, the exclusive privilege of which was to last 38 years and the average revenue of which, taking as a basis the progressive increase, may be valued at 80,000 francs a year	3,000,000
Annex No. 55:	
2. Damage done on the day of the outrage, destruction of the printing press, of a large part of the tramway material, robbery of different objects, and demolition of a part of the immovable	70,000
3. Forcible and difficult realization, in view of the absolute want of security, of twelve houses, the yearly rent of which is 9,000 francs	300,000
4. The physical and moral sufferings, traveling expense, and residence out of Venezuela, far from his family	360,000
Total	3,730,000

The evidence presented with regard to the facts to which these two claims are confined having been examined, it is found: That Pieri Dominique bought this enterprise at a public auction on the 8th of May, 1891, in the town of Carúpano, from the liquidator of the joint stock company, "Tranvias de Carúpano," for the sum of 38,500 bolivars. Pieri Dominique continued the exploitation of the Carúpano Tramway without any obstacle until early in March, 1895, when he desired to build a branch line to have wagons pass before the custom-house, and carrying out this purpose, he laid the rails; that this being done, the collector of customs, who was absent from the place, notified him on his return from Caracas, of the order to remove the rails, because they obstructed the traffic indispensable for the operations of the custom-house; that at the same time the municipal council ordered Pieri to stop the works he was doing on the tramway line until after the commission of surveyors appointed to that purpose should report as to whether said works did or not interfere with the free traffic; that Pieri obeyed the order of the council and even requested it that the commission appointed should be at once directed to examine the points of the line that he would indicate and that required to be repaired in

order to render traffic comfortable and secure; that the commission rendered its report and expressed the opinion—

that the portion of the line lying between the wharf and the custom-house must be restored to its primitive state—that is to say, to that in which it was before the contract with Messrs. D. Pieri & Co. had been entered into; that the municipal council approved said report and ordered the same to be transmitted for their compliance therewith to D. Pieri & Co., said company being free to establish the branch line in the lower part of the mound, which it was its duty to previously bring to the knowledge of the council, as well as any other reformation it might in the future pretend to make on the general line.

It also appeared to be proved that Pieri Dominique, who considered himself prejudiced in the rights granted him by his concession, *did not proceed to adduce those rights in a contentious action before the competent tribunals of the State*, in conformity with article 8 of his contract, but on the 10th of June, 1895, he issued a flying sheet, entitled: "To the public and to justice," in which he qualified in insolent terms the action of the collector of customs and of the municipal council; that a few days after, Pieri Dominique, being associated to A. L. Nasica, placed him in charge of the direction of a printing office he had in the same house of the tramway station, and there the first issue was edited of a newspaper entitled "El Eco del Oriente," which contained an editorial article written by Nasica, offensive to the local constituted authorities and especially depressive for the people of Carúpano; that on the 21st of June, two days after the appearance of said newspaper, the place where the printing press was was invaded by a group of people, who had a quarrel with Nasica, the result of which was that the types of the printing press were thrown to the street, as well as its materials; that Nasica fled with some confusion; that Pieri hid in the house of a friend, and that both of them cautiously embarked two or three days after for the island of Trinidad.

The alarm consequential to these occurrences, which assumed an especially serious character for the numerous French colony, that, as is well known, forms the principal portion of the merchants of Carúpano, gave occasion to the fact that, the very day said occurrences took place, said colony published a manifestation signed by its principal members (Annex No. 57), in which the following protest was made:

And as those assertions (those copied from the editorial article of the first issue of *El Eco del Oriente*) are absolutely untrue, as far as the French residing in this region of the Republic are concerned, we, as citizens of France, declare that far from being the objects of hatred and persecutions we have been treated by the authorities of the nation, of the state, and of the municipalities, with the same consideration they bestowed upon us before the lamentable interruption of the diplomatic relations between Venezuela and our beloved native land. We make this protest because we believe that man must, in all the acts of his life, profess fealty to truth and justice.

On the same date another manifestation was published, signed by the same French citizens, together with some Venezuelans (Annex No. 57) in which it is stated:

The undersigned, French and Venezuelan citizens, believe it to be their duty to make it to appear that we are satisfied with the actions and conduct of Gen. Froilan Caliman,

the collector of customs, in the maritime custom office at this port, who, without departing from the route of the law, makes efforts to contrive the means of facilitating our operations with said office, for which reason we recognize in this official a good servant, who tries to maintain the national Government the confidence of which he enjoys, in high repute; and we are persuaded that his presence at the post he holds constitutes a guaranty for our interests and a security for the honest merchants of the East.

The aforesaid protest and manifestation are signed by, besides other respectable members of the French colony, Messrs. Franceschi & Co., Joucla & Co., Rafalli Hermanos, Augustin Lucca & Co., A. Vicentelli O., Vicentelli & Santelli, Federico Benedetti, Andres Pietri, and Juan A. Auberon, and it is to be observed, as a very especial circumstance, that Messrs. Franceschi & Co. were at the time partners of Pietri Dominique & Co. in the enterprise of the Tramway of Carúpano.

It appears proved by the investigation made by the consular agent of France at Carúpano, by order of the vice-consul of the same nation in Caracas, and by the answers given to said consular agent by Messrs. F. Benedetti, Dr. B. Bermúdez, J. Blescini, F. Massiani, Santos Ermini, J. Vicentelli O., and Joaquín Hiques (Annex D No. 7):

First. That a mob penetrated the house where Pieri's printing press was and threw all the utensils of the printing press into the streets.

Second. That the enterprise of the Tramway suffered nothing by that event, it being untrue that a part of the tramway station was destroyed.

Third. That what happened to Pieri's printing press was due to an insulting and degrading editorial article of the paper edited at said printing office and directed against the local and national authorities and the citizens.

Fourth. That it was the people who, in a moment of indignation against those who injured it, exercised that vengeance.

Fifth. That it is untrue that the mob went to and entered the private house of Pieri Dominique.

Sixth. That no superior official of the custom-house, no member of the municipal council, no local authority was among the assailants of the printing press.

Seventh. That the police only arrived too late at the place where the event took place and that it did not know how to show the energy or the activity necessary to prevent the disorder.

Eighth. That Pieri and Nasica were hidden for two or three days in a private house and then abandoned the country, going by land via Río Caribe and Yaguaraparo.

Ninth. That there was no arrest and no investigation made by the local authorities; and

Tenth. That, in view of the condition of the printing press, that was worked by the hands and the long time it had been in use those who knew it only give it a value of 4,000 francs.

For the best appreciation of these events the Venezuelan arbitrator considers the definition given by the vice-consul of France in Caracas in an official note dated the 5th of May, 1896, addressed to his excellency Mr. Hanotaux, the minister of foreign affairs of France, of the character of the two parties interested in the claim, Messrs. Pieri and Nasica, in the following words:

Mr. Pieri has a pretty great natural intelligence, very little instruction, an iron temper, and an obstinacy equal to his temper. He possesses a most inveterate sentiment of property, and openly resists whomsoever violates his rights, and that with very little patience, for his violent temper is not guided by learning or prudence.

Mr. Nasica is little recommendable a personage, who puts his intelligence and learning to the service of all his vices. Wherever he has been he has left victims.

And further on the same note says:

As Mr. Pieri had a printing press, Nasica, who has an easy pen, advised Pieri to establish a newspaper to defend his interests and those of the colony. No member of the colony approved this idea, but Mr. Pieri, mastered by Nasica and feeling aggrieved in his interests, accepted the proposal, and *El Eco del Oriente* was established. The terms of its articles are very violent and could only be permitted to the natives.

The opinion expressed by the vice consul of France regarding Nasica is ratified in more vivid colors in the statement made by Mr. Jean Toussaint Santi, a proprietor at Ajaccio (Corsica), before the minister of foreign affairs of Venezuela on the 18th of August, 1895, a copy of which is inserted in these records. Santi states therein—

that he knew Nasica as being a man capable of all the acts of meanness that a perverse mind might perform, and that he knew, moreover, that he belongs to a family of outlaws and criminals.

It does not appear in the records that Nasica took any other step after he presented, in company with Mr. Pieri, to the governor of Martinique his claim for a part of the indemnity, amounting to 1,500,000 francs, in which he entered as pertaining to him the same printing press pertaining to Pieri and valued it at the sum of 600,000 francs. After having taken into consideration all the foregoing statements, which are proved by the records, the Venezuelan arbitrator is of opinion that the destruction of the printing press of Mr. Pieri Dominique was the deed of a popular vengeance against those appearing responsible for the injurious writings of the newspaper which was edited in said printing-press; that the enterprise of the tramway did not sustain any damage through those occurrences, and it appears from the records that the service of the enterprise was not interrupted; that the damage done to Pieri by the destruction of the printing press does not exceed 4,000 bolivars, and that for said damage only the authors of or accomplices in the aggression were responsible; that this responsibility ought to have been alleged in pleading by the owner of the printing press against those condemned as authors of or accomplices in the facts occurred on the 21st of June, 1895; that the want of

energy, of which the police gave proofs, to stop or prevent the aggression of the mob, and the omission on the part of the competent authorities to have the preparatory proceedings instituted in order to prosecute the respective criminal suit against those appearing to be guilty, render them liable to responsibility for noncompliance with their duties; that it must also be taken into consideration that the conduct of Pieri and Nasica renders them largely responsible for the provocation that gave rise to the popular mob.

Appreciating in a spirit of justice all these circumstances, the Venezuelan arbitrator is therefore of opinion that the largest indemnity to be allowed to Pieri Dominique for the destruction of his printing press and the damages which were the consequence thereof is the sum of 20,000 bolivars, and he hereby allows it for this respect.

In regard to the other facts and consequences alleged by the claimant relative to the enterprise of the tramway, to the abandonment thereof, the forcible and difficult disposal of the houses pertaining to him, and to moral sufferings proceeding from his being far from his family, they are destitute of all ground and proof and are inconsistent to serve as the basis of the claim he pretends.

Far from proving that Pieri Dominique abandoned his enterprise on account of the events of the 21st of June, 1895, the documents produced show that the tramway continued to run without interruption immediately after those events and that the exploitation of the business was continued for several years; that Pieri Dominique returned to Carúpano in March, 1896, and resumed the management of his enterprise without any menace or aggression against his person; that according to the avowal made by Pieri before this tribunal, as appears from the records of the proceedings of the sitting of the 9th instant, Pieri bought five or six years ago—that is to say, after the occurrences of the 21st of June, 1895—from the firm of Franceschi & Co., which was associated in the enterprise of the tramway, the interest of the latter in the business for the sum of 24,000 francs, which fact evidently proves that the assertion is groundless that Pieri was compelled to give up the enterprise, for the abandonment of which he claims the sum of 3,000,000 francs.

The questions arisen between the municipal council of Carúpano and the enterprise of the tramway on account of the drawing of the line, of the construction of the waterworks and the breaking of a bridge by the rains, which have been alleged to show the animosity of the authorities against the enterprise, do not absolutely prove that attitude. These questions are those that ordinarily occur between municipal corporations and the enterprises directly connected with the traffic and public works in the streets of a town. The local laws and the contracts provide the manner in which they are to be determined, the interested parties applying in due time to the competent judicial

officials. It appears from the records that Pieri Dominique abstained from following the procedure established by the laws and by his contract and accepted the facts, continuing the exploitation of the tramway under the conditions and circumstances that were the result of the report of the commission of surveyors and of the orders of the municipal council of Carúpano. As regards the construction of the waterworks, if they temporarily prejudiced the interests of the tramway company, it had an action against the joint stock company "Acueducto de Carúpano," of which Mr. Vicente Giuliani Franceschi, a member of the firm Franceschi & Co., associated in the enterprise of the tramway, was the president. (Annex 50.)

For all the reasons aforesaid the Venezuelan arbitrator considers entirely groundless the claim for indemnity entered by Pieri Dominique against the Government of Venezuela, as far as it concerns the enterprise of the tramway of Carúpano up to the 23d of May, 1899, amounting to the sum of 3,660,000 bolivars.

Posterior to that date it appears proved that from March, 1902, on account of the several attacks that the town of Carúpano has suffered on the part of revolutionary troops and of the National Government the enterprise of the tramway has sustained damages, its traffic having been completely interrupted; that at several points the rails have been forced out and the line cut by barricades; that the draft animals of the tramway were taken by the military forces commanded by Gen. Calixto Escalante; that the wagons and carts have sustained deteriorations and are unserviceable on account of the occupation of the station and depot buildings by troops of the government quartered therein. It also appears proved that Pieri Dominique is compelled to abandon, *as he did*, the exploitation of his contract by the circumstances narrated and that in virtue of that abandonment *he has offered before the legation* of France to leave the depot building, the rails, wagons, and all the materials and implements used in the exploitation to the benefit of the municipal council of Carúpano, putting an end to the concession and waiving any claim that might derive therefrom in his behalf. Appreciating in their just value *the damages sustained* by the enterprise *from the interruption of the traffic in March, 1902, and the seizure of its animals up to the last occurrences* the equitable and proved value of the materials, deposit, and of all that constituted its working capital, which, as appears from the records, cost for Pieri the sum of 62,000 bolivars, as well as of the other circumstances which represent for Pieri the gain frustrated of his enterprise, and in view of the circumstances under which the town of Carúpano had been placed, on account very especially of the continued revolutions which from four years ago have rendered that kind of enterprise almost unproductive, even in towns like Caracas, which have not been the theater of deeds of arms, the arbitrator is of opinion that the largest indemnity that

may be allowed to Pieri Dominique for all those reasons is the sum of 150,000 bolivars.

As to the claim of L. Nasica for the sum of 1,500,000 francs, Nasica having no right to the printing press destroyed, no share pertains to him in the indemnity allowed for said destruction; and as the other particulars on which he bases his claim for indemnity are entirely groundless and show by themselves the indecorous condition of this claim, it is absolutely disallowed.

In short, the Venezuelan arbitrator is of opinion that as full indemnification the sum of 170,000 bolivars should be allowed to Pieri, with the declaration of his abandoning in favor of the municipal council of Carúpano the concession of the tramway, the depot, the stock in hand, and all the material of exploitation.

CARACAS, *May 12, 1903.*

NOTE BY THE VENEZUELAN COMMISSIONER.

	Francs.
This claim, in its part concerning Pieri Dominique & Co. and Pieri Dominique, for the sums of	3,730,000
and	280,400
Total	4,010,400

was accepted by the French arbitrator for the sum of 600,000 bolivars, rejecting the claim of Nasica for 1,500,000 francs. The part relative to Pieri was, therefore, referred to the decision of the umpire.

CARACAS, *the date above written.*

OPINION OF THE FRENCH COMMISSIONER.

As is shown by the minutes of the session of the mixed commission of May 12, 1903, the Venezuelan and French arbitrators have both considered that Mr. Pieri had presented a well-founded claim and that he was entitled to an indemnity. But Doctor Paúl and myself have differed in opinion upon the amount of this indemnity. While I have reduced to 600,000 bolivars the sum of 4,010,400 bolivars claimed by the party interested, my colleague has reduced it to 170,000 bolivars. It is to be noted that the Venezuelan arbitrator, in conformity with the opinion of the French arbitrator, has pronounced, like him, the rescission of the contract which bound the contractor to the municipality of Carúpano to abandon to this latter in exchange for an indemnity "the concession of the tramway, the depot, and the material which constitutes the exploitation of the line." Doctor Paúl is then convinced that Mr. Pieri finds himself, not through his own fault, but because of a position he has been compelled to assume, unable to recommence work in his concession, and this inability, in my opinion, is not due to a state of war. It is solely based upon the malevolence of the municipality of Carúpano and the determination of the authorities of the

State and the city to deprive Mr. Pieri of a concession they wish to operate themselves. At the time of my visit to Carúpano I was able to prove *de visu* that the last war had completely arrested the exploitation; the rails had been torn up and in several places had been cut in two by four barricades. The depot, which had been used for a military hospital, was partly demolished by shells, and the cars had nearly all been put out of service, but all these damages were reparable.

Since March, 1903, Carúpano has been cleared of revolutionary bands. Since the month of July last the present Government has finally triumphed over the revolution and caused peace to reign throughout the Venezuelan territory. Dossier No. 8, prepared after May 12, 1903, proves that Mr. Pieri was not able to take up the exploitation of his enterprise because of the hostility of a part of the population, hostility which has the same causes as the malevolence of the State and municipal authorities, if indeed the latter does not explain and has not created the former.

Why, then, after having recognized implicitly the impossibility of Mr. Pieri's renewing the exploitation, does Doctor Paúl refuse "to acknowledge for the interested party the right to an indemnity, from the fact of his dispute with the municipal authorities," when the said "disputes" (démêlés) have truly caused this impossibility? Moreover, does not this refusal, following the payment of the indemnity of 170,000 bolivars for damages caused by the incident of 1895 and the civil war, show clearly that even in the mind of the Venezuelan arbitrator the 170,000 bolivars do not represent an indemnity sufficient for all the damages of every nature to which Mr. Pieri was subjected, including the loss of the concession?

In fixing at 600,000 bolivars the indemnity to be accorded to Mr. Pieri, who claimed 4,010,400 bolivars, I have desired to accord him a sum which might represent exactly the material damage which has been caused him. I have not wished to increase it by a special indemnity which would be of a penal character for the State and municipal authorities. The latter, however, would have merited it because of the stubbornness with which they have unjustly pursued and tormented a citizen stranger, the possessor of a perfectly regular contract. It seems from numerous authentic pieces of evidence contained in the dossier and from information that I have gathered on the spot that the enterprise of the tramway of Carúpano has brought in and can bring in for the future to the concessionary from 30,000 to 40,000 bolivars a year. If one does not take into account the high return of money in Venezuela, more than a million of capital should be allowed to Mr. Pieri. On the other hand, it is well to remark that according to the common opinion of the two arbitrators Mr. Pieri ought to abandon the concession to the municipality. The latter will be anxious to exploit it, and the benefits which it will receive will rep-

resent almost exactly in capital the indemnity accorded to Mr. Pieri. Venezuela would thus withdraw without disadvantage from the unfortunate position in which the actions of the local authorities of Carúpano have thrust her.

Finally, it is to be considered that according to the terms of the protocol this indemnity must be paid in bonds of the diplomatic debt and not in gold. From the fact of this concession consented to by the French Government to permit the Venezuelan Government to settle its debts with greater ease the amount of the indemnity is found to be really reduced. The real amount of these bonds is far, at this time, from reaching half their nominal value. The granting to Mr. Pieri of an indemnity of 600,000 bolivars would then permit the Venezuelan Government to free itself for 240,000 or 250,000 bolivars from a claim the settlement of which would assure to the Venezuelan administration an annual income of 30,000 to 40,000 bolivars.

MARCH 25, 1904.

ADDITIONAL OPINION OF THE VENEZUELAN COMMISSIONER.

I must call the honorable umpire's attention to the fact that when I agreed in the opinion of the French commissioner declaring the rescission of the contract binding the claimant to the municipality of Carúpano, and the abandonment to the latter, for an indemnification of the concession, such as it is, the deposit made and the materials destroyed or damaged, for which in my opinion I stated that Mr. Pieri should also be indemnified, I was not prompted by the fact, as the French commissioner avers, that I was convinced—

that Mr. Pieri finds himself, not through his own fault, but because of a position he has been compelled to assume, unable to recommence work in his concession,

and—

that inability is not due to a state of war, adds my colleague, but is solely based upon the malevolence of the municipality of Carúpano, and the determination of the authorities of the State and the city to deprive Mr. Pieri of a concession they wished to operate themselves.

In my written opinion read at the meeting of May 12, 1903, which, translated into English, I submit herewith to the honorable umpire, there is nothing whatever to show the conviction ascribed to me by my learned colleague, and I can not let such statements go unchallenged, as such motives are entirely foreign to the reasons I had to form my opinion in this case.

I have declared the rescission of the contract between Mr. Pieri and the municipality of Carúpano, because from the statements made by Mr. Pieri in his claim, his decided will to discontinue the operation of the Carúpano tramway is clearly shown, and because about the time the claim was entered (February, 1903) and at the time we—the two commissioners—rendered our decision (May 12, 1903), Carúpano was

in a state of siege because of the continuation of the revolutionary movement led by General Rolando, which ended in July, after the attack and capture of Ciudad Bolívar. These facts are universally known.

I have endeavored, in my opinion, since Mr. Pieri showed his purpose to abandon the operation of the tramway and in view of the fact that the circumstances at the time did not permit the immediate renewal of the operation of the line because of the seizure and destruction of the materials, to conciliate the private interests of the claimant and his manifest will to abandon the business, with the interests of the community, which could not be left at the mercy of a person who, during his intercourse with the local authorities, had shown himself not to be animated by a conciliatory spirit, but, on the contrary, by the earnest desire to constantly provoke disagreements and scandals.

To estimate the amount of a just indemnification, I have used the data furnished by the documents submitted on the real cost of the business, the value of the building or depot and that of the rolling stock, cars in use, and animals. I have not estimated any exaggerated, imaginary, or eventual profits, because the determination of Mr. Pieri to discontinue the operation of the tramway line plainly showed that the business does not yield profits, but losses, because of the decline of business in Venezuela by reason of continued revolutions and the considerable falling off in price of the principal export product of the country. In proof of this, there is the fact that the two tramway lines existing in Caracas, where there has been no fighting and where there is a population of 80,000 inhabitants, have not been able to pay dividends to their stockholders for the last four years, and that the stock is quoted below 50 per cent.

The decided purpose the French commissioner ascribes to the authorities of the State and the city of depriving Pieri of the grant they wish to operate themselves does not seem to have other foundation than the statement made by the French consular agent in a communication to his minister in Paris February 10, 1897, to the effect that General Rolando, then President of the State of Bermúdez, had made Mr. Pieri a proposition to buy the tramway for a sum in the neighborhood of 35,000 francs. General Rolando ceased to be the chief authority of the State of Bermúdez eight years ago, and it has not been established that the authorities which succeeded him in the State and city of Carúpano have desired either to buy or to take the business. The sum of 35,000 francs which we are told General Rolando offered during an era of peace and prosperity in the State of Bermúdez being far below the sum I have granted, plainly shows how exaggerated is the estimate made by my learned colleague, fixing in the sum of 600,000 bolivars the indemnification of Mr. Pieri.

I had not in mind, as my learned colleague implies in his brief, when I declared for the abandonment by Mr. Pieri of the tramway concession to the municipality, that the latter would hasten to operate it and that the profits derived from such operation should approximately represent the indemnity granted Mr. Pieri. Far from this, my sincere belief, which no one can suspect of being biassed, is that under the present condition of business in Venezuela, and especially in the towns of the eastern section of the country, which have suffered more than any others from the effects of the last revolution, the operation of a tramway line in a town like Carúpano is unproductive and that neither the authorities nor the municipality of that city have any interest whatever in becoming the owners of such line. I make this statement, in case the honorable umpire should in his award deem it more equitable for both parties that Mr. Pieri continue the operation of the concession of the Carúpano tramway, since he now desires it, during the years his contract has to run and to limit the indemnification which should then be granted to him to the value of the mules and material either lost or damaged by the Government forces during the military operations of the last war.

This statement, which I make as the commissioner for Venezuela, is the more indispensable, as in the latest brief submitted by the French commissioner it is not only stated, but affirmed, that according to evidence obtained after May 12, 1903—date of our respective opinions—Mr. Pieri has been prevented from renewing the operation of the tramway because of the hostility shown by a portion of the inhabitants of Carúpano. While this assertion has no other support than the word of the party concerned and lacks corroboration by trustworthy evidence to give it weight, it shows the intention to convey to the mind of the honorable umpire an impression different from the true situation which the Carúpano tramway concern occupies as a profitable business in order to obtain a compensation for future profits entirely unjustified. On the other hand, the notes and letters appended to the brief of the French commissioner, as Exhibit 8, deal with facts subsequent to May 12, 1903, when the two commissioners investigated and rendered their decision on Mr. Pieri's claim, and the production of the same at this time before the honorable umpire is contrary to the rules of procedure governing this commission, since it can not deal with facts other than those which have taken place, according to the extended jurisdiction granted by paragraph 2, article 2, of the Paris protocol, up to the date of the 23rd of May, 1903.

I must take advantage of this opportunity to challenge the statement made by the French commissioner at the end of every one of his briefs of the fact that, according to the terms of the protocol, the indemnities awarded by this commission are payable in 3 per cent bonds of the diplomatic debt, and that from this concession granted by

the Government of France to that of Venezuela to facilitate the payment of the latter's debts, it appears that the amount of the indemnity is greatly reduced at present, as the real value of said bonds is not one-half of their nominal value. The honorable umpire will find on page 499, Venezuelan Arbitrations of 1903, Ralston's Report, in the case of the Decauville Company before this same commission,[a] my opinion as the Venezuelan commissioner, altogether rejecting the claimant's contention that an allowance should be made to compensate for the lowest cash value the bonds of the diplomatic debt might obtain. The French commissioner, in his decision, concurred in my opinion, by which it was acknowledged that the commission had no jurisdiction to alter or change the method of payment established by the protocol, by advancing theories which might affect the nominal value of the bonds of the diplomatic debt, as such method of settlement on the part of Venezuela of the sums awarded by the commission was a matter exclusively concerning the two contracting parties and in no wise subject to the jurisdiction of the arbitration commission, called upon to examine only the proofs of the facts and the justice and sound foundation of the claims for indemnification, estimating the measure of damages by the established proof of such damages and not by the kind of money, whether cash or bonds, in which Venezuela is to discharge the awarded liability.

In regard to the other points covering my estimation of the damages which I deem justified in the claim of Mr. Pieri, the liability affecting the Venezuelan Government by reason of certain established facts and the amount of indemnity I have granted for the abandonment or rescission of the tramway contract, taking into consideration the value, as appearing from the proofs, of such business and the fair compensation for the price of the concession as an industrial investment, I hereby ratify in all its parts my opinion of May 12, 1903, whereby I allow for all indemnification the sum of 170,000 bolivars.

NORTHFIELD, VT., *February 8, 1905.*

ADDITIONAL OPINION OF FRENCH COMMISSIONER.

After having read the additional opinion of my honorable colleague, I can only maintain the conclusions of my memoir. I think I ought, moreover, to make the following observations:

My honorable colleague declares that in his opinion one can not raise anything which indicates his conviction that Mr. Pieri finds himself, not by his own fault, but from the fact of the situation which is thrust upon him, unable to renew the exploitation of his concession. It is, however, it seems to me, the logical conclusion which can be drawn

[a] Appendix herein, p. 456.

from the decision rendered by Doctor Paúl. If he does not have this conviction, why has he accepted the rescission of the contract which I have judged equitable and necessary? It is not, I imagine, merely to be agreeable to Mr. Pieri. It is really because my honorable colleague has thought, as I have, that the position of the claimant was such that circumstances independent of his will prevented him absolutely from renewing the exploitation of his concession. Only Doctor Paúl is of the opinion that the ruin of Mr. Pieri is due merely to the hindrances which the revolution has placed in the way of the exploitation, while I consider that to these hindrances has come to be added the open and declared hostility of the Venezuelan authorities which was manifested repeatedly several years before the commencement of the revolutions.

If one refers to the text of the minutes of the sitting of May 12, 1903, he may read there the phrase which I have cited. Doctor Paúl "refuses to acknowledge for the interested party the right to an indemnity from the fact of his dispute with the municipal authorities." I have the right to conclude from this that the indemnity accorded by Doctor Paúl represents merely the damages caused by the revolution and is not a sufficient compensation for the losses sustained by, Mr. Pieri. It is sufficient to review the dossier to note the fact that from 1895 to 1899—that is to say, during a period previous to the revolution—Mr. Pieri was the butt of continual persecutions from the Venezuelan authorities. At every moment they stopped his tramways under different pretexts, they created difficulties for him at pleasure, they chose as if by chance the place where the tracks were established to pass canals which they might have placed farther away, etc.

The umpire will be able to convince himself of these facts by perusing the dossier. It is these repeated manifestations of the municipality of Carúpano which have convinced me that the latter wished to exploit itself the line of tramways, and that it was trying by all possible means to dispossess the concessionary. I have nowise been brought to this opinion, as my colleague thinks, by the fact that General Rolando offered to purchase the concession for a sum of 35,000 bolivars. This offer is but one proof the more in support of my opinion, but it has not been the determining proof. Doctor Paúl concludes, moreover, from this amount that the concession was not worth more. But it is well to remark that the proposition of General Rolando was not followed by any result, Mr. Pieri having without doubt judged the offer to be derisory; it is clearly seen that according to the documents contained in the dossier this sum of 35,000 bolivars represents the income which the enterprise of the tramway might yield annually.

The documents presented after May 12, 1903, have no other end than to demonstrate that there exists in fact a declared hostility against Mr. Pieri, since peace has now reigned in Venezuela for long months. This unfortunate concessionary is prevented from gaining

his livelihood by taking up again the management of his concession. They also demonstrate that the concession has no such low value as my colleague would like to have believed, since without the persistent ill will of the municipality and of the population Mr. Pieri would find an advantage in again taking up the exploitation of his line. Whatever Doctor Paúl may say about it, Mr. Pieri was perfectly right, according to the protocol, in submitting these documents to the umpire. I searched in vain in section 2 of article 2, quoted by my colleague, the provision which would prevent Mr. Pieri from presenting the documents because they are posterior to May 12, 1903. On the contrary, I find that section 3 of the same article formally authorized him to do so.

I would particularly call the attention of the umpire to the enormous reduction which I have made in my decision from the amount of indemnity demanded, and I persist in thinking that the sum of 600,000 bolivars is the minimum which can be given to Mr. Pieri in compensation for vexations and losses which he has suffered and in exchange for his concession and his material. This reduction appears still more considerable if we take into account the depreciated currency with which the Venezuelan Government is to pay its indemnity. In regard to this I ought to bring up the manner in which my honorable colleague looks at this public debt. I should prefer not to be obliged to say that the Venezuelan Government wished to profit from the condescension, which alone among all the foreign governments the French Government has shown toward it, to allow it to free itself from its debts at a reduced rate and not to pay them integrally. In consenting to this concession of not being paid in gold the French Government has in no way wished to place its nationals, the victims of pillage or of denials of justice, in a position inferior as compared to the nationals of other countries placed under the same circumstances; it has wished only to permit Venezuela to acquit itself more easily in giving to the claimants in place of gold these bonds redeemable after a long time.

Can we conclude from this fact that it is forbidden the arbitrators in the fixing of an indemnity in equity to take into account the depreciation of the money which is to be given in payment? Can we say that this changes the mode of payment established by the protocol? The arbitrators have, to the contrary, a strict duty, and they can not fail without wounding equally equity and good sense to take account of the manner in which their award will be executed in such fashion that the sum which they have awarded shall be in fact paid. Otherwise their awards would be only deceptive. When my Government invested me with the duties of arbitrator it remitted entirely to my conscience in all that which considers fundamentally the claims which I might have to examine; it has only remarked that equity commanded me to take

account in the fixing of indemnities of the depreciation of the bonds of the diplomatic debt.

The protocol would in fact be vitiated if the arbitrators did not take account of this article 3, which declares that the indemnities will be paid in bonds of the diplomatic debt. In reading this article the arbitrators are informed that the indemnities will be paid in a certain money; they ought to take notice of this to conform to the letter of the protocol and also to its spirit, which is a spirit of equity. So I can not help express my profound astonishment to read in the additional memoir of my honorable colleague the phrase which begins thus: "The French commissioner in his decision (Decauville affair) concurred in my opinion," etc. In the matter of the Decauville affair I have given no other opinion than that which is laconically expressed in the minutes of the sitting of June 15, 1903, which is as follows:

The examination of the claim of Mr. Decauville is then taken up, in favor of which is recognized by common agreement a sum of 41,400 bolivars.

On the contrary, my colleague will kindly remember that I have in every affair which has been submitted to us each time demanded that account must be taken of the depreciation of the diplomatic debt. And at every time, to arrive at an agreement, he has consented to raise slightly the amount of the indemnity, declaring that this should not be mentioned either in the minutes or in the report which he would present to his Government. I hold, in principle, that this correction should be made, and I should consider myself as having failed in my duty and having been forgetful of equity if I had neglected a single time to take account of the manner of payment of indemnities and tolerated that the Venezuelan Government should thus receive an unjust benefit, to the detriment of the victims of the abuses of power, of pillages, and of denials of justice.

NORTHFIELD, *February 11, 1905.*

OPINION OF THE UMPIRE.

On the 2d of May, 1882, a lawful contract of concession was made by and between the president of the State of Bermúdez, of the United States of Venezuela, and José Gabriel Nuñez Romberg, of the city of Cumaná, of said State, for the purpose of promoting and encouraging the means of communication in that section, which contract, among other things, provided that the government of the State granted permission to the concessionary to construct tramways or railways in the cities of Cumaná, Carúpano, and Maturín of that State, and also to establish ways of communication under the system named between different points of the sections referred to, the works to be the property of the enterprise, but with the obligation to devote them to the trans-

portation of passengers and merchandise at prices lower than those then existing between those sections and in those cities and in accordance with tariffs to be approved by the government of the State of Bermúdez.

The concessionary was authorized to transfer to others, in whole or in part, the rights passing to him under the contract; also to use for the railways aforesaid the necessary streets or public walks, but in a way not to cause injury or obstruction to traffic. The enterprise was exempted from all State and national taxation, with the privilege of obtaining like exemption from municipal taxation through the action of the respective municipal councils. This concession was to continue for the term of fifty years, to be reckoned from the date of the inauguration of the first line of tramways or railways created under this contract, and when said fifty years had terminated, the enterprise, with all its property, was to pass to and become the property of the State of Bermúdez.

On the 20th of the same month the enterprise was duly exempted from municipal taxation by the city of Carúpano.

Thereafter the anonymous company of "Tramways of Carúpano" was duly organized, the privileges herein named were duly ceded to the said company, and the enterprise of the tramways was inaugurated and installed in the city of Carúpano.

At a date not material this company, the "Tramways of Carúpano," went into liquidation, and its liquidator, on the 8th day of May, 1891, sold at auction to Pieri Dominique the said enterprise, including the privileges contained in the concession aforesaid, so far as the same referred to the city of Carúpano. The price paid therefor was 38,500 bolivars. It became the property of Pieri Dominique & Co., the other member being the house of Franchessi & Co., of the city of Carúpano, Pieri's interest in the company being much the larger part.

Under the management of Pieri Dominique & Co. the enterprise was extended and enlarged, and for some four years proved quite successful. The income for the year 1891–92 was 30,232 bolivars, and there was a steady increase to 1894–95, when it had reached 47,200 bolivars.

It was in the year 1895 that difficulties began, culminating in the very serious affair of June 21, 1895, which continued through the intervening years up to the sitting of this mixed commission in Caracas in 1903, of a degree more or less troublesome each year, to the great detriment and loss of the company.

Before the sitting of this mixed commission at Caracas in 1903 Pieri Dominique had become the sole owner of the tramways and of the concession, paying for the share of Franchessi & Co. the sum of 24,000 bolivars.

The claim of A. L. Nasica was dismissed by the honorable commissioners of France and of Venezuela at their sitting in Caracas, and

there was reserved for the umpire only the claim of Pieri Dominique for himself and for Pieri Dominique & Co., he being the only person interested at the time this claim was presented before the mixed commission and the only person interested at the present time in the claim. The award is to be for his sole benefit.

The nationality of the claimant is unquestionably French, and there is a difference of opinion between the honorable commissioners only as to the amount which should be awarded the claimant for the damages and indemnities to which he is entitled.

The aggregate claim submitted by Pieri Dominique in his own behalf and as the successor of Pieri Dominique & Co. is 4,010,400 francs, covering injuries alleged to have been committed on his person and property commencing June 21, 1895, and continuing from time to time up to the conclusion of peace in 1903. After submitting this claim, and while the mixed commission was sitting at Caracas in 1903, Pieri Dominique appeared before the commission and suggested and consented that the award be made on the basis that he surrender the enterprise, including all the privileges of the concession, to the municipal council of Carúpano.

When the case came on for hearing before the honorable mixed commission it was the opinion of the honorable commissioner for Venezuela that the sum of 20,000 francs was a sufficient indemnity for the damages suffered in the person and in the property of the claimant on account of the events of June 21, 1895, and those which are prior or subsequent, but immediately connected therewith or naturally flowing into or therefrom. For so much of the damages suffered by the claimant during the revolution of 1901–1903 as he regarded to be properly chargeable to the respondent Government and for the enterprise itself, including the privileges of the concession, he allowed the sum of 150,000 francs, making in all the sum of 170,000 francs. He finds no occasion to allow any indemnity for the action of the customs authorities at Carúpano and later on for the action of the city council in prohibiting and preventing the carrying on of the tramway freight traffic, for the forced interruption by the municipal council of Carúpano of the entire traffic for a period of three months in 1896 during the installation of the aqueduct system in that city; for the defects and faults of certain portions of the streets on which was laid the tramway of the claimant through the inefficient use and management of the same by said aqueduct company while making its house connections, whereby was ruined one of the horses of the tramway system belonging to the claimant; for the forcible suspension of the passenger traffic by order of the municipal council at another time; for the arrest and imprisonment for twenty-four hours of the claimant, without warrant or any subsequent charge or trial, on the oral order only of the civil chief of the district of Bermúdez; for the delay and final neglect of the munici-

pality of Carúpano to rebuild a bridge carried away by a freshet, upon which rightfully rested the railway of the claimant, inducing serious loss in receipts through inability to conduct the enterprise and entailing upon the claimant the expense of rebuilding the bridge; or for the losses resulting, as claimed, in the alleged compulsory sale by the claimant of his twelve houses at great sacrifice.

It was the opinion of the honorable commissioner for France that the claim of 4,010,400 francs ought to be reduced to 600,000 francs, which includes the compensation to be paid the claimant for the enterprise of the tramways, its privileges and franchises. He considers this sum to be no more than just for all the losses suffered by the claimant for which he holds the respondent Government liable. He especially urges the allowance of this sum, because the payment is to be made not in gold but in bonds of diplomatic debt at 3 per cent, which manner of payment he regards as a more favorable proposition to the respondent Government than that made by any other claimant Government, and he is therefore of the opinion that in making the award the reduced market value of these diplomatic debts should be met by an award sufficiently enhanced to meet the deficit. He is also of the opinion that the vexations, difficulties, and injuries brought upon the claimant by the officers of the nation, state, or municipality, or suffered by them to be brought upon him, without rebuke or attempt at prevention were the result in part of a prejudice on the part of the nationals against all foreigners, and especially against those of French citizenship, and also in part were a result of a studied attempt of the President of the State of Bermúdez and of certain officers of the city of Carúpano to compel an abandonment of the enterprise by the claimant to them. He does not, however, claim that there should be any punitive proposition in the award to be made, but that it should contain simply the material damage which, in his judgment, the claimant has suffered if he now relinquishes the property and privileges of the concession to the municipality of Carúpano.

The honorable commissioners having disagreed in the manner above stated, by their joint action the claim comes to the umpire for his decision and award.

He finds himself greatly indebted to both of the honorable commissioners for the care and skill with which they have presented their respective opinions, shedding much light upon the questions at issue and greatly aiding the umpire in his efforts to determine the equities of the case.

After a careful study of these respective opinions and of the facts involved the umpire finds himself compelled to hold (a) that the interference of the chief of the custom-house with the enterprise of the tramways, and especially in the part covered by his order to the claimant that he desist from all freight transportation, were acts wholly unwar-

ranted, in direct antagonism to the clear right of the concessionary, and that this interference resulted in very serious damage to the claimant; (b) that the order of the municipal council to the same effect, made in January, 1897, was without right, very unjust, strictly against the terms of the concession, and resulted in serious loss and damage to the claimant; (c) that the suspension of the tramway service by the municipal council at the request of the aqueduct company for the installation of its pipe line was within the power of the municipal council to be followed by a sufficient indemnity to the claimant for the losses sustained by him in the interest of the aqueduct company, and that this indemnity is primarily due from the municipality to the claimant, since the aqueduct company sought the intervention of the municipality. The orders to suspend the tramway traffic came from the municipality. It was the order of the municipality which was obeyed, and it is therefore to the municipality that the claimant may properly look for his compensation. Whether the city did or did not obtain indemnity from the aqueduct company in order to meet this proper claim of Pieri Dominque & Co. is a matter not important to this inquiry, since it can not affect the claimant's right in the premises; (d) that the defects and faults of the street caused through the action of the aqueduct company in making its house connections with the main line were properly chargeable to the municipality as the party primarily liable for the injuries which might result therefrom to the lawful users of the street, it being borne in mind that the traffic of the tramways had been resumed on formal notice from the city authorities that the conditions would permit its resumption; (e) the arrest and imprisonment of the claimant, on the 8th day of October, 1896, on the oral order of the civil chief without warrant, his detention for twenty-four hours in prison, and his subsequent discharge on payment of the jail fees without intervention of a court or tribunal of any character is a serious assault upon the liberty of the individual and the sacredness of his person, is wholly unjustiafible, and is the proper subject of indemnity; (f) the staying of the traffic of the tramways by the order of the municipal council as it occurred on June 14, 1896, can only be justified as a matter of municipal right for the public good and can only be met properly by a charge upon the public to compensate the individual for his sacrifice to the public interests; (g) the allowance made by the honorable commissioner for Venezuela of 20,000 francs for the incidents of June 21, 1895, and the injuries and damages which are the approximate results or antecedents of those incidents in the judgment of the umpire is a sufficient sum to be allowed, and in the judgment of the umpire covers such damages as accrued because of the interference of the chief of customs with the tramway service; but there should be added thereto interest at the rate of 3 per cent from

June 21, 1896, at which time it is certain that the respondent Government had due notice of those incidents and of the justice of this claim; (h) the sum set by the honorable commissioner of Venezuela of 150,000 francs in the judgment of the umpire is ample to cover the revolutionary incidents of 1901–1903 for which the respondent Government may be held liable, and, in addition, for the purchase price of the tramway enterprise and the privileges of the concession; but it is equitable to relate back this purchase to the time when this property was taken by the Government for barricades and hospitals, which the umpire assumes to be January 1, 1902, and interest should be allowed on the sum of 150,000 francs from that date to the 31st day of July, 1905, the anticipated conclusion of this arbitration; (i) there can be no allowance for any losses accruing to the claimant in the sale of his houses, such losses not being the direct and approximate result of any cause for which the respondent Government has responsibility, and it is only for such results that indemnity can be awarded.

Concerning the responsibility of the national Government for the acts and neglects of the State of Bermúdez and the municipality of Carúpano, the umpire holds here, as he did in the claim of Davey, in the British-Venezuelan mixed commission of 1903, found in Ralston and Doyle's Venezuelan Arbitrations, page 410.

Before coming to his decision in that case the umpire gave much time and thought to this question of national responsibility, and his opinion there given is the result. Further study and reflection adds to his conviction that his position then taken was tenable, just, and necessary. He respectfully refers the honorable commissioners to the opinion above cited for an elucidation of his views on that subject. He would also cite the opinion of Paúl, commissioner in the French-Venezuelan commission of 1902, in the claim of Battistini,[a] Id. 503, as bearing upon this question of national liability for State indebtedness; the opinion of Duffield, umpire in the German-Venezuelan commission of 1903, case of Beckman & Co., Id. 598; also the opinion of Bunch, umpire in the Montijo case, Moore's Arb. 1421–1447.

It is the opinion of the umpire, however, that the decision in this case does not rest upon the ordinary postulates. It is here proposed that the claimant abandon, transfer, and make over to the municipality of Carúpano his enterprise of the tramway, his concessions and privileges in consideration of payment to be made therefor and to be included in the award. To put the municipality of Carúpano in possession of this enterprise as sole owner thereof to the entire exclusion of the claimant while the municipality is unquestionably the debtor of the claimant for its acts and neglects in connection with this enterprise would be so manifestly unjust and inequitable as not to permit a

[a] Page 459, post.

moment's favorable consideration. Whatever may be the usual relation of the nation to and with its municipal subordinate divisions, it is certain that in this case it can and will be so related to the municipality of Carúpano as to exact and require full repayment to itself for all it shall undertake and expend in behalf of that municipality in connection with this enterprise of the tramways. Whatever hesitancy, if any, there might be ordinarily in making such acts and neglects of the municipality a matter of international award is dissipated by the peculiar facts incident to this claim, as above stated.

So much of the award as corrects the wrong done the claimant by his arbitrary arrest and imprisonment stands solely upon the recognized and rightful responsibility of the nation, internationally, for the unlawful and injurious acts of its subordinate officials and is on all fours with the case of Davey first above cited.

Concerning the allegation of prejudice on the part of the nationals of the respondent Government toward foreigners, and especially the French, and also the allegation that there was a studied attempt of the President of the State of Bermúdez and of certain officers of the city of Carúpano to compel abandonment of his tramway enterprise by the claimant, it is sufficient to say that these allegations are not material to the inquiry, since there is no claim for punitive or exemplary damages and since all essential facts bearing upon the question of the actual damages suffered are found without involving the consideration of these questions.

The honorable commissioner for France again urges upon the umpire the propriety and duty of increasing the sum which he otherwise would award the claimant by an amount equal to the diminished value of the diplomatic debt of 3 per cent as compared with gold, and in this opinion he gives especial prominence to the claimed inequality of the plan accepted by the high contracting parties in the protocol providing for this commission with the plan adopted by the claimant Governments and the respondent Government in the several protocols of 1903. This particular reason was not passed upon by the umpire in his opinion given in the claim of Jules Brun,[a] if it were, in fact, then pressed upon his consideration by the honorable commissioner for the claimant Government.

In the motion for allowance of interest on awards from their date until payment, which was made in the British-Venezuelan Commission of 1903 and which on the disagreement of the honorable commissioners came to the umpire for his decision, a careful and painstaking study was made by him of the basic principles underlying this question, and while the exact proposition now before him is not identical with that, yet the principles which govern him in his decision are in large part the same.

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[a] Page 5.

Here, as there, the warrant for such action must be found, if found, in the protocol which constitutes this tribunal and defines its duties, its powers, and its limitations. There, as here, the protocol determined the manner and means of payment, and over that matter gave the tribunal no jurisdiction. Here, as there, the functions of this tribunal end when it has determined the damages sustained by the claimant. The reasons stated by the umpire in that case are applicable here, and the attention of the honorable commissioners is respectfully invited to it as found in Ralston and Doyle's Venezuelan Arbitrations of 1903, page 413. It will be observed that there, as here, the alleged ground for the requested award was a claimed equity. The long delay in payment which seemed probable was urged as the reason for the allowance of interest; here, by the terms of the treaty, the award draws interest, but its value in the market is below par, and hence the opinion of the honorable commissioner for France that the umpire should increase the sum awarded to meet this lessened value. It will be noted especially that the very terms of payment provided for in the protocols of 1903, and which are considered by the honorable commissioner of the claimant Government to be so much more favorable for the claimants than the plan evoked by the convention controlling this tribunal as to work injustice and inequity to the claimants before this commission by the inequality which it produces, were regarded by the British Government so onerous as to require the efficient aid of the umpire to maintain justice and equity through an allowance of interest. In the one case a certain method of assured payment without interest was devised and preferred by the high contracting parties; in the other the high contracting parties preferred a certain method of payment with interest in bonds circulating in the markets of the world. In the one case the award is not rated at par because of the necessary delay attached to its payment; in the other it is not rated at par for reasons satisfactory to the world of finance.

The inequality produced by the two methods of payment is therefore not very striking, nor is the inequity resulting therefrom very pronounced, and taken together they are insufficient to move the umpire to accord with the opinion of the honorable commissioner for France, even if the umpire were competent under the terms of the protocol to make such an award, and concerning that question the review which he has just made confirms his judgment as expressed by him in the claim of Jules Brun.

In order to compensate the claimant for his material damage suffered in all of the ways herein referred to, including interest at 3 per cent where interest is proper, there should be added to 170,000 francs allowed by the honorable commissioner for Venezuela the sum of 180,000 francs, which makes in all the sum of 350,000 francs, for which amount the award will be drawn.

ADDENDUM.

After this opinion was written, but before the award had been made, it was brought to the attention of the umpire that conditions had materially changed in Carúpano since the sitting of the honorable commission at Caracas. At the time named the revolution was still rampant in that part of the respondent Government, with the latter in possession of Carúpano, holding it under martial law, and with its troops occupying for military purposes the station of the tramways and for barricades portions of the tramway itself. The Government of Venezuela was then, in fact, in occupancy of the tramway system to the exclusion of the owner. There seemed to both commissioners no better way to dispose of the claim than, on the one hand, finally to surrender what was lost and, on the other, fully to accept what had been taken. They did not agree upon the terms, however, and the claim had to come before the umpire.

It transpired in the meanwhile that the revolution was quelled, peace was restored, and the claimant had entered into undisturbed possession of his franchise and such of his properties as he chose to make use of; had occupied the station house, regained a part of the movable property of the enterprise, and had begun again its exploitation. By the terms of the contract the tramway system was eventually to become the property of the municipality and was at all times under its civil control. Hence it had seemed to the honorable commissioner for Venezuela very unwise and, in a sense, not within its competency, for the respondent Government to interfere with either the ownership of the claimant or the present civic control and the ultimate municipal ownership of the city of Carúpano, and for these reasons he declined to accede to the proposition of abandonment on the part of the claimant and on the part of the respondent Government of acceptance and payment of his franchises and properties. The whole question was thoroughly and ably presented to the umpire at a sitting of this honorable commission, held on the 12th day of August, instant, the honorable commissioner for France believing and urging that the plan adopted at Caracas was the better and should be adhered to in the disposition of the claim. The honorable commissioner for Venezuela held and insisted that the arbitral tribunal constituted at Paris February 19, 1902, had no authority to do other than to award indemnities for damages suffered by Frenchmen in Venezuela and that it could not compel abandonment of property by its owner or acceptance of it by the respondent Government. To this position the honorable commissioner for France demurred and urged that it had authority to so award.

To-day, having carefully considered the questions involved and having reflected upon the opinions respectively held and ably declared to him by his able and learned associates, the umpire has concluded,

and hence holds, that the safe, sane, and wise course for this tribunal to pursue is to pay scrupulous regard to the terms of the protocol which constituted it and to place the entire responsibility in that behalf upon the high contracting powers which arranged and settled those terms. He is confident that the language of that compact does not permit the use of any such powers as will be involved in a compulsory award of the character proposed by the honorable commissioner for France, holding that, in this respect, the claim under consideration is identical in that regard with the claim of the French Company of Venezuelan Railroads, and the reasons there given [a] by the umpire are here referred to for an elaboration of his opinion. He therefore decides that it is only for damages suffered in Venezuela that the claimant has recourse to this tribunal, and for those the umpire will award the sum of 300,000 francs.

NORTHFIELD, *August 14, 1905.*

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[a] Page 367.

CLAIM OF THE HEIRS OF MASSIANI.—No. 6.[a]

HEAD NOTES.

An indebtedness of the respondent Government to the late Thomas Massiani in his lifetime is a part of the patrimony which descends to his widow and children, to be distributed in accordance with the laws of Venezuela.

The widow of Thomas Massiani was born in Venezuela, acquired French nationality by the laws of both countries by her marriage to Thomas Massiani, by the laws of France retained that nationality after his decease, but by the laws of Venezuela was restored by his death to her quality of a Venezuelan citizen.

During their marriage and since his death she has been domiciled in Venezuela. The law of her domicile prevails in this conflict and her nationality before this tribunal is Venezuelan.

The children were all born in Venezuela and it has always been their domicile. While by the laws of France they are Frenchmen, being the children of a Frenchman, they are by the laws of Venezuela citizens of that country. As in the case of the widow, the law of the domicile prevails, and before this tribunal they are Venezuelans.

Thomas Massiani deceased prior to the convention of February 19, 1902; therefore neither of the high contracting parties could have had him in mind as a possible claimant at the time of said convention.

His widow and children being Venezuelans in the contemplation of the respondent Government, their right to the intervention of France was not agreed to by Venezuela in said protocol.

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[a] EXTRACT FROM THE MINUTES OF THE SITTING OF AUGUST 28, 1903.

The commission then proceeded to the examination of the Massiani claim.

Doctor Paúl rejects it, and bases his opinion upon the following considerations: The heirs of Thomas Massiani are all Venezuelans by Venezuelan law. The mixed commission of 1890 has already rejected the claim in question, and the present commission would not be able to revise a judgment of the former commission. Finally, the very documents upon which the Massiani heirs base their right to the payment of the sum which they claim does not seem sufficient to prove the existence of the debt in a decisive manner.

M. de Peretti replies that M. Massiani (Thomas) enjoyed exclusively French nationality, and that his heirs, if they are Venezuelans according to Venezuelan law, are considered as Frenchmen by French law; that if the commission of 1890 has rejected the claim in question, it is because the Venezuelan Government did not give an acknowledgment to a document of which M. Philippe Massiani has been able to obtain an authentic copy only in 1903; that the present commission seems to him competent to revise a judgment of the earlier commission if a new fact has been presented, which is the case in the Massiani claim; finally, that the credit seems well established by the document delivered to M. Philippe Massiani by the Venezuelan administration.

He is, then, in favor of granting to the Massiani heirs a sum of 270,813.56 bolivars, representing the capital of the debt, and not according interest because of the negligence during long years by the claimants in the defense of their rights.

The arbitrators not being able to agree, the claim of the Massiani heirs will be submitted to the examination of the umpire.

The indebtedness of Venezuela to the estate of Thomas Massiani may still remain, but the forum is certainly changed. The present forum is the one constituted for Venezuelans. This forum is the result of the selection of their paternal ancestor and their own selection after attaining majority.

Having French paternity, and thereby having French nationality in France, they needed only to be domiciled therein to have a nationality which all the world must maintain to be French. They have preferred to remain in Venezuela; its laws and its courts are theirs; these they may invoke; with them they must be content.

To be sovereign and independent, each country must be master of its internal policy and subject neither to advice nor control by any other country.

The laws of Venezuela concerning citizenship are not peculiar or offensive, but are in accord with the law of nations in general.

OPINION OF THE VENEZUELAN COMMISSIONER.

This claim has been presented in the name of Mrs. Carmen Silva de Massiani, widow of Tomás Massiani, of Felipe A. Massiani, Ascención Massiani de Phelan, Nuncia Massiani de Orsini, Luis A. Massiani, children of Tomás Massiani, and Isabel Pavân de Massiani, acting in behalf of her minor children, Antonio José, Tomás María, Mercedes, Luis Enrique, Carmen de Lourdes, and Gloria, issue of her marriage with Mr. Antonio Massiani, now deceased, son of Tomás Massiani, and therefore those minors being grandchildren of the latter.

The claim proceeds from debts which, the claimants sustain, were contracted by the Government of Venezuela, in favor of him from whom they derive their rights, Mr. Tomás Massiani, by the years 1864 to 1869.

The documents presented prove that Tomás Massiani died in the city of Carúpano on the 9th of October, 1901, leaving as his lawful heirs his wife, Carmen Silva de Massiani, and his children Felipe A. Massiani, Antonio A. Massiani, Ascensión Massiani, Nuncia Massiani, and Luis A. Massiani; that these children have married as follows: Ascensión Massiani to a Mr. Phelan, Nuncia Massiani to Agustin Orsini, and Antonio J. Massiani to Isabel Pavân, of which latter marriage there are under the parental control of Isabel Pavân de Massiani, her husband being dead, six minor children.

From the certificates of birth presented of Mrs. Carmen Silva de Massiani, widow of Tomás Massiani, and of her children, Felipe A. Massiani, Antonio José, Ascensión, Nuncia, and Luis, it appears that all of them are of Venezuelan nationality, they having been born in the city of Carúpano, State of Sucre, United States of Venezuela, and that the same circumstance exists respecting the minor children of Antonio José Massiani, represented by their mother, Isabel Pavân de Massiani.

With reference to Mrs. Carmen Silva de Massiani, while by articles 19 of the Venezuelan civil code and 12 of the French civil code the woman married to a foreigner follows the condition of her husband, the final

provision of the Venezuelan civil code, which establishes that that change only subsists during the marriage, is conclusive.

Mrs. Carmen Silva de Massiani, having become a widow, has recovered, according to the Venezuelan law, which governs her personal status, her Venezuelan nationality; and, even if it might be sustained that, according to the French law, she continues to be French, this commission, in determining the conflict of nationality arising from the two laws, must take into consideration the especial circumstances and the facts showing the real condition in which Mrs. Carmen Silva de Massiani has maintained herself with reference to her nationality, as well as with respect to the nationality of her children.

It is not proved, nor has it been attempted to prove, that Mrs. Silva de Massiani, after she became a widow, or her children of full age, have ever pretended, by acts proving such circumstance, to obtain and preserve a nationality different from that which the Venezuelan law attributes to them, under which law they have performed all the most important acts of life connected with the personal statute, *status civitatis*, and governed by the especial laws of that statute, such as those relating to successions, inheritances, guardianships, and marriage. It is not proved either that the male children of Tomás Massiani have rendered France the military service obligatory for every Frenchman, or in any way contributed to the satisfaction of other charges that would procure the protection due to those who do not abstain in an unjustifiable way from the compliance with their duty to their native land.

On the contrary, all the especial circumstances and precedents connected with the persons of the claimants show that they have during all their life remained in the territory of Venezuela; that there they have had for three generations the business and the principal and only seat of their interests, and they have contracted in the same territory marriages with persons of different nationalities, enjoying under the protection of the Venezuelan laws the security they grant and the services which the authorities of their residences were called upon to render to them in order to safeguard their persons and interests. From those facts it is deduced that the permanent settlement of the widow and children of Tomás Massiani, in the territory of Venezuela, of which they are all natives, is the result of a reasoned and persisting will and the manifestation of a free and spontaneous purpose which makes the law of domicile prevail over any other law when determining the question of nationality.

Mrs. Carmen Silva de Massiani, her children, who have been born and, one of them, died in Venezuela, and her grandchildren, all born in Venezuela, are Venezuelans, not only by the law of Venezuela, but in virtue of all the especial personal circumstances of continued resi-

dence, business ties with the Venezuelan soil, which has given them everything, including their national character.

It is doubtless that when a group of men are considered, and the aptitudes, habits, and attributes of each individual are studied, it is found that each person pertaining to a group possesses certain common characters that are like a common property of all the members belonging to the same group. Hence it results that, if attention is paid to the common attributes pertaining to all the individuals of each group, it may rightly be said *that these individuals belong to this or that nation.*[a]

In view of the aforesaid circumstances, the arbitrator for Venezuela is of opinion that this tribunal has no jurisdiction to take cognizance of and decide the claim in question, and that there is, besides, with respect to it a precedent that renders it equally inadmissible.

Said precedent consists in the fact that the same claim was presented by Tomás Massiani, from whom the present claimants derive their rights, against the Government of Venezuela, before the mixed commission sitting at Caracas from 1888 to 1890, instituted in accordance with the Venezuelan-French convention of 1885.

Tomás Massiani claimed from the Government of Venezuela, before the said commission, the sum of 351,449.80 bolivars. As appears from the certificate issued by the citizen minister of foreign affairs on the 20th of the present month, annexed to this opinion, the members of said commission in the sitting of the 7th of July, 1890, gave the following award with reference to the claim in question:

The first part of the claim of Mr. Massiani, of which mention is made in the record of the proceedings of the 19th of May of the present year for 49,666.84 bolivars, was accepted by the commission, the question being a credit already recognized by the Government of Venezuela, and the present commissioner being authorized by a note addressed to him by the minister of foreign affairs on the 18th of July last, No. 643, to examine the claims that had been presented to the commission of 1879, and the second part of the same claim amounting to 301,784.96 bolivars was disallowed, because the interested party did not produce a sufficient document in support of his claim.

The reason on which was based the disallowance of the claim, in the part above determined, which is tantamount to its having been denied or rejected, was, as expressed in the same award, the want of sufficient proof to justify it.

The successors to Tomás Massiani now pretend that this commission should examine and decide again what was already the object of the decision of the mixed commission of 1888 to 1890, and base their pretention on a certificate from the centralization board of the general

[a] 687. Il est hors de doute, lorsque l'on considère une réunion d'hommes et qu'on étudie les aptitudes, les habitudes et les attributs de chaque individu, on trouve que chaque personne, que appartient à cette réunion, a certains caractères individuels et certains caractères communs, qui sont comme la propriété commune et de tous les membres qui appartiennent au même groupe. De là il résulte que, si on porte son attention sur les attributs communs qui sont propres à tous les individus de chaque groupe, on peut dire avec raison que ces individus appartiennent à telle ou telle nation. (Fiore, Nouveau Droit International Public, sec. 687.)

provision of the Venezuelan civil code, which establishes that that change only subsists during the marriage, is conclusive.

Mrs. Carmen Silva de Massiani, having become a widow, has recovered, according to the Venezuelan law, which governs her personal status, her Venezuelan nationality; and, even if it might be sustained that, according to the French law, she continues to be French, this commission, in determining the conflict of nationality arising from the two laws, must take into consideration the especial circumstances and the facts showing the real condition in which Mrs. Carmen Silva de Massiani has maintained herself with reference to her nationality, as well as with respect to the nationality of her children.

It is not proved, nor has it been attempted to prove, that Mrs. Silva de Massiani, after she became a widow, or her children of full age, have ever pretended, by acts proving such circumstance, to obtain and preserve a nationality different from that which the Venezuelan law attributes to them, under which law they have performed all the most important acts of life connected with the personal statute, *status civitatis*, and governed by the especial laws of that statute, such as those relating to successions, inheritances, guardianships, and marriage. It is not proved either that the male children of Tomás Massiani have rendered France the military service obligatory for every Frenchman, or in any way contributed to the satisfaction of other charges that would procure the protection due to those who do not abstain in an unjustifiable way from the compliance with their duty to their native land.

On the contrary, all the especial circumstances and precedents connected with the persons of the claimants show that they have during all their life remained in the territory of Venezuela; that there they have had for three generations the business and the principal and only seat of their interests, and they have contracted in the same territory marriages with persons of different nationalities, enjoying under the protection of the Venezuelan laws the security they grant and the services which the authorities of their residences were called upon to render to them in order to safeguard their persons and interests. From those facts it is deduced that the permanent settlement of the widow and children of Tomás Massiani, in the territory of Venezuela, of which they are all natives, is the result of a reasoned and persisting will and the manifestation of a free and spontaneous purpose which makes the law of domicile prevail over any other law when determining the question of nationality.

Mrs. Carmen Silva de Massiani, her children, who have been born and, one of them, died in Venezuela, and her grandchildren, all born in Venezuela, are Venezuelans, not only by the law of Venezuela, but in virtue of all the especial personal circumstances of continued resi-

is destitute of *decisive force* in favor of the creditor, for it is nothing but a certificate issued by the general auditor's office to the effect that according to the books of the custom-house at Carúpano it appeared that on the 23d of June, 1869, there was a balance in favor of Tomás Massiani, without determining in a decisive manner that he was creditor for that sum on the date of the certificate, the 12th of August, 1890, or twenty-two years thereafter. No data have been furnished with reference to the fluctuation of that account in the intervening twenty-two years, during which Mr. T. Massiani continued his importations through the custom-house at Carúpano, and transfers were made decreed by special laws for the conversion of the balances against the States into bonds of national debt.

The apparent abandonment in which, according to the pretention itself of Mr. Massiani, his credit was left during twenty-one years without any explanation; the lack of steps to obtain its payment or at least to procure proofs that might safeguard his rights, constitute so strong a presumption against the subsistence of that credit that it suffices to strengthen the opinion expressed that the certificate produced is an inefficient document and is destitute of the decisive force that the law and common sense require for the invalidation of a sentence that was rendered, because the claimant did not produce *a sufficient document in support of his claim.*

The decisions of tribunals of the nature of these commissions are conclusive and final, and such tribunals are constituted in order precisely that their decisions have that force with the purpose of putting an end to long-pending and vexing questions which generally disturb the progress of international relations.

When a court of arbitration rejects, for lack of proofs, a claim, or when it admits it in its entirety or in part, its decision is a law which binds the two contracting nations.

In the same case of the claim of Tomás Massiani, that of being admitted in part and in part rejected, were many others submitted to the examination of the commission of 1888 to 1890, and that commission was given the power of fixing or appreciating according only to the documents produced in each case, the just value of each reclamation.

In execution of that power it examined and decided more than one hundred and forty claims, rejecting many of them for lack of proofs, so that of the sum of 11,284,532.37 bolivars to which the claims having a determined value amounted the commission only admitted as lawful and proved the sum of 1,109,615.50 bolivars.

For the reasons stated I am of opinion that this commission must declare itself incompetent to take cognizance of the claim entered, because the claimants are Venezuelans, and, besides, that it must declare said claim to be inadmissible, as far as the sum of 301,784.76

bolivars and the interest thereon are concerned, because respecting that part of the claim there is a sentence passed and affirmed.

As to the new promissory notes presented as a complement of the said claim, they are not covered by this opinion, because as they are not authenticated they do not meet the requisite indispensable for their being taken into consideration according to the rules of procedure established by this commission.

The French arbitrator was of opinion that the claim was to be admitted for the sum of 270,813.56 bolivars without interest, and an agreement not having been arrived at, the claim was referred to the umpire.

CARACAS, *August 28, 1903.*

OPINION OF THE FRENCH COMMISSIONER.

According to the exposition made in his letters of April 6 and May 13, 1903, by M. Philippe Massiani, son of M. Thomas Massiani, French citizen, who lived in Carúpano and died there October 9, 1901, the Venezuelan Government would have been answerable to the latter for a sum of 728,476.48 bolivars. This amount is made up as follows:

First, 341,737.36 bolivars loaned from 1863 to 1869 to the administration of the custom-house of Carúpano and to General Acosta, chief of the Constitutional army of the east, this administrator and this general being duly authorized by the national Government to contract loans in its name.

Second, 351,003.12 bolivars representing the interest on the sum loaned from the date of the obligation to June 30, 1903.

Third, 3,200 bolivars handed over in 1885 upon the requisition of Generals Urdaneta, Pietri, and Rojas.

Fourth, 14,136 bolivars loaned to the Legalista revolution of 1892.

Fifth, 18,400 bolivars furnished the Restaurador revolution in 1899.

The amount, which appears under No. 5, formed the object of the demand for indemnity presented to the mixed commission established by the protocol signed at Washington February 27, 1903. This commission allowed to the Massiani heirs, taking account of interest, an indemnity of 19,900 bolivars, as results from the extract below from the minutes of the sitting of September 10, 1903:

Doctor Paúl declares that M. Massiani (Thomas) being to-day deceased and having left as heirs his wife born in Venezuela, of Venezuelan parents and four children born in Venezuela, he sees himself obliged to refuse consideration of the claim presented by this Frenchman because his heirs are all Venezuelans according to Venezuelan law, and the advantage of the arbitral tribunal is reserved by the protocol for Frenchmen.

M. de Peretti replies that M. Massiani (Thomas) who has himself addressed before his death his letter of claim to the legation of France enjoyed exclusively French nationality, and that consequently the commission is competent to examine this claim without its being necessary to look into the question of knowing if the heirs who are all considered as Frenchmen by the

French law and enjoy in reality two nationalities, have manifested in the course of their life the intention of remaining French.

The commissioners not being of accord remit the dossier to the umpire and ask him to decide if the claim in question, and of which they do not discuss the amount, enters into the category of those which are included by the terms of the protocol.

Mr. Filtz pronounced the following sentence:

The umpire, the commissioners being heard and after the examination of the dossier of the claim of Massiani (Thomas) and son, considering that the character of Frenchman is not denied to Massiani senior, that the claim was presented by him and not by his heirs and that there was no occasion to examine, consequently if the said heirs who enjoy in fact two nationalities have evidenced in the course of their life their preference for one of the two, decides that the claim in question certainly enters into the category of those which are provided for by the protocol and consequently accords to Massiani (Thomas) and son the indemnity of 19,900 bolivars.

The credit which is set forth in number four enters into the category of claims provided for by article 1 of the protocol of February 19, 1902, in that the Venezuelan Government has accorded a round sum of 1,000,000 bolivars. The commission which met at Paris to make a division of this sum, considering that the claim had been formulated by M. Thomas Massiani, who enjoyed incontestably French nationality, accorded to his heirs the indemnity demanded. The credit which appears in No. 3 is established by a "vale" dated June 28, 1885, and signed by the three generals who made the requisition. My colleague concludes to reject this demand, because aside from the reasons which caused him to refuse all the claims presented in the name of Massiani thought the latter ought to have been presented to the mixed commission which sat from 1888 to 1890 and was competent to examine the claims arising between 1869 to 1886, and again that the "vale" presented no authentic character, the signatures not being legalized.

I partook in these latter points of the opinion of Doctor Paúl and we rejected this demand. The credits which appear under Nos. 3, 4, and 5 are then out of the cause.

There remains the credit which appears under Nos. 1 and 2 and which amounts to 692,740.48 bolivars. When this claim was presented to the mixed commission in the course of the sitting of May 14, 1903, M. Massiani (Philippe) had not yet obtained from the Venezuelan Government the documents which seemed to establish in an incontestable manner the credit of his father. The dossier did not then establish the credit until after the taking up of the accounts of the Massiani house. Doctor Paúl asked Philippe Massiani, who was heard by the commission at its meeting of May 23, 1903, to show that after the decease of his father he had acquired all the rights of the firm Massiani & Co., and that his mother, his brothers, and his sisters had executed regular warrants of attorney. M. Philippe later remitted a dossier which satisfied this request.

Of a common accord my colleague and myself postponed the examination of this affair to a later date, M. Massiani having informed us that he was soliciting from the Venezuelan administration a recognition of the debt. He obtained, in fact, this instrument May 27, 1903, but the amount of the debt recognized was only 270,813.56 bolivars. This figure did not agree with that of the claim. The interested party declared that he would solicit a rectification. He did not remit until August 4, 1903, the document which, according to him, justifies his claim in its integral amount.

The affair entered into discussion at the sitting of August 6, 1903, as the register of the proceedings of the commission bears witness:

The arbitrators then took up the study of the Massiani claim, which in the course of the sitting of May 23 had been postponed to a later examination.

After having passed over in review the complementary pieces addressed by the interested parties, and having exchanged views with his colleague, Doctor Paúl expressed the desire to study the dossier anew, and it was agreed that the arbitrators would render their decision on this claim at the next meeting.

At the meeting of August 24, 1903, "after a new exchange of views and a long discussion," as the minutes say, the affair was again reserved. Finally at the sitting of August 28, 1903, Doctor Paúl having concluded to reject the demand, I appealed to the umpire.

I have accorded to the Massiani heirs an indemnity of 270,813.56 bolivars, because after having read the documents sent May 27, 1903, to M. Philippe Massiani by the minister of foreign relations it seems impossible to me that the credit should be contested. This document is an authentic copy delivered to M. Philippe Massiani upon his request by the director of public law to the minister of foreign relations with the authority of the minister of the liquidation of the credit of Massiani effected August 12, 1890. This liquidation concerns a table of loans, with their dates and their amounts, extracted from the books of public accounts and closed with the following declaration of Gen. T. B. Arismendi, contador general de la sala de centralización:

Consequently and as results from the former administration, it appears that M. Thomas Massiani is the creditor of the Government for the sum of 67,703.39 pesos, or 270,813.56 bolivars.

It is undeniable that on the date August 12, 1890, the Venezuelan Government owed this sum to M. Thomas Massiani. If the payment had been made since to the interested parties it would have been very easy for the Venezuelan administrator to prove it by producing the receipt. It is then beyond doubt that the debtor is still at the present hour responsible for this sum to the personal representatives of M. Massiani.

The rights of succession have only seemed to me completely established for this sum. M. Philippe Massiani argues that the said liquidation does not include a sum of 30,971.40 bolivars, which caused the credit of 270,813.65 bolivars to amount to 301,784.96 bolivars, a sum

already claimed in vain from a preceding mixed commission by M. Thomas Massiani. He has demanded of the minister of finances an official rectification and he flatters himself of having obtained it. Not sharing his opinion on this point, I have not been able, while recognizing for the interested parties only the right rigorously established, to accord this supplementary indemnity.

I ought to note here, for the information of the umpire, the notable contradiction which exists between the liquidation of August 12, 1890, and the official report, of which a copy certified by the director of the budget was sent to the minister of finances June 27, 1903, as a result of the demand for rectification of M. Philippe Massiani. Not only are the amounts produced by the latter document not in accord either with those of the demands nor with those of the liquidation of August 12, 1890, but the uncontested and uncontestable existence of this latter liquidation suffices to prove the inexactness of the conclusion of this official report. It concludes, in fact, that in the books of account one can follow the trace of the credit only as far as April, 1870, and that the liquidation remitted by the minister of foreign relations in a certified copy is dated August 12, 1890. Is this only an error? Does not this inexact report betray the predetermination of the minister of foreign affairs to efface the impression which ought to be produced on the arbitrators by the reading of the liquidation of 1890, the copy of which, vainly sought for during long years, seems to have been obtained only by a surprise, thanks to the friendly relation between the interested parties and certain officials of the ministry of foreign relations.

M. Philippe Massiani claimed, moreover, a sum of 39,952.40 bolivars, represented by receipts analogous to those which, remitted to the Venezuelan administration, had permitted him to establish notably the liquidation of 1890. Why have these receipts, which besides do not present sufficient authentic character, been thus preserved? Why did not M. Thomas Massiani present them to the mixed commission of 1888? Have they not already been settled? All these questions not having received satisfactory answers, I have not been able to admit this part of the claim.

Finally M. Philippe Massiani claimed 351,003.12 bolivars of interest reckoned at 3 per cent from the date of the obligation to June 30, 1903. I have not believed I ought to receive this demand even for the 270,813.56 bolivars, which I consider indisputably due by the Venezuelan Government. Messrs. Massiani, father and son, appear in effect to have taken no steps before the Venezuelan administration to obtain from it the reimbursement of their credit. They have both waited before filing their claim for the meeting of the mixed commissions. They have then waited of their own free will and have thus lost the chance to see themselves rewarded by a judge basing himself

upon equity alone for the interest which in right they ought not to have counted upon.

I have already explained why I could not share the opinion of my honorable colleague upon the value of the document remitted to M. Philippe Massiani May 27, 1903, a document which, in my opinion, proves superabundantly the credit of the Massianis. Besides the fact the document does not seem to him "sufficient to prove the existence of the debt in a decisive manner," Doctor Paúl justifies the rejection of this claim by considerations drawn from the nationality of the Massiani heirs and by the fact that the mixed commission of 1888–1890 has already rejected the demand in question. M. Thomas Massiani, born in France of French parents, enjoyed incontestably and exclusively French nationality. His title of French citizen has been certified by the legation of France at Caracas and recognized by the Venezuelan commissioner at the mixed commission of 1888–1890. The claim was born during the life of Thomas Massiani. It is the right of a French citizen who has been injured, and consequently the mixed commission appointed by the protocol of Paris, which includes "the demands for indemnities presented by Frenchmen," is indeed competent to consider this claim.

One might insist upon that, as the mixed commission appointed by the protocol of Washington has done successively for the same interested party for part No. 5 of their claim and the commission of repartition appointed by the French Government for No. 4.

One would place then out of the case as the umpire, Mr. Filtz, has done in his award, the nationality of the heirs. But I consider that even if one takes this latter into consideration the arbitral commission created by the protocol of Paris has jurisdiction. The widow of Thomas Massiani, born in Venezuela, of Venezuela parents, but married to a Frenchman, and her children, born in Venezuela of French parents, all enjoy incontestably two nationalities. They are French according to French law and Venezuelans according to Venezuelan law. It results that when the protocol speaks of "demands for indemnities presented by Frenchmen" it has in mind claims presented by individuals to which the French Government assures its protection because the French law recognizes them as Frenchmen. It is in no way specified in the protocol that the Venezuelan law will be obliged also to recognize these individuals as Frenchmen. On the contrary, all the protocols signed last year at Washington between Venezuelan and foreign powers to regulate analogous difficulties have declared expressly that local legislation ought not to be taken into account. Then, even if the heirs of Mr. Thomas Massiani had presented a claim in their personal name, the arbitral commission would have been qualified to examine it. It is so with much greater reason, since this claim concerns a credit of Mr. Thomas Massiani himself.

On the other hand, it is true that the mixed commission of 1888–1890 rendered, at its sitting of July 7, 1890, the following award:

> The second part of the same claim (claim Thomas Massiani), amounting to 301,784.96 bolivars, is definitely rejected, the interested party not supporting his demand by a sufficient document.

But it is necessary to know that this "sufficient document" was in the hands of the Venezuelan Government, which, being requested by the interested party, did not make it out until the 12th of August, 1890, after the close of the labors of the commission, and did not deliver a copy to Mr. Philippe Massiani until May 27, 1903. One can then discuss in what case and by what tribunal may an award rendered by the mixed commission of 1888–1890 be revised.

One could, however, remark that, this commission having rendered irrevocable decisions, these decisions could not be submitted to a revision unless a new fact unknown to the arbitrators has appeared to modify the appearance of the affair in such a manner that the decision may have been entirely different if the arbitrators had knowledge of it. One might establish then that this is precisely the case of the Massiani claim. Finally, one might maintain, with reason, that no tribunal would be better qualified than the present arbitral commission to examine anew an affair already submitted to the mixed commission of 1888–1890, and that even the protocol giving it competency to regulate all the claims of Frenchmen, whether they were directed against a former award or caused by an entirely different motive, this arbitral commission is alone in position to decide if there is room to revise such or such decision of the preceding commission.

In equity, the document sent May 27, 1903, to M. Philippe Massiani establishing incontestably the existence of his credit, and the arbitrators of 1890 having only rejected the Massiani claim for lack of *probative document* retained by the Venezuelan administration, an arbitrator can but condemn the Venezuelan Government to reimburse the Massiani heirs for the sum which it has recognized itself as due him.

In the course of our discussions relative to this claim Doctor Paúl declared to me that he would have been disposed to accord an indemnity equal to the sum included in the liquidation of 1890 if the interested party had filed a new claim bearing upon the refusal of the Government to deliver the document which was demanded of it.

I replied that this was a simple question of form, that the exposé made in the letters of M. Massiani of his numerous proceedings take the place of the formal claim, and that one could not, in order to reject his proven claim, base his action upon the moderation the claimant had displayed in not asking, besides the sum due, a special indemnity for the veritable denial of justice which this refusal in question constituted. In according to the heirs of Massiani only 270,813.56 bolivars of the 692,740.48 bolivars demanded, I have sought to restore

them possession of that which is incontestably due them. I have laid aside all the demands which, not being, perhaps, without some foundation, are, however, not established by sufficient proofs.

We ought to consider that, according to the terms of the protocol, this indemnity must be paid in bonds of diplomatic debt and not in gold. From the fact of this concession, graciously granted to the Venezuelan Government by the French Government, to allow it to settle its debts with more facility the amount of the indemnity finds itself in reality reduced.

At this time the true value of these bonds is half their nominal value.

The payment of the Massiani heirs of the indemnity of 270,813.56 bolivars would then permit the Venezuelan Government to free itself by 125,000 bolivars of a debt amounting in reality to 270,813.56 bolivars.

MARCH 12, 1904.

ADDITIONAL OPINION OF THE VENEZUELAN COMMISSIONER.

From the extract of the oral proceedings at the sitting held in Caracas on August 28, 1903, when the commissioners for France and Venezuela heard the claim entered by Felipe A. Massiani for the sum of 692,740.80 bolivars, it appears that the French commissioner held that the sum of 270,813.56 bolivars, representing the principal, should be awarded without interest, because of the negligence for many years shown by the claimants in defense of their rights. The same commissioner also rejected other specifications contained in the claim, as he did not consider them sufficiently established. The undersigned, as the commissioner for Venezuela, then and there rejected the claim in its entirety, basing my contention as shown in the opinion which, translated into English, I submit herewith, in these three main points, to wit:

First. Incapacity for want of proper jurisdiction of this arbitration commission to hear the claim in question, because Felipe A. Massiani and the rest of the claimants represented by him are Venezuelans, having been born within Venezuelan territory.

Second. Because there exists a condition of *res judicata* as regards the object of the claim in that portion dealing with the capital of 270,813.56 bolivars as submitted by the French commissioner; and

Third. Because the document produced by Felipe A. Massiani to prove the existence of the debt lacks sufficient force to establish beyond dispute the validity of the claim, such document being insufficient to overrule the award of the French-Venezuelan mixed commission of 1888-1890, decreed in the matter of the claim entered before said commission by the father of Felipe A. Massiani, demanding the same amount.

The Venezuelan citizenship by birth of the claimants, Carmen Silva de Massiani, the widow of Tomás Massiani; Felipe A. Massiani, Ascen-

ción Massiani de Phelan, Nuncia Massiani de Orsini, and Luis A. Massiani, children of Tomás Massiani; and the minor children of Isabel Paran de Massiani, Antonio José, Tomás María, Mercedes, Luis Enrique, Carmen de Lourdes, and Gloria, born during her marriage to Antonio Massiani, deceased, the son of Tomás Massiani, such minors being the grandsons of the latter, is fully established in this case and is not a point open to discussion. All of them, during a succession of years embracing three generations, have not only had one common native land, but one common city of birth, Carúpano, formerly a fishermen's town, where Tomás Massiani met and married, in 1858, Carmen Silva. The domicile of the widow has always continued to be the same as that of her forefathers and that of all her children and grandchildren. From the moment of her widowhood she recovered her Venezuelan nationality, according to the provisions of article 19, section 2, Title I, Book I of the civil code of Venezuela,[a] in force at the time of the death of Tomás Massiani, which took place in Carúpano on October 9, 1901. Her daughters, Ascención Massiani de Phelan and Nuncia Massiani de Orsini, do not appear to have lost their original nationality, as the foreign nationality of their respective husbands has not been established.

It is a generally-established principle that the individual status is governed by the laws of the country of which a man or woman is a citizen or subject, and the nationality in the case of the widow and children of Tomás Massiani as regards Venezuela is fixed by birth or *lex loci*. The conflict between French legislation which maintains the principle of descent, or *lex sanguinis*, and the Venezuelan laws, which support the principle of the birthplace, has already been the subject of learned discussions by mixed tribunals, when it has been invariably decided that the conflict is controlled by the law of domicile, and in conjunction with this ruling the no less weighty doctrine that in such controversies the principle that in the event of double citizenship, no country can claim for a person having the nationality of the respondent country, but it may claim against all other countries.

Bluntschli (International Law, section 374) states the following:

> Certain persons or families may in rare instances be under the jurisdiction of two or even a larger number of different states. In case of conflict the preference will be given to the state in which the individual or family in question have their domicile; their rights in the state where they had no residence will be considered suspended.[b]

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[a] Art. 19. La venezolana que se casare con un extranjero se reputará como extranjera respecto de los derechos propios de los venezolanos, siempre que por el hecho del matrimonio adquiera la nacionalidad del marido y mientras permanezca casada.

[b] Certaines personnes ou familles peuvent exceptionnellement être ressortissants de deux états différents ou même d'un plus grand nombre d'états.

En cas de conflit, la préférence sera accordée à l'état dans lequel la personne ou la famille en question ont leur domicile; leur droits dans les états où elles ne résident pas seront considérés comme suspendus.

The same opinion is held by Twiss, "Law of Nations," pages 231–232.

Moore, Int. Arbit., vol. 3, page 2454, in the cases of Lucien Lavigne, No. 11, and Felix Bister, No. 20; decision of Arbitrators, Spanish Commission, (1871), April 27, 1878, says:

> The act of Congress of February 10, 1855 (10 U. S. Stat. L., 604), which provides that persons heretofore born, or hereafter to be born, out of the limits and jurisdiction of the United States, whose fathers were or shall be at the time of their birth citizens of the United States, shall be deemed and considered and are hereby declared to be citizens of the United States, can not operate so as to interfere with the allegiance which such children may owe to the country of their birth while they continue within its territory.
>
> Supposing, finally, that one individual united in his person several nationalities, it would be necessary to apply the law *best agreeing with his actual position*, otherwise the question would be insoluble. (Heffter, Paris, 1866, p. 74.) [a]

It was under circumstances similar to those of the present claimants that the mixed American and Venezuelan commission, acting under the protocol of December 5, 1885, settled the question of double nationality in the case of Narcissa de Hammer and Amelia de Brissot, both born in Venezuela, both widows of United States citizens, and both having resided in Venezuela during their married lives, both having had children born in the same country, both claiming in behalf of their respective children, and both having continued to reside in Venezuela after the death of their respective husbands. The unanimous decision of the commission was that they had no jurisdiction to hear and decide the claim. (See Moore, Int. Arbit., vol. 3, pp. 2456–2461.)

Many other analogous cases could be cited to corroborate the principle involved in this question of jurisdiction, but they are well known to the honorable umpire, who has quoted them in enlightened awards that in his capacity of umpire he had occasion to render in the claims of Mathison against the Venezuelan Government before the British-Venezuelan commission, created by the protocol of Washington on February 13, 1903, and in his award in the case of Stevenson against that Government before the same commission. (Venezuelan Arbitrations of 1903, Ralston's Report, pp. 433–438 and 442–455.) The Hon. Jackson H. Ralston, umpire in the Italian-Venezuelan Commission under the Washington protocol of February 13, 1903, rendered similar decisions in the claims of Miliani, Brignone, and Poggioli. (Ralston's Report, pp. 715–720, 759–762, 866.)

The learned commissioner for France makes an issue of the French nationality of Tomás Massiani, who was the husband of Carmen Silva de Massiani and the father of Felipe A. Massiani and his brothers and sisters, to maintain that the claim entered by the latter before this

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[a] Supposé enfin qu' un individu réunît en sa personne plusieurs nationalités distinctes, il faudrait appliquer les lois qui s'accorderaient le mieux avec sa position actuelle; autrement la question serait insoluble.

commission originated during the life of their father; that the injured rights are those of a French citizen, and the mixed commission created by the Paris protocol dealing with the claims for indemnification entered by French citizens "is qualified to hear the present claim without *taking into consideration the citizenship of the heirs of Tomás Massiani.*" Such opinion can not be maintained in the presence of the strict terms of the Paris protocol, which vest this commission with but limited authority to investigate and decide the indemnification claims *entered by Frenchmen.* When the terms of a convention have been clearly and precisely stated, there is no room for interpretation, but they must be applied with strict adherence to the meaning of the words. The respective article of the protocol states "claims for indemnification entered by Frenchmen." Entered before whom? Before the commision. Entered by whom? By Frenchmen, and under no condition by the heirs of French citizens, no matter what the nationality of such heirs may be. Nor, how could it be possible that because there exists a right which has passed to a Venezuelan citizen or an English or Chinese subject by descent from a French citizen, the country of which the deceased was a citizen, should arrogate to itself the authority to enter an action as a claimant against Venezuela, if the claimant is a Venezuelan, or to invoke the protecting action of England or China in case the owners of the credit or of the injured right be an English or Chinese subject? Such anomalies can not exist within the precedents and principles of international law. It is indispensable that the claim in its origin should have belonged to a French citizen; and, furthermore, that it has continued to be the property of a French citizen until the very moment in which by virtue of a convention entered into by the two countries such *claim is entered before the proper commission* to be investigated and decided upon. Countless decisions of international commissions confirm this as the only possible rule to maintain the jurisdiction of such courts within the limits which their own nature and the ends to be served by them mark as indispensable for the performance of their legal functions.

The right of France to intervene on behalf of a French citizen, in case Tomás Massiani should have entered before his death a claim against the Venezuelan Government, would have ceased to exist on the day the claimant died, if he had not left either ascendants, descendants, or collateral heirs, or if he had not been married. It would also have ceased, if his widow or the ascendant or descendant heirs should have deprived the country of the husband or father of the right to intervene by acts of their own volition or because they lack the personal status indispensable to appear before this commission and be awarded indemnities which the commission can not grant to other than such persons as enjoy solely French nationality established beyond dispute.

The commissioner for Venezuela, in support of this right application of Article I of the Paris protocol, adduces the following authorities:

Sir Edward Thornton, umpire in the case of M. J. de Lizardi against Mexico, entered by his niece María de Lizardi del Valle, wife of Pedro del Valle, makes the following statement:

As, therefore, Mr. Lizardi's niece is not a citizen of the United States, and as she would be the beneficiary of whatever award the commission might make, the umpire is decidedly of opinion that the case is not within the jurisdiction of the commission. Even if the uncle of Mr. Lizardi had been a citizen of the United States, which the umpire does not admit, whatever may have been the merits of the case, the jurisdiction of the commission would have ceased on the death of Mr. Lizardi. (Moore's Int. Arbit. vol. 3, p. 2483.)

In the claim of Oscar Chopin against the United States, [a] under the convention of January 5, 1870, entered in his own behalf and the name of three heirs to Jean Baptiste Chopin, a French citizen, resident of Louisiana, who died in 1870, leaving three other heirs, all born in the United States, as a portion of his estate, the claim in question, the counsel for France withdrew that portion of the claim representing the share of one of the four heirs of Jean Baptiste Chopin on the grounds that such heir had married a citizen of the United States, thus clearly recognizing the principle that the right to an indemnification is governed by the legal and individual interest of the beneficiary and not by the original wrong or the damages sustained by the French nationality.

In the case of José María Jarrero under the resolution of Congress March 3, 1849, for the settlement of the claims of the United States against Mexico, the original claim was in favor of a citizen of the United States, but before the conclusion with Mexico of the treaty which created the commission such claim passed to a Mexican citizen. The commission disallowed the claim and made the following statement:

It matters not that the claim was American in its origin. It had ceased to be American at the date of the treaty, and the holder of it could not invoke the interposition of our Government for his protection. (Moore, Int. Arbit. vol. 3, p. 2325.)

Particular mention should be made of the excerpts found in Moore's International Arbitration, vol. 3, page 2388 of the "notes" published by one of the members of the commission created by the convention between the United States and France July 4, 1831, showing that this matter was considered by said commission.

It was of course indispensable to the validity of a reclamation before the commissioners that it should be altogether American. This character was held by them to belong only to cases where the individual in whose right the claim was preferred had been an American citizen at the time of the wrongful act, and entitled as such to invoke the protection of the United States for the property which was the subject of the wrong and where the claim *up to the date of the convention* had at all times belonged to American citizens.

Again—

It was necessary for the claimant to show not only that his property was American when the claim originated, but that the *ownership* of the claim was still American when the con-

[a] Moore, Int. Arb., p. 2506; page 83, Boutwell's report, House Ex. Doc. No. 235, Forty-eighth Congress, second session.

vention *went into effect.* * * * Nor could a claim that had lost its American character ever resume it if it had heretofore *passed into the possession* of a foreigner *or of one otherwise incapacitated* to claim before this commission.

The umpire above mentioned, Sir Edward Thornton, in the case of Herman F. Wulff against Mexico (Moore, pp. 1353–1354, note), decided:

The umpire can not acquiesce in the arguments put forward by the counsel for the claimant, *whoever that claimant may be.* He is of opinion that not only must it be proved that the person to whom the injury was done was a citizen of the United States, but also that *the direct recipients* of the award are citizens of the United States, *whether these beneficiaries be heirs* or, in failure of them, creditors.

In the case of Silvio and Americo Poggioli, a native of Italy and an Italian subject, before the Italian-Venezulean commission under the protocol of February 13, 1903, the umpire, the Hon. Jackson H. Ralston, decided in the matter of the claim of Americo Poggioli, who died before the convention took place, as follows:

However this may be, the claim of Americo Poggioli died with him, so far as this commission is concerned, as his only heirs consist of his widow and children, and all of whom are Venezuelans by birth. The claim of his heirs is therefore Venezeulan, under the rules heretofore adopted by the umpire, particularly in the Brignone and Miliani cases. (Venezuelan Arbitrations of 1903, Ralston's Report, p. 866.)

The decision quoted by my learned colleague in his brief, rendered by Mr. Filtz, umpire in the French-Venezuelan mixed commission, which met in Caracas under the Washington protocol of February, 1903, establishing that—

the condition of French citizenship of Tomás Massiani had not been disputed; that the claim in reference had been entered by him and not by his heirs, and that there was no need to examine whether said heirs, who, in effect, have a double citizenship, have shown or not during their life their preference for one or the other, and that therefore he adjudged the claim to belong to the class under the Washington protocol and accordingly awarded Tomás Massiani and sons an indemnification of 19,900 bolivars—

is not a precedent to be invoked. Such a decision is exclusively based upon the fact that the claim was presented to the minister of France in Caracas by Tomás Massiani, father himself, and such is not the case with the present claim entered before this commission by the widow and children of Tomás Massiani. On the other hand, the awards of Mr. Filtz, as umpire in the French-Venezuelan Commission, be it said without the desire to cast the slightest reflection upon his integrity, are noticeable because they are based solely on his own appreciation of the facts, without expounding any doctrine whatever, without reasoning the conclusions, which in the majority of cases are contrary to the rules and precedents established as fundamental principles of international law by the most eminent authors, expounders, and authorities on the subject having a universal reputation. Such decisions lack force as compared with the opinions quoted from among many others no less weighty that could be cited.

Tomás Massiani died in the city of Carúpano during the month of October, 1901, as shown by the death certificate in this case, before the conclusion of the Paris protocol of February 19, 1902, creating this commission, and without having entered before any representative of France, nor later before the mixed commission of 1888-1890, any claim whatever that may be construed to be the same entered before this commission by his widow and children in their capacity of heirs.

The present claim, as regards that portion of the same for 270,813.56 bolivars, which has been admitted by the French commissioner, originated, and, it may be said, was born in Felipe A. Massiani, in his own behalf, and in behalf of his mother, Carmen Silva de Massiani, and his brothers and sisters, on May 27, 1903, date of the document or certification issued by Mr. Manuel Fombona Palacio, chief of the bureau of foreign public law (*director de derecho público exterior*) in the ministry of foreign relations of Venezuela. The claimants base their pretentions in such documents, and as Felipe Massiani states in the communication to the French minister in Caracas, dated on August 4, 1903, that the mixed commission of 1888-1890 not having passed judgment upon his father's claim, because of the facts and causes stated, it becomes necessary to conclude that those same facts are at present the object of a new claim, and ends by asking the French minister to transmit to the commissioners the subjoined document, which is sufficient to establish the proof of the grounds for *the claim he had entered before the commission in behalf of his mother, his brothers and sisters, and in his own behalf.*

The foregoing shows that neither as heirs of Tomás Massiani, because he was a French citizen, his widow and children being of Venezuelan nationality, in the case, which has never nor could ever have existed, of Tomás Massiani having presented such claim, because he died before the date of the Paris protocol, nor entering the claim on their own behalf, as the case is, the widow and children of Tomás Massiani are not qualified to appear before this commission as claimants against the Venezuelan Government, which is that of their own nation and to which they owe allegiance in conformity with the law. The commission therefore has no jurisdiction to hear the claim for indemnification that such Venezuelan citizens have entered before the commission in their own name and in behalf of the estate, based upon certain vested rights originating in the deceased.

Now the commissioner for Venezuela will discuss the second point upon which he has based his opinion, i. e., that because there exists a condition of *res judicata* as regards the object of the claim in that portion dealing with the capital of 270,813.56 bolivars, as admitted by the French commissioner, such portion of the claim must also be rejected. As it has been shown by the opinion rendered at the session of August 28, 1903, Felipe A. Massiani, in his own behalf and as the

representative of his mother and children, pretends that this commission should examine some new documentary evidence he has obtained after his father's death to the end of establishing that the Government of Venezuela owed his predecessor in interest a certain sum, object of the claim entered before the French-Venezuelan Commission which met in Caracas in 1888-1890 in compliance with the convention entered into between Venezuela and France in November, 1885, said commission having disallowed the claim because—

the said claim, amounting to 301,784.96 bolivars, was disallowed because the interested party did not produce a sufficient document on which to base his pretention.

I submit herewith copy, both in Spanish and in English, of the minutes of the oral proceedings of said mixed commission, had on July 7, 1890, when all the claims of Mr. Tomás Massiani were examined, the commissioners dismissing one for 301,784.96 bolivars for the reasons before stated. The disallowance, as shown by the arguments in support of such ruling, was not based upon want of jurisdiction, nor on any other grounds which may give rise to the contention that the claim had not been examined on its merits. It was based upon no other grounds than the failure of the claimant to establish the pretended right or indebtedness, as the document submitted did not have sufficient weight to operate against the respondent party. Such decision constitutes the *res judicata*, which all the positive as well as the common law of nations hold to have an irresistible force, as shown by the principle *res judicata pro veritate habetur*.

The internal legislation of Venezuela affords a remedy against any judgment passed by the courts of the country to obtain in specified cases the reversal of such judgment, provided the remedial action is entered within three months after notice has been had of the sentence making the award, when the grounds for reversal are based upon the fact that the other party withholds or retains in his possession a *decisive document* favorable to the action or exception taken by the plaintiff or based upon an act of the opposing party which prevented that such *decisive document* was produced in due and proper time. In such cases, upon introducing the allegation of the retention or act on the part of the other party preventing the production of the document, if such decisive document is not produced, a statement must be made of its contents and of the name of the person who should deliver up the same. (All codes of civil procedure of Venezuela have uniformly had the same provisions.)

The remedy against the judgment of a court having local jurisdiction only can not find application when dealing with an award made by an international court specially constituted by the agreement of the high contracting parties to settle in a definite manner the claims of the subjects of one country against another, claims that have already been prepared, with the proper documents, by the interested parties,

and which, upon being filed before the arbitration commission, must be submitted with all the necessary evidence, or produce such evidence during the proceedings or hearings of the claim, and to this end such courts appoint certain fixed dates within which such testimony or evidence must be duly submitted.

Article 3 of the convention between France and Venezuela of November 26, 1885, under whose provisions the mixed commission of 1888–1890, which met in Caracas, disallowed the claim of Tomás Massiani, reads as follows:

> Claims subsequent to 1867–68 will be definitely settled by a mixed commission consisting of one member for each part.
>
> As soon as the work of the commission ends, and within three months following its adjournment, the Government of Venezuela shall issue a sufficient number of new bonds to equal the amount of the indemnities awarded, drawing the same amount of interest (3 per cent) from date of issue. Said bonds shall be redeemed, when the holders desire it, at the same time as the original bonds, and in all cases in accordance with the prescriptions of Article II of this convention.

It appears from even a cursory glance at the foregoing article that the intention of the high contracting parties was that the claims subsequent to 1867–68 *should be definitely settled* by a mixed commission, and the bond issue to be made by the Government of Venezuela to meet such obligation was limited to the amount that said commission should award the claimants.

It is a well-established principle, admitted in all legislation, and peculiarly and more forcibly applicable to the awards of arbitration courts created solely for the purpose of deciding *definitely* the settlement of pending questions or claims, that the authority of the *res judicata* applies in the first instance *to that which is the object of the claim*, when a judgment has been passed upon the essential points of such claim.

It is therefore evident that this commission can not assume authority to review the award or sentence passed by the mixed commission of 1888–1890 upon the claims of Tomás Massiani, wherein the claim against the Venezuelan Government for 301,784.96 bolivars was rejected because the liability had not been sufficiently established, and that same claim is the object of the present action of the heirs of Tomás Massiani. Under such circumstances the claim must be entirely disallowed.

In regard to the third point in my opinion, that the document produced by Felipe A. Massiani is not a *decisive document* to establish the existence of the debt or liability in question, it suffices to compare the two balance sheets produced, the one essentially different from the other, and to take into consideration that the certificate of the auditor of the central bureau of accounts (*Contador de la Sala de Centralización de Cuentas*) at the bottom of the balance from the books in his archives can only be construed as an evidence that said books showed that on

the 23d of June, 1869, the date of the last entry in the account current, there was a credit in favor of Tomás Massiani and against the Venezuelan Government for the sum of 270,813.56 bolivars. The certificate in question does not throw any light on further transactions on the same account current from June 23, 1869, until August 12, 1890, date of the certificate, or a lapse of time covering a period of over twenty-one years. It is not possible to admit that during that period the account was inactive, or that Tomás Massiani did not take any steps to collect the balance due him, or that he did not get any voucher to safeguard his rights. Notice should be taken of the fact that such period of twenty-one years—which in all legislations is sufficient to make null by prescription any personal liability or debt, and which is more than sufficient to prescribe a debt growing out of a balance in a current account—lapsed before the meeting at Caracas of the mixed commission of 1888–1890, and that Felipe Massiani was unable to produce before the commission sufficient proof to establish his credit, which should have appeared from his own books and papers. If such omissions are to be ascribed to negligence, as stated by the French commissioner, it is *culpable negligence* in the case of such an important amount, subject, according to the codes of laws of all countries, to suffer the consequences of the abandonment of property or private rights, and such consequences are to be declared by the courts to have lapsed or to be nonexistent. Such was the case in the matter of the claim of Tomás Massiani before the mixed commission of 1888–1890, which released the Venezuelan Government from the payment of the amount claimed and definitely settled all further controversy in the matter.

Before coming to a close I wish to rectify the statement made by by learned colleague in his opinion, that during our discussion I had stated that I should have been disposed to grant an indemnification equal to the amount shown by the balance sheet of 1890, if the parties concerned had entered a new claim based on the refusal of the Government to deliver the document which had been asked for. There exists, no doubt, a misunderstanding of what I may have said to my learned colleague in reference to the faulty presentation of the claim, such as it had been made, as I must have limited myself to saying that a new claim based upon the fact of the refusal of the Venezuelan Government to deliver a *decisive document*, which, it could be established, was *deliberately withheld* from a creditor, might have been admissible on the part of the Massiani heirs, putting aside the question of nationality, and in that case such claim might have been for an indemnification for damages, as in such form it did not conflict with the validity of the sentence of the mixed commission of 1888–1890, which is beyond our commission. Between such a statement made during our discussion and to admit as established the allegations of the claimants and to be willing to allow an indemnity there is a remarkable difference.

I therefore maintain in all its points my opinion that this commission has no jurisdiction to hear the claim of Felipe A. Massiani entered in his own behalf and as the representative of his brothers and sisters, because they are all Venezuelan citizens, and, in the second place, because there is a condition of *res judicata* as regards the object of the claim in that portion admitted by the French commissioner, and that the document on which the claim is based lacks the necessary force to establish a *decisive* proof, and for this reason it must be rejected on its merits.

NORTHFIELD, VT., *February 9, 1905.*

ADDITIONAL OPINION OF THE FRENCH COMMISSIONER.

After having read the additional memoir presented by my honorable colleague I can only maintain the conclusions of the prior memoir. To reply, it would be necessary for me to reproduce the explanation which I have already given superabundantly. I will confine myself, then, to a few observations.

This commission seems to me competent to pronounce upon the Massiani affair for the very reason of the French nationality of all the members of the Massiani family. All the Massianis are incontestably French; it would be then contrary to the protocol of February 19, 1902, which speaks of all the claims presented by Frenchmen, to refuse them the benefit of this exceptional jurisdiction opened by the very protocol to all those who are French, without there being need of examining if they enjoyed concurrently another nationality.

My colleague tries to combat my opinion, based upon the strict text of the protocol by a great number of citations of authors and of precedents. I will content myself by remarking to the umpire that the precedents of international law have no value except in so far as has been demonstrated by a parallel exposé of the facts that the cases are identical. I have, then, judged it useless to refer to treatises of international law with a view of looking for precedents favorable to my argument, which I should have been able without doubt to find in as large numbers as has my colleague. I have considered it sufficient to produce one precedent, the value of which is singular and incomparable, since the persons considered are exactly the same, and I call the attention of the honorable Mr. Plumley to the grave inconveniences which would result from varying the jurisprudence in like conditions. There would be reason to deprive the arbitral decisions, which one might tax with a lack of seriousness and inconsistency, of all their authority. This precedent has consequently disturbed my honorable colleague, since he has thought he ought to declare, to lessen its value, that the awards rendered by Mr. Filtz had not the same value as the awards by the other arbitrators. I think I ought

to protest against this allegation. Mr. Filtz, a magistrate who has grown gray in the service, has shown himself a perfect arbitrator, having, as he claims, for the only rules of conduct good sense, equity, and the protocol.

The awards rendered by him are unattackable and have the same authority as every other arbitral sentence; they have a greater authority, perhaps, here since they have been rendered in favor of the same persons with whom we are concerned. But since Doctor Paúl attaches a particular importance to precedents and thinks that one just cause does not defend itself sufficiently by its exposé alone, I present another, whose authority I think he will not contest, since it has been established by himself. In the course of the sitting of August 6, 1903, of the commission of which we both had the honor to join, and of which the present commission is but the natural conclusion, we rendered the following sentence:

There is accorded Mr. Charles Daniel Piton, and to the Misses Emilie Alexandrine and Isabelle Eugénie Piton, the sum of 228,714.64 bolivars.

But I will remark to the umpire that Mr. and Mrs. Piton claimed this sum on the part of their maternal grandfather because of a contract of the date of July 28, 1856, and a ministerial decision of January 7, 1868. This grandfather, Mr. Lemoine, a Frenchman by birth, had been dead for many years when his grandchildren, in 1903, presented their claim as heirs, but these three grandchildren—all three born in Venezuela of a Venezuelan mother—like the Massiani heirs, were all three Venezuelans by the Venezuelan law. Why then refuse to the Massianis that which has been accorded to the Pitons?

The umpire will kindly note, also, that not only from the point of view of nationality, but also from the point of view of the date, the Piton claim is like the Massiani claim. So far as concerns the plea of *res judicata* raised by my honorable colleague, I am content to recall to the umpire that the arbitrators of 1890 were not able to take it into consideration, since the interested parties were unable to obtain until thirteen years afterward, by surprise, without doubt, the document which permitted them to make their claim of value. They had no appeal from the mixed commission of 1890 to the Venezuelan tribunals, which would not have had jurisdiction, but to this commission, appointed to examine all the claims of Frenchmen, of whatever nature they might be. It is not possible to forget that the Venezuelan Government had been put upon notice by the interested parties to submit at the right time the said document and that it has not done so. Is not this point a denial of justice of the first class?

Finally, I consider that it is superfluous to discuss the value of the document which constitutes the acknowledgment of the debt. It is sufficient to read it to be convinced.

NORTHFIELD, *February 11, 1905.*

OPINION OF THE UMPIRE.

Thomas Massiani and Benito Massiani, both Frenchmen, married, and residing in Carúpano, State of Sucre, in the United States of Venezuela, formed a copartnership in trade at said Carúpano under the name and style of Massiani Brothers, on the 14th day of June, 1864, which continued until its dissolution by mutual consent on the 17th of May, 1868, which dissolution of partnership was by lawful procedure. Thomas Massiani remained in charge of the business, assuming all partnership liabilities and enjoying all partnership assets, agreeing to pay to Benito Massiani for his share of the company assets 82,000 pesos, to be paid in the city of Paris within the term of five years in five annual equal parts, with interest annually at 5 per cent.

Prior to the year 1870 Benito Massiani died. His widow and children, resident in Paris, received of Thomas Massiani the sum of 230,000 francs, being the sum due for the remaining interest of the estate of the deceased Benito in the aforesaid assets. This payment is shown by a receipt signed by the widow, Mercedes Cova, at Paris, in France, on September 21, 1871; also signed by Emilio Massiani, son of Benito, who had attained his majority.

During the years 1863 to 1869, both inclusive, and as well in the years 1870, 1871, 1872, 1879, 1885, 1892, and 1899, the Government of Venezuela enjoyed loans and payments on requisition or otherwise from the said Massiani Brothers, the said Thomas Massiani, and the Thomas Massiani Company, which latter existed part of the period covered by the years aforesaid.

The principal sum in issue, and in fact the only sum, by the holding of the honorable commissioner for France, now in issue, accrued between the years 1863 and 1869, both inclusive, and amounted to the sum of 270,813.56 bolivars, this sum being for supplies and cash furnished to the maritime custom-house of Carúpano and to certain chiefs of the national forces, both having authority to pledge the credit of the Government.

Doctor Urbaneja, attorney for Thomas Massiani, in 1890, July 19, stated to the honorable mixed commission of France and Venezuela, then sitting in Caracas, that the sum due to Thomas Massiani at that time was 301,784.96 bolivars.

The sum presented, in fact, to the mixed commission of 1888-1890 was 351,449.80 bolivars, and on the 7th of July, 1890, the said commission awarded to Thomas Massiani 49,666.84 bolivars, and at the same sitting the said commission disallowed the claim for 301,784.96 bolivars for the reason that the claimant had not produced a sufficient document in support of his claim. The sum allowed by the commission was one recognized as existing by the Government of Venezuela, and there was then pending with the minister of hacienda that portion of the claim which was disallowed by that commission. The

minister of hacienda was asked for the dossier containing the necessary proofs and for his authentication thereof, but on a too casual examination, he had reported to that commission that there were no such papers in his office. It was on receiving this information that the commission dismissed the case. Doctor Urbaneja, attorney aforesaid, learning of this statement of the minister of hacienda and of the action of the commission on the claim, asked the commission to delay their final action on the case and repaired directly to the office of the hacienda and insisted upon further examination, which was had, and in the archives the accounts were found. Doctor Urbaneja further insisted that the minister of hacienda correct his erroneous statement to the commission and that he also send the accounts, duly liquidated, to the minister of foreign affairs as the competent medium for their transmission to the commission. Doctor Urbaneja notified the commission of these supplementary facts and requested it to ask the señor minister for foreign affairs to produce the papers then in his possession. He urged a reconsideration by the commission of the case and gave cogent reasons why it should thus act. This request to reopen the case and receive this new proof was made July 17, 1890.

The important papers, properly certified to, were sent by the minister of hacienda to the minister of foreign affairs, but they did not leave the foreign office, were not presented or considered by the mixed commission, and there was no reconsideration of the case, and the commission dissolved without changing its first action. During all of the time of its sitting the accounts required were in the archives of the minister of hacienda and under the control of the ministry of Venezuela, and there was no reason why they were not produced, except that the examination made by the minister had been too casual to develop the accounts as being in the archives.

These papers were not, in fact, passed by the minister of hacienda to the foreign office until August 23, 1890.

In accordance with the arrangement with Massiani Brothers and Thomas Massiani, made by the maritime custom-house of Carúpano, these credits were to be reduced and canceled by an allowance on the import and export duties otherwise payable to the custom-house by Massiani Brothers and Thomas Massiani, and this plan of payment existed until October 22, 1872, when the minister of hacienda passed a resolution suspending the payment of all obligations based upon the custom-houses of the east, including the custom-house of Carúpano. Up to that date Massiani had been receiving pay in small amounts from time to time.

When the society of Massiani & Co. was organized at Carúpano the umpire has not learned, but on May 8, 1893, this company, composed of Thomas Massiani and his three sons, Luis Antonio, Antonio José, and Felipe Antonio, was dissolved by mutual consent under

lawful proceedings had, and the business continued under the mercantile name of Thomas Massiani.

On October 9, 1901, the said Thomas Massiani deceased at Carúpano, leaving a widow, Carmen de Silva, the two sons, Felipe A. and Luis A., his two married daughters, Ascensión N. Phelan and Nuncia de Orsini, and the widow and children of Antonio José. Antonio José died March 12, 1900.

On the 30th day of May, 1903, Luis Antonio, in his own right, Augustine Orsini, in representation of his wife, Señora Nuncia Massiani, Isabel Pavân de Massiani, widow of Antonio José, proceeding in representation of her minor children, Thomas, María, Mercedes, Antonio José, Gloria Margarita, Luis Enrique, and Carmen de Lourdes, acting with Señora Carmen de Silva Massiani, widow of the late Thomas Massiani, and Felipe Antonio Massiani, gave full power of attorney to Dr. Cárlos F. Grisanti against the respondent Government in the matter of the claim. The widow of Thomas, Carmen de Silva Massiani, at this time resided in Port of Spain, Trinidad.

The amount claimed of the respondent Government was 301,784.96 bolivars, and to this it is claimed should be added 39,952.40 bolivars, also 35,786 bolivars, made up of 3,200 bolivars, for cash and supplies furnished in 1885 to the titular Government, 14,136 bolivars to the successful Legalista revolution of 1892, and 18,400 bolivars furnished in 1899 to the successful Restaurador revolution.

On May 27, 1903, the certified copy of liquidation prayed for by Thomas Massiani May 8, 1890, and passed into the hands of the minister of foreign affairs by the minister of hacienda on the 23d of August, 1890, was furnished to Felipe A. Massiani and by him was presented to the commission sitting in Caracas in 1903.

But there were certain errors in the dossier as then presented to Felipe, as he claimed, and he presented a corrected copy to the citizen minister of hacienda on the 30th day of May, 1903, calling attention to the errors which were marked in red ink on the copy accompanying his communication, and he prayed that a certified copy, corrected in accordance with his suggestions, be returned to him. This request was referred by the minister of hacienda to the office of foreign affairs for the rectification desired.

It is claimed by Felipe Massiani, and is not questioned, that Thomas Massiani and his wife were married without any special agreement having been made as to the management of their property, and that in consequence there existed between them a conjugal society which makes common by halves to each the gains or benefits obtained during marriage. He refers for his authority to article 1369[a] of the

[a] Art. 1369. Entre marido y mujer, si no hubiere convención en contrario, existe la sociedad conyugal, cuyo efecto es hacer comunes de ambos por mitad las ganancias ó beneficios obtenidos durante el matrimonio, según lo establecido en el párrafo 3° de esta sección.

civil code of Venezuela, in force May 18, 1903, which is said to correspond with 1393 of the French civil code. The claim before the present commission is property gains and is controlled by that law. Under these circumstances the widow is entitled by the Venezuelan law to six-twelfths of Thomas Massiani's estate as her half thereof and to one-sixth part of the remainder of his estate by inheritance, she taking equally with each of the five children. He refers to articles 717 and 718 of the Venezuelan code for his authority.

The marriage of Thomas Massiani and of Carmen de Silva occurred January 5, 1855, as is duly established by authenticated registration of the same.

By the duly authenticated registration of births at said Carúpano there were proven to be born to Thomas Massiani and Carmen de Silva as the fruit of such marriage Felipe Antonio in 1855; Ascension del Carmen, 1859; Luis Antonio, 1866; María de La Mercedes in 1871, and of Antonio José there is no record proof. Antonio José Massiani and Isabel Pavân were married April 23, 1883, and the birth and date of birth of each of their children named in the power of attorney to Doctor Grisanti are fully established by lawful evidence.

Señora Carmen de Silva, widow of Thomas Massiani, was of Venezuelan parentage, and up to the date of her marriage with Thomas she was a Venezuelan. They ever thereafterwards resided in Venezuela; their children were all born to them there and have continued to reside in Venezuela and were so residing at the time of the presentation of this claim to the mixed commission at Caracas in 1903.

It is asserted by Felipe that this claim against the respondent Government is a part of the patrimony of Thomas and that the same was transmitted at his death to his universal successors, his widow and children.

It is agreed that by the law of both countries her marriage with Thomas gave her French nationality, which continued until the death of her husband. At his death, by French law, the widow retained her French nationality, and by the law of Venezuela she was restored to her former estate as a Venezuelan.

The claimants insist that, upon the facts existing in this case, to deny them a right of recovery before this tribunal is equivalent to saying that the indebtedness of Venezuela to Thomas and his successors was extinguished by his death.

In presenting this claim to the legation of France, at Caracas, Doctor Grisanti makes the claim that the adjudication of the mixed commission in 1890, dismissing this claim, was passed on an error of fact, which error of fact arose through the statements of the respondent Government to the said commission, and through its retention of the accounts which it then disclaimed to possess. He cites article 695 of the Code of Civil Procedure No. 4.

The retention in possession of the opposing party of decisive documents in favor of the action or exception of the claimant, or act of the opposing party which has impeded the opportune presentation of such decisive document.[a]

This, as he claims, is cause for the invalidation of the judgment which follows such a situation.

The claim, 18,400 bolivars, furnished in 1899 has been presented before the mixed commission sitting at Caracas and established under the Washington protocol of February 27, 1903, and is no longer a fit subject for the consideration of this tribunal.

The sum of 14,136 bolivars paid on account of the Legalista revolution of 1892 was cared for by the round sum of 100,000,000 bolivars, which was accorded to the Government of France by Venezuela in bonds of diplomatic debts for the "insurrection events" of 1892, as it was provided might be done in article 1 of the Paris protocol of 1902.

The claim for 3,200 bolivars arising through requisition of the titular Government in 1885, and approved by certain generals having authority on June 26th of that year, was disallowed by the mutual agreement of the honorable commissioners at the sitting in Caracas for reasons to them sufficient and satisfactory.

This cause came before the honorable commissioners sitting at Caracas as a claim for 341,737.36 bolivars as the principal sum against the respondent Government and 351,003.12 bolivars as accrued interest on the same to June 30, 1903. For reasons which were satisfactory and controlling to the honorable commissioner for France he dismisses the claim for 30,971.31 bolivars, which the immediate representatives of the claimants insist were errors of omission and should have been added to the certified allowance by the Government of 270,813.65 bolivars, as he also dismisses the claim for the additional sum of 39,952.40 bolivars, which sum was not presented to the mixed commission of 1888–1890, although existing at that time and capable, as is insisted by the claimants, of being substantiated by receipts analogous to those passed upon by the Venezuelan Government; so by this holding of the honorable commissioner for France the claim is stripped of all accessories and stands at 270,813.65 bolivars, as acknowledged by the auditors of the Venezuelan treasury.

The honorable commissioner for France, governed by the reasons which he names, is of the opinion that there should be no allowance for interest on this sum, and that the only claim which he recognizes as a rightful demand upon Venezuela is the said sum of 270,813.65 bolivars, without interest.

The honorable commissioner for Venezuela rejects the claim in its entirety. (*a*) Because the claim is *res judicata*, having been refused

[a] 4a. Retención en poder de la parte contraria de documento decisivo en favor de la acción ó excepción del reclamante, ó acto de la parte contraria que pidió la presentación oportuna de tal documento decisivo.

for want of sufficient proof to sustain it; that the claimant's position, holding that the decision of the said mixed commission ought to be invalidated because of the retention in its possession by the Venezuela Government of the dossier approved by its officers and through its statement to the honorable commissioners of 1890 that it held no such document, is not well taken and can not be sustained for reasons which are in part as follows: That the certified document produced is not a *decisive* document showing the real relation of Venezuela to the claimants, since it only purports to establish by the certificate of the general auditor's office that according to the books of the custom-house at Carúpano it appeared that on the 23d of June, 1869, there was a balance in favor of Thomas Massiani of the certain amount named; and that the production of this document before this commission is inefficient to overcome the decision of the mixed commission of 1890, when especially there are to be considered all of the presumptions which arise to meet the document, which are suggested somewhat in detail by the honorable commissioner for Venezuela; (*b*) That this commission has no jurisdiction over this claim, because neither of the successors of Thomas Massiani is French by Venezuelan law, and hence, since this commission was formed only to settle claims of Frenchmen, it has no jurisdiction of a claim which is solely for Venezuelans.

The honorable commissioner for France regards the position of *res judicata* as not well taken for the reasons stated by him in detail; and he considers the jurisdiction of this commission as unquestionable, holding that the widow of Thomas Massiani and his children and representatives being French, under French law, they are those for whom France intervened by the protocol of February 19, 1902. He regards the document in question as undeniably decisive and asserts that if payments had since been made it would have been very easy to prove it by books and papers. He considers that Thomas Massiani having birth in France of French parents always enjoyed incontestable and exclusive French nationality; that the claim in question had birth during his life, and it is consequently the right of a French citizen who has been injured in his property, and hence this commission, which is to consider the demands of indemnities by Frenchmen, is wholly competent to consider and determine it. He is of the opinion that the nationality of the heirs should be put out of the case, as is asserted by Mr. Filtz under the protocol of Washington.

The honorable commissioner for France is also of the opinion that, if the nationality of the heirs is to be considered, this commission is still competent. He reasons that the heirs enjoyed two nationalities—French by French law, Venezuelan by Venezuelan law—and that the protocol in providing for the consideration of demands for indemnities presented by Frenchmen was providing for claims presented by

individuals to whom the French Government assured its protection because they were recognized by the French law as Frenchmen. It is his opinion that it is only necessary that the claimant is one whom the laws of France recognize as French, although at the same time the law of Venezuela makes the claimant a Venezuelan. He calls to his support in this opinion the peculiar wording of the Washington protocols of 1903, in regard to local legislation, and holds that the meaning and effect of the language of those protocols are to exclude from the consideration of the several tribunals constituted thereunder all recognition of Venezuelan law; and hence, what Venezuela recognizes in the matter of citizenship is not important to the determination of this question.

To the position of the honorable commissioner for Venezuela that one commission has not authority to revise the proceedings of another, he introduces the new fact, unknown to the arbitrators of 1890, which is the fact that in the archives of the Venezuelan ministry there was then an approved dossier fully supporting the claim of Thomas Massiani, the existence of which the Venezuelan Government had denied, and upon which denial the commission had dismissed the claim. He also urges that this commission has especial power to examine anew the affair submitted to the mixed commission of 1888–1890, because the protocol gives it jurisdiction to pass upon all the claims of Frenchmen, and since the sentence anterior was caused by a reason entirely different from what in fact existed; and that in equity there being incontestable evidence that the credit in fact existed at the time of its rejection, which fact was retained from the consideration of the previous commission through the action or nonaction of the Venezuelan Government, the heirs of Massiani should receive the sum which the Government of Venezuela has recognized to be due.

The honorable commissioners having disagreed as hereinbefore stated and having failed to reconcile their disagreements, they join to send the claim to the umpire for his determination and award.

An indebtedness of the respondent Government to the late Thomas Massiani in his lifetime is, without doubt, a part of the patrimony which descends to his widow and children to be distributed in accordance with the laws of Venezuela.

But the important question to be determined is, has this tribunal jurisdiction over this claim? Neither the widow nor the children are of French nationality as recognized by the laws of Venezuela. The widow was born in Venezuela, achieved French nationality by the laws of both countries when she married Thomas Massiani, but by the laws of Venezuela was restored to her quality of a Venezuelan citizen at his death. During their married life they remained in Venezuela; they were there domiciled when he died. It always has been her domicile. It is therefore her nationality, since such is the law of her domicile,

which law prevails when there is a conflict as held by the umpire in the claim of Maninat heirs[a] before this same tribunal. The children of this marriage were all born in Venezuela. By the voluntary action of the father this was their birthplace. It has always been their domicile, first through the paternal selection and later through their own choice. Hence, governed by the laws of their domicile, they are Venezuelans.

Thomas Massiani deceased prior to the convention of February 19, 1902. Therefore he could not have been considered as a possible claimant by either of the high contracting parties at the time of that convention. His widow and children being Venezuelans in the contemplation of the respondent Government, their right to the intervention of France was not agreed to by Venezuela under the terms of the protocol as held by the umpire in the claim of the Maninat heirs. His reasons for his opinion in that regard and the authorities sustaining him in his reasoning and in his opinion having been therein stated and adduced, they need no further amplification here.

This case is on all fours with that of the estate of Stevenson, decided by the umpire in the British-Venezuelan mixed commission of 1903, and reported in Ralston and Doyle's Venezuelan Arbitrations of 1903, page 438. The reasons there given and the authorities there accumulated are directly in point in this case, and he respectfully refers the parties interested for further elucidation of these points to the opinion there found. His opinion then expressed is only confirmed and established by his subsequent study, and his reasons there given are to him as convincing and controlling now as then.

The indebtedness may indeed remain, but the form of action and the forum are changed. The forum to which they must now repair is the forum of the country Thomas Massiani chose for his domicile, for his marriage, and for the birthplace of his children; there death overtook him and his ashes are there.

He voluntarily selected Venezuela as the country in which to make his fortune and to gain the properties for which the respondent Government is now the alleged lawful debtor to his estate. His life in that country was voluntary, free, a matter of choice. After weighing probabilities and anticipating results he remained. His children have attained full age and have also remained. The ties of race on the paternal side have been to them less strong than the ties which bound them to the country of their birth and the land of their maternal nationality. They have for their recourse the forum constituted for Venezuelans. They have all the rights, opportunities, and privileges common to their brethren of that nation. They easily could have been French had they preferred life in France to life in Venezuela. Having French paternity, and thereby having French nationality in

[a] Page 44.

France, they needed only to be domiciled therein to have a nationality which all the world must maintain to be French. For reasons dominant with them they have preferred to remain in Venezuela. Its laws and its courts are theirs. These they may invoke; with them they must be content.

The umpire recognizes the position of the honorable commissioner for France that the laws of Venezuela upon the question of nationality of its own inhabitants may be ignored and the laws of France be made paramount. He is also not unmindful of the reference made by the same honorable commissioner to the provisions of the protocols drawn up at Washington in 1903 in their allusion to the effect of local legislation. The definition of that particular provision in those protocols is not germane to any inquiry under the protocol of February 19, 1902, which has no such restrictive clause and which in no way and in no part suggests that each country is not entitled in every particular to equal place before the international tribunal thus constituted. The umpire has already held, in effect, in the Maninat case,[a] that to be sovereign and independent each country must be master of its internal policy and subject neither to advice nor control by any other country nor by all other countries in respect to such matters. France would not brook that Venezuela should name to her who are her citizens within her domain; she must be content to ascribe equal privilege of selection to her sister Republic, certainly while Venezuela in this regard has no peculiar or offensive laws, but rather has those which accord with the laws of nations in general.

A large number of questions naturally arising out of the facts which are grouped together in this case do not become important matters of consideration, since in the opinion of the umpire the claim does not come within the provisions of the protocol.

This claim is to be therefore entered dismissed for want of jurisdiction, but clearly and distinctly without prejudice to the rights of the claimants elsewhere, to whom is especially reserved every right which would have been theirs had this claim not been presented before this mixed commission.

NORTHFIELD, *July 31, 1905.*

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[a] Page 44.

COMPANY GENERAL OF THE ORINOCO.—No. 7.[a]

HEAD NOTES.

If there were irregularities in the procedure of the respondent government in its suit for rescission in the matter of notice to the defendant company therein, these were all cured by the subsequent appearance of its attorney in said court and by its participation in the subsequent proceedings.

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[a] EXTRACT FROM THE MINUTES OF THE SESSION OF MAY 5, 1903.

The examination of the claim of the General Company of the Orinoco was then entered upon.

Doctor Paúl read the memoir which he drew up after having gained a knowledge of the dossier. His conclusion is that the claim of the company is not well founded, and he rejects it absolutely.

M. de Peretti asks his colleague to let him take the memoir to study it before giving his opinion. Doctor Paúl agrees, and it is understood that the French arbitrator will give his opinion during the next meeting.

EXTRACT FROM THE MINUTES OF THE SESSION OF MAY 7, 1903.

M. de Peretti returns to his colleague the memoir which Doctor Paúl kindly let him take at the last meeting. He declares that, after having read it with the interest which a remarkable argument demands, he persists in the opinion which he had formed in studying the dossier of the claim of the Company General of the Orinoco, namely, that there ought to be accorded to the latter an indemnity of 7,000,000 bolivars. He bases his judgment upon the fact that the Venezuelan Government has brought in its defense no document, no proof of a nature to weaken what is said by the company.

The amount claimed by the company amounted to 7,616,098.62 bolivars, of which 5,616,098.62 bolivars represent money expended and 2,000,000 bolivars benefits not realized.

The French arbitrator does not accord at all the second of these sums, and of the first he takes out 540,000 bolivars. The company claiming upon this capital an interest of 6 per cent; while the commission has decided that it would reckon interest at the rate of 3 per cent, it is to be remarked that the company having paid interest at 6 per cent to its lenders and holders of obligation, there is no reason for a reduction on the amount which it claims under this head. There remains, then, a sum of 5,076,098.62 bolivars, of which M. de Peretti demands the increase to the amount of 7,000,000 bolivars, that account may be taken, first, of the use of the interest from July 1, 1902, to the day of the award, and second, of the depreciation of bonds with which the payment of the indemnity is to be effected.

Doctor Paúl expresses to his colleague the desire that he present, as he himself has done, an exposition of arguments upon which he bases his judgment and by which, at the same time, he would reply to the arguments presented by the Venezuelan arbitrator. Doctor Paúl would be able to take these into consideration and see if it would be possible to reach an agreement.

M. de Peretti replies that he has no other arguments to give than those furnished by the company itself, whose argument he considers as sufficient, and that consequently if his colleague does not agree to the amount of 7,000,000 bolivars, which is demanded, he appeals to the umpire.

Doctor Paúl maintains his opinion, and it is agreed that this claim be submitted to the judgment of the umpire provided by the protocol.

If there were error in the manner of issuing and handing out the rogatory commissions called for by the claimant company, it was cured by the acceptance of those commissions by the attorney of the claimant company in the manner and form as issued and handed out without objection and by his proceeding to make use of them for the purposes for which they were issued. Failure to educe evidence by means of these commissions must be charged to the action or inaction of the company's attorney, and not to the high Federal court of the government under all the circumstances detailed in this case.

If there were error in the action of the high Federal court in proceeding to final decree without serving special notice upon counsel for the defendant company therein and in proceeding to enter up such dercee without notice in fact to said company or its attorney, it was cured by the neglect of the company to avail itself of its statutory remedies by petition for invalidation to the high Federal court. Failure to seek such invalidation through the proper statutory methods precludes the claimant government from asserting any denial of justice because of such decree whereas if an invalidation had been sought and it had been denied and the grounds therefor were clearly established, it might be a sufficient cause for the action of this commission on the ground of denial of justice.

Held that there was in said decree no denial of justice under the treaty of 1885 or in virtue of the rules or principles of public law.

Held that every matter and point distinctly in issue in said cause, and which was directly based upon and determined in said decree, and which was its ground and basis, is concluded by the judgment of the high Federal court in said cause; and the claimant itself, and the claimant government in its behalf, are forever estopped from asserting any right or claim based in any part upon any fact actually and directly involved in said decree.

Held that if the treaty of 1885 were applicable to this case, then there has been no denial of justice or such a delay of justice according to usage or to law, nor such exhaustion of the legal means available to the claimants, nor such a violation of treaty or the rules of the right of nations as would admit of a favorable award if the jurisdiction of the commission were thus limited.

In the suit for rescission the Company General of the Orinoco plead no counterclaims or claims in offset; hence they were not in issue, were not litigated, and therefore are not concluded by the decree.

Such claims as might have been plead as counterclaims or claims in offset to the suit in rescission, or which might have constituted a ground for an independent action, can be presented here as substantive grounds for an award.

The date when the suit for rescission was entered in court is the day on which the issues are considered as formed between the parties. The cause of action had then accrued. For such causes as accrued after that date the court gained no jurisdiction in virtue of the suit then pending.

The actions of the claimant company and the respondent government posterior to that date are all proper subjects of inquiry and of award.

The refusal of the respondent government to recognize or permit the properties, franchises, rights, and privileges of the Company General of the Orinoco to pass to the English company which was ready to take them, was a fatal breach of the contract and charges the respondent government with all loss and damage which accrued to the claimant company on account thereof.

The fact that there was ample justification to the respondent government for taking this position as a government does not change its relation, as the other party to a contract, with the claimant company, and as such other party it must stand in the same relation as though it were not also exercising governmental functions requiring it to prevent the claimant company from completing its contract of cession.

The claimant company had several grounds of defense to the suit for rescission; among them these:

(a) No offer to restore to the company the benefits conferred by it upon the plaintiff, it being easily susceptible of proof that it had conferred many such benefits, capable of being measured in money.

(b) The respondent government could not have sustained its position that it was without fault in the premises. The opinion gives in detail the instances falling under each of these heads.

None of these facts being brought to the attention of the high Federal court, it could only pass the decree which it finally registered.

The respondent government having prevented the completion of the contract between the Company General of the Orinoco and the British company, as heretofore stated, it became responsible for the value of the concession, since this action of the respondent government resulted in practically a total loss.

Approximate equity is all that can be attempted in a case so indefinite in many of its important facts.

When this sovereign act of the respondent government was interposed, the company was in shape to be relieved of all its indebtedness through the action of the British company. There is no inequity in holding that the value of the concession was the sum which the British company was then ready to pay.

This proceeding may be considered, in a limited sense, as in the nature of a creditor's bill, the purpose of which is to recover that which is due for the benefit of the creditors.

OPINION OF THE VENEZUELAN COMMISSIONER.

Under date of July 10, 1902, Messrs. Louis Roux, Felix Joseph Vial, and André Emile Belicam, liquidators of the "Compagnie Générale de l'Orénoque," addressed a memorial to the minister of foreign affairs of France, in which they state the following:

That in consequence of the sentence given by the high Federal court in 1891, without the appearing in court of the plaintiff company (par défaut), the creditors of the said company were obliged to apply to the liquidators for the vindication of their rights against the Government of Venezuela.

Following this the liquidators present a statement of their claims, as per items below:

	Francs.	Francs.
1. Capital of the Compagnie Générale de l'Orénoque		1,500,000.00
2. To the company called "La Monnaie"	609,030.91	
Interest at 6 per cent from 1892 to date and other expenses	655,659.45	
		1,264,690.36
3. To "La Banque de Consignations"	236,356.00	
Interest at 6 per cent from April 1, 1890, to date	248,753.00	
		485,109.00
4. To Mr. Alfred Chauvelot	345,976.00	
Interest at 6 per cent, as per account	292,102.00	
		638,078.00
5. To Mr. Eugene Ferminac	101,000.00	
Interest for twelve years at 6 per cent	100,340.00	
		201,340.00
6. To Mr. Louis Roux	30,504.00	
Interest at 6 per cent, as per account	24,071.00	
		54,575.00
7. To Mr. Albert de Suin	6,264.00	
Interest	5,083.00	
		11,347.00

	Francs.	Francs.
8. To Mr. Theodor Delort	14,641.26	
Interest, ten years at 6 per cent	8,402.00	
		23,043.26
9. Liquidation bonds		157,916.00
10. Expenses of the English company	25,000.00	
Expenses of the Belgian company	100,000.00	
Interest	90,000.00	
		215,000.00
11. Sundry expenses and unpaid salaries of 1891		75,000.00
12. Interest on the capital of the company from 1891 at 6 per cent		990,000.00
Total		5,616,098.62

To this amount the liquidators further add the sum of 2,000,000 francs under the head of eventual profits, thus bringing up the total to 7,616,098.62 francs.

To this statement the liquidators annex nine abstracts of accounts, referring to seven items of the claim, Nos. 7, 9, 10, and 11 being referred to as copies taken from the books of the company.

In another memorial, presented in Paris on September 12, 1901, by the same liquidators to the minister of foreign affairs, they annex two documents, one of which contains the declaration of Mr. Andres Fiat, the former attorney of the company at Caracas, who was acting as such at the time the company was sued before the high Federal court, in which Mr. Fiat affirms—

that the sentence of said court was given without having served previous legal summons to him or to the counsel of the company, which was thus really a sentence pronounced without hearing one of the parties concerned.

The liquidators further state in said memorial that of the two lawyers who acted as counsels for the company, viz., Dr. Diego B. Urbaneja and Dr. Ramón F. Feo, the first is dead, but the second of them is still alive, practicing in Caracas, and in capacity to make a declaration similar to that of Mr. Fiat's.

Together with the aforesaid two memorials and annexed documents referred to there is a letter from Mr. Theodor Delort, dated April 14, 1903, to the French minister at Caracas, in which he says:

Before my departure from Paris, the liquidators have conferred on me the power of attorney of the Compagnie Générale de l'Orénoque, and I hold such power at the disposal of the legation. All the books, documents, and accounts of said company are in the keeping of the liquidators, who can not let them out of their possession, as the work of liquidation is yet going on, and they may be at any time summoned before the commercial tribunal of the Seine, by reason of the liability of the company in case that the result of the claim now presented against the Government of Venezuela should not be sufficient to wipe out those liabilities.

They also produce a report or memorial of 111 pages, which was deposited with the minister of foreign affairs in Paris on December 3, 1895, containing a general description of the enterprise of

"La Compagnie Générale de l'Orénoque" and a compendium of the documents which constitute the action entered on behalf of the Government of Venezuela on the 28th May, 1890, by the financial representative (fiscal nacional de hacienda) against the company for the rescission of its contract and for damages. Annexed to this report the liquidators presented 128 documents, the greater part of which are private letters, memorials, and notes, very many of which are void of legal authenticity.

The Venezuelan commissioner has examined all and every one of these memorials, notes, papers, and private letters presented to him by the French commissioner, and he has also examined the process carried on before the high Federal court against the said company during the years 1890 and 1891, as well as all the documents filed in the ministry of fomento regarding the several concessions of the contracts made by the Government of Venezuela, thus: In 1885, with Mr. Miguel Tejera for the exploitation of the natural products of the territory of the Upper Orinoco and Amazonas; and in 1887, with Mr. Theodor Delort for the exploitation of tonca bean (sarrapia) in the territory comprised between the Orinoco River, Brazil, and British Guiana; all of which contracts were transferred to the Compagnie Générale de l'Orénoque. A process took place between the Government of Venezuela and the Compagnie Générale de l'Orénoque, entered upon by the financial representative of Venezuela (fiscal nacional de hacienda) on behalf of said Government, said action having begun before the high Federal court on the 19th June, 1890, and the object of same being the following: First, the rescission of the contract signed on the 17th December, 1885, between Gen. Guzmán Blanco, envoy extraordinary and minister plenipotentiary to several courts of Europe, and Mr. Miguel Tejera, for the exploitation of all the vegetable and mineral products of the territories of the Upper Orinoco and Amazonas during a period of thirty-five years; second, the rescission of the contract signed on the 1st April, 1887, between the minister of fomento of the United States of Venezuela and Mr. Theodor Delort for the exploitation of tonca beans (sarrapia) during a period of twenty-five years on the Government lands which lie between the extreme eastern boundary of the territories of the Upper Orinoco and Amazonas and British Guiana and between the Orinoco and the Brazilian boundary line; and third, for payment by the company of the sum of 40,048.62 francs for damages owing to the nonfulfillment of said contracts and expenses and costs incurred in this process.

This suit was ended by final judgment passed by the high Federal court on the 14th of October, 1891, against the company, which was condemned to pay the sum of 40,048.62 francs as well as expenses and costs incurred in the process.

The claim which the liquidators of the Compagnie Générale de l'Orénoque pretend to make good against the Government of Venezuela is, therefore, based on a judgment passed by the high Federal court since October, 1901, which has been affirmed and has the sanction of *chose jugée*.

The contracts between the Government of Venezuela and Messrs. Miguel Tejera and Doctor Delort, which were afterwards ceded to the Compagnie Générale de l'Orénoque, were signed under the constitution of 27th of April, 1881, and the civil code which entered into operation on the 27th of January of the same year. Article 26 of said civil code states—

that any party, even if not resident in Venezuela, can be sued in the Republic for obligations contracted for in the Republic or the fulfillment of which has to be carried on in Venezuela.[a]

Article 14 of the contract signed with Mr. Tejera for the exploitation and colonization of the territories of Upper Orinoco and Amazonas, and article 15 of the contract signed with Mr. Th. Delort for the exploitation of all the tonca beans existing on the Government's lands mentioned in said contract, both expressly stipulate—

that all doubts and controversies arising from the fulfillment of both agreements are to be decided by the tribunals of the Republic according to its laws.

In the memorial presented on the 12th of September, 1901, to the minister of foreign affairs in Paris the liquidators of the Compagnie Générale de l'Orénoque contend that, according to a document which they annex thereto, containing a declaration of their former attorney at Caracas, Mr. Andres Fiat, who was acting as such at the time of the suit, judgment was passed by the high Federal court without summons having been served either on him or on the counsel of the company, which is equivalent to a sentence pronounced without hearing one of the parties concerned. This aforesaid document is signed by Mr. Fiat in St. Cloud on the 1st of May, 1901, and is legalized by the prefect of the said city and by the minister of foreign affairs of France. Mr. Fiat therein certifies—

that, while residing in the city of Caracas in 1890 and 1891, the Compagnie Générale de l'Orénoque conferred to him the necessary power of attorney that he might represent the company at Caracas in all matters.

He also certifies—

that with reference to the suit entered by the fiscal nacional de hacienda on the 23d of May, 1890, before the high Federal court, against the Compagnie Générale de l'Orénoque, for rescission of the concessions of the 17th of December, 1885, and of the 1st of April, 1887, *he was never summoned nor did he ever receive an order to appear in court*, and that the counsel of the company, Messrs. Diego B. Urbaneja and Ramón F. Feo, were never summoned either.

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[a] Art. 26. Pueden ser demandados en Venezuela aun los no domiciliados en ella, por obligaciones contraídas en la República, ó que deben tener ejecución en Venezuela.

He further certifies—

that consequently the judgment of the high Federal court was passed during his absence on the 14th of October, 1891, and that neither he nor the two aforesaid counsel of the company ever received any advice, and in this way they never knew that such sentence had been pronounced until three days after, when they saw it published in the Official Gazette of the 17th of October, 1891.

The declarations of Mr. Fiat contained in this document are inaccurate, as will now be proved. The suit was entered on the 28th of May, 1890, by the fiscal nacional de hacienda before the high Federal court, and on the 30th of the same month the president of the court issued a writ thus:

Considering that, according to the document annexed to the suit, Messrs. Andrés Fiat and Bernabé Planas appear to be the representatives of the company in Venezuela, order is hereby given for them to be summoned in order that they may declare if they are still holding the power of the company, and in order to appoint a counsel for the defendant, in case they are no longer attorneys of the company, in accordance with the law.

There is legal proof in the papers of the suit that they were both summoned on the same 30th day of May, and they both appeared in court on the 2d of June and declared:

The only representative now of the Compagnie Générale de l'Orénoque is Mr. Andrés Fiat, who will duly produce his power of attorney in court on Wednesday, the 4th of June.

On the said 4th of June Mr. Fiat presented to the court his power of attorney and a translation of the same was ordered. On the 16th of June the interpreter, Mr. Veloz de Goiticoa, presented the power of attorney duly translated, and on the same date the court issued a writ ordering that the original power of attorney be returned to its owner and to summon the same in due form. On the 19th of June the fiscal nacional de hacienda altered the terms of the suit, limiting the sum demanded from the company for damages to 40,048.62 francs, as per account annexed. On the same 19th of June Mr. Fiat, as representative of the company, gave a receipt for the document containing the plaintiff's suit (libelo de demanda), which was handed to him, and said receipt was filed in court. On the same day the court issued a decree (folio 88) by which order was given to notify Mr. Fiat that the terms of the suit had been altered, and a copy of which alteration was handed to him.

Mr. Fiat was to give a receipt for this copy and he was to present in court his answer to the suit ten days after this date.

This writ was carried into execution on the same day, and Mr. Fiat gave a receipt on the 20th of June, which receipt is filed in court. On the 2d of July, which was the day appointed for answering the suit, there appeared in court the fiscal nacional de hacienda and Mr. Fiat, accompanied by his counsel, D. B. Urbaneja and R. F. Feo, and then and there all the parties agreed to defer the answering of the suit to a date fixed at eight days after the presentation of the docu-

ments to which reference is made in the suit by the plaintiff, *in order that the company should have time to examine these documents.* On the 22d of July, Mr. Fiat, accompanied by his two counsel, Doctors Urbaneja and Feo, appeared in court and filed their answer to the suit, petitioning the court at the same time for an extraterritorial term in order to obtain evidence from France and Rome. The suit then followed its ordinary legal course, during which the parties were to produce their respective evidence, and the court reserved its right to decide on Mr. Fiat's petition regarding an extra territorial period of time. Later on the president of the court granted one hundred days to obtain the extraterritorial evidence, and Mr. Fiat having appealed from this decision, considering that the term granted was too short, the court then extended it to one hundred and thirty days. On the 5th of September Mr. Fiat was notified that the fiscal had petitioned the court that the suit be registered in Ciudad Bolívar, in order to avoid any transfer intended by the company. Mr. Fiat duly received this notice, at the foot of which he set his signature, and on the 8th of September he appeared in court, accompanied by his counsel, Doctors Urbaneja and Feo, and said—

that he did not believe that he could make any legal opposition to the Government, which is a party in this suit, for the recording of the suit with the alterations which were made to it afterwards.

On the same day order was issued by the court that a copy of the suit be sent to the judge of first instance of Ciudad Bolívar for its being recorded in the registry office in that city, and said order was carried into effect on the same 15th day of September.

In the course of the suit Mr. Fiat presented the court a petition dated August 7, 1900, in order that such evidence might be advanced as he thought convenient to the case of the company. Among this evidence were declarations to be made by witnesses resident in Paris, Rome, Port of Spain, Río Chico, Barcelona, San Fernando de Apure, and Caracas. The president of the court issued a writ, dated August 12, admitting the presentation of such evidence, as far as the law permitted, and commissioned the several civil judges of first instance of the localities of the respective witnesses to hear their declarations, and petitioned and issued rogatory commissions to the competent judges of Paris, Rome, and Port of Spain for the same purpose. On the 11th of October of the same year Mr. Fiat appeared in court and stated—

that by virtue of the authority conferred on him by power of attorney from the company, he conferred special power to Dr. Ramón Feo and Dr. Martín F. Feo, so that both together or any one of them separately may intervene in the collecting of evidence that is to be made by the fiscal in this capital city; that he also conferred special power to Mr. Armando F. Larrouget, of Porto Rico, for the collecting of evidence on behalf of the company in that district and to intervene in the collecting of evidence by the plaintiff; that he conferred special power on Mr. Julio Philipe, of Barcelona, for all the evidence that is to be collected in

that city; that he conferred special power on Dr. Brígido Natera, of Ciudad Bolívar, for the collection of the evidence in Ciudad Bolívar and the Territorio Orinoco; that he conferred special power on Mr. Casto Rodriguez, of San Fernando de Apure, for all the evidence to be collected in that city; that he conferred special power on Mr. E. R. Mason, of Port of Spain, Trinidad, for all the evidence to be collected in that city, and that he conferred special power to Mr. Andrés Lenel Gutierrez for all the evidence that is to be collected in the Territories Orinoco and Amazonas.

By order of the 11th of October, 1890, the president of the court ordered that commissions and petitions be issued to the different parties residing in the different localities where the evidence was to be collected, and that in said petitions and commissions the insertion of the powers conferred on them be made, as requested by Mr. Fiat. The said order was carried into execution on the 13th of October, as it is proved in the records by a note signed by the secretary of the court to the effect that all the commissions and petitions issued had been handed to the defendant. All these commissions and petitions were duly returned, after having been carried into operation, and exist in the records of the court, with the exception of those addressed to the judges of Paris and Trinidad and to His Excellency Cardinal Limeoni, of Rome, which were not returned by the representative of the company, although he received them.

In page No. 56 of the document containing the evidence presented by the attorney of the company there is a note signed by the secretary of the court on the 24th of March, 1891, in which it is stated that after due computation both the ordinary and the extraordinary period of time granted for the collecting of evidence expires on that same 24th of March, 1891. On the same day the president of the court ordered that, the probatory period having expired that day, the papers and records of the suit were to be sent to the full court, which was duly effected.

On the 29th of April the fiscal stated that, this being the time for the court to study the papers and records of the suit, order be issued for the same to be effected. On the 21st of May the fiscal reiterated his petition, and on the 23d order was issued to begin the study of the papers and records on the 30th. The study of the papers and evidence commenced on the 16th of June and proceeded on the 24th of June, as the court did not meet on the 17th, 18th, 19th, 20th, 21st, 22d, and 23d. On the 1st, 4th, and 7th of August the court called suppletory judges to fill the vacancies of Dr. Chuecos Miranda and Mr. Cárlos Hernaiz, who were absent, and that of Dr. J. P. Rojas Paúl and General Velutini, who had petitioned to be excused from attending to court. On the 16th of September the suppletory judge, Dr. Cárlos Grisanti, was called, and the 19th day of the same month was appointed for the study of the process. Doctor Grisanti joined the court on the day fixed, and the study of the papers and records was commenced on the following day. The same pro-

ceeded on the 21st of September and following days until the 25th, and the 29th day of the same month was appointed to hear the reports or pleadings of the plaintiff and defendant. On this 29th day of September the fiscal nacional de hacienda appeared in court, but no representative or counsel on behalf of the defendant, the court then proceeding to sit in conference. According to notes set in the records by the secretary of the court in chronological order, it is evidenced that from September 30 to October 13 only one sitting of the court took place, on the 3d of October, during which the judges conferred on the judgment to be passed and agreed as to the same. On the 14th of October the sentence was drawn and signed by the members of the court on the same day.

From the foregoing it is clearly evidenced that the Compagnie Générale de l'Orénoque was duly summoned, through their representative in Caracas, Mr. A. Fiat, to appear in court to answer the suit entered against them before the high Federal court by the financial representative of Venezuela (Fiscal de la Nación); that Mr. Fiat did appear in court, accompanied by his counsel, Drs. D. B. Urbaneja and Ramón F. Feo; that he made such contentions as he deemed convenient on behalf of the defendant company; that he petitioned for an extraterritorial term in order to collect evidence in various foreign localities, and the same was granted to him; that he appointed special attorneys for the collection of such evidence within and without the territory of Venezuela; that the commissions and petitions issued by the court to the different judges and public officials of the various localities where the evidence was to be collected were handed to him in due time; that he forwarded to their destinations these petitions and commissions, which were all returned to the court, after a part of the evidence had been collected; that another part of the evidence was not collected, either through negligence of the company or because it desisted voluntarily of doing so, as there is no proof in the record that this was due to any cause beyond the control of the representative of the company; that after the expiration of the extra term granted by court for the collection of evidence, on the 24th of March, 1891, the fiscal de hacienda immediately petitioned that the court proceed to the examination and study of the papers and record of the suit in order that judgment be passed, for which purpose he continually applied to court, both plaintiff and defendant being present as according to law and there being no necessity of their being newly summoned for the complementary acts of the suit required to arrive to its final stage of being sentenced.

The sentence was thus pronounced by the high Federal court, after complying rigorously with the legal prescriptions and with all the formalities of the proceedings as established by law on behalf of both parties interested for the defense of their respective rights.

In the memorial or report presented by the liquidators of the company to the minister of foreign affairs of Paris, on the 3d of December, 1895, they pretend that *on the 25th of September, 1891, the high Federal court issued an order that the contending parties be advised that the 29th September had been appointed as the date on which they (plaintiff and defendant) were to present their respective reports or pleadings*, and that neither the representative of the company nor his counsel were summoned or advised, which lack of notice was in violation of articles 109 and 162 of the Code of Civil Procedure of Venezuela, and sufficient cause to invalidate the sentence.

This is inaccurate, as there was no such decree of the court ordering that the contending parties be notified; nor is there any violation of articles 109 and 162 of the Code of Civil Procedure as alleged for the nullity of the sentence.

In the papers and record no decree of the court exists under date of 25th of September, ordering the parties to be notified, there being simply a note sent by the secretary of the court, which reads thus:

CARACAS, *25th September, 1891.*

In the sitting of this day the study and examination of the papers and record by the court was completed and the sitting of the 29th current is appointed for plaintiff and defendant to present their respective reports or pleadings.

Let the parties be notified. O. BURGOS.

As may be seen from the draft of the foregoing note and from the phrase "let the parties be notified," which may be seen, at first sight, was forcibly inserted between the last line and the signature of the secretary, the said note was a fabrication of said secretary, conforming to no legal prescription, and in no way was it an order or decree of the judges of the court, who are the only parties authorized by law to issue such orders.

Article 287 of the Code of Civil Procedure in force at that time (chapter fourth, on the study and sentences of suits) directs the following:

After the completion by the judges of the study and examination of all the papers and record of the suit they will hear the reports which the contending parties may address to the court verbally or through their representatives and counsels, and they will also read such reports as said parties may address in writing which will be filed in the record.[a]

It may be gathered from this that, once the study and examination of the papers and records has been completed, there is no need of summoning the parties for them to present their reports. Article 89 of the same code reads thus:

The summons to the defendant for answering the said (demand) having been served there is no need for serving any further summons for any act during the course of the litis, nor

[a] Art. 287. Concluida esa relación se oirán los informes que de palabra dirijan las partes, sus apoderados ó patrocinantes y se leerán los que presenten por escrito, los cuales se agregarán á los autos.

any summons which may need to be served will suspend the proceedings, unless there be a special legal prescription to the contrary.[a]

The words of this article are so conclusive that they exclude any possibility that the court might have considered it necessary, after studying and examining the papers and records, to summon the contending parties to present their reports on the process, which had not been in suspense at any time.

Article No. 109, quoted by the liquidators of the company, reads thus:

When a litis be in a state of suspense, owing to motives caused by the contending parties, it will remain in this state until any one of the interested parties petitions for its continuation. In this case the other party or his representative will be summoned, but the proceedings can not follow their course until this summons be effected.[b]

The process to which I am now referring was never in this case and far from its ever having been in suspense owing to motives caused by the contending parties, it appears from the records that on the same day that the probatory term expired the fiscal petitioned for the active continuation of the case and several orders (señalamientos) were then and there issued for the study and examination of the papers and records and in order to complete the court by the appointment of adjunct judges, all of which is evidenced by the respective notes set in the records by the secretary of the court. The other article quoted as having been violated is No. 162 of the same code, and it reads thus:

When the tribunal be so taken up with business as not to be able to commence the process on the day appointed, or on any of the following eight days or by any other cause and the process be thus delayed indefinitely, the contending parties or their representatives shall be notified of the new date appointed for commencing the same, in the manner established by article 109, but the term fixed by this article being liable to be reduced.[c]

It is evidenced from the notes set in the records that the first act of examining and studying the papers and records took place on the 16th of June; that the same followed its course on the 24th of June, before eight sittings of the court had transpired, an adjunct judge was appointed on the 1st of August to fill the vacancy caused by the absence of Dr. Chuecos Miranda; that Mr. Cárlos Hernaiz, who had been appointed as adjunct, being away from the city, Dr. J. P. Rojas Paúl was

[a] Art. 89. Hecha la citación para la litis-contestación, no habrá necesidad de practicarla de nuevo para ningún acto del juicio, ni la que se mande verificar suspenderá el procedimiento á menos que resulte lo contrario de alguna disposición especial.

[b] Art. 109. La causa, cuyo curso esté en suspenso por motivos imputables á las partes, permanecerá en el mismo estado hasta que algunos de los interesados en ella pida su continuación. En este caso se citará á la otra, ó á su apoderado sin que corra ningún término mientras no conste haberse practicado estas diligencias.

[c] Art. 162. Cuando por ocupación del ribunal ú otro motivo no principiare á verse la causa el día designado ni en ninguno de los ocho siguientes, y tenga que sufrir una demora indefinida, se avisarán las partes ó sus representantes el nuevamente señalado para principiar su vista, de la manera establecida en el artículo 109, pero pudiendo reducirse el término que éste fija.

appointed to replace him on the 4th of August; that Dr. Rojas Paúl having tendered his resignation, another appointment was made on the 7th of August in the person of Gen. J. A. Velutini, who was notified of same, and that the 16th day of September had been fixed for the study of the process.

It is to be noted that the sitting of court of the 16th of September proximo was the first sitting after the vacation of the tribunals which runs from the 15th of August to 15th of September, and that from the 7th to the 15th of August no sittings transpired.

On the 16th of September the tribunal met and took cognizance of a communication from General Velutini, in which he stated that he could not accept, as he had to leave the city, and the court then appointed Dr. Cárlos Grisanti, who was duly notified, and the 19th of the same month was appointed for the examining and studying of the case, three days after Doctor Grisanti's appointment. On the appointed date Doctor Grisanti took his seat in court and the process began and followed its course on the 21st and 25th, on which last-mentioned day it terminated. It is thus evident that the process was never under indefinite delay, and that the court acted on the case at intervals of from two to three days, appointing adjuncts to fill the vacancy of some of the judges, the interested parties being in the obligation of calling on the secretary of the court in order to take knowledge of the acts of same.

In the notes contained in the memorial presented by the liquidators of the company to the minister of foreign affairs at Paris, referring to the evidence to be collected by the representative of the company regarding the process before the high Federal court, it is stated:

> Mr. Fiat was taken unaware by the suit entered at court by the fiscal against the company for rescission of its concessions and had no time to ask for orders or to collect information, and as no memorial had ever been communicated to him and it was impossible to foresee that such action would be entered against the company, he had received no instructions from Paris. Mr. Fiat, being very much perplexed, presented a list containing the names of all the employees of the company to be examined by the court, but not knowing their whereabouts he set them all as residing in Paris. The petition of Mr. Fiat was inspired by the report which the administration of the company had just forwarded to the ministry of fomento. The tribunal accepted Mr. Fiat's petition, but instead of forwarding the commissions to Paris, as was done with those to Rome, by the diplomatic channel, according to international rules, they were handed directly to Mr. Fiat for transmission to Mr. Delort. Nothing could be more strange, and side by side to a proceeding which appears to be regular at first sight there are irregularities which nullify the defense, and, finally, the judgment was passed without summoning the defendant, as has been seen by the document No. 1. Mr. Delort delivered the commissions issued by the court to the board of directors of the company, who were unable to do anything with them and returned them to their counsel in Caracas, Dr. D. B. Urbaneja, and, following the advice of their counsel, the board had affidavits made by such witnesses as could be found, on the subject of the commission issued by court to the judge of first instance of Paris.

The statement that Mr. Fiat was taken unawares by the suit entered by the fiscal before the high Federal court and that he had no time to

ask for order and information regarding the evidence is contradictory of the fact that Mr. Fiat was summoned on the 30th of May, 1890, to appear in court and take cognizance of the action entered against the company, and that it was only on the 7th of August, two months and eight days after he had been summoned, that he entered a petition to the tribunal for the collection of evidence. As to the action of the court in handing over to Mr. Fiat the commissions to Paris and Rome, instead of forwarding same through the diplomatic channel it is simply reckless and capricious to consider such action as an irregular omission. The Code of Civil Procedure, in article 205, on the extraordinary term for collecting evidence, says:

If one of the contending parties who has obtained permission for collecting evidence, as per the terms of the foregoing article, fails to do the necessary to obtain same, or if it appear from the records that he made a malicious petition in order to extend the duration of the suit, he shall be fined with an amount equivalent to one-fifth of the value of the suit, which sum will be applied to pay to the other party whatever damages he may have suffered by the delay.[a]

It was the interested party who should have taken the necessary steps in order to have forwarded the commissions to the judge of the Seine through the diplomatic channel, and his having neglected to do so could have been cause of his being fined, as per the article 205 quoted, as he petitioned for the collection of evidence which required an extraterritorial term and thus lengthened the period of the suit, and he did not do the necessary to collect the evidence. It is well known that these commissions are accepted by the judges to whom they are addressed by courtesy in accordance with international use. In some international treaties these commissions have been regulated, but failing this the rule to be followed is that of reciprocity. There is no agreement on this point between Venezuela and France, and it was therefore necessary to adhere to Venezuela's legislation on the subject, to which article 559 of the Code of Civil Procedure at the time in force is pertinent. This article states:

Commissions issued by foreign tribunals for the examination of witnesses for valuations, oaths, interrogatories, and any other such acts to be effected in the Republic, will be carried into execution by virtue of a simple decree from the judge of first instance of the locality where such acts are to take place.[b]

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[a] Art. 205. Si el litigante que ha obtenido concesión para evacuar las pruebas de que habla el artículo precedente no practicare las diligencias consiguientes, ó de lo actuado apareciere que la solicitud fué maliciosa, con el objeto de alargar el pleito, se le impondrá una multa equivalente á la quinta parte del valor de lo que se litigue, y se aplicará á la parte contraria en indemización de los perjuicios sufridos con la dilación. Si ni aproximadamente fuere conocido este valor, será la multa de una cantidad que no baje de quinientos bolívares ni exceda de cinco mil, con la misma aplicación.

[b] Art. 559. Las providencias de los tribunales extranjeros concernientes al exámen de testigos, experticias, juramentos, interrogatories y otros actos de mera instrucción que hayan de practicarse en la república, se ejecutarán con el simple decreto del juez de primera instancia que tenga jurisdicción en el lugar en que hayan de verificarse tales actos.

This is in accordance with the most advanced principles of jurisprudence on the matter.

The Institute of International Law, during the Zurich session, has established the following principles and rules, which are highly favorable to the prompt expedition of justice:

Any judge may in any process address himself by rogatory commissions to any foreign judge, requesting him to carry into execution in his jurisdiction any act of instruction or any other judicial acts to which the intervention of a foreign judge may be useful or indispensable. A judge to whom a petition is addressed in order that he may issue a rogatory commission has to decide in the following points: First, of his capacity in the matter; second, on the legality of the petition; third, whether or not it is opportune in cases where the acts petitioned for can be effected by the judge under whose guidance the suit is, such as the examination of witnesses, taking of oaths of one of the parties, etc. The rogatory commission *shall be sent directly to the foreign tribunal unless the interested governments may afterwards intervene in case it be necessary.* The tribunal which receives the commission is under obligation to comply with it after having ascertained the following: First, the authenticity of the document; second, its own capacity, ratione materiæ, according to the laws of the country. (Annual of the Institute of International Law, Volume II, 1878, pp. 150 and 151.)[a]

There was, consequently, nothing irregular in the proceedings of the court in addressing directly the judge of the first instance of the Seine and in handing the commissions to the interested party for its compli-

[a] The rules proposed by the Institute of International Law at Zurich in 1877, were as follows:

1. L'étranger sera admis à ester en justice aux mêmes conditions que le régnicole.

2. Les formes ordinatoires de l'instruction et de la procédure seront régies par la loi du lieu où le procès est instruit. Seront considérées comme telles, les prescriptions relatives aux formes de l'assignation (sauf de qui est proposé ci-dessous, 2me al.), aux délais de comparution, à la nature et à la forme de la procuration *ad litem*, au mode de recueillir les preuves à la rédaction et au prononcé du jugement, à la passation en force de chose jugée, aux délais et aux formalités de l'appel et autres voies de recours, à la péremption de l'instance.

Toutefois, et par exception à la règle qui précède, on pourra statuer dans les traités que les assignations et autres exploits seront signifiés aux personnes établies à l étranger dans les formes prescrites par les lois du lieu de destination de l'exploit. Si, d'après les lois de ce pays, la signification doit être faite par l'intermédiaire de juge, le tribunal appelé à connaître du procès requerra l'intervention du tribunal étranger par la voie d'une commission rogatoire.

3. L'admissibilité des moyens de preuve (preuve littérale, testimoniale, serment, livres de commerce, etc.) et leur force probante seront déterminées par la loi du lieu où s'est passé le fait ou l'acte qu'il s'agit de prouver.

La même règle sera appliquée à la capacité des témoins, sauf les exceptions que les États contractants jugeraient convenable de sanctionner dans les traités.

4. Le juge saisi d'un procès pourra s'adresser par commission rogatoire à un juge étranger, pour le prier de faire dans son ressort soit un acte d'instruction, soit d'autres actes judiciaires pour lesquels l'intervention du juge étranger serait indispensable ou utile.

5. Le juge à qui l'on demande de délivrer une Commission rogatoire décide: (a) de sa propre compétence; (b) de la légalité de la requête; (c) de son opportunité lorsqu'il s'agit d'un acte qui légalement peut aussi se faire devant le juge de procès, p. ex. d'entendre des témoins, de faire prêter serment à l'une des parties, etc.

6. La commission rogatoire sera adressée directement au tribunal étranger, sauf intervention ultérieure des gouvernements intéressés, s'il y a lieu.

7. Le tribunal à qui la commission est adressée sera obligé d'y satisfaire après s'être assuré: 1° de l'authenticité du document, 2° de sa propre compétence *ratione materiæ* d'après les lois du pays où il siège.

8. En cas d'incompétence matérielle, le tribunal requis transmettra la commission rogatoire au tribunal compétent, après en avoir informé le requérant.

9. Le tribunal qui procède à un acte judiciaire en vertu d'une commission rogatoire applique les lois de son pays en ce qui concerne les formes du procès, y compris les formes des preuves et du serment. (Annuaire de l'Institut de Droit International, Tom. ii, p. 150; Revue de Droit International, etc., Vol. ix, p. 308.)

ance. If the Compagnie Générale de l'Orénoque did not in due time see that its representatives in Paris, Rome, and Port of Spain attended to the execution of the commissions and allowed them to keep the documents in their possession for an indefinite period, it is an act for the consequences of which the company is solely and exclusively responsible. To pretend that the other party in the litis shall bear any responsibility on the matter is entirely contrary to common sense and to equity.

As has been shown, besides the absolute lack of legal basis of the charges preferred by the liquidators of the Compagnie Générale de l'Orénoque against the proceedings of the court and the judgment passed by that high tribunal on the 14th of October, 1891, there is the remarkable circumstance that neither the company nor its legal representatives denounced the sentence as null and void within the period and in the form established in Part XVII of the Code of Civil Procedure then in force. Article 538 of said code says:

Suits may be invalidated by the following causes: First, when one of the contending parties has not had a hearing in the suit whose invalidation is intended or by the want of summons in cases where such summons is necessary for the continuation or for the decision of the suit and whenever this fault has not been remedied by the party alleging the same.[a]

Article 549 says:

The claim of invalidation by any of the parties shall not interfere with the execution of the sentence.[b]

Article 550 says:

The claim of invalidation can not be made six months after the party has had knowledge of the suit in which he has not obtained a hearing or of the sentence or order issued in the suit when it was in suspense.[c]

And article 551 runs thus:

When an invalidation is pronounced, the trial shall commence again from the beginning in case there may have been a lack of hearing of the claiming party, and from the moment that a lack of summons took place in case this lack of summons be the cause of the invalidation.[d]

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[a] Art. 538. Son causas para la invalidación de los juicios:

1ª. La falta de audiencia en el juicio cuya invalidación se pretende, ó la falta de citación cuando ésta sea necesaria para continuarlo ó decidirlo, si no ha sido cubierta la falta por la parte que la alega.

[b] Art. 549. El reclamo de invalidación no impide la ejecución de la sentencia.

[c] Art. 550. Tampoco puede intentarse trascurridos seis meses desde que se descubrió la falsedad del documento, ó se tuvo prueba de la retención ó del hecho de la parte contraria, ó desde el día en que se pronunció la sentencia en caso de pronunciamiento sobre cosa no demandada ú omisión respecto de lo demandado, ó desde que llegó á noticia del reclamante el juicio en que no fué oído, ó la sentencia ó auto que se dictó en el juicio que estaba paralizado, ó desde que se tuvo conocimiento de la sentencia anterior que está en colisión con la pronunciada.

[d] Art. 551. Declarada la invalidación, el juicio se repone al estado de demanda cuando ha habido falta de audiencia del reclamante, y el estado en que se cometió la falta de citación, cuando es ésta la fundamento de la invalidación. En el caso de colisión de sentencias, quedará con su fuerza la primera. En los demás casos, se repondrá al estado de sentencia.

In the memorial presented by the liquidators of the company to the minister of foreign affairs of France on the 3d of December, 1895, they state, on page 69, the following:

> Nothing exists, therefore, which may give light on the sentence pronounced by the high Federal court on the 14th of October, 1891, which was published on the 17th, three days after, in the Official Gazette, No. 5385. It was by this publication that the counsel, Drs. D. B. Urbaneja and Ramón F. Feo, came to know of it. When Mr. Delort arrived at Caracas on the 26th of October, the whole matter had been completed. Mr. Delort hastened to Doctors Urbaneja and Feo for advice, and these counsel told him that there was nothing to do but to apply to the French Government, which had authority to intervene and to present a claim through the diplomatic channel by virtue of article 5 of the diplomatic convention of 1885.

It was therefore the opinion of the counsel of the company that according to the law on this matter no claim of invalidation of the sentence could be entered in court, although the term of six months granted by law for for this purpose was still running. Mr. Delort, as well as the other representatives of the company, submitted to this opinion of the counsel, and in no time did they take action to enter a claim of invalidation, thus affirming the sentence pronounced by the court.

According to the liquidators, when referring to Mr. Delort the counsel advised the company to make use of the diplomatic channel by virtue of article 5 of the diplomatic convention of 1885, not taking into account that article 5 of said convention runs thus:

> The representatives of the high contracting parties shall not intervene in claims or grievances of private parties referring to matters pertaining to the civil or penal administration of justice, according to the local laws unless, in case of denial of justice or of judicial delays contrary to use and to law, or in case of the noncompliance with an affirmed sentence, and, finally, in case there be an evident violation of a treaty or of the rules of international law in spite of the exhaustion of the legal remedies.

The invalidation of the judgment passed by the high Federal court was a matter pertaining to the jurisdiction of the civil justice of Venezuela, according to its legislation. The company did not exhaust all the legal means which the laws of the country offered for the invalidation of the sentence, acting on the advice of her counsel, in whose opinion it was useless to do anything in the matter. Although the company did not exhaust these legal means and although the sentence was not in violation of any treaty nor of any rule of international law, article 5 of the convention of November 26, 1885, was invoked four years after, thus pretending to insure the possibility of intervention by the diplomatic representatives of France.

From the documents presented by the liquidators of the company it appears that from the 14th of October, 1891, on which day the sentence was pronounced by the high Federal court, until the day when the French commissioner handed over to the Venezuelan commissioner copies of the memorial presented by the said liquidators to the minis-

ter of foreign affairs of France on the 3d of December, 1895, together with annexed papers, the diplomatic representatives of France in Venezuela never intervened in favor of any claim whatever presented by the liquidators of the Compagnie Générale de l'Orénoque. It is to be observed, on the other hand, that in a dispatch addressed by said liquidators on the 12th of September, 1901, to his excellency the minister of foreign affairs of France, they say—

that they have been informed from Caracas that Mr. Quiévreux, the vice-consul of France in that city, who is in charge of all the business of the French legation, is possessed of no document whatever concerning the claim of the Compagnie Générale de l'Orénoque, for which reason he has been unable to attend to it, and they therefore request his excellency kindly to transmit to Caracas, if necessary, all the papers referring to their claim.

It is therefore perfectly evident that the diplomatic representatives of France have abstained from all intervention tending to the invalidation of the aforesaid sentence during a long period of years, and especially so during the term of four years that elapsed from the day on which the sentence was pronounced to that on which political relations were suspended between France and Venezuela in 1895.

What action did the liquidators or the representatives of the company ever take during all the years following that of the sentence to make good their assumption that the judgment passed was a notorious injustice or a denial of justice?

The liquidators' memorial of December, 1895, to the minister of foreign affairs of France states the facts of the case in a precise manner and defines the attitude assumed by the company during several years in consequence of the sentence that rescinded her concessions and condemned her to the payment of a sum of money and the costs of the suit. Under the title of "Applications made by the Company to the Government of Venezuela," the aforesaid memorial contains the following narrative:

From the year 1891, or nearly four years back, all applications made to the Venezuelan Government, in order to obtain a *friendly compromise*, that is to say, to obtain an indemnity, have been of no avail. In 1892 there was a revolution in Venezuela and the Government declined to transact any business on the plea of the political situation. In 1893 General Crespo came into power, and during his first year of provisional government all applications made by the company were deferred until the establishment of a constitutional government. General Crespo was elected as constitutional president for a term of four years on the 20th of February, 1894. In the month of May of that same year Mr. Delort, who was going to the Pacific coast, called at Caracas to present his salutations to General Crespo and to General Velutini. This last named was at the time very powerful, and Mr. Delort explained to him the desirability of arriving to a friendly understanding and to come to terms as to the indemnity which the Compagnie Générale de l'Orénoque pretended. General Velutini expressed to Mr. Delort his willingness to assist him in this direction, and suggested that Mr. Delort procure from France the necessary power of attorney which would give him sufficient authority for dealing with this matter. On the 25th of October, 1894, Mr. Delort returned to Caracas, where full power of attorney had been sent to him, but General Velutini was then in a very different frame of mind and Mr. Delort was unable to secure the slightest cooperation from him. Mr. Delort then decided to apply directly to General Crespo, who at the time

was in his country seat at Maracaibo. General Crespo assured Mr. Delort, that *if the company had really any rights, justice would be done to it.* At this juncture Mr. Delort presented to Dr. P. E. Rojas, the then minister of foreign affairs, a report briefly stating all the facts and the rights claimed by the company. Doctor Rojas promised to examine said document carefully, for which purpose he asked for a time of two months. As Mr. Delort could not await in Caracas, he informed the minister that he would come back to Caracas in February or March, 1895. He did return to Venezuela on the 24th of May, and heard at La Guayra when he landed of the rupture of diplomatic relations between France and Venezuela, which had just taken place. A translation of this document presented by Mr. Delort to the minister of foreign affairs of Venezuela in November, 1894, has been deposited at the ministry of foreign affairs in Paris. That document was drafted without possessing full knowledge of all the records of the trial that took place before the high Federal court against the Compagnie Générale de l'Orénoque, and certain details are therefore wanting in said document (which are contained in this memorial), although the conclusions of said petition remain in their full force.

From the foregoing quotation it will be seen that the action taken by the representatives of the Compagnie Générale de l'Orénoque in liquidation in the four years subsequent to the sentence, during which time the diplomatic relations between France and Venezuela were on a friendly footing, was simply of a friendly and private nature with private and influential individuals and officials for the purpose of obtaining a friendly compromise of pecuniary advantage to the company, no diplomatic action whatever having taken place during that time. The record presented to Dr. P. E. Rojas, minister of foreign affairs, was not effected in an official manner, and no allusion whatever is made which may convey the idea that it was presented by the representative of France in Venezuela, who was the properly qualified party to communicate on this matter with the minister of foreign affairs. The document in question does not exist in the archives of the ministry o- foreign affairs, and it is to be presumed that a document annexed to the record presented to this commission, marked "No. 106," containing 37 pages written in Spanish without any signature, dated 12th of November, 1894, which is said to have been addressed to the minister of foreign affairs, is the very same report presented by Mr. Delort to Doctor Rojas, who may have returned it to the former.

This document, which is not even signed by the person who presented it, is simply a narrative of facts which took place from the time of the concessions from which the Compagnie Générale de l'Orénoque originated and of comments on the diplomatic incident between Venezuela and Colombia caused by the publication made in Paris by the Compagnie Générale de l'Orénoque of a report and geographical chart which comprised a zone of land which was sub litis between Venezuela and Colombia, on the real ownership of which judgment was pending from the Spanish Government according to the treaty of arbitration juris of the 14th of September, 1881. This document of report contains the following among other statements:

In short, an association was formed by a group of well-known honorable French citizens who placed reliance on the good faith of Venezuela, whose word was solemnly pledged by a

contract drawn according to its laws for carrying into execution an arduous enterprise, which was chiefly to be to the honor and benefit of the country. Some very important work was done, as well as the very difficult task of establishing steam navigation between Ciudad Bolívar and Brazil. But the Venezuelan Government, which had pledged their signature either by error or by omission, realizing then by the urgent claims of Colombia, as well as by the arbitration sentence pronounced by Spain, that they had had no right to grant concessions on territory which they did not possess, found no other way for withdrawing from an awkward position than to rescind their contract with the company, taking no heed of the serious damages caused by such an action to the other party in the contract. It is therefore but just and equitable as well as honorable for the Republic that this group of foreigners who brought their capital to this country in good faith under a contract should receive an indemnity for damages they have sustained.

Further in the report it is stated:

There can be no doubt as to the responsibility inherited by this Government from the former administration, *owing to the want of loyalty shown at the time the contract was drawn where the Colombian claim was kept in concealment* and allowing the company to proceed with its work to invest its capital and to make colossal efforts in order to comply with its obligations, and owing to the proceedings of the Government even before the malicious and baseless suit for rescission of the contract was entered and had been sentenced by the high Federal court proceedings, which were contrary to law, to universal justice, to all sound principles, and to the very interest of the country, and by the force of which the company was ruined and all the elements of progress and civilization which were to benefit and improve those territories were misapplied and frittered away.

The violent language used in this report and the offenses therein addressed to the Government of the Republic explain why it was that the same was returned to its author and why no traces were left of its passage through the hand of the minister of foreign affairs.

To refute the assertions contained in said report with reference to the boundary question with Colombia, it will be sufficient to quote in extenso the reply of Mr. Delort on the 23d of September, 1888, to the minister of fomento, when the former was asked by the latter to explain the cause of the publication made by the company in Paris of a report and a map *in which a certain territory which had been submitted to the decision of an arbitrator appointed by Venezuela and Colombia appeared as having been granted to the Compagnie Générale de l'Orénoque by the Government of Venezuela.*

The dispatch of the minister of fomento to which Mr. Delort replied is as follows:

No. 452.] DEPARTMENT OF TERRITORIAL WEALTH,
Caracas, 18 September, 1888.

To Mr. DELORT,

Concessionary for the Exploitation of the Territories Upper Orinoco and Amazonas.

Under date of 15th instant the minister of foreign affairs has officially transmitted the following to this ministry:

"CARACAS, *15th September, 1888.*

"SIR: The envoy extraordinary of Colombia has entered a claim against the publication of a geographical chart and a report by the Compagnie Générale de l'Orénoque of the Upper Orinoco and Amazonas, containing a description of the boundaries of their concessions in which are comprised, as granted to said company, vast territories which are *sub*

lite between Colombia and Venezuela. Consequently and with a view to examine said report and chart, I trust that you will remit them to me, if you are possessed with them, or that you will kindly request the representative of the company to furnish you with same, as well as with his own report on the subject, should these documents not exist in your office. I transmit this communication to you in order that you remit to me the information required.

"(Signed) CORONADO."

Mr. Delort's reply is as follows:

"CARACAS, *20th September, 1888.*

"To MINISTER OF FOMENTO.

"MONSIEUR LE MINISTRE: I have had the honor to receive your dispatch dated the 18th instant, to which I now reply. When the company of the Upper Orinoco was formed a report was drafted in Paris for distribution only among the shareholders. In said report *the concessions transferred to the company by Mr. Tejera* were inserted as well as an abstract of the articles of association and divers information on the natural products to be exploited as per the terms of the contract. To that report a map was annexed in order that the shareholders should know the location of the territories granted to the company *for exploitation.* That map is a copy of the one annexed to the statistical bulletin published in several languages by the Government of Venezuela. This report does not deal with the boundaries between Colombia and Venezuela *nor with a vast expanse of territory granted to the company, but only with the natural products of the extensive region of the Upper Orinoco and Amazonas. The company knows that the boundaries between Colombia and Venezuela are sub litis, submitted to the arbitration of the Spanish Government. The company therefore lays no claim on this* point; and as she holds her *concession from the Government of Venezuela, she is well aware that she has to conform to the final boundary fixed* to the Republic. Up to the present time the company has *extended her exploitation only to localities under the jurisdiction of Venezuelan* authorities and her agencies, stores and others are situated at Atines, Maipures, San Fernando, San Cárlos, and the Brazilian boundary, and our steamboats are plying only on the Orinoco, the Casiquaire, and the Guainia. I regret not to be able to send you the report referred to, but two copies of same must have been forwarded to you by the agent of the company in this city and should be in your possession. I trust, Monsieur le Ministre, that the explanation which I have the honor to submit to you will be satisfactory, and I trust as well *that you will appreciate our good faith on this matter.*

"With the highest consideration, I remain, Monsieur le Ministre.

"(Signed.) TH. DELORT."

If the wording of this communication is compared with that of the report addressed by the very same representative of the company in 1894 to the minister of foreign affairs of Venezuela and with that of the memorial addressed in 1895 by the liquidators of the company to the minister of foreign affairs of France, when reference is made in both documents to the boundary question with Colombia, the acts of the representatives of the company may be appreciated in their true meaning and value; but in spite of all, the plain and steadfast avowal made by the representative of the company remains unaltered, viz—

that the company knows that the boundaries between Colombia and Venezuela are *sub lite* submitted to the arbitration of the King of Spain, and that the company, therefore, lays no claim on this heading and is well aware that she has to conform to the boundaries which may be definitely fixed.

Nor could the company be ignorant of this, as she had been finally constituted on the 12th of March of that same year and she had been

formed according to the articles of association published in Paris *with the property of the concession belonging to Mr. Tejera, a Venezuelan citizen,* who had acquired it from Gen. Guzmán Blanco, an interest on 40 per cent of the profits having been adjudged to Mr. Tejera, according to articles 6 and 9 of said articles of association. Could it be likely that Mr. Tejera, a Venezuelan engineer and ex-minister of public works, during one of the terms of power of Gen. Guzmán Blanco, from whom he had obtained the said concession, would not be well aware of all the details referring to the boundary question with Colombia which had been submitted since 1881 by Gen. Guzmán Blanco to the *arbitrio juris* of the King of Spain?

The author of the report addressed to the minister of foreign affairs of Venezuela on the 12th of November, 1894, asserts, on page 25—

> that the Government of Dr. Andueza Palacio blundered in like manner to his predecessors, *that nothing had been communicated to the company with the intention of keeping from her all knowledge of the claim of Colombia,* and that it was evident that the Venezuelan Government knew they were wrong on this point toward the company and toward Colombia.

But it was necessary to give some reply to Colombia, whose protests and claims were daily growing more pressing, and a means was devised for withdrawing from the embarrassing position caused by the contract of 1885.

These assertions were repeated later on in December, 1895, in the memorial presented in Paris by the liquidators of the company to the minister of foreign affairs of France and were complemented with the following statements:

> Equity and justice, as well as the honor of Venezuela, impose on the government of Caracas the obligation to pay an indemnity to those parties who in good faith have invested their capital in the Compagnie Générale de l'Orénoque and who have been deceived from beginning to end.

The grave nature of these charges preferred against the Government of Venezuela, in order to base on them the right to a pecuniary indemnity in favor of certain parties pretending to have been the victims of deceit from beginning to end, imposes on the Venezuelan commissioner the task of throwing full light on the truth of this matter as to what refers to the claim of Colombia, which the company alleges was kept in concealment by the governments preceding that of Dr. Andueza Palacio.

It is altogether inaccurate that the governments preceding that of Dr. Andueza Palacio *had communicated nothing to the Orinoco Company with the purpose of keeping from her knowledge the claim of Colombia.*

Shortly after the formation in Paris of the syndicate which was to be the basis for the constitution of a limited company in favor of which the concession of Mr. Tejera was to be transferred, a report of fifteen pages was published in the city of Paris *on the concessions of the*

Compagnie Générale de l'Orénoque under formation, and annexed to it was an abstract of the articles of association of said company, together with a map *comprising the navigable waterways within the territory granted.* This report on the territory granted was drawn, as stated, by Mr. Delort in his reply to the minister of fomento of Venezuela, under date of 25th of September, 1888, solely for the use of the shareholders of the company which they had the intention of forming, and the geographical chart was annexed to it with the purpose that said shareholders should know where the territory granted to the company was located.

In a dispatch dated in Bogotá on the 28th of October, 1887, the minister of Colombia called the attention of the minister of foreign affairs of Venezuela—

to a report published in Paris by a French company on the subject of certain concessions which were said to have been granted by the Government of Venezuela on the territories of the upper Orinoco and Amazonas belonging to the Republic of Venezuela and to a chart annexed to that report, in which the western boundaries of said territories were fixed in such a manner as to comprise within them the large zone which was sub litis between Venezuela and Colombia, the real ownership of which was yet to be decided by the sentence of the Spanish Government according to the terms of the treaty of arbitration juris of the 14th of December, 1881.

This dispatch ends as follows:

It is clear that neither of the two Governments can grant any valid concession on these lands, and it is likewise evident that the error of the Compagnie Générale de l'Orénoque is due to their having made reference to geographical or statistical data previous to the treaty of 1881 aforesaid, by virtue of which that zone is not only made debatable, but is to be defined by a special arbitration in exclusive manner.

The importance of these observations from the minister of Colombia could not escape our then minister of foreign affairs, Dr. Diego Bautista Urbaneja, who had been counsel to the company from the very beginning, as evidenced from the payments made to him by the mint of Caracas on the 28th of February, 1888, 28th of April, and 30th of May, and at the end of each successive month for professional services, (account of the Company "La Monnaie" with the Compagnie Générale de l'Orénoque, voucher 3), and consequently a dispatch, dated the 25th of November, 1887, was addressed to the minister of fomento requesting the necessary information and report aforesaid for replying to the minister of Colombia. The minister of fomento replied to the minister of foreign affairs that the aforesaid report had never been sent to his department. (Secretary's record of the ministry of fomento referring to the contract Guzmán-Tejera, transmitted to the high federal court to be annexed to the record of the suit against the Compagnie Générale de l'Orénoque.)

Mr. Delort, who was director in Venezuela of the works started by the syndicate and the only representative of the company with whom the Government of Venezuela had had any dealing up to the present,

was in Paris at the time these events were taking place. When he returned to Caracas in December, 1887 (memorial of the 3d of December, 1895, p. 24), where he remained a few days, he proceeded to Ciudad Bolívar, there to attend to the work of organization.

Since February, 1888, Doctor Urbaneja was receiving from the "Société de la Monnaie (the mint) the payment of fees for professional services rendered to the Compagnie Générale de l'Orénoque during the administration of General López, and it is therefore not likely that from that period of transition to the coming into power of Dr. Rojas Paúl, which took place in July of same year, Mr. Delort would be ignorant of the claim of Colombia, his own counsel being the identical person who had received the dispatch on the subject from the foreign office of Colombia. As soon as Dr. Rojas Paúl had been installed in power his minister of foreign affairs received on the 9th of August, 1888, a confidential memorandum from the minister of Colombia in Caracas, in which he was reminded of the dispatch of the 28th of October, 1887, for replying to which Doctor Urbaneja, when minister of foreign affairs in November, 1887, had solicited from the minister of fomento the map and report referred to in said dispatch, which map and report the said minister of fomento had been unable to remit because they did not exist in his department. For replying to the confidential memorandum of the 9th of August, 1888, the minister of foreign affairs addressed another dispatch, under date of the 15th of September, 1888, to the minister of fomento, requesting once more the remittance of the said report and map in case these had already reached his department, and, if not, requesting that he would ask the representative of the company for said documents and a report on this subject. (Dispatch previously inserted). This was transmitted by the minister of fomento to Mr. Delort under date of the 18th of September, 1888, to which he replied in the terms of his communication of the 20th of the same month, which has already been reproduced in extenso. This exchange of dispatches was taking place at the beginning of the administration of Dr. Rojas Paúl, one year and a half before Dr. Andueza Palacio came into power in March, 1890, and in spite of this the representative of the Compagnie Générale de l'Orénoque and the liquidators of the same have not hesitated to assure to a high official of the French Republic, its minister of foreign affairs, in the memorial before mentioned—

that the Government of Dr. Andueza Palacio blundered in like manner as his predecessors, that nothing had been communicated to the Compagnie Générale de l'Orénoque, not wishing to bring to her knowledge the claim of Colombia.

A claim which is based on this sort of argument is judged and sentenced by itself.

Apart from the inconsistency and lack of truth of the assumption of the company that the Venezuelan Governments kept in conceal-

ment the claim of Colombia with reference to publications made by the syndicate of the company of the Orinoco what took place between the Venezuelan and the Colombian foreign offices did not in any way alter the essence of the contract between the Government of Venezuela and Mr. Miguel Tejera, which was simply for the exploitation of the natural products of the territories of Upper Orinoco and Amazonas, and which neither meant to convey the alienation of any lands nor fixed any boundaries.

This concession comprised an extension of territory several times larger than the zone of land coterminous, on the western part of the Republic, with Colombia, submitted to the award of the King of Spain. The extension of those territories comprised very nearly 25,000,000 hectares, thickly wooded from the rapids of Maipures to the Brazilian boundary toward the south and to the Republic of Colombia toward the east. The justice and the accuracy of this appreciation are acknowledged by the very Compagnie Générale de l'Orénoque in the reply of her representative to the minister of fomento, in which they say:

The company lays no claim whatever with reference to the boundary question with Colombia, as she is well aware that she has to conform to the limits which may ultimately be fixed to the Republic of Venezuela.

The good faith with which Venezuela held in her possession, as belonging to her, a certain zone of lands which was afterwards awarded by the arbitrator to Colombia precludes all responsibility from the Government in the concession in question, which was never intended to convey any definite alienation, but simply the exploitation of natural products in those localities where Venezuelan settlements existed under the jurisdiction of Venezuelan authorities.

This declaration, which is altogether in accordance with the principles of international law, is concretely embodied in the award of the arbitrator on the boundary question with Colombia in the following words:

Whereas, according to the agreement signed by the parties the award is to fix the limits or boundaries, which in the year 1810 existed between the then general captaincy of Venezuela, to-day the United States of Venezuela, and the viceroyalty of Santa Fé, to-day the Republic of Colombia;

Whereas the law functions assigned to the arbitrator by the treaty of Caracas of the 14th of September, 1881, were enlarged by the declaration of Paris of the 15th of February, 1886, so that the boundary line should be fixed in the best manner, as nearly as possible, according to the existing documents, whenever these documents throw not sufficient light on a given point;

Considering that, for the better understanding, section 6 (Orinoco and Río Negro line) can be divided into two parts, viz, from the Meta to Maipures, and from Maipures to the bowlder called Cocuy;

Considering that the starting point and the legal base for determining the boundary line in part second of the 6th section is the real cédula (royal decree) of the 5th of May, 1768, on the real meaning of which there is a disparity of opinion between the two high contracting parties;

Considering that the terms of the aforesaid real cédula are not as clear and precise as necessary in this class of documents so as to base exclusively on same a decision juris;

Considering therefore that the arbitrator is confronted with the case foreseen by the declaration of Paris before mentioned;

Considering *that the United States of Venezuela possess in good faith territories to the west of the Orinoco*, the Casiquiare and the Río Negro, which rivers form the boundaries assigned on that side to the province of Guayana, by the said real cédula of 1768;

Considering that in *said territories there exist very important Venezuelan settlements which have been fostered in the bona fide belief that they were located within the dominions of the United States of Venezuela*, and lastly,

Considering that the rivers Atabapo and Río Negro form a natural, clear, and precise frontier, with the only interruption of a few kilometers from Yavita to Pimichín thus to keep clear of the respective boundaries of these two villages;

I have to come to declare that the boundary line debated between the Republic of Colombia and the United States of Venezuela is now defined in the following manner: * * *

Section 6, Part I. From the mouth of the river Meta in the Orinoco down the stream of this last to the rapids of Maipures, *but always having consideration to the fact that the village of Atures from the time of its foundation has made use of a road which is on the left bank of the Orinoco for the purpose of turning the rapids from the said village of Atures* to the harbor or port situated to the south of Maipures, opposite to the hill called Macuriana, toward the north of the mouth of river Vichada; *the aforesaid incumbrance or right of way is here expressly assigned in favor of Venezuela, the same incumbrance to cease twenty-five years after the publication of this award* or as soon as a road be made in Venezuelan territory which may render unnecessary the traffic along the Colombian road, the two interested parties having the right to regulate by common consent the use of this incumbrance. (From the Official Gazette of Madrid, 7th of March, 1891.)

As may be seen from the preceding award, the arbitrator expressly acknowledged that Venezuela had possessed in good faith a portion of the territory adjudged to Colombia, and in consequence he established in favor of Venezuela the use of way between Atures and Maipures along the left bank of the Orinoco for a period of twenty-five years, to be counted from the publication of the award. This decision would have given full security of the Compagnie Générale de l'Orénoque, had it at the time carried out her obligation to construct a railway line which was to divert the hindrance of the rapids of Atures and Maipures and to facilitate the steam navigation of the Orinoco.

Having demonstrated that the charges preferred against the Venezuelan Governments and their proceedings toward the Compagnie Générale de l'Orénoque with reference to the Colombian boundary question are devoid of all bases, and having also demonstrated that the judgment passed by the high Federal court in the suit entered for rescission of the contracts granted to said company for the exploitation of the natural products of the territories of Upper Orinoco and Amazonas and for the exploitation of the tonca beans (sarrapia) on the territories conterminous with Brazil and British Guiana, was a sentence pronounced by that tribunal after having complied with all the legal prescriptions of the code of procedure then in force, and in every way in accordance with the fundamental laws then in force in Venezuela, the Venezuelan commissioner considers that said sentence is valid and

affirmed, and that it has been acknowledged and accepted by the Compagnie Générale de l'Orénoque, since this company did not in due time, according to the law, make use of her right to appeal in order to invalidate same.

After due examination of the fundamental part of this sentence, and after analyzing all the evidence produced by the contending parties, it is evident that the verdict of the high Federal court, in administering justice on behalf of the Republic and by authority of the law, was entirely adjusted to the prescriptions of the civil code on rescission of contracts, the Compagnie Générale de l'Orénoque not having complied with any of the obligations under Nos. 1, 2, 3, 4, 5, 6, 7, and 9 of article 2 of the contract of the 17th of December, 1885, nor with any of the stipulations 3d, 4th, and 5th of the contract of the 1st of April, 1887, and as a consequence of which rescission the tribunal condemned the Compagnie Générale de l'Orénoque to pay to the Venezuelan Government the sum of 40,048.62 francs for damages, besides the costs of the suit.

Two days after the financial representative of the Government (fiscal nacional de hacienda) entered before the high Federal court the suit against the Compagnie Générale de l'Orénoque a general meeting of shareholders of said company was taking place in Paris, on the 30th of May, 1890, in which a resolution was passed for the purpose of converting the Compagnie Générale de l'Orénoque into an English company, under the name of "Orinoco Exploration and Trading Company," which meeting likewise resolved *to dissolve and wind up the company and appointed liquidators.* In the memorial presented by the liquidators of the company on the 5th of December, 1895, reference is made to the aforesaid dissolution, after the following statements:

> The board of directors had many debtors and they hesitated therefore to collect the harvest of 1890, but yielding to the representations of their agents they furnished the necessary funds in agreement with a Liverpool firm who sent out their special agent, Mr. Staedelli.
>
> The position of the company in Paris *was very painful, as its credit had been totally exhausted. All efforts made in France proved to be of no avail,* while in England confidence was not lost and it was possible to go on there with the business. The board of directors therefore willingly considered a proposition from England for the constitution of a company in London, to which all the assets, contracts, material, works, etc., of the Compagnie Générale de l'Orénoque would be transferred.

No mention is made in this memorial of the liabilities of the company, although it may be inferred from their own statements that they must have been considerable, *as the credit of the company was exhausted in Paris and all efforts in France seemed of no avail.*

In the accounts annexed to the petition presented by the liquidators of the company on the 10th of July, 1902, to the minister of foreign affairs of France, which fixes their claim against the Venezuelan Government in the sum of 7,616,098.62 francs, will be found the following

items referring to the liabilities of the company on the 30th of May, 1890:

	Francs.
1. To the shareholders	1,500,000.00
2. To the Société de la Monnaie	722,851.56
3. La Banque de Consignations	236,356.00
4. Mr. Alfred Chauvelot	191,176.00
5. Mr. Eugene Ferminac	63,000.00
6. Mr. Louis Roux	13,059.55
7. Mr. Theodor Delort	14,641.26
Total	2,741,084.37

In this amount interest on the different credit balances is not included. The company had, therefore, on the 30th of May, 1890, debits amounting in total to almost as much as the capital of the company, equal to 1,500,000 francs.

Out of this capital, 600,000 francs had been allotted to Mr. Chauvelot, in 1,200 shares (fully paid) of 500 francs each, which were deducted from the 3,000 shares which formed the capital of the company.

Mr. Bricard, who had been appointed auditor in the first general meeting of the 9th of March, 1888, presented a report dated in Paris the 10th of March, 1888, in which he emits his opinion in reference to the valuation given to the contributions brought to the company by Messrs. Miguel Tejera, Chauvelot, and Th. Delort.

The contribution of Messrs. Tejera and Delort consisted in the concesisons granted by the Government of Venezuela for the exploitation of the natural productions of the Territories of the Upper Orinoco and Amazonas, and for the exclusive purchase and sale of all the tonca beans (sarrapia) of the territory between the Orinoco, Brazil, and British Guiana. In consideration of these contributions Messrs. Tejera and Delort had an interest of 40 per cent and 20 per cent, respectively, on the dividends to be distributed.

The contribution of Mr. Alfred Chauvelot consisted in the following:

First. The plant belonging to him, and principally the steam launches and boats of other kind, the rolling stock, etc., in short, all the goods bought by him for the intended exploitation.

Second. All the works already completed, such as houses, stores, offices, shops, etc., erected on the different agencies, and the actual organization of the exploitation, which included the contracts and agreements with the various agents and employees.

Third. The assets and liabilities of the company, including all goods on deposit or in transit, as well as the ingress and egress necessary for the purchase or sale of goods, or effects, etc., for the upkeep of the personnel.

Fourth. The agreement signed with several commercial agents for the purchase and sale of goods in Europe and America.

The opinion of the auditor with reference to the contribution of Mr. Chauvelot, in consideration of which he was allotted 1,200 shares of 500 francs each, is expressed in the following words:

A sum of 300,000 francs without any interest and without any guaranty was placed at the disposal of the explorers, and in consideration of this loan and of the penalties and privations suffered by Mr. Chauvelot and his friends (who had derived from this enterprise no benefit whatever, either direct or indirect, and who relinquished in favor of the company any benefits accruing from the sale of products exported up to date) 1,200 shares were allotted to him. I must add that the expenses incurred up to date far exceed the said sum of 300,000 francs, but said expenses are already incurred and they are represented by the plant and the work performed. These expenses had to be made and they will be beneficial to the company, who would have been obliged to incur the same after she had been constituted. It is therefore only right that the company liquidate these supplementary expenses at her own risk and peril and take them over.

The amount of these expenses, which were represented by plant and work performed, is said far to exceed the sum of 300,000 francs loaned by Mr. Chauvelot, but the exact figure is not given. From the examination of the accounts presented by the Société de la Monnaie it appears that on the 10th of March, 1888, when the auditor presented his report, the syndicate of the Haut Orénoque was raising the sum of 491,846 francs, not counting interest from the 1st of January of same year; that on that date the account was commenced with a debit balance of 499,523.69 francs; that the account of the Banque des Consignations commenced on the 1st of January, 1890, with a debit balance of 285,900.70 francs and was increased with interest to the 31st of March, 1890, amounting to 3,849.59 francs, and with 31.75 francs, Mr. Brumeaux's fees for a summons, and with 13 francs for dispatches to London and to New York.

The foregoing shows that when the Compagnie Générale de l'Orénoque was constituted with a capital of 1,500,000 francs, a sum of 600,000 francs in fully paid up shares was allotted to Mr. Chauvelot in consideration of his loan of 300,000 francs, which was represented in plant, steam launches, and preliminary work for establishing the navigation of the Orinoco, which really constituted the working capital of the company; that this working capital had really cost a sum in excess of the 300,000 francs loaned by Mr. Chauvelot and that the company undertook to liquidate the same and to take it over at her own risk and peril; that according to the abstract of account of the Société de la Monnaie, the syndicate was owing to that society the sum of 491,486 francs, which was partially paid off during the course of that year with bills of exchange and cash, and that said account was thus reduced on the 31st of December, 1888, to the sum of 284,673.29 francs, inclusive of interest amounting to 28,427.85 francs. The sum of 900,000 francs paid in by the shareholders, besides the 600,000 francs allotted to Mr. Chauvelot, were absorbed by the liquidation of the

debts of the syndicate and by the requirements of the trading of the society in buying and selling goods, exporting products, employees, and general expenses; and no evidence exists to show that any part of that sum of money had been invested as contracted by the company in the construction of two railway lines, in the sending out of a scientific commission for the study of the natural products and minerals existing in the territories, nor in the introduction of immigrants, or the building of chapels and schools in every village that the company was bound to found, nor in the construction of barracks, nor the introduction of Catholic missionaries, nor in the hospitals and drug shops for the attendance of natives and immigrants, nor in colonizing the tonca-bean territories, nor in establishing navigation in the principal affluents of the Orinoco.

This sum of 900,000 francs, paid into the treasury of the company, as well as the sum of 1,241,000 francs, which she was owing to several parties two years after starting her operations, after having exhausted her credit and being unable to proceed, appear to have been all spent without any other apparent result than the exportation during the same lapse of time of 73,992.20 kilograms of rubber and 44,569.70 kilograms of tonca beans, according to the official figures mentioned in page 68 of the memorial of the liquidators.

The explanation of the result of the commercial operations of the company is furnished by the very figures taken from her books and reproduced in the memorial so often quoted. (See p. 66.) This demonstration or abstract is headed thus:

General account of expenses of the Compagnie Générale de l'Orénoque, from the original syndicate, September, 1886, to the 14th of October 1891 (on which day judgment was passed by the high Federal court), after deducting the moneys received for sale of products by the company.

Items referring to expenses:

	Francs.
Expenses of first establishment, viz:	
Expenses of syndicate	290,995.88
Cindad Bolívar:	
Expenses of *administration, agencies, employees, navigation expenses, traveling expenses*, etc	487,263.09
Furniture and naval stores, shop and transport stores, sawmill, utensils, etc	425,040.66
Atures and Maipures:	
Work on boats and transportation of same over the rapids, mounting, remounting, repairing and maintaining same, railroad for the carrying over of the boats. Surveys of both banks of the river for the construction of a final line, roads, bridges, rafts, buildings, etc	629,080.37
Punta Brava:	
Expenses of agency and of installation, harbor, road, and other work	117,708.01
San Fernando and San Cárlos:	
Expenses of agency and installation, buildings, watch posts, etc	360,521.80
Cattle ranch on the Vichada	62,708.08

Paris:	
	Francs.
General expenses of administration, board of directors, employees, traveling expenses, etc	118,628.19
Stamps and registration	6,821.80
Total	2,498,767.88

Considering the amounts of these items and all that is revealed by them, and taking into account the capital with which the company was founded and the colossal magnitude of the enterprise it entered upon unaware of the difficulties of same, as has been repeatedly acknowledged by her principal directors, it must be admitted that what happened was only natural and inevitable, viz: That the company exhausted its credit; that it was unable to proceed with its operations or to comply with its engagements and to pay its debts; that the general meeting of shareholders of the 30th of May, 1890, resolved to dissolve and wind up the company before they had any knowledge of the action suit entered by the representative of the Government of Venezuela, and, lastly, its attempts, twice baffled, to convert itself, first, into an English company with the name of "The Orinoco Exploration and Trading Company," and later on into a Belgian limited company under the name of "Compagnie Internationale des Caoutchoucs," both attempts having been made with the object *of obtaining an increase of cash capital to pay off debts and proceed with the business.*

The declarations of several parties who had held important posts in the employ of the company can be made good as further evidence of the real situation of the company in May, 1890, which, being in want of funds and having totally exhausted its credit in Paris, was unable to comply with its engagement toward the Government of Venezuela and to continue the exploitation of the concessions transferred to it by Messrs. Tejera and Delort, by reason of which the general meeting of shareholders resolved on the dissolution and winding up of same. These declarations are: First, the declaration made before the judge of first instance of San Fernando de Apure by Mr. Enrique Ligeron, submanager of the company in the Upper Orinoco, which declaration is a part of the evidence procured and presented by the representative of the company before the high Federal court in the action entered by the fiscal de la hacienda pública (financial representative of the Government); and, second, the report presented by the liquidators of the company to the meeting of shareholders held in Paris on the 27th of December, 1890, as well as the minutes of said general meeting.

Mr. Enrique Ligeron's declaration of the 13th of November, 1890, before the said judge is as follows:

I was submanager of the company in San Fernando de Atabapo more than four years, hence when I went to that place the steam launches which the company had taken there for navigating the river above the rapids had been carried above these rapids. *These steam launches had been transported on rails provisionally laid,* and when I arrived there *no railway line existed and the rails had been scattered in different parts.* In the present condition of

the river above the rapids *no steamboat can navigate on those waters, as the obstacles offered by the rapids are insurmountable.* The more convenient way of covering that space *would be the construction of railway lines over ground, which offers no great difficulties,* the most difficult part of which being *the construction of bridges on the affluents of the Orinoco, which run across these lands.* It is evident to me that the company made all efforts in order to comply with the engagements of its concessions, *but in my opinion it could not do more than what it performed, owing to the insufficiency of its capital for carrying out the different enterprises of its contract.*

The abstract of the minutes of the general meeting of shareholders of the 29th of December, 1890, contains the following:

The meeting having been regularly constituted, the liquidators read the following report: "In our meeting of the 23d of June last you were acquainted with the agreement signed with the Gold Trust and Investment Company for converting the Compagnie Générale de l'Orénoque into an English company called 'Orinoco Exploration and Trading Company.' This agreement having been approved by the general meeting, *the dissolution and winding up of the company was* resolved and I had the honor to be appointed liquidator."

The agreement with the Gold Trust having been definitely sanctioned by the shareholders, the new company was formed and registered in England; but political differences having in the meantime arisen between England and Venezuela, this last power has absolutely refused to acknowledge the new company and to transfer to same the rights and concessions of the French company. It was but very late that I was made acquainted with the causes which were opposed to the formation of the English company, and this delay was the cause of my losing very valuable time; but the moment I knew of these causes I took steps conducive to a result *which might save our company.* I have *appealed for assistance* to the former directors of the company who are now negotiating with the Government of Venezuela and have looked *toward another solution of the problem, which is the only means of insuring the future of the company, viz, the reconstruction of the present company with an increase of fresh capital in cash.* These gentlemen will now submit their views to you and will bring to your knowledge the result of their negotiations.

The chairman then said that owing to the facts which had just been mentioned by the liquidator the board of directors had sent to Caracas Mr. Berthier, who had been a former agent of the company, with the following mission: *to obtain from the Government the revision of the old concessions, which evidently contained clauses which were embarrassing to the Government* as well as to the company. Mr. Berthier was, besides, to make sure that the Government would make no difficulties *for the transfer to a new company* (provided this be not an English company) *of all the rights and concessions accruing from the new contract.* The double purpose of Mr. Berthier's mission has been obtained, the terms of the new contract proposed have been accepted, and one of its clauses will allow the transfer to a new company. The new company will be French-Belgian, formed *with the assistance of a powerful Belgian group.*

The chairman then read the draft of the Articles of Association of the French-Belgian Company in formation.

The Compagnie Générale de l'Orénoque having ceased to exist in May, 1890, by virtue of the dissolution voted by the shareholders, the administrators had no longer power to transact any business, and the authority of the liquidators was reduced to the collection of moneys owing to the company, to wipe off former debts and liabilities, and to conclude whatever operations were pending at the time of the dissolution. The liquidators had also to appear in court in whatever actions existed against the company, as the limited company called "Compagnie Générale de l'Orénoque" had ceased to exist by virtue of her

dissolution, and there had likewise ceased to exist, from the moment that the liquidators had been appointed, all the powers and authority of the board of directors, as well as all the powers that might have been conferred by said directors.

From the minute examination of all the papers and documents referring to this matter, made by the Venezuelan commissioner it is evident that at no time whatever was the knowledge of the dissolution and liquidation of the Compagnie Générale de l'Orénoque conveyed to the high Federal court, and that the liquidators never took any steps for the purpose of being represented in the action, neither at the time when the suit entered by the representative of the Government of Venezuela was to be answered (on the 22d July, 1890), nor on the 7th of August, 1890, when Mr. Fiat entered his petition for the collection of evidence, nor in any other circumstance whatever during the whole course of the process. It is likewise evident from said examination that the dissolution of the company was never officially communicated to the Government of Venezuela, and it is natural to infer that the cause of this omission was to keep this fact from the knowledge of the Venezuelan authorities, a fact which in itself was sufficient for the complete success of the action entered by the representative of Venezuela in the high court for the rescission of the contracts upon which the company was formed, since the dissolution and liquidation of the company frustrated the object to be obtained by the working of the concessions granted and made it materially impossible for the concessionaries to comply with their obligations, which was the legal basis of the suit.

It is equally evident from the avowals of the liquidators, in their memorial to the minister of foreign affairs of France, and Mr. Alfred de Berthier's correspondence annexed to same, that Mr. Fiat, who had been representing the company before the court up to the 11th of October, 1890, *had sent his resignation to Paris*, and that Mr. Bernabé Planas was then appointed as attorney, but this gentleman having declined the appointment, it was decided, on the advise of Mr. Delort, to send out a special agent. Mr. Berthier was appointed for this mission, as he was acquainted with all the details of the matter. Mr. Berthier, who was at the time in Martinique, was notified to proceed to Caracas, where he arrived on the 25th of October, 1890. (Page 47 of the memorial.) Mr. Berthier remained in Caracas from the end of October, 1890, to the month of July, 1901, and the action taken by him *tended solely to the obtaining of an extra judicial understanding with the fiscal de hacienda* (the representative of the Government) *in the suit pending before the high Federal court*—

in order to put a stop to the process and the relinquishment on the part of the Government to demand an indemnity, and the company, on the other hand, to renounce to its concession, in place of which another would be granted which would be immediately transferred to the new company.

Mr. Berthier, in a letter dated the 16th of December, transmits to Count de Ker Daniel, the liquidator of the company, the following:

I am not yet sure of this result, which has not so far been agreed to, but it is useless to deceive ourselves on it, as after all it does not amount to much. *What we would really gain is the cessation of the action entered against us.* All else is a chimera (leurre). I do not, however, believe that I can obtain anything better, *and I consider it lucky if we obtain this.*

According to the scheme proposed to the Government of Venezuela for a new contract—

the company was to relinquish her former concessions and the Government was to desist from the action entered before the high court, each party to pay their own costs, and the Government was to grant to the company for a period of twenty-five years the exclusive right for steam navigation on the waterways of the Federal Territories Upper Orinoco and Amazonas, and on the rivers Caura and Cuchivero, during which period the Government would not grant a similar concession to any other party or company.

The steamers of the company were to navigate under the Venezuelan flag. (Annexed document No. 92.)

It is to be observed that this scheme commences in this way:

The Compagnie Générale de l'Orénoque, represented by her legal attorney, as per annexed power, which will be certified.

No mention whatever is made that the company was in liquidation, and all along this document she is simply called the "Compagnie Générale de l'Orénoque."

Article 10 of this scheme is worded thus:

This contract can be transferred to any other party or company with the previous consent of the Federal Government, without which formality the transfer can not be effected; however, as an exception this contract can be transferred in part or in whole to the Belgian company called "Compagnie Internationale des Caoutchoucs et Produits Naturels au Bassin de l'Orénoque."

According to article 3 of said scheme the company had the right to construct within the territories mentioned the railway and telegraph lines which it might think convenient.

Mr. Berthier went on with his extra judicial negotiations until May, 1891. On the 17th of the same month this gentleman (as confirmed by his letter of 28th of May to the liquidators) transmitted to the said liquidators the following cablegram:

Contract accepted on best terms, navigation included; no special commission. I await instructions to proceed. Don't you wait longer, as time is very limited. If you can not remit one hundred thousand, send by cable whatever you can with authority to draw on you for the balance.

He again telegraphed on the 22d of May as follows:

On receipt of my letter of the 7th of May (which has not been presented), reply by cable. The tenth word of my telegram should have been "pullcinetto" (£600,000). Give your approval to contract, which comprises the free navigation. I have sent you a copy. I will not weary of pressing you, as there is no time to be lost.

Again, a third cablegram of the 25th of May reads thus:

As you have not telegraphed to me, the negotiation has collapsed. It is useless to proceed, there being no probability of doing any business for some time. I am unable to do anything for the present. I will leave on the 6th June. I can not remain here any longer. Congress dissolves shortly.

Mr. Berthier's letter continues in this way:

I have received your last telegram one day after I had transmitted to you mine of the 25th. This is equivalent to telling you that *said telegram arrived too late.* I therefore confirm the contents of said telegram, but I shall, however, await for the arrival of Doctor Morisse, as per your advice.

I considered, by the contents of the letters you have written to me, that you were in a position to reply immediately on receipt of my first telegram. The deciphering you made of same was nearly correct, and it should have given you to understand the danger incurred by waiting. In truth I was careful to tell you that the Government maintained the nullity of the former contract to be replaced by a new one. You ought to have known, in consequence, that this entirely new decision required a certain time and that by means of the railroad we evaded the trouble of having to wait for Congress. I am still going to make a last attempt *in order to prevent that the new company be annulled in consequence of the nonfulfillment of the contracts by the old company.* There will be an extraordinary session of Congress which lasts for some weeks. I will try to obtain a solution of the process, whichever it may be. * * * If I fail in my last attempt, there will be no other way but to lodge a claim against the Government. It follows, of course, that a counteraction (cross demand) may be entered. Two facts have now taken place on the Orinoco which will give us considerable power later on. The first is that the steamer *Meta* was put out of service without any cause by order of the governor of the territory, an action which constitutes an outrage against private property. The second is an armed aggression against the steamer *El Libertad*, which was nearly captured. All this may serve as a basis *for demanding a large indemnity*, but when would such a cause come to an issue? Before I leave I will settle this matter *so as to give to my successor the starting point for a claim.* It would likewise be the official verification of those deeds which may be considered as worthy of a savage country. Resuming what precedes I am going to try to obtain a solution *which will countenance the existence (la raison d'être) of the new company.* In case I fail, I shall make preparations for obtaining the required matter (elements) for the process which we must necessarily enter into. I will associate with Maiz, by private agreement, for obtaining the concession on the rapids and sell out the same. *In this way we shall keep our hands on the business.* I will conclude by saying *that I rely on the sincerity of the promises made to me* and that the political situation has been the only cause of our failure. It is probable that a satisfactory result may be obtained, provided you can wait and spend some money at the proper moment; but as I can see no issue for the present, and I must necessarily return to France, I request you to relieve me from this post.

In page 49 of the memorial addressed to the minister of foreign affairs of France the liquidators express themselves as follows:

When Mr. Berthier saw that he could obtain nothing, he looked to a solution of the matter by means of contract for a railroad on the right bank; but we did not understand his cablegram, and this solution, on the other hand, was not acceptable. In short, Mr. Berthier had proved very expensive and had achieved no sort of success. But what was more grave than all this is that, on his advice, the Belgian company called "Compagnie Internationale des Caoutchoucs et Produits Naturels du Bassin de l'Orénoque" had been constituted at Brussels in May in order to transfer to the same the new contract (article 10 of the final scheme). What was now to become of that company?

The immediate consequence of Mr. Berthier's return to Paris was that the liquidators left the company without any attorney to represent it in the suit before the high Federal court, there being no document in existence to prove that the liquidators took the necessary steps for their representation at Caracas after Mr. Berthier had left.

From the examination of all the documents presented it appears likewise that the company had no official representative in the territories of upper Orinoco and Amazonas and that it limited its action there to entrusting to four employees (two in San Fernando and two in San Cárlos) the collection of moneys owing to it and to keep an employee at Atures and another one at Maipures.

More or less than three years after the company had been put into liquidation, and owing to the abandonment or desertion in which the company had left all its goods and chattels,which consisted of personal property, some goods, effects, and a few buildings made of earth, timber, and iron roofing, and which were scattered in different places on the banks of the Orinoco, the governor of the territory Upper Orinoco issued a decree laying an embargo on all these goods and chattels (under date of 8th of March, 1893), giving notice to the national executive of this decree and remitting the inventory of said goods to the representative of the company at Caracas for his knowledge and purposes.

The allegation set forth that the governor of the Upper Orinoco had no authority to carry into execution the sentence of the high Federal court without an order to the effect from said court does not imply that this governor had no authority to decree the inventory of the goods and chattels of the Compagnie Générale de l'Orénoque in liquidation, which were entirely abandoned and were suffering considerable damage, owing to the special condition of same and to the wide expanse of territory over which they were scattered.

From the evidence of document No. 2 of the records in the archives of the high Federal court and from the memorial addressed on the 3d of November, 1895, by the liquidators of the company to the minister of foreign affairs of France, it is proved that the acts of the governor of the aforesaid territory were limited to the following: To the appointment of the persons that were to make the inventory at Maipures and San Fernando de Atabapo, for which purpose the chief civil official was commissioned, as well as for acting as receiver, there being no legal representative of the company to deal with; to issue instructions to the same official, under date of 8th of May of same year, for the preservation of the real and personal property, for the caretaking of the machinery, hulks, tools, and other effects, and for the tending and care of the cattle and stock; to issue a decree appointing citizens Julián Franklin, Julián Rivero, Sergio Lira, and Pablo Sanchez to

take charge of all the stock and cattle that were under the care of Braulio Valiente.

It is therein stated that the firm of Messrs. Dalton & Co. had presented a petition or memorial requesting the payment of expenses and salaries which they had incurred on behalf of the Orinoco company. Messrs. Dalton & Co. say in said memorial:

During our commercial relations with the company of the upper Orinoco and Amazons we have, during more than one year, paid all expenses of the caretaking and preservation of the property of the company, including expenses caused by Mr. Marcelo Chiarelli. Without our intervention and without the interest which we took in the matter *the property aforesaid would have been completely ruined, as it had been notoriously left in abandonment*, owing to the difficulties which the company experienced latterly.

Messrs. Dalton concluded by requesting the payment of 4,000 francs, as per account, which they annex.

Pages 8 and 10 of the aforesaid document No. 2 contains the inventory of the property of the company at Perico, consisting of 1 house roofed with iron, several tools and pieces of furniture, 6 mules, 1 horse (all in bad condition), and 1 donkey; page 11 contains the receipt of Braulio Valiente for the cattle of the company at Santa Catalina, which consisted of 23 cows, 26 calves, 1 horse, 1 mule, and 1 donkey. Page the 12th contains a declaration from the same Valiente, in which he states the following: That besides these animals he had delivered the following during the revolution: To Santiago Hidalgo 20 head, to Mr. Horacio Luzard 3 oxen, and to Mr. Pedro Quiñones 2 head, making a total of 25 head in all; that he has in his possession 3 head belonging to Mr. Julián Rivero, 3 cows and 2 calves belonging to Mr. Sergio Lira, 12 head belonging to Mr. Juan Figarella and 1 more head belonging to Mr. Boulissière; that 7 bullocks have died and 1 has gone astray; that 2 bullocks were slaughtered by Gen. Venancio Pulgar, jr., and 2 by General Anselmo, governor of the Upper Orinoco; that Mr. Juan Figarella sold 5 cows at $25 each, 5 bullocks at $30 each, 1 lean bullock for $25, 1 calf for $8, and 1 bullock to Mr. Boulissière for $41; that the cattle belonging to Julián Rivero and Sergio Lira were delivered to them by order of Mr. Chiarelli, liquidator of the company.

Page 13 contains another declaration of the same Valiente to the effect that the house of Messrs. Dalton & Co. was owing him salaries as caretaker of the cattle of the company to the amount of $333.75, $30 for a hut and corral built by him, and $31 for payment to laborers, making in all a total of $396.75.

Page 16 contains the declaration of the French citizen G. Aubey, as follows:

Question. From whom did you receive the property of the company in San Fernando de Atabapo in order to become their agent in that place? Reply. The agent of the company in that place was the French citizen Mr. Eduardo Marie, but he had been obliged to leave on important business and he had commissioned to put me in charge the Belgian subject,

Eugenio Halveich, from whom I received all the property under inventory, Mr. Ramón Orosco being present and signing the same as witness

Question. To whom does the house called "Casa Amarilla" belong? Reply. The house belongs to me conditionally. I will explain this to you. The liquidator of the company, called Mr. Roux, who resided in Paris, wrote to me in August, 1891, to say "that I was to consider all the *bonos* (promissory notes) which I held from the company as hard cash." I then took the house in guarantee with the intention of turning over the same to the company in case she might need it, and provided I was paid the sum of 6,002 francs, which the company was owing me.

Question. What goods are there now in the Casa Amarilla? Reply. There are some pieces of furniture and some goods.

Pages 18, 19, and 20 contain the declaration of Juan Figarella, a French citizen in the employ of Mr. Chiarelli, who had been intrusted with the liquidation of the property of the company by Mr. Edmundo Knots. This declaration is in every way identical to that of Braulio Valiente with reference to the cattle.

Pages 21, 22, 23, and 24 contain the inventory of the goods in the Casa Amarilla, which was an erection in pretty good condition, built of earth with a thatch roof. These goods consisted of woven stuffs, haberdashery, and ironmongery, and the inventory of same was made in the presence of G. Aubey, Pedro Nicco, R. Orosco, and Nieves Arrabache.

Page 26 contains the declaration of Horacio Luzard, similar to that of Braulio Valiente, in what refers to the number of cattle.

Page 29 contains a receipt from Luis A. Ortega in favor of Gen. Juan Anselmo, governor of the Territory, for the amount of $131.43 on account of work as caretaker of the property of the company.

Page 30 contains a receipt from Braulio Valiente for $108.63 in favor of same governor for salaries as caretaker of the cattle of the company.

Page 31 contains a petition addressed to the judge by the aforesaid governor, requesting the payment of expenses incurred in taking the inventory of the property of the company, as per vouchers of Luis A. Ortega and Braulio Valiente for the sum of 959.24 bolivars and requesting that orders be issued for the sale of part of the property to cover said expenses. Then follows the record of the sale of the goods of the Casa Amarilla, as per inventory of 12th of April last, effected in public auction on the 22d of May, at which sale bids were made by the Vinciquina for 360 bolivars, by Nieves Arrabache for 400 bolivars, by Ramón Orosco for 800 bolivars, and by Juan Anselmo for 900 bolivars; and no higher bid being obtainable the goods were allotted to Gen. Juan Anselmo.

It is, therefore, inaccurate, as asserted in the aforesaid memorial, that the governor, Juan Anselmo, had declared, on his own authority, that he had a right to an indemnity in consideration of his labors, nor that *all the property of the Compagnie Générale de l'Orénoque* was sold and adjudged to Gov. Juan Anselmo for the sum of 900 bolivars.

In appreciating the true and real situation in which the property of the Compagnie Générale de l'Orénoque had been left after and by virtue of the dissolution of the company, and in consequence of the abandon in which the said property appears to have remained for years exposed to the inclemency of the weather in localities the natural conditions of which cause very serious damage to buildings, goods, utensils, tools, steamboats, and others, it is the conviction of the Venezuelan arbitrator that all this property did not represent at the end of the period elapsed a value sufficient to cover the sum of 40,048.62 francs, which the company had been condemned to pay for damages by the sentence of the high Federal court, and the further sum which the company was likewise to pay to the Government for costs of the suit, which have not as yet been liquidated.

By virtue of this and of the reasons set forth in this opinion the Venezuelan arbitrator considers that the claim lodged by the liquidators of the company against the Government of Venezuela for the amount of 7,616,098.62 francs is totally devoid of basis and disallows it absolutely.

NORTHFIELD, *February 9, 1905.*

NOTE BY THE VENEZUELAN COMMISSIONER.

The foregoing is a faithful translation of my opinion rendered at Caracas in session of the Venezuelan-French Commission of May 5, 1903, as it appears from the report called "Comisión Mixta Venezolana-Francesa, protocolo de 19 de Febrero de 1902. Dictámenes del Arbitro Venezolano."

OPINION OF THE FRENCH COMMISSIONER.

The Company General of the Orinoco claims on the date of July 10, 1902, a sum of 7,616,090.62 bolivars, which is made up as follows:

One million five hundred thousand bolivars for its capital, 1,701,680.17 bolivars for the debts contracted in view of the service of the concession, 2,414,410.45 bolivars for interest at 6 per cent on these two sums for twelve years, and finally 2,000,000 bolivars for the eventual profits which it has lost. After having examined the dossier and studied the memoir presented by Doctor Paúl, I have judged that the Venezuelan Government ought to pay to the company an indemnity of 7,000,000 bolivars. In failing in the obligations which it had assumed, in deceiving the company by its dissimulation which changed the substance of its agreements, and in interfering with the management of the concession by its vexations and abuses of power the Venezuelan State has brought about the ruin of the company. Its responsibility is then involved, in my opinion, to the amount of sums disbursed by the company. These sums including the capital, the debts, and obligations contracted for the service, and the interest, amount to a total of 5,616,098.62 bolivars.

indemnity of 6,000,000 bolivars by 1,000,000 bolivars, which thus reaches the sum of 7,000,000 bolivars in bonds of diplomatic debt. These 7,000,000 bolivars represent merely 2,800,000 bolivars in gold. This is the sum which the company ought to receive and the Venezuelan Government pay if the umpire should share the opinion of the French arbitrator. This sum represents only a little more than half of the disbursements of the company.

The Venezuelan arbitrator, playing the part of a lawyer rather than that of an impartial arbitrator in the brief submitted to me, undertakes to dispute the arguments of the company, and to demonstrate that the Venezuelan Government, far from having anything to be censured for, was, to the contrary, in a position to bring suit against the company for not having fulfilled its obligations. The minutes of the session of the commission of May 7, 1903, mentions that—

> Doctor Paúl expresses to his colleague the desire that he present, as he himself has done, an exposition of arguments upon which he bases his judgment and by which, at the same time, he would reply to the arguments presented by the Venezuelan arbitrator. Doctor Paúl would be able to take these into consideration and to see if it would be possible to reach an agreement.

I have refused to follow my colleague into this field, believing that in my capacity of an arbitrator I am not called upon to present any arguments in favor of or against one of the two parties, but only to examine their statements and decide in favor of the one or the other. One of the lawyers of the Paris bar, Maître Poincaré, has undertaken to defend the company in the field of law, answering Doctor Paúl's arguments.

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Has not my colleague confessed by these words that an agreement is possible and that consequently the company has a right to an indemnity? I do not see, in fact, how we would have been able to arrive at an agreement unless he recognized the principle of an indemnity, contrary to his decision to reject the claim entirely. I am still persuaded that my colleague would have changed his absolute opinion if I had consented to diminish in notable proportions the indemnity which I have fixed. But conscientiously I have not been able to decide to do it. It is not my intention to censure Doctor Paúl, because his patriotism may have led him to become a lawyer representing his country instead of the man who was called upon to pass judgment. I

To arrive at this amount the company has reckoned the interest at the rate of 6 per cent. While this rate may be moderate considering the nature of the enterprise and the value of money in Venezuela, a rate of 3 per cent must be allowed in the calculation of interest to be granted to the capital. In fact my colleague and myself have agreed that interest given by the commission should be calculated at a rate of 3 per cent, this rate being fixed by the Venezuelan code as a legal rate the contract being silent, and being accepted for the already existing French diplomatic debt.

There is then reason to diminish the sum claimed by the difference obtained in reckoning interest at 3 per cent instead of 6 per cent, or 540,000 bolivars. This decrease, on the other hand, ought only to relate to the interest on the capital; in fact the company being obliged to pay an interest of 6 per cent to its lenders and holders of obligations it would be unjust to make a reduction on the sum claimed under this head and which enters entirely into the disbursements of the company.

I have not thought at all that I ought to accord to the company the indemnity of 2,000,000 bolivars which it claims for the eventual profits which it has lost. It has not been in business long enough to arrive at a time of profit, and no one can know if it would ever have reached a point greater than the normal interest on the capital invested, the interest of which I take into account in the reckoning of the indemnity. That remains very doubtful if we consider the burdensome obligations which the company allowed to be imposed upon it in the contract. It would not be equitable that it owed to the situation of claimant the advantage of taking from Venezuela benefits upon which it could not have counted truly, considering the conditions of its management, if the latter had been developed without interference. It is, then, a sum of 5,078,098.62 bolivars that in equity the Venezuelan Government ought to pay to the company for losses suffered. But I have had to take account on the one hand of the use of the interest since July 1, 1902, the day on which the calculation prepared by the company stopped; and, on the other hand, of the depreciation of the bonds of the diplomatic debt. Twenty-seven months have already passed since the first of July, 1902, and this lapse of time increases the amount claimed by the company more than 800,000 bolivars, which will continue to accrue until the day of the final award. Up to to-day this will be a sum of at least 6,000,000 bolivars, which ought to be paid to the company for reimbursement of its expenses.

Finally, the indemnity, according to the terms of the protocol, having to be paid in bonds of the diplomatic debt, and not in gold, in virtue of the concession consented to by the French Government in favor of the Venezuelan Government, to allow it to pay its debts with greater facility, and the depreciation of these bonds being at the present moment about 60 per cent, I have judged it equitable to increase this

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am contented to make mention of it, and to the contrary I seize this occasion with pleasure to render homage to the courtesy and the breadth of mind he has shown in the course of the numerous sittings of the commission during which we have examined nearly four hundred claims, of which I understand that the exposé and the discussion must have been grievous many times to his Venezuelan sentiments.

But Doctor Paúl would not have been the only one among his authorized compatriots who would have consented to recognize the responsibility of his Government in this affair and consequently to admit that an indemnity is due to the company. In 1897 the President of the United States of Venezuela sent to Paris a semiofficial plenipotentiary, General Pietri, to endeavor to renew the diplomatic relations interrupted between the two countries since the departure in 1895 of the Marquis de Monclar, French minister, because of an incident which to reopen here is unnecessary. Mr. Pietri opened negotiations with the Quai d'Orsay, and such negotiations resulted in the signing of a protocol by virtue whereof normal relations between France and Venezuela were to be reestablished, provided such diplomatic act was ratified by the Congress of Venezuela. Annexed to said protocol there was a convention concluded on June 24, 1897, between the plenipotentiary of Venezuela and the liquidators of the Company General of the Orinoco, the text of said convention being attached to the papers (*dossier*) in the claim. It was stipulated by the convention that said company by way of a compromise agreed to relinquish any further claims upon payment by the Venezuelan Government of an indemnity of 3,600,000 bolivars.

The Venezuelan Congress did not ratify said protocol, the convention remaining, therefore, null and void. However, it may be inferred from such fruitless endeavors to come to an agreement that there has been a Venezuelan plenipotentiary, who eight years ago recognized the right on the part of the Company General of the Orinoco to a considerable indemnity.

The Venezuelan Congress having met in secret session to examine the protocol signed by Messrs. Hanotaux and Pietri, I have been unable to learn the reasons of its rejection by said assembly. It is possible that the convention subscribed to by the company may have had something to do with such rejection. But, even admitting that the existence of said convention had been the only cause of the refusal of Congress to ratify the protocol, said convention does not lose by that fact its character as a document of great value, for all those who know by experience that the facility with which the Venezuelan administration despoil foreigners of rights acquired by mutual consent is only equalled by the difficulty which the Government and public opinion in Venezuela experience in admitting for injured strangers the legitimacy of equitable compensation.

PARIS, *September 2, 1904.*

I must express at this point surprise to see how my colleague has construed the statements I made to him at the sitting of May 7, 1903, that I would—

take these [arguments] into consideration and see if it would be possible to reach an agreement.

To deduce from such statement, inspired only by my desire to become acquainted with the arguments of my colleague, to see—if I was convinced by them—whether we could reach an agreement or find out whether it was established that the General Company of the Orinoco was entitled to an indemnification, is equivalent to deriving from the question put by one person to another, "What reasons have you to demand from me the payment of that bill?" that such question establishes the fact that the debt has been acknowledged.

That my learned colleague should appeal to such a line of circumlocutory arguments in support of his opinion in favor of the General Company of the Orinoco plainly shows that in the store of arguments used by the company, and which my learned colleague produces as his own, there are not many weighty enough to bring conviction to the honorable umpire's mind of the sound foundation of the claim.

The French commissioner reaffirms his determination in the brief under discussion, when he avers that he abstains from following me into the field of argument,

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My learned colleague adds:

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Consequently, M. de Peretti, in his brief, limits himself to explaining his reasons for granting the company any indemnification for eventual profits; for reducing the rate of interest claimed to 3 per cent until July 1, 1902, when the estimate made by the company ends; and for granting besides a supplementary indemnification for interest from that date until the day of the final decision, fixed at 1,000,000 bolivars, and another million because of the depreciation of the bonds of the diplomatic debt, making a total of 7,000,000 bolivars.

I deny, as it is my bounden duty to do, most emphatically, the unfounded conjecture my learned colleague has made in his brief, when he states that I would not be the only one among my enlightened countrymen who would have consented to acknowledge my country's liability in this case, and consequently admitted that an indemnification is due the company. It is also indispensable, since the honorable

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PARIS, *September 2, 1904.*

ADDITIONAL OPINION OF THE VENEZUELAN COMMISSIONER.

I have read the brief lately prepared by the commissioner for France explanatory of his opinion rendered at the sittings held by the commission in Caracas on May 5 and 7, 1903, averring that the Government of Venezuela ought to indemnify the General Company of the Orinoco to the amount of 7,000,000 bolivars in 3 per cent bonds of the diplomatic debt.

The gallant expressions used by the French commissioner in speaking of my position on the mixed commission where I have had the most signal honor of sharing the arduous task with so distinguished and learned a colleague, I appreciate as a compensation for the mortifications which M. de Peretti justly believes my patriotic sentiments have suffered while examining the 332 claims submitted to our investigation and decision, representing in the aggregate the enormous sum of 80,000,000 bolivars, a sum which is about equivalent to the capital actually represented by the French colony in Venezuela.

Moved by a critical spirit, my learned colleague makes the following statements:

> The Venezuelan commissioner, playing the part of a lawyer rather than that of an impartial arbitrator, in the brief submitted to me undertakes to dispute the arguments of the company. * * *
>
> I have refused to follow my colleague into this field, believing that in my capacity of an arbitrator I am not called upon to present any arguments in favor of or against one of the two parties, but only to examine their statements and to decide in favor of the one or the other. * * *
>
> Doctor Paúl was so convinced that he was taking the part of the lawyer rather than that of an arbitrator, that he made the statement to me at the session, as shown by the minutes, that he would take my arguments into consideration, if I was willing to submit them and and see if it would be possible to reach an agreement. * * *
>
> It is not my intention to censure Doctor Paúl, because his patriotism may have led him to become a lawyer representing his country instead of the man who was called upon to pass judgment * * *

M. de Peretti de la Rocca, called upon to pass judgment on the claims of his countrymen, believes himself to be authorized under the Paris protocol to pass judgment upon the manner in which I have performed my work on the commission. I do not think that the protocol gives his authority so wide a scope, but I believe that I am obliged to state that his opinions as to the method I have deemed best to follow in the discharge of my duties and functions as an arbitrator, are entirely foreign to the impersonal character which discussions between arbitrators must have when a difference of opinion divides them while investigating and deciding upon a case.

The work I have helped to perform as the commissioner (arbitrator) for Venezuela on the two French-Venezuelan Commissions, in connection with the severe judge of my country, is well demonstrated by the facts that out of 332 French claims submitted to our decision, amount-

ing to the sum of 77,477,409.47 bolivars, 306 were definitively settled or decided by mutual agreement, reducing the sum claimed from 34,127,226.10 bolivars to 3,950,731.14 bolivars, or about one-ninth part of the sum claimed; 16 claims were submitted, because of disagreement, to the final decision of the umpire, Mr. Filtz, who awarded the sum of 153,369.38 bolivars, and the other 8 claims, representing the sum of 42,988,047.50 bolivars, are subject to the investigation of the honorable umpire, Mr. Frank Plumley, in this city of Northfield.

If through the bandage covering the eyes of justice, as she is always represented, the French commissioner has been able to discover that in the claims of his countrymen, as submitted to our joint examination, the amount had been inflated in the proportion of 9 to 1, what could the Venezuelan commissioner not have discovered, animated, as it is justly surmised, by his patriotic sentiments, which had been submitted to the hardship, as my colleague justly remarks of—

discussion [which] must have been grievous many times to his Venezuelan sentiments

from those 332 claims which offer, as shown, the plainest evidence that it has been pretended that Venezuela should pay for indemnity for damages an amount tenfold greater than the value of the actual damages sustained? If, because in order to succeed in preventing that such gross injustice be done by the mixed commissions to which I have been a party, my colleague considers that I have played the part of a lawyer in defense of my country, instead of that of an impartial judge, then I have done my duty, and I do not think I deserve on that score the censure of those who have no reason to desire that I should not have defended my country.

As regards the method adopted by the French commissioner of not supporting his decisions and opinions by arguments in order to distinguish his system of defense from mine, I have nothing to say. It is enough for me to be satisfied that I have fulfilled my duties to the utmost, and that I have in my opinions endeavored to follow the standard set by eminent jurists who have discharged these same duties of arbitrators and who did not think that they were to pass their sentences as imperial ukases, but that such sentences were to be based upon the exposition of the principles involved and upon a line of argument growing out of the examination of such principles, laws, and precedents. Such arguments have come to be a source of light to those who, like myself, desirous of learning how not to err, have gone thither to dispel shadows of darkness in their intellectual labors. Among other authorities, see the six large volumes of Moore's International Arbitrations; the volume containing the enlightened opinions of the commissioners in the United States and Venezuelan Claims Commissions, 1889–1890, and Ralston's Report, Venezuelan Arbitrations of 1903.

I must express at this point surprise to see how my colleague has construed the statements I made to him at the sitting of May 7, 1903, that I would—

take these [arguments] into consideration and see if it would be possible to reach an agreement.

To deduce from such statement, inspired only by my desire to become acquainted with the arguments of my colleague, to see—if I was convinced by them—whether we could reach an agreement or find out whether it was established that the General Company of the Orinoco was entitled to an indemnification, is equivalent to deriving from the question put by one person to another, "What reasons have you to demand from me the payment of that bill?" that such question establishes the fact that the debt has been acknowledged.

That my learned colleague should appeal to such a line of circumlocutory arguments in support of his opinion in favor of the General Company of the Orinoco plainly shows that in the store of arguments used by the company, and which my learned colleague produces as his own, there are not many weighty enough to bring conviction to the honorable umpire's mind of the sound foundation of the claim.

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My learned colleague adds:

One of the lawyers of the Paris bar, Maître Poincaré, has undertaken to defend the company in the field of law, answering Doctor Paúl's arguments. The perusal of the brief (*plaidoirie*) prepared by M. Poincaré has but strengthened me in the opinion which I had formed after having studied the dossier and the plea of my colleague.

Consequently, M. de Peretti, in his brief, limits himself to explaining his reasons for granting the company any indemnification for eventual profits; for reducing the rate of interest claimed to 3 per cent until July 1, 1902, when the estimate made by the company ends; and for granting besides a supplementary indemnification for interest from that date until the day of the final decision, fixed at 1,000,000 bolivars, and another million because of the depreciation of the bonds of the diplomatic debt, making a total of 7,000,000 bolivars.

I deny, as it is my bounden duty to do, most emphatically, the unfounded conjecture my learned colleague has made in his brief, when he states that I would not be the only one among my enlightened countrymen who would have consented to acknowledge my country's liability in this case, and consequently admitted that an indemnification is due the company. It is also indispensable, since the honorable

French commissioner is willing to use it in support of his opinion, that I should take into consideration the incident of the Pietri-Hanotaux protocol and the draft of an agreement signed in Paris by M. Juan Pietri, which M. de Peretti has submitted as a part of his brief.

The incident in question, as it appears in the opinion of my learned colleague is as follows:[a]

In 1897 the President of the United States of Venezeula sent to Paris a semiofficial plenipotentiary, General Pietri, to endeavor to renew the diplomatic relations interrupted between the two countries since the departure, in 1895, of the Marquis de Monclar, French minister, because of an incident which to reopen here is unnecessary. Mr. Pietri opened negotiations with the Quai d'Orsay and such negotiations resulted in the signing of a protocol by virtue whereof normal relations between France and Venezuela were to be reestablished, provided such diplomatic act was ratified by the Congress of Venezuela.

Annexed to said protocol there was a convention concluded on June 24, 1897, between the plenipotentiary of Venezuela and the liquidators of the General Company of the Orinoco, the text of said convention being attached to the papers (*dossier*) in the claim. It was stipulated by the convention that said company by way of a compromise agree to relinquish any further claims upon payment by the Venezuelan Government of an indemnity of 3,600,000 bolivars.

The Venezuelan Congress did not ratify said protocol, the convention remaining therefore null and void. However, it may be inferred from such fruitless endeavors to come to an agreement *that there has been a Venezuelan plenipotentiary who eight years ago recognized the right to a considerable indemnity on* the part of the General Company of the Orinoco.

The Venezuelan Congress having met in secret session to examine the protocol signed by Messrs. Hanotaux and Pietri, I have been unable to learn the reasons of its rejection by said assembly. It is possible that the convention subscribed to by the company may have had something to do with such rejection. But, even admitting that the existence of said convention had been the only cause of the refusal of Congress to ratify the protocol, said convention does not lose by that fact its character as a document of great value. * * * .

So much for the history of the incident of the Pietri-Hanotaux protocol. The other portion of the document, replaced by the dots, with which my colleague ends the paragraph, I shall not reproduce in this answer. They belong to that class of arguments called "*ab homine*," so generally used in French parliamentary oratory, but which are misplaced in abstract and severe debates before a court like this one. Whatever be the opinion the French commissioner may have formed of the administration and public opinion in Venezuela, will surely not have the slightest weight in the mind of the honorable umpire when he shall render his decision in the case.

M. de Peretti is in the right when he states that the convention concluded between Mr. Pietri and the liquidators of the General Company of the Orinoco acknowledging to the latter, by way of a compromise, 3,600,000 bolivars, had something to do with the refusal of the Congress of Venezuela to ratify the Pietri-Hanotaux protocol, the object of which was the renewal of diplomatic relations between the two countries. It not only had something to do with the refusal, but was the sole cause thereof. Even if Venezuela had solicited the

[a] Page 285.

renewal of the relations, for which Mr. Pietri had received instructions, Congress was compelled to refuse to ratify the protocol tending to such renewal, because the convention annexed as a condition to the end in view represented for Venezuela a sacrifice of such magnitude and so unjustified, that Congress preferred to continue depriving the country of friendly relations with France to subjecting it to a censurable negotiation. General Pietri lacked the necessary authority and instructions to negotiate with the General Company of the Orinoco, and even the officious negotiations which were intrusted to him in France for the renewal of diplomatic relations were *ad referendum*, because, such relations being interrupted, he could not have been invested with the character of minister plenipotentiary to the Quai d'Orsay.

If from the officious capacity of Mr. Pietri to treat with the Quai d'Orsay of the renewal of the diplomatic relations between Venezuela and France and from the character, as minister plenipotentiary, which was vested in Mr. Pietri by the administration of 1897 to represent Venezuela in other States of Europe, the French commissioner draws a favorable conclusion when he says:

> It may be inferred from such fruitless endeavors to come to an agreement, that there has been a Venezuelan plenipotentiary, who eight years ago, recognized the right on the part of the General Company of the Orinoco to a considerable indemnity.

what may I not deduce, as the Venezuelan commissioner, against the justice of such indemnification, following the same style of argument, upon considering that it has not been a Venezuelan plenipotentiary, but the National Congress, consisting of eighty plenipotentiaries representing the will of three millions of inhabitants, who disapproved the convention signed by Mr. Pietri, because they believed it to be unlawful?

M. de Peretti states in his brief that the perusal of the pleadings (*plaidoirie*) of Maître Poincaré, counsel for the company, who discusses my arguments, has come to confirm him in his opinion. I have read the brief of the eminent member of the French bar and lawyer of the court of appeals, and since his opinion has been sought for by the claimant company to impugn my opinion, I must examine it and reply to its allegations.

The first part of the brief and opinion of Maître Poincaré, called "Exposition of Facts," contains a relation based upon the documents and notes produced by the claimant company, making a better presentation of the same papers, statements, and letters found in the case (*dossier*) of the company. Of such exposition of facts the honorable umpire can only take into consideration for his decision such facts upon which both parties have agreed or the accuracy of which has been duly established, based on trustworthy documents showing the facts to be true.

The second part of the brief under consideration is called "Discussion" and is divided by Maître Poincaré into several chapters and sections dealing with the different grounds upon which the company has based its claim for indemnification, classified as follows:

First. Legal and decisive efficacy of the judgment rendered by the high Federal court against which the company opposes denial of justice, based upon the following facts: Irregularities in the summons, irregularities in the letters rogatory, irregularity in the pleadings (*plaidories*).

Second. Good grounds for the claim for indemnification, based upon substantial error vitiating the consent, failure to execute its obligations on the part of Venezuela, and fulfillment of its obligations on the part of the company.

Third. Conclusions: The amounts of the claims have been duly established by means of documentary evidence. The existing diplomatic debt is now worth from 40 to 42 per cent. That which is to be created for the indemnifications resulting from the protocol of 1902 shall be worth even less.

For the sake of brevity, in this additional opinion I shall examine only such points of the opinion of Maître Poincaré as are indispensable to strengthen the arguments in my first opinion and shall also point out whatever may be conducive to a clearer exposition of the juridical doctrine or international principles invoked, as well as to the first estimation of the facts.

The question advanced as the fundamental grounds for this case is in the first place whether the sentence of the Venezuelan Federal court, declaring the rescission of the contracts under which the General Company of the Orinoco operated and condemning said company to the payment of a certain sum and judicial costs, is a final or decisive sentence having the force of the *res judicata* and therefore binding and subjecting the company to all its consequences.

The General Company of the Orinoco, four years after such sentence has been passed, invoked the action of the French Government in order to enter a protest against said judgment, claiming, as Mr. Poincaré states—

> that it has been the victim of an actual denial of justice, because, in the first place, all remedies against administrative and governmental action being withheld from it, mainly by reason of the decree of August 8, 1890, issued under pressure by Colombia, and the arbitrary seizure of 1893, and in the second place because of the violations of both public and private law executed not only during the proceedings but also oustide of any judicial action.

The company produces no proof whatever to show that all legal remedies against administrative and governmental action have been withheld from it. The decree of August 8, 1890, as evidenced by its own terms, was issued in behalf of the large interests of the inhabitants of the region where the tonca bean is gathered and because the com-

pany had suspended the purchase of the bean for want of resources, and the Government could not permit the destruction of the interests and means of subsistence of that territory already threatened with abandonment on the part of the company and an absolute business stagnation. In regard to the seizure of 1893, subsequent to the judgment, the copies subjoined to the present additional opinion in support of the arguments of my first opinion will shed sufficient light to bring conviction to the mind that the property the company had abandoned on the banks of the Orinoco River because the company had gone into liquidation and was unable to even take care of and try to preserve said property has not sufficed, because of its state of deterioration and ruin to pay for the debts contracted in the locality, let alone those for which the company was liable to the nation by virtue of the sentence of the Federal court.

Against the argument I have put forth in my opinion that, according to the Venezuelan Code of Procedure, the General Company of the Orinoco had six months after date of sentence within which to demand that it be invalidated, if the company had or believed itself to have sufficient grounds to ask for such reversal, Mr. Poincaré advances the argument that the sentence of the court was in itself indisputably a sovereign decision, not open to any remedy or appeal whatever before a higher court. It is true that such decision was not subject to appeal before a higher court, because the high Federal court is the highest judicial tribunal; but such decision was open to the remedy of invalidation before the same court, according to Case I, article 538 of the Code of Civil Procedure then in force, or, in other words, the failure to issue such summons when they are necessary to continue the case, if the failure has not been remedied by the party invoking the same. Article 539, quoted in his opinion, clearly stipulates that—

such case shall be tried in the same manner as the case upon which the sentence whose invalidation is sought was tried *before the court which has decided the case in the last resort (instance)*.[a]

M. Poincaré adds:

There was nothing to be gained therefore in asking the invalidation, as this could not be granted except for a special cause, and the most important grounds of complaint could not contribute to justify such a step.

One of these grounds, as will be hereafter shown, was failure to notify the company's attorney to make his pleadings. The learned and expert counsel for France has already stated that such failure, which is a most important ground for complaint against the judgment, as believed by the claimant party, does not constitute one of the special causes to demand the invalidation of the sentence, according to the

[a] Art. 539. Este juicio se promoverá del mismo modo que la demanda sobre que recayó la sentencia cuya invalidación se pide, ante el tribunal que la dictó en última instancia.

provisions of article 538 of the Code of Civil Procedure.[a] Notwithstanding that such notification is unnecessary and not required by the Venezuelan law of procedure, the company uses it as the basis upon which rests its main argument to claim that the sentence of the Federal court was issued against it without previous hearing of its defense and that consequently the sentence is invalid.

The first cause of invalidation invoked by Maître Poincaré in his brief as vitiating the form or proceedings is the irregularity of the summons to answer the complaint. The counsel for the defense of the company's rights bases his contention to that effect on the testimony of Mr. Fiat, a former employee of the company, who affirms that when the State's attorney for the treasury (*fiscal nacional de hacienda*) entered his action before the high Federal court for the rescission of certain contracts and the payment of an indemnification he received no summons or order requiring him to appear.

It is true that in the records of the high court—the brief avers—

mention is made of the letter of the secretary of that jurisdiction, dated on May 30, 1890, addressed to Messrs. Fiat and Planas, informing them that the company had been sued before the high court.

But Messrs. Fiat and Planas have always declared that they had not received such letter and Mr. Fiat has added that it was only while reading a Caracas newspaper that he became aware that the company had been summoned to appear before the Federal court. It was then that he, of his own accord and without any previous summons, went to the secretary's office.

It can not be doubted, that if a regular summons had been issued to Mr. Fiat or Mr. Planas or if any notice by letter had been given to them of the action entered by the "fiscal," a receipt should have been demanded, as was done in the case of all subsequent summonses. It is thus shown that the proceedings were irregularly commenced.

What appears from the minutes in the case which may offer reasonable grounds for the deductions of the attorney presenting the brief under consideration?

At the end of the complaint entered by the fiscal the following resolution appears:

PRESIDENCY OF THE HIGH FEDERAL COURT,
Caracas, May 30, 1890.

[27 and 32. Entered.]

Summon the General Company of the Orinoco, defendant, whose domicile is outside of the Republic, and serve a copy of the foregoing complaint, to appear before this court at the sitting of the tenth working day after summoned to answer the action, which, in the name of the national Government, the State's attorney for the treasury (*fiscal nacional de hacienda*) has entered. And whereas it appears from the documents produced that Messrs. Andrés Fiat and Bernabé Planas have held powers of attorney from said company, let them be notified, that they may state whether they still exercise such duties, and if not, a counsel for the defense (*defensor de ausentes*) shall be appointed as requested.

(Signed) CÁRLOS URRUTIA.
MANUEL RENDÓN SARMIENTO.

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[a] For text of Art. 538 see p. 259, note.

On the same day and date the summonses were issued to Messrs. Fiat and Planas to appear at the first sitting of the court after being summoned for the purpose aforesaid, the summonses being delivered to the bailiff of this high court.

(Signed) RENDÓN SARMIENTO,
Secretary.

At the session of this day, June 2 (two days after the summonses were issued), there appeared Messrs. Andrés Fiat and Bernabé Planas and stated that Mr. Andrés Fiat is now the representative of the General Company of the Orinoco and offers to produce the power of attorney at the session of next Wednesday, the fourth day of the present month.

Subscribed to—

(Signed) CÁRLOS URRUTIA.
ANDRES FIAT.
B. PLANAS.
RENDÓN SARMIENTO, *Secretary.*

These are followed by others referring to the filing of the power of attorney in the French language; appointment of an interpreter to translate the same; his acceptance and oath; the translation of the power of attorney, and the order of the presidency of the high Federal court directing that the original power of attorney be returned to Mr. Fiat, and that he be duly summoned to appear as the attorney for the company.

Then follows an entry of the secretary, whereby it appears that a certified copy of the complaint was made and delivered to the bailiff to execute the summonses issued to the defendants.

As a part of the record, the following entry appears:

I have received the complaint in the action entered by the national Government against the General Company of the Orinoco, of which I am the representative. Caracas, June 19, 1890. (Signed) Andrés Fiat. (Minutes of the proceedings had before the high Federal court, a certified copy of which I submit to the honorable umpire, in Spanish and English, consisting of 6 exhibits, numbered 1, 2, and 3, respectively.)

The testimony furnished by the minutes of the proceedings shows that due regularity in conformity with the legal precepts was observed in summoning Mr. A. Fiat as the representative of the General Company of the Orinoco, and also establishes the fact that there is no truth in the declaration of Mr. Fiat, serving as a basis to the company's counsel to aver that the proceedings were irregularly commenced. In regard to the statement which, it is affirmed, Mr. Bernabé Planas made to the same effect, it is not found among the numerous documents submitted by the company, so that no other conclusion can be drawn except that the writer of the brief was induced to affirm a most serious fact affecting an old friend of the company, which is contrary to actual events.

The line of argument contained in the rest of this chapter of the brief dealing with the delay in summoning Mr. Fiat and answering the complaint because of the preliminary proceedings of giving notice, the filing and translating of the power of attorney, and the amendment of a part of the case by fixing the amount of the indemnification asked

for is so inadequate to arrive at the conclusion that Mr. Fiat found himself deprived of all means of defense, and that such condition of inability permeated the whole proceedings, that I do not deem it my duty to undertake its discussion, such assertions clearly revealing the fact that Maître Poincaré is not familiar with the method of procedure in contentious cases before our Venezuelan courts, and that his learning and talents can not bridge over his deficient knowledge in the matter of our adjective legislation. All the proceedings of the high court from the origin of the case in all matters pertaining to the summons of Mr. Fiat, the representative of the company, are strictly in accordance with the provisions of the Code of Civil Procedure in force at the time, as the honorable umpire may see by an examination of the legal provisions referred to in conjunction with the proceedings in the case, a copy of which I subjoin hereto.

The next section of the brief in question deals with the irregularity of the letters rogatory issued by the president of the high Federal court to the civil judge of the first instance of the city of Paris and to his eminence the Cardinal, chief of the propaganda in Rome, which letters rogatory were delivered to the representative of the company, Mr. Fiat, personally to obtain the extraterritorial evidence he had requested, consisting of affidavits of witnesses residing in Paris, and a statement of facts requested from his eminence the Cardinal.

Maître Poincaré maintains that diplomatic channels should have been used to forward to their respective destinations the letters rogatory, and, as the Government of Caracas knows what is the regular way to be followed to obtain the desired ends, both such Government and the high Federal court are to blame if the interrogatories were not made in Paris and Rome; that such conduct could not have been prompted but by the desire to prevent that the requested evidence be obtained, and so it follows that the General Company of the Orinoco was deprived of its most essential means of defense, and that the taking of the evidence for which the high court had fixed a time—which was insufficient—was then incomplete of necessity.

The counsel defending such theory adduces in its support the principles laid down by the Institute of International Law in its session at Zurich in 1877, which I have already had the opportunity to quote in my former opinion, to wit:

> As the opinion of the Institute was that letters rogatory should be sent *directly* to the foreign court by the court issuing the same.[a]

The learned counsel also quotes the opinion of Mr. Cárlos Calvo, who makes the following statement in his Treatise on International Law, Volume II, section 889:[b]

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[a] Page 258.

[b] Il résulte de principe de l'indépendance des nations que le juge étranger n'est pas obligé d'accepter la commission rogatoire; mais l'usage des nations a introduit la règle

From the principle of the independence of nations it follows that the foreign court is not obliged to accept letters rogatory, but usage among nations has introduced the rule that foreign courts accept such request and proceed to take the necessary steps in the matter, except in such cases where such acts may impair the sovereignty of the country or the rights of its citizens. This is why letters rogatory, as a general rule *are not sent to the courts directly* but through diplomatic channels, so that the Government may examine the same before directing their execution, in order to become satisfied that they do not contain anything contrary to the laws of the State. In case letters rogatory should be sent *directly from abroad* to a court they must be forwarded immediately to the minister of justice.

M. Poincaré adds:

And let us remark that Mr. Calvo's opinion is later than that of the Institute of International Law, because Mr. Calvo in section 894 makes reference to that authority erroneously quoted by Venezuela.

The learned counsel also invokes the opinion of Dalloz, Répertoire Général, Instruction Civile, No. 83, as follows:

Our courts are frequently called upon by foreign courts. An order of the minister of justice (*Garde des Sceaux*) contains the following rules to be observed in similar cases: Courts must not comply with any letters rogatory in civil matters coming from abroad unless *they are transmitted to them* through the ministry of justice, who in turn receives them from the minister of foreign affairs with the translation, as the case may be, after examination. * * * Letters rogatory in civil matter must be executed by the court without necessary intervention of the parties concerned. Notwithstanding this such parties are *free to intervene and in order to foster the proceedings* may ask the clerk to issue letters rogatory. *Beyond such cases of spontaneous intervention of the parties or one of them* the letters rogatory are executed upon request of the proper judicial authorities. The acts performed in the execution of the letters rogatory are sent by the court to the minister of justice with a certified memorandum of the costs, and the documents are forthwith *transmitted* to the minister of foreign affairs.[a]

M. Poincaré concludes—

Thus the parties are not called upon to *transmit* the request. They have only power of intervention during the execution of the letters rogatory.

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que les juges étrangers acceptent cette mission et procèdent aux actes d'instruction qu'elle a pour objet, excepté dans le cas où ces actes porteraient atteinte aux droits de souveraineté du pays ou aux droits des nationaux. C'est pourquoi les commissions rogatoires, en général, ne se transmettent pas aux tribunaux ou aux magistrats étrangers directement, mais par la voie diplomatique, de manière que le gouvernement puisse les examiner avant d'en autoriser l'exécution pour s'assurer qu'elles ne contiennent rien de contraire aux lois de l'État. Dans le cas où une commission rogatoire serait transmise directement de l'étranger à un magistrat, celui-ci doit l'envoyer immédiatement au ministre de la justice. (Calvo, Le Droit International Théorique et Pratique, 5e édition, sec. 889.)

[a] Nos tribunaux sont souvent délégués par les juges étrangers; une instruction de M. le garde des sceaux contient les règles à suivre en pareil cas. Elle est ainsi conçue:

Les magistrats ne doivent déférer aux commissions rogatoires, en matière civile qui viennent de l'étranger, autant qu'elles leur sont transmises par le ministre de justice, qui les reçoit du ministre des affaires étrangères, avec la traduction, s'il y a lieu, après examen. * * * Les commissions rogatoires en matière civile ou pour des faits qui pourraient donner lieu à une action civile, doivent être exécutées par les magistrats sans intervention nécessaire des parties intéressées. Toutefois, les parties sont libres d'intervenir, et alors, pour motiver leurs diligences, elles peuvent demander au greffier une expédition de la commission rogatoire. Hors le cas de l'intervention spontanée des parties ou de l'une d'elles, les commissions rogatoires sont exécutoires à la requête du ministère public. Les actes qui constatent l'exécution d'une commission rogatoire sont envoyés par le parquet au ministère de la justice, avec un état de frais visé les pièces sont ensuite transmises au ministère des affaires étrangères.

The authorities quoted, far from destroying what I have maintained in my opinion in support of the doctrine established by the Institute of International Law in its meeting in Zurich, comes to confirm my argument in all its conclusions.

There are two orders of facts of an entirely different character which Maître Poincaré confounds to the extreme of pointing out a difference between the Institute of International Law and Mr. Calvo, which does not really exist in this matter.

One of these points is the act of a court addressing to a foreign court a petition praying it to perform within its jurisdiction certain acts or proceedings, and to this end the letters rogatory are addressed *directly from one court to the other.* The other point is that of the *transmittal* of said letters rogatory addressed by a court to another, which, according to the Institute of International Law, *may be made through* diplomatic channels, and according to Calvo *must be always made* through such channels and not otherwise.

Calvo, in section 889, already quoted, further says:[a]

The request for such cooperation is made by a special letter whereby the court or judge concerned asks the cooperation of a foreign court or judge or *prays* such court or judge to perform within the proper jurisdiction certain acts or proceedings that the petitioner is unable to perform.

To solicit or pray for the cooperation of such foreign judge it is necessary to *address him* directly in writing a letter rogatory as done by the high court to the judge of the Seine in the following form quoted by Maître Poincaré.

United States of Venezuela: In their name the president of the high Federal court to the citizen civil judge of the first instance of the city of Paris.

And at the end of the petition—

Now, therefore, I pray the citizen judge of the first instance of the city of Paris to be pleased to have the present petition (letters rogatory) executed, pledging reciprocity in similar cases from the courts of the Republic.

To this M. Poincaré says that "it is nothing but a mere courtesy." Exactly; such courtesy is what is expected to be used.

The petition or letters rogatory which a court or judge addresses to another being prepared, for which it is necessary that the party concerned should go to the office of the secretary (clerk) of the court and furnish the same with the necessary stamped paper upon which to extend the writ in reference to the evidence required, the corresponding revenue stamps, fees for copies and translation when such is necessary; then such acts should be performed as are necessary for the

[a] La demande de cette coopération se fait au moyen d'une lettre spéciale par laquelle le tribunal ou le magistrat qui se trouve dans ces circonstances sollicite le concours d'un tribunal ou d'un magistrat étranger, ou le prie d'accomplir dans l'étendue de son ressort quelque acte de procédure ou d'instruction qu'il ne peut faire lui-même. (Calvo, Le Droit International Théorique et Pratique, 5e édition, sec. 889.)

transmission of the letters rogatory addressed to the foreign court or judge through the diplomatic channels. All these acts should be performed by the interested party, who receives the papers in order to foster their *transmittal* by applying to the department of foreign affairs.

On what principle of international law or on what authority, ancient or modern, could the theory be founded that it behooves the judge in the case or the contrary party—as in the case in point, the Government of Venezuela—to perform officiously acts which only the interested party is able to attend to with due diligence, defraying the necessary expenses and fostering their execution? And so, Mr. Fiat, the attorney for the company, assisted in its defense by two of the most distinguished lawyers of Caracas, Drs. Diego Bautista Urbaneja and Ramón F. Feo, who received the petitions or letters rogatory addressed to Paris and Rome, does not incur any liability because he did not employ in the transmittal of such papers the diplomatic channels, nor did he use the good offices of the department of foreign affairs in Caracas, nor did even apply to such office, and the Government of Venezuela, the contrary party, is to be made liable for such a negligence, since it can not be supposed it was ignorance or the deliberate purpose of not giving the letters rogatory the proper course so as to claim later on that the proceedings were vitiated.

According to M. Poincaré's theory, the Government of Venezuela and the high Federal court, the contrary party and the judge in the case, should perform in regard to Mr. Fiat, the attorney for the company, the duties of counselors at law, and taking him by the hand, to go with him to the Venezuelan foreign office, legations, or consulates, which were to attest to the respective signatures and then to the post-office where the papers were to be stamped, certified, and mailed, notwithstanding the clearly manifested purpose of Mr. Fiat when he personally received the letters rogatory of not trusting to others such steps for the transmission of the documents.

Our Code of Civil Procedure contains an article, reproduced in all such codes, which has been in force in the Republic, to this effect:[a]

In civil matters the judge can not take action against a party except at the request of the other party, unless authorized by law to proceed otherwise.

Another analogous article provides that—[b]

The court shall maintain the parties in the enjoyment of such rights and titles as are common to both without preference or inequality, as well as in the enjoyment of such rights and titles as are privative to each party, respectively, according to the provisions of law or the different conditions represented in the action. But the court shall not allow such parties

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[a] Art. 14. En materia civil el Juez no puede proceder sino á instancia de parte, salvo el caso en que la ley lo autorice para obrar de oficio.

[b] Art. 27. Los tribunales mantendrán á las partes en los derechos, facultades y goces que son comunes á ellas, sin preferencia ni desigualdades, y en los privativos de cada una de ellas, respectivamente, según los acuerde la ley á la diversa condición que tengan en el juicio. Pero no podran permitir ni permitirse ellos extralimitaciones de nigún género.

nor allow herself to *exceed the authority of their respective rights or jurisdiction in any case whatever.* (Arts. 14 and 27, Code of Civil Procedure, 1897.)

It was not facultative of the high Federal court to perform of its own accord acts tending to the *transmittal* of the letters rogatory, but in this case, as well as in all proceedings in the action, the court had to act by request of one of the parties, as the law does not authorize it to act on its own authority. To act otherwise would be to exceed its authority, an act punishable by our laws.

Mr. Fiat has not even pretended to maintain the fact that he endeavored to obtain from the court the transmission of the letters rogatory through diplomatic channels, but, on the contrary, he has confessed that he requested and obtained said letters and sent them directly to Paris to Mr. Delort, without he or his legal advisers—who could not have been ignorant of such means of procedure—ever thinking that diplomatic channels should be employed. The consequences of such omission, if it had any consequences on the legal action, must be suffered solely by the General Company of the Orinoco and in no way by the opposite party or the Government of Venezuela.

The brief of the company's counsel now deals with the third cause or grounds for invalidation of the sentence—i. e., irregularity in the pleadings (*plaidoiries*). M. Poincaré stops to discuss the fact that the representative of the company was not summoned, nor were his counsel to enter their pleadings, and the only party present at the time set for such pleadings, according to the records of the case, was the State's attorney (*fiscal nacional de hacienda*). I have, in my first brief, most carefully examined the matter and have established, by quoting the respective articles of the Code of Civil Procedure, and the chronological examination of the minutes of the case, that the action was never suspended for motives which were imputable to the parties and that consequently, in conformity with the provisions of law, the high Federal court directed that the pleadings should be entered without the necessity of issuing summons to the parties or their representatives. Had the court acted or decreed otherwise it would have been contrary to a provision specifically set forth by the same code, to this effect:

> After summons have been issued to answer the complaint there is no need of further summons for any other incident of the proceedings *nor the summons issued shall suspend the proceedings*, unless specially provided for to the contrary.[a]

Such action on the part of the court would have been contrary to the provisions of article 394 of the same code, reading thus:[b]

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[a] Art. 146. Hecha la citación para la litis-contestación, no habrá necesidad de practicarla de nuevo para ningún otro acto del juicio, ni la que se mande verificar suspenderá el procedimiento, á menos que resulte lo contrario de alguna dispsición especial de la ley.

[b] Art. 394. Concluída la relación se oirán los informes verbales de las partes, de sus abogados ó apoderados, y se leerán los que presentaren por escrito, los cuales se agregarán á los autos.

Upon the conclusion of the reading of the papers in the case (*expediente*), the oral statements of the parties or their attorneys or representatives shall be made or read, if in writing, as the case may be, and added to the record.

This article does not direct that the parties be summoned, and no such provision is made, because the parties to the action are constructively present during the hearing from the day they are summoned to answer the complaint without further summons, except in such cases as are specially provided for by the law.

The high Federal court is not authorized to alter or modify the method laid down by our laws of procedure, but, on the contrary, must adhere strictly to its provisions. Any act whatever in violation of such provisions is null and void. It was based upon such considerations, and in view of the original record of the case existing in the archives of the high Federal court that I stated in my former opinion that, in view of the fact that the sentence "that the parties be notified" was not duly authorized by the president of the court by means of a legal writ, order, or decree under his signature, but was only a statement under the signature of the clerk of the court (*secretario*) who, in conformity with the laws governing our method of procedure, has no other powers beyond the act of attesting or certifying to any judicial acts, decrees, orders, or judgments of the justices of the court, which should always be made in writing and under their hand, I was convinced that the Federal court had not ordered such notification to be made.

Maître Poincaré profits by this remark, which I, in my capacity of an arbitrator was entitled to make, to affirm that the Venezuelan Government—

found itself obliged to make the unfortunate admission that the sentence "that the parties be notified" has been the exclusive act of the clerk (secretario) and that the court was not a party to the order.

It was not the Government of Venezuela that made the statement in question, but the commissioner for Venezuela, in view of the legal provisions governing the case and of the minutes in the record. My opinion was based upon the fundamental fact that the law does not provide that the parties be summoned when the hearing has not been suspended because of acts of commission or omission for which the parties are answerable. My opinion points out the way to demonstrate that the high Federal court did not infringe any provisions of law, as might be apparent from the sentence in reference, which is due to an error of the clerk, having no validity whatever.

Mr. Poincarré states in his brief that the Venezuelan lawyers, Drs. Diego B. Urbaneja and Ramón F. Feo, agree in their statement that the General Company of the Orinoco not having been summoned to appear on the day set for the pleadings, articles 109 and 162 of the Code of Civil Procedure (1880) [a] had been violated. I have not found

[a] See p. 255, note.

among the documents and papers produced by the company any written opinion prepared or signed by said jurists to which credit might be given.

The company has pretended in several documents that said lawyers had rendered a favorable opinion on this and other important matters, but such opinions duly signed and verified have not been produced. The fact is worthy of consideration that Dr. Ramón F. Feo being still in Caracas, and it being an easy matter for the company to obtain a statement from him during the sittings of the commission in that city and his testimony on the facts relating to the action before the high Federal court, such steps have not been taken. It can not, therefore, be accepted that the authority and learning of such lawyers be invoked when no proofs are offered that they are or have been of the opinion ascribed to them in this matter.

The writer of the brief states that the sentence passed was not notified either to the representative of the company, Mr. Fiat, *who remained in Caracas for over a year after the sentence was passed*, or to the lawyers of the company, who lived in that city, nor even to the liquidators. This requisite of notification is not prescribed by our law of procedure, except in criminal cases. In civil actions, as it has been shown, the parties are deemed to be present at the trial from the time they are first summoned to answer the complaint and must be aware either personally or through their attorneys of all the stages of the proceedings. It should be noticed that at the date of the sentence, October 14, 1891, Mr. Fiat, although still residing in Caracas, was not the representative of the General Company of the Orinoco, in liquidation, as he had resigned since October 11, 1890; that the company appointed Mr. Bernabé Planas its representative, and that, this gentleman having refused to accept such commission, the company then decided to send Mr. Berthier, who arrived at Caracas about the end of October, 1890, leaving some time in July, 1891. Messrs. Urbaneja and Feo do not appear as being representatives of the company during the proceedings before the high Federal court, but simply the counsel for Mr. Fiat at the beginning of the action. (See complaint to the minister for foreign affairs in France by the liquidators of the company, folio 47, and the minutes of the proceedings.)

As regards the notice to the liquidators residing in Paris, the Federal court must have been ignorant of the fact that such liquidators existed, as it does not appear that the court was informed that the company had gone into liquidation, notwithstanding the fact that such steps were taken on May 30, 1890, two days after the filing of the complaint before the high court. The company kept the Venezuelan authorities and especially the high Federal court ignorant of the fact that it had gone into liquidation—a grave omission which sufficiently explains the abandonment of its representation during

the proceedings, the want of unity and cohesion in the acts for the defense, the difficulties had with the letters rogatory, and the non-appearance of the new attorney, Mr. Berthier, at the hearing, as he was then exclusively engaged in effecting an extra-judicial compromise which would put an end to the legal action and insure a new contract to the company in liquidation.

In the second chapter of the brief under consideration, under the head of "Bien fondé de la demande," the author directs all his efforts in support of the following claims:

First. That the agreements entered into by the Government of Venezuela and the company are vitiated from their origin, because of dissimulations which have substantially altered the convention and which permitted the Venezuelan Government to impose upon the consent of the General Company of the Orinoco.

Second. That in the execution of the contract the Government has not kept the contracted obligations.

By way of introduction, the author of the brief lays down the following premises:

> It is upon the basis of equity that the arbitration commission must pass sentence.
>
> It has been admitted that such should be the rule controlling matters pending between Venezuela and other States, and the protocol relating to those of the United States has established in this connection a rule applicable in this instance by assimilation: "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."

It is not possible to admit the principle of assimilation advanced by Maître Poincaré in regard to the claims submitted to the decision of the umpire, according to the terms of the Paris protocol of February 19, 1902. The terms of such agreement and those of the Washington protocol of 1903 have no similarity whatever; on the contrary, the contracting parties were very careful to declare in the final paragraph of article 2 of the Paris protocol controlling the present commission, *that the procedure* adopted for the examination and settlement of the claims referred to in articles 1 and 2, were not instituted but as an exception, and *did not invalidate the convention of 1885;* and that by article 5 of this convention the high contracting parties agreed that:—

> leurs représentants diplomatiques n'interviendront point au sujet des réclamations ou plaintes des particuliers concernant les affaires qui sont du ressort de la justice civile ou pénale, d'après les lois locales, *à moins qu'il ne s'agisse de dénis de justice* ou de retards en justice, contraires à l'usage ou à la loi, de l'inexécution d'un jugement définitif, ou en fin, des cas où, malgré l'épuisement des moyens légaux, il y a violation évidente des traités ou des régles du droit des gens.[a]

[a] Their diplomatic agents shall not interfere in the claims or complaints of private parties relating to such matters as come under the jurisdiction of the civil or penal laws, according to local legislation, *unless in cases of denial of* justice or delay in the administration of justice contrary to usage or law, or failure to execute a final judgment, or, in fine, in such cases where, notwithstanding the fact that all legal means have been exhausted, there is an evident violation of the treaties or of the rules of the law of nations.

If the declaration that the procedure adopted to submit to the examination of a mixed commission the claims of French citizens as an exceptional method, *which was not to invalidate the convention of 1885*, means anything, then it is as plain as daylight that this commission is bound to respect the sentences or decisions passed by the Venezuelan courts in accordance with local legislation in such matters as come under the jurisdiction of the civil or penal laws, *and only in such cases in which there is a denial of justice or delay in the administration of justice, contrary to usage or law*, or failure to execute a final judgment, or, in fine, in such cases where, notwithstanding the fact that all legal means have been exhausted, there should exist an evident violation of the treaties or rules of the law of nations, that this commission may approve of diplomatic interference and so fix the liability of the Government of Venezuela, if any.

In the claim entered by the General Company of the Orinoco there has been submitted to this commission a matter which comes under the jurisdiction of the Venezuelan civil courts, as the rescission of the contracts obtained by the General Company of the Orinoco for the exploitation of all mineral and vegetable products of the alto (upper) Orinoco and the Amazonas for a term of thirty-five years and that of the tonca bean for a term of twenty-five years upon the vacant lands lying between the eastern boundaries of the Federal territories Alto Orinoco and Amazonas, and between the Orinoco and the boundaries of Venezuela and Brazil, because it is thus established by the constitution, the laws of the Republic, and the fourteenth clause of the contract of December 17, 1885, reproduced in that of April 1, 1887, reading as follows:

> Any doubts or controversies that may arise in the execution of the contract shall be decided by the proper courts in the Republic in conformity with the laws thereof.

The sentence passed by the high court, as coming under its civil jurisdiction, in conformity with local legislation and in compliance with the solemn agreement entered into by the contracting parties, which is the supreme law controlling bilateral contracts, can not give rise to diplomatic intervention nor impose upon the Venezuelan Government any liability growing out of said sentence, *unless it is established beyond doubt that there has existed a denial of justice or delays in the administration of justice, contrary to usage or a law*, or that a final judgment has not been executed, or that there exists an evident violation of the treaties or rules of the law of nations. In order to enter the action the only plea that it has been possible to advance is that of *denial of justice*, as regards the form of proceedings and the substance of the action.

In regard to the first contention, i. e.—irregularity in the form of the proceedings, it has been sufficiently shown that the grounds advanced by the claimant company are wholly without foundation. In refer-

ence to the second contention, i. e.—the decision on the substance of the action for rescission of the contracts entered by the fiscal de hacienda before the high Federal court, it suffices to transcribe the very same terms employed by the author of the brief to come to the conclusion that the high Federal court in adjudging the rescission of the contracts did so by virtue of legal provisions governing such conventions as contain reciprocal obligations, in view of and upon investigation of the proofs produced by the claimant in case the defendant fails to show proof in support of the exception taken at the hearing of the case. Maître Poincaré says, page 78 of his brief:

Elle (la Compagnie Générale de l'Orénoque) n'a pu prouver qu'elle avait remplie ses obligations, sauf cas de force majeure, elle n'a pu montrer que c'était le Gouvernement qui avait manqué à ses devoirs; elle n'a pu présenter les très nombreuses et très intéressantes attestations écrites qu'á défaut d'enquête régulièrement ouverte en France, elle avait réunies, qu'elle était prête á fournir, que nous résumerons ou citerons plus loin et qui ont été totalement ignorées de la Haute Cour.[a]

Whose fault was it and whose the liability for the consequences if the General Company of the Orinoco did not know how or did not wish to defend its case and prove its exceptions when it had at its disposal all the legal means offered by the Venezuelan codes, so that such *proofs and testimony* would not be *wholly ignored?* If she had Mr. Fiat as her representative and Drs. Diego B. Urbaneja and Ramón F. Feo as her legal counsel, why did she not make use of her means of defense? If the representative or the counsel did find any difficulty, any obstacle having the color of denial of justice or of delay in its administration, why is it that they did not enter such complaint before the same court or did not file a protest showing such irregular method of procedure? Is it possible that at the end of four years after the sentence was passed such experienced lawyers should find omission in the proceedings and denials of justice which they did not detect during the hearing of the case?

On the other hand, the Government of Venezuela established with sundry proofs, not objected to, the truth of its statements, and the high court of justice, by means of personal inspection of the territory which is the object of the controversy, investigates and weighs such proofs which are found sufficient to adjudge by virtue of its legal authority has not fulfilled the obligations created by the contracts; and in conformity with article 1110 of the civil code, which deals with the resolutory conditions of contracts, and articles 1256 and 1163, does declare that there are great grounds for an action; that the contracts of May 24, 1886, and May 31, 1887, made between the national Gov-

[a] It (the General Company of the Orinoco) has been unable to prove that it had fulfilled its obligations except in case of *force majeure.* It has not been able to show that it was the Government which failed to do its duty. It could not produce the immense amount of most interesting written evidence which in the absence of depositions regularly made in France it had gathered and was ready to furnish, and which we will quote later or epitomize further, evidence which was totally *ignored* by the high court.

ernment, on the one part, and Miguel Tejera and Th. Delort on the other, of which the company was the assignee, should be dissolved, and condemns said company to pay the national Government the sum of 40,048.62 bolivars for damages to the State, because of the company's failure to execute the aforesaid contracts, besides the costs of the action. Such judgment, rendered by the highest court of the Republic and for fourteen years having had the weight of *res judicata*, can not be reviewed, except to the grave detriment of the sovereignty of the nation, by any court of arbitration unless such judgment contains an essential denial of justice fully established. The honorable umpire has at his disposal abundant material to arrive at a conclusion in regard to such denial of justice. The honorable umpire well knows what such phrase means when dealing with a sentence rendered by a court having full powers to pass final judgment on a matter submitted by positive law and by the will of the parties to investigation and decision. The honorable umpire is well aware that neither sophisms nor far-fetching arguments nor yet more or less specious pretexts can annul the action of the *res judicata* and brand those who by fundamental laws have been intrusted with the highest offices and powers to administer justice to have been guilty of denial of justice.

There are proofs—there are documents and memoranda—to show that the company, at the time of the filing of the suit for resolution of the contract, was in a state of bankruptcy; that it was powerless to continue the attempts at development and steam navigation undertaken four years before; the own confession of the company to the effect that it had engaged in a venture without knowing either its extent or its difficulties; the balance sheet presented at the meeting of the shareholders on May 30, 1890, showing liabilities three times as large as the assets; the necessity to go into liquidation, which in all languages means a complete paralyzation of business operations; the company's schemes of becoming first an English, then a Belgian association, in search of new capital, the loan of which it was impossible to obtain in France; the sending to Caracas of Mr. Berthier, eager to obtain a new contract releasing the company in liquidation of the former contractual obligations, freeing the company of the suit then pending before the high Federal court and saving it from the wreck; there are, in fine, the last letters of Agent Berthier, in which, after losing all hope of making a new contract with the Government of Venezuela, he prepares the ground for a *large claim*, giving out as its main foundation, not denials of justice, which was an afterthought, but two facts which had just taken place on the Orinoco River and which in time *would give them considerable grounds*. The first was that the governor of the territory placed out of commission the steamer *Meta* by the dismounting of certain valves to prevent their capture by the revolutionists; and the second event was an armed attack against the small steamer, *which was on the point of being captured*. All this will be examined by the honor-

able umpire, who is to decide whether the sentence of the high Federal court of Venezuela ordering the resolution of the contracts and condemning the company to the payment of an indemnity, very small, however, to the Government of Venezuela, has no value, as claimed by the liquidators of the company, because it involves a denial of justice.

In connection with said sentence it only remains for me to analyze the facts which constitute the first of the causes of the good grounds for the indemnity claim before mentioned, which the author of the brief bases upon the dissimulations which altered the substance of the contract and permitted the Government of Venezuela to obtain the consent of the General Company of the Orinoco.

Maître Poincaré devotes this section to the boundary question between Venezuela and Colombia, which the King of Spain decided, as umpire, by the award published in the Gaceta de Madrid, March 17, 1891. This event has come to be the main stronghold of the General Company of the Orinoco, which has gone so far as to charge Venezuela with fraud in the contracts made with Miguel Tejera and Th. Delort, which were subsequently conveyed by them to the company. In my former brief I dealt with these singular pretensions, and I believe I have fully confuted all the assumptions and charges that Mr. Delort in the first place, and then the liquidators of the company, and finally Maître Poincaré, have pretended and still pretend to maintain against the different administrations of Venezuela, from Guzmán Blanco to Andueza Palacio alleging that the company was kept in ignorance of the question with Colombia involving a portion of the vast expanse of territory subject to the concession.

From the extensive discussion of the subject by Maître Poincaré I will note the following points:

The Venezuelan Government says now

(It is not the Venezuelan Government that says it, but the commissioner for Venezuela in his opinion, page 31—Opinion of the Venezuelan commissioner and supported by indisputable proof)—

the good faith in which Venezuela was possessing a certain belt of her territory, which was afterwards adjudicated by the umpire to the Republic of Colombia, relieves its Government of all responsibility in the concession under discussion, the object of which never was a definitive conveyance but the development of natural products in places where Venezuelan interests had already been created and the authorities of the country discharged their respective duties.

The following is from Maître Poincaré:

Entendons nous. Il est possible que vis-à-vis de la Colombie le Vénézuéla ait été possesseur de bonne foi, en ce sens qu'il espérait obtenir gain de cause devant l'arbitre. Nous croyons volontiers que c'est là la raison du silence gardé par M. le Docteur Urbaneja, par M. Tejera et par le Général Guzmán Blanco.[a]

[a] Let us come to an understanding. It may be possible, that as far as Colombia is concerned, Venezuela has been a *bona fide* possessor in the sense, that Venezuela expected to gain her point before the umpire. We are willing to believe that such is the reason of the silence of Doctor Urbaneja, Mr. Tejera, and General Guzmán Blanco.

It is not only before Colombia that Venezuela has been a *bona fide* possessor, nor that it has been such because she expected to gain the point before the umpire. This last circumstance we do not find adopted in any positive legislation nor by any commentator on civil law as a determining condition of the possessor in good faith against the opposing party.

Let us see the award of the King of Spain as the *arbiter juris:*

Whereas the United States of Venezuela are the possessors in good faith of territories lying west of the Orinoco, Casiquiare, and the Rio Negro rivers, forming the boundaries on this side as assigned by the aforesaid "real cédula" of 1768 to the *province of Guiana*, and whereas there *exist in said lands numerous Venezuelan properties developed in the loyal belief that they lie in the domain of the United States of Venezuela,* * * * it is expressly assigned to Venezuela the *right of way* over the aforesaid road, it being understood that such easement shall cease twenty-five years after the publication of this award.

How does civil law define the *bona fide* possession? The possessor in good faith is he who possesses as an owner by virtue of a just title—that is to say, a title capable of conveying ownership even if the title is vitiated, provided such vitiation is unknown to the possessor. As a complement to such definition, civil law has established the following principles, which are a part of the substantive legislation of both France and Venezuela, to wit:

Good faith is always presumed and whoever alleges bad faith must prove that such exists. It suffices that good faith existed at the time of the acquisition.

The *de facto* possession, when it is continued, uninterrupted, peaceful, public, unequivocal, and with the purpose to hold the thing as one's own, is also established by both civil and natural laws as a title of possession capable of conveyance, thirty years being sufficient between private individuals even in cases where there is no title. If Venezuela, who possessed in good faith the territories west of the Orinoco, Casiquiare, and Río Negro, and *there developed numerous properties in the loyal belief that they lie within its domain,* as formally alleged by the award of the King of Spain, at least since the date of the "real cédula" of May 5, 1768, establishing as the boundaries of the province of Guiana the rivers Orinoco, Casiquiare, and Río Negro, could not gain the point, notwithstanding the fact of interrupted possession in good faith for over one hundred years of the disputed territories Venezuela has at least remained in the enjoyment *coram gentibus et nationibus* by the just award of the umpire the title of *bona fide* possessor of said territory, because she had established therein valuable properties and developed them in the loyal belief that she exercised over them immanent sovereignity.

After the preceding demonstration of facts, based upon indisputable documents, what is the weight of the following conclusion of Maître Poincaré?

Venezuela could not guarantee the company the peaceful possession of a territory under dispute. Thus she granted a thing which was tainted with a concealed vice, since it was doubtful whether it belonged to Venezuela, and she knew it.

By all these reasons *which belong both to the realm of natural as well as positive law*, Venezuela is liable to the General Company of the Orinoco. The latter must obtain the annulment of the *contract of concession* because of substantial errors and vice in the consent, and therefore is entitled to an indemnity for all the damages caused by such nullity.

Let us compare this conclusion with the statement made by Mr. Th. Delort, the company's representative, on September 20, 1888, in a letter addressed to the minister of fomento of Venezuela, who had asked him certain explanations, transcribing the following communication of the department of foreign relations of Venezuela:

SIR: The envoy extraordinary of the Republic of Colombia has lodged a complaint against the publication of a geographical chart and a report of the company of the upper Orinoco and Amazonas in which, while describing the *boundaries* of such possessions, *a vast expanse of the territory in dispute between the two countries* has been included as having been granted. In consequence thereof and in view of the necessity of examining the chart and report in reference, I beg to request that you send them to this office, if you have them in your department, and if not, I beg that you request from the representative of the company a report on whatever has been done in this matter, as well as the chart and report in question.

(Signed) YSTÚRIZ.

The statement of Mr. Delort in answer to said note and in reference to the *concealed vice* and *error in the consent* to which M. Poincaré refers, is as follows:

The company *is not ignorant* of the fact that the frontier between Venezuela and Colombia is in dispute, and submitted to the decision of the Government of Spain. *In consequence the company has no claim whatever to make in this respect and as the concession originated from the Venezuelan Government it (the company) is well aware that it must abide by the definitive boundaries* that may be fixed for this Republic. Up to the present the company has not extended its operations but to such points as are occupied by Venezuelan authorities; and the offices, warehouses, and dependencies are in Atures, Maipures, San Fernando, San Cárlos, and the Brazilian frontier and the steamers have *only navigated* on the Orinoco, Casiquiare, and Guainia.

(Signed) TH. DELORT.

Verba volant, scripta manent.

Maître Poincaré claims that that evidently important portion of the letter, as he states, was not *spontaneously* introduced in Mr. Delort's answer. So we have now that it is not the alleged *ignorance* in which the company was kept of the existence of the question between Colombia and Venezuela, as Mr. Delort declares that the company *was not ignorant* of such fact; it is not the *concealed vice* in the substance of the contract, since Mr. Delort himself states that the company has *no claims to make in this regard*, and finally, it is not *error in the consent*, because Mr. Delort avers that the company is well aware that it must accept the frontier which shall be definitively awarded to the Republic. The lack of spontaneity of such statements can not rob them of their intrinsic value. Is it perchance spontaneously that the man caught in the very act of putting his hand into some one else's trunk—as in the case of the company, which in the map and report offered to the stockholders, when about to

form the company, shows as her own definitive grant of land defining its boundaries a territory disputed by Venezuela and Colombia—confesses, when compelled to apologize, that appearances may be against him, but that he simply wanted to find out whether the trunk was empty? Whether spontaneous or not, the statements of M. Delort, in reference to his knowledge of the arbitration proceedings the ignorance of which was alleged and in regard to the fact that they had to abide by the consequences of the award and had *no claim* on this score, are decisive and cut short the handy boundary question between Venezuela and Colombia, on which the General Company of the Orinoco finds the grounds to pretend a large indemnity from the Venezuelan Government.

As a final statement on this point and not to leave unanswered a question of law to which M. Poincaré refers in his brief, that of the indemnification the vendor owes the vendee, the concessions being comparable from the standpoint of the obligations of the assignor to the sale of incorporeal rights, I will only say, admitting the common principle that the assignor is liable to the assignee, in assignments for a consideration for any indemnification growing out of concealed defects or faults in the thing assigned and for the peaceful possession of the thing sold or conveyed, which is a principle established in the Venezuelan Civil Code, that in the concessions made by the Government of Venezuela to Messrs. Miguel Tejera and Th. Delort, there are no concealed defects or vitiations, because, as such grants only dealt with the exploitation of mines and development of the natural products which lay within a certain belt of land, such operations have not offered nor could they offer any concealed defects or vice for which the grantor is responsible. And as regards the peaceful possession of the grant made with reference to the boundary question with Colombia, the grants do not fix any particular boundaries, but simply mention the territories of Upper (*Alto*) Orinoco and Amazonas in the first contract and the vacant lands lying between the eastern boundaries of the Federal territories Alto Orinoco, and Amazonas, and British Guiana, and between the Orinoco and the limits of Venezuela and Brazil.

The good faith declared in favor of Venezuela by the umpire, who decided the boundary dispute, in regard to that portion of the territory Venezuela was occupying with *animus domini* and the award fixing the boundary between both countries, establish as regards the extent of territory the development of which was the subject of the contracts, the condition *juris* between Venezuela and the grantees in the matter of the boundaries of the territories granted to be developed, which are only designated by their known names, without specifying their extent or their precise boundaries in the contracts under review.

On the other hand, the question of indemnification lies between the grantor or assignor and the grantee or assignee, and in the development contracts under discussion the assignors to the General Company of the Orinoco were Messrs. Miguel Tejera (a Venezuelan) and Th. Delort, who in turn had obtained such contracts from the Venezuelan Government. All questions relating to the concealed defects of the thing which was the subject of the contract or the lack of title of the vendor or assignor which may invalidate it grow out of the contract itself and at the very moment when such contract was made.

The Government of Venezuela never discussed with the General Company of the Orinoco the question of the development of the territories of Alto Orinoco and Amazonas. The stipulations to that effect in the respective contracts were agreed upon by the Venezuelan Government and Messrs. Tejera and Delort, and it is from said stipulations that the question dealing with the responsibility of the contracting parties may originate. The General Company of the Orinoco could only claim from Messrs. Tejera and Delort, the assignors who made the transfer in favor of the syndicate, for a 40 and 20 per cent, respectively, of the amounts that might be paid out as dividends.

It is also worthy of notice that notwithstanding the knowledge the General Company of the Orinoco had of the boundary question before September 28, 1888, as evidenced by the above-mentioned letter from the company's representative, Mr. Delort, the company did not enter before the high Federal court in the proceedings had two years later for the rescission of the contracts any exceptions whatever growing out of the boundary question, nor advanced any claim against the grantors or assignors for a guarantee or liability. The case ended with the final judgment awarding the rescission of the contracts on October 14, 1891—that is, seven months after the award of the King of Spain—and such declaration of rescission for failure of the assignee company to carry out the contracted obligations destroys or invalidates any importance the liability question may claim as affecting the Government of Venezuela.

Section II, Chapter II, of Maître Poincaré's brief deals with the failure on the part of Venezuela to execute her contractual obligations, a question which was examined in the action before the high Federal court of Venezuela, as it was one of the exceptions filed by Mr. Fiat, the company's representative, who answered the action for rescission. The company could establish nothing in favor of its claims, as shown by the minutes of the proceedings, and, quite to the contrary, the sentence passed adjudged that it appeared from the proceedings that the Government of Venezuela had fulfilled on its side all the obligations devolving upon the Government by virtue of the contracts in reference. The charges the counsel for the company accumulates in his brief

against the Venezuelan Government are in their large majority foreign to the obligations entered upon by the Government as regards the grantees or concessionaries to allow them to carry out the development of the natural products and the mines lying within the territories in the contract mentioned by their names. Such exploitation and development operations were carried on by the assignee company, as far as their limited resources would allow, as shown by the documents submitted, and, if such operations were not favorable to the ends of the company, it was not the fault of the Venezuelan Government, but of the company, which accepted the execution of the obligations and agreements contained in the contracts, which absorbed, nobody knows how, considerable sums for administration and installation expenses, and expensive and inefficient attempts to establish navigation on the upper Orinoco. The colossal scheme, as confessed in several documents by the representatives of the company, was undertaken without knowledge of its immense difficulties nor of the territory and river network which were to be the object of the improvements to be made in compensation for the development of the natural products and the monopoly of steam navigation on the river Orinoco and some of its affluents. The representatives of the company have tried to cast the blame for such want of knowledge and for the castles in the air built by the promoters of the company, Messrs. Miguel Tejera and Guzmán Blanco, because they did not show them in due time all the difficulties to be met later on in the execution of the contracted obligations. Such charges, however, do not affect in the least the responsibility of the Venezuelan Government, which had no dealings with the General Company of the Orinoco, nor was bound to make for the company the previous survey necessary to find out exactly which were the obligations contracted, or whether it was possible or not with the limited capital the company had to undertake and carry to a successful issue the vast plan of improvements which represented for the company, as compensation, the right to develop the natural products, and to enjoy the monopoly of steam navigation through the network of the Orinoco rivers, when such was established in conformity with the contract. To such considerations we must add the fact that Mr. Miguel Tejera and M. Th. Delort were the promoters of the syndicate of the General Company of the Orinoco, setting aside for themselves 40 and 20 per cent, respectively, on the profits of the company as a compensation for their concessions.

Let us see how Maître Poincaré describes the combination:

The beneficiary in the contract of December 17, 1885, Mr. Miguel Tejera, had close relations with General Guzmán Blanco. He had been connected with the general in several important business transactions, principally in the Carenero and the coinage deals, and without wishing to offend the memory of these gentlemen (both having died), it might be added that he (Tejera) passed as the figurehead (*prête-nom*) of General Guzmán Blanco.

He could not under circumstances take personal charge of the Alto Orinoco scheme, so he

immediately formed the means, if not to convey it to another grantee, at least to trust it, keeping to himself certain advantages in the hands of a French syndicate.

It was thus that the syndicate of the Alto Orinoco was established in Paris in September, 1886.

Such candid confession plainly reveals the origin of the General Company of the Orinoco. It was the outcome of tacit understanding between the two grantors of the contract of December 17, 1885, wherein the grantee was the figurehead of the grantor, according to the statement of the representative and counsel for the company. Such crooked contract concealing material frauds, according to the representative and counsel already mentioned, was accepted by a financial organization, abandoning to the beneficiary 40 per cent of the profits. It is not necessary to be a financier to affirm that such organization was doomed to death from its inception, and that under the conditions of the deal and the contract the child of the combination, the General Company of the Orinoco, created one year and a half afterwards, or on March 10, 1888, could not possibly live. Legitimate business transactions can not prosper, unless in that pure atmosphere of credit and trust, which is only found in the road labor and capital follow, leading to wise management and legitimate though moderate gain. If Messrs. Tejera and Delort had appropriated to themselves, according to the statutes of the syndicate, 60 per cent of the profits, simply because they had transferred to the syndicate two written contracts without any positive value, could it be expected that French capitalists, who are as conservative as clever, would contribute to make up the business capital indispensable to the development of the scheme within its proper proportions? Undoubtedly it could not be so, and that is why the company, which could scarcely get together a capital of 1,500,000 francs, when it was established in March, 1888, had liabilities exceeding 800,000 francs, made up of a debt to the coinage association of 491,486 francs and another debt due M. Chauvelot, a member of the syndicate, of 300,000 francs, and for which 600,000 francs in unassessable stock were delivered to him. Under such circumstances the capital on hand to continue the colossal scheme was reduced when the company began operations to the amount of 400,000 francs. Two years later the company failed with liabilities amounting to 2,741,084.27 francs, *its credit being totally exhausted* (see report of liquidation), so that it was forcibly driven to go into liquidation on May 30, 1890. Such, and no other, could be the end of the company when the beginning was tainted.

I beg to submit to the honorable umpire with this additional opinion and an annexed portion of it an affidavit duly attested containing the deposition made in Paris on June 6, 1903, by M. Joseph Hippolyte Andrau-Maural, a former representative and attorney in Venezuela for the General Company of the Orinoco, in liquidation from the latter part of 1890 until April, 1893.

Such affidavit contains, in confirmation of all the foregoing, the circumstances and the facts that have led the General Company of the Orinoco to its complete disorganization and the impossibility to continue to exist; and as a résumé of the causes which produced such results, the following may be transcribed:

The scheme was neither well investigated nor seriously prepared, and was put into execution in the worst possible manner. The scheme fell fatally under the weight of universal reprobation, a bad financial position from the start, through reprehensible dealings and detestable management.

This affidavit is accompanied by several letters addressed to M. Andrau-Maural by M. Roux, liquidator of the company, and M. Delort, its general representative in Venezuela, relating to the liquidation operations of the pending transactions in the Orinoco region, and instructions to open with the Government of Venezuela negotiations for an indemnification. M. Delort, in his letter of November 25, 1891, states (that is, one month after the sentence of the high court had been passed adjudging the rescission of the contracts and condemning the company to the payment of a certain amount) in part, as follows:

Third. The sentence of the high court has condemned the company to the payment of the sum of 40,048.62 bolivars, *which constitutes a new credit to be met by the liquidation.*

Will the Government collect such sum? In such case it is necessary to answer immediately that the liquidation belongs in the first place to *the creditors recognized before the sentence was passed*, and thereupon to claim from the Government the amounts due to the company by the Departments of War and Navy. (See Planas's letters in the documents delivered to the legation and Richard's letters on the requisitions (seizures) of the *Libertad*, a small steamer, December, 1888, and January, 1889. A first seizure of the *Libertad* took place in November, 1888, to carry troops from Ciudad Bolívar to Guayana Vieja.)

It is more than probable that, if the Government does not make a claim before the diplomatic reclamation is entered, it will do all that is possible to enter such claim afterwards. It is, then, an advantage *not to execute any liquidation operations* until the moment the claim is filed *so as not to put the Government on its guard*, as it may then pretend, because of its *credit* either to follow or else *to inspect* the liquidation operations.

Then follows a description of the assets of the liquidation in Venezuela, consisting, as stated, of the following:

1. Floating property.
2. Property in the warehouses.
3. All kinds of merchandise in stock.
4. Real property.
5. Furniture, writing materials, etc.
6. Animals, carts, wagons, etc.
7. The cattle ranch.
8. Bills for collection.

The same letter, further on, states:

It is very difficult, almost impossible, to issue *a priori* instructions; it is necessary to follow the events and to know how to get the best out of them. It suffices to establish on the one hand the basis of the compromise, in case such may be agreed upon, and on the other hand the direction matters should take, in case the Venezuelan Government should be obstinate and not accept a friendly settlement.

I. In case of compromise:

In our position before the French legation we can not undertake to do anything without its consent from the moment the diplomatic claim has been entered.

(Such claim was never directly entered. It is now that it has been entered before the mixed commission, but not by the French Government directly.)

The letter of instructions further says:

It seems to me clear that the Government will do nothing and will hear nothing before such claim has been presented, that is, delivered.

Only in that case the Government would perhaps like to enter into a compromise. In that case, with whom shall the Government enter negotiations?

With the French legation it would be difficult (for the Government) to enter into a *scheme of underhand negotiations* (*tripotages*) *and clandestine commissions which are the basis of all transactions and the reason of all dealings.* This is why direct negotiations with the legation may very probably fail. But the men in power are too shrewd to make a mistake and they will probably try to negotiate directly or indirectly by any means with the representative of the company. In this case you must keep the legation, which will certainly not interfere, informed of all the negotiations.

To give the honorable umpire an idea of the methods employed to get a heavy indemnity, the foregoing paragraphs are quite sufficient.

As a further complement to this brief, I beg to submit another affidavit of the same gentleman, M. Andrau-Maural, stating which was the property the General Company of the Orinoco in liquidation was possessed of in the Orinoco region in 1891, when said Andrau-Maural was appointed as its representative. After that date two years elapsed in the condition expressed in the testimony bearing number 3, to which I have referred in this writing, as abandoned, left in the open, and exposed to the destructive action of the climate and the elements in such remote country. I conscientiously took into consideration the deterioration and natural loss suffered by the property and for whatever the Government of Venezuela might be responsible on account of the established seizure of a small portion of the property. I found the positive value of such to be sufficiently compensated with the sum of 40,448.62 bolivars, which the company in liquidation should have paid for damages according to the sentence of the high Federal court, besides costs of the action which the company was also condemned to pay.

For the reasons stated in my former brief and for the reasons I now state I maintain my opinion that the claim entered against the Government of Venezuela is totally unfounded and must be rejected.

NORTHFIELD, VT., *February 9, 1905.*

ADDITIONAL OPINION OF THE FRENCH COMMISSIONER.

After having read the additional memoir of my honorable colleague I can only maintain the conclusions of the prior memoir. Faithful to the rule of conduct which I have traced for myself to remain within the field of impartiality which is suitable to an "arbitrator" (for that is the title which the protocol gives me) I shall not follow Doctor Paúl in the

discussion which he engages with M. Poincaré, advocate of the plaintiff party. Besides, this would be useless, the umpire having in hand the two briefs, and being able as well as myself to form an opinion after having read them. I shall content myself then with presenting to the Hon. Mr. Plumley a few observations which are suggested to me by this additional memoir upon some points, foreign, however, in their very foundation, to the matter, but upon the subject of which I differ absolutely from the opinion of my honorable colleague. In the first place it is a question of the manner in which we have understood, my colleague and myself, the rôle of "arbitrators" which has been intrusted to us by our respective Governments. I have not at all wished to censure Doctor Paúl about the manner in which he has understood his duties; he had, according to the protocol, the entire freedom to understand them as he has done. I have only wished to state to the umpire that I was not placed upon the same ground. I have insisted upon remaining an "arbitrator" and not to become the advocate of one of the parties; I have pronounced myself conscientiously with all impartiality, without being afraid to reject the pretensions which I found without foundation or exaggerated. It is because I have fixed for myself this line of conduct that I have not been able to give to my honorable colleague as he requests of me the "arguments" on which I base my ideas. An arbitral award, like an ordinary judgment, ought not and can not rest itself upon "arguments." The arbitrator, like the judge, ought only to give the reasons which have convinced him and led to his decision, but in this particular case I have stated the reasons for my decision since I have said:[a]

> In failing in the obligations which it had assumed, in deceiving the company by its dissimulation which changed the substance of its agreements, and in interfering with the management of the concession by its vexations and abuses of power, the Venezuelan State has brought about the ruin of the company.

I did not think I had the power to say more. I have thought that in explaining thus my position I gave to my decisions an authority which they would not have had if I had supported, as an advocate, the cause of the claimants as my colleague has sustained that of the Venezuelan Government. I have not bettered the arguments of the claimants; I have contented myself with weighing them. When I have accorded indemnities it is because I have considered these arguments acceptable. I have not furnished personal "arguments." I add that nothing prevented the Venezuelan Government, defendant, from imitating the claimants, plaintiffs; it could, in order to relieve its arbitrator from being at the same time its advocate, positions difficult to unite, have appointed special advocates in each case to produce documents and to call upon witnesses. It does not belong to me to seek for the reasons why it has not done so.

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[a] Page 282.

In the second place I maintain, in spite of the explanations given by my honorable colleague, that the phrase of the minutes "to see if it might be possible to arrive at an agreement" can not have any other sense than that which I have given it in my memoir. To refuse this would be the same as to declare that it has no sense, that which I can not admit. To arrive at an agreement after we have given opinions so diametrically opposite, it would be necessary that each of us grant concessions. On my side I would have to lessen the amount of the indemnity; on his side, Doctor Paúl would have to consent to accord one. In pronouncing this phrase, which he himself had inscribed in the minutes, my colleague then considered himself the possibility of according an indemnity to the company; there is no getting around it.

In the third place, I agree that Mr. Pietri, Venezuelan plenipotentiary had, like other plenipotentiaries, only powers "ad referendum." This does not avoid the fact that Mr. Pietri was a Venezuelan vested with high official character, and that, despite his well-known patriotism, despite the high functions with which his Government had honored him, despite his knowing the judgments of the high court condemning the company, Mr. Pietri recognized the right of the company to receive eight years ago an indemnity of 3,600,000 bolivars in gold. That is all I wish to establish.

The argument that my honorable colleague gathers from the refusal of Congress to ratify the diplomatic act signed by Mr. Pietri has in my opinion no value. In fact, it is true, that, if instead of having been accorded by sentences of arbitral tribunals, the indemnities fixed by the umpires in the mixed commission had been the result of diplomatic agreements submitted to the ultimate ratification of Congress, the latter would have rejected them all as it rejected the Pietri-Hanotaux protocol; it is just because the claims of foreigners force Venezuela to such a plea in bar that it has been necessary to have recourse to arbitration, and in truth I do not think that one can demand of the elected representatives of a country who have to reckon with the legitimate susceptibility of national self-love that they condemn their own country with the impartiality and indifference which foreign umpires alone can show.

Then my honorable colleague maintains that it is the large amount of the indemnity accorded by the Pietri-Hanotaux protocol that prevented Congress from ratifying this act. I admit that willingly, but I ought to remark without insisting that there can be other reasons of which we are ignorant since the sitting of Congress in the course of which this protocol was examined was a secret session and no journal, so far as I know, has been published.

In the fourth place I ought to remark in the additional memoir of my honorable colleague, an interpretation of the protocol of February 19, 1902, entirely unexpected. Doctor Paúl maintains that the pro-

tocol of Paris and the protocols of Washington are not alike; that the first does not give the arbitral commission the same powers as the second. I find to the contrary that from the point of view of the extent of powers the protocol of Paris being less precise is by that very reason broader than the protocols of Washington.

As the protocol signed at Paris, February 19, 1902, the protocol signed at Washington, February 27, 1903, has suspended the application of the French-Venezuelan convention of 1885 which, during all the time that the effect of these two protocols remain in force, is a dead letter. Both to an equal degree have been exceptions to common law represented by this convention, which has regained its force only when the operations are ended of an exceptional order provided by the protocols. Only while the protocol of Paris announced this evident truth, the protocol of Washington considered it as so evident that it did not think it necessary to speak of it. To uphold the contrary would be to maintain that the protocol of Washington abrogated forever the convention of 1885, that which would not be the business of the Venezuelan Government, would not displease the French inhabiting Venezuela, who consider that this convention of 1885 deprives them of the effective protection of their legation.

This sentence

> it is understood that this procedure * * * is instituted only as an exceptional act and does not invalidate the convention of November 26, 1886,

signifies that as soon as the protocol of 1902, which, having created a procedure of exceptional arbitration, shall have brought forth all its effects, the convention of 1885 will remain the only convention in force between the two high contracting parties. To give any other sense to this phrase and to make it say that the said convention is opposed to the protocol while the latter is in application is to put the protocol in opposition to itself and to take from it every kind of significance. Then, like the commission appointed by the protocol of Washington, like the arbitral tribunal which rendered its award on the Fabiani affair at Berne, and based it upon denials of justice imputable to the Venezuelan tribunals of all grades, this commission has full powers to examine all the judgments rendered by all the Venezuelan tribunals, and to accord indemnities if it finds that there have been denials of justice. To adopt any other interpretation, as my honorable colleague has done, refusing to this commission the power to review a judgment of the high Federal court, would be to take away from the protocol of Paris its efficiency, which protocol has for a purpose to correct failures of Venezuelan justice. There can not be the shadow of a doubt of this, and in the course of our labors at Caracas my colleague admitted it himself when he consented to accord an indemnity to the claimant Mr. Rogé, who had been unduly condemned by a Venezuelan tribunal.

In the last place I am obliged to give my idea of one of the dossiers which my honorable colleague has joined to his additional memoir. This dossier represented by papers forwarded by Mr. Andrau Moral was handed to me to-day, February 10, for the first time. I have the right to ask myself what are the reasons which have led this former representative of the company thus to betray the company which he formerly served. Has Mr. Andrau Moral been guided only by the love of truth and the search for justice? Does not his treason result, rather, from positive advantages upon the nature of which I can not insist? Or, indeed, is it the manifestation of a hostility which might have for its foundation the refusal of the company to pay certain sums to the interested party, or the manner in which the latter may have thanked him for his services? Of these three reasons, which is the one which has induced Mr. Andrau Moral to take such a step for the purpose of injuring the company? I have not the means of information sufficient to be well informed. So I can only ask the umpire to kindly wait, before taking into consideration the statements of Mr. Andrau Moral, giving no value whatever to his insinuations, the arrival of information which I have demanded from Paris by telegraph upon the integrity of this person thus appearing at the last moment and upon the conditions under which he left the service of the company. On the nature of this information will depend the credit which is suitable to attach to his statements. As for the letters of Mr. Delort joined in the original to the factum of Mr. Andrau Moral we can see only the manifestation of the desire of the company to settle this claim by a compromise which Mr. Delort with his experience of men and things in Venezuela thought only possible after a diplomatic action should have been engaged in. Besides, the letter of Mr. Delort, referred to by my colleague, if anyone wishes to read it from first to last and not to consider it as an extract, is not intended in truth to edify one with regard to the habits of the "men in power" in Venezuela, but it is in no way of a nature to spread doubts upon the right of the company to receive the indemnity which I persist in considering as due it.

NORTHFIELD, *February 10, 1905.*

EXHIBIT TO THE FOREGOING OPINION.

Reverting to the "P. S." joined to my memoir sent to the umpire to explain my opinion on the claim of the Company General of the Orinoco, I have the honor to remit to the Hon. Mr. Plumley the following telegram, which I received this day from Mr. Delort. I translate it from the telegraphic style to facilitate the reading.

PARIS, *February 13, 1905.*

I became acquainted with Mr. Andrau Moral at Caracas in 1880. He asked me for employment. The minister of France, Mr. de Tallenay, gave me, as information, that he had been obliged to leave the French army for misdemeanor. He then came to seek his fortune at

the mines of Callao, married at Ciudad Bolívar, entered the company of the Orinoco in 1891, being chosen by the agent of the company at Ciudad Bolívar without the director of the company at Paris being informed, to take command of the boat *Libertad*, which he lost the same year in a strange manner. I found him at Caracas in October, 1891, and his relations represented him as the representative of the liquidation during a very short time. He demanded money continually and was a very active agent for the claim against the Venezuelan Government. We do not then understand his protest. In 1893 he received the order of the liquidators to transmit his power and documents to Mr. Maninat, a new representative. He left the company, taking away important pieces from the dossier and was sent from Venezuela in 1893 by President Crespo for an act of indelicacy notoriously well known. He came to Paris to ask me for a loan and forgot to pay me. I have not seen him since and the liquidators remain without news from him. His protest without right, value, or reason is an infamous and inexcusable act. Wait the dossier which we are forwarding you and which will furnish proofs. Please send copy of the protestation.

(Signed) DELORT.

When the dossier mentioned reaches me, I will present it as a second annex to my memoir after having shown it to my honorable colleague.

E. DE PERETTI DE LA ROCCA.

NORTHFIELD, *February 13, 1905.*

The French arbitrator has the honor to remit to the umpire a dossier of twelve exhibits which has just been sent to him by the Company General of the Orinoco in view of destroying the effect which may have been produced by the protestation of Mr. Andau Moral remitted by the Venezuelan arbitrator. It will be enough for Mr. Plumley to read the letter of Mr. Andau Moral of the date of June 19, 1893, and to compare it with his letter of 1904 to take account of the authority which the declarations of this person may have that the company seems justified in accusing him of having written his protestation for money. In fact the 19th of June, 1893, Mr. Andau Moral wrote to the liquidators of the company:

"I put myself at your disposal for the steps to be taken to obtain from the Government the support which is necessary for the liquidation to bring to a head the legitimate claims against Venezuela."

As for the letter of Mr. Delort of November 25, 1891, which my colleague tries to use as a weapon against the company, I will remark to Mr. Plumley that the company itself produces a copy of it in the support of this claim. I maintain that there has not been any line of this letter from which one can raise an argument against the legitimacy of the claim in question.

E. DE PERETTI DE LA ROCCA.

NORTHFIELD, *March 1, 1905.*

NOTE WITH REGARD TO M. ANDRAU MORAL FOR M. DE PERETTI DE LA ROCCA.

On his arrival in Caracas, October 25, 1891, he, M. Delort, was received by M. Andrau Moral, and great was his surprise for he believed him to be on the Orinoco on board the *Libertad*, which he commanded. He was ignorant in fact of the loss of this steamer of which he had not yet received the news on his departure from France. M. Andrau Moral was not unknown to M. Delort of whom he had asked, in 1880, to be appointed on the mission which the Messrs. Perière had sent to Venezuela to study the resources of this country and the business enterprises which might succeed there.

M. Delort had been placed at the head of this mission. In the programme of the investigation were included the four mines of Callao and M. Andrau Moral had come from Callao, where he had been employed, to Caracas to offer his services, but the information gained with regard to him by the Marquis de Tallenay, chargé d'affaires of France in Venezuela, prevented the acceptance of these offers. M. de Tallenay informed M. Delort that M. Andrau Moral had been obliged to leave the French army for misdemeanor. In 1883 M. Delort ran across M. Andrau Moral at Panama, where he was in the employ of the Inter-Oceanic Canal,

and since that time he had not seen him. After the failure of the enterprise of the canal, M. Andrau Moral had come back to Ciudad Bolívar, where he had married a Venezuelan girl in 1879. He obtained, in 1891, from the agent of the Company General of the Orinoco in liquidation, M. Boulissière, the command of the steamer *Libertad*. M. Boulissière did not inform the people at Paris of this nomination, so that the liquidators found it out only through the report of the said agent relative to an attack on this steamer in April, 1891, by the armed bands of Valentini Perez.

After the loss of the *Libertad* in August M. Andrau Moral had come back to Caracas. He explained to M. Delort that going up the Orinoco August 6, at 5.15 in the morning at about 8 miles from Buenavista, the *Libertad* had encountered a squall from the east so violent that the steamer had capsized in a moment and was wrecked by the explosion of the boiler a moment later. It was a great loss to the company, the steamer having cost a hundred thousand francs. At any other time M. Delort would have wished to make an investigation with regard to the responsibility of M. Andrau Moral in the loss of the said steamer of which he was the captain; but he was so preoccupied with the situation that the judgment of the high court, rendered October 14, 1891, was going to cause to the liquidation of the company that he laid aside this investigation for the time. He had taken counsel of the advocates of the company as to the measures to be taken and as the latter saw no other action possible than a claim through diplomatic means, it was necessary to prepare this by evidence for the chargé d'affaires of France at Caracas, M. de Lacvivier. M. Andrau Moral was at that time on excellent terms with the said chargé d'affaires. He offered M. Delort to aid him in his work which he was rushing as much as possible in order to return to Paris where his presence was necessary. It was necessary to be acquainted with Venezuela and Caracas to understand the position in which M. Delort was placed. The president, Dr. Andueza Palacio, whom he knew very well and for whom he had even had the opportunity to render a service some years before when he was in a precarious position, refused to receive him, and the ministers followed his example. The representative of the liquidation, M. Fiat, who had become an employee of the Government, had handed in his resignation and wished to withdraw through fear of compromising himself. For M. Delort personally, it was all right, but it was not necessary that he should speak of the Orinoco. No merchant would have accepted the representation of the company through fear of the Government. In such circumstances M. Delort was well pleased at finding in M. Andrau Moral a person who did not fear to compromise himself in openly supporting the company, and as M. Delort did not wish to remain at Caracas more than one month he had with the said Andrau Moral the advantage of the man already acquainted with the affair and being able to prosecute it effectively with the French legation where he was very well regarded. M. Delort then thought no more about an investigation with regard to the loss of the *Libertad*. He considered the faults of youth as peccadillos to be forgotten, and he prepared M. Andrau Moral to continue in the business of which he had laid the foundation.

Moreover, M. de Lacvivier encouraged M. Delort in this respect. On going away the latter left to M. Andrau Moral the instructions of which a copy is here attached, but not wishing, however, to invest him with powers of attorney without the approbation of the liquidator, M. Roux, he remitted in blank the said powers to the legation of France, awaiting the decision of the liquidator.

M. Andau Moral was known to Doctor Urbaneja, legal counsel of the company, whose advice he was to follow. M. Delort went back to France and arrived in Paris the 15th of December. He had to explain first the situation of the company in Venezuela and the liquidator wished to call a meeting of the stockholders to explain it to them. M. Delort had brought to M. Roux a letter from M. Andau Moral, dated November 15, offering him his services, a copy of the reply of M. Roux, dated the 24th of December, 1891, being annexed. M. Andau Moral wrote again to the liquidator offering once more his services, dated the 17th of November.

January 5 M. Roux telegraphed to M. Andrau Moral that he agreed to give him the powers of attorney. M. Andau Moral wrote to M. Delort the 5th of January a letter to be for-

warded to the liquidator, in which he declared that he would demand payment of a regular salary and otherwise he spoke of accepting other offers which were made him. M. Roux replied to him by a first letter of the 25th of January and then by a second letter. As a result of this correspondence M. Andrau Moral had represented the liquidation provisionally from the date of the departure of M. Delort the 15th of November, to January 5, 1892, and officially from January 5, 1892, to February 25, 1892, on which date he received the letter informing him that M. Maninat had been selected and that he was to turn over his powers to him.

But M. Maninat to whom they had written at the same time to represent the company, did not put himself forward in this affair, at this time, made no reply, and took no steps with M. Andrau Moral who continued to represent the company *voluntarily*, but he had really nothing to do. Affairs remained thus during the whole year of 1892, which was exceedingly troublesome in Venezuela because of the civil war, the fall of Doctor Palacio, and the final victory of General Crespo. M. Maninat had come to France toward the close of 1892 and they had prevailed upon him to accept the power of attorney of the company. A letter was written to him, of which a copy is added. M. Maninat on his arrival at Caracas went to the legation to demand the dossier of the documents relative to the claims of the Company General of the Orinoco in liquidation. He was then informed that M. Andrau Moral had taken possession of some important exhibits and had gone away without returning them, and of this act M. Maninat informed those at Paris. M. Delort demanded these documents of M. Andrau Moral, who replied that he had left them with his cousin Mathew Valery, at La Guaira M. Delort then communicated with this said Valery who pretended to have sent them back again to M. Andrau Moral and sent a letter herewith attached, a copy of which was transmitted to M. Andrau Moral who declared that the agent of the post in question had remitted nothing to him.

Finally M. Andrau Moral has restored nothing. M. Andrau Moral was without personal resources and he expected to receive regularly from the liquidator a monthly allowance which would permit him to live. He complained much because the liquidator, M. Roux, had not wished to assist him. But at this time the liquidation had some heavy expenses to meet in regulating other affairs more important than a salary to M. Andrau Moral. On the other hand, the dossier of the company ought first of all to have been examined at the ministry of foreign affairs. There was really nothing to be done at Caracas, as M. Andrau Moral himself knew. They did not see under these conditions the necessity of paying him, and the offer which M. Roux had made him, placing to his credit some settlements to be made later, was a gratuitous kindness. Nevertheless he drew several checks upon M. Roux and M. Delort, together 2,500 francs, drafts which were paid. That could not continue and M. Delort urged him while waiting to take some employment. M. Andrau Moral had been able to win the good will of M. de Monclar, so that he got him the appointment of consular agent of France at La Guaira, to which he added the consular agency of Colombia in this same port. So in this manner he found the means of existence. Unfortunately he had many political friendships and in this time of troubles of expulsions and of flights he aided in the flight of certain compromised men. M. de Monclar did not pardon him for this fault and had him replaced. He then went to ask M. Orsi de Monbello to take him into his business in order to help him to get a living. M. Orsi de Monbello was in high favor of General Crespo, who placed him in charge of certain works, for which he was paid in advance to a certain amount, which is not common in Venezuela. M. Andrau Moral, who was notorious at Carcacas, got rid of part of these advances for him, and General Crespo learning about it sent him out of Venezuela, causing him to embark officially at La Guaira. M. Andrau Moral came to Paris. This was in April, 1893. M. Delort welcomed him kindly and aided him so far as he could in his plans, which he continued to pursue. M. Roux also welcomed him and remitted to him what he could. But the question of money always being the main thing, M. Andrau Moral drew upon M. Roux from Ajaccio, where he had gone. M. Roux refused to accept and then received a letter of regular blackmail.

But M. Andrau Moral changed his mind, and June 18, 1893, he wrote to the liquidators, again offering them his services, but this time for proceedings to be made at the ministry of foreign affairs, where he pretended to have influence powerful enough to act and to bring to a successful end the legitimate claims of the liquidations in Venezuela. And it is after such a letter that M. Andrau Moral protests against the claims of the Company General of the Orinico.

The liquidators of the company heard nothing further from M. Andrau Moral after this letter of June 18, 1893, and M. Delort has had no news from him since 1896. How, under these conditions, could M. Andrau Moral make a protest and to what end? It can not be for the remainder of the credit which he may have upon the liquidation, for it is to that alone that he ought to have addressed himself. He has no cause of complaint against the liquidation nor against M. Delort; however the protestation which he has made has for an end to injure the liquidation and M. Delort; but, then, what object was he pursuing? M. Andrau Moral is not a man to act without interest, and for him interest is money.

That is why his action aside from its lack of right, value, and reason is contemptible and can only place in confusion those who search to use it, making in a way a common cause with him.

TH. DELORT.

PARIS, *February 17, 1905.*

OPINION OF THE UMPIRE.

The liquidators of the Company General of the Orinoco, a French company, presented their claim through the Government of France before this honorable commission at its sitting in Caracas in 1903, claiming indemnity in the sum of 7,616,098.62 francs of date July 10, 1902.

The claim having received the careful consideration of the honorable commissioners, they found themselves in serious disagreement, the honorable commissioner for France deeming it just that there be awarded the liquidators the sum of 7,000,000 francs, while the honorable commissioner for Venezuela refused them any sum. The claim was therefore reserved for the consideration of the umpire, to whom it was presented at the sitting of the commission at Northfield on the 13th day of February last.

Nothing is in controversy but the merits of the claim.

It arises out of two concessions granted by the respondent Government. The earlier was to Miguel Tejera, a Venezuelan, through Gen. Guzmán Blanco, plenipotentiary of the Republic of Venezuela, at Paris, France, on the 17th day of December, 1885, and was approved by the Congress of the conceding Government May 21, 1886, made executory May 24, and published in the Official Gazette of June 5 of the same year. The other was from the respondent Government to Theodore Delort, made at Caracas April 1, 1887. It was approved by the Federal council, later by the national Congress, May 26, 1887, became executory May 31, and was promulgated June 13 of the same year.

The concession to Miguel Tejera was contained in fifteen articles and comprised certain valuable privileges to and certain compensa-

tory requirements of him in substance as next hereinafter stated. To the concessionary was granted the exclusive right to exploit all the mineral and vegetable productions of the territories of Upper Orinoco and Amazonas; to construct railroads, telegraph lines, and canals, such as he might think suitable for the development of the territories and the expansion of the enterprise, giving notice always to the national Government of the time when such works were to be commenced and submitting to the Government the plans thereof; the free importation of all material, implements, and instruments necessary for the construction and maintenance of the railroads and their equipments and the boats and their equipments; a rebate of 10 per cent from the regular customs duties on all other imports by the concessionary; the ownership in fee of all lands occupied by the concessionary for farms, pasturage, or industrial purposes; 6 hectares of land in fee to the concessionary for each immigrant introduced into the said territories as provided for in said concession, the same in all cases to be taken out of Government lands; immunity to the enterprise from any and every impost or contribution to or for Governmental support; right of navigation of the lower Orinoco and of exit or entry for his boats by the canal Macareo; that during the term of the concession the Federal Government was not to treat with any other person or company for the exploitation of mineral or vegetable products, steam navigation, and railroads, these being declared to be the basis of the contract; the privilege of assigning the concession in whole or in part to any other person, persons, or company, limited only to giving notice of such transfer and assignment to the Government of the Republic; the concession to continue for thirty-five years from the date of its ratification; at the expiration of this time all railroads of more than 10 kilometers constructed by the enterprise, all lines acquired by the enterprise, and all mines exploited by it were to continue to be its property until the end of ninety-nine years from the date of ratification.

The obligations imposed upon the concessionary by the terms of the contract were in substance these:

To construct narrow-gauge railroads around the rapids of the Atures and the Maipures in the Orinoco, the construction to be commenced within eight months, counting from the date on which the ratification of this contract should be communicated to the concessionary; to establish steam navigation on the upper Orinoco, the Casiquiare, and the Rio Negro, the first boat to be in those waters within six months, counting from the date when the construction of the railroad should be begun; to introduce at his own expense into the said Territories an annual number of immigrants not less than 500; to erect a building for a school and a chapel in each of the new villages which should be founded at his expense; to construct at his expense two barracks

suitable to accommodate 200 men each, one of which should be near the frontier of Colombia and the other in the neighborhood of the Brazilian frontier, both at points which should be selected by the Federal Government and for whose approbation the plans were to be submitted; to introduce into the said Territories at least three Catholic missionaries each year during a period of ten years; to support at his expense, at the most suitable places, hospitals and pharmacies for the assistance of the natives and immigrants who might fall sick in the work of the enterprise; to pay to the national Government during the existence of this contract the sum of 40 bolivars for each 46 kilograms of india rubber which should be exported to a foreign country; to send a scientific commission to explore the two Territories and to communicate to the Government the result of its labors; to maintain at his expense a body of police for the protection of his works, the chief to be appointed by the Federal Government; to proceed to the exploitation of the vegetable materials in such manner that the natural plantations existing might be preserved in good condition; to be responsible for the trees which might be destroyed in the exploitation of the india rubber and that he improve and benefit these natural plantations; to yield up to the Government all the property of the enterprise, which was to become the property of the nation, at the expiration of the general term of thirty-five years, excepting the properties named heretofore, which, under the privileges of the concession, were to belong to the company; to permit that all differences and controversies, which the carrying out of the concession might cause, should be resolved by the tribunals of the Republic conformably to its laws.

The enterprise contemplated by the Government of the Republic and by the concession was indeed colossal.

The two territories included in the concession had an area, as stated by Mr. Tejera, of 600,000 square kilometers. It was understood to contain vast and fertile plains, forests covered with wood, rare and rich; extensive mines of gold and silver; other metals and precious stones, and for immediate exportation and profit great quantities of india rubber, sarrapia, and oil of copaiba. The Orinoco, 2,000 miles long, received within these Territories its largest tributaries, and with these, above the Maipures rapids, had thousands of miles of navigable waters, extending west, east, and south, and beyond the boundaries of Venezuela. It was a land little known by the world at large, but it bore the charm of great attributed wealth of vegetable and mineral products, the exclusive exploitation of which passed to the concessionary by the terms of the contract.

From the map of Venezuela, as then constituted, the Orinoco and its eastern confluents were all within the domain of Venezuela, while important sections of the western affluents lay likewise within the Republic and under its control. The concessionary saw in these facts

far-reaching opportunities for exclusive navigation over many waters and through immense regions, and there came to him visions, not fanciful, of giant fortunes. There was, however, little genuine knowledge of these Territories; they were largely unexplored and in detail unknown. It afterwards appeared that the population had been decreasing for some time through different causes, and many villages once fairly populous were reduced to very few inhabitants. The rapids, which it was the plan of this concession to avoid by means of railroads, had been the sufficient cause both of the ignorance of the outside world concerning lands lying beyond them and of a paucity of inhabitants, of enterprise, and of improvements therein.

The conditions peculiar to a tropical country had added to the usual factors, making early explorations and investigations dependent exclusively upon waterways. The rapids had cut off approach from the north to the upper Orinoco, as well as descent therefrom. The Casiquiare joined together the Amazon and the Orinoco, and by this means the sea could be reached with freight carrying traffic from these Territories, and it was the only way by which the Territories had been open to navigation. It was only foresight and patriotism which suggested the plan proposed in the concession to unite these separated sections of Venezuela by means of steamboats and railways on and by the Orinoco.

While the enterprise promised much to its promoters financially, it bade fair to be of untold value to the Republic of Venezuela.

A French syndicate was formed September 1, 1886, to take over this concession, which was merged in the Company General of the Orinoco. This company was organized at Paris, France, March 28, 1887, with a capital of 1,500,000 francs, composed of 3,000 shares of 500 francs each. This company beame the legal assignee of the concession of December 17, 1885.

April 1, 1887, at Caracas, the Government of Venezuela entered into a contract with Theodore Delort, a French citizen, for the exclusive exploitation of sarrapia for a term of twenty-five years within the Government lands which are included between the eastern boundaries of the Federal Territories of Upper Orinoco and Amazonas and British Guiana and between the Orinoco and the Venezuelan-Brazilian frontier.

In addition to the provision concerning sarrapia there was granted by the Government the right to construct railroads and telegraph lines wherever deemed necessary for the development of its works and to establish rates of transportation subject to the approval of the Government; to become the proprietor in fee of the lands occupied by these establishments; to receive in fee one hectare of land for each immigrant introduced; to import free of duty all materials, machinery, and tools necessary for the exploitation of sarrapia and for the con-

struction of steamers, houses, railroads, and telegraph lines; the right to cut in the national forests the wood and timber to be used in all such constructions; to have all these privileges exclusively during the term of the concession; to have the unlimited right to assignment or transfer of said contract by simply advising the Government thereof.

In return for these privileges there were certain compensatory obligations resting upon the concessionary in said contract, such as that Mr. Delort was to organize a company with sufficient capital to carry on the exploitation named; also imposing these duties—to pay the National Government in specie 50 bolivars for each kilogram of sarrapia which should be exported; to introduce at the expense of the concessionary immigrants to colonize the Territories in which the exploitation of sarrapia was to take place; to establish hospitals and pharmacies sufficient for the immigrants and workmen who might fall sick; to introduce Catholic missionaries to catechise the natives of the Territories where the exploitation was to take place; to establish steam navigation on the principal branches of the Orinoco where it was possible within the Territories included in the contract; totcarry on the exploitation of sarrapia in such a manner as to keep in good condition the existing plantations; to transmit gratuitously postal correspondence.

This contract was also taken over by the Company General of the Orinoco, and it became the lawful assignee thereof.

Of both these assignments to the Company General of the Orinoco the respondent Government had due and sufficient notice and advices.

Prior to the organization of the Company General of the Orinoco the syndicate heretofore referred to did much toward preparing the way for performing the duties and gaining the privileges of the concession; but immediately following the organization of the company the enterprise was pressed faithfully and with measurable success. Unexpected difficulties and obstacles were met and overcome so far as the conditions would permit. Steamboats were placed on the lower Orinoco for navigation between Ciudad Bolívar and the Atures; between the rapids of the Atures and the Maipures and above the upper falls for the service of the upper Orinoco. By May 2, 1887, regular communication had been established between Atures and Ciudad Bolívar, the trip down taking five days and the trip up about ten. By the latter part of 1887 the boats on the upper Orinoco were plying between San Fernando de Atabapo and Maipures with reasonable regularity, accomplishing the service in about twelve days from San Fernando to Ciudad Bolívar, where before it had taken three months. The distance from Ciudad Bolívar to Atures is about 900 kilometers, and from Atures to Maipures is about 60 kilometers, and from Maipures to San Fernando de Atabapo is about 400 kilometers.

The discovery of two rapids between the Atures and the Maipures, not named in the contract and apparently not known, practically

negatived the idea of a successful scheme consisting solely of two narrow-gage railroads of about 10 miles each, one passing by the lower and the other by the upper rapids with carriage by boats between these two points, as was contemplated by both parties to the concession. It was essential to a wise issue that there be one railroad only of sufficient length to include both rapids, built at such distances from the river as the topography of the adjacent territory required. This would necssitate the crossing of wide and deep rivers, affluents of the Orinoco, and would entail expensive bridges and viaducts.

Such railway would cover a distance of 60 kilometers. One feature of the Orinoco not understood by either party to the concession, as it would seem, was the mighty flow of waters in a certain part of the season, reaching forty feet in height above low-water mark and inundating the country for leagues, especially on its western side, with a corresponding paucity of the waters during the opposing season. The successful navigation of the Orinoco was seriously impaired by these facts in the matter of accessible ports and towns of stable and organized character and by the lack in parts of a sufficient depth of water at its lowest ebb for the passage of such boats as the general condition of navigation in the upper Orinoco seemed to demand. It also prevented the railroads, which by the terms of the concession were to be built around the upper and lower rapids, from being located near the banks of the river as they existed in the ordinary flow.

A temporary railway was constructed around the lower rapids on the right and around the upper rapids on the left of the Orinoco in order to lift the steamers overland and to points where they could be again placed upon the river for purposes of navigation between the rapids and above. By this means steam navigation was established on the upper Orinoco.

These railways were built and used for no other purpose. They could not be permanently maintained at these places because the annual floods would lay them deep beneath the waters.

Instead, pending the building of a satisfactory railroad line, cart roads were built around each of the rapids; carts, mules, and other draft animals were secured and maintained, and in this way and by these means and by the aid of an adequate ferry upon the Cataniapo, and by a raft upon the Tuparo, the products from the Territories were carried by the rapids and taken up by the steamers in the lower Orinoco, and similarly transportation was effected from the lower to the upper Orinoco. It was not transportation by railroads around the rapids, but it linked together steam navigation on the Orinoco and opened up the Territories of the Upper Orinoco and Amazonas and this outer world by way of northern Venezuela.

Important steps in the construction of the railroads were taken and while in fair progress the work was interrupted and prevented by serious inundations covering quite a period of time.

During the years 1887-'8 the company entered upon the construction of a railroad from the mouth of the Cano Meta to the Rio Ventuario above the great rapids, uniting the Caura with the upper Orinoco. The progress of this work was interrupted when twelve leagues had been completed by the impressment of the workmen, under order of the Government of Caura, to be used as troops in the defense of the Government against the revolution. The work thus interrupted was never completed.

Contrary to the early expectations of the projectors of the enterprise, it was impossible to obtain the requisite labor in the country where the work was to be performed, and it became necessary to obtain workmen from Ciudad Bolívar and even from Trinidad.

In the Upper Orinoco a census of all the workmen, including men, women, and children, did not exceed one thousand.

Stations and depots were duly established by the company at Punta Brava, at the mouth of the Caura, at the ports of Perico, Salvajito, Atures, Maipures, Vichada, San Fernando de Atabapo, San Cárlos, and at the Brazilian frontier; storehouses, workshops, and supplies were at the stations Atures and Maipures; there were pharmacies at all the stations centralized at Puerto Perico; there was a chapel and home for the priest at San Fernando de Atabapo. The company also established herding and agriculture at La Vichada.

The flora of the territories was carefully studied and reported upon by Doctor Gaillard, a distinguished expert, the result of his investigations being printed in two volumes and presented to the Venezuelan Government. Explorations were made on the rivers Vichada, Guaviare, Inirida, Ventuario, Atabapo, Guainia, and the Casiquiare.

When the steamers were all placed as used in the enterprise of the company, there were the *Libertad*, *Caroni*, *Caura*, and the *Maipire* for navigation between Ciudad Bolívar and the lower rapids; the *Meta* and *Maipures* between the rapids; the *Atures*, *Naroa*, *Eva*, and *San Fernando* for the traffic of the upper Orinoco, of which steamers the first two made occasional trips to the Brazilian frontier and on the river Atabapo as far as Javita when the condition of water permitted. By means of the boats between the rapids the journey, which formerly occupied three or four days, was accomplished by them in six hours.

The company made careful reports of its proceedings annually, in 1888, 1889, and 1890, and these reports were furnished to the Venezuelan ministers of public works and of fomento, so that they were fully advised of the doings of the enterprise.

Agencies were established by the company at San Fernando de Atabapo, San Cárlos, and at the Brazilian frontier.

During the earlier stages of the enterprise it depended for information, to a large degree, upon its assignor, Mr. Tejera, who, in addi-

tion to a familiarity with the general characteristics of the country, gained in his department of minister of public works of the Republic of Venezuela, had paid official visits to the parts involved in this concession. Much of his information must have been obtained at second hand, after all, for it was seriously inexact and proved so misleading as to be very expensive to the company.

Experience gave the enterprise to know that in the upper part of the Orinoco its banks and the banks of the Casiquiare and of the Atabapo were completely inundated during the seasons of high water, which extended over a period of four or five months and attained a very serious maximum every ten or twelve years. As a result they are uninhabitable, except at certain elevated points, and the distance between these points is sometimes as great as 200 kilometers. The company found the native population very much scattered and established at places in the interior both above and beyond the reach of the annual floods. It was also learned that there was no agriculture and no live stock; that even to sustain life in these regions was difficult and many died of hunger.

The annual production of rubber in these Territories at the beginning of the exploitation of the Orinoco did not exceed 40 tons. There were also 50 to 60 quintals of copaiba oil and a few tons of piassava, although in the interior there were great opportunities for obtaining much larger products of all these, the development of which was a part of the plan and the hope of the company.

Except at Atures with three families and Maipures with one family there was no village upon the banks of the Orinoco from Cariben to San Fernando de Atabapo.

In February, 1889, application was made by the manager of the enterprise to the minister of fomento for lands which had been visited and selected on which to place the immigrants who were expected in a few months. It was explained in this communication that any earlier bringing of immigrants had been impossible, since the company's means of transportation had been inadequate to supply their needs, as everything on which they were to subsist at first must be brought into the country. The lands selected and applied for were situated opposite San Fernando de Atabapo. No reply was received to this application.

In the early part of the year 1889, 370 head of live stock were obtained in Buena Vista and were sent across the savannas to the Vichada, where, as has been previously stated, an *hato* had been established.

The necessity of building one railroad of 60 kilometers to go round the four rapids was fully developed to the national Government by the manager of the enterprise as early as February 4, 1889. A statement of the probable expense was given at the same time and the proposition was made to the Government that a 7 per cent guarantee

be made to secure its construction. The estimated cost was 60,000 francs to each kilometer. No reply was made by the national authorities.

For the two years of 1888 and 1889 the company had a regular monthly service from Ciudad Bolívar to San Fernando de Atabapo, and without accident carried every paying passenger who offered himself for transportation. In 1888 General Silva, governor of the Territories Upper Orinoco and Amazonas, with his general secretary and a large staff, went from Ciudad Bolívar to San Fernando de Atabapo to take up his office under the national Government in the boats of the company, taking with him also his troops, thirty soldiers, his baggage, and his provisions; similarly General Silva descended the Orinoco in 1889, and General Cabellero, receiving his appointment as governor to succeed General Silva, went from Ciudad Bolívar to the capital of these Territories in the boats of the company; later he came down on leave in these boats and again went back to his post in the same way, the company receiving no compensation for all the service above stated.

It was the universal custom of the company to receive as passengers without pay all employees of the Government. It carried the mail free from Ciudad Bolívar to San Fernando de Atabapo, and by means of its agencies performed the service of the budget of these Territories without commission or compensation.

September 15, 1888, the steamer *Libertad* was requisitioned by lawful authorities to transport troops, material, and provisions to the fort of Guyana Vieja in defense of the national Government. Reimbursement was demanded of these authorities by the company, but was refused. The fuel for the steamers and even the board of the crew during the trip was furnished without recompense by the company.

In December, 1888, the lawful authorities again requisitioned the steamer *Libertad*, which during the whole of that month made trips loaded with troops between Caicare and Rio Caura. To the request of the company for an indemnity there was a refusal. It was at this time that the workmen upon the railroad running out from Caura, an incident previously mentioned, as well as the agricultural laborers of the company, were impressed by the Government to march against the revolutionists. None of the workmen ever returned to the service of the enterprise.

October 31, 1888, the pro tempore governor of Upper Orinoco and Amazonas Territories issued a decree annulling all of the accounts of the Indians with the company wherein they were debtors. This was done in the especial interest of Valentin Perez and other like contractors.

Governor d'Aubeterre carried with him to San Fernando de Atabapo, his capital city, a considerable stock of different kinds of merchandise for the purpose of traffic in india rubber, which traffic he entered upon openly, in so far opposing the rights of the company in exploitation of this product.

In December, 1889, the same governor caused a petition to be signed against the company by persons of little standing, in this way attacking the company instead of assuring the execution of its contract.

At the same time a similar petition was passed among the merchants of Ciudad Bolívar. The claimants assert that it was done at the instigation of the minister of the interior.

Early in the year 1890, Governor d'Aubeterre made a long journey into the interior of the Territories in order to gather up the largest quantity possible of india rubber which had been harvested by means of advances made to the harvesters by the company.

May 17, 1890, a ministerial decree authorized the proprietors of sarrapia and other natural products to export them freely, paying the same duty as the company.

The historical order is here interrupted to name a very important matter, which may well be under consideration as having explanatory value in connection with the events of 1888 to 1891, both inclusive.

The Venezuelan-Colombian boundary question, which for a long time had been a matter of diplomatic controversy between these two countries, by a treaty executed by them September 14, 1881, was submitted to the arbitration of his Majesty the King of Spain. Gen. Guzmán Blanco was then President of the Republic of Venezuela and executed on its behalf the treaty aforesaid. On February 15, 1885, at Paris, for and on behalf of his Government he signed a declaration extending the time within which the award could be made.

October 28, 1887, the minister for foreign affairs for Colombia wrote from Bogotá to the minister of foreign affairs for Venezuela asking for explanations concerning the prospectus with map accompanying which had been published in the interests of the concession. The nature of his communication can best be gained from the letter itself, which is here reproduced:

BOGOTÁ, *October 28, 1887.*

MR. MINISTER: A French society known as the "Company General of the Upper Orinoco" has published a memoir or description upon the concessions which, it says, the Government of your excellency has granted to it of certain rights within the Territories Upper Orinoco and Amazonas of the Republic of Venezuela.

Annexed to the memoir concerned is a geographical map in which the boundaries of the said territories on the western side are marked in such a manner that they include the large tract of land which in this part is in litigation between Colombia and Venezuela, and of which in virtue of the treaty of arbitration (arbitramiento juris) of December 14, 1881, the true ownership is to be settled bv the sentence of the Government of Spain.

I have the honor to call the attention of your excellency to this point, being convinced that the Government of Venezuela, in accord with the Republic of Colombia, will recognize

that the error of the Company of the Upper Orinoco can not be passed over in silence, considering that it affects a solemn agreement between the two nations, in which is ceded in an absolute manner to a third party the right as arbitrator to define the boundary which separates Colombia and Venezuela.

It is evident that neither of our Governments can make any valid concession upon the said land: it is equally evident also that the error of the Company General of the Upper Orinoco can have no other cause than that of agreeing with geographical or statistical data anterior to the above-mentioned treaty of 1881, which places this zone of territory in a condition not only litigious, but about to be settled in an exclusive manner by an arbitrator already appointed.

I have the gratification to profit from this circumstance to renew to your excellency the expression of my most distinguished consideration.

(Signed) F. ANGULO.

To HIS EXCELLENCY THE MINISTER OF FOREIGN AFFAIRS OF THE UNITED STATES OF VENEZUELA.

It does not come to the knowledge of the umpire that any reply was made by the Government of Venezuela to this note from Colombia; neither is there anything to indicate that the attention of the Company General of the Orinoco was immediately called to the questions raised by the note.

The first official attention given to its contents, so far as is known to the umpire, is found in the action of the minister of foreign affairs for Venezuela in addressing a communication to the minister of fomento, in substance following:

CARACAS, *November 25, 1887.*

The minister of foreign relations of the Republic of Colombia has brought to the knowledge of this department that the French company known as the "Company General of the Orinoco" has published a memoir with a map annexed in which is included in the limits of the territory conceded to the said society the territory in litigation between the two countries.

To be able to reply to the said note of the Colombian minister it is necessary to have before us the said memoir, which I pray you to send me by right of devolution if it is found in the department under your charge.

I am, etc., DIEGO B. URBANEJA.

To this there was a reply on the next day, as follows:

SIR: As it has never been remitted to this department I find it impossible for me to remit to the ministry over which you preside so worthily the memoir of the Company General of the Upper Orinoco, of which your communication of the 25th of the present month treats.

This seems to be the end of progress in this line until about August, 1888, when the minister of Colombia renews his inquiries, as appears from the communication of the minister of fomento, as follows:

CARACAS, *August 10, 1888.*

In order to examine and resolve a claim of the Republic of Colombia I have need to have before my eyes a copy of the contract passed with the Company General of the Upper Orinoco and Amazonas.

That is why I pray you to give me information of the concessions and privileges made to the said company.

I am, etc., A. YSTÚRIZ.

To this there is a reply on the day succeeding in these terms:

CARACAS, *August 11, 1888.*

SIR: In reply to your letter of the 10th of the present month, No. 293, I have the honor to send you the Official Gazette of February 26, 1886, No. 3,698, in which is published the contract with the Company General of the Orinoco.

I am, etc., FOMBONA PALACIO.

There follow successive communications between these officials of the Government relative to this affair which, perhaps, are better quoted in full than placed in abstract. They are therefore subjoined:

CARACAS, *August 13, 1888.*

SIR: Besides the contract of the Company of the Upper Orinoco and Amazonas constituted in virtue of the concession made to Mr. Tejera, which you have kindly remitted to me in the corresponding number of the Official Gazette, I should be very grateful to you to send me a general report upon the proceedings of this company to the department under your worthy charge, as also every communication which this company may have made upon our maps, notices, or memoirs relative to the privilege which the said contract gives it.

YSTÚRIZ.

CARACAS, *August 21, 1888.*

SIR: In reply to your note of the 13th instant, No. 297, I have the honor to inform you that the company which has been exploiting the Territories Upper Orinoco and Amazonas since the date of its contract, December 17, 1885, has asked of this department exemptions from import duties at different dates upon the objects destined for its works; that it announced November 14, 1887, that the steamers *Atures* and *Eva* had passed above the rapids of Maipures, and that the latter steamer arrived at San Fernando de Atabapo the 30th of August, 1887, and as to that which concerns the memoir published by this company relative to the said territories I remit it to you inclosed with its map annexed.

I am, etc., GIL.

CARACAS, *September 15, 1888.*

SIR: The envoy extraordinary of the Republic of Colombia has made a claim against the publication of a geographical map and of a memoir of the Company of the Upper Orinoco and Amazonas, in which in describing the limits of its concession it has included as having been ceded vast extents of land in litigation between the two countries.

Consequently, considering the necessity of examining the said map and memoir, I hope that you will kindly send them to this ministry if they exist in your department, and if not I pray you to ask the representative of the company mentioned for information as to what has been done in this regard and also the map and memoir concerned.

YSTÚRIZ.

On the 18th of September, 1888, the minister of fomento advises the minister for foreign relations by note in part as follows:

I am addressing myself this very day to Mr. Th. Delort, contractor of the Territories Upper Orinoco and Amazonas, asking him for information as to the contents of your said communication, and as soon as I shall receive them it will be very agreeable to me to send it to the ministry over which you preside so worthily.

I am, etc.,

CORONALDO.

The letter addressed to Th. Delort, the manager of the company, by the minister of fomento is here quoted:

SIR: In an official note of the 15th of this month the ministry of foreign relations says to this department that which follows. (Here is a reproduction of the letter of the 15th.)

I communicate to you this note in order that you may give me information on the subject of which it treats.

CORONALDO.

The reply of Mr. Delort was made two days later and is of the tenor following:

CARACAS, *September 20, 1888.*

THE MINISTER OF FOMENTO: I have just had the honor of receiving your note of the 18th instant, to which I reply as follows:

In forming the Company of the Upper Orinoco there was made at Paris a memoir for the shareholders only in which was reproduced the contract which M. Miguel Tejera had transferred to the company, and furthermore an extract from the statutes and different information on the natural products which according to the contract were to be exploited. This memoir was accompanied by a map in order that the shareholders might know where the territories conceded for their exploitation were situated. This map was copied from that which accompanies the statistics which the national Government has published in different languages.

The memoir does not treat of the frontiers between Colombia and Venezuela nor, moreover, of the vast extent of territories conceded to the company; it treats only of natural products of the vast region which forms the Territories Upper Orinoco and Amazonas.

The company is not ignorant that the boundaries between Venezuela and Colombia are found in litigation and submitted to the arbitraton of the Government of Spain. Consequently it has no pretension on this subject, and holding the concession from Venezuela it knows very well that it ought to conform itself to the frontiers which shall be definitely fixed by this Republic.

Up to the present the company has extended its exploitation only upon the points occupied by the Venezuelan authorities. Its agencies, its shops, and dependencies are situated at Atures, Maipures, San Fernando, San Cárlos, and the frontier of Brazil, and its steamers have navigated only upon the Orinoco, Casiquiare, and the Guainia. I regret not being able to send you the memoir in question, but two copies ought to exist in your ministry, sent by the agent of the company in this city.

I hope that the explanations which I have the honor of sending you will satisfy you, so that you can render justice to our right conduct in such circumstances.

With sentiments, etc., DELORT.

In this connection the umpire decides to accept as the truth the statement of Mr. Delort and his associates, which is found as a part of the testimony in this case, that the 18th day of September, 1888, was the first day on which either he or the company knew that the Venezuelan-Colombian boundary line was then in process of settlement by arbitration. Not only are they entitled to belief since no one disputes them further than Mr. Delort's own statement of the 20th instant, but many of the previous acts of Mr. Delort and of the company were entirely inconsistent with such knowledge. It is easier, therefore, to reconcile his words with the fact of ignorance than his acts with the fact of knowledge.

The Government of Venezuela remitted to the Government of Colombia the letter of Mr. Delort above quoted.

Colombia, however, was not satisfied, and January 24, 1890, it again returned to the subject. The position of Colombia upon this matter was unambiguous, indeed positive, and there is no question in the mind of the umpire that the situation had become very embarrassing and troublesome to the Government of Venezuela.

In the judgment of the umpire it was not ignorance nor forgetfulness on the part of General Blanco or Mr. Tejera which kept them silent concerning the boundary question, in their intercourse, not infrequent, with the company and its officers and manager. The umpire believes that they both regarded the matter as unimportant in its probable effect upon the enterprise of the concession, for the reason that both considered a decision in any considerable degree unfavorable to Venezuela as practically impossible. This explanation, most favorable to them, and at the same time most probably the truth, is the one accepted by the umpire.

May 28, 1890, the national attorney of the exchequer of the United States of Venezuela, by direction of the president of the Republic, through the minister of fomento, entered in the high Federal court of the Republic a suit against the Company General of the Orinoco for the rescission of the contracts of concession which this company had taken over respectively from Miguel Tejera and Theodore Delort. The petition or declaration alleges in substance and in general terms that the Government on its part had fulfilled the stipulations agreed to in both of the said concessions; and in like general terms that the company, on its part, had not fulfilled its obligations; first, as to the contract of December 17, 1885, in Nos. 1, 2, 3, 4, 5, 6, 7, and 9, of Article II, and all of Articles V and X; second, as to Nos. 2, 3, 4, 5, and 6 of Articles III of the contract of April 1, 1887. The petition specifically alleges that—

the Government has not received any notice that the cessionary company has begun its works, and it is a fact that no railway line has been offered to the public, nor any steam launch nor steamship line.

It is also alleged specifically in said petition that the cessionary company exported through the custom-house in Ciudad Bolívar during the years 1887, 1888, and 1889, india rubber weighing 73,292.20 kilograms, and had paid accordingly to the Government the sum of 63,740 bolivars at the rate of 40 bolivars for each 46 kilograms, as provided in the contract of concession of December 17, 1885, and that the quantity of sarrapia exported by the said company through the same custom-house and in the same years was 44,569.76 kilograms, for which there was paid to the Government the sum of 84,445.74 bolivars, at the rate of 56 bolivars for 46 kilograms, as agreed in the contract of April 1, 1887, making in all the sum of 148,186.74 bolivars. It is also alleged in the petition that a contract is not deemed fulfilled by the obligee save when it has been so fulfilled in all the stipulations which it contains and that specially

in this case in which they are so linked between themselves that failing one the whole or object of the contract does not exist, and hence the conclusion drawn by the said Government that said convention has not been fulfilled. That the inexecution of these contracts on the part of the cessionary company has caused the Government very grave damages and, therefore, it is obliged to ask before the high Federal court its solution.

The especial damages named in the petition are the losses which the Government had suffered from the duties remitted under the contract upon articles imported by the company, as well as the loss of duties on the india rubber and sarrapia exported. The domicile of the company is alleged to be in Paris and that it is without a legal representative in Venezuela. The Government asks for procedure in accordance with Article XXVIII of its civil code; alleging further that the company may be sued under such circumstances as exist in this case by virtue of the provisions made in both contracts in reference thereto and in virtue also of Article XXVI of the civil code, which applies to suits where the contracts are to be executed in Venezuela. The petitioner also asks that the formalities be observed provided for in such cases in Article XCIII, XCIV, and XCV of the Code of Civil Procedure.

Reliance is had in the petition on Articles MCX, MCLXIII, and MCLXXII of the civil code as justifying fully the procedure on the part of the Government for the annulment and rescission of said contracts and for the recovery of the losses and damages suffered by it from their nonexecution by the cessionary company.

The suit was duly entered in the high Federal court on May 28, 1890, and on the 30th day of the same month the president of the said court issued a writ stating therein that—

> Considering that according to the documents annexed to the suit Messrs. Andrés Fiat and Bernabé Planas appear to be the representatives of the company in Venezuela, order is hereby given for them to be summoned in order that they may declare if they are still holding the power of the company, and in order to appoint a counsel for the defendant in case they are no longer attorneys of the company, in accordance with the law.

The proceedings show that both of these gentlemen were duly summoned on that same day and that on June 2 following they appeared in court and declared that Mr. Andrés Fiat was then the only representative of the company in Caracas and that he would appear in court on the 4th day of that month and produce his power of attorney. This was done and a translation of the same was ordered, and on the 16th day of June this was completed and accepted by the court and a summons ordered upon Mr. Fiat.

On the 19th day of June the claim for damages was reduced by the attorney of the Government from 600,000 bolivars to 40,048.62 bolivars, and on the same day Mr. Fiat received and receipted for the copy of the petition. On the same day the court issued a decree by which an order was made to notify Mr. Fiat of the amendment to the petition

above stated and to give him a copy of the amendment. Mr. Fiat was also directed in the order to receipt for this copy and to present in court his answer to the petition after ten days from June 19. This order was duly served on Mr. Fiat on the day of its issue and he gave his receipt to that effect on June 20. July 2, the day appointed for the answer, Mr. Fiat appeared, accompanied by his counsel, D. B. Urbaneja and R. F. Feo, and as well appeared the fiscal nacional de hacienda. It was then and there agreed to defer the answering of the suit to a date fixed at eight days after the presentation of the documents to which reference is made in the suit by the plaintiff, in order that the company should have time to examine these documents. On July 22 Mr. Fiat with his counsel, above named, appeared in court and filed his answer to the suit; at the same time he preferred his petition for an extraterritorial term in order to obtain evidence from France and Rome. The suit progressed in ordinary course, during which the parties were to produce their respective evidence, the court reserving its right to decide on the petition of Mr. Fiat in regard to an extraterritorial period of time. Later on the president of the court granted one hundred days to obtain this extraterritorial evidence, and Mr. Fiat having appealed from this decision on the grounds that the term granted was too short, the court then extended it to one hundred and thirty days.

September 5, Mr. Fiat was notified that the fiscal had petitioned the court that the suit might be registered in Ciudad Bolívar, in order to avoid any transfer intended by the company. That he received this notice is established, because at the foot of it is set his signature, and on September 8 he appeared in court, accompanied by his said counsel, and declared that he had no opposition to make to the recording of the suit, with the alterations which were made to it afterward. The court issued an order on the same day that a copy of the suit be sent to the judge of the first instance of Ciudad Bolívar, that it might be recorded in the registry office in that city, and said order was carried into effect on the same day.

August 7, 1890, Mr. Fiat presented the court with a petition asking that evidence might be promoted as he thought convenient to the case of the company. As a part of this evidence were declarations to be made by witnesses resident in Paris, Rome, Port of Spain, Rio Chico, Barcelona, San Fernando de Apure, and Caracas.

The president of the court issued a writ, dated August 12, admitting the promotion of such evidence as far as the law permitted, and commissioned several civil judges of first instance of the residences of the respective witnesses to hear their declarations; he also issued rogatory commissions petitioning the competent judges af Paris, Rome, and Port of Spain for the same purpose. October 11 of the same year, Mr. Fiat appeared in court and stated that by virtue of the authority con-

ferred on him, by his power of attorney from the company, he conferred a special power on Dr. Ramón Feo and Dr. Martín F. Feo, so that both together, or either one of them separately, might intervene in the collecting of evidence that had to be made by the fiscal in the city of Caracas, and also stating that he conferred special power on persons resident at Porto Rico, Barcelona, Ciudad Bolívar, San Fernando de Apure, Port of Spain, and for the territories of Orinoco and Amazonas, for the collecting of evidence on behalf of the company in their respective districts, and to intervene in the collecting of evidence by the plaintiff in the same districts. October 11, 1890, the president of the court ordered that commissions and petitions be issued to the different parties named by Mr. Fiat as aforesaid, and that said petitions and commissions contain the powers conferred on them as requested by Mr. Fiat. The said order was carried into execution October 13, and the said commissions and petitions being issued were handed to the defendant.

All these commissions and petitions were duly returned after having been carried into operation, with the exception of those addressed to the judges of Paris and Trinidad and to His Excellency Cardinal Simeoni of Rome, which were not returned by the representative of the company, although they were given him.

March 24, 1891, marked the expiration of the time given for the collecting of testimony, and on that date the president of the court ordered that the papers and records of the suit be sent to the full court, which was duly effected.

April 29, the fiscal moved the court to begin the study of the papers and records of the suit and that an order be issued for that purpose. On May 21, 1891, the fiscal renewed his motion, and on May 23, an order was issued to begin the study of the papers and records on the 30th of that month. This study begun in fact on June 16, and proceeded on June 24, the court not being in session on the 17th to 23d, inclusive.

On the 1st, 4th, and 7th of August suppletory judges were called to fill the vacancies existing. Two of those selected were excused on their own petition. On September 16, the full court was made by the suppletory judge, Dr. Cárlos F. Grisanti, and the 19th was appointed for the study of the process. The study was begun as ordered, and proceeded on the 21st of September and following days until the 25th. The 29th of September was appointed to hear the reports or proceedings of the plaintiff and defendant. The records of the 25th of September show this note by the secretary:

CARACAS, *September 25, 1891.*

In the sitting of this day the study and examination of the papers and records by the court was completed, and the sitting of the 29th current is appointed for plaintiff and defendant to present their respective reports or pleadings. Let the parties be notified.

O. BURGOS.

There was no decree of the court ordering the parties to be invited, as appears of record.

September 29, the fiscal nacional de hacienda appeared in court, but no representative or counsel on behalf of the defendant. The court proceeded to sit in conference.

From September 30 to October 13, only one sitting of the court took place, which was on the 3d of October, on which day the judges conferred on the sentence to be passed and agreed as to the same. October 14 the sentence was drawn and signed by the members of the court.

As appears from the history already given, the suit for rescission was begun in 1890, May 28; summons to the defendant was issued May 30; and on June 2 Mr. Fiat appeared in the high Federal court and avowed and acknowledged himself the legal representative in Caracas of the Company General of the Orinoco. On the next day, the minister of foreign relations at Caracas, wrote the minister plenipotentiary of the Republic of Colombia to the United States of Venezuela as follows:

THE MINISTER OF FOREIGN RELATIONS,
Caracas, June 3, 1890.

MR. MINISTER: Relative to the confidential memorandum of August 9, 1888, and to the note of your excellency of January 24, concerning a memoir published by the Company General of the Orinoco, I have the honor to communicate to your excellency that the Government has resolved to demand of the said company the rescission of the original contract.

Please accept, etc.,

M. A. SALUZZO.

The most excellent Dr. J. F. INSIGNARIES,
Envoy Extraordinary and Minister Plenipotentiary of the Republic of Colombia.

The Colombian minister did not accept the proposed action of the Government of Venezuela as an earnest of sufficient protection to the interests of his Government, as is made evident by his reply, which follows:

LEGATION OF COLOMBIA AT VENEZUELA,
Caracas, June 6, 1890.

MR. MINISTER: I have the honor to reply to the note of your excellency of the 3d of the present month, in which your excellency deigns to communicate to me relative to the confidential memorandum of August 9, 1888, and to my note of January 24 last, which refers to memoir published by the Company General of the Orinoco, that the Government of your excellency has resolved to demand the rescission of the contract made with the said company. I shall transmit the said note to my Government, but I ought to manifest to your excellency, as I am doing very respectfully by means of the present, that the fact which it communicates can not modify in any way the state of the claim in which in a matter so grave was initiated before the Government of your excellency by that of Colombia in a note of October 28, 1887, to which there has yet to-day been no reply. In fact, as your excellency will clearly understand, in spite of the demand of rescission proposed and while waiting for it to be decided favorably the Company General of the Upper Orinoco will continue to enjoy the contract in virtue of which the Government has made concessions in the territories of the Upper Orinoco and Amazonas, a concession which the said company extends through error or unjustly to the lands which on this side are in litigation between Colombia and Venezuela as it appears with all clearness in the geographical map annexed to the memoir of the relation which has set in motion the claim of my Government without formal rectification on the part of the Government of Venezuela.

Favorable as the sentence may be to the Government of Venezuela there will still exist powerful reasons of equity and justice with which the Government of Colombia has solicited the said rectification because this act is notoriously in violation of the treaty of arbitration of September 14, 1881, by which the two nations submitted their differences with regard to the frontiers to the decision of the Government of Spain. Consequently it is my duty to insist, as I am doing, with the greatest respect, before the Government of your excellency for the said claim of my Government, reproducing to this effect the contents of the note of October 28, 1887, mentioned, which was the origin of my memorandum of August 9, 1888, and of my note of January 24 of the present year.

I profit, with pleasure, from this occasion, etc.

(Signed) J. E. INSIGNARIES.

To Doctor SOLUZZO,

Minister of Foreign Relations of the United States of Venezuela.

Eléven days prior to the date of the suit for rescission the minister of the interior at Caracas issued a statement authorizing the proprietors of sarrapia and other natural products in the Federal Territories Upper Orinoco and Amazonas to export them freely on paying the same duties as the company. During the same month the agent of the company at San Fernando de Atabapo and the engineer of the Naroa were threatened with death and were forced to take refuge at the home of a habitant. Frightened by the conditions surrounding them, they declared they could no longer remain on the upper river and asked to be relieved.

The 4th of June Governor d'Aubeterre left his capital, descended the river, and arrived at Ciudad Bolívar June 27. The day of his departure from his capital he sent a long telegram to the Government at Caracas, stating that the company did not have funds wherewith to pay for the india rubber which was gathered and demanded that authority be given to those who possessed this product to export it directly either by way of Ciudad Bolívar or through the custom-house at San Cárlos. The custom-house of San Cárlos had been closed by the Government since 1886 and had never been opened for the use of the company, thus compelling it to use the Orinoco exclusively for the shipment of the products obtained by it.

On the departure of Mr. d'Aubeterre from San Fernando de Atabapo Mr. Henry Page became governor pro tempore. June 16, 1890, upon his own authority, he issued a decree which annulled the contract of December 17, 1885, and he sent Valentin Perez and Sinforiano Orosco to Caracas with this decree to obtain for it the approval of the Government. He based his action upon the anticipated damages which the agents of the company might cause the inhabitants and that through them the public order might be endangered. At this time there were three agents of the company in Upper Orinoco. They were Messrs. Calvàras and Nary at San Fernando de Atabapo and Mr. Oudart at San Cárlos.

The Government decided not to approve of the decree of June 16, issued by pro tempore Governor Page, and on August 8, 1890, there was issued the following:

The PRESIDENT OF THE REPUBLIC:

Whereas the decree rendered by the governor *ad interim* of the Federal Territories, Upper Orinoco and Amazonas, of June 16 last, in which he declares the caducity of the contract passed by the Federal executive with Mr. Miguel Tejera for the exploitation of all the mineral and vegetable productions of this Territory and of which (contract) the Company General of the Orinoco is the cessionary; and whereas, also, the demand which the inhabitants of the same Territory addressed to the said official, in which they set forth the prejudices, for their own interests and for the maintenance of the public order in these large and rich regions, caused by the acts of the agents of the company cessionary, conjointly with the acts of adhesion of the municipal councils of San Fernando de Atabapo and of that of La Urbana, to the manifestations made by the population; and

Considering:

1. That the Federal executive can not give his approbation to the said decree of the governor of the Upper Orinoco and Amazonas, inasmuch as this official by such an act has exercised a function which is attributed by the constitution and the laws to the Federal power;

2. That the Federal executive has already submitted to the high Federal court, through the agency of the fiscal nat'onal de hacienda the rescission, not only of the contract passed with Mr Miguel Tejera, but also of that passed with Mr. Delort for the exploitation of the sarrapia (feve tonka), basing his action upon the fact that the company cessionary has not accomplished on its part the obligations to which it is bound by these contracts of establishing steam navigation upon the Upper Orinoco, of constructing railroads, of introducing immigrants to found colonies; of building churches, hospitals, barracks for the police; of establishing the postal service, and of founding missions;

3. That by the "documentación aducida" (allegations furnished by the documents) it is demonstrated that the acts of the agents of the Company General of the Orinoco, aside from the grave prejudices which they are causing to the inhabitants of the Territories Upper Orinoco and Amazonas in their legitimate interests, are going so far as to threaten the public security which the executive is bound to protect with the vote of the Federal council;

Be it decreed:

ARTICLE 1. The decree of June 16 of the current year rendered by the governor *ad interim* of the Federal Territories Upper Orinoco and Amazonas is disapproved, becomes null, and will produce no effect.

ART. 2. The Federal executive will dictate through the agency of the ministers of the interior, of hacienda, and of fomento, in all the extension necessary, the provisions tending to satisfy the just demands made by the inhabitants of the Upper Orinoco and Amazonas, while waiting for the high Federal court to decide whatever is just in the demand brought before it.

Given, signed by my hand, marked with the great national seal, and countersigned by the ministers of the interior, of hacienda, and of fomento, in the Federal palace at Caracas, August 8, 1890.

R. ANDUEZA PALACIO.

Countersigned: S. CASANAS.
VINCENT CORONADO,
Minister of Hacienda.
FRANCISCO BALAELO,
Minister of Fomento.

On the next day the minister of interior issued the administrative order, No. 1011, as follows:

[Administrative order, No. 1011.]

CARACAS, *9th of August, 1890.* (27 and 32.)

CITIZEN GOVERNOR OF THE FEDERAL TERRITORY AMAZONAS: Accompanying I send to you a copy of No. 5016 of the Official Gazette, containing a decree issued by the President of the Republic with date of yesterday, in which he annulled that which the Government pronounced on the 17th of last June, relative to declaring the defunct condition of the contract celebrated by the national executive with the Señor Miguel Tejera, of which the cessionary is the General Company of the Orinoco, remaining consequently null and without any value or effect, and in which it was decided (or determined) that until the high Federal court may decide what may be justice the national executive will dictate, through means of this ministry and those of hacienda and fomento, to all necessary length, the arrangements (orders) necessary for satisfying the just exigencies manifested by the inhabitants of that Territory.

Consequently you will please not to give any permission to the agents of the expressed company to continue exploiting the products of that territory and give large franchises in order that the inhabitants can without hindrances undertake the work of exploitation upon the products referred to.

God and federation.

S. CASANAS.

It will be observed that the provision in the decree of August 8 that the national executive would act through the ministries therein named took effect in the last paragraph of the above order.

On the 29th of August the minister of the interior sent a telegram of advice to the governor of the Federal Territories Upper Orinoco and Amazonas through Mr. Valentin Perez of the following tenor:

CARACAS, *29th August, 1890.*

Señor VALENTIN PEREZ:

The governor ought to enforce the decree suspending the prerogatives of the Alto Orinoco and Amazonas.

It can not continue exploiting the natural products of the Territories nor collect reward upon those which it expected to obtain by its proper work.

S. CASANAS.

By a letter of later date he again brought the attention of the citizens of those territories to the situation, as existing under the decrees of August 8 and 9, by means of a letter, which is as follows:

CARACAS, *September 10, 1890.*

Señor SONFORIANO OROSCO:

By resolution of the ministry of hacienda, dated May 27, 1890, it is ordered that the owners of sarrapia and other natural products which the company exports, to which you refer in a telegram of day before yesterday, can export them freely, paying the same duties as said company, and by the decree of the 8th of August it prohibits to the company the absolute (unconditional) exportations and exploitations which it had of those products, all which orders were transmitted to the custom-house opportunely by the ministers of hacienda and of fomento in order for their fulfillment. You and the rest are interested in this matter on account of the last urgent orders.

God and federation.

S. CASANAS.

Having followed the process of the high Federal court from the inception of the suit for rescission, May 28, 1890, to the sentence of the high Federal court, given October 14, 1901, having traced the progress of the administrative department in its relation to the company to September, 1890, it is well to examine into the condition and history of the Company General of the Upper Orinoco during the same time.

May 30, 1890, the same day on which Mr. Fiat was summoned to appear before the high Federal court to answer to the suit of the national Government for rescission of both concessions, the Company General of the Orinoco met in a shareholders' general meeting at Paris, in which meeting a resolution was passed for the purpose of converting the company into an English company with the name of Orinoco Exportation and Trading Company, which meeting likewise determined to dissolve and wind up the Company General of the Orinoco and appoint a liquidator.

It is said in behalf of the company by the liquidator in a memorial of date December 5, 1895, that—

> the board of directors had many debtors and they hesitated therefore to collect the harvest of 1890, but yielding to the representations of their agents they furnished the necessary funds in agreement with a Liverpool firm, who sent out their special agent, Mr. Staedelli.
>
> The position of the company in Paris was very painful, as its credit had been totally exhausted. All efforts made in France seemed to be of no avail, while in England confidence was not lost and it was possible to go on there with the business. The board of directors therefore willingly considered a proposition from England for the constitution of a company in London to which all the assets, contracts, material, works, etc., of the Company General of the Orinoco would be transferred.

It is ascertained that the liabilities of the company, as stated by it, were on May 30, 1890, as follows:

	Francs.
To the shareholders	1,500,000.00
To the Society (La Monnaie)	722,851.56
La Banque de Consignations	236,356.00
Mr. Alfred Chauvelot	191,176.00
Mr. Eugene Ferminhac	63,000.00
Mr. Louis Roux	13,059.55
Mr. Th. Delort	14,641.26
Total	2,741,084.37

It is an agreed fact that the company had no knowledge or intimation of the pending suit in Caracas at the time of this meeting of May 30, 1890, and that its proceedings on that day were without any relation thereto and not in any way influenced thereby. June 23, 1890, at a general meeting of the shareholders of the Company General of the Orinoco at Paris, a liquidator was appointed, and in the third resolution of the shareholders his powers were defined as follows:

> Confers upon the liquidator its full powers to the effect of realizing the social assets by way of fusion or union in another French or foreign society, existing or to be created, to

receive whether in specie or obligations or stock, free or not free, to have recourse to actions and deliberations which shall have for their object the formation and constitution of a new society to sell the stock or obligations received until the concurrence of the sums necessary for the payment of the liabilities and to turn over the surplus in conformity with the statutes. Also to take all the measures possible for the continuation of the business until the realization of the assets, to exercise in this regard all the powers conferred upon the council of administration by article 22 of the statutes.

Further, to negotiate and conclude all contracts, whether for the purchase and sale of the merchandise and other objects or for the exploitation of all or part of the social capital by lease or otherwise, by forfeit or by means of fines or parts of the benefits; to borrow all sums necessary for meeting the engagements of the society; to confer all guaranties upon the lenders—in a word, to do all which circumstances require in the interest of the society, the powers above mentioned not being limited.

The general meeting of the shareholders of the company was held December 27, 1890. From the liquidator's report made to this meeting it was learned that the approval given by the shareholders at their meeting of June 23 to an arrangement that would merge the Company General of the Orinoco in a new English company, as is previously stated herein, was so far completed on June 7, 1890, that an agreement had been signed by the company with the "Gold Trust and Investment Company" providing for such transfer. Following the approval of the shareholders, as above stated, the new company, the Orinoco Exploration and Trading Company, was formed and registered in England. Owing, however, to the political relations then existing between England and Venezuela over the boundary line between the latter country and British Guiana, involving, among other questions, claims on the part of England in connection with the outlets of the Orinoco, the Government of Venezuela, from reasons of state, as it is understood—

absolutely refused to acknowledge this new company and to transfer to the same the rights and concessions of the French company.

This quotation is taken from the report of the liquidator at the shareholders' meeting of December 27, 1890.

He goes on to say in his report:

It was but very late that I was made acquainted with the causes which were opposed to the formation of the English company, and this delay was the cause of my losing very valuable time; but the moment I knew of these causes I took steps conducive to a result which might save our company.

I have appealed for assistance to the former directors of the company who are now negotiating with the Government of Venezuela, and have looked toward another solution of the problem, which is the only means of assuring the future of the company, viz, the reconstruction of the present company with an increase of fresh capital in cash.

Following the report of the liquidator the chairman of the meeting announced—

That owing to the facts which had just been mentioned by the liquidator the board of directors had sent to Caracas Mr. Berthier, who had been a former agent of the company, with the following mission:

To obtain from the Government the revision of the old concessions, which evidently contained clauses which were embarrassing to the Government, as well as to the company. Mr. Berthier was, besides, to make sure that the Government would make no difficulties for the transfer to a new company (provided this be not an English company) of all the rights and concessions accruing from the new contract. The double purpose of Mr. Berthier's mission has been obtained; the terms of the new contract proposed have been accepted, and one of its clauses will allow the transfer to a new company. The new company will be French-Belgian, formed with the assistance of a powerful Belgian group.

The chairman then read the draft of the articles of concession of the French-Belgian company information.

At some time succeeding October 11, 1890, on which day he appeared in the high Federal court as the attorney of the company, Mr. Andrés Fiat resigned his position as such attorney, and Mr. Bernabé Planas was appointed, but he declined the appointment.

On the advice of Mr. Delort it was then determined, as above stated, to send Mr. Berthier to Caracas as a special agent of the company, he being well acquainted with all details of the matter. He arrived in Caracas October 25, 1890, and remained until July, 1891.

His mission, as disclosed by the statement of the chairman above quoted, was to be confined to negotiations with the Government looking to a discontinuance of its suit without costs to the defendant, a relinquishment on the part of the company of the concessions it held, the Government to grant to the company for a period of twenty-five years the exclusive right of steam navigation on the waterways of the Federal Territories Upper Orinoco and Amazonas and in the rivers Caura and Cuchiroro, during which period the Government would not grant a similar concession to any other person or company. This arrangement was put into writing; and in article 10 of this agreement there is found the following:

This contract can be transferred to any other party or company with the previous assent of the Federal Government, without which formality that transfer can not be effected. However, as an exception, this contract can be transferred in part or in whole to the Belgian company called Compagnie Internationale des Caoutchoucs et Produits Naturels au Bassin de l'Orénoque.

In another part of the agreement the company was accorded the right to construct within the Territories mentioned such railways and telegraph lines as it might think convenient or valuable.

Through misadventures this agreement was not effected.

In the meantime, anticipating success in the above-mentioned negotiations, the Belgian company had been constituted to take over the new contract. In the end there was no new contract and the Belgian company did not become effective. The departure of Mr. Berthier for Paris July, 1891, left no attorney to represent the company before the high Federal court, and it does not appear that another was appointed.

March 17, 1891, His Majesty the King of Spain published his award settling the boundary dispute between the Republics of Venezuela

and Colombia. It was unfavorable to the first-named country and sustained the contention of the latter. It gave to Colombia more than one-half of the area of the Federal Territories Upper Orinoco and Amazonas as claimed by Venezuela up to the date of the royal award. It made the Orinoco south of its junction with the Meta, the Casiquiare, and the Rio Negro the line between the two countries, giving both of them equal rights therein. It removed from the control of Venezuela the Rio Guaviare, Vichada, Inrida, Atabapo, and Guainia. Of these the last four were wholly and the first was largely in the territory of Venezuela, as claimed by that Government in her contention before the royal arbitrator and as it appears from its official maps. Similarly the maps current in the United States of America prior to 1891 allotted this territory to Venezuela. Under the rectified boundary these rivers are wholly within Colombian territory.

On the territory thus removed from the dominion of Venezuela the company had established on the left bank of the Vichada an *hato*, where had been installed 300 cows, 12 bulls, mules, and donkeys, and had there prepared lands for cultivation; on the left bank of the Guaviare it had begun the cultivation of sugar cane, had built a sugar house and a still; on the left bank of the latter river and also of the Orinoco had been begun improvements of the cacao. Of these enterprises the Government of Venezuela had received due and seasonable notice. The company considered a valuable part of its concession to be the marble deposits on the Inrida, the minerals in the region of the Guaviare, and above all the great savannas west of the Meta, regarded as very valuable for cattle raising.

It is now time to bring forward the decree of rescission pronounced by the high Federal court. The amendment, previously named, which was made by the fiscal nacional de hacienda of June 19 was to the effect that examination of the documents relating to the articles imported by the Company General of the Orinoco disclosed that the unpaid duties on these articles by reason of the company's exemption amounted to 40,048.62 bolivars, which sum is demanded in damages as a substitute for 600,000 bolivars, which appeared in the original petition.

The answer which was made by Andrés Fiat to the suit in question on July 22, 1890, is in substance and effect summarized in that portion of the decree which is herein quoted, and therefore need not be set forth here.

Upon the issues formed and upon the testimony adduced before the high Federal court it proceeded in due course to the consideration and determination of the cause and to the pronouncing of its sentence.

The decree of the high Federal court is a carefully considered and carefully written document of many pages, but that which is essential to the questions here involved can be easily abbreviated. After

having brought into the decree the essential facts connected with the process and proceedings anterior to the settling of its decision the court says:

6. That it appears from the documents that the Government has fulfilled on its part all the obligations which the contracts already mentioned imposed upon it.

And considering that from the documents result the proof of the failure of accomplishment by the Company General of the Orinoco of the obligations, 1 2, 3, 4, 5, 6, 7, and 9 of the first contract, and also that it has not carried out the stipulations 3, 4, and 5 of the second contract, the Government having brought to an end the perfect execution of the said contract; that the representative of the said company has alleged, in reply to the demand of the present process, that "the facts on which they pretend to base themselves are not certain, or are inexact, and those which really can be established prove that the company has fulfilled with extraordinary effort and diligence and with enormous expenses up to the point where there have appeared insurmountable difficulties, which constitute *force majeure*, or acts of authorities dependent upon the Government itself and contrary to the stipulations of the contract."

That these exceptions offered by the company do not appear to be proven by the documents of the present process, and that finally the lack of accomplishment on the part of the company of the two contracts referred to is an evident fact being given that in the present case are applicable the provisions of article 1149 of the civil code, in virtue of which the omission in the accomplishment of any one of the requirements of a contract is equivalent to its absolute inexecution when there is no agreement to the contrary, and it has not been alleged nor proven that any compact of this nature exists; that article 1110 of the civil code establishes that "the resultory condition is always implicit in bilateral contracts in the case where one of the two contracting parties does not accomplish its obligation;" that as for the resolution, it has the effect which article 1256 of the same code provides; that article 1163 of the said code imposes the payment of damages and prejudices to the debtor who does not execute his obligation, damages, and prejudices which in the present case amount to 40,048.62 bolivars, according to the liquidation produced by the demander, a sum to which the claim of the treasury on this subject is limited. For such reasons the high Federal court, administering justice in the name of the Republic and by authority of the law, declares to allow the claim presented in the present process by the fiscal nacional de hacienda against the Company General of the Orinoco, and consequently is declared the resolution of the contracts of May 24, 1886, and May 31, 1887, passed by the National Government with Messrs. Tejera and Delort, respectively, of which the company named is cessionary.

The Company General of the Orinoco is sentenced to pay to the National Government the sum of 40,048.62 bolivars for damages and prejudices caused to the nation from the non-accomplishment on the part of the company of the contracts named, together with the expenses of this process.

There was no appearance on the part of the company on September 29, 1891, at which time the National Government was properly represented and was heard in oral pleading before the court. No notice was served or summons made upon the counsel who had appeared in the case for Mr. Fiat. Indeed, since he was attorney of the company, and they were his counsel only, their relation to the company and to the case since he had resigned, their right to appear and to be heard, or the duty of the Government to have them cited in, had such a duty rested upon the Government at that stage of the cause, is in none of these respects very clear to the umpire. There was no attorney of the company then resident in Venezuela, and there had been none since July previous, but whether this fact was known to the Government

or to the court does not appear. The evidence of two witnesses adduced by the company is referred to by the court in its decree as having been considered by it in coming to its final judgment. Aside from this evidence the court was not assisted by the company in anyway after the court began its consideration of the facts, the law, and the equity of the cause, nor were the interests of the company in anyway subserved or protected at this time by the presence in court of attorney or counsel. In a very few days the company had knowledge of the action of the court; but it did not then or ever take any steps to be heard on any question or motion proper to have been taken on its part under the law of the Republic or the procedure of the court. Neither does it appear from the attitude of the company toward the suit for quite a period prior to October 14, 1890, and for years thereafter that it desired to be heard in the high Federal court on the matter of the final decree. The tenor of the proceedings of the company after it passed into liquidation is clearly that it depended, not on a successful defense to the suit, but solely upon negotiations with the Government for its existence and prosperity. No other version can be given to the acts, declarations, and apparent animus of its moving and managing spirits and agents.

At the time this decree was passed the Company General of the Orinoco had actually brought into Venezuela and expended in and about its enterprise the sum of 2,373,317.89 francs, after deducting from the total expenses the sums actually received for products exported under its concessions.

Certain conditions of the Company General of the Orinoco and certain administrative acts in relation to it will now be considered.

It was in March, 1888, that the company took possession of the lands granted by Mr. Vernet and formed on the Vichada the hato which bore the name of Santa Catalina. It was here that the cattle obtained at Buena Vista were placed, the chief purpose of this hato being to prepare for the necessities of the immigrants, since there was not in all the region of the Maipures so much as one single animal of the cow kind.

The minister of fomento was advised of the establishment of the hato, and later a concession of lands was demanded of him to be located on the Vichada for similar purposes. To this demand there was no reply by the Government.

The action of the governors of the Territories Upper Orinoco and Amazonas, and of persons representatives of the Federal Government in that locality, was such concerning the exploitation and exportation of the natural products of those Territories, which were exclusively the property of the company, that it resulted in depriving the company of any benefits of its concessions for the year 1890 and thereafterwards, notwithstanding adequate provisions had been made by the company

with a Liverpool firm to furnish the requisite funds to complete the payment for those products and the agent of the firm had been sent out to Venezuela for that purpose, and in spite of the fact that much of the india rubber had been harvested by means of advances which the company had made aforetime.

Mr. Valentin Perez, the trusted representative and agent of the Government at San Fernando de Atabapo in the summer and early autumn of 1890, returned to his home in La Urbana late in that year or early in 1891, organized an armed force and began an expedition up the river. April 28, 1891, he attacked the steamer *Libertad*, at the mouth of the river Meta, with firearms. The steamer escaped without loss of life to its crew, although the marks of many bullets were found upon the boat. The doings of Perez came to the knowledge of the governor at San Fernando de Atabapo, who, fearing an attack, took away the valves from the boiler of the *Meta* and removed different parts of the engine, rendering her useless should she fall into the hands of Perez, but it had a similar effect upon her usefulness and value to the company.

The governor also took by main force the arms and munitions which the company had a lawful right to keep at its agencies and which were necessary for its protection in that part of the country. Perez took possession, consecutively, of Atures, Maipures, and San Fernando de Atabapo, and seized everything of value which lay in his way; and, from his home at La Urbana to the capital of the Territories he burned all the wood sheds of the company, some seventeen in number, including the fuel contained therein. About this time Mr. Calvaras, agent of the company at San Fernando de Atabapo, attempting to escape to Ciudad Bolívar, died at Maipures of fatigue and privation. Mr. Mary, another agent, descended the river to Ciudad Bolívar. Mr. Oudart tried to escape from San Cárlos, but he was attached and robbed. He gathered together a few men and attacked the troops of Perez by night, seized about one-fourth of his india rubber, threw it into boats, and went to Brazil. This practically ended the exploitation of these Territories by the Company General of the Orinoco.

Perez captured the governor and detained him as a prisoner. To reestablish order in the Territories the Government sent troops from Ciudad Bolívar to San Fernando de Atabapo. To accomplish this, it requisitioned the *Libertad* to carry its soldiers to Atures. Above the rapids the Government used the steamers of the enterprise to take the soldiers to the capital of the Territories. At Maipures the troops were fed with meat from the cattle of the company. For the service of the *Libertad* the company received 2,000 bolivars, but for the rest nothing.

The years 1892 and 1893 witnessed the successful revolution of Gen. Joaquin Crespo. As a consequence, public and private business and the processes of the courts and the administration of the Government

were seriously interrupted and obstructed. It was not until February 20, 1894, that General Crespo was named constitutional President.

The matters of the Company General had suffered seriously through this revolutionary crisis. No execution had been issued for the damages and costs awarded the Government in its suit of rescission against the company. March 8, 1893, the new governor of the Federal Territories, Gen. Juan Anselmo, issued a decree of suquestration against the property of the company in the Territory of Upper Orinoco, to make effective the judgment of October 14, 1891, by recovering the amount thereof; and to that end he asserted the lien of the Government upon both the movable and the immovable property of the company, whether in its possession or in the hands of those who had appropriated it to their own use, appointed a depositary, and allowed thirty days during which time all persons who had anything belonging to the Company General of the Orinoco were to bring it to the depositary or to pay him the value of the same. After this delay of thirty days, judicial proceedings were to be taken conformable to the laws against delinquents.

This decree was disaffirmed by the high Federal court because no such power was vouchsafed the governor by the decree which created and organized the Territory. The court held that this could issue solely through the judiciary department, citing articles 298, 299, 300, 301, 302, 303, 304, 305, and 306 of the Code of Civil Procedure. It goes on to say:

> That which the governor ought to have done was to bring to the knowledge of the judges of the locality of the circumspection of his command, in which were the interests of the company, the complaints of the interested parties, in order that according to the reasons alleged their acquired rights might be guaranteed, etc.

It resulted that all of the Company's property which at that time could be assembled in that Territory was sold at a nominal figure.

July 10, 1902, the liquidators of the Company General of the Orinoco addressed a memorial to the minister of foreign affairs of France in which they stated their case as follows:

> That in consequence of the sentence given by the high Federal court October 14, 1891, without the appearing in court of the plaintiff company the creditors of the said company were obliged to apply to the liquidators for the vindication of their rights against the Government of Venezuela.

This was followed by a statement of their claim in detail.

In 1894, shortly after General Crespo became the constitutional President of the Republic, Mr. Theodore Delort came to Caracas in the interest of the liquidators in an effort to adjust the matters of difference then existing. While at Caracas he addressed a communication, in the nature of a résumé, to the minister of foreign affairs of Venezuela. Among other things of value is found this:

> The honor and standing of the members who form this enterprise, our credit being understood and our proceedings correct, are the reasons which compel me to act to-day in the pres-

ent claim, not to regain our capital lost, if it is understood that the Venezuelan Government wishes to render us justice, but to take into consideration the said credits and that we may be able to fulfill our engagements honorably.

Earlier in the communication Mr. Delort had stated the indebtedness of the company.

The purpose of the company to obtain means whereby to cancel its indebtedness is ascribed to it by the honorable commissioner for Venezuela in his opinion in this case, where he says:

And lastly, their attempts, twice baffled, to convert first into an English company with the name of "The Orinoco Exploration and Trading Company," and later into a Belgian limited company, under the name of "Compagnie International des Caoutchoucs," both attempts having been made with the object of obtaining an increase of cash capital to pay off debts and proceed with the business.

The liquidators of the company presented a further memorial of their difficulties to the minister of foreign affairs for France, December 5, 1895.

For quite a portion of the time elapsing between October 14, 1891, and the treaty of February 19, 1902, the two Governments had not been in friendly diplomatic relation. This fact is named as an explanation of delays which have occurred in the presentation and pursuit of this claim diplomatically.

In the preceding attempt to present the salient facts of this case much time has been taken and many words have been used, and yet much which tends to throw light upon it has been omitted in order to condense and shorten the statement. It is hoped that the bases upon which a decision must rest are sufficiently apparent. The umpire must acknowledge his indebtedness to the company for the valued aid of its counsel Mr. Poincaré, and to the honorable commissioners for their efficient services both in the matters of fact and in the justice and equity to be evolved therefrom in arriving at a right award.

The claimant Government asserts its right of recovery because of denials of justice through a long series of administrative and governmental measures, notably the decrees of August 8 and 9, 1890, and the sequestration of 1893; also finds cause therefor in the unpunished wrongs perpetrated by Valentin Perez and in the abuses of the powers of the governors, notably Mr. d'Aubeterre, and the decree of annulment by pro tempore Governor Page; likewise in the decree of the minister of hacienda in April, 1890, and in successive acts of the minister of the interior in the same year; and, further, in a multitude of acts, of manœuvers, of outrages; also in the refusal of the respondent Government to permit assignments of the concessions of the company and its properties to the English company formed and registered, and to recognize and allow said English company to take up and carry on the contracts of December 17, 1885, and of April 1, 1887, together with its unjust silence respecting the Colombian-Venezuelan arbitration and

its acquiescence in the large expenditures made by the company in the extension and development of its enterprise after the knowledge of the Government that there had been no compliance in fact with the provisions concerning the railroads around the rapids of Atures and the rapids of Maipures, and to the general attitude of the Government and its administration toward the company after the year 1888, whereby it permitted, if it did not incite, attacks, open and covert, upon the concessions of the company.

It also claims denials of justice through violations of public and private right, committed not only in the course of the process (suit of 1890), but outside of every judicial instance. Concerning the suit for rescission, it is alleged to be a nullity, because (a) that Mr. Fiat, the attorney of the company in Caracas, received no citation or order to appear at the time of the presentation by the fiscal nacional de hacienda before the high Federal court of the demand for rescission of the contracts and payment of an indemnity; (b) the rogatory commissions issued in said cause on the motion of the defendant for the investigation in Europe were irregular in the issue and transmission and ineffective through the fault of the court or the Government; (c) the failure of the court or the Government to forewarn Mr. Fiat or the advocates of the defendant of the day set for the oral pleadings in the cause, and the resultant nonparticipation of the defendant in such hearing; (d) the sentence of the court October 14, 1891, was rendered in the absence of Mr. Fiat and the advocates of the defendant and without citation upon them or either of them to be present and without their knowledge, in fact, that the sentence was to be pronounced, and without other knowledge than its publication in the Official Gazette of October 17, three days after the decree was promulgated. This procedure was said to be in violation of Title 5, Venezuelan Code of Civil Procedure with regard to citation.

The claimant company also asserts its right for indemnity arising from requisitions of and injuries to its property by the authorities of the respondent Government and for other acts contrary to the law of nations. The honorable commissioner for Venezuela, a lawyer of high standing in the courts of his country, skillful in his profession, and of high honor, whose opinion in such a matter is entitled to great weight, finds no irregularities in the preliminary process of the high Federal court. The umpire fails to observe any.

However, if the umpire regarded the point as possessing value, he would more carefully study the question. In his opinion the appearance of Mr. Fiat as disclosed cures all irregularity of notice or entire lack of official notification, had either existed. This proposition is elementary, and requires no authority to sustain it. It effectually removes the first objection of the claimant to the proceedings of the high Federal court.

The second objection refers to the issuing of the rogatory commissions from the court direct to the attorney of the company instead of transmitting them through diplomatic channels at its instance and through its personal procurement. This is regarded as fatal error by the eminent counsel of the claimant company. Much ingenuity, ability, and learning is displayed in an effort to charge the failure in the execution of some of these commissions upon this act of the court and thereby to find cause to invalidate its final decree. Without entering the domain of this discussion it suffices to say that the attorney of the company accepted these commissions from the hand of the court's officer without objection and proceeded to make use of them in his own way. It was he, and not the court, who sent them abroad through other than diplomatic channels. He had always the right and the opportunity to obtain the aid and the intervention of the friendly diplomatic powers of France. He had, moreover, the unused privilege of preferring to the high Federal court a petition for the reissuing of those commissions and their transmission through such channels as he might then request or suggest. There were many months in which he should have learned the necessity of such procedure, if it existed, and in which he might have appeared before the court for such purpose. So far as appears of record, every request he made in court was granted, and any failure to educe evidence through the rogatory commissions must be charged to the action or inaction of the company's attorney, and not to the high Federal court or the respondent Government. Such is the judgment of the umpire upon the second point of objection to the judicial process in question.

Objections "c" and "d" will be considered together.

The first point to be recalled is that the recognized and accredited attorney of the company before the high Federal court was Andrés Fiat. His power of attorney had been presented to the inspection of the court, it had been translated, examined, adjudged to be ample and correct, and in virtue thereof he was accorded a representative character for said company in said court. He had resigned. His resignation had been accepted by the company. Another had been appointed, and had declined to serve. It does not appear that Mr. Berthier was constituted an attorney with letters as such. If he were, he failed to qualify before the court. Until his resignation Mr. Fiat was the attorney of the company. Doctors Urbaneja and Feo were his counsel, so designated and named by him in court and so recognized and received. It is also true that so far as the umpire knows at this time there was no duly constituted attorney of the company in Venezuela. This was the situation September 25, 1891, the day on which selection was made by the court of the time on which the final audience was to take place and the parties were to be heard orally and in writing by their respective advocates. The situation was the same

September 29, and it had not changed October 14. Was the high Federal court charged with any duty of notice to the company under these circumstances, provided such notice was required by the laws of the country and the rules of the court, if there had been an attorney of the company known to the court within reach of its process? The honorable commissioner for Venezuela holds that articles 109 and 162 of the Code of Procedure do not apply to such a case as is here presented. Article 109 refers to a cause in suspension; article 162, to a case of indefinite delay. In his opinion he gives a historical review of the case from its inception to the decree, and from this review he reaches the conclusion that—

> the sentence was thus pronounced by the high Federal court after complying rigorously with the legal prescriptions, and with all the formalities of the proceedings as established by law on behalf of both parties interested for the defense of their respective rights.

He holds that the case had never been in suspense; that the day on which the time had expired for producing proofs the representative of the Government moved for active continuation of the case and the court acceded to his motion.

Similarly, the honorable commissioner finds no indefinite delay such as is designated in and covered by article 162.

Doctors Urbaneja and Feo, also learned in the law, gave an opinion sustaining the contention of the claimants. It is not necessary for the umpire to decide between these conflicting opinions, since the company had opportunity to test the worth of its contentions by a petition to the high Federal court to invalidate its decision under and by virtue of case I, article 538, of the Code of Civil Procedure then in force in Venezuela. If the points now urged before the umpire were of the character to come under that article, the duty of the court was clear and its action certain. Practically it must come under the terms of that article or else it had not the vitality now claimed for it.

For six months an opportunity existed wherein this question could be considered, the proofs marshaled, and the petition made. If there had been such grave fault on the part of the high Federal court as in the opinion of the company's eminent counsel would amount to a denial of justice, why was not an effort made, based upon these grounds, to secure an invalidation of the decree? If this had been done and there had resulted a refusal on the part of the court to reopen the case, then the duty of the umpire to carefully consider the law and the facts relating to this objection would be paramount. There is not a single act of the high Federal court in connection with the suit in question which suggests in the slightest degree any other than a scrupulous regard for the rights of the defendants therein. With this judgment formed from his study of the procedure in this case the umpire would be peculiarly constituted if he should hold

that this distinguished body would necessarily depart from its well-ordered course when there was presented before it a just cause for reconsideration.

In the suit to rescind the contracts of December 17, 1885, and of April 1, 1887, it is therefore adjudged that the decree of the high Federal court of October 14, 1891, is not now open to attack by the defendant therein through the intervention of the claimant Government, and it is not a denial of justice under the treaty of 1885, or in virtue of the rules and principles of public law.

It follows, therefore, that every matter and point distinctly in issue in said cause, and which was directly passed upon and determined in said decree, and which was its ground and basis, is concluded by said judgment, and the claimants themselves and the claimant Government in their behalf are forever estopped from asserting any right or claim based in any part upon any fact actually and directly involved in said decree.

The general principle announced in numerous cases is that a right, question, or fact *distinctly put in issue and directly determined* by a court of competent jurisdiction, as a ground of recovery, can not be disputed, etc.,

Southern Pacific R. Co. *v.* U. S., 168 Sup. Ct. Rep., 1. (S. C., L. C. P. Co., 42, 377, with extensive annotations.)

Also, see 9 Encylc. Pl. and Pr., 625, and the notes.

Is this holding by the umpire conclusive of this claim? The answer is affected by the decision which he will make upon the proposition, that no award can be predicated upon any other ground than a denial of justice; which proposition is based upon the ground that the treaty of 1885 is determinative of the issues which may be decided by this honorable commission. If the treaty of 1885 is applicable to this case, then his position in reference to the decree of October 14, 1891, decides adversely this claim.

If the treaty of 1885 was before the umpire he would interpret its provisions as did the honorable President of the Swiss Republic in the Fabiani award. Being so interpreted, it would be impossible to award damages here. There has been no denial of justice, nor such a delay of justice according to usage or to law, nor such exhaustion of the legal means available to the claimants, nor such a violation of treaty or the rules of the right of nations as would admit of a favorable award, if the jurisdiction of this honorable commission is thus limited. Such, however, is not the interpretation placed by the umpire upon the convention of February 19, 1902. Article 2 of that protocol provides that—

Demands for indemnities other than those which are aimed at in article 1, but based upon facts anterior to the 23d of May, 1899, will be examined in concert by the minister of foreign affairs of Venezuela and by the French minister at Caracas, etc.

All of the cases which came before this honorable commission at Caracas in 1903, including the eight reserved for the consideration of

the umpire, were under the above provisions of article 2, which concludes with the clause:

> It is intended that this procedure, like that which is adopted for the claims of 1892, is instituted as an exception only and does not invalidate the covenant of November 26, 1885.

The provisions of the treaty of 1885 were not interposed in the case of Jules Brun, heirs of Maninat, Frierdich & Co., heirs of Massiani, Pieri & Co., or Antoine Fabiani. It was apparently not interposed in Caracas against any of the cases heard by the honorable commissioners and reported in Ralston and Doyle's Venezuelan Arbitrations of 1903.

None of the six cases above referred to and now before the umpire for his decision rest upon denials of justice. All have been submitted upon the claim, implied or stated, that the treaty of 1885 did not apply. The Fabiani claim was based entirely upon this proposition. To these positions of the claimants there has been no dissent on the part of the respondent Government. The umpire has been permitted to proceed upon this theory and has made his judgment and awards in accordance with what he understood to be the admitted construction of the convention of 1902; and it is not until he reaches the case now in hand that this question is raised, if it is now distinctly raised, by the respondent Government. He is inclined to the view that it is practically in assent to the assumption of the eminent counsel for the claimants that such might be the construction of this treaty that the respondent Government takes the position it has seemed to take in this case and contends for the paramount authority of the treaty of 1885.

Were the umpire unaided by the interpretation which in practice has been placed upon the protocol of 1902, he would have no serious difficulty in construing it adversely to the contention of the respondent Government. In effect, if not in express terms, the treaty of 1885, by the convention of 1902, is left in force generally; but for the purposes of claims to be considered under article 2 of the last-mentioned convention the treaty of 1885 has wholly superseded and practically abrogated it so long as the protocol of 1902 remains effective. Such must be the meaning of that provision in article 1 of the protocol of 1902, which relates to—

> examining in concert the demands for indemnity presented by Frenchmen for damages sustained in Venezuela, etc.

Concerning this there might exist a doubt, but not when there is considered the provisions heretofore quoted, that the procedure instituted by the protocol of 1902 is—

> as an exception only and does not invalidate the covenant of November 26, 1885.

The umpire holds, therefore, that by the terms of the convention of February 19, 1902, he can award such sum in damages in any and all of the cases submitted to him as, in his judgment, properly clarified

and steadied by the ethical precepts of international law, equity and good conscience demand, in no respect limited or controlled by the treaty of 1885.

It is a consequence of this holding that if there were aught of wrong toward the Company General of the Orinoco done or permitted by the respondent Government through officials or persons for whose acts the Federal Government is responsible which were not concluded in and determined by the decree of October 14, 1891, then over such this honorable commission has jurisdiction and for such there may be an award in damages if justice and equity so permit and so require.

In the opinion of the umpire there are many matters anterior to May 28, 1890, which might seriously affect the rights of the contending parties which were not at all involved in the decree of the high Federal court. The restrictive quality of estoppel by judgments is well understood. It is not broader than the rule stated by the umpire in this case. It is only the particular matter in controversy which is decided. It is the exact issue as formed which is determined. There must be identity of cause, the same questions in issue, the same subject-matter. (9 Encycl. Pl. and Pr., 622–623; id., 624, 625; Story's Eq. Pleadings, par. 791; 24 Encycl. of Law, 2d ed., 775; 5 Encycl. Pl. and Pr., 780.)

What was affirmed in the case in question by the plaintiff therein? (1) That on the part of the plaintiff Government it had fulfilled the stipulations agreed to in both contracts. (2) That certain articles and parts of articles of both contracts as set out in the declaration had not been fulfilled on the part of the defendant.

What was the pleading of the company? (1) That it had performed. (2) When it had not performed it had been prevented by main force or by the acts and neglects of the Government or by the acts and neglects of the authorities for whom the Government was responsible, these acts and neglects referring to the matters of the contract. Such were the issues. These were determined: That the Government had fulfilled on its part all the obligations which the two said contracts imposed upon it; that the defendant had not fulfilled the obligations contained in Nos. 1, 2, 3, 4, 5, 6, 7, and 9 of the contract of December 17, 1885, nor the stipulations 3, 4, and 5 of the contract of April 1, 1887; that it was not prevented from fulfilling these obligations by insurmountable difficulties constituting *force majeure* nor was it so prevented by the acts of authorities dependent upon the Government itself and contrary to the stipulations of the contract. This reference to the acts of authorities dependent upon the Government in the answer of the defendant in excuse for its failure to fulfill certain of its obligations is understood solely to refer to matters springing from the contracts and referring to the Government as the other party thereto. Such also in the opinion of the umpire is the force, extent, and value of the decree upon that point. However, from the attitude which this

claim has assumed in the mind of the umpire it is not necessary that he make critical analysis of the decree or of the elements of fact anterior to May 28, 1890, which may or may not be included therein and concluded thereby.

The answer of the defendant company in the suit for rescission was in defense only. It presented and suggested no counterclaims or claims in set-off. These were reserved. They were not plead, not in issue, were not litigated, and therefore can not be concluded by the decree.

The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand, or claim, having passed into judgment, can not again be brought into litigation between the parties in proceedings at law, upon any ground whatever.

But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action; not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action. (Cromwell *v.* Sac County, 4 Otto (U. S. Sup. Ct.), 351–371; (S. C., L. C. P. Co., 24, 195–204, and note.)

The law in respect to estoppel by judgment is well settled, and the only difficulty lies in the application of the law to the facts. The particular matter in controversy in the adverse suit was the triangular piece of ground, which is not the matter of dispute in this action. The judgment in that case therefore is not conclusive in this as to matters which might have been decided, but *only as to matters which were in fact decided.* (Last Chance Mining Co. *v.* Tyler Mining Co. 157 U. S. Sup. Ct., 683–685; (S. C., L. C. P. Co. 39, 862); 9 Encycl. Pl. and Pr., 629–630; 24 Encycl. of Law, 2d ed., 775.)

Not having been pleaded and passed upon in the suit for rescission, all claims or demands which by the claimant company on May 28, 1890, might have been plead as counterclaims or claims in set-off to the suit for rescission in its prayer for damages, or which might have constituted at that time ground for an independent action, are proper to be presented and considered in this honorable commission as substantive ground for an award. (24 Encycl. of Law, 2d ed., 775; id., 791.)

It is certain that a claim in offset would not be concluded by a judgment when it was neither placed, considered, nor deducted in making up the judgment. (Sup. Ct. of Vt., found in 52 Vt., 121.)

For the same reasons as have already been given, the decision of October 14, 1891, settled nothing after May 28, 1890, the day on which the suit to rescind was entered in the high Federal court by the fiscal nacional de hacienda. The issues were formed as of that date. The cause of action had then accrued. It then existed or the court had no jurisdiction. For such causes as accrued after that date the court gained no jurisdiction in virtue of the suit then pending. The

actions of the claimant company and of the respondent Government posterior to that date are all proper subjects of inquiry and of award.

The cause of action does not accrue until the existence of such a state of things as will enable a person having the proper relations to the property or persons concerned to bring an action; * * *. (1 Bouv. Law Dict., 295.)

Causes of action must exist at time of commencement of suit. (1 Encycl. Pl. and Pr., 209).

Hence a judgment against a defendant is not conclusive as to set-off or counterclaim which he might have pleaded to the action. In the absence of statute a defendant having a cross-demand against the plaintiff may, at his election, either use it in the pending suits as a set-off, or reserve it to be used as the basis of an independent action. His failure, therefore, to plead it does not preclude him from bringing a subsequent action upon it. (24 Encycl. of Law, 785.)

Notwithstanding the clear right of this honorable commssion to weigh, pass upon, and merge in the award any and all rightful claims for damages inhering in the claimant company for wrongs suffered through those for whom the respondent Government is responsible and which occurred prior to May 28, 1890, it does not become necessary to take this position in order to obtain equity in this claim, and for that reason only none such will be considered for that purpose.

There is no disagreement that in the spring and summer of 1890 arrangements had been perfected by the liquidator of the company and approved by its shareholders whereby an English company regularly organized and registered was to take over the properties and franchises, rights, and privileges of the Company General of the Orinoco, assume and pay its indebtedness, and furnish a pecuniary basis for the continuation of its enterprise. It is agreed that this compact and these results failed to be consummated solely through the absolute refusal of the respondent Government to permit it. There were unquestionably grave reasons of state which animated and inspired this action of the respondent Government and which in its judgment required and compelled it to take this course; but it was as fatal to the interests of the claimant company as though differently inspired. The contention which had been very threatening and serious between the United States of Venezuela and Great Britain over the right of the latter to an equal control with the former Government of certain mouths of the Orinoco—a right claimed largely through alleged occupancy by the British citizens of the country contiguous thereto—was a cogent reason why the former Government should seriously object to any relations with a British company through a contract which by its very terms gave exclusive rights in certain portions of that river and peculiar privileges over its whole extent. That to Venezuela it seemed impossible to permit such a condition to exist is evident from its acts. That it was wholly justified in this assumption is the opinion of the umpire. As a party to the contract, however, it was bound by its terms, and one of its provisions spe-

cifically permitted, without restriction or supervision, just such an assignment as was proposed.

The right to assign was the sole value of the contract to the original concessionary. It was exercised again in the contract passed from the syndicate to the company. These assignments were recognized by the respondent Government. The interpretation was thus and then made by the parties thereto and especially by the Government of Venezuela that the assignment named in the contract was not restrictive in its operation to the first concessionary. Without such an interpretation by the parties thereto it would seem to the umpire to be the only correct inference to be drawn from the language used when the purposes and conditions are considered.

This is beyond all fair question. As the Government of Venezuela, whose duty of self-preservation rose superior to any question of contract, it had the power to abrogate the contract in whole or in part. It exercised that power and canceled the provision of unrestricted assignment. It considered the peril superior to the obligation and substituted therefor the duty of compensation. Had there been no other troublesome question of State entangled with the contracts of the Company General of the Orinoco it is quite possible that this governmental surgery would not have taken the life of the claimant company. Such entanglements, however, existed.

One is found in the controversies between Venezuela and Colombia over the terms of those contracts, the territory involved, and the claims of the company in connection therewith. A careful student of the situation quickly discerns the delicate position occupied in that matter by the respondent Government. It is not difficult to understand the supreme confidence of Gen. Guzmán Blanco and of Venezuela in general, concerning the favorable final outcome of the arbitration then resting in the hands of His Majesty the King of Spain. This belief was so intense, so complete, that it is evident that the dispute over the boundary and the pending arbitration were not disturbing factors in the plans of Venezuelans or of their Government. This easy and perfect confidence begot a carelessness of conduct in reference to the territories involved, readily understood but none the less, even more, disturbing to the other party litigant. The position of Colombia was undeniably correct. Venezuela could not question it. The serene confidence of Gen. Guzmán Blanco and his compatriots had unintentionally betrayed the Republic into a seeming serious affront to Colombia. The contracts were susceptible of no other interpretation than that through them there was an assumption in Venezuela of exclusive control over the upper Orinoco and its important confluents entering it from the west and over large areas of territory to the west of the Orinoco. Equally, there was an assumption that this control was to exist indefinitely. Notwithstanding the

pending litigation over the boundary, the Company General of Orinoco was permitted to enter into unquestioned and absolute possession of these litigated areas. From the view point of nations the respondent Government had been led into grave error. This error it must repair. It could only repair by receding. It could only recede by compromise with the company or by annulment. Every day that the contract was continued it was more or less a menace to the peaceful relations then existing between those two countries. That which had been held as a valued enterprise, a boon to Venezuela, for the reasons stated had become a source of serious national danger. The changed position of the respondent Government toward the claimant company, a change not at all obscure or doubtful, is thus easily and, as the umpire believes, correctly explained. No other than a paramount reason, in the belief of the State, can explain the ministerial decree of May 17, 1890; the suit for rescission of May 29, 1890; the gubernatorial decree of June 16, 1890; the administrative decree of August 9, disaffirming the action of the governor only because it was a usurpation of power, but displacing it with the ministerial decree of August 9, 1890; the successive and progressive acts of the ministers and the governors of similar tenor and effect together substantially annihilating the enterprise. No ordinary cause would have suggested or permitted this destruction of an internal improvement possessing such potentialities for the future of Venezuela, against the ordinary policy of the country, which had been to foster and encourage such enterprises.

The umpire does not question that there was an intimate relation between these administrative and official acts and the attitude of Colombia toward the respondent Government in regard to these contracts. The prompt report made by the minister for foreign affairs to the minister plenipotentiary of Colombia at Caracas has deep significance when it is noticed that it answered a communication of that same Colombian minister of date January 24, 1890, which answer had been apparently withheld until something of a positive and decisive character could be given. Five days after the suit was entered in court, three days after the company had been summoned, the day after Mr. Fiat appeared, this notification to Colombia was made. A suit for rescission did not satisfy Colombia. Its interests were still, in its judgment, imperiled and would remain thus imperiled so long as the company had power or opportunity to extend its exploitation over the debatable ground. Colombia by its reply of June 6 indicates this very precisely and emphatically to the respondent Government. Following this correspondence there were the gubernatorial and administrative decrees of June 16, August 8 and 9, the telegrams of the minister for the interior of August 29, and his letter of September 10. Other facts might be easily adduced which are of some evi-

dential value, all tending toward the same end. Enough has been said, however, to suggest the ground upon which the umpire bases his judgment that the strait of Venezuela in regard to the Colombian incident was a potent cause for the position assumed by the respondent Government toward the Company General of the Orinoco in 1889, 1890, and 1891. It was a question of governmental policy, and that Venezuela decided upon this plan of action must be attributed to its solicitude for peace with a sister Republic.

Running as a not unimportant thread in this warp of discomfort and resulting discontent of the respondent Government was the attitude of antagonism toward the company assumed by the business men of the Orinoco from Ciudad Bolívar through the Territories of Upper Orinoco and Amazonas. The monopoly in the natural products granted in its concessions interfered with their personal enterprises. These privileges were in compensation for the very important obligations resting upon the company, which when fulfilled were to be of incalculable value to the country, but this did not prevent the sense of wrong and the feeling of revolt on the part of these people. That this feeling was general and deep on their part is readily discerned. The governors and officials there resident were naturally sympathetic. The President and his cabinet observed and were disturbed by these manifestations of anger and dissatisfaction, which became very apparent. The situation in this regard was grave. The Perez campaign was perhaps the most violent and destructive, but it illustrates the situation. These contracts then became a source of constant annoyance to the administration at Caracas and of menace to the internal security and welfare of the State. It is quite probable that the natural hostility of the business men of that section of the country was increased and made bitter and rancorous through the method and manner of some of the agents of the company. Where concession and conciliation might have been most valuable emollients, they were not always in evidence, but instead there was no doubt at times superciliousness and arrogance.

Such is the purport of the evidence before the umpire. It is too like a possible fact to be discredited. It is not strange with all the cumulative reasons therefor that the Republic of Venezuela became very weary over the situation which its contracts had created or permitted, or that it sighed for relief therefrom at whatever cost.

The sum to be awarded the claimant Government in behalf of the liquidators must be made commensurate to the damages caused by the act of the respondent Government in denying efficacy to the contract of assignment from the Company General of the Orinoco to the English company. A careful study of the events connected with this Governmental act, and of those which followed, reveals nothing which in any degree lightens the responsibility or in any part changes the

relation which the respondent Government assumed toward the Company General of the Orinoco and its creditors when it exercised this sovereign right. The successive struggles of the company for existence which followed this act have been collated in this opinion; they need not here be referred to in detail. Suffice it to say that its ruin was not its fault. It fought bravely to exist either in its own or in some other corporate entity, to continue in its contracts as they then were in some modified form. It sought these ends persistently and patiently, but without avail. Eventually there came the revolutionary upheaval of 1892-93, the unsettled conditions which followed, then, at the hands of the executive and judicial powers of the Territory—Upper Orinoco—the finale.

These efforts of the company for resuscitation and the expense involved were necessary, but they can not be charged against the respondent Government. They are not a proximate result of the primary act for which it is held responsible in damages. The Venezuelan Government might make a new contract but it was not bound to do so. It might recede from its suit for rescission, but it had a right to refuse to do so. These were matters of negotiation, and that they resulted unfavorably to the wishes of the company is unfortunate, but it does not add to the pecuniary responsibility of the respondent Government. The acts of administrative authorities in 1890 heretofore referred to only quickened the process of dissolution. There was in it all no demonstrated financial loss to the liquidators on the basis upon which this award is to rest. It was not the liquidators but the Liverpool firm, which was to reap the pecuniary benefit of the concession for 1890. To the suggestion that there was undue and unnecessary loss of the property because of the acts done or permitted by the respondent Government from 1890 to 1893, both inclusive, there is this answer, that the award practically covers that investment so far as the liquidators are concerned, and it is impossible from the data at hand to arrive at any just conclusions concerning the pecuniary loss, if it were proper or necessary to consider it at all. To the possible suggestion that the arrangement with the English company might have proved illusory, when the suit for rescission had become known to this latter company, there is the answer that there was then ample grounds for the successful defense of that suit, had defense been the desired policy of the company. A full defense lies in the fact that there was in this suit for rescission no offer to restore to the company the benefits conferred by it upon the plaintiff when coupled with the uncontroverted fact that the company had conferred many and repeated benefits upon the plaintiff Government, which were capable of being measured in money, and for which there had been no compensation. Notably among these benefits is the one stated in the suit itself, where it refers to the amount paid by the company to the Government under its con-

tracts for the exploitation and exportation of india rubber and sarrapia. (*24 Encycl. of Law, 621.*)

Many other equally pertinent easily discerned facts in the historical data are brought into this case, in the opinion of the umpire. It is not necessary to do more than to refer to them in this general way. Again, it was easily susceptible of proof that the respondent Government could not sustain its contention that it was without fault in the premises, and this is an essential fact which must always precede and accompany a suit for rescission and without which there must always be judgment for the defendant.

In the Encycl. of Pl. and Pr., vol. 18, page 752, there is laid down this general proposition:

> The right to rescind belongs only to the party who is himself without default. Thus, if one having sufficient ground therefor wishes to avoid a contract, but has done some act which hinders performance by the other, or has failed in any way to perform his own part of the stipulations, his right is thereby lost to him.

What were these defaults of the respondent Government? There was the Colombian incident bristling with points along this line; there was the decree of the minister of hacienda of May 17, 1890; there were the unrecompensed requisitions of 1888 and 1889; the decree not disaffirmed, not annulled, of Governor Larrazabal, October 31, 1888, an indisputable attack upon the terms of the contract; the absorption of the workmen of the company at Caura for the national defense, which, while proper, if necessary as an act of sovereignty, was none the less an attack upon the terms of the contract, when the Government is viewed in its proper position as the other party thereto; its neglect to allot or designate lands for immigrants as and when requested; its neglect to allot or designate lands for agricultural purposes as and when requested; the traffic in india rubber entered into by Governor d'Aubeterre in direct contravention of the exclusive privileges inherent in the company under this contract, and other incidents not so important, which, taken together, add force and value, yet need not here be brought forward.

The umpire is convinced that with these facts proven before it the high Federal court would have rendered a judgment for the defendant. Certainly a courageous company, conversant with these facts, would not have regarded the retention of the contracts as a very debatable proposition, and for that reason alone would not have regarded them as of insignificant value. This point is adverted to only that there may be negatived any proposition that on knowledge of the suit for rescission the British company might have refused to go on with its contract on the terms agreed upon. This position of the umpire does not at all reflect upon the action of the high Federal court, which proceeded to pass its decree upon the facts which were before it and upon a cause whose defense had been abandoned because its manager believed that in negotiations there existed the better recourse.

What were the damages suffered by the claimant company because of the injury it received through the action of the respondent Government in reference to the contract with the British company? These damages were substantially the value of the concession at that time. There are minor matters which if definitely known in character, amount, and value might be considered, reckoned with, and deducted from this sum, but they are left all too vague to be of evidential value, and hence they are omitted from consideration. Approximate equity is all that can be required and all that can be gained from a case so indefinite in many of its important facts. Substantially the property of the company was dispersed and disposed of to its entire loss, though its inability was not through any inherent weakness of its own, but resulted from the conditions which environed it. In 1890 it was in a situation to be relieved of its indebtedness through aid of the British company. The sovereign act of the respondent Government prevented this. There is no inequity if that Government be asked to take up the load just as it was when this act of sovereignty was interposed. The value of the concession may certainly be regarded as equivalent to the sum which the British company was about to pay for it. That sum was the amount of its indebtedness at that time, which was stated at 1,636,078.17 francs, to which may be added 25,000 francs, the sum representing the expense attending the contract with the British company, which was thwarted by the intervention of the respondent Government. This makes the sum of 1,661,078.17 francs. To this interest for fifteen years will be added 747,485.18 francs, which is the approximate length of time during which this sum has been in default, making a sum total of 2,408,563.35 francs, for which sum the award will be drawn.

These figures were gathered from a statement made by the liquidators, L. Roux, F. Vial, and A. Boulissière to the minister of foreign affairs at Paris, July 10, 1902. They comprise all of the principal sums there named, but exclusive of the interest reckoned, except the charge for the liquidation bonds, the expenses of the Belgian society, and the different expenses, salaries of employees unpaid since 1891. The latter item falls outside of the indebtedness in 1890, and the umpire understands the same to be true of the liquidation bonds, which were for that reason excluded. The reason for excluding the expenses of the Belgian society have already been stated in the opinion. This conclusion has the approval of Manager Delort, who said to the Government at Caracas, November, 1894, that it was only the indebtedness of the company which he asked to have canceled in order that the honor of the company and of its shareholders might be sustained. Then, again, this claim may properly be regarded in a limited sense as of the nature of a creditor's bill, the purpose of which is to recover that which is due for the benefit of the creditors that it may be distributed pro rata among them, but the controlling

reason is the one stated in the first instance, that it appears to be the value of the property destroyed by the act of the Government.

The umpire has considered the propriety and importance of deducting from the sum allowed the damages assessed against the company in a suit for rescission. But he can not disregard the fact that the respondent Government in its suit for rescission admitted the receipt of 148,199.74 bolivars as its share of the products exported in accordance with the rescinded contracts and recovered its damages solely on the ground that the goods imported free would, but for the contracts, have paid a duty to the amount claimed. Neither can he fail to consider that, except for the rescinded contracts, the respondent Government would have received no part of the 148,199.74 bolivars, and that no part of the goods in question would have been imported. It seems, therefore, equitable that the sum set as damages against the company in the suit for rescission be assimilated in and absorbed by the sums which the respondent Government directly received from the company solely because of the existence of said rescinded contracts. Hence the umpire has decided to make no such deduction and has therefore placed the award at the amount above written.

NORTHFIELD, *July 31, 1905.*

CLAIM OF THE FRENCH COMPANY OF VENEZUELAN RAILROADS.—No. 8.[a]

HEAD NOTES.

It was one of the claims of the company that the respondent Government should be awarded to pay France 18,483,000; (1) on the basis that it was responsible for the company's ruin; (2) that the company renounce its concession and abandon its enterprise to the respondent Government, including all its properties. The umpire failing to find the respondent Government responsible for the ruin of the company, the sum claimed cannot be allowed upon that basis.

[a] EXTRACT FROM THE MINUTES OF THE SITTING OF AUGUST 28, 1903.

The examination of the claim of the French Company of Venezuelan Railroads, presented at the sitting of May 19 last and amounting to the sum of 18,483,000 bolivars, was then taken up.

The French arbitrator considering:

That the nonexecution of the obligations contracted by the Venezuelan Government with the company and the nonpayment of sums which it owed it from the fact of its engagements. and its requisitions carried on, has rendered the company unable to continue its exploitation;

That the inspection of the line, of the material, and of the buildings demonstrates clearly that the company had not recoiled before any expense to assure excellent conditions, the service of merchandise and travelers;

That the examination of the accounts establishes that the exploitation would have been remunerative in spite of the obstacles presented by the civil war and the inclemencies of the climate if the Venezuelan Government had paid over the amounts due from it and that consequently by the act of the Venezuelan Government the company has been deprived of the legitimate benefits which it had the right to hope for;

That according to the said contract the Venezuelan Government having accorded a guaranty of 7 per cent upon a kilometric value of 300,000 bolivars, has itself implicitly recognized that the value of the exploitation was 18,000,000 bolivars;

That the Venezuelan Government seems to have had the intention of annulling the contract and of according the concession to a new enterprise;

That the company's claim for indemnity for the damages suffered by its maritime service from Maracaibo to Santa Bárbara is perfectly justified;

Decides that the Venezuelan Government ought to pay to the French Company of Venezuelan Railroads the sum of 18,483,000 bolivars demanded by it, on condition that the latter renounce the concession of the enterprise and abandons to the Venezuelan Government its line, its buildings of exploitation and habitation, its stores, and its terrestrial and maritime material in the condition which they are found, by means of which payment, renunciation, and abandon the two parties will be free from all their reciprocal engagements and obligations.

The Venezuelan arbitrator considering, on the contrary:

That the true reasons for the suspension of the exploitation of the line by the company are of economic order, the latter having been led to take this resolve because of the lack of

To determine the other question, the power of the commission under the protocol of February 19, 1902, must be determined. He fails to find such power, but finds it limited to providing indemnities for damages suffered by Frenchmen in Venezuela. To accomplish this, its methods of procedure must not contravene the general and established principles of the law of nations, nor its awards be opposed to justice and equity. It is given no power to revoke, rescind, modify, or limit the terms of a contract to the very least degree. Such was not the purpose of its creation, it was endowed with no such powers. Were rescission or abandonment agreed upon between the claimant company and the respondent Government, then it might be competent for the commission to establish the indemnities for such rescission or abandonment.

The contracts in issue were mutual and reciprocal, and neither party can make abandonment or rescission without the consent of the other. The United States of Venezuela does not consent. Therefore there can be no abandonment by the claimant company of its properties for which redress can be made compulsory upon Venezuela.

The commission is utterly powerless even for good cause to decree an unaccepted or an unacceptable abandonment by either party of a mutual and reciprocal contract, or to award an act of rescission which has not, in effect, previously taken place.

This commission can not order something to be done which would cause damage to the party obeying the order and then award damages therefor. This would be an injury received posterior to the submission and it would be damages in fact suffered by the claimant company in the United States of Venezuela and at the hands of the umpire.

The contract between the claimant company and the respondent Government that all doubts and controversies arising from that contract should be resolved by the competent tribunals of the respondent Government can not be entirely ignored. No more serious doubt can be resolved than that involved in the question of rescission and nothing could more clearly arise out of the contract itself than such a question. A claim for damage may be regarded as ulterior to the contract especially where the damage has accrued from the operation of the parties under the contract; not so the question of rescission.

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traffic due to the troubled state of the country and by the impossibility in which its bad financial position had placed it of obtaining new funds necessary to make repairs for damages caused by the inclemency of the weather to a line established under unfavorable conditions;

That the Venezuelan Government could be held responsible neither for damages caused to the material of exploitation by a voluntary abandonment nor for those suffered from the fact of the troubled condition to the country or of accidents of war;

That the arrangement entered into by the company with the Venezuelan Government on the subject of the guaranty stipulated in the contract has been entirely carried out and that the company has received the sums accruing from the sale of the bonds which have been remitted to it in execution of the said arrangement;

That the Venezuelan Government has never refused to reimburse the company for the requisitions and damages caused by them to the material, and that the impossibility in which it finds itself of making this reimbursement as the result of the penury of the treasury in the course of the civil war obliges it only to pay interest after demand;

Decides that the claim of the company is without foundation.

It recognizes only the right to an indemnity of 10,000 bolivars for damages done to their steamer *Santa Bárbara* during the time when it was requisitioned, and reserves for it the privilege of claiming from the Venezuelan Government, by presenting the necessary proofs, the sums due for the requisitions, with interest corresponding. It equally reserves the right of the Venezuelan Government to claim for the fact of the abandonment of the exploitation.

Consequently, after a short discussion, it is agreed that the claim of the French Company of Venezuelan Railroads shall be submitted to the examination of the third arbitrator.

The protocol of February 19, 1902, concerning itself only in the question of damages suffered by Frenchmen in Venezuela, can in no sense be regarded as a claim on the part of France or consent on the part of Venezuela that these restrictive features of a contract are to be abandoned when it affects questions like the one here being considered. Nor does it in any way tend to give the power to rescind were no such restrictive features to be found. It being determined therefore by the umpire that he can not declare or direct rescission or abandonment, but can only settle the question of damages which had been suffered by Frenchmen in Venezuela where he finds responsibility in the respondent Government, it follows that the second basis for the claim of 18,483,000 francs fails, and the award can not be made for such sum.

Neither is the claim of the company considered sound that the contract of April 18, 1896, should be declared void in equity for want of adequate consideration, as being made against the desire of the company, and under irresistible compulsion of circumstances which were availed of by the respondent Government to drive an unconscionable and hard bargain, for the umpire finds a consideration, also an apparent desire on the part of the company to make the contract, and does not find the compulsion of circumstances which is referred to and claimed by the company. The transaction was open, the negotiations lengthy, the time for reflections ample, and the action of the company taken under circumstances which permitted entire freedom of will and of conduct.

Courts are loath to interfere where there is an executed contract, where there are lacking, the elements of fraud or mistake, and where it rests in fact upon the mutual assent of parties intelligent, competent, and free to contract. It is also negatively held by the umpire, because the company appropriated the fund paid it in redemption by the Government after a great length of time and opportunity for observation, investigation, and reflection, thus placing itself in a situation where it could not restore the status quo by returning the funds.

It is also held negatively, because there is no offer to restore, and if there were offer to restore, this commission under the protocol has no power to compel its acceptance.

The claimant company was compelled by *force majeure* to desist from its exploitation in 1899. The respondent Government from the same cause was prevented from paying its indebtedness to the claimant company. This was the sole cause of the acts and neglects of the respondent Government. Its first duty was to itself. Its own preservation was paramount. It had revenues only sufficient to that end.

The respondent Government is not chargeable with the loss which came to the company through the confusion and havoc of war, or because there were none to ride and no products to be transported. This was a part of the assumed risks of the company when it entered upon its exploitation. Such possible disordered conditions of a country are all discounted in advance by one who enters it for recreation or business.

There is no question as to the liability of the respondent Government for the natural and consequential damages which resulted to the railroad properties while they were in the use and control of the titular government. There is unquestioned responsibility on the part of the respondent Government for all the necessary and consequential injuries which resulted to the railroads and its properties when used by either the successful revolutionary or the then contending governmental forces.

OPINION OF THE VENEZUELAN COMMISSIONER.

Mr. Albert Reynaud, deputy administrator of the "Compañía Francesa de Ferrocarriles Venezolanos," in a communication which he addressed to his excellency the minister of foreign affairs of France, dated the 21st of January, 1901, introduced before said department

the claim which is the object of this opinion, in the following form and terms:

As we had apprehended, during the fifteen months which have just elapsed since we were compelled by the revolutionary events to suspend our exploitation, and our last resources being already exhausted, the tropical temperature and depredations of the inhabitants have almost completely destroyed our railway and our immovables; our bridges have been carried away by the waters; the rails have been broken or twisted by the falling of the trees and the intensity of vegetation; our warehouses and deposits of materials have fallen down or are seriously deteriorated; our rolling stock, deprived of any care, has rusted and rotted.

Of our three steam vessels, one was used as target by the combatants of the two parties and sunk; the second had sustained serious damage whilst at the service of the Government of Maracaibo, and we have just sold it for the twentieth part of what it had cost us; the third and at the same time the most important has remained useless since several months past, and we have not been able to repair it for lack of resources. It must be in deplorable condition, which would require large expense to put it in order.

It would at present be impossible for us to value the extent of the damage we have sustained and still more to estimate the cost of its repairs.

The Venezuelan authorities, whether or not legally constituted, have ruined us by their proceedings during these last years and especially during these last eighteen months.

From a financial point of view, they have compelled us, through threats of grievous cruelty and imprisonment of our agents, to employ only at their service the last resources of our company.

From a commercial and industrial point of view, they have placed us in the impossibility of carrying on our double exploitation of the railway and the steamers by violently taking possession of our material and our personnel.

In fact, said authorities have arbitrarily dispossessed us of our rights and of our property.

We shall not be able to prevent them from retaining what they have taken from us or deteriorated, but we consider it to be conformable to the most vulgar equity that they reimburse to us its market value.

To fix that value we could not make a more moderate and less discussable estimation than the one the Venezuelan authorities themselves have fixed in their Congress of 1891.

By the concession granted us by the Venezuelan Government the latter thought it its duty to assign to us an interest guaranty of 7 per cent on a capital of 300,000 francs per kilometer. The length of our line was 60 kilometers; the estimation of the value of our railway amounted, therefore, according to that calculation, to 18,000,000 francs. That sum Venezuela owes us for the railway.

It also owes us an indemnity for the loss or detention of our vessels. (This indemnity the company has fixed, of late, at the sum of 483,000 francs.)

We again apply, Monsieur le Ministre, to your high and powerful intervention to obtain from the Venezuelan authorities the payment of that sum, reduced to its minimum. We do not think we must insist upon the importance which that restitution has for the French holders of our shares. You know the sad situations through which our company has passed since its creation. We ask, however, that you should allow us to tell you the present moment is, in our judgment, the most opportune to act. The Government of General Castro, according to the latest news, desires, it appears, to reorganize the Venezuelan credit.

The German and American authorities have expressed and continue to express their will to cause their subjects and citizens to be paid what is owed them.

We do not doubt but that the French Government will act in the same manner.

In the foregoing statement the facts are summarized upon which the demand of indemnity against Venezuela rests, as well as the manner in which the amount of that liability with reference to the railway has been appreciated; and regarding the steamers that were at the

service of the company the indemnity is based on the primitive cost of said vessels, deducting the sum of 11,100 francs which the company received for the sale of two of said steamers, the *Reliance* and the *Santa Bárbara.*

The representative of the Venezuelan Government, in his reply to the foregoing claim, denies any proving force to the documents presented by the company, as it only consists in a statement of facts which the company itself narrates without any proof of the veracity of its assertions; and said documents, on the other hand, far from being favorable to the company, offer, on the contrary, sufficient merits to support very serious charges against the said enterprise for not having complied with the obligations it contracted and for the abandonment of the railway without any reason that might justify a measure of such a significance, which latter fact renders it responsible for the losses deriving therefrom to the commerce of the regions which the Government intended to benefit by the railway concession in question.

The agent of the Venezuelan Government refers in his reply to the technical report presented by Drs. F. Arroyo-Parejo and Ocanto, which was formulated in the very field and by order of the national executive in December of last year, appreciating that said report shows clearly and scientifically that the larger part of the losses sustained by said company are due to the bad construction of the line in the first place, and then to the abandonment of it, which facts are proved by the official documents produced by the Government and excluding any responsibility on its part; that what he has said of the line must be applied to the steamers the company had at its service, for the losses claimed for that respect are due to causes imputable to the claimant, which abandoned the exploitation without a reason warrantable in law and without taking into consideration the prejudice which by so inconsiderate a step it had to cause to the other contracting party, which up to the present has reserved to itself the action which pertains to it in law to legally claim the same; that regarding the other losses which the company says it sustained on account of facts imputable to armed factions and enemies of the public order raised against the lawful authority of the Government, it is a question determined in accordance with the principles of international law that lawfully constituted Governments which have endeavored by all the means at their disposal to reestablish order and energetically to affirm their authority are not responsible for such prejudice, and in conclusion the representative of the Government of Venezuela argues that the claiming company itself is the cause of the prejudice which it says to have sustained and of those which by the abandonment of the concession it has caused to Venezuela.

The points debated in this claim having been fixed, it pertains to this tribunal to examine the facts that may appear proved and to

establish the responsibilities which those facts may originate as sources of obligations reciprocally affecting the parties interested in this issue.

The Congress of the United States of Venezuela, by law of the 3d of August, 1888, gave its approval to the contract concluded in Caracas on the 25th of July, 1887, between the minister of public works and the Duke of Morny, which had for its object the construction of a railway from Mérida to the Lake of Maracaibo, canalizing the rivers Chamas and Escalante, or some other navigable river. By article 10 of said contract and in accordance with the law on the matter, the Government of Venezuela guaranteed the 7 per cent of the capital that the contractor, his assigns, or successors should issue in bonds, shares, or obligations in representation of the capital of the company.

On the 13th of August, 1888, Gen. Guzmán Blanco, envoy extraordinary and minister plenipotentiary of Venezuela in Paris, concluded with the Duke of Morny an amplification of said contract, and by article 1 of said amplification it was agreed upon that the railway from Mérida to the Lake of Maracaibo would be divided into two sections—the first, starting from the point on the Escalante River which the concessionary would determine and developing in a length of 60 kilometers in the direction of Mérida; and the second section, starting from the terminal point of the first up to the city of Mérida. By article 4 it was agreed upon that on the opening of the first section of 60 kilometers to the exploitation the guaranty provided for would be definitively acquired by that first part of the line; by article 7 it remained established that the Government of the United States of Venezuela guaranteed the 7 per cent of the capital of the company, which capital remained from that moment fixed at 300,000 bolivars per kilometer for the 60 kilometers of the first section and at 350,000 bolivars for each kilometer of the second section.

By a communication which the same Gen. Guzmán Blanco addressed on the 9th of November, 1888, to the minister of public works, this official was notified that the Duke of Morny had on the 28th of September of the same year transferred to the "Compagnie Française de Chemins de Fer Vénézuéliens" the rights which the contract of the 25th of July, 1887, vested in him.

The Congress of Venezuela approved on the 18th of June, 1891, the contract concluded by the minister of public works on the 16th of April, 1891, with Mr. Charles Weber, the representative of the "Compagnie Française de Chemins de Fer Vénézuéliens," modifying that of the 25th of July, 1887, which modification contains the three following articles:

ARTICLE 1. The concession shall remain confined to the first section of sixty kilometers, which will extend from Santa Bárbara to the high road, at a point one kilometer distant from La Vigia, where the line will terminate.

ART. 2. The payment of the guarantee shall be made at the close of each quarter of exploitation in accordance with the primitive contracts. The sum owed to the company shall be

calculated at the rate of 7 per cent on the sum fixed in the contract of the 13th of August, 1888, after deducting the net profits realized by the exploitation. These profits will be the net proceeds of the receipts of any kind that the exploitation of the railway may obtain after deducting the general expense of the company and the exploitation expense.

ART. 3. The sums that shall be paid to the company by way of interest guarantee will constitute but advances which the Government of Venezuela has a right to be reimbursed, as follows: When the profits realized by the company in the exploitation of the railway will exceed the 7 per cent on the capital guaranteed, the Government will have one-half of the surplus until the entire reimbursement of its advances; when the Government shall have been reimbursed said advances, it will continue to participate in the profits to which this article refers until completing the 20 per cent thereof.

The company also obtained by said concession exemptions of duties for the importation of all its material, machines, implements, and other things necessary for the construction and exploitation of the railway, and in fee simple a zone of 500 meters of land on each side of the line of the one pertaining to the nation without any indemnification; it was, moreover, granted it that the wood necessary to the company for the construction works of the line might be freely taken in the national woods and that the company would not, at any time, be burdened with national or State taxes. There was also secured to the company by said contract the exploitation and enjoyment of the revenue of the enterprise during ninety-nine years, at the end of which it was to become with all its appurtenances the property of the nation without any indemnification. In return the company agreed to terminate the work undertaken within a term of two years from the 13th of August, 1888, excepting that a compensation would be given, if necessary, for loss of time occasioned by main force; to transport the mail free of charge, and, for one-half of the tariff price, which would be established, *the employees on commission, the military officers on service and the troops and war ammunitions.*

The "Compagnie Française de Chemins de Fer Vénézuéliens" was constituted in Paris on the 28th of September, 1888, with a share capital of 300,000 francs, the Duke of Morny contributing thereto the railway concession to which the above contracts refer.

The construction of the railway, from the port of Santa Bárbara to the inland having been undertaken early in January, 1889, as appears from a note addressed by the president of the company, under date of the 3d of January, 1880, to Gen. Guzmán Blanco, the works went on with frequent interruptions and serious irregularities, such as the freshet of the Escalante River in January, 1890, which completely inundated all the works of the line, its warehouses, deposits of materials and offices at Santa Bárbara, compelling the company to absolutely suspend the works.

The report presented on that account by Mr. A. Lacasette, chief engineer of the railway, to the ministry of public works, found on pages 126 and 136 of the piece of records No. 1 of the papers which said minister has handed to this commission for its examination, details, in all

its extent, the damage caused by the said inundation, and concludes by asking for an extension of one year to comply with the engagement contracted by the company, which extension was granted by the Government.

By the month of March, 1891, according to the report of the inspector of the railway, transmitted by the President of the State of Maracaibo, with a note addressed to the minister of public works, the locomotive arrived at the site called "Los Cañitos," distant 50 kilometers more or less from the Santa Bárbara station, the starting point.

On the 30th of September, 1891, according to a telegram addressed by the same inspector to the ministry of public works, it was communicated that the locomotives had arrived at kilometer 56, but soon after, in the month of October of the same year, according to report subscribed by the chief engineer of the line, Mr. Curau, inserted on page 66 of the piece of records No. 1 bis, a great flood produced by the swells of Cañonegro River made the water fall on the railway line on a width of more than 2 kilometers, and on account of their extreme violence the currents destroyed everything on the way and covered the distance from 49.50 to 51.60 kilometers up to a height of 50 centimeters and more. In said report it is added that the inundation also threatened the Cañonegro station, the one that was established on the highest land and on which many installations had been made. It was impossible to save a train formed by a locomotive and three platforms. This situation forced the company to suspend the exploitation beyond kilometer 48, it only remaining between Santa Bárbara and Los Cañitos.

In a telegram of the 21st of the same month the inspector announces to the minister of public works that the inundation having continued with heavier force, the Cañonegro station had disappeared, as well as the locomotive that was there, the whole space being now converted into a marsh with very powerful current.

The works of reconstruction at 50 to 53 kilometers, which were inundated, lasted, according to the reports and returns sent by the company to the ministry of public works, until the month of August, 1892, there having arrived at the La Vigia station, on the 28th of July of the same year, a train that inaugurated the traffic between the initial station at Santa Bárbara and the terminal station at kilometer 60.

The company being unable to pay in November, 1892, the coupon of the obligations it had contracted to meet the expense of the establishment of the enterprise, asked for the benefit of the French law of the 4th of May, 1889, and obtained the appointment of a judicial liquidator. At the same time, and having had to enter into new engagements with the Tives-Lille Company and Dyle & Bacalan Works Company (Limited), it was owing said company, according to the balance of the 29th of October, 1892, the sum of 864,482.69 francs. In the impossibility to meet this debt, it asked for an agreement with its

creditors, proposing the exchange of the old obligations for an equivalent number of the new ones, to which the distribution of the assets would entitle them, or, in case of the nonacceptance of that proposal, the payment of the 20 per cent of their credits in fifty annuities. Besides, it was proposed that the contractors of the construction, the only creditors of the company besides the bondholders, would be entitled to receive as many new obligations as the amount of their chirographic credit would contain, 382.25 francs. This agreement having been approved, the liabilities of the company were represented, according to the balance of the 31st of December, 1893, in the following manner:

	Francs.	Francs.
Shares		3,000,000.00
Obligations:		
1,811 old ones	905,500	
42,757 new ones	21,378,500	
		22,284,000.00
Sundry debts		40,979.31
To-order accounts		42,392.15
Guarantee owed by the Venezuelan Government from the 1st of April, 1892, to the 31st of December, 1893		2,205,000.00
Interest due up to the 31st of December, 1893 (obligations)		1,781,541.60
Total		29,353,913.12

On the 1st of May, 1893, the official inauguration of the railway from Santa Bárbara to La Vigia, ordered by the Government of Venezuela, took place, and the exploitation service of the whole line, which had not undergone any interruption during the administrative year of 1893, was violently interrupted about the close of the month of April, 1894, by the earthquake which occurred in that region. The extraordinary violence of the seismic phenomenon caused the line to be injured through the fall of large trees, and the superposed works, as bridges and buildings, to be destroyed, and the traffic entirely paralyzed.

It was necessary at any price to remedy without delay this situation, for, if the railway was left in such a condition, the power of vegetation in Venezuela and the action of the tropical rains would speedily entirely destroy it and render any construction very difficult.

The available resources being insufficient, a loan is indispensable.

Consequently, we have at once convened the gentlemen commissaries for the execution of the agreement and obtained from them, as the representatives of the bondholders, the authorization to contract for an effective loan for 300,000 francs, which sum was considered by common accord as the *maximum* for the reestablishment of the exploitation. According to the data furnished by the direction in Venezuela, we therefore propose to create bonds for a nominal value of 500 francs each, bearing interest at the rate of 6 per cent, which bonds shall be redeemed within the maximum term of ten years. (*Rapport du Conseil d'Administration, 1894.*)

The debt contracted by the company to make the repairs occasioned by the earthquake of 1894 did not confine itself to the sum of 300,000 francs, which had been considered as the *maximum*, but

ascended to 2,000,000 francs, as appearing from the following paragraphs of the report of the administration council corresponding to the year of 1897:

We shall remind you, gentlemen, of the fact that, on account of the earthquake of 1894 and of numerous inundations which were the consequence thereof, our railway sustained from 1895 to 1897 considerable damage, and we saw ourselves compelled, in order to raise the resources necessary for those repairs, to create privileged bonds bearing interest at the rate of 6 per cent a year, free from taxes and redeemable within ten years at the latest.

The creation and issue of 4,000 of those bonds, which constitute the privileged debt of a nominal value of 2,000,000 francs, have been successively authorized by you.

The balance presented on the 31st of December, 1897, offers for that date the following situation:

Liabilities.

	Francs.
Shares	3,000,000.00
Obligations (44,569)	22,284,500.00
6 per cent ten-year bonds (4,000)	2,000,000.00
Sundry creditors' accounts	102,403.09
Interest owed to bondholders on the 31st of December, 1896	6,235,175.00
Total	33,622,078.09

On the 18th of April, 1896, between the citizen minister of public works of the United States of Venezuela, sufficiently authorized by the President of the Republic, and with the vote of the Government council, on the one part, and Mr. Charles Weber, representative of the "Compagnie Française de Chemins de Fer Vénézuéliens," according to a power of attorney executed before the notary Dufour and his colleague, of Paris, on the 21st day of March, 1898, on the other part, a contract was entered into concerning the payment and redemption of the 7 per cent guaranty, the preliminaries and definitive provisions of which are as follows:

6597.

Contract entered into on the 18th of April, 1896, between the Government of the United States of Venezuela and Mr. Charles Weber, representative of the "Compagnie Française de Chemins de Fer Vénézuéliens," concerning the payment and redemption of the 7 per cent guaranty.

Between the citizen minister of public works of the United States of Venezuela, sufficiently authorized by the citizen President of the Republic, and with the vote of the Government council on the one part, and Mr. Charles Weber, representative of the "Compagnie Française de Chemins de Fer Vénézuéliens," hereinafter called "the company," according to a power of attorney executed before the notary Dufour and his colleague, of Paris, on the 21st of March, 1891, which, duly legalized and translated, is hereto annexed, the following contract has been concluded:

PRELIMINARIES.

(a) By a contract of the 25th of July, 1887, entered into between the National Government and the Duke of Morny, and afterwards approved by the National Congress, on the 30th July, 1888, the nation granted to him the right to build a railway from Mérida to the lake of Maracaibo, the Government guaranteeing the 7 per cent on the capital that the contractor, his assigns or successors, should emit in bonds, shares, or obligations, and which would represent the capital of the company.

(b) On the 13th of August of the same year the minister plenipotentiary of Venezuela in Europe made some reformations in the above-mentioned contract, among which the one that the total line of the railway remained divided into two sections, namely: the first, starting from a point on the Escalante River, at the discretion of the concessionary, thence to proceed in the direction of Mérida on an extent of 60 kilometers; and the second, starting from the point where the first terminates and proceeding from thence to the city of Mérida. And by this same contract of explanation and amplifications the guaranty of 7 per cent was fixed on a capital of 300,000 bolivars per kilometer of the first section and of 340,000 bolivars per kilometer of the second. This contract was approved by the Federal council on the 30th of November of the same year.

(c) By a contract of the 17th of June, 1891, reforming those of the 25th of July, 1887, and 13th of August, 1888, above cited, the company, as the cessionary of the railway from Mérida to the lake of Maracaibo, stipulated with the National Government: First, that said concession would remain confined to the first section, to which the reformation of the primitive contract refers, according to paragraph b—i. e., 60 kilometers from Santa Bárbara to a point distant 1 kilometer from El Vigia; second, that the payment of the 7 per cent guaranty would be made quarterly on the sum of 18,000,000 bolivars, fixed as the price of that section, according to the contract of the 13th of August, 1888.

	Bolivars.
(d) The company claims from the National Government for guaranty due until the 31st of December, 1895	4,725,000.00
And, besides, for damage and other motives, the following items: Insufficiency of exploitation, according to returns and notes	396,921.75
Damage sustained on account of the forcible conscription of the laborers of the company	525,509.57
Requisitions according to voucher	96,320.00
Damage and prejudices through nonpayment of the 7 per cent guaranty, which occasioned an emission of 2,616 "obligations," supplementary, of 500 francs each	1,308,000.00
which forms a total of	7,051,751.32

(Seven million fifty-one thousand seven hundred and fifty-one bolivars and thirty-two centimes.)

The Government has rejected the claim of the guaranty during the time elapsed from the 1st of April, 1892 (at which date the line could have been opened to traffic, if it had not been for the forcible conscription of the laborers), to the 1st of May, 1893, the date of the official inauguration; and it has likewise rejected the claim of the sum of two million three hundred and twenty-six thousand seven hundred and fifty-one bolivars and thirty-two centimes (2,326,751.32 bolivars), to which the items of insufficiency, damage, etc., above mentioned refer.

The company, although sustaining in principle the equity of the claims it has formulated, is willing to make important concessions with a view to arriving at an arrangement, and, after long discussions regarding the accounts presented, the Government and the company, by way of a compromise, have agreed upon the following:

ART. 1. The company reduces to one million nine hundred and fifty thousand bolivars (1,950,000 bolivars) the total amount of its claims for the 7 per cent guaranty, liquidated up to the 31st of December, 1895, and for any other cause to which it may be entitled.

ART. 2. For the redemption of the obligation of the Government to continue to pay the same 7 per cent guaranty on eighteen million bolivars, guaranteed capital, for the remainder of the ninety-nine years, terms of the contracts referred to, the company agrees to receive two million five hundred thousand bolivars (2,500,000 bolivars), articles 2, 3, and 4 of the above-mentioned contract of the 17th of June, 1891, remaining in virtue thereof without any effect.

ART. 3. The payment of the one and the other sum is made by the Government in this act delivering to the representative of the company an order on the direction of the Disconto Gesellschaft of Berlin for the sum of four million four hundred and fifty thousand bolivars in par bonds of the Venezuelan loan of 1896 with 6 per cent yearly interest and 1 per cent of redemption, which order shall be provided, besides, with the approval of the representative of the Disconto in Caracas.

ART. 4. The representative of the company declares the nation, therefore, free from all responsibility, as well on account of the 7 per cent guaranty already due as on account of the obligation to pay that same sum in future, and will repeat this declaration on the receipt he will give the direction of the Disconto Gesellschaft.

ART. 5. The company binds itself to have, within the term of six months from the date hereof, *any imperfection undergone by the railway line on account of the change of the course of the Chamas River repaired and to keep the line in working order in accordance with the obligations contracted* in the contracts above referred to, *subject to the penalties imposed by the laws on the matter.*

ART. 6. In all that is not contrary to the provisions of this agreement the rights and obligations acquired by the company in virtue of the preceding contracts herein referred to remain in their perfect force and vigor.

Done in duplicate to one same effect in Caracas, this eighteenth day of April, one thousand eight hundred and ninety-six.

(Signed) C. BRUZUAL SERRA,
The Minister of Public Works.
CH. WEBER,
The Representative of the "Compagnie Française de Chemins de Fer Vénézuéliens."

By article 5 of the above-inserted convention the company was bound to have, within a term of six months from the date of the compromise, any imperfections which the railway line might have undergone on account of the change of the course of the Chamas River repaired and *to keep the line in working order* in accordance with the obligations contracted in the contracts referred to *and subject to the penalties imposed by the laws* on the matter.

The company met the expenses of the interest service and of the redemption of the loan contracted by it to meet the expense of the repairs of the line, occasioned by the earthquake of 1894, and numerous inundations which followed in the years 1895 to 1897, with the proceeds of the negotiation of the 4,450,000 bolivars delivered by the Government of Venezuela in par bonds of the Venezuelan loan of the Disconto Gesellschaft of 1896.

The company collected the amount of the interest and redemption of the bonds of the loan, corresponding to the half years due on the 31st of December, 1896, and 30th of June, 1897, and having kept in its possession, when negotiating the bonds in 1898, the interest coupons due on the 30th of June of that year, amounting to about 79,000 francs, it received from the Disconto Gesellschaft on the 15th of January, 1899, a payment on account of 28,228.94 francs, there remaining, therefore, on the said date as a balance of interest in favor of the company a sum of about 50,000 francs.

These data appear from the two reports presented by the administration council to the ordinary general meeting in its sittings of

the 30th of June, 1898, and 12th of March, 1900. From the first of them the following paragraphs are copied:

On account of the earthquake of 1894 and of numerous inundations which were the consequence thereof in 1895 to 1897, our railway having sustained considerable damage, we were compelled, in order to raise the resources necessary for their repairs, to create privileged bonds bearing interest at the rate of 6 per cent a year, free from taxes and redeemable within ten years at the latest.

The creation and issue of 4,000 of those bonds, which constitute the privileged debt of a nominal value of 2,000,000 francs, of which we have just spoken to you, was successively authorized by you.

We propose you, therefore, to give in payment of this privileged debt, to which they are already appropriated, the bonds of the Venezuelan 5 per cent loan, 1896, which we have received from the Venezuelan Government, in redemption of the interest guarantees it has promised us by our concession act, which bonds figure in the balance you have just approved as stock of the company, for a value of 3,152,000 francs.

As we told you at the beginning, we have a buyer of these bonds of our stock, which bonds are not quoted and the disposal of which is almost impossible for a sum that might enable us to redeem and reimburse the 4,000 bonds that are outstanding and to obtain besides the constitution of an administration fund of 200,000 francs. In view of the fact that the 3 per cent revenue of Venezuela is quoted in London at from 31 to 33 per cent, you will see, gentlemen, as the comptrollers of the compromise and as your administration council, that the company will obtain by this combination a realization under unexpected conditions of these bonds of the 5 per cent Venezuelan loan of 1896, since these realizations will take place at 70 per cent.

And from the second report, dated the 12th of March, 1900:

The funds that had remained available to the company after the reimbursement of the ten years' bonds would have constituted for it, *in normal times*, a sufficient administration fund, but the revolutionary events which almost uninterruptedly have occurred up to the present have rapidly consumed them.

These resources having been exhausted and in view of the continuation of the revolution the commissaries of the compromise, on the 16th of August, 1899, authorized the council to borrow up to the amount of 100,000 francs, the sums it would require to meet the situation, *whether there was a possibility to proceed with the exploitation or the necessity of suspending it.*

The coupons of the 5 per cent Venezuelan loan of 1896, due on the 1st of July, 1896, representing about 79,000 francs, were given as security for an advance, which amounted to 58,215.95 francs.

This advance was reduced 28,228.94 francs on the 15th of January last through the part payment made to us on that date on the coupons given as security.

In short, the debt we have in favor of our lender is this day of 29,987.01 francs.

He has in his possession a pledge of about 50,000 francs, nominal value, represented by the receivable balance of the aforesaid coupons.

From the narrative above made, from all the modifications made in the primitive contract which had for its object the construction of the railway from Mérida to San Cárlos, from the different cases of main force which at different times suspended the construction works or largely destroyed them, from the agreements concluded between the contracting parties with a view to avoiding the sometimes insurmountable obstacles which nature opposed to the stability of the enterprise, and, finally, from the compromise concluded on the 18th of April, 1896, between the Government of Venezuela and the repre-

sentative of the "Compagnie Française de Chemins de Fer Vénézuéliens," the following facts appear sufficiently proved:

On the 1st of July, 1898, which date it is convenient to establish for the due separation of the time to which the claim presented refers, all the engagements contracted by the Government of Venezuela with respect to the company, as the concessionary of the contract concluded with the Duke of Morny in August, 1888, and in virtue of the subsequent convention directly concluded between the Government of Venezuela and the representative of the company, had been exactly complied with. The obligations contracted by said Government by the contracts of the 13th of August, 1888, of the 18th of June, 1891, and the 18th of April, 1896, were: To give in fee simple to the contractor 500 meters of national lands on each side of the line on the whole length thereof; to allow it to take in the national woods all the timber required by the enterprise for the construction of the works of the line; to permit the introduction, free from duties, of the machines, materials, implements, and other utensils necessary for the construction of the railway; not to impose upon the enterprise at any time any national or state contributions; to grant extensions of time for the conclusion of the work in cases of main force that might stop the works of construction, and, finally, to deliver to the company 4,450,000 bolivars in par bonds of the Venezuelan loan of the Disconto Gesellschaft, 1896, in payment of the sum of 1,950,000 bolivars, to which it reduced the total amount of all its claims for the 7 per cent guarantee, liquidated up to the 31st of December, 1895, and for *any other* cause to which it might be entitled, and, besides, for the redemption of the obligation of continuing to pay the same 7 per cent guaranty on 18,000,000 bolivars, guaranteed capital, for the rest of ninety-nine years, for which respect the company agreed to receive 2,500,000 bolivars. All the aforesaid obligations were in due time complied with, as appearing from the voluminous records relating thereto, and as is acknowledged by the company itself. The Government of Venezuela appears to be the debtor in the month of June, 1899, only of the sum of 50,000 francs for balance of interest on the bonds of the loan of 50,000,000 bolivars, which the company received, which interest corresponded to the first six months of 1898, and that debt is not one of the Venezuelan Government as a contractor with the "Compagnie Française de Chemins de Fer Vénézuéliens," nor said Government could pay it separately and directly to the company, as the latter has pretended, but it formed a part of an obligation contracted by the Republic with the Disconto Gesellschaft, of Berlin, with which the loan was contracted for and which is called by the same contract to receive the funds destined to the gradual redemption and the payment of interest.

Article 3 of the contract concluded on the 18th of April, 1896, with the representative of the French company explicitly says:

> The payment of the one and the other sum is made by the Government in this act, delivering to the representative of the company an order on the direction of the Disconto Gesellschaft of Berlin for the sum of 4,450,000 bolivars, in par bonds, etc., which order shall be provided, besides, with the approval of the representative of the Disconto in Caracas.

Payment means cancellation, extinction of a debt, and, therefore, between the Government of Venezuela and the French company, as parties to the contract which had for its object the construction and exploitation of the railway from Santa Bárbara to La Vigia, any credit or claim that on account of the guaranty or for any other cause was possessed by the company against the Government remained legally extinguished in virtue of the provisions of articles 1, 2, and 3 of said agreement of the 18th of April, 1896. Any rights pertaining to the company as holder of coupons of interest, due and unpaid, of the loan of 50,000,000 bolivars of 1896 are a subject entirely strange to the juridical relations established between the Government of Venezuela and the company on account of the railway contract and completely alien to the facts connected with the compliance with the obligations derived from that contract.

As a proof of this inference, see Article VI of the Venezuelan-German protocol signed in Washington on the 13th of February, 1903, which runs as follows:

> The Government of Venezuela undertakes to make a new satisfactory arrangement to settle simultaneously the 5 per cent Venezuelan loan of 1896, which is chiefly in German hands and the entire exterior debt. In this arrangement the state revenues to be employed for the service of the debt are to be determined without prejudice to the obligations already existing.

For the more precise appreciation of the grounds on which it is pretended to base the present claim, it is to the purpose to examine the steps taken by the direction of the "Compagnie Française de Chemins de Fer Vénézuéliens" near the ministry of foreign affairs of France posteriorly to the arrangement to the 18th of April, 1896, steps that moved the chief of said ministry to exercise his diplomatic action through the consul of France in Caracas based on the data furnished by the company.

In a letter addressed by the administrator of the company to the minister of foreign affairs in Paris on the 29th of November, 1898, said administrator asked for the intervention of the French Government to secure for his countrymen in the employ of the company in Venezuela the protection of their persons and property and compel the Government of Venezuela to comply with its engagements to its creditors, adding in said letter that the administration was informed by the Disconto Gesellschaft, of Berlin, that the Imperial Government would simultaneously interfere to the same purpose,

and in support of his request he recalled the letters which had been addressed to the ministry dated the 2d and the 25th of June, 1898. It was in virtue of that request that the ministry of foreign affairs addressed on the 7th of December, 1898, to Mr. Quiévreux, in charge of the archives of the legation of France, the official note inserted in these records under No. 8, in which the following instructions are communicated to him:

You are not unaware that the "Compagnie Française de Chemins de Fer Vénézuéliens" was placed, in April, 1896, by the government of Caracas, under the necessity of accepting for the redemption of the guaranties that had been given in the concession of the enterprise, certain bonds proceeding from an especial loan of 50,000,000 bolivars, negotiated in Berlin. The Disconto Gesellschaft, in charge of the operation, distributed those redeemable bonds to the different European railway companies and our fellow-countrymen for all payment of a debt already due, of more than 7,000,000 francs, and for the redemption of 90 annuities of 1,260,000 francs had to content themselves with a net sum of 3,200,000 francs, represented by bonds of said loan.

The moneys proceeding from the payment of interest and from the sinking service have constituted for two years the only resources with which the French company has been able to continue its exploitation. But the deliveries have ceased this year, or, at least, the Disconto Gesellschaft has not been able up to the present to meet only one of the monthly payments of 1898.

In view of the suspension of payments of this 5 per cent loan of 1896, our countrymen declare that they find themselves under the necessity of abandoning their enterprise, which will lead to the definitive loss of the French capital which has been invested therein, and the amount of those capitals, I am assured, is not less than 33,500,000 francs.

In order to prevent this eventuality, that the company already considers as imminent, it is necessary that the Venezuelan Government determines to immediately pay a sum of 210,000 francs, including:

	Francs.
For interest due	160,000
For bonds redeemed	50,000

If the information given me corresponds with what yourself may know concerning the financial situation of the French company, and, in case you know that, under the pressure of the legation of Germany, the ministers of Venezuela may be compelled to comply within a short delay with all or part of the obligations to the European creditors, you must procure that the rights of our fellow-countrymen are taken into equitable consideration.

For the date of the above-inserted note, the 7th of December, 1898, the French company had alienated the 4,450,000 francs in bonds of the loan of 1896 and only had an interest of about 79,000 francs in coupons due on the 1st of July, 1898; so that it induced the ministry of foreign affairs of France, by its erroneous indications, to ask from the Government of Venezuela the immediate payment of 210,000 francs as owed for redemption and interest of bonds which no longer pertained to it, affirming, however, that that redemption and that interest represented for the company a vital necessity and that without their payment it would find itself in the imperious case of abandoning its enterprise.

It thus appears from the resolution passed by the general meeting of shareholders held on the 30th of June, 1888, by which said meeting,

approving the proposal of the administration council and of the committee of commissioners of the obligations, authorized said council:

1. To deliver on the 1st of July, 1898, all the bonds of the 5 per cent Venezuelan Loan of 1896 that the company had in deposit with the Disconto of Berlin, upon:

(A) The delivery of 3,619 ten-years' privileged 6 per cent bonds of the company.

(B) A cash balance of 390,500 francs.

2. To invite to the reimbursement, on the 15th of June, 1898, at 500 francs par, of the 381 privileged 6 per cent bonds, the numbers of which are indicated, and to separate, in order to meet this reimbursement, the sum of 190,500 francs from the 390,500 francs received as said in article 1.

The balance of 200,000 francs was to serve as working fund.

Besides, as already shown, the 79,000 francs, more or less, left in favor of the company for interest of the coupons due up to the date of the negotiation of the bonds of the loan remained represented in the sum of 50,000 francs, more or less, in January, 1899, for a part payment made by the Disconto of 28,228.94 francs and that nominal value of the coupons was utilized by the company in obtaining a loan and leaving them as security for the sum of 30,000 francs, more or less.

The argument that the company has adduced against the Government of Venezuela by making the existence of the company depend on the opportune payment of the redemption and interest of the bonds of the loan is inconsistent, for it is a fact that it considered convenient to its interest to negotiate those bonds when it thought it opportune so to do, availing itself of an offer of 70 per cent, which it considered highly advantageous.

Regarding the imposition which it is adduced the Government of Venezuela exercises against the company, compelling it to accept the 4,450,000 francs in bonds of the loan in payment of a debt of 7,000,000 francs already due, and for the redemption of ninety annuities of 1,260,000 francs each, while it can not truly be maintained that the compromise between the Government of Venezuela and the representative of the company took place in that manner, as it was the result of the free and spontaneous will of the two contracting parties, circumstances may certainly be pointed out, which show that the sum paid in bonds by the Government of Venezuela and which gave the company the opportunity of receiving in cash the sum of 2,508,000 francs represents, in view of the occasion on which the arrangement was made, the only possibility the company could obtain to find itself in a position to undertake and carry out the works of repairs of the line, which it indispensably required to put it in working order on account

of the damage caused by the earthquake of 1894, and of the subsequent inundations until 1897.

The Government of Venezuela had contracted the obligation of guaranteeing the company the 7 per cent on the capital of the enterprise during ninety-nine years, taking as a basis for the computation of the capital the sum of 300,000 francs per kilometer on the length of 60 kilometers—i. e., 18,000,000 francs—and also taking as a basis to fix the sum corresponding to the 7 per cent the proceeds of the enterprise in its exploitation, deducting from the income the general administration expense and the exploitation expense. The very nature of this engagement shows that the company was to constitute itself with a capital of at least 18,000,000 francs, at which the cost of the construction of the railway was estimated, and that it was to contribute, out of its own resources, all the sums indispensable for the completion of the work and the repairs indispensable for keeping it in constant exploitation. The articles of association of the company and documents thereto annexed show that the capital with which it constituted itself was only 3,000,000 francs; that it immediately created bonds to raise resources, which amounted to more than 18,000,000 francs, bearing interest at the rate of 6 per cent, and that from the year 1892 the company, being unable to pay that interest, had to ask for and obtain the appointment of a judicial liquidator, and the following year, 1893, asked for the conclusion of a concord with its creditors.

The inauguration of the railway took place in March, 1894, and in the same year, in the month of November, there occurred the earthquake that destroyed the line and caused the suspension of the exploitation, and thereupon other great inundations took place until the year 1897.

These disastrous accidents found the company in a state of insolvency, without possibility to make use of any credit, bound as it was by a concord with its creditors and without any other basis to raise funds to undertake the works of reconstruction than the guaranty promised by the Government of Venezuela that could not be rendered effective until the exploitation of the railway had been perfectly assured, in permanent conditions by the firmness and solidity of the railway line on its whole length.

The conclusion of the agreement with the company, which put an end to the guaranty, took place on the 18th April, 1896, and at that time the suspension of the traffic of the railway subsisted on account of the works of repairs which the company had to undertake after the earthquake of 1894, and that continued until 1897. Still, in the month of November, 1896, the national executive determined to defer to a request presented by Mr. J. Brun, as director of the railway, having for its object to ask for the extension of the time fixed by article 5 of the

contract of the 18th of April of that same year, in order to have repaired within a term of six months the damage that the line had sustained through the change of the course of the Chamas River, and the president of the Republic was pleased to defer to that request by granting an extension of three months, from the 15th of October above referred to.

The precarious condition of the works of repairs and the continual dangers to which the line was exposed by the deviation of the Chamas River, are technically shown in the report addressed by the inspector of the line, Mr. Leonidas Vargas, in February, 1897, to the ministry of public works. From said report are taken the following paragraphs:

The principal station, Santa Bárbara, is 14 meters on the level of the sea and 5 meters on the low waters of the Escalante River, which in its freshets of 1890 ascended 3.50 meters over its level, overflowing in all its length and inundating the farms on its banks.

The terminal station at kilometer 60, "La Vigia," is 128 meters above the sea level on a high plain having a 2 per cent grade as far as kilometer 55, where the railway crosses the creek "Bobuqui," then comes the creek "La Arenosa," and on the distance to 46 kilometer there are found "Cañonegro" and "Los Cañitos."

In the year 1889, in December, the Chamas River had a large freshet by which corpulent trees were dragged along that were detained near "La Vigia," obstructing its natural bed with heaps of dirt, for which reason the current broke the banks that sloped "El Vigia" and inundated all the woods existing between kilometers 52 and 41 of the line from Santa Bárbara to "La Vigia."

In 1890 the work of repairs began. Every one did his duty, but according as the river went on with its freshets it went on destroying all that man opposed to its caprices, always led by the unevenness of the ground, which presented a 2 per cent grade, and the waters invaded the woods and inundated a portion of the line.

Then comes the earthquake, the trepidations of which caused many a damage on the cordilleras of the Andes and adjoining plains, producing a larger unevenness in the woods lying between La Culebra and Caño del Padre, through which the railway passes, leaving rails in the form of Nos. 3 and 5, and of the letter S, curves straight and straight curves; springs of dark mud having a nauseous odor in the drains and culverts, flow 20 and 25 centimeters wide and incalculably deep, through which the invading waters of the Chamas entered, excavating the embankments of the rails and separating from the ground the sleepers that remained adhered to the rails: these were in the form of a hammock swinging when the rolling stock passed, moved by force of arms, that the mercantile intercourse might not stop.

From the year 1894 up to the present the French company has made strenuous efforts to restore the line to its normal condition. To that purpose they had built a siding from 43 to 46 kilometers, where the Chamas forms a drain consisting of two curves, through mud pits from 150 to 200 meters wide on each side. In November, when this siding was completed and tried, another freshet of the Chamas took place, stronger than the preceding ones, and inundated the line, dragging along an alluvial sediment that has stopped up the 70 meters' light of the "Los Cañitos" bridge, and the waters have spread on the banks and left the neighboring villages in a flood three and four feet deep and the rails with 20 or 40 centimeters of water over them. This I saw in my last visit to the line.

Now the company again undertakes the reconstruction, according to a document I have before me, and also undertakes to carry the Chamas to its former bed, *the only remedy which, in my judgment, can save the line of the railway, for else all the ballast that the Cordilleras of the Andes may give will not be sufficient to resist the violence of 60 meters in a minute that the Chamas possesses in the currents of the La Libertad straight line, from 43 to 46 kilometers, as it would be dragged away according as it would be put in place.*

The situation of the company regarding its repair works and the reopening of the railway traffic in February, 1897, after the expiration of the extension granted by the national Government by its resolution of the 15th October, 1896, is shown by the following letter of the director of the exploitation:

Line from San Cárlos to Mérida.—Direction of the Exploitation.

L. R., No. 329.] COMPAGNIE FRANÇAISE DE CHEMINS DE FER VÉNÉZUÉLIENS,
Santa Bárbara, February 26, 1897.

CITIZEN MINISTER OF PUBLIC WORKS:

We have the honor to inform you that communications are reestablished and that the trains and locomotives of our company are regularly and without transfer running between Santa Bárbara and El Vigia *from this date.*

BREYSSLOU.
For the Director.

During the administrative year of 1897, and the first six months of 1898, the railway company made use in its relations with the national Government of the exemptions granted it by the concession as regards the importation of materials as appearing from the records 15 and 16 of the archives of the ministry of public works. The direction of the exploitation omitted in the year 1897 to send to said ministry the statistical tables which it was its duty to periodically send to it, conformably to article 99 of the regulations on railways. The agency of the French company at Maracaibo said to the ministryof public works, in a communication dated the 17th of May, 1897, that in virtue of instructions communicated to him from Santa Bárbara del Zulia by Mr. Julio Brun, director of the exploitation, the company in Paris had since long ago taken charge of the opportune remission of said data to the ministry.

From the tables sent to the ministry of public works, corresponding to the months from January to November, 1898, forming the records No. 17, it appears that the exploitation in said months left the company an unfavorable balance amounting to the sum of 184,418.13 francs.

During the period running from the 1st of January to the 20th of May, 1899, of direct and regular exploitation, the company could by dint of economies and in full crop realize a favorable balance of 30,000 francs, the receipts amounting to 172,593.01 francs and the expenses to 141,883.28 francs. From the 20th of May to the 12th of October, at which date the actual suspension of the exploitation took place, owing to the nonexistence of regular traffic, the receipts rapidly decreased and even ceased entirely, while the expense did not undergo any reduction. The deficit of that period amounted to about 60,000 francs, the receipts amounting to 83,153.33 francs and the expense 141,869.46 francs, and that deficit consuming the preceding favorable balance and the remainder of the resources of the company.

In the report of the administration council presented to the shareholders on the 12th of March, 1900, from which the foregoing data are taken, it is said that the Government of Venezuela was owing the company on the 31st of December, 1898, a sum of 174,097.20 francs for expense of transportations, regularly ordered by its official mandatories, and that on the 31st of December, 1899, the same Government was owing the sum of 203,529.70 francs.

The balance contained in the above-mentioned report, corresponding to the 31st of December, 1899, gives the following indication of the assets and liabilities of the company:

Assets.	Francs.	Liabilities.	Francs.
First establishment	16,352,175.70	Shares	3,000,000.00
Deposit of stores in Venezuela	84,757.98	Bonds, 44,569, of 500 francs (Francs. 22,284,500.00)	
Money in safe and in banks	1,827.35	Difference between the nominal value and the proceeds realized (7,649,465.50)	
Debtors: (Francs.)			14,635,034.50
Sundries (81,443.34)		Sundry creditors	99,117.16
Government of Venezuela (203,529.70)	284,973.04	Bondholders' interest on the 31st December, 1899 (article 2 of concord)	8,439,083.35
Profit and loss (1,010,417.59)			
Interest owed bondholders on 31st December, 1889 (8,439,083.35)	9,449,500.94		
Total	26,173,235.01	Total	26,173,235.01

The foregoing indication throws light enough to make the financial situation known in which the "Compagnie Française de Chemins de Fer Vénézuéliens" found itself on the 12th of October, 1899, at which date it abandoned its exploitation for lack of resources to continue to meet the most indispensable expense, which in proper commercial terms is called state of bankruptcy.

With assets represented by investments or dead capital of 16,436,933.68 francs, 1,827.35 francs in cash, and 284,973.04 francs in credits receivable, and liabilities of 14,734,151.60 francs in bonds, and 8,439,083.36 francs in interest, subject to a concord and without any credit, the company could not but abandon, as it did, the exploitation of the enterprise for lack of resources.

Such is the situation of every merchant who, being in want of the most indispensable means to continue the movement of his business, is constrained to suspend it and call his creditors to the liquidation and distribution of their credits.

The "Compagnie Française de Chemins de Fer Vénézuéliens" did not act in this way, but, protected by a concord which favored both its interest and that of its creditors, preferred to the liquidation and distribution of its assets declaring the Government of Venezuela responsible for the bad condition of its finance, for the lack of resources to continue the traffic, for the paralyzation of this on account of revolu-

tionary movements, of the use of its steamers, which was the origin of the only important credit contained in its assets and the cause, through default of payment, as it pretends, of the ruin of its concerns.

The charges formulated by the company against the Government of Venezuela, and as appearing from the reports of the 12th of March, 1900, and the 30th of the same month, 1901, and from its communications to the ministry of foreign affairs of France, are summarized in the paragraphs of a communication addressed to the minister of foreign affairs by the president of the administration council on the 30th of March, 1901, running as follows:

MONSIEUR LE MINISTRE: We have just been officially informed, both through Mr. Quiévreux, consul of France in Caracas, and the "Compagnie Française de Cables Télégraphiques," that the minister of public works of Venezuela intends to have an inventory of our goods made to give the enjoyment thereof to an Italian.

We have the honor to transcribe to you, hereinafter, the communication such as it was addressed to us:

"PARIS, *March 18, 1891.*

"COMPAGNIE FRANÇAISE DE CHEMINS DE FER VÉNÉZUÉLIENS,
15 Avenue Martignon, Paris.

"GENTLEMEN: As a complement of our telephonic communication of Friday last, we have the honor to convey to you herein the copy of a telegram we have received from Mr. Quiévreux, chargé d'affaires de France in Caracas.

"Kindly inform the 'Compagnie Française des Chemins de Fer Vénézuéliens' that minister of public works, considering that it abandons its Santa Bárbara line, has just appointed a commission in charge of proceeding to an inventory, this with a purpose to give this line to an Italian named Salvatore Botaro.

"Kindly accept, gentlemen, the assurance of our distinguished consideration.

"COMPAGNIE DE CABLES TÉLÉGRAPHIQUES."

(Signed) ——— ———.

This decision of the Venezuelan minister would constitute an actual and definitive spoliation of the rights and goods of our fellow countrymen, share and bondholders.

That ministry of Venezuela pretends to justify its decision by saying that we abandon our line. It does not even do us the honor of announcing its project to us, as it did not do us the honor of acknowledging the receipt of our claims and of the reasons that compelled us to suspend our exploitation in October, 1889.

Those reasons, Monsieur le Ministre, we have communicated to you and were numerous and important. One of them would have been sufficient to justify our suspension. Our finance had been exhausted only to satisfy the exactions of the agents of Venezuela who did not cease to seize our steamers, trains, material, personnel, and who even in the moments of calm in the revolutionary disturbances opposed our transporting merchandise for which we were organized.

If we had been in due time reimbursed by the Venezuelan authorities the expense and disbursements of all kinds we had to make for them, we would have been able to continue, reorganize, and recommence our exploitation.

But nothing of that has happened.

We have never been honored with a proposal or even the least communication.

Now, only because we are French, because no diplomatic relations exist between Venezuela and France, and because, according to the idea spread over all the country, *everything can be done to the French without having anything to fear*, it is finally desired to rob us of what remains of our property, violating the seals with which we have provided it in the presence and with the assistance of the Venezuelan authorities and our consular agent.

The records, certainly too voluminous, that our company possesses in the ministry of foreign affairs, teem with official and unofficial evidence of the vexations suffered by our fellow countrymen, either agents or not of our French company, and even by our national flag. It would, rigorously, be sufficient for us to respectfully remind you, Monsieur le Ministre, of the fact that Mr. Brun, a French engineer, *was murdered* in May, 1898, in his post as director, in our directive house, at a window over which the French flag was floating, by a Venezuelan soldier, who obeyed the orders of the Venezuelan general, Eleazar Montiel. The flag was pulled down and dragged along in the mud, etc.

Through a prudence which we have thought would be appreciated we have avoided to revive these sad incidents.

Thenceforth, in 1898 and 1899, several of our service employees have been arrested, or threatened to be arrested, by generals and even by the brother of the late President of the Republic, Mr. Andrade, the president of the State of Zulia. Our steamers have been seized, deteriorated, and destroyed, of which a proof is offered by our steamer *San Cárlos y Mérida*, which, anchored in the harbor of Maracaibo, has served as target for the marksmen of both parties and finally was sunk by their bullets.

We request you, Monsieur le Ministre, to excuse our insistence in asking for your intervention.

The question, in effect, is the interest the importance of which is considerable for our fellow countrymen, not only from the particular point of view of the millions which the bondholders of our company represent, but from the general point of view of the moral and commercial influence that France possessed in Venezuela and which it is about to lose forever.

Venezuela is a rich country. It would suffice for it to become a very prosperous country, that its interior organization should be regenerated.

Monsieur le Ministre, permit that we finally appeal to the protection of France in favor of the French interests we represent, that we renew to you the claims formulated in our letter of the 17th of January, 1901, and that we protest with all our force against the new abuse that seems to threaten us.

Kindly accept, Monsieur le Ministre, the assurance of our high consideration.

E. REYNAUD,
The President.

The integral insertion of the foregoing note will facilitate the chronological examination of the facts therein mentioned, abstaining in this examination, as becomes our duty of an impartial judge, from all appreciation that is not entirely conformable to truth, that does not appear proved in the voluminous records to which the aforesaid note refers, that is not inspired with the principle of justice and absolute equity upon which the arbitrator must base his decisions.

In this examination of the evidence presented by the very claiming party, consisting in the declarations of the employees of the company themselves, the first place pertains, by order of dates, to the accident of the killing of Mr. Brun, a French engineer, which took place on the 15th of July, 1898, in order to ascertain whether it is true, as affirmed by the president of the company, that Mr. Brun was murdered in his post as director in his own house, at a window over which the French flag was floating, by a Venezuelan soldier, who obeyed the order of the Venezuelan general, Eleazar Montiel, and pulled down and dragged the flag along in the mud, etc.

On the 1st of May, 1898, General Eleazar Montiel, late governor of the "Colon" territory, proceeding from Maracaibo on the steamer *Progreso*, landed with troops of the Government at Santa Bárbara. The said steamer went down the river Escalante, carrying 120 conscripts and the authorities of Santa Bárbara. The following day the steamer *Santa Bárbara* arrived, bringing on board a guard of 12 soldiers of the Government. On Wednesday, the 3d of May, at midnight 150 insurgents, commanded by a General Figuera, took possession of the steamer *Santa Bárbara* after short, but severe fighting, in which 5 soldiers of the Government and the boatswain of the steamer were wounded. During the 4th, 5th, 6th, and 7th of May the revolutionaries, masters of the territory, cut the telegraph and made the steamer *Santa Bárbara* set out for Santa Cruz del Zulia, a village situated up the Escalante River, with some of their men, scattering their partisans in guerrillas along the rivers to wait for the arrival of the troops of the Government. They had taken possession of 6 empty wagons and formed a barricade on the landing pier. On Sunday, the 8th of May, at 6.30 in the morning, a lively musket firing was heard at some distance from Santa Bárbara, while the troops of the Government penetrated by the bottom of the village, and a lively musket firing broke out in the streets.

Now comes the textual part of the report of Mr. Peysselon, chief agent of the company at Santa Bárbara:

Notwithstanding that the French flag was hoisted on all the windows and angles of the building of the direction, this building was not respected. Five bullets of a precision arm were directed to the windows only, and while Mr. Brun was closing the shutters of one of them he was very seriously wounded in his right hand.

Without hesitation and without a deliberated purpose we can say that the bullet which so unfortunately wounded Mr. Brun proceeded from one of the arms of the soldiers of the Government. The guerrilla which executed this sad deed was commanded by Eleazar Montiel, which affirmation I am in a position to make, because when I went to look for a physician, almost immediately after the misfortune, the first and only known person I saw was Montiel. When I went out the second time, I found his lieutenants, Beliais and José Acosta, with him. To make the first cure of Mr. Brun, it was necessary to wait a moment for the arrival of the physicians. Mr. Brun sustained then a very painful and long operation and the doctor did not conceal from us that his state was a serious one.

Mr. Peysselon completes his statement in the following terms:

Steps were taken immediately near the generals and the legal authorities to obtain the transportation of Mr. Brun to Maracaibo on the steamer *Progreso*. These steps had no result.

At 2 o'clock in the afternoon the troops were masters of *Santa Bárbara*. On Monday morning Generals Eleazar Montiel and Zuleta set out toward Santa Cruz with 100 men to retake from the insurgents our steamer *Santa Bárbara*. Several forces took part with them in the expedition of Tuesday. Our steamer, which the revolutionaries had led going up the Escalante to beyond Santa Cruz, amidst numerous risks which that waterway, unnavigable in that part, offered, was recovered on Wednesday by the troops of the Government and brought back to Santa Bárbara, towed by barks, as the revolutionaries had taken away the bearings and cushions of the axle in order to immobilize her.

By order of the legal authorities our shop immediately made the necessary pieces and within a few days put the steamer in navigating order.

On Thursday morning at 10 o'clock our director, Mr. Brun, who was a little better, was embarked on the *Progreso*, bound for Maracaibo, and died on board at 8.45 p. m. on account of his wound having gangrened.

Such was the information which the agent Peysselon transmitted to his company while the events above narrated took place, affirming, without hesitation and without a deliberated purpose, that the bullet which wounded Mr. Brun had been intentionally directed by one of the soldiers of the Government, under the orders of Gen. Eleazar Montiel.

Let us now see which was the declaration made by the same Mr. Peysselon before the consul of France at Maracaibo on the 19th of May, 1898, regarding the events of the 8th of May. It is as follows:

On Sunday, the 8th, the legal troops carried on the steamer *Progreso* arrived at 12.30 at the village. Under these circumstances we must foresee a battle in the streets. This foresight advised us to immediately shut all the doors and windows of our dwelling house. While I was closing a window overlooking the square, Mr. Brun was closing that of his room, which overlooked the Santo Domingo street. At the same moment the musket firing began in that street, the window was closed already, but Mr. Brun had not yet had time enough to remove his hand from the lock, when a bullet of a precision arm pierced the window through, twisted the lock in an extraordinary way, and pierced his hand through and through, throwing the chips on his breast.

Mr. and Mrs. Crinière, who inhabit the house of the direction, assisted Mr. Brun in this sad circumstance. On my part I immediately went out to the square to have a physician called, met with twenty armed men of the Government, and the only person known to me to whom I could apply was Gen. Eleazar Montiel, the chief of the force. As the doctor had not arrived, I went out for a second time and saw the same General Montiel, with Beliais and Acosta, his lieutenants, and another guerrilla of the Government. Then, when the first panic was over, Drs. P. Rosales and T. Cohen could be called and immediately came to assist our friend.

To complete my declaration, I address you a copy of the information presented by Doctor Cohen, the physician of the company, who assisted Mr. Brun until his death. I must add that since the morning we had heard the dull noise of a distant musket firing; that in view of the situation prudence advised us to hoist the French flag on all the fronts of the house, which we did at about 10 o'clock in the morning, when the public rumor announced that the *Progreso* was sailing up the river with Government troops. In spite of our three colors, you see it well, Monsieur le Consul, our house was not respected and five bullets were shot on our windows. Mr. Brun remained at Santa Bárbara *until the first occasion that presented itself for him to come down to Maracaibo.* He was embarked on Sunday at about 10 with the greatest attention, and his state did not permit us to foresee so fatal and prompt an end.

The bookkeeper of the company, M. A. Crinière, declares, before the same consul of France, at Maracaibo, in the following words:

In the morning of Sunday, the 8th of May, fearing a serious encounter of the two parties, we hoisted at about 10 o'clock on the house of the direction flags with our French colors, two on the windows of the hall overlooking the square, which were hoisted by Mr. Brun himself, helped by Miguel Labarca, and two others which were hoisted by me, a very large one in Santo Domingo street. *It was through this street that the Government forces flanked the village, and the room in which Mr. Brun was wounded while closing a window overlooked this street.* The fifth flag was placed by the same Labarca on the entrance barrier overlooking the road.

We were intranquil because we did not see or hear anything, when at half past twelve it was known that the steamer *Progreso* was at the entrance of Santa Bárbara. A great movement took place and a white flag was seen at the station, *which tranquilized us a little*, as we thought that the two parties would make terms. Unfortunately it did not happen so, and a strong volley broke out at that moment in Santo Domingo street. It was that the soldiers sent from Maracaibo arriving by the bottom of the village *attacked the forces of Generals Figuera and Pozo in rear.* Immediately Messrs. Brun, Peysselon, and myself ran in order to protect ourseleves from the bullets to close doors and windows. I had already heard behind me as the noise produced by the fall of gravel. It was a bullet that had pierced through the window of the hall, on which there were two flags and which overlooked the square; almost at the same moment I heard Mr. Brun cry, "Ah! I am wounded." We all ran to help him and saw his right hand horribly mutilated by a bullet. This happened in one instant. We furnished the first attentions that so serious a wound required and, the musket firing, being over Mr. Peysselon ran in search of a physician. I followed him in search of water and saw soldiers of the Government keeping the entrance of the house of the direction which overlooked the road and the French flag floating over their heads, which did not prevent them from preparing to fire at us, and fortunately Mr. Peysselon had presence of mind enough to cry "French company," which was sufficient to prevent that they should carry out their purpose, and then Mr. Peysselon went out.

In view of the manner in which the two presential witnesses, who were high employees of the company, relate the events of the 8th of May and the manner in which the wound of Mr. Brun took place, the affirmation of Mr. Peysselon that the bullet which caused the wound of Mr. Brun was intentionally directed against the window where the latter was, can only be considered as entirely groundless and precisely suggested *by the deliberate purpose to attribute a mischievous intention to a merely accidental act.* The declaration of the bookkeeper of the company that on hearing the musket firing in the street Monsieurs Brun, Peysselon, and himself ran to close the doors and windows to protect themselves from the bullets, proves to evidence that that impulsive movement of self-preservation, the desire of protecting themselves from the manifest danger offered by the entrance of the bullets fired in all directions by the forces combating around the house, was precisely the origin of Mr. Brun's presence at the fatal point and moment to be a victim of the deplorable accident that occasioned the wound of his right hand. To style this event as *murder* of the director of the company in his post of director in his own house, at a window over which the French flag was floating, by a Venezuelan soldier, who obeyed orders of General Montiel, is to pretend to entirely disfigure the natural and frequent accidents of a deed of arms, to convert them, as it has been attempted in the present declaration, in a characterized proof of outrages suffered by French citizens, agents of the company, and even by the French flag itself.

The very circumstance that the flag was pulled down and dragged along in the mud at the moment of the wound of Mr. Brun, as is roundly affirmed by the president of the company, in his note to the minister of foreign affairs of France, strongly appealing to the pro-

tection of France in favor of his fellow-countrymen and of the French interests, proves to be a mere invention destined to impress the mind of a high French officer against the Venezuelan nation.

From the documents inserted in the records it appears that General Montiel was the chief of the forces that went up the Escalante River and recovered from the revolutionaries the steamer *Santa Bárbara*, the property of the company, which he brought back to the harbor of the same name; that the day after his return he put at the disposal of the company the steamer *Progreso* to the purpose of carrying Mr. Brun to Maracaibo; that it was said chief who approached Mr. Peysselon when the latter went out from the house, charging him with sending for a physician to take care of the former; that Mr. Peysselon durst not go himself in search of the physician, but returned to the house to wait for him; that seeing that the physician had not arrived he went out again, but only to the purpose of speaking again to General Montiel, returning thereupon to the house and waiting there for the physicians after the panic of the first moment was over, and as a complement of the credit which the position and affirmations of Mr. Peysselon in this matter must deserve, it suffices to reproduce the note that he himself addressed on the 12th of May, 1898, three days before the death of Mr. Brun, to Gen. Mamerto D. González, the military agent of General Gómez in the Santa Bárbara district. Said letter runs as follows:

Line from San Cárlos to Mérida—Direction of the Exploitation.

L. R. No. 658.] COMPAGNIE FRANÇAISE DE CHEMINS DE FER VÉNÉZUÉLIENS,
Santa Bárbara, May 12, 1898.

Gen. MAMERTO D. GONZÁLEZ.

MY DEAR SIR: As the agent of the company and through impediment of Mr. Brun, I thank you for the restoration of public order and for having taken the necessary steps to bring the *Santa Bárbara* steamer. We are greatly pleased to see you among us to protect our persons and interest. I am, with all consideration, your respectful servant.

(Signed) J. B. PEYSSELON,
Inspector of the Exploitation.

The *Santa Bárbara* steamer having been returned to the company through the action of the force of the constituted Government, that protected the interest of the former, as expressed by the thanksgiving note above inserted, the public order having been restored by the disappearance of the insurrectional guerrillas, the company reestablished the traffic on its railway and steamer's lines in all the period of the subsequent months of 1898 and in the first months of 1899 until the 20th of May, with the result shown by the report of the administration council of the 30th of May, 1901, already referred to.

In the month of May, 1899, there arose the revolutionary movement denominated "Liberal Restaurador," conducted by General Castro, and its first field of action was the Cordillera of the Andes,

the local movements affecting the region of the railway from Santa Bárbara to La Vigia. It was then that the President of the State of Zulia took possession of the steamers *Santa Bárbara* and *Reliance*, upon notification to Mr. Decleva, who acted as the director of the exploitation. This fact was communicated by cable to the direction of the company in Paris on the 12th of June, 1899, and on the 22d of the same month the agent at Maracaibo transmitted to the company the following cablegram:

President will not pay navigation salaries or opposes our dismissing our personnel. Receipts none. We can not foresee any increase of income. Steamer *Reliance* out of service. Give orders. I'll keep firm.

In a letter dated the 28th of May, the same agent, Decleva, writes to the direction the following:

In effect the movement increases. The region of the Cordillera and particularly the zone interesting us is greatly alarmed. It is said that the revolution will not propagate and is the result of merely local rivalries. If such is the case, the evil will be circumscribed in narrow limits; the country in general will suffer little, but we shall suffer the consequences—I mean to say *all the consequences of the events.* I am informed that mules coming to La Vigia with cargo have been taken by the revolutionists, that hundreds of others have taken a different direction in order to escape from the revolutionary bands. Such facts, the narrative of which spreads from village to village, are not proper to encourage transportation, as you will well judge. Many days will pass so, supposing the movement is of a short duration, before those people will have recovered confidence and send us their merchandise.

In the bill which I intend to present to the Government (I have already prepared it for the requisition of the month of March) it is my purpose to charge, besides the expense occasioned by the immobilization of our steamer, *the damage caused to our traffic; but what a small and problematic reward!*

By the correspondence of the agent, Decleva, the following facts are evidenced: That he agreed with the President of the State of Zulia that that Government would undertake to prepare and put in serving order the steamer *Reliance* and that, regarding the *Santa Bárbara*, Decleva would give the order that it might be brought to Maracaibo without delay and without waiting for any cargo; that he delivered, purely and simply, the steamer *Reliance*, the treasury of the State undertaking to pay the engineer, helmsman, fireman, wood, oil, and lamps; that he wrote an order to Captain Faria to the effect of bringing the *Santa Bárbara* steamer, availing himself of all the circumstances permitting him, without delaying the departure of the steamer, to ship the whole or part of the cargo, so as not to lose the voyage; that he was permitted to embark on board the *Santa Bárbara*, bound for San Cárlos del Zulia, with the purpose of giving the necessary orders for the protection of the interests of the company, affirming, in a letter dated the 29th of May, that perhaps there was no danger for the employees on the line, and that the orders he might give from Maracaibo, under the influence of contrary information, might result in producing disorder among the personnel; that it appeared from the information received from the line *that everything was in peace and order on the 7th* of June,

1899; that La Vigia was placed under the watch of an inspector, the Venezuelan Lomonaco, commissioner of the Government, near the company, who at the same time was a colonel, commanding 15 armed men; that until the 9th of June the Government had furnished only 7 loads of wood, as far as the navigation was concerned; and regarding the *Reliance* Decleva said:

You know that I have been able to disburden myself of all the service and maintenance expense. The president complains that the small steamer costs him too much. I have smiled and changed the conversation.

The correspondence of Mr. Decleva, in a letter of the 18th of June, 1899, goes on as follows:

I have returned after a voyage without incidents. At Santa Bárbara, at La Vigia, on the line, *everything is quiet.* The line is in *good condition and the material complete.* All our engines have entered the shop, even that of the ballast works that I had set on service, *and that I had to keep by order of the civil and military authority.*

The traffic continues to be none. It is now more than twenty days that not one load is arrived; our engines only run on the account of the Government.

Regarding the navigation, you know that I have been able to obtain that the Government provides the fuel and the food on board.

I shall be compelled, gentlemen, to ask in July *for a remittance of funds.* I would not like to alarm you, but I can not give you a hope that I do not possess myself—*the hope of undertaking the transactions* again.

The revolution seems to be spreading itself and increasing every day.

Our exploitation has gone through other crises and revolutions, the political and financial consequences of which *might imperil the most important interests and even the existence of this country,* but the exploitation had never, on any occasion, *been so directly and radically affected.*

A letter of the 22d of June says:

In view of the daily loss that we are sustaining, *the imminent deficit of our resources* and the difficulties of a situation which complicates itself more and more and seems to be prolonging itself farther and farther, I have desired, as I informed you in a previous letter, to reduce our expense as much as possible. The dismissal of the navigation personnel from the moment the Government was not willing to take charge of it presented itself to me as a mighty and immediate measure. You know that the Government opposed this project. Not knowing what our strict right is, what our absolute right in the matter is, I have vainly endeavored to illustrate myself with the copy of the concession which I have in my possession. I have not been willing to take, on my own account only, a decision, and thus engage you in an affair the solution of which did not appear to me to be entirely certain.

All the subsequent correspondence of the agent, Decleva, with the direction of the company confines itself to the discussion with the President of the State of Zulia, on account of the elimination, which the former thought convenient, of the personnel of the steamers, to introduce economies in the expense of the company, in which discussion there interfered the consular agent of France at Maracaibo, Mr. d'Empaire, and the vice-consul at Caracas, Mr. Quiévreux, who, on that account, sent to Mr. d'Empaire the following telegram:

President of the Republic communicates me a dispatch according to which the agent of the French company *does not render the task of the Government easy in the difficult moments the*

latter goes through. I request you to endeavor without delay to obtain in my name that the director of the company *cooperates as far as it may be possible in the restoration of order, thus avoiding disagreeable incidents.*

In the absence of a reply from the direction of the company in Paris to the cablegrams sent to it by its agent asking for instructions to decide as to his persisting in the position he had taken, Decleva construed this silence, according to his letter of the 1st of July, 1899, as follows:

I do not know, I regret, your projects, your purposes. *You may have a secret one which you have not told me, which you have no reason to tell me, which you pursue without me, as it were, and of which the orders I receive are the consequence.*

If such is the case, I must obey your instructions at all events. But if, on the contrary, it is your intention to carry things *only to the limit that is prudent in view of the future interests of the company,* my passive obedience would prove to be a *blindness.* You do not ask for my opinion. It does not appear that you are willing to leave the decision of the situation to me. Your orders are peremptory, precise, categorical; hence my embarrassment. What has the appearance of a contradiction is only, in reality, an exceeding care in serving you, *carrying out your intentions.*

And in the letter immediately following, of the 3d of July, it is said:

I recur to what I told you yesterday. You may be pursuing a purpose unknown to me, *a purpose which only the resistance opposed here by your directors to the requisitions of the Government can prepare.*

And could I act against that purpose? No; my conscience prohibits me to do so; my duty, the devotion I owe to your interests, everything commands me to obey you.

To this discussion occasioned by salaries of the personnel of the steamers, amounting to the sum of 2,300 bolivars monthly, an end was put by the following telegram from the direction in Paris, dated the 4th of July:

No act of hostility; of the salaries pay what you can out of what you may have. It is well understood that the Government *will pay all the other expense and previously acknowledge its former and present debts. Here we have exhausted all the resources.*

The foregoing decision and the request to acknowledge the accounts having been communicated to the President of the State by the agent of the company, the President submitted said approval to the National Government, for such was incumbent upon it. Owing to this reply, Mr. Decleva consulted the direction as to whether he could proceed to Caracas with the purpose of presenting these accounts, and was answered by cable on the 5th of the same month:

It is not possible that you should leave Maracaibo for Caracas. Mr. Simon will stop there in his next voyage.

According to a telegram from the consular agent of France at Maracaibo, dated the 13th of August, and addressed to the French consul, the Government had reestablished traffic and intended to return the steamers of the company, but revolutionaries having reappeared at Tovar and Mérida, precisely in the line of exploitation, the French company had to wait for the result of the further operations before the restitution could take place.

In a letter dated the 23d of August of the same year, the deputy administrator of the company in Paris informs the minister of foreign affairs that the steamer *Reliance* had been returned to them, as he had already been notified, with its axle broken and the propeller lost; that the steamer *Santa Bárbara* remained in the possession of the Government of the State of Zulia; that the railway continued to be in the same condition, *without having as yet a free traffic;* that no payment had been made by the Venezuelan authorities, and that its director, Mr. Gustavo Simon, would leave on the 26th of August for Venezuela with instructions to go to Caracas.

On the 15th of September of the same year, said director, on his arrival at Caracas, asked, through the vice-consul of France, for an audience from the minister of finance, which was granted him immediately for the next day. In this audience Mr. Simon asked the National Government *for a settlement of accounts or a part payment, in order to be able to proceed on the exploitation of the enterprise.* Minister Olavarria answered that there was no money in the safe of the treasury and that he could not foresee when he could have funds, and that, therefore, he was sorry not to be able to give satisfaction or to make any promise for the future, however small the sum might be.

In the statement addressed on the 10th of October of the same year to the President of the Republic, then Gen. Ignacio Andrade, by the same director, Gustavo Simon, setting down the motives why he had determined to suspend the exploitation of the railway from Santa Bárbara to La Vigia, the following facts are made to appear:

That in September, 1899, there was a moment of peace, and some receipts were obtained, but that *the revolution reappeared on the 27th of September, and thenceforward the traffic was paralyzed and Maracaibo incommunicated with Santa Bárbara;* that meanwhile the Government did nothing to free the company from the revolutionaries and enable it to proceed on the exploitation; *that it had remained without one cent in its safe, with all the expense in force and without any income;* that in Paris the coupons of the 5 per cent Venezuelan loan of 1886 had not been paid, although due on the 1st of July, 1898; that its claims presented to the Government for damage and prejudice had not been satisfied, and that the circumstance to be most regretted was that they had not succeeded in obtaining from the Government the payment of the accounts for freight, money lent, sundry effects furnished, etc., which amounted on the 30th of September, 1899, to 200,000 bolivars, as there existed arrears from the year 1884, and that on the 3d of October the President of the State of Zulia had asked the company for the *Santa Bárbara* steamer to carry a commission to Encontrados and had not been able to pay for two piles of wood available on board and a sum of 300 bolivars on account of the traveling expense, as it had promised to do.

In virtue of the facts above narrated, the director of the company concluded his statement to the President of the Republic with the following declaration:

First. There is no possibility of realizing any revenue in the exploitation of the line, *as the revolutionaries are masters of it,* and until this date, the 1st of October, there is no hope that the Government may recover that place.

Second. The Government of Venezuela *can not pay the company* any of its debts, or even the least sum, or any sum by installments.

Third. The company *has no longer any resources, as they have all been exhausted*, and it has sent all its money from Paris to meet the expense of its line, *while there was no revenue on account of frequent* revolutions.

The company, considering that this state of things has caused it enormous prejudice and amage and that, if it continues to make the expense in course, it will directly go to bankruptcy, *it is compelled through main force to suspend the exploitation of its line and its steamer Santa Bárbara* until an arrangement has been entered into with the National Government of the United States of Venezuela, and declares that, in the meantime, whether the railway is or not in the hands of the revolutionaries, said Government is responsible for all damage, prejudice, faults, deteriorations that may be caused to the rolling stock, the permanent way, the stores in the warehouse—in short, to all the goods representing the capital of the company.

It is well understood that the company *does not, however, abandon its rights to the concession of said railway.*

The foregoing statement was addressed in like terms to the President of the State of Zulia and to the minister of public works.

The President of the State of Zulia, in acknowledging to the consular agent of France the receipt of the foregoing statement, thought it to be his duty to tell him that whenever, owing to the necessities of war, it had been necessary to make use of the *Santa Bárbara* steamer, whether to mobilize troops or to avoid that the enemies should take possession of it, the Government had always furnished the fuel as well as the provisions and the salary of the employees and marines, when the direction had required it, and made several repairs on the steamer, which was in a very bad condition. He says in conclusion that, as soon as the reasons which compelled the Government to retain said steamer had ceased, he would notify the consular agent that it might be received by the person in charge of receiving it.

From the document appearing as subscribed and dated in Curaçao on the 22d of October, 1899, by Mr. Simon, and certified as correct by the deputy administrator, M. Reynaud, it is apparent that all the archives and printed papers of the company had been closed into boxes, with a detailed inventory, and delivered to Mr. d'Empaire; that all the personnel of the steamer had been dismissed, Captain Matos having made the inventory of the *Santa Bárbara* steamer, together with the mechanical engineer and the bookkeeper; that the company had the following advertisement published in the papers *El Fonógrafo*, *El Avisador*, and *La Compañía Francesa.*

The Compagnie Française de Chemins de Fer Vénézuéliens has the regret of informing the public and commerce that *on account of force majeure* it suspends the exploitation of its line and its steamer *Santa Bárbara.*

The lack of income during more than four years, the revolutions, and the nonpayment by the Government of its debts to the company are the motives inducing the company *to ask for an arrangement with the National* Government before continuing its exploitation.

It is apparent *that from the 27th of September the railway line is in the hands of the revolutionaries and that up to this date, the 12th of October*, there is no *hope* that the Government may recover this place.

The director of the exploitation, E. SIMONS.

At the end of this document Mr. Simon expresses the hope that everything might be settled before the close of the month, because he had just been advised that the President of the Republic of Venezuela had resigned and left Caracas on a ship of war for an unknown destination.

In a communication addressed by the minister of foreign affairs of France to Mr. Quiévreux, vice-consul in Caracas, Mr. d'Empaire, the consular agent in Maracaibo, appears vested with the commission of watching and stating the state in which the goods of the company were.

The steamer *Santa Bárbara* was returned to the company on its return to Maracaibo after the expedition made on it by President Andrade, in which voyage it sustained a damage in one of the wheels. Mr. Glennie was appointed overseer of the seals, and Mr. Aiguillon, late chief engineer of the *Santa Bárbara*, keeper of the maritime material. Mr. d'Empaire received from the director of the company a sufficient sum to pay for the furniture, rent, and the salaries of the agents Glennie and Aiguillon and of the one at Caracas, during six months from the 1st of December, 1899.

In the fight that took place in the harbor of Maracaibo in the month of November, 1899, between revolutionary nationalist forces and those of the Government of General Castro, the steamer *San Cárlos y Mérida*, at anchor in the harbor, sustained, on account of bullets, damages that caused it to sink, and the steamer *Santa Bárbara* also suffered deteriorations on its top part. Such appears from the testimonial investigation carried out by the consular agent of France at Maracaibo at the request of Mr. Arguillon. The witnesses, Edmond Hainel, Antonio Martínez Peña, and José Vincente González declare that the steamer *San Cárlos y Mérida*, at anchor opposite the stores of Rafael Morales and McGregor & Co., had wrecked in the night and day of the 1st and 2d of December, 1899, on account of the bullets received in its hull on the port and starboard sides during the fight and the fire between the forces of Gen. Cipriano Castro (Maracaibo side) and the forces of Gen. José Manuel Hernandez (Los Haticos side).

The damages sustained on its sides were so numerous, that the aforesaid steamer sunk at 4 p. m. on the 2d of December, 1899.

The consular agent, Mr. d'Empaire, ordered the appointment of experts to estimate the damages sustained by the steamer *Santa Bárbara* during the time it was at the service of the State, to which purpose Messrs. Eugenio Kreutzer, a French mechanic domiciled in that town, and Manuel María Loto, a captain in the Venezuelan navy, commander of the Venezuelan steamer *Progreso*. Said experts—after having examined the steamer and its engines and considered that said vessel has been kept, from the last days of May of the preceding year until the first days of November, constantly in motion under pressure,

without giving time to make any repairs on it or repaint it, which circumstance increased the value of the repairs required; that, through a constant labor the engine had suffered a great deal; that during the last voyage it made in the river Zulia, at the service of the Government, a piece of timber entirely broke one of its wheels—valued the damages at 10,000 bolivars, without being able to make an especial mention as to the state of the hold of the steamer that was submerged.

On the 20th of January, 1900, Mr. d'Empaire communicates to the direction that there was an individual that desired to know the lowest price of the little steamer *Reliance*, with a view to seeing whether he could buy it, and that he thought that the company would transact a good business, if it succeeded in selling it for any price.

On the 9th of December, 1899, Mr. Simon left Venezuela for Havre.

It is equally apparent that the company posteriorly disposed, according to its own declaration, of the two steamers, *Reliance* and *Santa Bárbara*, for the sum of 1,100 francs the former and 10,000 bolivars the latter.

On the 3d of February, 1900, the administration of the company addressed a letter to the President of the Republic, proposing to him the reorganization of the exploitation of the railway and maritime lines, upon the delivery which the Venezuelan Government was to make to him of a part payment of at least 300,000 francs in cash, calculated on the sums which he considered were owed to said lines both by the nation and the States, as follows:

(A) A sum of 300,000 francs for reimbursement of transportation expense and requisitions carried out by order of the authorities.

(B) A sum of 250,000 bolivars, at which the company valued the minimum of the indemnity which the authorities were owing to it for the material reparation of the damage done to all its properties, railway, steamers, immovables, material, etc., during the last campaign.

(C) A sum of 105,000 francs monthly from the 1st of July, 1899, as indemnity for the losses that said lines had sustained from that date on account of the almost absolute suppression of the traffic and the immobilization of the means of exploitation. The total of those monthly debts that would be owed to them on the 1st of May, 1901, would amount to 1, 050,000 francs.

The true motives that compelled the French company to suspend the exploitation of the railway line and of the steamer *Santa Bárbara*, as appearing explicitly declared by the director of the company, Mr. Simon, in his statement addressed to the President of the Republic, on the 12th of October, 1899, from the advertisements published in different newspapers and from all the documents of this claim, were only the lack of resources in the treasury of the company, of funds proceeding from the traffic, owing to the fact that this had ceased, on account of the revolutionary events which recommenced in September and continued in October of the same year. The company exhausted all

its available resources, to the extent of being forced to eliminate the personnel of its employees.

The requisitions made by the authorities of the State of Zulia concerning the steamers and trains of the company, with a view to satisfying the necessities of the public service and restoring order constitute the exercise of a power vested in the authorities of a State with a purpose to provide for the security of lakes, rivers, and ways of communication and with a purpose also to subtract any element of struggle from the revolutionary action, thus cooperating in the restoration of order and the consolidation of peace. Those requisitions were voluntarily accepted by the company, as it was by its contract bound to accept them, and the nature of its business and its own advantage required it to do so. They could only give rise to the obligation, on the part of the Venezuelan authorities, to indemnify the company for the service rendered and the direct damage that the means of locomotion seized might sustain during that service, through motives that might be attributed to the especial nature of the same services, which obligation was determined and valued by the administration council of the company in its report rendered before the general meeting of shareholders, inserting it in the balance of the 31st of December, 1901, for a sum of 203,529.70 francs.

The government of the State of Zulia and therefore the National Government contracted the obligation of paying to the company the amount of those accounts, and this debt has never been denied by the constituted authorities. The local government of the State of Zulia could not in the days the aforesaid requisitions took place nor could the minister of finance at Caracas at the date he was visited by Mr. Simon make any part payment on account of what might be owed to the company. This impossibility is comprehensible under those circumstances, under which every resource was consumed by the imperative necessities of war, and both the National Government and the government of the State of Zulia were deprived of a large portion of the ordinary revenue on account of the same disturbance which deprived the company of the proceeds of its ordinary traffic on the line.

It is neither just nor equitable, therefore, nor is it based on any law, that the Government of Venezuela, because it could not pay in moments of penury of its revenues the sum of more than 200,000 bolivars to which the company made its credit amount, and of which it urgently needed to continue in the activity of its transactions, should be responsible for the sum of 18,000,000 bolivars, at which the company estimates the integral value of its capital and obligations (bonds).

When a debt is contracted to be paid in cash, it is a universal law that the nonpayment thereof in due time only constitutes a delay which binds the debtor to pay interest at the rate agreed upon or at the legal rate, this when liquidated accounts or debts are the question.

The larger part of the credit that the company pretended to collect in the month of September, 1899, from the minister of finance at Caracas, requiring from him a part payment, proceeded from debts contracted by the government of the State of Zulia and approved by its legislature in previous years, but the company at no time theretofore had endeavored to obtain the payment of those accounts from the National Government, nor is it proved that the steps taken near the government of the State before the revolutionary events of June and July, 1890, were active.

The insistence shown by the company in those moments, placing the government of the State in the alternative of delivering a sum which it had not, or eliminating the personnel of its steamers; the silence kept by the direction in Paris for several days, leaving its agent at Maracaibo engaged in a discussion which grew more and more bitter with the authority, and, finally, the violent determination taken by Mr. Simon of entirely suspending traffic, dismissing all the employees of the line and placing under seal all the appurtenances thereof, precisely when a change of administration and the victory of the revolutionary arms promised the prompt pacification of the country, only show the deliberate purpose of abandoning the enterprise, creating a situation entirely alienate from the conditions of the original contract, and only tending to accumulate difficulties, presenting to the Government of Venezuela, as a previous condition for the reestablishment of traffic, new and more exacting claims, as well as demands of money. It was, therefore, a perfectly voluntary act, due to the purely financial causes, connected with the state of insolvency in which the company had been for some years past. That abandonment has continued since the suspension of the exploitation was determined by the direction of the company. All the damages that may have been caused by that abandonment to the material of the line, and that, it is natural, must have been very considerable, owing to the intemperature in which it has remained for four years and to the want of all care on the part of its owners, only affect the responsibility of those who adopted the measure, save the excuse they have adduced, the *force majeure* produced by the exhaustion of means and resources to continue the exploitation.

The free disposal of its property has always remained within the reach of the company, as is proved by the circumstance that the consular agent of France at Maracaibo has constantly been the custodian thereof, and that it was sealed to that purpose.

The measure projected by the National Government in March, 1901, of making an inventory of the line, of its permanent and rolling stock, and of the vessels and other appurtenances which the construction company had abandoned, as appears from the same resolution,

was tried, taking into consideration the official capacity of Mr. Julio d' Empaire and his commission as custodian of the property of the company, and to that purpose the National Government intrusted said agent with the commission of attending to the formation of the inventory and reporting, with the remarks he might think pertinent, about the actual state of that property.

Mr. d'Empaire declined the commission, stating that he had been officially designed to take care of the material, tools, and archives of the company, which proved that they were not abandoned and that the company had but suspended the exploitation.

Mr. d'Empaire adds, in his reply to the Government, dated the 26th of March, 1901, that whenever he has to apply to the authorities, either of the State of Zulia or of that of Mérida, in his capacity of in charge of taking care of the interests of the company, asking for the suppression of some abuse or for support on the part of the Government, *he has always been answered and attended to, which clearly shows on the one side that the company has always preserved its rights to the line and its material, and on the other that such rights have at all times been recognized by the Government of Venezuela.*

In view of this reply, the Government thought it advisable to leave things in the same state they were, as it does not appear that it has in any sense attempted to interfere with the determinations of the company regarding the free disposal or maintenance of its goods on the railway line.

The damage those goods have sustained, according to the technical report presented to the minister of public works by Drs. Francisco Arroyo-Parejo and Eliodoro Ocanto, attorney-general and engineer, respectively, at the orders of the ministry, is due,

"besides the natural causes of the exposition to intemperature and the weather, to the very especial one that the company did not carry out the drawing in accordance with the rules and principles ordered by science in enterprises of such a nature, for the line is constructed on lands the topographical configuration of which is unfit thereto,"

and said report adds that

"if it is certain that the inundations of the Chamas River have cooperated in that destruction it is also true that the company has not made such efforts or used such means as were necessary to prevent the damage."

The report adds:

Without the help of the drains cut parallel to the road (during the construction) in order to extract therefrom the earth necessary for the embankments, which drains will always be the cause of the destruction of the line, the undermining of the ground would not have taken place, for the waters proceeding from the inundations would not stagnate on each side of the platform, but would go through culverts conveniently situated, following the natural depressions of the ground, to be lost on the plains; and to place again this line in a state of good service it is necessary *either to make the Chamas River return to its former bed* or to stop

up the drains parallel to the line, raising the level of the line with good materials, and to make serious repairs to the rolling stock, which is almost tantamount to renewing it in its entirety.

For all the reasons aforesaid and in virtue of the careful examination of all the precedents of the case the Government of Venezuela can not be held responsible for the damage that the "Compagnie Française de Chemins de Fer Vénézuéliens" may have sustained, for the suspension of the exploitation of the line and the abandonment in which it has kept its property, or for the consequences that nature, the weather, and the bad construction of the works may have produced in its concerns.

Neither can this commission fix the amount owed by the Government of Venezuela to the above-mentioned company for services rendered by its railway and line of steamers, for those accounts have not been presented or been the object of any examination in this commission.

With regard to the damage done by revolutionary parties on the line from Santa Bárbara to La Vigia during the time it was occupied by said parties, neither this fact nor the responsibility of the authorities then constituted in the State of Zulia has been proved.

The only thing that has been proved is the damage sustained by the steamer *Santa Bárbara* while at the service of the government of the State of Zulia, which damage was valued at the sum of 10,000 bolivars by the experts appointed by the consular agent of France at Maracaibo.

The prejudice caused the company by the sinking of the steamer *San Cárlos y Mérida*, which, as it appears, was out of all active service since long before and which was not apt to be utilized, does not affect the responsibility of the Government of Venezuela, for it appears from the evidence produced that the sinking took place on account of the firing exchanged in a deed of arms, and is therefore recognized in international law as an accident inefficient to cause any responsibility on the part of the constituted authorities.

It is my opinion, therefore, that the company is entitled to an indemnity of 10,000 bolivars and interest thereon at the rate of 3 per cent from the 12th of October, 1899, which the Government of Venezuela will pay for deteriorations of the steamer *Santa Bárbara* while at its service; that its rights must be reserved to it to obtain payment of the accounts for freight, transportation of troops, and the use of two steamers by the authorities of the State of Zulia duly formulated and proved and which, as expressed in the balance of the 31st of October, 1899, amounted on that date to the sum of 203,529.70 francs with interest thereon from the respective dates at which they had their origin; that to the Venezuelan Government the rights and claims must also be reserved which may pertain to it for the suspension of traffic, the abandonment of the exploitation and ensuing damage

caused to the line through lack of maintenance, and that for all the rest the claim presented must be disallowed.

CARACAS, *August 28, 1903.*

NOTE BY THE VENEZUELAN COMMISSIONER.

This opinion was presented at the sitting of the 28th of August, 1903, and an understanding was not arrived at with the French arbitrator, who was of the opinion that the company must be allowed the sum of 18,483,000 bolivars, to which the claim amounted, said company abandoning to the Government of Venezuela the railway with all its appurtenances and the concession. The two commissioners having failed to agree, this claim was referred to the decision of the umpire.

OPINION OF THE FRENCH COMMISSIONER.

I have accorded to the French Company of Venezuelan Railroads an indemnity of 18,483,000 bolivars, considering that the Venezuelan Government is responsible for the ruin of the company, and that in equity this responsibility carries with it the rescission of the contract signed between the company and the Venezuelan State.

It seems to me beyond doubt that the Venezuelan Government has placed the company in the necessity of ceasing the exploitation of the line by depriving it of the considerable sums which it owed it from the fact of the guaranty and from the fact of the requisitions.

According to the contract the state guaranteed to the company the 7 per cent of the capital, and this guaranty was to be paid in hard cash. These provisions are repeated in the three stages which the contract in question has passed through.

But from 1888 to 1896 the State neglected to fulfill the obligations accepted at the time of the signing of this bilateral act. It did not pay a centime of the guaranty promised of which the part falling due December 31, 1895, represented already 4,725,000 bolivars. It is not surprising that the company, deprived of this sum upon which it had the right to count, then found itself in embarrassment. It had made all sacrifices; with only the resources of its credit, it had already finished the line provided in the contract and assured for three years the regular exploitation, in spite of inundations, earthquakes, and revolutions, factors equally unforeseen and very capable of bringing trouble to the most wisely established provisions. It was natural that it should have reached the limit of its resources and appealed for the support which the State ought to have lent it a long time previous.

It is this moment that the Government of Caracas chose, taking advantage of the circumstances which itself had prepared, to impose a treaty ruinous to the company, obliged to pass under these Caudine Forks.[a] It reduced to 1,950,000 bolivars the total amount of all the

[a] Caudine Forks (Furculæ Caudinæ), the name of an Italian village famous in Roman history on account of the disaster which there befell the Roman army during the second Samnite war, in 321 B. C.

claims that the company might present, as well from the point of the guaranty as from any other point, and promised 2,500,000 bolivars for the abandonment in the future of every right of guaranty. Then, instead of paying in specie these promised sums, it remitted them in bonds which, having ceased to bear interest, are to-day no longer negotiable, so that certain creditors of the company, whose borrowed money had, instead of the money of the guaranty, permitted the finishing of the construction and the pursuit of the exploitation, hold these depreciated bonds, which are only in their hands a lien without value.

The Venezuelan State has then found the means to free itself of its contractual obligations without opening its purse. Not only did it elude in this way the clauses of the contract relative to the guaranty in reducing the latter to zēro, but it never paid the numerous requisitions for which at different times the company had sent it the drafts.

So the company, deprived of the millions of the guaranty and of the remuneration of the services rendered, saw itself at the same time dispossessed of its rolling stock, employed in transporting free of charge troops and military equipments, while the merchandise lay in the storehouses at the mercy of guerrillas, while its personnel was maltreated or imprisoned, its director wounded to death, its boats requisitioned or destroyed, its real estate encroached upon, its cash boxes emptied.

Is it not evident that the only cause of the arrest of the exploitation was the situation made for the company by the Government itself, which in every way in its power had rendered this exploitation impossible?

Moreover, the more time passed the greater the increase of the debts of the company and the difficulty for it to resume the exploitation of the line; in fact, the interest on the sums due is accumulating, its idle machinery damaged, the track is going down from the fact of the inclemencies of the climate and from the use which the inhabitants are making of it.

In these conditions it would not be an equitable solution to compel the company to resume the exploitation in consideration of the mere payment by the State for the ravages and requisitions. It is only by the rescission of the contract that equity can be satisfied. The Venezuelan State could not complain, since it has never executed it even after having strangely corrupted it.

In consequence of this rescission, the Venezuelan Government will become possessor of all that the company owns in Venezuela—that is to say, of the concession, of the line, of the buildings, of the rolling stock, of the maritime material, in the condition in which it is actually found. In exchange it would have to reimburse the company for the sums expended by it, which include its capital—say, 3,000,000

bolivars—and the value of the obligations and bonds emitted, with arrears of revenues due to the bearers—say 30,500,000 bolivars.

Moreover, it ought to take account of the interest of these sums and of the profits of which the company has been deprived. The indemnity would reach without doubt two score millions. But for all these valuations it would be necessary to admit the affirmations of the company or to engage in interminable investigations, which would still leave many of the points in doubt.

It is the most simple means of determining the value of the concession; it does away with all investigation and all chance of error; it has, moreover, the advantage of being drawn from the contract.

The State and the company have both recognized that the concession was worth 18,000,000 bolivars for a line of 60 kilometers—the first according it, the second accepting the payment of a guaranty of 7 per cent upon a kilometric value of 300,000 bolivars. Taking back the concession, the State will be free, so far as the company is concerned, paying to it this sum by way of indemnity.

It is fitting to add to it the value of the maritime material, say 483,000 bolivars; the service of navigation, the object of a special article of the contract, not having entered into the line of account at the time of the establishment of the calculation of the guaranty.

It is then a sum of 18,483,000 bolivars that the Government ought to pay to the French Company of Venezuelan Railroads.

The company, through its advocate, claims, besides, the adjudication of interest at the rate of 7 per cent, which in my opinion does not harmonize with the manner in which this indemnification may be estimated. We are now dealing with a simple exchange of values without any consideration of profits or interest.

If the interest were to be estimated would it not be also necessary to take into account, for instance, the products of the exploitation of the line while it was in operation and deduct them from the amount of the indemnity?

My colleague does not share my opinion. He has declared the claim of the company to be groundless and has accorded it only the right to an indemnity of 10,000 bolivars for the damage suffered by the steamer *Santa Bárbara*, and reserved the privilege of claiming from the Venezuelan Government, by presenting the necessary justification, the sums due for requisitions, with the corresponding interest. He has reserved equally the rights of the Venezuelan Government for the fact of the abandonment of the exploitation.

Doctor Paúl has published a "dictamen" which is a regular defense of the Venezuelan State. I have not been able to follow him on this ground, the position of arbitrator not authorizing me, in my opinion, to produce arguments in favor of one of the two parties in the case. Moreover, the company has intrusted to an advocate at the court of

appeal at Paris, Mr. Dacraigne, the care of replying point by point to the plea of Doctor Paúl.

It only remains for me to call the particular attention of the umpire to a few observations.

In the first place, I have taken it upon myself to get information *de visu* of the condition of the line from Santa Bárbara to El Vigia. I then went on board the French cruiser *Jouffroy* on the south of the lagoon of Maracaibo. Then I went up the river Escalante as far as Santa Bárbara. There I inspected in detail the establishments of the company, and followed the line on foot for several kilometers. I observed that the company had neglected nothing to place the service of merchandise and passengers in excellent condition. A large rolling stock was found at Santa Bárbara, where the buildings of the company include, besides the passenger station, the depot for merchandise, the director's office, vast storehouses for the materials, and large workshops supplied with machines, tools, and material for repairs of all kinds. In spite of the numerous repairs which these buildings and this material would require after five years of abandonment, they are far from having no value and from being of no use.

In the second place, it is not superfluous to recall that a claim in all points analogous to the claim of the French Company of Venezuelan Railroads has been presented by the English company of the railroad from Puerto Cabello to Valencia to the British-Venezuelan Mixed Commission which sat last year at Caracas under the presidency of an American umpire.

This English company had likewise ceased its traffic, which it has since resumed, because of the nonpayment of a guaranty promised, and because of requisitions. It obtained, if I am well informed, an indemnity of 7,000,000 bolivars gold. It had been less tried than the French company, whose terminus at Santa Bárbara is upon a river inaccessible to warships, in a region which is entirely out of reach of action of foreign navies, while Puerto Cabello, head of the line of the English company, can be visited by European squadrons.

Finally, while the foreign claimants will receive in gold the amount of indemnities which have been allowed them, the French claimants will have to be satisfied, according to the terms of the protocol of Paris, with the payment in bonds of the diplomatic debt.

Thanks to the concession consented to by the French Government to allow the Venezuelan Government to pay its debts with greater facility, the figure of the French indemnities finds itself in reality singularly reduced.

The bonds in question having undergone a depreciation of 60 per cent, if the umpire partakes of the opinion of the French arbitrator, it is in reality only a sum of 8,500,000 bolivars in gold which the French company would be entitled to receive and the Venezuelan Government obliged to pay.

The value of the concession or of sums disbursed by the company is far from this amount.

PARIS, *September 13, 1904.*

ADDITIONAL OPINION OF THE VENEZUELAN COMMISSIONER.

I have most carefully examined the brief prepared by my learned colleague, bearing date of September 13, 1904, explanatory of his opinion at the sitting of the commission held in Caracas, August 28, 1903. I have also read the brief and the opinion submitted by Maître Dacraigne, which is annexed thereto. But I have not been able to find in either of these documents sufficient reasons, based upon right and justice, to convince me that my opinion submitted at the session above mentioned does not adhere most strictly to the truth as established by facts, as well as to the statutory and common-law precepts which are applicable to such facts in order to find and establish the liability of the Venezuelan Government, while rejecting all that can not be held as good and sufficient grounds for liability. Under such circumstances I am satisfied that the grounds upon which my opinion was based still subsist as strong as ever, and I may say stronger than ever, as the new line of argument introduced by the French commissioner and Maître Dacraigne seems to strengthen my former opinion, as stated.

Both these gentlemen hold as a powerful reason to grant and demand the indemnification under discussion that the agreement made between the Venezuelan Government and the French Company of Venezuelan Railroads under date of April 18, 1896, by virtue of which the 7 per cent guaranty on the capital of 18,000,000 francs was redeemed and the company paid up to December 31, 1895, the amount of her claims due as per balance sheets on the same guaranty and settlement made for *any other and all causes the company may have a right to invoke, was a ruinous agreement* imposed upon the company, which found herself compelled to pass under the *Caudine Forks* of said compact. This new argument is of such character, that it is my sincere belief that no answer whatever is needed in rebuttal. Such argument offers, because of its far-fetched application, the most telling proof of the scarcity of grounds, real solid grounds, the company has upon which to build the liability of the Venezuelan Government.

I will simply remark that when that agreement—now called *Caudine Forks* by my learned colleague—was entered into, the company, according to the statement of Maître Dacraigne, page 14 of his opinion, found herself in this position:

> The *earthquake* of April (1894) left the company as unexpectedly as unfortunately *without resource of any kind.* In order to attend to urgent repairs and work and to procure funds, the company was compelled to make a first issue of 500-franc bonds, drawing an interest of 6 per cent.

On page 12 of the same opinion the following statement is found:

The company issued in this way 4,000, the largest portion of which was held by the Dyle and Bacalan and the Tives-Lille companies. It was agreed with these two companies that the payments made by the state were to be employed in preference for the payment of said bonds. It was therefore in execution of this covenant entered into by the company because of the failure of the state to keep its part of the agreement that in the month of June, 1898, the Venezuelan Railroad Company transferred to the other two companies the *Venezuelan revenues received.*

About the 30th of June, 1898, the general assembly of stockholders ratified such agreement, which was confirmed by the bondholders, *and after payment of all accounts there remained* out of this transaction at the disposal of the railroad company a balance of 200,000 francs as working capital.

If, notwithstanding the fact that the Venezuelan Government had delivered to the company 5 per cent bonds of the 1896 loan to the amount of 4,450,000 bolivars, thus enabling the company to redeem its debt, amounting to 2,000,000 francs, in stock and bonds, the largest portion of which was held by the Dyle and Bacalan and the Tives-Lille Companies, still leaving the company a working capital of 200,000 francs if, I say, notwithstanding that fact, the company was unable to meet the ruinous future events, it is plain that the failure of the company to continue repairs and to defray operating expenses would have taken place sooner.

This clearly shows that the company, in view of its critical financial position in Paris, its credit being completely exhausted, found it advantageous to its interest and to the continuation of the undertaking to accept the propositions made by the Venezuelan Government for the redemption of the guaranty and the payment of the amounts due, which the company agreed to reduce to the amount of 1,950,000 bolivars, fixing the redemption of the future guaranty at 2,500,000 bolivars.

In this agreement made by the French Company because the company found it to be acceptable and advantageous, Mr. Dacraigne finds grounds to hold "without possible discussion" that the French Company is authorized to ask the rescission of the contract and the reimbursement of all the expenses that such action entails, plus the corresponding damages and respective interest. Thus, he says, is justified the claim for the 18 millions expended and the interest as above specified.

Thus the Venezuelan Government, because of the fact that it has canceled its obligations up to the date of the convention, after having paid a heavy sum in settlement of a guaranty which could remain undue and without foundation, as the company was unable to continue operations because of the ruinous future events, must pay again and settle, besides, damages and interests because such had been paid. The Venezuelan commissioner has been unable to find in the legislation of any country, nor in the natural law, anything that may lead

to the acceptance and holding of such kind of liabilities as established either by private or international law.

The French commissioner holds that the Venezuelan Government, as stated in the opinion, would enter into possession of everything the company possesses in Venezuela, and details such possessions as "the line, the buildings, the rolling stock, the maritime property, *in such condition as they are found now*," and fixes the amount of the indemnity such conveyance would represent at 18,483,000 bolivars.

I have also been unable to find among the documents and papers in the case reasons justifying such forcible transfer, nor any advances whatever on the part of the Venezuelan Government which might lead to the supposition that the Government is inclined to accept such transfer of the property in question in such condition as it is found now for the amount demanded by the claimant company, which the French commissioner grants. Such transactions are always controlled by the convenience of both contracting parties, are agreed upon freely and spontaneously, and can not be the object of a decision of this commission.

I think it my duty to quote, in this connection, the following statement of the French commissioner as having special significance:

> The company, through its legal advocate, claims, besides the adjudication of interest at the rate of 7 per cent, which, in my opinion, does not harmonize with the manner in which this indemnification may be estimated. *We are now dealing with a simple exchange of values* without any consideration of profits or interest. If the interest were to be estimated, would it not be also necessary to take into account, for instance, the products of the exploitation of the line while it was in operation and deduct them from the amount of the indemnity?

The Paris protocol by which this tribunal has been vested with arbitration powers by special commission intrusted to the legal reprerentatives of France and Venezuela has narrowed the scope of said commission to a single and solitary point—that of examining and deciding upon the claims for indemnification entered by French citizens for *acts whith have* taken place at a certain time. Now, to grant indemnities *for acts which have not actually taken place because of the exchange of values* which were to be made by virtue of a sentence of the commission, would be to substantially alter the terms of the protocol binding the contracting parties and to render the award of the commission nugatory, as it would then involve a violation of the pact which controls the commission.

> The *pact*, or, in other words, the free agreement of the parties, by which they agree to submit the examination and settlement of differences arising among them to an impartial third party, controls the whole arbitration proceedings. The *pact* previously agreed to by the contracting parties is, in fact, the essential condition for the institution of arbitration proceedings—is the starting point, the rule to be followed by the arbitrators. The nature of things and common sense thus direct. The arbitrator or arbitrators can not constitute themselves as judges of a question. The limit of the mission intrusted to them grows

exclusively out of the will of the parties; having been chosen to apply the law to a question, *they themselves can not create the rule of law and apply it. The pact determines and circumscribes the object of the dispute,* * * *. (Pradier-Fodéré, Droit International Public, vol. 6, section 2612.)

The pact as laid down by the French court of cassation in its judgment of January 18, 1842 (Mauny case—see Dalloz, Jurisprudence Générale, Vol. IV, Arbitrage, No. 471, note)—

is the only essential thing to be consulted to decide whether the arbitrators have passed judgment without authority or jurisdiction.

It is true that the claim of the French Company of Venezuelan railroads embodies the sum of 18,430,000 bolivars for indemnities demanded from the Venezuelan Government, and this commission is vested with full authority to determine whether the amount of the indemnities which Venezuela is to pay for such acts as may have directly caused actual damages to the company's property or for actual services such company may have rendered the Government of Venezuela, such damages and services to be fully established and affecting Venezuela's liabilities. Any and all acts partaking of either character, be it *damages* or *services rendered* which the Government of Venezuela should indemnify, falls under the action of this commission.

It was by reason of this application of the terms of the protocol, which I consider the right application, that in my opinion rendered in Caracas on August 28, 1903, I differed from my learned colleague and explained the acts which in my judgment, and in conformity with the proofs furnished by the papers in the case the Venezuelan Government might incur a liability for, concluding my opinion with the following concrete statement:

I am therefore of the opinion that the company is entitled to an indemnification of ten thousand bolivars (10,000 bolivars) and interest at the rate of 3 per cent from October 12, 1899, which the Government of Venezuela will pay *for wear and tear* of the steamer *Santa Bárbara* while she was in the Government's service; that the company should reserve her action to obtain payment of the bill for *freight, transportation of troops, and use* of two of her steamers by the authorities of the State of Zulia, duly made out and vouched for, and that according to the balance sheet of December, 1899, amounted to that date to the sum of 203,529.70 francs, and interest from their respective dates of origin, and that the Government of Venezuela should also reserve the actions and rights that might concern it, because of the suspension of traffic, abandonment of operation, and consequently damages suffered by the line because of failure to maintain and preserve it; and that as far as the other points are concerned the claim should be rejected as groundless. (Comisión Mixta Venezolana-Francesa. Protocolo de 19 de Febrero, 1902. Dictámenes del Arbitro Venezolano. Edición Oficial, 1903, p. 206.)

During the oral proceedings had at the sitting of August 28, 1903, (ibid., p. 211), the grounds for my decision were summarized as follows:

The commissioner for Venezuela considering in opposition—

That the actual reasons of the suspension of operation of the line by the company are of an economic character, as the company was compelled to take such steps because of the lack of traffic due to the state of revolt of the country and because of the impossibility in which it (the company) was placed by reason of its bad financial situation of obtaining the necessary

funds to repair the damages caused by the weather to a line built under unfavorable conditions;

That the Venezuelan Government *could not be responsible either for the damages* suffered by the working materials because of voluntary abandonment *nor yet of such damages* as the company may have suffered on account of the state of revolution in the country or by an accident of war;

That the agreement entered into by the company and the Venezuelan Government, in regard to the guaranty stipulated in the contract, has been duly and fully executed and that the company has received the sums resulting from the sale of the bonds which in compliance with the terms of said agreement were delivered to the company;

That the Government of Venezuela has never refused to pay the company the value of the *requisitions* (seizures) *and the damages resulting therefrom* to the material and that the inability of the Government to make such payments because of the exhausted condition of the public funds during the civil war only makes the Government liable for the payment of unpaid interests;

The commissioner is therefore of the opinion that the claim of the company lacks proper grounds and only acknowledges to the company the right to an indemnity for 10,000 bolivars for the wear and tear suffered by the steamer *Santa Bárbara* while she was in the Government's service and reserves to the company the right to claim from the Venezuelan Government by filing the proper and necessary vouchers the amounts due by requisitions (seizures) and the corresponding interests;

Doctor Paúl reserves for the Venezuelan Government all its rights of action against the company because of the abandonment of the operation of the line.

The French Company of Venezuelan Railroads under date September 28, 1904—that is to say, one year after the session of August 28, 1903, when the commission closed its labors in Caracas—submitted all the documents in support of the requisitions or services rendered by the railways and the ships of the company to the Government of the State of Zulia up to September 30, 1899. I have examined with due care and attention the bills and annexed vouchers and found correct the balance due to the company by the government of Zulia, according to a communication addressed by the manager to the President of the State on the date aforesaid and found under No. 3 "Dossier Réquisitions—Jacket No. 11." According to said communication and vouchers submitted the balance due amounts to *193,135.95 bolivars*.

In a communication addressed under date of January 18, 1900, by the board of managers of the French company to his excellency the minister of foreign affairs in Paris a copy of which is found in Exhibit 3, document 5, the following statement is made:

We take the liberty to send you herewith a copy of the report of our chief manager, the engineer, Gustave Simon, relating to his mission, which said gentleman delivered to us upon his arrival in France.

Every day that passes since we *were compelled and forced* by the revolutionary events *to suspend* our operations in Venezuela, since October 12, 1899, will render more difficult and onerous the possibility of our resuming operations.

The failure to maintain a road and, above all, a railroad leads to its rapid destruction, especially in a tropical country where vegetation is powerful and of almost instantaneous growth.

* * * We estimate in 300,000 francs the minimum cash amount necessary to renew, before the end of April next, the operation and service of our business.

Now the different debts of the national Government, as well as those of the provincial governments, due to our company may be resumed as follows:

(a) The amount of 300,000 francs, in round numbers, representing *reimbursement of transportation expenses and requisitions* made by the account of the authorities.

The itemized accounts *have been furnished to the authorities* according to forms and decrees.

The largest portion of these bills have received proper official approval.

(b) The amount of 250,000 francs, our minimum estimate of the *indemnification* due by the Government of Venezuela by substantial repairs and damages caused because of its acts to *the whole of our property* during the last revolution.

(c) The amount of 1,050,000 francs which, at the rate of 105,000 francs *per month, represents the amount of the indemnification* which the Government of Venezuela owes us *because of suppression by its act* of our traffic during the ten months elapsed between July, 1899, and May, 1900.

We have taken as a basis for this estimate of the *indemnification* the amount of the guaranty of 1,260,000 francs which had been fixed and acknowledged to our company by the concession-contract, duly approved and ratified by the Venezuelan Congress and the President of the Republic.

Let us examine now, one by one, these charges for indemnity requested from the Government of Venezuela under date of January 18, 1900—that is to say, three months after the abandonment or suspension of operations on the part of the board of managers, on the 12th day of October, 1899.

The first item—that is, the amount of 300,000 francs in round numbers, as reimbursement for transportation and requisitions by the authorities—exceeds in the amount of 106,864.05 bolivars the sum of the balance sheet submitted by the same board of managers to the authorities on September 30, 1899, or twelve days before the suspension of operations and the delivery of the rolling stock, offices, implements, and other property of the company to the consular agent of France in Maracaibo, Mr. A. I. d'Empaire. The claimant has produced said bills and vouchers before the commission. In this regard, the Government of Venezuela is the debtor of the French Company of Venezuelan Railroads, as per bills and vouchers, to the amount of 193,135.95 bolivars, and interest at the rate of 3 per cent, as established by the company, from the date when it is shown such transportation and requisitions took effect in compliance with the orders of the local authorities of the State of Zulia.

The dates and respective balances are the following, as shown by the examination I have made of the bills in the record of the case:

	Bolivars.
Balance approved by the legislature of the State of Zulia, February 27, 1894	2,994.85
Balance approved by the legislature of the State of Zulia, January 23, 1895	6,434.60
Invoice as per statement up to December 31, 1897	15,443.60
Invoice, etc., to May 30, 1898	3,886.00
Invoice, etc., to October 30, 1898	34,618.90
Invoice, etc., to March 3, 1898	6 532.00
Invoice, etc., to April 6, 1899	9,047.00
Invoice, etc., to September 30, 1899	114,679.00
Total	193,635.95

An estimate of the interest on the several balances from their respective dates until that when the company may probably come into possession of the funds by virtue of the execution of the sentence which may be finally passed, a lapse of time which I believe to be reasonably within three months, taking into consideration any inevitable delay, will show that the company in this regard is entitled to the sum of 36,060 bolivars.

Between the amount of 193,135.95 bolivars, which is established by the company's statements, and that of 203,529.70 bolivars, balance in the company's statement of December 31, 1899, as due by the Venezuelan Government at that time, as shown in the report of the board of managers to the stockholders in the company, and to which I have made reference at the conclusion of my opinion of August 28, 1903, there is a difference of 10,393.75 bolivars, to which I find no other explanation in its support than that it represents the price the company has charged the Government of Venezuela for the service of the steamer *Santa Bárbara* during the days intervening between September 30, 1899, and the end of October of the same year, when it appears the steamer was returned to the company after having taken to the island of Curaçao Doctor Andrade, the President of the State, after the so-called "Liberal-Restauradora" revolution. Such amount, even if it does not appear in a specified form, as it should do, I deem to be a fair compensation for the services rendered by the steamer *Santa Bárbara* to the local authorities during the month of October, as, according to documents in the case, the company had suspended since the 12th of the same month all operations in its railroad and steamer service, so that there were no expenses for maintenance of the service.

On the aforesaid amount, which I recognize as also due by the Government of Venezuela, interest at the rate of 3 per cent should be added from October 30, 1899, to the date of the execution of the sentence as aforesaid, so that the amount of the indemnity increases to the sum of 1,767 bolivars.

So that the principal and interests on this amount, as shown, amount to 203,529.70 bolivars as principal and 37,827 bolivars as interest, or, in all, 241,357.70 bolivars.

I do not think that the indemnification which this commission may award the company should exceed such sum for delay in payment of services rendered the authorities of the State of Zulia at different times, because such services as are represented by transportation of employees and troops, both by land and water, during the time intervening between 1893 and March, 1899, the correspondence and other papers submitted in the case show they were a portion of the active and frequent business transactions of the company carried on with the local authorities, originating debits and credits in account current.

There is no written or documentary evidence showing that the company did ever press the payment of the periodical balances of the account by means of any of the measures which the law places at the disposal of the creditor to obtain or enforce the payment of what is due him. Under such conditions there was no denial of justice nor has such claim been advanced. On the contrary, from the correspondence it appears that such activity in the account current of the Government with the company during the six years mentioned was of such importance for the latter that it could well afford, as it happens at times in this kind of business transactions, to take into consideration certain circumstances which only the company was capable of appreciating, in order not to institute legal proceedings to compel such payment, but willingly to wait the payment of such sums as fell due.

It must be stated that the delay in the payment of the balances on the part of the local authorities of the State of Zulia only represents in a period of over six years the amount of 78,450.95 bolivars, out of which sum 50,197.90 bolivars belong to the six months elapsed from October, 1898, to April, 1899, preceding the revolutionary events of May of the latter year. It is also worthy of notice that the company has not shown the total movement of its account current with the government of the State of Zulia from the year 1893 up to the month of April, 1899, when the government of the State appears to be the company's debtor to the amount of 78,456.95 bolivars. The company has only submitted to this commission the balances due at certain dates, which do not furnish sufficient data to find out the amount represented by the total volume of the business transactions during the six years in question to indicate whether the government of the State of Zulia is as remiss in the payment of its obligations as represented.

The same documents and correspondence, which I have had before me, show, as has been established, that the larger portion of the total balance for freights and requisitions due by the government of the State of Zulia on September 30, 1899, arises from services rendered by the railways and the steamers of the company to the authorities of the State of Zulia for the months elapsed from May of the same year when the revolution "Libertadora" broke out in the Andes until said authorities were deprived of their power, because of the triumph of the revolutionary party. It was during these months that traffic was suspended on the railroad, because of the interrupted communications with the interior and the complete cessation of all transportation of the products, which made the normal carrying trade of the line in the ordinary course of business transactions. The managers of the line found themselves in an embarrassing position to meet the indispensable expenses for the want of the income produced by such transportation operations, and it was then that the govern-

ment of the State of Zulia, finding itself under the necessity of defending the duly constituted authorities and to restore public order, made use, as the government was entitled to do and the company bound to allow by the terms of the concession-contract and the imperious military necessity, of the means of transportation over land and water that the company had at a standstill at that moment because of the lack of mercantile traffic.

Thus the debt created by the authorities of the State of Zulia in favor of the company under such circumstances represents the sole industrial profits the company could have obtained out of its land and water transportation facilities, while the use to which said authorities placed such means of transportation afforded the only possible means to protect and save such property either from the injurious action of a protracted period of idleness or from the risk of being seized and destroyed by the revolutionary party in order to prevent that the Government they were opposing might make use of it.

I do not find that the impossibility said government was in of satisfying the pressing request for payment which the agent for the company in Maracaibo began to urge precisely at the very moment said authorities were, for the same reasons alleged by the company; in want of funds and when the Government was compelled to spend whatever revenues might be collected to defray the expensive operations of war—I do not find, I say, that such impossibility can be made a cause to justify the claim of liability which the company pretends affects the national Government and settlement of which by an indemnity amounting to millions of bolivars has been demanded. If the managing board of the French Company of Venezuelan Railroads found itself compelled to suspend operations because of the lack of funds, and neither the company nor the board of directors can be made responsible for such state of affairs, as it is due, the company avers, to a case of *force majeure*, why is the national Government of Venezuela to be made responsible because the local authorities of the State of Zulia were in the impossibility to make disbursements to the company in payment of its debts when such authorities were also under the *force majeure* of impossibility on account of the war?

In an interview had in Caracas between the manager, Mr. Simon, and the minister of finance, Mr. Olivarria, in September (16), 1899, when for the first time a direct request for a payment on account of the sum due the company by the sectional government of Zulia was made to the national Government, the aforesaid minister of finance gave as a reason for not making the payment then requested lack of funds and impossibility to promise to make such payment in the near future. At the time of this interview the national Government of Venezuela, represented by the president general Ignacio Andrade,

was reduced to the capital of the Republic after the armed conflict of Tocuyito, September 12, when the Government forces were defeated by the army under the command of Gen. Cipriano Castro, the present provisional President of Venezuela. General Andrade and those who composed the Federal executive could not at that moment be in a position to satisfy other needs than those the precarious conditions of the disorganized Government exacted as of vital importance. A month after, which was spent in gathering new troops and directing military operations, to which effect new war contributions were levied and requisitions issued on the inhabitants of Caracas for horses, mules, and provisions for the army, General Andrade found himself in the impossibility of continuing the struggle and abandoned the capital, accompanied by some officers and soldiers, on October 19. From these facts, which are in perfect accord with historic truth, by the simple application of common sense free from any passion or prejudice whatever, it is concluded that there has not existed on the side either of the sectional government or of the national authorities any deliberate purpose of doing any injury to the prosperity and the business of the French Company of Venezuelan Railroads by delaying without any justifiable cause the payment of the amounts due.

The liability which by all possible law and by all principles universally established affects the debtor who does not pay his obligations in due time is solely that of paying interest to his creditor for the time of the delay at the rate agreed upon and, in the absence of an agreement on this point, at the legal rate.

The provisions of the Venezuelan Civil Code, which in this matter agree with those of the French and Italian Civil Codes and with the civil law of all countries, establish that there exist obligations with penal clause when the debtor, to secure the fulfillment of an obligation agrees to give or to do something in case of failure or delay in the execution of such obligation, and that the penal clause is the compensation for damages growing out of the failure to fulfill the principal obligation. (Articles 1175 and 1178 of the Venezuelan Code of 1896).[a]

When the government of the State of Zulia made a compact with the French Company of Venezuelan Railroads for the service of transportation of troops, ammunition, etc., and the requisitions which created the Government's debt, no penal clause was stipulated to secure the fulfillment of the contracted obligation, nor did the Gov-

[a] ART. 1175. Hay obligaciones con cláusula penal cuando el deudor, para asegurar el cumplimiento de una obligación, se compromete á dar ó hacer alguna cosa para el caso de inejecución ó retardo en el cumplimiento de la obligación.

ART. 1178. La cláusula penal es la compensación de los daños y perjucios causados por la inejecución de la obligación principal.

El acreedor no puede reclamar á un mismo tiempo la cosa principal y la pena, si no la hubiere estipulado por el simple retardo.

ernment become bound to pay damages in case of delay in the payment different from those the law in all countries grant the creditor against the *debtor of an amount of money*—i. e., interest either in conformity with the contract or with the law.

The following provisions of the Venezuelan Civil Code mentioned, which agree with the identical prescriptions in the French Civil Code, from which they were adopted, are pertinent to the case:

ART. 1191. The debtor is not under obligation to pay damages when as the consequence of *fortuitous events or force majeure he has failed* to give or to perform that which he is bound to do, or has performed that which was forbidden.

ART. 1192. Damages are generally due to the creditor for the loss sustained or the benefits which he has been deprived of, according to the provisos and exceptions hereunder.

ART. 1193. The debtor is not liable except for such damages *as have been foreseen or that could have been foreseen* the time the contract was made, when the failure to fulfill the obligation is not due to fraud or deceit (*dolo*).

ART. 1194. Even in cases where the failure to execute an obligation *may be the result of fraud or deceit on* the part of the debtor the damages for the loss suffered by the creditor or from the loss of profits of which he might have been deprived, can not extend beyond the *immediate and direct consequences* of the failure to fulfill the obligation.

ART. 1196. When in the obligations *for a certain sum of money* there exists no special agreement, *such damages as are the result of delay in the execution* are indemnified by the payment of *interest at the legal rate*, except when otherwise specified. Such damages are due from the day of delay, the creditor not being under obligation to establish any loss by proof.[a]

These prescriptions which are based on universal rules of civil and commercial law of all civilized countries are the only ones applicable to this case. And it is based upon such rules that I have held and do still hold that the Venezuelan Government is not liable to the French Company of Venezuelan Railroads for any other damages for failure to pay the amounts due on the contracts for services rendered, except the payment of the sum of money due for such services and the corresponding interest at the legal rate. To hold otherwise would be to apply to Venezuela a penalty which has not been established by any codes of any of the nations existing under international law. I, therefore, limit the liability of the Government of Venezuela on this

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[a] ART. 1191. El deudor no está obligado á pagar daños ó perjuicios cuando es á consecuencia de un caso fortuito ó de fuerza mayor que ha dejado de dar ó de hacer aquello á que estaba obligado ó que ha ejecutado lo que le estaba probibido.

ART. 1192. Los daños y perjuicios son debidos generalmente al acreedor, por la pérdida que ha sufrido y por la utilidad de que ha sido privado, salvo las modificaciones y excepciones establecidas á continuación.

ART. 1193. El deudor no queda obligado sino por los daños y perjuicios que han sido previstos ó que han podido preverse al tiempo de la celebración del contrato, cuando la falta de cumplimiento de la obligación no proviene de dolo.

Art. 1.194. Aunque la falta de cumplimiento de la obligación resulte de dolo del deudor los daños y perjuicios relativos á la pérdida sufrida por el acreedor y á los que son consecuencia inmediata y directa de la falta de cumplimiento de la obligación.

Art. 1.196. A falta de convenio en las obligaciones que tienen por objeto una cantidad de dinero los daños y perjuicios resultantes del retardo en el cumplimiento, se satisfacen con el pago del interés legal, salvo disposiciones especiales.

account to the amount above mentioned—241,357.70 boilvars—as principal and estimated interest on the debt.

As the final complement in the discussion of this part of the indemnification claim, I am pleased to quote the high authority of the opinion of my honorable and learned colleague in the American and Venezuelan Commission, Mr. William E. Bainbridge, in the case of Ford Dix against the Venezuelan Government:

> 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 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. 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. (Venezuelan Arbitrations of 1903, Ralston's Report, p. 9.)

The same reasoning is applicable to the necessity of the company to suspend operations, which the company made dependent from *force majeure*, because of the lack of revenues during four months by reason of the revolution and the failure of the Government to pay its debts to the company and because after September 27, 1899,

> *the railroad line was in the hands of the insurgents, and until the day of the suspension (October 12) there were no hopes that the Government would recover the place.*

See the notice of the manager announcing to the public that traffic had been suspended published in the newspapers called *El Fonógrafo*, *El Anunciador*, and *La Compañía Francesa*.

The second charge made by the board of directors of the company, resuming the claim for indemnification demanded from the Government of Venezuela, January 18, 1900, reads as follows:

> (b) The amount of 250,000 francs, our minimum estimate of the *indemnification* due by the Government of Venezuela for *substantial repairs and damages caused because of its acts to the whole of our property during the last revolution.*

In my opinion of August 28, 1903, I granted the claimant company an indemnification of ten thousand (10,000) bolivars and interest from October 12, 1899, for damages caused the steamer *Santa Bárbara* while in the service of the government of the State of Zulia by reason of the revolutionary movement at that time. Said estimate is based on the documentary evidence produced by the company or, in other words, on the estimate of the damages suffered by the steamer, as directed to be made by the French consular agent in Maracaibo, Mr. A. J. d'Empaire, on January 2, 1903, Messrs. Eugene Creutzer, a French mechanical engineer, and Manuel María Soto, a captain in the Venezuelan merchant marine, being intrusted as experts with the

appraisement of said damages. The report of these experts to the consular agent January 2, 1900, which bears the signature of said consular agent, fixes the amount of damages at the sum of *ten thousand bolivars*. There is no other evidence on record purporting to establish the existence of damages to the railroad material of the company, while, on the contrary, from the correspondence of Mr. Decleva, acting as manager of the company, it appears—

that peace and order reigned on the 7th of June, 1899, according to the reports received from the line.

Under date of June 18 the same manager reports to the company:

I am back after an uneventful trip. In Santa Bárbara, in La Vigia, along the line, *everything is quiet. The road is in good condition and the material complete.* All our engines have come back to the shops, *even those employed in the ballast work*, which I had pressed into service and kept *by order of the civil and military authorities.*

The only thing that the record establishes in reference to damages sustained by the maritime property of the company, besides the damages done to the steamer *Santa Bárbara*, valued at 10,000 bolivars, is the loss of the steamer *San Cárlos y Mérida*, at anchor in the harbor of Maracaibo. The witnesses, Edmond Hainst, Antonio Martínez Peña, and José Vicente González declared at the inquest held by direction of the French consular agent—

that the steamer *San Cárlos y Mérida* at anchor opposite the warehouse of McGregor & Co., and of Rafael Morales, had foundered during the evening of the 1st and the day of the 2d of December, 1899, because of the shots received in her hull, both on the port and starboard sides, during the engagement and shots exchanged between the forces under Gen. Cipriano Castro (on the Maracaibo side) and the forces under Gen. José Manuel Hernandez (on the Haticos side).

What is the liability affecting Venezuela for the above-mentioned events? The answer is the same Mr. Evarts, Secretary of State, gave Mr. Hoffman July 18, 1879 (Wharton's Int. Law Dig., section 224):

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.*

I do not deem it necessary to quote numberless decisions of arbitration courts or commissions in support of the views of the eminent Secretary of State.

Taking as a basis the above-quoted principle, I have not been willing to admit liability on the part of Venezuela for the foundering of the steamer *San Cárlos y Mérida*, which was not occupied by the Government forces, but was anchored in the Maracaibo harbor, unfortunately placed between the belligerent forces during an engagement at a point where the cross fire damaged her hull to the extent that she foundered.

Under such circumstances, the indemnification I have granted for substantial damages to the company's property is limited to what has been established as affecting the responsibility of the Venezuelan Government—i. e., the damages sustained by the steamer *Santa Bárbara* while in the service of the local authorities of the State of Zulia, appraised by experts at the sum of ten thousand (10,000) bolivars. The interest on this sum at the rate of 3 per cent from the date of the return of said vessel, about the end of October, 1899, until the time before stated, represents an amount of 1,675 bolivars or a sum total for the whole item of 11,675 bolivars.

The third and last charge for indemnification contained in the report of the director of the company under discussion is as follows:

(c) The amount of 1,050,000 francs, which, at the rate of 105,000 francs per month, represents the amount of the indemnification which the Government of Venezuela owes us because of suppression *by its acts* of our traffic during the ten months elapsed between July, 1899, and May, 1900.

The above-mentioned allegation is based on the suppression of the traffic of the company, a fact which is attributed to an act of the Government of Venezuela. From all the documents submitted to this commission by the company, the only established fact is that the suspension of traffic from the month of July, 1899, to October 12 of the same year, was due to the state of revolution then existing in the Cordillera de los Andes and localities contiguous to the State of Zulia, such revolution causing interruption of the carrying trade and paralyzation of all such commercial transactions, and that such suspension of traffic from October 12 on was due to the determination taken by the manager of the operations of the company, as published in the newspapers in the State of Zulia, to such causes as were made public by Manager Simon—i. e., the lack of receipts. It is in no way established that the suspension of the railroad and steamer traffic operations since the month of July were due to the direct individual act of the Venezuelan Government, whether by government is understood the one which terminated on October 19, 1899, with the fall of Gen. Ignacio Andrade or the *de facto* government succeeding it under Gen. Cipriano Castro.

Neither the authorities of the government of General Andrade nor the revolutionary forces led by General Castro, which afterwards constituted the government, did ever perform any direct act which may render the Venezuelan Government liable for the suspension of traffic both by land and by water of the company during the months elapsed from July, 1899, to October 12, 1899, while it is fully established that the management directed the suspension of the operations of the lines, and this constitutes an act of its own volition.

Even in the event, *which is not the present case*, that the governmental authorities should have directed the traffic of the trains to

stop temporarily because of the needs of war, such determination could not have made the Government of Venezuela incur a liability to indemnify the damages sustained.

There can be no reasonable doubt that it is the right of a government, in situations of danger or organized rebellion and revolution, to take such measures as it may deem proper to prevent the passage of persons, either for travel or business, from one point to another in the localities where there are armed and organized troops of insurrectionists, and to this end it certainly has the right and the power to suspend traffic upon any line of transportation; but this right is coupled with a corresponding duty, which is to make proper compensation to the company in cases other than those where the territory traversed by the railroad is the theater of active warlike operations between armed forces. (Opinion of the Hon. Henry M. Duffield, umpire in the German-Venezuelan Claims Commission in the case of the Great Railroad of Venezuela against Venezuela, Ralston's Report, p. 636.)

That the authorities of the State of Zulia directed the suspension of traffic on the railroad line, as alleged, has not been established. But even in such case, the operations of war being active precisely within the territory over which the railroad runs, the right to suspend traffic rested with said authorities, the Government of Venezuela not having obligation on that score to indemnify.

The interruption of the ordinary course of business is an inevitable consequence of the state of war, to which both natives and foreigners must submit, and therefore the losses suffered under such circumstances do not create any liability for indemnification to the government of the territory where the war takes place. This is the same rule controlling the case of liability when the property of neutrals suffers a direct injury or is destroyed during an engagement of the belligerent forces.

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

The reason for this is obvious. If the damages suffered by natives as well as aliens in consequence of a war were to be indemnified, the sum total would be so great that whatever the war might have left standing would not be sufficient to indemnify the claimants for direct damages. Payment would have to be made with their own property, and perhaps even this would not suffice.

If governments were under obligations to accept such liabilities as the French Company of Venezuelan Railroads has pretended should be charged against the Venezuelan Government because of the war, claiming for the value of the capital invested in the operation of the Santa Bárbara and El Vigia Railroad an indemnification of 18,000,000 francs, because the state of war compelled the company to suspend operations, suppressing all its revenues, and pretending besides that Venezuela should receive in exchange both the railroad and the maritime property of the company in such a condition as it is now, why should it not be admitted also that all railroad, maritime, commercial, industrial companies, even the undertakers and funeral

directors who have been compelled to suspend in Venezuela their active business transactions on account of a state of war, are entitled to transfer to the State their several business properties in exchange for an indemnity equivalent to their working capital? The claim of the French Company of Venezuelan Railroads for 18,430,000 bolivars leads to such absurdity.

The foregoing statements are, I believe, sufficient to firmly establish that the lack of grounds to base the claim for an indemnification upon, larger than the two I have acknowledged, relieves the Venezuelan Government from other liabilities to the French Company of Venezuelan Railroads than—

First. Indemnity for transportation and requisitions as established and estimated interest, 241,357.70 bolivars.

Second. Indemnity for damages to the steamer *Santa Bárbara* and interest, 11,675 bolivars.

Or a sum of two hundred and fifty-three thousand and thirty-two bolivars, rejecting the other claims, as they are not fully established. In this connection I beg to reaffirm in each and every particular my opinion of August 28, 1903.[a]

Before closing this paper I desire to be allowed to make two remarks in reference to the opinion submitted by my learned colleague in support of his decision.

The first remark is that the claim my colleague quotes in his opinion of the English Company of the Puerto Cabello and Valencia railroads,[b] which by the award of the umpire in the British-Venezuelan mixed commission obtained an indemnification of £231,794 7s. 11d., has no similarity whatever with the present claim, as my learned colleague avers, but, on the contrary, it essentially differs as regards the grounds upon which it rests. Such claim, as the honorable umpire knows better than we do, as he passed the final judgment upon the matter, was entered before the commission by the English Government in behalf of the Puerto Cabello and Valencia Railroad Company, demanding from the Venezuelan Government the amount of £319,381 4s. 9d. as arrears on the guaranty that the Venezuelan Government had given the English railroad company, and their interest, besides a small sum for freights. The English Government could not have submitted to an international arbitration court a claim similar to that submitted to this commission by the French Company of Venezuelan Railroads.

The second remark is that it was not Doctor Paúl who published a volume entitled "*Dictámenes del Árbitro Venezolano*" (Opinions of the Venezuelan Commissioner), among which is found that which my learned

[a] See pp. 369–405.

[b] Herein, p. 408, and citing Venezuelan Arbitrations of 1903, Ralston's Report. p. 455.

colleague, with a certain amount of fitness, perhaps, calls "a formal defense of the Venezuelan nation." It is the Venezuelan Government which made the publication, and it may be possible that such step has been taken with the purpose that the French commissioner or the counsel for the claimant companies may have an opportunity to learn as far in advance as possible the arguments therein contained, so as to be able to contradict them with convincing proofs and arguments before the umpire. I will simply say to my learned colleague that it is not our opinions which are to be submitted to the judgment of the honorable umpire. It is the mass of papers and documents around which the claimant has woven the net of its pretensions which will give no little trouble to the honorable umpire to unravel. It is the claims for indemnification against the Venezuelan Government which are to be sifted to attain the ends of justice.

I also submit herewith five exhibits translated into English, marked, respectively, with the numbers 2, 3, 4, 5, and 6, containing several reports from the railroad inspectors during different stages of the construction and operation of the road and during the suspension of traffic, as well as other communications from the company's agents, addressed to the department of promotion (ministerio de fomento) of the United States of Venezuela, relating to the facts dealt with in the present case.

NORTHFIELD, VT., *February 13, 1905.*

ADDITIONAL OPINION OF THE FRENCH COMMISSIONER.

After having read the additional memoir presented by my honorable colleague, I can only maintain the position which I took at the meeting of the commission of August 28, 1903, and explained in the prior memoir.

Although Doctor Paúl speaks of my "arguments," I maintain that I have rendered my opinion according to my conscience, as my position as an "arbitrator" requires. The protocol of 1902 gives us the title of "arbitrators" and not "commissioners" or "advocates."

I have no arguments to furnish. I am satisfied to examine those of the company and its defender, Mr. Dacraigne.

I have judged them to be convincing. I have read the two memoirs presented by my honorable colleague, not to combat them, but to find reasons for changing my convictions. After having read them my conviction remains intact. The Venezuelan Government has failed in its contractual obligations in never having paid to the company the guaranty of interest as agreed; it has imposed upon the company, which was forced to accept it, a leonine contract of which judges in equity could not recognize the existence any more than

ordinary judges can accord value to a signature given under threat; it has paid the pittance which it has kindly given on this occasion in paper without value; it has used the materials of the company for its needs; it has deprived it of its ordinary resources and employees; it has not even paid the price for services demanded. Consequently it has obliged the company to suspend operations. It is, then, responsible for its ruin, and it owes it an equitable compensation. The manner which I have adopted for calculating this compensation seems to me to be the only one which meets the requirements of equity and avoids, as the spirit of the protocol desires, a new claim being held after the arbitral sentence is rendered. Besides this estimation is made in accordance with the terms of the contract, and in this mode of settlement the Venezuelan Government would find advantages, since it would acquire a concession and a line of railroad at a price inferior to the contract price estimated by itself.

My colleague considers that my decision is contrary to the protocol and that the commission could not pronounce the rescission of a contract. Such is not my opinion. What are the terms of the protocol?

The commission will unite for the purpose of examining "the claims for indemnities presented by Frenchmen." If the two arbitrators "do not agree upon the amount of indemnities to be allowed, the demands will be submitted by them to an umpire," who "will decide without appeal." The protocol says nothing else, and it would be to take from it all the efficacy which the signers wished to give it to restrain the powers of the umpire contrary to the letter and to the spirit of this diplomatic act. The protocol was intended to terminate all the differences existing between Frenchmen and the Government of Venezuela, and has placed no limitation upon the sovereign power of the arbitrators to weigh and decide and, in case of disagreement between the latter, that of the umpire. In pronouncing the rescission, besides, the commission would only cause a condition of fact to be registered, solemnly, and consecrated, the Venezuelan Government having treated the contract in question as nonexisting, since it has never executed its clauses.

Finally, I ought to remark to the honorable Mr. Plumley that Doctor Paúl has not always been of the opinion that the rescission of the contract was beyond the jurisdiction of the commission, since at the sitting of the commission of May 12, 1903, relative to the Pieri claim, he decided that this Frenchman should obtain an indemnity in exchange for the concession which he held of a contract with a municipality. The umpire can refer to the extract of the minutes of the said meeting, which he will find in the *dossier* of the Pieri claim.

As to the foundation of the claim, it is not for me to defend the company of which I am not the advocate but the judge; I can only pray the umpire to go over the *dossier* and the argument of Mr. Dacraigne.

It only remains for me to express a few ideas which are suggested to me by the additional memoir of my honorable colleague, additional memoir which, with the memoir printed in the "Dictámenes," form so well an argument in favor of the Venezuelan Government that the latter has presented no other defense.

In support of his opinions Doctor Paúl cites passages from known authorities and decisions of arbitrators whose science and impartiality I respect; he calls to his aid international law and the law of all countries. I reply that these authors, these arbitrators, and these laws agree in proclaiming that States, like individuals, are bound to keep their engagements solemnly made and to pay their debts, and are responsible, like individuals, for damages which their faults have caused to others.

Doctor Paúl asks why the Venezuelan Government should not also reimburse their capital to all enterprises, "even funerals," which have suffered in Venezuela from operations of war. And to this question I make the same reply as he: We are agreed upon the above. It is not a question of that in the claim of the French Company of Venezuelan Railroads, which was bound to the Government by a formal contract and has rendered it service worthy of remuneration.

Doctor Paúl maintains that there is no possible comparison between this claim and that of the English Company of Railroads between Puerto Cabello and Valencia. It seems to me, however, that both cases relate to the nonpayment of a guaranty of interest. Only they did not dare, because of the easy access of English fleets to Puerto Cabello, to impose upon the English company the conditions which the French company was obliged to accept under penalty of obtaining nothing for the sums due it. A look cast upon the map of Venezuela is more instructive than all the explanations.

It is also known that France is opposed to using force against the weak to have her rights respected. Besides, the umpire knows better than anyone the claim of the English company, which I have merely heard spoken of, and he will be able, knowing the case, to decide if what has been granted the one can be refused the other because the other is less fortunate or less feared.

Doctor Paúl courteously observes to me that it is the Venezuelan Government that has had the "*Dictámenes del árbitro venezolano*" published, perhaps to permit the French arbitrator and the advocates of the parties to understand its arguments, and besides that the honorable umpire ought to pass, not upon our respective decisions, but upon the claims themselves, of which he ought to become conversant integrally.

On the first point, I reply to my honorable colleague that I have never criticized the publication of the "Dictámenes"—I have no authority at all to do so. I am content to state that this publication

emphasizes the character of the arguments of the "Dictámenes" and gives to the French claimants the right of replying, as certain of them have done.

On the second point I am happy to share completely the opinion of my honorable colleague. It will be necessary to remember on this occasion that it is not the first time that we have agreed since we have already settled together, without recourse to an umpire, 72 claims out of the 80 that were submitted to us under the protocol of 1902.

NORTHFIELD, *February, 14, 1905.*

OPINION OF THE UMPIRE.

July 25, 1887, the minister of public works of the United States of Venezuela, duly authorized, executed a contract with the Duke of Morny, a French citizen, which contract was duly approved by the Congress of that Republic August 3, 1888. It contained provisions which are summarized by the umpire as follows:

The Government of Venezuela conceded to the party above named the right to build a railroad from Mérida to the Lake of Maracaibo; canalizing the river Chamas, the Escalante, or any other navigable river whatsoever; the exploitation and the enjoyment of the revenues of the enterprise for a term of ninety-nine years; a strip of 500 meters of land on each side of the railroad track without payment therefor to be taken from the lands of the nation; the right to avail himself of the lands belonging to individuals which might become necessary for the construction of the railroad, stations, and the like, in conformity with the laws governing the taking of lands for public use and subject to compensation therefor; the wood and timber necessary for the construction of the works to be taken from the national forest without compensation therefor; the right to introduce into the country free of import duties the engines, material, instruments, and everything necessary for the construction of the line, subject only to proceeding in reference thereto in conformity with the provisions of article 177 of the code of finances; the right of exemption from assessments at all times by the nation and the State; a right to extension of the time allowed for the beginning and the completion of the works when delay was caused by *force majeure*, the entire extension not to exceed one year; a guaranty of 7 per cent on the capital in shares, bonds, or obligations; the right to construct such branch lines as he should deem necessary; the privilege of transferring the contract thus executed to any other person or company at his pleasure on notice to the Venezuelan Government.

The Duke of Morny obligated himself in said contract to begin the said railroad and the canalization of the river, in case it be necessary,

within one year from the date of the contract and to finish the line in three years therefrom; to yield up to the Government of Venezuela at the expiration of the said ninety-nine years, without indemnity therefor, the enterprise with all its annexes and properties; to carry the mail free of charge; to transport for one-half the established rates the employees of the Government, its soldiers, troops, and elements of war; to the resolution by the competent tribunals of the Republic, in conformity with its laws, of all doubts and controversies which might arise from the contract.

August 13, 1888, certain declarations and amplifications to the foregoing were made by Gen. Guzmán Blanco, envoy extraordinary and minister plenipotentiary for Venezuela, to and with the said Duke of Morny, which are summarized by the umpire as follows: The Government of Venezuela thereby and therein conceded to the other party that the railroad from Mérida to Lake Maracaibo was to be divided into two sections; the first section was to start from a point upon the river Escalante, which point the concessionary was to determine, and to be continued for a length of 60 kilometers in the direction of Mérida; the second section was to start from the terminal point of this first section and continue to the city of Mérida; an extension of the time fixed in said modification of the contract for the building of the first section equal to the delay suffered, if the delay was caused by *force majeure;* the guaranty of 7 per cent provided for in the original contract to begin when the first section was opened for exploitation; an extension of the time fixed in this modification to the original contract for the building of the second section was to be made equivalent to the delay suffered, if the delay was caused by *force majeure;* establishing the capital at an estimate of 300,000 bolivars per kilometer for the first section and at 350,000 bolivars per kilometer for the second section, the guaranty of 7 per cent to rest upon the amount of this estimate; to pay the said guaranty in three equal parts at equal periods during the year; to add to the material which was to be imported free of duty under the terms of the original contract the engines, material, and instruments necessary for the running of the railroad; and that during the period of twelve years from the date of the said modification of the original contract the Government would not establish a service of navigation to carry on traffic between the terminal point of the railroad or any points upon the Escalante and the different ports of the Lake of Maracaibo.

The concessionary was obligated therein to begin the work of building the first section of said railroad within six months from August 13, 1888, and to complete the same within two years therefrom; to complete the construction of the second section within four years from the date named, and to introduce the material which was to come in duty

free in conformity with the provisions of the law of finances provided for in such matters.

April 16, 1891, further modifications of the contract were made by the Congress of the United States of Venezuela by and with the representative of the French Company of Venezuelan Railroads, which latter had succeeded to the rights of the original concessionary, which modifications are summarized by the umpire as follows: The Republic ratified in behalf of said company the contract of August 13, 1888, and confirmed the original contracts except where they were contrary to the conditions named in that modification. The company renounced and declared null and void Article X of the contract of August 13, 1888, which gave exclusive navigation privileges on the river Escalante and the different ports of the Lake of Maracaibo. It was mutually stipulated that the concession was to be limited to the first section, which was to extend from Santa Bárbara to Camino Real, a point 1 kilometer distant from La Vigia. The guaranty of 7 per cent was to be reduced by the amount of the net benefits received by the company, these being composed of the net product of the receipts of every nature made by the exploitation of the railroad after deducting the general expenses of the company and of its management; the sums paid on account of said guaranty to be treated as advances only, to be returned as and when the benefits received by the company exceeded 7 per cent on the guaranteed capital by applying one-half of such excess in liquidation of said advances until all was reimbursed; that after said advances had been fully reimbursed the Government was to continue to share in said benefits to the extent of 20 per cent thereof. There was added to the provision in regard to the resolution of all doubts and controversies by the tribunals of the Republic the further agreement that in no case were these doubts and controversies to give place to international claims.

It will be observed that by the modification of the original contract made August 13, 1888, the capital of the company for the purpose of reckoning the guaranty was estimated at 18,000,000 francs.

Following this arrangement a French company was formed September 28, 1888, taking the name of French Company of Venezuelan Railroads, with headquarters at Paris, and its duration limited to ninety-nine years. The concessions obtained by the Duke of Morny were taken over by this company. The social fund was fixed at 300,000 francs, divided into 6,000 shares of 500 francs each; the other resources of the company necessary to the enterprise were to be raised by a loan. The laws of the company provided that from the guaranty of the Venezuelan Government of 7 per cent there should be set aside annually a sufficient sum to insure the payment of interest on the capital, which was to be obtained by loans. This guaranty was

reckoned to produce 126,000 francs annually on the estimated capital of 18,000,000 francs.

October 26, 1888, the company created 41,664 obligations of a nominal value of 500 francs, each representing 25 francs annual interest.

With the capital thus provided, a syndicate undertook to construct the railway, pay the interest in the meantime, and reserve finally to the company for current funds at the time the first section was ready for exploitation the sum of 300,000 francs. The building of the road was in progress from 1889 to 1892.

It is complained by the company that on April 16, 1891, the Government, by the rule of the stronger, compelled in the agreement of that date, the provisions of which have already been stated, the introduction of the clause into the original contract that there was to be deducted from the amount of the guaranty the actual net profits of the company.

September 29, 1891, the first section was nearly completed and about ready for use, when there occurred a very serious inundation, causing a considerable delay and the expenditure of a large sum of money to reconstruct the parts destroyed. It was April 1, 1892, when the company considered the work of construction completed and demanded of the Government its acceptance. But the State of Andes was then in revolt, while that of Zulia was loyal to the titular Government. A portion of the railroad was in each State. To whom should it apply? Which was its Government?

August 5, 1892, the company made publication in the local papers of the fact of the completion of the railroad and that it had begun business.

The company suffered badly from the insurrection, in requisitions from both sides, in the dispersions of its workmen, in the disappearance of its traffic, while the Government in the midst of this intestine war paid neither requisitions, damages, nor guaranties. The line was repaired from the resources of the company, but it thereby exhausted its capital, and November 1, 1892, judicial liquidation resulted. The creditors accepted the proposition made by the company to pay them pro rata and permitted it to continue its enterprise.

February 23, 1893, the engineer of the Government examined the line and declared it to be well constructed and advised that by April 1, 1893, it would be in a situation to be accepted by the Government. March 23, 1893, the decree of inauguration was published, and on May 10, 1893, the record was made of its definite acceptance by the Venezuelan Government, dated back to April 1 of that year. As a matter of fact, the line had been in operation since 1892, with receipts for that year aggregating 149,241.21 francs, for 1893 the

receipts being 570,061.37 francs, and in 1894 they were 458,525.24 francs.

An earthquake in 1894 did great damage to the roadbed and to the bridges, which required large expenditures to restore. The receipts through its traffic were insufficient to meet these expenditures, and the national Government, though repeatedly urged so to do, paid neither guaranties nor indemnities nor requisitions. At the general meeting of the shareholders of the company, held June 30, 1894, its reports showed a claim against the Venezuelan Government amounting to 2,205,000 francs. In fact, the repairs which were required by the earthquake had been made only by the issue of bonds of the denomination of 500 francs, drawing interest at 6 per cent, to be reimbursed by the sums to be received from the respondent Government. On June 20, 1895, the report to the general meeting of the shareholders showed a claim against this Government of 5,820,785.47 francs. In 1894 the company issued 800 of the bonds, which have been mentioned, and in 1895 it made a further issue of 400. In the month of December of this last-named year requisitions by the national Government began again; the financial condition of the company became more strenuous. It sought diplomatic aid through its own Government, but obtained no results. December 31, 1895, it claimed of the Government of Venezuela as follows:

	Bolivars.
For guaranty to December 31, 1895	4,725,000.00
Damage to the exploitation	396,924.75
Damage for recruiting its workmen	525,509.57
Requisitions	96,320.00
Damage resulting from the nonpayment of the guaranty for the issue of bonds	1,308,000.00
Total	7,051,754.32

The years 1892 to 1894, both inclusive, were involved more or less in the successful Crespo revolution. It was February 20, 1894, that General Crespo became constitutional President of the Republic for a term of four years. But it was not until the year 1895 that his authority was everywhere recognized, and up to that time there were occasional revolutionary outbreaks, entailing large expense upon the Government and lessening and interrupting its sources and means of revenue.

The answer of the national Government to the repeated and urgent requests of the company for the recognition and payment of its credits was always a lack of funds, of which fact there could be no real denial. The respondent Government had not, however, agreed to the sums demanded of it by the company.

By 1896 the financial condition of the national Government had greatly improved, and in April of that year, together with Mr. Charles Weber, the duly constituted representative of the French Company

of Venezuelan Railroads, it took up the claims of that company. Substantially the same figures were presented to the respondent Government as have been here produced of date December 31, 1895. The consideration and discussion of these affairs resulted in a formal convention made April 18, 1896, when was brought in first a rehearsal of the salient matters of the previous contracts and then the statement of the claim of the company against the respondent Government. This statement is succeeded by the language which follows:

(e) The Government has refused the payment of this guaranty during the time between April 1, 1892 (date upon which the line would have been opened to traffic had it not been for the forced recruiting of workmen), and June 1, 1893, date of the official inauguration; and, furthermore, it has refused the payment of the amount of 2,326,751.32 bolivars, which treats of damages not well founded.

The company, although maintaining in principle the good foundation of the claim, shows itself disposed to make important concessions in view of arriving at an agreement, and after lengthy discussions upon the accounts presented the Government and the company by way of a transaction have agreed upon that which follows:

ART. 1. The company reduces to 1,950,000 bolivars the total amount of all its claims for the guaranty of 7 per cent, liquidated until December 31, 1895, for every other cause which it would have the right to invoke.

ART. 2. For the redemption of the obligation by which the Government has to continue to pay the same guaranty of 7 per cent upon 18,000,000 bolivars guaranteed capital during ninety-nine years, the term of the above-mentioned contract, the company consents to receive 2,500,000 bolivars. Articles 2, 3, and 4 of the said contract of June 17, 1891, become by this fact without force.

ART. 3. The payment of both these amounts is to be made by the Government simultaneously with the present act and by remitting to the representative of the company an order upon the Disconto Gesellschaft of Berlin for the amount of 4,450,000 bolivars in bonds at par of the Venezuelan loan of the Disconto Gesellschaft of 1896 bearing 5 per cent interest annually with 1 per cent amortization, the same order bearing moreover the signed approval of the agent of the Disconto at Caracas.

ART. 4. The representative of the company declares in consequence the nation to be free from every responsibility, as well upon the guaranty of 7 per cent already due as for the obligation to pay this same guaranty in the future, and he will repeat this same declaration in the receipt which he will give to the direction of the Disconto Gesellschaft.

ART. 5. The company binds itself within six months from this date to repair whatever deteriorations have been sustained by the railroad from the changing of the course of the river Chamas, and to keep the line in a good condition for use, in conformity with obligations assumed in the previous contracts, and submitting itself to the penalties which the law, inflict in this matter.

ART. 6. In all that which is not opposed to the stipulations of this convention the rights and obligations resulting for the company from anterior contracts to which reference has been made retain all their force and all their vigor.

Made in duplicate at Caracas, April 18, 1896.

Two days thereafter the ministers of finance and of public works for Venezuela made the following communication:

CARACAS, *April 20, 1896.*

To the DIRECTION OF THE DISCONTO GESELLSCHAFT, *Berlin.*

GENTLEMEN: In conformity with the provisions of article 5 of the contracts of the loans passed between our Government and your direction, the citizen President of the Republic informs you that, in accordance with the contract passed between the national Government and the French Company of Venezuelan Railroads, you will have to remit to the said com-

pany the sum of 4,450,000 bolivars in bonds of Venezuelan loan of 1896 at 5 per cent annual interest, with 1 per cent amortization.

It is to be noted that in giving you the receipt for this amount the French Company of Venezuelan Railroads is obliged to make the following declarations:

"That it recognizes as annulled all its credits against the Venezuelan Government for the guaranty of 7 per cent due up to December 31, 1895, and that it renounces absolutely this guaranty during the remainder of the ninety-nine years, the term of its concession; that in consequence it declares the nation freed from all responsibilities."

June 27, 1896, there was a general meeting of the shareholders of the French Company of Venezuelan Railroads, and the council of administration made its report. In that report is found the following:

At the beginning of this year, 1896, the Venezuelan Government, being desirous of making a settlement of its debts with the different railroad companies of Venezuela, negotiated with the Bank of Berlin, the Disconto Gesellschaft, for the creation of a loan, called the Venezuelan loan of 1896, bearing 5 per cent annual interest and with 1 per cent amortization, and payable within the term of thirty-six years and a half. The loan was guaranteed by custom-house receipts. The nominal amount of this loan was fixed at 50,000,000 bolivars.

Each of the German, French, English, and other railroad companies were invited by the Venezuelan Government to negotiate simultaneously the payment of what was due them and the redemption of the guaranty which had been conceded. *Each of these companies, after lively debates, accepted the conditions imposed by the Venezuelan Government, harsh as they were, under penalty of seeing themselves eliminated forever from the only combination which might terminate their credit upon this Government.*

Like the other companies, we then accepted the conditions which were imposed upon us. However, we did not authorize our mandatary at Caracas to give our acceptance *until after we had taken counsel and received the authority of the controllers appointed* by the shareholders.

* * * * * * *

Seeing the necessity of keeping the social assets up to their full value and with the authority of the controllers appointed in execution of the concordat to represent the creditors, the company has had to issue up to this date 2,500 privileged bonds of 500 francs to procure funds for repairing the line, repairs which are not yet finished.

Recently the Venezuelan Government, having shown a desire to settle with the different companies of railroads in Venezuela, our company, following the example of the German, English, and other companies, sent to Venezuela its formal representatives, and after a long negotiation it succeeded in obtaining from the Government of Venezuela the remittance for the balance of credits and for the redemption of the guaranty for the future of its concession a net sum of 3,200,000 bolivars in bonds of Venezuelan loan of 5 per cent, 1896, above mentioned.

The able patronage of the Disconto Gesellschaft of Berlin assures the actual value of this title.

However grievous such a transaction has seemed to us, we had to resign ourselves, after having been authorized by the official representatives of the shareholders to accept it, like other railroad companies, as the only means of obtaining any indemnity whatever. * * *

We shall request of you, gentlemen, to ratify the transaction between the Venezuelan Government and your company.

After the reading of this report the shareholders passed the resolution which follows:

The special assembly, after having heard the report of the council of administration read, ratifies the transaction between the Venezuelan Government and the council of admin-

istration of the Company of Venezuelan Railroads, assuring regularly the debts of the said Government toward the said company and the redemption of the guaranty in favor of the said company by act of concession which had been attributed to it.

June 25, 1897, there was an annual meeting of the shareholders of the company, and among its proceedings is found a resolution which is here reproduced:

Second resolution. The general assembly, approving the measures taken by the council of administration following the disturbances caused by the inundations which succeeded the earthquake of 1894, authorizes it, so far as it has need, to realize in the best measures possible a complement of the loan voted in 1894, which will be represented by 1,500 privileged bonds of the nominal value of 500 francs, bearing 6 per cent annual interest and redeemable in at least ten years from January 15, 1897, raising thus from 2,500 to 4,000 the total number of these ten-year bonds.

June 30, 1898, there occurred an annual meeting of the shareholders of the company. There was a report of the management of the line for the year then past, from which it is learned that the exploitation suffered a loss of 10,401.75 francs, and that the finishing of the repairs, bridges, buildings, etc., amounted to 499,805.70 francs. There followed certain resolutions, the second of which is here quoted:

Second resolution. The general meeting of the shareholders authorizes the council of administration, first, to remit, July 1, 1898, the full amount of the bonds of the Venezuelan loan, 5 per cent, 1896, which the company possesses on deposit under its name at the Disconto Gesellschaft at Berlin, contra: (*a*) the remission of 3,619 ten-year privileged bonds, 6 per cent, of the company, (*b*) a balance in cash of 390,500 francs; second, to call on July 15, 1898, for the redemption at par of 500 francs on 381 privileged bonds, 6 per cent, of the following numbers, and to raise, to meet this payment, the sum of 190,500 francs of the 390,500 francs received as in article 1. The balance of 200,000 francs will be used as current fund. (Numbers of the bonds here given.)

June 29, 1899, there again occurred the company's annual meeting. The directors presented their report, from which is taken the following quotation:

Our railroad has given us an income of 8,966.23 francs, while our service of navigation has caused us a loss of 22,324.83 francs. There is, then, a net loss of 13,358.60 francs. We have finished the repairing of the damages which were caused by the earthquake of 1894 and by the floods which up to 1897 were the consequence. The special expenses paid for this in 1898 reached 149,191.86 francs, which were settled by means of funds at hand; the latter were reduced December 30 last to 51,344.86 francs. The somewhat unsatisfactory results are attributable almost exclusively to the consequences of the political crisis which had been going on in Venezuela for the greater part of the year. * * * Among the 256,126.14 francs of the different debits found in the balance sheet which we are going to submit to you the Venezuelan Government is set down for 174,077.20 francs.

For some months quiet seems to have been reestablished in the country. We hope that with it the commercial situation will resume normal conditions and that our exploitation will profit from it.

The first months of 1899 seemed to justify this hope.

The reimbursement of our privileged bonds has been carried on regularly and in conformity with your decision of June 30, 1898.

Earlier in this opinion the gross receipts of the railroad for 1894 were stated. The net result for that year was 72,332.15 francs. In

1895 the net receipts were 101,676.97 francs and in 1896 they were 102,319.28 francs. In 1897 the respondent Government employed the line to transport its troops and materials, but paid nothing and did not answer the claims presented by the company. As a result the year 1897 showed a loss; similarly, the year 1898.

The 4,000 bonds issued by the company, under authorization which has been quoted, were largely held by the companies Dyle & Bacalan and of Tives-Lille, and with these companies it had always been understood that the payments made by the State were to be used first of all in payment of these bonds; it was for this reason and under the authority above quoted and by reason of the general inexecution of the engagements of the State toward the company, that in the month of June, 1898, the French Company of Venezuelan Railroads turned over to these financial companies the Venezuelan loan of 1896, which was arranged through the Disconto Gesellschaft, of Berlin. And, as has been seen in the quotation last made, there was left for the current use of the railroad company a balance of 200,000 francs. In June, 1898, there was a new revolutionary movement affecting especially the States of Zulia and Andes. The general in charge of the Federal forces drafted the workmen. The director, Mr. Brun, was shot at Santa Bárbara in the midst of a conflict, and died of his wounds; there were requisitions of material, of trains for the transfer of troops, of war material, etc. The passenger and freight service was paralyzed; the claims of the railroad received no attention from the Government; there was no payment for the services and sacrifices required of and imposed upon the company, and its very existence was seriously threatened. It appealed to its own Government, it rehearsed its wrongs and grievances but it obtained no relief. Just as the exploitation began again to yield some income and the revenues of the national Government began to quicken, the successful revolution of General Castro broke out. Requisitions were again in evidence and more than ever before. Destruction was manifest on all sides; grave losses were caused to the boats; while the revolutions took from it its traffic, the Government made requisitions and neither paid anything.

This successful revolution of General Castro which began in the spring of 1899 brought serious disaster to the railroad in many ways. A letter of date October 12, 1899, to the French minister of foreign affairs by Mr. Reynaud of the administrative board vividly portrays the situation. Selections therefrom are quoted:

> The political and revolutionary crisis which exists in Venezuela has not diminished in intensity since the last communication which we had the honor of addressing to you August 23 last.
>
> Our property and all our possessions—our railroad material and our boats—have not ceased for several months to be arbitrarily seized or sequestered by the authorities, now said to be legal, now revolutionary. The future of the exploitation of our railroad and boats is grievously compromised in the source of its receipts.

The harvests are destroyed, abandoned, or lost; the workmen are pursued and tracked in the forests; the owners and merchants in flight or ruin.

Finally, our resources are exhausted.

We have been obliged, then, to suspend our exploitation.

It was two days anterior to the date of the above letter that Mr. Simon, general manager of the railroad, informed the citizen president of Zulia in writing that "because of *force majeure*" all operations of the steamers and of the railroad from Santa Bárbara to La Vigia were suspended. In this communication the *force majeure* referred to is thus explained:

1. All the resources which the company had, whether at Paris or at Maracaibo, have been completely exhausted in paying the expenses of this railroad and its steamer *Santa Bárbara* during all of the revolutions, and then the Venezuelan Government and the insurgents used these means of transfer until little by little they became masters of them.

2. Since September 27, 1899, the revolutionists have again taken possession of the line, and consequently we can have no receipts except from our steamers and of these the Government is constantly taking possession.

3. All our efforts with the national Government at Caracas, as well as with the government of Zulia, to recover the large sums which they owed the company, have had no success, not even for the little sums of 300 and 144 bolivars, which were to be paid October 3, 1899.

4. In these conditions if the company continued the exploitation it would be obliged to go into bankruptcy.

5. *It suspends its exploitations without renouncing its rights on that account upon the concession of the railroad from Santa Bárbara to La Vigia until the special settlement takes place between the French company and the Government.*

A communication to the same effect was sent to the national Government through its minister of public works. In it Mr. Simon stated that the revolution had made it impossible for the railroad to receive any benefit during the months of June, July, and August. It was there stated that in September there was a suspension of hostilities and there were some receipts; but that the new revolution broke out September 27, since which time the traffic had ceased. The use of the steamer plying between Santa Bárbara and Maracaibo had terminated, because of the order of the customs officer forbidding its use and of the confirmation of the same by the president of the State.

The situation is there summarized by Mr. Simon as follows:

1. It is not possible for the exploitation to gain any receipts since the revolutionists are masters; and up to this day, October 10, there is not hope that the Government can retake this city.

2. The Venezuelan Government can not pay the company any of its debts nor even give it an account nor make any promises for the future.

3. The company has no longer any resources, having exhausted everything by which it may meet expenses of the line, while it has made no receipts because of the frequent revolutions.

Considering that this state of affairs has caused it prejudices and enormous damages, and that if it continued its expenses it would be led into bankruptcy, the company sees itself because of *force majeure* obliged to suspend the exploitation of its line and its steamers until a settlement may be made with the national Government of the United States of Venezuela; that the company does not abandon its right upon the concession of the said railroad from Santa Bárbara to La Vigia.

October 22, 1899, by communication of Mr. Simon to the company at Paris it is learned that the archives and records of the company had been locked up in the safes and a detailed inventory had been given the consular agent of France at Maracaibo; that the entire personnel of the boats had been paid and discharged, and the copy of the notice to the public which had been given it through the newspapers was therein remitted. It is added that—

> The lack of income during more than four months, together with the revolutions and lack of payment by the Government of its obligations to the company, are the reasons which lead the company to ask for a settlement with the national Government before continuing anew the exploitation.
>
> It appears that since the 27th of September the railway is in the hands of the insurrectionists, and that until this date, October 12, there is no hope that the Government may recover this place.

The Government of France through its foreign office directed its consular agent at Maracaibo to safeguard the interest and properties of the railroad company during its suspension of activities.

December 2, 1899, there was an armed conflict on the shores of the bay of Maracaibo between the forces of General Castro and those of General Hernandez. A steamer of the company, the *San Cárlos y Mérida*, was lying at anchor in the bay and the armed forces were so situated toward one another that the steamer lay in their line of fire; as a result the damage to the hull of the steamer was so serious that it sank during the afternoon of that day. These facts concerning the steamer are taken from the report of the French consular agent at Maracaibo in a communication made by him of date December 30, 1899.

January 2, 1900, the appraisers specially appointed for the purpose of estimating the damages suffered by the *Santa Bárbara* while in the service of the national Government made their report, naming these damages at 10,000 bolivars.

January 18, 1900, the French Company of Venezuelan Railroads addressed the minister of foreign affairs of France and referred to its communication of the previous month to the same official and asserted a claim which is reproduced in the additional opinion submitted by the honorable commissioner for Venezuela to the umpire at Northfield, Vt., February 13, 1905,[a] and it need not, therefore, be repeated here.

February 3, 1900, the railroad company addressed itself to the President of the Republic of Venezuela, informing him of the grave disasters which had overtaken the company and declaring that any considerable delay in the settlement of the sums due it from the national Government might prove fatal.

January 18, 1901, the French Company of Venezuelan Railroads, having received no payment from the respondent Government and

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no encouragement that payment would be made, came to believe that its efforts were forever compromised, and it then presented to the French minister of foreign affairs a claim for 18,000,000 francs, the *ensemble* of the losses which the action of the respondent Government was held to have brought upon it. To this was added the service of the boats, which had been destroyed or injured, and a part of the material of the dredging machine, which had been stolen, making a total of 483,900 francs, deduction having been made of 11,100 bolivars, that sum being the price for which the *Santa Bárbara* and the launch had been sold. This claim was brought to the attention of the consul-general of Venezuela at Paris, whose response was that the new president up to that time had been able to concern himself only with matters political and martial.

It is claimed on the part of the company that in March, 1901, the respondent Government had planned to cede or let the line and its accessories to a Mr. Bolaro, and to that end had appointed a commission for making estimates. The action of the Government met with a very vigorous protest from the company, and if results were intended there were none.

In behalf of the company there is also presented by Counselor Dacraigne in his very able and valuable brief the claim that it was ruined at the hands of the respondent Government; that this ruin was practically consummated by what he is pleased to denominate the culpable removal of the guaranty. He insists that the exchange made between the company and the Government was without any equivalent and was brought about only by such pressure that it was invalid and should be declared a nullity. He also asserts that it should be declared a nullity by default of execution, since the respondent Government has not paid the arrears of the bonds which it has given the French company in exchange for its guaranty. The respondent Government, as the essential part of that exchange, was to furnish bonds bearing 5 per cent interest, the bonds having no other value than their interest-bearing qualities. The interest not being paid, the bonds were without value; hence there was, in fact, no consideration for the surrender of the guaranty by the company, and the respondent Government having thus failed to perform that which was essential in the contract for the surrender of the guaranty, the company has a right to demand the rescission of that portion of the convention of 1896. He includes in the right of rescission a claim for damages in behalf of the company, which is in the nature of a reimbursement of all the expenses which have been imposed upon it, with interest at 7 per cent. He urges that the guaranty be liquidated from May 10, 1893, up to the date of this award, less the sums paid thereon, with a charge of 7 per cent interest annually for the default. The claim for 18,000,000 francs is presented on behalf of the company in another view. The reasons given are that the respondent

Government by requisitioning the material and the personnel of the company deprived it of its rights and its property. The Government had power to take it, but it is equity that the company be reimbursed for it. The damage thus consummated is estimated at the price set upon it by the Congress of Venezuela in 1891, which, it is urged, is the amount of the claim here presented.

Summarized, then, the claim of the French company, as presented by its counsel, is as follows:

1. For the loss of its line the sum of 18,000,000 francs, with interest at 7 per cent upon the capital of 15,000,000.

2. For the loss of its maritime exploitation, the sum of 483,000 francs, with interest at 7 per cent. The interest on both of these items should be reckoned from March 23, 1893.

This résumé of the facts appearing in this claim and forming the body of it is perhaps sufficient to make intelligent the opinions of the honorable commissioners, and later, the views and holdings of the umpire. He thinks that he can best make to appear the divergent paths by which the honorable commissioners approached the questions involved by quoting liberally the record of their proceedings, which is as follows:

The examination of the claim of the French Company of Venezuelan Railroads, presented at the sitting of May 19 last, and amounting to the sum of 18,483,000 bolivars, was then taken up.

The French arbitrator considering: That the nonexecution of the obligations contracted by the Venezuelan Government with the company and the nonpayment of sums which it owed, from the fact of its engagements and its requisitions carried on, have placed the company in the imposibility of continuing its exploitation; that the inspection of the line, of the material, and of the buildings demonstrates clearly that the company had not recoiled before any expense to assure in excellent condition the service of merchandise and travelers;

That the examination of accounts permits to establish that the exploitation would have been remunerative in spite of the obstacles presented by the civil war and the inclemencies of the climate if the Venezuelan Government had paid over the amounts due from it, and that consequently by the act of the Venezuelan Government the company has been deprived of the legitimate benefits which it had the right to hope for;

That according to the said contract the Venezuelan Government having accorded a guaranty of 7 per cent upon a kilometric value of 300,000 bolivars, has itself implicity recognized that the value of the exploitation was 18,000,000 bolivars;

That the Venezuelan Government seems to have had the intention to annul the contract and to accord the concession to a new enterprise;

That the company's claim for indemnity for the damages suffered by its maritime service from Maracaibo to Santa Bárbara is perfectly justified;

Decides that the Venezuelan Government ought to pay to the French Company of Venezuelan Railroads the sum of 18,483,000 bolivars demanded by it, on condition that the latter renounce the concession of the enterprise and abandon to the Venezuelan Government its line, its buildings of exploitation and habitation, its stores, and its terrestrial and maritime material in the condition in which they are found, by means of which payment, renunciation, and abandonment the two parties will be free from all their reciprocal engagements and obligations.

The Venezuelan arbitrator, considering on the contrary:

That the true reasons for the suspension of the exploitation of the line by the company are of economic order, the latter having been led to take this resolve because of the lack of

traffic due to the troubled state of the country and by the impossibility in which its bad financial position had placed it to obtain new funds necessary to make repairs for damages caused by the inclemency of the weather to a line established under unfavorable conditions;

That the Venezuelan Government could be held responsible neither for damages caused to the material of the exploitation by a voluntary abandonment nor for those suffered from the fact of the troubled condition of the country or of accidents of war;

That the arrangement entered into by the company with the Venezuelan Government on the subject of the guaranty stipulated in the contract has been entirely carried out and that the company has received the sums accruing from the sale of the bonds which have been remitted to it in execution of the said arrangement;

That the Venezuelan Government has never refused to reimburse the company for the requisitions and damages caused by them to the material, and that the impossibility in which it finds itself of making this reimbursement as the result of the penury of the treasury in the course of the civil war obliges it only to pay interest after demand:

Decides that the claim of the company is without foundation.

It recognizes only the right to an indemnity of 10,000 bolivars for damages done to their steamer *Santa Bárbara* during the time when it was requisitioned, and reserved for it the privilege of claiming from the Venezuelan Government by presenting the necessary justifications, the sums due for the requisitions with interest corresponding. It equally reserves the right of the Venezuelan Government for the fact of the abandonment of the exploitation.

Thus disagreeing, the claim was presented to the umpire at a sitting of the honorable commission held at Northfield, Vt., February 14, 1905.

During the sitting of the honorable commission at Caracas and on August 28, 1903, the honorable commissioner for Venezuela presented an able memoir or opinion relating to this case, giving the reasons of fact and equity which prevented him from allowing any of the claim except the sum of 10,000 bolivars for the appraised injury done the steamer *Santa Bárbara* while in the service of the respondent Government. Many of the facts brought out in his opinion are not repeated in the statement of facts preceding, as reference may be had to them as thus set out in the opinion of the said honorable commissioner. The memoir has been of valued service to the umpire.

September 13, 1904, at Paris, the honorable commissioner for France wrote a memoir or opinion in regard to this claim for the consideration of the umpire, in which he reviewed the memoir or opinion of the honorable commissioner for Venezuela and wherein he gave more in detail than is set out in the records of the proceedings at Caracas, the belief which he entertained in reference to this claim and his inability to accede to the position of his honorable colleague. It has been of great value to the umpire in his study of the claim. The services of the eminent counsel of the company, Mr. Dacraigne, have been of large value in placing before the umpire in concrete form the facts of the case and their bearing upon the question in issue. Following the brief of Mr. Dacraigne is an additional opinion by the honorable commissioner for Venezuela, in which he reviews the utterances of his honored colleague and the arguments of the company's learned counsel.

He also brings to the attention of the umpire the contents of the dossier, réquisitions, jacket No. 11, which, among other things, contains the required proofs from the company concerning its claims against the respondent Government for requisitions, transportation of troops and material, and other services rendered the respondent Government by the company after December 31, 1895, the date of the last settlement. As the honorable commissioner for Venezuela does not question, but, on the contrary, fully accepts the evidential force of the proofs thus adduced, they were not earlier brought into the statement of this case and are not here brought forward, except to name the annual balances, the total, and the conclusion and the allowance which are made by the honorable commissioner aforesaid.

The dates and respective balances are the following, as shown by the examination I have made of the bills in the record of the case:

	Bolivars.
Balance approved by the legislature of the State of Zulia, February 27, 1894..	2,994.85
Balance approved by the legislature of the State of Zulia, January 23, 1895..	6,434.60
Invoicc as per statement up to December 31, 1897	15,443.60
Invoice, etc., to May 30, 1898	3,886.00
Invoice, etc., to October 30, 1898	34,618.90
Invoice, etc., to March 3, 1898	6,532.00
Invoice, etc., to April 6, 1899	9,047.00
Invoice, etc., to September 30, 1899	114,679.00
Total	193,635.95

An estimate of the interest on the several balances from their respective dates until that when the company may probably come into possession of the funds by virtue of the execution of the sentence which may be finally passed, a lapse of time which I believe to be reasonably within three months, taking into consideration any inevitable delay, will show that the company in this regard is entitled to the sum of 36,000 bolivars.

Between the amount of 193,635.95 bolivars, which is established by the company's statements, and that of 203,529.70 bolivars, balance in the company's statement of December 31, 1899, as due by the Venezuelan Government at that time, as shown in the report of the board of managers to the stockholders in the company to which I have made reference at the conclusion of my opinion of August 28, 1903, there is a difference of 10,393.75 bolivars, to which I find no other explanation in its support than that it represents the price the company has charged the Government of Venezuela for the service of the steamer *Santa Bárbara* during the days intervening between September 30, 1899, and the end of October of the same year, when it appears the steamer was returned to the company after having taken to the island of Curaçao Doctor Andrade, the president of the State after the so-called liberal (restauradora) revolution. Such amount even if it does not appear in a specified form, as it should do, I deem to be a fair compensation for the services rendered by the steamer *Santa Bárbara* to the local authorities during the month of October, as according to documents in the case the company had suspended since the 12th of the same month all operations in its railroad and steamer service, so that there were no expenses for maintenance of the service. On the aforesaid amount, which I recognize as also due by the Government of Venezuela, interest at the rate of 3 per cent should be added from October 30, 1899, to the date of the execution of the sentence as aforesaid, so that the amount of the indemnity increases to the sum of 1,767 bolivars.

As the honorable commissioner for France, in his supplementary statement made at Northfield, Vt., on February 14, 1905,[a] reviews

[a] Pp. 425–428.

this additional opinion of his colleague, Doctor Paúl, and does not suggest any error in the figures presented by him as above set out, the umpire has accepted them without carefully studying the original proofs and has adopted them as a basis upon which that feature of the case can safely rest.

The French Company of Venezuelan Railroads contends for an allowance of 18,483,000 francs, (*a*) on the basis that the Venezuelan Government is responsible for the ruin of the company and that in equity this responsibility carries with it the rescission of the contracts signed between the said company and the respondent Government, as stated in the first paragraph of the opinion of the honorable commissioner for France; (*b*) on the basis that the French Company of Venezuelan Railroads renounces the concession of the enterprise and abandons to the Venezuelan Government its line, its buildings of exploitation and habitation, its stores, and its terrestrial and maritime material in the condition in which they are found by means of which—payment on the one hand, renunciation and abandonment on the other—the two parties will perform all their reciprocal obligations and engagements, as stated in the record of the proceedings of the honorable commission at Caracas in defining the position of the honorable commissioner for France in regard to the said claim. These two statements of the claim, although differing in form, are understood by the umpire and will be treated by him as in essence one and the same.

In event of failing to impress this view upon the honorable commission the company asks for a large allowance in the way of deferred guaranties and other losses, together with an allowance of the sums approved and accepted by the honorable commissioner for Venezuela. In order to reach the consideration of these deferred guaranties, it urges upon the honorable commission the duty to declare that portion of the convention of April 18, 1896, which refers to the redemption of the guaranty to be null and void, because it was obtained in a manner so conscienceless that it can not be sustained in the forum of equity. If this view is upheld, the honorable commission is asked to pass in detail upon the elements composing this claim.

To take these several propositions in their order, it becomes necessary to consider first the claim of 18,483,000 francs, which is the sum demanded provided the umpire decides in favor of the rescission of the contract.

It would seem to the umpire that the question first occurring is one of jurisdiction—in other words, of competency. For however deeply the sympathies of the trier may be stirred in behalf of those who have bravely struggled and who have seriously lost there is an imperative duty which is primary. That duty is to determine the limits which circumscribe him and keep him within the set and required bounds.

The limits of this honorable commission are found and only found in the instrument which created it, the protocol of February 19, 1902. An arbitral tribunal is one of large and exclusive powers within its prescribed limits, but it is as impotent as a morning mist when it is outside these limits. A reference to the convention which created this commission will disclose its purpose and purview.

Article I declares:

> That the first two arbitrators shall meet * * * for the purpose of examining in concert the demands for indemnity presented by Frenchmen for damages sustained in Venezuela, etc.

Article II provides that:

> Demands for indemnities other than those which are aimed at in Article I or based upon facts anterior to the 23d of May, 1899, will be examined in concert by, etc.

Article II, then, would permit this liberal reading:

> The arbitral tribunal here constituted shall meet for the purpose of examining in concert the demands for indemnity presented by Frenchmen for damages sustained in Venezuela, but exclusive of those which grew out of the "insurrection events" of 1892.

The sole scope and sweep of the authority given is to provide indemnities for damages suffered by Frenchmen in Venezuela. It is not defined but it is assumed that its methods of procedure will not contravene the general and established principles of the law of nations, nor its awards be opposed to justice and equity. This much can be assumed, but to assume that it has power to revoke, rescind, modify, or limit the terms of a contract, even so much as by a hair's breadth, is impossible. It was created for no such purpose; it was endowed with no such powers. So far as a Frenchman has suffered damages in Venezuela for which Venezuela is responsible, the indemnities may be stated and the decision be final. The arbitral tribunal thus constituted may, as a means to the end provided, ascertain and declare the responsibility of Venezuela, it may pass upon its own jurisdiction within the scope of its charter, but it can not step in the least outside the path prepared for it, which is and only is the path which leads from damages to indemnities. If the French Company of Venezuelan Railroads and the respondent Government did but agree that rescission should be had, or that abandonment should be made of the concessions and the properties of the company to Venezuela, then this honorable commission might be considered competent to pass upon and establish the indemnities thus required. Otherwise there is incompetency absolute and entire. This commission is not only destitute of primary authority which is enough, but it is equally destitute of all capacity to compel the parties to carry into effect any such award were it made, which is more.

The contracts in issue were mutual and reciprocal and neither party thereto can make abandonment thereof without the consent of the

other. The United States of Venezuela does not consent. Therefore the French Company of Venezuelan Railroads can not, by right, abandon its contracts or its properties.

If it be held that the respondent Government has wrought the utter ruin of the company and that this was done in a manner and by means which charge upon the nation the full measure of responsibility, then there is a case for damages only, and the sum awarded might be—it is not said would be—the sum of 18,483,000 francs, the amount claimed. But it is always and only on the basis of indemnities for damages that this honorable commission has jurisdiction, and it is utterly powerless, even for good cause, to decree an unaccepted and unacceptable abandonment by either party of a mutual and reciprocal contract, or to award an act of rescission which has not, in effect, previously taken place.

The umpire finds ample warrant for his conclusions regarding his powers in the authorities to which he makes reference, and that their pertinency may at once appear he quotes briefly:

The authority of the arbitrator * * * is derived exclusively from the submission, and every part of it, as well as the documents referred to therein, must be taken into consideration in order to determine the extent of such authority. *2 Am. and Eng. Encycl. of Law, 669 (2d ed.)*

It has been held that the arbitrator can consider only the precise question submitted to him, that he can neither modify the question nor add other controversies to it, no matter how cognate to the matter submitted. *Id., 671.*

However, it is within the arbitrator's power to award in regard to all matters which are necessarily or properly incidental to, or included within, the terms of the submission, etc. *Id.*

But he can not lawfully go beyond the terms of the submission in order to do general justice. *Id., 672.*

For this honorable commission to order something to be done which would cause damage to the party obeying the order and then to award damages therefor would be opposed to the terms of the convention. It would be an independent act posterior to the convention, and were this to be done by the umpire it would require a payment by Venezuela to the claimant company for damages in fact suffered in the United States of America at the hands of the umpire.

A submission of all matters in difference means, as a rule, all matters in difference *down to the date* of the submission *but not after*. *Id., 610.*

The umpire can not entirely ignore the restrictive features of the contract between the claimant company and the respondent Government, which in terms and in fact strictly required and still requires that all doubts and controversies arising from that contract should be resolved by the competent tribunals of the respondent Government. Certainly to consider and determine the question of its rescission is the most serious doubt, the most important controversy, which could grow out of or arise from the contract in question. A claim for damage may be regarded as ulterior to the contract, especially where the

damage has accrued from the operation of the parties under the contract, but the question of its rescission is an entirely different proposition. The unrestricted agreement to submit to an arbitral tribunal the question of damages suffered by Frenchmen in Venezuela may properly be considered, if necessary, as equivalent to a suspension of the provision in the contract, were the damages claimed to be such as arose or grew out of the contract; but the agreement to submit a question of damages arising through operations performed under a contract, in no sense suggests a purpose to arm that tribunal with plenary power to consider and settle the question involved in the rescission of a contract, and therefore does not suggest an intent on the part of the high contracting powers to ask on the one hand or to grant on the other the suspension of the restrictive features referred to, which are contained in said contract. What is here said concerning the matter of rescission applies with equal force to the matter of abandonment. It is therefore the deliberate and settled judgment of the umpire that he can not determine this claim on the basis of a declared and directed rescission or of abandonment, and can only decide the amount of the award, this to depend upon the ordinary bases of damages which have been suffered in Venezuela by the French Company of Venezuelan Railroads at the hands of those for whom the respondent Government is responsible.

By the claimant company the redemption of the guaranty as settled by the compact of April 16, 1896, is declared void in equity, (*a*) for want of adequate consideration and as being made against the desire of the company and under the irresistible compulsion of circumstances which were availed of by the respondent Government to drive a bargain so hard and so unconscionable that it should be set aside by this tribunal; (*b*) as a default of the Government in neglecting to meet its obligations of interest as they fell due upon the bonds which were given to redeem such guaranty, being a total failure to comply with and carry out the terms of that agreement which renders the agreement itself nugatory and void; and for these reasons the rescission thereof should be declared by this honorable commission.

The agreement effected to redeem this guaranty of the French Company of Venezuelan Railroads was only a part of a general plan introduced by the United States of Venezuela in 1896, to be made applicable to all similar enterprises wherever located in that country and by whomsoever exploited. To this end it had arranged with the noted and conservative German house, the Disconto Gesellschaft, to float a loan of 50,000,000 bolivars, secured upon the custom-houses of the nation and bearing 5 per cent interest annually, the proceeds of said funds to be devoted to the purpose named.

It was accepted generally by the different guaranteed enterprises, the claimant company being one of the several.

Examination of the reports made by the company to the shareholders at its annual meetings for the years 1894, 1895, and 1896 shows a successive and continuing ability on the part of the claimant company to raise money by loans. June 27, 1896, was noteworthy in this regard, since at this annual meeting successful provision was made for floating a loan of 1,300,000 francs. In 1895, the year preceding the redemption of the guaranty, there was raised by loan 200,000 francs, and in the year 1897, a year and more succeeding the settlement, there was negotiated a loan of 1,500,000 francs. Hence it was not an overwhelming financial necessity which confronted the company nor an utter inability to obtain money otherwise which compelled the acceptance of the offered redemption.

The redemption of the guaranty on the terms provided did not mean, on the part of the claimant company, the relinquishment of 1,260,000 francs annually for the sum of 2,500,000 francs in hand. It was only the relinquishment of such sum, if any, as might remain when the net annual revenue was deducted from this annual guaranty.

The net revenue had been growing for the years prior to April 16, 1896. In 1894 it was 72,332.15 francs; in 1895, 101,676.97 francs. Both parties had contemplated and apparently believed that it would finally exceed the guaranty and had provided for that contingency, as will be seen by reference to the contracts which arranged to meet and eventually to cancel the guaranty which had theretofore been paid, directing that one-half of the net annual revenue in excess of 1,260,000 francs be used in payment, and also agreeing that after the said advances had been canceled fully the respondent Government should continue to enjoy 20 per cent of such excess in perpetuity. By this redemption the right of Venezuela to participate in any way in the net profits of the company was canceled. That this right was considered as of some value is evident or it never would have been placed in the contract. In fact, by its terms the annual guaranty was only in advance, an indebtedness of a peculiar character, payable only in certain contingencies and in a particular way, but still it was an indebtedness. By the agreement constituting the redemption these conditions were all changed, to the effect that the arrears then provided for and the 2,500,000 francs then paid were not debt producing, but debt reducing. They were gifts, purely and simply, so far as any duty of repayment was concerned. In another sense they were not gifts. They were the nation's estimate of the value of the railroad and the steamboats to its commerce and to its agriculture, also to the means of communication between different parts of the country. The transaction itself was open, the negotiations lengthy, the time for reflection ample. The cooperation of the directors of the company and of the representatives of the creditors was solicited and received, and all was done with due deliberation under

circumstances which permitted entire freedom of will and of action. The approval just mentioned took recorded form on June 27, 1896, after a lapse of more than two months and after a full and explicit report of the action taken, with the reasons therefor fully set forth. It was referred to approvingly at the annual meeting of 1897, and on June 30,1898, two years and two months after the agreement of redemption was made, the bonds which had been issued in accordance with that agreement were appropriated by the deliberate action of the company to the payment of a special indebtedness. They were accepted by two of the vigilant and sagacious financial houses of France in place of the obligations of the company. There are apparent none of the features which accompany and signalize bargains which the courts undertake to set aside. The freedom of contracts is one of the bulwarks of business, and courts are loath to interfere where a contract is executed and where are lacking the elements of fraud or mistake, and where it rests upon the mutual assent of parties intelligent, competent, and free to contract.

It is elementary law that every person of sound and disposing mind and under no legal disability has the absolute right of disposing of his property in any way not expressly or impliedly forbidden by law and to any person legally capable of taking it.

Hence, where a person competent to convey has fairly and knowingly made a complete conveyance of his land to another person competent to receive it, and no fraud, accident, mistake, or undue influence was involved in the transaction, the fact that the conveyance was wholly voluntary and without consideration constitutes no ground for rescinding the conveyance and canceling the deed; and in such a case the fact that the disposition of the property was unwise, improvident, or absurd will not be considered by a court of equity. *24 Am. and Eng. Encycl. of Law, 611* (*2d ed.*).

Where the contract has been fully and voluntarily performed before relief by rescission is sought, it is only where the most forceful reasons exist for granting equitable relief that a court of equity or a court exercising equitable powers will interpose to decree the rescission of the contract, etc. Indeed it has been frequently held that nothing short of actual fraud or mistake will justify the court in granting rescission of an executed contract. *Id., 612.*

Although the consideration of simple contracts and of certain forms of real conveyances must be valuable, it is not essential that the consideration should be adequate in point of value. The law does not weigh the *quantum* of consideration, deeming it unwise to interfere with the facility of contracting and the free exercise of the judgment and will of the parties, but allows them to be the sole judges of the benefits to be derived from their bargains, provided there be no incompetency to contract and the agreement violates no rule of law. *6 Am. and Eng. Encycl. of Law, 694* (*2d ed.*).

The final appropriation and use of the redemption fund after such length of time, after such opportunity for observation, investigation, and reflection, without a murmur of dissent in the meanwhile or a request for rescission or an offer to restore the *statu quo* is too palpably a solemn acceptance to admit of doubt, while the absorption of the funds precludes return. There is also no offer to restore. If there were such offer this honorable commission has no power to compel its acceptance.

Moreover, in order to render valid the compromise of a claim, it is not essential that the matter should be really in doubt. It is sufficient if the parties consider it so far doubtful as to make it the subject of a compromise. *6 Am. and Eng. Encycl. of Law, 713 (2d ed.)*, citing Union Bank *v.* Geary, 5 Peters (U. S. Sup. Ct.), 99.

The parties to a contract may at any time rescind it, either in whole or in part, by mutual consent, and the surrender of their mutual rights is a sufficient consideration. *6 Am. and Eng. Encycl. of Law, 729 (2d ed.), note.*

An agreement by one party to a contract, at the instance of the other party, to modify its terms, is a valuable consideration. *Id., 738.*

A prepayment of interest before it is due is a valuable consideration for an agreement to extend the time of payment. (Summarized.) *Id., 704.*

It is a valuable consideration if the promisee, having the right to refuse permission, is moved by the promise to allow a certain thing to be done. The question is not, did the promisor derive any benefit from the permission or did the promisee suffer any detriment from giving it? but merely was it something the latter had the right to refuse.

Consideration arises from the permission, irrespective of the benefits derived from it. *Id., 741.*

The umpire is unable to accept the contention of the claimant company that the respondent Government was the sole cause of its ruin. This is nowhere asserted, or even suggested, by its agents and managers during the progress of the events which culminated in its suspension, nor until the lapse of many months thereafter. It is entirely opposed to the expressions of Mr. Reynaud, of the administrative board of the company, in his careful and analytical statement of the claims of the company on February 3, 1900, since which time it is not claimed that there is to be found any direct injury received from the respondent Government, unless it occurs in its delay to pay its debts. The claim then put forth was (a) payment of 300,000 francs as the full amount due for expenses of transportation and requisitions on account and by order of the authorities of the nation and the States; (b) payment of the sum of 250,000 francs, estimated as the minimum amount of the indemnity due for damages which had been occasioned upon its property; (c) the sum of 105,000 francs a month on account from July 1, 1899, to indemnify the company for the loss which it had suffered since that date from the almost absolute suppression of its traffic and for the immobilization of its railroad and boats. This sum is obtained by taking the amount originally stipulated as an annual guaranty, viz, 126,000 francs, and dividing it by 12, the number of months in a year, the quotient being 105,000 francs. This communication from its authorized agent must be taken as the voice of the company speaking its honest and deliberate convictions and asserting its claims in their most broad and comprehensive sense. This statement was made when all the facts were fresh in the minds of both parties and when there were no reasons for concealment, reservation, or dissimulation. The umpire will accept it as the maximum of the claimant company's demands for those matters which had occurred at that time. He will allow so much of the 300,000 francs as he

ascertains to be well founded. He will grant so much of the 250,000 francs as is determined to exist in a claim properly attributable to the respondent Government. He will allow nothing of the claim for 105,000 francs a month, as he finds no lawful responsibility in the respondent Government. It can not be charged with responsibility for the conditions which existed in 1899, prostrating business, paralyzing trade and commerce, and annihilating the products of agriculture; nor for the exhaustion and paralysis which followed; nor for its inability to pay its just debts; nor for the inability of the company to obtain money otherwise and elsewhere. All these are misfortunes incident to government, to business, and to human life. They do not beget claims for damages.

The claimant company was compelled by *force majeure* to desist from its exploitation in October, 1899; the respondent Government, from the same cause, had been prevented from paying its indebtedness to the claimant company. The umpire finds no purpose or intent on the part of the respondent Government to harm or injure the claimant company in any way or in any degree. Its acts and its neglects were caused and incited by entirely different reasons and motives. Its first duty was to itself. Its own preservation was paramount. Its revenues were properly devoted to that end. The appeal of the company for funds came to an empty treasury, or to one only adequate to the demands of the war budget. When the respondent Government used, even exclusively, the railroad and the steamboats it was not outside its contractual right nor beyond its privilege and the company's duty had there been no contract. When traffic ceased through the confusion and havoc of war, or because there were none to ride and no products to be transported, it was a dire calamity to the country and to all its people; but it was a part of the assumed risks of the company when it entered upon its exploitation.

When revolution laid waste both country and village, or seized the railroad and its material, or placed its hands upon the boats and wrought serious injury to all, it is regrettable, deplorable, but it is not chargeable upon the respondent Government, unless the revolution was successful and unless the acts were such as to charge responsibility under the well-recognized rules of public law. These possible disordered conditions of a country are all discounted in advance by one who enters it for recreation or business. It is no reflection upon the respondent Government to say that the claimant company must have entered upon its exploitation in full view of the possibility, indeed, with the fair probability, that its enterprise would be obstructed occasionally by insurgent bands and revolutionary forces and by the incidents and conditions naturally resulting therefrom.

The honorable commissioner for Venezuela allows, as has already been shown in this opinion, 241,357.70 bolivars. This includes interest

on the annual balances appearing in the claimant company's statement to the national and sectional governments, also interest for the use of the steamer *Santa Bárbara.*

The umpire sees no reference by the honorable commissioner in his additional opinion to the appraised damage done the steamer *Santa Bárbara,* which said honorable commissioner allowed in his original opinion. The umpire, by a cursory examination of the vouchers which support the claims allowed by the said commissioner, does not find that it is included therein. Hence the umpire concludes that there can be no mistake in adding that sum, with interest from October 1, 1899, which makes an amount of 11,750 francs. The sinking of the steamer *San Cárlos y Mérida,* as stated by the consular agent of France, was, without doubt, an accident of war. No circumstance is suggested which takes it out of the usual rule of nonresponsibility on the part of the respondent Government, and hence it must be disallowed.

The injuries done the railroad, the buildings and the material, by use in war, must have been considerable, and since the revolution was successful, the respondent Government is properly chargeable for its use and for the injuries and damages which resulted. There is no question as to the liability of the respondent Government for the natural and consequential damages which resulted to the railroad properties while they were in the use and control of the titular Government. Hence there is unquestioned and complete responsibility on the part of the respondent Government for all the necessary, natural, and consequential injuries which resulted to the railroad and its properties when used by either the revolutionary or the governmental forces. The umpire is destitute of data upon which he can safely base his judgment as regards the just amount of that damage, but that it is considerable is unquestionable.

He will approach the subject, however, from another standpoint. It is not right that the claimant company be paid only the regular one-half rate for services performed at such times and under such circumstances. There is no clear proof just how much this service was, and any conclusion can in fact be only conjectural and at best only approximate. The umpire accepts as the best basis obtainable the last item of charge, viz, 114,679 bolivars. He assumes that this represented the usual charge to the Government at one-half rate. He considers full rate as none too much and he adds to the sum allowed by the honorable commissioner for Venezuela 114,679 francs and interest, which he reckons at 20,069 francs, making in all 134,748 francs. Where the respondent Government can be charged with no other offense than a neglect to pay its debts through inability so to do, no greater responsibility rests upon it than the payment of interest for the delay thus caused. Such is the situation in this case, as it appears to the umpire.

The facts brought upon the record, the facts placed in this opinion, do not disclose any relation of the respondent Government to the claimant company which makes the former chargeable financially for the ruin of the latter; and the award can not, in justice and equity, be placed upon any such basis. The several sums allowed for the different causes mentioned constitute the maximum amount which can be named in the sentence. The aggregate of these sums is 387,875.70 francs, and the award will be prepared for that sum.

NORTHFIELD, *July 31, 1905.*

SUMMARY OF AWARDS BY UMPIRE.

No.	Claimants.	Amount claimed.	Amount awarded.
		Bolivars.	*Bolivars.*
1	Heirs of Jules Brun	500,000.00	100,000.00
2	Frierdich & Co	176,080.10	Dismissed.
3	Heirs of Maninat	2,000,000.00	100,000.00
4	Antoine Fabiani	9,509,728.30	Dismissed.
5	Pieri Dominique	3,370,000.00	350,000.00
	Pieri Dominique & Co	280,400.00	
6	Heirs of Massiani	728,476.48	Dismissed.
7	Company General of the Orinoco	5,616,098.62	2,408,563.35
8	French Company of Venezuelan Railroads	18,483,000.00	387,875.70

APPENDIX.

OPINIONS OF COMMISSION RENDERED IN CARACAS.[a]

[Paris Protocol.]

LEDUC, ST. IVES, FISCHER & CO. CASE.

Commission declared without jurisdiction because claims arose subsequent to May 23, 1899.

PAÚL, *Commissioner:*

This claim arose out of a debt by the Government of Venezuela in faver of Mr. Domingo R. Wetto, a tailor domiciled in Caracas, for the price of uniforms for the national army, which debt was assigned by said Mr. Wetto on September 6, 1901, to the firm of Leduc, St. Ives, Fischer & Co., as appears by a document authenticated by the parochial court of this city on the 23d of said month and year.

The orders of payments drawn by the minister of war and marine in favor of Wetto are dated August 1, September 12 and 14, and October 19, 1899.

As appears from the dates of these orders they are all subsequent to May 23, 1899, and consequently the examination of this claim does not belong to this commission, in conformity with Article II of the protocol of Paris, which determines its jurisdiction, wherefore the Venezuelan arbitrator is of opinion that the commission should declare itself without jurisdiction to examine it.

ROGÉ CASE.

Damages allowed for unlawful imprisonment.

PAÚL, *Commissioner:*

From the documents presented following the facts are proven:

That Dr. J. M. Aveledo, as attorney of Alfonso Santerre and Carlos Luciani, on the 17th of October, 1888, before the court of the first instance, of the first judicial circuit of Ciudad Bolívar, instituted a suit for libel against Ernesto Rogé, superintendent of the syndicate Alto Orinoco. The judge of the first instance received testimony requested by the complainant and that of said Mr. Rogé, and, not finding any merit from the summary proceedings to follow up the suit, issued a decree on November 5 of said year discontinuing the action and declaring that it did not injure the defendant in any manner as to his reputaton.

This decision having been called to the attention of the superior judge in the ordinary manner, the latter official by a decree dated January 7, 1889, revoked the decree issued by the judge of the first intsance and made an order for detention against the citizen Ernesto

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[a] See Venezuelan Arbitrations of 1903, Ralston's Report, pp. 490–510, inc. Decided by commission under Protocol of 1902. While the French Commissioner generally concurred in the result indicated by the following opinions, they were not submitted to him and he accepted no responsibility for their reasoning.

Rogé. Dr. F. A. Hammer and Ramón Barrios Gómez having certified that Rogé was suffering from rheumatism in the præcordial region, which prevented him from remaining in the public jail as a prisoner of that city, said superior judge made an order to the judge of the first instance that he should transfer said Rogé to the hospital for men of that city.

The judgment of the superior judge having been appealed from in turn by Rogé, the record passed to the supreme court, which in a judgment dated February 13, 1889, revoked in all its parts the judgment rendered by the superior court, and confirmed the decree issued by the court of the first instance on November 5, 1888, ordering that the proper order be issued so that the defendant, Rogé, might be placed at liberty, which order was made on the same day. E. Rogé bases his claim for indemnity upon the injury, which he asserts was committed against his person, in ordering his detention and committing him to be deprived of his liberty for the space of thirty-seven days, the superior judge of Ciudad Bolívar violating by this proceeding the definite provisions of article 271 of the code of criminal procedure.

On July 4, 1892, Ernesto Rogé addressed himself to the minister of foreign relations of France, asking that his claim be pressed against the Government of Venezuela for damages and injuries which he estimated at the sum of 200,000 bolivars.

During the detention of Rogé notes were exchanged between the representative of France in Venezuela and the minister of foreign relations of the latter country, the minister of France interposing his diplomatic action in order to procure the prompt release of Rogé and reserving in said notes all rights concerning the moral and material satisfaction that the Government of France on the one part, or Mr. Rogé on the other, might believe they were entitled to obtain from the Government of Venezuela with reference to the attempt consummated against the liberty of a French citizen.

Proof also exists in the record, which shows that the President of the Republic and the minister of foreign relations, then in authority, addressed themselves by telegraph concerning the actions of the French minister to the president of the State of Bolivar, asking the necessary information for a correct understanding of the matter, of which demand the said representative was duly advised. There exists also a telegram dated on January 16, from Mr. Saint Chaffray, minister of the French Republic, addressed to Mr. Delort at Ciudad Bolívar, which says:

"Relying upon the intentions and sentiments of equity of the Government, I do not doubt that what is necessary will be done in order to assure Mr. Rogé of the benefits of constitutional guaranties and, on this occasion, to give a new proof of its benevolent intentions toward the Alto Orinoco Company."

The superior judge of Ciudad Bolívar, in ordering the detention of E. Rogé, violated the provisions of articles 200 and 271 of the code of criminal procedure, it being expressly provided by said articles that—

"In every case of discontinuance if the act in controversy has warranted the detention of the defendant, and if said detention has been effected, the person or persons released from responsibility shall immediately be placed at liberty, under bond, while the superior tribunals affirm or overrule the judgment, as they are empowered to do by this code."

Rogé not having been properly imprisoned in accordance with the discontinuance of the judge of the first instance, because the committing magistrate did not find any reason to order his detention in conformity with article 137 of said code, the superior judge could not order the arrest of the accused, because he had not been put at liberty, but he ought to have limited himself to referring his judgment to the supreme court, and until it was rendered final by its confirmation it was the place of the committing magistrate or the judge of the first instance to fulfill what had been definitely adjudged, and his place to decree the detention of the accused.

The arbitrator considers this violation of the law as an unjust and illegal act perpetrated by the superior judge of Ciudad Bolívar; but at the same time he can not help but appreciate the attitude of the judge of the first instance, who in a truly justified and honorable judgment gave every sort of guaranty and satisfaction. Likewise he considers the proceeding

of the supreme court entirely in accord with the law and the acts which the President of the Republic and his ministers of interior and foreign relations performed with all diligence in order to satisfy, as far as possible, the demand of the minister of France in favor of Rogé showing without any doubt what the said representative expressed in his telegram copied above, *the good intentions and sentiments of equity of the Government, and that the necessary steps were being taken to assure Mr. Rogé of the benefit of the constitutional guaranties.*

The amount of indemnity which is demanded is, under every aspect, disproportionate, seeing, as it is demonstrated, that relief was sought to be given by the national Government for the illegal act in question with the least possible delay, and it was corrected by the judgment of the supreme court in the State of Bolívar.

The Venezuelan commissioner considers that it would be a reasonable and equitable compensation for the damage suffered by Rogé on account of his detention in the hospital of Ciudad Bolívar for thirty-seven days to award him the sum of 10,000 bolivars.

DECAUVILLE COMPANY CASE.

Demand that claim be paid for the amount demanded in bonds of diplomatic debt at 40 per cent of their face value refused. Held, that the commission had no jurisdiction to change manner of payment prescribed by protocol.

PAÚL, *Commissioner:*

This claim for indemnity is made up of the following amounts:

	Bolivars.
Balance of the debt of the Government of Venezuela to the Decauville Association, due May 15, 1889	10,923.46
Installment due September 15, 1889	25,923.47
Interest at 6 per cent, in accordance with the liquidation	9,896.55
Difference on account of the value which is contained in the claim of the bonds of the diplomatic debt, estimating them at 60 per cent	31,162.32
	77,905.80

The document presented in support of this claim consists of a contract made between Mr. Alberto Smith, minister of public works, with the authorization of the Persident of the Republic, and the Vicomte Gonzague de la Baume, as representative of the Decauville du Petit Bourg Company, whereby the indebtedness which said company held against the Government of Venezuela for the sale of four iron bridges was liquidated and the amount of said indebtedness was fixed at the sum of 77,770.39 bolivars, inclusive of interest to the dates of the respective expirations of the three terms agreed on in said contract for the total payment of the debt.

It appears, from a communication addressed by the citizen minister of the treasury to the minister of foreign relations, dated June 5 of the present year, and numbered 284, a copy of which has been transmitted to this commission, that the account which the representative of the Decauville company makes of the payments made by the Government of Venezuela upon the dates therein indicated on account of the debt, is correct, and the balance which results as being owed on account of this debt at the date of the termination of the respective obligations, amounting to 36,848.93 bolivars, is likewise correct. Notwithstanding that the liquidation of interest made in the contract between the minister of public works and the representative of the Decauville company was made at the rate of 6 per cent annually up to the dates established for the subsequent payments of the debt, there is no proof that it was agreed to make any agreement in the future for interest upon the sums which might remain owing at the same rate, wherefore the rate established by this commission ought to govern in this case—that is to say, that in the cases in which there is no express agreement concerning interest there will be allowed upon liquidated debts or obligations for loans of cash at the legal rate of 3 per cent, in conformity with article 1720 of our code, which is in

accord with article 1907 of the French civil code. This liquidation being carried into effect from the respective dates upon the balances which have remained owing, a result of 4,530.85 bolivars is obtained.

The contention which the claimant makes that he should be allowed 40 per cent more upon the amount of the principal debt and upon the interest because of the fact that the payment was made, in conformity with the terms of the protocol, in bonds of the 3 per cent diplomatic debt, instead of in cash, is entirely inadmissible, because the party claimant has spontaneously submitted his demand to this commission, whose authority is limited to examining the claims presented by Frenchmen, founded upon facts prior to May 23, 1899, fixing the amount thereof in conformity with the proofs which relate to the facts upon which they are based and in conformity with the grounds that may justify them.

The method of payment established by Article III of the protocol is a fact entirely separated from the duty of judging concerning the justice or injustice of the demand.

This fact relates solely to the execution of the judgment which the arbitrators may pronounce, and this conclusion is clearly deduced from the terms of said article, which reads as follows:

"Awards [those which the arbitrators or the umpire may allow] shall be paid to the French Government in bonds of the 3 per cent diplomatic debt within three months after the agreement or judgment." [a]

The provision which Article IV of the protocol contains is of the same character, and provides:

" That the Government of Venezuela shall ask Congress to include in the provision for expenses the sums necessary for the payment of the monthly installments in arrears of the diplomatic debt, and the holders of bonds of that debt shall, besides, participate in all the advantages which may accrue to them from the strict application of the Venezuelan laws applicable to the premises."

The definite provision of Article III and that which Article IV of the protocol contains relate solely to negotiations of government with government, which refer to the manner of paying obligations incurred, be it by contract, by former arbitral decisions, or by those which the present commission may pronounce. It is solely for the respective governments to determine the manner of payment by special agreement, and in no way can this be attributed to the arbitrators, who are only called upon to decide concerning the justice of the claim and to determine the amount which the Government of Venezuela has to pay, in case it has to pay, taking into consideration the facts and foundation of the claim.

It is to be observed that among the 40 claims which have been presented before this commission up to date, embraced in Article II of the protocol signed at Paris February 19, 1902, the claim concerning which this decision is given is the first to set up the extraordinary and rash contention that there be attributed to the diplomatic debt by the arbitrators a value of 40 per cent, thereby causing a notorious injury to the actual holders of said debt and to those who are authorized by the findings of this commission to receive in payment of their debt, according to the terms of the protocol, bonds of the said diplomatic debt. Such an arbitrary proceeding would cause the continued depreciation of the value of the debt until it destroyed it completely, and the holders of it would be the first to suffer the consequences of the values established against the economic rules which govern public securities.

Therefore this portion of the claim is disallowed, and it is admitted for the principal and interest estimated until the 15th of September of the present year, or, say, three months after the date of the present award, amounting to 41,377.78 bolivars.

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[a] Page 3.

LALANNE AND LEDOUR CASE.

Damages allowed because of unjustified refusal of customs officials to clear ship from Venezuelan port.

PAUL, *Commissioner:*

This claim is composed of 34,376.40 bolivars demanded by G. Lalanne for damages and injuries resulting from the fact that the head of the custom-house of Ciudad Bolívar did not permit the shipment, in June, 1886, on the steamer *Dieu Merci*, of 120 head of cattle which Gen. G. Battistini held ready to send to Guayana, as had been done in other prior shipments, in order to fulfill the contracts made by Lalanne with the governor of French Guiana, for furnishing meat to the penitentiary, garrison, and other administrations of Guiana, and for 14,400 bolivars which the owner of the steamer *Dieu Merci* demands for the freight which the cargo of 120 head of cattle ought to have produced him at 120 francs each, of which he was deprived.

From the documents presented in this claim and in that of G. Battistini, which is joined with it, it is seen that G. Lalanne periodically sent to Ciudad Bolívar a steamship to load cattle destined for Guiana for the purpose of complying with contract with the governor of said colony; that a contract being in existence, made between Messrs. Fonseca, Navarro & Co., merchants, of Ciudad Bolívar, with the national Government, which accorded them the exclusive privilege of exporting cattle by steamships, which said firm ought to have put in operation for the navigation of the Orinoco River between Ciudad Bolívar and the West Indies; that they had consented to the exporting of cattle in steamers sent by Lalanne, charging for each shipment 8 bolivars per head; that in its turn the national custom-house in Ciudad Bolívar required, in order to give permission for shipments of cattle, that there be presented by the shipper the order or permission of Fonseca & Co., showing the payment to them of the tax imposed; that in accordance with this rule G. Battistini had been permitted to ship cattle for Cayena in steamships, by order and for the account of Lalanne, up to the number of 767 head, from September, 1885, to March, 1886, Battistini having paid to Fonseca, Navarrc & Co. the sum of 6,136 bolivars, as is proven by the receipt of cash by Alejandro Mantilla, as attorney for Fonseca & Co.; that in the month of June, 1886, the steamer *Dieu Merci* arrived at Ciudad Bolívar to load the customary 120 head of cattle which G. Battistini had ready for this journey upon the order and for the account of Lalanne, and that it was not possible to complete the shipment because the custom-house had refused to permit it, alleging that the order of Fonseca & Co. had not been presented to it, as was necessary; that it was impossible to obtain this order because Messrs. Fonseca & Co. refused to give it, notwithstanding that payment of the tax was offered them, as had been done before, and even Battistini had offered to buy from Fonseca & Co. their own cattle and ship them in place of those Battistini held ready; that these refusals of Fonseca & Co. and that of the maritime government house at Ciudad Bolívar caused the detention for several days of the steamer *Dieu Merci* in the harbor of Ciudad Bolívar, and caused it to depart from the port without loading the cattle under the protest of the captain; and, finally, it is also proven that in the months following, the voyages of the steamer and the shipments of cattle were continued for the account of Lalanne, the shipment being permitted by the Government custom-house at Ciudad Bolívar, because the hindrances placed upon traffic in cattle on the Orinoco by the house of Fonseca & Co. had in fact ceased.

During the period of the first events the president of the State of Guiana was Gen. Raimundo Fonseca, an active member of the firm of Fonseca, Navarro & Co., and at the time when the opposition of said house to the shipment of cattle in Ciudad Bolívar ceased General Fonseca ceased to be president of that section, being called by Gen. Guzmán Blanco to form a part of his cabinet in September, 1886. These facts being taken into consideration in the light of an impartial and just appreciation, the conviction results that an abuse of authority was committed by the president of the State of Guiana by refusing, in his capacity as an associate of the firm of Fonseca & Co., to permit the shipment of cattle under the same conditions that his commercial firm had adopted in prior shipments, and that this abuse was arbitrarily sustained by the chief of the customs of Ciudad Bolívar, who ought to have

authorized the shipment upon learning that the owners of the cattle were disposed to pay to Fonseca & Co. the same duties or taxes which in prior shipments they had received. This dual entity of first magistrate of a body politic and partner of a commercial firm putting in action the influences of his power in order to obtain pecuniary benefits at the cost of legitimate interests created under the protection of the constitutional guaranties naturally produced a disturbance in the dealings established at Ciudad Bolívar by Lalanne for the shipment of cattle, and gave rise to the present claim which, even if excessively exaggerated, has in its favor the principle of equity. Having admitted this in the claim of Lalanne and Ledour, the former a contractor in the purchase and exportation of cattle for Cayena and the latter the owner of the steamer *Dieu Merci*, the Venezuelan commissioner proceeds to estimate the damage suffered by both.

The death of the 29 head of cattle, which Lalanne claims took place in the journey from Demerara to Cayena, is not proven, and it is only proven that the *Dieu Merci* took on board at Cayena 75 head of cattle coming from Demerara. Nor is the difference in price between the cost of the cattle bought at Demerara and the cost of the cattle in Ciudad Bolívar destined for the shipment proved. The prospective profits of 122.50 bolivars for each head of cattle which the contractor believed he would obtain for the 120 head which ought to have been shipped from Ciudad Bolívar is exaggerated, since it is equivalent to 100 per cent on the price of the cattle in that city; besides this, damage can not be demanded except for 45 head, since 75 were unloaded in Cayena upon that voyage of the *Dieu Merci*, and upon them the contractor realized the profit which they ought to have yielded. There is likewise an exaggeration in the demand of the shipowner for 14,400 bolivars for the freight upon 120 head of cattle which he did not take on at Ciudad Bolívar, since this damage is reduced to the freight on 45 fewer cattle loaded upon said voyage, to the expenses of delay during his stay at Ciudad Bolívar, and to those of the journey and stay at Demerara.

Taking these points into consideration, the Venezuelan commissioner allows G. Lalanne an indemnity of 4,000 bolivars, and the owner of the ship *Dieu Merci* 4,000 bolivars—in all, for the total claim, 8,000 bolivars.

BATTISTINI CASE.

Damages allowed claimant for unjustified refusal of customs officials to clear ship, whereby claimant suffered injury.
Damages allowed for wrongful imprisonment.
Claim for payment of outstanding bonds disallowed because of want of proof of ownership thereof.
Claim allowed against Federal Government for supplies furnished the State of Guayana.

PAÚL, *Commissioner:*

This claim is composed of ten distinct items, which the petitioner classifies, estimating the amount of each one of them, wherefore this opinion will refer particularly to each of them, examining the origin and the proofs upon which they are based, and will indicate the opinion which the corresponding demand for indemnity may merit.

1. For hindrances opposed to the departure of the French steamer *Dieu Merci* with a cargo of cattle destined for Demerara and Cayena, and the consequent necessity of leaving this cargo on shore where the cattle were destined for the provision of the government of Cayena, the claimant demands 100,000 bolivars.

A claim on account of these same facts has been presented before this commission by Messrs. G. Lalanne and H. Ledour, the former a contractor for the furnishing of cattle for the Government of French Guayana, and the latter the owner of the steamer *Dieu Merci*, and that claim was decided, an allowance of 8,000 bolivars being made for the damages, because the custom-house at Ciudad Bolívar did not allow the shipment of 120 head of cattle destined by Battistini to fulfill the order of shipment for his constituent, Lalanne. The cattle appear to have been the property of Battistini, who sold them to Lalanne at a given price. It does not appear that these cattle were lost or decreased in value as a consequence

of remaining in Ciudad Bolívar, and it is proved that the voyage of the steamers and shipment of cattle continued without interruption, Battistini himself carrying out said shipment for the account and by order of Lalanne.

The injury suffered by Battistini, who is the owner of pasture lands on the banks of the Orinoco, was nothing but his returning these cattle to the pastures or their sale in Ciudad Bolívar at a price not so high as the transaction of Lalanne assured him. Estimating this expense or loss conservatively, the sum of 5,000 bolivars is allowed in this respect.

2. For the matter of Caliman, civil chief of Ciudad Bolívar, who (according to the record) has committed injustices in detriment to his interests, 20,000 bolivars.

From the record it appears only that the civil chief, Caliman, ordered the withdrawal from public market of Ciudad Bolívar of a quantity of raw meat, which Battistini had sent there for its sale, disobeying positive orders not to do so, because this act was contrary to a contract made with certain persons for the furnishing of meat in the market. The meat withdrawn was attached and sold at public auction by the police officer. There exists no other proof referring to the action of the civil authority against the interests of claimants, and no claim against the nation can be founded upon this procedure of municipal regulation.

3. For the claim of Pereira Alvarez, judge of the first instance at Ciudad Bolívar, who, as Battistini says, has committed abominable injustices against his person and against his interests, for which he has not been able to obtain any reparation before the tribunals, 40,000 bolivars.

It is proven that because Battistini had protested against the action of the civil chief, Caliman, in withdrawing from the market his raw meat, a protest which the subtreasurer of Ciudad Bolívar did not wish to record, because he considered it offensive to the authority, Judge Pereira Alvarez rendered judgment for calumny and injuries against Battistini, and issued an order of arrest against him and a mandate to all the authorities to carry it into effect. Battistini fled from the locality and came to the capital of the Republic seeking protection. The son of Battistini complained to the judge, and the latter revoked the order of detention, because the offense had not been proven; that is, because there was nothing injurious or calumnious in Battistini's protest. Battistini sued the judge, Pereira Alvarez, before the court for neglect in the exercise of his duties, but the court could not move because Battistini was not able to obtain the necessary copies of documents which the judge in question ought to have ordered to be issued to him, and his solicitations in this regard before the president of the State and other local officials were futile. These facts proved the denial of justice, because the local authorities deprived Battistini of the legal means of instituting before the competent tribunals the actions which the laws would authorize him in case he might improperly have been condemned to a criminal judgment. In this respect the Venezuelan commissioner believes that Battistini is entitled to an indemnity which, in relation to the offense and the injuries which the arbitrary order of detention of the judge caused him, he estimates at 25,000 bolivars.

4. This item of the claim is a demand for indemnity amounting to 75,000 bolivars for principal and interests for a certain number of coupons or bonds of the debt of the State of Guayana, of which Battistini says he is the owner, and that by decree of President-General Fonseca, it was ordered that they should not be admitted as had been the custom in payment in the tax offices of the State unless they had been redeemed up to date. The claimant has not presented the original bonds or any part of them which he may have in his possession. The failure to present said bonds makes an appreciation regarding the legitimacy of the claim impossible, because its essential foundation, which is the ownership or existence under the control of Battistini of such certificates or bonds and the exact ascertainment of their amount, is wanting. Besides this circumstance, which by itself alone nullifies the claim, it appears from the claim of Battistini himself that these bonds are nothing else but bonds of a public debt of the State of Guayana extinguishable from the time of their issue in 1878 by 10 per cent of the ordinary receipts of the treasury of the State; that later, in November, 1882, the president of the State suspended the circulation of said bonds, and on December 9 of said year he issued a decree ordering their redemption by means of payments to be made

out of an allotment of 25 per cent of the special revenue of the State of Bolívar destined for the section of Guayana on June 7, 1884, and payment was made whereby the value of the bonds was reduced from 104,837 bolivars, the amount of the first issue, to the sum of 49,507 bolivars, which sum Battistini says was completely in his possession; that the effects of the financial crisis that took place at that time and the reduction of 25 per cent in the revenue of the allowance and by the territorial revenues hindered the continuation of the extinguishment, and finally that the legislature of the State by a legislative act of 1888 passed a law concerning the public debt which had as an object to consolidate all the debts of the State. It is to this decree that the judgments of the court in the various grades of jurisdiction of the State of Bolívar have remitted Mr. Battistini in the suit which he instituted against the treasury of the State for the payment of the bonds which were in his possession. In May, 1890, Battistini, the claimant, instituted a proceeding of cassation against this decision in the supreme court of Ciudad Bolívar as a court of last resort, and on the 16th of that month the court of cassation granted the appeal which, as appears from the statement of Battistini, was allowed to lapse.

There are, therefore, final judgments which decree that Battistini, like any other holder of the internal debt of the State of Guaiana, is obliged to submit himself to the laws or decrees which govern the extinguishment of said debt.

It is a principle of public international law that the internal debt of a state, classified as a public debt, which is subject to speculations current among that sort of values which are acquired freely and spontaneously at very different rates of quotations which mark great fluctuations of their rise and fall, can never be the subject of international claims in order to obtain their immediate payment in cash [a] just as they can not be the subject of judgments before the tribunals of the country in order that their holders may obtain the payment of their nominal value. To establish such a principle would be to put a premium upon stock jobbing, which would be often possible with this sort of public values, and would place nations at the mercy of speculators who might obtain control of all their internal debt. The certificates or bonds, in question in the matter of the claim of Battistini, in this subdivision, are in the same condition as the internal debt of the nation, which amounts to many millions and bears interest, and it is more than four years since payment for its extinguishment and the payment of interest has been suspended on account of the abnormal condition caused by the war. Could these mixed commissions have jurisdiction to decide claims which the foreign holders of this internal debt might present to them in order to obtain the payment of the principal and interests?

This could not be sustained even with respect to the foreign, or as it is called diplomatic debt, of 3 per cent, nor with respect to any public debt which has been put upon the speculative market and may therefore pass from hand to hand by virtue of transactions prompted daily by those who profit from the rise and fall of public securities.

This portion of the claim is declared inadmissible, because it can not be prosecuted before this Commission.

5. This portion of the claim arises out of the recovery of a private debt which Mr. Hernandez Lopez contracted in favor of Battistini, amounting to the sum of 12,228 bolivars, and which gave rise to a suit prosecuted before the competent judge of Ciudad Bolívar, in which judgment was rendered and ordered to be executed ordering the attachment of the property of the debtor. This attachment could not be carried into effect because Hernandez disappeared from the place of execution and the property of the debtor could not be found upon which to lay it. Battistini seeks to make the nation responsible for the insolvency of his private debtor, an unsustainable and evidently rash pretension, which only indicates in the petitioner a true monomania for claims. The amount of this portion of the claim therefore is disallowed, which is 25,000 bolivars.

6. The claim of 35,000 bolivars for a certain quantity of *sarrapia*, which was declared contraband after a formal judgment which was twice appealed and terminated in the full

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a In the Italian Commission of 1903 (Boccardo case, not reported) judgment was given on internal bonds on authority of Aspinwall case, Moore's International Arbitrations, p. 3616.

Federal court confirming the judgments of the first and second instances, which condemned Battistini to lose the sacks of *sarrapia*, a contraband article, and to the payment of double duties, lacks all foundation, because there is upon this matter res judicata, and it ought therefore to be disallowed.

(Items 7, 8, and 9 dismissed for want of proof.)

10. For the value of a certificate issued in favor of Domingo María Battistini April 29, 1891, by the general internal treasurer of the State of Bolívar, recognizing the debt against the old State of Guayana, amounting to 13,780 bolivars, for supplies made to the State of Guayana and by order of the citizen president of the same State, No. 2307. This is admitted for said sum.

For interests upon this receipt and other general injuries there is allowed by the arbitrators the sum of 6,220 bolivars.

(This claim was allowed for 50,000 bolivars.)

PITON CASE.[a]

Prescription unless pleaded by the debtor will not be taken into consideration by the Commission.

PAÚL, *Commissioner:*

The claimants, in their capacity of French citizens, and sole and legitimate children of P. Claudius Piton and Augustina Piton, née Lemoine, as appears from the public documents which have been presented before this commission, demand from the Government of Venezuela the payment of the sum of 489,468.64 bolivars for capital and interest accrued since the date of their claim, arising out of the acknowledgment made by the minister of interior and justice on January 7, 1868, and by a resolution of the same date marked No. 5, in favor of Messrs. A. Lemoine & Co., for the following amounts: For the balance due on a credit of $50,000, to which they have a right by the contract of July 20, 1856, made with the honorable municipal council of La Guaira, and approved by the government of the former province of Caracas on August 28 of the same year, said contract having as an object the furnishing of drinkable water to the city of La Guaira by means of an iron pipe, the construction of various public fountains, the building of a reservoir for the storage of the waters, and the repairing of the aqueduct in various places, $38,411.16.

For interest accrued upon this balance at the rate of 6 per cent per annum from June 1, 1860, until December 31, 1867	$16,751.50
For damages and injuries which A. Lemoine & Co. claim for the breach of the contract (it being remembered that this amount is much less than what the profit of 1 per cent per month would have been which was indicated as simple interest in the original contract)	7,500.00
	62,662.66

It was moreover resolved that this sum of $62,662.66 should be paid by the administration of the revenues of the department of Vargas by the receipts from the public market of said city of La Guaira, and by the tariff for pure water which should be collected at that place, the payments having to be made monthly and the account to bear interest at said rate of 6 per cent per annum only upon the balance of $38,411.16, since in no case could interest be paid upon interest.

As appears from the documents registered at La Guaira on January 28, 1868, under No. 4, protocol 8, the collector of revenues of the municipal council of the department of Vargas, Mr. G. Quevedo, by virtue of the special authorization of said body, by said instrument, put Messrs. A. Lemoine & Co. into possession of the receipts of the market and of pure water which might be collected by the administration of municipal revenues of the department of Vargas, its product to be delivered monthly, without any other reduction except what might be caused by its collection.

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[a] Reported in Venezuelan Arbitrations of 1903, p. 507, as "Daniel" case.

It appears from the documents presented that the administrative council of the department of Vargas carried on with A. Lemoine & Co. an open account in fulfillment of the resolution of the ministry of the interior and justice, under the division of districts until November 1, 1871, when the change of application of the funds destined for the extinction of the capital acknowledged to be due A. Lemoine & Co., and the interest on said capital at one-half per cent per month. From this last account it appears that upon the above date, November 1, 1871, the municipal council of the department of Vargas owed A. Lemoine & Co. the following:

For capital	$31,944.64
Interest	25,234.62
Damages and injuries acknowledged	7,500.00
	64,678.66

An account has been presented bearing date April 17, 1882, showing an amount due of $84,643.66 as the balance of the capital and interest in favor of A. Lemoine & Co., and a note addressed by the president of the municipal council of the district of Vargas, dated June 1, 1883, No. 188, to Mr. Daniel Dibble, in order that he might transmit it to the heirs of A. Lemoine, deceased, wherein he announced to them that said municipal council at its session of June 7, 1883, had resolved with reference to the claim presented by said heirs upon March 31 of said year, to approve the opinion of representative Manuel F. Sojo couched in the following terms:

"That it being a matter of the greatest importance, and his many duties not permitting him to examine it, he returned it, indicating that he thought it would be well to have the advice of a lawyer."

The president of the council in said communication also announced that the body had postponed until another session the choice of the lawyer to be consulted.

Under letters D and E two plain copies of the two communications, the first addressed in July, 1895, by Cárlos Piton in his own right, and Santiago Carias as the representative of Amelia and Isabel Piton to the municipal council of the department of Vargas, in which they requested that order be given that a liquidation might be made showing the indebtedness of said council to the heirs of Augusto Lemoine on account of the iron pipe line at La Guaira, in accordance with the contract in the premises which appeared in evi. dence in said record, and they demanded that a certified copy be issued to them of such liquidation.

The second communication, dated at Caracas in September, 1896, is written by the same petitioners and was addressed to the president of the State of Miranda, of which State the city of La Guaira then formed a part, asking said official that he examine the documents which the demand mentioned and that he might signify that he considered it just, and that he might fix upon a fortnightly payment for the gradual extinguishment of the debt. It is not proved that these two demands have reached their destination, and that consequently any determination with respect to them was reached.

From the facts stated, it appears that an agreement duly recorded existed by which the National Government through its official, the minister of the interior and justice, acknowledged an indebtedness in favor of Messrs. A. Lemoine & Co. of $66,682.66, as capital, interest, and damages, and injuries in January, 1868, ordering the gradual extinction of this debt by means of the receipts of the rents of the market and pure water of the eity of La Guaira; that this agreement was performed for the space of three years and ten months, Messrs. A. Lemoine & Co. receiving from the municipal rents of the district of Vargas various sums from said rents, which extinguished in part the balance owed upon the capital, and that portion owed for interest increased, whereby, by November 1, 1871, the general balance ol the running account in favor of A. Lemoine & Co. amounted to $64,678.66; that from this last date it does not appear that there has ever been any action taken by the owner of the debt directly, nor by their legitimate successors in interest, before the competent tribunals or officials of the country, demanding the fulfillment of the

agreement made with the municipal corporation of La Guaira. It is not possible to leave out of consideration this notable circumstance which as a consequence has caused the default in payment of a debt, recognized by a public instrument, for the extinguishment of which the party debtor had set aside certain receipts of the municipal revenues, thus constituting a pledge which in law establishes a legal right in favor of the creditor.

It is a notorious fact that the district of Vargas has since the year 1871 passed through a series of political and economic changes which have radically altered its organization and greatly decreased for various reasons the receipts of the municipal revenues.

The liability which might attach to the National Government to-day for a debt which was originally contracted by the municipal council of the district of Vargas, of the former province of Caracas, and which debt should be paid by these very municipal revenues which said corporation administered, can not be founded legally except in the ultimate territorial distribution sanctioned by the constitution of 1901 whereby the States obligated themselves to cede to the nation, among other cities, that of La Guaira.

Upon the date of this session the debt due the successors in interest of A. Lemoine had for a great many years remained without action, without their having been presented before this commission any sufficient reason or motive to show that that situation was not owing to the neglect of the creditor and his legitimate successors in interest. The reason upon which all legislations base the right of the debtor to invoke prescription as a means of extinguishing an obligation is the abandonment in which the creditor has for a number of years left the exercise of his right, the legal presumption of payment arising therefrom. Prescription has not been invoked before this commission in the present case by the Government of Venezuela, wherefore it can not of its own motion take it into consideration, in conformity with the principles which govern, but there is no right for the allowance of interest upon the amount of the debt; and taking moreover into consideration that the amount shown to be due by the liquidation of November 1, 1871, includes an item of $7,500 for damages, and at the same time another amount for interest up to that date upon the capital at 6 per cent, which amounts to the sum of $25,234.62; and that in all equity this double indemnity should not be allowed for interest and for damages, there should be deducted from the total amount of said liquidation the sum of $7,500, and the balance in favor of the successors in interest of A. Lemoine should be allowed, say, the sum of 228,714.64 bolivars, without interest.

SUMMARY OF CLAIMS ADJUDICATED BY THE COMMISSIONERS AT CARACAS IN 1903.

Number of claims submitted		75
Number of claims withdrawn		1
Number of claims in which awards were given		37
Number of claims dismissed for want of jurisdiction		2
Number of claims disallowed		27
Number of claims referred to umpire		8
		— 75
	Bolivars.	
Amount of claims presented		61,334,352.45
	Bolivars.	
Amount of claims withdrawn	336,000.00	
Amount of claims dismissed for want of jurisdiction	22,311.00	
Amount of awards made	1,437,021.01	
Amounts of claims disallowed	9,068,908.08	
Amount of reduction of claims in which awards were made	7,482,064.86	
Amount of claims referred to umpire	42,988,047.50	
		61,334,352.45

CLAIMS REFERRED TO THE UMPIRE UNDER THE FRENCH PROTOCOL OF 1902.

	Bolivars.
1. Pieri Dominique & Co	4,010,400.00
2. Compañía General del Orinoco	7,616,098.62
3. Compañía de Betunes del Orinoco	176,080.10
4. Massiani Sucesores	692,740.48
5. Maninat, Pedro, y Hermanas	2,000,000.00
6. Compañía francesa de ferrocarriles venezolanos	18,483,000.00
7. Jules Brun	500,000.00
8. Fabiani, Antonio	9,509,728.30
Total	42,988,047.50

On these eight claims the French commissioner favored judgments for 36,868,541.86 bolivars, while the Venezuelan commissioner rejected all except 180,000 bolivars.

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