ORINOCO STEAMSHIP COMPANY CASE

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

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

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

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

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

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

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

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

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

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

The learned counsel for Venezuela contends that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Law XXXIII (Financial Code)

ON THE NATIONALIZATION OF SHIPS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[1] *Supra*, p. 115.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

BARGE, *Umpire*:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Whether this decree annulled the contract-concession;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Feliciano ACEVEDO
Edward P. GANTEAUME

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

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

Caracas, 10 May, 1894.

José R. NUÑEZ
M. A. SANCHEZ

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

DECREE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

For whereas, if in general this is the only just standpoint from which to view the right to ask and to grant the means of diplomatic intervention and in consequence casu quo of arbitration, how much the more where the recourse to the tribunals of the country was formally pledged and the right to ask for intervention solemnly renounced by contract, and where this breach of promise was formally pointed to by the government whose intervention was asked;

Whereas, therefore, the question imposes itself, whether absolute equity ever would permit that a contract be willingly and purposely trespassed upon by one party in view to force its binding power on the other party;

And whereas it has to be admitted that, even if the trick to change a contract for regular coastal service into a concession for exclusive navigation succeeded (quod non), in the face of absolute equity the trick of making the same contract a chain for one party and a screw press for the other never can have success:

It must be concluded that article 14 of the contract disables the contracting parties to base a claim on this contract before any other tribunal than that which they have freely and deliberately chosen, and to parties in such a contract must be applied the words of the Hon. Mr. Finley, United States Commissioner in the Claims Commission of 1889: "So they have made their bed and so they must lie in it." [1]

But there is still more to consider.

For whereas it appears that the contract originally passed with Grell was legally transferred to Sanchez and later on to the English company the Orinoco Shipping and Trading Company (Limited), and on the 1st day of April, 1902, was sold by this company to the American company, the claimant;

But whereas article 13 of the contract says that it might be transferred to another person or corporation upon previous notice to the Government, while the evidence shows that this notice has not been previously (indeed ever) given; the condition on which the contract might be transferred not being fulfilled, the Orinoco Shipping and Trading Company (Limited), had no right to transfer it, and this transfer of the contract without previous notice must be regarded as null and utterly worthless;

Wherefore, even if the contract might give a ground to the above-examined claim to the Orinoco Shipping and Trading Company (Limited) (once more quod non), the claimant company as quite alien to the contract could certainly never base a claim on it.

For all which reasons every claim of the Orinoco Steamship Company against the Republic of the United States of Venezuela for the annulment of a concession for the exclusive navigation of the Macareo and Pedernales channels of the Orinoco has to be disallowed.

As for the claims for 100,000 bolivars, or $ 19,219.19, overdue on a transaction celebrated on May 10, 1900, between the Orinoco Shipping and Trading Company (Limited) and the Venezuelan Government:

Whereas these 100,000 bolivars are those mentioned in letter B, of article 2 of said contract, reading as follows:

(B) One hundred thousand bolivars, which shall be paid in accordance with such arrangements as the parties hereto may agree upon on the day stipulated in the decree 23d of April, ultimo, relative to claims arising from damages caused during the war, or by other cause whatever;

And whereas nothing whatever of any arrangement, in accordance with which it was stipulated to pay, appears in the evidence before the Commission, it might be asked if, on the day this claim was filed, this indebtedness was proved compellable;

Whereas further on, in which ever way this question may be decided, the contract has an article 4, in which the contracting parties pledged themselves to the following: "All doubts and controversies which may arise with respect to the interpretation and execution of this contract shall be decided by the tribunals of Venezuela and in conformity with the laws of the Republic, without such mode of settlement being considered motive of international claims," while it is shown in the diplomatic correspondence brought before the Commis-

[1] Woodruff *et al. v.* Venezuela, Opinions United States and Venezuelan Claims Commission, 1890, *infra*, Moore's Arbitrations, p. 3564.

sion on behalf of claimant, that in December 1902, a formal petition to make it an international claim was directed to the Government of the United States of America without the question having been brought before the tribunals of Venezuela, which fact certainly constitutes a flagrant breach of the contract on which the claim was based;

And whereas, in addition to everything that was said about such clauses here above it has to be considered what is the real meaning of such a stipulation;

And whereas when parties agree that doubts, disputes, and controversies shall only be decided by a certain designated third person, they implicitly agree to recognize that there properly shall be no claim from one party against the other, but for what is due as a result of a decision on any doubts, disputes, or controversies by that one designated third; for which reason, in addition to everything that was said already upon this question heretofore, in questions on claims based on a contract wherein such a stipulation is made, absolute equity does not allow to recognize such a claim between such parties before the conditions are realized, which in that contract they themselves made conditions sine qua non for the existence of a claim;

And whereas further on — even in case the contract did not contain such a clause, and that the arrangements, in accordance to which it was stipulated to pay were communicated to and proved before this Commission — it ought to be considered that if there existed here a recognized and compellable indebtedness, it would be a debt of the Government of Venezuela to the Orinoco Shipping and Trading Company;

For whereas it is true that evidence shows that on the 1st of April, 1902, all the credits of that company were transferred to the claimant company, it is not less true that, as shown by evidence, this transfer was never notified to the Government of Venezuela;

And whereas according to Venezuela law, in perfect accordance with the principles of justice and equity recognized and proclaimed in the codes of almost all civilized nations, such a transfer gives no right against the debtor when it was not notified to or accepted by that debtor;

And whereas here it can not be objected that according to the protocol no regard has to be taken of provisions of local legislation, because the words " the commissioners, or, in case of their disagreement, the umpire, shall decide all claims upon a basis of absolute equity, without regard to objections of a technical nature, or of the provisions of local legislation," clearly have to be understood in the way that questions of technical nature or the provisions of local legislation should not be taken into regard when there were objections against the rules of absolute equity; for, in case of any other interpretation, the fulfilling of the task of this Commission would be an impossibility, as the question of American citizenship could never be proved without regard to the local legislation of the United States of America, and this being prohibited by the protocol, all claims would have to be disallowed, as the American citizenship of the claimant would not be proved; and as to technical questions it might then be maintained (as was done in one of the papers brought before this Commission on behalf of a claimant in one of the filed claims) that the question whether there was a proof that claimant had a right to a claim was a mere technical question;

And whereas, if the provisions of local legislation, far from being objections to the rules of absolute equity are quite in conformity with those rules, it would seem absolutely in contradiction with this equity not to apply its rules because they were recognized and proclaimed by the local legislation of Venezuela;

And whereas, the transfer of credits from " the Orinoco Shipping and Trading Company " to " the Orinoco Steamship Company " neither was

notified to, or accepted by the Venezuelan Government, it can not give a right to a claim on behalf of the last-named company against the Government of Venezuela:

For all which reasons the claim of the Orinoco Steamship Company (Limited) against the Government of Venezuela, based on the transaction of May 10, 1900, has to be disallowed.

In the next place the company claims $ 147,038.79, at which sum it estimates the damages and losses sustained during the last revolution, including services rendered to the Government of Venezuela.

Now, whereas this claim is for damages and losses suffered and for services rendered from June, 1900, whilst the existence of the company only dates from January 31, 1902, and the transfer of the credits of " the Orinoco Shipping and Trading Company (Limited) " to claimant took place on the 1st of April of this same year, it is clear from what heretofore was said about the transfer of these credits, that all items of this claim, based on obligations originated before said April 1, 1902, and claimed by claimant as indebtedness to the aforenamed company and transferred to claimant on said April 1, have to be disallowed, as the transfer was never notified to or accepted by the Venezuelan Government. As to the items dating after the 1st of April, 1902, in the first place the claimant claims for detention and hire of the steamship *Masparro* from May 1 to September 18, 1902 (one hundred and forty-one days), at 100 pesos daily, equal to 14,100 pesos, and for detention and hire of the steamship *Socorro* from March 21 to November 5, 1902 (two hundred and twenty-nine days), 22,900 pesos, together 37,000 pesos, equal to $ 28,401.55;

And whereas it is proved by evidence that said steamers have been in service of the National Government for the time above stated;

And whereas nothing in the evidence shows any obligation on the part of the owners of the steamers to give this service gratis, even if it were in behalf of the commonwealth;

Whereas therefore a remuneration for that service is due to the owners of these steamers:

The Venezuelan Government owes a remuneration for that service to the owners of the steamers;

And whereas these steamers, by contract of April 1, 1902, were bought by claimant, and claimant therefore from that day was owner of the steamers:

This remuneration from that date is due to claimant.

And whereas in this case it matters not that the transfer of the steamers was not notified to the Venezuelan Government, as it was no transfer of a credit, but as the credit was born after the transfer, and as it was not in consequence of a contract between the Government and any particular person or company, but, as evidence shows, because the Government wanted the steamers' service in the interest of its cause against revolutionary forces; and whereas for this forced detention damages are due, those damages may be claimed by him who suffered them, in this case the owners of the steamers;

And whereas the argument of the Venezuelan Government, that it had counterclaims, can in no wise affect this claim, as those counter claims the Venezuelan Government alludes to, and which it pursues before the tribunals of the country, appear to be claims against the Orinoco Shipping and Trading Company, and not against claimant;

And whereas it matters not whether claimant, as the Government affirms and as evidence seems clearly to show, if not taking part in the revolution, at all events favored the revolutionary party, because the ships were not taken and confiscated as hostile ships, but were claimed by the Government, evidence

shows, because it wanted them for the use of political interest, and after that use were returned to the owners: For all these reasons there is due to claimant from the side of the Venezuelan Government, a remuneration for the service of the steamers *Masparro* and *Socorro*, respectively, from May 1 to September 18, 1902 (one hundred and forty-one days), and from April 1 to November 5, 1902 (two hundred and nineteen days, together three hundred and sixty days);

And whereas, according to evidence since 1894 these steamers might be hired by the Government for the price of 400 bolivars, or 100 pesos, daily, this price seems a fair award for the forced detention:

Wherefore for the detention and use of the steamers *Masparro* and *Socorro* the Venezuelan Government owes to claimant 36,000 pesos, or $ 27.692.31.

Further on claimant claims $ 2,520.50 for repairs to the *Masparro* and $ 2,932.98 for repairs to the *Socorro*, necessitated, as claimant assures, by the ill usage of the vessels whilst in the hands of the Venezuelan Government.

Now, whereas evidence only shows that after being returned to claimant the steamers required repairs at this cost, but in no wise that those repairs were necessitated by ill usage on the side of the Government;

And whereas evidence does not show in what state they were received and in what state they were returned by the Government:

And whereas it is not proved that in consequence of this use by the Government they suffered more damages than those that are the consequence of common and lawful use during the time they were used by the Government, for which damages in case of hire the Government would not be responsible;

Where the price for which the steamers might be hired is allowed for the use, whilst no extraordinary damages are proved, equity will not allow to declare the Venezuelan Government liable for these repairs:

Wherefore this item of the claim has to be disallowed.

Evidence in the next place shows that, on May 29 and May 31, 1902, 20 bags of rice, 10 barrels of potatoes, 10 barrels of onions, 16 tins of lard, and 2 tons of coal were delivered to the Venezuelan authorities on their demand on behalf of the Government forces, and for these provisions, as expropriation for public benefit, the Venezuelan Government will have to pay;

And whereas the prices that are claimed, viz, $ 6 for a bag of rice, and $ 5 for a barrel of potatoes, $ 7 for a barrel of onions, $ 3 for a tin of lard, and $ 10 for a ton of coal, when compared with the market prices at Caracas, do not seem unreasonable, the sum of $ 308 will have to be paid for them.

As for the further $ 106.40 claimed for provisions and ship stores, whereas there is given no proof of these provisions and stores being taken by or delivered to the Government, they can not be allowed.

For passages since April 1, 1902, claimant claims $ 224.62, and whereas evidence shows that all these passages were given on request of the Government, the claim has to be admitted, and whereas the prices charged are the same that formerly could be charged by the " Orinoco Shipping and Trading Company," these prices seemed equitable;

Wherefore, the Venezuelan Government will have to pay on this item the sum of $ 224.62.

As to the expenses caused by stoppage of the steamer *Bolívar* at San Felix when Ciudad Bolívar fell in the hands of the revolution —

Whereas this stoppage was necessitated in behalf of the defense of the Government against revolution;

And whereas no unlawful act was done nor any obligatory act was neglected by the Government, this stoppage has to be regarded, as every stoppage of commerce, industry, and communication during war and revolution, as a

common calamity that must be commonly suffered and for which government can not be proclaimed liable;

Wherefore, this item of the claim has to be disallowed.

And now as for the claim of $ 61.336.20 for losses of revenue from June to November, 1902, caused by the blockade of the Orinoco:

Whereas a blockade is the occupation of a belligerent party on land and on sea of all the surroundings of a fortress, a port, a roadstead, and even all the coasts *of its enemy*, in order to prevent all communication with the exterior, with the right of " transient occupation " until it puts itself into real possession of that port of the hostile territory, the act of forbidding and preventing the entrance of a port or a river on its own territory in order to secure internal peace and to prevent communication with the place occupied by rebels or a revolutionary party can not properly be named a blockade, and would only be a blockade when the rebels and revolutionists were recognized as a belligerent party;

And whereas in absolute equity things should be judged by what they are and not by what they are called, such a prohibitive measure on its own territory can not be compared with the blockade of a hostile place, and therefore the same rules can not be adopted;

And whereas the right to open and close, as a sovereign on its own territory, certain harbors, ports, and rivers in order to prevent the trespassing of fiscal laws is not and could not be denied to the Venezuelan Government, much less this right can be denied when used in defense not only of some fiscal rights, but in defense of the very existence of the Government;

And whereas the temporary closing of the Orinoco River (the so-called " blockade ") in reality was only a prohibition to navigate that river in order to prevent communication with the revolutionists in Ciudad Bolívar and on the shores of the river, this lawful act by itself could never give a right to claims for damages to the ships that used to navigate the river;

But whereas claimant does not found the claim on the closure itself of the Orinoco River, but on the fact that, notwithstanding this prohibition, other ships were allowed to navigate its waters and were dispatched for their trips by the Venezuelan consul at Trinidad, while this was refused to claimant's ships, which fact in the brief on behalf of the claimant is called " unlawful discrimination in the affairs of neutrals," it must be considered that whereas the revolutionists were not recognized belligerents there can not properly here be spoken of " neutrals " and " the rights of neutrals; " but that

Whereas it here properly was a prohibition to navigate;

And whereas, where anything is prohibited, to him who held and used the right to prohibit can not be denied the right to permit in certain circumstances what as a rule is forbidden;

The Venezuelan Government, which prohibited the navigation of the Orinoco, could allow that navigation when it thought proper, and only evidence of unlawful discrimination, resulting in damages to third parties, could make this permission a basis for a claim to third parties;

Now, whereas the aim of this prohibitive measure was to crush the rebels and revolutionists, or at least to prevent their being enforced, of course the permission that exempted from the prohibition might always be given where the use of the permission, far from endangering the aim of the prohibition, would tend to that same aim, as, for instance, in the case that the permission were given to strengthen the governmental forces or to provide in the necessities of the loyal part of the population;

And whereas the inculpation of unlawful discrimination ought to be proved;

And whereas, on one side, it not only is not proved by evidence that the ships

cleared by the Venezuelan consul during the period in question did not receive the permission to navigate the Orinoco in view of one of the aforesaid aims;

But whereas, on the other side, evidence, as was said before, shows that the Government had sufficient reasons to believe claimant, if not assisting the revolutionists, at least to be friendly and rather partial to them, it can not be recognized as a proof of unlawful discrimination that the Government, holding in view the aim of the prohibition and defending with all lawful measures its own existence, did not give to claimant the permission it thought fit to give to the above-mentioned ships;

And whereas therefore no unlawful act or culpable negligence on the part of the Venezuelan Government is proved that would make the Government liable for the damages claimant pretends to have suffered by the interruption of the navigation of the Orinoco River, this item of the claim has to be disallowed.

The last item of this claim is for $ 25,000, for counsel fees and expenses incurred in carrying out the above examined and decided claims;

But whereas the greater part of the items of the claim had to be disallowed;

And whereas in respect to those that were allowed it is in no way proved by evidence that they were presented to and refused by the Government of the Republic of the United States of Venezuela, and whereas therefore the necessity to incur those fees and further expenses in consequence of an unlawful act or culpable negligence of the Venezuelan Government is not proved, this item has, of course, to be disallowed.

For all which reasons the Venezuelan Government owes to claimant:

	United States gold
For detention and use of the steamers *Masparro* and *Socorro*, 36,000 pesos, or	$ 27,692.31
For goods delivered for use of the Government	308.00
For passages	224.62
Total	28,224.93

While all the other items have to be disallowed.