RUDLOFF CASE

INTERLOCUTORY DECISION

BAINBRIDGE, *Commissioner* (claim referred to umpire on preliminary question of jurisdiction:)

The Government of Venezuela demurs to the jurisdiction of the Commission in respect to the above-entitled claim, and bases its demurrer on the following grounds:

First. That on May 6, 1901, Sofia Ida Wiskow Rudloff and Frederick W. Rudloff sued the nation before the Federal court in order to compel it to pay them, in their capacities as heirs of Henry J. Rudloff, the sum of 3,698,801 bolivars for damages originating in an alleged breach of the contract entered into between their predecessor in interest, the said Henry J. Rudloff and the Government of Venezuela, for the construction of a market building in Caracas. It is argued that as the claimants sought the jurisdiction of the tribunals of Venezuela to submit to them their claim, a voluntary and deliberate act on their part, they have submitted themselves to the provisions of local legislation, both substantive and adjective, in all and everything that might pertain to the suit; that the Federal court has assumed jurisdiction over and decided the claim; that the parties have both appealed from the decision of the court and the court of appeals has taken cognizance of the matter, that article 216 of the Code of Civil Procedure in force provides: " If the discontinuation is limited to the proceedings, it can not be had without the consent of the opposite party", and that the defendant Government not having given its consent for the discontinuance in the manner in which the claimants have done so, the claimants

can not withdraw the claim from the jurisdiction from the Federal court in order to submit it to the Commission.

Second. That article 12 of the aforesaid contract provides that:

> The doubts and controversies that may arise on account of this contract shall be decided by the competent tribunals of the Republic in conformity with the laws and shall not give reason for any international reclamations,

and that the case of a denial of justice can not be alleged because the court of first instance has decided the case favorably to the claimants, and the jurisdiction of the tribunals of the Republic has not been exhausted in the litigation.

These two grounds of demurrer will be considered here in the order stated, but it is to be remarked at the outset that the Commission as a court of last resort is the sole and conclusive judge of its own jurisdiction. Mr. Webster, then Secretary of State, said, in relation to the United States and Mexican Commission of 1839, that it was

> essentially a judicial tribunal with independent attributes and powers in regard to its peculiar functions,

and that

> its right and duty, therefore, like those of other judicial bodies, are to determine upon the nature and extent of its own jurisdiction, as well as to consider and decide upon the merits of the claims which might be laid before it.[1]

The determination by the Commission of the objections to its jurisdiction raised by the Government of Venezuela, as above set forth, is clearly within the scope of its delegated authority.

In determining the first objection, certain material facts must be borne in mind. On the 6th of May, 1901, the claimants brought suit in the chamber of first instance of the Federal court against the Government of Venezuela. The suit proceeded to trial and judgment which was entered on the 14th of February, 1903. On February 16, 1903, the attorney-general, on behalf of the Government, appealed from the judgment, and on the same day the claimants appealed from it. The case thus remains pending in the courts.

The parties to an action pending in court may always by agreement submit the whole or any part of the matter or matters in issue to arbitration. Indeed, the submission to arbitration, in the absence of collusion or fraud, is favored by courts upon broad grounds of public policy. This principle of arbitration enters into and forms a part of every civilized code of jurisprudence, and to this rule the jurisprudence of Venezuela is no exception. Article 493 of the Venezuelan Code of Civil Procedure provides:

> In any condition of the case in which the parties may signify a wish to have it submitted to arbitrators, the course of proceeding shall be suspended and the case immediately passed over to those named.

The rule above stated is the same, so far as it touches the question here, where the arbitration is between nations and the submission concerns a private claim. Only the Government of the claimant, acting in his behalf, enters into the agreement for arbitration.

In this case the parties to the action pending in the local tribunals are on the one hand the claimants, citizens of the United States as plaintiffs, and the Government of Venezuela on the other as defendant. Have these parties litigant agreed to submit the cause to the arbitration of this international tribunal? If they have, the agreement is binding upon both.

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[1] Moore's Arbitrations, 1242; Senate Ex. Doc. 320, 27th Cong., 2d sess., 185.

The appeal was taken by both parties from the judgment of the lower court on February 16, 1903. On the following day the Government of Venezuela signed the protocol constituting this Commission, and by that act agreed to submit to the arbitrament of this tribunal:

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

Nothing could be clearer than the language thus employed to define the scope of the jurisdiction conferred, or than that the jurisdiction conferred is inclusive of such a claim as this one of the Rudloff heirs against the Venezuelan Government. The signing of the convention by the two Governments was in the solemn exercise of the highest prerogative of sovereignty, and it is the duty of the Commission to so interpret the terms of the convention, and, under its oath, so to act as to give effect to the intention, thus unequivocally expressed, of the high contracting parties.

Vattel, speaking of the interpretation of treaties, says:

> The interpretation which renders a treaty null and without effect can not be admitted. It ought to be interpreted in such a manner as it may have its effect, and not to be found vain and nugatory. (Vattel, book 2, ch. 17, sec. 283.)

The claim presented here is a claim owned by citizens of the United States of America against the Republic of Venezuela. It has not been settled by diplomatic agreement or by arbitration. The Government of Venezuela has in the most solemn manner agreed to submit such claims to the jurisdiction of this Commission, under the plain terms of the convention of February 17, 1903. The claimants, availing themselves of the action of their Government in their behalf, agree to submit their claim to the jurisdiction of this Commission by its presentation here.

The identical objection to the jurisdiction was urged in the case of Selwyn *v.* Venezuela before the British and Venezuelan Claims Commission now in session at this capital. In sustaining the jurisdiction of the Commission, Plumley, umpire, said:

> International arbitration is not affected jurisdictionally by the fact that the same question is in the courts of one of the nations. Such international tribunal has power to act without reference thereto, and if judgment has been pronounced by such court to disregard the same, so far as it affects the indemnity to the individual, and has power to make an award in addition thereto or in aid thereof, as in the given case justice may require. Within the limits prescribed by the convention constituting it, the parties have created a tribunal superior to the local courts.[1]

In fact the law which governs this Commission, and which it must apply in the exercise of its functions, is not the municipal law of either of the contracting nations, but it is that paramount code which is obligatory upon both.

Says Hall (4th Ed., p. 1):[2]

> International law consists in certain rules of conduct which modern civilized states regard as being binding on them in their relations with one another with a force comparable in nature and degree to that binding the conscientious person to obey the laws of his country, and which they also regard as being enforceable by appropriate means in case of infringement.

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[1] See p. 323; see also the Italian - Venezuelan Commission (Martini Case) in Volume X of these *Reports*.

[2] See the German - Venezuelan Commission (Kummerow *et al.*, opinion of Umpire) in Volume X of these *Reports*.

These rules of conduct recognize the right and duty of a state to protect its citizens or subjects at home or abroad, and the corresponding obligation of a state to make due reparation and give just compensation for injuries inflicted upon another state, or upon its citizens or subjects. And whenever two independent nations have by solemn compact provided a forum to determine the extent of the injuries inflicted by the one upon the other, and the means of redress therefor, the legislation of neither of the contracting parties can interpose to limit or defeat the jurisdiction of that forum in respect of any matter fairly within the purview of the compact. The two Governments have for the purposes expressed created a tribunal superior to the local courts —

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

The second objection to the jurisdiction of the Commission raised by the Government of Venezuela is based upon article 12 of the contract, which reads as follows:

> The doubts or controversies that may arise on account of this contract shall be decided by the competent courts of the Republic, in conformity with the laws, and shall not give reason for any international reclamation.

The memorial states that, pursuant to an order of the national Executive, the governor of the Federal district placed the contract in question before the municipal council, who, on September 8, 1903, by a decree, declared it null, and authorized the governor to take possession of the market and demolish the work done by Rudloff, and that this decree was carried out by the public functionaries, notwithstanding the protests of Mr. Rudloff. For the purpose of this preliminary inquiry as to jurisdiction, the statements in the memorial are to be considered as true, the sole question for the present being whether, if true, this Commission can take cognizance of the claim.

In regard to that portion of article 12 of the contract inhibiting international reclamation, it is perfectly obvious that under established principles of the law of nations such a clause is wholly invalid. A contract between a sovereign and a citizen of a foreign country not to make matters of differences or disputes arising out of an agreement between them or out of anything else the subject of an international claim, is not consonant with sound public policy and is not within their competence. In the case of Flanagan, Bradley, Clark & Co. *v.* Venezuela, before the United States and Venezuelan Commission of 1890, Mr. Commissioner Little said:

> It (i.e., such a contract) would involve, pro tanto, a modification or suspension of the public law, and enable the sovereign in that instance to disregard his duty toward the citizen's own government. If a state may do so in a single instance, it may in all cases. By this means it could easily avoid a most important part of its international obligations. It would only have to provide by law that all contracts made within its jurisdiction should be subject to such inhibitory condition. For such a law, if valid, would form the part of every contract therein made as fully as if expressed in terms upon its face. Thus, we should have the spectacle of a state modifying the international law relative to itself. The statement of the proposition is its own refutation. The consent of the foreign citizens concerned can, in my belief, make no difference — confer no such authority. Such language as is employed in article 20, contemplates the potential doing of that by the sovereign toward the foreign citizen for which an international reclamation may rightfully be made under ordinary circumstances. Whenever that situation arises — that is, whenever a wrong occurs of such a character as to justify diplomatic interference — the government of the

citizen at once becomes a party concerned. Its rights and obligations in the premises can not be affected by any precedent agreement to which it is not a party. Its obligation to protect its own citizen is inalienable.[1]

The contingency suggested by Commissioner Little appears to have happened in the case of Venezuela, since article 139 of the constitution of 1901 provides that the inhibitory condition against international reclamation shall be considered as incorporated, whether expressed or not, in every contract relating to public interest, and essentially the same provision was embodied in article 149 of the constitution of 1893. These constitutional provisions and legislative enactments of like nature are, however, clearly in contravention of the law of nations; they are pro tanto modifications or suspensions of the public law, and beyond the competence of any single power. For every member of the great family of nations must respect in others the right with which it is itself invested. And the right of a State to intervene for the protection of its citizens whenever by the public law a proper case arises can not be limited or denied by the legislation of another nation. Mr. Justice Story says:

> The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation within its own jurisdiction. And however general and comprehensive the phrases used in our municipal laws may be, they must always be restricted in construction to places and persons upon whom the legislature have authority and jurisdiction. (The *Apollon*, 9 Wheaton, 362.)

The subject of international reclamation is by its very terms outside the legislative jurisdiction of any one nation. And it is, furthermore, an utter fallacy to assert that this principle is an encroachment upon national sovereignty. That nation is most truly sovereign and independent which most scrupulously respects the independance and sovereignty of other powers.

Neither is it within the power of a citizen to make a contract limiting in any manner the exercise by his own government of its rights or the performance of its duties. A state possesses the right and owes the duty of protection to its citizens at home and abroad. The exercise of this right and the performance of this duty are as important to the state itself as the protection afforded may be to the individual. The observance of its obligation is fundamental and vital to every government. An injury to one of its citizens is an injury to the state, which punishes for infraction of municipal law and demands redress for violation of public law upon broad grounds of public policy. The individual citizen is not competent by any agreement he may make to bind the state to overlook an injury to itself arising through him, nor can he by his own act alienate the obligations of the state toward himself except by a transfer of his allegiance.[2]

There remains to be considered that portion of article 12 of the contract which provides that —

> the doubts and controversies that may arise on account of this contract shall be decided by the competent courts of the Republic in conformity with the laws.

Assuming, for the purposes of the examination, but in no wise admitting, that this portion of the article refers to such a case as is presented here, it must be apparent that the obligations of the article bore equally and reciprocally upon both parties to the contract — upon the Government of Venezuela as well as upon the claimants — and that when the Government, without resort

[1] Opinions of Commission of 1889-90, p. 451; Moore's Arbitrations, p. 3566.

[2] See also upon this point the Italian - Venezuelan Commission (Martini Case, opinion of Umpire) in Volume X of these *Reports*.

to the tribunals of the Republic, declared the contract null, the claimants were absolved from all obligations, if any had theretofore existed in that behalf.

In the great case of the Delagoa Bay Company,[1] the Government of the United States said, in reply to a similar objection raised by Portugal, that it was not within the power of one of the parties to an agreement first to annul it and then to hold the other party to the observance of its conditions, as if it were a subsisting engagement. It is contrary to every principle of natural justice that one party to a contract may pass judgment upon the other, and this is no less true when the former is a government and the latter is a foreign citizen. Public law regards the parties to a contract as of equal dignity, equally entitled to the hearing and judgment of an impartial and disinterested tribunal.

The acts of a sovereign [says Mr. Wheaton, a very high authority], however binding on his own subjects, if they are not conformable to the public law of the world, can not be considered as binding on the subjects of other states. A wrong done to them forms an equally just ground of complaint on the part of their government, whether it proceed from the direct agency of the sovereign or is inflicted by the instrumentality of his tribunals. (Wharton's Int. Law Dig., sec. 242.)

It is undoubtedly true that citizens or subjects of one country who go to a foreign country and enter into contracts with its citizens are presumed to make their engagements in accordance with and subject to the laws of the country where the obligations of the contract are to be fulfilled, and ordinarily can have recourse to their own government for redress of grievances only in case of a denial of justice. But as was forcibly stated by Mr. Cass, Secretary of State of the United States:

The case is widely different when the foreign government becomes itself a party to important contracts, and then not only fails to fulfill them but capriciously annuls them, to the great loss of those who have invested their time, and labor, and capital from a reliance upon its own good faith and justice.[2]

It is just such a " widely different case " that is presented here. It is just such a case that is within the terms of Article I of the protocol, defining the jurisdiction of this Commission. And in my judgment the Commission can not refuse to take cognizance of this claim without disregarding its solemn oath —

carefully to examine and impartially decide according to justice and the provisions of said convention all claims submitted to it in conformity with its terms.

Prima facie, the memorial presents the case of a wrongful annulment, by the arbitrary act of the Venezuelan Government, of a contract to which it was a party, injuriously affecting the rights of the other party thereto, who was a citizen of the United States. Manifestly, the first part of article 12 of the contract relates solely to questions growing out of the agreement itself, and can not be construed to apply to a claim resulting from the capricious annulment of the agreement by one of the parties. Such a claim does not rest upon any doubts or controversies arising out of the contract, but is based upon the fact that the claimants have been deprived of valuable rights, moneys, property, and property rights by the wrongful act of the Government of Venezuela, which they were powerless to prevent and for which they claim compensation. The " doubts and controversies " referred to in article 12 obviously relate to questions affecting the interpretation of the contract, to questions whether it was being or had been complied with, and the like. As to such matters the parties, by that article, mutually agreed to have recourse to the local tribunals. But when the Government, on whatever grounds of policy, saw fit to abrogate

[1] Moore's Arbitrations, p. 1865.
[2] Wharton, International Law Dig., sec. 230, Vol. II, p. 615.

the contract itself, and then to appropriate or to destroy the property or the property rights of the claimants, it must be held to have done so subject to the obligation to make full and adequate reparation and in full recognition of the right of the claimants, as citizens of the United States, to seek the intervention of their Government for their protection.

The term " property " embraces every species of valuable right and interest, including real and personal property, easements, franchises, and hereditaments.

Property is again divided into corporeal and incorporeal. The former comprehends such property as is perceptible to the senses, as lands, houses, goods, merchandise, and the like; the latter consists in legal rights, as choses in action, easements, and the like. (Bouvier's Law Dict., Rawle's ed., Vol. II, p. 781.)

The law of Venezuela recognizes that property rights may rest in contracts. Article 691 of the civil code provides:

La propiedad y demás derechos se adquieren y transmiten por sucesión, por donación y por efecto de los contratos.

The taking away or destruction of rights acquired, transmitted, and defined by a contract is as much a wrong, entitling the sufferer to redress, as the taking away or destruction of tangible property; and such an act committed by a government against an alien resident gives, by established rules of international law, the government to which the alien owes allegiance and which in return owes him protection, the right to demand and to receive just compensation. Such an act constitutes the basis of a " claim " clearly within the meaning and intent of the convention constituting this Commission.

In addition to the foregoing it may be said the presence of article 12 in the Rudloff contract is obviously due to the constitutional and legislative provisions requiring it. The protocol, which is the fundamental law of this tribunal, however, provides that:

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

I am of the opinion that this claim is within the jurisdiction of this Commission, and that its careful examination and impartial decision constitute a solemn duty which the Commission can not with propriety either evade or ignore.

PAÚL, *Commissioner* (claim referred to umpire on preliminary question of jurisdiction):

The honorable agent for the United States presented to this Commission a memorial signed by Sofia Ida Wiskow de Rudloff and Frederick W. Rudloff, citizens of the United States, and heirs of Henry Frederick Rudloff, deceased, in which memorial said heirs claim from the Republic of Venezuela the payment of the sum of 3,698,801 bolivars, with interest, for the loss of capital and damages caused by the abrogation of certain contract made between said Henry Frederick Rudloff and the minister of public works and the mayor of the Federal district, published in the Official Gazette, No. 5717, of February 8, 1893, which contract had for its object the construction of a new market building in the San Jacinto square, this city.

The honorable agent for Venezuela, in his reply to the above-mentioned memorial, presented to this Commission, as a previous and special question to be decided, the exception against jurisdiction, based on the following reasons:

That on May 8, 1901, the same claimants, represented by Dr. Ascanio Negretti, sued the Venezuelan Government before the Federal court for the

payment of the same amount and on the same basis that they now present to this Commission;

That the claimants having chosen the jurisdiction of the Federal court and submitted themselves to its decision, it is evident that they also accepted the dominion of the local legislation, substantive as well as adjective, in connection with the action brought by them against the Government of Venezuela, with the special circumstance that, by article 12 of the contract presented as evidence by the claimant, the contracting party agreed that —

all doubts and disputes arising by reason of said contract should be decided by the tribunals of the Republic, and said disputes could never give reason for international reclamations.

That the hall of the first instance of the Federal court having taken cognizance of and decided the said action, and both parties having appealed from its decision, the same Federal court in its hall of the second instance has this matter under its judicial notice at the present time; and Venezuela, that is to say, the defendant party, not having consented to the withdrawal of the suit from the jurisdiction of that high tribunal in order to have it submitted to this Commission, the latter consequently lacks jurisdiction; and, finally, that the case of denial of justice could not be alleged, since, not only has the court of the second instance not yet given a judgment that could cause definite execution in the case, but the decision rendered by the first instance of the Federal court was favorable to the claimants.

The question of jurisdiction in this case evidently is a matter of interpretation of the terms of the first article of the protocol dated February 17, 1903, signed at Washington by the Secretary of State of the United States of America and the plenipotentiary of Venezuela, that had for its object to submit to arbitration all the claims not settled, owned by citizens of the United States against the Republic of Venezuela.

The exact terms of said article are as follows:

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

The general terms in which this article defines the jurisdiction of this tribunal are apt to be interpreted in such a way that the scope of the faculty intended to be given to the Commission comprised all claims owned by citizens of the United States against the Republic of Venezuela that had been the object of diplomatic correspondence between the two Governments without having reached a final settlement, or that were unknown to both Governments; but this amplitude of jurisdictional scope does not in any way interfere with the principles of common law and sound logic, which naturally exclude, because of nature and peculiar circumstances, certain questions or pretensions of those parties that consider themselves entitled to claim from the Republic of Venezuela from being presented, examined, or decided by this Commission. For instance, the above-mentioned article does categorically state that those questions or claims of citizens of the United States against the Republic of Venezuela that had already been submitted to the ordinary tribunals of the country and had been the object of definite executory judgment, and against which there has not been invoked as a basis for a new and different claim a denial of justice or evident injustice were excluded from the jurisdiction of this Commission, and notwithstanding that these claims could not be considered as settled by *diplomatic agreement or by arbitration between both Governments*, it is an indisputable fact that

such questions or pretensions do not constitute a claim susceptible of submission to the examination and decision of this Commission.

In the meaning of the word " claim " it is indispensable to admit as a consubstantial element the idea of controversy between the Government of Venezuela and the claimant. That controversy, as in the present case, arises from a contract, and has been submitted for its definite decision to the jurisdiction of a tribunal of the Republic, which, according to the laws of the country and by the special articles of the same contract, has full jurisdiction to decide whether or not there exist responsibilities and obligations in favor of either party, and the stage of the proceedings of the action in that case determine that it is not a claim of a Government against another Government to obtain satisfaction for a damage caused to the interests of one of its citizens, but it enters upon that condition of every question which is the object of a civil action in which concur all the elements and means accorded by the laws for the dilucidation and protection of the rights of both parties.

The Washington protocol could not have for its object the withdrawal from the decision of the tribunals of the Republic the judicial disputes that had been already submitted to them when it is natural to suppose that it had no other object than to facilitate, by means of the Mixed Commission, the definitive decision of those claims that had been already object of diplomatic dissension between the two Governments and about which a settlement had not been reached by agreement or arbitration. The act of making nugatory the laws of the Republic which are a part of its constitutional statute in regard to contracts and in regard to the jurisdiction of its tribunals, thus opposing the terms of the express contractual conditions that oblige the parties to submit all questions arising from said contract to the courts of the country without same ever becoming a cause for international claims, would have been a transgression on the legitimate powers with which the plenipotentiary of Venezuela was invested, which powers could never have made ineffectual the constitutional precepts established in the fundamental charter of 1901 that was in force at that date of the signing of the protocol. It is not then possible to admit an interpretation of the terms of said protocol that is not in perfect accordance with the fundamental basis of the national sovereignty exercised through its tribunals of justice, and in accordance with the universal principles that establish as supreme law to the parties in contracts and obligations, the judicial ties established by themselves in the exercise of their free will, and as a law to the contract.

It was in the exercise of this liberty, it was in the observance of the laws of the Republic that were known to Sofia I. W. de Rudloff and Frederic Henry Rudloff which laws they were obliged to comply with, as well as to the very special clause 12 of the said contract, on which they found their claim; and it was also in view thereof, that the Department of State of the United States of America, which under its constant rule of nonintervention in disputes arising form contracts between its citizens and foreign countries until after having availed themselves of all the remedies which the laws of such country afforded for the protection of their rights, instructed the claimants to make use of their right before the tribunals of Venezuela, and in accordance with those instructions said claimants presented to the Federal court their demand for damages against the Government of Venezuela. While this action exists, and while all the remedies afforded by our laws in their various instances are not exhausted, and while there is not used as a basis of a claim the fact of denial of justice or evident injustice in the judicial proceedings and in the final judgment of the Federal court, there does not exist any claim with reference to this matter that could be a subject for examination by this Commission.

It is true that the parties have the right, by article 216 of the code of civil proceedings, to desist from any action brought before a tribunal. The same article establishes that such desistance can not take place without the consent of the other party; and article 492 of the same code, quoted by the honorable agent for the United States in his reply, stipulates that when at any stage of the case the parties manifest that they have submitted themselves to the decision of umpires, the course of the action be suspended and the pleadings and proceedings be immediately delivered to the umpires, it reveals by its own terms that such a statement should be made explicit, and by both parties, before the tribunal where the action was pending, and by no means could such a manifestation be deduced from the more or less exact interpretation of the terms of the protocol. When the protocol was signed at Washington the said action was pending before the Federal court, and had it been the intention of the Government of Venezuela, notwithstanding the conditions stated in the constitution of the Republic, and the clause of the contract which is the cause of the demand, and the natural jurisdiction of a high court of the Republic in the action brought by the same plaintiffs, such an exception would have to have been the object of an especial statement in the terms of the protocol, as happened in the Venezuelan-Mexican protocol signed by the same plenipotentiary of Venezuelan, Mr. Bowen, on the 26th day of the same month of February.

Said Venezuelan-Mexican protocol expressly states:

> It is understood that if before the 1st of June, 1903, the claims of Mexico above mentioned are settled by agreement between the claimants and the Government of Venezuela, or decided in favor of said claimants by the court of Venezuela, said claims shall not be submitted to the arbitration agreed upon in the preceding articles.[1]

This exception was caused by the circumstances that the representatives of the high contracting parties knew of the existence of the demand entered in action by the firm of Martinez del Río & Bros. before the high Federal court, and both representatives thought it indispensable to specify a date and a condition that would contribute to fixing the jurisdiction of the Mixed Commission in the special case of the above-mentioned claim, it being in limine litis submitted for its decision to a court that fully exercised that jurisdiction, and which the parties could not avoid without a special, express, and definite declaration.

For the above-stated reasons, it is my opinion that while there exists a demand in action brought by the same claimant before the Federal court for the same object mentioned in the memorial presented to this Commission, which judgment is still pending by reason of an appeal made by both parties to the hall of the second instance of the same court from the decision pronounced by the hall of the first instance, there does not properly exist a claim against the Government of Venezuela which could be submitted to the jurisdiction of this Commission by the Rudloff heirs, and consequently this Commission has absolutely no jurisdiction and ought to reject the pretension of the applicants.

INTERLOCUTORY DECISION OF THE UMPIRE ON JURISDICTION

BARGE, *Umpire.*

A difference of opinion having arisen between the Commissioners of the United States of North America and of the United States of Venezuela about

[1] See the Mexican - Venezuelan Commission (Article VI of the Protocol of February 26, 1903) in Volume X of these *Reports*.

the question of jurisdiction in this case, this question was duly referred to the umpire for an interlocutory decision.

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

Whereas the protocol, whereupon solely and wholly rests the jurisdiction of this Commission, says that all claims owned by citizens of the United States of North America against the Republic of Venezuela which have not been settled by diplomatic agreement or by arbitration between the two Governments, and which shall have been presented to this Commission by the Department of State of the United States or its legation at Caracas shall be examined and decided by this Commission; and

Whereas claimants in the first place are citizens of the United States, and, secondly, own a claim against the Republic of Venezuela, which claim has not been settled by diplomatic agreement or by arbitration between the two Governments, whilst in the third place it has been duly presented to this Commission by the Department of State of the United States through its agent.

This claim certainly prima facie shows itself as standing under the jurisdiction of this Commission.

Now, whereas the Government of Venezuela, by its honorable agent, opposes that in article 12 of the contract entered into by the predecessor in interest of the claimants, the parties stipulated that the doubts and controversies which might arise by reason of it should be decided by the tribunals of the Republic, it has to be considered that this stipulation by itself does not withdraw the claims based on such a contract from the jurisdiction of this Commission, because it does not deprive them of any of the essential qualities that constitute the character which gives the right to appeal to this Commission; but that in such cases it has to be investigated as to every claim, whether the fact of not fulfilling this condition and of claiming in another way, without first going to the tribunals of the Republic, does not infect the claim with a *vitium proprium*, in consequence of which the absolute equity (which, according to the same protocol, has to be the only basis of the decisions of this Commission) prohibits this Commission from giving the benefit of its jurisdiction (for as such it is regarded by the claimants) to a claim based on a contract by which this benefit was renounced and thus absolving claimants from their obligations, whilst the enforcing of the obligations of the other party based on that same contract is precisely the aim of their claim; and

Whereas the evidence of such a *vitium proprium* can only be the result of an examination of the claim in its details, the jurisdiction of the Commission as to the examination of the case is not impeached by the above-mentioned clause, leaving open for the decision of the Commission the question whether this clause, under circumstances sufficiently evidenced after investigation, forbids the Commission in absolute equity to give claimants the benefit of this jurisdiction as to the decision;

Wherefore this argument does not seem conclusive against the jurisdiction of this Commission.

Whereas, furthermore, the Government of Venezuela, by its honorable agent, opposes that this same claim, being already the object of a suit before the Federal court, it can not, in accordance with article 216 of the code of civil procedure, be withdrawn from the jurisdiction of that court without the consent of the opposite party, which consent is here failing, it has to be considered that;

Whereas, even admitting the facts as stated by the Government of Venezuela, this argument does not seem to go against the provisions of the protocol, which states that the Commission shall decide all claims without regard to the provisions of local legislation and which at all events does not except claims in litigation, when it speaks about " All claims owned by citizens, etc.; " whilst it should be borne in mind that this protocol is the fundamental law for this Commission and the only source of its jurisdiction; and in which way soever the provisions of the protocol might be discussed in view of the principles of right — international as well as right in general — the adage should not be forgotten, " *dura lex sed lex*," and it must be remembered that this protocol under what circumstances soever originated, is an agreement between two parties, and that the Commission, whose whole jurisdiction is only founded on this agreement, has certainly above all to apply the great rule, " *pacta servanda*," without which international as well as civil law would be a mere mockery; whilst, on the other hand, it is not to be forgotten that this Commission, in the practice of its judicial powers, may find that the *absolute equity*, which according to that same protocol has to be the *only* basis for its decision, forces it to take into consideration, whether conflict with the provisions of local legislation as well as with previous agreements between parties, may infect the claim with that *vitium proprium* in consequence of which that same absolute equity prevents the Commission from making use of the jurisdiction as to the decision:

Whereas, therefore, the arguments opposed do not seem to impeach the prima facie arguments that speak for the jurisdiction of the Commission under the protocol, this jurisdiction has to be maintained and the claim has to be submitted to it.