Heirs of Massiani Case

OPINION OF THE VENEZUELAN COMMISSIONER

This claim has been presented in the name of Mrs. Carmen Silva de Massiani, widow of Tomás Massiani, of Felipe A. Massiani, Ascención Massiani de Phelan, Nuncia Massiani de Orsini, Luis A. Massiani, children of Tomás Massiani, and Isabel Paván de Massiani, acting in behalf of her minor children, Antonio José, Tomás María, Mercedes, Luis Enrique, Carmen de Lourdes, and Gloria, issue of her marriage with Mr. Antonio Massiani, now deceased, son of Tomás Massiani, and therefore those minors being grandchildren of the latter.

The claim proceeds from debts which, the claimants sustain, were contracted by the Government of Venezuela, in favor of him from whom they derive their rights, Mr. Tomás Massiani, by the years 1864 to 1869.

The documents presented prove that Tomás Massiani died in the city of Carúpano on the 9th of October, 1901, leaving as his lawful heirs his wife, Carmen Silva de Massiani, and his children Felipe A. Massiani, Antonio A. Massiani, Ascensión Massiani, Nuncia Massiani, and Luis A. Massiani; that these children have married as follows: Ascensión Massiani to a Mr. Phelan, Nuncia Massiani to Agustin Orsini, and Antonio J. Massiani to Isabel Paván, of which latter marriage there are under the parental control of Isabel Paván de Massiani, her husband being dead, six minor children.

From the certificates of birth presented of Mrs. Carmen Silva de Massiani, widow of Tomás Massiani, and of her children, Felipe A. Massiani, Antonio José, Ascensión, Nuncia, and Luis, it appears that all of them are of Venezuelan nationality, they having been born in the city of Carúpano, State of Sucre, United States of Venezuela, and that the same circumstance exists respecting the minor children of Antonio José Massiani, represented by their mother, Isabel Paván de Massiani.

With reference to Mrs. Carmen Silva de Massiani, while by articles 19 of the Venezuelan civil code and 12 of the French civil code the woman married to a foreigner follows the condition of her husband, the final provision of the Venezuelan civil code, which establishes that that change only subsists during the marriage, is conclusive.

Mrs. Carmen Silva de Massiani, having become a widow, has recovered, according to the Venezuelan law, which governs her personal status, her Venezuelan nationality; and, even if it might be sustained that, according to the

French law, she continues to be French, this commission, in determining the conflict of nationality arising from the two laws, must take into consideration the especial circumstances and the facts showing the real condition in which Mrs. Carmen Silva de Massiani has maintained herself with reference to her nationality, as well as with respect to the nationality of her children.

It is not proved, nor has it been attempted to prove, that Mrs. Silva de Massiani, after she became a widow, or her children of full age, have ever pretended, by acts proving such circumstance, to obtain and preserve a nationality different from that which the Venezuelan law attributes to them, under which law they have performed all the most important acts of life connected with the personal statute, *status civitatis*, and governed by the especial laws of that statute, such as those relating to successions, inheritances, guardianships, and marriage. It is not proved either that the male children of Tomás Massiani have rendered France the military service obligatory for every Frenchman, or in any way contributed to the satisfaction of other charges that would procure the protection due to those who do not abstain in an unjustifiable way from the compliance with their duty to their native land.

On the contrary, all the especial circumstances and precedents connected with the persons of the claimants show that they have during all their life remained in the territory of Venezuela; that there they have had for three generations the business and the principal and only seat of their interests, and they have contracted in the same territory marriages with persons of different nationalities, enjoying under the protection of the Venezuelan laws the security they grant and the services which the authorities of their residences were called upon to render to them in order to safeguard their persons and interests. From those facts it is deduced that the permanent settlement of the widow and children of Tomás Massiani, in the territory of Venezuela, of which they are all natives, is the result of a reasoned and persisting will and the manifestation of a free and spontaneous purpose which makes the law of domicile prevail over any other law when determining the question of nationality.

Mrs. Carmen Silva de Massiani, her children, who have been born and, one of them, died in Venezuela, and her grandchildren, all born in Venezuela, are Venezuelans, not only by the law of Venezuela, but in virtue of all the especial personal circumstances of continued residence, business ties with the Venezuelan soil, which has given them everything, including their national character.

It is doubtless that when a group of men are considered, and the aptitudes, habits, and attributes of each individual are studied, it is found that each person pertaining to a group possesses certain common characters that are like a common property of all the members belonging to the same group. Hence it results that, if attention is paid to the common attributes pertaining to all the individuals of each group, it may rightly be said *that these individuals belong to this or that nation.*[1]

In view of the aforesaid circumstances, the arbitrator for Venezuela is of opinion that this tribunal has no jurisdiction to take cognizance of and decide

---

[1] 687. Il est hors de doute, lorsque l'on considère une réunion d'hommes et qu'on étudie les aptitudes, les habitudes et les attributs de chaque individu, on trouve que chaque personne, que appartient à cette réunion, a certains caractères individuels et certains caractères communs, qui sont comme la propriété commune et de tous les membres qui appartiennent au même groupe. De là il résulte que, si on porte son attention sur les attributs communs qui sont propres à tous les individus de chaque groupe, on peut dire avec raison que ces individus appartiennent à telle ou telle nation. (Fiore, Nouveau Droit International Public, sec. 687.)

the claim in question, and that there is, besides, with respect to it a precedent that renders it equally inadmissible.

Said precedent consists in the fact that the same claim was presented by Tomás Massiani, from whom the present claimants derive their rights, against the Government of Venezuela, before the mixed commission sitting at Caracas from 1888 to 1890, instituted in accordance with the Venezuelan-French convention of 1885.

Tomás Massiani claimed from the Government of Venezuela, before the said commission, the sum of 351,449.80 bolivars. As appears from the certificate issued by the citizen minister of foreign affairs on the 20th of the present month, annexed to this opinion, the members of said commission in the sitting of the 7th of July, 1890, gave the following award with reference to the claim in question:

> The first part of the claim of Mr. Massiani, of which mention is made in the record of the proceedings of the 19th of May of the present year for 49,666.84 bolivars, was accepted by the commission, the question being a credit already recognized by the Government of Venezuela, and the present commissioner being authorized by a note addressed to him by the minister of foreign affairs on the 18th of July last, No. 643, to examine the claims that had been presented to the commission of 1879, and the second part of the same claim amounting to 301,784.96 bolivars was disallowed, because the interested party did not produce a sufficient document in support of his claim.

The reason on which was based the disallowance of the claim, in the part above determined, which is tantamount to its having been denied or rejected, was, as expressed in the same award, the want of sufficient proof to justify it.

The successors to Tomás Massiani now pretend that this commission should examine and decide again what was already the object of the decision of the mixed commission of 1888 to 1890, and base their pretention on a certificate from the centralization board of the general auditor's office, bearing the date of the 12th of August, 1890, posterior, as may be seen, to the date of the award of the mixed commission, in which certificate the movement in the books of the custom-house of Carúpano is partly detailed, and ending by a note signed by the auditor-general, in which it is declared that, according to said books, Tomás Massiani appeared to be the creditor of the Government of Venezuela up to the 23d of June, 1890, for the sum of 270,813.56 bolivars.

The claimants give that certificate the force of a *decisive* document in favor of the creditor, and sustaining that that document was retained by the debtor, or that, at least, this prevented its presentation in due time before the award of the mixed commission of 1890, they pretend that the commission, in virtue of those reasons, should invalidate the award of the preceding commission of the 7th of July, 1890, and again decide in favor of their claims.

In the law the invalidation of a sentence is admissible when founded on several causes, as: The omission of the summons for the reply of the defendant; the falsity of the document in virtue of which the sentence was rendered, and the retention in the possession of the adverse party of a *decisive* document in favor of the action or the exception of the claimant, or any act on the part of the adverse party preventing the presentation in due time of said *decisive* document.

To admit that this commission is called upon to decide the invalidation of the sentence rendered by the preceding commission it would first be necessary, as provided by the Venezuelan Civil Code of Procedure, which establishes that the suit for invalidation must be brought before the same tribunal that rendered the sentence, to declare that this commission is the same commission sitting in Caracas in 1888 in virtue of the Venezuelan-French convention of 1885.

This similitude or identity can not be deduced only from the international character of both commissions, but would require to be the result of an express convention of the two high contracting parties vesting this commission with the power of revising and finding the decisions of the preceding commission in the same way as the national law gives its ordinary tribunals the express power of invalidating their own sentences in such cases as the law determines.

No suit for invalidation has either been brought before this commission, in which the debate should be confined to examine the *decisive force* of the document presented in favor of the creditor, whether it was or not in the possession of the debtor when the sentence was rendered, or whether said debtor did or did not perform any acts that might prevent the presentation thereof. The commissioner for Venezuela does not consider that he must give an especial decision on these points which constitute a suit for the invalidation of a sentence previously rendered, because such has not been the subject of examination by this commission; but he is of opinion that the document presented is destitute of *decisive force* in favor of the creditor, for it is nothing but a certificate issued by the general auditor's office to the effect that according to the books of the custom-house at Carúpano it appeared that on the 23d of June, 1869, there was a balance in favor of Tomás Massiani, without determining in a decisive manner that he was creditor for that sum on the date of the certificate, the 12th of August, 1890, or twenty-two years thereafter. No data have been furnished with reference to the fluctuation of that account in the intervening twenty-two years, during which Mr. T. Massiani continued his importations through the custom-house at Carúpano, and transfers were made decreed by special laws for the conversion of the balances against the States into bonds of national debt.

The apparent abandonment in which, according to the pretention itself of Mr. Massiani, his credit was left during twenty-one years without any explanation; the lack of steps to obtain its payment or at least to procure proofs that might safeguard his rights, constitute so strong a presumption against the subsistence of that credit that it suffices to strengthen the opinion expressed that the certificate produced is an inefficient document and is destitute of the decisive force that the law and common sense require for the invalidation of a sentence that was rendered, because the claimant did not produce *a sufficient document in support of his claim.*

The decisions of tribunals of the nature of these commissions are conclusive and final, and such tribunals are constituted in order precisely that their decisions have that force with the purpose of putting an end to long-pending and vexing questions which generally disturb the progress of international relations.

When a court of arbitration rejects, for lack of proofs, a claim, or when it admits it in its entirety or in part, its decision is a law which binds the two contracting nations.

In the same case of the claim of Tomás Massiani, that of being admitted in part and in part rejected, were many others submitted to the examination of the commission of 1888 to 1890, and that commission was given the power of fixing or appreciating according only to the documents produced in each case, the just value of each reclamation.

In execution of that power it examined and decided more than one hundred and forty claims, rejecting many of them for lack of proofs, so that of the sum of 11,284,532.37 bolivars to which the claims having a determined value amounted the commission only admitted as lawful and proved the sum of 1,109,615.50 bolivars.

For the reasons stated I am of opinion that this commission must declare itself incompetent to take cognizance of the claim entered, because the claim-

ants are Venezuelans, and, besides, that it must declare said claim to be inadmissible, as far as the sum of 301,784.76 bolivars and the interest thereon are concerned, because respecting that part of the claim there is a sentence passed and affirmed.

As to the new promissory notes presented as a complement of the said claim, they are not covered by this opinion, because as they are not authenticated they do not meet the requisite indispensable for their being taken into consideration according to the rules of procedure established by this commission.

The French arbitrator was of opinion that the claim was to be admitted for the sum of 270,813.56 bolivars without interest, and an agreement not having been arrived at, the claim was referred to the umpire.

CARACAS, *August 28, 1903.*

OPINION OF THE FRENCH COMMISSIONER

According to the exposition made in his letters of April 6 and May 13, 1903, by M. Philippe Massiani, son of M. Thomas Massiani, French citizen, who lived in Carúpano and died there October 9, 1901, the Venezuelan Government would have been answerable to the latter for a sum of 728,476.48 bolivars. This amount is made up as follows:

First, 341,737.36 bolivars loaned from 1863 to 1869 to the administration of the custom-house of Carúpano and to General Acosta, chief of the Constitutional army of the east, this administrator and this general being duly authorized by the national Government to contract loans in its name.

Second, 351,003.12 bolivars representing the interest on the sum loaned from the date of the obligation to June 30, 1903.

Third, 3,200 bolivars handed over in 1885 upon the requisition of Generals Urdaneta, Pietri, and Rojas.

Fourth, 14,136 bolivars loaned to the Legalista revolution of 1892.

Fifth, 18,400 bolivars furnished the Restaurador revolution in 1899. The amount, which appears under No. 5, formed the object of the demand for indemnity presented to the mixed commission established by the protocol signed at Washington February 27, 1903. This commission allowed to the Massiani heirs, taking account of interest, an indemnity of 19,900 bolivars, as results from the extract below from the minutes of the sitting of September 10, 1903:

Doctor Paúl declares that M. Massiani (Thomas) being to-day deceased and having left as heirs his wife born in Venezuela, of Venezuelan parents and four children born in Venezuela, he sees himself obliged to refuse consideration of the claim presented by this Frenchman because his heirs are all Venezuelans according to Venezuelan law, and the advantage of the arbitral tribunal is reserved by the protocol for Frenchmen.

M. de Peretti replies that M. Massiani (Thomas) who has himself addressed before his death his letter of claim to the legation of France enjoyed exclusively French nationality, and that consequently the commission is competent to examine this claim without its being necessary to look into the question of knowing if the heirs who are all considered as Frenchmen by the French law and enjoy in reality two nationalities, have manifested in the course of their life the intention of remaining French.

The commissioners not being of accord remit the dossier to the umpire and ask him to decide if the claim in question, and of which they do not discuss the amount, enters into the category of those which are included by the terms of the protocol.

Mr. Filtz pronounced the following sentence:

The umpire, the commissioners being heard and after the examination of the dossier of the claim of Massiani (Thomas) and son, considering that the character of Frenchman is not denied to Massiani senior, that the claim was presented by

him and not by his heirs and that there was no occasion to examine, consequently if the said heirs who enjoy in fact two nationalities have evidenced in the course of their life their preference for one of the two, decides that the claim in question certainly enters into the category of those which are provided for by the protocol and consequently accords to Massiani (Thomas) and son the indemnity of 19,900 bolivars.

The credit which is set forth in number four enters into the category of claims provided for by article 1 of the protocol of February 19, 1902, in that the Venezuelan Government has accorded a round sum of 1,000,000 bolivars. The commission which met at Paris to make a division of this sum, considering that the claim had been formulated by M. Thomas Massiani, who enjoyed incontestably French nationality, accorded to his heirs the indemnity demanded. The credit which appears in No. 3 is established by a " vale " dated June 28, 1885, and signed by the three generals who made the requisition. My colleague concludes to reject this demand, because aside from the reasons which caused him to refuse all the claims presented in the name of Massiani thought the latter ought to have been presented to the mixed commission which sat from 1888 to 1890 and was competent to examine the claims arising between 1869 to 1886, and again that the " vale " presented no authentic character, the signatures not being legalized.

I partook in these latter points of the opinion of Doctor Paúl and we rejected this demand. The credits which appear under Nos. 3, 4, and 5 are then out of the cause.

There remains the credit which appears under Nos. 1 and 2 and which amounts to 692,740.48 bolivars. When this claim was presented to the mixed commission in the course of the sitting of May 14, 1903, M. Massiani (Philippe) had not yet obtained from the Venezuelan Government the documents which seemed to establish in an incontestable manner the credit of his father. The dossier did not then establish the credit until after the taking up of the accounts of the Massiani house. Doctor Paúl asked Philippe Massiani, who was heard by the commission at its meeting of May 23, 1903, to show that after the decease of his father he had acquired all the rights of the firm Massiani & Co., and that his mother, his brothers, and his sisters had executed regular warrants of attorney. M. Philippe later remitted a dossier which satisfied this request.

Of a common accord my colleague and myself postponed the examination of this affair to a later date, M. Massiani having informed us that he was soliciting from the Venezuelan administration a recognition of the debt. He obtained, in fact, this instrument May 27, 1903, but the amount of the debt recognized was only 270,813.56 bolivars. This figure did not agree with that of the claim. The interested party declared that he would solicit a rectification. He did not remit until August 4, 1903, the document which, according to him, justifies his claim in its integral amount.

The affair entered into discussion at the sitting of August 6, 1903, as the register of the proceedings of the commission bears witness:

> The arbitrators then took up the study of the Massiani claim, which in the course of the sitting of May 23 had been postponed to a later examination.
>
> After having passed over in review the complementary pieces addressed by the interested parties, and having exchanged views with his colleague, Doctor Paúl expressed the desire to study the dossier anew, and it was agreed that the arbitrators would render their decision on this claim at the next meeting.

At the meeting of August 24, 1903, " after a new exchange of views and a long discussion," as the minutes say, the affair was again reserved. Finally at the sitting of August 28, 1903, Doctor Paúl having concluded to reject the demand, I appealed to the umpire.

I have accorded to the Massiani heirs an indemnity of 270,813.56 bolivars, because after having read the documents sent May 27, 1903, to M. Philippe Massiani by the minister of foreign relations it seems impossible to me that the credit should be contested. This document is an authentic copy delivered to M. Philippe Massiani upon his request by the director of public law to the minister of foreign relations with the authority of the minister of the liquidation of the credit of Massiani effected August 12, 1890. This liquidation concerns a table of loans, with their dates and their amounts, extracted from the books of public accounts and closed with the following declaration of Gen. T. B. Arismendi, contador general de la sala de centralización:

Consequently and as results from the former administration, it appears that M. Thomas Massiani is the creditor of the Government for the sum of 67,703.39 pesos, or 270,813.56 bolivars.

It is undeniable that on the date August 12, 1890, the Venezuelan Government owed this sum to M. Thomas Massiani. If the payment had been made since to the interested parties it would have been very easy for the Venezuelan administrator to prove it by producing the receipt. It is then beyond doubt that the debtor is still at the present hour responsible for this sum to the personal representatives of M. Massiani.

The rights of succession have only seemed to me completely established for this sum. M. Philippe Massiani argues that the said liquidation does not include a sum of 30,971.40 bolivars, which caused the credit of 270,813.65 bolivars to amount to 301,784.96 bolivars, a sum already claimed in vain from a preceding mixed commission by M. Thomas Massiani. He has demanded of the minister of finances an official rectification and he flatters himself of having obtained it. Not sharing his opinion on this point, I have not been able, while recognizing for the interested parties only the right rigorously established, to accord this supplementary indemnity.

I ought to note here, for the information of the umpire, the notable contradiction which exists between the liquidation of August 12, 1890, and the official report, of which a copy certified by the director of the budget was sent to the minister of finances June 27, 1903, as a result of the demand for rectification of M. Philippe Massiani. Not only are the amounts produced by the latter document not in accord either with those of the demands nor with those of the liquidation of August 12, 1890, but the uncontested and uncontestable existence of this latter liquidation suffices to prove the inexactness of the conclusion of this official report. It concludes, in fact, that in the books of account one can follow the trace of the credit only as far as April, 1870, and that the liquidation remitted by the minister of foreign relations in a certified copy is dated August 12, 1890. Is this only an error? Does not this inexact report betray the predetermination of the minister of foreign affairs to efface the impression which ought to be produced on the arbitrators by the reading of the liquidation of 1890, the copy of which, vainly sought for during long years, seems to have been obtained only by a surprise, thanks to the friendly relation between the interested parties and certain officials of the ministry of foreign relations.

M. Philippe Massiani claimed, moreover, a sum of 39,952.40 bolivars, represented by receipts analogous to those which, remitted to the Venezuelan administration, had permitted him to establish notably the liquidation of 1890. Why have these receipts, which besides do not present sufficient authentic character, been thus preserved? Why did not M. Thomas Massiani present them to the mixed commission of 1888? Have they not already been settled? All these questions not having received satisfactory answers, I have not been able to admit this part of the claim.

Finally M. Philippe Massiani claimed 351,003.12 bolivars of interest reckoned at 3 per cent from the date of the obligation to June 30, 1903. I have not believed I ought to receive this demand even for the 270,813.56 bolivars, which I consider indisputably due by the Venezuelan Government. Messrs. Massiani, father and son, appear in effect to have taken no steps before the Venezuelan administration to obtain from it the reimbursement of their credit. They have both waited before filing their claim for the meeting of the mixed commissions. They have then waited of their own free will and have thus lost the chance to see themselves rewarded by a judge basing himself upon equity alone for the interest which in right they ought not to have counted upon.

I have already explained why I could not share the opinion of my honorable colleague upon the value of the document remitted to M. Philippe Massiani May 27, 1903, a document which, in my opinion, proves superabundantly the credit of the Massianis. Besides the fact the document does not seem to him "sufficient to prove the existence of the debt in a decisive manner," Doctor Paúl justifies the rejection of this claim by considerations drawn from the nationality of the Massiani heirs and by the fact that the mixed commission of 1888-1890 has already rejected the demand in question. M. Thomas Massiani, born in France of French parents, enjoyed incontestably and exclusively French nationality. His title of French citizen has been certified by the legation of France at Caracas and recognized by the Venezuelan commissioner at the mixed commission of 1888-1890. The claim was born during the life of Thomas Massiani. It is the right of a French citizen who has been injured, and consequently the mixed commission appointed by the protocol of Paris, which includes "the demands for indemnities presented by Frenchmen," is indeed competent to consider this claim.

One might insist upon that, as the mixed commission appointed by the protocol of Washington has done successively for the same interested party for part No. 5 of their claim and the commission of repartition appointed by the French Government for No. 4.

One would place, then, out of the case as the umpire, Mr. Filtz, has done in his award, the nationality of the heirs. But I consider that even if one takes this latter into consideration the arbitral commission created by the protocol of Paris has jurisdiction. The widow of Thomas Massiani, born in Venezuela, of Venezuela parents, but married to a Frenchman, and her children, born in Venezuela of French parents, all enjoy incontestably two nationalities. They are French according to French law and Venezuelans according to Venezuelan law. It results that when the protocol speaks of "demands for indemnities presented by Frenchmen" it has in mind claims presented by individuals to which the French Government assures its protection because the French law recognizes them as Frenchmen. It is in no way specified in the protocol that the Venezuelan law will be obliged also to recognize these individuals as Frenchmen. On the contrary, all the protocols signed last year at Washington between Venezuelan and foreign powers to regulate analogous difficulties have declared expressly that local legislation ought not to be taken into account. Then, even if the heirs of Mr. Thomas Massiani had presented a claim in their personal name, the arbitral commission would have been qualified to examine it. It is so with much greater reason, since this claim concerns a credit of Mr. Thomas Massiani himself.

On the other hand, it is true that the mixed commission of 1888-1890 rendered, at its sitting of July 7, 1890, the following award:

> The second part of the same claim (claim Thomas Massiani), amounting to 301,784.96 bolivars, is definitely rejected, the interested party not supporting his demand by a sufficient document.

But it is necessary to know that this " sufficient document " was in the hands of the Venezuelan Government, which, being requested by the interested party, did not make it out until the 12th of August, 1890, after the close of the labors of the commission, and did not deliver a copy to Mr. Philippe Massiani until May 27, 1903. One can then discuss in what case and by what tribunal may an award rendered by the mixed commission of 1888-1890 be revised.

One could, however, remark that, this commission having rendered irrevocable decisions, these decisions could not be submitted to a revision unless a new fact unknown to the arbitrators has appeared to modify the appearance of the affair in such a manner that the decision may have been entirely different if the arbitrators had knowledge of it. One might establish then that this is precisely the case of the Massiani claim. Finally, one might maintain, with reason, that no tribunal would be better qualified than the present arbitral commission to examine anew an affair already submitted to the mixed commission of 1888-1890, and that even the protocol giving it competency to regulate all the claims of Frenchmen, whether they were directed against a former award or caused by an entirely different motive, this arbitral commission is alone in position to decide if there is room to revise such or such decision of the preceding commission.

In equity, the document sent May 27, 1903, to M. Philippe Massiani establishing incontestably the existence of his credit, and the arbitrators of 1890 having only rejected the Massiani claim for lack of *probative document* retained by the Venezuelan administration, an arbitrator can but condemn the Venezuelan Government to reimburse the Massiani heirs for the sum which it has recognized itself as due him.

In the course of our discussions relative to this claim Doctor Paúl declared to me that he would have been disposed to accord an indemnity equal to the sum included in the liquidation of 1890 if the interested party had filed a new claim bearing upon the refusal of the Government to deliver the document which was demanded of it.

I replied that this was a simple question of form, that the exposé made in the letters of M. Massiani of his numerous proceedings take the place of the formal claim, and that one could not, in order to reject his proven claim, base his action upon the moderation the claimant had displayed in not asking, besides the sum due, a special indemnity for the veritable denial of justice which this refusal in question constituted. In according to the heirs of Massiani only 270,813.56 bolivars of the 692,740.48 bolivars demanded, I have sought to restore them possession of that which is incontestably due them. I have laid aside all the demands which, not being, perhaps, without some foundation, are, however, not established by sufficient proofs.

We ought to consider that, according to the terms of the protocol, this indemnity must be paid in bonds of diplomatic debt and not in gold. From the fact of this concession, graciously granted to the Venezuelan Government by the French Government, to allow it to settle its debts with more facility the amount of the indemnity finds itself in reality reduced.

At this time the true value of these bonds is half their nominal value.

The payment of the Massiani heirs of the indemnity of 270,813.56 bolivars would then permit the Venezuelan Government to free itself by 125,000 bolivars of a debt amounting in reality to 270,813.56 bolivars.

MARCH 12, 1904.

ADDITIONAL OPINION OF THE VENEZUELAN COMMISSIONER

From the extract of the oral proceedings at the sitting held in Caracas on

August 28, 1903, when the commissioners for France and Venezuela heard the claim entered by Felipe A. Massiani for the sum of 692,740.80 bolivars. it appears that the French commissioner held that the sum of 270,813.56 bolivars, representing the principal, should be awarded without interest, because of the negligence for many years shown by the claimants in defense of their rights. The same commissioner also rejected other specifications contained in the claim, as he did not consider them sufficiently established. The undersigned, as the commissioner for Venezuela, then and there rejected the claim in its entirety, basing my contention as shown in the opinion which, translated into English, I submit herewith, in these three main points, to wit:

First. Incapacity for want of proper jurisdiction of this arbitration commission to hear the claim in question, because Felipe A. Massiani and the rest of the claimants represented by him are Venezuelans, having been born within Venezuelan territory.

Second. Because there exists a condition of *res judicata* as regards the object of the claim in that portion dealing with the capital of 270,813.56 bolivars as submitted by the French commissioner; and

Third. Because the document produced by Felipe A. Massiani to prove the existence of the debt lacks sufficient force to establish beyond dispute the validity of the claim, such document being insufficient to overrule the award of the French-Venezuelan mixed commission of 1888-1890, decreed in the matter of the claim entered before said commission by the father of Felipe A. Massiani, demanding the same amount.

The Venezuelan citizenship by birth of the claimants, Carmen Silva de Massiani, the widow of Tomás Massiani; Felipe A. Massiani, Ascención Massiani de Phelan, Nuncia Massiani de Orsini, and Luis A. Massiani, children of Tomás Massiani; and the minor children of Isabel Paran de Massiani, Antonio José, Tomás María, Mercedes, Luis Enrique, Carmen de Lourdes, and Gloria, born during her marriage to Antonio Massiani, deceased, the son of Tomás Massiani, such minors being the grandsons of the latter, is fully established in this case and is not a point open to discussion. All of them, during a succession of years embracing three generations, have not only had one common native land, but one common city of birth, Carúpano, formerly a fishermen's town, where Tomás Massiani met and married, in 1858, Carmen Silva. The domicile of the widow has always continued to be the same as that of her forefathers and that of all her children and grandchildren. From the moment of her widowhood she recovered her Venezuelan nationality, according to the provisions of article 19, section 2, Title I, Book I of the civil code of Venezuela,[1] in force at the time of the death of Tomás Massiani, which took place in Carúpano on October 9, 1901. Her daughters, Ascención Massiani de Phelan and Nuncia Massiani de Orsini, do not appear to have lost their original nationality, as the foreign nationality of their respective husbands has not been established.

It is a generally-established principle that the individual status is governed by the laws of the country of which a man or woman is a citizen or subject, and the nationality in the case of the widow and children of Tomás Massiani as regards Venezuela is fixed by birth or *lex loci*. The conflict between French legislation which maintains the principle of descent, or *lex sanguinis*, and the Venezuelan laws, which support the principle of the birthplace, has already been the subject of learned discussions by mixed tribunals, when it has been

[1] Art. 19. La venezolana que se casare con un extranjero se reputará como extranjera respecto de los derechos propios de los venezolanos, siempre que por el hecho del matrimonio adquiera la nacionalidad del marido y mientras permanezca casada.

invariably decided that the conflict is controlled by the law of domicile, and in conjunction with this ruling the no less weighty doctrine that in such controversies the principle that in the event of double citizenship, no country can claim for a person having the nationality of the respondent country, but it may claim against all other countries.

Bluntschli (International Law, section 374) states the following:

> Certain persons or families may in rare instances be under the jurisdiction of two or even a larger number of different states. In case of conflict the preference will be given to the state in which the individual or family in question have their domicile; their rights in the state where they had no residence will be considered suspended.[1]

The same opinion is held by Twiss, " Law of Nations," pages 231-232.

Moore, Int. Arbit., vol. 3, page 2454, in the cases of Lucien Lavigne, No. 11, and Felix Bister, No. 20; decision of Arbitrators, Spanish Commission (1871), April 27, 1878, says:

> The act of Congress of February 10, 1855 (10 U. S. Stat. L., 604), which provides that persons heretofore born, or hereafter to be born, out of the limits and jurisdiction of the United States, whose fathers were or shall be at the time of their birth citizens of the United States, shall be deemed and considered and are hereby declared to be citizens of the United States, can not operate so as to interfere with the allegiance which such children may owe to the country of their birth while they continue within its territory.
>
> Supposing, finally, that one individual united in his person several nationalities, it would be necessary to apply the law *best agreeing with his actual position*, otherwise the question would be insoluble. (Heffter, Paris, 1866, p. 74.)[2]

It was under circumstances similar to those of the present claimants that the mixed American and Venezuelan commission, acting under the protocol of December 5, 1885, settled the question of double nationality in the case of Narcissa de Hammer and Amelia de Brissot, both born in Venezuela, both widows of United States citizens, and both having resided in Venezuela during their married lives, both having had children born in the same country, both claiming in behalf of their respective children, and both having continued to reside in Venezuela after the death of their respective husbands. The unanimous decision of the commission was that they had no jurisdiction to hear and decide the claim. (See Moore, Int. Arbit., vol. 3, pp. 2456-2461.)

Many other analogous cases could be cited to corroborate the principle involved in this question of jurisdiction, but they are well known to the honorable umpire, who has quoted them in enlightened awards that in his capacity of umpire he had occasion to render in the claims of Mathison against the Venezuelan Government before the British-Venezuelan commission, created by the protocol of Washington on February 13, 1903, and in his award in the case of Stevenson against that Government before the same commission. (Venezuelan Arbitrations of 1903, Ralston's Report, pp. 433-438 and 442-455.) The Hon. Jackson H. Ralston, umpire in the Italian-Venezuelan Commission

---

[1] Certaines personnes ou familles peuvent exceptionnellement être ressortissants de deux états différents ou même d'un plus grand nombre d'états.

En cas de conflit, la préférence sera accordée à l'état dans lequel la personne ou la famille en question ont leur domicile; leurs droits dans les états où elles ne résident pas seront considérés comme suspendus.

[2] Supposé enfin qu'un individu réunît en sa personne plusieurs nationalités distinctes, il faudrait appliquer les lois qui s'accorderaient le mieux avec sa position actuelle; autrement la question serait insoluble.

under the Washington protocol of February 13, 1903, rendered similar decisions in the claims of Miliani, Brignone, and Poggioli. (Ralston's Report, pp. 715-720, 759-762, 866.)

The learned commissioner for France makes an issue of the French nationality of Tomás Massiani, who was the husband of Carmen Silva de Massiani and the father of Felipe A. Massiani and his brothers and sisters, to maintain that the claim entered by the latter before this commission originated during the life of their father; that the injured rights are those of a French citizen, and the mixed commission created by the Paris protocol dealing with the claims for indemnification entered by French citizens "is qualified to hear the present claim without *taking into consideration the citizenship of the heirs of Tomás Massiani.*" Such opinion can not be maintained in the presence of the strict terms of the Paris protocol, which vest this commission with but limited authority to investigate and decide the indemnification claims *entered by Frenchmen.* When the terms of a convention have been clearly and precisely stated, there is no room for interpretation, but they must be applied with strict adherence to the meaning of the words. The respective article of the protocol states "claims for indemnification entered by Frenchmen." Entered before whom? Before the commission. Entered by whom? By Frenchmen, and under no condition by the heirs of French citizens, no matter what the nationality of such heirs may be. Nor, how could it be possible that because there exists a right which has passed to a Venezuelan citizen or an English or Chinese subject by descent from a French citizen, the country of which the deceased was a citizen, should arrogate to itself the authority to enter an action as a claimant against Venezuela, if the claimant is a Venezuelan, or to invoke the protecting action of England or China in case the owners of the credit or of the injured right be an English or Chinese subject? Such anomalies can not exist within the precedents and principles of international law. It is indispensable that the claim in its origin should have belonged to a French citizen; and, furthermore, that it has continued to be the property of a French citizen until the very moment in which by virtue of a convention entered into by the two countries such *claim is entered before the proper commission* to be investigated and decided upon. Countless decisions of international commissions confirm this as the only possible rule to maintain the jurisdiction of such courts within the limits which their own nature and the ends to be served by them mark as indispensable for the performance of their legal functions.

The right of France to intervene on behalf of a French citizen, in case Tomás Massiani should have entered before his death a claim against the Venezuelan Government, would have ceased to exist on the day the claimant died, if he had not left either ascendants, descendants, or collateral heirs, or if he had not been married. It would also have ceased, if his widow or the ascendant or descendant heirs should have deprived the country of the husband or father of the right to intervene by acts of their own volition or because they lack the personal status indispensable to appear before this commission and be awarded indemnities which the commission can not grant to other than such persons as enjoy solely French nationality established beyond dispute.

The commissioner for Venezuela, in support of this right application of Article I of the Paris protocol, adduces the following authorities:

Sir Edward Thornton, umpire in the case of M. J. de Lizardi against Mexico, entered by his niece María de Lizardi del Valle, wife of Pedro del Valle, makes the following statement:

> As, therefore, Mr. Lizardi's niece is not a citizen of the United States, and as she would be the beneficiary of whatever award the commission might make, the umpire is decidedly of opinion that the case is not within the jurisdiction of the

commission. Even if the uncle of Mr. Lizardi had been a citizen of the United States, which the umpire does not admit, whatever may have been the merits of the case, jurisdiction of the commission would have ceased on the death of Mr. Lizardi. (Moore's Int. Arbit. vol. 3, p. 2483.)

In the claim of Oscar Chopin against the United States,[1] under the convention of January 5, 1870, entered in his own behalf and the name of three heirs to Jean Baptiste Chopin, a French citizen, resident of Louisiana, who died in 1870, leaving three other heirs, all born in the United States, as a portion of his estate, the claim in question, the counsel for France withdrew that portion of the claim representing the share of one of the four heirs of Jean Baptiste Chopin on the grounds that such heir had married a citizen of the United States, thus clearly recognizing the principle that the right to an indemnification is governed by the legal and individual interest of the beneficiary and not by the original wrong or the damages sustained by the French nationality.

In the case of José María Jarrero under the resolution of Congress March 3, 1849, for the settlement of the claims of the United States against Mexico, the original claim was in favor of a citizen of the United States, but before the conclusion with Mexico of the treaty which created the commission such claim passed to a Mexican citizen. The commission disallowed the claim and made the following statement:

It matters not that the claim was American in its origin. It had ceased to be American at the date of the treaty, and the holder of it could not invoke the interposition of our Government for his protection. (Moore, Int. Arbit. vol. 3, p. 2325.)

Particular mention should be made of the excerpts found in Moore's International Arbitration, vol. 3, page 2388 of the " notes " published by one of the members of the commission created by the convention between the United States and France July 4, 1831, showing that this matter was considered by said commission.

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

Again —

It was necessary for the claimant to show not only that his property was American when the claim originated, but that the *ownership* of the claim was still American when the convention *went into effect.* * * * Nor could a claim that had lost its American character ever resume it if it had heretofore *passed into the possession* of a foreigner *or of one otherwise incapacitated* to claim before this commission.

The umpire above mentioned, Sir Edward Thornton, in the case of Herman F. Wulff against Mexico (Moore, pp. 1353-1354, note), decided:

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

---

[1] Moore, Int. Arb., p. 2506; page 83, Boutwell's report, House Ex. Doc. No. 235, Forty-eighth Congress, second session.

In the case of Silvio and Americo Poggioli, a native of Italy and an Italian subject, before the Italian-Venezuelan commission under the protocol of February 13, 1903, the umpire, the Hon. Jackson H. Ralston, decided in the matter of the claim of Americo Poggioli, who died before the convention took place, as follows:

> However this may be, the claim of Americo Poggioli died with him, so far as this commission is concerned, as his only heirs consist of his widow and children, and all of whom are Venezuelans by birth. The claim of his heirs is therefore Venezuelan, under the rules heretofore adopted by the umpire, particularly in the Brignone and Miliani cases. (Venezuelan Arbitrations of 1903, Ralston's Report, p. 866.)

The decision quoted by my learned colleague in his brief, rendered by Mr. Filtz, umpire in the French-Venezuelan mixed commission, which met in Caracas under the Washington protocol of February, 1903, establishing that —

> the condition of French citizenship of Tomás Massiani had not been disputed; that the claim in reference had been entered by him and not by his heirs, and that there was no need to examine whether said heirs, who, in effect, have a double citizenship, have shown or not during their life their preference for one or the other, and that therefore he adjudged the claim to belong to the class under the Washington protocol and accordingly awarded Tomás Massiani and sons an indemnification of 19,900 bolivars —

is not a precedent to be invoked. Such a decision is exclusively based upon the fact that the claim was presented to the minister of France in Caracas by Tomás Massiani, father himself, and such is not the case with the present claim entered before this commission by the widow and children of Tomás Massiani. On the other hand, the awards of Mr. Filtz, as umpire in the French-Venezuelan Commission, be it said without the desire to cast the slightest reflection upon his integrity, are noticeable because they are based solely on his own appreciation of the facts, without expounding any doctrine whatever, without reasoning the conclusions, which in the majority of cases are contrary to the rules and precedents established as fundamental principles of international law by the most eminent authors, expounders, and authorities on the subject having a universal reputation. Such decisions lack force as compared with the opinions quoted from among many others no less weighty that could be cited.

Tomás Massiani died in the city of Carúpano during the month of October, 1901, as shown by the death certificate in this case, before the conclusion of the Paris protocol of February 19, 1902, creating this commission, and without having entered before any representative of France, nor later before the mixed commission of 1888-1890, any claim whatever that may be construed to be the same entered before this commission by his widow and children in their capacity of heirs.

The present claim, as regards that portion of the same for 270,813.56 bolivars, which has been admitted by the French commissioner, originated, and, it may be said, was born in Felipe A. Massiani, in his own behalf, and in behalf of his mother, Carmen Silva de Massiani, and his brothers and sisters, on May 27, 1903, date of the document or certification issued by Mr. Manual Fombona Palacio, chief of the bureau of foreign public law (*director de derecho público exterior*) in the ministry of foreign relations of Venezuela. The claimants base their pretentions in such documents, and as Felipe Massiani states in the communication to the French minister in Caracas, dated on August 4, 1903, that the mixed commission of 1888-1890 not having passed judgment upon his father's claim, because of the facts and causes stated, it becomes necessary to conclude that those same facts are at present the object of a new claim, and ends by

asking the French minister to transmit to the commissioners the subjoined document, which is sufficient to establish the proof of the grounds for *the claim he had entered before the commission in behalf of his mother, his brothers and sisters, and in his own behalf.*

The foregoing shows that neither as heirs of Tomás Massiani, because he was a French citizen, his widow and children being of Venezuelan nationality, in the case, which has never nor could ever have existed, of Tomás Massiani having presented such claim, because he died before the date of the Paris protocol, nor entering the claim on their own behalf, as the case is, the widow and children of Tomás Massiani are not qualified to appear before this commission as claimants against the Venezuelan Government, which is that of their own nation and to which they owe allegiance in conformity with the law. The commission therefore has no jurisdiction to hear the claim for indemnification that such Venezuelan citizens have entered before the commission in their own name and in behalf of the estate, based upon certain vested rights originating in the deceased.

Now the commissioner for Venezuela will discuss the second point upon which he has based his opinion, i.e., that because there exists a condition of *res judicata* as regards the object of the claim in that portion dealing with the capital of 270,813.56 bolivars, as admitted by the French commissioner, such portion of the claim must also be rejected. As it has been shown by the opinion rendered at the session of August 28, 1903, Felipe A. Massiani, in his own behalf and as the representative of his mother and children, pretends that this commission should examine some new documentary evidence he has obtained after his father's death to the end of establishing that the Government of Venezuela owed his predecessor in interest a certain sum, object of the claim entered before the French-Venezuelan Commission which met in Caracas in 1888-1890 in compliance with the convention entered into between Venezuela and France in November, 1885, said commission having disallowed the claim because —

> the said claim, amounting to 301,784.96 bolivars, was disallowed because the interested party did not produce a sufficient document on which to base his pretention.

I submit herewith copy, both in Spanish and in English, of the minutes of the oral proceedings of said mixed commission, had on July 7, 1890, when all the claims of Mr. Tomás Massiani were examined, the commissioners dismissing one for 301,784.96 bolivars for the reasons before stated. The disallowance, as shown by the arguments in support of such ruling, was not based upon want of jurisdiction, nor on any other grounds which may give rise to the contention that the claim had not been examined on its merits. It was based upon no other grounds than the failure of the claimant to establish the pretended right or indebtedness, as the document submitted did not have sufficient weight to operate against the respondent party. Such decision constitutes the *res judicata*, which all the positive as well as the common law of nations hold to have an irresistible force, as shown by the principle *res judicata pro veritate habetur.*

The internal legislation of Venezuela affords a remedy against any judgment passed by the courts of the country to obtain in specified cases the reversal of such judgment, provided the remedial action is entered within three months after notice has been had of the sentence making the award, when the grounds for reversal are based upon the fact that the other party withholds or retains in his possession a *decisive document* favorable to the action or exception taken by the plaintiff or based upon an act of the opposing party which prevented that such *decisive document* was produced in due and proper time. In such cases, upon introducing the allegation of the retention or act on the part of the other

party preventing the production of the document, if such decisive document is not produced, a statement must be made of its contents and of the name of the person who should deliver up the same. (All codes of civil procedure of Venezuela have uniformly had the same provisions.)

The remedy against the judgment of a court having local jurisdiction only can not find application when dealing with an award made by an international court specially constituted by the agreement of the high contracting parties to settle in a definite manner the claims of the subjects of one country against another, claims that have already been prepared, with the proper documents, by the interested parties, and which, upon being filed before the arbitration commission, must be submitted with all the necessary evidence, or produce such evidence during the proceedings or hearings of the claim, and to this end such courts appoint certain fixed dates within which such testimony or evidence must be duly submitted.

Article 3 of the convention between France and Venezuela of November 26, 1885, under whose provisions the mixed commission of 1888-1890, which met in Caracas, disallowed the claim of Tomás Massiani, reads as follows:

> Claims subsequent to 1867-68 will be definitely settled by a mixed commission consisting of one member for each part.
>
> As soon as the work of the commission ends, and within three months following its adjournment, the Government of Venezuela shall issue a sufficient number of new bonds to equal the amount of the indemnities awarded, drawing the same amount of interest (3 per cent) from date of issue. Said bonds shall be redeemed, when the holders desire it, at the same time as the original bonds, and in all cases in accordance with the prescriptions of Article II of this convention.

It appears from even a cursory glance at the foregoing article that the intention of the high contracting parties was that the claims subsequent to 1867-68 *should be definitely settled* by a mixed commission, and the bond issue to be made by the Government of Venezuela to meet such obligation was limited to the amount that said commission should award the claimants.

It is a well-established principle, admitted in all legislation, and peculiarly and more forcibly applicable to the awards of arbitration courts created solely for the purpose of deciding *definitely* the settlement of pending questions or claims, that the authority of the *res judicata* applies in the first instance *to that which is the object of the claim*, when a judgment has been passed upon the essential points of such claim.

It is therefore evident that this commission can not assume authority to review the award or sentence passed by the mixed commission of 1888-1890 upon the claims of Tomás Massiani, wherein the claim against the Venezuelan Government for 301,784.96 bolivars was rejected because the liability had not been sufficiently established, and that same claim is the object of the present action of the heirs of Tomás Massiani. Under such circumstances the claim must be entirely disallowed.

In regard to the third point in my opinion, that the document produced by Felipe A. Massiani is not a *decisive document* to establish the existence of the debt or liability in question, it suffices to compare the two balance sheets produced, the one essentially different from the other, and to take into consideration that the certificate of the auditor of the central bureau of accounts (*Contador de la Sala de Centralización de Cuentas*) at the bottom of the balance from the books in his archives can only be construed as an evidence that said books showed that on the 23d of June, 1869, the date of the last entry in the account current, there was a credit in favor of Tomás Massiani and against the Venezuelan Government for the sum of 270,813.56 bolivars. The certificate in question does not throw any light on further transactions on the same account current from

June 23, 1869, until August 12, 1890, date of the certificate, or a lapse of time covering a period of over twenty-one years. It is not possible to admit that during that period the account was inactive, or that Tomás Massiani did not take any steps to collect the balance due him, or that he did not get any voucher to safeguard his rights. Notice should be taken of the fact that such period of twenty-one years — which in all legislations is sufficient to make null by prescription any personal liability or debt, and which is more than sufficient to prescribe a debt growing out of a balance in a current account — lapsed before the meeting at Caracas of the mixed commission of 1888-1890, and that Felipe Massiani was unable to produce before the commission sufficient proof to establish his credit, which should have appeared from his own books and papers. If such omissions are to be ascribed to negligence, as stated by the French commissioner, it is *culpable negligence* in the case of such an important amount, subject, according to the codes of laws of all countries, to suffer the consequences of the abandonment of property or private rights, and such consequences are to be declared by the courts to have lapsed or to be nonexistent. Such was the case in the matter of the claim of Tomás Massiani before the mixed commission of 1888-1890, which released the Venezuelan Government from the payment of the amount claimed and definitely settled all further controversy in the matter.

Before coming to a close I wish to rectify the statement made by my learned colleague in his opinion, that during our discussion I had stated that I should have been disposed to grant an indemnification equal to the amount shown by the balance sheet of 1890, if the parties concerned had entered a new claim based on the refusal of the Government to deliver the document which had been asked for. There exists, no doubt, a misunderstanding of what I may have said to my learned colleague in reference to the faulty presentation of the claim, such as it had been made, as I must have limited myself to saying that a new claim based upon the fact of the refusal of the Venezuelan Government to deliver a *decisive document*, which, it could be established, was *deliberately withheld* from a creditor, might have been admissible on the part of the Massiani heirs, putting aside the question of nationality, and in that case such claim might have been for an indemnification for damages, as in such form it did not conflict with the validity of the sentence of the mixed commission of 1888-1890, which is beyond our commission. Between such a statement made during our discussion and to admit as established the allegations of the claimants and to be willing to allow an indemnity there is a remarkable difference.

I therefore maintain in all its points my opinion that this commission has no jurisdiction to hear the claim of Felipe A. Massiani entered in his own behalf and as the representative of his brothers and sisters, because they are all Venezuelan citizens, and, in the second place, because there is a condition of *res judicata* as regards the object of the claim in that portion admitted by the French commissioner, and that the document on which the claim is based lacks the necessary force to establish a *decisive* proof, and for this reason it must be rejected on its merits.

NORTHFIELD, VT., *February 9, 1905.*

ADDITIONAL OPINION OF THE FRENCH COMMISSIONER

After having read the additional memoir presented by my honorable colleague I can only maintain the conclusions of the prior memoir. To reply, it would be necessary for me to reproduce the explanation which I have already given superabundantly. I will confine myself, then, to a few observations.

This commission seems to me competent to pronounce upon the Massiani affair for the very reason of the French nationality of all the members of the

Massiani family. All the Massianis are incontestably French; it would be then contrary to the protocol of February 19, 1902, which speaks of all the claims presented by Frenchmen, to refuse them the benefit of this exceptional jurisdiction opened by the very protocol to all those who are French, without there being need of examining if they enjoyed concurrently another nationality.

My colleague tries to combat my opinion, based upon the strict text of the protocol by a great number of citations of authors and of precedents. I will content myself by remarking to the umpire that the precedents of international law have no value except in so far as has been demonstrated by a parallel exposé of the facts that the cases are identical. I have, then, judged it useless to refer to treatises of international law with a view of looking for precedents favorable to my argument, which I should have been able without doubt to find in as large numbers as has my colleague. I have considered it sufficient to produce one precedent, the value of which is singular and incomparable, since the persons considered are exactly the same, and I call the attention of the honorable Mr. Plumley to the grave inconveniences which would result from varying the jurisprudence in like conditions. There would be reason to deprive the arbitral decisions, which one might tax with a lack of seriousness and inconsistency, of all their authority. This precedent has consequently disturbed my honorable colleague, since he has thought he ought to declare, to lessen its value, that the awards rendered by Mr. Filtz had not the same value as the awards by the other arbitrators. I think I ought to protest against this allegation. Mr. Filtz, a magistrate who has grown gray in the service, has shown himself a perfect arbitrator, having, as he claims, for the only rules of conduct good sense, equity, and the protocol.

The awards rendered by him are unattackable and have the same authority as every other arbitral sentence; they have a greater authority, perhaps, here since they have been rendered in favor of the same persons with whom we are concerned. But since Doctor Paúl attaches a particular importance to precedents and thinks that one just cause does not defend itself sufficiently by its exposé alone, I present another, whose authority I think he will not contest, since it has been established by himself. In the course of the sitting of August 6, 1903, of the commission of which we both had the honor to join, and of which the present commission is but the natural conclusion, we rendered the following sentence:

> There is accorded Mr. Charles Daniel Piton, and to the Misses Emilie Alexandrine and Isabelle Eugénie Piton, the sum of 228,714.64 bolivars.

But I will remark to the umpire that Mr. and Mrs. Piton claimed this sum on the part of their maternal grandfather because of a contract of the date of July 28, 1856, and a ministerial decision of January 7, 1868. This grandfather, Mr. Lemoine, a Frenchman by birth, had been dead for many years when his grandchildren, in 1903, presented their claim as heirs, but these three grandchildren — all three born in Venezuela of a Venezuelan mother — like the Massiani heirs, were all three Venezuelans by the Venezuelan law. Why then refuse to the Massianis that which has been accorded to the Pitons?

The umpire will kindly note, also, that not only from the point of view of nationality, but also from the point of view of the date, the Piton claim is like the Massiani claim. So far as concerns the plea of *res judicata* raised by my honorable colleague, I am content to recall to the umpire that the arbitrators of 1890 were not able to take it into consideration, since the interested parties were unable to obtain until thirteen years afterward, by surprise, without doubt, the document which permitted them to make their claim of value. They had no appeal from the mixed commission of 1890 to the Venezuelan

tribunals, which would not have had jurisdiction, but to this commission, appointed to examine all the claims of Frenchmen, of whatever nature they might be. It is not possible to forget that the Venezuelan Government had been put upon notice by the interested parties to submit at the right time the said document and that it has not done so. Is not this point a denial of justice of the first class?

Finally, I consider that it is superfluous to discuss the value of the document which constitutes the acknowledgment of the debt. It is sufficient to read it to be convinced.

NORTHFIELD, *February 11, 1905.*

OPINION OF THE UMPIRE

Thomas Massiani and Benito Massiani, both Frenchmen, married, and residing in Carúpano, State of Sucre, in the United States of Venezuela, formed a copartnership in trade at said Carúpano under the name and style of Massiani Brothers, on the 14th day of June, 1864, which continued until its dissolution by mutual consent on the 17th of May, 1868, which dissolution of partnership was by lawful procedure. Thomas Massiani remained in charge of the business, assuming all partnership liabilities and enjoying all partnership assets, agreeing to pay to Benito Massiani for his share of the company assets 82,000 pesos, to be paid in the city of Paris within the term of five years in five annual equal parts, with interest annually at 5 per cent.

Prior to the year 1870 Benito Massiani died. His widow and children, resident in Paris, received of Thomas Massiani the sum of 230,000 francs, being the sum due for the remaining interest of the estate of the deceased Benito in the aforesaid assets. This payment is shown by a receipt signed by the widow, Mercedes Cova, at Paris, in France, on September 21, 1871; also signed by Emilio Massiani, son of Benito, who had attained his majority.

During the years 1863 to 1869, both inclusive, and as well in the years 1870, 1871, 1872, 1879, 1885, 1892, and 1899, the Government of Venezuela enjoyed loans and payments on requisition or otherwise from the said Massiani Brothers, the said Thomas Massiani, and the Thomas Massiani Company, which latter existed part of the period covered by the years aforesaid.

The principal sum in issue, and in fact the only sum, by the holding of the honorable commissioner for France, now in issue, accrued between the years 1863 and 1869, both inclusive, and amounted to the sum of 270,813.56 bolivars, this sum being for supplies and cash furnished to the maritime custom-house of Carúpano and to certain chiefs of the national forces, both having authority to pledge the credit of the Government.

Doctor Urbaneja, attorney for Thomas Massiani, in 1890, July 19, stated to the honorable mixed commission of France and Venezuela, then sitting in Caracas, that the sum due to Thomas Massiani at that time was 301,784.96 bolivars.

The sum presented, in fact, to the mixed commission of 1888-1890 was 351,449.80 bolivars, and on the 7th of July, 1890, the said commission awarded to Thomas Massiani 49,666.84 bolivars, and at the same sitting the said commission disallowed the claim for 301,784.96 bolivars for the reason that the claimant had not produced a sufficient document in support of his claim. The sum allowed by the commission was one recognized as existing by the Government of Venezuela, and there was then pending with the minister of hacienda that portion of the claim which was disallowed by that commission. The minister of hacienda was asked for the dossier containing the necessary proofs and for his authentication thereof, but on a too casual examination, he had

reported to that commission that there were no such papers in his office. It was on receiving this information that the commission dismissed the case. Doctor Urbaneja, attorney aforesaid, learning of this statement of the minister of hacienda and of the action of the commission on the claim, asked the commission to delay their final action on the case and repaired directly to the office of the hacienda and insisted upon further examination, which was had, and in the archives the accounts were found. Doctor Urbaneja further insisted that the minister of hacienda correct his erroneous statement to the commission and that he also send the accounts, duly liquidated, to the minister of foreign affairs as the competent medium for their transmission to the commission. Doctor Urbaneja notified the commission of these supplementary facts and requested it to ask the señor minister for foreign affairs to produce the papers then in his possession. He urged a reconsideration by the commission of the case and gave cogent reasons why it should thus act. This request to reopen the case and receive this new proof was made July 17, 1890.

The important papers, properly certified to, were sent by the minister of hacienda to the minister of foreign affairs, but did not leave the foreign office, were not presented or considered by the mixed commission, and there was no reconsideration of the case, and the commission dissolved without changing its first action. During all of the time of its sitting the accounts required were in the archives of the minister of hacienca and under the control of the ministry of Venezuela, and there was no reason why they were not produced, except that the examination made by the minister had been too casual to develop the accounts as being in the archives.

These papers were not, in fact, passed by the minister of hacienda to the foreign office until August 23, 1890.

In accordance with the arrangement with Massiani Brothers and Thomas Massiani, made by the maritime custom-house of Carúpano, these credits were to be reduced and canceled by an allowance on the import and export duties otherwise payable to the custom-house by Massiani Brothers and Thomas Massiani, and this plan of payment existed until October 22, 1872, when the minister of hacienda passed a resolution suspending the payment of all obligations based upon the custom-houses of the east, including the custom-house of Carúpano. Up to that date Massiani had been receiving pay in small amounts from time to time.

When the society of Massiani & Co. was organized at Carúpano the umpire has not learned, but on May 8, 1893, this company, composed of Thomas Massiani and his three sons, Luis Antonio, Antonio José, and Felipe Antonio, was dissolved by mutual consent under lawful proceedings had, and the business continued under the mercantile name of Thomas Massiani.

On October 9, 1901, the said Thomas Massiani deceased at Carúpano, leaving a widow, Carmen de Silva, the two sons, Felipe A. and Luis A., his two married daughters, Ascensión N. Phelan and Nuncia de Orsini, and the widow and children of Antonio José. Antonio José died March 12, 1900.

On the 30th day of May, 1903, Luis Antonio, in his own right, Augustine Orsini, in representation of his wife, Señora Nuncia Massiani, Isabel Paván de Massiani, widow of Antonio José, proceeding in representation of her minor children, Thomas, María, Mercedes, Antonio José, Gloria Margarita, Luis Enrique, and Carmen de Lourdes, acting with Señora Carmen de Silva Massiani, widow of the late Thomas Massiani, and Felipe Antonio Massiani, gave full power of attorney to Dr. Cárlos F. Grisanti against the respondent Government in the matter of the claim. The widow of Thomas, Carmen de Silva Massiani, at this time resided in Port of Spain, Trinidad.

The amount claimed of the respondent Government was 301,784.96 bolivars,

and to this it is claimed should be added 39,952.40 bolivars, also 35,786 bolivars, made up of 3,200 bolivars, for cash and supplies furnished in 1885 to the titular Government, 14,136 bolivars to the successful Legalista revolution of 1892, and 18,400 bolivars furnished in 1899 to the successful Restaurador revolution.

On May 27, 1903, the certified copy of liquidation prayed for by Thomas Massiani May 8, 1890, and passed into the hands of the minister of foreign affairs by the minister of hacienda on the 23d of August, 1890, was furnished to Felipe A. Massiani and by him was presented to the commission sitting in Caracas in 1903.

But there were certain errors in the dossier as then presented to Felipe, as he claimed, and he presented a corrected copy to the citizen minister of hacienda on the 30th day of May, 1903, calling attention to the errors which were marked in red ink on the copy accompanying his communication, and he prayed that a certified copy, corrected in accordance with his suggestions, be returned to him. This request was referred by the minister of hacienda to the office of foreign affairs for the rectification desired.

It is claimed by Felipe Massiani, and is not questioned, that Thomas Massiani and his wife were married without any special agreement having been made as to the management of their property, and that in consequence there existed between them a conjugal society which makes common by halves to each the gains or benefits obtained during marriage. He refers for his authority to article 1369[1] of the civil code of Venezuela, in force May 18, 1903, which is said to correspond with 1393 of the French civil code. The claim before the present commission is property gains and is controlled by that law. Under these circumstances the widow is entitled by the Venezuelan law to six-twelfths of Thomas Massiani's estate as her half thereof and to one-sixth part of the remainder of his estate by inheritance, she taking equally with each of the five children. He refers to articles 717 and 718 of the Venezuelan code for his authority.

The marriage of Thomas Massiani and of Carmen de Silva occurred January 5, 1855, as is duly established by authenticated registration of the same.

By the duly authenticated registration of births at said Carúpano there were proven to be born to Thomas Massiani and Carmen de Silva as the fruit of such marriage Felipe Antonio in 1855; Ascensión del Carmen, 1859; Luis Antonio, 1866; María de La Mercedes in 1871, and of Antonio José there is no record proof. Antonio José Massiani and Isabel Paván were married April 23, 1883, and the birth and date of birth of each of their children named in the power of attorney to Doctor Grisanti are fully established by lawful evidence.

Señora Carmen de Silva, widow of Thomas Massiani, was of Venezuelan parentage, and up to the date of her marriage with Thomas she was a Venezuelan. They ever thereafterwards resided in Venezuela; their children were all born to them there and have continued to reside in Venezuela and were so residing at the time of the presentation of this claim to the mixed commission at Caracas in 1903.

It is asserted by Felipe that this claim against the respondent Government is a part of the patrimony of Thomas and that the same was transmitted at his death to his universal successors, his widow and children.

It is agreed that by the law of both countries her marriage with Thomas gave her French nationality, which continued until the death of her husband. At his death, by French law, the widow retained her French nationality, and

[1] Art. 1369. Entre marido y mujer, si no hubiere convención en contrario, existe la sociedad conyugal, cuyo efecto es hacer comunes de ambos por mitad las ganancias ó beneficios obtenidos durante el matrimonio, según lo establecido en el párrafo 3.° de esta sección.

by the law of Venezuela she was restored to her former estate as a Venezuelan.

The claimants insist that, upon the facts existing in this case, to deny them a right of recovery before this tribunal is equivalent to saying that the indebtedness of Venezuela to Thomas and his successors was extinguished by his death.

In presenting this claim to the legation of France, at Caracas, Doctor Grisanti makes the claim that the adjudication of the mixed commission in 1890, dismissing this claim, was passed on an error of fact, which error of fact arose through the statements of the respondent Government to the said commission, and through its retention of the accounts which it then disclaimed to possess. He cites article 695 of the Code of Civil Procedure No. 4.

> The retention in possession of the opposing party of decisive documents in favor of the action or exception of the claimant, or act of the opposing party which has impeded the opportune presentation of such decisive document.[1]

This, as he claims, is cause for the invalidation of the judgment which follows such a situation.

The claim, 18,400 bolivars, furnished in 1899 has been presented before the mixed commission sitting at Caracas and established under the Washington protocol of February 27, 1903, and is no longer a fit subject for the consideration of this tribunal.

The sum of 14,136 bolivars paid on account of the Legalista revolution of 1892 was cared for by the round sum of 100,000,000 bolivars, which was accorded to the Government of France by Venezuela in bonds of diplomatic debts for the " insurrection events " of 1892, as it was provided might be done in article 1 of the Paris protocol of 1902.

The claim for 3,200 bolivars arising through requisition of the titular Government in 1885, and approved by certain generals having authority on June 26th of that year, was disallowed by the mutual agreement of the honorable commissioners at the sitting in Caracas for reasons to them sufficient and satisfactory.

This cause came before the honorable commissioners sitting at Caracas as a claim for 341,737.36 bolivars as the principal sum against the respondent Government and 351,003.12 bolivars as accrued interest on the same to June 30, 1903. For reasons which were satisfactory and controlling to the honorable commissioner for France he dismisses the claim for 30,971.31 bolivars, which the immediate representatives of the claimants insist were errors of omission and should have been added to the certified allowance by the Government of 270,813.65 bolivars, as he also dismisses the claim for the additional sum of 39,952.40 bolivars, which sum was not presented to the mixed commission of 1888-1890, although existing at that time and capable, as is insisted by the claimants, of being substantiated by receipts analogous to those passed upon by the Venezuelan Government; so by this holding of the honorable commissioner for France the claim is stripped of all accessories and stands at 270,813.65 bolivars, as acknowledged by the auditors of the Venezuelan treasury.

The honorable commissioner for France, governed by the reasons which he names, is of the opinion that there should be no allowance for interest on this sum, and that the only claim which he recognizes as a rightful demand upon Venezuela is the said sum of 270.813.65 bolivars, without interest.

The honorable commissioner for Venezuela rejects the claim in its entirety. (*a*) Because the claim is *res judicata*, having been refused for want of sufficient

---

[1] 4a. Retención en poder de la parte contraria de documento decisivo en favor de la acción ó excepción del reclamante, ó acto de la parte contraria que pidió la presentación oportuna de tal documento decisivo.

proof to sustain it; that the claimant's position, holding that the decision of the said mixed commission ought to be invalidated because of the retention in its possession by the Venezuela Government of the dossier approved by its officers and through its statement to the honorable commissioners of 1890 that it held no such document, is not well taken and can not be sustained for reasons which are in part as follows: That the certified document produced is not a *decisive* document showing the real relation of Venezuela to the claimants, since it only purports to establish by the certificate of the general auditor's office that according to the books of the customhouse at Carúpano it appeared that on the 23d of June, 1869, there was a balance in favor of Thomas Massiani of the certain amount named; and that the production of this document before this commission is inefficient to overcome the decision of the mixed commission of 1890, when especially there are to be considered all of the presumptions which arise to meet the document, which are suggested somewhat in detail by the honorable commissioner for Venezuela; (*b*) That this commission has no jurisdiction over this claim, because neither of the successors of Thomas Massiani is French by Venezuelan law, and hence, since this commission was formed only to settle claims of Frenchmen, it has no jurisdiction of a claim which is solely for Venezuelans.

The honorable commissioner for France regards the position of *res judicata* as not well taken for the reasons stated by him in detail; and he considers the jurisdiction of this commission as unquestionable, holding that the widow of Thomas Massiani and his children and representatives being French, under French law, they are those for whom France intervened by the protocol of February 19, 1902. He regards the document in question as undeniably decisive and asserts that if payments had since been made it would have been very easy to prove it by books and papers. He considers that Thomas Massiani having birth in France of French parents always enjoyed incontestable and exclusive French nationality; that the claim in question had birth during his life, and it is consequently the right of a French citizen who has been injured in his property, and hence this commission, which is to consider the demands of indemnities by Frenchmen, is wholly competent to consider and determine it. He is of the opinion that the nationality of the heirs should be put out of the case, as is asserted by Mr. Filtz under the protocol of Washington.

The honorable commissioner for France is also of the opinion that, if the nationality of the heirs is to be considered, this commission is still competent. He reasons that the heirs enjoyed two nationalities — French by French law, Venezuelan by Venezuelan law — and that the protocol in providing for the consideration of demands for indemnities presented by Frenchmen was providing for claims presented by individuals to whom the French Government assured its protection because they were recognized by the French law as Frenchmen. It is his opinion that it is only necessary that the claimant is one whom the laws of France recognize as French, although at the same time the law of Venezuela makes the claimant a Venezuelan. He calls to his support in this opinion the peculiar wording of the Washington protocols of 1903, in regard to local legislation, and holds that the meaning and effect of the language of those protocols are to exclude from the consideration of the several tribunals constituted thereunder all recognition of Venezuelan law; and hence, what Venezuela recognizes in the matter of citizenship is not important to the determination of this question.

To the position of the honorable commissioner for Venezuela that one commission has not authority to revise the proceedings of another, he introduces the new fact, unknown to the arbitrators of 1890, which is the fact that in the archives of the Venezuelan ministry there was then an approved dossier fully

supporting the claim of Thomas Massiani, the existence of which the Venezuelan Government had denied, and upon which denial the commission had dismissed the claim. He also urges that this commission has especial power to examine anew the affair submitted to the mixed commission of 1888-1890, because the protocol gives it jurisdiction to pass upon all the claims of Frenchmen, and since the sentence anterior was caused by a reason entirely different from what in fact existed; and that in equity there being incontestable evidence that the credit in fact existed at the time of its rejection, which fact was retained from the consideration of the previous commission through the action or nonaction of the Venezuelan Government, the heirs of Massiani should receive the sum which the Government of Venezuela has recognized to be due.

The honorable commissioners having disagreed as hereinbefore stated and having failed to reconcile their disagreements, they join to send the claim to the umpire for his determination and award.

An indebtedness of the respondent Government to the late Thomas Massiani in his lifetime is, without doubt, a part of the patrimony which descends to his widow and children to be distributed in accordance with the laws of Venezuela.

But the important question to be determined is, has this tribunal jurisdiction over this claim? Neither the widow nor the children are of French nationality as recognized by the laws of Venezuela. The widow was born in Venezuela, achieved French nationality by the laws of both countries when she married Thomas Massiani, but by the laws of Venezuela was restored to her quality of a Venezuelan citizen at his death. During their married life they remained in Venezuela; they were there domiciled when he died. It always has been her domicile. It is therefore her nationality, since such is the law of her domicile, which law prevails when there is a conflict as held by the umpire in the claim of Maninat heirs [1] before this same tribunal. The children of this marriage were all born in Venezuela. By the voluntary action of the father this was their birthplace. It has always been their domicile, first through the paternal selection and later through their own choice. Hence, governed by the laws of their domicile, they are Venezuelans.

Thomas Massiani deceased prior to the convention of February 19, 1902. Therefore he could not have been considered as a possible claimant by either of the high contracting parties at the time of that convention. His widow and children being Venezuelans in the contemplation of the respondent Government, their right to the intervention of France was not agreed to by Venezuela under the terms of the protocol as held by the umpire in the claim of the Maninat heirs. His reasons for his opinion in that regard and the authorities sustaining him in his reasoning and in his opinion having been therein stated and adduced, they need no further amplification here.

This case is on all fours with that of the estate of Stevenson, decided by the umpire in the British-Venezuelan mixed commission of 1903, and reported in Ralston and Doyle's Venezuelan Arbitrations of 1903, page 438. The reasons there given and the authorities there accumulated are directly in point in this case, and he respectfully refers the parties interested for further elucidation of these points to the opinion there found. His opinion then expressed is only confirmed and established by his subsequent study, and his reasons there given are to him as convincing and controlling now as then.

The indebtedness may indeed remain, but the form of action and the forum are changed. The forum to which they must now repair is the forum of the country Thomas Massiani chose for his domicile, for his marriage, and for the birthplace of his children; there death overtook him and his ashes are there.

---

[1] *Supra*, p. 55.

He voluntarily selected Venezuela as the country in which to make his fortune and to gain the properties for which the respondent Government is now the alleged lawful debtor to his estate. His life in that country was voluntary, free, a matter of choice. After weighing probabilities and anticipating results he remained. His children have attained full age and have also remained. The ties of race on the paternal side have been to them less strong than the ties which bound them to the country of their birth and the land of their maternal nationality. They have for their recourse the forum constituted for Venezuelans. They have all the rights, opportunities, and privileges common to their brethren of that nation. They easily could have been French had they preferred life in France to life in Venezuela. Having French paternity, and thereby having French nationality in France, they needed only to be domiciled therein to have a nationality which all the world must maintain to be French. For reasons dominant with them they have preferred to remain in Venezuela. Its laws and its courts are theirs. These they may invoke; with them they must be content.

The umpire recognizes the position of the honorable commissioner for France that the laws of Venezuela upon the question of nationality of its own inhabitants may be ignored and the laws of France be made paramount. He is also not unmindful of the reference made by the same honorable commissioner to the provisions of the protocols drawn up at Washington in 1903 in their allusion to the effect of local legislation. The definition of that particular provision in those protocols is not germane to any inquiry under the protocol of February 19, 1902, which has no such restrictive clause and which in no way and in no part suggests that each country is not entitled in every particular to equal place before the international tribunal thus constituted. The umpire has already held, in effect, in the Maninat case,[1] that to be sovereign and independent each country must be master of its internal policy and subject neither to advice nor control by any other country nor by all other countries in respect to such matters. France would not brook that Venezuela should name to her who are her citizens within her domain; she must be content to ascribe equal privilege of selection to her sister Republic, certainly while Venezuela in this regard has no peculiar or offensive laws, but rather has those which accord with the laws of nations in general.

A large number of questions naturally arising out of the facts which are grouped together in this case do not become important matters of consideration, since in the opinion of the umpire the claim does not come within the provisions of the protocol.

This claim is to be therefore entered dismissed for want of jurisdiction, but clearly and distinctly without prejudice to the rights of the claimants elsewhere, to whom is especially reserved every right which would have been theirs had this claim not been presented before this mixed commission.

NORTHFIELD. *July 31, 1905.*