CAYUGA INDIANS (GREAT BRITAIN) *v.* UNITED STATES

(January 22, 1926. Pages 307-331.)

This is a claim of Great Britain, on behalf of the Cayuga Indians in Canada, against the United States by virtue of certain treaties between the State of New York and the Cayuga Nation in 1789, 1790, and 1795, and the Treaty of 1814 between the United States and Great Britain known as the Treaty of Ghent.

At the time of the American Revolution, the Cayugas, a tribe of the Six Nations or Iroquois, occupied that part of Central New York lying about Cayuga Lake. During the Revolution, the Cayugas took the side of Great Britain, and as a result their territory was invaded and laid waste by Continental troops. Thereupon the greater part of the tribe removed to Buffalo Creek and after 1784 a considerable portion removed thence to the Grand River in Canada. By 1790 the majority of the tribe were probably in Canada. In 1789 the State of New York entered into a treaty with the Cayugas who remained at Cayuga Lake, recognized as the Cayuga Nation, whereby the latter ceded the lands formerly occupied by the tribe to New York and the latter covenanted to pay an annuity of $500 to the nation. In this treaty a reservation at Cayuga Lake was provided for. As there was much dissatisfaction with this treaty on the part of the Indians, who asserted that they were not properly represented, it was confirmed by a subsequent treaty in 1790 and finally by one in 1795, executed by the principal chiefs and warriors both from Buffalo Creek and from the Grand River. By the terms of the latter treaty, in which, as we hold, the covenants of the prior treaties were merged, the State covenanted, among other things, with the "Cayuga Nation" to pay to the said "Cayuga Nation" eighteen hundred dollars a year forever thereafter, at Canandaigua, in Ontario County, the money to be paid to "the Agent of Indian Affairs under the United States for the time being, residing within this State" and, if there was no such agent, then to a person to be appointed by the Governor. Such agent or person appointed by the Governor was to pay the money to the "Cayuga Nation", taking the receipt of the nation and also a receipt on the counterpart of the treaty, left in the possession of the Indians, according to a prescribed form. By this treaty the reservation provided for in the Treaty of 1789 was sold to the State.

There are receipts upon the counterpart of the Treaty of 1795 down to and including 1809, and these receipts and the receipt for 1810, retained by New

York, show that the only persons who can be identified among those to whom the money was paid, and the only persons who can be shown to have held prominent positions in the tribe, were then living in Canada. In 1811 an entire change appears. From that time a new set of names, of quite different character, appear on the receipts retained by New York. From that time there are no receipts upon the counterpart. Since that time, it is conceded, no part of the moneys paid under the treaty has come in any way to the Cayugas in Canada, but the whole has been paid to Cayugas in the United States, and since 1829 in accordance with treaties in which the Canadian Cayugas had no part or in accordance with legislation of New York. The claim is: (1) that the Cayugas in Canada, who assert that they have kept up their tribal organization and undoubtedly have included in their number the principal personages of the tribe according to its original organization, are the "Cayuga Nation", covenantees in the Treaty of 1795, and that as such they, or Great Britain on their behalf, should receive the whole amount of the annuity from 1810 to the present. In this connexion it is argued that the covenant could only be discharged by payment to those in possession of the counterpart of the treaty and indorsement of a receipt thereon, as in the treaty prescribed; (2) in the alternative, that the Canadian Cayugas, as a part of the posterity of the original nation, and numerically the greater part, have a proportion of the annuity for the future and a proportion of the payments since 1810, to be ascertained by reference to the relative numbers in the United States and in Canada for the time being.

As the occasion of the change that took place in and after 1811 was the division of the tribe at the time of the War of 1812, those in the United States and those in Canada taking the part of the United States and of Great Britain, respectively, Great Britain invokes article IX of the Treaty of Ghent, by which the United States agreed to restore to the Indians with whom that Government had been at war "all the possessions, rights, and privileges which they may have enjoyed or been entitled to" in 1811 before the war.

Great Britain can not maintain a claim as for the Cayuga Nation for the whole annuity since 1810 and for the future. In order to maintain such a claim, it would be necessary to establish the British nationality of the obligee at the date at which the claim arose. The settled doctrine on this point is well stated by Little, Commissioner, in Abbiatti's case, 3 Moore, International Arbitrations, 2347-8. See also Mexican claims, 2 id. 1353; Dimond's case, 3 id. 2386-8. The obligee was the "Cayuga Nation", an Indian tribe. Such a tribe is not a legal unit of international law. The American Indians have never been so regarded, 1 Hyde, International Law, para. 10. From the time of the discovery of America the Indian tribes have been treated as under the exclusive protection of the power which by discovery or conquest or cession held the land which they occupied. Wheaton, International Law, 838; 3 Kent, Commentaries, 386; Breaux *v.* Jones, 4 La. Ann. 141. They have been said to be "domestic, dependent nations" (Marshall, C. J., in Cherokee Nation *v.* Georgia, 5 Pet. 1, 17), or "States in a certain domestic sense and for certain municipal purposes" (Clifford, J., in Holden *v.* Joy, 17 Wall. 211, 142). The power which had sovereignty over the land has always been held the sole judge of its relations with the tribes within its domain. The rights in this respect acquired by discovery have been held exclusive. "No other power could interpose between them" (Marshall, C. J., in Johnson *v.* McIntosh, 8 Wheat. 543, 578). So far as an Indian tribe exists as a legal unit, it is by virtue of the domestic law of the sovereign nation within whose territory the tribe occupies the land, and so far only as that law recognizes it. Before the Revolution all the lands of the Six Nations in New York had been put under the Crown as "appendant to the

Colony of New York", and that colony had dealt with those tribes exclusively as under its protection (Baldwin, J., in Cherokee Nation *v.* Georgia, 5 Pet. 1, 34-35). New York, not the United States, succeeded to the British Crown in this respect at the Revolution. Hence the "Cayuga Nation", with which the State of New York contracted in 1789, 1790 and 1795, so far as it was a legal unit, was a legal unit of New York law.

If the matter rested here, we should have to say that the Legislature of New York was competent to decide, as it did in the treaties of 1829 and 1831, what constituted the "Nation", for the purposes of the prior treaties made by the State with an entity in a domestic sense of its own law and existing only for its own municipal purposes.

It does not follow, however, that Great Britain may not maintain a claim on behalf of the Cayuga Indians in Canada. These Indians are British Nationals. They have been settled in Canada, under the protection of Great Britain and, subsequently, of the Dominion of Canada, since the end of the eighteenth or early years of the nineteenth century. There was no definite political constitution of the Cayuga Nation, and it is impossible to say with legal precision just what would constitute a migration of the nation as a legal and political entity. But as an entity of New York law, it could not migrate. "Nationality is the status of a person in relation to the tie binding such person to a particular sovereign nation." Parker, Umpire, in Administrative Decision No. 5, Mixed Claims Commission, United States and Germany, October 31, 1924, 25 Am. Journ. Int. Law, 612, 625. The Cayuga Nation, as it existed as a legal unit by New York law, could not change its national character, without any concurrence by New York, and become, while preserving its identity as the covenantee in the treaty, a legal unit of and by British law. The legal character and status of the New York entity with which New York contracted was a matter of New York law. Moreover, the situation of the Cayuga Nation is very different from that of an ordinary corporation, which has no small margin of self-determination. Such a legal unit cannot change its national character by its own act. See North and South American Construction Company's case, 3 Moore, International Arbitrations, 2318, 2319. Even less is such a thing possible in the case of an Indian tribe, whose dependent condition is as well settled as its legal position is anomalous. Such tribes are "in a state of pupilage" (Marshall, C. J., in Cherokee Nation *v.* Georgia, 5 Pet. 1, 17). They have always been "subject to such restraints and qualified control in their national capacity as was considered by the whites to be indispensable to their own safety and requisite to the due discharge of the duty of protection" (3 Kent, Commentaries, 386). In the case of Indians on the public domain of the United States, they are "the wards of the Nation. They are communities dependent on the United States" (Miller, J., in United States *v.* Kagama, 118 U.S. 375, 383-4). With respect to Indians, the Government "is *in loco parentis*" (Nisbet, J., in Howell *v.* Fountain, 3 Ga. 176).

When the Cayugas divided, some going to Canada and some remaining in New York, and when that cleavage became permanent in consequence of the War of 1812, Great Britain might, if it seemed desirable, treat the Canadian Cayugas as a unit of British law or might deal with them individually as British nationals. Those Indians were permanently established on British soil and under British jurisdiction. They were and are dependent upon Great Britain or later upon Canada, as the New York Cayugas were dependent on and wards of New York. If, therefore, the Canadian Cayugas have a just claim, according to "the principles of international law and of equity", Great Britain is entitled to maintain it.

That, as a matter of justice the Canadian Cayugas have such a claim, has

been the opinion of every one who has carefully and impartially investigated their case. In 1849, the Commissioners of the Land Office, to whom the Legislature of New York had referred a memorial of "the chiefs and warriors of the Cayuga Indians residing in Canada West", reported in their favor and urged a "just distribution" of the annuity. This commission was composed of the then Lieutenant Governor, Secretary of State, Comptroller, Treasurer, and State Engineer and Surveyor of New York (N.Y. Assembly, Doc. 1849, vol. 3, No. 165). Afterwards the claim was considered in detail by the General Term of the Supreme Court of New York in People *v.* Board of Commissioners of the Land Office, 44 Hun. 588. That tribunal pointed out that we "ought not to permit words such as 'sovereign states', 'treaties', and the like to conceal the real facts". The substance of the matter was that New York agreed to pay the then Cayuga Indians and their posterity, and on the division of the tribe the annuity ought to have been apportioned as, indeed, was done when the New York Cayugas afterward divided. It is true the judgment in this case was reversed by the Court of Appeals. But the reversal was upon jurisdictional grounds in no way affecting the views of the Supreme Court upon the merits of the claim. Nor can we examine the evidence and come to any other conclusion than that as a matter of right and justice such an apportionment should have been and ought to be made.

In the report of the Committee of the New York Senate, in 1890, that committee was governed by two propositions of law, one that the Canadian Cayugas by their emigration "surrendered all claim or interest in the annuity funds and property of said Cayuga Nation of Indians", the other, that the claim was not within the purview of the Treaty of Ghent (N.Y. Senate Doc. No. 73, 1890). But the first cannot be maintained in view of the circumstances that the United States guaranteed their lands to the Six Nations in 1789 after the removal to the Grand River in 1784, and that the principal signers of the Treaty of 1795 and most of those who receipted for the annuities on behalf of the Nation from 1795 to 1810 were Cayugas who had so emigrated. As to the second, we do not so construe the Treaty of Ghent. The committee relies on the form of payment to the nation as an entity. The word "enjoy" in the treaty, as we think, refers to the substantial participation in the division of the money. If New York did not follow the treaty as to production of and receipt on the counterpart, the State was bound to see that those who ought to have the money were those who got it. Both in this report and in the opinion of Judge O'Brien, then Attorney-General of New York, in 1884 (memorial, vol. III, p. 777), the circumstance that the Canadian Cayugas had taken part with Great Britain in the War of 1812 is evidently regarded as a ground of excluding them from any share in the annuity. So also the letter of Commissioner Bissell (memorial, vol. III, p. 793) gives this reason. But it is obviously untenable, and it was expressly stated on behalf of the United States at the hearing that no such defense is urged. It is evident that both the committee and the Attorney-General go upon the form of the covenant and the legal authority of New York to determine what shall be recognized as the Cayuga Nation. They do not deny the merit of the claim. This is palpably true of the decision of the New York Court of Appeals in Cayuga Nation *v.* State, 99 N.Y. 235.

It cannot be doubted that until the Cayugas permanently divided, all the sachems and warriors, wherever they lived, whether at Cayuga Lake, Buffalo Creek, or the Grand River in Canada, were regarded as entitled to and did share in the money paid on the annuity. Indeed, it is reasonably certain that the larger number and the more important of those who signed the Treaty of 1795 were then, or were soon thereafter, permanently established in Canada. It is clear that the greater number and more important of those who signed the

annuity receipts from the date of the treaty until 1810 were Canadian Cayugas. We find the person through whom, by the terms of the treaty, the money was to be paid, writing to the Governor of New York in 1797 that the Canadian Cayugas had not received their fair proportion in a previous payment and proposing to make the sum up to them at the next payment. Everything indicates that down to the division the money was regarded as payable to and was paid to and divided amoung the Cayugas as a people. The claim of the Canadian Cayugas, who are in fact the greater part of that people, is founded in the elementary principle of justice that requires us to look at the substance and not stick in the bark of the legal form.

But there are special circumstances making the equitable claim of the Canadian Cayugas especially strong.

In the first place, the Cayuga Nation has no international status. As has been said, it existed as a legal unit only by New York law. It was a *de facto* unit, but *de jure* was only what Great Britain chose to recognize as to the Cayugas who moved to Canada and what New York recognized as to the Cayugas in New York or in their relations with New York. As to the annuities, therefore, the Cayugas were a unit of New York law, so far as New York law chose to make them one. When the tribe divided, this anomalous and hard situation gave rise to obvious claims according to universally recognized principles of justice.

In the second place, we must bear in mind the dependent legal position of the individual Cayugas. Legally, they could do nothing except under the guardianship of some sovereign. They could not determine what should be the nation, nor even whether there should be a nation legally. New York continued to deal with the New York Cayugas as a "nation". Great Britain dealt with the Canadian Cayugas as individuals. The very language of the treaty was in this sense imposed on them. What to them was a covenant with the people of the tribe and its posterity had to be put into legal terms of a covenant with a legal unit that might and did come to be but a fraction of the whole. American courts have agreed from the beginning in pronouncing the position of the Indians an anomalous one (Miller, J., in United States *v.* Kagama, 118 U.S. 375, 381). When a situation legally so anomalous is presented, recourse must be had to generally recognized principles of justice and fair dealing in order to determine the rights of the individuals involved. The same considerations of equity that have repeatedly been invoked by the courts where strict regard to the legal personality of a corporation would lead to inequitable results or to results contrary to legal policy, may be invoked here. In such cases courts have not hesitated to look behind the legal person and consider the human individuals who were the real beneficiaries. Those considerations are even more cogent where we are dealing with Indians in a state of pupilage toward the sovereign with whom they were treating.

There is the more warrant for so doing under the terms of the treaty by virtue of which we are sitting. It provides that decision shall be made in accordance with principles of international law and of equity. Mérignhac considers that an arbitral tribunal is justified in reaching a decision on universally recognized principles of justice where the terms of submission are silent as to the grounds of decision and even where the grounds of decision are expressed to be the "principles of international law". He considers, however, that the appropriate formula is that "international law is to be applied with equity" (*Traité théorique et pratique de l'arbitrage international*, para. 303). It is significant that the present treaty uses the phrase "principles of international law and equity". When used in a general arbitration treaty, this can only mean to provide for the possibility of anomalous cases such as the present.

An examination of the provisions of arbitration treaties shows a recognition that something more than the strict law must be used in the grounds of decision of arbitral tribunals in certain cases; that there are cases in which—like the courts of the land—these tribunals must find the grounds of decision, must find the right and the law, in general considerations of justice, equity and right dealing, guided by legal analogies and by the spirit and received principles of international law. Such an examination shows also that much discrimination has been used in including or not including "equity" among the grounds of decision provided for. In general, it is used regularly in general claims arbitration treaties. As a general proposition, it is not used where special questions are referred for arbitration.

Three arbitration treaties between Great Britain and the United States contain provision for decision in accordance with "equity" or "justice": the Claims Convention of 1853, article I (1 Malloy, Treaties, 664), using the words "according to justice and equity"; the Claims Convention of 1896, article II (1 Malloy, 766), calling for "a just decision"; and the Agreement for Pecuniary Claims Arbitration, 1910, article VII (3 Malloy, 2619), prescribing decision "in accordance with treaty rights, and with the principles of international law and of equity". These are general claims arbitrations. They should be contrasted with the arbitration agreements between Great Britain and the United States in which there is no provision for equity as one of the grounds of decision. Articles IV, V and VI of the Treaty of Ghent provide for arbitration as to the islands on the Maine boundary, as to the north-eastern boundary, and as to the river and lake boundary. The arbitrators are to decide "according to such evidence as shall be laid before them". Here the questions were of fact only. Hence in an arbitration of specific questions, all provision as to equity is omitted. So also in the Regulations for the Mixed Courts of Justice under the Treaty of April 7, 1862 (1 Malloy, 681), article I, the arbitrators are to "act in all their decisions in pursuance of the stipulations of the aforesaid treaty". This was a special tribunal under a treaty for abolition of the slave trade. The contrast with the provisions of the treaties for general claims arbitrations is noteworthy. So also in the Fur Seal Arbitration Convention of 1892 (1 Malloy, 746), articles II, VI; the Alaskan Boundary Convention, 1903 (1 Malloy, 787), articles I, III, IV; and the Agreement for the North Atlantic Coast Fisheries Arbitration (1 Malloy, 835), article I. In each of these, certain specific questions were submitted. These agreements are either silent as to the grounds of decision or provide simply for a fair and impartial consideration.

In some of the arbitration agreements between Great Britain and the United States it has happened that clauses of both types have been included in one treaty. Thus, in the Jay Treaty of 1794, article V has to do with arbitration of the Maine boundary. In that matter the arbitrators are to decide "according to such evidence as shall . . . be laid before them". But article VII, providing for arbitration of claims, requires a decision "according to the merits of the several cases, and to justice, equity, and the law of nations". (1 Moore, International Arbitrations, 5,321.) Again in the Treaty of Washington, 1871, art. XXXIV and following, providing for arbitration of the San Juan water boundary, call for decision "in accordance with the true interpretation of the Treaty of June 15, 1846". 1 Moore, International Arbitrations, 227. Also in the same treaty, article VI, submitting the Alabama claims, provides three carefully formulated rules, agreed on expressly by the parties, and requires decision by those rules and "such principles of international law, not inconsistent therewith, as the arbitrators shall determine to have been applicable to the case". So also in article II, as to claims governed by rules agreed upon, the arbitrators are to examine and decide "impartially and carefully". On the

other hand, in article XXIII, providing for the arbitration of fishing claims, the decision is to be "according to justice and equity" (1 Malloy, 710, 714). Here the careful discrimination, according to the subject matter dealt with in the several articles of the same treaty, speaks for itself.

Arbitration treaties of and with Latin American countries before 1910 (the date of the treaty here in question) tell the same story. Of these, some provide for decision according to international law, equity (or justice) and treaty provisions. Such are (with slightly varying language): Arbitration Convention between the United States and Mexico, 1839, 1 Malloy, 1101, art. IV (arbitration of claims); Ecuador-United States, 1862, 13 St. L. 631; Peru-United States, 1863, 13 St. L. 639, art. III; United States-Venezuela, 1866, 13 St. L. 713, art. I; Mexico-United States, 1868, 1 Malloy, 1128, art. I; Guatemala-Mexico, 1888, 71 Br. & For. State Pap. 255, art. IV; United States-Venezuela, 1892, 28 St. L. 1183, art. III; Chile-United States, 1892, 27 St. L. 965, art. IV; Guatemala-Honduras, 1895, 77 Br. & For. State Pap. 530, art. VI; Mexico-Venezuela, 1903, Manning, Arbitration Treaties among the American States, 343, art. I (arbitration of all pending claims); Brazil-Peru, 1904, U.S. Foreign Relations, 1904, p. 111, art. III (General claims arbitration); Argentina-Brazil, 1905, 3 Am. Journ. Int. Law, Suppl. p. 1, art. X (General arbitration); Brazil-Peru, 1909, Manning, 450, art. IX (General arbitration). It will be noted that these words are used where no specific claims are in question, but there is a general arbitration of claims of all kinds. In other cases the treaty speaks only of justice and equity. Such are: Costa Rica-Nicaragua, 1854, Manning, 31, art. III; New Granada-United States, 1857, 1 Malloy, 319, art. I; Chile-United States, 1858, 12 St. L. 1083; Paraguay-United States, 1857, Manning, 145, art. II; Costa Rica-United States, 1860, 12 St. L. 1135, art. II; Peru-United States, 1868, 16 St. L. 751, art. I; Chile-Peru, 1868, Manning, 78; United States-Venezuela, 1886, Manning, 150, art. VI; Mexico-United States, 1902, 32 St. L. 1916; Brazil-United States, 1902, U.S. Treaty Series, No. 413, art. I. Here it is significant that eight of the ten are arbitrations between the United States and Latin American States, in which, because of the difference in legal systems and technique of decision, it was expedient to give some latitude to the Tribunal. In this connexion the treaty between the United States and Venezuela in 1903 (U.S. Treaty Series, No. 420) is especially significant. It requires decision "upon a basis of absolute equity, without regard to objections of a technical character or of the provisions of local legislation" (as to what this meant, see Ralston, International Arbitral Law and Procedure, 69-71). In other cases, the language shows that the arbitrator was to be no more than an *amiable compositeur:* Honduras-Salvador, 1880, Manning, 1115, art. V ("just and expedient"); Honduras-Nicaragua, 1894, Manning, 211, art. II (5); Honduras-Salvador, 1895, Manning, 216, art. II; Chile-United States, 1909, U.S. Treaty Series, No. 535 1/2 ("as an *amiable compositeur*").

In the treaties cited, to which the United States has been a party, it will be noted how discriminatingly the language is chosen. How can it be said that the phrase "principles of equity" is of no significance when the different phrases are shown to have been so carefully chosen to fit different occasions?

This conclusion is borne out even more when we examine the arbitration treaties of and with the Latin American States in which no reference is made to equity. In some of these no reference is made to grounds of decision: Mexico-United States, 1897, 30 St. L. 1593 (a limited arbitration of specific issues of law and fact raised by prior diplomatic correspondence); Peru-United States, 1898, U.S. Treaty Series, No. 286 (limited arbitrations of the amount of indemnity only—all other questions excluded); Haiti-United States, 1899, Manning, 282 (special agreement to submit one claim of a citizen of the United

States to one of the Justices of the Supreme Court of the United States); Guatemala-United States, 1900, Manning, 288, art. I (refers "questions of law and fact" as to one specific claim); Nicaragua-United States, 1900, 2 Malloy, 1290 (reference to specific claims, as to the amount of indemnity only—question of liability expressly excluded); Salvador-United States, 1901, U.S. Treaty Series, No. 400 (specific claims, the issues having already been defined by diplomatic correspondence); Dominican Republic-United States, 1902, Manning, 320 (special arbitration of one claim on defined points); Dominican Republic—United States, U.S. Treaty Series, No. 417 (special arbitration as to terms of payment of agreed indemnity). In each of these cases the United States was a party, and the nature of the arbitration shows why it is that reference to general grounds of decision was omitted.

In another type of case provision is made for decision according to international law or "public law" and treaties. Such a case is: Colombia-United States, 1874, 1 Foreign Rel. U.S. 427, art. II (but here these general grounds were supplemented by special stipulations). In another type, the grounds of decision are expressly restricted to "the rules of international law existing at the time of the transactions complained of": Haiti-United States, 1884, 23 St. L. 785, art. IV (reference of two special claims of citizens of the United States to one of the Justices of the Supreme Court of the United States; naturally it was sought to restrict the scope of his choice of grounds of decision). In another group of treaties, the decision is to be "according to the principles of international law". Such are: Brazil-Chile, 1899, Manning, 259, art. V; Argentina-Uruguay, 1899, 94 Br. & For. State Pap. 525, art. X; Argentina-Paraguay, 1899, 92 Id. 485, art. X; Argentina-Bolivia, 1902, Manning 316, art. X; Argentina-Chile, 1902, Manning, 328, art. VIII; Costa Rica-Guatemala-Honduras-Nicaragua-Salvador, 1907, 100 Br. & For. States Pap. 836, art. XXI (treaty establishing the Central American Court of Justice as a Permanent Court of Arbitration). But these treaties (except the last) add that the terms of submission may otherwise provide, thus taking care of the possibility of anomalous situations. One treaty, Bolivia-Peru, 1901, 3 Am. J. Int. Law, Suppl. 378, art. VIII, requires "strict obedience to the principles of international law". In another type of this species of treaty there is minute specification of the exact grounds of decision. Such are Bolivia-Peru, 1902, Manning, 334; Costa Rica-Panama, 1910, 6 Am. J. Int. Law, Suppl., p. 1. Each is a boundary arbitration.

In these treaties of and with Latin American States, as in the case of treaties between Great Britain and the United States, it happens sometimes that different provisions as to the grounds of decision are made in different articles of the same treaty. Thus: Colombia-Ecuador, 1884, Manning, 140 (art. I, "impartiality and justice", art. II, "in accordance with the principles of international law and the legal principles established by analogous modern tribunals of high authority"); Ecuador-United States, 1893, 28 St. L. 1205 (art. II *(b)* "under the law of nations", art. IV, such damages "as may be just and equitable"—an arbitration of one specified claim); United States-Venezuela, 1908, U.S. Treaty Series, No. 522 I/2 (art. I "under the principles of international law", art. II whether "manifest injustice" was done, art. III "on its merits in justice and equity", art. V "in accordance with justice and equity"). This different language for different situations speaks for itself. It should be said also that the language of treaties with Continental Powers, both prior and subsequent to 1910, to which the United States is a party, entirely sustains the conclusions to which the examination of the treaties with Great Britain and with Latin-American States must lead (see United States-Norway, 1921, 3 Malloy, 2749, art. I; Allied Powers-Germany, 1920, 3 Malloy, 3469, art.

299 *(b)*; Allied Powers-Hungary, 1921, 3 Malloy, 3644, art. 234 *(b)*; United States-Great Britain-Portugal, 1891, 2 Malloy, 1460, art. 1; United States-Germany-Great Britain, 1899, 2 Malloy, 1589, art. I.)

Under the first and second Hague Conventions for the Pacific Settlement of International Disputes (32 St. L. 1779, art. XLVIII; 36 St. L. 2199, art. LXXIII) there is to be a special *compromis* in each arbitration which is to provide as to the basis of decision. But wide powers of determining the basis of decision are insured by art. 48. Also art. 38 of the Statute of the Permanent Court of International Justice (1920) provides specially that the Court may decide *ex æquo et bono*, if the parties agree thereto. As Anzilotti points out, however, that much-criticized provision is meant for cases such as we have seen above, which call, not for principles of equity, but for a degree of compromise (Anzilotti, *Corso di diritto internazionale*, 64 (1923)). Such a power is not necessarily non-judicial, as Magyary asserts *(Die internationale Schiedsgerichtsbarkeit im Völkerbunde*, 151-2 (1922)). But it is a different thing from what we invoke in the present case, namely, general and universally admitted principles of justice and right dealing, as against the harsh operation of strict doctrines of legal personality in an anomalous situation for which such doctrines were not devised and the harsh operation of the legal terminology of a covenant which the covenantees had no part in framing and no capacity to understand. It is enough to cite the opinions of Mérignhac *(Traité théorique et pratique de l'arbitrage international*, paras. 294-305); Bulmerincq *(Die Staatsstreitigkeiten und ihre Entscheidung ohne Krieg*, para. 11; Holtzendorff, *Handbuch des Völkerrechts*, VI, 42); and Lammasch *(Die Lehre von der Schiedsgerichtsbarkeit in ihrem ganzen Umfange*, II, 179-181, 185).

It remains to consider the United States-Norway Arbitration Award, 1922. (17 Am. J. Int. Law, 362, ff.) By article I of the agreement under which that award was made, the decision was to be "in accordance with the principles of law and equity". The meaning of this phrase is discussed on pages 383-385. Construing article LXXIII of The Hague Convention for the Settlement of International Disputes (1907) and article XXXVII of the Convention of 1908, the Tribunal considers, rightly, as we conceive, that the word *droit*, as used in those articles has a broader meaning than that of "law" in English, in its restricted sense of an aggregate of rules of law. It quotes Lammasch to the effect that the arbitrator should "decide in accordance with equity, *ex æquo et bono*, when positive rules of law are lacking". It then says of the words "law and equity" in the agreement under which it was sitting: "The majority of international lawyers seem to agree that these words are to be understood to mean general principles of justice as distinguished from any particular system of jurisprudence or the municipal law of any State" (p. 384). Not only is this the weight of opinion, but it is amply borne out by the language of arbitration treaties as adapted to the different sorts of arbitration and the types of questions which they present. The letter of Secretary Hughes to the Norwegian Minister, of date February 26, 1923 (17 Am. J. Int. Law, 287-289), in which he protests as to certain features of the awards, challenges the rule of international law found by the Tribunal and applied to the case. But it does not contest or refer to the Tribunal's construction of the words "law and equity", as used in the agreement; nor do we think that construction is open to question. Our conclusion on this branch of the cause is that, according to general and universally recognized principles of justice and the analogy of the way in which English and American courts, on proper occasions, look behind what in such cases they call "the corporate fiction" in the interests of justice or of the policy of the law (Daimler Company, Ltd., *v.* Continental Tyre and Rubber Company, Ltd. [1916] 2 A.C. 307, 315-316, 338 ff; 1 Cook (Corporations, 8 ed., para. 2)),

on the division of the Cayuga Nation the Cayuga Indians permanently settled in Canada became entitled to their proportionate share of the annuity and that such share ought to have been paid to them from 1810 to the present time.

But it is not necessary to rest the case upon this proposition. It may be rested upon the strict legal basis of article IX of the Treaty of Ghent, and in our judgment is to be decided by the application of that covenant to the equitable claim of the Canadian Cayugas to their share in the annuity.

Article IX of the Treaty of Ghent, so far as material, reads as follows: "The United States of America engage to put an end, immediately after the ratification of the present treaty, to hostilities with all the tribes or nations of Indians with whom they may be at war at the time of such ratification; and forthwith to restore to such tribes or nations, respectively, all the possessions, rights, and privileges which they may have enjoyed or been entitled to in one thousand eight hundred and eleven, previous to such hostilities." The former portion of this covenant clearly refers to the Indian tribes on the public domain of the United States known then as the Western Indians, and was so construed by the United States, which proceeded to make special treaties of peace with those tribes. On its face the remainder of the covenant seems to apply squarely to the Canadian Cayugas, who had been actually in the receipt and enjoyment of their share of the annuity from the Treaty of 1795 down to the eve of the war of 1812. In the answer of the United States there is an elaborate and ingenious argument, based upon the history of the negotiations leading to article IX, on the basis of which we are asked to hold that the article was only a "nominal" provision, not intended to have any definite application. We can not agree to such an interpretation. Nothing is better settled, as a canon of interpretation in all systems of law, than that a clause must be so interpreted as to give it a meaning rather than so as to deprive it of meaning. We are not asked to choose between possible meanings. We are asked to reject the apparent meaning and to hold that the provision has no meaning. This we cannot do. We think the covenant in article IX of the Treaty of Ghent must be construed as a promise to restore the Cayugas in Canada who claimed to be a tribe or nation and had been in the war as such, to the position in which they were prior to the division of the nation at the outbreak of the war. It was a promise to restore the situation in which they received their share of the money covenanted to be paid to the original undivided nation. There are but two alternatives, each quite inadmissible under every day rules of interpretation. One is that the promise has no meaning but was, as it was urged in argument, a provision inserted to save the face of the negotiators. The other is that the tribe or nation must be taken to be the entity of New York law, not the Canadian Cayugas as British nationals. As to this interpretation, the remark of Chief Justice Fuller, in Burthe *v.* Dennis, 133 U.S. 514, 520-21 is pertinent. He says: "It would be a remarkable thing, and we think without precedent in the history of diplomacy for the Government of the United States to make a treaty with another country to indemnify its own citizens for injuries received from its own officers". It would be no less strange and unprecedented for the United States to covenant with another power to restore the rights of its own nationals under its exclusive protection. In order to give this portion of the article any meaning, we must take it to promise that the Indians who had gone to Canada and had sided with Great Britain on the splitting up of the original nation, were to be put in the *status quo* as of 1811, even if legally the New York Cayuga organization was now the nation for the strict legal purposes of the covenant in the Treaty of 1795.

In 1843, in a letter to the then Governor of New York, written on behalf of the New York Cayugas with reference to the division of the annuity between

the Cayugas remaining in New York and those who had gone to the West, Peter Wilson, an educated Cayuga, and one of the Sachems of the New York nation, said: "The emigrating party of the New York Cayugas have invited the Canadian Indians to come over and accompany them to the western country, and we are apprehensive they will represent these as composing a part of their party having claims to the moneys of the Cayuga Nation arising from the annuities of the State of New York, which claim we do not recognize". Further on he adds: "We wish your excellency distinctly to understand that the Cayugas residing in a foreign country, to wit, Canada, have no just or legal claim to any part of the annuities arising from this State". Here, in its original form, the objection of the New York Cayugas to participation by the Canadian Cayugas rests on the proposition, obviously inadmissible, if for no other reason, in view of art. IX of the Treaty of Ghent, that the Canadian Cayugas reside in a foreign country. Six years later (1849), when the Canadian Cayugas were pressing their claim to a share before the Legislature of New York, the objection was rested on the ground of an agreement at the time of the division of the nation, whereby, to use Wilson's own words "It was mutually agreed that thereafter they should no longer participate in the annuities or emoluments flowing from the governments they were to oppose; but each division should take the whole from the government to which it is allied . . . that all property and interest on the British side should belong to the British Indians, while the property and interests on the American side must be the sole property of the American Iroquois". This is a plausible theory and, urged dramatically and with much detail of circumstance in Wilson's speech in 1849, it has undoubtedly played a controlling part in the subsequent denials of the claims of the Canadian Cayugas. But without adverting to the mystery that surrounds the speech itself, for it is not established that it was ever delivered, and conceding certain circumstances that appear to confirm it, we are of opinion that it has no foundation beyond the admitted division of the nation on the eve of the War of 1812, and the fact that during and after that war the Canadian Cayugas did not participate in the division of the payments. In reality the circumstances do not go beyond this. If there had been more, Wilson certainly would have said so in 1843. His letter of that date is too prolix to justify an assumption that he left out anything he knew that had a bearing on his case. Certainly he would not have left out the one conclusive argument in his armoury. Moreover, it ought to have been possible to establish a point of such importance by something more than the assertion in Wilson's speech. The only other evidence is a statement in a report of the Committee on Indian Affairs to the Senate of New York, in 1849, that the Council in which "that agreement was made, if any", had been graphically described to the committee by an Onondaga chief. It is clear enough from the whole report that the committee, at the least, was skeptical as to the alleged agreement. Certainly the whole conduct of the Canadian Cayugas from the conclusion of the War of 1812 was inconsistent with it. We are satisfied that they held the counterpart of the Treaty of 1795 from a time soon after its execution to the present, when they produce it before us. There is clear evidence that after 1815 their chiefs made repeated visits to New York, claiming a share and vouching their possession of the counterpart upon which, by the terms of the treaty, receipts for payment were to be indorsed. Almost immediately upon the close of the war they urged upon the British Colonial Office that they were no longer receiving their share of the annuity, as they had received it before the war. In 1819 they discussed their claim in a council and considered retaining counsel to present it. In 1849 they presented it by petition to the Legislature of New York, and continued to press it at intervals from that time. No one but Wilson testifies (if his speech may be called testimony)

to the agreement of partition. His speech, in many of its details, is palpably erroneous. The circumstances and the conduct of the parties are at variance with it. It cannot be that, if this solid and conclusive ground for excluding the Canadian Cayugas had existed, the ground of excluding them from a share in the annuity would have been doubtful in 1849.

We have next to consider whether the claim of Great Britain, on behalf of the Canadian Cayugas, that the latter should share in the payments of the annuity covenanted to be paid to the original Cayuga Nation, is barred by article V of the Claims Convention of 1853. That article reads:

"The High Contracting Parties engage to consider the result of the proceedings of this commission as a full, perfect, and final settlement of every claim upon either Government arising out of any transaction of a date prior to the exchange of the ratifications of the present convention; and further engage that every such claim, whether or not the same may have been presented to the notice of, made, presented, or laid before the said commission, shall from and after the conclusion of the proceedings of the said commission, be considered and treated as finally settled, barred, and thenceforth inadmissible."

On behalf of Great Britain it is contended that article V must be construed in connexion with article I and II. The United States, on the other hand, contends that article V is complete and unambiguous and hence calls for no interpretation, but must be applied according to its plain terms.

It will be noted that in order to be barred the claim must have: (1) "arisen"; and (2) arisen out of "transactions" prior to the ratification of the convention. No doubt the Treaty of 1795, the division of the Cayuga Nation, and the Treaty of Ghent are "transactions" prior to 1853. But if no claim against the United States had "arisen" in 1853, there was no claim to be barred by the terms of article V, which does not purport to apply and certainly ought not to be construed as applying to claims to arise in the future, even if in part out of past transactions. If, as the United States insists, we must apply the language of article V as it stands, the word "arise" is quite as important as the word "transactions", and we must look to the transactions that are decisive for the "arising" of the claim, as one cognizable before an international tribunal, in order to determine whether the claim before us is barred.

What, then, are the grounds on which liability of the United States must be based, and what is the date of the "transactions" from which a claim "arises" in which that liability may be asserted?

First, we must ask whether the United States would be liable directly and immediately on the basis of the Treaty of 1795. It has been urged upon us that the United States would be liable upon that treaty on three grounds: (1) that the treaty is legally a Federal, not a New York, treaty, made in the presence of a Federal Indian agent; (2) that the treaty has to do with a matter of exclusively Federal cognizance, under the Constitution of the United States, and so must be presumed to have been executed under competent Federal authority, since the alternative would be that the treaty would be void; (3) that in any event the interest of the United States in the treaty, as one dealing with a matter of Federal cognizance under the Constitution of the United States, is such as to make the United States directly and immediately liable upon the treaty, even if it is the contract of the State of New York.

We are unable to assent to any of these propositions. Neither in form nor in substance was the Treaty of 1795 a Federal treaty; it was a contract of New York with respect to a matter as to which New York was fully competent to contract. In form it is exclusively a New York contract. The negotiators derived their authority from the State Legislature and purported to represent the State only. The United States does not appear anywhere in the negotia-

tions nor in the treaty. The United States Indian agent, who was present, at the request of the Indians because they had confidence in him, appears as a witness in his personal, not his official, capacity. Nor was the subject matter one of Federal cognizance. The title of the Cayuga Indians, one of occupation only, had been extinguished by the Treaty of 1789, which ceded the Lands of the Cayugas to New York, providing for a reservation which, we think, must be taken to have been held of New York by the Nation. It is argued that the language of the treaty is rather that of a common law reservation, so that the reserved land was reserved out of the grant. As to this, we are satisfied with the observations of Gray, J., in Jones *v.* Meehan, 175 U.S. 1, 11: "The Indians . . . are a weak and dependent people who have no written language and are wholly unfamiliar with all the forms of legale xpression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter . . .; the treaty must therefore be construed not according to the technical meaning of the words to learned lawyers, but in the sense in which they would naturally be understood by the Indians". We think the treaty meant to set up an Indian reservation, not to reserve the land from the operation of the cession. Such a construction is indicated by Marshall C. J., in Cherokee Nation *v.* Georgia, 5 Pet. 1, 17.

That treaty (1789) was made at a time when New York had authority to make it, as successor to the Colony of New York and to the British Crown. Long before the Revolution, the country of the Six Nations had been treated as "appendent to the government of New York" (Baldwin, J. in Cherokee Nation *v.* Georgia, 5 Pet. 1, 35). It was for the Legislature of New York to say who could bind the Cayuga Nation as a New York entity. The subsequent treaties of 1790 and 1795 purported simply to confirm the original treaty and were made because of dissatisfaction of the Indians, not because of any legal invalidity. The cases cited to us with respect to Indians on the public domain of the United States or on lands relinquished by some or other of the original thirteen States are not in point. The distinction is made clear in Dana's note to Wheaton, Elements of International Law, para. 38 (8 ed. 60). He says: "It is important to notice the underlying fact that the title to all lands occupied by the Indian tribes *beyond the limits of the thirteen original States*, is in the United States. The Republic acquired it by the treaties of peace with Great Britain, by cessions from France and Spain, and by *relinquishments from the several States*" (see also Seneca Nation *v.* Appleby, 127 App. Div. 770). The title of New York here was independent of and anterior to the Federal Constitution. At the time of the Treaty of 1795, the Cayuga Indians held the reservation of New York and the dealings of New York with the Cayuga Nation as a New York entity and with respect to lands held of New York were a matter for that State only (see Marshall, C. J., in Cherokee Nation *v.* Georgia, 5 Pet. 1, 16-18; Nelson, J. in Fellows *v.* Blacksmith, 19 How. 366, 369; 3 Kent, Commentaries, 380-386; Beecher *v.* Wetherbee, 95 U.S. 517, 525 and State decisions there cited; Seneca Nation *v.* Christie, 126 N.Y. 122; Jemison *v.* Bell Telephone Co., 186 N.Y. 493, 498).

We must hold that the Treaty of 1795 was a contract of the State of New York and that it was not a contract on a matter of Federal concern or in which the Federal Government had an interest. Indeed, the fact that it has stood unchallenged as a New York contract for over a century and that New York has gone on for the whole of that time dealing with the provisions of the treaty and with the legal position of the Cayuga Nation as matters of New York law, speaks for itself. This Tribunal cannot know more as to what is a Federal treaty and what a New York treaty than the United States and the State of New York.

If the Treaty of 1795 is a contract of the State of New York, the United States would not be liable merely on the basis of a failure of New York to perform a

covenant to pay money. This proposition is established by repeated decisions of international tribunals: Thornton, Umpire, in Nolan's case, 4 Moore, International Arbitrations, 3484; Thompson's case, *ibid.;* Bainbridge, commissioner, in La Guaira Electric Light and Power Company's case; Ralston, Venezuela Arbitrations of 1903, 178, 181-2; Thomson-Houston Electric Company's case, id. 168-9; Schweitzer *v.* United States, 21 Ct. Cl. 303; Florida Bond Cases, 4 Moore, International Arbitrations, 3594, 3608-12. In the case last cited there is a full discussion by Bates, Umpire. See also Ralston, International Arbitral Law and Procedure, paras, 457-467, pp. 217-221; Borchard, Diplomatic Protection of Citizens Abroad, 200. Two *dicta*, cited to the contrary on the argument, are readily distinguishable. What is said in the Montijo, 2 Moore, International Arbitrations, 1421, 1439, had no reference to a contract of a State of a Federal union creating a debt of that State. There was a violation of a Federal treaty. And the letter of Secretary Fish, 6 Moore, Digest of International Law, 815-816, had reference to injuries to persons and property by the State authorities, not to Federal liability for debts incurred by the contract of a State.

In the cases in which a Federal government has been held upon the contract of a State, there has been: (1) an immediate connexion of the Federal government with the contract as a participant therein; or (2) an assumption thereof or of liability therefor; or (3) a connexion therewith as beneficiary, whether in the inception or as beneficiary of the performance, in whole or in part; or (4) some direct Federal interest therein. The United States is in no such relation to and had no such connexion with or interest in the contract of New York with the Cayuga Nation.

Liability of the United States must, therefore, be grounded upon article IX of the Treaty of Ghent, in which the United States covenanted that the Indians should be restored to the position in which they were before the War of 1812, and hence that they should share in the annuity, as they did before the war. That liability, in our opinion, did not accrue until, New York having definitely refused to recognize the claims of the Canadian Cayuga, the matter was brought to the attention of the authorities of the United States, and that Government did nothing to carry out the treaty provision. That situation and the Treaty of Ghent are the transactions out of which the claim arises. The earliest date at which the claim can be said to have accrued, as a claim against the United States under international law, is 1860.

In municipal law, failure of a promisor to perform gives rise to a cause of action than and there, without more. But it is otherwise when one State steps in to assert a claim against another State because the latter is in default with respect to some performance promised to a national of the former. "In the estimation of statesmen and jurists, international law is probably not regarded as denouncing the failure of a State to keep such a promise, until there has been a refusal either to adjudicate wholly the claim arising from the breach or, following an adjudication, to heed the adverse decision of a domestic court. Upon the happening of either of those events, the denial of justice is regarded as first apparent. Then there is seen a failure to respect a duty of jurisdiction which is distinct from the breach of the contract and subsequent to it in point of time." 1 Hyde, International Law, para 303, pp. 546-7. See to the same effect decisions cited in Ralston, International Arbitral Law and Procedure, para. 37, pp. 27-29; 6 Moore, Digest of International Law, para. 916, pp. 285-9; 1 Westlake, International Law 331-334.

Even in 1860, the Government of the United States referred the Indians to New York. Certainly in 1853, when it was by no means clear that something might not yet be done by the Legislature of New York, an international tribunal would have said that, while there might have been a breach of the covenant,

there had not as yet been a denial of justice by the United States. For these reasons we hold that the claim is not barred by article V of the Convention of 1853.

It is urged on behalf of the United States that the claim should be held to be barred by laches. There is no doubt that there has been laches on the part of Great Britain. The claim of the Canadian Cayugas to share in the annuity payments was brought to the attention of the British Colonial Office immediately after the War of 1812, and within a few years thereafter was repeatedly urged upon the Deputy Superintendent General of Indian Affairs in Canada. Yet it was not until 1899 that the British Minister at Washington presented the claim to the State Department of the United States. Also it must be conceded that the case is not as if New York had withheld the money entirely. That State had paid the whole amount of the annuity each year, in reliance upon its authority to decide who constituted the "Cayuga Nation". There is much to be said for an equity in favor of New York as to payments before the claim of the Canadian Cayugas was presented to the legislature of that State, in 1849. But no laches can be imputed to the Canadian Cayugas, who in every way open to them have pressed their claim to share in the annuities continuously and persistently since 1816. In view of their dependent position, their claim ought not to be defeated by the delay of the British Government in urging the matter on their behalf. Nor can New York be said to have been prejudiced by the delay after 1849, at which time the facts of the case had been brought to the notice of the legislature and a public commission had recommended that justice be done. On the general principles of justice on which it is held in the civil law that prescription does not run against those who are unable to act, on which in English-speaking countries persons under disability are excepted from the operation of statutes of limitation, and on which English and American Courts of Equity refuse to impute laches to persons under disability, we must hold that dependent Indians, not free to act except through the appointed agencies of a sovereign which has a complete and exclusive protectorate over them, are not to lose their just claims through the laches of that sovereign, unless at least there has been so complete and bona fide change of position in consequence of that laches as to require such a result in equity. In the present case by no possibility can there be said to have been a change of position without notice after 1849. Under all the circumstances, we think it will be enough to deny interest on the share of the Canadian Cayugas in past installments of the annuity and to let the payments from 1811 to 1849 stand as made.

By the third prayer of the Memorial, Great Britain seeks a declaration that the Canadian Cayugas are entitled to the annuity for the future. Great Britain, for reasons already stated, is not entitled to such a declaration. Nor have we jurisdiction to make a declaration that the Canadian Cayugas are entitled to share in the annuity for the future. Our powers are limited to a money award, and we must consider how we may frame a money award so as to give effect by that means to the substantive rights of the parties and reach a just result. Accordingly we think the award should contain two elements: (1) an amount equal to a just share in the payments of the annuity from 1849; (2) a capital sum which at 5 % interest will yield half of the amount of the annuity for the future. If by means of an award the United States is held to pay these sums, we think that Government will have been required to perform the covenant in article IX of the Treaty of Ghent so far as specific performance may be achieved through a money award. The Canadian Cayugas are in a legal condition of pupilage. A sum in the hands of their *quasi* guardian sufficient to pay their share of the annuities for the future will fully protect them and give them what they are entitled to under the Treaty of Ghent.

In explanation of the way in which we have arrived at the amount of the award, we may say that as to the second element we have taken a sum sufficient to yield an income equal to half of the annuity because the evidence is too uncertain and controversial and the relative numbers fluctuate too much to permit of an exact proportion. Hence, in the absence of any clear mathematical basis of distribution, we proceed upon the maximum that equality is equity. In view of all the evidence we are satisfied that it is not New York nor the United States that will suffer by reason of any margin of error. As to the first element, as it is palpable that in any possible reckoning the Canadian Cayugas have always been numerically much more than half the tribe, we feel that we should be quite justified in awarding sixty per cent of the payments after 1849. But out of abundant caution and in view of the fact that New York actually paid out the whole amount each year under claim of right, we fix the whole amount, including both the elements above set forth, at one hundred thousand dollars.

We award one hundred thousand dollars.