Foreign relations of the United States, 1902. United States vs. Mexico. In the matter of the case of the Pious Fund of the Californias. Appendix II 1902

United States Department of State
Washington, D.C.: U.S. Government Printing Office, 1902

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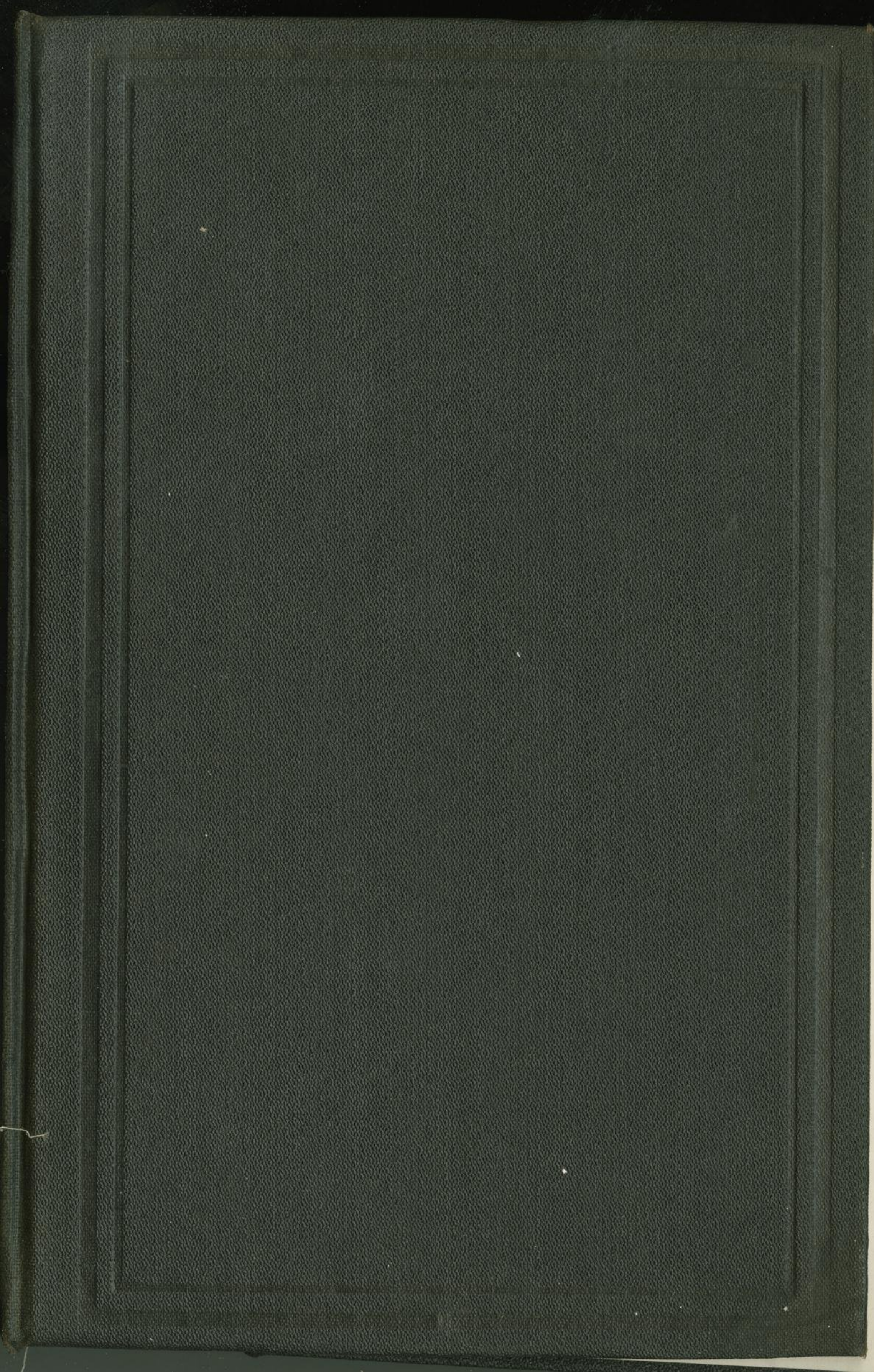

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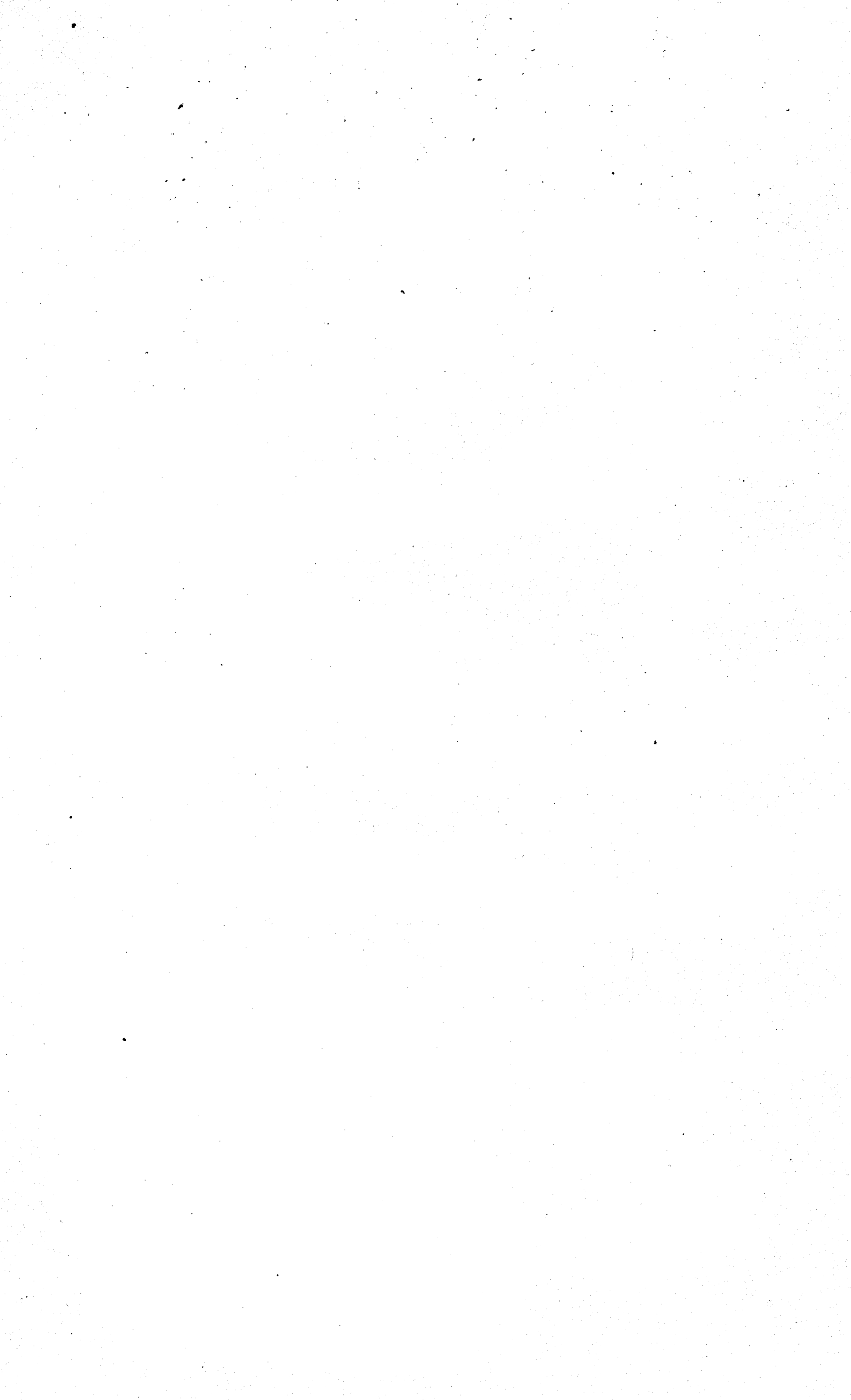


APPENDIX II.

FOREIGN RELATIONS

OF THE

UNITED STATES,

1902.

UNITED STATES vs. MEXICO.

IN THE MATTER OF THE CASE OF

THE PIOUS FUND OF THE CALIFORNIAS.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1903.

UNITED STATES vs. MEXICO.

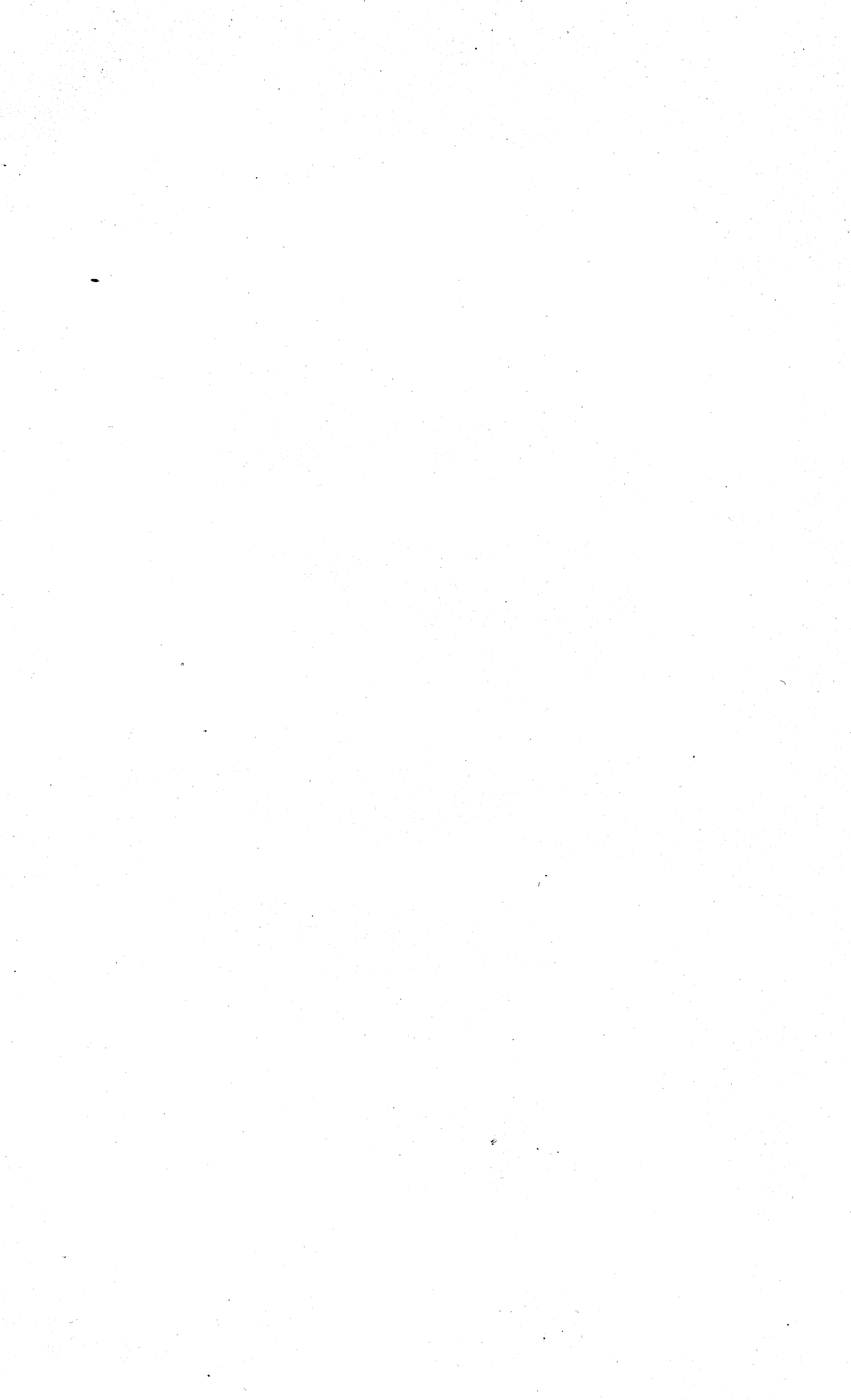
REPORT OF JACKSON H. RALSTON, AGENT OF THE UNITED STATES AND OF COUNSEL,

IN THE MATTER OF THE CASE OF THE

PIOUS FUND OF THE CALIFORNIAS,

HEARD BEFORE

A TRIBUNAL OF THE PERMANENT COURT OF ARBITRATION UNDER THE HAGUE CONVENTION OF 1899, SITTING AT THE HAGUE SEPTEMBER 15, 1902, TO OCTOBER 14, 1902, WITH PLEADINGS, APPENDIX, EXHIBITS, BRIEFS, AND RECORD OF THE ENTIRE PROCEEDINGS.



The SENATE:

In response to the Senate resolution of the 4th instant, I transmit herewith a report from the Secretary of State forwarding the report of the agent of the United States in the case of the United States *v.* Mexico before the Permanent Court of Arbitration under The Hague Convention.

THEODORE ROOSEVELT.

WHITE HOUSE,
December 9, 1902.

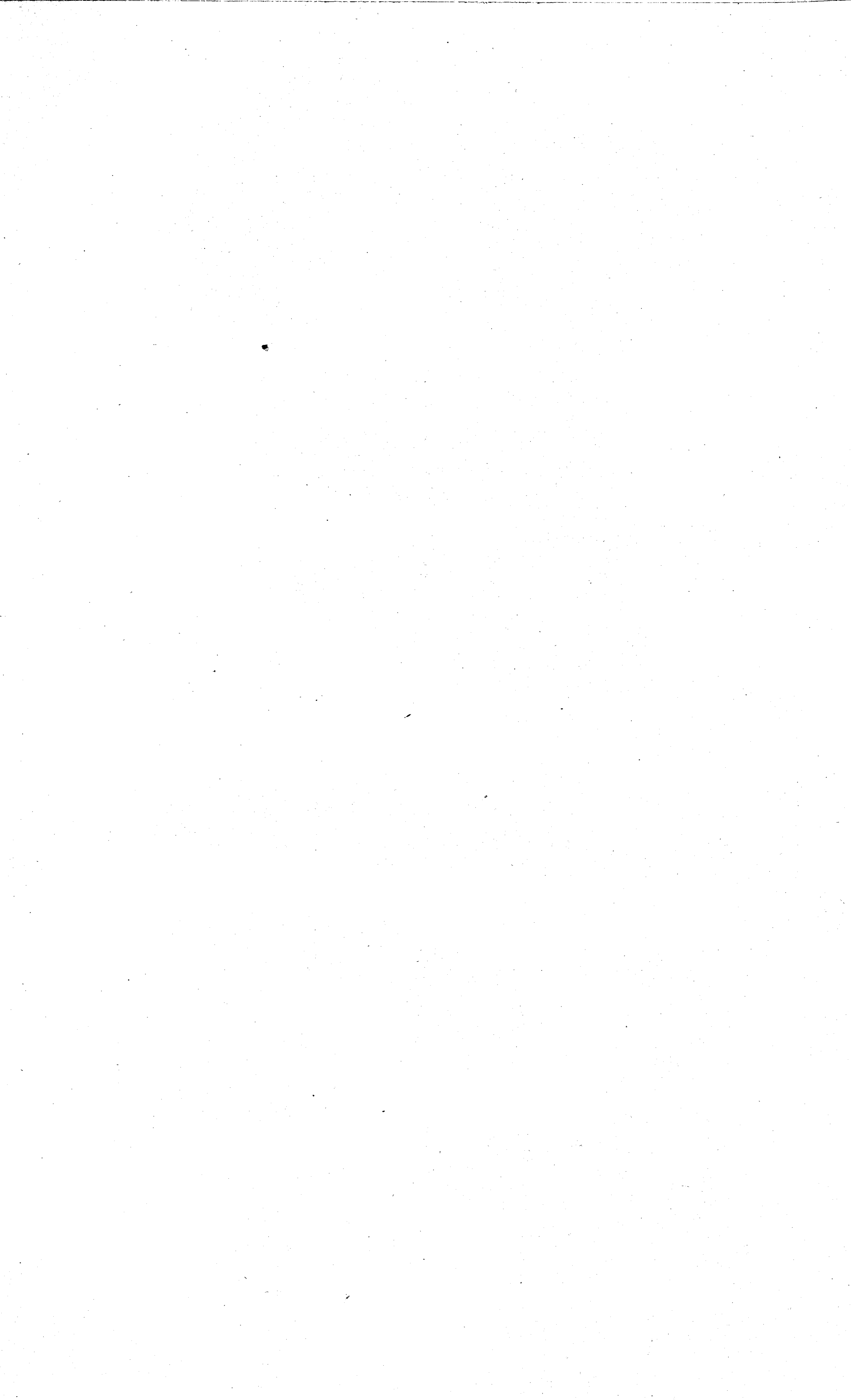
The PRESIDENT:

The Secretary of State, to whom was referred the resolution of the Senate of December 4, 1902, requesting the President, "if not incompatible with the public interest, to send to the Senate the report and accompanying papers of the agent of the United States in the case of the United States *v.* Mexico before the Permanent Court of Arbitration under The Hague Convention," has the honor to lay before the President a copy of the agent's report with pleadings, appendix, exhibits, briefs, and record of the entire proceedings.

Respectfully submitted.

JOHN HAY.

DEPARTMENT OF STATE,
Washington, December 6, 1902.



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[a] No briefs were submitted on behalf of Mexico, except the printed argument prepared by the Mexican agent and embodied in the record of proceedings, commencing on page 252.

[b] The exhibits noted herein include all presented by the United States, except maps, of which there were two, one being copy of the map attached to the treaty of Guadalupe Hidalgo, and the other a map showing the Indian reservations of the United States. No exhibit was submitted by Mexico, except the Pleito de Rada, a book of about 1,000 pages, a summary of the contents of which is to be found as Exhibit B, on page 37 et seq. of the replication of the United States, and here found at page 83.

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[a] All of the arguments delivered before the tribunal were revised by the speakers, save that as to a small part of Mr. Pardo's, the Mexican agent, he unfortunately lacked opportunity of revision, and some errors may exist therein.

PART I.

Report of agent, with English translation of the award.

REPORT OF JACKSON H. RALSTON, AGENT OF THE UNITED STATES AND OF COUNSEL, IN THE MATTER OF THE PIOUS FUND CASE.

WASHINGTON, D. C., *November 10, 1902.*

Hon. JOHN HAY,
Secretary of State of the United States, Washington, D. C.

SIR: I have the honor to submit the following report as agent of the United States in the matter of the claim of the Pious Fund of the Californias, submitted to arbitration by the United States and the Republic of Mexico under the terms of the protocol between the Hon. John Hay, Secretary of State of the United States, and Señor Don Manuel de Azpiroz, ambassador extraordinary and plenipotentiary to the United States of America for the Republic of Mexico, concluded at Washington on May 22, 1902, and ratified by the Mexican Senate May 30, 1902.

Before entering into an account of my own duties in connection therewith, it may be proper to recall some of the circumstances attending the claim in question.

As early as the year 1697 certain members of the Order of Jesus, with the permission of the King of Spain and upon the condition that they should not have power to draw against or from the royal revenues for such purpose, undertook the conversion of the Indians of the Californias, and to effect this end collected considerable sums of money and entered upon their work. From time to time large contributions were made to assist the development of the missions established or designed to be established by them or by their successors, the total of such contributions down to the year 1731 reaching $120,000. In 1735 properties valued at about $400,000 were deeded for the same purpose, and in 1747 an additional contribution, finally amounting to the sum of $120,000, was made. Later, and about the year 1784, some $400,000 reached the fund from another source.

These moneys, to which were added various smaller contributions from time to time from other sources, constituted what became known as "the Pious Fund of the Californias," which, during the earlier portion of its existence, was entirely managed and controlled by the Order of Jesus. Later, and upon the expulsion of that order from the dominions of the King of Spain, that Monarch acted as trustee, delivering the charge of the missions of Upper California to the Franciscans, and of Lower California to the Dominicans. When Mexico threw off her allegiance to Spain, the Mexican Government, through a junta, managed the fund for the pious uses intended by the founders. On September 19, 1836, Mexico enacted a law looking toward the establishment of a bishopric for the two Californias, and providing that the person selected therefor should receive from the public revenues

$6,000 per annum, with certain additional allowances, and further providing that "the property belonging to the Pious Fund of the Californias shall be placed at the disposal of the new bishop and his successors, to be by them managed and employed for its objects or other similar ones, always respecting the wishes of the founders of the fund."

The Mexican legation to the Holy See, on April 6, 1840, notified the Papacy that "the Mexican Government had taken all proper measures so that the new prelate may not lack a decent income, which is necessary to sustain the expenses and respect and the dignity of a bishop, and in addition, according to a decree of Congress, the Pious Fund destined for the support of missions in the Californias is to be placed at his disposal."

Immediately after receiving this notification, and in consequence thereof, on April 27, 1840, the bishopric of the Californias was created, and Francisco Garcia Diego, last president of the missions, appointed thereto, he assuming his office in the latter part of the year.

On February 8, 1842, by decree of that date, the Mexican Government repealed the law of September 19, 1836, placing the management of the Pious Fund in the hands of the bishop of the diocese, and reassumed its direction, as the decree said, "for the purpose of carrying out the intention of the donors in the civilization and conversion of the savages."

On October 24 of the same year a further decree was passed, formally incorporating the properties of the Pious Fund into the national treasury, and directing the sale of the real estate and other property for the capital represented by their annual product at 6 per cent per annum, and acknowledging an indebtedness of 6 per cent per annum on the total proceeds of the sale, at the same time pledging the revenue from tobacco to the payment of the income corresponding to the capital of said fund.

After the purchase of Upper California by the United States from Mexico in 1848, Mexico failed to pay any part of the income to the proper recipients in Upper California, and as a consequence, upon the formation of the mixed commission, under the treaty of 1868, to adjust claims of citizens of the United States or of Mexico against the other Government, the archbishop of San Francisco, and the bishops of Monterey and Grass Valley, through the American agent, presented their claim against the Republic of Mexico for a proper portion of the income of said fund, bringing it to the attention of the mixed commission on March 30, 1870, a formal memorial being filed December 31, 1870. A large amount of evidence was filed with the memorial, and Mr. Cushing, on behalf of Mexico, on April 24, 1871, filed a motion to dismiss for the reasons shown in the Transcript on page 67. After full consideration of this motion and of all the evidence adduced on behalf either of the United States or Mexico, the American arbitrator (Transcript, p. 523 et seq.) found in favor of the claimants for $904,700.99, and the Mexican arbitrator for the defendant Government (Transcript, p. 527 et seq.).

Because of this difference of opinion, the case was submitted to the umpire, Sir Edward Thornton, who, on November 11, 1875, awarded against Mexico and in favor of the claimants the sum of $904,700.99 in Mexican gold, being twenty-one years' interest at the rate of $43,080.99 per year; or, in other words, 6 per cent upon one-half of the capitalized value of the Pious Fund, it being considered by him that the proper

apportionment of interest in the fund itself between Upper and Lower California would be one-half to each (Transcript, p. 606). Attention being called to an error in computation, this sum total was, by the further order of the umpire, reduced to $904,070.99 (Transcript, p. 650). This award was duly paid by Mexico, although the Mexican secretary of foreign affairs, by a letter, on pages 77 and 78 of the Diplomatic Correspondence, said that "though the final award in the case only refers to interest accrued in a fixed period, said claim should be considered as finally settled *in toto*, and any other fresh claim in regard to the capital of said fund or its interest, accrued or to accrue, as forever inadmissible." This position Secretary Fish (Diplomatic Correspondence, p. 79) declined to entertain. Mexico, on January 20, 1890, made its last payment on account of the Pious Fund award, and shortly thereafter, and on August 3, 1891, Hon. William F. Wharton, as Acting Secretary of State, took up the matter of the claim for interest which had accrued since 1869 (Diplomatic Correspondence, p. 23); the same subject being renewed by later Secretaries of State, including Hon. James G. Blaine, Hon. John W. Foster, Hon. Walter Q. Gresham, Hon. John Sherman, Hon. W. R. Day, and, finally, by yourself.

As the immediate result of the work performed under your direction, the protocol of May 22, 1902, was entered into with Mexico (Session Statutes, Fifty-seventh Congress, first session, Treaties, p. 142), providing for the reference to a tribunal, to be constituted in general conformity with the provisions of the Hague Peace Convention, of the dispute between the two countries, such tribunal having the power to determine:

"1. If said claim, as a consequence of the former decision, is within the governing principle of *res judicata*, and

"2. If not, whether the same be just;

"And to render such judgment and award as may be meet and proper under all the circumstances of the case."

Pursuant to the terms of this protocol, the United States served upon Mexico on July 3, 1902, a copy of the memorial, setting forth "the origin and amount of their claim," and on August 12, 1902, Mexico delivered to the Department of State of the United States "a statement of its allegations and grounds of opposition to said claim." Meanwhile the United States had prepared and printed a copy of the proceedings had before the Mixed Commission of 1868, the work above referred to, on behalf of the United States, having been performed under my direction, pursuant to appointment by you as agent in the case under date of May 26, 1902.

Following the terms of the protocol, the United States selected as its nominees for the special tribunal to determine the matter in controversy, Prof. F. de Martens, of Russia, member of the Permanent Court of Arbitration, and the Right Hon. Sir Edward Fry, of England, likewise member of said court, while on behalf of Mexico there were named Mr. T. M. C. Asser and Jonkheer A. F. de Savornin Lohman, both of Holland, likewise members of said court, Mr. Asser taking the place of Sig. Guarnaschelli, of Italy, who has declined the position. The four gentlemen so named met at the hotel of the Permanent Court of Arbitration on Monday, September 1, 1902, for the selection of the fifth, who, under the terms of The Hague Peace Convention, was entitled to act as president, and their choice fell upon Prof. Henning Matzen, of Copenhagen, member of the Permanent Court of Arbitra-

tion. Professor Matzen accepted the duties imposed upon him, and the court opened its first formal session at The Hague on Monday, September 15, 1902.

The judges upon assembling were greeted in their private chamber by Baron van Lynden, president of the administrative council of the court, and after the exchange of felicitations, the court was formally opened, the address of the president made at that time being replied to by myself, as agent on the part of the United States, and Señor Don Emilio Pardo, as agent on behalf of the Mexican Republic.

His Excellency L. H. Ruyssenaers, secretary-general of the court, was appointed secretary, and to assist him Mr. Walter S. Penfield and Mr. Luis Pardo acted, respectively, as the American and Mexican secretaries.

The sessions for the hearing of arguments extended over ten days, occurring on September 15, 17, 22, 23, 24, 26, 27, 29, 30, and October 1, on which latter date the discussions were closed, the decision being finally given at a meeting on October 14, 1902.

In matters of formal precedence, the preference was given to the United States, the idea being to place the national representatives according to the alphabetical order indicated by the names of their respective countries, and "Etats-Unis d'Amérique" preceding "Etats-Unis Mexicains."

The official language of the court was French, but as all of the arbitrators were familiar with both French and English, the right was extended to the representatives of the United States to address the court in English.

The discussion was opened by Senator William M. Stewart, of Nevada, who considered very fully and clearly the facts of the case, making some incidental observations with relation to the law applicable thereto. He was followed by Mr. Garret W. McEnerney, who analyzed thoroughly the facts surrounding the creation and growth of the Pious Fund and the action of Mexico and Spain with relation thereto, discussing somewhat as well the subject of *res judicata*. As American agent and as of counsel, I followed Mr. McEnerney, devoting myself to the questions of law arising in connection with the American contentions upon the subject of *res judicata* and also the application of that theory to arbitral awards. M. Delacroix, of Belgium, of counsel for Mexico, followed with a lengthy analysis of the facts from the Mexican standpoint, and in turn was succeeded by M. Beernaert, who discussed the subject of *res judicata*, the Mexican opening being concluded by Señor Don Emilio Pardo, the Mexican agent. In reply for the United States, M. Descamps, of Belgium, presented his views with reference to the subject of *res judicata* or *chose jugée* as understood by the civil law, and the case of the United States was concluded by Judge William L. Penfield, Solicitor of the Department of State, who summed it up largely from an international standpoint. Under the rules of practice established by the court, the right to conclude was given to the defendant, and MM. Delacroix and Beernaert closed the case with discussions in the line of their original contention.

Upon the conclusion of the arguments on October 1, an adjournment was had for consideration and preparation of the opinion, the court reassembling, after notice to the parties, on October 14, as indicated, to deliver its judgment, at which time there were present

the representatives of the United States and Mexico, and as well a very large number of the members of the Permanent Administrative Council and others at The Hague interested in international affairs.

It is a source of gratification to me to be able to state that all of the leading contentions indulged in on behalf of the United States were unanimously sustained by the tribunal. In the first argument submitted by the American agent it had been maintained, among other things, that "the amount of the proper judgment in this case was fixed by the terms of the former award;" that an arbitral court had "inherent power to pass upon its own jurisdiction," and particularly was this true as to the Mixed Commission of 1868; that an arbitral decision, more especially the decision of a Mixed Commission, was entitled to be given the effect of *res judicata* as to the matters passed upon by it as fully as the judgments of courts established by a State, and that the former award was to be looked at in its entirety in order to determine as to what it was *res judicata*. All of these positions, important in themselves and important as bearing upon the future history of international arbitrations, received the fullest indorsement.

In addition to supporting the above propositions, all the counsel for the United States contended that the Pious Fund controversy was eminently international in character, and that national laws of prescription could not be invoked to defeat such a claim as ours, presented before an international body. These positions also received the explicit sanction of the tribunal. The only point upon which the United States could be considered as having failed of success was as to the currency in which the award ought to be paid, the tribunal declaring that payment should be made in the legal currency of Mexico, and as to its direction that payment be made in gold, the award of Sir Edwin Thornton was not to be considered as *res judicata*, except with relation to the years embraced within its terms, payment in gold relating to the execution of the award, and not to the foundation of the right in controversy. We had believed that there were many equitable considerations, such as long delay in the payment made by Mexico, the gradual fall in the price of silver during the time, the fact that gold had remained constant in value, and the property originally taken was valued in gold, even at less than its true value, etc., which would have justified a different view, but we accepted cheerfully the findings of the tribunal. The award was highly satisfactory, in that it directed perpetual payment of the yearly annuity, thus by its express language settling forever the controversy.

As a matter of convenience, I attach immediately to this report an English translation of the award.

By the terms of the protocol a period of eight days was allowed within which revision could be asked, but inasmuch as by the further provision of The Hague Convention such revision could only be demanded on the ground of "the discovery of some new fact calculated to exercise a decisive influence on the award, and which at the time the discussion was closed was unknown to the tribunal and to the party demanding the revision," no appeal therefor was possible, the case having been decided upon a proposition of law, and none was sought.

All matters submitted by the United States to the Permanent Court of Arbitration were presented in print, a method which facilitated and

lightened the work of the court, and by hastening the determination of the case proved to be highly economical.

On the first day the American agent laid before the court the printed volume containing the transcript of the proceedings in the case of Alemany et al *v.* Mexico, before the mixed commission of 1868, diplomatic correspondence between the two Governments relative to the Pious Fund, and the memorial of the United States; also submitting an appendix containing the various treaties and conventions between Mexico and the United States, the rules of practice before the former mixed commission and The Hague Peace Convention. There was also added a replication to the answer of Mexico, with certain exhibits attached thereto of presumed importance and value to the court, as well as the statement and brief of the agent and counsel of the United States, and briefs prepared by Senator Stewart and Mr. Kappler and by Messrs. Doyle & Doyle. Some objection was made to the submission of the replication as being a document not contemplated by the protocol. This was withdrawn, and it was submitted, the right to respond thereto being reserved to Mexico. Later other documents were presented, either as independent pieces of evidence on the part of the United States or in reply to demands for discovery made by Mexico. In this connection it is to be noted that the two demands for discovery submitted by Mexico were fully and completely answered by the United States, even though not considered pertinent to the issues, while similar demands on behalf of the United States met with only partial response, it being stated by the agent of Mexico that fuller answer within the limited time was impossible because of the extent of the records to be examined and the confusion in which some of them were found.

I shall not in this report, brief in character as it is, take space to discuss the questions submitted to the Permanent Court of Arbitration. The considerations in support of, or antagonism to, the positions taken by the United States are set forth with the utmost fullness of detail in the briefs and record of proceedings hereto attached, and no useful purpose would be subserved by their recapitulation. The result, as above indicated, was in a high degree satisfactory to the United States and justifies the wisdom of the course pursued by your Department in insisting upon a settlement of this dispute, so long a cause of difference between the two countries.

The relations between the agent and the counsel of the United States and the court and representatives of the opposing Government were at all times agreeable and friendly, and the proceedings were marked by no incident of an unpleasant character. It is to be believed that an important element contributing to this condition was the entirely neutral character of the court, the protocol having provided that the nationals of the contending parties should not be eligible for membership. The tribunal therefore regarded itself as in no degree composed of the representatives of either party, but entirely divorced from any bias which might have been assumed to exist because of the circumstances of the appointment of its members. I am confident that if the precedent in this respect now set be followed in future arbitrations under The Hague Peace Convention, much good may be hoped therefrom.

The two nations concerned in the dispute may congratulate themselves upon having appeared before able, painstaking, conscientious

judges, whose devotion to duty, clearness of comprehension, and celerity of action can not fail to do much to advance the cause of international arbitration. At the same time it is a pleasure to add that the secretary-general of the court, His Excellency L. H. Ruyssenaers, and the assistant secretary, Mr. J. M. Röell, were of the greatest possible assistance to the court, agents, and counsel, meeting most admirably the varied and exacting requirements of their positions.

I desire to tender my most sincere thanks to yourself and to all officials and employees of the Department of State for the cordial assistance rendered in the prosecution of this case. The utmost credit must be given to Judge William L. Penfield, Solicitor of the Department, for the able, earnest, and assiduous attention given by him to the controversy. The Department furnished for its prosecution at The Hague Mr. H. B. Armes, Mr. Walter S. Penfield, Miss Margaret M. Hanna, and Miss Victoria G. Peacock (the last two translators), and in addition I had the aid of Miss L. May Larkin as stenographer. Mr. W. T. S. Doyle, aside from important work performed by him as attorney, gave most efficient help as a translator. All of those mentioned labored with earnestness and enthusiasm to bring about a successful result, and without their assistance the large amount of work indicated by the accompanying documents could not have been completed. As it is, with all the factors mentioned, we may feel that nothing was neglected which might tend to bring about the favorable result finally achieved.

From Mr. Stanford Newell, envoy extraordinary and minister plenipotentiary of the United States to the Netherlands, and Mr. John W. Garrett, secretary of the legation, many valued favors and much needed assistance were thankfully received. Other diplomatic representatives cheerfully responded to all calls made upon them.

I submit at this time, to be bound herewith, copies of all documents presented before the Permanent Court of Arbitration not contained in the volume heretofore printed, the documents so submitted to be printed, arranged, and bound with this report in the manner indicated in the preceding table of contents.

Renewing my thanks to you for your constant courtesy, I have the honor to be,

Very respectfully, your obedient servant,

JACKSON H. RALSTON,
Agent of the United States in the Pious Fund Case, and of Counsel.

TRANSLATION OF THE SENTENCE OF THE PERMANENT COURT OF ARBITRATION IN THE MATTER OF THE PIOUS FUND OF THE CALIFORNIAS, RENDERED OCTOBER 14, 1902.

The tribunal of arbitration constituted by virtue of the treaty concluded at Washington, May 22, 1902, between the United States of America and the United Mexican States.

Whereas, by a compromis (agreement of arbitration) prepared under the form of protocol between the United States of America and the United Mexican States, signed at Washington, May 22, 1902, it

was agreed and determined that the differences which existed between the United States of America and the United Mexican States, relative to the subject of the "Pious Fund of the Californias," the annuities of which were claimed by the United States of America for the benefit of the Archbishop of San Francisco and the Bishop of Monterey, from the Government of the Mexican Republic, should be submitted to a tribunal of arbitration, constituted upon the bases of the convention for the pacific settlement of international disputes, signed at The Hague, July 29, 1899, which should be composed in the following manner—that is to say:

The President of the United States of America should designate two arbitrators (nonnationals), and the President of the United Mexican States equally two arbitrators (nonnationals); these four arbitrators should meet September 1, 1902, at The Hague, for the purpose of nominating the umpire, who at the same time should be of right the president of the Tribunal of Arbitration.

Whereas the President of the United States of America named as arbitrators:

The Right Hon. Sir Edward Fry, LL. D., former member of the court of appeals, member of the privy council of His Britannic Majesty, member of the Permanent Court of Arbitration; and

His Excellency M. De Martens, LL. D., privy councilor, member of the council of the imperial ministry of foreign affairs of Russia, member of the Institute of France, member of the Permanent Court of Arbitration.

Whereas the President of the United Mexican States named as arbitrators:

Mr. T. M. C. Asser, LL. D., member of the council of state of the Netherlands, former professor at the University of Amsterdam, member of the Permanent Court of Arbitration; and

Jonkheer A. F. de Savornin Lohman, LL. D., former minister of the interior of the Netherlands, former professor at the Free University at Amsterdam, member of the second chamber of the States-General, member of the Permanent Court of Arbitration; which arbitrators at their meeting, September 1, 1902, elected, conformably to articles 32–34 of the Convention of The Hague of July 29, 1899, as umpire and president of right of the Tribunal of Arbitration,

Mr. Henning Matzen, LL. D., professor at the University of Copenhagen, councilor extraordinary to the supreme court, president of the Landsthing, member of the Permanent Court of Arbitration; and

Whereas, by virtue of the protocol of Washington of May 22, 1902, the above-named arbitrators, united in tribunal of arbitration, were required to decide:

1. If the said claim of the United States of America for the benefit of the Archbishop of San Francisco and the Bishop of Monterey was within the governing principle of *res judicata* by virtue of the arbitral sentence of November 11, 1875, pronounced by Sir Edward Thornton, as umpire.

2. If not, whether the said claim was just, with power to render such judgment as would seem to them just and equitable.

Whereas, the above-named arbitrators having examined with impartiality and care all the documents and papers presented to the tribunal of arbitration by the agents of the United States of America and of the United Mexican States, and having heard with the greatest atten-

tion the oral arguments presented before the tribunal by the agents and the counsel of the two parties in litigation;

Considering that the litigation submitted to the decision of the tribunal of arbitration consists in a conflict between the United States of America and the United Mexican States, which can only be decided upon the basis of international treaties and the principles of international law;

Considering that the international treaties concluded from the year 1848 to the compromis of May 22, 1902, between the two powers in litigation, manifest the eminently international character of this conflict;

Considering that all the parts of the judgment or the decree concerning the points debated in the litigation enlighten and mutually supplement each other, and that they all serve to render precise the meaning and the bearing of the dispositif (decisory part of the judgment) and to determine the points upon which there is *res judicata* and which thereafter can not be put in question;

Considering, that this rule applies not only to the judgments of tribunals created by the State, but equally to arbitral sentences rendered within the limits of the jurisdiction fixed by the compromis;

Considering, that this same principle should for a still stronger reason be applied to international arbitration;

Considering, that the convention of July 4, 1868, concluded between the two States in litigation, had accorded to the Mixed Commission named by these States, as well as to the umpire to be eventually designated, the right to pass upon their own jurisdiction;

Considering, that in the litigation submitted to the decision of the Tribunal of Arbitration, by virtue of the compromis of May 22, 1902, there is not only identity of parties to the suit, but also identity of subject-matter, compared with the arbitral sentence of Sir Edward Thornton, as umpire, in 1875, and amended by him October 24, 1876;

Considering, that the Government of the United Mexican States conscientiously executed the arbitral sentence of 1875 and 1876 by paying the annuities adjudged by the umpire;

Considering, that since 1869 thirty-three annuities have not been paid by the Government of the United Mexican States to the Government of the United States of America, and that the rules of prescription, belonging exclusively to the domain of civil law, can not be applied to the present dispute between the two States in litigation;

Considering, so far as the money is concerned in which the annual payment should take place, that the silver dollar, having legal currency in Mexico, payment in gold can not be exacted, except by virtue of an express stipulation;

Considering that in the present instance such stipulation not existing, the party defendant has the right to free itself by paying in silver; that with relation to this point the sentence of Sir Edward Thornton has not the force of *res judicata*, except for the twenty-one annuities with regard to which the umpire decided that the payment should take place in Mexican gold dollars, because question of the mode of payment does not relate to the basis of the right in litigation, but only to the execution of the sentence.

Considering, that according to article 10 of the protocol of Washington, of May 22, 1902, the present Tribunal of Arbitration must determine, in case of an award against the Republic of Mexico, in what money payment must take place;

For these reasons the Tribunal of Arbitration decides and unanimously pronounces as follows:

1. That the said claim of the United States of America for the benefit of the Archbishop of San Francisco and of the Bishop of Monterey is governed by the principle of *res judicata* by virtue of the arbitral sentence of Sir Edward Thornton, of November 11, 1875; amended by him October 24, 1876.

2. That conformably to this arbitral sentence, the Government of the Republic of the United Mexican States must pay to the Government of the United States of America the sum of $1,420,682.67 Mexican, in money having legal currency in Mexico, within the period fixed by article 10 of the protocol of Washington of May 22, 1902.

This sum of $1,420,682.67 will totally extinguish the annuities accrued and not paid by the Government of the Mexican Republic—that is to say, the annuity of $43,050.99 Mexican from February 2, 1869, to February 2, 1902.

3. The Government of the Republic of the United Mexican States shall pay to the Government of the United States of America on February 2, 1903, and each following year on the same date of February 2, perpetually, the annuity of $43,050.99 Mexican, in money having legal currency in Mexico.

Done at The Hague in the hotel of the Permanent Court of Arbitration in triplicate original, October 14, 1902.

HENNING MATZEN.
EDW. FRY.
MARTENS.
T. M. C. ASSER.
A. F. DE SAVORNIN LOHMAN.

PART II.

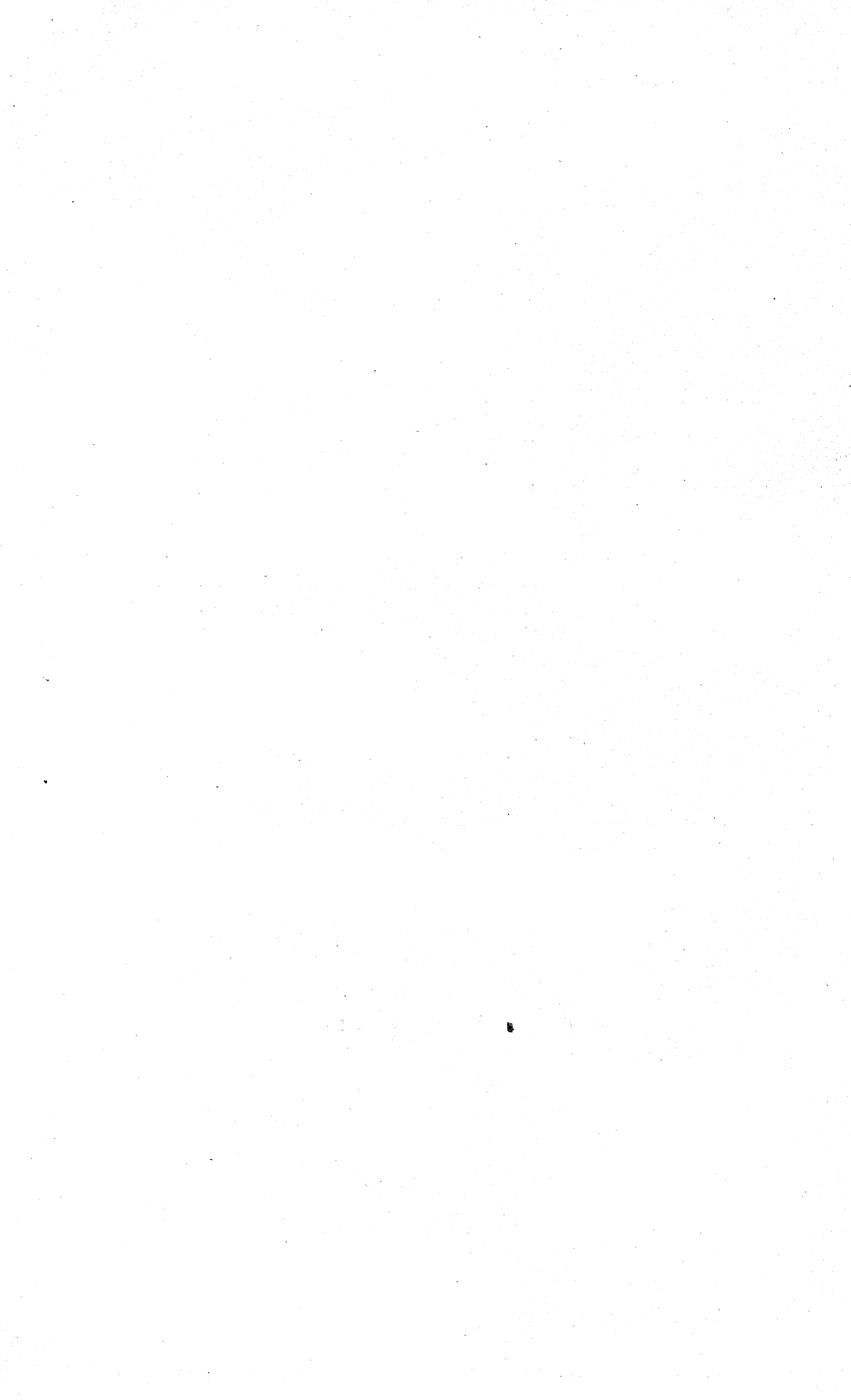
PLEADINGS.

Memorial of the United States.

Answer of Mexico in Spanish and translation into French, prepared by the Mexican agent

Replication of the United States, with exhibits consisting of English translation of Mexican answer with notes, résumé of de Rada litigation, statement as to Indian populations of Lower California, and copy of deed of Ciénega del Pastor.

Conclusions (rejoinder on behalf of Mexico).



MEMORIAL OF THE CLAIM OF THE UNITED STATES OF AMERICA AGAINST THE REPUBLIC OF MEXICO.

(*Submitted to the determination and judgment of the arbitral court provided for in the protocol of an agreement between the said Republics, bearing date on the 22d day of May, A. D. 1902.*)

This claim is made by the United States aforesaid, on behalf of the Roman Catholic Church, of what was formerly known as Upper California, represented by the Roman Catholic Archbishop of San Francisco, California, and the Roman Catholic Bishop of Monterey, California, successors of the former Bishop of the Californias.

I. The said claimants show to this honourable court, that the said Roman Catholic Archbishop of San Francisco is a corporation sole incorporated under the laws of the State of California, and the said Roman Catholic Bishop of Monterey is also a corporation sole incorporated under the same laws; that the Most Reverend Patrick W. Riordan is the incumbent of said first mentioned corporation, and the Right Reverend George Montgomery incumbent of the said last mentioned one, and that as such Archbishop and Bishop they are successors of the Right Reverend Francisco Garcia Diego, formerly Bishop of the Californias, now deceased.

The said claimants thereupon allege that the Republic of Mexico is indebted to the Roman Catholic Church of that portion of the United States which was formerly designated and known as Upper California, represented by the Bishop and Archbishop aforesaid, in a large sum of money, to-wit: in the sum of one million four hundred and twenty thousand six hundred and eighty-nine dollars and sixty-seven cents, in Mexican Gold money, for the portion of the interest or income which has accrued since February 2nd, 1869, on the capital of the Pious Fund of the Californias corresponding, and properly belonging to what was anciently known as "Alta California" or Upper California, now a portion of the United States of America.

II. The Pious Fund of the Californias was a great charity, founded and endowed during the closing years of the seventeenth and portion of the eighteenth century, for the purpose of propagating the Catholic faith in unsettled portions of Spanish North America, called the Californias, and included, as did the whole scheme of the Spanish conquest of America, the conversion to the Catholic faith of the Indian tribes of the country, as well as the establishment of churches, the support of the clergy and the maintenance of divine worship there, according to the faith and rites of the Catholic Church.[a] It was confided to the

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[a] Nachrichten von der Amerikanischen Halbinsel Californien; Geschreiben von einem Priester der Gesellschaft Jesu, &c. Manheim, 1772, pp. 198—199 (Hereafter cited as "Nachrichten.")

Noticia de la California y de su Conquista Temporal y Espiritual hasta el Tiempo Presente. Sacada de la Historia Manuscrita, Formada en México año de 1739, por el Padre Miguel Venegas, de la Compañía de Jesús, &c., &c. Madrid, 1757. Vol. II, p. 11 et seq. (Hereafter cited as "Venegas.")

Society of Jesus. A copy of the foundation deed with a translation thereof is among the papers to be submitted to the Court, from which deed the following is an extract:

To have and to hold, to said missions founded, and which may hereafter be founded, in the Californias, as well for the maintenance of their religious, and to provide for the ornament and decent support of divine worship, as also to aid the native converts and catechumens with food and clothing, according to the custom of that country; so that if hereafter, by God's blessing, there be means of support in the reductions and missions now established, as *ex. gr.* by the cultivation of their lands, thus obviating the necessity of sending from this country provisions, clothing and other necessaries, the rents and products of said estates shall be applied to new missions to be established hereafter in the unexplored parts of the said Californias, according to the discretion of the Father Superior of said missions; and the estates aforesaid shall be perpetually inalienable, and shall never be sold, so that, even in the case of all California being civilized and converted to our holy catholic faith, the profits of said estate shall be applied to the necessities of said missions and their support: etc.

III. The said fund was contributed by private individuals and religious societies, and placed in the hands of the Society of Jesus in New Spain, for the purposes above indicated, and was held in trust and administered by the said Society. The income derivable from ten thousand dollars being found sufficient for the support of a mission each contributor of that sum was at first deemed to found a particular mission and was allowed to give it a name.[a] But there was no actual separation of the funds and the investment and management of them having been always united in the same hands, the aggregate of the moneys and property contributed, ere long became considerable and obtained and became known by the name of "The Pious Fund of the Californias." It originated in the year 1697,[b] when the Reverend Juan María Salvatierra and the Reverend Juan Ugarte, of that Society, began collecting means for the proposed undertaking, under the name of limosnas or alms, from charitable persons, to aid them in the work of Christianizing the inhabitants of the Californias, to attempt which they had obtained the permission of the Spanish Crown, on condition that the Public Treasury should not be called upon to furnish any money for the undertaking. A list of the earliest contributions for the purpose is to be found in a little work, published in Valencia in the year 1794, entitled "*Noticias de la provincia de Californias, en tres cartas de un sacerdote religioso, hijo del real convento de predicadores de Valencia, a un amigo suyo.*" (Carta II, pag 48, 49.)

In 1735 Don José de la Puente y Peña, Marquis de Villa-puente, and his wife, Doña Gertrudis de la Peña, Marchioness de las Torres de Rada, by deed of gift *inter vivos* conveyed to the Society of Jesus in New Spain, for the support of their missions in the Californias, estates and properties of great extent and importance, valued at the time at over four hundred thousand dollars; and to the fund thus augmented were aggregated the contributions enumerated in the "*Tres Cartas*," and others amounting to over one hundred and thirty thousand dollars. The purposes contemplated by the contributors being clearly expressed in the deed of the Marquis and Marchioness above named, that instrument came to be looked upon, and spoken of, as the foundation deed, although considerable contributions preceded it in time. Another large contribution to the fund of about one hundred

[a] Venegas Vol. II, pp. 12 and 13, 233, 235–236. Nachrichten, pp. 214, 222. *Tres Cartas*, ubi infra.

[b] Venegas Vol. II, p. 11–14. Nachrichten, p. 199.

and twenty thousand dollars followed, from the Duchess of Gandia,[a] and still another of great magnitude, from Doña Josefa Paula de Arguelles, a wealthy lady of Guadlajara, who by her will bequeathed one-fourth of her residuary estate to the Jesuit College of Santo Tomás of Guadlajara, and the remaining three-fourths to the Jesuit Missions of New Spain, and of the Philippine Islands, in equal parts. The bequest to the College was renounced by the legatees, and litigation ensued as to the disposition of the property of the testatrix, resulting in a decree or judgment, which was appealed to the Audiencia Real of New Spain and thence to the Council of the Indies. By the time a decision by that tribunal was reached the Jesuits had been expelled from the Spanish Dominions, and even suppressed by the Holy See; the management of the property devolved on the Crown and the three-fourths of this estate devised to these missions were therefore ordered by the decree to be employed in equal moieties in the Missions of New Spain and those of the Philippine Islands under the direction of the Monarch; one-half of them was thereupon aggregated to the Pious Fund of the Californias and of the other half was formed a fund for the support of the Missions in the Philippine Islands, the interest of which was periodically remitted to them for that purpose.

IV. The text of the Pragmatic Sanction expelling the Jesuits from the Spanish dominions is to be found in the Novísima Recopilacion Lib. I, Tít. 26, Ley III. Edicion de Salvá, Paris 1846, pp. 183, 184, 185. The Crown in taking possession of the properties that were held in trust, took them *cum onere*, or as expressed in Section 3, "*sin perjudicio de sus cargas, mente de los fundadores*," and thus the management of the whole Pious Fund of the Californias (for want of trustees capable of acting) devolved on the Crown, and continued to be conducted and managed, as a trust for the benefit and support of the Missions, by a Royal Commission, until the accomplishment of Mexican independence, when it passed to the hands of the new government, and remained in the management of Mexico down to the year 1836, when the Californias were erected into a diocese, and the Reverend Francisco Garcia Diego, having been appointed and consecrated Bishop thereof, the administration and control of the Pious Fund was transferred to him, as such, in pursuance of an Act of the Mexican Congress passed September 19th, 1836. On February 8th, 1842, General Santa Ana, then provisional President of the said Republic, with extraordinary powers, made a decree resuming the administration of the Pious Fund by the Mexican Government, and requiring all the properties of the Fund to be delivered to General Gabriel Valencia, whom he had commissioned for the purpose, to whom they were surrendered by Don Pedro Ramirez, the *apoderado* or agent of the Bishop, accompanied by an official inventory or *instruccion circunstanciada*, of which a copy forms part of the record of the former arbitration. On the 24th of October, 1842, in pursuance of another decree of the same provisional President, the properties of the Pious Fund were incorporated into the National Treasury of the Mexican Republic and directed to be sold, the Republic undertaking to pay interest on the proceeds at six per cent. per annum. War broke out between the United States and Mexico in 1846, which was terminated by the treaty of Guadalupe

[a] Storia della California, Opera póstuma del Nob. Sig. Abate D. Francesco Saverio Clavigero. 2 vols. Venice, 1789. Vol. II. pp. 139–140.

Hidalgo, bearing date February 2nd, 1848, and Upper California, being all the Territory originally claimed by Spain, and after its independence, by Mexico, north of the Gila River and of a line from the mouth of said river to the Pacific Ocean, at a point one league south of the Bay of San Diego, was ceded by Mexico to the United States in consideration of fifteen million dollars, and other considerations, amounting to several millions more.

The events, of which the above is a brief synopsis, are more fully related in the "Brief History of the Pious Fund of California," and amply corroborated by printed extracts from various historical works and public documents which form a part of the record of the former arbitration, to be presently referred to. Hence they are here related very succinctly.

V. During the twenty years immediately succeeding the treaty of Guadalupe Hidalgo many claims arose, made by citizens of each republic against the government of the other for damages, resulting from injuries of various sorts, and a convention for the settlement of all these various claims, was concluded between the two nations, bearing date July 4th, 1868 (to which as a matter of public international law reference is made without setting forth its terms), under which an international tribunal was constituted for the determination of all such claims, and their payment was provided for. The said tribunal opened its sessions in the City of Washington on the 31st of July, 1869. To this tribunal the Roman Catholic Archbishop of San Francisco and the Roman Catholic Bishop of Monterey, then in office, as successors of the Right Reverend Francisco Garcia Diego, Bishop of the Californias, presented a claim on behalf of the Roman Catholic Church aforesaid for so much of the interest on the capital of the Pious Fund accrued since the date of the treaty of Guadalupe Hidalgo, viz: the 2nd of February, 1848, as properly belonged to Upper California. The time for making awards under the said Convention of 1868 was originally limited to two years and six months from the first meeting of the Commission, viz: July 31st, 1869. But such time was enlarged by supplementary conventions between the two nations, dated April 19, 1871; November 27, 1872, and November 20, 1874; so that it finally expired on January 31, 1876, with six additional months thereafter, within which the Umpire was empowered to make his awards, in cases where the Commissioners had differed.

In the meantime, after a motion by the Counsel of Mexico to dismiss the aforesaid claim of the said Archbishop and Bishop on the ground that the Commission had not jurisdiction of the case, proofs were offered and argument on the merits of the claim suggested by each party, and on the 19th of May, 1875, the Mexican and American Commissioners filed their opinions in the case, whereby it appeared that they differed totally; the American Commissioner being of opinion that an award should be made in favor of the claimants for one-half of the interest at six per cent. per annum on the capital of the Pious Fund (the amount of which capital he decided to be $1,436,033.00) and the Mexican Commissioner being of opinion that no sum whatever should be awarded them. Thereupon, under the provisions of the said original Convention of July 4th, 1868, and the several conventions supplementary thereto, above mentioned, the said case was referred to Sir Edward Thornton, then Minister Plenipotentiary to the United States Government from the Queen of the United Kingdom of Great Britain and Ire-

land, who had been chosen and was acting as Umpire in such cases, for his decision. The decision of said Umpire not having been announced within the time allowed therefor by the supplementary convention of November 20th, 1874, to-wit: the 31st of January, 1876, another supplementary convention dated April 29th, 1876, was concluded between the two governments whereby the term within which the Umpire might make an award was further extended to November 20th of that year.

VI. On the 29th of November, 1875, the said Umpire signed his decision in favor of the claimants, and said decision became known to the Agent of the Mexican Republic, who, on January 29th, 1876, filed with the said Umpire a petition on behalf of Mexico for rehearing, and on September 19th of the same year presented an extended argument in support thereof. He pointed out an error of one thousand dollars in the addition of the items composing the capital of said Fund, which was rectified by the Umpire on the 18th of November, 1876, and on the same day said Umpire rendered his final award in the case in favor of the claimants, for the sum of $904,070.79 in Mexican Gold coin, being twenty-one years interest at 6 per cent. per annum on one-half of the capital of the said Pious Fund, to-wit: the principal sum of $717,516.50, which award was in due course fully and punctually paid by the said Republic of Mexico in accordance with the terms of the said convention of July 4th, 1868.

VII. The said Republic however again defaulted in the payment of the current interest on the said Pious Fund Capital, in consequence whereof and at the instance of the present incumbents (the said Joseph S. Alemany having meantime been translated to another diocese, and afterwards departed this life, and been duly succeeded as Archbishop of San Francisco by the Most Reverend P. W. Riordan; and the said Thadeus Amat having been succeeded by Francis Mora as Bishop of Monterey, who in his turn was also succeeded by the Right Reverend George Montgomery, being the present incumbent of the said diocese of Monterey, and the said Patrick W. Riordan of that of San Francisco), the government of the United States demanded payment thereof from the government of Mexico, which the said government of Mexico refused, and in fact, the annual interest of $43,050.99 remains unpaid for each and every year after the year 1868, down to the present day, the United States on behalf of the said prelates, insisting that the adjudication by the Umpire of the Mixed Commission created by the Convention of July 4th, 1868, above mentioned, establishes conclusively the amount of said annual interest to be the sum of $43,050.99, and the liability of Mexico for the payment thereof in Mexican Gold Coin on the 24th of October of each and every year after 1868 as *res judicata*, and Mexico denying such liability and the finality and conclusiveness of such judgment. Which question has been by the consent of the high contracting parties, by the protocol dated May 22nd, 1902, referred to this Honourable Court to determine.

VIII. Second. The said United States insist that, if the said liability and its amount are not deemed by this honorable Court to be conclusively established by the said adjudication made under the Convention of July 4th, 1868, then the indebtedness of Mexico, justly due to the said prelates, on behalf of their church as aforesaid, for the interest on the portion of the said Pious Fund, corresponding to what was formerly known as Upper California, is really a much larger sum than

that above demanded. And in support of said last allegation they aver that the following errors and omissions occurred in making said award, occasioned by the ignorance of counsel of material facts relating to the same, and their consequent failure to make proof thereof, and to oversight of the Commissioner and Umpire, as follows, viz.:

1. The claim for the amount received by the Mexican Government from sales, or otherwise from the property donated or bequeathed by Doña Josepha de Argüelles, was stated in the exhibit filed with the Memorial before the former Mixed commission, to amount to the sum of $681,946.00. A portion of this, amounting to $496,291.00 was erroneously claimed, having been already included in the enumeration of "assets of the pious fund" in the same exhibit. Of the remaining $185,654.91 thereof, $105,045 was improperly rejected, as will be shown by the evidence. The capital of the Pious Fund should therefore be increased by said last mentioned amount.

2. In making the said award the proceeds of the hacienda called the "Ciénaga del Pastor" were excluded from the computation of the said principal, because the same was stated in the inventory or "instruccion circunstanciada" of Don Pedro Ramirez to be embargoed or attached, and the claimants had no knowledge or means of learning the ultimate results of said attachment or embargo, or the amount realized by Mexico for the said hacienda. The said claimants have since learned and aver that the three-quarters of said hacienda belonging to the Pious Fund, were sold by the Government of Mexico for $213,750, which sum should therefore be added to the capital of the said Pious Fund, in the interest of which they were then and are still entitled to participate.

3. The award or opinion of Commissioner William H. Wadsworth which the Umpire adopted as the basis of his decision in the former arbitration shows that in calculating the amount of the capital of the Pious Fund, he deducted from the amount of the claims against the Mexican Government the sum of $7,000, *as a bad debt*, under the date of October 20th, 1829. This deduction was erroneous, and the adjudged capital of the said fund should be augmented by the said sum, and the income of the fund by the interest thereon amounting to $420 per annum. The said Commissioner and Umpire designate the said sum as a bad debt, referring to the *instruccion circunstanciada* of Don Pedro Ramirez, from which the item is taken, but the text of said document shows this to be an error, resulting from a misunderstanding of its language.

4. The claimants are informed and believe and therefore aver, that the Mexican Government borrowed from the Pious Fund, in or about the month of July, 1834, various sums amounting in the whole to $22,763.15, which loans have not, nor have any of them been repaid, and they therefore claim that the said sum of $22,763.15, which was omitted from the claim made before the Mixed Commission aforesaid, by reason of the ignorance of counsel of the facts, this amount should therefore be added to the aforesaid capital of the Pious Fund.

5. They also show that in the sale of the said hacienda of "Ciénaga del Pastor" was included certain personal property on said hacienda, under the name of "*llenos*," for the sum of $4,000, three-fourths of which belonged to the said Pious Fund, the capital of which should therefore be further increased by the amount of $3,000.

6. If the adjudication of the tribunal constituted under the Conven-

tion of July 4th, 1868, is not deemed conclusive as to the amount due to the claimants on account of the Pious Fund by the Mexican Republic, neither is it conclusive as to the proportion in which the same should be divided between Upper and Lower California, and an equal division between the two former provinces, whatever excuse may have appeared to exist for it in 1875, is at the present day wholly unjust and indeed absurd. The present population of the region, which under the Spanish and Mexican dominion was known as Upper California, as shown by the United States Census of 1900 is 3,000,000 souls and upwards and steadily increasing; the number of priests within its borders performing active missionary duty was then 284. Lower California, on the other hand, has ceased to retain its former importance. Its total population is only a little over 42,000 individuals, as stated in the "Statesman's Year Book" on the authority of the Mexican Census of 1895. The number of clergy as well as can be estimated from the Memorial or report of Ulysses Urbano Lassépas, compiled by order of the Mexican government (1859), could not then have exceeded 24. Mexico can, of course, furnish the actual number. An equal division of a fund, for missionary purposes, between two populations so wholly disproportionate as these, seems entirely absurd.

The United States have reason to believe that the evidence to be adduced before this honorable Court in the course of this arbitration will show other and additional sums due by Mexico, and going to increase the capital of the said Pious Fund in the Public Treasury of Mexico on which interest as aforesaid should be allowed. And the said claimants allege and insist that the true basis of a division of the income of the Pious Fund between Upper and Lower California is in proportion to population which would give to Upper California 85 per cent. and to Lower California 15 per cent. of the whole.

CONCLUSION.

We propose now to state the capital of the Pious Fund and show the amount due by Mexico under each of the two alternatives above suggested, viz:

I. If the amount and rate of division are deemed settled as *res judicata;*

II. In the contrary supposition, viz: that the whole question is open.

I. If the amount of the Fund and rate of division between Upper and Lower California are deemed to be established as *res judicata* the account will stand thus:

Principal as shown (after deducting $1,000 for said error in addition)	$1,435,033.00
The half of this sum corresponding to Upper California	717,516.50
The interest, 6 per cent, on which is	43,050.99
Total in this case (33 installments, at $43,050.99)	1,420,689.67

II. If the said amount and rate of division are not deemed fixed as *res judicata*, the capital of the Pious Fund should be stated as follows:

REAL ESTATE.

Houses on Vergara street, ¾ of annual income, viz: $2,625, belonging to the Pious Fund, which, capitalized at 6 per cent, corresponds to a capital of (Instruccion of Ramirez, p. 28½)	$43,750.00
Hacienda "Ciénaga del Pastor," ¾ of annual income, viz: $12,825 belonging to the Pious Fund, which, capitalized at 6 per cent, represents a capital of (Id., p. 30)	213,750.00

Item		Amount
"Llenos" (personality) sold with the same		$3,000.00
Haciendas "San Augustin de Amoles," "El Custodio," "San Ignacio del Buey," and "La Baya," annual income of $12,705 belonging to the Pious Fund, which at 6 per cent represents a capital of (Id., pp. 30–31)		211,750.00
Hacienda "San Pedro de Ibarra," annual income $2,000, belonging to the Pious Fund, which at 6 per cent represents a capital of (Id., p. 30)		33,333.33
MORTGAGES.		
$42,000 on Hacienda "Sta. Lugarda," at 5 per cent (Id., p. 31)		42,000.00
On Hacienda "Arroyozarco," $40,000, at 6 per cent, with arrears of interest amounting to $26,770.75		66,770.75
On Hacienda "San José Minyo," $3,000, at 5 per cent, with arrears of interest amounting to $2,275		5,275.00
OWED BY PUBLIC TREASURY.		
$20,000 borrowed during Spanish rule with arrears of interest at 5 per cent, $29,166.54, down to April 30th, 1842 (Id., p. 32)		49,166.63
$201,856.75 with arrears at 5 per cent, since 1812 down to April 30th, 1842, $294,434.25 (Id., p. 32)		496,291.00
$162,618.37½ borrowed in 1810 with interest at 6 per cent, in arrears since 1820, amounting down to April 30th, 1842, to $206,525.25 (Id., p. 33)		369,143.75
$38,500 formerly owed by College of San Gregorio, with arrears of interest at 3 per cent since 1811, amounting to $34,842.50 (Id., p. 33)		73,342.50
$68,160.37½ deposited in National Mint in 1825, no rate of interest mentioned (Id., p. 34)		68,160.37^5
$7,000 paid on October 28th, 1829, by order of Government for their account, no interest mentioned (Id., p. 34)		7,000.00
$22,763.15 advanced Government in 1834 (Id., p. 3)		22,763.15
$3,000 advanced to Government to pay for Bulls of Bp. Diego in 1836, no interest mentioned (Id., p. 34)		3,000.00
Government Bonds		15,973.37^5
Proceeds of the estate of Sra. Argüelles paid into the General Treasury according to decree of Court, from time to time, as set forth in Manuel Payno's Official Report, which after paying $10,000 to a charity in the Philippine Islands, should be divided one-fourth to the heirs of Sra. Arguelles, three-eighths to the Philippine Missions, and three-eighths to the Pious Fund. Up to August 2nd, 1803, there had been paid into the treasury on this account $544,901.10; from which amount for convenience we at once deduct $10,000 for the charity in the Philippine Islands. Three-eighths of the remainder will belong to the Pious Fund	$200,606.64	
February 9th, 1804, there was deposited $18,000, of which there belonged to the Pious Fund	6,750.00	
January 20th, 1809, there was deposited $80,000, of which there belonged to the Pious Fund	30,000.00	
February 1st, 1809, there was deposited $30,000, of which there belonged to the Pious Fund	11,250.00	
October 25th, 1809, there was deposited $25,000, of which there belonged to the Pious Fund	9,375.00	
October 25th, 1809, there was deposited $75,000, of which there belonged to the Pious Fund	28,125.00	
July 16th and 29th, 1812, there was deposited $8,000 of which there belonged to the Pious Fund	3,000.00	
July 29th, 1812, there was deposited $19,000, of which there belonged to the Pious Fund	7,125.00	
May 7th, 1814, there was deposited $28,453.63, of which there belonged to the Pious Fund	10,670.00	
Total	306,901.64	
Of this amount $201,856.75 have already been taken into consideration, which we therefore deduct	$201,856.75	
Total amount due as received from Sra. Argüelles estate, not accounted for above		105,044.89

PRIVATE INDIVIDUALS OWED.

Estate of Dolores Reyes (Instruccion, p. 34)	$9,850.00
D. Ramon Vestiz (Id., p. 35)	13,997.00
(We do not take into account debts of individuals considered in the former arbitration as bad.)	
Grand total	1,853,361.75
The interest on this at 6 per cent per annum is	111,201.70
Eighty-five per cent of the last named sum is	94,521.44
Thirty-three installments of $94,521.44 amount to	3,108,207.52

JACKSON H. RALSTON,
Agent of the United States.
WILLIAM M. STEWART,
Of Counsel.

Prepared by—
JOHN T. DOYLE,
W. T. SHERMAN DOYLE,
Of Counsel for the Prelates.

CONTESTACIÓN AL MEMORIAL SOBRE LA RECLAMACIÓN PRESENTADA POR EL GOBIERNO DE LOS ESTADOS UNIDOS DE AMÉRICA CONTRA EL DE MÉXICO RELATIVA AL LLAMADO "FONDO PIADOSO DE CALIFORNIAS."

Á reserva de producir á favor de la República Mexicana, en uso del derecho que la asiste conforme al protocolo ajustado en Wáshington el 22 de Mayo último para el arbitramento de la presente reclamación, las pruebas de las excepciones que en seguida se expresan y de otras que sean oportunas, así como las defensas y alegaciones convenientes, el infrascrito, órgano autorizado del Gobierno de México, pide que La Corte Permanente de Arbitraje de La Haya deseche la reclamación, por las razones siguientes:

Primera. Falta de título en el Arzobispo de San Francisco y en el Obispo de Monterrey para presentarse como legítimos comisarios del Fondo Piadoso de Californias.

Segunda. Carencia de derecho de la Iglesia Católica de la Alta California para exigir réditos provenientes del supuesto fondo.

Tercera. Ineptitud ó extinción de los títulos en que el Arzobispo y Obispo mencionados fundan su reclamación.

Cuarta. Insubsistencia del objeto atribuido á la institución del fondo, en lo que respecta á la Alta California.

Quinta. Facultad exclusiva del Gobierno Mexicano para el empleo del fondo y disposición de sus productos sin la intervención de la Iglesia Católica de la Alta California.

Sexta. Uso que el Gobierno hizo de dicha facultad, y

Séptima. Exageración de la demanda.

I.

Los reclamantes convienen con el Gobierno Mexicano en reconocer los hechos siguientes, comprobados con irrefutables documentos:

Primero. Los Jesuitas fueron los comisarios ó administradores originarios de los bienes que formaban el Fondo Piadoso de Californias hasta el año 1768, en que fueron expulsados de los dominios españoles.

Segundo. La Corona Española ocupó los bienes que constituían el citado Fondo Piadoso, en substitución de los Jesuitas, y lo administró por medio de una Real Comisión hasta que se consumó la independencia de México.

Tercero. El Gobierno Mexicano, que sucedió al Gobierno Español, fué, como éste lo había sido, comisario del Fondo y, en este concepto, sucesor de los Jesuitas Misioneros, con todas las facultades concedidas á éstos por los fundadores.

Para que el Arzobispo y Obispo reclamantes pudieran ser considerados como comisarios (*trustees*, en inglés), por sucesión, según ellos lo pretenden, tendrían que justificar su actual calidad de causahabientes del

Gobierno Mexicano, á título perpetuo, universal ó singular. De otro modo no se podría explicar la actitud de acreedores con que se han presentado contra su pretendido causante.

En efecto, invocan como título de sucesión que les concedió la representación inmediata del Gobierno, y la mediata de los Jesuitas, el decreto del Congreso Mexicano expedido en 19 de Septiembre de 1836, el cual mandó poner á disposición del Obispo de las Californias y de sus sucesores los bienes pertenecientes al Fondo Piadoso de las Californias, para que lo administrasen é invirtiesen en sus objetos ú otros análogos, respetando siempre la voluntad de los fundadores. Pero los mismos reclamantes reconocen que el citado decreto fué derogado en 8 de Febrero de 1842 por el General Santa Ana, Presidente provisional de la República investido de facultades extraordinarias, y que devolvió al Gobierno Mexicano la administración é inversión del producto de esos bienes en el modo y términos que él dispusiera, para llenar el objeto que los fundadores se propusieron, *la civilización y conversión de los bárbaros.* Posteriormente, en 24 de Octubre del mismo año, se mandó vender esos bienes y que su producto entrara en el Tesoro Nacional para constituir con él un censo consignativo al seis por ciento anual, aplicable al objeto de la primitiva fundación.

Ninguna ley posterior otorgó á los Obispos de las Californias la facultad de recibir y aplicar á su objeto los réditos del indicado censo. Verdad es que el Gobierno Mexicano expidió otro decreto, en 3 de Abril de 1845, ordenando que todos los bienes del Fondo Piadoso de las Californias que existieran *invendidos*, se devolviesen al Obispo de Californias y á sus sucesores, para los objetos expresados en el artículo 6° de la ley del 19 de Septiembre de 1836, sin perjuicio (se decía), "de lo que el Congreso resolviera después acerca de los bienes ya enajenados." Aunque el tenor de este decreto dió pretexto al árbitro tercero en discordia de la Comisión Mixta, en 1875, para afirmar que en él estaba reconocida la obligación de remitir al Obispo los productos del fondo, no ha parecido oportuno á los abogados de los reclamantes alegarlo en apoyo de su actual demanda, seguramente porque ese decreto se refiere á los bienes *invendidos*, cuyo importe, es claro que no había ingresado en el Tesoro Nacional, y no á los réditos ó intereses sobre el producto de los enajenados, respecto de los cuales el Congreso se reservó expresamente la facultad de resolver. Esta resolución no llegó á darse, y por lo mismo, el último decreto no ha podido mejorar la situación en que el del 8 de Febrero de 1842 colocó al Obispo de las Californias, destituyéndolo del cargo de aplicar á las Misiones los réditos del seis por ciento anual sobre el producto de lo enajenado; réditos que son precisamente la única materia de la actual reclamación.

II.

La Iglesia Católica de la Alta California jamás pudo, por derecho propio, administrar el Fondo Piadoso de las Californias ni reclamar sus productos, por la sencilla razón de que los fundadores no se lo dieron ni se lo dieron tampoco los Jesuitas, que fueron los primitivos comisarios, ni el Gobierno Español que sucedió á ellos, ni el Gobierno Mexicano que sucedió al Español y que, lo mismo que éste y los Jesuitas, adquirió la facultad de aplicar los bienes del Fondo en cuestión á las Misiones de las Californias ó á cualesquiera otras dentro de sus dominios, á su solo arbitrio y discreción. Esta facultad discrecional no

tolera la coacción, que es atributo del derecho perfecto. Por lo mismo, aunque en gracia del argumento se concediera á la Iglesia Católica de la Alta California la representación de las misiones de los Jesuitas (suprimidas expresamente por el Papa Clemente XIV desde el año de 1773), esa Iglesia no tendría el derecho de exigir los réditos del Fondo Piadoso.

El decreto del 19 de Septiembre de 1836 arriba citado, en que los reclamantes pretenden fundar sus derechos, solamente confirió al primer Obispo de Californias y á sus sucesores la administración del Fondo, durante la voluntad del Gobierno, con la obligación de invertir sus productos en el objeto que les señalaron los fundadores ó en otros análogos; pero no les dió un derecho irrevocable, ni á ellos ni á la Iglesia que representaban, y además fué derogado por el de 8 de Febrero de 1842, que retiró á los Obispos de Californias la administración del Fondo y la devolvió al Gobierno.

III.

No pudiendo servir de título para esta reclamación ley alguna vigente, quieren los reclamantes suplirlo con el que llaman instrumento de constitución (*foundation deed*) de la obra pía, ó con el laudo pronunciado por la Comisión Mixta de Reclamaciones establecida en Washington conforme á la convención ajustada entre México y los Estados Unidos á 4 de Julio de 1868, pronunciado en 11 de Octubre de 1875, considerándolo como generador de *res judicata.*

(A.)

En cuanto al primer título, bastará, para demostrar que él no favorece las intenciones de los reclamantes, copiar las siguientes cláusulas del instrumento que ellos toman como un modelo de las donaciones que se hicieron al Fondo:

Esta donación * * * hacemos * * * á dichas *Misiones* fundadas y por fundar de las Californias, así para la manutención de sus religiosos, ornato y decencia del culto divino, como para socorro que acostumbran á los naturales catecúmenos y convertidos por la *misma* (probablemente *miseria*) de aquel país: de tal suerte, que si en los venideros tiempos con el favor de Dios en la reducción y misiones mandadas, hubiere providencia de mantenimientos, cultivadas sus tierras *sin que se necesiten llevar de estas tierras,* vestuario y demás necesarios, *se han de aplicar los frutos* y esquilmos de dichas haciendas de (seguramente á) *nuevas misiones* * * * *y en el caso de que la Compañía de Jesús voluntariamente ó precisada dejare dichas misiones de Californias,* ó, lo que Dios no permita, se rebelen aquellos naturales apostatando de nuestra santa fé, *ó por otro contingente, en ese caso ha de ser á arbitrio del reverendo Padre Provincial que á la sazón fuere de la Compañía de Jesús de esta Nueva España,* el aplicar los frutos de dichas haciendas, sus esquilmos y aprovechamientos, para *otras misiones de lo que falta de descubrir de esta Septentrional América ó para otras del Universo Mundo, según le pareciere ser más del agrado de Dios Nuestro Señor; y en tal manera que siempre y perpetuamente se continúe el gobierno de dichas haciendas en la sagrada Compañía de Jesús y prelados, sin que jueces algunos, eclesiásticos ni seculares tengan la mas mínima intervención* * * * queremos que en tiempo alguno se inculque, *ni por ningún juez eclesiástico ó secular se entrometa á saber si se cumple la condición de esta donación, pues nuestra voluntad es que en esta razón haya lugar ninguna pretensión y que cumpla ó no cumpla la Sagrada Compañía con el fin de las misiones, en esta materia sólo á Dios Nuestro Señor tendrá que dar cuenta.*

(B.)

El laudo antes referido, que fué pronunciado en Washington el 11 de Noviembre de 1875, no pudo prejuzgar la presente reclamación, la cual, por lo tanto, no debe considerarse cosa juzgada. Hoy se trata de

una demanda de nuevos réditos, y áun cuando los reclamantes aleguen que al condenar á México á pagar los vencidos hasta cierta fecha, se declaró implícitamente que existía el capital y que seguiría produciendo réditos, éstas serán consideraciones ó motivos para la declaración que se hizo de que la República Mexicana debía pagar cierta cantidad de intereses vencidos, á lo cual se limitaba la reclamación. La inmutabilidad de una sentencia y su fuerza de cosa juzgada pertenecen solamente á su conclusión, esto es, á la parte que pronuncia absolución, ó bien condena, *quod jussit vetuitve.* Esta proposición apenas es discutible, y por eso la generalidad de los autores, al exponer la teoría de la cosa juzgada, la atribuyen á la parte resolutiva de la sentencia, al paso que su extensión á la expositiva (motivos) es asunto de controversia, sólo para algunos.

Entre los que favorecen esa extensión se hallan ciertamente autoridades tan famosas como la de Savigny; pero no son menos respetables y se cuentan en mayor número los que profesan la opinión contraria. El mismo insigne maestro que acabo de nombrar declara textualmente que:

Es doctrina muy antigua, sostenida por gran número de autores, que la verdad legal de la cosa juzgada pertenece *exclusivamente* á la resolución y no participan de ella los motivos, resumiendo su doctrina en estos términos: "La autoridad de la cosa juzgada no existe sino en la parte dispositiva de la sentencia." (Savigny. Droit Romain, § 291, T. 6, p. 347.)

La mayor parte de los autores, añade, rehusan absolutamente á los motivos la autoridad de cosa juzgada, *sin exceptuar el caso en que los motivos son parte de la sentencia.* (§ 293, T. 6, p. 382.)

Griolet se expresa así:

La decisión supone siempre diversas proposiciones que el juez ha debido admitir para hacer una declaración sobre los derechos controvertidos y que comunmente en nuestro derecho (el francés) expresa la sentencia; estos son los considerandos (*motives*). Ya hemos manifestado que, contra la opinión de Savigny, ni los motivos subjetivos ni los objetivos deben participar de la autoridad de la sentencia, porque el juez no tiene la misión de decidir sobre los principios jurídicos ni sobre la existencia de los hechos. * * * Hemos, pues, demostrado ya, en todos los casos que puedan presentarse, que la autoridad de la cosa juzgada no comprende los motivos de la sentencia *ni aun la afirmación ó negación de la causa de los derechos juzgados.*

El mismo escritor añade:

Ninguno de nuestros autores, en efecto, ha enseñado un sistema análogo al de M. Savigny sobre la autoridad de los motivos, y la jurisprudencia francesa reconoce el principio de que la autoridad de la cosa juzgada no se extiende á ninguno de los motivos de la decisión. (Griolet. De la aut. de la cosa juzgada, p. p. 135, 168, 169 y 173.)

En cuanto el derecho prusiano, el mismo Savigny dice:

Respecto á la autoridad de los motivos, existe un texto que desde luego parece excluirla absolutamente, dando la mayor importancia á la parte que contiene la decisión judicial. (Allg. Gerichte Ordnung l. 13 13, p. 38.) Los colegios de Jueces y los ponentes de las sentencias deben cuidadosamente distinguir de sus motivos la decisión real, y asignarles un lugar distinto y jamás confundirlos, porque *simples motivos no deben nunca tener la autoridad de cosa juzgada.* (D. R., § 294, T. 6, p. p. 389 y 390.)

Los tribunales españoles constantemente han desechado el recurso de casación intentado contra los fundamentos de la sentencia definitiva, por no reconocer en ellos, sino solamente en la parte dispositiva, la autoridad de la cosa juzgada, única materia del recurso. (Pantoja. Rep., p. p. 491, 955, 960, 970 y 979.)

En el caso especial (que es el nuestro) de una demanda de intereses

fundada en sentencia que los declaró debidos, después de haber oído las excepciones del demandado contra el derecho que alegó al capital ó á la renta, Savigny es de opinión que este derecho tiene á su favor la autoridad de la cosa juzgada; pero al mismo tiempo advierte que Buchka resuelve la cuestión en sentido contrario con arreglo al Derecho Romano; que en el mismo sentido la han resuelto los tribunales prusianos por razón de que el reconocimiento de un derecho en los motivos de la dicisión no pertenece verdaderamente á la sentencia, cuya sola parte resolutiva constituye la cosa juzgada; y agrega Savigny:

> No tenemos sobre este punto la decisión del Derecho Romano y los textos que suelen citarse son extraños á la materia. (D. R., § 294, núms. 3 y 4, nota (r) del núm. 7, y § 299, núm. 4, T. VI, p. p. 397, 401 y 446.)

Sin embargo, lo cierto es que Ulpiano dice: *Si in judicio actum sit usuræque solæ petiæ sint, non est verendum ne noceat rei judicatæ exceptio circa sortis petitionem:* QUIA ENIM NON COMPETIT NEC OPPOSITA NOCET. Tal es el principio de la ley 23 D, de *Exc. rei Jud.;* y aun cuando parece estar en contradicción con lo que en ella sigue, esa aparente antinomia se halla explicada de un modo satisfactorio por Griolet (p. p. 46 y 47), á quien me refiero, para evitar extenderme en esta materia. He aducido sobre ella todas las citas precedentes, por no haberse tratado hasta ahora el punto sino muy ligeramente en la correspondencia diplomática seguida con motivo de la presente reclamación.

Aun debo añadir, que si lo anterior es cierto respecto de las sentencias pronunciadas por jueces investidos de autoridad pública para decidir sobre el caso, sus motivos y consecuencias, lo es mucho más con respecto á decisiones pronunciadas por árbitros que no tienen verdadera jurisdicción, ni más facultades que las que se les concede en el compromiso. Así es que si todo lo relativo á la excepción y acción *rei judicatæ*, es de estricta interpretación (Griolet. De la aut. de cosa juzg., p. 68), mucho más debe serlo cuando se aplica á sentencias arbitrales.

De éstas ha dicho una ley romana: *De his rebus et rationibus et controversiis judicare arbiter potest, quæ ab initio fuissent inter eos qui compromisserunt, non quæ postea supervenerunt* (L. 46 D, *de recept. qui arb.*, T. L., p. 25), y tan limitado efecto atribuía el Derecho Civil á los laudos, que no les concedía que produjeran la acción de cosa juzgada. La ley primera del Código *de recept.* se expresa en estos términos:

> *Ex sententia arbitri ex compromisso jure perfecto arbitri apellari non posse sæpe receptum est;* QUIA NEC JUDICATI ACTIO INDE PRÆSTARI POTEST.

La ineficacia de los laudos arbitrales, en Derecho Internacional, para decidir casos futuros, aunque sean análogos á los que aquellos resolvieron, ha sido expresamente reconocida por el Gobierno de los Estados Unidos, según puede verse en Moore, "International Arbitrations," con motivo de la comisión mixta reunida en Halifax, á consecuencia del tratado de Washington, que condenó á los Estados Unidos á pagar al Gobierno Británico la suma de cinco millones y medio de pesos por daños y perjuicios causados por pescadores americanos, y en el caso de una reclamación presentada por el Ministro de España, Sr. Muruaga, procedente de confiscación de algodón, considerado como contrabando de guerra, que sufrieron los súbditos españoles Mora y Larrache. El

Secretario de Estado, T. F. Bayard, decía con este motivo en nota de 3 de Diciembre de 1886:

Los fallos de Comisiones Internacionales * * * no se considera que tengan autoridad *sino en el caso particular decidido* * * * *en ninguna manera ligan al Gobierno de los Estados Unidos, excepto en aquellos casos en que tuvieron aplicación.* (Papers relating to the For. Rel. of the U. S., year 1887, p. 1,021.)

El mismo honorable Secretario, en el documento citado, decía: "Tales decisiones se acomodan á la naturaleza y términos del tratado de arbitraje," teniendo en cuenta, sin duda, que: "*Omne tractatum ex compromisso sumendum: nec enim aliud illi* (*arbitro*) *licebit, quam quod ibi ut afficere possit cautum est: non ergo quodlibet statuere arbiter poterit, nec in qua re libet,* NISI DE QUA RE COMPROMISSUM EST."

Consultando las estipulaciones contenidas en la citada Convención del 4 de Julio de 1868, se ve que las reclamaciones de ciudadanos americanos contra México, y de ciudadanos mexicanos contra los Estados Unidos, que fué permitido someter á la Comisión Mixta creada por aquella convención, debían indispensablemente reunir estas tres condiciones:

Primera. Haberse originado en acontecimientos posteriores al 2 de Febrero de 1848, y *anteriores* al 1° de Febrero de 1869 (fecha del canje de ratificaciones de la Convención).

Segunda. Tener por objeto perjuicios estimables en dinero, causados en las personas ó bienes de los reclamantes de cualquiera de los dos países, por autoridades del otro.

Tercera. Haber sido presentadas al Gobierno de los reclamantes y por éste ó en su nombre á la Comisión Mixta dentro de ocho meses, prorrogables hasta once meses, contados desde la primera reunión de los árbitros.

Desde luego se nota que la reclamación de los réditos cuyo pago hoy se solicita, no podía considerarse con la primera ni con la tercera de dichas condiciones. Inútil parece detenerse en demostrarlo, ó seguir discutiendo sobre la falta de fundamento con que se alega la cosa juzgada en la nueva reclamación que ahora se presenta contra el Gobierno Mexicano. El fallo que pronunció el árbitro en 1875 quedó completa y absolutamente cumplido con el pago que hizo México de los $904,070.79 oro mexicano á que fué condenado, y ese fallo no puede aplicarse á nueva reclamación.

Dando por supuesto, en virtud de lo alegado, que no se declare resuelta ya la actual reclamación por el laudo pronunciado en 1875, la primera objeción, la excepción más clara que oponemos á la demanda, es que el derecho que pudieran haber tenido los reclamantes al principio del año 1848, quedó completamente extinguido por el tratado de paz y amistad que el 2 de Febrero de ese año fué celebrado entre México y los Estados Unidos, porque en su artículo 14 se declaró que todos los créditos y reclamaciones no resueltos hasta entonces y que pudieran tener los ciudadanos de la segunda de esas naciones contra el Gobierno de la primera, se considerarían fenecidos y cancelados para siempre. El texto del artículo de ese tratado que así lo dispone, es como sigue, y lo cito en inglés para que sea mejor comprendido por la parte demandante. Dice así:

ARTICLE XIV.

The United States do furthermore discharge the Mexican Republic from all claims of the United States not heretofore decided against the Mexican Government, which may have arisen previously to the date of the signature of this treaty, which discharge shall be final

and perpetual, whether the said claims be rejected or be allowed by the board of commissioners provided for in the following article and whatever shall be the total amount of those allowed.

La contestación que los reclamantes han dado á esta excepción perentoria, se reduce á decir que ellos no demandan los réditos causados antes de la fecha del tratado, sino los devengados después de esa fecha, y no han demandado el capital porque no se creen con derecho á ello, pudiendo conservarlo México indefinidamente. Al dar esta respuesta no reflexionan que el Artículo XIV antes citado, no exonera á México únicamente de las reclamaciones ó demandas que puedan desde luego presentarse, sino de todos los créditos (all claims) no decididos anteriormente (not heretofore decided) contra su gobierno, y en este caso se encontraba el *crédito* del Fondo Piadoso, comprendiéndose en él tanto el capital como sus réditos. Todo ello, en efecto, se comprende en la palabra inglesa *claim*, que tanto significa la reclamación ó demanda que se hace de algo á que nos creemos con derecho, como la causa, origen ó fundamento de esa demanda: "*a right to claim or demand something; a title to any debt, privilege or other thing in possession of another; also a title of any thing which another should give or concede to, or confer on, the claimant,*" según lo dice Webster en su Diccionario, que es la mejor autoridad lingüística en los Estado Unidos y tal vez donde quiera que se hable la lengua inglesa. (Véase el Diccionario Inglés de Webster, artículo *Claim*, acepción segunda.)

Esta inteligencia del Artículo XIV se corrobora leyendo el comienzo del artículo siguiente, el XV, cuyo texto es como sigue:

The United States exonerating Mexico from all demands on account of the claims of their citizens mentioned in the preceding article and considering them entirely and forever cancelled.

Aquí se ve la distinción hecha entre *demands* y *claims* y que esta última palabra se ha tomado en el sentido de título ó derecho que da origen á una reclamación.

Ni podía ser de otra manera, cuando el espíritu bien claro de ese convenio fué no dejar nada pendiente que pudiese alterar ó pertubar las relaciones pacíficas y de amistad que se renovaban en aquel tratado. Por esto se hizo en él lo que se hace con frecuencia en tratados de igual especie: se pactó la extinción completa de las reclamaciones y motivos de reclamación pendientes ó que por hechos pasados pudieran ocurrir entre ambos Gobiernos, sin dejar de atender al interés de los particulares. Á este último se proveyó en el mismo Artículo XV, cuyo principio he copiado, previniendo que se reservaran tres y un cuarto millones de pesos para satisfacer á los reclamantes hasta donde sus demandas fueran aprobadas por una Comisión Americana que al efecto se mandaba establecer y se estableció por el Gobierno de los Estados Unidos, comisión ante la cual, si tenían conciencia de su derecho, pudieron haberse presentado los representantes de la Iglesia Católica de California. Si no lo hicieron, no por eso pueden reclamar ahora contra México, el cual quedó exonerado de toda responsabilidad, *from all demands on account of the claims of their* (of the United States) *citizens.*

Parece inconcedible que en presencia de esos artículos del tratado de Guadalupe Hidalgo, el más solemne de cuantos hemos celebrado con la nación vecina, y que está vigente porque es de carácter perpetuo, se haya sostenido que no se extinguió en virtud de sus estipulaciones el crédito del llamado Fondo Piadoso. ¿Qué privilegio tenía ese fondo

para no estar comprendido en la absoluta declaración del tratado? No es de extrañarse que los abogados de los reclamantes, en su apuro para contestar esta excepción, hayan querido limitar los efectos del tratado en este punto á extinguir los réditos del Fondo, anteriores á Febrero de 1848; lo que apenas se explica es que la sentencia arbitral, suscrita por Sir Edward Thornton, haya admitido semejante interpretación. Por eso, entre otros motivos, consideramos dicha sentencia como notoriamente injusta, no habiendo injusticia más clara que la de un laudo que decide una cuestión entre ciudadanos de un país y el Gobierno de otro, contrariando lo estipulado por los dos países en un tratado solemne y cuyo vigor nadie disputa.

En caso de que se resuelva (contra toda probabilidad) que el tratado de Guadalupe Hidalgo dejó vigente el crédito (the claim) de ciudadanos americanos contra México, relativamente al Fondo Piadoso y existente, según se alega, al celebrarse el tratado, aún hay otro motivo por el cual se habría extinguido ese crédito, y de consiguiente el derecho de cobrar los réditos del capital. Sabido es que la República Mexicana, en uso de su soberanía y por razones de alta política, que explicó el Comisionado mexicano en su dictámen de 1875, decretó en los años 1856 y 1859, primero, la desamortización y en seguida la llamada nacionalización de los bienes eclesiásticos, que no fué, propiamente hablando, sino la prohibición al clero de seguir administrando aquellos bienes nacionales. Si, como justamente se ha dicho, la validez y fundamentos de esta providencia se pueden disputar á la luz del derecho canónico, son incuestionables bajo el aspecto político y social, y no menos en vista de los favorables resultados que esa determinación ha producido para consolidar la paz y promover el progreso de la República.

Bajo el aspecto del derecho común y el internacional privado, parece claro que el capital cuyos réditos se demandan, en su carácter de censo consignativo ó de censo en general, y debiendo ser considerado como bien inmueble (Sala. Dro. Real de España, tom. I, lib. 2, tít. 14 y autores que cita), estaba sujeto á la legislación del país donde se hallaba constituído, á la jurisdicción y fuero *rei sitæ*, cualquiera que fuese la nacionalidad de los censualistas.

Por otra parte, debe tenerse en cuenta que la falta de cobro por largos años de los réditos que ahora se demandan, los ha sujetado á las leyes del país sobre prescripción y que es de aplicarse al caso el artículo 1,103 de nuestro Código Civil, que dice así:

> Las pensiones enfitéuticas ó censuales, las rentas, los alquileres y cualesquiera otras prestaciones no cobradas á su vencimiento, quedarán prescriptas en cinco años contados desde el vencimiento de cada una de ellas, ya se haga el cobro en virtud de acción real ó de acción personal.

Si llegamos á suponer que el crédito de los reclamantes no se extinguió ni por el terminante art. XIV del tratado de Guadalupe Hidalgo, ni por los otros motivos que acabamos de examinar, aún queda otro más que lo habría hecho parecer conforme á la legislación mexicana, á la cual, sin duda alguna, está sujeto un censo constituído por su Gobierno en el año 1842. Dicho Gobierno, con el fin de arreglar la deuda pública, dió, con fecha 22 de Junio de 1885, un decreto convocando á todos sus acreedores para el exámen y conversión de sus créditos originados de ministraciones, ocupaciones, préstamos, ó de cualquiera otro acto ó negocio del que resultara un cargo al erario público; y al efecto fijó un plazo conveniente, que fué prorrogado en varias ocasiones,

para la presentación de dichos créditos. El art. 15 de la ley de 6 de Septiembre de 1894 era del tenor siguiente:

Quedan para siempre prescritos, sin que puedan jamás constituir un derecho ni hacerse valer en manera alguna, los créditos, títulos de deuda pública y reclamaciones siguientes * * * Todos los créditos comprendidos en los arts. 1° y 2°, que no fueren presentados á esta conversión dentro del plazo fijado en el artículo anterior, ó que, aún cuando se presenten, no lleguen los interesados á satisfacer los requisitos que establece este decreto.

Es incuestionable que los supuestos créditos por capital é intereses reclamados al Gobierno de México por el Arzobispo y Obispos de la Iglesia de la Alta California, no fueron presentados para su conversión en obediencia á la ley de 1885, ni se aprovecharon los pretendidos acreedores del nuevo plazo que en calidad de último y fatal les concedió el citado decreto de 1894 en su art. XIV. La caducidad ó prescripción de acción ó excepción superveniente, dejaría, sin efecto, aún la sentencia pasada en autoridad de cosa juzgada: principio de explorado derecho, reconocido hasta por los actuales reclamantes.

IV.

Dicen los reclamantes que el objeto del Fondo Piadoso de las Californias fué proveer á la conversión de los indios y al sostenimiento de la Iglesia Católica en las Californias.

Siendo este objeto doble, hay que distinguir entre las dos partes que lo constituyen.

La primera parte, conversión de los indios paganos á la fé católica y á la obediencia del Soberano Español, es incuestionable y hay que considerarla como el fin principal y directo de las misiones encomendadas á la Compañía de Jesús por el Rey Católico, dotadas por los constituyentes del Fondo Piadoso y subvencionadas por el Tesoro público de México. La otra parte del objeto, esto es, el sostenimiento de la Iglesia en las Californias, no fué el fin principal ni directo de la institución del fondo, sino el medio de llevar á cabo la conquista espiritual de los indios salvajes por los religiosos misioneros.

Hecha esta distinción, se comprende que el culto católico fué un objeto de las misiones subordinado al fin de la conquista espiritual de los indios bárbaros. De lo cual se sigue que la no existencia de los indios bárbaros é idólatras en una región determinada, ó la supresión en ella de las misiones católicas instituidas para sojuzgarlos ó cristianizarlos, debería traer consigo el retiro de las subvenciones ofrecidas á los misioneros; no su aplicación exclusiva al fomento del culto católico, á no ser violando abiertamente la intención de los bienhechores que fundaron tal obra pía.

Á la expulsión de los Jesuitas ordenada por el Rey Carlos III y consiguiente cesación de las Misiones de la Nueva España, siguió la supresión de la Orden, que declaró Clemente XIV en su Breve, expedido el día 21 de Julio de 1773, párrafo 32, en que se lee.

Por lo tocante á las sagradas misiones, las cuales queremos que se entiendan también comprendidas en todo lo que va dispuesto acerca de la *supresión* de la Compañía, nos reservamos establecer los medios con los cuales se pueda conseguir y lograr con mayor facilidad y estabilidad, así la conversión de los indios como la pacificación de las disensiones.

Y es de advertir que las misiones fundadas por los Jesuitas jamás traspasaron los límites de la Baja California. La más avanzada al Norte, que dejaron, fué la de Santa María, debajo del 31 grado de

latitud, y por lo mismo fuera de la demarcación de la Alta California hecha en el tratado de Guadalupe Hidalgo.

Las misiones de la Alta California comenzaron, después de la expulsión de los Jesuitas, por meras disposiciones, no de la Compañía de Jesús ni de la Santa Sede ni de alguna otra autoridad eclesiástica, sino del Virrey de Nueva España, aprobadas por el Rey en 1769 y 1762.

Como empresas nacionales, las misiones de la Alta California fueron naturalmente abandonadas por el Gobierno Mexicano cuando los Estados Unidos adquirieron aquella región. Este abandono fué exigido por el cambio de autoridad y de jurisdicción sobre el territorio enajenado á los Estados Unidos, y correspondió, además, á la facultad privativa que tenía el Gobierno Mexicano, heredada del Gobierno Español, de *suprimir misiones y fundar otras nuevas para la conversión de infieles dentro de sus dominios.*

No solamente cesaron en la Alta California las misiones desde el 7 de Julio de 1846 como empresas nacionales á cargo del Gobierno Mexicano, sino que cesó como entidad legal la misma Iglesia Católica, puesto que su restablecimiento como corporación no tuvo efecto sino en 22 de Abril de 1850 á virtud del estatuto de aquella fecha del Estado de California.

Por último, hay que tener en cuenta que en la Alta California no existen tribus de indios bárbaros, cuya sujeción al poder secular de la Nueva España y conversión á la fé católica fué el objeto principal ó fin directo de las misiones de los Jesuitas dotadas con los bienes del Fondo Piadoso de California.

V.

La facultad de aplicar el fondo é invertir sus productos conforme á la intención de los donadores de los bienes que lo formaron, fué ejercida legítimamente sin la intervención de los ordinarios eclesiásticos, primeramente por los Jèsuitas, en seguida por la Corona de España y últimamente por el Gobierno de la República Mexicana. Los reclamantes jamás probarán que una autoridad legítima haya dado ley ó disposición alguna que restringiera esa facultad. En ejercicio de ella, el Gobierno Mexicano ordenó, por decreto del 19 de Septiembre de 1836, que se diera la administración del Fondo al Obispo de California y sus sucesores, como dependientes de dicho Gobierno; retiró la misma comisión al Obispo y sus sucesores por decreto de 18 de Febrero de 1842; ordenó la venta de los bienes de que se componía el Fondo y su capitalización á censo consignativo sobre el Tesoro nacional por decreto del 24 de Octubre de 1842; y dos años y medio más tarde, por decreto del 3 de Abril de 1845, mandó devolver al entonces Obispo de California y á sus sucesores los créditos y demás bienes que no se hubieran vendido reservándose expresamente la facultad de disponer del producto de los bienes vendidos, cuyos réditos son precisamente la materia de esta reclamación.

Esta facultad privativa del Gobierno Mexicano está reconocida por parte de los reclamantes. En su réplica dirigida el 21 de Febrero de 1901 al Hon. John Hay, Secretario de Estado de los Estados Unidos por los Srs. Jackson H. Ralston y Frederick L. Siddons, abogados de los Obispos católicos romanos de California, se encuentran las palabras siguientes:

No dispute has ever been raised as to the right of the Mexican Government to administer the property in question. * * * *Mexico must continue the trust relation which she has*

herself assumed. * * * *It should be borne in mind that we never have had or made any claims to the principal. From its origin it has been in the hands of trustees; first the Jesuits, then in the Spanish Crown; then the Government of Mexico, then in the Bishop under the law of 1836, then from February 8, 1842, again in the Mexican Republic. All of these changes were accomplished by law, the act of the Sovereign.*

VI.

El uso que el Gobierno Mexicano hizo del derecho soberano de reasumir la facultad de administrar el fondo é invertir sus productos con exclusión de la Iglesia de California en 1842, no puede considerarse en Derecho, perjudicial á la parte reclamante: "*Qui jure suo utitur neminem lædit.*"

Por la misma razón tampoco puede justificar la demanda contra la República Mexicana el hecho de que su Gobierno, desde que dejó de tener autoridad sobre la Alta California, hubiese concentrado todo su cuidado y protección en la Baja California, tanto en el órden civil como en el eclesiástico, y cesado en consecuencia de aplicar á la Alta California las rentas destinadas á fomentar las misiones católicas.

Habían cesado las misiones de los Jesuitas en aquel territorio, no había ya necesidad de que sus habitantes recibieran de México miniestras, vestuario y demás recursos de subsistencia; sus tierras iban á ser cultivadas, como lo fueron en efecto y se hicieron maravillosamente productivas; y en tales circunstancias quedó al arbitrio del Gobierno, como comisario, substituto de los Jesuitas, destinar los productos del Fondo á otras misiones, sin dar lugar á censura, queja ó reclamación de nadie, conforme en todo á la voluntad de los fundadores, expresada en el instrumento de constitución del Fondo, según las palabras textuales arriba citadas.

VII.

La exageración de la demanda ó *plus petición* se demuestran de varias maneras, y á reserva de presentar en el curso del juicio una liquidación, que hasta ahora no ha sido posible concluir, haré las siguientes reflexiones:

En primer lugar, es de toda evidencia que pretender ahora, en *moneda de oro mexicano*, el pago de los réditos que se demandan, porque otros réditos del mismo capital fueron mandados pagar en esa moneda por la sentencia pronunciada en Noviembre de 1875, es pedir más del doble de lo que importaría el interés al seis por ciento á que se alega tener derecho. La razón consiste en que—nadie lo ignora—en 1875 era casi exacta la proporción de 16 á 1 entre el valor del oro y el de la plata, habiéndose más que duplicado posteriormente el valor del oro respecto al del metal blanco. Ahora bien, en pesos de plata y no en otra cosa fueron valuados los bienes del Fondo Piadoso, en el valor que representa esa moneda fueron vendidos y el producto de la venta reconocido por el Gobierno Mexicano á favor de dicho fondo. México ni ha tenido nunca ni tiene ahora otro tipo para su moneda que el peso de plata; su moneda de oro se acuña en muy corta cantidad y no sirve para regular ningún valor mercantil. Cuando los reclamantes piden por réditos tantos *dollars*, hablan de pesos de su país que así se llaman, entendiéndose que son de oro. El oro mexicano de que hablan tiene un ligerísimo descuento respecto del americano; pero en todo caso los *dollars* de oro mexicano valen más del doble de los pesos de plata, en los que únicamente se podrían cobrar los réditos del Fondo Piadoso, si els correspondieran á los reclamantes.

Por lo mismo la pretensión de los Obispos califórnicos viene á ser usuraria, al pedir, no el seis por ciento de capital sino mucho más del doce por ciento al año.

Otro de los excesos de la demanda es cobrar, no la mitad (que es ya una demasía) del rédito del capital, en consideración á que tendría que aplicarse la otra mitad á misiones en la Baja California, sino que ahora se pide el ochenta y cinco por ciento, porque la proporción—se dice—entre las poblaciones de la Alta California de los Estados Unidos y la Baja California de México. Así se discurre como si el fondo se hubiera destinado á toda la población y no á los indios bárbaros para su conversión y mejora. Semejante razonamiento sólo tendría cabida si toda la población de una y otra California fuera de indios bárbaros. Es, pues, insostenible tal pretensión, que revela únicamente el celo, desproporcionado en este caso, de los abogados y consejeros de los reclamantes. La proporción á que debiera atenderse, para cumplir en su espíritu la voluntad de los fundadores, sería la que hubiese entre los indios no convertidos y civilizados de una de las Californias en comparación con los de la otra; y ya se sabe que en la perteneciente á los Estados Unidos no hay muchos, tal vez ni un solo indio en ese caso.

Otro exceso de la demanda consiste en incluir en el valor de lo demandado el de los bienes que fueron del Marqués de las Torres de Rada. El importe de esos bienes forma, indudablemente, la mayor parte de lo que se reclama, y sin embargo no hay fundamento legal para reclamarlo. Esta aserción escandalizará, sin duda, á los reclamantes, que han hecho un estudio prolijo de lo relativo á la donación de dichos bienes hecha al Fondo Piadoso; pero es de advertir que muy recientemente se han descubierto en el Archivo General de la República datos importantísimos que comprueban lo que acabo de asentar. Esos datos se contienen en el libro impreso en el siglo XVIII que acompaño á la presente demanda y cuya autenticidad será debida y oportunamente comprobada. En él se advierte que hubo un largo litigio acerca de la sucesión del Marqués de las Torres de Rada y que al final del pleito el Supremo Consejo de Indias en España, último tribunal competente para el caso en aquella época, declaró nulos y de ningún valor ni efecto los inventarios y aprecios de los bienes que quedaron por muerte del referido Marqués, y nula también la adjudicación que de ellos se hizo á la Marquesa su viuda. Esta sentencia de última instancia dejó sin efecto alguno las determinaciones de la Marquesa viuda de las Torres de Rada, y por lo mismo las del Marqués de Villa Puente en el testamento que éste hizo con poder para testar de su prima la Marquesa. Ahora bien, dicho testamento fué la base de la donación que hicieron ambos al Fondo Piadoso de unos bienes que no pertenecían legalmente á ninguno de los dos.

No me extenderé en explicaciones sobre esta materia y me refiero al libro adjunto, principalmente á la sentencia con la cual concluye y cuyo original, según se probará á su tiempo, existe en el archivo español del Supremo Consejo de Indias. No cabe duda en que fué nula la donación que de bienes ajenos hizo la Marquesa al Fondo Piadoso, por el conocido principio de *Nemo plus juris transferre potest quam ipse haberet.* Debe, pues, descontarse de la suma que demandan los reclamantes, cuando menos el valor de los bienes á que me contraigo.

En conclusión, me parece quedar demostrado:

1° Que los reclamantes carecen de título para presentarse como legítimos comisarios del Fondo Piadoso de Californias.

2° Que la Iglesia Católica de la Alta California no tiene derecho para exigir del Gobierno Mexicano el pago de réditos por el supuesto capital ó Fondo.

3° Que los títulos alegados por el Arzobispo y el Obispo reclamantes, ó adolecen de ineptitud para el caso, ó se han extinguido, principalmente por el Tratado de Guadalupe Hidalgo que extinguió "todos los créditos de ciudadanos de los Estados Unidos contra la República Mexicana," exonerando á ésta de todas las demandas por razón de créditos contra ella, que existieran el 2 de Febrero de 1848, á favor de dichos ciudadanos, como se ve en los Artículos XIV y XV del Tratado. Á falta de esa Convención, el derecho de los reclamantes se habría extinguido por varias de las leyes generales que sucesivamente se han expedido en esta República, á las cuales estaba, sin duda, sujeto el censo que constituía el Fondo Piadoso.

4° Que el verdadero objeto de ese Fondo, el fin á que estaba destinado, era la conversión de los indios bárbaros al cristianismo y su civilización, siendo así que ya no hay indios bárbaros á quienes se aplique en California.

6° Que al Gobierno Mexicano, y sólo á él, le corresponde dar, en su territorio ó fuera de él, esa ú otra aplicación al fondo, sin que tenga que dar cuenta de lo que hiciere en el particular á los Obispos de California.

7° Que si algún derecho á cobrar réditos tuvieran los reclamantes, no sería á la cantidad que piden, la cual es excesiva, desde luego, por haberse calculado en pesos de oro, cuando las sumas que toman por base han sido en pesos de plata y hoy la diferencia entre ambas monedas no es la misma que en 1875, cuando México fué condenado á pagar otros réditos en oro. Además, se computa la porción de réditos que corresponden á la Alta California por la población y no por el número de indios en cuya conversión hayan de emplearse; y por último, se incluyen en el valor del Fondo Piadoso los bienes donados por la Marquesa de las Torres de Rada, cuando nuevos documentos comprueban la nulidad de esa donación.

Por estas razones y las demás que se alegaren en su oportunidad, á nombre del Gobierno Mexicano suplico respetuosamente al Tribunal se sirva desechar la demanda interpuesta contra este Gobierno por los representantes de la Iglesia Católica de California, demanda contraria en general á la Justicia y en particular al tratado de paz y amistad vigente entre la República Mexicana y los Estados Unidos de América.

México, 6 de Agosto de 1902.

El Ministro de Relaciones Exteriores,
IGNACIO MARISCAL.

[Translation into French of foregoing answer.]

RÉPONSE AU MÉMORIAL SUR LA RÉCLAMATION PRÉSENTÉE PAR LE GOUVERNEMENT DES ÉTATS-UNIS D'AMÉRIQUE CONTRE LE MEXIQUE RELATIVE AU FONDS PIE DES CALIFORNIES.

Sous réserve de produire au nom de la République Mexicaine les preuves des défenses qui seront exposés dans la suite, ainsi que les exceptions et les allégations convenables en vertu du droit accordé par le Protocole signé à Washington, le 22 mai dernier, le soussigné, dûment autorisé par le Gouvernement Mexicain, demande à la Cour Permanente d'Arbitrage de La Haye, de rejeter les réclamations en vertu des raisons suivantes:

1. L'Archevêque de San-Francisco et l'Evêque de Monterey n'ont aucun titre à alléguer comme fidéi-commissaires légitimes du Fonds Pie des Californies.
2. L'Eglise Catholique de la Haute Californie n'a aucun droit d'exiger les intérêts provenant du Fonds supposé.
3. L'inefficacité ou l'extinction des titres invoqués par l'Archevêque et par l'Evêque sus-mentionnés à l'appui de leur réclamation.
4. La non-subsistance de l'objet attribué à l'institution du Fonds, en ce qui concerne la Haute Californie.
5. La faculté exclusive du Gouvernement Mexicain d'employer le Fonds et de disposer de ses produits sans aucune intervention de l'Eglise Catholique de la Haute Californie.
6. L'usage que le Gouvernement Mexicain a fait de la dite faculté.
7. L'exagération de la réclamation.

I.

Les réclamants sont d'accord avec le Gouvernement Mexicain sur les faits suivants, établis par des documents irréfutables:

1. Les Jésuites furent les fidéicommissaires ou administrateurs originels des biens qui formaient le Fonds Pie des Californies jusqu'en 1768, année de leur expulsion des domaines espagnols.
2. La Couronne d'Espagne, se substituant ainsi aux Jésuites, prit possession des biens constituant le Fonds Pie, et les administra par l'intermédiaire d'une Commission Royale jusqu'au moment de l'indépendance du Mexique.
3. Le Gouvernement Mexicain, ayant succédé au Gouvernement Espagnol, devint, comme ce dernier l'avait été, fidéicommissaire du Fond, et à ce titre, le successeur des Jésuites missionaires avec toutes les facultés accordées par les fondateurs.

En s'attribuant le rôle de fidéicommissaire (trustees en Anglais), par succession, l'archevêque et l'evêque réclamants devraient établir leur

qualité actuelle *d'ayant-cause* du Gouvernement Mexicain, en vertu d'un titre quelconque, perpétuel, universel ou singulier. Autrement, l'attitude de créanciers qu'ils ont prise vis-à-vis de leur prétendu débiteur, resterait inexplicable.

Comme titre de succession que leur donna la représentation immédiate du Gouvernement et celle médiate des Jésuites, ils invoquent le décret du Congrès Mexicain expédié le 15 septembre 1836, ordonnant la mise à la disposition de l'évêque de Californie, et de ses successeurs, des biens qui appartenaient au Fonds Pie des Californies, pour être par eux administrés et appliqués à leurs intentions ou autres fins analogues, la volonté des fondateurs devant toujours être respectée. Mais les réclamants eux-mêmes admettent que le décret précité fut abrogé le 8 février 1842, par le Général Santa-Anna, Président Provisoire de la République, muni de facultés extraordinaires et qui restitua au Gouvernement Mexicain l'administration et l'emploi du produit de ces biens, selon qu'il le jugeait convenable afin d'atteindre les buts visés par les fondateurs: *la civilisation et la conversion des sauvages.* Le 24 octobre de la même année, la vente de ces biens fut ordonnée ainsi que l'incorporation au Trésor National pour constituer ainsi un "*census consignativus*" au taux annuel de 6 pour cent aux intentions de la fondation primitive.

Aucune loi postérieure ne donna aux Evêques des Californies, la faculté de toucher et d'appliquer à leur but, les intérêts, du "*census*" indiqué. Il est vrai qu'un autre décret fut expédié par le Gouvernement Mexicain le 3 avril 1845 ordonnant que tous les biens encore invendus du Fonds Pie, fussent remis à l'Evêque des Californies et à ses successeurs en vue des fins exprimées par l'article 6 de la loi du 19 septembre 1836, sous réserve "de ce que le Congrès disposa touchant les biens déjà vendus." Bien que le taxte de ce décret ait servi de prétexte au surarbitre de la Commission Mixte de 1875, pour affirmer que l'obligation y était reconnue de remettre à l'Evêque les produits du fonds, les avocats des réclamants n'ont pas jugé convenable de l'alléguer à l'appui de leur demande actuelle, sans doute parce que ce décret vise les biens encore *invendùs* dont le montant n'avait pas été incorporé au Trésor National, et non les intérêts ou les redevances du produit des biens vendus, et sur lesquels le Congrès s'était réservé expressément la faculté de pourvoir. Aucune résolution ne fut prise à ce sujet et en conséquence, ce dernier décret n'a pas modifié la situation créée à l'Evêque des Californies par le décret du 8 février 1848, qui lui retira la faculté d'appliquer aux missions les intérèts du 6 pour cent annuel sur le produit des biens déjà vendus, intérêts qui sont précisément l'objet de la réclamation actuelle.

II.

L'Eglise Catholique de la Haute Californie ne put jamais administrer de son propre droit le Fonds Pie des Californies, ni en réclamer le produit, pour la raison très simple que ce droit ne lui fut pas accordé par les fondateurs, non plus que les Jésuites qui en furent les premiers fideicommissaires ou par le Gouvernement Espagnol qui les remplaç, ou encore par le Gouvernement Mexicain qui succéda à ce dernier, et pareillement à celui-ci et aux Jésuites, eut la faculté d'appliquer les biens due Fonds en litige aux missions des Californies ou à d'autres dans ses domaines, à son jugement et à sa discrétion. Cette faculté

"discrétionnelle" qui est l'attribut du droit parfait, n'admet pas de contrainte. En conséquence, même en concédant por supposition, à l'Eglise Catholique de la Haute Californie, la représentation des missions des Jésuites (supprimées expressément par le Pape Clement XIX, l'année 1773) cette Eglise n'aurait pas le droit de réclamer les intérêts du Fonds Pie. Le décret du 19 Septembre 1836 sus-mentionné invoque par les réclamants à l'appui de leurs prétendus droits, conféra seulement au premier Evêque des Californies et à ses successeurs, l'administration du Fonds, selon le bon vouloir du Gouvernement avec l'obligation d'en employer les produits aux intentions visées par les fondateurs ou à d'autres analoges. Mais il ne leur donna pas un droit irrévocable, non plus qu'à l'Eglise qu'ils représentaient; en outre, il fut abrogé par le décret du 8 février 1842 qui enleva aux Evêques des Californies l'administration du Fonds pour la restituer au Gouvernement.

Cette réclamation ne pouvant invoquer comme titre aucune loi en vigueur, les réclamants cherchent à y suppléer par ce qu'ils appellent un instrument de constitution (fondation deed) de l'œuvre pie, ou par la décision rendue le 2 octobre 1875, par la Commission Mixte de Réclamations établie à Washington, d'après la convention passée entre le Mexique et les Etats-Unis, le 4 juillet 1868, s'efforçant de la faire apparaître comme génératrice de *res judicata*.

A. Pour établir que le premier titre ne favorise pas les intentions des réclamants, il suffira de citer les causes suivantes de l'acte qu'ils acceptent comme le modèle des dons qui formèrent le Fonds:

"Cette donation—nous la faisons—aux dites missions fondées et restant à fonder aux Californies, ainsi que pour le maintien de leurs religieux, le soutien et la décence du Culte Divin, pour le secours qu'ils ont coutume de donner aux indigènes cathécumènes et convertis pour la *même* (probablement *miserie*) de ce pays: de sorte que, si dans les temps à venir, pour la réduction et pour les missions commandées par la grâce de Dieu, il y avait des ressources, et que leurs terres fussent cultivées, *sans qu'il fût nécessaire de les emporter de ces terres, les fruits et les produits des dites fermes* devront être appliqués à des missions nouvelles—et, *si la Compagnie de Jésus, de son gré ou par contrainte, abandonne les dites missions des Californies*, ou si, —ce qu'à Dieu ne plaise,—les indigènes se soulèvent et apostasient notre sainte foi, ou dans toute autre éventualité, il restera à l'arbitre du R. P. Provincial de la Compagnie de Jésus dans cette Nouvelle Espagne, et quel qu'il soit, à appliquer les produits desdites fermes, ainsi que leurs revenus et redevances à d'autres missions dans les territories de cette Amérique Septentrionale qui ne sont pas encore découverts, ou à d'autres de "l'universo mundo" selon qu'il le jugera le plus plus agréable à Dieu, Notre Seigneur, et de telle sorte que toujours et perpétuellement, le Gouvernement desdites fermes soit dans *les mains de la Sacrée Compagnie de Jésus et prélats*, sans qu'aucun juge, ni ecclésiastique, ni séculier, ait le droit d'intervenir dans l'accomplissement de cetta donation, notre volonté étant qu'aucune prétention ne puisse être déduite à ce sujet, et que la Sacrée Compagnie de Jésus remplisse ou non les intentions des missions, elle ne soit tenue d'en rendre compte qu'à Dieu, Notre Seigneur."

B. La décision ci-dessus mentionnée, rendue à Washington, le 11 novembre 1875, n'a pu préjuger sur la réclamation présentée, et par rapport à laquelle, en conséquence, il n'y a pas de chose jugée. Il s'agit maintenant d'une demande d'intérêts nouveaux, et, bien que les réclamants aient allégué que le Mexique était condamné à payer les intérêts échus jusqu'à une certaine date, il fut déclaré implicitement que le capital existait et devait produire des intérêts. Ce pouvait être là des considérations ou des motifs à l'appui de la déclaration faite sur l'obligation à la charge de la République Mexicaine de payer une certaine somme pour les intérêts échus, l'unique objet de la réclamation. L'immutabilité d'un jugement et sa force de chose jugée n'appartiennent qu'à sa conclusion, c'est-à-dire à la partie qui prononce l'acquitte-

ment ou la condamnation, *quod jussit vetuitve.* Cette proposition est presque indiscutable et voilà pourquoi la plupart des auteurs, quand ils exposent la théorie de la chose jugée, l'attribuent seulement à la partie résolutive du jugement, alors que son extension à la partie expositive (motifs) n'est controversée que par quelques-uns. Il est vrai qu'au nombre de ceux qui favorisent une telle extension, se trouvent des autorités aussi célèbres que celle de Savigny, mais celles qui professent l'opinion contraire ne sont pas moins respectables et sont plus nombreuses. L'éminent professeur que je viens de nommer déclare lui-même, textuellement, que: "Cest une doctrine trés ancienne appuyée par un grand nombre d'auteurs, que la vérité légale de la chose jugée appartient *exclusivement* à la résolution et qu'elle n'est pas partagée par les motifs," et il résume sa doctrine: "L'autorité de la chose jugée n'existe que dans la partie dispositive du jugement." (Savigny—Droit Romain, par. 291, tome 6, p. 347.) "La plupart des auteurs, ajoute-t-il, refusent absolument aux motifs l'autorité de la chose jugée, *sans excepter même les cas où les motifs font partie du jugement*" (par. 293, tome 6, p. 282).

Griolet enseigne que "la décision suppose toujours diverses propositions que le juge a dû admettre pour faire une déclaration sur les droits disputés, et qui, ordinairement sont exprimées selon notre droit (le droit français) par le jugement, ce sont les considérants (motifs). Nous avons déjà dit, contrairement à l'opinion de Savigny que les motifs tant subjectifs qu'objectifs, ne doivent pas partager l'autorité du jugement, car il ne rentre pas dans la mission du juge, de se prononcer sur les principes juridiques ou sur l'existence des faits . . . Nous avons donc déjà démontré que dans tous les cas qui peuvent se présenter, l'autorité de la chose jugée ne comprend pas les motifs du jugement, *ni même l'affirmation ou la négation de la cause des droits jugés.*"

Le même écrivain ajoute: Aucun de nos auteurs n'enseigne en effet un système analogue à celui de Monsieur Savigny sur l'autorité des motifs, et la jurisprudence française admet le premier principe: que l'autorité de la chose jugée n'appartient à aucun des motifs de la décision.—(Griolet, de l'autorité de la chose jugée, par. 135, 168, 169 et 173.)

Quand au droit Prussien, Savigny dit lui-même: "Quant à l'autorité des motifs, il existe un texte qui paraît tout d'abord l'exclure absolument, en attribuant une importance, considérable à la partie qui contient la décision judicaire (All. Gerichte Ordnung, 1, 13 13 p. 38) Les collèges des juges et les rapporteurs des jugements doivent distinguer soigneusement entre la décision réelle et ces motifs, et leur donner une place différente sans les confondre jamais, *parce que de simples motifs ne doivent jamais avoir l'autorite de la chose jugée.* (D. R. par. 294—tome 6—pp. 389 et 390).

Les tribunaux espagnols ont rejeté constamment les recours en cassation interjetés contre les fondements du jugement définitif, parce qu'ils n'ont voulu reconnaitre l'autorité de la chose jugée qu'à la partie dispositive, la seule matieère de recours (Pantoja, Repert. pp. 491, 955, 960, 970 et 975.)

Dans l'espèce spéciale (qui est la nôtre) d'une demande d'intérêts fondée sur le jugement qui les déclara dûs, après avoir entendu les défenses du défendeur contre le droit invoqué sur le capital ou sur la rente, Savigny a pour opinion que ce droit a, en sa faveur, l'autorité

de chose jugée, mais il remarque immédiatement que Bucka résout la question dans le sens opposé, selon le droit romain; que les Cours Prussiennes ont décide dans le même sens parce que la reconnaissance d'un droit par les motifs de la decision n'appartient vraiment qu'au jugement dont la partie résolutive constitue la chose jugée, et il ajoute: „Nous n'avons pas sur ce point la décision du droit romain et les textes que l'on invoque si souvent n'ont rien à faire avec le sujet." (D. R. par. 294—num. 3 et 4, note (r) du num 7 et par. 299, num. 4, tome 6, pp. 397, 401 et 446.)

Et cependant Ulpien dit: *Si in judicio actum sit use roeque solæ petitæ sini, non est verendum ne noceat rei judicate exceptio circa sortis petitionem: Quia enim non competit nec apposita noceat.* Tel est le principe de la loi 23 D. de *Except rei jud.* et, bien qu'il semble contredit par ce qui le suit, cette antinomie apparente est expliquée par Griolet (pp. 46 et 47) d'une façon satisfaisante. C'est à lui que je me suis référé en faisant les citations précédentes au sujet de cette question qui n'a encore été traitée que légèrement dans la correspondance diplomatique échangée sur la réclamation présente.

Et je dois ajouter que si ce qui vient d'être dit est vrai en ce qui concerne les jugements rendus par des juges revêtus de l'autorité publique pour décider sur un cas, sur ses motifs et sur ses conséquences, l'absolutisme de cette vérité est encore plus complète en ce qui touche les décisions rendues par des arbitres sans juridiction véritable et sans autres facultés que celles accordées par le compromis. Donc, tout ce qui vise l'exception et l'action de la „res judicata" étant d'interprétation stricte (GRIOLET- de l'autorité de la chose jugée p. 68) doit l'être plus encore lorsqui'il s'agit de l'appliquer aux décisions arbitrales.

Dans cette discussion, une loi romaine dit: *De his rebus et rationibus et controversiis judicare arbiter potest, que ab initie fuissent inter eos qui compromisserunt, non quæ postea supervenerunt* (L. 46 D. de recept. qui arb.) et l'effet attribué par le droit civil aux décisions arbitrales était si limité qu'il ne leur accordait pas de produire les effets de chose jugée. La loi I du code de *recept* dit: *Ex sententia arbitri ex compromisso jure perfecto arbitri appellari non posse saepe receptum est; quia nec judicati actio inde praestari potest.*"

L'inefficacité des décisions arbitrales du Droit International, à servir pour la décision des cas futurs, quoiqu'ils pussent être analogues à ceux déjà jugés, a été expressément reconnue par le Gouvernement des Etats-Unis d'après ce que l'on voit dans l'ouvrage de Moore "International Arbitrations," au sujet de la Commission Mixte, qui siégea Halifax, en vertu du traité de Washington, et qui condamna les Etats-Unis à payer au Gouvernement Britannique cinq millons et demi de dollars à titre de dommages et intérêts pour le préjudice causé par des pêcheurs américains, et, dans l'espèce de réclamation présentée par le Ministre d'Espagne, Sénor Muruaga, le motif en était la confiscation de coton considéré comme contrebande de guerre dont les sujets espagnols Mora et Larrache avient souffert. Le Secrétaire d'Etat des Etas-Unis, T. F. Bayard, a dit dans sa communication du 3 décembre 1886: „Les décisions des Commissions Internationales * * * ne sont considérées comme ayant d'autorité *que sur l'espèce particulière jugée* * * * d'aucune façon elles ne lient les Etats-Unis, sauf dans les cas où elles furent appliquées (Papers relating to the For. Rel. of the U. S., year 1837, p. 1021).

Le méme honorable Secrétaire disait dans le document précité "Ces

décisions s'accordent avec la nature et les termes du traité d'arbitage's tenant compte, sans doute, que: *Omne tractatum ex compromisso sumendum: nec enim aliud illi (arbitro) licebit, quam quod ibi ut officere possit cautum est; non ergo quodlibet statuere arbiter poterit, nec in que re libe nisi de qua re compromissum est.*"

Si l'on se rappele les stipulations de la Convention citée, du 4 juillet 1868, l'on est convaincu que les réclamations des citoyens Américains contre le Mexique et celle des Mexicains contre les Etats-Unis, soumise au jugement de la Commission Mixte créée par la dite Convention, devaient indispensablement réunir les trois conditions suivantes:

1. Avoir pour origine, des événements postérieurs au 2 février 1848, et *antérieurs* au 1 février 1869 (date de l'échange des ratifications de la (Convention).

2. Avoir pour objet des préjudices estimables en argent, occasionnés aux individus ou aux biens des réclamants de l'un des deux pays, par les autorités de l'autre.

On remarquera de suite que la réclamation des intérêts dont on sollicite aujourd'hui le paiement, ne peut être considérée comme remplissant la première et la troisième des conditions énumérées. Il me semble inutile de m'arrêter à le démontrer ou de continuer à discuter le peu de fondement avec lequel on allègue la chose jugée dans la nouvelle réclamation présentêe contre le gouvernement Mexicain. La décision que prononça l'arbitre en 1876 fut complètement et absolument exécutée par le paiement effectué par le Mexique de $904,070.79 en or mexicain, qu'il était condamné à payer et cette décision est inapplicable à la nouvelle réclamation.

Lors même qu'en vertu des allégations antérieures, il serait jugé que la réclamation actuelle ne fut pas réglée par la décision prononcée en 1875, la première objection, l'exception la plus claire que l'on pût opposer à la demande, c'est que le droit que les réclamants auraient pu avoir au commencement de l'année 1848, fut complétement éteint en vertu du traité de paix et d'amitié, de la même année, entre le Mexique et les Etats-Unis; l'article 14 en effet déclara que toutes les créances et toutes les réclamations non résolues jusqu'alors et que les citoyens de la seconde de ces puissances pourraient avoir à présenter contre le Gouvernement de la première, devraient être considérées désormais comme éteintes et comme annulées pour toujours. Voici le texte de l'article de ce traité qui contient la disposition invoquée et je le cite en anglais, afin qu'il soit mieux compris par la partie plaignante. Il est ainsi formule:

XIV.

The United States do furthermore discharge the Mexican Republic from all claims of the United States not heretofore decided against the Mexican Government, which may have arisen previously to the date of the signature of this treaty, which discharge shall be final and perpetual, whether the said claims be rejected or be allowed by the board of commissioners provided for in the following article and whatever shall be the total amount of those allowed.

A cette exception péremptoire les réclamants répondent qu'ils ne demandent pas les intérêts échus avant la date du traité, mais ceux échus après cette date, et equ'ils ne réclament pas le capital parce qu'ils ne s'y reconnaissent aucun droit, le Mexique pouvant le garder

indéfiniment. En répondant ainsi, les réclamants oublient que l'article précité (XIV) ne libère pas seulement le Mexique des réclamations ou des demandes pouvant être présentées immédiatement, mais de toutes les créances (all claims) non encore tranchées (not heretofore decided) à la charge de son Gouvernement; et tel est le cas pour la créance du Fonds Pie qui comprend en tout, le capital et les intérêts. Le mot anglais *claim*, qui signifie la réclamation ou la demande de ce que nous croyons, avec droit, nous appartenir, comme la cause, l'origine ou le fondement de cette demande, comprend en effet tout cela: "*a right to claim or demand something; a title to any debt, privilege or other thing in possession of another; also a title of any thing which another should give or concede to, or confer on, the claimant*," d'après ce que dit Webster dans son dictionnaire, l'autorité linguistique la plus compétente aux Etats-Unis, et qui pénètre partout où la langue anglaise est parlée. (Voyez le Dictionnaire Anglais de Webster, article *claim*, deuxième acception.)

Cette interprétation de l'article XIV est confirmée par la lecture du commencement de l'article suivant, (XV) dont le texte anglais dit ceci: "The United States exonerating Mexico from all demands on account of the claims of their citizens mentioned in the preceding article and considering them entirely and for ever cancelled." Ici, l'on voit bien la distinction entre *demands* et *claim* et l'on remarque que ce dernier mot est pris dans le sens due titre ou droit conféré par son origine à une réclamation quelconque.

Il ne pouvait en être autrement puisque l'intention manifeste de cette convention, fut de ne rien laisser en suspens qui fût susceptible d'altérer ou de troubler les relations pacifiques et amicales renouvelées par ledit traité. Aussi, ce que l'on fait très souvent dans des traités du même genre: l'extinction complête de toutes les réclamations, et de tous les motifs de réclamations en suspens ou qui par suite de faits antérieurs, pourraient surgir entre les deux Gouvernements, fut stipulée, sans abandon toutefois de l'intérêt des particuliers. L'article XV don't le premier paragraphe a été copié pourvoyait à cet intérêt. Il ordonnait que trois millions et un quart de piastres fussent réservés pour faire face aux réclamations approuvées par une Commission Américaine nommée à cet effet, et établie par le Gouvernement des Etats-Unis, et devant laquelle les représentants de l'Eglise Catholique de Californie auraient dû se présenter s'ils avaient eu conscience de leurs droits. Pour n'avoir pas voulu se présenter à cette époque, ils ne sont pas du tout autorises à réclamer aujourd'hui contre le Mexique, qui resta libéré de toute responsabilité, *from all demands on account of the claims of their* (of the United States) *citizens*.

En présence des articles invoqués du traité de Guadelupe Hidalgo le plus solennel de tous ceux que nous ayons signés avec la Nation voisine, et toujours en vigueur parce que de son essence il est de nature perpétuelle, il paraît inconcevable de soutenir que la créance du Fonds Pie ne fut pas éteinte en vertu des stipulations du dit traité. Quel était le privilège de ce Fonds qu'il ne fût pas compris dans la déclaration absolue du traité? Il n'y a pas à s'étonner que les avocats des réclamants, à bout de ressources, aient, pour contester cette défense, cherché à limiter sur ce point les effets du traité à l'extinction des intérêts du Fonds, échus avant le mois de février 1848. Mais il est inexplicable, qu'une semblable interprétation ait été admise par la décision arbitrale signée par Sir Edward Thornton. Voilà pourquoi,

entre autres motifs, nous considérons la dite décision comme notoirement injuste, puisque aucune injustice ne peut être plus évidente que celle d'une décision jugeant sur une question entre las citoyens d'un pays et le Gouvernement d'un autre, en opposition expresse avec les stipulations d'un traité solennel conclu par les deux pays et dont la vigueur n'est past en cause.

Lors même que, contre toute probabilité, on en viendrait à décréter que le traité de Gaudalupe Hidalgo laissa ouverte la créance (the claim) des citoyens américains contre le Mexique, touchant le Fonds Pie, créance existant, allègue-t-on, au moment de la signature du traité, il y aurait encore un motif d'extinction de cette créance et par conséquent du droit à exiger les intérêts du capital. On sait en effet que la République Mexicaine, en vertu de ses droits souverains et pour des raisons de haute politique exposées par le Commissaire Mexicain dans son rapport de 1879, décréta en 1856 en 1859, d'abord la désamortisation pius la nationalisation des biens ecclésiastiques, ce qui, à proprement parler, n'est autre chose, que l'interdiction au clergé de continuer à administrer ces biens nationaux. Si, comme on l'a dit fort justement, la validité et les motifs de cette détermination peuvent être contestés au point de vue du droit canonique, ils sont indiscutables sous leur aspect politique et social; et ils ne le sont pas moins si l'on tient compte des résultats favorables de cette détermination qui consolida la paix et stimula les progrès de la République.

Il semble clair au point de vue du droit commun et du droit international privé, que le capital, dont les intérêts sont réclamés, devait être considéré comme bien immeuble, si l'on tient compte de son caractère de *census consignativus* ou de cens en général, et du fait qu'il. (Sala Dro. Real de España, tom. 1, lib. 2, tit. 14 et les auteurs qu'il cite) était soumis à la législation du pays sous la jurisdiction duquel il était constitué et fut *rei sitae*, quelle que fut la nationalité des créanciers (censualistas).

D'autre part, il faut tenir en compte que les soi-disants créanciers ayant laissé passer maintes années sans exiger les intérêts qu'ils réclament maintenant, les ont par là assujettis aux lois du pays, sur la prescription. L'article 1,103 de notre Code Civil leur est donc applicable. Il y est dit: "Les pensions '*emphitéotiques*' (emphiteose—bail à longues années, 10 à 90 ans) ou censuelles, les rentes, les loyers et toutes autres prestations non exigées à leur échéance, seront prescrites après 5 années, à partir de l'échéance de chacune d'elles, que l'action réelle ou l'action personnelle soit exercée aux fins du recouvrement.

"Supposant même que la créance des réclamants n'ait été éteinte ni par l'article XIV du traité de Guadalupe Hidalgo ni par les autres motifs que nous venons d'examiner, il en est un autre qui aurait déterminé son extinction d'après la législation mexicaine, à laquelle, sans aucun doute, est soumis un cens constitué par le Gouvernement mexicain en l'année 1842.

Lorsqu'il s'agit de régler la dette publique, le dit Gouvernement expédia à la date du 22 juin 1885 un décret convoquant tous ses créanciers en vue de l'étude et de la conversion de celles de leurs créances ayant pour origine des occupations, emprunts, ou tous faits ou affaires dont une responsabilité pourrait résulter à la charge du Trésor public. A cet effet un délai convenable fut fixé et prorogé plusieurs fois pour la présentation desdites créances. L'article 15 de la loi du 6 septembre 1894 était ainsi conçu; 'Seront pour toujours

prescrits sans que jamais dans la suite ils soient susceptibles de constituer un droit ou d'être exercés en aucune façon, les créances, les titres de dettes publiques et les réclamations suivantes —" Toutes les créances visées par les articles 1 et 2 qui ne seront pas présentées à cette conversion dans le délai fixé par l'article antérieur, ou bien que présentées, ne rempliraient pas les conditions établies par ce décret."

Il est indiscutable que les créances supposées pour ce capital et pour les intérêts réclamés au Gouvernement du Mexique par l'Archevêque et les Evêques de l'Eglise de la Haute Californie, ne furent pas présentées à la conversion, selon la loi de 1885, et que les soi-disants creanciers ne profitèrent pas du nouveau et dernier délai qui leur fut accordé par le décret de 1894, à l'article 14. La caducité ou prescription d'action ou de défense "*superveniente*" laisserait même donc sans aucun effet le jugement devenu autorité de chose jugée, d'après un principe de droit indubitable reconnu par les réclamants actuels eux-mêmes.

IV.

Les réclamants disent que l'objet du Fonds Pie des Californies était de pourvoir à la conversion des Indiens et au maintien de l'Eglise Catholique aux Californies. Ce but étant double, il y a une distinction à établir entre ses deux parties.

Le premier point, la conversion des Indiens païens à la Foi Catholique et leur soumission au Souverain Espagnol doit être indiscutablement considéré comme le but principal et direct des missions confiées à la Compagnie de Jésus par le Roi Catholique, dotées par les fondateurs du Fonds Pie et subsidiées par le Trésor public du Mexique. Le second point, c'est-a-dire le maintien de l'Eglise aux Californies, ne fut pas le but principal ni direct de l'institution du Fonds, mais seulement le moyen d'opérer la conquête spirituelle des Indiens sauvages par les religieux missionaires.

Cette distinction établie on voit immédiatement que le Culte Catholique fut un but des missions, subordonné à celui de la conquête spirituelle des Indiens sauvages. Il s'ensuit que la non-existance des Indiens sauvages ou idolâtres dans une contrée donnée, où la suppression des missions catholiques pour les dominer ou les christianiser devrait produire la suppression des subsides affectés aux missionnaires et, non, en aucune façon, leur application exclusive au maintien du culte catholique, à moins de violer ouvertement la volonté des bienfaiteurs de cette pieuse fondation.

A l'expulsion de Jésuites, ordonnée par le Roi Charles III, et dont la cessation des missions de la nouvelle Espagne fut la conséquence, sinon à la suppression de l'ordre, déclarée par Clement XIV, dans son Bref du 21 juillet 1773, paragraphe 32, et qui dit: "Touchant les missions sacrées, lesquelles nous voulons qu'elles soient comprises également dans tout ce qu'il été disposé sur la *suppression* de la Compagnie, nous réservons d'établir des moyens par lesquels il sera possible d'obtenir avec une plus grande facilité et une plus grande stabilité le conversion des Indiens ainsi que la pacification des dissensions."

Il faut remarquer que les missions fondées par les Jésuites ne depassérent jamais les limites de la Basse Californie. Leur mission la plus septentrionale fut celle de Sainte-Marie sous le trente et unième degré de latitude et en dehors de la démarcation de la Haute Californie, fixée par le traité de Guadaloupe Hidalgo.

Les missions de la Haute Californie furent entreprises après l'expulsion des Jésuites, non par la Compagnie de Jésus, par le Saint-Siège ou une autre autorité ecclésiastique quelconque, mais sur les dispositions du Vice-Roi de la nouvelle Espagne approuvées par le Roi en 1769 et 1762.

Les missions de la Haute Californie étant des entreprises nationales furent naturellement abandonnées par le Gouvernement Mexicain au moment de l'acquisition de cette contrée par les Etats-Unis. Cet abandon fut imposé par le changement d'autorité et de juridiction sur le territoire aliéné aux Etats-Unis, et il était en outre une dérivation de la faculté privative que le Gouvernement Mexicain avait héritée du Gouvernement Espagnol, *de supprimer des missions et d'en fonder de nouvelles pour le conversion des infidèles dans ses domaines.*

Non seulement les missions de la Haute Californie prirent fin depuis le 7 juillet 1846 comme entreprises nationales à la charge du Gouvernement Mexicain, mais l'Eglise catholique elle-même cessa d'exister comme entité légale, puisque son rétablissement comme corporation n'eut lieu que le 22 avril 1850, en vertu du statut de cette date de l'Etat de Californie.

Enfin, il faut tenir compte qu'il n'existe pas dans la Haute Californie de tribus d'Indiens sauvages dont la soumission au pouvoir séculier de la Nouvelle Espagne et la conversion à la foi catholique fussent le but principal ou l'objet direct des missions des Jésuites dotées des biens du Fonds Pie des Californies.

V.

Les réclamants ne prouvèrent jamais qu'une loi ou une disposition fût expédiée par une autorité légitime, imposant des restrictions à cette faculté. En l'exerçant, le Gouvernement Mexicain ordonna par le décret du 15 septembre 1836 que l'administration du Fonds fût confiée à l'Evêque de Californie et à ses successeurs en qualité d'employés dudit Gouvernement. Le décret du 18 fevrier 1842 retira cette commission à l'Evêque et à ses successeurs. Le décret du 24 octobre 1842 ordonna la vente des biens qui formaient le Fonds et leur capitalisation à *census consignativus* sur le Trésor National; et deux ans et demi plus tard il ordonna la dévolution à l'Evêque de Californie et à ses successeurs des créances et autres biens encore invendus, tout en se réservant expressément, par le décret du 3 avril 1845, la faculté de disposer du produit des biens vendus dont les intérêts sont précisément l'objet de cette réclamation.

Cette faculté privative du Gouvernement Mexicain est reconnue par les réclamants. Dans leur réplique envoyée le 21 février 1901, à l'hon. John Hay, Secrétaire d'État des Etats-Unis, par MM. Jackson H. Ralston et Frederick L. Siddons, avocats des Evêques catholiques romains de Californie, se trouvent les mots suivants: "*No dispute has ever been raised as to the right of the Mexican Government to administer the property in question . . . Mexico must continue the trust relation which she has herself assumed . . . It should be borne in mind that we never have had or made any claims to the principal. From its origin it has been in the hands of trustees: First the Jesuits, then in the the Spanish crown, then in the Government of Mexico, then in the bishop under the law of 1836, then from February 8, 1842, again in the Mexican Republic. All of these changes were accomplished by law, the act of the sovereign.*"

VI.

L'usage fait en 1842 par le Gouvernement Mexicain du droit souverain de recouvrer la faculté d'administrer le fonds et d'en affecter le produit sans aucune intervention de l'Eglise Catholique des Californies, ne peut être considéré en droit comme la cause d'un dommage fait à la partie réclamante: "*qui jure suo utitur neminem lædit.*"

Par cette même raison, le fait que le Gouvernement Mexicain, du moment où cessa son autorité sur la Haute Californie, concentra sur la Basse Californie ses soins et sa protection tant dans l'ordre civil que dans l'ordre ecclésiastique, et que dès lors il cessa d'appliquer à la Haute Californie les rentes destinées à stimuler les missions catholiques, ce fait ne peut pas justifier davantage les réclamations contre la République Mexicaine.

Les missions des Jésuites dans cette contrée n'existaient plus; les habitants n'avaient plus besoin de recevoir du Mexique des provisions, des habillements et autres ressources pour subsister; leurs terres étaient destinées à être cultivées, elles le furent en effet et devinrent merveilleusement productives. Etant donné ces circonstances, le Gouvernement avait la faculté "discrétionnelle" en sa qualité de fidéicommissaire, substitué aux Jésuites, d'employer les produits du Fonds à d'autres missions sans donner lieu par là à aucune censure, plainte ou réclamation de qui que ce fût et conformément en tous points à la volonté des fondateurs, exprimée dans l'acte de constitution du Fonds d'après les mots textuellement cités plus haut.

VII.

L'exagération de la demande, ou *plus pétition* se démontre de plusieurs manières, et tout en me réservant de pıésenter au cours de la procédure une liquidation qu'il n'a pas été possible d'achever jusqu'à présent, je crois devoir faire les remarques suivantes:

D'abord, il est bien évident que la demande faite aujourd'hui du paiement en monnaie d'or Mexicaine des intérêts réclamés s'autorisant de ce que d'autres interêts du même capital furent payés de cette monnaie, en vertu du jugement rendu en novembre 1875, équivaut à demander le double du montant de l'intérêt à 6 pour cent sur leque, un droit a été allégué. La raison en est que—personne ne l'ignore—en 1875 la valeur de l'or par rapport à celle de l'argent était presque exactement de 16 à 1 tandis qu'aujourd'hui cette proportion s'élève à plus du double de cette valeur. Or, les biens du Fonds Pie furent estimés en piastres argent, ils furent vendus pour la valeur représentée par cette monnaie, et le produit de leur vent fut reconnu par le Gouvernement Mexicain en faveur dudit fonds. Le Mexique n'a pas eu et n'a pas encore aujourd'hui d'autre étalon pour sa monnaie, que la piastre argent; il ne frappe d'or que pour une somme très minime et cette monnaie n'est pas en usage dans les transactions commerciales. Lorsque les réclamants demandent à titre d'intérêts cette somme en dollars, ils parlent des piastres de leur pays, qui ont cette dénomination, bien entendu parce qu'elles sont en or. L'or Mexicain dont ils parlent vaut un peu moins que l'or américain; mais dans tous les cas, les dollars d'or mexicains ont une valeur double de celle des piastres en argent; la seule monnaie au moyen de laquelle les intérêts du Fonds Pie devraient étre payés s'ils étaient dus aux réclamants.

La prétention des Evêques Californiens est donc usuraire lorsqu'ils réclament non le 6 pour cent du capital mais plus de douze pour cent par an.

Un autre point sur lequel la réclamation est exagérée, c'est lorsque, ne se bornant plus à exiger la moitié des intérêts du capital, ce qui serait déjà excessif, considérant que l'autre moitié devrait revenir aux missions de la Basse Californie les réclamants formulent une demande des 85 pour cent en s'appuyant sur le fait que cette proportion est celle qui existe entre les populations de la Haute Californie des Etats-Unis et de la Basse Californie du Mexique. On oublie en raisonnant de la sortè que le Fonds avait été destiné à la conversion des sauvages et à l'amelioration de leur sort, et non à la population tout entière des Californies. Pareil raisonnement serait admissible si toute la population des deux Californies était composée d'Indiens sauvages. Une telle prétention est insoutenable et démontre uniquement le zèle immodere dans l'espéce des avocats et des conseillers des réclamants. Pour satisfaire à l'esprit de la volonté des fondateurs, on devrait considerer non la proportion de la population totale des deux Californies mais celle qui existe entre les Indiens non convertis et non civilisés de l'une et de l'autre. Et il est bien avéré que dans la Californie Americaine il n'y en a pas beaucoup et peut-être pas un seul, qui se trouve dans la situation prévue.

Un autre excès de la réclamation consiste à faire entrer les biens appartenant au Marquis de las Torres de Rada dans la valeur de ce qui est réclamé. Le montant de ces biens constitue indubitablement la plus grande part de la réclamation et cependant il n'y a pas de motif légal pour les réclamer. Cette assertion étonnera sans doute les réclamants qui se sont livrés à une étude très détaillée de tout ce qui concerne la donation des dits biens au Fonds Pie; mais il faut tenir compte que tout récemment on a découvert dans l'archive générale de la République des données très importantes établissant ce point. Ces donnés se trouvent dans le livre imprimé au XVIIIe siècle, que je présente avec cette réponse et dont l'autenticité sera bien et dûment établie. Ce livre prouve qu'un procès très étendu fut suscité par la succession du Marquis de las Torres de Rada et que le jugement final, rendu par le Conseil Supréme des Indes en Espagne, à cette époque tribunal de dernier ressort, déclara nuls et non avenus les inventaires et les estimations des biens qui, laissés à sa mort par le Marquis sus-mentionné, et nulle et sans aucune valeur l'adjudication qui fut faite de ces biens à la Marquise sa veuve. Ce jugement, rendu en dernière instance laissa sans effet. les volontés de la Marquise Douairière de las Torres de Rada, et par la même sentence, celle du Marquis de Villa Puente exprimées dans le testament que ce dernier fit au moyen d'une procuration pour tester au nom de la Marquise. Or, ce testament fut la base de la donation que tous les deux firent au Fonds Pie, de biens qui ne leur appartenaient pas légalement.

Je n'insiste pas davantage sur ce point et je me rapporte au livre que je présente et principalement au jugement par lequel il se termine et dont l'original, d'après ce qu'il sera établi à l'occasion, se trouve à l'archive Espagnole du Conseil Suprême des Indes. Il n'est point douteux que la donation des biens d'autrui faite par la Marquise au Fonds Pie fut nulle d'après le principe bien connu. "*Nemo plus juris transferre potest quam ipse haberet.*" Il y aurait donc à déduire de la somme réclamée par les plaignants au moins la valeur des biens dont il s'agit.

En conclusion, il me paraît qu'il a été demontré:

1. Que les réclamants n'ont pas de titres à se présenter comme fidei-commissaires légitimes du Fonds Pie des Californies.

2. Que l'Eglise de la Haute Californie n'a pas le droit d'exiger du Gouvernement Mexicain le paiement des intérêts pour le capital du Fonds supposé.

3. Que les titres invoqués par l'Archevêque et l'Evêque réclamants sont sans force dans ce cas, ou sont éteints, d'abord en vertu du traité de Guadalupe Hidalgo qui prononça l'extinction de toutes les créances des citoyens des Etats-Unis envers la République Mexicaine, en la libérant de toutes réclamations fondées sur des créances à sa charge existant le 2 février 1848, en faveur des dits citoyens, comme on le voit dans les articles 14 et 15 du traité. Même sans cette convention, le droit des réclamants serait éteint en vertu des lois générales successivement votées en cette République et auxquelles, sans aucun doute, le sens qui constituait le Fonds Pie se trouvait assujetti.

4. Que le véritable but de ce Fonds, l'objet auquel il était destiné, était la conversion des Indiens sauvages au christianisme ainsi que leur civilisation. Etant donné qu'il n'existe plus d'Indiens sauvages, il serait sans application dans la Californie.

5. Qu'au Gouvernement Mexicain seul appartient le droit de donner dans son territoire ou en dehors de celui-ci, une application quelconque au Fonds, sans qu'il soit tenu de rendre compte aux Evêques de la Californie de ses actes à ce sujet.

6. Que si les demandeurs avaient un droit à réclamer des intérêts, ils n'auraient pas le droit d'exiger la somme qu'ils demandent et qui est excessive car ils estiment en or des sommes qui ont été calculées ne piastres argent. La différence entre ces deux espèces de monnaie n'est pas la même aujourd'hui que celle qui existait en 1875 à l'époque où le Mexique fut condamné à payer d'autres intérêts en or. D'ailleurs la portion des intérêts correspondant à la Haute Californie est évaluée sur la population et non sur le nombre des Indiens qui sont à convertir. Cette somme est encore d'une plus grande exagération; l'on veut comprendre dans la valeur du Fonds Pie les biens donnés par la Marquise de las Torres de Rada, dont la donation fut annulée comme le révèlent les documents nouvellement découverts.

Pour ces motifs et pour ceux qui seront allégués plus tard au nom du Gouvernement Mexicain, je demande respectueusement au tribunal de rejeter la réclamation proposée contre ce Gouvernement par les représentants de l'Eglise Catholique de la Californie, réclamation opposée en général à la justice et spécialement au traité de paix et d'amitié en vigueur entre la République Mexicaine et les Etats-Unis d'Amérique.

Mexico, le 6 août 1902.

Le Ministre des Affaires Etrangères,

IGNACIO MARISCAL.

REPLICATION OF THE UNITED STATES OF AMERICA TO THE ANSWER OF THE REPUBLIC OF MEXICO IN REPLY TO THE MEMORIAL RELATIVE TO THE PIOUS FUND OF THE CALIFORNIAS.

Sr. Don. Ignacio Mariscal, minister of foreign affairs of the Republic of Mexico, having offered to this honorable court an answer to the memorial of the United States, it has seemed incumbent upon the undersigned to present for the consideration of this tribunal what may be regarded as in the nature of a replication thereto, and in so doing the paragraphing of the answer will be followed.

I.

Under the head of Paragraph I, the distinguished secretary contends that no law later in date than October 24, 1842, granted to the Californias the right to receive and apply to their enterprises the annuity of the Pious Fund. The existence of a later law was not necessary, for, apart from the legal and equitable right of the bishop to administer the fund in question, the act of April 3, 1845, recognizes him as the proper beneficiary, and even before that date, during the continuance of the decree of October 24, 1842, and on April 23, 1844, and, as is believed, on other dates, payments on account of the income belonging to the Pious Fund of the Californias were ordered to be made to him (Transcript, p. 149). This sufficiently disposes of the suggestion that the Mexican Congress having, in the act of April 3, 1845, reserved the right to decide as to the proceeds of property sold, the bishop was not the proper recipient of funds chargeable on account thereof, for a practical interpretation covering the matters reserved in the law of April, 1845, had been given to the law of October, 1842, and further congressional action was needless, and none in fact took place.

II.

Even if no perfect right had existed in the Catholic Church of Upper California to administer the Pious Fund of the Californias, or to demand the perpetual interest thereon provided for by the Mexican decrees (a proposition we deny), nevertheless, in the eye of a court of equity dealing with the subject-matter upon broad principles of right, the Catholic Church, through its accredited officers, would have been the proper recipient of the interest upon the fund. And this equitable, and, as we contend legal, right also, was conclusively recognized by the Mexican Government, as has been fully discussed in the brief of the agent and counsel of the United States, pages 55 and 56. For further considerations relative to the question of legal right, we also refer to the argument of Messrs. Stewart and Kappler.

III.

A. For the moment, under this heading, following the answer of Mexico, attention is invited to the fact that Sr. Mariscal in his statement in the answer of the trusts upon which the Pious Fund was held only included them in so far as he esteemed them as assisting to sustain the argument he desired to make. We have not believed that the court could be enlightened or brought to a proper conclusion by this method of treatment, and in the original brief we have fully stated the trusts, and, for the convenience of the court, we have repeated them in a footnote to the English copy of the answer. (See Exhibit A, hereto attached.) In the American view of the matter, a proper conclusion as to the meaning of the instrument in question can only be gained by a perusal of its essential parts, and any argument predicated upon partial and imperfect quotation must be erroneous in itself, and incidentally have a tendency to mislead the court.

To the point discussed under this paragraph subsequent reference will be made.

B. Under this heading, Sr. Mariscal renews the contentions made by him in his letter to Secretary Hay, of date November 28, 1900 (Diplomatic Correspondence, pp. 27 et seq.), insisting that only the decisory part of the judgment is to be regarded as *res judicata.* It will be noted, however, that in the letter above referred to he relied upon Laurent to sustain his contentions. That he was in error as to the effect of the legal citation he then employed, must, we think, appear fully by reference to the letter of Messrs. Ralston and Siddons (Diplomatic Correspondence, pp. 51 et seq.), wherein it is shown that the citation relied upon by Laurent for his statement was based upon a case not properly involving the principle laid down by him, while upon the very page from which the citation was taken, Laurent showed that if the matters necessary to be found to make up a judgment had been debated between the parties, the judgment of necessity in these respects had the force of *res judicata.* It will be borne in mind that before an award could have been given in the former controversy in favor of the bishops of California, it was necessary that the court should have found the existence of a fund, the possession of it by Mexico, her obligation to pay interest thereon to the Catholic bishops, the yearly amount due by her on account of such obligation, and the number of years for which she was in default. Questions upon all of these matters were raised. They were made the subject of evidence and fully debated between the parties, and, as Laurent would indicate, having been so debated, the authority of the conclusions reached as *res judicata* "n'est point douteuse."

Having therefore abandoned Laurent, he now discusses Savigny, and in the translation of the answer hereto attached (p. 23[a]) he quotes him as expressing his own opinion to the effect that "the force of *res judicata* does not exist except in the decisory part of the judgment."

In making this statement Sr. Mariscal is manifestly in error. We hesitate to attribute to him want of care in his reading of Savigny, but the exact language of that author is as follows:

> C'est une doctrine fort ancienne et soutenue par un grand nombre d'auteurs que l'autorité de la chose jugée appartient au jugement seul, et non à ses motifs, et cette doctrine se résume en ces termes: L'autorité de la chose jugée n'existe que pour le dispositif du jugement. (Dr. Rom., tome 6, p. 357.)

[a] Page 72, this volume.

It will be seen that the statement made by Savigny was not a pronouncement of his own ideas, as would be implied from the reading of the Mexican answer, but a deduction from the writings of others of their opinion.

With this statement as the foundation for his discussion, Savigny undertakes to disentangle what he denominates "the confused and erroneous ideas" entertained by the partisans of the doctrine cited for the purpose of discovering its foundation. In the course of his interesting and instructive discussion he arrives at the logical and impregnable position that—

Les éléments du jugement ont l'autorité de la chose jugée (p. 365).

Further pursuing the subject, he groups the "motifs" into two classes; those which are objective, or which constitute the elements necessary to be found before any judgment may be given, and those which are subjective, or which influence the mind of the judge to affirm or to deny the existence of these elements (p. 367). Then, stating the principle above given in other words, he declares that—

Les motifs objectifs (les éléments) adoptés par le jugé ont l'autorite de la chose jugé; les motifs subjectifs n'ont pas l'autorité de la chose jugée.

With this distinction in mind he finds no difficulty whatsoever in reconciling the divergencies of opinion and explaining the misunderstandings to be found among the various authors.

The conclusion of Savigny is summed up in these words (p. 376):

Les motifs (meaning of the word being as above explained by him) font partie intégrante du jugement, et l'autorité de la chose jugée a pour limites le contenu du jugement y compris ses motifs.

He further comments:

Ce principe important, conforme à la mission du jugé, a été formellement reconnu par le droit romain et appliqué dans toute son extension.

Further pursuing the citations made by Sr. Mariscal from Savigny, we beg to call attention to the fact that on page 25 [a] (Exhibit A), hereto attached, of the answer of Mexico the following language is used:

In the particular case (which is ours) of a demand for interests founded on a judgment which declared them due, after having heard the pleas of the defendant against the right that claimed the capital or rent, Savigny is of opinion that this right has in its favor the force of *res judicata;* but, at the same time, he observes that Buchka solves the question in the contrary sense in accordance with Roman law; that, in the same sense, the Prussian tribunals have solved it for the reason that a recognition of a right in the reasons (motifs) of a decision does not appertain in fact to the judgment, whose decisory part alone constitutes *res judicata;* and Savigny adds: "We have not on this point the decision of Roman law, and the texts that are usually cited are foreign to the matter. (D. R., sec. 294; Nos. 3 and 4, note (*r*) of No. 7, and sec. 299, No. 4, T. 6, pp. 397, 401, 446.)"

In the above summary and citation occur two errors, to us entirely inexplicable. To understand their nature, let us cite the exact language used by Savigny, taking it from pages 458 and 459:

Il en est de même quand le défendeur a été condamné à payer les intérêts d'une créance ou les arrérages d'une rente après avoir contesté le droit du demandeur au capital, ou à la rente; ce droit se trouve investi de l'autorité de la chose jugée, par la condamnation. (*q*).

(q) Ici encore Buchka a bien résolu la question pour le droit actuel, mais pour le droit romain il la résout à tort en sens inverse. Vol. I, p. 307, 308; Vol. II, pp. 184, 191. J'ai déjà signalé, sec. 294, notes (*n*) et (*r*), quelques décisions erronées des tribunaux prussiens sur cette question.

Nous n'avons pas sur ce point de décision du droit romain, et les textes que l'on a coutume de citer sont étrangers à la matière.

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[a] Page 73, this volume.

Critical comparison of the answer of Mexico with the language of Savigny, which it purports to sum up, will show that Buchka exactly agreed with Savigny as to the present law (a fact overlooked by Mr. Mariscal), and in so far as he undertook to state the Roman law otherwise, he had, in Savigny's opinion, reached a wrong conclusion (à tort); this commentary also being omitted.

There are contained in the answer of Mexico three citations from Griolet, who has been correctly quoted as stating in opposition to the opinion of Savigny that neither the subjective or the objective reasons can share in the authority of the judgment, and that the authority of *res judicata* does not embrace the reasons (motifs). His positions, nevertheless, are not altogether clear, and it is not too much to say they are contradictory. For instance, after referring to the distinctions made by Savigny between subjective and objective "motifs," he says (pp. 8 and 9):

> Cette théorie est exacte dans sa plus grande partie, parce qu'on voit que M. de Savigny considère comme motifs objectifs de la sentence les rapports de droit en vertu desquels la condamnation est demandée, et les rapports de droit que le défendeur oppose au demandeur pour neutraliser en quelque sorte l'effet des rapports de droit qu'on invoque contre lui, et éviter ou amoindrir la condamnation.

Furthermore, in the application of the rules govering the subject, he furnishes us with references directly in point for the support of the contentions of the United States. To make clear his understanding of what is said to be his rule, and to furnish applications in point for our present consideration, we copy the following extracts:

> 1°. *Condamnation du défendeur.*—Il est facile de reconnaître quels sont les droits sur lesquels la condamnation suppose une déclaration du juge le plus souvent affirmative, quelquefois négative. Ce sont tous les droits dont l'existence, dans le premier cas, ou l'inexistence, dans le second cas, était nécessaire pour justifier l'ordre sanctionnateur. (p. 125.)

Again, from page 104, we quote two paragraphs:

> Un rapport de droit peut avoir de nombreuses conséquences et être l'objet de sanctions diverses. Bien qu'on n'ait invoqué qu'une seule de ces conséquences ou qu'on n'ait poursuivi qu'une seule de ces sanctions, la déclaration que le juge a rendue s'attache au droit lui-même, en sorte qu'elle serait opposable si on invoquait plus tard une autre conséquence du droit, ou si on poursuivait quelque autre des sanctions que ce droit peut recevoir. Cette conclusion est conforme aux décisions de la jurisprudence et des auteurs.
>
> N'est-elle pourtant pas contraire à la théorie qui exige l'identité de l'objet de la demande?
>
> Sans abandonner cette théorie, on reconnaît que le juge saisi de la revendication à titre héréditaire prononce sur le droit héréditaire, que le juge qui admet un enfant à la succession de son père le déclare enfant légitime (cas. 25 pluv., an 11, D. ch. j., 163), que le juge qui ne condamne qu'au paiement du quart d'une créance, des intérêts du capital, affirme, dans le premier cas, toute la créance, et, dans le second, la créance du capital (req. 20 décembre 1830, D. ch j., 112; Toulouse, 24 décembre 1840, ibid., 113).

We add from page 105:

> Il est donc bien admis dans notre droit que la déclaration du jugement porte sur le droit contesté tout entier, et non pas seulement sur le droit contesté relativement à la condamnation qui était demandée.

We add from page 131:

> Quelquefois l'existence de plusieurs droits est nécessaire pour justifier la condamnation poursuivie par le demandeur. Quand cette condamnation est prononcée elle implique évidemment l'existence de tous ces droits. Mais on voit non moins aisément que l'absolution peut ne pas avoir toujours le même sens. Il suffit en effet, pour qu'elle soit justifiée, qu'un seul des droits nécessaires ait fait défaut. Ainsi une demande d'intérêts suppose qu'un capital est dû et que ce capital produit des intérêts qui sont encore dus.

We add in a note some references to recent Netherland decisions and authorities sustaining our propositions. ([a])

We have heretofore referred to the elements entering into the judgment for which we claim the authority of *res judicata*. To deny to these elements, so bound up in the amount for which judgment was finally awarded, the force of *res judicata*, and to accept the position taken by the Mexican Government, would be to take the position that it is right to regard the quotient as *res judicata*, but we may not analyze that quotient into its two elements of multiplier and multiplicand and treat the judgment as determining the amount of the multiplicand.

We might cheerfully admit that in the subjective sense, so well pointed out by Savigny, the "motifs" are not to be regarded as entering into the thing adjudged, and, applying this doctrine, say simply

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([a]) In support of the contentions made by us upon this point, we may cite Deurwaarder's Maanblad, Part 16, March 3, 1900, as showing that in the case of a suit for rent the existence of the lease may be proved by reference to a former judgment in which the tenant was condemned to pay for a prior term.

Again, as appears by reference to Paleis van Justitie for the year 1901, page 92, a decision of the Leeuwarden court of justice of May 31, 1900, shows that there must be considered as included within the scope of a judgment the questions of law which the judge had to decide in order to arrive at the final decision.

Again in the Weekblad van het Recht of March 7, 1900, being numbered 7397, we find a decision of the Netherlands High Court of Justice, in which it was advised by the Procureur General that every decision of the judge which by reason of the contentions of the parties he might and has given with regard to their rights, is included in the subject-matter of his judgment, no matter in what particular part thereof the decision might be found. The finding of the court in this case was in the line of the above contentions, holding that the subject-matter of the judgment must not be understood to relate exclusively to the actual dictum at its end, but includes the decisions given by the judge with regard to the points of difference between the parties as to their rights, provided the requirements of the second clause of article 1954 are met. (This article requires that the claim to constitute *res judicata* be based upon the same cause and made by and against the same parties in the same capacity.) In the case at bar it was held that although two suits were brought between the same parties, having relation to the same subject-matter, in reality the suit prosecuted is one and the same, depending upon the same thing—noncompliance with the contract—and therefore the former judgment was received as conclusive evidence as to facts affecting such contract.

In the observations with regard to the articles of the Civil Code, by C. W. Opzoomer, third edition, pages 279 to 281, is to be found a discussion of the subject-matter under consideration. That author considers that—

"Whatever has once passed through all the forms of a suit and is legally decided by the judge must never afterwards be subject to any doubt."

Further discussing, he says:

"From what has been here discussed it appears that, as the legal bases are actually fundamental parts of the judgment of the judge, they should be entirely independent of the place in which they appear in such judgment. Whether they are found in the so-called *dispositif* or whether they be anywhere else is a matter of perfect indifference. They become authority not because of the place in which they appear, but because of the inseparable connection in which they stand to the immediate decision. Those who tear the legal basis from the decision follow the abstract method of treatment, which in the nature of things regards as divided that which our reasoning power divides."

The views of Dr. Opzoomer are thoroughly indorsed and followed in Netherland Civil Law, part 3, edition of 1874, pages 234 et seq. Without quoting therefrom at length, the writer says:

"His (Dr. Opzoomer's) views are, in my opinion, the correct ones (p. 242). A judgment (p. 256) deciding the existence or nonexistence of a claim for an interest-bearing debt may be relied upon to maintain or contest a claim with relation to unpaid interest, and for or against a claim for adjustment of a debt one may appeal to a judgment in which a decision has been given with regard to a claim for interest based on the existence or nonexistence of the debt."

that the reasons influencing the mind of the mixed commission to conclude that $43,080.79 was the multiplicand, rather than some other sum, and to conclude further that the Roman Catholic bishops of California were the proper plaintiffs, and had a right to demand the sum above indicated yearly, should be rejected as not entering into *res judicata*, leaving us simply to claim for the substantial elements of the judgment.

If we are not right in this contention, and the beneficiary, the number of installments for which judgment has been rendered, and the yearly amount of each installment do not form part of the decisory part of the award, and the judgment may not be inspected for the purpose of determining these various elements, so as to inform us as to what yearly claims would be satisfied by payment, then might the United States hereafter declare that, although a judgment had been obtained against Mexico for a gross sum, such judgment could not constitute a bar to another action for one of the factors of the old judgment, such as a particular yearly installment. Of course, such a suggestion would be regarded as absurd.

We have up to this time argumentatively assumed the possibility that the determination of the amount due per year and the number of years for which the mixed commission made their calculations might be classed among the "motifs" of the award. In point of fact, we submit that these elements are exactly embraced within its decisory part, the "motifs" being merely the reasoning conducive to the result. Referring to the award itself (Transcript, p. 609), we read as follows:

The annual amount of interest, therefore, which should fall to the share of the Roman Catholic Church of Upper California is $43,080.79, and the aggregate sum for twenty-one years will be $904,700.79.

This is the finding of the umpire, and after some further remarks he adds:

The umpire consequently awards that there be paid by the Mexican Government on account of the above-mentioned claim the sum of nine hundred and four thousand, seven hundred Mexican gold dollars and seventy-nine cents ($904,700.79), with interest.

The two clauses constitute at least part of the decisory portion or *dispositif* of the award, and so treating them, the award as *res judicata* upon the question of annual payments is free from even the doubt sought to be raised by Mexico on the supposed authority of Laurent, as first suggested by Sr. Mariscal and afterwards abandoned, and lastly upon the authority of Griolet, above analyzed and showed to be lacking in so far as it was used by the minister of foreign affairs to sustain his position.

Sr. Mariscal, further continuing his discussion of the subject of *res judicata*, refers to a letter from the American Secretary of State to the Spanish minister, Sr. Muruaga, to the effect that the findings of international commissions—

Are not to be regarded * * * as authoritative, except in the particular case decided. * * * They do not in any way bind the Government of the United States, except in those cases in which they were rendered.

In a footnote to the appendix of this replication we have added at the appropriate place the full paragraph contained in the letter of Mr. Bayard, Secretary of State, quoted partially and imperfectly by Sr. Mariscal.

In making the reference last indicated, Sr. Mariscal has, we respect-

fully submit, committed the same error pointed out on page 55 [a] of our first brief, under the head of "The doctrine of overruled cases." He has once more confused *stare decisis* with *res judicata*. In the reference now made by him, Mr. Bayard, Secretary of State, refused to recognize the authority of a decision had between certain parties with relation to a given subject-matter, when it was invoked to control his action in a controversy having relation to an issue between other parties with a somewhat different subject-matter. In other words, of course, he refused to recognize the doctrine, not of *res judicata*, but of *stare decisis*. No reference other than this having been cited on behalf of the Mexican Government, believed by it to show that the doctrine of *res judicata* does not apply to arbitral tribunals, we may conclude that none exists.

We are fortunately able, in opposition to the suggestion of Sr. Mariscal that the decisions of arbitral tribunals have not the force of *res judicata*, to quote that gentleman himself, for in addressing Mr. Clayton, under date of November 28, 1900 (Diplomatic Correspondence, p. 31), he writes as follows:

> That *res judicata pro veritate accipitur* is a principle admitted in all legislation, and belonging to the Roman law, certainly no one will deny. Nor is it denied that a tribunal or judge established by international arbitration gives to its decisions "*pronounced within the limits of its jurisdiction*" (in the language of the authority cited by Mr. McCreery) the force of *res judicata;* but to give in practice the same force as that directly expressed in the decision to close the litigation, to the considerations or premises not precisely expressed as points decided by the judge, but simply referred to by him in the bases of his decision, or assumed as antecedents necessary for the party in interest who interprets the decision, is a very different thing and can not be considered in the same way.

Nowhere in the course of the present answer has Sr. Mariscal distinctly denied the jurisdiction of the mixed commission. Not having denied such jurisdiction, according to the citations given, its decisions have "the force of *res judicata*."

That the Mexican commissioner (member of the mixed commission of 1868) believed the award would constitute *res judicata* is shown on pages 44 and 45 [b] of brief of agent and counsel of the United States, and that Mexico's former counsel agreed to the proposition is fully developed on page 14 [c] of the brief of the Messrs. Doyle.

It is a matter of pleasure to be able to add to this replication a reference to the Civil Law of the Netherlands, edition of 1874, Part III, page 242, to the effect that as to *res judicata*, "Even the judgments of arbitrations are in precisely the same condition as judicial decisions."

It may not be inappropriate at this moment to congratulate the present tribunal upon the fact that the first controversy submitted to arbitration under the provisions of The Hague Convention will enable this court, if in its judgment it be right, to declare once and for all time that to the findings of arbitral tribunals there attaches at least the same sanctity and conclusiveness as pertains to the judgments of the least important courts, passing upon the most trifling disputes likely to arise between man and man.

If the Permanent Court of Arbitration can give no greater degree of permanence and finality to its utterances than may be inferred from the present answer of Mexico through Sr. Mariscal, then indeed may the outlook for solemn and conclusive arbitration be considered as gloomy and discouraging. The United States adhere to a view which

[a] Page 237, this volume. [b] Pages 229, 230, this volume. [c] Page 271, this volume.

we believe will tell in the future in favor of the peace and well-being of the world, in that it will tend, if maintained, to insure absolutely the peaceful settlement of difficulties.

Under a further subheading of the present paragraph, it is contended by Sr. Mariscal that any right the claimants may have had in the beginning of the year 1848 was completely extinguished by the treaty of peace and friendship which was consummated February 2 of that year between Mexico and the United States; and this for the reason that Article XIV of that treaty declares that all debts and claims not decided up to that time, and which the citizens of the last-named country should hold against the former, would be considered ended and canceled forever.

The particular reason for the insertion of this article is found in the fact that some years previously, and before the breaking out of the war between the two countries, there had been a commission in session for the settlement of claims between the citizens of one country and the government of the other, respectively; that many of the claims had remained legally incomplete and unsettled, and that it was the design of both Governments to put an end to the old litigations. It could not have the slightest relation to the claims of those who became citizens from or at any time after the date of the treaty. The argument upon this point now being urged by Sr. Mariscal was presented by the Mexican Government in the litigation before the former mixed commission, and was passed upon unfavorably to the Mexican contentions, as certainly it could not have been the intention of Mexico, by a treaty had between it and the United States, to cancel claims against itself of those who up to the date of its signing had been its own citizens.

The further suggestion is made by Mexico that the claim is extinguished because, being in the nature of an annuity of one sort or another, it should be considered real property, subject to the legislation of the country in which it was held, and barred by the running of its statute of limitations.

It has never yet been held in international tribunals that a claim brought before them could be defeated by reason of the existence of a statute of this sort, such statute having no authority whatsoever over international courts. The purpose and effect of statutes of this kind, as is well known, is not to extinguish the right, but to bar the remedy. Their operation, therefore, may be waived by the defendants, and the very agreement to submit a claim to arbitration is a waiver.

By the terms of the protocol it is agreed between the two countries that reference be made specifically to determine whether the claim is within the governing principle of *res judicata*, and if not "whether the same be just," and the award if against the Republic of Mexico must be for "such amount as under the contentions and evidence may be just." Even without these specific clauses, which of themselves effectually prevent any appeal to a statute of limitations and offer a consideration absolutely determinative of the plea now presented by Mexico, international tribunals are controlled in their operations by broad principles of right and justice, and this tribunal can not, of course, recognize that injustice becomes justice by the simple efflux of time without culpable laches on the part of the creditor or by the act of debtor declaring the claim barred.

After the reasons above given, we may dismiss without further dis-

cussion the references made to Sala. Dro. Real de España, Tom. I, lib. 2, tit. 14; art. 1103, Civil Code; the decree of June 22, 1885, and Article XV of September 6, 1894, even if it were not true that the claim now under consideration, so far as it had then accrued, had been presented to Mexico before the last-named law had gone into effect, and on August 17, 1891. (Diplomatic Correspondence, p. 8.) Just about that time Mexico paid the last installment of the former judgment.

IV.

Messrs. Stewart and Kappler have so fully pointed out in the brief filed by them that the purpose of the Pious Fund was to maintain the Catholic Church and its missions, as well as to civilize and convert the Indians, that but little time need be spent over the point discussed by Mexico under this heading. We may, however, remark that Mexico's position is largely predicated upon the asserted control by the Mexican Government over all the goods of the church and the assumption that since the separation of California from Mexico she had rightfully exercised this control, even though prejudicially to the California bishops.

In considering this argument, the fact is not to be lost sight of that at the time of the cession of Upper California to the United States Mexico was under an acknowledged obligation to pay a certain income, based upon the estimated values of the properties of the Pious Fund, to the bishops of California for church purposes. The bishop of Upper California very shortly after the transfer became a corporation sole under the American law. The obligation then existed on the part of Mexico to pay the income, at least in a proper proportion, to the bishop of California, as that country existed in the United States, and whatever might have been the power of Mexico to use the property of the Roman Catholic Church of Mexico for its own purposes, such power could not extend to property belonging to, or income payable to, a religious corporation which had become the citizen of another country, whose laws did not recognize the power, either in itself or in a foreign nation, to sequester the property of the church without just compensation. In other words, even though it be granted (and we do not make this concession) that Mexico had the right to sequester the property of its own religious corporations, no right could be exercised as against such corporations or bodies, citizens of the United States. To hold otherwise would be to give extraterritorial effect to the supposed right of sequestration or confiscation.

To explain at this point the legal position occupied by the bishop of California under the Mexican law, we refer to the argument of Señor Aspiroz, page 395, paragraph 126, of the Transcript, stating as follows:

126. The merely canonical creation of the Church of California may have given it a standing in the Universal Church, as a religious body, but it would not have been sufficient to entitle it to recognition of the sovereign of the country; hence the said church was created by virtue of a decree of the Mexican Congress. This, which occurred in a nation officially Catholic, is the same as is established by the laws of the United States to entitle a corporation to be acknowledged by public law as has been repeatedly decided, in accordance with the public law of all nations.

The church, therefore, having a recognized legal existence and being possessed of certain rights under the laws of Mexico at the time of the cession of California to the United States, was, according to the

principles of international law, entitled to maintain its legal existence under the new sovereignty, as was indicated in the opinion of the umpire. (Transcript, p. 606.)

To the suggestion made on behalf of Mexico that the nonexistence of uncivilized or idolatrous Indians should entail at the same time the withdrawal of the support offered the missionaries, we have to repeat our former remark to the effect that Mexico has apparently forgotten the first and principal purpose of the foundation deed, which was to support the Catholic Church and its missions, "so that even in case of all California being civilized and converted to our holy Catholic faith, the profits of said estates shall be applied to the necessities of said missions and their support." For this reason, the remark contained on page 13[a] of the answer, to the effect that "it is necessary to take into account that in Upper California there exist no tribes of uncivilized Indians whose subjugation to the secular power of New Spain and conversion to the Catholic faith was the principal object or direct end of the missions of the Jesuits, endowed with the properties of the Pious Fund of the Californias," becomes immaterial, and any evidence tending to sustain this point incompetent and beside the purpose.

We desire, however, to be distinctly understood as denying the statement of fact last quoted in whatever form it occurs in the answer. There are, as we shall be prepared to show if material, many thousands of uncivilized Indians in Upper California, while the whole Roman Catholic Church of that territory is canonically recognized as missionary in character. Meanwhile the disappearance of the Indian population of Lower California is graphically shown by Exhibit C.

V.

It is contended in the corresponding paragraph of the answer that the Mexican Government possessed the exclusive right of investing the fund and applying its proceeds according to the intentions of the donors, and that this right had been recognized on the part of the claimants. We deny both these propositions.

The Mexican Government itself has in its legislation, as we have pointed out in another brief, and before in this, under the head of Paragraph I (pp. 1 and 2[b]), admitted that the proper person to apply the proceeds, according to the intention of the donors, was the bishop of the Californias. We further deny, as a matter of right, that any person other than the bishop could have properly administered the funds designed for the benefit of the church, in accordance with the wishes of the founders of the Pious Fund, and this position was fully recognized by Mexico in the several laws referred to in the course of this brief, as well as sustained by its established course of conduct.

The distinguished minister of foreign affairs of Mexico further errs, as we have said, in his statement that any exclusive right on the part of the Mexican Government to invest the fund and apply its proceeds has been recognized by the claimant. In reaching the conclusion maintained he has made (as shown by note to translation of answer attached hereto) a partial and entirely imperfect citation from a brief on behalf of the Roman Catholic bishops of California, omitting entire sentences and part of one sentence explaining and defining the posi-

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[a] Page 79, this volume.

[b] Page 56, this volume.

tion entertained by the bishops. Correcting the errors and supplying the omissions, it is manifest that the contention of the parties in interest was that Mexico, as trustee, had charged itself with the payment of a definite amount, fixed by the Mexican Government at a sum equal to 6 per cent upon the total capitalization of the Pious Fund; that Mexico had recognized the definite character of the claim against her for a certain annual charge; that having assumed a trust relation, and undertaken to pay an annuity to the bishop of California, she was not at liberty to disregard the undertaking. It may not, therefore, be said, and the language used on behalf of the bishops can not be tortured into an admission, that Mexico has been recognized as having a right to administer the fund and dispose of the proceeds otherwise than by delivery to the bishops of the Californias.

VI.

This paragraph of the reply of Mexico would convey the inference, to support or to contradict which discovery has been asked by the United States, that since 1848 Mexico has centered its care and protection, so far as the Pious Fund is concerned, on Lower California. We do not consider it in truth important whether this be the fact or not. The more important point is that the most considerable beneficiary (the Catholic Church of Upper California, and the missions subordinate thereto), has received no assistance from the fund, to the income of which it was the principal claimant, since 1848, except as the result of the decision of the mixed commission. To show the disappearance of the Indians of Lower California, we again refer to Exhibit C, hereto attached.

VII.

We are left at a disadvantage in replying to this paragraph of the answer of Mexico, the right being reserved by that country of presenting in the course of the proceedings a basis for a settlement, which, as it is said, Mexico has not yet found it possible to conclude. Nevertheless there are certain considerations which should be submitted.

Instead of the suggestion next made by Mexico that justice demands the privilege of payment in silver of any judgment against that country, we insist that justice would more naturally require that interest be charged against Mexico on every yearly installment from the 24th day of October of each year to the date of the protocol providing for the present court.

Mexico occupies the position of a trustee. The unquestionable duty of a trustee is to make payments to the beneficiary as they become due. A trustee who withholds payments therefrom is, and of right ought to be, chargeable with interest from the date of his default.

Mexico further charges the United States with having exaggerated the claim, because of the fact that in the former adjudication there was included in the basis of calculation of the court the property that belonged to the Marchioness de las Torres de Rada, and says that its assertions with relation thereto "will no doubt astonish the claimants, who have made a minute study with regard to the donations of said properties made to the Pious Fund; but it is to be observed that there has very recently been discovered in the general archives of the Republic important data which verifies the foregoing statement," (the statement being that the value of the properties of the Marchioness de

las Torres de Rada formed the greater part of the amount demanded, and that there was nevertheless no legal basis on which to claim it).

The claimants are astonished by this assertion, but not quite in the manner anticipated by Mexico. The facts contained in the volume of ancient records (Pleito de Rada) produced by Mexico were substantially all familiar to the claimants in the suit of Alemany *v.* Mexico, as will appear by reference to pages 518–521 of the Transcript. Therein will be found a history prepared by Pedro Ramirez, the agent of the bishop of California, substantially complete in all respects, and in general agreement with the volume Mexico now produces. For the purpose of the further enlightenment of the present tribunal we have added in the form of an appendix to this replication an abstract of the contents of the volume in question, together with a copy of the decree contained at its close, translated into English, the summary so added being supplemented as to some of its details by reference to the review of the litigation written by Ramirez and before referred to.

At the present time we shall direct the attention of the court to but one or two facts. The decree closing the volume in question was not a final decree settling the title of the property, as might fairly be implied from the Mexican answer. To the contrary, while determining the title to certain offices it remanded the cause to the lower court to settle the question of the rights in the other property of the Marchioness and her successors, together with the other litigants, "in order that they may make use of it as they see fit, according to the respective rights deduced in that audiencia where they shall execute it." It thus appears that the record Mexico has now supplied to the court is incomplete and imperfect, and reference must be made to the statements of Ramirez for information as to the further course of the litigation. It is, however, apparent, taking the record and the statements of Ramirez in conjunction, that no order was ever passed declaring the Marchioness and her successors to be without interest in the lands claimed by them, but that there was finally granted simply a money judgment. No attempt seems ever to have been made to disturb the title of the Pious Fund to the Rada property, and the last step taken in the litigation was the levying of an attachment, not against the Rada and Villapuente property, but against the Ciénaga del Pastor and the house on Vergara street (Transcript, p. 520), both of which came to the Pious Fund from the property left by Madame de Arguëlles. It thus remains incorrect to say, in effect, as has been averred in the answer, that the Pious Fund had no legal basis on which to claim the properties that belonged to the Marchioness de las Torres de Rada, and this particularly in view of the fact that the fund was never disturbed in its possession thereof until it was sold by Mexico.

As to the money judgment in favor of the heirs of de Rada above referred to, it could have been settled prior to the reassumption of control by Mexico for the sum of $210,000 (Transcript, p. 521). Mexico thereafter sold this particular property, despite the attachment, for a price which yielded for the interest of the Pious Fund $213,750 (see copy Escritura de Venta, Exhibit D, hereto attached), and so far as the record discloses, no part of this money was ever paid out in settlement of any supposed claim against the fund, but Mexico received the exclusive benefit thereof, and failing to disclose this fact there was excluded from the calculations of the former commission (Transcript, opinion of Commissioner Wadsworth, p. 526, followed by Umpire,

p. 609) the sum of about $200,000. Had all the facts with relation to the transaction been disclosed by Mexico to the mixed commission, there seems no doubt that a much larger award would then have been rendered against Mexico, but with the additional facts now before this court, in the event of the reopening of the former decision, the United States will insist strenuously upon the calculation of annuity in favor of the Pious Fund upon the additional amount of $213,750, as derived from the sale of Ciénaga del Pastor (the property so excluded) since 1848.

On behalf of the United States, I respectfully submit that the allegations and prayers of the memorial have not been met by the answer of Mexico.

JACKSON H. RALSTON,
Agent of the United States and of Counsel.

EXHIBIT A.

[Translation from the Spanish. See p. 30.]

Answer to the memorial upon the claim presented by the United States of America against Mexico in regard to the so-called "Pious Fund of the Californias."

Reserving the privilege to produce on the part of the Mexican Republic, in exercise of the right which belongs to it under the protocol concluded in Washington the 22d of May last, for the arbitration of this claim, proofs of the contentions which are hereafter set forth and of others that may be appropriate, such as defenses and proper allegations, the undersigned, the authorized representative of the Government of Mexico, asks that the Permanent Court of Arbitration of The Hague set aside the claim for the following reasons:

First. Lack of title of the Archbishop of San Francisco and of the bishop of Monterey to present themselves as legal trustees of the Pious Fund of the Californias.

Second. Want of right of the Catholic Church of Upper California to demand interests originating in the supposed fund.

Third. Insufficiency or extinction of title on which the archbishop and bishop, above mentioned, base their claim.

Fourth. Nonexistence of the object attributed to the institution of the fund, so far as regards Upper California.

Fifth. The exclusive right of the Mexican Government to employ the fund and dispose of the proceeds, without the intervention of the church of Upper California.

Sixth. The use which the Government made of said right; and

Seventh. The exaggeration of the demand.

I.

The claimants agree with the Government of Mexico in admitting the following facts, proved by irrefutable documents:

First. The Jesuits were the original trustees or administrators of the properties which constituted the Pious Fund of the Californias up to the year 1768, when they were expelled from Spanish dominions.

Second. The Spanish Crown, in place of the Jesuits, took possession of the properties which constituted the aforesaid Pious Fund, and administered them by means of a Royal Commission until the independence of Mexico was achieved.

Third. The Mexican Government which succeeded the Spanish Government was, as the latter had been, trustee (comisario) of the fund, and in this conception successor of the Jesuit Missionaries, with all the rights granted to them by the founders.

In order that the archbishop and bishop, the claimants, may be considered trustees (comisarios) by succession, as they contend, they would have to prove their actual position as successors in interest of the Mexican Government, to perpetual, general, or particular title. In no other way could the attitude in which they present themselves as creditors against their alleged debtor be explained.

In fact, they claim as title of succession that the direct representation of the government, and the indirect of the Jesuits, was granted to them by the decree of the Mexican Congress, issued on the 19th of September, 1836, which authorized the placing at the disposition of the Bishop of the Californias and his successors the properties belonging to the Pious Fund of the Californias, to be administered and invested in their enterprises, or other analogous ones, respecting always the wish of the founders. But the same claimants acknowledge that the aforesaid decree was repealed on the 8th of February, 1842, by General Santa Ana, provisional president of the Republic, invested with extraordinary powers, which devolve upon the Mexican Government the administration and employment of the proceeds of the properties in the way and manner which it should determine, in carrying out the objects proposed by the founders—*the civilization and conversion of the heathen.* Later, on the 24th of October of the same year, the properties were directed to be sold and the proceeds to be incorporated into the National Treasury to constitute a secured annuity (censo consignativo) at the rate of 6 per cent per annum, to be used for the purpose of the original foundation.

No later law granted to the bishops of the Californias the right to receive and apply to their enterprises the interests of the aforesaid annuity. It is true that the Mexican Government issued another decree, on the 3d of April, 1845, directing that all the properties of the Pious Fund of the Californias, remaining unsold, should be returned to the bishop of the Californias, and to his successors, for the ends set forth in article 6 of the law of September 19, 1836, without prejudice (it was said) "to what Congress shall afterwards determine concerning the properties already disposed of." Although the tenor of this decree gave an excuse to the umpire under the mixed commission of 1875 to declare that the obligation of remitting to the bishop the proceeds of the fund was recognized in it, it has not seemed advisable to the claimants' attorneys to allege it in support of their present claims, certainly because that decree refers to *unsold* properties, whose value clearly had not been incorporated into the National Treasury, and not to the revenues or interests upon the proceeds of the properties sold, touching which Congress had expressly reserved the right to decide. This right was never exercised, and therefore the last decree has not bettered the situation in which the bishop of the Californias was placed by the decree of the 8th of February, 1842, which deprived him of the charge of using for the missions the revenues from the annual 6 per

cent upon the proceeds of the properties sold, which revenues are the only subject-matter of the present claim.

II

The Catholic Church of Upper California never could, of its own right, administer the Pious Fund of the Californias, nor demand its proceeds, for the simple reason that they were not granted it by the founders, nor by the Jesuits, who were the original trustees (*comisarios*), nor by the Spanish Government that succeeded them, nor by the Mexican Government that succeeded the Spanish, and which, like that Government and the Jesuits, acquired the right of using the properties of the fund in question for the missions of the Californias, or for any others within its dominions, at its free will and discretion alone. Such discretionary power will not permit coercion, which is an attribute of perfect right. Therefore, although for the sake of the argument, the representation of the Jesuit missions (expressly suppressed by Pope Clement XIV since the year 1773) might be conceded to the Catholic Church of Upper California, that church would have no right to demand the interests of the Pious Fund.

The decree of the 19th of September, 1836, above cited, on which the claimants pretend to base their rights, only conferred on the first bishop of the Californias and upon his successors the administration of the fund, during the will of the Government, with the obligation of employing the income for the ends indicated by the founders or for other like objects; but did not give either to them or to the church they represented an irrevocable right; and, moreover, it (this decree) was repealed by that of the 8th of February, 1842, which withdrew from the bishops of the Californias the administration of the fund and devolved it upon the Government.

III.

No existing law being able to establish any title to this claim, the claimants wish to supply it with the so-called foundation deed of the pious work, or with the decision rendered by the Mixed Claims Commission, established at Washington under the convention between Mexico and the United States, signed on the 4th of July, 1868, which decision was given on the 11th of October, 1875, claiming it to cause *res judicata.*

A. As to the first, it will suffice to show that it does not favor the pretentions of the claimants, to quote the following clauses from the instrument which they take as an example of the donations that were made to the fund:[a]

This donation * * * we make * * * to said missions founded, and which may hereafter be founded, in the Californias, not only as for the maintenance of their religious, and to provide for the support and conduct of divine worship, but

[a] The full and exact trusts, including all omitted portions, read as follows:

To have and to hold, to said missions founded, and which hereafter may be founded, in the Californias, as well for the maintenance of their religious, and to provide for the ornament and decent support of divine worship, as also to aid the native converts and catechumens with food and clothing, according to the destitution of that country; so that if hereafter, by God's blessing, there be means of support in the "reductions" and missions now established, as ex. gr. by the cultivation of their lands, thus obviating the necessity of sending from this country provisions, clothing, and other

also to aid the native converts and catechumens by the same (probably "from the misery") of that country: so that if thereafter, by God's blessing, there be means of support in the "reductions" and missions now established—as ex. gr. by the cultivation of their lands, *thus obviating the necessity of sending from this country* clothing and other necessaries—the rents and products of said estates *shall be applied of* (*surely to*) *new missions* * * * and in case *the Society of Jesus, voluntarily or by compulsion, should abandon said missions of the Californias, or,* which God forbid, the natives of that country should rebel and apostatize from our holy faith, or *in any other* (*such*) *contingency, then, and in that case, it is left* to the discretion of the reverend father provincial of the Society of Jesus in this New Spain, for the time being, to apply the profits of said estates, their products and improvements, *to other missions in the undiscovered portions of this North America, or to others in any part of the world, as he may deem most pleasing to Almighty God; and in such a way that the government of said estates be always and perpetually continued in the reverend Society of Jesus and its prelates, so that no judge, ecclesiastical or secular, shall exercise any control therein* * * * we desire that at no time shall this donation be set aside nor shall any judge, *ecclesiastical or secular, undertake to investigate or intervene to ascertain whether the conditions of this donation be fulfilled; for our will is that in this matter there shall be no pretense for such intervention, and that whether the said reverend society fulfills or does not fulfill the trusts in favor of the missions herein contained it shall render account to God, our Lord, alone.*

B. The decision above referred to, rendered in Washington on the 11th of November, 1875, could not prejudge the present claim, which, therefore, can not be regarded as *res judicata*.

Now we are treating of a claim for new interests, and even if the claimants maintain that in condemning Mexico to pay the accrued interests up to a certain date, it was declared impliedly that the capital existed and would continue to produce revenues, those would be considerations or reasons (motifs) for the judgment which was made that the Republic of Mexico must pay a definite amount of accrued interest to which the claim was limited.

The immutability of a judgment and its force *as res judicata* belong alone to its conclusion (*conclusión*); that is, to that part which pro-

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necessaries, the rents and products of said estates shall be applied to new missions to be established hereafter in the unexplored parts of the said Californias, according to the discretion of the Father Superior of said missions; and the estates aforesaid shall be perpetually inalienable, and shall never be sold, so that, even in case of all California being civilized and converted to our holy catholic faith, the profits of said estates shall be applied to the necessities of said missions and their support; and in case that the reverend Society of Jesus, voluntarily or by compulsion, should abandon said missions of the Californias, or (which God forbid) the natives of that country should rebel and apostatize from our holy faith, or in any other such contingency, then, and in that case, it is left to the discretion of the reverend father provincial of the Society of Jesus in this New Spain for the time being to apply the profits of said estates, their products, and improvements to other missions in the undiscovered portions of this North America, or to others in any part of the world, according as he may deem most pleasing to Almighty God, and in such ways that the government of said estates be always and perpetually continued in the reverend Society of Jesus and its prelates, so that no judges, ecclesiastical or secular, shall exercise any control therein or intervene in or about the same; and all such rents and profits shall be applied to the purposes and objects herein specified, i. e., the propagation of our holy catholic faith; and by this deed of gift we, the said grantors, both divest ourselves of and renounce absolutely all property, dominion, ownership, rights, and actions, real and personal, direct and executive, thereover, and all others whatever which belong to us or which from any other cause, title, or reason may belong or appertain to us; and we cede, renounce, and transfer the whole thereof to said reverend Society of Jesus, its missions of Californias, its prelates and religious, under whose charge may happen to be the government of said missions and of this province of New Spain, now and at all times hereafter, in order that from the profits of said estates and the increase of their cattle, large and small, their other gains, natural or otherwise, they may maintain said missions in the manner above proposed, indicated, defined, and laid down forever. (Following parts of quotation not included as not properly trusts.)—J. H. Ralston, agent United States.

nounces acquittal or condemnation, *quod jussit vetuitve.* This proposition is scarcely open to question, and therefore the greater part of authorities, in expounding the theory of *res judicata*, attributes it to the decisory part of the judgment, so that its extension to the reasons (motifs) is a matter of controversy only to a few.

Among those who favor that extension are found, it is true, authorities as noted as that of Savigny; but there are no less noted ones, and they are in greater numbers, who hold the contrary opinion. The same noted authority that I have just named, declares that—

"It is a very old doctrine, sustained by a large number of authorities, that the legal principle of *res judicata* belongs *exclusively* to the decision (resolución), and the reasons are not embraced in it," summing up his doctrine in these terms:

"The force of *res judicata* does not exist except in the decisory part of the judgment."

(Savigny: Droit Romain, sec. 291, T. 6, p. 347.)[a]

"The greater number of authorities," he adds, "deny absolutely to the reasons (motifs) the force of *res judicata, not excepting the case where the reasons (motifs) are a part of the judgment.* (Sec. 293, T. 6, p. 382.)[b]

Griolet expresses himself as follows:

The judgment supposes always several propositions which the judge has had to admit in rendering a decision upon controverted rights and which under our law (the French) the judgment usually expresses. These are the reasons (motifs). We have already shown, in opposition to the opinion of Savigny, that neither the subjective nor objective reasons (motifs) should share the authority of the judgment, because the judge has not the duty of deciding upon juridical principles nor upon the existence of facts.

* * * We have, then, already shown, in all cases that may be presented, that the authority of *res judicata* does not embrace the reasons (motifs) of the judgment, *nor even the affirmation or denial of the cause of the rights adjudged.* * * *

The same writer adds:

None of our authorities, in fact, have shown a system analogous to that of M. Savigny upon the authority of the reasons, and French jurisprudence recognizes the principle that *res judicata* does not extend to any of the reasons of the sentence. * * *

On the authority of *res judicata* (pages 135, 168, 169, and 173.)[c]

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[a] The exact language of M. Savigny is as follows:

"C'est une doctrine fort ancienne et soutenue par un grand nombre d'auteurs que l'autorité de la chose jugée appartient au jugement seul, et non à ses motifs, et cette doctrine se résume en ces termes: L'autorité de la chose jugée n'existe que pour le dispositif du jugement." (Savigny, vol. 6, p. 357.) J. H. Ralston, Agent United States.

[b] "La plupart refuse absolument aux motifs l'autorité de la chose jugée sans même excepter le cas où les motifs font partie intégrante du prononcé du jugement." (Savigny, vol. 6, pp. 393, 394.) J. H. Ralston, Agent United States.

[c] "La décision suppose et le plus souvent, dans notre droit, le jugement exprime diverses propositions que le juge a dû admettre pour rendre sa déclaration sur les droits contestés. Ce sont les motifs. Nous avons déjà montré, contrairement à l'opinion de M. de Savigny, que ni les motifs subjectifs, ni les motifs objectifs ne doivent participer à l'autorité des jugements, parce que le juge n'a pas mission de prononcer sur la vérité des principes ou sur l' existence des faits." (Griolet, p. 113.)

"Nous avons aussi montré dans toutes les hypothèses l'autorité de la chose jugée refusée à tous les motifs des jugements, même à l'affirmation ou à la négation de la cause des droits jugés." (Griolet, p. 117.)

"Aucun de nos auteurs en effet n'a enseigné un système analogue à celui de M. de Savigny sur l'autorité des motifs. Et la jurisprudence reconnaît en principe que l'autorité de la chose jugée ne s'étend à aucun des motifs de la décision." (Griolet, p. 103.) J. H. Ralston, Agent United States.

As to Prussian law, the same Savigny says:

Regarding the force of the reasons, a text exists that at first glance appears to exclude it absolutely, giving the greatest importance to the part that contains the judicial decision. (Allg. Gerichtsordnung, I, 1313, p. 38.) Judges and those rendering decisions must carefully distinguish the real judgment from the reasons (motifs), and give them a distinct place, and never confuse them, *because simple reasons should never have the force of res judicata.* (D. R., sec. 294, T. 6, pp. 389, 390.) [a]

Spanish tribunals have constantly excluded appeal for annulment attempted against the foundations of a definitive sentence by not recognizing in them, except in the decisory part, the force of *res judicata*, the only subject for appeal. (Pantoja, Rep. pp. 491, 955, 960, 970, and 979.)

In the particular case (which is ours) of a demand for interests founded on a judgment which declared them due, after having heard the pleas of the defendant against the right that claimed the capital or rent, Savigny is of opinion that this right has in its favor the force of *res judicata;* but, at the same time, he observes that Buchka solves the question in the contrary sense in accordance with Roman law; that, in the same sense, the Prussian tribunals have solved it, for the reason that the recognition of a right in the reasons (motifs) of a decision does not appertain in fact to the judgment, whose decisory part alone constitutes *res judicata;* and Savigny adds:

We have not, on this point, the decision of Roman law, and the texts that are usually cited are foreign to the matter. (D. R. sec. 294, Nos. 3 and 4, note (*r*) of 7, and sec. 299, No. 4, T. 6, pp. 397, 401, 446.) [b]

Nevertheless it is positive that Ulpian says:

Si in judicio actum sit usuraeque solae petitae sint, non est verendum ne noceat rei judicatae exceptio circa sortis petionem: *Quia enim non competit nec opposita nocet.*

Such is the principle of the law 23 D., of Exc. Rei. Jud.; and even though it appears to be in contradiction with what follows in it, that apparent conflict of law is explained satisfactorily by Griolet, pages 46 and 47, to which I refer in order to avoid dealing at too much length with this subject. I have adduced all the preceding citations because up to this time the point has been but lightly touched upon in the diplomatic correspondence in connection with the claim.

I must add, however, that if the foregoing is true respecting judgments rendered by judges invested with public authority to act in the case, their reasons (motifs) and inferences (consecuencias) it is much

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"(*a*) Quant à l'autorité des motifs, il y a un texte qui au premier abord semble l'exclure absolument et attacher la plus haute importance à la place qu'occupe une décision judiciaire. Allg. Gerichtsordnung, I, 13, sec. 18: Les collèges de juges et les rédacteurs des jugements doivent soigneusement distinguer la décision réelle de ses motifs, et leur assigner une place distincte, et ne jamais les confondre, car de simples motifs ne doivent jamais avoir l'autorité de la chose jugée. (Savigny, vol. 6, p. 401.) J. H. Ralston, Agent United States.

"(*b*) Il en est de même quand le défendeur a été condamné à payer les intérêts d'une créance ou les arrérages d'une rente après avoir contesté le droit du demandeur au capital ou à la rente; ce droit se trouve investi de l'autorité de la chose jugée, par la condemnation. (*q*)

"Nous n'avons sur ce point de décision du droit romain, et les textes que l'on a coutume de citer sont étrangers à la matière (Savigny, vol. 6, pp. 458, 459). J. H. Ralston, Agent United States.

"(*q*) Ici encore Buchka a bien résolu la question pour le droit actuel, mais pour le droit romain il a résout à tort en sens inverse. Vol. 1, pp. 307, 308; vol. 2, pp. 184, 191. J'ai déjà signalé, § 294, notes (*n*) and (*r*), quelques décisions erronées des tribunaux prussiens sur cette question."

more true with regard to awards rendered by arbitrators who have no real jurisdiction nor other powers than those granted them in the arbitration agreement (compromiso). Thus it is that if all that relates to the plea and effect of *res judicata* is of strict (limited) interpretation (Griolet, on the authority of *res judicata*, p. 68), it must be much more so when it relates to arbitral awards.

Of these arbitral awards a Roman law has said:

> De his rebus et rationibus et controversiis judicare arbiter potest, quæ ab initio fuissent inter eos qui compromisserunt, non quæ postea supervenerunt. (L. 46 D, de recept. qui arb., T. L. p. 25.)

The civil law attributed so limited a scope to awards that it did not concede to them that they should produce the effect (accion) of *res judicata*. The first law of the code *de recept* is to the following effect:

> Ex sententia arbitri ex compromisso jure perfecto arbitri appellari non posse saepe receptum est; *quia nec judicati actio inde præstari potest.*

The inadequacy of arbitral decisions, under international law, to decide future cases, although they may be analogous to those already decided, has been expressly recognized by the Government of the United States, as may be seen in Moore's "International Arbitrations," with regard to the mixed commission, convoked at Halifax under the treaty of Washington, which condemned the United States to pay to the British Government the sum of $5,500,000 for damages and injuries caused by American fishermen, and in the case of a claim presented by the Spanish Minister, Sr. Muruaga, growing out of the confiscation of cotton, considered as contraband of war, which the Spanish subjects, Mora and Larrache, suffered. The Secretary of State, T. F. Bayard, said in this connection in a note of the 3d of December, 1886:[a]

> Decisions of international commissions * * * are not regarded as authoritative, *except in the particular case decided* * * * *they do not in any way bind the Government of the United States, except in those cases in which they were rendered.* (Papers relating to the Foreign Relations of the United States, year 1887, p. 1021.)

The same honorable Secretary, in the document cited (further), said:

> Such decisions are molded by the nature and terms of the treaty of arbitration.

Taking into account without doubt that:

> Omne tractatum ex compromisso sumendum: nec euim aliud illi (arbitro) licebit, quam quod ibi ut afficere possit cautum est: non ergo quodlibet statuere arbiter poterit, nec in qua re libet, *nisi de qua re compromissum est.*

Referring to the stipulations contained in the aforesaid convention of July 4, 1868, it is seen that the claims of the American citizens against Mexico and of Mexican citizens against the United States,

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[a] The full paragraph referred to, supplying all omitted matters and correcting the arrangement of words, reads as follows:

"But, aside from this criticism, I must be allowed to remind you that decisions of international commissions are not to be regarded as establishing principles of international law. Such decisions are molded by the nature and terms of the treaty of arbitration, which often assumes certain rules, in themselves deviations from international law, for the government of the commission. Even when there are no such limitations, decisions of commissions have not heretofore been regarded as authoritative, except in the particular case decided. I am compelled, therefore, to exclude from consideration the rulings to which you refer, not merely because they do not sustain the position for which they are cited, but because, even if they could be construed as having that effect, they do not in any way bind the Government of the United States, except in those cases in which they were rendered."—J. H. Ralston, Agent United States.

which were permitted to be submitted to the mixed commission created by that convention, must indispensably embrace the following conditions:

First. To have arisen out of transactions of a date later than the 2d of February, 1848, and before the 1st of February, 1869 (the date of the exchange of ratifications of the convention).

Second. To be founded upon damages calculable in money caused to the persons or property of the claimants of either of the two countries by the authorities of the other.

Third. To have been presented to the government of the claimants, and by it or in its name to the mixed commission within eight months (capable of being extended to eleven months), counting from the first meeting of the arbitrators.

It may be noted, therefore, that the claim for interests of which payment is now asked could not be considered under the first or third of the above conditions. It seems useless to take up further time by showing or continuing to dwell upon the lack of *cause* with which *res judicata* is alleged in the new claim which is now presented against the Mexican Government. The award rendered by the umpire in 1875 became complete and absolutely fulfilled with the payment that Mexico made of $904,070.79 Mexican gold, to which it was condemned, and that award can not be applied to a new claim. Admitting in virtue of all the allegations that the present claim is not declared already determined by the award rendered in 1875, the first objection—the clearest plea that we oppose to the claim—is that any right that the claimants might have had in the beginning of the year 1848 was completely extinguished by the treaty of peace and friendship which was celebrated the 2d of February of that year between Mexico and the United States, because in article 14 (of that treaty) it was declared that all debts and claims not decided up to that time and which the citizens of the latter of those nations should hold against the Government of the former would be considered ended and canceled forever. The text of the article of that treaty which thus provides is as follows, and I quote it in English in order that it may be better understood by the party complainant. It reads as follows:

The United States do furthermore discharge the Mexican Republic from all claims of *citizens of* [a] the United States not heretofore decided against the Mexican Government which may have arisen previously to the date of the signature of this treaty; which discharge shall be final and perpetual, whether the said claims be rejected or be allowed by the Board of Commissioners provided for in the following article, and whatever shall be the total amount of those allowed.

The answer which the claimants have made to this peremptory provision amounts to saying that they do not demand the interests accrued before the date of the treaty, but those accrued since that date, and they have not demanded the principal, because they do not think they have any right to it, Mexico being able to indefinitely retain it. In giving this answer, they do not reflect that the fourteenth article, above cited, not only exonerates Mexico from the claims or demands which might be thereupon presented, but from all claims not heretofore decided against the Government, and in this class was included the claim of the Pious Fund, not only the capital but also the interests being comprehended therein. All that, in fact, is understood in the

[a] The words in italics "*citizens of*" omitted in the answer.—J. H. Ralston, Agent United States.

English word "claim," which means as well the claim or demand which is made to something to which we believe ourselves entitled, as to the cause, origin, or foundation for that claim: "*A right to claim or demand something; a title to any debt, privilege or other thing in possession of another; also a title of anything which another should give or concede to or confer on the claimant,*" according to Webster's dictionary, which is the best authority on definitions in the United States, and possibly wherever English is spoken. (See Webster's English Dictionary, under *Claim*, the second acceptation of word.)

This interpretation of Article XIV is corroborated by reading the beginning of the article following, Article XV, the text of which is as follows:

> The United States exonerating Mexico from all demands on account of the claims of their citizens mentioned in the preceding article, and considering them entirely and forever canceled.

Here is seen the distinction made between *demands* and *claims* and that this last word is used in the sense of the title or right which gives rise to a claim.

Nor could it be otherwise, when it was very clearly the intention of this agreement to leave nothing pending that might alter or disturb the peaceable and friendly relations which were renewed in that treaty. By this was made, as is frequently done in similar treaties, an agreement to completely cancel all claims and demands for indemnity pending, or which for past acts might arise between the two Governments, providing also for the settlement of private claims. The same article, the fifteenth, the beginning of which I have copied, provided that three and a quarter millions of dollars be reserved to satisfy the claimants, as far as their claims should be approved by an American commission which it ordered created for that purpose, and which was created by the Government of the United States, a commission before which, if aware of their right, the representatives of the Catholic Church of Californias would have presented it. If they did not do so, they can not, on that account, now make the claim against Mexico, which is released from all liability, from all demands on account of the claims of their (of the United States) citizens.

It seems inconceivable, in view of these articles of the treaty of Guadalupe Hidalgo—the most solemn we have ever celebrated with a neighboring nation, and which is in force because it is perpetual in character—that it should be claimed that the debt known as the Pious Fund had not been canceled in virtue of its stipulations. What privilege did this fund have to be excluded from the positive declaration of the treaty? Is it not strange that the attorneys of the claimants, in their zeal to reply to this plea, should have wished to limit the meaning of the treaty on this point—to cancel the interest of the fund prior to February, 1848? And what is scarcely less explicable is that the arbitral award subscribed by Sir Edward Thornton should have accepted the same interpretation. For this, among other reasons, we consider said judgment as notoriously unjust, there being no injustice more manifest than the judgment pronounced by an arbitrator who decides a question between citizens of one country and the government of another, ignoring the stipulations of a solemn treaty made by both countries, the force of which no one disputes.

In case it should be determined (contrary to all probability) that the treaty of Guadalupe Hidalgo left in force the claims of American citi-

zens against Mexico relative to the Pious Fund, and existing, as alleged, at the time of celebrating said treaty, there is still another ground upon which that claim might be canceled, and consequently the right to collect interest on capital. It is well known that the Mexican Republic, in the exercise of its sovereignty, and for high political reasons, which the Mexican commissioner explained in his opinion of 1875, ordered in the years 1856 and 1859, first, the disentailing, following it by the so-called nationalization of the church property, but which, properly speaking, was not actually such, but only the prohibition to the clergy of continuing in control of those national properties. If, as has been properly said, the validity and principles of this provision can be disputed from the standpoint of canon law, from a political and social point of view, they are unquestionable, and no less so in view of the favorable results which that action has produced in the way of establishing peace and of promoting the general welfare of the Republic.

From the standpoint of common law and private international law, it seems clear that the capital whose interest is claimed in the character of a secured annuity (censo consignativo), or of general annuity (censo), and which should be considered as real property (Sala. Dro. Real de España, tom I, Lib. 2, tit. 14, and authors cited), was subject to the legislation of the country in which it was held, to the jurisdiction and statute law *rei sitae*, whatever might be the nationality of the annuitants.

On the other hand, it should be taken into account that the failure for many years to collect the interest which is now claimed makes it subject to the laws of limitations of the country, concerning which Article 1103 of our Civil Code applies to the case, and says as follows:

> Emphyteutic or annuity pensions, revenues, rents, and any other loans whatsoever, not collected when due, remain barred in five years, counting from the maturity of each of them, even though the collection be attempted by virtue of a real or personal action.

If we are to suppose that the demand of the claimants was not canceled by the decisive Article XIV of the treaty of Guadalupe Hidalgo, or on the other grounds which we have just reviewed, there is yet another reason which would make it seem subject to Mexican legislation, to which an annuity, established by that Government in the year 1842 is undoubtedly subject. Said Government, for the purpose of settling the public debt, issued, under date of June 22, 1885, a decree calling upon all its creditors for the examination and funding of their debts arising from supplies, employments, loans, or any other act or business which might become a charge upon the national treasury, and for this purpose it fixed a suitable time, which was extended on several occasions for the presentation of said claims. Article XV of the law of September 6, 1894, was of the following tenor:

> The debts, evidences of public indebtedness, and the following claims, are forever barred, without being able to constitute any cause of action, or to be of any validity whatever: * * * All claims included in Articles I and II, which were not presented for this funding within the period fixed by the article preceding or which when they are presented, the interested party may not comply with the requirements of said decree.

It is undeniable that the supposed claims for capital and interest made against the Government of Mexico by the archbishop and bishops of the Church of Upper California were not presented for adjustment

in compliance with the law of 1885, nor did the pretended creditors avail themselves of the new period which the said decree of 1894 granted them in Article XIV as a final and last resort. The lapse (caducidad) or barring of suit, or supervening plea, would leave without effect even a former judgment having the force of res judicata—a principle of well investigated law recognized even by the present claimants.

IV.

The claimants state that the object of the Pious Fund of the Californias was to provide for the conversion of the Indians and for the support of the Catholic Church in the Californias. This being a double object, it is necessary to distinguish between the two parts which constitute it. The first part, the conversion of the pagan Indians to the Catholic faith and to the obedience of Spanish authority, is unquestionable, and must be considered as the principal and direct object of the missions intrusted to the Society of Jesus by the Catholic King, indorsed by the founders of the Pious Fund, and subsidized by the public treasury of Mexico. The other part of the object—that is, the support of the church in California, was not the principal or direct object of the establishment of the fund, but the means of carrying out the spiritual conquest of uncivilized Indians through the religious missionaries.

This distinction being made, it is understood that the Catholic worship was an object of the missions subordinate to the spiritual conquest of the uncivilized Indians; hence it follows that the nonexistence of uncivilized or idolatrous Indians in a specified region, or of the suppression therein of the Catholic missions, instituted for the purpose of subjugating or Christianizing them, should entail at the same time the withdrawal of the support offered the missionaries; not their exclusive application to fostering the Catholic faith, otherwise it would be an open violation of the intention of the benefactors who founded said pious work. Upon the expulsion of the Jesuits ordered by King Charles III and the consequent cessation of the missions of New Spain, the suppression of the order followed, which Clement XIV declared in his bull, issued the 21st day of July, 1773, paragraph 32, which reads:

> But as regards the religious missions we desire to extend and include all that has been decreed concerning the suppression of the Society (of Jesuits), reserving (at the same time) the privilege of providing the means by which not only the conversion of the infidels, but also the peaceful settlement of dissensions may be obtained and secured with greater facility and stability.

And it is a fact worthy of note that the missions founded by the Jesuits never extended beyond the limits of Lower California. The mission farthest north that they had in charge was that of Santa Maria, below the thirty-first degree of-latitude, and was therefore outside of the limits of Upper California, as fixed in the Treaty of Guadalupe Hidalgo.

The missions of Upper California were undertaken after the expulsion of the Jesuits by the orders, not of the Society of Jesus, nor of the Holy See, nor any other ecclesiastical authority, but of the viceroy of New Spain, with the approval of the King, in 1769 and 1762.[a]

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[a] Should be 1772. J. H. Ralston, Agent United States.

As national enterprises the missions of Upper California were naturally abandoned by the Mexican Government when the United States acquired that region. The abandonment became necessary by the change of authority and jurisdiction over the territory disposed of to the United States, and, moreover, the Mexican Government had the original authority which it had inherited from the Spanish Government to *abandon missions and establish other new ones for the conversion of infidels within its dominions.*

No only did the missions of Upper California cease on the 7th of July, 1846, as national enterprises in charge of the Mexican Government, but the Catholic Church itself ceased as a legal entity, inasmuch as its reestablishment as a corporation did not go into effect until the 22d of April, 1850, in virtue of the statute of that date of the State of California.

Finally, it is necessary to take into account that in Upper California there exist no tribes of uncivilized Indians whose subjugation to the secular power of New Spain and conversion to the Catholic faith was the principal object or direct end of the missions of the Jesuits endowed with the properties of the Pious Fund of California.

V.

The right of investing the fund and applying its proceeds according to the intentions of the donors of the properties which constitute it were legitimately exercised without the intervention of ordinary clergy, first by the Jesuits, followed by the Spanish Crown, and lastly by the Mexican Government. The claimants can never prove that any legitimate authority has ever made any law or decree to restrict that right. In exercise of this right the Mexican Government ordered, by the decree of September 19, 1836, that the administration of the fund be given to the bishop of California and his successors as dependents of said Government; the same commission was withdrawn from the bishop and his successors by the decree of February 18, 1842; the sale of the properties which composed the fund and its constitution into the secured annuity (censo consignativo) upon the National Treasury was ordered by decree of October 24, 1842; and two and one-half years later, by the decree of April 3, 1845, the "creditos" and other properties were ordered returned to the then bishop of California and his successors, reserving expressly the right to dispose of the proceeds resulting from the properties sold, the interest on which is the very subject-matter of this claim.

This exclusive right of the Mexican Government is recognized on the part of the claimants.

In the reply made February 21, 1901, to the honorable John Hay, Secretary of State of the United States, by Messrs. Jackson H. Ralston and Frederick L. Siddons, attorneys for the Roman Catholic bishops of California, are found the following words:[a]

> No dispute has ever been raised as to the right of the Mexican Government to administer the property in question. Mexico must continue the trust relation which

[a] A full and complete extract from the Diplomatic Correspondence (p. 52) above quoted partially and imperfectly, reads as follows:

"No dispute has ever been raised as to the right of the Mexican Government to administer the property in question and charge itself, as a trustee, with the payment of a definite sum. No demand has ever been made for the repayment of the principal sum. The bishops of California and all other parties in interest have treated

she has herself assumed. It should be borne in mind that we never have had or made any claims to the principal. From its origin it has been in the hands of trustees; first, the Jesuits; then in the Spanish Crown; then the Government of Mexico; then in the bishop under the law of 1836; then, from February 8, 1842, again in the Mexican Republic. All of these changes were accomplished by law—the act of the sovereign.

VI.

The use which the Mexican Government made of the sovereign privilege to reassume the right of administering the fund or investing its proceeds to the exclusion of the church of California in 1842, can not be considered in law prejudicial to the party claimant. "*Qui jure suo utitur neminem laedit.*"

Nor for the same reason can the fact that this government, since it ceased to exercise authority over Upper California, should have centered all its care and protection on Lower California, not only in the civil but also in the ecclesiastical order, and discontinued consequently to apply to Upper California the revenues intended to foster the Catholic missions, justify the claim against the Mexican Republic.

The missions of the Jesuits having discontinued in that territory, there remained no necessity that its inhabitants should receive from Mexico supplies, clothing, and other means of subsistence; its lands were about to come under cultivation, as in fact they did, with marvelously productive results; and under these circumstances the Government was at liberty, as trustee (comisario), in place of the Jesuits, to apply the proceeds of the fund to other missions, without exposing itself to censure, complaint, or claim from anyone, conforming entirely to the will of the founders expressed in the foundation deed of the fund, according to the language of the text above cited.

VII.

The exaggeration of the demands, or *plus petición*, is demonstrated in various ways, and, reserving the privilege of presenting in the course of the proceedings a basis for a settlement, which up to this time it has not been possible to conclude, I make the following observations:

In the first place, it is most evident that to solicit now, in Mexican gold money, the payment of the interests which are claimed because

their claim against the Mexican Government as being a claim for an annuity, the amount of which annuity has been fixed by the Mexican Government at a sum equal to 6 per cent upon the total capitalization. Mexico, by her acts in 1842, recognized the definite character of the claim against her, acknowledging a liability, not for the principal, but for a certain annual charge. After having herself stamped this character upon the claim of the Pious Fund, Mexico can not now say that the claim is to the principal and not to an annuity, and a claim for the principal, if such existed, being barred by treaty stipulation, no claim for the annuity can exist. Mexico must continue the trust relation which she has herself assumed.

"The difference now insisted upon is more than verbal; it is substantial, and is to be borne in mind when it is suggested to us, as it has been by the Mexican secretary of state, that we have lost our claim to the principal because such claim was not presented under the treaty of 1848; the fact being that at no time under the Mexican decrees could a claim for the principal have been entertained.

"It should be borne in mind that we never have had or made any claim to the principal. From its origin it has been in the hands of trustees; first, the Jesuits; then the Spanish Crown; then the Government of Mexico; then in the bishop under the laws of 1836; then from February 8, 1842, again in the Mexican Republic. All of these changes were accomplished by law—the act of the sovereign." J. H. Ralston Agent United States.

other interest on the same capital were ordered paid in this money by the award made in November of 1875, is to ask more than double what the interest would amount to at 6 per cent, to which right is claimed. The reasons consist in this, which no one denies: In 1875 the ratio between the value of gold and silver was almost exactly 16 to 1, the value of gold later having more than doubled that of silver. Now, then, in pesos of silver, and in no other way, were the properties of the Pious Fund valued, and for the value which this money represented, they were sold, and the amount resulting from the sale recogonized by the Mexican Government in favor of said fund. Mexico has never had nor has it now any other standard for its money than the silver peso; its gold money is coined in very small quantity, and is not used to regulate the commercial values. When the claimants ask for interest in so many dollars, they speak of dollars of their own country, as they are there called, with the understanding that they are of gold. The Mexican gold of which they speak is at very slight discount with respect to American gold; but in every case the *dollars* of Mexican gold are of more than double the value of the silver dollar, in which money only could the interest of the Pious Fund be collected, if they should belong to the claimants.

Therefore, the claim of the bishops of California is usurious in asking, not only 6 per cent on the capital, but much more than 12 per cent per annum.

Another of the exaggerations of the claim is the endeavor to collect, not the half (which is even too much) of the interest on capital, since the other half would have to be applied to the missions in Lower California, but now 85 per cent is asked, because this is the proportion, it is said, between the populations of Upper California of the United States and Lower California of Mexico. Thus it is argued as if it had been intended that the fund should be applied to the entire population and not to the conversion and improvement of uncivilized Indians. This reasoning would only have held good if the entire population of both Californias were of barbarous Indians. This argument, then, can not be sustained, which demonstrates only the zeal, disproportionate in this case, of the attorneys and counsellors of the claimants. In order to comply with the spirit and intention of the founders, the proportion should be made between the unconverted and uncivilized Indians of one of the Californias in comparison with those of the other; and it is now known that in that belonging to the United States, there are not many, perhaps not even one, in that condition.

Another exaggeration of the claim consists in including in the amount demanded the value of the properties that belonged to the Marquis de las Torres de Rada. The value of these properties form, undoubtedly, the greater part of the amount demanded, and there is, nevertheless, no legal basis on which to claim it. This assertion will, no doubt, astonish the claimants, who have made a minute study with regard to the donation of said properties made to the Pious Fund; but it is to be observed that there has very recently been discovered in the general archives of the Republic important data which verify the foregoing statement. These data are contained in the book printed in the eighteenth century, which accompanies the present reply, and whose authenticity will be properly and opportunely proved. In it is given the history of the protracted litigation concerning the inheritance of

the Marquis de las Torres de Rada, and at the close of the suit, the supreme "consejo de Indias" in Spain, the court of last resort capable of acting in the case at that time, declared null and without value the inventories and valuations of the properties which remained at the death of the said Marquis, as well as the adjudication which was made of it to the Marchioness, his widow. This judgment of the court of last resort rendered the dispositions of the Marchioness, widow of Torres de Rada, worthless, and therefore those of the Marquis de Villapuente in the will which the latter made with power to will from his cousin, the Marchioness. Now, then, said will was the basis of the donation which both made to the Pious Fund of certain properties which did not legally belong to either of them. I will not prolong this matter with explanations, but refer to the accompanying book, principally to the concluding judgment, and whose original, as will be proved at the proper time, exists in the Spanish archives of the "supremo consejo de Indias." There can be no doubt as to the nullity of the donation made by the Marchioness to the Pious Fund of properties which did not belong to her, by the recognized principle of *nemo plus juris transferre potest quam ipse haberet.* There should at least then be deducted from the sum demanded by the claimants the value of the properties to which I refer.

In conclusion, I believe I have demonstrated—

1. That the claimants lack the right of presenting themselves as legitimate trustees of the Pious Fund of the Californias.

2. That the Catholic Church of Upper California has no right to exact from the Government of Mexico the payment of interest upon the supposed capital or fund.

3. That the rights alleged by the archbishop and bishop, the claimants, are either inadequate to sustain the case or they have been canceled chiefly by the treaty of Guadalupe Hidalgo, which canceled all claims of citizens of the United States against the Republic of Mexico, exonerating the latter from all demands on account of claims against it, which were in existence February 2, 1848, in favor of said citizens, as is seen in Articles XIV and XV of the treaty. Even in the absence of this treaty, the right of the claimants would have been canceled by the various general laws which were made successively by this Republic, to which, without doubt, the annuity (*censo*) which constituted the Pious Fund was subject.

4. That the real object of this fund, the purpose for which it was intended, was the conversion of the barbarous Indians to Christianity and their civilization, and this being so, that there are now no barbarous Indians to whom to apply it in California.

(5. No such number given in original.)

6. That the right rests with the Mexican Government and with it alone to direct in its territory or out of it this or other application of the fund, without any obligation to account to the bishops of California for its action in the matter.

7. That if the claimants should have any right to collect interest, it would not be for the sum which they ask, which is excessive inasmuch it has been calculated in gold dollars, when the sums which were taken for its basis have been in silver dollars, and to-day the difference between the two moneys is not the same as in 1875, when Mexico was condemned to pay other interests in gold. Moreover, the portion of interest which belonged to Upper California is computed according to

the population and not by the number of Indians in whose conversion it has to be employed; and, lastly, the properties donated by the Marchioness de las Torres de Rada are included in the value of the Pious Fund, when new evidence proves the nullity of that donation.

For these reasons and others which will be alleged when the opportunity arises, I respectfully pray in the name of the Mexican Government to the court to disallow the claim brought against this Governmnt by the representatives of the Catholic Church of California, a claim contrary in general to justice, and in particular to the treaty of peace and friendship in force between the Mexican Republic and the United States of America.

Mexico, August 6, 1902.

IGNACIO MARISCAL,
Minister of Foreign Affairs.

EXHIBIT B.

Résumé of litigation relating to the Rada property referred to in the answer of Mexico.

This synopsis is taken principally from the statement of the case contained in the first eleven pages of Document No. 3 in the volume produced by Mexico.

The Mexican exhibit consists of the following documents, which are bound together in the order in which they are here enumerated:

1. Memorial of Don Joseph de Rada, as ordered by the supreme council of the Indies, in the matter of his claim against the widow of the Marquis of Torres de Rada and the Marquis of Villapuente dated at Madrid, January 11, 1748.
2. Addition to the foregoing memorial.
3. Argument in support of the memorial of Don Joseph de Rada, printed in Mexico in 1742.
4. Statement made by the attorney appointed to defend the estate of the Marquis Villapuente dated 1741.
5. Legal defense of the missions of California as the devisees of the widow of the Marquis of Torres de Rada in the matter of the distribution of his estate, as ordered by the judgment at the end of the volume, dated Mexico, 1759.
6. Judgment of the royal and supreme council of the Indies dated Madrid, April 16, 1749.

These documents in substance recite that on the 23d of April, 1713, the Marquis of Torres de Rada died, and, as no will of his could be found, the probate judge in the City of Mexico proceeded to take the necessary steps to distribute the estate. The proceedings were opened on the 19th of May following, and by the testimony that was taken, especially by that of the marquis's widow, Doña Gertrudis de la Peña, it appeared that he had not left any natural heirs, except herself, his brothers and sisters in Spain, a nephew named Francisco, who was with her; another, a Franciscan novice, and a third in Spain. Accordingly, on June 23 of the same year, an order was made reciting that the marquis had died intestate, and ordering the inventories and appraisements of his estate to be made, and all pertinent evidence to be produced, and referring the cause to the chief justice of the probate court, further reciting that the appraisers should be named by the marchioness and the attorney of the court, Defensor del Juzgado, reserving the right for any absent heirs to come in and prove their

heirship. This order was communicated to the attorney of the court on the following day, and thereupon he and the marchioness named the appraisers. After some time—that is, on the 28th of August—the attorney of the court consented to the approval of the inventories then completed, and on the 29th of August an order was made approving them and allowing Doña Gertrudis to take further steps in the matter.

On the same day she came into court, reciting that the estate, as shown by the inventories, was insufficient to cover her separate estate (dote), and she asked that it be distributed to her, promising to pay the debts of the late marquis, and claiming the right to ask for the distribution to her of any other property that might at any future time be discovered. Service of her petition was made on the attorney of the court, who consented to it, and an order was made on the 9th of September in accordance therewith. At the same time the judge declared that Don Andres, Doña Francisca, Doña Isabel, and Doña Maria Lorenz de Rada, brother and sisters of the late marquis, to be his heirs, and in place of his brother Don Juan Antonio Lorenz de Rada and the other brothers, who were dead, their children should be so considered.

This order of the probate judge remained undisturbed until 1718, when Don Joseph de Rada appeared, through his guardian, and sought to compel the marchioness to render an account of the expenditures and administration of the estate of the late marquis, as well as to produce any evidence that she might possess concerning the title and expenditures of the marquis, and asking certain information as to properties which she took as her separate estate (dote). Notice of this was served on the marchioness. The moving party was the son of the late Don Juan Antonio Lorenz de Rada, who was the eldest brother of the deceased marquis. Upon this demand an order issued requiring that Doña Gertrudis produce all papers relating to the title of marquis in her possession, as well as all account books and papers of the marquis. From this order she appealed, but it was sustained. The marchioness thereupon produced some papers of her husband, declaring them to be all that she could find that in any way related to his property, saying that she thought her late husband had not kept any books of account, whereupon Don Joseph de Rada asked that the inventories made in the estate of her husband be annulled, saying that they had been falsified. The marchioness resisted the demand and the court ordered that if the moving party considered that the properties had been undervalued in the inventories he should bring forward some one who would offer more for them than the prices set down in said inventories. This was not done and the demand was refused. An appeal was taken, which was dismissed by the Audiencia Real on the 21st of July, 1721.

The suit remained in this condition until August 18 of the following year, when an attempt was made by the Marchioness to have Don Gregorio Joseph del Pino appointed to be chancellor, and after various steps in the courts she was, in 1724, referred to the King of Spain and the council of the Indies. From the orders submitting this appointment to the council of the Indies, the Marchioness appealed.

At about this time, Don Joseph de Rada came forward, asking that he be furnished with copies of all the orders made in these proceedings. His demand was granted, and the Marchioness appealed; her appeal was dismissed, and she was enjoined from further proceeding.

The order appealed from was confirmed in 1726. In view of the decision against the Marchioness, Don Joseph Lorenz de Rada came into court, demanding that he be declared the successor to the title of Marquis, and that the rights and possession of the offices of chancellor and registrar be granted him, at the same time asking that an account accompanied by payment over to him of the receipts of these offices, since 1713, be rendered him. To this the Marchioness made objection, producing a royal cedula of 1725, declaring that she was the person who should succeed to the title and offices. This paper was served on Don Joseph Lorenz de Rada, who represented that it could not abridge his rights in his demand, as it had been obtained by misrepresentation, and he insisted upon his rights.

An order was thereupon made for the production of the proceedings since November 26, 1729. (This must have been some years after the production of the cedula.)

The case remained in this state until March 12, 1738, when the Marchioness having died, Don Joseph Lorenz de Rada asked that the suit be revived as against her heirs and personal representatives. Notice of this revival was served on one Father Juan Francisco de Tompez, a Jesuit, the attorney in fact of the Marquis of Villapuente, whom the Marchioness had named as her executor and heir by an instrument (el poder de testar), executed before the notary, Francisco de Valle, on October 15, 1735. He (the attorney in fact) contended that the whole controversy had been settled by the royal cedula of 1725, to which Don Joseph Lorenz de Rada replied that the cedula had been obtained by misrepresentation, etc. The court then learned of the death of the Marquis of Villapuente at Madrid, apparently without leaving any will, and it therefore appointed an attorney to defend his rights. This attorney set up practically the same defense as Padre Tompez, and the court then ordered that the evidence in the case be taken.

Don Joseph contended that he was entitled to the title of Marquis and all receipts of the offices of chancellor and registrar since 1713, as well as the property remaining over after the payment of the separate estate (credito dotal) of the late widow of his uncle.

The other parties asked that the suit be dismissed, and that all property distributed as the separate estate of Doña Gertrudis be exempt from this judgment.

This suit was decided by the audiencia real on December 20, 1742, against Don Joseph Lorenz de Rada, and he was condemned to pay costs, and enjoined from further proceedings. (These latter facts are set forth in the judgment of the council of the Indies at the end of the volume.)

Furthermore, the right of appeal was denied him, and on this account he instituted proceedings to take the matter to the council of the Indies by an appeal to the King. These proceedings resulted in his being allowed to take an appeal from the judgment of the court below, and the former judgment of the audiencia real of December 20, 1742, was reversed, and it was ordered that the parties appear in that court to show their respective rights to the property left by the Marquis over and above the separate estate of his widow. This judgment was rendered without any notice to the heirs or representatives of the Marquis of Villapuente, or the missions of California.

In accordance with this judgment, in 1752 an order of the council

of the Indies was made, formally referring the question of division of the properties of the late Marquis of Torres de Rada to the audiencia real of Mexico.

In 1759 the representatives of the missions of California furnished a brief on the subject, which is to be found in the volume just before the judgment of the council of the Indies, and although it precedes said judgment in the arrangement of this exhibit, it is, in fact, ten years later in date. This brief recites the facts substantially in the same way as the argument made on behalf of Don Joseph de Rada, except that it brings the matter down to a later date. Upon reading it, it will be seen that the statement made by Pedro Ramirez (Transcript, p. 518 et seq.) is entirely correct.

We thus trace this suit, beginning in 1718, through all its stages, down to 1759. Mexico has not furnished any additional evidence bearing on the case, but the ultimate result of the whole litigation was considered and passed upon by the mixed commission of 1869. The history of the case from 1759, as given by Pedro Ramirez, brings it down to 1840. At that time the claimant, Señor Jauregui, was willing to settle for $210,000. (Transcript, p. 520.)

In making his award, the umpire followed the American commissioner's opinion, and rejected the estate of Ciénega del Pastor, because it was under attachment at the instance of Señor Jauregui. This property was afterwards sold for $213,750, as will be seen by the deed of sale, executed by order of the Mexican Government on November 29, 1842, in the City of Mexico, before the notary, Ramon Villalobos, a copy of which is in evidence as Exhibit D.

SENTENCIA DE EL REAL Y SUPREMO CONSEJO DE INDIAS.

(*Senorcs:* La Isequilla, Regalía, Cornejo, Contreras, Aguero.)

Vistos por los del Supremo Consejo de Indias en Sala de Justicia en virtud de Real Cedula de Comision de su Magestad, su fecha en San Ildephonso á 21 de Octubre de 1744 los Autos seguidos por Don Joseph Lorenz de Rada, y otros sus Coherederos, como herederos, ab intestato del Marqués de las Torres de Rada, primero ante el Juez de bienes de difuntos de la Ciudad de Mexico, y despues en aquella Audiencia; con Doña Gertrudis de la Peña, Marquesa que fué de las Torres de Rada, viuda de dicho Marqués, y por muerte de esta, con el apoderado del Marqués de Villapuente, su heredeo, y por su fallecimiento, con el Defensor nombrado á sus bienes: cuyos Autos se siguieren en su principio, sobre la exhibición de los Libros,

JUDGMENT OF THE ROYAL AND SUPREME COUNCIL OF THE INDIES.

Those of the Supreme Council of the Indies in the Hall of Justice considering that by virtue of the royal cedula of commission, dated at San Ildephonso October 21, 1744, the suits prosecuted by Don Josef Lorenz de Rada, and others his coheirs, as heirs *ab intestato* of the Marquis of Torres de Rada, first before the probate judge of the City of Mexico, and afterwards in the Audiencia of that place; with Doña Gertrudis de la Peña, late Marchioness of Torres de Rada, widow of said Marquis, and in consequence of her death, with the attorney in fact of the Marquis de Villapuente, her heir, and upon his death with the lawyer appointed to defend his estate (*Défenser nombrado á sus bienés*): which suits were prosecuted at first for the production of the books; and papers of the said Marquis of

y Papeles del referido Marqués de las Torres de Rada, recision, y nulidad de los inventarios, y aprecios hechos por su muerte de sus bienes, manifestación de ellos, sucesion en el Titulo de Marqués y en los Oficios de Chancillér, y Registrador de aquella Audiencia, las de Guadalaxara, Goathemala, Santo Domingo, y Philipinas, y quenta con pago de los rendimientos de estos oficios; y ultimamente sobre la nulidad de la adjudicación *insolutum*, que de uno, y otro se hizo á dicha Doña Gertrudis de la Peña, y restrución de sus salarios y emolumentos, con lo demás, que son los Autos: los quales se mandaron entregar, y presentaron en el Consejo, por Testimonio, y penden en grado de segunda suplicación, interpuesta por el expresado Don Joseph Lorenz de Rada, de los Autos proveídos por los Ministros de ella en 14 de Noviembre, y 20 de diciembre de 1742 en que por el primero declararon, no haver probado su acción, y demanda la parte de Don Joseph Lorenz de Rada, y haverlo hecho de sus excepciones, y defensas, la del Defensor de los bienes del Marqués de Villapuente, y en su consequencia mandaron se guardasse, cumpliesse, y executasse el Auto de 5 de Julio de 1721 en que se delarò por aquella Audiencia por desierta la suplicación del de 13 de Febrero de este mismo año, proveído por el Juez General del Juzgado de bienes de difuntos, y que para su execución se bolviessen los Autos á dicho Juzgado, donde las Partes ocurriessen á pedir lo que les conviniesse; y á mayor abundamiento se impuso perpetuo silencio á dicho Don Joseph de Rada, y sus Colitigantes, y se les condenó en las costas, con otras cosas que por menor se expressan en dicho Auto; y por el segundo de 20 Diciembre de 742 declaró dicha Audiencia por insuplicable el antecedente; cuyos Autos se han substanciado

Torres de Rada; the cancellation and annulment of the inventories and appraisements, made after his estate; the exhibition of them; the succession to the title of Marquis, and the office of Chancellor and Registrar of said Audiencia and those of Guadalajara, Guatemala, Santo Domingo, and the Philippines, and for an account accompanied by payment of the emoluments of these officers; and finally, for the annulment of the adjudication *insolutum*, both of which, and the restitution of the salaries and emoluments, with the rest, were decided in favor of Doña Gertrudis de la Peña which are the decisions (on appeal), which were ordered produced and they were presented before the council as evidence, and they are pending in the nature of a second appeal taken by the aforesaid Don Joseph Lorenz de Rada from the decrees pronounced by the judges of it (the Audiencia) on the 14th of November and 20th of December, 1742, in which, by the first, they declared that on the part of Don Joseph Lorenz de Rada he had not proved his suit and demand, and that on the part of the attorney appointed to defend the estate of the Marquis de Villapuente in his pleas and defenses this had been done, and in consequence they ordered that the decree of the 5th of July, 1721, should be obeyed, complied with, and executed, in which it was declared by said audiencia that the appeal from the one (the decree) of the 13th of February of the same year, pronounced by the chief justice of the probate court should be dismissed, and that in order that it be executed, the decisions be remanded to the said court, where the parties might appear to pray (the relief) that they may deem proper; and in addition perpetual silence was imposed on said Joseph de Rada and his colitigants, and they were adjudged to pay costs

en ausencia, y rebeldía del Defensor de los bienes del Marqués de Villapuente, en los Estrados de este Supremo Consejo, por nó haver comparecido á su seguimiento; y vistos por uno de 27 de Noviembre de 1748. teniendo presente lo dicho por el señor Fiscal en ellos, se declaró haver lugar á el grado de segunda suplicación, interpuesto por dicho Don Joseph Lorenz de Rada, y que se traxessen estos Autos en lo principal, lo que se executó así, y en su inteligencia, y de todo lo demás que és el processo, y vér convino.

FALLAMOS:

Atento á los meritos de él, á que nos remitimos, que debemos revocar, y revocamos, los Autos proveídos por aquella Audiencia, que qüedan citados en 5 de Julio de 721 y 14 de Noviembre de 742 por los que declaró por desierta la suplicación interpuesta por Don Joseph Lorenz de Rada, y Don Francisco de Revilla, del Auto proveído por el Juez General de bienes de difuntos en 13 de Febrero del referido año de 721 como también el de 20 de Diciembre de 742 que vá expressado; y declaramos por nulos, y de ningún valor, ni efecto, los Inventarios, y aprecios de los bienes que quedarón por meurte del Marqués de las Torres de Rada, y la adjudicación hecha de ellos á la referida Marquesa, y reservamos á los successores de esta, y al referido Don Joseph Lorenz de Rada, y sus colitigantes, su derecho á salvo, para que usen de él como les convenga, sobre los respectivos derechos deducidos en aquella Audiencia, donde lo deberán executar. Declarando, como declaramos que por muerte de Don Francisco Lorenz de Rada, Marqués de las Torres de Rada, se transfirió en Don Joseph Lorenz de Rada, su sobrino, la possession civil, y natural del Titulo, y Dignidad de

and other things, which are more specifically set forth in said decrees; and by the second, that of the 20th of December of 742 (1742), said audiencia adjudged the former proceedings to be nonappealable; which decrees have been enforced in the absence and nonappearance of the lawyer appointed to defend the estate of Marquis de Villapuente, in the halls of this supreme council, because of his not having appeared at the rendering of these decrees; and considering that by a decree of November 27, 1748, interposed by the said Don Joseph Lorenz de Rada, and weighing all that was said by the attorney-general in them (decrees) the right of taking a second appeal was sustained, and it was ordered that the decrees be set forth in the premises, which was done, and in the knowledge of this and all the other facts of the suits, and it seeming just:

WE DECREE:

That mindful of the merits of him to whom we remand this cause, that we ought to revoke, and we do revoke, the decrees rendered by said audiencia, which have been cited as of the 5th of July, 1751, and 14th of November, 1742, by which the appeal taken by Don Joseph Lorenz de Rada, and Don Francisco de Revilla, from the decree pronounced by the chief justice of the probate court on the 13th of February of the said year 1721, as also the one (the appeal) of the 20th of December of 1742, which has been set forth, was dismissed; and we declare null and of no value nor effect the inventories and appraisements of the properties left by the Marquis of Torres de Rada upon his death, and the distribution of them made to the said Marchioness, and we reserve to her successors, and to the said Don Joseph Lorenz de Rada and

Marquès de las Torres de Rada, la que realmente, y con efecto debe verificarse en èl. Y assimismo mandamos se le ponga en la possession de los oficios de Chancillèr, y Registrador de aquella Audiencia, y las demàs que ván citadas, para que las sirva, y possea, en la misma forma, y con las proprias facultados que las gozò, y posseyò, el Marquès su Tio, perciviendo los Frutos de ellas por salario, y manteniendo la propriedad responsable à las resultas del juicio que sigan las partes en aquella Audiencia, por los derechos que les vàn reservados: y en consequensia de todo lo que và dicho, mandamos se chancele, y tenga por de ningun valor, ni efecto la caucion Juratoria, y obligacion otorgada por dicho Don Joseph Lorenz Rada para las resultas de este Juicio; y por esta nuestra sentencia difinitivamente jusgando, assi lo pronunciamos, mandamos, y firmamos. Don Joseph de la Isequilla. Marqués de la Regalia. Don Joseph Cornejo. Don Pedro Domingo de Contreras. Don Juan Vazques de Aguero. Dada, y pronunciada fuè la sentencia antecedente por los Señores del Supremo Consejo de las Indias, que la firmaron en Madrid à 16. Abril de 1749. Don Antonio de Salazar y Castillo.

his colitigants, their right safe and in full force, in order that they may make use of it as they see fit, according to the respective rights deduced in that Audiencia, where they shall execute it. Declaring, as we do declare, that on account of the death of Francisco Lorenz de Rada, the Marquis of Torres de Rada, the civil possession and right of title and rank of the Marquis of Torres de Rada, which really and in effect ought to be confirmed in him, were transferred to Don Joseph Lõrenz de Rada, his nephew. And at the same time, we command that he be put in possession of the office of Chancellor and Registrar of that Audiencia and the others before mentioned, in order that he may fill and possess them in the same way, and with the proper authority which the Marquis, his uncle, enjoyed and possessed, enjoying the emoluments of them, as salary, and maintaining the property in accordance with the outcome of the judgment which the parties may pursue in said Audiencia, by reason of the rights above reserved; and in consequence of all that has been said, we order that the parol (oath taken in lieu of bail) and bond executed by said Don Lorenz de Rada to abide the outcome of this judgment be cancelled and held of no value nor effect; and by this our judgment *definitively* (definitivamente) decreeing, thus we pronounce, command and sign. Don Joseph de la Isequilla. El Marquès de la Regalia. Don Joseph Cornejo. Don Pedro Domingo de Contreras. Don Juan Vazquez de Aguero.

The foregoing judgment was given and pronounced by the officers of the Supreme Council of the Indias, who signed it in Madrid, the 16th of April, 1749. Don Antonio de Salazar y Castillo.

EXHIBIT C.

The statistics which follow are taken from a work entitled "Historia de la Colonizacion de la Baja California," by Ulixes Urbano Lassépas, an official of the Mexican Government in Lower California, and printed in 1859 in Mexico City, apparently as a Government publication. The work (pp. 91–107) contains a description of the missions and shows that their population in nearly every case had suffered a great decrease. Where the figures have been given they are reproduced. On page 164 of the history this Mexican official says that—

> The greater number of the northern missions lying between Santa Catarina and San Ignacio are to-day (1859) veritable skeletons, some in ruins, scarcely indicating the spot where formerly stood the houses of worship and other buildings. The animals have disappeared from the fields, the native populace has died, silence reigns where formerly was heard the humming of a mill, the bells of the chapels, and the lowing of the herds. One of the principal causes of this decadence was without doubt *the application of the Pious Funds of California to purposes other than those for which they were designed.*

Name of mission.	Year enumeration was made.	Population.	Name of mission.	Year enumeration was made.	Population.
San Francisco Xavier	1768	485	San Pedro Martir	1796	420
	1857	56		1857	1
Guadalupe or Guasinapi	1768	530	Santa Catarina Martir	1800	1,500
	1857	11		1857	0
Los Dolores	1768	450	Santo Tomás	1797	350
	1857	6		1855	40
San Ignacio	1778	750	San Vicente Ferrer	1835	176
	1857	281		1855	40
San José del Cabo	1768	350	Rosario	1830	41
	1857	1,091		1855	24
Todos Santos	1768	90	Santo Domingo	1778	530
	1857	310		1855	19
San Luis Gonzaga	1768	310	San Miguel	1778	600
	1857	20		1855	5
Santa Gertrudis	1768	1,000	Descanso	1778	220
	1857	4		1855	24
San Borja	1768	1,500	Total of Indians at above-mentioned missions of Lower California at the earlier dates		10,162
	1857	3	Total in 1857		1,938
Santa María	1768	330	Difference		8,224
	1857	0			
San Fernando	1770	530			
	1857	3			

EXHIBIT D.

Archivo general de notarías del distrito federal.

Testimonio de la escritura de venta de fincas de la pertenencia del Fondo Piadoso de Californias, otorgada por los Señores Ministros de la Tesorería General de la Nación, á favor de los Señores Liquidatarios y demás socios de la extinguida empresa del tabaco.

MÉXICO, *agosto 9 de 1902.*

En la Ciudad de México, á veinte y nueve de noviembre de mil ochocientos cuarenta y dos, ante mí, el

General archives of notaries of the federal district.

Certified copy of the deed of sale of properties which belonged to the Pious Fund of Californias, executed by the ministers of the general treasury of the nation, in favor of the liquidators and the other members of the extinct tobacco monopoly.

MEXICO, *August 9th, 1902.*

In the City of Mexico, the 29th day of November, 1842, before me, the notary public, appeared, with

Escribano Público del número y testigos, los Señores Don Tranquilino de la Vega y Don Nicolas María de Fagoaga, ministros actuales de la tesorería general de la nación dijeron: que por el ministerio de hacienda se les han dirijido las dos supremas órdenes que tengo á la vista y cuyo tenor con el de la respectiva certificación de entero y decreto de la materia es á la letra como sigue "ministerio de hacienda. Sección segunda número dos mil setecientos diez y siete. El Ecselentisímo Señor Ministro de Justicia é Instruction publica con fecha de ayer me dice lo que sigue: Ecselentísimo Señor, El Ecselentísimo Señor Presidente provisional de la República mejicana se ha servido espedir el decreto siguiente "Antonio López de Santa Anna, Benemérito de la Patria, General de Division y Presidente provisional de la Républica mejicana á los habitantes de ella sabed; Que teniendo en consideracion que el Decreto de ocho de Febrero del presente año, que dispuso volviera á continuar al cargo del Sepremo Gobierno el cuidado y Administración del fondo piadoso de Californias, como lo había estado anteriormente, se dirije á que se logren con toda esactitud lo benéficios y nacionales objetos que se propuso la fundadora, sin la menor pérdida de los bienes destinados al intento: y considerando asímismo, que esto solo puede conseguirse, capitalizando los propios bienes, é imponiéndolos á créditos bajo las debidas seguridades, para evitar así los gastos de Administracion y cualquiera otros que puedan sobrevenir; usando de las facultades que me concede la séptima de las bases acordadas en Tacubaya y sancionadas por la nacion, he tenido á bien decretar lo siguiente primero. Las Finca rústicus y urbanas, los créditos, y demáas bienes pertenecientes al fondo piadoso de Californias, quedan incorporados al

witnesses, the Messrs. Don Tranquilino de la Vega and Don Nicolás María de Fagoaga, present ministers of the general treasury of the nation, and said that through the department of finance (hacienda) there have been issued the two supreme orders which I have before me, and whose tenor, with that of the respective certificate of receipt and decree relative to the matter is literally as follows: "Department of finance (hacienda) section second, number two thousand seven hundred and seventeen. His excellency, the minister of justice and public instructions under date of yesterday, addresses me as follows: Most Excellent Sir: His Excellency the Provisional President of the Mexican Republic has seen fit to issue the following decree: Antonio Lopez de Santa Anna, Well deserving of the country, general of division and Provisional President of the Mexican Republic to the inhabitants of the same, be it known: That whereas, the decree of February 8th of the present year, directing that the administration and care of the Pious Fund of the Californias should redevolve on and continue in charge of the Government, as had previously been the case, was intended to fulfill most faithfully the beneficent and national objects designed by the founders, without the slightest diminution of the properties destined to the end; and whereas, this result can only be attained by capitalizing the funds and placing them at interest on proper securities so as to avoid the expenses of administration and the like, which may occur. In virtue of the power conferred on me by the Seventh Article of the Bases of Tacubaya, and sanctioned by the Nation, I have determined to decree as follows:

1. The real estate, urban and rural, the credits, and all other property belonging to the Pious

Erario nacional. Segundo. Se procederá por el Ministerio de Hacienda á la venta de las fincas y demás bienes pertenecientes al fondo piadoso de Californias, por el capital que representen al seis por ciento de sus productos anuales, y la Hacienda pública reconocerá el rédito del mismo seis por ciento, el total producido de estas enagenaciones. Tercero. La renta del Tabaco queda hipotecada especialmente, al pago de los réditos correspondientes del capital del referido fondo de Californias, y la Direccion del ramo entregará las cantidades necesarias para cumplir los objetos á que está destinado el mismo fondo, sin deducción alguna por gastos de Administration ni otro alguno, por tanto mando se imprima, publique circule y se le dé el debido cumplimiento. Palacio del Gobierno nacional en Méjico á veinte y cuatro de Octubre de mil ochocientos cuarenta y dos. Antonio Lopéz de Santa Anna. Pedro Véloz, Ministro de Justicia é Instruccion pública. "Y lo comunico á Vuesencia, para su inteligencia y efectos correspondientes." Trasládolo á Usías, de Suprema orden con iguales fines. Dios y Libertad. Méjico, Octubre veinte y cinco de mil ochocientos cuarenta y dos. Trigueros—Señores encargados de la Tesorería general." Al márgen: "Supremas orden." Ministerio de hacienda. Seccion. Número dos mil setecientos once. T. Número cuatro mil novecientos diez y seis. Los liquidatarios y demás socios de la estinguida empresa del tabaco, han hecho la siguiente proposicion. 1[a]. Compraremos al Supremo Gobierno, la Hacienda conocida con el nombre de amoles con sus anexas, y las tres cuartas partes que le pertenecen en la de Ciénega del Pastor y sus anecsas, ubicadas, la primera en el Departamento de San Luis Potosí, y la segunda en el de Guadalajara; pertenecientes ambas al fondo piadoso de Californias; y cuyo va-

Fund of the Californias are incorporated into the national treasury.

2. The department of the treasury will proceed to sell the real estate and other property belonging to the Pious Fund of the Californias for the capital represented by their annual product at six per cent per annum. And the public treasury will acknowledge an indebtedness of six per cent per annum on the total proceeds of the sales.

3. The revenue from tobacco is specially pledged for the payment of the income corresponding to the capital of the said fund of the Californias, and department in charge thereof, will pay over the sums necessary to carry on the objects to which said fund is destined without any deduction for costs, whether of administration or otherwise.

Therefore, I order that it be printed, published, and circulated and properly executed. Palace of the National Government of Mexico, October 24, 1842, Antonio Lopez de Santa Anna, Pedro Velez, minister of justice and public instruction. "And I communicate it to your honor for your knowledge and appropriate action." I transfer it to your honors by supreme order for the same purposes, God and liberty. Mexico, October 25, 1842. Trigueros.—Gentlemen in charge of the general treasury. In the margin: "Supreme order," department of finance (hacienda). Section number two thousand seven hundred and eleven. T. Number four thousand nine hundred and sixteen. The liquidators and the other members of the extinct tobacco monopoly have made the following proposal: First. We will buy from the Supreme Government the estate known by the name of "Amoles," with its outlying properties (anexas) and three-fourths of the Ciénega del Pastor and its outlying properties (anexas), which also belong to it; the first situated

lor se calculará por lo que produsca sus actuales arrendamientos, á razon de un seis por ciento al año: es decir, que si estos producen anualmente veinte y cuatro mil pesos, el precio de estas dos fincas será de cuatrocientos mil pesos; y en la misma proporción si el arrendamiento es mayor ó menor. Daremos en pago, cincuenta mil pesos que se enterarán inmediatamente en laTesorería general--doscientos cincuenta mil pesos que por resultado de nuestra cuenta con el Banco nos deben ser pagados en abonos de treinta y cinco mil pesos mensuales con los productos de las rentas de Tabacos de las Administraciones de Zacatecas y Guadalajara, tan luego como se amortizen las órdenes anteriores, que se nos están pagando en la actualad por las mismas Administraciones con arreglo al Decreto Supremo de doce de Noviembre de mil ochocientos cuarenta y uno. 2ª. Segunda. Lo que faltare hasta completar el total valor de dichas haciendas lo entregaremos en la Tesorería general en créditos reconocidos por la nacion; verificándolo en el término de ocho meses, que se contarán desde la fecha de la aprobación de esta propuesta. 3ª. Tercera. El Supremo Gobierno saneará en todo caso la venta de dichas fincas; cualquiera reclamacion que pueda hacerse contra las mismas, será de cuenta del Gobierno satisfacerlas, sin que por ningún motivo se nos inquiete en la pacífica poseción de ellas, y cualquiera gasto ó perjuicio que se nos pueda orijinar por este motivo, nos deberá ser indemnizado por la Hacienda pública. 4ª. Cuarta. No estaremos obligados á ecsivir ninguna otra cantidad que las ya espresadas, por razón de esta compra. 5ª. Quinta. Nos obligamos á cumplir las Escrituras de arrendamiento de dichas Haciendas hasta su término, si en ellas se espresare que los arrendatarios no deban ser molestados ni aun

in the District of San Luis Potosí, and the second in that of Guadalajara; both belonging to the Pious Fund of Californias; the value of which shall be determined by the capital, which at the rate of 6 per cent per annum would produce their present rents—that is to say, that if these yield annually twenty-four thousand dollars, the price of these two estates shall be four hundred thousand dollars; and in the same proportion if the income for rents be greater or less. We will give in payment fifty thousand dollars, to be deposited immediately in the general treasury—two hundred and fifty thousand, which as a result of our account with the bank (banco) ought to be paid us in monthly instalments of $35,000, together with the proceeds of the revenues of tobacco from the districts of Zacatecas and Guadalajara as soon as the above orders shall fall due, which are being paid at present by said districts in accordance with the supreme order of the 12th of November, 1841. Second: The amount lacking to complete the total value of the said estates will pay into the general treasury in notes approved by the nation; redeeming the same in the period of eight months, which will be counted from the approval of this offer. Third: The Supreme Government shall guarantee in every case the sale of said estates; it shall be the obligation of the Government to satisfy any claims whatsoever that may be brought against the estates, so that we may not for any cause be disturbed in the peaceful possession of them, and any expense or loss which may originate through this cause must be made good by the public treasury (Hacienda). Fourth. We will not be held liable for any other amount than those already stated by reason of this purchase. Fifth. We bind ourselves to carry out the contracts of the leases of said

en el caso de enagenación de las mencionadas fincas." Y en virtud de la autorización que concede al Gobierno el decreto de esta fecha, admite el Ecselentísimo Señor Presidente provisional esta proposición, bajo el concepto de que los cincuenta mil pesos que se ofrecen entregar en numerario se ecsivirán en el acto. Dios y Libertad. Méjico, Octubre veinte y cinco de mil ochocientos cuarenta y dos. *Trigueros.* Señores encargados de la Tesorería general." Al margen: "Otra." "Ministerio de hacienda. *Sección segunda, Número dos mil ochocientos tres. T. número cinco mil trescientos cuarenta y seis.* Dada cuenta al Ecselentísimo Señor Presidente sustituto con el oficio de Usías., número doscientos uno de diez y siete del que rige, en que consultan si al venderse las Haciendas de Ciénega del Pastor y San Agustín de los Amoles pertenecientes al Fondo Piadoso de Californias se tubo presente el valor de los llenos, ecsistencias, deudas y mejoras; se ha servido acordar su Escelencia diga á Usías., en contestación, como lo verifico, que teniendo en consideracion el Supremo Gobierno que se computaron los llenos de las Haciendas referidas para apreciar sus arrendamientos á los que se acomodó el precio ó valor contenido en el contrato celebrado con los liquidatarios y demás socios de la estinguida empresa del tabaco para la venta de las fincas espresadas cuya aprobación comuniqué á Usías. bajo el número dos mil setecientos once en veinte y cinco del último Octubre, no se insiste en que sean pagados por separado. En consecuencia dispone su Escelencia se admita la propuesta que han hecho los interesados vervalmente, reducida á recibir tres mil pesos en el acto, y con calidad de que si los llenos aparecieren pertenecer á tercera persona, será de cuenta de los mismos su devolución ó contenta, sin

estates until their expiration, if therein it be provided that the tenants must not be disturbed even in case of the sale of the said estates."

And in virtue of the authority conceded to the Government by the decree of this date, His Excellency, the Provisional President, accepts this offer upon the condition that the $50,000 which is offered to be paid in coin be delivered immediately. God and Liberty. Mexico, October 24, 1842. Trigueros. Gentlemen in charge of the General Treasury. In the margin—"Another," "Department of Finance" (Hacienda), "Section Second, Number two thousand eight hundred and three. T. Number five thousand, three hundred and forty-six. His Excellency, the Provisional President, having been notified by the letter of Your Excellencies, No. 201 of 17 instant, in which you discuss as to whether or not account was taken of the utensils (llenos) stock, debts and improvements of the hacienda Ciénega del Pastor and San Agustin de los Amoles belonging to the Pious Fund of Californias at the time of their sale. His Excellency has seen fit to say in reply to your Honors, to which I attest, that inasmuch as the Supreme Government took into consideration the farming utensils (llenos) on the said estates in order to determine their rents, by means of which the price or value contained in the contract made with the liquidators of the extinct Tobacco Monopoly for the sale of the aforesaid estates was computed, the approval of which contract, I communicated to your Honors under Number 2711 on the 25th of October last, it is not required that the utensils be paid for separately. Therefore his Excellency orders the acceptance of the proposal made verbally by the parties interested, provided three thousand dollars be paid down, and with the understanding

que esta incluya responsabilidad alguna que tenga que cubrir el Gobierno. De suprema orden lo comunico á Usías. para su inteligencia y fue desde luego se proceda á otorgar la correspondiente Escritura de enagenación. Dios y Libertad. Méjico Noviembre veinte y tres de mil ochocientos cuarenta y dos. *Trigueros.* Señores encargados de la Tesorería general. Certificación de entero. "Los ministros. Tesoreros generales de la Nación. Certificamos que hoy á fojas quinientas veinte y nueve vuelta del Libro manuel de cargo, nos formamos el siguiente. Son cargo: Trescientos tres mil pesos que con el valor de las Pólizas numeros mil ochocientos cuatro y mil ochocientos cinco y tres mil en numerario, enteran los liquidatarios y demas socios de la extinguida Empresa del Tabaco, y con *ciento veinte y cinco mil quinientos* que han de enterar en veinte y cinco de Junio del año procsimo de mil ochocientos cuarenta y tres, en créditos reconocidos por la Nacion componen el total de cuatrocientos veinte y ocho mil quinientos pesos, en que han comprado las haciendas del Custodio (á) San Agustín de los Amoles y sus anecsas en el Departamento de San Luis Potosí, y la de Ciénega del Pastor y sus anecsas en el de Jalisco, pertenecientes al Fondo Piadoso de Californias, calculado el valor de la primera sobre doce mil setecientos cinco pesos que produce de arrendamiento á razón de un seis por ciento anual, y de doce mil ochocientos veinte y cinco pesos tres cuartas partes sobre diez y siete mil cien pesos que produce también de arrendamiento la segunda; todo conforme á aprobación suprema del Gobierno fecha veinte y cinco del mes prócsimo pasado y á resolución superior que orijinales se adjuntan á este billete, en el concepto de que el entero de la parte de créditos, queda afianzada á nuestra

that should the utensils (llenos) thereon belong to a third party, it will be the duty of the purchasers to restore the same or give satisfaction relieving the Government from all responsibility. By supreme order I communicate the same to your honors for your information and that you may forthwith proceed to execute the corresponding deed of sale. God and liberty. Mexico, November 23, 1842. Trigueros. Gentlemen in charge of the general treasury. Certificate of receipt (entero). The ministers, treasurers general of the nation — We certify that to-day on pages 529 and over in the book of accounts we have entered the following: There has been entered to the account of the liquidators and the other members of the extinct tobacco monopoly $303,000, deposited in notes Nos. 1804 and 1805, and $3,000 in cash, which, with the $125,500 which they are obliged to pay on the 25th of June of next year, 1843, in notes approved by the nation, forms the total amount of $428,500 for which sum has been purchased the estates Custodio, San Agustín de los Amoles and their outlying properties (anexas) in the District of San Luis Potosí, that of Ciénega del Pastor and its outlying properties (anexas) in the District of Jalisco, belonging to he Pious Fund of Californias; the value of the first calculated at $12,705, which it produced from rents at the rate of 6% per annum, and the second at $2,825, being three-fourths of $17,100, which is also produced from rents; all in accordance with the approval of the Supreme Government, dated 25th of last month and a superior resolution, the originals of which are attached to this letter, with the understanding that the entire amount in the form of notes be secured to our satisfaction. Letter 1884 — $303,000. Vega—Fagoaga—Manuel Fernández, Li-

satisfacción. Billete mil ochocientos ochenta y cuatro. Trescientos tres mil pesos. *Vega. Fagoaga. Manuel Fernández*, Liquidatario de la E. del Tabaco. Y para que conste damos la presente en Méjico á veinte y seis de Noviembre de mil ochocientos cuarenta y dos. *Tranquilino de la Vega. Nicolás María de Fagoaga.* Que supuesto lo referido y procediendo al otorgamiento de la correspondiente Escritura, por la presente y en aquella vía y forma que más haya lugar en derecho firme y valedera sea, los espresados Señores Ministros otorgan: Que en cumplimiento de las supremas órdenes referidas, venden en venta real de hoy para siempre y dan en adjudicación y pago á los Señores Liquidatarios y demás socios de la estinguida Empresa del Tabaco las tres cuartas partes que el Supremo Gobierno tiene en la Hacienda de Ciénega del Pastor y sus anecsas con cuanto á ellas corresponda, y la Hacienda de San Agustin de los Amoles con sus anecsas de San José la Vaya, San Ygnacio del Buey, Custodio, Buena Vista, y todas las otras tierras y rancherías que constan de los respectivos documentos y se han considerado y consideran como pertenecientes á dicha finca, excepto la de San Pedro de Ybarra, que con anterioridad está enagenada por el Supremo Gobierno; cuyas fincas se hayan ubicadas en los Departamentos de Guadalajara, San Luis Potosí, Tamaulipas ó algún otro que no se tiene presente, y fueron de la pertenencia del fondo piadoso de Californias, de las cuales dispone el Supremo Gobierno con arreglo á lo prevenido en el Decreto incerto, que con respecto á dicho fondo espidió por el Ministerio de Justicia en veinte y cuatro del procsimo pasado Octubre y á otras varias antiguas disposiciones, cuya venta hacen los referidos Señores Ministros con cuanto de hecho y

quidator of the extinct tobacco monopoly. And in witness whereof, we execute the present instrument in Mexico, the 26 of November, 1842—Tranquilino de la Vega. Nicolás María de Fagoaga." That admitting the foregoing and proceeding to the execution of the corresponding deed, now and in that manner and form which may be most binding and valid in law, the said gentlemen ministers covenant: That in fulfillment of said Supreme orders, they will sell in fee simple (venta real) from now and forever and give in settlement and payment to the liquidators and the other members of the extinct tobacco monopoly the three-fourths part which the supreme government owns in the estate Ciénega del Pastor and its outlying properties (anexas) and whatever belongs thereto, and the estate San Agustín de los Amoles, with its outlying properties (anexas) of San José Lavaya, San Ignacio del Buey, Custodio, Buena Vista, and of the other lands and ranches which appear in the respective documents, and which have been considered and are considered as pertaining to said property, except that of San Pedro de Ibarra, which has already been sold by the Supreme Government; which properties are situated in the districts of Guadalajara, San Luís Potosí, Tamaulipas, or in any other not named, and which properties belonged to the Pious Fund of California, of which the Supreme Government disposes in accordance with its rights, set forth in the decree hereto annexed, and which, with reference to said fund, was issued by the Department of Justice the 24th of October last, and in accordance with various former orders, which sale the said ministers make of all that by right and law belongs and pertains to said properties, including the farming implements

de derecho toca y pertenece á dichas fincas inclusos los llenos de muebles, semovientes y aperos, con los linderos que guardan, sus entradas, salidas, usos, servidumbres, trojes, casas y aguas, del mismo modo que hasta aquí se han poseido por el referido fondo piadoso, libres de todo gravámen, censo é hipoteca, en precio y cuantía de cuatrocientos veinte y ocho mil quinientos pesos que es su legítimo valor, regulado por los actuales arrendamientos, incluyéndose el valor de los llenos en los términos y del modo que espresa la segunda de las Supremas órdenes incertas, y caso que más valgan, hacen donación pura, perfecta é irrevocable que el derecho llama *intervivos*, sin que ahora ni nunca pueda demandárseles otra suma á los compradores por razón de este contrato, debiéndose, además entregárseles á estos todos los títulos, papeles y documentos que hagan relacion con dichas fincas, y pudiendo tomar poseción de ellas desde luego, judicial ó estrajudicialmente segun les convenga con solo la copia de esta Escritura y como reales vendedores se obligan á la evicción y saneamiento de este contrato, en tales términos que siempre será firme y subsistente sin que nadie pueda alegar mejor derecho, y si se anulare ó saliere tercero que sobre estas fincas ó parte de ellas alegare derecho ó pusiere pleito, lo tomará de su cuenta la Hacienda pública tan luego como se le avise aunque sea despues de la publicacion de provanzas, y lo seguirá por todas sus instancias hasta dejar á los Señores compradores en quieta y pacífica posecion, lo que si no pudiere conseguir los indemnizará del precio de esta venta con todas las mejoras que hubieren hecho, gastos erogados, y daños y perjuicios que se les sigan con total arreglo á lo pactado en las condiciones tercera y cuarta en la primera de las supremas ór-

[llenos], furniture, stock, and sheep, with the fences which enclose them, the rights of way enjoyed, or to whom they are subject, uses, servitudes, granaries, buildings, and waters in the same manner as they have been possessed heretofore by the said Pious Fund, free from all encumbrance, annuity, and mortgage, for the sum of $428,500, which is their true value, estimated by the present rents, including the value of the farming utensils [llenos] under the terms and in the manner expressed by the second of the supreme orders herein incorporated; and in case they are worth more, they make entire, perfect, and irrevocable donation, which in law is called *intervivos*, so that neither now nor ever can any other sum be demanded from the grantees by reason of this contract, binding themselves, moreover, to deliver to the latter all the titles, papers, and documents which may relate to said properties; and granting immediate possession of them, judicially or extrajudicially, according as may please them (con solo) by a copy of this deed alone; and as actual sellers they bind themselves to the security and guaranty of this contract on such terms as will always be binding and lasting to the exclusion of all prior rights, and if the sale should be annulled, or a third party should appear to allege title or to bring suit concerning these properties, the public treasury as soon as it is advised of it, even though it be after the taking of testimony, undertakes to prosecute the same through all its stages until the grantees be left in quiet and undisturbed possession, or if this can not be accomplished in full performance of that which is agreed in the third and fourth conditions of the first of the supreme orders here incorporated, it (the public treasury) will return to them the price

denes incertas. Y habiendo cumplido yá los compradores adjudicatarios con las eshibiciones á que se comprometieron segun consta de la certificacion incerta; y no teniendo lugar la cláusula quinta en razon de no estar obligado el supremo gobierno á mantener á los arrendatarios en sus contratos, verificada la venta; quedan los espresados compradores adjudicatarios en la libre, franca, y general administracion de las espresadas fincas para que puedan disponer de ellas como les convenga por sí ó por quien sus derechos represente, como de cosa suya propia, legítimamente adquirida; entendiéndose que este contrato debe comenzar á tener sus efectos desde el dia veinte y cinco del pasado Octubre, que es la fecha de su aprobacion, segun la primera de las incertas órdenes; y que por consiguiente desde aquella fecha deberán percibir los compradores los productos y arrendamiento de las repetidas fincas. Y á la guarda, firmeza y cumplimiento de esta Escritura, obligan los Señores otorgantes los haberes de la Hacienda pública y los someten á los Tribunales y Jueces competentes para que á lo dicho la compelan y apremien como si fuese por sentencia consentida y pasada en autoridad de cosa juzgada, con la renuncia de Leyes favorables en derecho necesaria. Y estando presentes los Señores Don Francisco de Paula Rubio y Don Manuel Fernández y habiendo entendido el tenor de esta Escritura, dijeron: Que como socios liquidatarios y en representacion de los Señores Rubio hermano, Don Joaquin María Errazu, Don Felipe Neri del Barrio, Don Manuel Escandon, Don Benito de Maqua y Muriel hermanos, que son los que componen la estinguida empresa del Tabaco, y á quienes se ha hecho esta adjudicacion y venta, aceptaban y aceptan en los términos en ella contenidos, y firmaron con

of this sale, and of all the improvements which they have made, costs of suit, damages, and losses which may be incurred by them. And the grantees having made the deposits to which they agreed as is shown by the certificate hereto annexed and the fifth clause having no force, because the Supreme Government is not obliged to protect the tenants in their contracts in the event of a sale, the said grantees are placed in full, free, and entire possession to manage the said properties, so that they may dispose of them as they please for themselves or for those whose rights they represent, as of their own private preperty legimately acquired; it being understood that this contract is to take effect from the 25th of October last, the date of its approval, according to the first of the orders herein incorporated and that consequently from that date the grantees should receive the proceeds and rents from the said properties. And for the perfect performance and fulfillment of this deed, the grantors pledge the assets of the public treasury and submit them to the tribunals and competent judges, so that at the proper time they may uphold and enforce it as though by a judicial sentence pronounced, with the force of *res judicata*, with the renunciation of favorable statutes deemed necessary in law. And being present, the Messrs. Don Francis de Paula Rubio and Don Manuel Fernandez, and having understood the meaning of this deed, said: That as associated liquidators and as representatives of the Messrs Rubio brothers, Don Joaquin Maria Errazu, Don Felipe Neri de Barrio, Don Manuel Escandon, Don Benito de Magua and Muriel Brothers, who are those who constitute the extinct tobacco monopoly, and to whom this conveyance and sale has been made, they accepted and do accept in the

los Señores Ministros siendo testigos Don Manuel Bracho, Don Felipe Diaz y Don Francisco Gonzales de esta vecindad, de que doy fé.—*Tranquilino de la Vega. Nicolas Ma. de Fagoaga. Franco. de P. Rubio. Liqo. de la E. de T. M. Fernandez. Liqo. de la E. de Tavo. Ramon Villalobos. Esno. Pubco. Rúbricas.*

Un sello que dice: "Secretaría de relaciones exteriores. México." Sección de América, Asia y Oceania Número 169. Mexico, Agosto 5 de 1902. El Señor Embajador de los Estados Unidos me dice en nota fechada ayer lo que traducido, sigue: "El Departamento de Estado me ha informado que, el 21 de Julio próximo pasado, el Gobierno de los Estados Unidos notificó su deseo al Señor Godoy, Encargado de Negocios *ad interim* de México, para que ciertos documentos fuesen presentados, á fin de hacer prueba ante la Corte de Arbitraje, constituida para considerar la cuestión de los fondos piadosos. Entre ellos está la escritura de venta de tres cuartas partes de la hacienda "Ciénaga del Pastor" y sus anexas, y de la hacienda de San Agustin, de San José, Lavaya, San Ygnacio del Buey, Custodio, Buena Vista etc., por los Secretarios de Hacienda de México, por $428,500; la cual escritura, creése, fué tirada en 29 de Noviembre de 1842, ante el Notario Fillalobos, y que actualmente se halla bajo la Custodia del Notario Don Gil Mariano León, de la Ciudad de México. Se desea con interés que una copia del citado documento se ha suministrada tan pronto como fuese posible, ó cuando menos, que mi Gobierno sepa que tal documento será suministrado por el Gobierno de México. Tengo instrucciones para preguntar desde luego, si el Gobierno Mexicano ha hecho sacar copia del referido documento, y en qué tiempo pueda esperar mi

terms therein contained and signed with the Ministers, the witnesses thereto being Don Manuel Bracho, Don Felipe Diaz and Don Francisco Gonzalez of this neighborhood, to which I attest. Tranquilino de la Vega. Nicolas Ma. de Fagoaga. Franco. de P. Rubio, liquidator of the tobacco monopoly. M. Fernandez, liquidator of the tobacco monopoly. Ramon Villalobos, Notary Public, Rubrics. A seal which says: "Department of Foreign Relations, Mexico." Section of America, Asia, and Oceanica Number 169. Mexico, August 5, 1902. The Ambassador of the United States informs me in a note, dated yesterday, which, translated, reads as follows: "The Department of State has informed me that on the 21st of July last the Government of the United States expressed its desire to Señor Godoy, chargé d'affaires *ad interim* of Mexico, that certain documents should be presented as evidence before the court of arbitration formed to consider the question of the Pious Funds. Among these is the deed of sale of 3/4 parts of the estate 'Ciénega del Pastor' and its outlying properties (anexas) and of the estate San Agustin de San José, Lavaya, San Ignacio del Buey, Custodio, Buena Vista, etc., by the secretaries of the treasury of Mexico for $428,500, which deed it is believed was executed on the 29th of November, 1842, before the Notary Villalobos, and which to-day is to be found in the custody of the Notary Don Gil Mariano León, of the City of Mexico. It is specially desired that a copy of the said document be furnished as soon as possible, or at least that my Government may know that said document will be furnished by the Government of Mexico. I am, therefore, instructed to inquire if the Mexican Government has had the said document

Gobierno que le sea remitida al Agente de los Estados Unidos según está prevenido en el articulo IV del Protocolo.—"Solicito respectuosamente de Vuestra Excelencia que me envíe, con la prontitud que las emergencias del caso lo requieren, el informe deseado." Lo que traslado á Usted á fin de que se sirva expedir, á la brevedad posible, la copia de la escritura á que se refiere la preinserta nota, en el concepto de que debe ser copia fehaciente y sin timbres, por tratarse del asunto que la propia nota especifica. Renuevo á Usted mi consideración. *Mariscal.* Rúbrica. Señor Director del Archivo general de Notarias. Presente.

Es tercer testimonio compulsado de su matríz, la que está autorizada por el Notario Ramón Villalabos en el protocolo que formó, el cual obra en el Archivo de mi cargo. Y en uso de la facultad que me concede la ley de diez y nueva de Diciembre de mil novecientos uno, en su artículo noventa y seis, fracción catorce, expido el presente á solicitud y para el Supremo Gobierno de la Unión, en virtud de lo mandado en el oficio preinserto. Está cotejado y vá en seis fojas, y sin timbres por tratarse de asunto en que se interesa el fisco federal. Mexico, Agosto nueve de mil novecientos dos. Entre líneas—circule—una palabra—vale.

E. ESCUDERO.

[Sello. (Archivo General de Notarias del Distrito Federal, Mexico.)]

Derechos devengados siete pesos.
(Sin derechos.)

No. 494. El infrascrito, Subsecretario de Relaciones exteriores, certifica: que el Sr. Lic. Don Eduardo Escudero es Director del Archivo general de notarías

copied, and when my Government may expect it to be forwarded to the agent of the United States, as provided in Article IV of the Protocol. "I respectfully request of your excellency that the desired information be sent to me with the promptness which the emergency of the case requires." All of which I hand to you that you may send as soon as possible the copy of the deed to which the above-inserted note refers, with the understanding that the copy must be authentic and without stamps, to be used for the purpose certified in said note. I renew to your honor my consideration. Mariscal. Rubric. Señor Director of the General Archives of Notaries. Present.

This is the third copy taken from its original, which is subscribed by the notary, Ramon Villalobos, in the protocol he made, which is filed in the archives in my charge. And availing myself of the rights conceded me by the law of December 19, 1901, in its article 96, part 14, I issue the present copy at the request and for the Supreme Government of the Union, in virtue of the order in the official letter previously inserted. Compared and issued in six leaves and *without stamps* on account of dealing with a subject in which the federal treasury is interested. Mexico, August 9, 1902. Inserted between the lines. Circulate—one word—authentic.

[Seal. General archives of notaries of the federal districts, Mexico.]

E. ESCUDERO.

Fees are $7.
(Rubric.)
(Without charge.)

No. 24. The undersigned, assistant secretary of foreign relations, certifies that the Sr. Lic. Don Eduardo Escudero is the

del distrito federal y suya la firma que antecede.

México, doce de Agosto de mil novecientos dos.

JOSE ALGARA.

[Sello (Secretaría de Relaciones Exteriores. México).]

director of the general archives of the federal district, and the above signature is his.

Mexico, August 12, 1902.

[Seal of Department of Foreign Affairs.]

JOSÉ ALGARA.

EMBASSY OF THE
UNITED STATES OF AMERICA,
Mexico, August 13, 1902.

I, Powell Clayton, ambassador extraordinary and plenipotentiary of the United States of America at Mexico, hereby cereify that José Algara, whose signature is hereto attached, was, at the time he signed the same, subsecretary of the department of foreign affairs at Mexico, and that said signature is his true and genuine signature.

In witness whereof I have hereunto set my hand and affixed the seal of the embassy of the United States at Mexico, the day and year next above written, and of the independence of the United States the one hundred and twenty-seventh.

POWELL CLAYTON.

[Seal (Embassy of the United States of America, City of Mexico).]

CONCLUSIONS POUR LA RÉPUBLIQUE MEXICAINE CONTRE LL. GG. L'ARCHEVÊQUE DE SAN FRANCISCO ET L'ÉVÊQUE DE MONTEREY.

Attendu que la réclamation a pour objet le paiement de 33 années d'intérêts (1870 à 1902) du "Fonds Pie de Californie" dans la proportion pour laquelle les intérêts de ce Fonds appartiendraient aux évêques de la Haute Californie;

Les demandeurs soutiennent:

En ordre principal, que le litige relatif à l'attribution aux évêques de la Haute Californie des intérêts du Fonds Pie, aurait reçu une solution complète et définitive le 29 novembre 1875, par l'attribution à leur profit dans une première sentence arbitrale, de la moitié de ces intérêts et par la fixation de cette moitié à 43,050 dollars 99 par an; qu'il y aurait ainsi chose jugée et en conséquence les demandeurs réclament pour les 33 années écoulées, la somme totale de 1,420,689 dollars 67 en or;

En ordre subsidiaire et pour le cas où l'exception de chose jugée ne serait pas admise par le Tribunal arbitral, et où ils auraient ainsi à établir à nouveau le fondement de leurs droits, les demandeurs réclament 85 pour cent du revenu du Fonds et allèguent que cette part représente annuellement 94,521 dollars 44; en conséquence et pour cette hypothèse, ils sollicitent à charge du Mexique pour les 33 années écoulées de 1870 à 1902, une condamnation à 3,108,207 dollars 52;

Attendu qu'il est à remarquer tout d'abord qu'il ne s'agit pas à proprement parler d'un arbitrage international, lequel suppose nécessairement un conflit entra deux Etats; que le Gouvernement des Etats-Unis n'est pas partie en cause; qu'il ne réclame rien pour lui-même et se borne à appuyer deux de ses sujets, Evêques de Californie;

Attendu en conséquence qu'il s'agit d'un litige de Droit privé, qui doit recevoir sa solution d'après les règles du droit positif;

Attendu que la question soumise aux arbitres est celle de savoir si les demandeurs ont droit à une part du produit des biens des Jésuites de Californie, biens confisqués par l'Etat en 1768; que c'est là une question de droit civil qui, à défaut de la constitution d'un Tribunal arbitral, aurait dû normalement être portée devant les Tribunaux Mexicains comme toutes les réclamations dirigées contre le Gouvernement de ce pays; que les lois civiles mexicaines doivent donc être appliquées par le Tribunal arbitral comme l'auraient fait les Juges auxquels il est substitué;

Attendu que les demandeurs prétendent à tort que la Cour aurait à faire abstraction de toute règle de droit pour ne tenir compte que de qu'ils appellent arbitrairement "l'équité;" que tel n'est ni le sens ni la portée du compromis; que la justice procède du droit;

Attendu qu'il importe tout d'abord de charactériser nettement la réclamation;

Qu'en réalité les demandeurs prétendent que l'Etat Mexicain aurait l'obligation de leur remettre une part de toutes propriétés, créances et valeurs qui auraient autrefois appartenu aux Jésuites de Californie en vue de leurs Missions, et que l'Etat ayant aliéné toutes ces propriétés et valeurs qu'il s'était appropriées, doit aux évêques-demandeurs, l'intérêt à 6 pour cent du montant de ces réalisations;

Que, d'après les demandeurs, cette obligation de l'Etat Mexicain vis-à-vis d'eux est *perpétuelle, absolue, irrévocable;* et n'aurait pas même pour corollaire un droit de contrôle à son profit; que le droit implicitement réclamé équivaut donc au droit de propriété.

Attendu que les demandeurs qualifient cependant le droit réclamé de "trust" et considèrent le Gouvernement Mexicain comme trustée, mais que le trust suppose évidemment un tiers-propriétaire, pour lequel le trustée agit comme mandataire ou dépositaire, et que tout en ne réclamant qu'un certain nombre d'annuités, c'est donc bien la propriété que visent les demandeurs;

Attendu qu'il y a lieu de rechercher quel est le titre sur lequel les demandeurs appuient leur revendication;

Que ce titre ne pourrait être trouvé que dans les actes de donation primitifs, tels que celui du Marquis de Villa-Puente considéré par les demandeurs comme l'acte-type au point de vue de la discussion, ou dans les décrets du 19 septembre 1836 et du 3 avril 1845 qui ont confié à l'Evêque de Californie l'administration et l'emploi du "Fonds Pie."

QUANT AUX ACTES DE DONATION PRIMITIFS.

Attendu que les Jésuites ont été chargés par le Roi d'Espagne de la conquête spirituelle et temporelle de la Californie et qu'en vue de ce double but, il les a autorisés, indépendamment de prestations du Trésor Royal, à recueillir des aumônes et à recevoir des libéralités.

Attendu que le fonds ainsi formé, moyennant l'autorisation du Roi, ne constituait aucunement une propriété de l'église Catholique et que, sauf les droits de la Couronne, il appartenait exclusivement aux Jésuites, pour leurs missions de Californie; que l'Eglise n'est intervenue ni dans la constitution, ni dans l'administration dudit fonds, que même les actes de donation excluent toute intervention de l'Ordinaire, fût-ce au point de vue d'un simple contrôle; les Jésuites "n'avaient à rendre compte qu'à Dieu seul."

Attendu que même en droit canon, on n'a jamais confondu les biens de l'église avec ceux appartenant soit aux communautés religieuses, soit aux ordres à la fois religieux et militaires, tels que l'ordre de Malte, celui des chevaliers Teutoniques, l'ordre de N. D. du Mont Carmel, etc., qu'il n'y a donc pas même à examiner si dans les missions de Californie, le but religieux l'emportait sur le but politique ou réciproquement; qu'à toute époque, les gouvernements se sont tenus comme investis d'un droit de domaine éminent sur les biens des corporations religieuses, se considérant comme autorisés à les supprimer comme ils les avaient autorisées à naître; qu'en mainte occasion, en Angleterre, en Allemagne, en Espagne, en France, etc., ils se sont attribué le même droit quant aux biens ecclésiastiques proprement dits;

Attendu que lors de la suppression de l'ordre des Jésuites en Espagne en 1767, le Roi a confisqué leurs biens et que notamment il s'est emparé de ceux qui étaient affectés aux missions de Californie; qu'à cette époque, le souverain pontife Clément XIV n'a fait ni protesta-

tions, ni réserves, soit contre le décret du 27 février 1767, qui concernait tous les Etats de la couronne d'Espagne, soit contre le décret spécial du vice-Roi du Mexique de 1768;

Attendu que du domaine de la couronne d'Espagne, lesdits biens ont passé dans celui de la République Mexicaine, qui depuis, les a vendus et désamortis;

Attendu qu'assurément ces divers actes posés il y a longtemps, en vertu du droit de souveraintê, peuvent être diversement appréciés, mais qu'ils ne peuvent prêter à aucune critique utile; que cependant la demande tend implicitement à les faire déclarer nuls en ce qui concerne la Haute Californie, alors qu'ils conserveraient tous leurs effets quant à la Basse Californie; qu'il suit de ce qui précède que la prétention manque de toute base juridique,

a. parce qu'il ne s'agit pas de biens ayant jamais appartenu à l'Eglise Catholique.

b. parce que les Jésuites, à qui ils appartenaient, ont été dépouillés de tout droit.

c. parce qu'en aucun cas, ces droits n'auraient passé à aucun titre, aux Evêques de la Haute Californie.

et *d.* parce qu'enfin l'Eglise elle-même en aurait été dépouillée par des actes souverains;

Attendu d'autre part que les demandeurs ne peuvent invoquer l'intention prétendue des donateurs: 1°. parce que ceux-ci, qui entendaient investir les Jésuites de droits absolus, n'avaient certes pas prévu la suppression de l'Ordre, 2°. parce que, lorsqu'ils fondaint une œuvre à la fois religieuse et nationale d'évangélization et de "reduction" politique, au profit de populations déshérités, ils ne pouvaient viser le budget du culte d'une contrée devenue toute Chrétienne, riche et désormais étrangère à la race Espagnole; que de semblables hypothèses, inadmissibles en droit, manqueraient de tout fondement en fait.

Attendu qu'il est encore à remarquer que les Jésuites ont porté exclusivement leur effort sur la Basse Californie, que les missions fondées par eux se trouvaint toutes sur son territoire, que le nom même de Californie n'était alors donné qu'à la presqu'île et que l'on était même généralement dans la croyance que c'était une ile; que les donations faites au Fonds Pie n'ont donc réalisé le but des fondateurs que quant au territoire demeuré Mexicain et que si certaine séventualités permettaient d'en étendre l'effet à d'autres territoires, même en dehors de l'Amérique, ce n'était que pour autant que telle fut la volonté souveraine de l'Ordre des Jésuites et que semblable volonté, qui n'a jamais été émise, ne pouvait plus l'être après leur suppression en 1768.

Attendu que l'on objecte que le décret de confiscation dont l'ordre a été alors l'objet, annonce l'intention du Roi de ne point faire préjudice aux charges imposées par les donateurs, mais que cette énonciation d'une volonté unilatérale ne diminue en rien les droits absolus que s'attribue le Roi et dont il use par la confiscation; qu'en effet elle ne pouvait créér de droit au profit de personne, ni pour les Jésuites qui, seuls auraient eu qualitée pour protester, mais dont on supprimait l'existence et qui même depuis leur rétablissement n'ont formulé aucune réclamation, ni pour l'Eglise Catholique, dont il n'est pas question dans le décret de confiscation, même au point de vue droits d'administration ou de contrôle, ni pour les Indiens de Californie, ou d'ailleurs, qui n'avaient aucune existence comme corps ou être de droit, puisqu'à ce titre ils se confondaient avec la nation, alors personnifiée par le Roi;

Qu'il s'en suit que les droits absolus que s'attribuait le Roi sont demeurés absolus et qu'en effet, un engagement bilatéral seul aurait pu les restreindre; qu'aussi nul le leur a contesté ce caractère, avant que des Evêques auxquels la personnalité civile a été conférée deux siècles plus tard, en vertu des institutions d'un Etat étranger, aient prétendu puiser droit dans l'énonciation des intentions Royales.

QUANT AUX DÉCRETS DE 1836, DE 1842 ET DE 1845.

Attendu que par un décret du 19 september 1836, le gouvernement Mexicain a chargé l'Evêque de Californie, qu'il voulait instituer, de l'administration et de l'emploi des biens des missions, que cette mesure fut rapportée par un décret du 24 octobre 1842, qui prononçait la nationalisation du fonds des missions et son incorporation au domaine et ordonnait la vente des biens qui le composaient, qu'un troisième décret du 3 avril 1845 rendit à l'Evêque de Californie l'administration des biens non vendus en vertu du décret précédent en réservant au congrès national le droit de disposer quant aux biens déjà aliénés.

Attendu que ces diverses dispositions n'étaient que des expressions successivement différentes d'une volonté toujours souveraine et qu'il est impossible d'y voir des contrats synallagmatiques, emportant de la part du gouvernement quelque aliénation de propriété ou reconnaissance de créance et que même en remettant à l'Evêque la gestion des biens affectés aux missions, l'Etat ne faisait que les charger d'un office public, en vue d'un intérêt public; que'n effet, il n'est intervenu à ce sujet aucun contrat ou concordat, soit avec l'autorité pontificale, soit avec le primat de l'Eglise Mexicaine, soit avec l'Evêque de Californie; que des biens qui appartenaient sans contestation au domaine de l'Etat Mexican, n'auraient pu sortir de ce domaine qu'en vertu de dispositions législatives formelles et d'une acceptation non moins positive et régulière de l'Eglise Catholique; qu'aussi en 1842 les nouvelles mesures du gouvernement ne furent l'objet d'aucune protestation de la part d'aucune autorité eclésiastique et que lors de la remise des biens, le mandataire de l'Evêque, tout en alléguant l'intérêt de l'Eglise et des fidèles, reconnut qu'il n'avait aucun droit à invoquer;

Attendu qu'ici encore l'on invoque l'intention exprimée par le gouvernment mexicain d'affecter aux missions de Californie une somme représentant l'intérêt à 6 pour cent du produit de la vente des biens, mais que pas plus qu'en 1768 l'énonciation de semblable volonté dans un acte souverain ne pouvait constituer de droits privés au profit de personne; qu'il aurait fallu pour cela un engagement bilatéral qui n'est jamais intervenu; qu'aussi, ni l'église mexicaine ni spécialement l'Evêque de Basse Californie n'ont revendiqué aucun droit, soit sous l'empire du décret de 1842, soit depuis 1848, lorsque la Hante Californie a été annexée aux Etats-Unis, soit surtout depuis les lois mexicaines de 1857, 1859 et 1874, qui ont complètement nationalisé les biens de l'église mexicaine.

Attendu que ce n'est qu'en 1859 que les Evêques américains de la Haute Californie, dont la personnification civile ne date que de 1850, ont pour la première fois invoqué des droits à une part du Fonds Pie de la Californie et qu'ils n'invoquaient et n'invoquent d'autre titre que celui qu'aurait l'église mexicaine elle-même en vertu des intentions exprimées en 1768 et en 1842; que leur demande doit donc être déclarée sans fondement.

Attendu que les demandeurs invoquent encore, mais sans raison, l'arrangement intervenu au sujet des missions des îles Philippines;

Que certains biens donnés par Dona Josepha Arguelès étaient destinés pour moitié aux missions des îles Philippines, qu'après la proclamation de l'indépendance du Mexique, les Dominicains des îles Philippines notamment représentés par le P. Moran, revendiquèrent avec l'appui de la couronne d'Espagne leur part dans lesdits biens et qh'il intervint à ce sujet une transaction en vertu de laquelle le Mexique paya 145,000 dollars;

Mais qu'il n'est pas admissible que l'on argumente d'une transaction, puisque le caractère essentiel de semblable acte est de ne pas impliquer la reconnaissance d'un droit; que la situation était d'ailleurs ici toute différente et parce que le Roi d'Espagne en cédant au Mexique le fonds des missions, était certes fondé à en retenir la part qu'il affectait aux missions des îles Philippines, dont il conservait la charge, et parce que d'autres considérations d'ordre politique commandaient un arrangement.

Attendu que les défendeurs au contraire sont en droit d'invoquer divers précédents et notamment:

1°. Une décision du Conseil supérieur des Indes du 4 juin 1783 au sujet de la succession de Dona Josefa Arguelès, reconnaissant le droit absolu du Roi aux biens donnés aux missions, depuis la suppression de l'ordre des Jésuites et même auparavant, en vertu du droit éminent de la couronne;[a]

2°. Diverses décisions des tribunaux américains, en ce qui concerne les biens qui appartenaient jadis aux missions de la Haute Californie, où les Franciscains avaient pris la place des Jésuites; l'Eglise Catholique ayant revendiqué la propriété de certains de ces biens, comme étant aux droits des missions, a été déclarée n'y avoir aucun titre. En cause Nobile contre Redman,[b] il a été décidé que "les missions établies en Californie antérieurement à son acquisition par les Etats-Unis, étaient des établissements politiques et n'avaient aucune relation avec l'Eglise. Le fait que des moines ou des prêtres étaient à la tête de ces institutions ne prouve rien en faveur de la prétention de l'Eglise à leur propriété."

Attendu que même en faisant abstraction de tout ce qui précède, la réclamation des demandeurs, devrait encore être écartée comme en opposition formelle avec les termes et l'esprit du traité de Guadalupe Hidalgo, du 2 février 1848;

Attendu que ce traité stipule au profit de l'Etat Mexicain décharge absolue, tant en ce qui concerne le gouvernement des Etats-Unis—qui loin de se réserver quelque revendication pécuniaire, allouait au Mexique une somme de 15 millions de dollars, en considération de la cession d'une partie de son territoire—que quant aux réclamations que des citoyens des Etats-Unis pouvaient avoir à former contre l'Etat Mexicain à raison de faits antérieurs au Traité; une somme de 3,250,000 dollars était remise aux Etats-Unis, qui ce moyennant, se chargeaient de désintéresser tous les sujets américains, pouvant être créanciers du Mexique et une commission exclusivement américaine était instituée pour apprécier leurs prétentions;

Attendu que la pensée des parties était donc de supprimer entre elles tout sujet de conflit et qu'il semble d'évidence que si les Etats-Unis avaient cru à une obligation du Mexique envers quelque corporation religieuse devenue Américaine, ils l'auraient déduite de

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[a] V. le volume publié par les demandeurs, p. 486.
[b] V. même volume, p. 343.

l'indemnité qu'ils allouaient, ou tout au moins fait à ce sujet quelque réserve;

Attendu que si les chefs de l'église catholique dans la Haute Californie s'étaient crus fondés à soulever quelque réclamation du chef du fonds pie, ils auraient dû en saisir la prédite commission Américaine et que ne l'ayant pas fait, ils seraient de ce seul chef nonrecevables.

Attendu qu'à cette fin de non recevoir, les demandeurs opposent une double objection: *n.* N'ayant été investis de la personnification civile qu'en 1850, ils ne pouvaient agir avant cette date et leur créance ne peut donc être de celles dont il a été donné décharge; *b.* N'ayant droit qu'à des intérêts et non à un capital, leur droit ne pourrait procéder que du nonpayement et n'était donc pas ouvert en 1848.

Attendu:

a. Que par la sentence arbitrale de 1875, les demandeurs se sont fait allouer des intérêts depuis 1848 et que dès lors il se conçoit peu, qu'ils argumentent de leur nonexistence à cette époque, mais qu'il est en effet certain qu'en 1848, à partir du traité de Guadelupe, il n'existait plus dans la Haute Californie d'église catholique reconnue, soit Mexicaine, soit Américaine, et qu'une incorporation obtenue depuis n'aurait pu faire revivre des droits éteints, d'où une nouvelle fin de nonrecevoir;

b. Que le droit aux intérêts présuppose un droit de créance et que ce droit dont la base aurait remonté à de longues années aurait dû exister lors de la séparation des deux Californies; d'où suit qu'il tombait sous le coup des stipulations du traité de Guadalupe ou n'existrait pas; que d'ailleurs la réclamation des demandeurs a porte d'abord sur le principal et que notamment dans leur lettre du 30 mars 1870 au Secrétaire des Etats-Unis Messeigneurs Alemany et Amat l'évaluaient à 3 millions de dollars; que si plus tard et aujourd'hui encore, on n'a réclamé que le paiement d'un certain nombre d'années d'intérêt, ce n'était et ce n'est encore que pour échapper à la déchéance prononcée par le prédit traité de Guadalupe.

Attendu que la demande est encore non recevable à raison des art. 27 paragraphe 2 de la constitution fédérale des Etats-Unis Mexicains du 5 février 1857, de la loi du 12 juillet 1859 et de l'art. 14 de l'amendement à la constitution du 14 décembre 1874;

Attendu que ces lois déjà ci-dessus citées, refusent à toute institution ecclésiastique la personalité civile et partant le droit de posséder et d'administrer des biens quelconques; que l'art. 13 du code civil fédéral rend les lois Mexicaines applicables aux biens possédés par les étrangers et spécialement aux créances garanties par une hypothèque, comme l'eût été la créance litigieuse par la redevance des fermiers du tabac.

Attendu que sans qu'il y ait à discuter ou à apprécier ces lois en elles-mêmes, ou dans leur portée politique et sociale, on ne peut méconnaître leur force obligatoire, ni leur applicabilité au Fonds pie de Californie qui, dans la thèse même des demandeurs, continuerait à appartenir au Mexique en capital et demeurerait soumis à la législation Mexicaine, qu'une loi étrangère ne pourrait paralyser;

DE LA CHOSE PRÉTENDUEMENT JUGÉE PAR DÉCISION DE LA COMMISSION MIXTE DU 29 NOVEMBRE 1875.

Attendu qu'il résulte déjà de ce qui précède que ce moyen, invoqué par les demandeurs en ordre principal, n'est pas fondé; que les

demandeurs ne peuvent à la fois invoquer la chose jugée quant à la perpétuité de leur droit et échapper aux stipulations du traité de Guadalupe, en alléguant qu'ils n'ont que des droits annuels, naissant avec chaque échéance;

Attendu que la présomption de vérité qui s'attache à la chose jugée est une fiction nécessaire et admise par toutes les législations, mais qui se renferme dans les limites très scientifiquement tracées par le code Napoléon, en conformité du droit antérieur; il n,y a chose jugée que quant à ce qui a fait l'objet de la demande et du jugement et il faut que la chose demandée soit la même, que la demande ait la même cause et soit agitée entre les mêmes parties, agissant en la même qualité. Et la chose jugée ne consiste que dans la décision du juge, c. à d. dans le dispositif de la sentence; elle ne s'étend pas aux motifs qui en sont seulement l'explication et ne peuvent servir qu'à l'interprêter, s'il en est besoin; celui-ci même ne comporte présomption de verité que pour ses dispositions certaines, non pour de simples énonciations (sententia debet esse certa).

Telle est la disposition expresse de l'Allgemeine Gerichtsordnung d'Allemagne et l'enseignement de la doctrine comme de la jurisprudence, en France, en Belgique, en Néerlande, en Espagne, comme au Mexique. Aussi, de simples motifs ne peuvent-ils faire l'objet d'un recours devant les cours suprêmes de justice, dont la compétence est limitée à la vérification de l'exacte application des lois.

Non seulement des motifs ne peuvent lier un autre juge, ni influencer la décision de faits postérieurs, mais ils ne lient pas même le juge de qui ils émanent; il dépend de lui d'écarter ceux qu'il a précédemment admis et c'est pourquoi l'interlocutoire ne lie pas le juge. Après avoir exprimé un sentiment d'après lequel il y avait lieu d'ordonner un devoir d'instruction et bien que la preuve ainsi prescrite ait été obtenue, il peut statuer en un sens absolument opposé;

Attendu que pour apprécier s'il y a chose jugée, il faut donc voir ce qui a été demandé, le juge ne pouvant jamais excéder la demande.

Attendu dans l'espèce que les conclusions sur lesquelles les arbitres ont eu à statuer ne portaient que sur 21 années d'intérêts et non sur le prétendu droit de créance productif de ces intérêts, que la sentence intervenue s'est exactement renfermée dans ces termes, sans même qu'il ait été tenu compte des intérêts qui seraient venus à échéance au cours de l'instance; qu'elle a été pleinement exécutée, qu'il eût été impossible aux demandeurs de poursuivre de ce chef le paiement des intérêts ultérieurs et que partant la demande actuelle qui porte sur 33 autres années d'intérêt, est nouvelle et indépendante de la demande antérieurement admise;

Attendu qu'en réalité on n'allègue pas à proprement parler, la chose jugée, mais un simple préjugé. La demande serait analogue à celle déjà admise et les mêmes motifs devraient la faire admettre encore.

Mais ainsi qu'il a été dit déjà, le préjugé fût-il formel, n'est pas la chose jugée, et n'a rien d'obligatoire, même pour le juge dont il émane. De plus:

A. Tout préjugé était impossible dans l'espèce, puisque la décision intervenue émanait d'une commission à laquelle on ne peut reconnaître qu'une autorité arbitrale, et que le pouvoir des arbitres ne procédant que du consentement des parties, se trouve toujours exactemente limité par le mandat privé dont il émane et ne peut donc constituer de préjugé d'aucune sorte.

B. Si la commission mixte avait implicitement statué sur une réclamation en capital du chef de droits antérieurs à 1848, elle eût excédé les bornes de sa compétence et de l'avis de tous les jurisconsultes, semblable décision devrait être tenue pour non avenue.

C. Dans la thèse même de la partie adverse, il n'y aurait identité ni d'objet, ni de cause et les moyens de défense pourraient être fort différents, ce qui est encore exclusif de toute chose jugée:

1°. La réclamation de 1870 a été conformément à la convention du 4 juillet 1868, soumise à la commission mixte et les pouvoirs de celle-ci étant expirés, celle de 1902 ne pouvait plus l'être;

2°. Si les intérêts réclamés sont du même chiffre annuel, l'objet de la demande ne porte assurément pas sur les mêmes sommes que celles payées. De plus, le règlement en or naguère indifférent serait aujourd'hui ruineux pour le Mexique et ne pourrait se justifier;

3°. Les demandeurs invoquant un droit qui ne naîtrait pour eux que chaque année auraient pour chaque réclamation à justifier non seulement du l'existence de l'Eglise Catholique en Californie et du maintien de sa personnification civile, mais de la qualité de ceux qui agissent pour elle, de la possibilité pour eux de remplir encore les intentions des donateurs, de la quotité qui pourrait revenir à la Haute Californie dans la somme totale, d'après les données du moment et de l'intentement de la demande en temps opportun, la prescription extinctive pouvant être utilement opposée pour certaines années, alors qu'elle ne pourrait l'être pour d'autres.

SUBSIDIAIREMENT.

QUANT À LA PRESCRIPTION.

Attendu que la demande comporte en réalité la revendication d'une part des biens donnés aux Jésuites pour les missions de Californie, biens confisqués par le Roi d'Espagne en 1768 et plus tard repris par l'Etat Mexicain, puis nationalisés par lui;

Que dans ces termes, la réclamation, fût-elle établie, devrait être écartée à un triple point de vue:

1°. Aux termes de la loi du 22 juin 1885 et du décret du 6 septembre 1894, toutes les créances à charge de l'Etat Mexicain devaient être produites dans un délai de huit et de onze mois, devant un Bureau institué pour en juger la réalité et ce à peine de déchéance définitive; que cette loi concerne les créances appartenant à des étrangers comme celles alléguées par des citoyens mexicains; la réclamation des demandeurs n'ayant pas été ainsi produite, se trouverait donc frappée de déchéance.

2°. Elle serait d'autre part prescrite aux termes de l'art[e], 1901 du Code Civil Mexicain, lequel est ainsi conçu;

> La prescription négative s'opère, qu'il y ait ou non bonne foi, par le délai de 20 ans à compter du jour où l'exécution de l'obligation eût pu être exigée.

3o. Aux termes de l'art. 1103 du Code Civil Mexicain, les rentes et toutes prestations périodiques se prescrivent par 5 ans, et dans l'espèce, il n'a été formulé aucune réclamation, même officieuse, de 1870 à 1891.

QUANT AU CHIFFRE DE LA DEMANDE.

a. Attendu que le capital dont les intérêts sont réclamés est notamment formé par des accumulations d'intérêts capitalisés et que devien-

draient ainsi eux-mêmes productifs d'intérêts; or, la loi mexicaine comme presque toutes les législations, proscrit l'anatocisme.

b. Que jusqu'en 1848, le gouvernement mexicain et avant lui le gouvernement espagnol, disposaient souverainement du Fonds Pie, sans avoir aucun compte à rendre de son emploi, et que partant toute réclamation de ce chef manque de base.

c. Qu'il n'existe d'actes que pour les biens donnés par le marquis de Villa Puente et la marquise de las Torres del Rada et par Dona Josepha Arguelles, que pour le surplus, il n'est justifié d'aucun titre;

d. Qu'il existe dans la Haute Californie trois diocèces et que l'Evêque de Grass Valley, qui naguère est intervenu au débat, n'y figure plus aujourd'hui; que par conséquent on ne pourrait allouer aux demandeurs la quotité qui reviendrait à ce diocèse;

e. Que la répartition éventuelle du Fonds Pie entre la Haute et la Basse Californie devrait être établie d'après le nombre des missions ot des Indiens à convertir en Californie, que les demandeurs ne fournissent aucune justification à cet égard et que l'on croit pouvoir affirmer qu'il ne reste plus dans la Haute Californie un seul indigène païen; qu'en aucun cas la répartition ne pourrait avoir pour base la population, c. à d. le nombre de fidèles aptes à subvenir aux besoins du culte que par conséquent il n'y aurait à admettre ni la base de moitié établie par la sentence de 1875, ni bien moins encore celle de 85 pour cent et de 15 pour cent aujourd'hui proposée;

f. Que les biens du Fonds Pie ont été réalisés par l'Etat Mexicain avant 1848 et que leur produit doit avoir été employé au profit de toutes les parties de l'Etat; que par conséquent la restitution qui pourrait devoir être opérée serait à la charge de l'ensemble des provinces qui constituaient alors le Mexique et que le gouvernement des Etats-Unis Mexicains ne devrait qu'une part proportionnelle à l'importance des provinces conservées.

Que d'autre part il aurait à reclamer une quotité du produit des biens des missions situées dans la Haute Californie.

g. Qu'en aucun cas, l'Etat Mexicain ne pourrait être condamné à payer en or; que l'étalon Mexicain, est exclusivement d'argent; que c'est en cette monnaie que l'Etat a encaissé le produit des réalisations et qu'il ne pourrait avoir à remettre qu'une partie de ce qu'il a ainsi reçu, comme il l'a reçu.

h. Qu'enfin, il y aurait lieu de déduire tout ce qui concerne les biens donnés par le marquis de Villa Puente et la marquise de las Torres del Rada, puisqu'il y a eu à ce sujet un procés engagé et jugé.

Plaise à M. M. les arbitres:

admettre les exceptions et moyens ci-dessus proposés et en conséquence débouter les demandeurs de leur action.

A. Beernaert.
L. Delacroix.

PART III.

APPENDIX TO RECORD.

Containing copies of treaties between the United States and Mexico, rules of procedure before the Mixed Commission of 1868, and The Hague Peace Convention of 1899, with index.

APPENDIX TO RECORD.

TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE MEXICAN REPUBLIC—PEACE, FRIENDSHIP, LIMITS, AND SETTLEMENT.

Signed at Guadalupe Hidalgo, February 2, 1848.
Ratification advised, with amendments, by the Senate, March 10, 1848.
Ratified by the President of the United States, March 16, 1848.
Ratified by the President of Mexico, May 30, 1848.
Ratifications exchanged at Querétaro, May 30, 1848.
Proclaimed July 4, 1848.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION:

Whereas a Treaty of Peace, Friendship, limits, and settlement between the United States of America and the Mexican Republic, was concluded and signed at the City of Guadalupe Hidalgo, on the second day of February, one thousand eight hundred and forty-eight, which Treaty, as amended by the Senate of the United States, and being in the English and Spanish languages, is word for word as follows:

In the name of Almighty God:

The United States of America, and the United Mexican States, animated by a sincere desire to put an end to the calamities of the war which unhappily exists between the two Republics, and to establish upon a solid basis relations of peace and friendship, which shall confer reciprocal benefits upon the citizens of both, and assure the concord, harmony and mutual confidence, wherein the two Peoples should live, as good Neighbours, have for that purpose appointed their respective Plenipotentiaries: that is to say, the President of the United States has appointed Nicholas P. Trist, a citizen of the United States, and the President of the Mexican

En el nombre de Dios Todopoderoso:

Los Estados Unidas Mexicanos y los Estados Unidos de América, animados de un sincero deseo de poner término á las calamidades de la guerra que desgraciadamente existe entre ambas Repúblicas, y de establecer sobre báses sólidas relaciones de paz y buena amistad, que procuren recíprocas ventajas á los ciudadanos de uno y otro pais, y afianzen la concordia, armonía y mútua seguridad en que deben vivir, como buenos vecinos, los dos pueblos han nombrado á este efecto sus respectivos plenipotenciarios; á saber, el Presidente de la República Mexicana á Don Bernardo Couto, Don Miguel Atristain, y Don Luis Gonzaga Cuevas, ciudadanos de la misma

Republic has appointed Don Luis Gonzaga Cuevas, Don Bernardo Couto, and Don Miguel Atristain, citizens of the said Republic; who, after a reciprocal communication of their respective full powers, have, under the protection of Almighty God, the author of Peace, arranged, agreed upon, and signed the following

República; y el Presidente de los Estados Unidos de América á Don Nicolas P. Trist, ciudadano de dichos Estados; quienes, despues de haberse comunicado sus plenos poderes, bajo la proteccion del Señor Dios Todo-poderoso, autor de la paz, han ajustado, convenido, y firmado el siguiente

Treaty of Peace, Friendship, Limits and Settlement between the United States of America and the Mexican Republic.

Tratado de paz, amistad, límites y arreglo definitivo entre la República Mexicana y los Estados Unidos de América.

ARTICLE I.

There shall be firm and universal peace between the United States of America and the Mexican Republic, and between their respective Countries, territories, cities, towns and people, without exception of places or persons.

ARTÍCULO I.

Habrá paz firme y universal entre la República Mexicana y los Estados Unidos de América, y entre sus respectivos paises, territorios, ciudades, villas y pueblos, sin escepcion de lugares ó personas.

ARTICLE II.

Immediately upon the signature of this Treaty, a convention shall be entered into between a Commissioner or Commissioners appointed by the General in Chief of the forces of the United States, and such as may be appointed by the Mexican Government, to the end that a provisional suspension of hostilities shall take place, and that, in the places occupied by the said forces, constitutional order may be reestablished, as regards the political, administrative and judicial branches, so far as this shall be permitted by the circumstances of military occupation.

ARTÍCULO II.

Luego que se firme el presente tratado, habrá un convenio entre el comisionado ú comisionados del Gobierno Mexicano, y el ó los que nombre el General en gefe de las fuerzas de los Estados Unidos, para que cesen provisionalmente las hostilidades, y se restablezca en los lugares ocupados por las mismas fuerzas el órden constitucional en lo político, administrativo y judicial, en cuanto lo permitan las circunstancias de ocupacion militar.

ARTICLE III.

Immediately upon the ratification of the present treaty by the Government of the United States, orders shall be transmitted to the Commanders of their land and naval officers, requiring the latter,

ARTÍCULO III.

Luego que este tratado sea ratificado por el gobierno de los Estados Unidos, se expedirán órdenes á sus comandantes de tierra y mar previniendo á estos segundos (siempre que el tratado haya

(provided this Treaty shall then have been ratified by the Government of the Mexican Republic, and the ratifications exchanged) immediately to desist from blockading any Mexican ports; and requiring the former (under the same condition) to commence, at the earliest moment practicable, withdrawing all troops of the United States then in the interior of the Mexican Republic, to points, that shall be selected by common agreement, at a distance from the sea-ports, not exceeding thirty leagues; and such evacuation of the interior of the Republic shall be completed with the least possible delay: the Mexican Government hereby binding itself to afford every facility in it's power for rendering the same convenient to the troops, on their march and in their new positions, and for promoting a good understanding between them and the inhabitants. In like manner, orders shall be despatched to the persons in charge of the custom houses at all ports occupied by the forces of the United States, requiring them (under the same condition) immediately to deliver possession of the same to the persons authorized by the Mexican Government to receive it, together with all bonds and evidences of debt for duties on importations and on exportations, not yet fallen due. Moreover, a faithful and exact account shall be made out, showing the entire amount of all duties on imports and on exports, collected at such Custom Houses, or elsewhere in Mexico, by authority of the United States, from and after the day of ratification of this Treaty by the Government of the Mexican Republic; and also an account of the cost of collection; and such entire amount, deducting only the cost of collection, shall be delivered to the Mexican Government, at the City of Mexico, with-

sido ya ratificado por el gobierno de la República Mexicana, y cangeadas las ratificaciones) que inmediatamente alcen el bloqueo de todos los puertos mexicanos, y mandando á los primeros (bajo la misma condicion) que á la mayor posible brevedad comiencen á retirar todas las tropas de los Estados Unidos que se halláren entonces en el interior de la Repúlica Mexicana, á puntos que se elegirán de comun acuerdo, y que no distaran de los puertos mas de treinta leguas; esta evacuacion del interior de ly República se consumará con la menor dilacion posible, comprometiéndose á la vez el Gobierno Mexicano á facilitar, cuanto quepa en su arbitrio, la evacuacion de las tropas americanas; á hacer cómodas su marcha y su permanencia en los nuevos puntos que se elijan; y á promover una buena inteligencia entre ellas y los habitantes. Igualmente se librarán órdenes á las personas encargadas de las aduanas marítimas en todos los puertos ocupados por las fuerzas de los Estados Unidos, previniéndoles (bajo la misma condicion) que pongan inmediatamente en posesion de dichas aduanas á las personas autorizadas por el Gobierno mexicano para recibirlas, entregándoles al mismo tiempo todas las obligaciones y constancias de deudas pendientes por derechos de importacion y exportacion, cuyos plazos no estén vencidos. Ademas se formará una cuenta fiel y exacta que manifieste el total monto de los derechos de importacion y exportacion, recaudados en las mismas aduanas marítimas ó en cualquiera otro lugar de México, por autoridad de los Estados Unidos desde el dia de la ratificacion de este tratado por el Gobierno de la República Mexicana; y tambien una cuenta de los gastos de recaudacion; y la total suma de los dere-

in three months after the exchange of ratifications.

The evacuation of the Capital of the Mexican Republic by the Troops of the United States, in virtue of the above stipulation, shall be completed in one month after the orders there stipulated for shall have been received by the commander of said troops, or sooner if possible.

chos cobrados, deducidos solamente los gastos de recaudacion, se entregará al Gobierno Mexicano en la ciudad de México á los tres meses del cange de las ratificaciones.

La evacuacion de la capital de la República Mexicana por las tropas de los Estados Unidos, en consecuencia de lo que queda estipulado, se completará al mes de recibirse por el comandante de dichas tropas las órdenes convenidas en el presente artículo, ó antes si fuere posible.

Article IV.

Immediately after the exchange of ratifications of the present treaty, all castles, forts, territories, places and possessions, which have been taken or occupied by the forces of the United States during the present war, within the limits of the Mexican Republic; as about to be established by the following Article, shall be definitely restored to the said Republic, together with all the artillery, arms, apparatus of war, munitions, and other public property, which were in the said castles and forts when captured, and which shall remain there at the time when this treaty shall be duly ratified by the Government of the Mexican Republic. To this end, immediately upon the signature of this treaty, orders shall be despatched to the American officers commanding such castles and forts, securing against the removal or destruction of any such artillery, arms, apparatus of war, munitions, or other public property. The city of Mexico, within the inner line of intrenchments surrounding the said city, is comprehended in the above stipulations, as regards the restoration of artillery, apparatus of war, &c.

Artículo IV.

Luego que se verifique el cange de las ratificaciones del presente tratado, todos los castillos, fortalezas, territorios, lugares y posesiones que hayan tomado ú ocupado las fuerzas de los Estados Unidos, en la presente guerra, dentro de los límites que por el siguiente artículo van á fijarse á la República Mexicana, se devolverán definitivamente á la misma República, con toda la artillería, armas, aparejos de guerra, municiones y cualquiera otra propiedad pública existentes en dichos castillos y fortalezas cuando fueron tomados, y que se conserve en ellos al tiempo de ratificarse por el gobierno de la República Mexicana el presente tratado. A este efecto, immediatamente despues que se firme, se expedirán órdenes á los oficiales Americanos que mandan dichos castillos y fortalezas para asegurar toda la artillería, armas, aparejos de guerra, municiones, y cualquiera otra propiedad pública, la cual no podrá en adelante removerse de donde se halla, ni destruirse. La ciudad de México dentro de la línea interior de atrincheramientos que la circundan, queda comprendida en la precedente estipulacion en lo que toca á la devolucion de artillería, aparejos de guerra, etca.

The final evacuation of the territory of the Mexican Republic, by the forces of the United States, shall be completed in three months from the said exchange of ratifications, or sooner, if possible: the Mexican Government hereby engaging, as in the foregoing Article, to use all means in its power for facilitating such evacuation, and rendering it convenient to the troops, and for promoting a good understanding between them and the inhabitants.

If, however, the ratification of this treaty by both parties should not take place in time to allow the embarkation of the troops of the United States to be completed before the commencement of the sickly season, at the Mexican ports on the Gulf of Mexico; in such case a friendly arrangement shall be entered into between the General in Chief of the said troops and the Mexican Government, whereby healthy and otherwise suitable places at a distance from the ports not exceeding thirty leagues shall be designated for the residence of such troops as may not yet have embarked, until the return of the healthy season. And the space of time here referred to, as comprehending the sickly season, shall be understood to extend from the first day of May to the first day of November.—

All prisoners of war taken on either side, on land or on sea, shall be restored as soon as practicable after the exchange of ratifications of this treaty. It is also agreed that if any Mexicans should now be held as captives by any savage tribe within the limits of the United States, as about to be established by the following Article, the Government of the said United States will exact the release of such captives, and cause them to be restored to their country.

La final evacuacion del territorio de la República Mexicana por las fuerzas de los Estados Unidos quedará consumada á los tres meses del cange de las ratificaciones, ó antes si fuére posible, comprometiéndose á la vez el Gobierno mexicano, como en el artículo anterior, á usar de todos los medios que estén en su poder para facilitar la tal evacuacion, hacerla cómoda á las tropas americanas, y promover entre ellas y los habitantes una buena inteligencia.

Sin embargo, si la ratificacion del presente tratado por ambas partes no tuviera efecto en tiempo que permita que el embarque de las tropas de los Estados Unidos se complete antes de que comience la estacion malsana en los puertos mexicanos del golfo de México; en tal caso, se hará un arreglo amistoso entre el Gobierno mexicano y el General en gefe de dichas tropas, y por medio de este arreglo se señalarán lugares salubres y convenientes (que no disten de los puertos mas de treinta leguas) para que residan en ellos hasta la vuelta de la estacion sana las tropas que aun no se hayan embarcado. Y queda entendido que el espacio de tiempo de que aquí se habla, como comprensivo de la estacion malsana, se extiende desde el dia primero de Mayo hasta el dia primero de Noviembre.

Todos los prisoneros de guerra tomados en mar ó tierra por ambas partes, se restituirán á la mayor brevedad posible despues del cange de las ratificaciones del presente tratado. Queda tambien convenido que si algunos mexicanos estuvieren ahora cautivos en poder de alguna tribu salvage dentro de los límites que por el siguiente artículo van á fijarse á los Estados Unidos, el Gobierno de los mismos Estados Unidos exigirá su libertad y los hará restituir á su pais.

ARTICLE V.

The Boundary line between the two Republics shall commence in the Gulf of Mexico, three leagues from land, opposite the mouth of the Rio Grande, otherwise called Rio Bravo del Norte, or opposite the mouth of it's deepest branch, if it should have more than one branch emptying directly into the sea; from thence, up the middle of that river, following the deepest channel, where it has more than one to the point where it strikes the Southern boundary of New Mexico; thence, westwardly along the whole Southern Boundary of New Mexico (which runs north of the town called *Paso*) to it's western termination; thence, northward, along the western line of New Mexico, until it intersects the first branch of the river Gila; (or if it should not intersect any branch of that river, then, to the point on the said line nearest to such branch, and thence in a direct line to the same;) thence down the middle of the said branch and of the said river, until it empties into the Rio Colorado; thence, across the Rio Colorado, following the division line between Upper and Lower California, to the Pacific Ocean.

The southern and western limits of New Mexico, mentioned in this Article, are those laid down in the Map, entitled "*Map of the United Mexican States, as organized and defined by various acts of the Congress of said Republic, and constructed according to the best authorities. Revised edition. Published at New York in 1847 by J. Disturnell:*" Of which Map a Copy is added to this Treaty, bearing the signatures and seals of the Undersigned Plenipotentiaries. And, in order to preclude all difficulty

ARTÍCULO V.

La línea divisoria entre las dos Repúblicas comenzará en el golfo de México, tres leguas fuera de tierra frente á la desembocadura del Rio Grande, llamado por otro nombre Rio Bravo del Norte, ó del mas profundo de sus brazos, si en la desembocadura tuviere varios brazos; correrá por mitad de dicho rio, siguiendo el canal mas profundo, donde tenga mas de un canal, hasta el punto en que dicho rio corta el lindero meridional de Nuevo México; continuará luego hácia occidente por todo este lindero meridional (que corre al norte del pueblo llamaco *Paso*) hasta su término por el lado de occidente: desde allí subirá la linea divisoria hácia el norte por el lindero occidental de Nuevo México, hasta donde este lindero esté cortado por el primer brazo del rio Gila,) y si no está cortado por ningun brazo del rio Gila, entónces hasta el punto del mismo lindero occidental mas cercano al tal brazo, y de allí en una línea recta al mismo brazo;) continuará despues por mitad de este brazo y del rio Gila hasta su confluencia con el rio Colorado; y desde la confluencia de ambos rios la línea divisoria, cortando el Colorado, seguirá el límite que separa la Alta de la Baja California hasta el mar Pacífico.

Los linderos meridional y occidental de Nuevo México, de que habla este artículo, son los que se marcan en la carta titulada: *Mapa de los Estados Unidos de México segun lo organizado y definido por las varias actas del Congreso de dicha República, y construido por las mejores autoridades. Edicion revisada que publico en Nueva York en 1847 J. Disturnell;* de la cual se agrega un ejemplar al presente tratado, firmado y sellado por los plenipotenciarios infrascriptos. Y para evitar toda dificultad al trazar

in tracing upon the ground the limit separating Upper from Lower California, it is agreed that the said limit shall consist of a straight line, drawn from the middle of the Rio Gila, where it unites with the Colorado, to a point on the Coast of the Pacific Ocean, distant one marine league due south of the southernmost point of the Port of San Diego, according to the plan of said port, made in the year 1782, by Don Juan Pantoja, second sailing-Master of the Spanish fleet, and published at Madrid in the year 1802, in the Atlas to the voyage of the schooners *Sutil* and *Mexicana:* of which plan a Copy is hereunto added, signed and sealed by the respective Plenipotentiaries.

In order to designate the Boundary line with due precision, upon authoritative maps, and to establish upon the ground landmarks which shall show the limits of both Republics, as described in the present Article, the two Governments shall each appoint a Commissioner and a Surveyor, who, before the expiration of one year from the date of the exchange of ratifications of this treaty, shall meet at the Port of San Diego, and proceed to run and mark the said Boundary in it's whole course to the mouth of the Rio Bravo del Norte. They shall keep journals and make out plans of their operations; and the result, agreed upon by them, shall be deemed a part of this treaty, and shall have the same force as if it were inserted therein. The two Governments will amicably agree regarding what may be necessary to these persons, and also as to their respective escorts, should such be necessary.

The Boundary line established by this Article shall be religiously respected by each of the two Republics, and no change shall ever be made therein, except by the

sobre la tierra el límite que separa la Alta de la Baja California, queda convenido que dicho límite consistirá en una línea recta tirada desde la mitad del rio Gila en el punto donde se une con el Colorado, hasta un punto en la costa del mar Pacífico, distante una legua marina al sur del punto mas meridional del puerto de San Diego, segun este puerto está dibujado en el plano que levantó el año de 1782 el segundo piloto de la armada Española Don Juan Pantoja, y se publicó en Madrid el de 1802, en el átlas para el viage de las goletas *Sutíl* y *Mexicana:* del cual plano se agrega copia firmada y sellada por los plenipotenciarios respectivos.

Para consignar línea divisoria con la precision debida en mapas fehacientes, y para establecer sobre la tierra mojones que pongan á la vista los límites de ambas repúblicas, segun quedan descritos en el presente artículo, nombrará cada uno de los dos gobiernos un comisario y un agrimensor, que se juntarán antes del término de un año contado desde la fecha del cange de las ratificaciones de este tratado, en el puerto de San Diego, y procederán á señalar y demarcar la expresada linea divisoria en todo su curso hasta la desembocadura del Rio Bravo del Norte. Llevarán diarios y levantarán planos de sus operaciones; y el resultado convenido por ellos se tendrá por parte de este tratado, y tendrá la misma fuerza que si estuviese inserto en él; debiendo convenir amistosamente los dos gobiernos en el arreglo de cuanto necesiten estos individuos, y en la escolta respectiva que deban llevar siempre que se crea necesario.

La línea divisoria que se establece por este artículo será religiosamente respetada por cada una de las dos Repúblicas, y ninguna variacion se hará jamás en ella,

express and free consent of both nations, lawfully given by the General Government of each, in conformity with it's own constitution.

sino de expreso y libre consentimiento de ambas naciones, otorgado legalmente por el gobierno general de cada una de ellas, con arreglo á su propia constitucion.

Article VI.

The vessels and citizens of the United States shall, in all time, have a free and uninterrupted passage by the Gulf of California, and by the river Colorado below it's confluence with the Gila, to and from their possessions situated north of the Boundary line defined in the preceding Article; it being understood that this passage is to be by navigating the Gulf of California and the river Colorado, and not by land, without the express consent of the Mexican Government.

If, by the examinations which may be made, it should be ascertained to be practicable and advantageous to construct a road, canal or railway, which should, in whole or in part, run upon the river Gila, or upon it's right or it's left bank, within the space of one marine league from either margin of the river, the Governments of both Republics will form an agreement regarding it's construction, in order that it may serve equally for the use and advantage of both countries.

Artículo VI.

Las buques y ciudadanos de los Estados Unidos tendrán en todo tiempo un libre y no interrumpido tránsito por el golfo de California y por el rio Colorado desde su confluencia con el Gila, para sus posesiones, y desde sus posesiones sitas al norte de la línea divisoria que queda marcada en el artículo precedente; entendiéndose que este transito se ha de hacer navegando por el gulfo de California y por el Rio Colorado, y no por tierra, sin expreso consentimiento del Gobierno mexicano.

Si por reconocimientos que se practiquen, se comprobáre la posibilidad y conveníencia de construir un camino, canal, ó ferrocarril que en todo ó en parte corra sobre el rio Gila ó sobre alguna de sus márgenes derecha ó izquierda en la latitud de una legua marina de unò ó de otro lado del rio, los gobiernos de ambas repúblicas se podrán de acuerdo sobre su construccion á fine de que sirva igualmente para el uso y provecho de ambos países.

Article VII.

The river Gila, and the part of the Rio Bravo del Norte lying below the southern boundary of New Mexico, being, agreeably to the fifth Article, divided in the middle between the two Republics, the navigation of the Gila and of the Bravo below said boundary shall be free and common to the vessels and citizens of both countries; and neither shall, without the consent of the other, construct any work that may impede or interrupt, in

Artículo VII.

Como el rio Gila y la parte del Rio Bravo del Norte que corre bajo el lindero meridional de Nuevo México se dividen por mitad entre las dos repúblicas, segun lo establecido en el artículo quinto, la navegacion en el Gila y en la parte que queda indicada del Bravo sera libre y comun á los buques y ciudadanos de ambos países, sin que por alguno de ellos pueda hacerse (sin consentimiento del otro) ninguna obra que impida ó interrumpa

whole or in part, the exercise of this right: not even for the purpose of favoring new methods of navigation. Nor shall any tax or contribution, under any denomination or title, be levied upon vessels or persons navigating the same, or upon merchandise or effects transported thereon, except in the case of landing upon one of their shores. If, for the purpose of making the said rivers navigable, or for maintaining them in such state, it should be necessary or advantageous to establish any tax or contribution, this shall not be done without the consent of both Governments.

The stipulations contained in the present Article shall not impair the territorial rights of either Republic, within it's established limits.

en todo ó en parte el ejercicio de este derecho, ni aun con motivo de favorecer nuevos métodos de navegacion. Tampoco se podrá cobrar (sino en el caso de desembarco en alguna de sus riberas) ningun impuesto ó contribucion bajo ninguna denominacion ó título á los buques, efectos, mercancías ó personas que naveguen en dichos rios. Si para hacerlos ó mantenerlos navegables fuere necesario ó conveniente establecer alguna contribucion ó impuesto, no podrá esto hacerse sin el consentimiento de los dos gobiernos.

Las estipulaciones contenidas en el presente artículo dejan ilesos los derechos territoriales de una y otra república dentro de los límites que les quedan marcados.

ARTICLE VIII.

Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present Treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican Republic, retaining the property which they possess in the said territories, or disposing thereof and removing the proceeds wherever they please; without their being subjected, on this account, to any contribution, tax or charge whatever.

Those who shall prefer to remain in the said territories, may either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States. But, they shall be under the obligation to make their election within one year from the date of the exchange of ratifications of this treaty: and those who shall remain in the said territories, after the expiration of that year, without having declared their intention to retain the char-

ARTÍCULO VIII.

Los Mexicanos establecidos hoy en territorios pertenecientes ántes á México, y que quedan para lo futuro dentro de los límites señalados por el presente tratado á los Estados Unidos, podrán permanecer en donde ahora habitan, ó trasladarse en cualquier tiempo á la República mexicana, conservando en los indicados territorios los bienes que poseen, ó enagenándolos y pasando su valor á donde les convenga, sin que por esto pueda exigirseles ningun género de contribucion, gravámen ó impuesto.

Los que prefieran permanecer en los indicados territorios, podrán conservar el título y derechos de ciudadanos mexicanos, ó adquirir el título y derechos de ciudadanos de los Estados Unidos. Mas la eleccion entre una y otra ciudadanía deberán hacerla dentro de un año contado desde la fecha del cange de las ratificaciones de este tratado. Y los que permanecieren en los indicados territorios despues de transcurrido el año, sin haber de-

acter of Mexicans, shall be considered to have elected to become citizens of the United States.

In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it, guaranties equally ample as if the same belonged to citizens of the United States.

clarado su intencion de retener el carácter de mexicanos, se considerará que han elegido ser ciudadanos de los Estados Unidos.

Las propiedades de todo género existentes en los expresados territorios, y que pertenecen ahora á mexicanos no establecidos en ellos, serán respetadas inviolablemente. Sus actuales dueños, los herederos de estos, y los mexicanos que en lo venidero puedan adquirir por contrato las indicadas propiedades, disfrutaran respecto de ellas tan amplia garantia como si perteneciesen á ciudadanos de los Estados Unidos.

ARTICLE IX.

The Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican Republic, conformably with what is stipulated in the preceding article, shall be incorporated into the Union of the United States and be admitted, at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States according to the principles of the Constitution; and in the mean time shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction.

ARTÍCULO IX.

Los mexicanos que en los territorios antedichos no conserven el carácter de ciudadanos de la República mexicana, segun lo estipulado en el artículo precedente, serán incorporados en la union de los Estados Unidos y se admitirán en tiempo oportuno (á juicio del Congreso de los Estados Unidos) al goce de todos los derechos de ciudadanos de los Estados Unidos conforme á los principios de la Constitucion; y entretanto serán mantenidos y protegidos en el goce de su libertad y propiedad, y asegurados en el libre ejercicio de su religion sin restriccion alguna.

ARTICLE X.

[Stricken out.]

ARTÍCULO X.

[Suprimido.]

ARTICLE XI.

Considering that a great part of the territories, which, by the present treaty, are to be comprehended for the future within the limits of the United States, is now occupied by savage tribes, who will hereafter be under the exclusive controul of the Government

ARTÍCULO XI.

En atencion á que una gran parte de los territorios que por el presente tratado van á quedar para lo futuro dentro de los límites de los Estados Unidos, se halla actualmente ocupada por tríbus salvages, que han de estar en adelante bajo la exclusiva au-

of the United States, and whose incursions within the territory of Mexico would be prejudicial in the extreme; it is solemnly agreed that all such incursions shall be forcibly restrained by the Government of the United States, whensoever this may be necessary; and that when they cannot be prevented, they shall be punished by the said Government, and satisfaction for the same shall be exacted; all in the same way, and with equal diligence and energy, as if the same incursions were meditated or committed within it's own territory against it's own citizens.

toridad del gobierno de los Estados Unidos, y cuyas incursiones sobre los distritos Mexicanos serian en extremo perjudiciales; está solemnemente convenido que el mismo gobierno de los Estados Unidos contendrá las indicadas incursiones por medio de la fuerza siempre que así sea necesario; y cuando no pudiere prevenirlas, castigará y escarmentará á los invasores, exigiéndoles ademas la debida reparacion: todo del mismo modo, y con la misma diligencia y energia con que obraria, si las incursiones se hubiesen meditado ó ejecutado sobre territorios suyos ó contra sus propios ciudadanos.

It shall not be lawful, under any pretext whatever, for any inhabitant of the United States, to purchase or acquire any Mexican or any foreigner residing in Mexico, who may have been captured by Indians inhabiting the territory of either of the two Republics; nor to purchase or acquire horses, mules, cattle or property of any kind, stolen within Mexican territory by such Indians;

A ningun habitante de los Estados Unidos será lícito, bajo ningun pretesto, comprar ó adquirir cautivo alguno, mexicano ó extrangero residente en México, apresado por los Indios habitantes en territorio de cualquiera de las dos Repúblicas, ni los caballos, mulas, ganados, ó cualquiera otro género de cosas que hayan robado dentro del territorio mexicano.

And, in the event of any person or persons, captured within Mexican territory by Indians, being carried into the territory of the United States, the Government of the latter engages and binds itself, in the most solemn manner, so soon as it shall know of such captives being within it's territory, and shall be able so to do, through the faithful exercise of it's influence and power, to rescue them, and return them to their country, or deliver them to the agent or representative of the Mexican Government. The Mexican Authorities will, as far as practicable, give to the Government of the United States notice of such captures; and it's agent shall pay the expenses incurred in the maintenance and transmission of the rescued captives; who, in

Y en caso de que cualquier persona ó personas cautivadas por los Indios dentro del territorio mexicano sean llevadas al territorio de los Estados Unidos, el gobierno de dichos Estados Unidos se compromete y liga de la manera mas solemne, en cuanto le sea posible, á rescatarlas y á restituirlas á su pais, ó entregarlas al agente ó representante del Gobierno mexicano; haciendo todo esto, tan luego como sepa que los dichos cautivos se hallan dentro de su territorio, y empleando al efecto el leal ejercicio de su influencia y poder. Las autoridades mexicanas darán á las de los Estados Unidos, segun sea practicable, una noticia de tales cautivos; y el agente mexicano pagará los gastos erogados en el mantenimiento y remision de los que se rescaten, los

the mean time, shall be treated with the utmost hospitality by the American Authorities at the place where they may be. But if the Government of the United States, before receiving such notice from Mexico, should obtain intelligence through any other channel, of the existence of Mexican captives within it's territory, it will proceed forthwith to effect their release and delivery to the Mexican agent, as above stipulated.

For the purpose of giving to these stipulations the fullest possible efficacy, thereby affording the security and redress demanded by their true spirit and intent, the Government of the United States will now and hereafter pass without unnecessary delay, and always vigilantly enforce, such laws as the nature of the subject may require. And finally, the sacredness of this obligation shall never be lost sight of by the said Government, when providing for the removal of the Indians from any portion of the said territories, or for it's being settled by citizens of the United States; but on the contrary, special care shall then be taken not to place it's Indian occupants under the necessity of seeking new homes, by committing those invasions which the United States have solemnly obliged themselves to restrain.

cuales entre tanto serán tratados con la mayor hospitalidad por las autoridades americanas del lugar en que se encuentren. Mas si el gobierno de los Estados Unidos antes de recibir aviso de México; tuviere noticia por cualquiera otro cenducto de existir en su territorio cautivos mexicanos, procedará desde luego á verificar su rescate y entrega al agente mexicano, segun queda convenido.

Con el objeto de dar á estas estipulaciones la mayor fuerza posible, y afianzar al mismo tiempo la seguridad y las reparaciones que exige el verdadero espíritu é intencion con que se han ajustado, el gobierno de los Estados Unidos dictará sin inútiles dilaciones, ahora y en lo de adelante, las leyes que requiera la naturaleza del asunto, y vigilará siempre sobre su ejecucion. Finalmente, el gobierno de los mismos Estados Unidos tendrá muy presente la santidad de esta obligacion siempre que tenga que desalojar á los indios de cualquier punto de los indicados territorios, ó que establecer en él á ciudadanos suyos: y cuidará muy especialmente de que no se ponga á los indios que habitaban ántes aquel punto, en necesidad de buscar neuvos hogares por medio de las incursiones sobre los distritos mexicanos, que el gobierno de los Estados Unidos se ha comprometido solemnemente á reprimir.

Article XII.

In consideration of the extension acquired by the boundaries of the United States, as defined in the fifth Article of the present treaty, the Government of the United States engages to pay to that of the Mexican Republic the sum of fifteen Millions of Dollars.

Immediately after this Treaty shall have been duly ratified by

Artículo XII.

En consideracion á la estension que adquieren los límites de los Estados Unidos, segun quedan descritos en el artículo quinto del presente tratado, el Gobierno de los mismos Estados Unidos se compromete á pagar al de la República mexicana la suma de quince millones de pesos.

Inmediatamente despues que este tratado haya sido ratificado

the Government of the Mexican Republic, the sum of three Millions of Dollars shall be paid to the said Government by that of the United States at the city of Mexico, in the gold or silver coin of Mexico. The remaining twelve Millions of Dollars shall be paid at the same place, and in the same coin, in annual installments of three Millions of Dollars each, together with interest on the same at the rate of six per centum per annum. This interest shall begin to run upon the whole sum of twelve millions, from the day of the ratification of the present treaty by the Mexican Government, and the first of the instalments shall be paid at the expiration of one year from the same day. Together with each annual instalment, as it falls due, the whole interest accruing on such instalment from the beginning shall also be paid.

por el gobierno de la República mexicana, se entregará al mismo Gobierno por él de los Estados Unidos, en la ciudad de México, y en moneda de plata ú oro del cuño mexicano, la suma de tres millones de pesos. Los doce millones de pesos restantes se pagarán en México, en moneda de plata ú oro del cuño mexicano, en abonos de tres milliones de pesos cada año, con un rédito de seis por ciento anual: este rédito comienza á correr para toda la suma de los doce milliones el dia de la ratificacion del presente tratado por el Gobierno mexicano, y con cada abono anual de capital se pagará el rédito que corresponda á la suma abonada. Los plazos para los abonos de capital corren desde el mismo dia que empiezan á causarse los réditos.

Article XIII.

The United States engage moreover, to assume and pay to the claimants all the amounts now due them, and those hereafter to become due, by reason of the claims already liquidated and decided against the Mexican Republic, under the conventions between the two Republics, severally concluded on the eleventh day of April eighteen hundred and thirty-nine, and on the thirtieth day of January eighteen hundred and forty three: so that the Mexican Republic shall be absolutely exempt for the future, from all expense whatever on account of the said claims.

Artículo XIII.

Se obliga ademas el Gobierno de los Estados Unidos á tomar sobre sí, y satisfacer cumplidamente á los reclamantes, todas las cantidades que hasta aquí se les deben y cuantas se verzan en adelante por razon de las reclamaciones ya liquidadas y sentenciadas contra la República mexicana conforme á los convenios ajustados entre ambas Repúblicas el once de Abril de mil ochocientos treinta y nueve, y el treinta de Enero de mil ochocientos cuarenta y tres; de manera que la República mexicana nada absolutamente tendrá que lastar en lo venidero, por razon de los indicados reclamos.

Article XIV.

The United States do furthermore discharge the Mexican Republic from all claims of citizens

Artículo XIV.

Tambien exoneran los Estados Unidos á la República mexicana de todas las reclamaciones de ciu-

of the United States, not heretofore decided against the Mexican Government, which may have arisen previously to the date of the signature of this treaty: which discharge shall be final and perpetual, whether the said claims be rejected or be allowed by the Board of Commissioners provided for in the following Article, and whatever shall be the total amount of those allowed.

dadanos de los Estados Unidos no decididas aun contra el Gobierno mexicano, y que puedan haberse originado antes de la fecha de la firma del presente tratado: esta exoneracion es definitiva y perpetua, bien sea que las dichas reclamaciones se admitan, bien sea que se desechen por el tribunal de comisarios de que habla al artículo siguiente, y cualquiera que pueda ser el monto total de las que queden admitidas.

ARTICLE XV.

The United States, exonerating Mexico from all demands on account of the claims of their citizens mentioned in the preceding Article, and considering them entirely and forever cancelled, whatever their amount may be, undertake to make satisfaction for the same, to an amount not exceeding three and one quarter millions of dollars. To ascertain the validity and amount of those claims, a Board of Commissioners shall be established by the Government of the United States, whose awards shall be final and conclusive: provided that in deciding upon the validity of each claim, the board shall be guided and governed by the principles and rules of decision prescribed by the first and fifth Articles of the unratified convention, concluded at the city of Mexico on the twentieth day of November one thousand eight hundred and forty-three; and in no case shall an award be made in favor of any claim not embraced by these principles and rules.

If, in the opinion of the said Board of Commissioners, or of the claimants, any books, records or documents in the possession or power of the Government of the Mexican Republic, shall be deemed necessary to the just decision of any claim, the Commis-

ARTÍCULO XV.

Los Estados Unidos, exonerando á México de toda responsabilidad por las reclamaciones de sus ciudadanos mencionadas en el artículo precedente, y considerándolas completamente canceladas para siempre, sea cual fuére su monto, toman á su cargo satisfacerlas hasta una cantidad que no exceda de tres millones doscientos cincuenta mil pesos. Para fijar el monto y validez de estas reclamaciones, se establecerá por el Gobierno de los Estados Unidos un tribunal de comisarios, cuyos fallos serán definitivos y concluyentes, con tal que al decidir sobre la validez de dichas reclamaciones, el tribunal se haya guiado y gobernado por los principios y reglas de decision establecidos en los artículos primero y quinto de la convencion, no ratificada, que se ajustó en la ciudad de México el veinte de Noviembre de mil ochocientos cuarenta y tres; y en ningun caso se dará fallo en favor de ninguna reclamacion que no esté comprendida en las reglas y principios indicados.

Si en juicio del dicho tribunal de comisarios, ó en él de los reclamantes se necesitare para la justa decision de cualquier reclamacion algunos libros, papeles de archivo ó documentos que posea el Gobierno mexicano, ó que estén en su poder; los comisarios, ó los

sioners or the claimants, through them, shall, within such period as Congress may designate, make an application in writing for the same, addressed to the Mexican Minister for Foreign Affairs, to be transmitted by the Secretary of State of the United States; and the Mexican Government engages, at the earliest possible moment after the receipt of such demand, to cause any of the books, records or documents, so specified, which shall be in their possession or power (authenticated copies or extracts of the same) to be transmitted to the said Secretary of State, who shall immediately deliver them over to the said Board of Commissioners: *Provided* That no such application shall be made, by, or at the instance of, any claimant, until the facts which it is expected to prove by such books, records or documents, shall have been stated under oath or affirmation.

reclamantes por conducto de ellos, los pedirán por escrito (dentro del plazo que designe el Congreso) dirigiéndose al Ministro mexicano de Relaciones Exteriores, á quien transmitirá las peticiones de esta clase el Secretario de Estado de los Estados Unidos: y el Gobierno mexicano se compromete á entregar á la mayor brevedad posible, despues de recibida cada demanda, los libros, papeles de archivo ó documentos, así especificados, que posea ó estén en su poder, ó copias ó extractos auténticos de los mismos, con el objeto de que sean transmitidos al Secretario de Estado, quien los pasará inmediatamente al expresado tribunal de comisarios. Y no se hará peticion alguna de los enunciados libros, papeles ó documentos, por ó á instancia de ningun reclamante, sin que antes se haya aseverado bajo juramento ó con afirmacion solemne la verdad de los hechos que con ellos se pretende probar.

ARTICLE XVI.

Each of the contracting parties reserves to itself the entire right to fortify whatever point within it's territory, it may judge proper so to fortify, for it's security.

ARTÍCULO XVI.

Cada una de las dos Repúblicas se reserva la completa facultad de fortificar todos los puntos que para su seguridad estime convenientes en su propio territorio.

ARTICLE XVII

The Treaty of Amity, Commerce and Navigation, concluded at the city of Mexico on the fifth day of April A. D. 1831, between the United States of America and the United Mexican States, except the additional Article, and except so far as the stipulations of the said treaty may be incompatible with any stipulation contained in the present treaty, is hereby revived for the period of eight years from the day of the exchange of ratifications of this treaty, with the same force and virtue as if incorporated therein;

ARTÍCULO XVII.

El tratado de amistad, comercio y navegacion, concluido en la ciudad de México el cinco de Abril del año del Señor 1831, entre la República mexicana y los Estados Unidos de América, esceptuándose el artículo adicional y cuanto pueda haber en sus estipulaciones incompatible con alguna de las contenidas en el presente tratado, queda restablecido por el período de ocho años desde el dia del cange de las ratificaciones del mismo presente tratado, con igual fuerza y valor que si estuviese inserto en él; de-

it being understood that each of the contracting parties reserves to itself the right, at any time after the said period of eight years shall have expired, to terminate the same by giving one year's notice of such intention to the other party.—

biendo entenderse que cada una de las partes contratantes se reserva el derecho de poner término al dicho tratado de comercio y navegacion en cualquier tiempo luego que haya expirado el período de las ocho años, comunicando su intencion á la otra parte con un año de anticipacion.

ARTICLE XVIII.

All supplies whatever for troops of the United States in Mexico, arriving at ports in the occupation of such troops, previous to the final evacuation thereof, although subsequently to the restoration of the Custom Houses at such ports, shall be entirely exempt from duties and charges of any kind: the Government of the United States hereby engaging and pledging its faith to establish and vigilantly to enforce, all possible guards for securing the revenue of Mexico, by preventing the importation, under cover of this stipulation, of any articles, other than such, both in kind and in quantity, as shall really be wanted for the use and consumption of the forces of the United States during the time they may remain in Mexico. To this end, it shall be the duty of all officers and agents of the United States to denounce to the Mexican Authorities at the respective ports, any attempts at a fraudulent abuse of this stipulation, which they may know of or may have reason to suspect, and to give to such authorities all the aid in their power with regard thereto: and every such attempt, when duly proved and established by sentence of a competent tribunal, shall be punished by the confiscation of the property so attempted to be fraudulently introduced.

ARTÍCULO XVIII.

No se exigirán derechos ni gravámen de ninguna clase á los artículos todos que lleguen para las tropas de los Estados Unidos á los puertos mexicanos ocupados por ellas, ántes de la evacuacion final de los mismos puertos, y despues de la devolucion á México de las aduanas situadas en ellos. El Gobierno de los Estados Unidos se compromete á la vez, y sobre esto empeña su fé, á establecer y mantener con vigilancia cuantos guardas sean posibles para asegurar las rentas de México, precaviendo la importacion, á la sombra de esta estipulacion, de cualesquiera artículos que realmente no sean necesarios, ó que excedan en cantidad de los que se necesiten para el uso y consumo de las fuerzas de los Estados Unidos mientras ellas permanezcan en México. A este efecto, todos los oficiales y agentes de los Estados Unidos tendrán obligacion de denunciar á las autoridades mexicanas en los mismos puertos, cualquier conato de fraudalento abuso de esta estipulacion que pudieren conocer ó tuvieren motivo de sospechar; así como de impartir á las mismas autoridades todo el auxilio que pudieren con este objeto: y cualquier conato de esta clase, que fuere legalmente probado, y declarado por sentencia de tribunal competente, será castigado con el comiso de la cosa que se haya intentado introducir fraudalentamente.

ARTICLE XIX.

With respect to all merchandise, effects and property whatsoever, imported into ports of Mexico, whilst in the occupation of the forces of the United States, whether by citizens of either republic, or by citizens or subjects of any neutral nation, the following rules shall be observed:

I. All such merchandise, effects and property, if imported previously to the restoration of the Custom Houses to the Mexican Authorities, as stipulated for in the third Article of this treaty, shall be exempt from confiscation, although the importation of the same be prohibited by the Mexican tariff.

II. The same perfect exemption shall be enjoyed by all such merchandise, effects and property, imported subsequently to the restoration of the Custom Houses, and previously to the sixty days fixed in the following Article for the coming into force of the Mexican tariff at such ports respectively: the said merchandise, effects and property being, however, at the time of their importation, subject to the payment of duties as provided for in the said following Article.

III. All merchandise, effects and property, described in the two rules foregoing, shall, during their continuance at the place of importation, and upon their leaving such place for the interior, be exempt from all duty, tax or impost of every kind, under whatsoever title or denomination. Nor shall they be there subjected to any charge whatsoever upon the sale thereof.

IV. All merchandise, effects and property, described in the first and second rules, which shall have been removed to any place in the inte-

ARTÍCULO XIX.

Respecto de los efectos, mercancías y propiedades importados en los puertos mexicanos durante el tiempo que han estado ocupados por las fuerzas de los Estados Unidos, sea por ciudadanos de cualquiera de las dos Repúblicas, sea por ciudadanos ó súbditos de alguna nacion neutral, se observarán las reglas siguientes:

1. Los dichos efectos, mercancias y propiedades siempre que se hayan importado ántes de la devolucion de las aduanas á las autoridades Mexicanas conforme á lo estipulado en el artículo tercero de este tratado, quedarán libres de la pena de comiso, aun cuando sean de los prohibidos en el arancel mexicano.

2. La misma exencion gozarán los efectos, mercancías y propiedades que lleguen á los puertos mexicanos, despues de la devolucion á México de las aduanas marítimas, y antes de que expiren los sesenta dias que van á fijarse en el artículo siguiente para que empiece á regir el arancel mexicano en los puertos; debiendo al tiempo de su importacion sujetarse los tales efectos, mercancías y propiedades, en cuanto al pago de derechos, á lo que en el indicado siguiente artículo se establece.

3. Los efectos, mercancías y propiedades designados en las dos reglas anteriores quedarán exentos de todo derecho, alcabala ó impuesto, sea bajo el título de internacion, sea bajo cualquiera otro, mientras permanezcan en los puntos donde se hayan importado, y á su salida para el interior; y en los mismos puntos no podrá jamás exigirse impuesto alguno sobre su venta.

4. Los efectos, mercancias y propiedades designados en las reglas primera y segunda que hayan sido internados á cualquier lugar

rior, whilst such place was in the occupation of the forces of the United States, shall, during their continuance therein, be exempt from all tax upon the sale or consumption thereof, and from every kind of impost or contribution, under whatsoever title or denomination.

ocupado por fuerzas de los Estados Unidos, quedarán exentos de todo derecho sobre su venta ó consumo, y de todo impuesto ó contribucion bajo cualquier título ó denominacion, mientras permanezcan en el mismo lugar.

V. But if any merchandise, effects or property, described in the first and second rules, shall be removed to any place not occupied at the time by the forces of the United States, they shall, upon their introduction into such place, or upon their sale or consumption there, be subject to the same duties which, under the Mexican laws, they would be required to pay in such cases, if they had been imported in time of peace through the Maritime Custom Houses, and had there paid the duties, conformably with the Mexican tariff.

5. Mas si algunos efectos, mercancías ó propiedades de los designados en las reglas primera y segunda se trasladaren á algun lugar no ocupado á la sazon por las fuerzas de los Estados Unidos; al introducirse á tal lugar ó al venderse ó consumirse en él, quedarán sujetos á los mismos derechos que bajo las leyes mexicanas deberian pagar en tales casos si se hubieran importado en tiempo de paz por las aduanas marítimas, y hubiesen pagado en elles los derechos que establece el arancel mexicano.

VI. The owners of all merchandise, effects or property, described in the first and second rules, and existing in any port of Mexico, shall have the right to reship the same, exempt from all tax, impost or contribution whatever.

6. Los dueños de efectos, mercancías y propiedades designados en las reglas primera y segunda, y existentes en algun puerto de México, tienen derecho de reembarcarlos, sin que pueda exigírseles ninguna clase de impuesto, alcabala ó contribucion.

With respect to the metals, or other property, exported from any Mexican port, whilst in the occupation of the forces of the United States, and previously to the restoration of the Custom House at such port, no person shall be required by the Mexican Authorities, whether General or State, to pay any tax, duty or contribution upon any such exportation, or in any manner to account for the same to the said Authorities.

Respecto de los metales y de toda otra propiedad exportados por cualquier puerto Mexicano durante su ocupacion por las fuerzas americanas, y ántes de la devolucion de su aduana al Gobierno mexicano, no se exigirá á ninguna persona por las autoridades de México, ya dependan del Gobierno general, ya de algun estado, que pague ningun impuesto, alcabala ó derecho por la indicada exportacion, ni sobre ella podrá exigírsele por las dichas autoridades cuenta alguna.

Article XX.

Through consideration for the interests of commerce generally, it is agreed, that if less than sixty

Artículo XX.

Por consideracion á los intereses del comercio de todas las naciones, queda convenido que si pasaren

days should elapse between the date of the signature of this treaty and the restoration of the Custom-Houses, conformably with the stipulation in the third Article, in such case, all merchandise, effects and property whatsoever, arriving at the Mexican ports after the restoration of the said Custom Houses, and previously to the expiration of sixty days after the day of the signature of this treaty, shall be admitted to entry; and no other duties shall be levied thereon than the duties established by the tariff found in force at such Custom Houses at the time of the restoration of the same. And to all such merchandise, effects and property, the rules established by the preceding Article shall apply.

ménos de sesenta dias desde la fecha de la firma de este tratado hasta que se haga la devolucion de las aduanas marítimas, segun lo estipulado en el artículo tercero; todos los efectos, mercancías, y propiedades que lleguen á los puertos mexicanos desde el dia en que se verifique la devolucion de las dichas aduanas hasta que se completen sesenta dias contados desde la fecha de la firma del presente tratado, se admitirán no pagando otros derechos que los establecidos en la tarifa que esté vigente en las expresadas aduanas al tiempo de su devolucion, y se extenderán á dichos efectos, mercancías, y propiedades las mismas reglas establecidas en el artículo anterior,

Article XXI.

If unhappily any disagreement should hereafter arise between the Governments of the two Republics, whether with respect to the interpretation of any stipulations in this treaty, or with respect to any other particular concerning the political or commercial relations of the two Nations, the said Governments, in the name of those Nations, do promise to each other, that they will endeavour, in the most sincere and earnest manner, to settle the differences so arising, and to preserve the state of peace and friendship, in which the two countries are now placing themselves: using, for this end, mutual representations and pacific negotiations. And if, by these means, they should not be enabled to come to an agreement, a resort shall not, on this account, be had to reprisals, aggression or hostility of any kind, by the one Republic against the other, until the Government of that which deems itself aggrieved, shall have maturely considered, in the spirit of peace and good neighbourship,

Artículo XXI.

Si desgraciadamente en el tiempo futuro se suscitare algun punto de desacuerdo entre los gobiernos de las dos Repúblicas, bien sea sobre la inteligencia de alguna estipulacion de este tratado, bien sobre cualquiera otra materia de las relaciones políticas ó comerciales de las dos naciones, los mismos Gobiernos, á nombre de ellas, se comprometen á procurar de la manera mas sincera y empeñosa allanar las diferencias que se presenten y conservar el estado de paz y amistad en que ahora se ponen los dos países, usando al efecto de representaciones mútuas y de negociaciones pacíficas. Y si por estos medios no se lograre todavía ponerse de acuerdo, no por eso se apelará á represalia, agresion ni hostilidad de ningun género de una República contra otra, hasta que el Gobierno de la que se crea agraviada haya considerado maduramente y en espíritu de paz y buena vecindad, si no seria mejor que la diferencia se terminara por un arbitramento de comisarios nombrados

whether it would not be better that such difference should be settled by the arbitration of Commissioners appointed on each side, or by that of a friendly nation. And should such course be proposed by either party, it shall be acceded to by the other, unless deemed by it altogether incompatible with the nature of the difference, or the circumstances of the case.

por ambas partes, ó de una nacion amiga. Y si tal medio fuere propuesto por cualquiera de las dos partes, la otra accederá á él, á no ser que lo juzgue absolutamente incompatible con la naturaleza y circunstancias del caso.

ARTICLE XXII.

If (which is not to be expected, and which God forbid!) war should unhappily break out between the two Republics, they do now, with a view to such calamity, solemnly pledge themselves to each other and to the world, to observe the following rules: absolutely, where the nature of the subject permits, and as closely as possible in all cases where such absolute observance shall be impossible.

I. The merchants of either Republic, then residing in the other, shall be allowed to remain twelve months (for those dwelling in the interior) and six months (for those dwelling at the sea-ports) to collect their debts and settle their affairs; during which periods they shall enjoy the same protection, and be on the same footing, in all respects, as the citizens or subjects of the most friendly nations; and, at the expiration thereof, or at any time before, they shall have full liberty to depart, carrying off all their effects, without molestation or hinderance: conforming therein to the same laws, which the citizens or subjects of the most friendly nations are required to conform to. Upon the entrance of the armies of either nation into the territories of the other, women and children, ecclesiastics, scholars of every faculty, cultivators of

ARTÍCULO XXII.

Si (lo que no es de esperarse, y Dios no permita) desgraciadamente se suscitare guerra entre las dos Repúblicas, éstas para el caso de tal calamidad se comprometen ahora solemnemente, ante sí mismas y ante el mundo, á observar las reglas siguientes de una manera absoluta, si la naturaleza del objeto á que se contraen lo permite; y tan estrictamente como sea dable en todos los casos en que la absoluta observancia de ellas fuere imposible:

1. Los comerciantes de cada una de las dos Repúblicas que á la sazon residan én territorio de la otra, podrán permanecer doce meses los que residan en el interior, y seis meses los que residan en los puertos, para recoger sus deudas y arreglar sus negocios; durante estos plazos disfrutarán la misma proteccion, y estarán sobre el mismo pié en todos respectos que los ciudadanos ó súbditos de las naciones mas amigas; y al expirar el término, ó ántes de él, tendrán completa libertad para salir y llevar todos sus efectos sin molestia ó embarazo, sujetándose en este particular á las mismas leyes á que estén sujetos y deban arreglarse los ciudadanos ó súbditos de las naciones mas amigas. Cuando los ejércitos de una de las dos naciones entren en territorios de la otra, las mujeres y niños, los eclesiásticos, los estudiantes de cualquier facultad,

the earth, merchants, artisans, manufacturers, and fishermen, unarmed and inhabiting unfortified towns, villages or places, and in general all persons whose occupations are for the common subsistence and benefit of mankind, shall be allowed to continue their respective employments, unmolested in their persons. Nor shall their houses or goods be burnt, or otherwise destroyed; nor their cattle taken, nor their fields wasted, by the armed force, into whose power, by the events of war, they may happen to fall; but if the necessity arise to take anything from them for the use of such armed force, the same shall be paid for at an equitable price. All churches, hospitals, schools, colleges, libraries, and other establishments for charitable and beneficent purposes, shall be respected, and all persons connected with the same protected in the discharge of their duties and the pursuit of their vocations.

los labradores, comerciantes, artesanos, manufactureros y pescadores que estén desarmados y residan en ciudades, pueblos ó lugares no fortificados, y en general todas las personas cuya ocupacion sirva para la comun subsistencia y beneficio del género humano, podrán continuar en sus ejercicios, sin que sus personas sean molestadas. No serán incendiadas sus casas ó bienes, ó destruidos de otra manera; ni serán tomados sus ganados, ni devastados sus campos por la fuerza armada en cuyo poder puedan venir á caer por los acontecimientos de la guerra; pero si hubiere necesidad de tormarles alguna cosa para el uso de la misma fuerza armada, se les pagará lo tomado á un precio justo. Todas las iglesias, hospitales, escuelas, colegios, librerias, y demas establecimientos de caridad y beneficencia serán respetados; y todas las personas que dependan de los mismos serán protegidas en el desempeño de sus deberes y en la continuacion de sus profesiones.

II. In order that the fate of prisoners of war may be alleviated, all such practices as those of sending them into distant, inclement or unwholesome districts, or crowding them into close and noxious places, shall be studiously avoided. They shall not be confined in dungeons, prison-ships, or prisons; nor be put in irons, or bound, or otherwise restrained in the use of their limbs. The officers shall enjoy liberty on their paroles, within convenient districts, and have comfortable quarters; and the common soldier shall be disposed in cantonments, open and extensive enough for air and exercise, and lodged in barracks as roomy and good as are provided by the party in whose power they are for it's own troops. But, if any officer shall break his

2. Para aliviar la suerte de los prisioneros de guerra, se evitarán cuidadosamente las prácticas de enviarlos á distritos distantes, inclementes ó malsanos, ó de aglomerarlos en lugares estrechos y enfermizos. No se confinarán en calabozos, prisiones ni pontones; no se les aherrojará ni se les atará, ni se les impedirá de ningun otro modo el uso de sus miembros. Los oficiales quedarán en libertad bajo su palabra de honor, dentro de distritos convenientes, y tendrán alojamientos cómodos, y los soldados rasos se colocarán en acantonamientos bastante despejados y extensos para la ventilacion y el ejercicio, y se alojarán en cuarteles tan amplios y cómodos como los que use para sus propias tropas la parte que los tenga en su poder. Pero si algun

parole by leaving the district so assigned him, or any other prisoner shall escape from the limits of his cantonment, after they shall have been designated to him, such individual, officer or other prisoner, shall forfeit so much of the benefit of this article as provides for his liberty on parole or in cantonment. And if any officer so breaking his parole, or any common soldier so escaping from the limits assigned him, shall afterwards be found in arms, previously to his being regularly exchanged, the person so offending shall be dealt with according to the established laws of war. The officers shall be daily furnished by the party in whose power they are, with as many rations, and of the same articles as are allowed either in kind or by commutation, to officers of equal rank in it's own army; and all others shall be daily furnished with such ration as is allowed to a common soldier in it's own service: the value of all which supplies shall, at the close of the war, or at periods to be agreed upon between the respective commanders, be paid by the other party on a mutual adjustment of accounts for the subsistence of prisoners; and such accounts shall not be mingled with or set off against any others, nor the balance due on them be withheld, as a compensation or reprisal for any cause whatever, real or pretended. Each party shall be allowed to keep a commissary of prisoners, appointed by itself, with every cantonment of prisoners, in possession of the other: which commissary shall see the prisoners as often as he pleases; shall be allowed to receive, exempt from all duties or taxes, and to distribute whatever comforts may be sent to them by their friends; and shall be free to trans-

oficial faltare á su palabra, saliendo del distrito que se le ha señalado; ó algun otro prisonero se fugare de los límites de su acantonamiento despues que estos se le hayan fijado, tal oficial ó prisionero perderá el beneficio del presente artículo por lo que mira á su libertad bajo su palabra ó en acantonamiento- Y si algun oficial faltando así á su palabra, ó algun soldado raso saliendo de los límites que se le han asignado, fuere encontrado despues con las armas en la mano antes de ser debidamente canjeado, tal persona en esta actitud ofensiva será tratada conforme á las leyes comunes de la guerra. A los oficiales se proveerá diariamente por la parte en cuyo poder estén, de tantas raciones compuestas de los mismos artículos como las que gozan en especie ó en equivalente los oficiales de la misma graduacion en su propio ejército: á todos los demas prisioneros se proveerá diariamente de una racion semejante á la que se ministra al soldado raso en su propio servicio: el valor de todas estas suminstraciones se pagará por la otra parte al concluirse la guerra, ó en los períodos que se convengan entre sus respectivos commandantes, precediendo una mutua liquidacion de las cuentas que se lleven del mantenimiento de prisioneros: y tales cuentas no se mezclarán ni compensarán con otras; ni el saldo que resulte de ellas se reusará bajo pretesto de compensacion ó represalia por cualquiera causa, real ó figurada. Cada una de las partes podrá mantener un comisario de prisioneros nombrado por ella misma en cada acantonamiento de los prisioneros que estén en poder de la otra parte: este comisario visitará á los prisioneros siempre que quiera; tendrá facultad de recibir, libres de todo derecho ó impuesto, y de

mit his reports in open letters to the party by whom he is employed.

distribuir todos los auxilios que pueden enviarles sus amigos, y podrá libremente transmitir sus partes en cartas abiertas á la autoridad por la cual está empleado.

And it is declared that neither the pretence that war dissolves all treaties, nor any other whatever shall be considered as annulling or suspending the solemn covenant contained in this article. On the contrary, the state of war is precisely that for which it is provided; and during which its stipulations are to be as sacredly observed as the most acknowledged obligations under the law of nature or nations.

Y se declara que ni el pretesto de que la guerra destruye los tratados, ni otro alguno, sea él que fuere, se considerarà que anula ó suspende el pacto solemne contrenido en este artículo. Por el contrario, el estado de guerra es cabalmente él que se ha tenido presente al ajustarlo, y durante el cual sus estipulaciones se han de observar tan santamente como las obligaciones mas reconocidas de la ley natural ó de gentes.

ARTICLE XXIII.

This treaty shall be ratified by the President of the United States of America, by and with the advice and consent of the Senate thereof; and by the President of the Mexican Republic, with the previous approbation of it's General Congress: and the ratifications shall be exchanged in the City of Washington, or at the seat of government of Mexico, in four months from the date of the signature hereof, or sooner if practicable.

In faith whereof, we, the respective Plenipotentiaries, have signed this Treaty of Peace, Friendship, Limits and Settlement, and have hereunto affixed our seals respectively. Done in Quintuplicate, at the City of Guadalupe Hidalgo, on the second day of February in the year of Our Lord one thousand eight hundred and forty eight.

N. P. TRIST. [SEAL.]
LUIS G. CUEVAS. [SEAL.]
BERNARDO COUTO [SEAL.]
MIGL. ATRISTAIN. [SEAL.]

ARTÍCULO XXIII.

Este tratado será ratificado por el Presidente de la República mexicana, previa la aprobacion de su Congreso general; y por el Presidente de los Estados Unidos de América con el consejo y consentimiento del Senado: y las ratificaciones se cangearán en la ciudad de Washington, ó donde estuviere el Gobierno mexicano, á los cuatro meses de la fecha de la firma del mismo tratado, ó ántes si fuere posible.

En fe de lo cual, nosotros los respectivos plenipotenciarios hemos firmado y sellado por quintuplicado este tratado de paz, amistad, límites y arreglo definitivo, en la ciudad de Guadalupe Hidalgo, el dia dos de Febrero del año de nuestro Señor mil ochocientos cuarenta y ocho.

BERNARDO COUTO. [L. S.]
MIGL. ATRISTAIN. [L. S.]
LUIS G. CUEVAS. [L. S.]
N. P. TRIST. [L. S.]

And whereas the said Treaty, as amended, has been duly ratified on both parts, and the respective ratifications of the same were exchanged at Querétaro, on the thirtieth day of May last, by Ambrose H. Sevier and Nathan Clifford, Commissioners on the part of the Government of

the United States, and by Senor Don Louis de la Rosa, Minister of Relations of the Mexican Republic, on the part of that Government:

Now, therefore, be it known, that I, James K. Polk, President of the United States of America, have caused the said Treaty to be made public, to the end that the same, and every clause and article thereof, may be observed and fulfilled with good faith by the United States and the citizens thereof.

In witness whereof, I have hereunto set my hand, and caused the seal of the United States to be affixed.

Done at the City of Washington, this fourth day of July, one thousand eight hundred and forty-eight, and of the Independence of the United States the seventy-third.

[SEAL.]

JAMES K. POLK.

By the President:
JAMES BUCHANAN
Secretary of State.

ARTICLES REFERRED TO IN THE FIFTEENTH ARTICLE OF THE PRECEDING TREATY.

First and Fifth Articles of the unratified Convention between the United States and the Mexican Republic of November 20, 1843.

ARTICLE 1ST.

All claims of citizens of the Mexican Republic against the government of the United States, which shall be presented in the manner and time hereinafter expressed, and all claims of citizens of the United States against the government of the Mexican Republic, which for whatever cause were not submitted to, nor considered, nor finally decided by the commission, nor by the arbiter appointed by the Convention of 1839, and which shall be presented in the manner and time hereinafter specified, shall be referred to four commissioners, who shall form a Board, and shall be appointed in the following manner, that is to say: Two commissioners shall be appointed by the President of the Mexican Republic, and the other two by the President of the United States, with the approbation and consent of the Senate. The said commissioners thus appointed shall, in presence of each other, take an

ARTÍCULO.

Todas las reclamaciones de ciudadanos de la República mexicana contra el Gobierno de los Estados Unidos, que se presentaren del modo y en el tiempo que en adelante se espresa, y todas las reclamaciones de ciudadanos de los Estados Unidos contra el Gobierno de la República mexicana, que por cualquier motivo no se presentaron á la Junta ó que no fueron examinadas ó decididas finalmente por ella ó por el árbitro establecido por la convencion de 1839, y que se presentaren del modo y en el tiempo que en adelante se espresará, se someterán á cuatro comisionados que formarán Junta, y serán nombrados del modo siguiente, á saber: Dos comisionados serán nombrados por el President de la República mexicana, y los otros dos lo serán por el Presidente de los Estados Unidos, con consentimiento y aprobacion del Senado de los mismos. Los dichos comisionados, de ese modo nombrados, prestarán jura-

oath to examine and decide impartially the claims submitted to them, and which may lawfully be considered, according to the proofs, which shall be presented, the principles of right and justice, the Law of Nations, and the Treaties between the two Republics.

mento en presencia unos de otros, de examinar y decidir imparcialmente las reclamaciones que se les sometan y que legalmente deban considerarse segun las pruebas que se les presentaren y segun los principios de derecho y justicia de la Ley de las Naciones y de los tratado entre ambas Repúblicas.

ARTICLE 5TH.

All claims of citizens of the United States against the Government of the Mexican Republic, which were considered by the commissioners, and referred to the umpire appointed under the convention of the 11th April, 1839, and which were not decided by him, shall be referred to, and decided by, the umpire to be appointed, as provided by this Convention, on the points submitted to the umpire under the late Convention, and his decision shall be final and conclusive. It is also agreed, that if the respective commissioners shall deem it expedient, they may submit to the said arbiter new arguments upon the said claims.

ARTÍCULO V.

Todas las reclamaciones de ciudadanos de los Estados Unidos contra el Gobierno de la República mexicana, que fueron examinadas por los comisionados y sometidas al Árbitro nombrado con arreglo á la convencion de once de Abril de 1839, y que no fueron por él decididas, se someterán y decidirán por el Árbitro que debe nombrarse conforme á esta convencion por lo relativo á los puntos que se sujetaron al Árbitro establecido por la anterior convencion; y su decision será final y definitiva. A la vez se ha convenido que, si se juzga oportuno por los comisionados respectivos, podrán someterse por ellos al espresado Árbritro, nuevas esposiciones sobre dichas reclamaciones.

CONVENTION BETWEEN THE UNITED STATES OF AMERICA AND MEXICO—ADJUSTMENT OF CLAIMS.

Concluded July 4, 1868.
Ratification advised by Senate July 25, 1868.
Ratified by President January 25, 1869.
Ratified by President of Mexico December 26, 1868.
Ratifications exchanged at Washington February 1, 1869.
Proclaimed February 1, 1869.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

Whereas a convention between the United States of America and the republic of Mexico, providing for the adjustment of the claims of citizens of either country against the other, was concluded and signed by their respective plenipotentiaries, at the city of Washington, on

the fourth day of July, in the year of our Lord one thousand eight hundred and sixty-eight, which convention, being in the English and Spanish language, is word for word as follows:

Whereas it is desirable to maintain and increase the friendly feelings between the United States and the Mexican republic, and so to strengthen the system and principles of republican government on the American continent; and whereas since the signature of the treaty of Guadalupe Hidalgo, of the 2d of February, 1848, claims and complaints have been made by citizens of the United States, on account of injuries to their persons and their property by authorities of that republic, and similar claims and complaints have been made on account of injuries to the persons and property of Mexican citizens by authorities of the United States; the President of the United States of America and the President of the Mexican republic have resolved to conclude a convention for the adjustment of the said claims and complaints, and have named as their plenipotentiaries—the President of the United States, William H. Seward, Secretary of State; and the President of the Mexican republic, Matias Romero, accredited as envoy extraordinary and minister plenipotentiary of the Mexican republic to the United States; who, after having communicated to each other their respective full powers, found in good and due form, have agreed to the following articles:

Considerando que es conveniente mantener y ensanchar los sentimientos amistosos entre la república Mexicana y los Estados Unidos, y afianzar así el sistema y principios de gobierno republicano en el continente Americano; y considerando que con posterioridad á la celebracion del tratado de Guadalupe Hidalgo, de 2 de Febrero de 1848, ciudadanos de la república Mexicana han hecho reclamaciones y presentado quejas con motivo de perjucios sufridos en sus personas ó sus propiedades, por autoridades de los Estados Unidos, y reclamaciones y quejas semejantes se han hecho y presentado con motivo de perjucios sufridos por ciudadanos de los Estados Unidos, en sus personas ó sus propiedades, por autoridades de la república Mexicana; el Presidente de la república Mexicana y el Presidente de los Estados Unidos de América han determinado concluir una convencion para el arreglo de dichas reclamaciones y quejas, y han nombrado sus plenipotenciarios; el Presidente de la república Mexicana, á Matias Romero, acreditado como enviado extraordinario y ministro plenipotenciario de la república Mexicana en los Estados Unidos; y el Presidente de los Estados Unidos, á William H. Seward, Secretario de Estado; quienes despues de haberse mostrado sus respectivos plenos poderes y encontradolos en buena y debida forma, han convenido en los artículos siguientes:

ARTICLE I.

All claims on the part of corporations, companies, or private individuals, citizens of the United States, upon the government of the Mexican republic arising from injuries to their persons or property by authorities of the Mexican re-

ARTÍCULO I.

Todas las reclamaciones hechas por corporaciones, compañías ó individuos particulares, ciudadanos de la república Mexicana, procedentes de perjuicios sufridos en sus personas ó en sus propiedades, por autoridades de los Estados

public, and all claims on the part of corporations, companies, or private individuals, citizens of the Mexican republic, upon the government of the United States, arising from injuries to their persons or property by authorities of the United States, which may have been presented to either government for its interposition with the other since the signature of the treaty of Guadalupe Hidalgo between the United States and the Mexican republic of the 2d of February, 1848, and which yet remain unsettled, as well as any other such claims which may be presented within the time hereinafter specified, shall be referred to two commissioners, one to be appointed by the President of the United States, by and with the advice and consent of the Senate, and one by the President of the Mexican republic. In case of the death, absence, or incapacity of either commissioner, or in the event of either commissioner omitting or ceasing to act as such, the President of the United States or the President of the Mexican republic, respectively, shall forthwith name another person to act as commissioner in the place or stead of the commissioner originally named.

Unidos, y todas las reclamaciones hechas por corporaciones, compañías ó individuos particulares, ciudadanos de los Estados Unidos, procedentes de perjuicios sufridos en sus personas ó en sus propiedades, por autoridades de la república Mexicana, que hayan sido presentados á cualquiera de los dos gobiernos, solicitando la interposicion para con el otro, con posterioridad á la celebracion del tratado de Guadalupe Hidalgo entre la república Mexicana y los Estados Unidos, de 2 de Febrero de 1848, y que aún permanecen pendientes, de la misma manera que cualesquiera otras reclamaciones que se presentaren dentro del tiempo que mas adelante se especificará, se referirán á dos comisionados, uno de los cuales será nombrado por el Presidente de la república Mexicana y el otro por el Presidente de los Estados Unidos, con el consejo y aprobacion del Senado. En caso de muerte, ausencia ó incapacidad de alguno de los comisionados, ó en caso de que alguno de los comisionados cese de funcionar como tal, ó suspenda el ejercicio de sus funciones, el Presidente de la república Mexicana ó el Presidente de los Estados Unidos, respectivamente, nombrarán desde luego otra persona que haga de comisionado en lugar del que originalmente fué nombrado.

The commissioners so named shall meet at Washington within six months after the exchange of the ratifications of this convention, and shall, before proceeding to business, make and subscribe a solemn declaration that they will impartially and carefully examine and decide, to the best of their judgment, and according to public law, justice, and equity, without fear, favor, or affection to their own country, upon all such claims above specified as shall be laid before them on the part of the governments of the United States and of the Mexi-

Los comisionados nombrados de esta manera, se reunirán en Washington dentro de seis meses, despues de cangeadas las ratificaciones de esta convencion, y ántes de desempeñar sus funciones, harán y suscribirán una declaracion solemne de que examinarán y decidirán imparcial y cuidadosamente, segun su mejor saber, y conforme con el derecho público, la justicia y equidad, y sin temor ó afeccion á su respectivo pais, sobre todas las reclamaciones ántes especificadas, que se les sometan por los gobiernos de la república Mexicana y de

can republic, respectively; and such declaration shall be entered on the record of their proceedings.

The commissioners shall then name some third person to act as an umpire in any case or cases on which they may themselves differ in opinion. If they should not be able to agree upon the name of such third person, they shall each name a person, and in each and every case in which the commissioners may differ in opinion as to the decision which they ought to give, it shall be determined by lot which of the two persons so named shall be umpire in that particular case. The person or persons so to be chosen to be umpire shall, before proceeding to act as such in any case, make and subscribe a solemn declaration in a form similar to that which shall already have been made and subscribed by the commissioners, which shall be entered on the record of their proceedings. In the event of the death, absence, or incapacity of such person or persons, or of his or their omitting, or declining, or ceasing to act as such umpire, another and different person shall be named, as aforesaid, to act as such umpire, in the place of the person so originally named, as aforesaid, and shall make and subscribe such declaration as aforesaid.

Article II.

The commissioners shall then conjointly proceed to the investigation and decision of the claims which shall be presented to their notice, in such order and in such manner as they may conjointly think proper, but upon such evidence or information only as shall be furnished by or on behalf of their respective governments. They shall be bound to receive and peruse all written documents or statements which may be pre-

los Estados Unidos, respectivamente, y dicha declaracion se asentará en la acta de sus procedimientos.

Los comisionados procederán entónces á nombrar una tercera persona que hará de árbitro en el caso ó casos en que difierán de opinion. Si no pudieren convenir en el nombre de esta tercera persona, cada uno de ellos nombrará una persona, y en todos y cada uno de los casos en que los comisionados defierán de opinion respecto de la decision que deban dar, se determinará por suerte quien de las dos personas así nombradas hará de árbitro en ese caso particular. La persona ó personas que se eligieren de esa manera, para ser árbitros, harán y suscribirán ántes de obrar como tales, en cualquier caso, una declaracion solemne en una forma, semejante á la que deberá haber sido ya hecha y suscrita por los comisionados, lo cual se asentará tambien en la acta de los procedimientos. En caso de muerte, ausencia ó incapacidal de la persona ó personas nombradas árbitros, ó en caso de que suspendan el ejercicio de sus funciones, se rehusen á desempeñarlas ó cesen en ellas, otra persona será nombrado árbitro de la manera, que queda dicha, en lugar de la persona originalmente nombrada, y hará y suscribirá la declaracion ántes mencionada.

Artículo II.

En seguida procederán juntamente los comisionadas á la investigacion y decision de las reclamaciones que se les presenten en el órden y de la manera que de comun acuerdo creyeren conveniente, pero recibiendo solamente las pruebas ó informes que se les ministren por los respectivos gobiernos ó en su nombre. Tendrán obligacion de recibir y leer todas las manifestaciones ó documentos escritos que se le presenten por sus gobiernos

sented to them by or on behalf of their respective governments in support of or in answer to any claim, and to hear, if required, one person on each side on behalf of each government on each and every separate claim. Should they fail to agree in opinion upon any individual claim, they shall call to their assistance the umpire whom they may have agreed to name, or who may be determined by lot, as the case may be; and such umpire, after having examined the evidence adduced for and against the claim, and after having heard, if required, one person on each side as aforesaid, and consulted with the commissioners, shall decide thereupon finally and without appeal. The decision of the commissioners and of the umpire shall be given upon each claim in writing, shall designate whether any sum which may be allowed shall be payable in gold or in the currency of the United States, and shall be signed by them respectively. It shall be competent for each government to name one person to attend the commissioners as agent on its behalf, to present and support claims on its behalf, and to answer claims made upon it, and to represent it generally in all matters connected with the investigation and decision thereof.

The President of the United States of America and the President of the Mexican republic hereby solemnly and sincerely engage to consider the decision of the commissioners conjointly or of the umpire, as the case may be, as absolutely final and conclusive upon each claim decided upon by them or him respectively, and to give full effect to such decisions without any objection, evasion, or delay whatsoever.

It is agreed that no claim arising

respectivos, ó en su nombre, en apoyo ó respuesta á cualquiera reclamacion, y de oir, si se les pidiere, á una persona por cada lado, en nombre de cada gobierno, en todas y cada una de las reclamaciones separadamente. Si dejaren de convenir sobre alguna reclamacion particular, llamarán en su ausilio al árbitro que havan nombrado de comun acuerdo, ó á quien la suerte haya designado segun fuere el caso, y el árbitro, despues de haber examinado las pruebas producidas en favor y en contra de la reclamacion, y despues de haber oido, si se le pidiere, á una persona por cada lado, como queda dicho y consultado con los comisionados, decidirá sobre ella finalamente y sin apelacion. La decision de los comisionados y del árbitro se dará en cada reclamacion por escrito, especificará si la suma que se concediere se pagará en oro ó en moneda corriente de los Estados Unidos, y será firmada por ellos respectivamente. Cada gobierno podrá nombrar una persona que concurra á la comision en nombre del gobierno respectivo, como agente; que presente ó defienda las reclamaciones en nombre del mismo gobierno, y que responda á las reclamaciones hechas contra él, y que le represente en general en todos los negocios que tengan relacion con la investigacion y decision de reclamaciones.

El Presidente de la república Mexicana y el Presidente de los Estados Unidos de América se comprometen solemne y sinceramente en esta convencion, á considerar la decision de los comisionados de acuerdo, ó del árbitro, segun fuere el caso, como absolutamente final y definitiva, respecto de cada una de las reclamaciones falladas por los comisionados ó el árbitro respectivamente, y á dar entero cumplimiento á tales decisiones sin objecion, evasion ni dilacion ninguna.

Se conviene que ninguna recla-

out of a transaction of a date prior to the 2d of February, 1848, shall be admissible under this convention.

macion que emane de acontecimientos de fecha anterior al 2 de Febrero de 1848, se admitirá con arreglo á esta convencion.

ARTICLE III.

Every claim shall be presented to the commissioners within eight months from the day of their first meeting, unless in any case where reasons for delay shall be established to the satisfaction of the commissioners, or of the umpire in the event of the commissioners differing in opinion thereupon, and then and in any such case the period for presenting the claim may be extended to any time not exceeding three months longer.

The commissioners shall be bound to examine and decide upon every claim within two years and six months from the day of their first meeting. It shall be competent for the commissioners conjointly, or for the umpire if they differ, to decide in each case whether any claim has or has not been duly made, preferred, and laid before them, either wholly or to any and what extent, according to the true intent and meaning of this convention.

ARTÍCULO III.

Todas las raclamaciones se presenterán á los comisionados dentro de ocho meses contados desde el dia de su primera reunion, á no ser en los casos en que se manifieste que haya habido razones para dilatarlas, siendo estas satisfactorias para los comisionados ó para el árbitro, si los comisionados no se convinieren, y en ese y otros casos semejantes, el periodo para la presentacion de las reclamaciones podrá estenderse por un plazo que no exceda de tres meses.

Los comisionados tendrán la obligacion de examinar y decidir todas las reclamaciones dentro de dos años y seis meses, contados desde el dia de su primera reunion. Los comisionados de comun acuerdo ó el árbitro, si ellos difirieren, podrán decidir en cada caso, si una reclamacion ha sido ó no debidamente hecha, comunicada y sometida á la comision, ya sea en su totalidad ó en parte y cual sea esta, con arreglo al verdadero espíritu y á letra de esta convencion.

ARTICLE IV.

When decisions shall have been made by the commissioners and the arbiter in every case which shall have been laid before them, the total amount awarded in all the cases decided in favor of the citizens of the one party shall be deducted from the total amount awarded to the citizens of the other party, and the balance, to the amount of three hundred thousand dollars, shall be paid at the city of Mexico, or at the city of Washington, in gold or its equivalent, within twelve months from the close of the commission, to the

ARTÍCULO IV.

Cuando los comisicnados y el árbitro hayan decidido todos los casos que les hayan sido debidamente sometidos, la suma total fallada en todos los casos decididos en favor de los ciudadanos de una parte, se deducirá de la suma total fallada en favor de los ciudadanos de la otra parte, y la diferencia hasta la cantidad de trescientos mil pesos en oro, ó su equivalente, se pagará en la ciudad de Mexico ó en la ciudad de Washington, al gobierno en favor de cuyos ciudadanos se haya fallado la mayor cantidad, sin interes, ni otra deduc-

government in favor of whose citizens the greater amount may have been awarded, without interest or any other deduction than that specified in Article VI of this convention. The residue of the said balance shall be paid in annual installments to an amount not exceeding three hundred thousand dollars in gold or it equivalent, in any one year until the whole shall have been paid.

cion que la especificada en el Artículo VI de esta convencion. El resto de dicha diferencia se pagará en abonos anuales que no excedan de trescientos mil pesos en oro, ó su equivalente, hasta que se haya pagado el total de la diferencia.

ARTICLE V.

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

ARTÍCULO V.

Las altas partes contratantes convienen en considerar el resulta do de los procedimientos de esta comision, como arreglo completo, perfecto y final, de toda reclamacion contra cualquiera gobierno, que proceda de acontecimientos de fecha anterior al canje de las ratificaciones de la presente convencion; y se comprometen ademas á que toda reclamacion, ya sea que se haya presentado ó no á la referida comision, sera considerada y tratada, concluidos los procedimientos de dicha comision, como finalmente arreglada, desechada y para siempre inadmisible.

ARTICLE VI.

The commissioners and the umpire shall keep an accurate record and correct minutes of their proceedings, with the dates. For that purpose they shall appoint two secretaries versed in the language of both countries to assist them in the transaction of the business of the commission. Each government shall pay to its commissioner an amount of salary not exceeding forty-five hundred dollars a year in the currency of the United States, which amount shall be the same for both governments. The amount of compensation to be paid to the umpire shall be determined by mutual consent at the close of the

ARTÍCULO VI.

Los comisionados y el árbitro llevarán una relacion fiel y actas esactas de sus procedimientos con especificacion de las fechas; con este objeto nombrarán dos secretarios versados en las lenguas de ambos paises, para que les ayuden en el arreglo de los asuntos de la comision. Cada gobierno pagará á su comisionado un sueldo que no exceda de cuatro mil quinientos pesos al año, en moneda corriente de los Estados Unidos, cuya cantidad será la misma para ambos gobiernos. La compensacion que haya de pagarse al árbitro se determinará por consentimiento mútuo, al terminarse la comision; pero

commission, but necessary and reasonable advances may be made by each government upon the joint recommendation of the commission. The salary of the secretaries shall not exceed the sum of twenty-five hundred dollars a year in the currency of the United States. The whole expenses of the commission, including contingent expenses, shall be defrayed by a ratable deduction on the amount of the sums awarded by the commission, provided always that such deduction shall not exceed five per cent. on the sums so awarded. The deficiency, if any, shall be defrayed in moieties by the two governments.

podrán hacerse por cada gobierno adelantos necesarios y razonables en virtud de la recomendacion de los dos comisionados. El sueldo de los secretarios no excederá de la suma de dos mil quinientos pesos al año, en moneda corriente de los Estados Unidos. Los gostos todos de la comision, incluyendo los contingentes, se pagarán con una reduccion proporcional de la cantidad total fallada por los comisionados, siempre que tal deduccion no exceda del cinco por ciento de las cantidades falladas. Si hubiere algun deficiente, lo cubrirán ambos gobiernos por mitad.

ARTICLE VII.

The present convention shall be ratified by the President of the United States, by and with the advice and consent of the Senate thereof, and by the President of the Mexican republic, with the approbation of the Congress of that republic, and the ratifications shall be exchanged at Washington within nine months from the date hereof, or sooner if possible.

In witness whereof the respective plenipotentiaries have signed the same and have affixed thereto the seals of their arms.

Done at Washington the fourth day of July, in the year of our Lord one thousand eight hundred and sixty-eight.

WILLIAM H. SEWARD. [L. S.]
M. ROMERO. [L. S.]

ARTÍCULO VII.

La presente convencion será ratificada por el Presidente de la república Mexicana, con aprobacion del Congreso de la misma, y por el Presidente de los Estados Unidos, con el consejo y aprobacion del Senado de los mismos, y las ratificaciones se cangearán en Washington dentro de nueve meses contados desde la fecha de la convencion, ó antes, si fuere posible.

En fé de lo cual, los respectivos plenipotenciarios la hemos firmado y sellado con nuestros sellos respectivos.

Hecho en Washington el dia cuatro de Julio, del año del Señor mil ochocientos sesenta y ocho.

M. ROMERO. [L. S.]
WILLIAM H. SEWARD. [L. S.]

And whereas the said convention has been duly ratified on both parts, and the respective ratifications of the same have this day been exchanged:

Now, therefore, be it known that I, ANDREW JOHNSON, President of the United States of America, have caused the said convention to be made public, to the end that the same, and every clause and article thereof, may be observed and fulfilled with good faith by the United States and the citizens thereof.

In testimony whereof I have hereunto set my hand, and caused the seal of the United States to be affixed.

Done at the city of Washington this first day of February, in the year of our Lord one thousand eight hundred and sixty-nine, and of the Independence of the United States of America the ninety-third. [SEAL.]

ANDREW JOHNSON.

By the President:
WILLIAM H. SEWARD,
Secretary of State.

CONVENTION BETWEEN THE UNITED STATES OF AMERICA AND THE UNITED STATES OF MEXICO—EXTENSION OF THE DURATION OF THE JOINT COMMISSION FOR SETTLEMENT OF CLAIMS.

Signed April 19, 1871.
Ratified December 15, 1871.
Exchanged February 8, 1872.
Proclaimed February 8, 1872.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

Whereas a convention between the United States of America and the United States of Mexico was concluded and signed by their respective plenipotentiaries, at the city of Mexico, on the nineteenth day of April, in the year of our Lord one thousand eight hundred and seventy-one, for extending the time limited by the convention between the two countries of the 4th of July, 1868, for the termination of the proceedings of the joint commission provided for by the latter instrument; which convention, being in the English and Spanish languages, is word for word as follows:

Whereas a convention was concluded on the 4th day of July, 1868, between the United States of America and the United States of Mexico, for the settlement of outstanding claims that have originated since the signing of the treaty of Guadalupe Hidalgo, on the 2d of February, 1848, by a mixed commission limited to endure for two years and six months from the day of the first meeting of the commissioners; and whereas doubts have arisen as to the practicability of the business of the said commission being concluded within the period assigned:

The President of the United States of America and the President of the United States of Mex-

Considerando que fué concluida, en 4 de Julio de 1868, una convencion entre los Estados Unidos Mexicanos y los Estados Unidos de América, para el arreglo de las reclamaciones pendientes que se habian originado despues de firmado el tratado de Guadalupe Hidalgo en 2 de Febrero de 1848, por medio de una comision mixta, cuya duracion fué limitada por el término de dos años y seis meses, contados desde el dia de la primera reunion de los comisionados; y considerando que se ha puesto en duda la posibilidad de que sean concluidos dentro del término señalado los negocios pendientes ante dicha comision:

El Presidente de los Estados Unidos Mexicanos y el Presidente de los Estados Unidos de América

ico are desirous that the time originally fixed for the duration of the said commission should be extended, and to this end have named plenipotentiaries to agree upon the best mode of effecting this object, that is to say: The President of the United States of America, Thomas H. Nelson, accredited as Envoy Extraordinary and Minister Plenipotentiary of the United States of America to the Mexican Republic; and the President of the United States of Mexico, Manuel Azpiroz, Chief Clerk and in charge of the Ministry of Foreign Relations of the United States of Mexico; who, after having presented their respective powers, and finding them sufficient and in due form, have agreed upon the following articles:

desean que el tiempo primitivamente fijado para la duracion de dicha comision sea prorogado, y para alcanzar este fin de mejor modo por medio de una convencion han nombrado plenipotenciarios, á saber El Presidente de los Estados Unidos Mexicanos á Manuel Azpiroz, Oficial Mayor encargado del Ministerio de relaciones Exteriores de los Estados Unidos Mexicanos; y el Presidente de los Estados Unidos de América á Thomas H. Nelson, acreditado como Enviado Extraordinario y Ministro Plenipotenciario de los Estados Unidos de América en Mexico; quienes, despues de haberse mostrado sus respectivos poderes y de haberlos hallado bastantes y en debida forma, han convenido en los artículos siguientes:

Article I.

The high contracting parties agree that the term assigned in the convention of the 4th of July, 1868, above referred to, for the duration of the said commission, shall be extended for a time not exceeding one year from the day when the functions of the said commission would terminate according to the convention referred to, or for a shorter time if it should be deemed sufficient by the commissioners, or the umpire, in case of their disagreement.

It is agreed that nothing contained in this article shall in any wise alter or extend the time originally fixed in the said convention for the presentation of claims to the mixed commission.

Artículo I.

Las altas partes contratentes convienen en que el término señalado en la convencion de 4 de Julio de 1868, arriba citada, para la duracion de dicha comision, sea prorogado por un tiempo que no exceda de un año, contado desde el dia en que, segun la convencion citada, deberian terminar las funciones de la misma comision, ó por un tiempo menor que sea bastante á juicio de los comisionados, ó del arbitro en caso de discordia entre ellos.

Queda convenido, que por este artículo no se alteran ó prorogan de ningun modo los términos prefijados en la citada convencion para la presentacion de reclamaciones ante la comision mixta.

Article II.

The present convention shall be ratified, and the ratifications shall be exchanged at Washington, as soon as possible.

In witness whereof the above-mentioned plenipotentiaries have

Artículo II.

La presente convencion será ratificada, y las ratificaciones serán cangeadas en Washington, á la mayor brevedad.

En fé de lo cual los plenipotenciarios arriba nombrados firman

signed the same and affixed their respective seals.

Done in the city of Mexico the 19th day of April, in the year one thousand eight hundred and seventy-one.

[SEAL.] THOMAS H. NELSON.
[SEAL.] MANUEL AZPIROZ.

la presente convencion, poniendo en ella sus sellos respectívos.

Hecha en México el dia diez y nueve de Abril del año mil ochocientos setenta y uno.

[SEAL.] MANUEL AZPIROZ.
[SEAL.] THOMAS H. NELSON.

And whereas the said convention has been duly ratified in both parts, and the respective ratifications of the same have been exchanged:

Now, therefore, be it known that I, ULYSSES S. GRANT, President of the United States of America, have caused the said convention to be made public, to the end that the same, and every clause and article thereof, may be observed and fulfilled with good faith by the United States and the citizens thereof.

In testimony whereof I have hereunto set my hand, and caused the seal of the United States to be affixed.

Done at the city of Washington this eighth day of February, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the United States of America the ninety-sixth.

[SEAL.]

U. S. GRANT.

By the President:
HAMILTON FISH,
Secretary of State.

CONVENTION BETWEEN THE UNITED STATES OF AMERICA AND THE UNITED STATES OF MEXICO.—REVIVAL AND FURTHER EXTENSION OF DURATION OF THE JOINT COMMISSION FOR THE SETTLEMENT OF CLAIMS.

Concluded November 27, 1872.
Ratification advised by Senate with amendment, March 9. 1873.
Ratified by President March 10, 1873.
Ratifications exchanged at Washington July 17, 1873.
Proclaimed July 24, 1873.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

Whereas a convention between the United States of America and the United States of Mexico, for further extending the time fixed by the convention between the same parties of the 4th July, 1868, for the duration of the joint commission on the subject of claims, was concluded and signed by their respective Plenipotentiaries, at Washington, on the twenty-seventh day of November last, which convention, after having been amended and ratified by the contracting parties, is word for word as follows:

Whereas, by the convention concluded between the United States and the Mexican Republic on the

Considerando que por la convencion celebrada entre la República Mejicana y los Estados Unidos el 4

fourth day of July, 1868, certain claims of citizens of the contracting parties were submitted to a joint commission, whose functions were to terminate within two years and six months, reckoning from the day of the first meeting of the commissioners; and whereas the functions of the aforesaid joint commission were extended, according to the convention concluded between the same parties on the nineteenth day of April, 1871, for a term not exceeding one year from the day on which they were to terminate according to the first convention; and whereas the possibility of said commission's concluding its labors even within the period fixed by the aforesaid convention of April nineteenth, 1871, is doubtful:

Therefore, the President of the United States of America and the President of the United States of Mexico, desiring that the term of the aforementioned commission should be again extended, in order to attain this end, have appointed, the President of the United States Hamilton Fish, Secretary of State, and the President of the United States of Mexico Ignacio Mariscal, accredited to the Government of the United States as Envoy Extraordinary and Minister Plenipotentiary of said United States of Mexico, who, having exchanged their respective powers, which were found sufficient and in due form, have agreed upon the following articles:

ARTICLE I.

The high contracting parties agree that the said commission be revived and that the time fixed by the convention of April nineteenth, 1871, for the duration of the commission aforesaid, shall be extended for a term not exceeding two years from the day on which the functions of the said commission would terminate according to

de Julio de 1868, ciertas reclamaciones de los ciudadanos de las partes contratantes fueron sometidas á una comision mixta cuyas funciones habian de concluir dentro de dos años y seis meses contados desde el dia de la primera reunion de los comisionados; que las funciones de la expresada comision mixta fueron prorogadas, en virtud de la convencion celebrada entre las mismas partes el 19 de Abril de 1871, por un término que no pasase de un año contado desde el dia en que debian terminar con arreglo á la primera convencion; y por cuanto á que es dudosa la posibilidad de que dicha comision concluya sus trabajos aun dentro del periodo fijado por la mencionada convencion del 19 de Abril de 1871.

El Presidente de los Estados Unidos Mejicanos y el Presidente de los Estados Unidos de América, deseosos de que el término de la referida comision sea nuevamente prorogado, para llegar á este fin han nombrado Plenipotenciarios, el Presidente de los Estados Unidos Mejicanos á Don Ignacio Mariscal, acreditado ante el Gobierno de los Estados Unidos como Enviado Extraordinario y Ministro Plenipotenciario de dichos Estados Unidos Mejicanos, y el Presidente de los Estados Unidos á Hamilton Fish, Secretario de Estado, quienes, habiendo cangeado sus respectivos poderes, que se encontraron bastantes y en debida forma, han convenido en los siguientes artículos:

ARTÍCULO I.

Las altas partes contratantes convienen en que reviva dicha comision y en que el tiempo designado en la convencion del 19 de Abril de 1871, para la duracion de la comision expresada, se prorogue por un término que no exceda de dos años contados des de el dia en que las funciones de la comision referida deberian concluir con

that convention, or for a shorter time if it should be deemed sufficient by the commissioners or the umpire, in case of their disagreement.

It is agreed that nothing contained in this article shall in any wise alter or extend the time originally fixed in the said convention for the presentation of claims to the commission.

arreglo á esa convencion, ó por menos tiempo si lo creyeren bastante los comisionados, ó el árbitro en caso de disentimiento.

Queda convenido que nada de lo que contiene este artículo alterará de modo alguno, ó extenderá el plazo fijado en dicha convencion para presentar reclamaciones ante la comision mixta.

ARTICLE II.

The present convention shall be ratified and the ratifications shall be exchanged at Washington as soon as possible.

In witness whereof, the above-named Plenipotentiaries have signed the same and affixed their respective seals.

Done in the city of Washington the twenty-seventh day of November, in the year one thousand eight hundred and seventy-two.

[SEAL.] HAMILTON FISH.
[SEAL.] IGNO. MARISCAL.

ARTÍCULO II.

La presente convencion será ratificada y las ratificaciones cangeadas en Washington á la mayor brevedad posible.

En testimonio de lo cual, los referidos Plenipotenciarios han firmado esta convencion, y puéstole sus respectivos sellos.

Fecha en la ciudad de Washington el dia veinte y siete de Noviembre del año mil ochocientos setenta y dos.

HAMILTON FISH. [SEAL.]
IGNO. MARISCAL. [SEAL.]

And whereas the said convention, as amended, has been duly ratified on both parts, and the respective ratifications of the same were exchanged at Washington on the 17th instant:

Now, therefore, be it known that I, ULYSSES S. GRANT, President of the United States of America, have caused the said convention to be made public, to the end that the same, and every clause and article thereof, may be observed and fulfilled by the United States and the citizens thereof.

In witness whereof, I have hereunto set my hand, and caused the seal of the United States to be affixed.

Done at the city of Washington this twenty-fourth day of July, in the year of our Lord one thousand eight hundred and seventy-three, and of the Independence of the United States the ninety-eighth.

[SEAL.]

U. S. GRANT.

By the President:
J. C. BANCROFT DAVIS,
Acting Secretary of State.

CONVENTION BETWEEN THE UNITED STATES OF AMERICA AND THE MEXICAN REPUBLIC FOR THE FURTHER EXTENSION OF THE DURATION OF THE JOINT COMMISSION RESPECTING CLAIMS, ORIGINALLY FIXED BY THE CONVENTION OF JULY 4, 1868.

Concluded November 20, 1874.
Ratification advised by Senate January 20, 1875.
Ratified by President January 22, 1875.
Ratified by President of Mexico December 21, 1874.
Ratifications exchanged at Washington January 28, 1875.
Proclaimed January 29, 1875.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

Whereas a convention between the United States of America and the Mexican Republic for further extending the time originally fixed by the convention between the same parties of the 4th of July, 1868, and extended by those of the 19th of April, 1871, and of the 27th of November, 1872, for the duration of the joint commission on the subject of claims, was concluded and signed by their respective Plenipotentiaries at Washington on the 20th day of November, 1874, the original of which convention, being in the English and Spanish languages, is word for word as follows:

Convention between the United States of America and the Mexican Republic.

Whereas, pursuant to the convention between the United States and the Mexican Republic of the 19th day of April, 1871, the functionsof the jointcommisssionunder the convention between the same parties of the 3th of July, 1868, were extended for a term not exceeding one year from the day on which they were to terminate according to the convention last named;

And whereas, pursuant to the first article of the convention between the same parties, of the twenty-seventh day of November, one thousand eight hundred and seventy-two, the joint commission above referred to was revived and again extended for a term not exceeding two years from the day on which the functions of the said

Convencion entra la República Mexicana y los Estados Unidos de América.

Considerando: Que, conforme á la convencion celebrada entre la República Mexicana y los Estados Unidos el 19 de Abril de 1871, las funciones de la comision mista establecida por la convencion entre las mismas partes, del 4 de Julio de 1868, fueron prorogadas por un término que no excediera de un año contado desde el dia en que debian terminar con arreglo á la convencion últimamente citada;

Y que, si bien conforme al artículo primero de la convencion entre las mismas partes, del veintisiete de Noviembre de mil ochocientos setenta y dos, la referida comision mista fué revivida y de nuevo prorogada por un término que no excediese de dos años contados desde el dia en que las funciones de dicha comision habian de ter-

commission would terminate pursuant to the said convention of the nineteenth day of April, 1871; but whereas the said extensions have not proved sufficient for the disposal of the business before the said commission, the said parties being equally animated by a desire that all that business should be closed, as originally contemplated, the President of the United States has for this purpose conferred full powers on Hamilton Fish, Seretary of State, and the President of the Mexican Republic has conferred like powers on Don Ignacio Mariscal, Envoy Extraordinary and Minister Plenipotentiary of that republic to the United States; and the said Plenipotentiaries having exchanged their full powers, which were found to be in due form, have agreed upon the following articles:

ARTICLE I.

The high contracting parties agree that the said commission shall again be extended, and that the time now fixed for its duration shall be prolonged for one year from the time when it would have expired pursuant to the convention of the twenty-seventh of November, 1872; that is to say, until the thirty-first day of January, in the year one thousand eight hundred and seventy-six.

It is, however, agreed that nothing contained in this article shall in any wise alter or extend the time originally fixed by the convention of the 4th July, 1868, aforesaid, for the presentation of claims to the commission.

ARTICLE II.

It is further agreed that, if at the expiration of the time when, pursuant to the first article of this con-

minar segun la citada convencion del diez y nueve de Abril de 1871, dichas prórogas no han sido suficientes para el despacho de los negocios pendientes ante dicha comision, hallándose las referidas partes igualmente animadas del deseo de que todos esos negocios queden concluidos como se estipuló originalmente, el Presidente de la República Mexicana ha conferido con este fin plenos poderas á Don Ignacio Mariscal, Enviado Extraordinario y Ministro Plenipotenciaro de dicha República en los Estados Unidos, y el Presidente de los Estados Unidos ha conferido iguales poderes á Hamilton Fish, Secretario de Estado. Y estos Plenipotenciarios, habiendo cangeado sus poderes plenos, que se encontraron en debida forma, han convenido en los artículos siguientes:

ARTÍCULO I.

Las altas partes contratantes convienen en que el término ahora fijado para la duracion de la comision mencionada se extienda de nuevo, prorogándose por un año contado desde el tiempo en que espiraria con arreglo á la convencion del veintisiete de Noviembre de mil ochocientos setenta y dos: es decir, hasta el treinta y uno de Enero de mil ochocientos setenta y seis.

Queda sin embargo convenido que nada de lo que contiene este artículo alterará ó extenderá de modo alguno el término originalmente fijado por la convencion del cuatro de Julio de mil ochocientos sesenta y ocho, ya referida, para presentar reclamaciones ante la comision.

ARTÍCULO II.

Se conviene ademas en que, si al espirar el tiempo en que conforme al artículo primero de la presente

vention, the functions of the commissioners will terminate, the umpire under the convention should not have decided all the cases which may then have been referred to him, he shall be allowed a further period of not more than six months for that purpose.

convencion terminen las funciones de los comisionados, el árbitro establecido por la convencion no hubiese decidido todos los casos que se le hubieren sometido hasta entónces, quedará facultado para hacerlo en un nuevo periodo que no exceda de seis meses.

ARTICLE III.

All cases which have been decided by the commissioners or by the umpire heretofore, or which shall be decided prior to the exchange of the ratifications of this convention, shall from the date of such exchange be regarded as definitively disposed of, and shall be considered and treated as finally settled, barred, and thenceforth inadmissible. And, pursuant to the stipulation contained in the fourth article of the convention of the fourth day of July, one thousand eight hundred and sixty-eight, the total amount awarded in cases already decided, and which may be decided before the exchange of ratifications of this convention, and in all cases which shall be decided within the times in this convention respectively named for that purpose, either by the commissioners or by the umpire, in favor of citizens of the one party shall be deducted from the total amount awarded to the citizens of the other party, and the balance, to the amount of three hundred thousand dollars, shall be paid at the city of Mexico, or at the city of Washington, in gold or its equivalent, within twelve months from the 31st day of January, one thousand eight hundred and seventy-six, to the government in favor of whose citizens the greater amount may have been awarded, without interest or any other deduction than that specified in article VI of that convention. The residue of

ARTÍCULO III.

Todas las reclamaciones que han sido sentenciadas por los comisionados ó por el árbitro hasta la presente fecha, ó que sean sentenciadas ántes del cange de las ratificaciones de esta convencion, serán consideradas desde la fecha de ese cange como definitivamente resueltas, y se considerarán y tratarán como finalmente arregladas y en lo futuro inadmisibles. Y, conforme á la estipulacion contenida en el artículo cuarto de la convencion del cuatro de Julio de 1868, la suma total fallada en casos ya decididos, y que se decidan ántes del cange de ratificaciones de esta convencion, y en todos los casos que estuvieren decididos dentro de los plazos respectivamente fijados con tal fin en la convencion presente, ya sea por los comisionados ó por el árbitro, en favor de ciudadanos de una de las partes, será deducida de la suma total fallada en favor de los ciudadanos de la otra parte, y la diferencia hasta la cantidad de trescientos mil pesos, se pagará en la ciudad de México ó en la de Washington, en oro ó su equivalente, dentro de doce meses contados desde el 31 de Enero de mil ochocientos setenta y seis, al gobierno en favor de cuyos ciudadanos se hubiere fallado la mayor cantidad, sin interes, ni otra deduccion que la especificada en el artículo VI de aquella convencion. El resto de dicha diferencia se pagará en abonos anuales que no excedan de trescientos mil pesos en oro, ó su

the said balance shall be paid in annual instalments, to an amount not exceeding three hundred thousand dollars, in gold or its equivalent, in any one year, until the whole shall have been paid.

equivalente, hasta que se haya pagado el total de la diferencia.

ARTICLE IV.

The present convention shall be ratified, and the ratification shall be exchanged at Washington, as soon as possible.

In witness whereof the above-named Plenipotentiaries have signed the same and affixed thereto their respective seals.

Done in Washington the twentieth day of November, in the year one thousand eight hundred and seventy-four.

[SEAL.] HAMILTON FISH.
[SEAL.] IGNO. MARISCAL.

ARTÍCULO IV.

La presente convencion será ratificada y las ratificaciones se cangearán en Washington á la brevedad posible.

En testimonio de lo cual, los Plenipotenciarios ántes mencionados firmaron la presente y le pusieron sus respectivos sellos.

Hecho en Washington el dia veinte de Noviembre del año mil ochocientos setenta y cuatro.

[SELLO.] IGNO. MARISCAL.
[SELLO.] HAMILTON FISH.

And whereas the said convention has been duly ratified on both parts, and the respective ratifications were exchanged in this city on the 28th instant:

Now, therefore, be it known that I, ULYSSUS S. GRANT, President of the United States of America, have caused the said convention to be made public, to the end that the same, and every clause and article thereof, may be observed and fulfilled with good faith by the United States and the citizens thereof.

In witness whereof I have hereunto set my hand, and caused the seal of the United States to be affixed.

Done at the city of Washington, this twenty-ninth day of January, in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the United States the ninety-ninth.

[SEAL.]

U. S. GRANT.

By the President:
HAMILTON FISH,
Secretary of State.

CONVENTION BETWEEN THE UNITED STATES OF AMERICA AND THE MEXICAN REPUBLIC FOR EXTENDING THE FUNCTIONS OF THE UMPIRE UNDER THE CONVENTION OF JULY 4, 1868.

Concluded April 29, 1876.
Ratification advised by Senate May 24, 1876.
Ratified by the President June 27, 1876.
Ratified by the President of Mexico May 30, 1876.
Ratifications exchanged at Washington June 29, 1876.
Proclaimed June 29, 1876.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

Whereas a Convention between the United States of America and the Mexican Republic for extending the functions of the Umpire under the Convention between the two countries of the 4th of July, 1868, was concluded and signed by their respective Plenipotentiaries, at the city of Washington, on the twenty-ninth day of April, eighteen hundred and seventy-six, which Convention, being in the English and Spanish languages, is word for word as follows:

Convention between the United States of America and the Mexican Republic.

Whereas pursuant to the convention between the United States and the Mexican Republic of the 19th day of April, 1871, the functions of the joint commission under the convention between the same parties of the 4th of July, 1868, were extended for a term not exceeding one year from the day on which they were to terminate according to the convention last named;

And whereas, pursuant to the first article of the convention between the same parties, of the twenty-seventh day of November, one thousand eight hundred and seventy-two, the joint commission above referred to was revived and again extended for a term not exceeding two years from the day on which the functions of the said commission would terminate pursuant to the said convention of the nineteenth day of April, 1871;

And whereas pursuant to the convention between the same par-

Convencion entre la República Mexicana y los Estados Unidos de América.

Considerando: Que, conforme á la convencion celebrada entre la República Mexicana y los Estados Unidos el 19 de Abril de 1871, las funciones de la comision mixta establecida por la convencion entre las mismas partes, del 4 de Julio de 1868, fueron prorogadas por un término que no excediera de un año, contado desde el dia en que debian terminar con arreglo á la convencion últimamente citada:

Que, conforme al artículo primero de la convencion concluida entre las mismas partes el veintisiete de Noviembre de mil ochocientos sentata y dos, la comision mista antes mencionada fué revivida y prorogada de nuevo por un término que no excediera de dos años, contados desde el dia en que las funciones de dicha comision terminasen con arreglo á la citada convencion del diez y nueve de Abril de 1871:

Que, conforme á la convencion celebrada entre las mismas partes

ties, of the twentieth day of November, one thousand eight hundred and seventy-four, the said commission was again extended for one year from the time when it would have expired pursuant to the convention of the twenty-seventh of November, one thousand eight hundred and seventy-two, that is to say, until the thirty-first day of January, one thousand eight hundred and seventy-six; and it was provided that if at the expiration of that time, the umpire under the convention should not have decided all the cases which may then have been referred to him, he should be allowed a further period of not more than six months for that purpose:

And whereas it is found to be impracticable for the umpire appointed pursuant to the convention adverted to, to decide all the cases referred to him, within the said period of six months prescribed by the convention of the twentieth of November, one thousand eight hundred and seventy-four;

And the parties being still animated by a desire that all that business should be closed as originally contemplated, the President of the United States has for this purpose conferred full powers on Hamilton Fish, Secretary of State, and the President of the Mexican Republic has conferred like powers on Don Ignacio Mariscal, Envoy Extraordinary and Minister Plenipotentiary of that Republic to the United States; and the said Plenipotentiaries having exchanged their full powers, which were found to be in due form, have agreed upon the following articles:

el veinte de Noviembre de mil ochocientos setenta y cuatro, dicha comision fué de nuevo prorogada por un año contado desde el tiempo en que habria espirado con arreglo á la convencion del veintisiete de Noviembre de mil ochocientos setenta y dos, es decir, hasta el dia trienta y uno de Enero de mil ochocientos setenta y seis; y se dispuso que si, al expirar aquel término, el árbitro nombrado en virtud de la convencion no hubiese decidido todos los caso que hasta entónces se le hubieran sometido, se le concedería un nuevo periodo que no excediera de seis meses, para ese objeto:

Que ya se conoce la imposibilidad de que el árbitro nombrado en virtud de la convencion á que se alude decida todos los casos que se le han sometido, dentro de dicho periodo de seis meses señalado por la convencion del veinte de Noviembre de mil ochocientos setenta y cuatro;

Y hallándose las referidas partes igualmente animadas del deseo de que todos esos negocios queden concluidos como se estipuló originalmente, el Presidente de la República Mexicana ha conferido con este fin plenos poderes á Don Ignacio Mariscal, Enviado Extraordinario y Ministro Plenipotenciario de dicha República en los Estados Unidos, y el Presidente de los Estados Unidos ha conferido iguales poderes á Hamilton Fish, Secretario de Estado. Y estos Plenipotenciarios, habiendo cangeado sus poderes plenos, que se encontraron en debida forma, han convenido en los artículos siguientes:

Article I.

The high contracting parties agree that if the umpire appointed under the convention above referred to shall not, on or before the

Artículo I.

Las altas partes contratantes convienen en que si el árbitro nombrado en virtud de la convencion á que antes se alude no hubiere de-

expiration of the six months allowed for the purpose by the second article of the convention of the twentieth of November, one thousand eight hundred and seventy-four, have decided all the cases referred to him, he shall then be allowed a further period until the twentieth day of November, one thousand eight hundred and seventy-six, for that purpose.

cidido todos los casos que se le hayan sometido, al espirar los seis meses concedidos con tal objeto por el artículo segundo de la convencion del veinte de Noviembre de mil ochocientos setenta y cuatro, se le concederá un nuevo término hasta el veinte de Noviembre de mil ochocientos setenta y seis, con el referido objeto.

ARTICLE II.

It is further agreed that so soon after the twentieth day of November, one thousand eight hundred and seventy-six, as may be practicable, the total amount awarded in all cases already decided, whether by the commissioners or by the umpire, and which may be decided before the said twentieth day of November, in favor of citizens of the one party, shall be deducted from the total amount awarded to the citizens of the other party, and the balance, to the amount of three hundred thousand dollars, shall be paid at the city of Mexico, or at the city of Washington, in gold or its equivalent, on or before the thirty-first day of January, one thousand eight hundred and seventy-seven, to the government in favor of whose citizens the greater amount may have been awarded, without interest or any other deduction than that specified in article VI of the said convention of July, 1868. The residue of the said balance shall be paid in annual instalments on the thirty-first day of January in each year, to an amount not exceeding three hundred thousand dollars, in gold or its equivalent, in any one year, until the whole shall have been paid.

ARTÍCULO II.

Se conviene ademas en que á la mayor brevedad posible despues del veinte de Noviembre de mil ochocientos setenta y seis, el monto total fallado en todos los casos ya decididos, bien sea por los comisionados, ó bien por el árbitro, y que fueren decididos antes del mencionado dia del mes de Noviembre en favor de ciudadanos de una de las partes, será deducido del monto total concedido á los ciudadanos de la otra parte, y la diferencia hasta la suma de trescientos mil pesos, será pagada en la ciudad de México, ó en la ciudad de Washington, en oro ó su equivalente, el treinta y uno de Enero de mil ochocientos setenta y siete, ó antes, al gobierno en favor de cuyos ciudadanos se hubiere fallado la cantidad mayor, sin interes ni otra deduccion que no sea la especificada en el artículo VI de dicha convencion de Julio de 1868. El resto de dicha diferencia será pagado en anualidades el dia treinta y uno de Enero de cada año, no excediendo ninguna anualidad de trescientos mil pesos en oro ó su equivalente, hasta que el total quedare cubierto.

ARTICLE III.

The present convention shall be ratified, and the ratifications shall be exchanged at Washington, as soon as possible.

ARTÍCULO III.

La presente convencion será ratificada y las ratificaciones se cangearán en Washington tan pronto como sea posible.

In witness whereof the above-named plenipotentiaries have signed the same and affixed thereto their respective seals.

Done in Washington the twenty-ninth day of April, in the year one thousand eight hundred and seventy-six.

HAMILTON FISH. [SEAL.]
IGN°. MARISCAL. [SEAL.]

En testimonio de lo cual los Plenipotenciarios antes mencionados han firmado la presente y puéstole sus respectivos sellos.

Fech° en Washington el dia veintinueve de Abril del año de mil ochocientos setenta y seis.

IGN°. MARISCAL. [SEAL.]
HAMILTON FISH. [SEAL.]

And whereas the said Convention has been duly ratified on both parts, and the respective ratifications of the same have this day been exchanged:

Now, therefore, be it known that I, ULYSSES S. GRANT, President of the United States of America, have caused the said Convention to be made public, to the end that the same, and every clause and article thereof, may be observed and fulfilled with good faith by the United States by the citizens thereof.

In testimony whereof I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the city of Washington this twenty-ninth day of June, in the year of our Lord one thousand eight hundred and seventy-six, [SEAL.] and of the Independence of the United States of America the one hundreth.

U. S. GRANT.

By the President:
HAMILTON FISH,
Secretary of State.

PROTOCOL OF AN AGREEMENT BETWEEN THE UNITED STATES AND THE REPUBLIC OF MEXICO FOR THE ADJUSTMENT OF CERTAIN CONTENTIONS ARISING UNDER WHAT IS KNOWN AS "THE PIOUS FUND OF THE CALIFORNIAS."

Signed at Washington May 22, 1902.

PROTOCOL OF AN AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF MEXICO FOR THE ADJUSTMENT OF CERTAIN CONTENTIONS ARISING UNDER WHAT IS KNOWN AS "THE PIOUS FUND OF THE CALIFORNIAS."

Whereas, under and by virtue of the provisions of a convention entered into between the High Contracting Parties above named, of date July 4, 1868, and subsequent conventions supplementary

PROTOCOLO DE COMPROMISO ENTRE LOS ESTADOS UNIDOS DE AMÉRICA Y LA REPÚBLICA DE MÉXICO PARA LA DECISIÓN DE CIERTAS CUESTIONES SUSCITADAS CON RESPECTO AL LLAMADO "FONDO PIADOSO DE LAS CALIFORNIAS."

Por cuanto, en virtud de las disposiciones de una Convención ajustada entre las Altas Partes Contratantes arriba mencionadas, con fecha 4 de Julio de 1868, y siguientes convenciones suplemen-

thereto, there was submitted to the Mixed Commission provided for by said Convention, a certain claim advanced by and on behalf of the prelates of the Roman Catholic Church of California against the Republic of Mexico for an annual interest upon a certain fund known as "The Pious Fund of the Californias," which interest was said to have accrued between February 2, 1848, the date of the signature of the Treaty of Guadalupe Hidalgo, and February 1, 1869, the date of the exchange of the ratifications of said Convention above referred to; and

Whereas, said Mixed Commission, after considering said claim, the same being designated as No. 493 upon its docket, and entitled Thaddeus Amat, Roman Catholic Bishop of Montery, a corporation sole, and Joseph S. Alemany, Roman Catholic Bishop of San Francisco, a corporation sole, against The Republic of Mexico, adjudged the same adversely to the Republic of Mexico and in favor of said claimants, and made an award thereon of Nine Hundred and Four Thousand, Seven Hundred and 99/100 (904,700.99) Dollars; the same, as expressed in the findings of said Court, being for twenty-one years' interest of the annual amount of Forty-three Thousand and Eighty and 99/100 (43,080.99) Dollars upon Seven Hundred and Eighteen Thousand and Sixteen and 50/100 (718,016.50) Dollars, said award being in Mexican gold dollars, and the said amount of Nine Hundred and Four Thousand, Seven Hundred and 99/100 (904,700.99) Dollars having been fully paid and discharged in accordance with the terms of said convention; and

Whereas, the United States of America on behalf of said Roman Catholic Bishops, above named,

tarias de ella, fué sometida á la Comisión Mixta establecida por dicha Convención una reclamación presentada por parte y en favor de los prelados de la Iglesia Católica Romana de California contra la República de México, por réditos anuales de cierto fondo llamado el "Fondo Piadoso de las Californias," los cuales réditos se consideraron devengados desde el 2 de Febrero de 1848, fecha de la firma del tratado de Guadalupe Hidalgo, hasta el 1° de Febrero de 1869, fecha del canje de las ratificaciones de la Convención arriba referida; y

Por cuanto la indicada Comisión Mixta, después de examinar dicha reclamación, que fué señalada en el libro de registro con el número 493 e intitulada "Thaddeus Amat Obispo Católico Romano de Monterrey, por la corporación unitaria que representa, y Joseph S. Alemany Obispo Católico Romano de San Francisco, por la corporación unitaria que representa, contra la Republica de México" decidió la reclamación contra la República de México, y en favor de dichos reclamantes, dando un laudo por novecientos cuatro mil setecientos pesos noventa y nueve centavos (904,700.99); los cuales, como se expresa en la exposición de dicho tribunal, fueron el importe de réditos vencidos en veintiún años a razón de cuarenta y tres mil ochenta pesos noventa y nueve centavos ($43,080.99) anuales sobre la suma de setecientos diez y ocho mil diez y seis pesos cincuenta centavos ($718,016.50) y habían de pagarse en oro mexicano; y dicha suma de novecientos cuatro mil setecientos pesos noventa y nueve centavos ($904,700.99) fué completamente pagada y finiquitada en conformidad con los términos de dicha Convención; y

Por cuanto los Estados Unidos de América por los Obispos Católicos Romanos arriba nombrados

and their successors in title and interest, have since such award claimed from Mexico further instalments of said interest, and have insisted that the said claim was conclusively established, and its amount fixed as against Mexico and in favor of said original claimants and their successors in title and interest under the said first mentioned convention of 1868 by force of the said award as *res judicata;* and have further contended that apart from such former award their claim against Mexico was just, both of which propositions are controverted and denied by the Republic of Mexico, and the High Contracting Parties hereto, animated by a strong desire that the dispute so arising may be amicably, satisfactorily and justly settled, have agreed to submit said controversy to the determination of Arbitrators, who shall, unless otherwise herein expressed, be controlled by the provisions of the International Convention for the pacific settlement of international disputes, commonly known as The Hague Convention, and which arbitration shall have power to determine:

1. If said claim, as a consequence of the former decision, is within the governing principle of res judicata; and,

2. If not, whether the same be just.

And to render such judgment or award as may be meet and proper under all the circumstances of the case.

It is therefore agreed by and between the United States of America, through their representative, John Hay, Secretary of State of the United States of America, and the Republic of Mexico, through its representative, Manuel de Azpiroz, Ambas-

y sus sucesores con el mismo título é interés han reclamado á México después de dicho laudo los sucesivos vencimientos de dichos réditos y han insistido en que la expresada reclamación fué definitivamente juzgada y su monto fijado en contra de México y á favor de los primitivos reclamantes y de sus sucesores con el mismo título e interés, conforme á la primera Convención mencionada de 1868, en virtud de dicho laudo como *res judicata;* y han sostinido además que independientemente de tal laudo su reclamación contra México era justa; aserciones ambas que han sido controvertidas é impugnadas por la República de México, y las Altas Partes signatarias de este Compromiso, animadas de un vivo deseo de que la controversia así suscitada sea amigable, satisfactoria y justamente resuelta, han convenido en someter dicha controversia á la decisión de árbitros, quienes se ajustarán en todo lo que no se disponga de otro modo por el presente instrumento, á las prevenciones de la Convención international para el arreglo pacífico de controversias internacionales comunmente denominada "Convención de La Haya" y estarán facultados para resolver:

1°. Si dicha reclamación como consecuencia del laudo anterior está regida por el principio de *res judicata;* y

2°. De no estarlo, si es justa la misma reclamación.

Y para pronunciar un fallo ó laudo tal que sea adecuado y conveniente á todas las circumstancias del caso:

Por tanto, se conviene entre los Estados Unidos de América, representados por John Hay, Secretario de Estado de los Estados Unidos de América, y la República de México, representada por Manuel de Azpíroz, Embajador Extraordinario y Plenipotenciario de la Repú-

sador Extraordinary and Plenipotentiary to the United States of America for the Republic of Mexico as follows:

I.

That the said contentions be referred to the special tribunal hereinafter provided, for examination, determination and award.

II.

The special tribunal hereby constituted shall consist of four arbitrators, (two to be named by each of the High Contracting Parties) and an umpire to be selected in accordance with the provisions of the Hague Convention. The arbitrators to be named hereunder shall be signified by each of the High Contracting Parties to the other within sixty days after the date of this protocol. None of those so named shall be a native or citizen of the parties hereto. Judgment may be rendered by a majority of said court.

All vacancies occurring among the members of said court because of death, retirement or disability from any cause before a decision shall be reached, shall be filled in accordance with the method of appointment of the member affected as provided by said Hague Convention, and if occurring after said court shall have first assembled, will authorize in the judgment of the court an extension of time for hearing or judgment, as the case may be, not exceeding thirty days.

III.

All pleadings, testimony, proofs, arguments of counsel and findings or awards of commissioners or

blica de México en los Estados Unidos de América, en lo siguiente:

I.

Las referidas cuestiones serán sometidas al tribunal especial que en seguida se autoriza para examinarlas, determinarlas y fallarlas.

II.

El tribunal especial constituido por este instrumento se compondrá de cuatro árbitros, debiendo ser dos nombrados por cada una de las altas partes contratantes y un árbitro superior que será elegido con arreglo á las disposiciones de la Convención de La Haya. Los árbitros nombrados, como se ha dicho, por cada una de las Altas Partes Contratantes serán dados a conocer por la parte que los nombró a la otra parte dentro de sesenta días que correrán desde la fecha de este protocolo. Ninguno de los árbitros nombrados como se ha dicho será oriundo ó ciudadano de las partes contratantes. El laudo podrá ser pronunciado por mayoría de votos de dicho tribunal. Todas las vacantes que ocurran entre los miembros de dicho tribunal por causa de muerte, separación ó inhabilidad que provenga de causa anterior al pronunciamiento del laudo serán cubiertas del mismo modo que fué nombrado el miembro cesante, como se dispone en la Convención de La Haya, y si ocurrieren después que dicho tribunal se haya instalado podrán justificar, á juicio del tribunal, una prórroga del término señalado para la audiencia ó resolución, según sea el caso, con tal que ella no pase de treinta días.

III.

Todas las alegaciones, testimonios, pruebas, informes en derecho y conclusiones ó laudos de los

umpire, filed before or arrived at by the Mixed Commission above referred to, are to be placed in evidence before the Court hereinbefore provided for, together with all correspondence between the two countries relating to the subject matter involved in this arbitration; originals or copies thereof duly certified by the Departments of State of the High Contracting Parties being presented to said new tribunal. Where printed books are referred to in evidence by either party, the party offering the same shall specify volume, edition and page of the portion desired to be read, and shall furnish the Court in print the extracts relied upon; their accuracy being attested by affidavit. If the original work is not already on file as a portion of the record of the former Mixed Commission, the book itself shall be placed at the disposal of the opposite party in the respective offices of the Secretary of State or of the Mexican Ambassador in Washington, as the case may be, thirty days before the meeting of the tribunal herein provided for.

Comisionados ó del tercero en discordia, presentados ante la Comisión Mixta arriba referida ó acordados por ella, son de aducirse como pruebas ante el tribunal que ahora se nombra, juntamente con toda la correspondencia habida entre los dos países concerniente á los puntos comprendidos en este arbitramento; exhibiéndose al nuevo tribunal dichos documentos originales ó copias de ellos debidamente certificados por los Departamentos de Estado respectivos de las Altas Partes Contratantes. Cuando cualquiera de las dos partes cite libros impresos por vía de prueba, la que ofrezca tal prueba especificará el volumen, edición y página de la parte que quiera se lea, y proporcionara al tribunal impresos de los pasajes que deseare hacer valer, cuya exactitud será comprobada con testimonio legal; y si la obra original no está ya formando parte del archivo de la primera Comisión Mixta, el libro mismo será puesto á disposición de la parte contraria, en los despachos respectivos del Secretario de Estado ó del Embajador Mexicano en Washington, según sea el caso, treinta días antes de la reunión de tribunal que aquí se nombra.

IV.

Either party may demand from the other the discovery of any fact or of any document deemed to be or to contain material evidence for the party asking it; the document desired to be described with sufficient accuracy for identification, and the demanded discovery shall be made by delivering a statement of the fact or by depositing a copy of such document (certified by its lawful custodian, if it be a public document, and verified as such by the possessor, if a private one), and the opposite party shall be given the opportunity to examine

IV.

Cada parte podrá pedir á la otra que dé á conocer cualquier hecho ó documento considerado como prueba ó que contenga materia de prueba interesante á la parte que la solicita; debiendo ser descrito el documento deseado con suficiente exactitud para su identificación; y se dará la noticia se hará la exhibición pedida, mediante una relación del hecho, ó el depósito de una copia de dicho documento (certificada por quien lo tenga legalmente en guarda si es un documento público, y autorizada por su poseedor si el documento

the original in the City of Washington at the Department of State, or at the office of the Mexican Ambassador, as the case may be. If notice of the desired discovery be given too late to be answered ten days before the tribunal herein provided for shall sit for hearing, then the answer desired thereto shall be filed with or documents produced before the court herein provided for as speedily as possible.

fuero privado) y á la parte contraria se deberá dar la oportunidad de examinar el original en la ciudad de Washington en el Departamento de Estado ó en el despacho del Embajador de México según fuere el caso. Si la noticia ó exhibicion deseada se obtuviere demasiado tarde para que pueda ser contestada diez días antes que el tribunal acquí establecido abra la audiencia, en tal caso la contestacíon que se dé al pedimento, ó el documento que se produzca, se presentará al tribunal acquí establecido, tan pronto como fuere posible.

V.

Any oral testimony additional to that in the record of the former arbitration may be taken by either party before any Judge or Clerk of Court of Record, or any Notary Public, in the manner and with the precautions and conditions prescribed for that purpose in the rules of the Joint Commission of the United States of America, and the Republic of Mexico, as ordered and adopted by that tribunal August 10, 1869, and so far as the same may be applicable. The testimony when reduced to writing, signed by the witness, and authenticated by the officer before whom the same is taken, shall be sealed up, addressed to the court constituted hereby, and deposited so sealed up in the Department of State of the United States, or in the Department of Foreign Relations of Mexico to be delivered to the Court herein provided for when the same shall convene.

V.

Todo testimonio oral que no conste en el archivo del primer arbitramento podrá rendirse por cualquiera de las partes ante algún juez ó secretario de juzgado de letras ó notario público, de la manera, con las precauciones y bajo las condiciones prescritas para tal caso en las reglas de la Comisión Mixta de México y los Estados Unidos de América, y adoptadas por dicho tribunal el 10 de Agosto de 1869, en todo lo que sean aplicables. Cuando el testimonio se extienda por escrito, firmado que sea por el testigo y legalizado por el funcionario ante quien se haya rendido, deberá ser sellado, dirigido al tribunal que aquí se establece, y así sellado se entregará en depósito en el Despacho de Relaciones exteriores de México ó en el Departamento de Estado de los Estados Unidos á fin de que sea remitido al tribunal que aquí se establece cuando el mismo se reúna.

VI.

Within sixty days from the date hereof the United States of America, through their agent or counsel, shall prepare and furnish to the Department of State aforesaid,

VI.

Dentro de sesenta días desde la fecha de este instrumento la parte de los Estados Unidos de América, por medio de su agente ó abogado, deberá preparar y entregar al

a memorial in print of the origin and amount of their claim, accompanied by references to printed books, and to such portions of the proofs or parts of the record of the former arbitration, as they rely on in support of their claim, delivering copies of the same to the Embassy of the Republic of Mexico in Washington, for the use of the agent or counsel of Mexico.

Departamento de Estado arriba dicho un memorial impreso del origen y monto de la reclamación, acompañado de las citas de libros impresos y de aquellas partes de las pruebas ó piezas del archivo del primer arbitramento, en que quiera fundar su reclamación, dando copias de los mismos documentos á la Embajada de la República Mexicana en Washington para uso del agente ó abogado de México.

VII.

Within forty days after the delivery thereof to the Mexican Embassy the agent or counsel for the Republic of Mexico shall deliver to the Department of State of the United States of America in the same manner and with like references a statement of its allegations and grounds of opposition to said claim.

VII.

Dentro de cuarenta días después de la entrega del memorial á la Embajada Mexicana, el agente ó abogado de la República de México entregará al Departamento de Estado de los Estados Unidos de América, de la misma manera y con iguales referencias, un memorial de sus alegaciones y razones de oposición á la reclamación dicha.

VIII.

The provisions of paragraphs VI and VII shall not operate to prevent the agents or counsel for the parties hereto from relying at the hearing or submission upon any documentary or other evidence which may have become open to their investigation and examination at a period subsequent to the times provided for service of memorial and answer.

VIII.

Las prevenciones de los párrafos VI y VII no impedirán á los agentes ó abogados de las partes contratantes reforzar oralmente ó por escrito sus argumentos citando cualesquiera documentos probatorios ú otras pruebas que consideren útiles y les haya sido dado conocer y examinar en un período subsiguiente á los términos señalados para el traslado del memorial y la contestación.

IX.

The first meeting of the arbitral court hereinbefore provided for shall take place for the selection of an umpire on September 1, 1902, at the Hague in the quarters which may be provided for such purpose by the International Bureau at the Hague, constituted by virtue of the Hague convention hereinbefore referred to, and for the commence-

IX.

La primera reunión del tribunal arbitral arriba nombrado se verificará con objeto de elejir un árbitro superior el 1° de Septiembre de 1902 en la Haya en el local que al efecto destine la Oficina Internacional de la Haya constituida en virtud de la convención de la Haya, antes referida y para dar principio á las audiencias del tribunal se de-

ment of its hearings September 15, 1902, is designated, or, if an umpire may not be selected by said date, then as soon as possible thereafter, and not later than October 15, 1902, at which time and place and at such other times as the court may set (and at Brussels if the court should determine not to sit at the Hague) explanations and arguments shall be heard or presented as the court may determine, and the cause be submitted. The submission of all arguments, statements of facts, and documents shall be concluded within thirty days after the time provided for the meeting of the court for hearing (unless the court shall order an extension of not to exceed thirty days) and its decision and award announced within thirty days after such conclusion, and certified copies thereof delivered to the agents or counsel of the respective parties and forwarded to the Secretary of State of the United States and the Mexican Ambassador at Washington, as well as filed with the Netherland Minister for Foreign Affairs.

signa el 15 de Septiembre de 1902, ó si en esa fecha no estuviere ya electo el árbitro superior, las audiencias comenzarián tan pronto como sea posible y no después del 15 de Octubre de 1902, en cuyo tiempo y lugar ó en otras fechas que el tribunal disponga (y en Bruselas, si el tribunal determinare no tener sus sesiones en la Haya) explicaciones y alegatos, que se presenten según lo determine el tribunal, y el caso le quedará sometido. Esta sumisión con todos los alegatos, relación de hechos y presentación de documentos estará concluida dentro de los treinta días siguientes al término señalado para las audiencias del tribunal (á no ser que éste acuerde una prórroga que no excederá de treinta días) y el laudo se pronunciará dentro de treinta días después de cerradas las audiencias. Copias certificadas del laudo se darán á los agentes ó abogados de las respectivas partes y se enviarán al Embajador de México en Washington y al Secretario de Estado de los Estados Unidos, así como al Ministro de Negocios Extranjeros de los Países Bajos para su archivo.

X.

Should the decision and award of the tribunal be against the Republic of Mexico, the findings shall state the amount and in what currency the same shall be payable, and shall be for such amount as under the contentions and evidence may be just. Such final award, if any, shall be paid to the Secretary of State of the United States of America within eight months from the date of its making.

X.

Si el laudo del tribunal fuere adverso á la República Mexicana, sus conclusiones expresaran la suma, la especie de moneda en que ha de ser pagada, y la suma será la que se considere justa conforme á lo probado y alegado. La suma, si alguna fuere definitivamente fallada, será pagada al Secretario de Estado de los Estados Unidos de América dentro de ocho meses desde la fecha del laudo.

XI.

The agents and counsel for the respective parties may stipulate for the admission of any facts, and

XI.

Los agentes y abogados de las respectivas partes podrán convenir en la admisión de cualesquiera

such stipulation, duly signed, shall be accepted as proof thereof.

XII.

Each of the parties hereto shall pay its own expenses, and one-half of the expenses of the arbitration, including the pay of the arbitrators; but such costs shall not constitute any part of the judgment.

XIII.

Revision shall be permitted as provided in Article LV of The Hague Convention, demand for revision being made within eight days after announcement of the award. Proofs upon such demand shall be submitted within ten days after revision be allowed (revision only being granted, if at all, within five days after demand therefor) and counterproofs within the following ten days, unless further time be granted by the Court. Arguments shall be submitted within ten days after the presentation of all proofs, and a judgment or award given within ten days thereafter. All provisions applicable to the original judgment or award shall apply as far as possible to the judgment or award on revision. *Provided* that all proceedings on revision shall be in the French language.

XIV.

The award ultimately given hereunder shall be final and conclusive as to the matters presented for consideration.

Done in duplicate of English and Spanish at Washington, this 22d day of May, A. D. 1902.

hechos, y tal convenio debidamente firmado será admitido como prueba de los mismo hechos.

XII.

Cada una de las partes contratantes pagará sus propios gastos y la mitad de los comunes del arbitraje, incluyendo la remuneración de los árbitros; mas estas costas no constituirán parte de la suma fallada.

XIII.

Habrá lugar á revisión conforme á lo prevenido en el artículo 55 de la Convención de La Haya, si fuere promovida dentro de ocho días desde la notificación del laudo. Las pruebas admisibles en este recurso se presentarán dentro de diez días desde la fecha en que se concediere (el cual solamente se otorgará, si así se acordare, dentro de cinco días después de su promoción) y las pruebas de la parte contraria dentro de los diez días siguientes á no ser que se conceda mayor plazo por el tribunal. Los alegatos se producirán dentro de diez días después de la presentación de todas las pruebas, y el fallo ó laudo se dará dentro de los diez días siguientes. Todas las disposiciones aplicables al fallo ó laudo recurrido se aplicarán en lo posible al fallo ó laudo de revisión; bien entendido que en los procedimientos de este recurso se empleará la lengua francesa.

XIV.

El laudo último dado conforme á este compromiso será definitivo y concluyente en todos los puntos propuestos á la consideración del tribunal.

Hecho por duplicado en inglés y en español en Washington hoy día 22 de Mayo, A. D. 1902.

JOHN HAY [SEAL]
M. DE AZPIROZ [SEAL]

RULES AND REGULATIONS OF THE COMMISSIONERS UNDER THE CONVENTION BETWEEN THE UNITED STATES OF AMERICA AND THE UNITED STATES OF MEXICO OF JULY 4, 1868.

1. All claims filed with the commission by the respective Governments shall be entered in duplicate dockets, one kept by each of the two secretaries, in his respective language, in the order in which they are referred.

Separate dockets shall be kept for the claims, respectively, of citizens of the United States, and for those of citizens of the Mexican Republic.

Duplicate records shall be kept in like manner of all the proceedings of the commissioners.

2. All claims provided for by the convention shall be presented, through the respective Governments, on or before the 31st day of March, 1870, unless at a later day, for special cause shown to the satisfaction of the commissioners.

3. All persons having claims shall file memorials of the same with the respective secretaries.

Every memorial shall be signed and verified by the claimant, or, in his absence from the District of Columbia, by his attorney in fact, such absence being averred by such attorney, and it shall be subscribed by his solicitor or counsel.

It shall set forth particularly the origin, nature, and amount of the claim, with other circumstances, as follows:

(a) The amount of the claim; the time when and place where it arose; the kind or kinds and amount of property lost or injured; the facts and circumstances attending the loss or injury out of which the claim arises, and all the facts upon which the claim is founded.

(b) For and on behalf of whom the claim is preferred.

(c) Whether the claimant is now a citizen of the United States or of the Mexican Republic, as the case may require; and if so, whether he is a native or a naturalized citizen, and where is now his domicile; and if he claims in his own right, then whether he was a citizen when the claim had its origin, and where was then his domicile; and if he claims in right of another, then whether such other was a citizen when the claim had its origin, and where was then, and where is now, his domicile; and if in either case the domicile of claimant, at the time the claim had its origin, was in any foreign country, then whether such claimant was then a subject of the government of such country, or had taken any oaths of allegiance thereto.

(d) Whether the entire amount of the claim does now, and did at the time when it had its origin, belong solely and absolutely to the claimant; and if any other person is or has been interested therein, or in any part thereof, then who is such other person, and what is or was the nature and extent of his interest; and how, when, and by what means and for what considerations the transfer of rights or interests, if any such was made, took place between the parties.

(e) Whether the claimant or any other who may have been entitled to the amount claimed, or any part thereof, had ever received any, and if any what, sum of money, or other equivalent or indemnification, for the whole or any part of the loss or injury upon which the claim is founded; and if so, when and from whom the same was received.

(f) Whether the claim was presented prior to the 1st of February, 1869, to the Department of State of either Government, or to the minister of the United States at Mexico, or that of the Mexican Republic at Washington, and to which and at what time.

4. All motions and arguments addressed to the commissioners shall be made in writing and filed with the secretaries, who shall note thereon the time when they are received.

Brief verbal explanations may be made after the opening of each day's session, by or on behalf of the agents of the respective Governments.

5. All testimony and proofs hereafter taken, other than papers and documents referred by either Government, whether taken in support of or in opposition to pending claims, will be taken and filed subject to the following regulations:

(a) Proofs in support of claims shall be filed with the memorial; no proofs will be received subsequently, except such as may be responsive to proofs presented on the part of either Government, unless for special cause shown, and supported by affidavit or affirmation, according to the law of the respective countries.

(b) All testimony must be in writing, and upon oath or affirmation duly administered according to the laws of the place where the same is taken, by a magistrate competent by such laws to take depositions, having no interest in the claim to which the testimony relates, and not being the agent or attorney of any person having such interest, and it must be certified by him that such is the case. The credibility of the affiant or deponent, if known to such magistrate or other person authorized to take such testimony, must be certified by him, and if not known, must be certified on the same paper upon oath, by some other person known to such magistrate, having no interest in such claim, and not being the agent or attorney of any person having such interest, whose credibility must be certified by such magistrate. The deposition must be reduced to writing by the person taking the same, or by some person in his presence having no interest, and not being the agent or attorney of any person having an interest in the claim, and must be carefully read to the deponent by the magistrate before being signed by him, and must be signed by him in the presence of the officer, and this must be certified.

(c) Depositions taken in any city, port, or place, neither within the limits of the United States nor within those of the Mexican Republic, may be taken before any diplomatic or consular officer of either Government residing in such city, port, or place, he having no interest and not being agent or attorney of any person having an interest in the claim to which the testimony so taken relates. In all other cases, whether in the United States or in the Mexican Republic, or any other foreign place, the right of the person taking the same to administer oaths by the laws of the place must be proved.

(d) Every affiant or deponent is required to state in his deposition his age, place of birth, residence, and occupation, and where was his residence and what was his occupation at the time the events took place in regard to which he deposes, and must also state if he have any, and if any what, interest in the claim to support which his testimony is taken, and if he have any contingent interest in the same, to what extent, and upon the happening of what event he will be entitled

to receive any part of the sum which may be awarded by the Commissioners. He must also be required to state whether he be the agent or attorney of the claimant or of any person having an interest in the claim.

(e) Original papers or other documents exhibited in proof must be certified as required in the second of these rules; but when the fact is within the exclusive knowledge of the claimant, it may be verified by his own oath or affirmation. Papers in the handwriting of any person deceased, or whose residence is unknown to the claimant, may be verified by proof of such handwriting, and of the death of the party, or his removal to places unknown.

(f) When the claim arises from seizure or loss of any vessel, or cargo of any ship or vessel, a certified copy of the enrollment or registry of such ship or vessel must be produced, together with the original clearance, manifest, and all other papers and documents required by the laws of the United States or of the Mexican Republic, as the case may be, which she possessed on her last voyage, when the same are in the possession of the claimant, or can be obtained by him; and when not, certified copies of the same must be produced, together with oath or affirmation, according to the law of the respective countries, that the originals are not in his possession and can not be obtained by him.

(g) In all cases where property of any description, for the seizure or loss of which a claim has been presented, was at the time of such seizure or loss insured, the original policy of insurance or a certified copy thereof must be produced.

(h) If the claimant be a naturalized citizen of the United States or of the Mexican Republic, as the case may be, a copy of the record of his naturalization, duly certified, must be produced.

6. Of all memorials, twenty printed copies in quarto form in English and twenty in Spanish shall be filed with the respective secretaries.

Citizens of the United States may file their documents and proofs in English, and citizens of the Mexican Republic may file theirs in Spanish, and in both cases in manuscript, subject to the further order of the commissioners in this respect.

7. When a claimant shall have filed his proofs in chief, and argument in support thereof, the adverse proofs and argument on the part of the United States, or of the Mexican Republic, shall be filed within the terms of four mouths; but upon good cause shown on either side this period may be extended in particular cases.

Ordered, That when the Commission shall close its present session it will adjourn to meet in this city on the first Monday of December next, and will then proceed to consider whether the memorials which shall then have been filed with the secretaries are in due form and proper to be received for examination; and all such papers are hereby set down for hearing at that time; and if any claimant desires a longer time in which to file a memorial, or present arguments, he must file a written motion to that effect, setting forth the reasons for the same on or before said day.

By order of the commissioners:

GEORGE G. GAITHER,
J. CARLOS MEXIA,
Secretaries.

CONVENTION BETWEEN THE UNITED STATES AND CERTAIN POWERS FOR THE PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES.

Signed at The Hague July 29, 1899.
Ratification advised by the Senate February 5, 1900.
Ratified by the President of the United States April 7, 1900.
Ratification deposited with the Netherlands Government September 4, 1900.
Proclaimed November 1, 1901.

BY THE PRESIDENT OF THE UNITED STATES.

A PROCLAMATION.

Whereas a Convention for the pacific settlement of international disputes was concluded and signed on July 29, 1899, by the Plenipotentiaries of the United States of America, Germany, Austria-Hungary, Belgium, China, Denmark, Spain, the United Mexican States, France, Great Britain and Ireland, Greece, Italy, Japan, Luxembourg, Montenegro, the Netherlands, Persia, Portugal, Roumania, Russia, Servia, Siam, Sweden and Norway, Switzerland, Turkey and Bulgaria, the original of which Convention, in the French language, is word for word as follows:

CONVENTION POUR LE REGLEMENT PACIFIQUE DES CONFLITS INTERNATIONAUX.

Sa Majesté l'Empereur d'Allemagne, Roi de Prusse; Sa Majesté l'empereur d'Autriche, Roi de Bohême etc. et Roi Apostolique de Hongrie; Sa Majesté le Roi des Belges; Sa Majesté l'Empereur de Chine; Sa Majesté le Roi de Danemark; Sa Majesté le Roi d'Espagne et en Son Nom Sa Majesté la Reine-Régente du Royaume; le Président des Etats-Unis d'Amérique; le Président des Etats-Unis Mexicains; le Président de la République Française; Sa Majesté la Reine du Royaume-Uni de la Grande Bretagne et d'Irlande, Impératrice des Indes; Sa Majesté le Roi des Hellènes; Sa Majesté le Roi d'Italie; Sa Majesté l'Empereur du Japon; Son Altesse Royale le Grand-Duc de Luxembourg,

[Translation.]

His Majesty the Emperor of Germany, King of Prussia; His Majesty the Emperor of Austria, King of Bohemia etc. and Apostolic King of Hungary; His Majesty the King of the Belgians; His Majesty the Emperor of China; His Majesty the King of Denmark; His Majesty the King of Spain and in his name Her Majesty the Queen Regent of the Kingdom; the President of the United States of America; the President of the United Mexican States; the President of the French Republic; Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, Empress of India; His Majesty the King of the Hellenes; His Majesty the King of Italy; His Majesty the Emperor

Duc de Nassau; Son Altesse le Prince de Monténégro; Sa Majesté la Reine des Pays-Bas; Sa Majesté Impériale le Schah de Perse; Sa Majesté le Roi de Portugal et des Algarves etc.; Sa Majesté le Roi de Roumanie; Sa Majesté l'Empereur de Toutes les Russies; Sa Majesté le Roi de Serbie; Sa Majesté le Roi de Siam; Sa Majesté le Roi de Suède et de Norvège; le Conseil Fédéral Suisse; Sa Majesté l'Empereur des Ottomans et Son Altesse Royale le Prince de Bulgarie

of Japan; His Royal Highness the Grand Duke of Luxemburg, Duke of Nassau; His Highness the Prince of Montenegro; Her Majesty the Queen of the Netherlands; His Imperial Majesty the Shah of Persia; His Majesty the King of Portugal and of the Algarves etc.; His Majesty the King of Roumania; His Majesty the Emperor of all the Russias; His Majesty the King of Servia; His Majesty the King of Siam; His Majesty the King of Sweden and Norway; the Swiss Federal Council; His Majesty the Emperor of the Ottomans and His Royal Highness the Prince of Bulgaria

Animés de la ferme volonté de concourir au maintien de la paix générale;

Résolus à favoriser de tous leurs efforts le règlement aimable des conflits internationaux;

Reconnaissant la solidarité qui unit les membres de la société des nations civilisées;

Voulant étendre l'empire du droit et fortifier le sentiment de la justice internationale;

Convaincus que l'institution permanente d'une juridiction arbitrale, accessible à tous, au sein des Puissances indépendantes peut contribuer efficacement à ce résultat;

Considérant les avantages d'une organisation générale et régulière de la procédure arbitrale;

Estimant avec l'Auguste Initiateur de la Conférence Internationale de la Paix qu'il importe de consacrer dans un accord international les principes d'équité et de droit sur lesquels reprosent la sécurité des Etats et le bien-être des Peuples;

Désirant conclure une Conven-

Animated by a strong desire to concert for the maintenance of the general peace;

Resolved to second by their best efforts the friendly sentiment of international disputes;

Recognizing the solidarity which unites the members of the society of civilized nations;

Desirous of extending the empire of law, and of strengthening the appreciation of international justice;

Convinced that the permanent institution of a Court of Arbitration, accessible to all, in the midst of the independent Powers, will contribute effectively to this result;

Having regard to the advantages attending the general and regular organization of arbitral procedure;

Sharing the opinion of the august Initiator of the International Peace Conference that it is expedient to record in an international Agreement the principles of equity and right on which are based the security of States and the welfare of peoples;

Being desirous of concluding a

tion à cet effet ont nommé pour Leurs plénipotentiaires, savoir:

Sa Majesté l'Empereur d'Allemagne, Roi de Prusse:

Son Excellence le Comte de Münster, Prince de Derneburg, Son Ambassadeur à Paris.

Sa Majesté l'Empereur d'Autriche, Roi de Bohême etc., et Roi Apostolique de Hongrie:

Son Excellence le Comte R, de Welsersheimb, Son Ambassadeur extraordinaire et plénipotentiaire.

M. Alexandre Okolicsanyi d'Okolicsna, Son Envoyé extraordinaire et Ministre plénipotentiaire à la Haye.

Sa Majesté le Roi des Belges:

Son Excellence M. Auguste Beernaert, Son Ministre d'État, Président de la Chambre des Représentants.

M. le Comte De Grelle Rogier, Son Envoyé extraordinaire et Ministre plénipotentiaire à la Haye.

M. le Chevalier Descamps, Senateur.

Sa Majesté l'Empereur de Chine:

M. Yang Yü, Son Envoyé extraordinaire et Ministre plénipotentiaire à St. Pétersbourg.

Sa Majesté le Roi De Danemark:

Son Chambellan Fr. E. de Bille, Son Envoyé extraordinaire et Ministre plénipotentiaire à Londres.

Sa Majesté le Roi d'Espagne et en Son Nom, Sa Majesté la Reine-Régente du Royaume:

Son Excellence le Duc de Tetuan, Ancien Ministre des Affaires Etrangères.

M. W. Ramirez de Villa Urrutia, Son Envoyé extraordinaire

Convention to this effect, have appointed as their Plenipotentiaries, to-wit:—

His Majesty the Emperor of Germany, King of Prussia:

His Excellency Count de Münster, Prince of Derneburg, His Ambassador at Paris.

His Majasty the Emperor of Austria, King of Bohemia etc., and Apostolic King of Hungary:

His Excellency Count R. De Welsersheimb, His Ambassador Extraordinary and Plenipotentiary.

Mr. Alexander Okolicsanyi d'Okolicsna, His Envoy Extraordinary and Minister Plenipotentiary at The Hague.

His Majesty the King of the Belgians:

His Excellency Mr. Auguste Beernaert, His Minister of State, President of the Chamber of Representatives.

Count De Grelle Rogier, His Envoy Extraordinary and Minister Plenipotentiary at The Hague.

The Chevalier Descamps, Senator.

His Majesty the Emperor of China:

Mr. Yang Yü, His Envoy Extraordinary and Minister Plenipotentiary at St. Petersburg.

His Majesty the King of Denmark:

His Chamberlain Fr. E. de Bille, His Envoy Extraordinary and Minister Plenipotentiary at London.

His Majesty the King of Spain and in His Name, Her Majesty the Queen Regent of the Kingdom:

His Excellency the Duke of Tetuan, formerly Minister of Foreign Affairs.

Mr. W. Ramirez de Villa Urrutia, His Envoy Extraordi-

et Ministre plénipotentiaire à Bruxelles.

M. ARTHUR DE BAGUER, Son Envoyé extraordinaire et Ministre plénipotentiaire à la Haye.

LE PRÉSIDENT DES ÉTATS-UNIS D'AMÉRIQUE:

Son Excellence M. ANDREW D. WHITE, Ambassadeur des États-Unis à Berlin.

M. SETH LOW, Président de l'Université "Columbia" à New-York.

M. STANFORD NEWEL, Envoyé extraordinaire et Ministre plénipotentiaire à la Haye.

M. ALFRED T. MAHAN, Capitaine de Vaisseau.

M. WILLIAM CROZIER, Capitaine d'Artillerie.

LE PRÉSIDENT DES ÉTATS-UNIS MEXICAINS:

M. DE MIER, Envoyé extraordinaire et Ministre plénipotentiaire à Paris.

M. ZENIL, Ministre-Résident à Bruxelles.

LE PRÉSIDENT DE LA RÉPUBLIQUE FRANÇAISE:

M. LÉON BOURGEOIS, Ancien Président du Conseil, Ancien Ministre des Affaires Étrangères, Membre de la Chambre des Députés.

M. GEORGES BIHOURD, Envoyé extraordinaire et Ministre plénipotentiaire à la Haye.

M. le BARON D'ESTOURNELLES DE CONSTANT, Ministre plénipotentiaire, Ministre de la Chambre des Députés.

SA MAJESTÉ LA REINE DU ROYAUME UNI DE LA GRANDE BRETAGNE ET D'IRLANDE, IMPÉRATRICE DES INDES:

Son Excellence le Très Honorable BARON PAUNCEFOTE DE PRESTON, Membre du Conseil Privé de Sa Majesté, Son Ambassadeur extraordinaire et plénipotentiaire à Washington.

SIR HENRY HOWARD, Son Envoyé extraordinaire et Ministre plénipotentiaire à la Haye.

nary and Minister Plenipotentiary at Brussels.

MR. ARTHUR DE BAGUER, His Envoy Extraordinary and Minister Plenipotentiary at The Hague.

THE PRESIDENT OF THE UNITED STATES OF AMERICA:

His Excellency MR. ANDREW D. WHITE, Ambassador of the United States at Berlin.

MR. SETH LOW, President of Columbia University, New York.

MR. STANFORD NEWEL, Envoy Extraordinary and Minister Plenipotentiary at The Hague.

CAPTAIN ALFRED T. MAHAN.

CAPTAIN WILLIAM CROZIER.

THE PRESIDENT OF THE UNITED MEXICAN STATES:

MR. DE MIER, Envoy Extraordinary and Minister Plenipotentiary at Paris.

MR. ZENIL, Minister Resident at Brussels.

THE PRESIDENT OF THE FRENCH REPUBLIC:

MR. LÉON BOURGEOIS, formerly President of the Council, formerly Minister of Foreign Affairs, Member of the Chamber of Deputies.

MR. GEORGES BIHOURD, Envoy Extraordinary and Minister Plenipotentiary at The Hague.

The BARON D'ESTOURNELLES DE CONSTANT, Minister Plenipotentiary, Member of the Chamber of Deputies.

HER MAJESTY THE QUEEN OF THE UNITED KINGDOM OF GREAT BRITAIN AND IRELAND, EMPRESS OF INDIA:

His Excellency the Right Honorable BARON PAUNCEFOTE OF PRESTON, Member of her Majesty's Privy Council, Her Ambassador Extraordinary and Plenipotentiary at Washington.

SIR HENRY HOWARD, Her Envoy Extraordinary and Minister Plenipotentiary at The Hague.

SA MAJESTÉ LE ROI DES HELLÈNES:

M. N. DELYANNI, Ancien Président du Conseil, Ancien Ministre des Affaires Étrangères, Son Envoyé extraordinaire et Ministre plénipotentiaire à Paris.

SA MAJESTÉ LE ROI D'ITALIE:

Son Excellence le COMTE NIGRA, Son Ambassadeur à Vienne, Sénateur du Royaume.

M. le COMTE A. ZANNINI, Son Envoyé extraordinaire en Ministre plénipotentaire à la Haye.

M. le COMMANDEUR GUIDO POMPILJ, Député au Parlement Italien.

SA MAJESTÉ L'EMPEREUR DU JAPON:

M. I. MOTONO, Son Envoyé extraordinaire et Ministre plénipotentiaire à Bruxelles.

SON ALTESSE ROYALE LE GRAND DUC DE LUXEMBOURG, DUC DE NASSAU:

Son Excellence M. EYSCHEN, Son Ministre d'État, Président du Gouvernement Grand-Ducal.

SON ALTESSE LE PRINCE DE MONTÉNÉGRO:

Son Excellence M. le CONSEILLER PRIVÉ ACTUEL DE STAAL, Ambassadeur de Russie à Londres.

SA MAJESTÉ LA REINE DES PAYS-BAS:

M. le JONKHEER A. P. C. VAN KARNEBEEK, Ancien Ministre des Affaires Étrangères, Membre de la Seconde Chambre des États-Généraux.

M. le GÉNÉRAL J. C. C. DEN BEER POORTUGAEL, Ancien Ministre de la Guerre, Membre du Conseil d'État.

M. T. M. C. ASSER, Membre du Conseil d'État.

M. E. N. RAHUSEN, Membre de la Première Chambre des États-Généraux.

SA MAJESTÉ IMPÉRIALE LE SCHAH DE PERSE:

Son Aide de Camp GÉNÉRAL MIRZA RIZA KHAN, Arfa-ud-Dov-

HIS MAJESTY THE KING OF THE HELLENES:

Mr. N. DELYANNI, formerly President of the Council, formerly Minister of Foreign Affairs, His Envoy Extraordinary and Minister Plenipotentiary at Paris.

HIS MAJESTY THE KING OF ITALY:

His Excellency COUNT NIGRA, His Ambassador at Vienna, Senator of the Kingdom.

COUNT A. ZANNINI, His Envoy Extraordinary and Minister Plenipotentiary at The Hague.

COMMANDER GUIDO POMPILJ, Deputy in the Italian Parliament.

HIS MAJESTY THE EMPEROR OF JAPAN:

MR. I. MOTONO, His Envoy Extraordinary and Plenipotentiary at Brussels.

HIS ROYAL HIGHNESS THE GRAND DUKE OF LUXEMBURG, DUKE OF NASSAU:

His Excellency Mr. EYSCHEN, His minister of State, President of the Grand Ducal Government.

HIS HIGHNESS THE PRINCE OF MONTENEGRO:

His Excellency the present PRIVY COUNCILLOR DE STAAL, Ambassador of Russia at London.

HER MAJESTY THE QUEEN OF THE NETHERLANDS:

JONKHEER A. P. C. VAN KARNEBEEK, formerly Minister of Foreign Affairs, Member of the Second Chamber of the States-General.

GENERAL J. C. C. DEN BEER POORTUGAEL, formerly Minister of War, Member of the Council of State.

Mr. T. M. C. ASSER, Member of the Council of State.

Mr. E. N. RAHUSEN, Member of the First Chamber of the States-General.

HIS IMPERIAL MAJESTY THE SHAH OF PERSIA:

His Aid-de-Camp GENERAL MIRZA RIZA KHAN, Arfa-ud-Dov-

leh, Son Envoyé extraordinaire et Ministre plénipotentiaire à St. Pétersbourg et à Stockholm.

SA MAJESTÉ LE ROI DE PORTUGAL ET DES ALGARVES, ETC.:

M. le COMTE DE MACEDO, Pair du Royaume, Ancien Ministre de la Marine et des Colonies, Son Envoyé extraordinaire et Ministre plénipotentiaire à Madrid.

M. D'ORNELLAS ET VASCONCELLOS, Pair du Royaume, Son Envoyé extraordinaire et Ministre plénipotentiaire à St. Pétersbourg.

M. le COMTE DE SELIR, Son Envoyé extraordinaire et Ministre plénipotentiaire à la Haye.

SA MAJESTÉ LE ROI DE ROUMANIE:

M. ALEXANDRE BELDIMAN, Son Envoyé extraordinaire et Ministre plénipotentiarie à Berlin.

M. JEAN N. PAPINIU, Son Envoyé extraordinaire et Ministre plénipotentiaire à la Haye.

SA MAJESTÉ L'EMPEREUR DE TOUTES LES RUSSIES:

Son Excellence M. le CONSEILLER PRIVÉ ACTUEL DE STAAL, Son Ambassadeur à Londres.

M. DE MARTENS, Dembre Permanent du Conseil du Ministère Impérial des Affaires Etrangères, Son Conseiller Privé.

Son CONSEILLER D'ETAT ACTUEL DE BASILY, Chambellan, Directeur du Premier Département du Ministère Impérial des Affaires Etrangères.

SA MAJESTÉ LE ROI DE SERBIE:

M. MIYATOVITCH, Son Envoyé extraordinaire et Ministre plénipotentiaire à Londres et à la Haye.

SA MAJESTÉ LE ROI DE SIAM:

M. PHYA SURIYA NUVATR, Son Envoyé extraordinaire et Ministre plénipotentiaire à St. Pétersbourg et à Paris.

M. PHYA VISUDDHA SURIYASAKTI, Son Envoyé extraordinaire et Ministre plénipotentiaire à la Haye à Londres.

leh, His Envoy Extraordinary and Minister Plenipotentiary at St. Petersburg and at Stockholm.

HIS MAJESTY THE KING OF PORTUGAL AND OF THE ALGARVES, ETC.:

COUNT DE MACEDO, Peer of the Kingdom, formerly Minister of the Navy and of the Colonies, His Envoy Extraordinary and Minister Plenipotentiary at Madrid.

Mr. D'ORNELLAS ET VASCONCELLOS, Peer of the Kingdom, His Envoy Extraordinary and Minister Plenipotentiary at St. Petersburg.

COUNT DE SELIR, His Envoy Extraordinary and Minister Plenipotentiary at The Hague.

HIS MAJESTY THE KING OF ROUMANIA:

MR. ALEXANDER BELDIMAN, His Envoy Extraordinary and Minister Plenipotentiary at Berlin.

MR. JEAN N. PAPINIU, His Envoy Extraordinary and Minister Plenipotentiary at The Hague.

HIS MAJESTY THE EMPEROR OF ALL THE RUSSIAS:

His Excellency the present PRIVY COUNCILLOR DE STAAL, His Ambassador at London.

MR. DE MARTENS, Permanent Member of the Council of the Imperial Ministry of Foreign Affairs, His Privy Councillor.

His present COUNCILLOR OF STATE DE BASILY, Chamberlain, Director of the First Department of the Imperial Ministry of Foreign Affairs.

HIS MAJESTY THE KING OF SERVIA:

MR. MIYATOVITCH, His Envoy Extraordinary and Minister Plenipotentiary at London and at The Hague.

HIS MAJESTY THE KING OF SIAM:

PHYA SURIYA NUVATR, His Envoy Extraordinary and Minister Plenipotentiary at St. Petersburg and at Paris.

PHYA VISUDDHA SURIYASAKTI, His Envoy Extraordinary and Minister Plenipotentiary at The Hague and at London.

SA MAJESTÉ LE ROI DE SUÈDE ET DE NORVÈGE:

M. le BARON DE BILDT, Son Envoyé extraordinaire et Ministre plénipotentiaire à Rome.

LE CONSEIL FÉDÉRAL SUISSE:

M. le DR. ARNOLD ROTH, Envoyé extraordinaire et Ministre plénipotentiaire à Berlin.

SA MAJESTÉ L'EMPEREUR DES OTTOMANS:

Son Excellence TURKHAN PACHA, Ancien Ministre des Affaires Étrangères, Membre de Son Conseil d'Etat.

NOURY BEY, Secrétaire-Général au Ministère des Affaires Étrangères.

SON ALTESSE ROYALE LE PRINCE DE BULGARIE:

M. le DR. DIMITRI STANCIOFF, Agent Diplomatique à St. Pétersbourg.

M. le MAJOR CHRISTO HESSAPTCHIEFF, Attaché Militaire à Belgrade.

Lesquels, après s'être communiqué leurs pleins pouvoirs, trouvés en bonne et due forme, sont convenus des dispositions suivantes:

TITRE I.—DU MAINTIEN DE LA PAIX GÉNÉRALE.

ARTICLE 1.

En vue de prévenir autant que possible le recours à la force dans les rapports entre les Etats, les Puissances signataires conviennent d'employer tous leurs efforts pour assurer le règlement pacifique des différends internationaux.

TITRE II.—DES BONS OFFICES ET DE LA MÉDIATION.

ARTICLE 2.

En cas de dissentiment grave ou de conflit, avant d'en appeler aux armes, les Puissances signataires conviennent d'avoir recours, en tant que les circonstances le per-

HIS MAJESTY THE KING OF SWEDEN AND NORWAY:

BARON DE BILDT, His Envoy Extraordinary and Minister Plenipotentiary at Rome.

THE SWISS FEDERAL COUNCIL:

DR. ARNOLD ROTH, Envoy Extraordinary and Minister Plenipotentiary at Berlin.

HIS MAJESTY THE EMPEROR OF THE OTTOMANS:

His Excellency TURKHAN PACHA, formerly Minister of Foreign Affairs, Member of His Council of State.

NOURY BEY, Secretary-General at the Ministry of Foreign Affairs.

HIS ROYAL HIGHNESS THE PRINCE OF BULGARIA:

DR. DIMITRI STANCIOFF, Diplomatic Agent at St. Petersburg.

MAJOR CHRISTO HESSAPTCHIEFF, Military Attaché at Belgrade.

Who, after communication of their full powers, found in good and due form have agreed on the following provisions:

TITLE I.—ON THE MAINTENANCE OF THE GENERAL PEACE.

ARTICLE I.

With a view to obviating, as far as possible, recourse to force in the relations between States, the Signatory Powers agree to use their best efforts to insure the pacific settlement of international differences.

TITLE II.—ON GOOD OFFICES AND MEDIATION.

ARTICLE II.

In case of serious disagreement or conflict, before an appeal to arms, the Signatory Powers agree to have recourse, as far as circumstances allow, to the good offices

mettront, aux bons offices ou à la médiation d'une ou de plusieurs Puissances amies.

or mediation of one or more friendly Powers.

ARTICLE 3.

Indépendamment de ce recours, les Puissances signataires jugent utile qu'une ou plusieurs Puissances étrangères au conflit offrent de leur propre initiative, en tant qui les circonstances s'y prêtent, leurs bons offices ou leur médiation aux Etats en conflit.

Le droit d'offrir les bons offices ou la médiation appartient aux Puissances étrangères au conflit, même pendant le cours des hostilités.

L'exercice de ce droit ne peut jamais être considéré par l'une ou l'autre des Parties en litige comme un acte peu amical.

ARTICLE III.

Independently of this recourse, the Signatory Powers recommend that one or more Powers, strangers to the dispute, should, on their own initiative, and as far as circumstances may allow, offer their good offices or mediation to the States at variance.

Powers, strangers to the dispute, have the right to offer good offices or mediation, even during the course of hostilities.

The exercise of this right can never be regarded by one or the other of the parties in conflict as an unfriendly act.

ARTICLE 4.

Le rôle de médiateur consiste à concilier les prétentions opposées et à apaiser les ressentiments qui peuvent s'être produits entre les Etats en conflit.

ARTICLE IV.

The part of the mediator consists in reconciling the opposing claims and appeasing the feelings of resentment which may have arisen between the States at variance.

ARTICLE 5.

Les fonctions du médiateur cessent du moment où il est constaté soit par l'une des Parties en litige, soit par le médiateur lui-même, que les moyens de conciliation proposés par lui ne sont pas acceptés.

ARTICLE V.

The functions of the mediator are at an end when once it is declared, either by one of the parties to the dispute, or by the mediator himself, that the means of reconciliation proposed by him are not accepted.

ARTICLE 6.

Les bons offices et la médiation, soit sur le recours des Parties en conflit, soit sur l'initiative des Puissances étrangères au conflit, ont exclusivement le caractère de conseil et n'ont jamais force obligatoire.

ARTICLE VI.

Good offices and mediation, either at the request of the parties at variance, or on the initiative of Powers strangers to the dispute, have exclusively the character of advice and never having binding force.

ARTICLE 7.

L'acceptation de la médiation ne peut avoir pour effet, sauf con-

ARTICLE VII.

The acceptance of mediation can not, unless there be an agreement

vention contraire, d interrompre, de retarder ou d'entraver la mobilisation et autres mesures préparatoires à la guerre.

Si elle intervient aprés l'ouvertures des hostilités, elle n'interrompt pas, sauf convention contraire, les opérations militaires en cours.

to the contrary, have the effect of interrupting, delaying, or hindering mobilization or other measures of preparation for war.

If mediation occurs after the commencement of hostilities it causes no interruption to the military operations in progress, unless there be an agreement to the contrary.

ARTICLE 8.

Les Puissances signataires sont d'accord pour recommander l'application, dans les circonstances qui le permettent, d'une Médiation spéciale sous la sorme suivante.

En cas de différend grave compromettant la Paix, les Etats en conflit choisissent respectivement une Puissance à laquelle ils confient la mission d'entrer en rapport direct avec la Puissance choisie d'autre part, à l'effet de prévenir la rupture des relations pacifiques.

Pendant la durée de ce mandat dont le terme, sauf stipulation contraire, ne peut excéder trente jours, les Etats en litige cessent tout rapport direct au sujet du conflit, lequel est considéré comme déféré exclusivement aux Puissances médiatrices. Celles-ci doivent appliquer tous leurs efforts à régler le différend.

En cas de rupture effective des relations pacifiques, ces Puissances demeurent chargées de la mission commune de profiter de toute occasion pour rétablir la paix.

ARTICLE VIII.

The Signatory Powers are agreed in recommending the application, when circumstances allow, of special mediation in the following form:—

In case of a serious difference endangering the peace, the States at variance choose respectively a Power, to whom they intrust the mission of entering into direct communication with the Power chosen on the other side, with the object of preventing the rupture of pacific relations.

For the period of this mandate, the term of which, unless otherwise stipulated, cannot exceed thirty days, the States in conflict cease from all direct communication on the subject of the dispute, which is regarded as referred exclusively to the mediating Powers, who must use their best efforts to settle it.

In case of a definite rupture of pacific relations, these Powers are charged with the joint task of taking advantage of any opportunity to restore peace.

TITRE III.—DES COMMISSIONS INTERNATIONALES D'ENQUÊTE.

ARTICLE 9.

Dans les litiges d'ordre international n engageant ni l'honneur ni des intérêts essentiels et provenant d'une divergence d'appréciation sur des points de fait, les Puis-

TITLE III.—ON INTERNATIONAL COMMISSIONS OF INQUIRY.

ARTICLE IX.

In differences of an international nature involving neither honour nor vital interests, and arising from a difference of opinion on points of fact, the Signatory Powers recom-

sances signataires jugent utile que les Parties qui n'auraient pu se mettre d'accord par les voies diplomatiques instituent, en tant que les circonstances le permettront, une Commission internationale d'enquête chargée de faciliter la solution de ces litiges en éclaircissant, par un examen impartial et consciencieux, les questions de fait.

mend that the parties, who have not been able to come to an agreement by means of diplomacy, should as far as circumstances allow, institute an International Commission of Inquiry, to facilitate a solution of these differences by elucidating the facts by means of an impartial and conscientious investigation.

ARTICLE 10.

Les Commissions internationales d'enquête sont constituées par convention spéciale entre les Parties en litige.

La convention d'enquête précise les faits à examiner et l'étendue des pouvoirs des commissaires.

Elle règle la procédure.

L'enquête a lieu contradictoirement.

La forme et les délais à observer, en tant qu'ils ne sont pas fixés par la convention d'enquête, sont déterminés par la commission elle-même.

ARTICLE X.

The International Commissions of Inquiry are constituted by special agreement between the parties in conflict.

The Convention for an inquiry defines the facts to be examined and the extent of the Commissioners' powers.

It settles the procedure.

On the inquiry both sides must be heard.

The form and the periods to be observed, if not stated in the inquiry Convention, are decided by the Commission itself.

ARTICLE 11.

Les Commissions internationales d'enquête sont formées, sauf stipulation contraire, de lamanière déterminée par l'article 32 de le présente Convention.

ARTICLE XI.

The International Commissions of Inquiry are formed, unless otherwise stipulated, in the manner fixed by Article XXXII of the present convention.

ARTICLE 12.

Les Puissances en litige s'engagent à fournir à la Commission internationale d'enquête, dans la plus large mesure qu'Elles jugeront possible, tous les moyens et toutes les facilités nécessaires pour la connaissance complète et l'appréciation exacte des faits en question.

ARTICLE XII.

The powers in dispute engage to supply the International Commission of Inquiry, as fully as they may think possible, with all means and facilities necessary to enable it to be completely acquainted with and to accurately understand the facts in question.

ARTICLE 13.

La Commission internationale d'enquête présente aux Puissances en litige son rapport signé par tous les membres de la Commission.

ARTICLE XIII.

The International Commission of Inquiry communicates its Report to the conflicting Powers, signed by all the members of the Commission.

Article 14.

Le rapport de la Commission internationale d'enquête, limité à la constatation des faits, n'a nullement le caractère d'une sentence arbitrale. Il laisse aux Puissances en litige une entière liberté pour la suite à donner à cette constatation.

Titre IV.—De l'Arbitrage International.

Chapitre I.—*De la Justice Arbitrale.*

Article 15.

L'arbitrage international a pour objet le règlement de litiges entre les Etats par des juges de leur choix et sur la base du respect du droit.

Article 16.

Dans les questions d'ordre juridique, et en premier lieu dans les questions d'interprétation ou d'application des conventions internationales, l'arbitrage est reconnu par les Puissances signataires comme le moyen le plus efficace et en même temps le plus équitable de régler les litiges qui n'ont pas été résolus par les voies diplomatiques.

Article 17.

La convention d'arbitrage est conclue pour des contestations déjà nées ou pour des contestations éventuelles.

Elle peut concerner tout litige ou seulement les litiges d'une catégorie déterminée.

Article 18.

La convention d'arbitrage implique l'engagement de se soumettre de bonne foi á la sentence arbitrale.

Article XIV.

The report of the International Commission of Inquiry is limited to a statement of facts, and has in no way the character of an Arbitral Award. It leaves the conflicting Powers entire freedom as to the effect to be given to this statement.

Title IV.—On International Arbitration.

Chapter I.—*On the System of Arbitration.*

Article XV.

International arbitration has for its object the settlement of differences between States by judges of their own choice, and on the basis of respect for law.

Article XVI.

In questions of a legal nature, and especially in the interpretation or application of International Conventions, arbitration is recognized by the Signatory Powers as the most effective, and at the same time the most equitable, means of settling disputes which diplomacy has failed to settle.

Article XVII.

The Arbitration Convention is concluded for questions already existing or for questions which may rise eventually.

It may embrace any dispute or only disputes of a certain category.

Article XVIII.

The Arbitration Convention implies the engagement to submit loyally to the Award.

ARTICLE 19.

Indépendamment des traités généraux ou particuliers qui stipulent actuellement l'obligation du recours à l'arbitrage pour les Puissances signataires, ces Puissances se réservent de conclure, soit avant la ratification du présent Acte, soit postérieurement, des accords nouveaux, généraux ou particuliers, en vue d'étendre l'arbitrage obligatoire à tous les cas qu'Elles jugeront possible de lui soumettre.

ARTICLE XIX.

Independently of general or private Treaties expressly stipulating recourse to arbitration as obligatory on the Signatory Powers, these Powers reserve to themselves the right of concluding, either before the ratification of the present Act or later, new Agreements, general or private, with a view to extending obligatory arbitration to all cases which they may consider it possible to submit to it.

CHAPITRE II.—*De La Cour Permanente d'Arbitrage.*

CHAPTER II.—*On the Permanent Court of Arbitration.*

ARTICLE 20.

Dans le but de faciliter le recours immédiat à l'arbitrage pour les différends internationaux qui n'ont pu être réglés par la voie diplomatique, les Puissances signataires s'engagent à organiser une Cour permanente d'arbitrage, accessible en tout temps et fonctionnant, sauf stipulation contrairie des Parties, conformément aux Règles de procédure insérées dans la présente Convention.

ARTICLE XX.

With the object of facilitating an immediate recourse to arbitration for international differences, which it has not been possible to settle by diplomacy, the Signatory Powers undertake to organize a permanent Court of Arbitration, accessible at all times and operating, unless otherwise stipulated by the parties, in accordance with the Rules of Procedure inserted in the present Convention.

ARTICLE 21.

La Cour permanente sera compétente pour tous les cas d'arbitrage, à moins qu'il n'y ait entente entre les Parties pour l'établissement d'une juridiction spéciale.

ARTICLE XXI.

The Permanent Court shall be competent for all arbitration cases, unless the parties agree to institute a special tribunal.

ARTICLE 22.

Un Bureau international établi à la Haye sert de greffe à la Cour.

Ce Bureau est l'intermédiaire des communications relatives aux réunions de celle-ci.

Il a la garde des archives et la gestion de toutes les affaires administratives.

Les Puissances signataires s'engagent à communiquer au Bureau international de la Haye une copie

ARTICLE XXII.

An International Bureau, established at The Hague, serves as record office for the Court.

This Bureau is the channel for communications relative to the meetings of the Court.

It has the custody of the archives and conducts all the administrative business.

The Signatory Powers undertake to communicate to the International Bureau at The Hague a

certifiée conforme de toute stipulation d'arbitrage intervenue entre elles et de toute sentence arbitrale les concernant et rendue par des juridictions spéciales.

Elles s'engagent à communiquer de même au Bureau, les lois, règlements et documents constatant éventuellement l'exécution des sentences rendues par la Cour.

duly certified copy of any conditions of arbitration arrived at between them, and of any award concerning them delivered by special Tribunals.

They undertake also to communicate to the Bureau the Laws, Regulations, and documents eventually showing the execution of the awards given by the Court.

Article 23.

Chaque Puissance signataire désignera, dans les trois mois qui suivront la ratification par elle du présent acte, quatre personnes au plus, d'une compétence reconnue dans les questions de droit international, jouissant de la plus haute considération morale et disposées à accepter les fonctions d'arbitres.

Les personnes ainsi désignées seront inscrites, au titre de membres de la Cour, sur une liste qui sera notifiée à toutes les Puissances signataires par les soins du Bureau.

Toute modification à la liste des arbitres est portée, par les soins du Bureau, à la connaissance des Puissances signataires.

Deux ou plusieurs Puissances peuvent s'entendre pour la désignation en commun d'un ou de plusieurs membres.

La même personne peut être désignée par des Puissances différentes.

Les membres de la Cour sont nommés pour un terme de six ans. Leur mandat peut être renouvelé.

En cas de décès ou de retraite d'un membre de la Cour, il est pourvu à son remplacement selon le mode fixé pour sa nomination.

Article XXIII.

Within the three months following its ratification of the present Act, each Signatory Power shall select four persons at the most, of known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of Arbitrators.

The persons thus selected shall be inscribed, as members of the Court, in a list which shall be notified by the Bureau to all the Signatory Powers.

Any alteration in the list of Arbitrators is brought by the Bureau to the knowledge of the Signatory Powers.

Two or more Powers may agree on the selection in common of one or more Members.

The same person can be selected by different Powers.

The Members of the Court are appointed for a term of six years. Their appointments can be renewed.

In case of the death or retirement of a member of the Court, his place shall be filled in accordance with the method of his appointment.

Article 24.

Lorsque les Puissances signataires veulent s'adresser à la Cour permanente pour le règlement d'un différend survenu entre elles, le

Article XXIV.

When the Signatory Powers desire to have recourse to the Permanent Court for the settlement of a difference that has arisen between

choix des arbitres appelés à former le Tribunal compétent pour statuer sur ce différend, doit être fait dans la liste générale des membres de la Cour.

A défaut de constitution du Tribunal arbitral par l'accord immédiat des Parties, il est procédé de la manière suivante:

Chaque Partie nomme deux arbitres et ceux-ci choisissent ensemble un surarbitre.

En cas de partage des voix, le choix de surarbitre est confié à une Puissance tierce, désignée de commun accord par les Parties.

Si l'accord ne s'établit pas à ce sujet, chaque Partie désigne une Puissance différente et le choix du surarbitre est fait de concert par les Puissances ainsi désignées.

Le Tribunal étant ainsi composé, les parties notifient au Bureau leur décision de s'adresser à la Cour et les noms des arbitres.

Le Tribunal arbitral se réunit à la date fixée par les Parties.

Les membres de la Cour, dans l'exercice de leurs fonctions et en dehors de leur Pays, jouissent des privilèges et immunités diplomatiques.

them, the Arbitrators called upon to form the competent Tribunal to decide this difference, must be chosen from the general list of members of the Court.

Failing the direct agreement of the parties on the composition of the Arbitration Tribunal, the following course shall be pursued:—

Each party appoints two Arbitrators, and these together choose an Umpire.

If the votes are equal, the choice of the Umpire is intrusted to a third Power, selected by the parties by common accord.

If an agreement is not arrived at on this subject, each party selects a different Power, and the choice of the Umpire is made in concert by the Powers thus selected.

The Tribunal being thus composed, the parties notify to the Bureau their determination to have recourse to the Court and the names of the Arbitrators.

The Tribunal of Arbitration assembles on the date fixed by the parties.

The Members of the Court, in the discharge of their duties and out of their own country, enjoy diplomatic privileges and immunities.

ARTICLE 25.

Le Tribunal arbitral siège d'ordinaire à la Haye.

La siège ne peut, sauf le cas de force majeure, être changé par le Tribunal que de l'assentiment des Parties.

ARTICLE XXV.

The Tribunal of Arbitration has its ordinary seat at The Hague.

Except in cases of necessity, the place of session can only be altered by the Tribunal with the assent of the parties.

ARTICLE 26.

Le Bureau international de la Haye est autorisé à mettre ses locaux et son organisation à la disposition des Puissances signataires pour le fonctionnement de toute juridiction spéciale d'arbitrage.

La juridiction de la Cour permanente peut être étendue, dans

ARTICLE XXVI.

The International Bureau at The Hague is authorized to place its premises and its staff at the disposal of the Signatory Powers for the operations of any special Board of Arbitration.

The jurisdiction of the Permanent Court, may, within the con-

les conditions prescrites par les Règlements, aux litiges existant entre des Puissances non signataires ou entre des Puissances signataires et des Puissances non signataires, si les Parties sont convenues de recourir à cette juridiction.

ditions laid down in the Regulations, be extended to disputes between non-Signatory Powers, or between Signatory Powers and non-Signatory Powers, if the parties are agreed on recourse to this Tribunal.

ARTICLE 27.

Le Puissances signataires considèrent comme un devoir, dans le eas où un conflit aigu menacerait d'éclater entre deux ou plusieurs d'entre Elles, de rappeler à celles-ci que la Cour permanente leur est ouverte.

En conséquence, Elles déclarent que le fait de rappeler aux Parties en conflit les dispositions de la présente Convention, et le conseil donné, dans l'intérêt supérieur de la paix, de s'adresser à la Cour permanente ne peuvent être considérés que comme actes de Bons Offices.

ARTICLE XXVII.

The Signatory Powers consider it their duty, if a serious dispute threatens to break out between two or more of them, to remind these latter that the Permanent Court is open to them.

Consequently, they declare that the fact of reminding the conflicting parties of the provisions of the present Convention, and the advice given to them, in the highest interests of peace, to have recourse to the Permanent Court, can only be regarded as friendly actions.

ARTICLE 28.

Un Conseil administratif permanent composé des représentants diplomatiques des Puissances signataires accrédités à la Haye et du Ministre des Affaires Etrangères des Pays-Bas qui remplira les fonctions de Président, sera constitué dans cette ville le plus tôt possible après la ratification du présent Acte par neuf Puissances au moins.

Ce Conseil sera chargé d'établir et d'organiser le Bureau international, lequel demeurera sous sa direction et sous son contrôle.

Il notifiera aux Puissances la constitution de la Cour et pourvoira à l'installation de celle-ci.

Il arrêtera son règlement d'ordre ainsi que tous autres règlements nécessaires.

Il décidera toutes les questions administratives qui pourraient

ARTICLE XXVIII.

A Permanent Administrative Council, composed of the Diplomatic Representatives of the Signatory Powers accredited to The Hague and of the Netherland Minister for Foreign Affairs, who will act as President, shall be instituted in this town as soon as possible after the ratification of the present Act by at least nine Powers.

This Council will be charged with the establishment and organization of the International Bureau, which will be under its direction and control.

It will notify to the Powers the constitution of the Court and will provide for its installation.

It will settle its rules of Procedure and all other necessary Regulations.

It will decide all questions of administration which may arise

surgir touchant le fonctionnement de la Cour.

Il aura tout pouvoir quant à la nomination, la suspension ou la révocation des fonctionnaires et employés du Bureau.

Il fixera les traitements et salaires et contrôlera la dépense générale.

La présence de cinq membres dans les réunions dûment convoquées suffit pour permettre au Conseil de délibérer valablement. Les décisions sont prises à la majorité des voix.

Le Conseil communique sans délai aux Puissances signataires les règlements adoptés par lui. Il leur adresse chaque année un rapport sur les travaux de la Cour, sur le fonctionnement des services administratifs et sur les dépenses.

with regard to the operations of the Court.

It will have entire control over the appointment, suspension or dismissal of the officials and employés of the Bureau.

It will fix the payments and salaries, and control the general expenditure.

At meetings duly summoned the presence of five members is sufficient to render valid the discussions of the Council. The decisions are taken by a majority of votes.

The Council communicates to the Signatory Powers without delay the Regulations adopted by it. It furnishes them with an annual Report on the labours of the Court, the working of the administration, and the expenses.

ARTICLE 29.

Les frais du Bureau seront supportés par les Puissances signataires dans la proportion établie pour le Bureau international de l'Union postale universelle.

ARTICLE XXIX.

The expenses of the Bureau shall be borne by the Signatory Powers in the proportion fixed for the International Bureau of the Universal Postal Union.

CHAPITRE III.—*De la Procédure Arbitrale.*

CHAPTER III.—*On Arbitral Procedure.*

ARTICLE 30.

En vue de favoriser le développement de l'arbitrage, les Puissances signataires ont arrêté les règles suivantes qui seront applicables à la procédure arbitrale, en tant que les Parties ne sont pas convenues d'autres règles.

ARTICLE XXX.

With a view to encourage the development of arbitration, the Signatory Powers have agreed on the following Rules which shall be applicable to arbitral procedure, unless other rules have been agreed on by the parties.

ARTICLE 31.

Les Puissances qui recourent à l'arbitrage signent un acte spécial (compromis) dans lequel sont nettement déterminés l'objet du litige ainsi que l'étendue des pouvoirs des arbitres. Cet acte implique l'engagement des Parties de se soumettre de bonne foi à la sentence arbitrale.

ARTICLE XXXI.

The Powers who have recourse to arbitration sign a special Act ("Compromis"), in which the subject of the difference is clearly defined, as well as the extent of the Arbitrators' powers. This Act implies the undertaking of the parties to submit loyally to the award.

ARTICLE 32.

Les fonctions arbitrales peuvent être conférées à un arbitre unique ou à plusieurs arbitres désignés par les Parties à leur gré, ou choisis par Elles parmi les membres de la Cour permanente d'arbitrage établie par le présent Acte.

A défaut de constitution du Tribunal par l'accord immédiat des Parties, il est procédé de la manière suivante:

Chaque Partie nomme deux arbitres et ceux-ci choisissent ensemble un surarbitre.

En cas de partage des voix, le choix de surarbitre est confié à une Puissance tierce, désignée de commun accord par les Parties.

Si l'accord ne s'établit pas à ce sujet, chaque Partie désigne une Puissance différente et le choix du surarbitre est fait de concert par les Puissances ainsi désignées.

ARTICLE XXXII.

The duties of Arbitrator may be conferred on one Arbitrator alone or on several Arbitrators selected by the parties as they please, or chosen by them from the members of the Permanent Court of Arbitration established by the present Act.

Failing the constitution of the Tribunal by direct agreement between the parties, the following course shall be pursued:

Each party appoints two arbitrators, and these latter together choose an Umpire.

In case of equal voting, the choice of the Umpire is intrusted to a third Power, selected by the parties by common accord.

If no agreement is arrived at on this subject, each party selects a different Power, and the choice of the Umpire is made in concert by the Powers thus selected.

ARTICLE 33.

Lorsqu'un Souverain ou un Chef d'Etat est choisi pour arbitre, la procédure arbitrale est réglée par Lui.

ARTICLE XXXIII.

When a Sovereign or the Chief of a State is chosen as Arbitrator, the arbitral procedure is settled by him.

ARTICLE 34.

Le surarbitre est de droit Président du Tribunal.

Lorsque le Tribunal ne comprend pas de surarbitre il nomme lui-même son président.

ARTICLE XXXIV.

The Umpire is by right President of the Tribunal.

When the Tribunal does not include an Umpire, it appoints its own President.

ARTICLE 35.

En cas de décès, de démission ou d'empêchement, pour quelque cause que ce soit, de l'un des arbitres, il est pourvu à son remplacement selon le mode fixé pour sa nomination.

ARTICLE XXXV.

In case of the death, retirement, or disability from any cause of one of the Arbitrators, his place shall be filled in accordance with the method of his appointment.

ARTICLE 36.

Le siège du Tribunal est désigné par les Parties. A défaut de cette

ARTICLE XXXVI.

The Tribunal's place of session is selected by the parties. Failing

désignation le Tribunal siège à la Haye.

Le siège ainsi fixé ne peut, sauf le cas de force majeure, être changé par le Tribunal que de l'assentiment des Parties.

ARTICLE 37.

Les Parties ont le droit de nommer auprès du Tribunal des délégués ou agents spéciaux, avec la mission de servir d'intermédiaires entre Elles et le Tribunal.

Elles sont en outre autorisées à charger de la défense de leurs droits et intérêts devant le Tribunal, des conseils ou avocats nommés par Elles à cet effet.

ARTICLE 38.

Le tribunal décide du choix des langues dont il fera usage et dont l'emploi sera autorisé devant lui.

ARTICLE 39.

La procédure arbitrale comprend en règle générale deux phases distinctes: l'instruction et les débats.

L'instruction consiste dans la communication faite par les agents respectifs, aux membres du Tribunal et à la Partie adverse, de tous actes imprimés ou écrits et de tous documents contenant les moyens invoqués dans la cause. Cette communication aura lieu dans la forme et dans les délais déterminés par le Tribunal en vertu de l'article 49.

Les débats consistent dans le développement oral des moyens des Parties devant le Tribunal.

ARTICLE 40.

Toute pièce produite par l'une des Parties doit être communiquée à l'autre Partie.

this selection the Tribunal sits at The Hague.

The place thus fixed cannot, except in case of necessity, be changed by the Tribunal without the assent of the parties.

ARTICLE XXXVII.

The parties have the right to appoint delegates or special agents to attend the Tribunal, for the purpose of serving as intermediaries between them and the Tribunal.

They are further authorized to retain, for the defense of their rights and interests before the Tribunal, counsel or advocates appointed by them for this purpose.

ARTICLE XXXVIII.

The Tribunal decides on the choice of languages to be used by itself, and to be authorized for use before it.

ARTICLE XXXIX.

As a general rule the arbitral procedure comprises two distinct phases; preliminary examination and discussion.

Preliminary examination consists in the communication by the respective agents to the members of the Tribunal and to the opposite party of all printed or written Acts and of all documents containing the arguments invoked in the case. This communication shall be made in the form and within the periods fixed by the Tribunal in accordance with Article XLIX.

Discussion consists in the oral development before the Tribunal of the arguments of the parties.

ARTICLE XL.

Every document produced by one party must be communicated to the other party.

ARTICLE 41.

Les débats sont dirigés par Président.

Ils ne sont publics quìen vertu d'une décision du Tribunal, prise avec l'assentiment des Parties.

Ils sont consignés dans des procès-verbaux rédigés par des secrétaires que nomme le Président. Ces procès-verbaux ont seuls caractère authentique.

ARTICLE XLI.

The discussions are under the direction of the President.

They are only public if it be so decided by the Tribunal, with the assent of the parties.

They are recorded in the *procès-verbaux* drawn up by the Secretaries appointed by the President. These *procès-verbaux* alone have an authentic character.

ARTICLE 42.

L'instruction étant close, le Tribunal a le droit d'écarter du débat tous actes ou documents nouveaux qu'une des Parties voudrait lui soumettre sans le consentement de l'autre.

ARTICLE XLII.

When the preliminary examination is concluded, the Tribunal has the right to refuse discussion of all fresh Acts or documents which one party may desire to submit to it without the consent of the other party.

ARTICLE 43.

Le Tribunal demeure libre de prendre en considération les actes ou documents nouveaux sur lesquels les agents ou conseils des Parties appelleraient son attention.

En ce cas, le Tribunal a le droit de requérir la production de ces actes ou documents, sauf l'obligation d'en donner connaissance à la Partie adverse.

ARTICLE XLIII.

The Tribunal is free to take into consideration fresh Acts or documents to which its attention may be drawn by the agents or counsel of the parties.

In this case, the Tribunal has the right to require the production of these Acts or documents, but is obliged to make them known to the opposite party.

ARTICLE 44.

Le Tribunal peut, en outre, requérir des agents des Parties la production de tous actes et demander toutes explications nécessaires. En cas de refus le Tribunal en prend acte.

ARTICLE XLIV.

The Tribunal can, besides, require from the agents of the parties the production of all Acts, and can demand all necessary explanations. In case of refusal, the Tribunal takes note of it.

ARTICLE 45.

Les agents et les conseils des Parties sont autorisés à présenter oralement au Tribunal tous les moyens qu'ils jugent utiles à la défense de leur cause.

ARTICLE XLV.

The agents and counsel of the parties are authorized to present orally to the Tribunal all the arguments they may think expedient in defence of their case.

ARTICLE 46.

Ils ont le droit de soulever des exceptions et incidents. Les décisions du Tribunal sur ces points sont définitives et ne peuvent donner lieu à aucune discussion ultérieure.

ARTICLE XLVI.

They have the right to raise objections and points. The decisions of the Tribunal on those points are final, and cannot form the subject of any subsequent discussion.

ARTICLE 47.

Les membres du Tribunal ont le droit de poser des questions aux agents et aux conseils des Parties et de leur demander des éclaircissements sur les points douteux.

Ni les questions posées, ni les observations faites par les membres du Tribunal pendant le cours des débats ne peuvent être regardées comme l'expression des opinions du Tribunal en général ou de ses membres en particulier.

ARTICLE XLVII.

The members of the Tribunal have the right to put questions to the agents and counsel of the parties, and to demand explanations from them on doubtful points.

Neither the questions put nor the remarks made by members of the Tribunal during the discussions can be regarded as an expression of opinion by the Tribunal in general, or by its members in particular.

ARTICLE 48.

Le Tribunal est autorisé a déterminer sa compétence en interpretant le compromis ainsi que les autres traités qui peuvent être invoqués dans la matière, et en appliquant les principes du droit international.

ARTICE XLVIII.

The Tribunal is authorized to declare its competence in interpreting the "Compromis" as well as the other Treaties which may be invoked in the case, and in applying the principles of international law.

ARTICLE 49.

Le Tribunal a le droit de rendre des ordonnances de procédure pour la direction due procès, de déterminer les formes et délais dans lesquels chaque Partie devra prendre ses conclusions et de procéder à toutes les formalités que comporte l'administration des preuves.

ARTICLE XLIX.

The Tribunal has the right to issue Rules of Procedure for the conduct of the case, to decide the forms and periods within which each party must conclude its arguments, and to arrange all the formalities required for dealing with the evidence.

ARTICLE 50.

Les agents et les conseils des Parties ayant présenté tous les éclaircissements et preuves à l'appui de leur cause, le Président prononce la clôture des débats.

ARTICLE L.

When the agents and counsel of the parties have submitted all explanations and evidence in support of their case, the President pronounces the discussion closed.

ARTICLE 51.

Les déliberations du Tribunal ont lieu à huis clos. Toute décision est prise à la majorité des membres du Tribunal.

Le refus d'un membre de prendre part au vote doit être constaté dans le procès-verbal.

ARTICLE LI.

The deliberations of the Tribunal take place in private. Every decision is taken by a majority of members of the Tribunal.

The refusal of a member to vote must be recorded in the *procès-verbal.*

ARTICLE 52.

La sentence arbitrale, votée à la majorité des voix, est motivée. Elle est rédigée par écrit et signée par chacun des membres du Tribunal.

Ceux des membres qui sont restés en minorité peuvent constater, en signant, leur dissentiment.

ARTICLE LII.

The award, given by a majority of votes, is accompanied by a statement of reasons. It is drawn up in writing and signed by each member of the Tribunal.

Those members who are in the minority may record their dissent when signing.

ARTICLE 53.

La sentence arbitrale est lue en séance publique du Tribunal, les agents et les conseils de Parties présents ou dûment appelés.

ARTICLE LIII.

The award is read out at a public meeting of the Tribunal, the agents and counsel of the parties being present, or duly summoned to attend.

ARTICLE 54.

La sentence arbitrale, dûment prononcée et notifiée aux agents des Parties en litige décide définitivement et sans appel la contestation.

ARTICLE LIV.

The award, duly pronounced and notified to the agents of the parties at variance, puts an end to the dispute definitely and without appeal.

ARTICLE 55.

Les Parties peuvent se réserver dans le compromis de demander la revision de la sentence arbitrale.

Dans ce cas et sauf convention contraire, la demande doit être adressée au Tribunal qui a rendu la sentence. Elle ne peut être motivée que par la découverte d'un fait nouveau qui eût été de nature à exercer une influence décisive sur la sentence et qui, lors de la clôture des débats, était inconnu du tribunal lui-même et de la Partie qui a demandé la revision.

ARTICLE LV.

The parties can reserve in the "Compromis" the right to demand the revision of the award.

In this case, and unless there be an agreement to the contrary, the demand must be addressed to the Tribunal which pronounced the award. It can only be made on the ground of the discovery of some new fact calculated to exercise a decisive influence on the award, and which, at the time the discussion was closed, was unknown to the Tribunal and to the party demanding the revision.

La procédure de revision ne peut être ouverte que par une décision du Tribunal constatant expressément l'existence du fait nouveau, lui reconnaissant les caractères prévus par le paragraphe précédent et déclarant à ce titre la demande recevable.

Le compromis détermine le délai dans lequel la demande de revision doit être formée.

Proceedings for revision can only be instituted by a decision of the Tribunal expressly recording the existence of the new fact, recognizing in it the character described in the foregoing paragraph, and declaring the demand admissible on this ground.

The "Compromis" fixes the period within which the demand for revision must be made.

Article 56.

La sentence arbitrale n'est obligatoire que pour les Parties qui ont conclu le compromis.

Lorsqu'il s'agit de l'interprétation d'une convention à laquelle ont participé d'autres Puissances que les Parties en litige, celles-ci notifient aux premières le compromis qu'elles ont conclu. Chacune de ces Puissances a le droit d'intervenir au procès. Si une ou plusieurs d'entre elles ont profité de cette faculté, l'interprétation contenue dans la sentence est également obligatoire à leur égard.

Article LVI.

The award is only binding on the parties who concluded the "Compromis."

When there is a question interpreting a Convention to which Powers other than those concerned in the dispute are parties, the latter notify to the former the "Compromis" they have concluded. Each of these Powers has the right to intervene in the case. If one or more of them avail themselves of this right, the interpretation contained in the award is equally binding on them.

Article 57.

Chaque Partie supporte ses propres frais et une part égale des frais du Tribunal.

Article LVII.

Each party pays its own expenses and an equal share of those of the Tribunal.

Dispositions générales.

Article 58.

La présente Convention sera ratifiée dans le plus bref délai possible.

Les ratifications seront déposées à la Haye.

Il sera dressé du dépôt de chaque ratification un procès-verbal, dont une copie, certifiée conforme, sera remise par la voie diplomatique à toutes les Puissances, qui ont été représentées à la Conference Internationale de la Paix de la Haye.

General provisions.

Article LVIII.

The present Convention shall be ratified as speedily as possible.

The ratifications shall be deposited at The Hague.

A *procès-verbal* shall be drawn up recording the receipt of each ratification, and a copy duly certified shall be sent, through the diplomatic channel, to all the Powers who were represented at the International Peace Conference at The Hague.

ARTICLE 59.

Les Puissances non signataires qui ont été représentées à la Conférence Internationale de la Paix pourront adhérer à la présente Convention. Elles auront à cet effet à fair connaître leur adhésion aux Puissances contractantes, au moyen d'une notification écrite, adressée au Gouvernement des Pays-Bas et communiquée par celui-ci à toutes les autres Puissances contractantes.

ARTICLE LIX.

The non-Signatory Powers who were represented at the International Peace Conference can adhere to the present Convention. For this purpose they must make known their adhesion to the Contracting Powers by a written notification addressed to the Netherlands Government, and communicated by it to all the other Contracting Powers.

ARTICLE 60.

Les conditions auxquelles les Puissances qui n'ont pas été représentées à la Conférence Internationale de la Paix, pourront adhérer à la présente Convention, formeront l'objet d'une entente ultérieure entre les Puissances contractantes.

ARTICLE LX.

The conditions on which the Powers who were not represented at the International Peace Conference can adhere to the present Convention shall form the subject of a subsequent Agreement among the Contracting Powers.

ARTICLE 61.

S'il arrivait qu'une des Hautes Parties contractantes dénonçât la présente Convention, cette dénonciation ne produirait ses effets qu'un an après la notification faite par écrit au Gouvernement des Pays-Bas et communiquée immédiatement par celui-ci à toutes les autres Puissances contractantes.

Cette dénonciation ne produira ses effets qu'à l'égard de la Puissance qui l'aura notifiée.

En foi de quoi, les Plénipotentiaires ont signé la présente Convention et l'ont revêtue de leurs sceaux.

Fait à la Haye, le vingt-neuf juillet mil huit cent quatre-vingt dix-neuf, en un seul exemplaire qui restera déposé dans les archives du Gouvernement des Pays-Bas et dont des copies, certifiées conformes, seront remises par la voie diplomatique aux Puissances contractantes.

Pour l'Allemagne:
(L. S.) MUNSTER DERNEBURG.

ARTICLE LXI.

In the event of one of the High Contracting Parties denouncing the present Convention, this denunciation would not take effect until a year after its notification made in writing to the Netherlands Government, and by it communicated at once to all the other Contracting Powers.

This denunciation shall only affect the notifying Power.

In faith of which the Plenipotentiaries have signed the present Convention and affixed their seals to it.

Done at The Hague the 29th July, 1899, in a single copy, which shall remain in the archives of the Netherlands Government, and copies of it, duly certified, be sent through the diplomatic channel to the Contracting Powers.

For Germany:
(L. S.) MUNSTER DERNEBURG.

Pour l'Autriche-Hongrie:
(L. S.) WELSERSHEIMB.
(L. S.) OKOLICSANYI.
Pour la Belgique:
(L. S.) A. BEERNAERT.
(L. S.) CTE DE GRELLE ROGIER.
(L. S.) CHR DESCAMPS.
Pour la Chine:
(L. S.) YANG YU.
Pour le Danemark:
(L. S.) F. BILLE.
Pour l'Espagne:
(L. S.) EL DUQUE DE TETUAN.
(L. S.) W. R. DEVILLA URRUTIA.
(L. S.) ARTURO DE BAGUER.
Pour les Etats-Unis d'Amérique:
(L. S.) ANDREW D. WHITE.
(L. S.) SETH LOW.
(L. S.) STANFORD NEWEL.
(L. S.) A. T. MAHAN.
(L. S.) WILLIAM CROZIER.
Sous réserve de la déclaration faite dans la séance plénière de la Conférence de 25 juillet 1899.

Pour les Etats-Unis Mexicains:
A. DE MIER.
J. ZENIL.
Pour la France:
(L. S.) LÉON BOURGEOIS.
(L. S.) G. BIHOURD.
(L. S.) D'ESTOURNELLES DE CONSTANT.
Pour la Grande Bretagne et l'Irlande:
(L. S.) PAUNCEFOTE.
(L. S.) HENRY HOWARD.
Pour la Grèce:
(L. S.) N. DALYANNI.
Pour l'Italie:
(L. S.) NIGRA.
(L. S.) A. ZANNINI.
(L. S.) G. POMPILJ.
Pour le Japon:
(L. S.) I. MOTONO.
Pour le Luxembourg:
(L. S.) EYSCHEN.
Pour le Monténégro:
(L. S.) STAAL.
Pour les Pays-Bas:
(L. S.) V. KARNEBEEK.
(L. S.) DEN BEER POORTUGAEL.
(L. S.) T. M. C. ASSER.
(L. S.) E. N. RAHUSEN.

For Austria-Hungary:
(L. S.) WELSERSHEIMB.
(L. S.) OKOLICSANYI.
For Belgium:
(L. S.) A. BEERNAERT.
(L. S.) CTE. DE GRELLE ROGIER.
(L. S.) CHR. DESCAMPS.
For China:
(L. S.) YANG YU.
For Denmark:
(L. S.) F. BILLE.
For Spain:
(L. S.) EL DUQUE DE TETUAN.
(L. S.) W. R. DE VILLA URRUTIA.
(L. S.) ARTURO DE BAGUER.
For the United States of America:
(L. S.) ANDREW D. WHITE.
(L. S.) SETH LOW.
(L. S.) STANFORD NEWEL.
(L. S.) A. T. MAHAN.
(L. S.) WILLIAM CROZIER.
Under reserve of the declaration made at the plenary sitting of the Conference on the 25th of July, 1899.
For the United Mexican States:
(L. S.) A. DE MIER.
(L. S.) J. ZENIL.
For France:
(L. S.) LÉON BOURGEOIS.
(L. S.) G. BIHOURD.
(L. S.) D'ESTOURNELLES DE CONSTANT.
For Great Britain and Ireland:
(L. S.) PAUNCEFOTE.
(L. S.) HENRY HOWARD.
For Greece:
(L. S.) N. DELYANNI.
For Italy:
(L. S.) NIGRA.
(L. S.) A. ZANNINI.
(L. S.) G. POMPILJ.
For Japan:
(L. S.) I. MOTONO.
For Luxemburg:
(L. S.) EYSCHEN.
For Montenegro:
(L. S.) STAAL.
For the Netherlands:
(L. S.) V. KARNEBEEK.
(L. S.) DEN BEER POORTUGAEL.
(L. S.) T. M. C. ASSER.
(L. S.) E. N. RAHUSEN.

Pour la Perse:
(L. S.) MIRZA RISA KHAN, Arfa-ud-Dovleh.
Pour le Portugal:
(L. S.) CONDE DE MACEDO.
(L. S.) AGOSTINHO D'ORNELLAS DE VASCONCELLOS.
(L. S.) CONDE DE SELIR.
Pour la Roumanie:
(L. S.) A. BELDIMAN.
(L. S.) J. N. PAPINIU.
Sous les réserves, formulées aux articles 16, 17 et 19 de la présente Couvention (15, 16 et 18 du projet présenté par le Comité d'Examen) et consignées aux procès-verbal de la séance de la Troisième Commission du 20 juillet 1899.
Pour la Russie:
(L. S.) STAAL.
(L. S.) MARTENS.
(L. S.) A. BASILY.
Pour la Serbie:
(L. S.) CHEDO MIYATOVITCH.
Sous les réserves, consignées au procès-verbal de la Troisième Commission du 20 juillet 1899.
Pour le Siam:
(L. S.) PHYA SURIYA NUVATR.
(L. S.) VISUDDHA.
Pour les Royaumes Unis de Suède et de Norvège:
(L. S.) BILDT.
Pour la Suisse:
(L. S.) ROTH.
Pour la Turquie:
(L. S.) TURKHAN.
(L. S.) MEHEMED NOURY.
Sous réserve de la déclaration faite dans la séance plénière de la Conférence du 25 juillet 1899.
Pour la Bulgarie:
(L. S.) D. STANCIOFF.
(L. S.) MAJOR HESSAPTCHIEFF.

Certifié pour copie conforme,
Le Secrétaire Général du Département des Affaires Etrangères,
(L. S.) L. H. RUYSSENAERS.
LA HAYE, *le 31 janvier, 1900.*

For Persia:
(L. S.) MIRZA RIZA KHAN, Arfa-ud-Dovleh.
For Portugal:
(L. S.) Conde DE MACEDO.
(L. S.) AGOSTINHO D'ORNELLAS DE VASCONCELLOS.
(L. S.) Conde DE SELIR.
For Roumania:
(L. S.) A. BELDIMAN.
(L. S.) J. N. PAPINIU.
Under the reserves formulated in Articles 16, 17 and 19 of the present Convention (15, 16 and 18 of the project presented by the Committee on Examination) and recorded in the procès-verbal of the sitting of the Third Commission of July 20, 1899.
For Russia:
(L. S.) STAAL.
(L. S.) MARTENS.
(L. S.) A. BASILY.
For Servia:
(L. S.) CHEDO MIYATOVITCH.
Under the reserves recorded in the procès-verbal of the Third Commission of July 20, 1899.
For Siam:
(L. S.) PHYA SURIYA NUVATR.
(L. S.) VISUDDHA.
For the United Kingdoms of Sweden and Norway:
(L. S.) BILDT.
For Switzerland:
(L. S.) ROTH.
For TURKEY:
(L. S.) TURKHAN.
(L. S.) MEHEMED NOURY.
Under reserve of the declaration made in the plenary sitting of the Conference of July 25, 1899.
For Bulgaria:
(L. S.) D. STANCIOFF.
(L. S.) Major HESSAPTCHIEFF.

Certified as a true copy, The Secretary General of the Department of Foreign Affairs,
(L. S.) L. H. RUYSSENAERS.
THE HAGUE, *January 31, 1900.*

And whereas the said Convention was signed by the Plenipotentiaries of the United States of America under reservation of the following declaration:

"Nothing contained in this convention shall be so construed as to require the United States of America to depart from its traditional policy of not intruding upon, interfering with, or entangling itself in the political questions of policy or internal administration of any foreign state; nor shall anything contained in the said convention be construed to imply a relinquishment by the United States of America of its traditional attitude toward purely American questions;"

And whereas the said Convention was duly ratified by the Government of the United States of America, by and with the advice and consent of the Senate thereof, and by the Governments of the other Powers aforesaid with the exception of China and Turkey;

And whereas, in pursuance of the stipulations of Article LVIII of the said Convention the ratifications of the said Convention were deposited at The Hague on the 4th. day of September, 1900, by the Plenipotentiaries of the Governments of the United States of America, Germany, Austria-Hungary, Belgium, Denmark, Spain, France, Great Britain, Italy, the Netherlands, Persia, Portugal, Roumania, Russia, Siam, Sweden and Norway and Bulgaria; on the 6th. day of October, 1900, by the Plenipotentiary of the Government of Japan; on the 16th. day of October, 1900, by the Plenipotentiary of the Government of Montenegro; on the 29th. day of December, 1900, by the Plenipotentiary of the Government of Switzerland; on the 4th. day of April, 1901, by the Plenipotentiary of the Government of Greece; on the 17th. day of April, 1901, by the Plenipotentiary of the Government of Mexico; on the 11th. day of May, 1901, by the Plenipotentiary of the Government of Servia; and on the 12th. day of July, 1901, by the Plenipotentiary of the Government of Luxembourg.

Now, therefore, be it known that I, Theodore Roosevelt, President of the United States of America, have caused the said Convention to be made public, to the end that the same and every clause thereof may be observed and fulfilled with good faith by the United States and the citizens thereof, subject to the reserve made in the aforesaid declaration of the Plenipotentiaries of the United States.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this first day of November in the year of our Lord one thousand nine hundred and one, and of the Independence of the United States, the one hundred and twenty-sixth.

[L. S.]

THEODORE ROOSEVELT.

By the President:

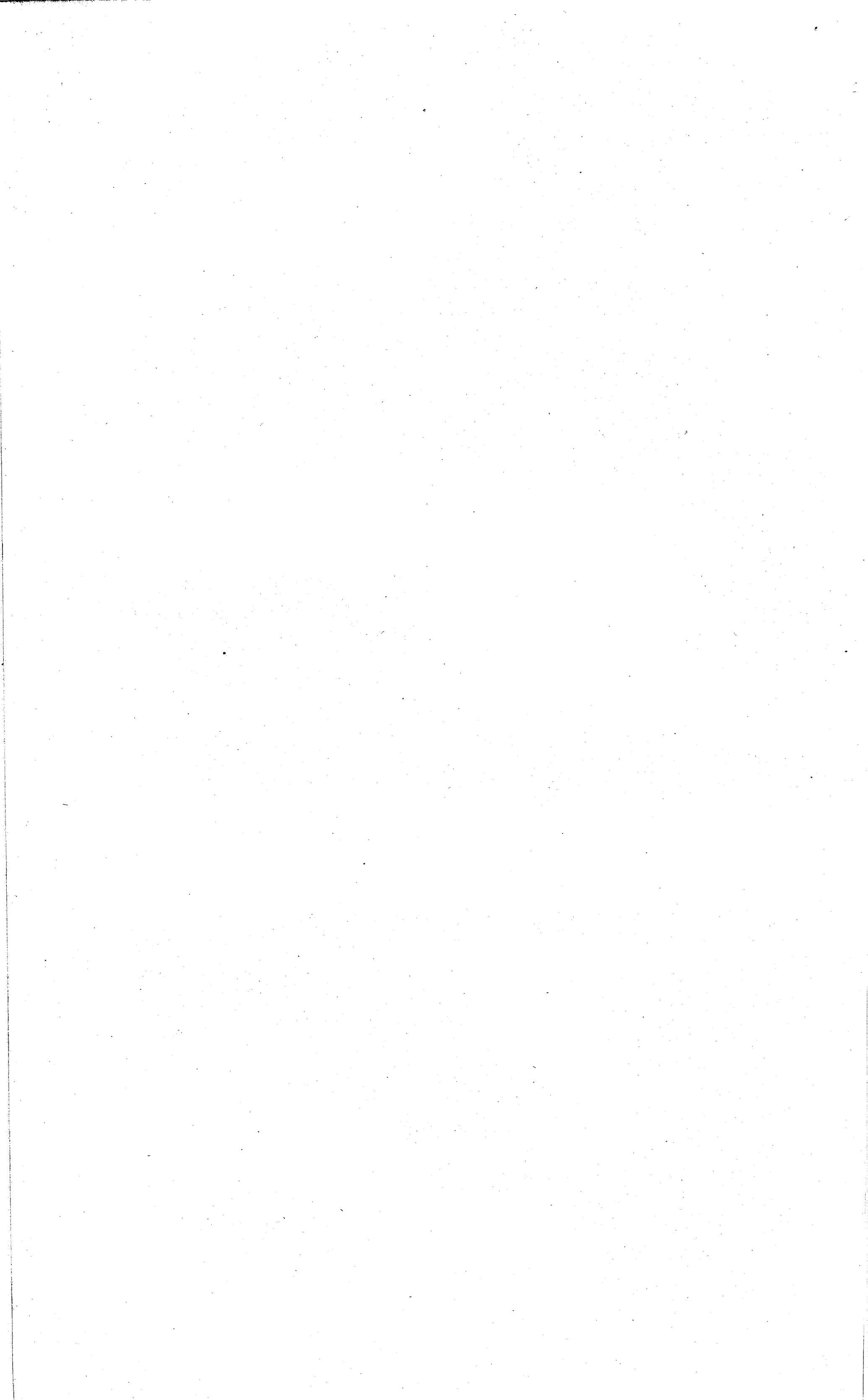
JOHN HAY,

Secretary of State.

PART IV.

BRIEFS SUBMITTED TO THE PERMANENT COURT OF ARBITRATION ON BEHALF OF THE UNITED STATES.

Statement and brief of agent and counsel of the United States.
Brief of Senator William M. Stewart and Mr. C. J. Kappler.
Brief of Messrs. Doyle & Doyle.
Brief of Mr. Garret W. McEnerney.
Supplemental brief of Messrs. Doyle & Doyle.



BEFORE THE PERMANENT COURT OF ARBITRATION UNDER THE HAGUE CONVENTION OF 1899.

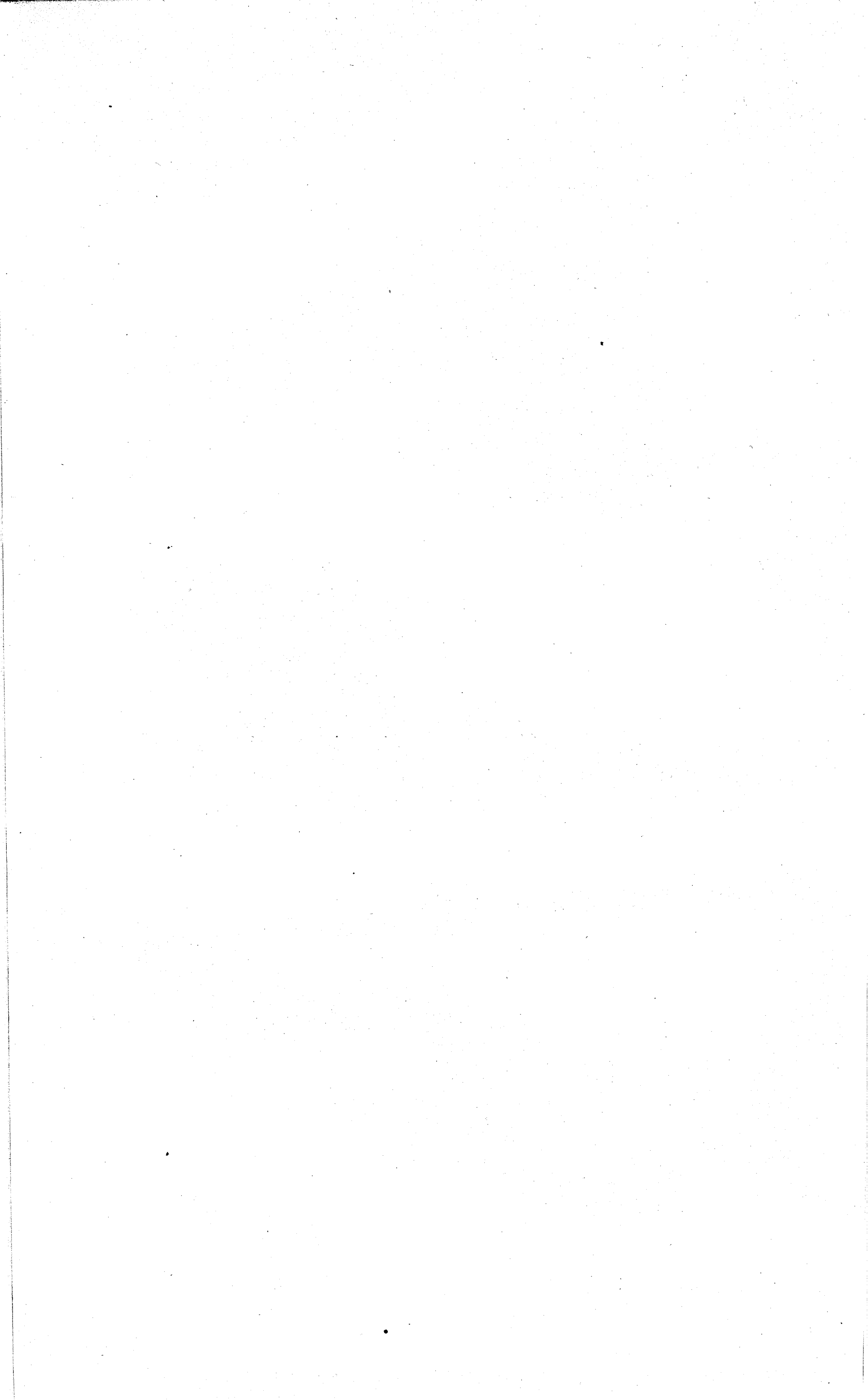
THE CASE OF THE PIOUS FUND OF THE CALIFORNIAS.

UNITED STATES OF AMERICA
v.
REPUBLIC OF MEXICO.

STATEMENT AND BRIEF ON BEHALF OF THE UNITED STATES.

JACKSON H. RALSTON,
Agent of the United States and of Counsel.

WILLIAM L. PENFIELD,
Solicitor of the Department of State.



STATEMENT AND BRIEF ON BEHALF OF THE UNITED STATES.

The present case comes before this honorable tribunal through joint reference to it by the United States and Mexico under the terms of what is known as the The Hague Convention, except in so far as the provisions of such convention may have been departed from by the express language of the protocol.

The matter at issue has relation to what is known as the Pious Fund of the Californias, the history of which, as well as the history of all prior litigation relating thereto, will hereafter be related. For the moment it is sufficient to say that some, and, as the United States contends, practically all, of the matters at issue were formerly passed upon by what was known as the American and Mexican Mixed Claims Commission, established under the terms of a convention entered into between the United States and Mexico in 1868, and the final ratifications of which were exchanged at Washington February 1, 1869, and that by the terms of the protocol under which this tribunal acts it has power to decide—

(1) If said claim, as a consequence of the former decision, is within the governing principle of res judicata; and

(2) If not, whether the same be just;

And to render such judgment and reward as may be meet and proper under all the circumstances of the case.

With these preliminary remarks, we may proceed to the consideration of the case from the point of view of the complaining Government.

JUDICIAL HISTORY OF THE PIOUS FUND CONTROVERSY BETWEEN THE TWO NATIONS.

The Pious Fund case was first brought to the attention of the American Government through a letter addressed by Mr. John T. Doyle, on behalf of the bishops of California, to the Hon. Lewis Cass, Secretary of State of the United States, which letter was dated July 20, 1859, and is to be found on page 5 of the transcript of record. This letter asked for the "enforcement of" the rights of the bishops "against the Government of Mexico," stated briefly the facts in the case, and requested the interposition of the Government. No steps seem to have been taken based upon this letter.

Later, differences arising between the two countries because of grievances complained of by the citizens of each country against the other, a convention was agreed upon between the United States and Mexico, this convention being concluded July 4, 1868, and ratifications exchanged February 1, 1869. By virtue of its terms the first session of the Commission thereunder took place in Washington July 31, 1869. Subsequent agreements between the two countries extending the operations of the tribunal so created are summed up elsewhere in this brief.

Within eight months after the first meeting provided for, and on March 30, 1870, the bishops of California, by Mr. Eugene Casserly, again made the State Department acquainted with the fact that they were the owners of a large claim against Mexico, his letter being found on page 8 of the transcript. The letter was followed by a memorial, complete in all particulars, and filed before the arbitrators December 31, 1870 (Transcript, p. 9). A large amount of evidence was filed with the memorial, and, apparently assuming that all the evidence on behalf of the claimants was in, Mr. Cushing on April 24, 1871, filed a motion to dismiss for the following reasons (Transcript, p. 67):

(1) Because the act of incorporation of the petitioners as corporation sole did not authorize them to claim property beyond the limits of the State of California.

(2) Because the petitioners show no legal interest in or title to the "Pious Fund" in controversy.

(3) Because the petitioners had a legal remedy in the Mexican courts which they were bound to pursue and exhaust before coming here.

(4) Because the injuries complained of were done before February 8, 1848, and this Commission has no jurisdiction of the claim.

In his brief accompanying said motion Mr. Cushing discussed at length the evidence already before the Commission, insisting that it was insufficient to make a case of which that body should take cognizance, as well as that the petitioners were without legal right for the reasons above indicated. Briefs were filed in reply, followed by additional evidence on behalf of the complainants, and succeeded by a brief with extensive evidence relating to the facts of the case furnished by the Mexican Government.

The case, therefore, being fully placed before the court on both the law and the facts, was considered by the arbitrators; the American arbitrator finding on behalf of the complainants for $904,700.99 and the Mexican arbitrator finding for the defendant.

The case thereupon went to the umpire, and before him extended arguments were filed on behalf of the parties in interest: John T. Doyle (Transcript, p. 557), Nathaniel Wilson and P. Phillips (Transcript, p. 575), and Eugene Casserly (Transcript, p. 594) all presenting briefs, and Sr. Eleuterio Avila, on behalf of the Mexican Government (Transcript, p. 546), presenting an exhaustive argument. After having considered the case, the umpire, Sir Edward Thornton, on November 11, 1875, awarded against Mexico and in favor of the claimants the sum of $904,700.99 in Mexican gold (p. 606).

On January 29, 1876, the agent for Mexico filed a motion for rehearing, supported by a lengthy argument (pp. 615–647). This motion was, on November 18, 1876, denied by the umpire (p. 647), although on the same day, by a further order, he made a correction of an error in computation to which his attention had been called (p. 650).

The award was duly paid by Mexico in conformity with the terms of the several conventions, although some correspondence ensued with reference thereto, which correspondence is to be found in the latter part of Diplomatic Correspondence. By a letter on pages 77 and 78 of Diplomatic Correspondence the Mexican secretary of foreign affairs declared that—

> Though the final award in the case (Pious Fund) only refers to interest accrued in a fixed period, said claim should be considered as finally settled in toto, and any other fresh claim in regard to the capital of said fund or its interest accrued or to accrue as forever inadmissible.

To this Secretary Fish, under date of December 4, 1876 (Diplomatic Correspondence, p. 79), replied, among other things, as follows:

I must decline, however, to entertain the consideration of any question which may contemplate any violation of or departure from the provisions of the convention as to the final and binding nature of the awards, or to pass upon, or by silence to be considered as acquiescing in, any attempt to determine the effect of any particular award

In his reply in turn to the foregoing, Señor Mariscal (Diplomatic Correspondence, p. 80) said:

It is not my intention, nor the intention of Señor Avila, to open any question whatever, nor to put in doubt the final and conclusive character of the above-mentioned award. (Pious Fund.) * * *

In a further letter Señor Villarta (Diplomatic Correspondence, p. 81) replied at length.

After the letter last mentioned no further correspondence with relation to the Pious Fund took place between the two countries until the letter of Mr. Ryan to Señor Mariscal, dated August 17, 1891. (Diplomatic Correspondence, p. 8.)

From the date last named until the signing of the protocol by virtue of which this court is convened the correspondence between the two countries was quite active, leading up finally to the making of the present arrangements.

DATES OF CONVENTION OF 1868 AND SUPPLEMENTS THERETO WITH RELATION TO THE SITUATION OF THE "PIOUS FUND" CASE.

Ratifications of the convention of 1868 were exchanged at Washington February 1, 1869. The first meeting of the arbitrators under this convention took place on the last day of the six months allowed therefor—that is, on July 31, 1869. This convention provided, Section III, that every case should be examined and decided within two years and six months from the date last mentioned—that is to say, the proceedings under the convention were to terminate January 31, 1872.

The Pious Fund case was referred to the commission August 13, 1869; statement filed March 31, 1870; memorial filed December 31, 1870, and on January 31, 1872, the cause was pending on motion to dismiss, filed by Mr. Cushing on April 24, 1871.

A convention providing for the extension of the time within which the joint commission should settle claims was signed between the two countries April 19, 1871, and ratifications exchanged February 8, 1872, eight days after the original convention had expired by limitation. This extended the first commission for not exceeding one year from January 31, 1872, or, in other words, to January 31, 1873.

On January 31, 1873, motion to dismiss, filed by Mr. Cushing, was still pending and undetermined, although on March 1, 1872, a reply thereto had been filed.

On November 27, 1872, a further convention was concluded, reviving and extending the duration of the joint commission for a period not exceeding two years from the day on which the functions of the commission would have terminated according to the convention of April 19, 1871. In other words, the commission was extended until January 31, 1875. Ratifications of this convention were exchanged July 17, 1873, nearly six months after the commission had expired by virtue of the convention of April 19, 1871, and it was proclaimed July 24, 1873.

At the time of the expiration of the functions of the commission by the conven-

tion signed April 27, 1872, and ratified July 17, 1873, to wit, on January 31, 1875, final argument for the claimants and an exhibit attached thereto had been offered by the agent of the United States (January 25, 1875).

By further convention concluded November 20, 1874, ratifications of which were exchanged January 28, 1875, and proclamation issued January 29, 1875, the functions of the commission were extended until January 31, 1876.

At the time the last extension went into effect the Pious Fund case was still pending and undetermined, the difference in opinion being announced May 19, 1875, and arguments on behalf of Mexico and the United States being submitted, respectively, on July 10 and July 19, 1875, the award by the umpire being made November 11, 1875.

By convention entered into April 29, 1876, and ratifications exchanged June 29, 1876, the umpire was allowed until November 20, 1876, for the performance of his duties, he having been allowed by the treaty concluded November 20, 1874, to conclude his reports by July 31, 1876.

On January 31, 1876, the motion of the agent for rehearing was pending and undetermined, the same having been filed on January 29, 1876. On November 18, 1876, this motion was denied, although on the same day an arithmetical error was corrected by the umpire.

STATEMENT OF FACTS.

The circumstances out of which grew the formation of what became known as "The Pious Fund" date back to the close of the seventeenth century. In the year 1697 Fathers Juan Maria Salvatierra and Eusebio Francisco Kino (or Quino), members of the Order of Jesus, presented a memorial to the King of Spain asking permission to undertake the conversion of the heathen of California, and that monarch, recognizing the fact that prior expenditures on the part of the royal treasury for the purpose of obtaining the subjugation of California had proven a failure, and that it was not proper to expend additional public property to make new conquests in that neighborhood, and that the fathers had by their own exertion succeeded in converting more than 5,000 unbelievers, and that their missions and conversions were to be undertaken upon the charitable contributions which the Christian zeal of certain persons had offered to supply therefor, acceded to their prayers until he could decide further what might be his pleasure in the premises. This was, however, upon the condition that the reverend fathers should not have power, without order from him, to draw against or from the royal revenues for such "conquests." He further provided that all that might be conquered should be taken possession of in his name, and that the fathers should have absolute control of the expedition, with the right to arm soldiers for their protection. Addition No. 1. (Transcript, pp. 254, 401.)

The reverend fathers collected considerable sums of money for the purposes of their expedition, having obtained prior leave therefor from their superiors, and in the latter part of October, 1697, they landed at the little harbor of San Dionysio, constructed "a small intrenchment, in the middle of which they erected a tent as temporary chapel and in front of it planted a cross crowned with flowers," and thereafter, on October 25, took possession of the country in the name of the King. For some time the whole expenses of the missions founded by the reverend fathers referred to and their successors and all the soldiers and sailors employed were defrayed from the charitable

contributions which formed the nucleus of the Pious Fund. Later, however, the missionaries appealed to the King, and he consented to take upon himself the expense of the soldiers and sailors employed and to allow the missionaries for their personal support the same modest stipend of $200 per year which he granted through the rest of the viceroyalty. (Venegas, vol. 2, p. 58.) Even as late as 1734 we find that the missions occasioned no expense to the royal treasury, and no money had been furnished the missionaries as salary or stipend. (Transcript, p. 438.)

Down to 1731 the total of contributions for the development of the missions of California was $120,000. (Noticias de la Provincia de Californias, Carta 2ª, p. 48.) It is supposed, however, that by judicious investments this amount had been somewhat augmented.

On June 8, 1735, was created a donation evidenced in writing, and which has generally been regarded as the foundation deed of the Pious Fund. We refer to the deed from the Marquis de Villapuente and his wife Marquesa de las Torres De Rada, found in the record in English at pages 104 and 452, and in Spanish at pages 99 and 309. The essential portions of this instrument should be quoted somewhat at length. It recites among other things the desires of the donors to labor—

> to the utmost for His holy service and the glory of His most holy name, and to use all our power and faculties to cause Him to be known and adored as the true God, which He is, and Creator of all things, visible and invisible; and whereas the Reverend Society of Jesus, with its well-known religious zeal, has been heretofore employed and steadily engaged in the conversion of the heathen natives of the Californias, and its members, by preaching and instruction, have drawn into the fold of our holy Catholic faith great numbers of those barbarous people to whom they have devoted and are devoting themselves according to their institute, sacrificing their lives and exposing themselves to contumely from the heathens, solely for the greater glory of our Lord God; and whereas in the propagation of His holy faith (which at the sacrifice of so much labor they have established), and in order also that the many other tribes which are now at the doors of the church, as well as those remaining yet undiscovered, may not be deprived of the same advantages, they need human aid as a means of successfully prosecuting their labors.

The deed then continues with recitals of the source of title, indicates that the value of one-half of the premises conveyed is $204,000, and conveys "to the missions of the Society of Jesus founded, and which in aftertimes the said society may found in said Californias," the estate known as San Pedro de Ibarra, with the annexed estate known as Ricon de Ibarra, with the buildings and appurtenances, supplies, and cattle and other animals, etc., and also a tract of land called San Antonio de los Llaños, a second tract situate at Los Alamos, and a third tract in the jurisdiction of San Pedro Guadalcazar. The total areas of the land so conveyed were estimated to exceed considerably 450,000 acres.

The trusts upon which said properties were to be held by the donees were as follows:

> To have and to hold, to said missions founded, and which hereafter may be founded in the Californias, as well as for the maintenance of their religious, and to provide for the ornament and decent support of divine worship, as also to aid the native converts and catechumens with food and clothing, according to the custom of that country, so that if hereafter, by God's blessing, there be means of support in the "reductions" and missions now established, as ex. gr. by the cultivation of their lands, thus obviating the necessity of sending from this country provisions, clothing, and other necessaries, the rents and products of said estates shall be applied to new missions to be established hereafter in the unexplored parts of the said Californias, according to the discretion of the Father Superior of said missions; and the estates aforesaid shall be perpetually inalienable, and shall never be sold, so that, even in

case of all California being civilized and converted to our holy Catholic faith, the profits of said estates shall be applied to the necessities of said missions and their support; and in case that the reverend Society of Jesus, voluntarily or by compulsion, should abandon said missions of the Californias or (which God forbid) the natives of that country should rebel and apostatize from our holy faith, or in any other such contingency, then, and in that case, it is left to the discretion of the reverend father provincial of the Society of Jesus in this New Spain, for the time being, to apply the profits of said estates, their products and improvements, to other missions in the undiscovered portions of this North America, or to others in any part of the world, according as he may deem most pleasing to Almighty God; and in such ways that the dominion and government of said estates be always and perpetually continued in the reverend Society of Jesus and its prelates, so that no judge, ecclesiastical or secular, shall exercise any control thereon, or intervene in or about the same; and all such rents and profits shall be applied to the purposes and objects herein specified, i. e., the propagation of our holy Catholic faith. And by this deed of gift we, the said grantors, both divest ourselves of and renounce absolutely all property, dominion, ownership, rights, and actions, real and personal, direct and executive, thereover, and all others whatever which belong to us, or which from any other cause, title, or reason may belong, appertain to us; and we cede, renounce, and transfer the whole thereof to said reverend Society of Jesus, its missions of Californias, its prelates and religious, under whose charge may happen to be the government of said missions and of this province of New Spain, now and at all times hereafter, in order that from the profits of said estates and the increase of their cattle, large and small, their other gains, natural or otherwise, they may maintain said missions in the manner above proposed, indicated, defined, and laid down forever.

This donation was accepted by the Society of Jesuits. (Transcript, p. 108.)

We have already adverted to the fact that before the making of this deed a number of contributions had been received by the Jesuits, generally for the purpose of providing for particular missions, and we have mentioned their aggregate. Such detailed list as we are able to call to the attention of this tribunal is to be found on page 202 of the transcript, being an extract from the work entitled "Documentos para la Historia de Mexico." Shortly after the deed referred to, we find on page 203 of the transcript that the Marquis de Villapuente founded (in 1746) an eleventh mission with the sum of $10,000, and that in 1747 Doña María de Borja, Duquesa de Gandia, by her will, furnished the missions with a very substantial contribution of $62,000, which, after the falling in of annuities left servants, was increased to over $120,000. (Transcript, p. 198.) During all of the years indicated and the following years the work of the Jesuits, or those who succeeded to them, steadily progressed; the missions ultimately established in Upper and Lower California being indicated on pages 150, 270, and 418 of the transcript.

In the year 1767 a royal decree was passed directing the banishment of the Jesuits and the taking possession of their temporalities by the Government (Transcript, pp. 262 and 410), and in 1773 another decree enforcing the same (Transcript, pp. 266 and 410). The order itself was abolished by the Papal decree dated July 21, 1773 (Transcript, pp. 323 and 461). Three of the missions which had been established were suppressed, and after some royal decrees covering the matter (pp. 426, 278) the missions of northern California were established by the Franciscans, being supported, as is said (Transcript, pp. 272 and 420), "out of the enormous Pious Fund acquired by the Jesuit fathers."

After the missions of California and the other missions of the Jesuits had been taken charge of by the orders of the King, he declared (Transcript, p. 456) that he had "subrogated in my royal person all the rights of patronage, which belonged to the regulars of the said order, and also those which they might possess in common with those

other orders, without prejudice to these being devoted to the same purpose which they were before the time of the expulsion."

Shortly after this time the Pious Fund received the benefit of another large contribution, being from the estate of Doña Josefa Paula de Arguelles, a full account of which appears on pages 458 to 460 of the transcript. The court finally adjudged, in 1784, that after deducting $10,000 for one special purpose, and one-fourth going to the heir at law of Mrs. Arguelles because of the failure of one legacy, the remaining three-fourths should be devoted "to the conversion of the infidels in this kingdom and in the Philippines, half and half, at the disposal of the King." The estate left by her in Mexico consisted of several haciendas and pieces of city property, and to this fact we shall have occasion hereafter to refer. The King directed investment of the estate on the security of good real estate at 5 per cent interest for the purpose of employing the proceeds in the maintenance and increase of the missions of the Californias (Transcript, pp. 317 and 477).

After the revolution, by virtue of which Mexico threw off the power of Spain, the Mexican Government assumed the administration of the Pious Fund; the first law with relation thereto being passed on May 25, 1832 (Transcript, p. 579), and reading, in English and Spanish, as follows:

Mayo 25 de 1832.—Ley: *Que el gobierno proceda al arrendamiento de las fincas rústicas pertenecientes al fondo piadoso de Californias.*

Art. 1. El gobierno procederá al arrendamiento de las fincas rústicas pertenecientes al fondo piadoso de Californias, por término que no pase de siete años.

2. Estos arrendamientos se contratarán precisamente en pública subasta, en las capitales de los Estados ó Territorios, ó en la ciudad Federal, segun la ubicacion de las fincas.

3. Estos arrendamientos se sacarán al pregon dentro de tres meses de la fecha de este decreto, por treinta dias, y á lo ménos con el mismo término se anunciarán por rotulones en la ciudad Federal, en las capitales de los Estados y Territorios, en las cabeceras de los Partidos, Departamentos ó Cantones en que se hallen ubicadas las fincas, y en los demas lugares que tuviere á bien el gobierno; y estos anuncios se inserterán á lo ménos en un periódico de la ciudad Federal.

4. Se sacarán tambien al pregon dentro de tres meses de concluido cualquier arrendamiento, ó cada seis meses si no hubiere arrendatario.

5. La aprobacion del remate de arrendamiento se hará prévia la del gobierno, á cuyo efectose le remitirá el expediente dentro de quince dias de verificado aquel.

6. Los productos de estos bienes se depositarán en la casa de moneda de la ciudad Federal, para destinarlos única y precisamente á las misiones de Californias.

7. Lo directivo y económico de estos bienes, así por lo tocante á su administracion, como para conservar é invertir sus productos, estará á cargo de una junta dependiente del gobierno por la Secretaría del despacho de Relaciones.

8. Esta junta se compondrá de tres individuos, uno de ellos eclesiástico, nombrados por el gobierno, que se renovarán saliendo uno cada año, comenzando por el último, y podran ser continuados.

9. Esta junta tendrá un secretario, con la dotacion de 600 pesos anuales, pagaderos de los fondos de que se trata.

10. Las atribuciones de la junta serán:

Primera. Cuidar de que se arrienden con oportunidad las fincas rústicas y urbanas, pertenecientes al fondo piadoso de que se trata.

Segunda. Proponer al gobierno las condiciones con que hayan de hacerse los arrendamientos, y la cantidad á que por lo ménos deberá ascender la renta de cada finca.

Tercera. Examinar los expedientes de los remates, y consultar al gobierno si es de aprobarse el arrendamiento, ó si las propuestas hechas por algun otro licitante son mas ventajosas.

Cuarta. Proponer al gobierno el número de individuos que juzgue absolutamente necesarios para la administracion de las fincas rústicas, cuando no puedan arrendarse por falta de postores.

Quinta. Proponer el sueldo de los administradores, y la cantidad con que cada uno haya de caucionar su manejo.

Sexta. Cuidar de que los arrendatarios ó administradores presenten la informacion de idoneidad de sus respectivos fiadores, y la certificacion de supervivencia.

Sétima. Presentar á la contaduría general de propios, la cuenta general de los productos de los bienes del fondo piadoso, acompañando las de los administradores cuando los haya, á cuyo efecto las exigirá de éstos con la oportunidad necesaria.

Octavo. Cuidar de que los arrendatarios y los administradores, á su vez, verifiquen á su debido tiempo los enteros en la casa de moneda.

Novena. Proponer al gobierno las cantidades que puedan remitirse á cada una de las Californias, segun sus respectivos gastos, y la existencia que haya de caudales.

11. El secretario llevará un libro de actas de la junta, otro de los caudales que entraren en depósito en la casa de moneda, cuyas partidas se comprobarán con los recibos que expida el superintendente de ella, y otro de las cantidades que se libraren contra éste. Todas las partidas, sean de cargo ó data, á la casa de moneda, las firmarán los individuos de la junta.

12. El superintendente de la casa de moneda se abonará el 1 por ciento de premio sobre las cantidadades que recibiere en depósito, será responsable de éstas, y solo se le pasarán en data pagos que hiciere en virtud de libramiento firmado por los individuos de la junta, autorizado por el secretario de ella, y con el dése del secretario del despacho de relaciones.

13. La junta, dentro de los tres meses siguientes á su instalacion, formará su reglamento interior, y lo pasará á la probacion del gobierno.

(Se circuló por la Secretaria de relaciones en dicho dia 25, v se publicó en bando del 1° de Junio.)

[Translation.]

MAY 25, 1832.—Law: *That the Government proceed with the lease of the rural property belonging to the Pious Fund of the Californias.*

ARTICLE 1. The Government shall proceed with the lease of the rural property belonging to the Pious Fund of the Californias, for a term which shall not exceed seven years.

2. These leases shall be contracted by public sale, in the capitals of the States or Territories or in the Federal city, according to the location of the property.

3. These leases shall be announced by the public crier within three months of the date of this decree during thirty days, and at least for the same period shall be announced by printed notices in the Federal city, in the capitals of the States and Territories, and in the principal places of the districts, departments, or cantons in which the property may be situate, and in such other places as the Government may deem expedient, and these announcements shall be inserted at least in one newspaper of the Federal city.

4. There shall be also announced by public crier within three months the conclusion of any lease whatsoever, or every six months if there should be no lease.

5. The approval of the letting of the lease shall be effected upon the sanction of the Government, to which the papers in the case shall be submitted for the purpose within fifteen days of the making of the lease.

6. The proceeds of such property shall be deposited in the mint of the Federal city, to be solely and exclusively destined for the missions of the Californias.

7. The disposal and management of such property, as well as matters relative to their administration, such as converting or disposing of its proceeds, shall be in the charge of a board, depending on the Government through the office of the secretary of foreign affairs.

8. This board shall consist of three persons, one of them an ecclesiastic, appointed by the Government, who shall be renewed by the retirement of one each year, commencing with the last, and who may be continued in office.

9. This board will have a secretary, with a compensation of 600 pesos per annum, payable from the funds in question.

10. The powers of the board shall be as follows:

First. To see that the rural and city property belonging to the Pious Fund in question be suitably leased.

Second. To submit to the Government the terms under which the leases are to be made and the minimum rental for each piece of property.

Third. To examine the papers relative to the letting of the leases, and to consult with the Government as to the approval of the leases, or whether the propositions made by some other applicant are more advantageous.

Fourth. To submit to the Government the number of persons that it deems abso-

lutely necessary for the administration of the rural property when the said property can not be leased for want of bidders.

Fifth. To submit the amount of the compensation of the administrators and of the bond with which each must guarantee his management.

Sixth. To see to it that the lessees or administrators submit information as to the qualifications of their respective sureties and the certification of survivorship.

Seventh. To lay before the auditor-general a general account of the proceeds of the property of the Pious Fund accompanying those of the administrators, if any, for which purpose said accounts shall be demanded of such administrators in good time.

Eighth. To see to it that the lessees and administrators on their part shall turn into the mint in due time moneys due by them.

Ninth. To name to the Government the amounts which may be remitted to each one of the Californias, in accordance with their respective expenses and their available funds.

11. The secretary shall keep a journal of the proceedings of the board, a book of moneys deposited in the mint, the entries whereof shall be supported by the vouchers delivered by the superintendent of said mint, and another book of the amounts that may be drawn from the same. All the entries, whether of debit or credit, in the mint shall be signed by the members of the board.

12. The superintendent of the mint shall receive 1 per cent premium on the amounts that may be deposited with him, shall be responsible for the same, and such payments only shall be credited to him as he may make under warrants signed by the members of the board, authorized by the secretary of the said board, and with the visé of the secretary of foreign affairs.

13. The board shall within three months after its organization frame its internal regulations and submit the same to the approval of the Government.

(Was published by the department of foreign affairs on the said 25th day, and promulgated by proclamation on the 1st of June.)

In 1836 Mexico took under consideration the formation of a bishopric of California, passing the law hereafter given, pursuant to which Francisco Garcia Diego, last president of the missions, was made the first incumbent of the bishopric, assuming his office about 1840. The law (Transcript, pp. 469 and 580) reads as follows:

LEY SOBRE ERECCION DE UN OBISPADO EN LAS DOS CALIFORNIAS.

ART. 1. El gobierno, oyendo á los que por derecho toque, y á los demás que jusgue oportuno, formará un expediente instructivo de la necesidad que haya de erigir un obispado en las dos Californias.

ART. 2. Si del expediente resultare haber aquella necesidad, dará cuenta con él á la Santa Sede para la aprobacion y ereccion de dicha mitra.

ART. 3. El gobierno escogerá la persona que creyere mas conveniente, de la terna que al afecto forme el cabildo metropolitano, y la propondrá á su Santidad.

ART. 4. Al electo se la acudirá del erario público con seis mil pesos anuales miéntras el obispado no cuente con rentas sufficientes.

ART. 5. Durante las mismas circumstancias se le auxiliará del propio erario con tres mil pesos para la expedicion de las bulas y traslacion á su silla episcopal.

ART. 6. Se pondrán á disposicion del nuevo obispo y de sus sucesores, los bienes pertenecientes al fondo piadoso de Californias, para que los administren é inviertan en sus objetos ú otros analogos, respetando siempre la voluntad de los fundadores.

Se circuló en el mismo dia 19 por la secretaria de justicia, y se publicó en Vando de 22. (Colleccion de leyes y decretos Julio á Diciembre de 1836, p. 107.)

[Translation.]

LAW CONCERNING THE ERECTION OF A BISHOPRIC IN THE TWO CALIFORNIAS.

ARTICLE I. The Government, after hearing such parties as by law may be entitled to a hearing on the subject, and such other persons as it may think proper to hear, shall thereupon make a report with regard to the necessity of creating a bishopric for the two Californias.

ART. II. If the report should show that there is such a necessity, the Pope should be duly informed of the report, for him to approve of it, and create such a see.

ART. III. The Government shall select from three nominees, presented by the archbishop's council, the person whom it thinks most suitable, and submit his name for appointment to His Holiness.

ART. IV. The person elected shall receive from the public revenue six thousand dollars per annum, until such time as the bishopric shall be in receipt of a sufficient income.

ART. V. During a continuation of the same circumstances the public revenue shall furnish a subsidy of three thousand dollars per annum for the despatching of bulls and the traveling expenses of the episcopate.

ART. VI. The property belonging to the Pious Fund of the Californias shall be placed at the disposal of the new bishop and his successors, to be by them managed and employed for its objects or other similar ones, always respecting the wishes of the founders of the fund.

The present was put in circulation on the same day—the 19th—by the department of justice, and was officially made public on the 22d.

While the fund was under the administration of the bishop we are informed that he paid off a mortgage held by Mexico amounting to $28,233, and that the income for the year 1841 amounted to over $34,000 (Transcript, p. 149). The agent of the bishop in Mexico from 1840 to 1842, while the fund was being administered by him, was Don Pedro Ramirez, and his special agent for the rural estates was Miguel Balaunzaran. In the year 1842, without any cause therefor appearing from the record, the Mexican Government determined to take possession of the Pious Fund. Prior to the taking of such possession and on February 5, 1842 (Transcript, p. 501), it called upon Ramirez for a statement of the goods and properties constituting it. This he furnished on the same day, but in an informal and very defective manner (Transcript, p. 501), as appears from his comment apparently thereon (Transcript, p. 508). Considerable correspondence followed between Ramirez and the representative of the Government, and on February 8, 1842, the following decree was passed providing for the resumption by the Government of the management of the Pious Fund (Transcript, pp. 39, 469, 580):

DECRETO POR EL QUE REASUMIÓ EL GOBIERNO LA ADMINISTRACION E INVERSION DEL FONDO PIADOSO DE CALIFORNIAS.

Antonio Lopez de Santa Anna, etc., sabed:

Que siendo de un interés y verdaderamente nacionales todos los objetos á que está destinado el fondo piadoso de Californias, y debiendo por lo mismo estar bajo el inmediato cuidado y administracion del supremo gobierno, como antes lo habia estado, he venido en decretar:

ART. 1. Se deroga el Art. 6 del decreto de 19 setiembre, 1836, en que se privó al gobierno de la administracion del fondo piadoso de Californias, y se puso á disposicion del R. obispo de esa nueva diócesis.

ART. 2. En consecuencia volverá á estar á cargo del supremo gobierno nacional la administracion é inversion de estos bienes en el modo y términos que este disponga, para llenar el objeto que se propuso el donante, con la civilizacion y conversion de los bárbaros.

Por tanto, mando se imprima, publique, circule y se le dé el debido cumplimiento.

(Decretos y órdenes del gobierno provisional, de diciembre 14 á junio de 1842, p. 334.)

[Translation.]

DECREE UNDER WHICH THE GOVERNMENT REASSUMED THE MANAGEMENT AND DISBURSING OF THE PIOUS FUND OF THE CALIFORNIAS.

Antonio Lopez de Santa Anna, etc., greeting:

Whereas all the purposes for which the Pious Fund of the Californias is intended is really of a general and national importance, and should therefore be under the immediate care and management of the supreme government as it formerly was, I have made the following decree:

ARTICLE I. The sixth article of the law of the 19th of September, 1836, by which

the Government relinquished the management of the Pious Fund of the Californias, and the same was then placed at the disposal of the right reverend bishop of the new diocese is hereby repealed.

ART. II. The management and disbursing of the proceeds of this property shall therefore again become the charge of the supreme government, in such way and manner as it shall direct, for the purpose of carrying out the intention of the donor in the civilization and conversion of the savages.

Wherefore I order the present to be printed, published, and duly observed.

In the further correspondence between Ramirez and the representatives of the Government we find a very full and exact statement of the properties of the Pious Fund at the time it was taken by Mexico. We learn from this that the various pieces of real estate yielded to the Pious Fund annually as follows:

Three-fourths of houses on Vergara street	$2,625
Three-fourths of estate of Ciénaga del Pastor	12,825
Estate of San Pedro de Ibarra	2,000
Estates of San Augustin de Amoles et al	12,705
Total	30,155

The foregoing would represent, capitalized at 6 per cent per annum, $502,583.33. To this Señor Ramirez adds as due from the public treasury (principal and interest) $1,082,078 3 gr., and from private individuals $71,464 1 real, and deducts as due by the fund $32,380 4 r. 3 g., leaving, according to his figures, the value of the Pious Fund at $1,656,125.33 at the time it was taken possession of by the Republic of Mexico.

The Mexican Government continued to administer the fund for only a short time, and on October 24, 1842, passed a decree incorporating its property into the treasury, a copy of said decree appearing in full in the transcript in English and Spanish in several places, and reading as follows (Transcript, p. 469):

Antonio Lopez de Santa Anna, etc., sabed:

Que teniendo en consideracion que el decreto de 8 de Febrero del presente año que dispuso volviera á continuar al cargo del supremo gobierno el cuidado y administracion del fondo piadoso de Californias, como lo habia estado anteriormente, se dirige á que se logren con toda exactitud los benéficos y nacionales objetos que se propuso la fundadora, sin la menor pérdida de los bienes destinados al intento; y considerando asi mismo, que esto solo puede conseguirse capitalizando los propios bienes é imponiéndolos á rédito, bajo las debidas seguridades, para evitar así los gastos de puedan sobrevenir; usando de las facultades que me concede la séptima de las bases acordadas en Tacubaya y sancionadas por la nacion, he tenido á bien decretar lo siguiente:

ART. 1°. Las fincas rústicas y urbanas, los créditos activos y demas bienes pertenecientes al fondo piadoso de Californias, quedan incorporados al erario nacional.

2°. Se procederá por el ministerio de hacienda á la venta de las fincas y demas bienes pertencientes al fondo piadoso de Californias, por el capital que representen al 6 por 100 de sus productos anuales, y la hacienda pública reconocerá al rédito del mismo 6 por 100 el total producido de estas enagenaciones.

3°. La renta del tabaco queda hipotecada especialmente al pago de los rèditos correspondientes al capital del referido fondo de Californias, y la direccion del ramo entregarà las cantidades necesarias para cumplir los objetos á que está destinado el mismo fondo, sin deduccion alguna por gastos de administracion, ni otro alguno.

Por tanto, etc.

[Translation.]

Antonio Lopez de Santa Anna, etc.:

Whereas the decree of February 8 of the present year, directing that the administration and care of the Pious Fund of the Californias should redevolve on and continue in the charge of the Government, as had previously been the case, was intended

to fulfill most faithfully the beneficent and national objects designed by the foundress without the slightest diminution of the properties destined to the end; and whereas the result can only be attained by capitalizing the funds and placing them at interest on proper securities, so as to avoid the expenses of administration and the like, which may occur, in virtue of the power conferred on me by the seventh article of the Bases of Tacubaya, and sanctioned by the nation, I have determined to decree as follows:

1. The real estate, urban and rural, the debits and credits, and all other property belonging to the Pious Fund of the Californias are incorporated into the national treasury.

2. The minister of the treasury will proceed to sell the real estate and other property belonging to the Pious Fund of the Californias for the capital represented by their annual product at 6 per cent per annum. And the public treasury will acknowledge an indebtedness of 6 per cent per annum on the total proceeds of the sales.

3. The revenue from tobacco is specially pledged for the payment of the income corresponding to the capital of the said fund of the Californias, and department in charge thereof will pay over the sums necessary to carry on the objects to which said fund is destined without any deduction for costs, whether of administration or otherwise.

Wherefore, etc.

Orders upon the revenue for tobacco were given from time to time for the benefit of the Bishop of California. We read a copy of one of them for $8,000, on page 149 of the Transcript, described as given "on account of the income belonging to the Pious Fund of California, the properties of which were incorporated into the national treasury."

We are not greatly concerned in the disposition which the Government made of the various properties taken by it, their capitalized value having been fully shown, as already appears by the statement of Sr. Ramirez, to which statement there was no demur on the part of the Mexican Government, in fact the inventory having been made upon its demand (Transcript, p. 505). We may note, however, that in two places in the record some references are made to the sale or purchase of the several properties. In the extract from the work of M. Duflot de Mafras, entitled "Exploration du Territoire de l'Oregon," at page 216, it is stated that President Santa Anna sold the entire fund to the houses of Baraio and to Rubio Brothers, and in a note on page 476 reference is made to the treasury report of December 31, 1843, acknowledging in favor of the Pious Fund of the Californias the receipt of $323,274.51, and from a like report, dated June 20, 1844, the further sum of $124,726.01 is acknowledged.

The last legislation had by Mexico with reference to the Pious Fund appears to have been a decree of April 3, 1845, which is to be found in the record on page 581, and which, in English and Spanish, reads as follows:

ABRIL 3 DE 1845.—*Ley: Sobre devolucion de creditos y bienes del fondo piadoso de Californias.*

El Excmo. Sr. presidente interino se ha servido dirigirme el decreto que sigue:

"José Joaquin de Herrera, general de division y presidente interino de la República mexicana, á los habitantes de ella, sabed:

"Que el congreso general ha decretado y el ejecutivo sancionado, lo siguiente:

"'Los créditos y los demas bienes del fondo piadoso de Californias que existan invendidos, se devolverán inmediatamente al reverendo obispo de aquella mitra y sus sucesores, para los objetos de que habla el art. 6° de ley de 19 de Setiembre de 1836, sin perjuicio de lo que el congreso resuelva acerca de los bienes que están enajenados.'"

APRIL 3, 1845.—*Law: Concerning the restitution of debts and property of the Pious Fund of the Californias.*

The most excellent president ad interim has been pleased to forward to me the following decree:

"José Joaquin de Herrera, general of division and president ad interim of the Mexcan Republic, to the inhabitants thereof:

"Know ye that the general Congress has decreed and the executive sanctioned the following:

"'The debts and other properties of the Pious Fund of the Californias which are now unsold shall be immediately returned to the reverend bishop of that see and his successors for the purpose mentioned in article 6 of the law of September 19, 1836, without prejudice to what Congress may resolve in regard to the property that has been alienated.'"

We are unable to learn that any property whatsoever was turned over to the bishops or other action taken because of or consequent upon this law.

Something should be added at this time with relation to the estate of Ciénaga del Pastor, referred to by Sr. Ramirez in his report to the Mexican Government. At the time the report was made it was embargoed or attached for a heavy debt, but notwithstanding such embargo, as we expect the evidence will show, it was sold by the Mexican Government, and so far as the interest of the Pious Fund was concerned it produced $213,750, and, aggregating with this the original claim as finally adjudicated by the Mixed Commission, the sums claimed by the memorial in this case because of the larger amount than formerly allowed, which was received from the property donated by Doña Josefa de Arguelles, erroneous deductions for a so-called debt, additional loans not credited, and personal property sold at the same time with Ciénaga del Pastor, we find as the sum total of the Pious Fund the sum of $1,853,361.57.

It is to be noted that a difficulty arose between the Spanish and the Mexican Governments similar in nature to that now presented; such difficulty, however, arising out of the fact that under the terms of the settlement of the estate of Señora Arguelles the Philippine and the California missions were entitled to equal interests in three-fourths thereof. Spain, as the representative of the interests of the Philippine church, demanded that there be paid to her the sums properly belonging to the Philippine portion of the fund. We ask that the same treatment as to the California branch of the claim be accorded us, regarding such settlement equally applicable in the one case as in the other.

ARGUMENT.

The United States confidently rely upon the findings of the former Mixed Commission as settling beyond the need of argument upon other points the issues now presented, and offer the considerations following in support of the position that—

THE AMOUNT OF THE PROPER JUDGMENT IN THIS CASE IS FIXED BY THE TERMS OF THE FORMER AWARD.

Let us first consider, therefore, as this court is authorized to do by the terms of the protocol, the question as to whether the decision of the former Mixed Commission may be regarded as constituting as to any of the facts passed upon by it what is known to the common law

as *res judicata*, or to the civil law as *chose jugée*, and if so, what facts are to be treated as settled thereby and what consequences flow from such settlement as affecting the subject-matter submitted to the present tribunal.

According to the first edition of the American and English Encyclopedia of Law, Title "Res Judicata," volume 21, page 128—

When a matter has once passed to final judgment without fraud or collusion in a court of competent or concurrent jurisdiction it has become *res judicata*, and the same matter between the same parties can not be reopened or subsequently considered.

To somewhat similar effect article 1351 of the French Code Civil says:

L'autorité de la chose jugée n'a lieu qu'a l'égard de ce qui a fait l'objet du jugement. Il faut que la chose demandée soit la même, que la demande soit fondée sur la même cause, que la demande soit entre les mêmes parties, et formée par elles et contre elles en la même qualité.

It will thus be seen that the common law and the civil law view the subject-matter in similar lights.

We may fairly deduce from the citations above given that the first question to be considered is whether the former Mixed Commission was a court competent to render the decision at which it arrived, and to determine this we must reach a just conclusion as to whether it was authorized to pass upon, and did adjudicate, its own jurisdiction. If we give an affirmative answer to this proposition, then as a matter of interest, but necessarily of lesser importance in view of the conclusion reached, we might fairly consider whether the judgment of the tribunal as to its own competency was correct as a matter of law. This branch of the discussion is, however, fully covered by the Messrs. Doyle in their brief to be filed herein.

When a tribunal exists there must of necessity be authority in some person or body to judge whether the questions raised before it properly come within the purview of the powers with which it is invested. Sometimes the reviewing authority consists of an appellate or other tribunal superior by virtue of the general theory of the law controlling judicatory bodies. Sometimes the review is expressly provided for by the instrument constituting the court, and in cases such as that we are now examining it is always proper for the high contracting parties to retain a power of review, acceptance, or rejection of the conclusions reached by the commission, such power being reserved in the instrument creating it. Still another course is permissible, according to many authorities, when it is found that a court of arbitration is likely to exceed its just powers, and this is to withdraw the matters concerning which the exercise of excess of power is to be feared from the examination of the commission, and thereafter to decline to recognize judgments which may be reached. This course appears to be recognized by many writers on the subject of international law as proper, for they find, as we shall hereafter see, that a judgment rendered when one party or the other has not been heard or has withdrawn is a nullity.

Withdrawal from the Geneva Tribunal was threatened by England when the question of consequential or indirect damages was raised, and her right so to do has been questioned by scarcely any writer, if we may except M. Rolin-Jaequemyns, who, in an article published in volume 4, Revue de Droit International, denies that England was at liberty to take this course, the contention raised by her coming fairly

within the powers of the arbitrators to decide as being one relating to their jurisdiction.

The treaty between the United States and Mexico did not provide for any reviewing power, did not reserve a right of ultimate rejection or dissent, and Mexico did not decline or refuse at any stage to proceed with the submission to the former Mixed Commission of the Pious Fund Claim. None of the things happened, therefore, which might have had a tendency to invalidate the former award, or to diminish its effect as *res judicata.* Furthermore, while Mexico formally filed a motion to dismiss, that country, the question yet remaining undetermined, proceeded to submit a great variety of testimony touching the contentions directly raised by the memorial and to argue as to its effect. This very course showed that Mexico recognized to the fullest the authority of the commission to render a final judgment upon the merits of the dispute, her conduct amounting to a practical waiver of any objection to the jurisdiction. We say this not unmindful of the fact that particularly in the argument on revision an attempt was made to renew her former objections, to enlarge their scope and to reinforce the motion to dismiss by additional arguments, but such motion could not revivify and strengthen a position finally and definitely abandoned, as her former contention had been, by an entry upon a discussion of the merits of the controversy. We shall find occasion later to enlarge upon this view of the question.

But if Mexico had not confessed jurisdiction, as she did by her actions more than twenty-five years ago, there would then have been left to us to consider as of the highest moment the questions heretofore raised. As it is, we would not be justified in passing them by without careful examination.

HAS AN ARBITRAL COURT INHERENT POWER TO PASS UPON ITS OWN JURISDICTION?

We have adverted to the principle that power must rest somewhere to determine the jurisdiction of an arbitral court, and in the case under consideration, this power not having been reserved for any other authority, must, as we believe, be considered to rest in the court itself.

The analogy existing between international and private arbitrations is such that we are justified in believing that if private arbitrators possess the power to determine their own jurisdiction and to interpret the instrument creating them, for stronger reasons must the same power be regarded as resting in international arbitral courts, bodies of infinitely greater dignity and importance, and from whose actions consequences may flow of vastly more importance to the welfare of mankind.

We read in Répertoire Général Alphabétique du Droit Français, volume 12, title "Compétence Civile et Commerciale," paragraph 44, as follows:

> Tout tribunal a le droit et la devoir de statuer sur sa propre compétence.

Civil law judges have many times passed upon the powers of arbitral courts in this respect, and have held (Répertoire Général de Jurisprudence, Volume IV, title "Arbitrage," sec. 572)—

> Que les arbitres peuvent connaître de leur compétence bien qu'ils n'y soient pas expressément autorisés par le compromis, ce n'est pas la juger hors des termes du

compromis: le droit de juger de leur propre compétence est la conséquence naturelle du caractère de juges dont ils sont investis par les parties.

From this flow, of course, the natural consequences expressed under the same title in paragraph 60:

Lorsque le tribunal se déclare compétent il doit nécessairement statuer sur la cause qui lui est soumise à peine de déni de justice. (Garsonnet, titre 1, sec. 186, p. 752.)

The question as to the right of a mixed commission or international board of arbitrators to pass upon its own powers has several times been under active consideration. The earliest example in American practice is discussed in Moore's International Arbitrations, and relates to the commission formed under Article VII of the treaty between the United States and Great Britain of November 19, 1794. In that case the British commissioners attempted by withdrawal to deny the power of the court to determine its own jurisdiction, but the British Government refused to sustain them in their position. We read that Mr. Gore, one of the American commissioners, held that—

A power to decide whether a claim referred to this board is within its jurisdiction appears to me inherent in its very constitution and indispensably necessary to the discharge of any of its duties. * * *

To decide on the justice of the claim, it is absolutely necessary to decide whether it is a case described in the article. It is the first quality to be sought for in the examination. To say that power is given to decide on the justice of the claim, and according to all the merits of the case, and yet no power to decide or examine if the claim has any justice, any merit even sufficient to be the subject of consideration, is to offer in terms a substance, in truth a phantom. * * *

To my mind there can be no greater absurdity than to conceive that these two nations appointed commissioners with power to examine and decide claims, prescribe the rules by which they were to examine them, authorize them for this purpose to receive books, papers, and testimony, examine persons on oath, award sums of money, and solemnly pledge their faith to each other that the award should be final and conclusive, both as to the justice of the claim and to the amount of the sum to be paid, and yet gave them no power to decide whether there was any claim in question. * * *

It is a contradiction in terms to say that a measure adopted shall terminate all differences, and yet that the very measure presupposes a new negotiation on what are the differences. * * *

The objection that the board is incompetent to decide whether these cases or any of them are within the description submitted arrests and stops all proceedings, and, in fact, renders the article null and illusive. * * *

To say that the board has authority to decide that a cause is not within its jurisdiction, and yet no authority to decide that a case is within its jurisdiction appears to be a contradiction too glaring to be persisted in. That the commissioners have a right to decide in favor of one party only—in favor of the party complained against, but not in favor of the complainant—can not be true.

Mr. Pinkney, the remaining American commissioner, entertained a similar view, and in part expressed it as follows:

I think that we are of ourselves, and without consulting the high contracting parties, the proper judges (at least in the first instance) of the nature and extent of our powers under the seventh article of the treaty, or, in other words, that it belongs to us, and is our indispensable duty in the first instance to decide in every case referred to us, without reference to the contracting parties, whether the claim is such a one as the treaty submits to our award. * * *

Without such a power it is extremely obvious that the authority expressly communicated by the treaty to decide the merits of a claim and the amount of compensation to be awarded is completely nominal and illusory.

* * * If a reference to arbitrators takes place between individuals the arbitrators are always in the first instance the judges of the scope of the submission without any specific provision to that effect in the instrument of reference.

The question arising as above was referred to Lord Chancellor Loughborough, who said:

> The doubt respecting the authority of the commissioners to settle their own jurisdiction was absurd; and they must necessarily decide upon a case being within or without their competency.

Wharton's International Law Digest, volume 2, section 221, page 568.

The note to the above reference shows that the view so expressed was adopted by Lord Grenville, then minister for foreign affairs. (See 2 American State Papers (Foreign Relations), 398.)

The question arose and was distinctly passed upon with reference to certain parts of the claim of the Venezuela Steam Transportation Company, although the reasoning of the court is not given. On page 26 of Morse's Report, as agent and counsel for the United States, we read that, an objection being raised by the agent on the part of Venezuela to the jurisdiction of the Commission over certain parts of the claim, the court "do hereby unanimously declare ourselves competent on the said portions of the claim."

Instances might, in fact, be multiplied indefinitely of cases where arbitral commissions have accepted or rejected jurisdiction, but we fail to find a precedent for the denial of the authority of arbitrators to pass upon the interpretation of the instrument creating them, or a case until the present where their incapacity has been urged finally by the losing government to invalidate the effect of their awards.

In Chronique des Faits Internationaux, Revue Générale de Droit International, volume 1, 1894, p. 284, it is said:

> L'arbitrage tend à devenir de plus en plus le droit commun international pour la solution judiciaire des conflits entre les États; si cela est, ne faut-il pas, dans le doute, se prononcer pour tout ce qui peut en favoriser l'extension?
>
> Les arbitres doivent donc être seuls juges de leur compétence. Cette doctrine est conforme à la nature des choses; l'affirmation de ses pouvoirs est un attribut naturel de toute autorité. La règle que le juge de l'action est aussi le juge de l'exception est universellement admise dans les rapports de droit civil; pourquoi en serait-il différemment dans l'ordre international?
>
> Telle est au surplus l'opinion de la plupart des écrivains du droit des gens; et l'Institut de droit international, réunion des jurisconsultes les plus considérables du monde entier, a donné à cette thèse l'appui de son autorité; le 28 août 1875, dans sa session de la Haye, il a en effet déclaré, a l'unanimité, que "les arbitres doivent prononcer sur les exceptions tirées de l'incompétence du tribunal arbitral. * * * Dans le cas où le doute sur la compétence dépend de l'interprétation d'une clause du compromis, les parties sont censées avoir donné aux arbitres la faculté de trancher la question, sauf clause contraire." (Art. 14, secs. 2, 4.)

The opinion of Calvo is expressed in section 1768 as follows:

> Ils ont le droit d'interpréter le compromis préalable intervenu entre les parties, et par conséquent de prononcer sur leur propre compétence.

Goldschmidt, in discussing the matter as quoted in the Revue de Droit International for 1872, page 440, says:

> Le danger d'un excès de compétence ne justifie point une immixtion préjudicielle du tribunal officiel. Dans l'arbitrage international il y a cette raison de plus, qu'une procédure judiciaire préliminaire est impossible.

Citing further from text writers, we would refer to Pradier-Fodéré, who, in his Traité de Droit International Public, section 2622, says:

> En principe l'arbitre, ou les arbitres, sont juges de leur compétence; la règle du droit commun que le juge de l'action est aussi le juge de l'exception leur est applicable; ils ont le droit d'interpréter le compromis en se sens que, lorsque les parties

prétendent que telles réclamations, tels point du differend, ne sont pas soumis à l'arbitrage, et par conséquent ne sont point déférés à l'arbitre, ou aux arbitres, ces derniers peuvent examiner si cette exception est fondée: es dans le cas où elle leur paraîtrait sans fondement, ils peuvent retenir ces réclamations, ces points du different, pour les comprendre dans leur décision. Cette doctrine est conforme à la nature des choses; car l'affirmation de ces pouvoirs est un attribut naturel de tout autorité.

The author continues in the same section on page 424 as follows:

Les arbitres doivent donc être considérés comme juges de leur compétence avec le consentement tacite des parties, dans le silence du compromis et en l'absence de toute clause ultérieure; de plus ce consentement tacite produit son effet autant que les parties donnent suite à l'arbitrage sans manifester une volonté contraire.

So far as we have had an opportunity personally of examining the publications of leading text writers upon the subject of international law, there are but two who entertain a view at all contrary to that expressed by those whom we have cited, and the positions taken by them deserve some analysis.

M. Rivier, in his Principes du Droit des Gens, volume 2, page 174, says:

En cas de silence ou d'obscurité du compromis, l'arbitre n'est pas juge de sa propre compétence. En effet il n'est qu'un mandataire, et n'a d'autres pouvoirs que ceux qui lui sont conférés par la volonté des États parties au compromis. Il devra donc, la cas échéant, demander à ceux-ci de préciser le compromis ou de le compléter.

Waiving for the moment the discussion of the suggestion contained in the foregoing, it is worthy of note that according to the Revue de Droit International for 1875, page 277, M. Rivier was, with MM. Bulmerincq and Marquardsen, membre adjoint à la commission de la Procédure Arbitrale Internationale; the members of the commission being Messrs. Dudley Field, De Laveleye, and Pierantoni, and article 14, proposed by these gentlemen with apparent unanimity, provides as follows:

Les exceptiones tirées de l'incapacité des arbitres, doivent être opposées avant toute autre. Dans le silence des parties toute contestation ultérieure est excluse, sauf les cas d'incapacité postérieurement survenus. Les arbitres doivent prononcer sur les exceptiones tirées de l'incompétence du tribunal arbitral, sauf le recours dont il est question à l'art. 24, 2me al., et conformément aux dispositions du compromis. Aucune voie de recours ne sera ouverte contre des jugements préliminaires sur la compétence, si ce n'est cumulativement avec le recours contre le jugement arbitral définitif. Dans le cas où le doute sur la compétence dépend de l'interprétation d'une clause du compromis, les parties sont censées avoir donné aux arbitres la faculté de trancher la question, sauf clause contraire.

We may, we think, fairly regard article 14, in the position of which M. Rivier joined, as offsetting the expression of opinion given by him in his Principes, and which we have already quoted.

The only other notable writer whose works we have had an opportunity of examining, and whose expressions tend to deny the right of arbitrators to pass upon their own jurisdiction, is M. Bonfils, who in his Droit International Public, third edition, section 951, says:

Les pouvoirs des arbitres sont déterminés par le compromis qui les en investît. Les arbitres ne peuvent pas statuer eux-mêmes sur leurs pouvoirs et déterminer les limites de leur compétence. Bluntschli pensait autrement (op. cit., art. 492 bis); mais son opinion est erronée. Un mandataire ne saurait fixer lui-même la portée et l'étendue de son mandat. Si des doutes se produisent, les arbitres doivent en référer à leurs mandants et leur demander l'extension de leurs pouvoirs et une fixation plus nette et plus précise de l'objet du compromis.

The editor, commenting upon the above, finds that article 48 of The Hague Convention "a consacré l'opinion de Bluntschli."

The very statement by M. Bonfils of the ground of his opinion appears to us to demonstrate its erroneous character, for if, whenever the jurisdiction of an arbitral tribunal be challenged, the arbitrators are obliged to refer to their so-called mandants for permission to proceed, their operations will be paralyzed, and through the efflux of time, in many cases, the obtention of a final judgment rendered impossible.

But the fundamental idea expressed by MM. Rivier and Bonfils is fatally erroneous in that it does not correctly express the character to be accorded to an arbitral tribunal. We do not recognize the court before which we have the honor of appearing as a collection of agents, incapable of determining their own powers and compelled in cases of doubt to appeal to the countries creating them. It is true that the jurisdiction of this court is limited, but within the bounds of such jurisdiction we believe its powers to be plenary. Its judgments should be recognized like the judgments of all other arbitral courts as binding upon the parties appealing to it, even though the results in particular instances may not be such as would be desired by one of the litigants.

The opinion we express as to the dignity of the present court applies with equal force to the former Mixed Commission, formed as it was with the free consent of the same parties, and exercising similar, though in some respects even more extended, powers, and the reasons which will justly operate to give solemnity and finality to the findings of this honorable court must equally as well serve to maintain the integrity and sanctity of the judgment of the Mixed Commission.

Without elaborating the discussion at this moment, we are justified in inviting your attention to certain expressions of distinguished publicists in marked opposition to the idea that arbitral courts are assemblages of agents.

Says Hall in his International Law, chapter 11, section 119:

> The arbitrating person or body forms a true tribunal, authorized to render a decision obligatory upon the parties with reference to the issues before it. It settles its own procedure, when none has been prescribed by the preliminary treaty; and when composed of several persons it determines by a majority of voices.

The opinion of M. Calvo is also to the point. He says in section 1768:

> Les arbitres, une fois nommés, forment bien qu'ils ne tiennent leurs pouvoirs que des parties, un corps indépendant, un véritable tribunal judiciaire. Ils ont le droit d'interpréter le compromis préalable intervenu entre les parties et par conséquent de prononcer sur leur propre compétence.

In his Essai sur l'Organisation de l'Arbitrage International, M. Le Chevalier Descamps says:

> L'arbitrage n'est pas une tentative de conciliation. L'arbitre est juge et statue comme tel.

He cites with approval M. Le Baron Lambermont, who, in addressing to the German and English Governments his sentence in the arbitration of Lamu, says:

> Arbitre et non médiateur, je n'avais à dire que le droit.

We will refer again to section 572, title "Arbitrage," Volume IV, Répertoire Générale de Jurisprudence, for the expression of many judges that:

> Le droit de juger leur propre compétence est la conséquence naturelle du caractère *de juges dont ils sont investis par les parties.*

The same work under the same title says (sec. 1107):

Il est vrai que les arbitres ne sont pas revêtus de fonctions publiques et que leurs pouvoirs n'ont d'autre source que la volonté des parties. Mais il faut remarquer que le législateur ne considère pas les arbitres comme de simples mandataires; leur sentence a par elle-meme autorité de chose jugée; de plus, elle ne peut pas être revisée, quant au fond, par le juge qui est chargé d'y apposer son ordonnance d'exéquatur. C'est donc que les arbitres ne sont pas seulement des mandataires, mais aussi des juges; et par conséquent, leur sentence doit avoir la même force probante que les jugements.

As apropos, might in fact be cited all the authorities already quoted, showing that arbitrators have a full right to pass upon their own competency, for this is a power never possessed by or accorded to agents or mandataries, but pertaining to courts in the fullest sense of the word.

RULE OF INTERPRETATION OF THE COMPROMIS.

Some of the writers upon international law have laid down a rule for the interpretation of the compromis, which rule seems to us in accord with common sense and with the necessities of the situation and presents to us the point of view from which the former Mixed Commission may properly have regarded the instrument they were called upon to construe. Calvo says (Sec. 1757):

Dans tous les cas où le tribunal arbitral entretient des doutes sur l'étendue du compromis, il doit l'interpréter dans son sens le plus large.

M. Rolin-Jaequemyns, in La Revue de Droit International, Volume IV, page 13, says, in effect, that:

La question de compétence ne doit pas être résolue par une stricte interprétation du compromis, mais qu'il faut dans le doute la trancher afirmativement. En effet cette affirmation ne porte aucune atteinte à la connaissance d'un tribunal ordinaire. Elle rend au contraire possible la décision judiciaire d'un point qui, sans cela, demeurerait litigieux. La jurisprudence Anglo-Americaine reconnait, même en matière d'arbitrage civil, le principe que "a fair and liberal construction is allowed in its interpretation." (Bouvier au mot Submission No. 7.)

Inasmuch as without reserve Mexico submitted to the former tribunal the question of its own powers, it is not inappropriate at this time to refer to Gueret *v.* Andoury, Ct. of Ap. (Eng.), 62 L. J., 633, wherein it was held that where parties to a contract have referred to arbitrators the question of its construction, their award is conclusive evidence as to the construction in a subsequent action brought for other breaches of the same contract.

MEXICO WAIVED THE RIGHT TO OBJECT TO THE JURISDICTION OF THE MIXED COMMISSION.

Without any reservation as to her rights, Mexico presented to the former tribunal a motion to dismiss, not raising but, by failure so to do, waiving the question of jurisdiction.

Let it not be supposed that in submitting this point we rely upon a technicality, for it would seem that if there be any intention on the part of one party not to allow a given claim to go to arbitration, or under certain circumstances not to recognize the full validity of a judgment which may be rendered by the arbitrators, it is his duty to announce such fact in the beginning, since if such announcement be made the opposing party may at once agree to the withdrawal of the subject-

matter and make the claim the foundation of a separate convention. To permit arbitrators to assume jurisdiction, and, a decision adverse to him being reached, to allow one party thereafter to aver that the arbitration has been without validity, is to give him a double chance of success.

The common law requires that all questions of a dilatory nature (including, first of all, jurisdictional ones) should be presented to the court before an entry upon the merits of the controversy, and that the same course should be taken before arbitral tribunals can be demonstrated by reference to several of the authors who have treated of this particular subject. According to the project of Goldschmidt, afterwards substantially adopted at The Hague, and to be found in Revue de Droit International for 1874, page 440, section 18, it is provided that—

> Le tribunal arbitral est juge de sa compétence. Si l'exception d'incompétence n'est pas opposée au premier moment opportun ou si l'exception opposée en temps utile ayant éte repoussée par le tribunal arbitral, les parties passent outre sans faire de réserves, toute contestation ultérieure de la compétence est exclue.

A view indicated by M. Rolin-Jaequemyns as that proper to be taken by international courts is to be found in Volume IV, Revue de Droit International, page 139, wherein he says:

> 4. La partie qui soulève devant des arbitres internationaux une exception d'incompétence, a le droit d'y ajouter des réserves formelles de nullité totale ou partielle de la sentence pour le cas où l'exception serait rejétée par les arbitres. Faute de pareilles réserves, elle est censée avoir accepté d'avance la décision arbitrale comme définitive et sans appel.

According to Calvo, section 1757 of his work upon international law:

> Lorsque l'un des contestants prétend que tout ou partie des demandes de l'autre ne rentre pas dans les termes du compromis, cette prétention doit être produite devant les arbitres, au début de la cause, comme exception d'incompétence, et il appartient aux arbitres d'en connaître.
>
> La partie qui soulève ainsi devant les arbitres une exception d'incompétence a le droit d'y ajouter des réserves formelles de nullité totale ou partielle de la sentence à intervenir pour le cas où l'exception serait rejétée par les arbitres. À défaut de présenter de pareilles réserves, la partie qui soulève l'exception est censée avoir accepté d'avance la décision arbitrale comme définitive et sans appel.

The language of M. Pradier-Fodéré is somewhat similar, for he says (sec. 2622, Traité de Droit International Public) that—

> Lorsque, donc, l'une des parties soutient que la demande ou certains points de la demande de son adversaire ne rentrent pas dans les termes du compromis, cette affirmation constitue une exception d'incompétence dont il appartient à l'arbitre, ou aux arbitres, de connaître. Mais les États contendants sont maîtres d'enlever ce droit à l'arbitre, ou aux arbitres, dans le compromis ou dans une convention ultérieure, et, s'ils ne l'ont pas fait expressément, ils peuvent toujours, en renonçant à l'arbitrage, empêcher l'arbitre, ou les arbitres, d'interpréter le compromis et de prononcer sur leur compétence.

As we have already noted, the course taken by England with relation to consequential damages claimed in connection with the *Alabama* arbitration was quite in the line of the suggestion of MM. Rolin-Jaequemyns and Pradier-Fodéré, and in the spirit of the opinion expressed by M. Goldschmidt and M. Calvo, but no such course was taken by Mexico before the former tribunal. Mexico entered upon the consideration of the facts without the formal reservations indicated as possible, and without withdrawing from the tribunal, because of its lack of jurisdiction, the consideration of the Pious Fund case.

Having therefore failed to take any of the precautions or to avail herself of any of the courses indicated as open to her by the various

writers on international law, she must be conceived to have waived all of her rights to object to the jurisdiction of the former tribunal.

For the purpose of meeting all suggestions which may by any possibility be made, let us next examine the question—

DOES THE DOCTRINE OF RES JUDICATA APPLY TO ARBITRAL DECISIONS?

According to the decisions of civil law courts, an arbitral sentence in a private dispute has all the force of *res judicata* possessed by any other judgment, for it is said in Répertoire Générale de Jurisprudence, Volume IV, title "Arbitrage," section 1082:

> Les sentences arbitrales acquièrent autorité de chose jugée comme les autres jugements, dès qu'elles sont devenues inattaquables par l'expiration de délais établies. (See also sec. 1083.)

The same work, title "Chose jugée," at paragraph No. 204, says:

> Les sentences arbitrales sont de véritables jugements; elles sont donc investies de l'autorité de la chose jugée.

The common law holds to the same view of the matter, for it is said in American and English Encyclopædia of Law (2d edition), title "Jurisdiction," Volume XVII, page 1055:

> An award of arbitrators with jurisdiction can not be collaterally impeached for errors or irregularities in the proceedings.

And again (page 1056):

> Whenever any person is given authority to hear and determine any question, such determination is in effect a judgment, having all the properties of a judgment pronounced in a legally created court of limited jurisdiction.

The matter is further made the subject of discussion in the same work under the title of "Arbitration and award," Volume II, page 778, the following conclusion being reached:

> The weight of authority in the United States leans toward making absolute the certain and simple rule that the award of arbitrators, when made in good faith, is final, and that it can not be questioned or set aside for a mistake, either of law or of fact.

In the case of Boston Water Power Co. *v.* Gray, 6 Metcalf (Mass.), 131, Chief Justice Shaw, one of the most eminent of American jurists, speaking of the weight to be attached to the finding of arbitrators, said:

> It is within the principle of *res judicata.* It is the final judgment for that case and between these parties. * * * It would be as contrary to principle for a court of law or equity to rejudge the same question as for an inferior court to rejudge the decision of a superior, or for one court to overrule the judgment of another, where the law has not given an appellate jurisdiction or a revising power acting directly upon the judgment alleged to be erroneous.

We thus see that the civil and the common law are entirely in accord upon the question of the weight to be attached to the findings of arbitrators, and this question being beyond dispute, as it seems to us, either from the standpoint of precedents and opinion or of natural reason, we may pass quickly to the consideration of the more important question:

DOES THE AUTHORITY OF RES JUDICATA ATTACH TO THE FINDINGS OF INTERNATIONAL BOARDS OF ARBITRATION?

Let us now investigate and determine whether there may be invoked as a consequence of the judgment of the Mixed Commission the results which would attach to the judgment of any court of competent jurisdiction.

We believe that we have already shown that the commission referred to was entirely competent to pass upon the question of its own jurisdiction, particularly as the question raised depended practically altogether upon the proper construction and application of the powers given it under the language of the treaty of 1868. Let us, therefore, see the results attendant upon this conclusion.

We may refer with propriety to article 18 of The Hague convention, under which the present tribunal operates, and which says:

La convention d'arbitrage implique l'engagement de se soumettre de bonne foi à la sentence arbitrale.

The foregoing article was adopted in the form reported to the delegates by M. Chevalier Descamps, who in his report presented to the body in question, which report is to be found in La Revue de Droit International for 1900, page 225, says:

Dans l'arbitrage les États en litige défèrent conventuellement la solution de leur contestations au jugement d'une ou de plusieurs personnes chargées de "dire le droit" pour les parties en cause.

L'obligation de se soumettre de bonne foi à la sentence arbitrale est dans ces conditions une obligation positive impliquée dans la convention intervenue. Un arbitrage n'est pas une tentative de conciliation. Le trait caractéristique de l'arbitrage est précisément la soumission commune des États à un juge de leur choix, avec l'engagement à la sentence. Á moins de dispositions spéciales du compromis attachant tel ou tel effet particulier à une sentence arbitrale et sauf usage de voies légitimes de recours, l'inexécution de la décision des arbitres n'est pas plus admissible en droit que la violation des contrats, et cela par la raison qu'elle est précisément la violation d'un contrat.

A careful consideration of the foregoing paragraphs must make it evident that M. Descamps and his associates upon the committee did not understand that they were creating a new law applicable only to decisions which might be reached under the court they were seeking to create, but rather announcing a condition which was believed by them to attach to all conventions for the settlement of disputes. Any other interpretation would render meaningless the words:

L'obligation de se soumettre de bonne foi à la sentence arbitrale est dans ces conditions une obligation positive impliquée dans la convention intervenue.

Further commenting upon article 18, M. Descamps says:

La rédaction primitive de l'article 18 était celle-ci: "La convention d'arbitrage renferme l'engagement de se soumettre de bonne foi à la sentence arbitrale." Le mot "implique" substitué au mot "renferme" sur la proposition de M. Rolin accentue nettement, au point de vue qui nous occupe, le caractère et les conséquences du contrat d'arbitrage.

The action of The Hague convention in adopting article 18 shows clearly the authority which, in the opinion of the eminent gentlemen constituting that convention, should be accorded to arbitral decisions. The reason for establishing this rule as to future conventions is no greater, of course, than the reason for regarding it as existing with relation to the conventions of the past, for it is not to be conceived that the delegates desired to claim for subsequent arbitral commissions a greater power and authority than they were willing to accord to those of times past. The view of the committee upon this point we have already seen.

Commenting upon the article now under consideration, M. Merignhac, in his La Conférence Internationale de la Paix, on page 296, says:

Ainsi la décision arbitrale, qu'elle dérive d'un compromis fait après ou avant la naissance du litige, est obligatoire pour les parties, à la différence de la médiation facultative. Tous les auteurs sont unanimes à reconnaître que la sentence de l'arbitre

est un jugement, qu'elle à l'autorité de la chose jugée; et, à cet égard, on pourrait multiplier les citations. Le fait du reste est ici d'accord avec le droit; et il n'y a pas d'exemple d'une nation ayant refusé d'exécuter une sentence prononçant contre elle une condamnation, sentence qui n'était d'ailleurs viciée par aucune cause de nullité. On doit donc se soumettre à la sentence arbitrale et on doit s'y soumettre de bonne foi, conformément au principe qui régit l'exécution de toutes les conventions internationales. L'article 18 précité ne fait qu'appliquer à l'institution de l'arbitrage ce principe général. Il faut néanmoins réserver le cas où le compromis contiendrait des clauses speciales relativement à l'exécution et aussi à l'application des voies de recours qui y auraient été prévues. Mais, en dehors de ces circonstances exceptionelles, le compromis constituant un contrat par lequel on accepte à l'avance la décision d'un arbitre, doit être exécuté de la meme façon que les autres contrats internationaux. L'arbitrage de l'Alabama nous fournit un exemple mémorable de cette soumission unanime et nécessaire aux décisions arbitrales. L'arbitre anglais, sir Cockburn, après avoir refusé d'adhérer à la sentence de Genève, ajoutait dans son mémoire de protestation; "J'espère néanmoins que le peuple anglais acceptera la décision des juges avec la soumission et le respect dus à la décision d'un tribunal dont il a consenti à accepter librement l'arrêt."

WHEN MAY ARBITRAL SENTENCES BE ATTACKED.

Having therefore established the duty of all persons appealing to courts of this nature to submit loyally to the award, let us examine and discover, if we may, in what cases it has been considered such sentences may be the subject of attack, to the end that we may learn whether the findings of the former Mixed Commission were open to revision or were of such a nature as to require those submitting to the tribunal to recognize the decision as having in all respects the force of *res judicata*.

The general subject of the weight to be given arbitral sentences was under consideration by the Institute of International Law at The Hague in 1875, and in article 27 of the rules there established (see Revue de Droit International, Volume VII (1875), p. 282) it was provided that—

La sentence arbitrale est nulle en cas de compromis nul, ou d'excès du pouvoir, ou de corruption prouvée d'un des arbitres, ou d'erreur essentielle.

It is interesting to note that the foregoing paragraph omits (the reason for such omission not being explained) the explanatory words contained in the first draft by Goldschmidt, following the word "*erreur*," his draft making the sentence close—

erreur essentiellement causée par la production de faux documents.

The expression "*erreur essentielle*" has been severely criticised as leaving it uncertain whether the error in question be one of law or fact and as permitting possibly the continuance of the dispute for the determination of which the arbitration was formed, one side or the other claiming that there was essential error in the findings of the court, and for that reason proposing to refuse adhesion thereto. This weakness has been discussed quite at length by Merignhac in his Traité de l'Arbitrage, section 333, as follows:

La qualification "d'erreur essentielle" employée par l'Institut est vague; l'erreur dont il s'agit portera-t-elle sur le droit ou sur le fait; et, en outre, à quoi reconnaîtra-t-on qu'elle est essentielle? On se rend compte que les opinions varieront nécessairement dans une large mesure; et qu'une telle formule porte, par suite, en elle les germes de discorde d'autant plus dangereux qu'ils pourront facilement se transformer en causes de guerres! D'autre part, le point de savoir si la sentence émanée des arbitres privés donne lieu à un recours pour cause d'erreur, a été resolu de façons diverses par les législations positives; toutefois, quelque solution de principe qu'on accepte à cet égard, on constate tout au moins qu'en droit privé le recours pourra être porté devant une jurisdiction officielle placée au-dessus de l'arbitre et qui statuera

sur l'articulation d'erreur. Mais, cette juridiction qui serait chargée d'apprécier l'erreur commise par l'arbitre, n'existe pas, on le sait, dans le domain international, à moins que les parties n'aient pris soin de la prévoir et de l'organiser dans le compromis. En l'état actuel des choses, les parties demeureraient donc elles-mêmes juges de l'appréciation de l'erreur invoquée et partant de la validité de la sentence. Or, s'il est des cas dans lesquels ou pourra sûrement affirmer que le droit a été violé, ou que les faits ont été mal apprécies, ces cas constitueront la grande exception; le plus souvent, par contre, la question sera douteuse, et délicate. Admettre que la partie condamnée tranchera souverainement ce point, c'est livrer l'arbitrage à sa discrétion, et dénaturer son caractère obligatoire.

To our mind we may treat the words in question either as still qualified by the clause attached by Mr. Goldschmidt or as referring by "*erreur essentielle*" to what we might call fundamental or jurisdictional error as distinguished from error as to the law or fact occurring during the trial of the cause, and this latter interpretation might appear to be almost of necessity the true one, for otherwise this very important point is but inadequately covered, inasmuch as "*excès du pouvoir*" may very well relate to cases where the arbitrators have had the right to exercise some power, but in this exercise have passed the limits set for them, as was the case in the noted arbitration by the King of the Netherlands of the dispute between the United States and England with relation to the St. Croix River, while "*erreur essentielle*," or, as we would suggest, jurisdictional error, would prohibit the arbitrators from proceeding at all.

We shall have occasion to advert to this subject at a later period, meanwhile noting that in its present form, open as it is to discussion and dispute, the paragraph in question was adopted "*à la simple majorité.*" (Revue de Droit International (1875), p. 277.)

Let us briefly collate the expressions of the leading writers on international law, indicating their opinions as to the circumstances under which an arbitral sentence might be made the subject of attack.

Rivier, in his Principes du Droit des Gens, Volume II, page 185, finds that the state against which sentence has been rendered may have just grounds for refusing execution if the compromis be null or extinct, if the arbitrators have been deceived or have permitted themselves to be corrupted, if the sentence has been obtained by trickery or is materially unjust, and, as is most frequently the case, he says, if the arbitrators have exceeded their powers or have not conformed to the directions of the compromis.

Taylor, in his International Public Law, page 379, finds that—

If that expedient (proposition for equitable settlement) fails, then a definite award should be rendered, which has all the moral force of a judgment at law, provided that the procedure of which it is the culmination has been justly and legally conducted. It is generally admitted that the arbitral decision of award may be honorably disregarded when the tribunal has exceeded the powers conferred upon it by the articles of submission, when the award has been procured through fraud or corruption, when there has been a flagrant denial of justice, or when the terms of the award are equivocal. Bluntschli claims that it may also be disregarded "if the arbitral decision is contrary to international law. But the decision of the arbitrators can not be attacked under the pretext that it is erroneous or contrary to equity, save for errors of calculation."

Bonfils, in his Droit International Public, third edition, section 955, says:

Est-ce à dire que la sentence de l'arbitre sera toujours et dans tous les cas forcément obligatoire? Non assurement faut-il encore que la sentence soit valable en ellemême et regulièrement rendue. Les auteurs sont généralement d'accord pour reconnaître que la sentence arbitrale n'est point obligatoire: 1. Si les arbitres ont statué

ultra petita; 2. Si l'une des parties n'a pas été entendue et mise à même de faire valoir ses moyens et ses preuves; 3. Si la sentence est le résultat de la fraude et de la déloyauté de l'arbitre. * * *

Monsieur Féraud-Giraud, in an essay upon Traités d'Arbitrage Général et Permanent, to be found in Revue de Droit International for 1897, page 333, finds that the majority of publicists have agreed in admitting several causes of nullity, but he does not specify in detail what he considers sufficient cause.

Heffter, in his Droit International d'Europe, Birgson's edition, page 210, says, in effect, that it may be attacked if rendered without a valid compromis or beyond its premises; if rendered by arbitrators absolutely incapable; if the arbitrator or other party has not acted in good faith; if the parties or one of them have not been heard; if it has been pronounced upon things not asked for, and if its provisions are contrary in an absolute manner to the rules of justice, and can not consequently form the object of an agreement; but he finds that errors which may be alleged against the sentence when they are not the result of a partial spirit do not constitute a cause of nullity, but nevertheless an error of calculation in the undertakings, which he described under the name of "arbitratio," will justify a demand for rectification.

Phillimore says, Volume III, page 3:

It should be observed that if any arbitrator be appointed the terms of the appointment will, of course, limit his authority, and if his award exceed or be inconsistent with those limits it will be altogether null. * * *

The sentence, once given, is binding upon the parties whose own act has created a jurisdiction over them. The extreme case may be indeed supposed of a sentence bearing upon its face glaring partiality and attended with circumstances of such evident injustice as to be null. "Nec tamen (Voet observes), executioni danda erit, si per sordes, aut per manifestam gratiam vel inimicitiam probetur lata."

In an article entitled "De Certains Dangers de l'Arbitrage International," by Darras, contained in La Revue Général de Droit International Public, volume 6, page 547 (1899), the writer refers to a large number of authorities to support the contention that a sentence in which an arbitrator has determined upon points not submitted to him is a nullity.

In Hall's International Law, chapter 11, page 379, we find that—

An arbitral decision may be disregarded in the following cases, viz: When the tribunal has clearly exceeded the powers given to it by the instrument of submission, when it is guilty of an open denial of justice, when its award is proved to have been obtained by fraud or corruption, and when the terms of the award are equivocal. Some writers add that the decision may also be disregarded if it is absolutely contrary to the rules of justice, and M. Bluntschli considers that it is invalidated by being contrary to international law; he subsequently says that nothing can be imposed by an arbitral decision which the parties themselves can not stipulate in a treaty. It must be uncertain whether in making this statement he intends to exemplify his general doctrine or to utter it in another form. Whatever may be the exact scope of these latter reserves, it is evident that an arbitral decision must for practical purposes be regarded as unimpeachable, except in the few cases first mentioned, and that there is therefore ample room for the commission, under the influence of sentiment, of personal or national prejudices, of erroneous theories of law, and views unconsciously biased by national interests, of grave injustice, for which the injured State has no remedy.

Reenforcing the comments of Mr. Hall upon the position taken by Bluntschli, Mr. Geffcken remarks:

Que la partie condamnée par la sentence pourrait trop facilement prétendre qui le jugement est contraire au droit international, ce serait perpétuer les conflits.

Halleck (chap. 4, sec. 11, p. 87), whose doctrines receive the approval of Ferguson in Volume II, Manual of International Law, p. 208, says:

But if such proffered or invited mediation is of the nature of an arbitration, in which the question of difference is submitted to the decision of the mediating power as an arbitrator, with an agreement to abide by such decision, neither party can properly refuse to abide by the result of the reference, unless it be shown that the award has been made in collusion with one of the parties, or that it exceeds the terms of the submission.

Kamarowsky (Westman's edition, 1887, p. 348) in a note quotes M. Chrabro-Wassilewsky as saying:

La décision arbitrale étant obligatoire pour les deux parties pour les raisons signalées, elle ne saurait être méconnue à raison de motifs concernant la substance de cette décision.

Kamarowsky himself (Westman's edition, p. 355), after discussing the opinions of Vattel, Calvo, Heffter, Bluntschli, Fiore, Pierantoni, Bulmerincq, and Goldschmidt as to when findings of arbitrators may be attacked, says:

L'énumeration des motifs de cassation que nous venons de reproduire épuise complétement la question. Nous pouvons, en résumé, les réduire aux trois points fondamentaux suivants:

1. La violation par le tribunal du compromis, sous quelque rapport que se soit.
2. La nonobservation des principes généraux et fondamentaux de la procédure, en général.
3. Une décision incompatible avec les principes du droit international.

Vattel says, section 329, book 2, chapter 18:

In order to obviate all difficulty and cut off every pretext of which fraud might make a handle, it is necessary that the arbitration articles should precisely specify the subject in dispute, the respective and opposite pretensions of the parties, the demands of the one and the objections of the other. These constitute the whole of what is submitted to the decision of the arbitrators; and it is upon these points alone that the parties promise to abide by their judgment. If, then, their sentence be confined within these precise bounds, the disputants must acquiesce in it. They can not say that it is manifestly unjust, since it is pronounced on a question which they have themselves rendered doubtful by the discordance of their claims, and which has been referred as such to the decision of the arbitrators. Before they can pretend to evade such a sentence they should prove by incontestable facts that it was the offspring of corruption or flagrant partiality.

Calvo (sec. 1756) finds that the parties who have presented a demand to arbitration have submitted morally in advance and are held bound to execute the conclusions reached.

As grounds for attacking the judgment of an arbitral court he gives the following (sec. 1774):

1°. Si la sentence a été prononcée sans que les arbitres y aient été suffisamment autorisés, ou lorsqu'elle a statué en dehors ou au delà des termes du compromis. * * *

2°. Lorsqu'il est prouvé que ceux qui ont rendu la sentence se trouvaient dans une situation d'incapacité légale ou morale, absolue ou relative, par exemple s'ils étaient liés par des engagements antérieurs ou avaient dans les conclusions formulées un intérêt direct ignoré des parties qui les avaient choisis.

3°. Lorsque les arbitres ou l'une des parties adverses n'ont pas agi de bonne foi: si l'on peut prouver, par exemple, que les arbitres se sont laissé corrompre ou acheter par l'une des parties. Heureusement il serait difficile de mentionner un cas d'arbitrage ayant ce caractère dans nos temps modernes; depuis le commencement du siècle quarante différends internationaux au moins ont été réglés par des arbitres, et nous ne sachions pas qu'il se soit élevé le plus léger soupçon que leurs jugements n'aient pas été entièrement impartiaux. Il faut remonter jusqu'au moyen-âge pour rencontrer des exemples de fraude et de corruption; ainsi Pufendorf cite celui de l'empereur Maximilien et du doge de Venise soumettant leurs différends à l'arbitrage

du pape Léon X, tandis que chacun d'eux intriguait en particulier auprès du pontife romain pour qu'il se déclarât en sa faveur.

4°. Lorsque l'un ou l'autre des États intéressés dans la question n'a pas été entendu ou mis à même de justifier de ses droits.

5°. Lorsque la sentence porte sur des questions non pertinentes, c'est-a-dire n'ayant pas trait au litige, ou sur des choses qui n'ont pas éte demandées.

6°. Lorsque la teneur de la sentence est absolument contraire aux règles de la justice et ne peut dès lors faire l'objet d'une transaction, comme dans le cas où l'arbitre, appelé à prononcer sur la satisfaction, qu'un État doit à un autre pour une offense, condamnerait l'offenseur à une réparation qui porterait atteinte à son honneur ou à son indépendance; ou bien encore dans le cas où l'arbitre aurait en vue quelque avantage qu'il pourrait tirer d'une décision injuste, et serait assez puissant pour ne craindre pas le ressentiment des parties qui ont déféré à son jugement le réglement de leurs réclamations en litige: ainsi fut la décision du peuple romain, lorsque les villes italliennes d'Ardée et d'Aricie ayant remis à son arbitrage leur contestation au sujet de la souveraineté sur un certain territoire, l'assemblée des tribus romaines adjugea à l'État romain la propriété du territoire contesté.

Il convient de faire observer que la décision des arbitres ne saurait être attaquée pour un simple vice de forme, sous le prétexte qu'elle est erronée, ou contraire à l'équité, ou préjudiciable aux intérêts de l'une des parties. Néanmoins les erreurs de calcul et du reste toutes les erreurs de fait constatées peuvent toujours être rectifiées.

According to M. Pradier-Fodéré (sec. 2628), an arbitral sentence is null if it is in derogation in any respect whatever of the terms of the compromis, or if the universal or fundamental principles of procedure have not been observed, or if there has been partiality on the part of the arbitrator or bad faith on his part or on the part of the parties, or if the decision is absolutely incompatible with the principles of justice and international law.

According to M. Goldschmidt, the arbitral sentence duly pronounced can be attacked and held for naught (Revue de Droit International for 1874, p. 447):

1°. Si le compromis n'a pas été conclu valablement. Ce motif ne peut être invoqué si le recourant a pris part à la procédure devant le tribunal arbitral, sans opposer la nullité du compromis.

2°. Si le compromis valablement conclu s'est ensuite éteint: *a*, par convention des parties intervenue avant le prononcé de la sentence; *b*, parce qu'on n'a pas pu former le tribunal arbitral, ou parce que le tribunal arbitral valablement formé s'est ensuite dissous; *c*, parce que le délai prescrit pour le prononcé de la sentence est expiré avant ce prononcé.

3°. Si le tribunal arbitral n'a pas délibéré et statué tous les membres présents et votants.

4°. Si, le compromis prescrivant l'exposé des motifs, la sentence a été rendue sans motifs.

5°. Si le tribunal arbitral a décidé sans aucunement entendre le recourant. Est assimilé au cas de refus d'audition celui où la personne qui s'est gérée en representant du recourant n'en a reçu mandat ni exprès ni tacite; sa gestion n'ayant été non plus ratifiée ni expressément ni tacitement par le recourant.

6°. Si le tribunal arbitral a excédé les limites de la compétence que lui donnait le compromis.

7°. Si le tribunal arbitral a, par sa décision, accordé à la partie adverse plus qu'elle ne demandait.

8°. Si les règles de procédure ou les principes de droit expressément prescrits à l'observation du tribunal arbitral dans le compromis ou une convention subsequente des compromettants, ou les principes de procédure posés par le tribunal lui-même et notifiés aux parties, ont été manifestement negligés ou violés.

9°. Si la sentence arbitrale ordonne un acte reconnu généralement pour immoral ou prohibé.

10°. Si, a l'insu du recourant et avant le prononcé de la sentence, un des arbitres a reçu de la partie adverse un avantage ou la promesse d'un avantage.

11°. S'il est établi que le tribunal arbitral a été trompé par la partie adverse, par exemple, au moyen d'actes faux ou altérés ou de témoins corrompus.

Summing up the various grounds for supposed just denial of the authority of the decisions of arbitral courts, we find that many relate

to questions of departure from the terms of the compromise, and others to the exercise, or attempted exercise, by the arbitrators of powers beyond those conferred upon them by that instrument, although to the latter point the writers instance but a single case, such being the action of the King of Holland in connection with the arbitration between England and America for the settlement of the St. Croix River difficulty, before referred to.

The authors are further in substantial accord to the point that the decision may be rejected on the ground of partiality, bad faith, or corruption, but fortunately again in the history of arbitrations no instance is cited of partiality or bad faith, and but one of attempted corruption.

According to some writers, the award may be rejected when contrary to the principles of international law, but unless this expression be given a narrow interpretation this opinion may be regarded as doubtful and dangerous. Properly interpreted, it may be esteemed as referring to cases where the award would involve, without its express consent, the territorial impairment or the infringement of the independence of a state.

Writers generally agree that an award may be attacked for errors of calculation, but the good faith of nations, of course, permits corrections of this sort to be made without involving serious trouble, and the point may be dismissed as of minor importance.

It is to be noted that, the point being considered by him, no author believes that the award of arbitrators may be attacked because of erroneous appreciation either of the facts or of the law as applicable to them. We have seen that upon this point Bluntschli argues that a decision may not be attacked on the pretext that it is erroneous or contrary to equity save for errors of calculation; while Heffter finds that errors which may be alleged against the sentence, when they are not the result of a partial spirit, do not constitute a cause of nullity. Kamarowsky quotes Chrabro-Vassilewsky as contending that the effect of an arbitral sentence can not be lost on account of reasons affecting its substance. Vattel declares that the parties may not say "it is manifestly unjust, since it is pronounced on a question which they have themselves rendered doubtful by the discordance of their claims, and which has been referred as such to the decision of the arbitrators." Calvo is of the opinion that the decision of arbitrators can not be attacked on the pretext that it is erroneous or contrary to equity or prejudicial to the interests of one of the parties.

It is true that, in the opinion of the Institute of International Law, arbitral sentences may be disputed for "*erreur essentielle.*" We have already adverted to the possibility that these words are to be interpreted with reference to the original "*projet*" of Goldschmidt, and intended to refer to the production of false documents; but if this meaning be not given the words, then we must understand by "*erreur essentielle*" a fundamental error—one which is of the nature known to the common law as jurisdictional, and therefore vitiating the whole proceedings, and not such error as might arise from a miscitation of the facts or misapplication of the law of the particular case. It must be, in other words, such an error as is criticised by some authors as constituting an infraction of public international law, which subject we have already briefly discussed.

The distinction can not be too strongly emphasized between errors

involving a subversion of what we might term natural law of nations and errors which rest upon matters of judgment, with relation to which men may differ, and which are only regarded among men and nations as set at rest by the judgment of a competent tribunal. That the decision under consideration was subversive in any degree of the fundamental principles of international law we think can scarcely be contended.

That Mexico will insist that the former arbitrators erred in their appreciation of the facts submitted to them seems probable, but that such a contention is sufficient to justify the rejection of an award can not, we think, in view of the foregoing considerations, be sustained from the standpoint either of law or reason.

We do not believe it can or will be seriously argued that Mexico was bound by the decision formerly had, in so far as that decision related to the payment of the sum of $900,000, but would not be bound for any other consequences to flow therefrom. It will not do, we think, to say that while Mexico was bound to abide by the former decision and pay the award then rendered, nevertheless the consequences which might naturally flow from such award, constituting *res judicata*, may not follow. If the former award was valid, then it may not be invalid as to the incidents attaching to it.

It is to be noted that the new protocol does not authorize this court to review or revise in any manner the judgment of the former Mixed Commission, but to determine whether it is *res judicata* of the matters at issue, and what are the consequences of its being *res judicata*, and if it be not *res judicata*, then what are the merits of the claim submitted to this court. This very statement emphasizes that a revision of the former adjudication is not one of the things asked at your hands, and, further, implies that except there be such fundamental error attaching to the former award as absolutely vitiates it then its conclusions are to be given their full force and effect, whatever such force and effect may be, which subject we reserve for later discussion.

MEXICO'S OFFICIAL VIEW OF THE SANCTITY OF THE AWARD OF THE MIXED COMMISSION.

Reference to the diplomatic correspondence between the United States and Mexico occurring at the close of the year 1876 demonstrates the fact that Mexico did not consider the award in this case properly attackable. Sr. Mariscal stated that Mexico did not "pretend to put in doubt the present award," and his correspondence shows that, although Mexico sought to minimize its future effect, she did not, nevertheless, deny its absolute sanctity.

If Mexico had at any time intended to question or thought there was reasonable ground for questioning the jurisdiction of the former tribunal, surely it would have been at such a moment as this, but she merely denied the right to claim the capital upon which the interest then awarded was based. Our position in this respect is all the stronger, because, believing that the Weil and La Abra awards were obtained by fraud, Mexico expressed certain hopes of a reconsideration as to them. Again, we believe that, recognizing, as the Mexican commissioner did, that the award would place upon Mexico "the perpetual tribute of a rent," the Mexican Government, had it conceived that there was vital error in the award itself, would not have failed to note the fact and to announce its intention of future resistance. Instead

of such an attitude being assumed, we are left simply to infer that the only position taken by Mexico was that any claim for the capital which might thereafter be made would be opposed, and possibly that the contention would be made that the award then obtained amounted to a conclusive settlement of the whole transaction, although as to this latter suggestion the view of Mexico was not clearly defined.

Considering the point last above mentioned, we believe we might well have waived all of the argument up to this point and limited ourselves to the questions we are about to discuss; for if Mexico, immediately upon the rendition of the decision of the umpire, did not contend, as we have endeavored to show she could not, that the award was contrary to public international law, or was based upon errors of law or of fact, or was vitiated or inoperative for some other reason, surely now, after a lapse of twenty-six years, and without the discovery of any new fact affecting the sanctity of the former adjudication, which new fact was not at that time discoverable, Mexico will not be permitted to attack as invalid the finding of the Mixed Commission.

We may with propriety at this point quote Lord Cairns, who, in Dundas *v.* Waddell (5 Appeal Cases, 263), said:

> I can not imagine anything more unsafe than to attempt to cut down the effect of judgments, distinct and absolute on the face of them, on a surmise that a case was imperfectly considered, or that the court had not proper materials for a judgment. Especially does it appear to me unsafe to enter on such speculations after the lapse of nearly a century, when every source of information, except what is retained in the judgment, has been dried up by lapse of time.

THE EFFECT OF THE ARBITRAL DECISION IN THIS CASE AS RES JUDICATA.

By reference to the protocol it will appear that the former Mixed Commission adjudged the claim of the Catholic bishops of California submitted to it adversely to the Republic of Mexico, and made an award thereon of $904,700.99, the same being, as expressed in the findings of the court, for twenty-one years' interest of the annual amount of $43,080.50 upon $718,016.50 in Mexican gold. Subsequently this award was reduced, because of an error of calculation, to $904,070.79 Mexican gold, representing a diminution in the total amount of principal upon which interest should be recovered of $500. (Transcript, p. 650.) This award was paid, and in view of the demonstration in which we believe we have successfully indulged of the fact that the former award constituted *res judicata* as to the amount of yearly installments which could be claimed on behalf of the bishops of California, the question arises as to the consequences which flow therefrom. We have introduced in evidence the former adjudication for the purpose of establishing conclusively the amount of yearly interest we now have a right to claim. This done, Mexico would still be privileged to show, if such were the fact, that the interest had been paid. The protocol admits that this interest has not been paid or released.

Before entering into a discussion of the legal consequences of the former decision, it is worth noting the opinion expressed at the time of its rendition by the representatives of Mexico. Said Señor de Zamacona, in his opinion as commissioner:

> When Mexico and the United States liquidated, so to say, their accounts in 1848, binding themselves not to seek in the past for any cause of complaint or reclamation, the Fund of California was already incorporated into the national revenues of the Republic, and the Government of Mexico had only allotted certain subsidies to the

ecclesiastical functionaries who served it as auxiliaries in that part of the confederacy. This situation the claimants now desire to alter *and to oblige Mexico to pay the perpetual tribute of a rent to certain American corporations.* (Transcript, p. 542.)

Again, he asks:

What is there in common between that case and that of the claimants? What do they give Mexico? What do they offer her in exchange for a sort of *perpetual annuity* which they want to secure in favor of their churches? (Transcript, p. 543.)

For citations to similar effect from the argument of Sr. Avila, we refer to the brief of the Messrs. Doyle, where they are collated.

It is evident that Señor de Zamacona believed that an award against his country for past interest necessarily involved the payment of future interest, which he terms "the perpetual tribute of a rent," or, in other words, "a perpetual annuity." His view of the law upon this point was absolutely correct, as we shall now proceed to show.

THE FORMER AWARD BEING RES JUDICATA, ESTABLISHES CONCLUSIVELY THE ANNUAL AMOUNT OF INTEREST TO BE PAID.

By reference to the protocol we find the recital that in the former controversy the Mixed Commission—

adjudged the same adversely to the Republic of Mexico and in favor of said claimants, and made an award thereon of nine hundred and four thousand seven hundred and $\frac{99}{100}$ (904,700.99) dollars, the same, as expressed in the findings of said court, being for twenty-one years' interest of the annual amount of forty-three thousand and eighty and $\frac{99}{100}$ (43,080.99) dollars upon seven hundred and eighteen thousand and sixteen and $\frac{50}{100}$ (718,016.50) dollars.

A slight correction is properly to be made in the foregoing as above indicated, inasmuch as the umpire, upon his attention being called to an arithmetical error, reduced the sum total to $904,070.79.

The language of the protocol above quoted indicates that by agreement of the two nations it is covenanted that the former tribunal adjudged not only the annual interest to be paid, but also the amount of principal upon which it was based, and we might well rely upon this single fact as a complete answer to the suggestion on behalf of the Mexican Republic that the decisory or *dispositif* part of the judgment had reference only to the question of interest.

But for a few moments, even though it be contrary to the actual facts of the situation, let us assume that the two Governments have not agreed as to the points upon which the decision was reached, and further assume that it is open to this court to investigate and redetermine upon the different findings of the former tribunal, provided, however, the doctrine of *res judicata* does not prevent such reexamination. We shall lay it down as a principle equally well established by the civil law and by the common law of England and America that the things which are of necessity implied in a decision, and without which the decision could not have had an existence, are as much an integral part of it as if they had entered into the last words spoken and the last action taken by the court.

Quoting from an eminent American authority (Freeman on Judgments, sec. 256), we may say that—

A judgment is conclusive upon every matter actually and necessarily decided in the former suit, though not then directly the point in issue. If the facts involved in the second suit are so cardinal that without them the former decision can not stand, they must now be taken as conclusively settled. In an order of settlement J. G. and W. G. were adjudged to be the lawful children of William G. and Esther G. and to

have their settlement in a certain township. Afterwards a contest arose in relation to the settlement of Esther G., whereupon it was considered that as the settlement of the children depended on that of their father and on his marriage with their mother, Esther, the father's settlement and marriage must have been decided as the groundwork of the former order, and that as those facts which upheld the order of settlement of the children were necessarily and exclusively applicable to their mother, her settlement was fixed by the decision in relation to that of her children. (Regina *v.* Hartington, 4 El. and Bl., 780.)

Again we read in the same work in section 258:

In ascertaining whether a particular matter has become *res judicata*, the reasoning of the court is less to be regarded than the judgment itself, and the premises which its existence necessarily affirms.

As inferentially bearing upon the point now under consideration we may cite Doty *v.* Brown (4 New York, 71; 53 American Decisions. 350) as authority to the proposition that the former judgment is conclusive when the parties and the question involved in the two suits are the same, notwithstanding the property claimed in them may be different. To the same proposition we cite Keown *v.* Murdock (10 Ohio State, 606).

In the case of Reynolds *v.* Mandel (73 Illinois Appeals, 379) it was decided that where a question material to the determination of both causes has been adjudicated in the former suit by a competent court, and the same question is again at issue between the same parties, its adjudication in the former case is conclusive in the latter whether the cause of action be the same in both suits or not.

The language of the court of appeals of New York in the case of Manufacturing Company *v.* Walker (114 New York, 7) is much in point:

The estoppel of a former judgment extends to every material matter within the issues which was expressly litigated and determined, and also to those matters which, although not expressly determined, were comprehended and involved in the thing expressly stated and decided, whether they were or not actually litigated or considered. It is not necessary that issue should have been taken upon the precise point controverted in the second action.

In passing to a brief consideration of the position of the English courts, we may refer to the fact that in Cromwell *v.* County of Sac (4 Otto, Supreme Court U. S., 351) the Supreme Court quotes approvingly the opinion of the chancellor in Henderson *v.* Henderson (3 Hare, Eng., 100) as follows:

In trying this question I believe I state the rule of court correctly that when a given matter becomes the subject of litigation in and of adjudication by a court of competent jurisdiction the court requires the parties to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in controversy, but which was not brought forward only because they have from negligence, inadvertence, or even accident omitted part of the case. The plea of *res judicata* applies, except in special cases, not only to the points upon which the court was required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.

The general rule is again indicated by the language of Lord Mellish in Bank of Hindustan, China, and Japan, Allison's case (L. R. Ch. Appeal Cases, vol. 9, p. 1), as follows:

It is clear, I apprehend, that the judgment of the courts of common law is not only conclusive with reference to the actual matter decided, but that it is also conclusive with reference to the grounds of the decision, provided that from the judgment itself the actual grounds of the decision can be clearly discovered.

As supplying us with a general rule, the application of which is explained by the cases already given and those hereafter to be adduced, we may with advantage refer to the much cited opinion of Lord De Grey in *The Duchess of Kingston's case* (20 Howell's State Trials, 538), as follows:

From the variety of cases relative to judgments being given in evidence in civil suits these two deductions seem to follow as generally true: First, that the judgment of a court of concurrent jurisdiction directly upon the point is as a plea a bar, or as evidence, conclusive between the same parties upon the same matter directly in question in another court; secondly, that the judgment of a court of exclusive jurisdiction directly upon the point is in like manner conclusive upon the same matter between the same parties coming incidentally in question in another court for a different purpose.

Let us now consider whether the civil law treats this subject-matter in the same manner, bearing in mind the citation made by Señor Mariscal (Diplomatic Correspondence, p. 32) from the work of Professor Laurent to the effect that—

The creditor sues his debtor for interest of a principal sum; the judge condemns the debtor to pay. Is there *res judicata* in respect to the principal? It is supposed that the decisory part of the decision affects the amount of the principal, and it has been decided that a decision in these terms does not give the force of *res judicata* with respect to the principal itself. (Citing decision August 25, 1829, Dalloz, Chose Jugée, No. 24.)

When, however, we examine the work of Dalloz itself, we find that the citation was simply that of a case in which judgment for compound interest had been rendered by default, and Dalloz contended that the authority of *res judicata* did not attach to the points or reasons announced in connection with the judgment relative to facts or questions which had not been specially submitted to the examination of the judge, even if these announcements were found in the "*dispositif*" of the judgment. Thus he continues:

Judgment by default which results from a demand tending solely to produce interest upon interest of a capital has not the effect of *chose jugée* as to the quantity of the capital, although this capital may be expressed in the judgment.

Looking at the reason suggested, we may readily grant the conclusion. No question as to the amount of the capital was "specially submitted to the examination of the judge." He was only asked to determine the amount of interest accruing upon another alleged amount of interest, and the judgment in the case being by default, there was no contest before him tending to bring out all the facts of the case. That we have correctly stated the reason for the position taken by Dalloz sufficiently appears from a further citation from paragraph 32, in which Señor Mariscal found the quotation applied by him. There M. Laurent says:

Un jugement accorde à une personne des aliments en qualité d'enfant, A-t-il l'autorité de chose jugée sur la question d'affiliation? Si la question a été débattue entre les parties l'affirmative n'est point douteuse.

Let us apply the last citation to the case at issue. Mexico discussed fully before the former tribunal the question of her obligation to pay the interest finally awarded against her, and the finding of the tribunal was contrary to her contentions. The question, therefore, of her liability to pay interest "*a été débattue entre les parties*," and, according to M. Laurent, the proposition of *res judicata* under such circumstances "*n'est point douteuse.*"

As a preliminary proposition we may say that the civil law has determined that the authority of *chose jugée*—

Pouvant être invoquée par le demandeur aussi bien que le défendeur, n'est pas toujours invoquée sous la forme d'une exception. (Répertoire Général Alphabétique du Droit Français, vol. 11, Chose Jugée, sec. 767.)

Addressing ourselves now to the underlying principle to which we are giving consideration, we read from the Dictionnaire Général de Droit et de Jurisprudence de M. Bertheau, in sec. 15535, as follows:

Il y a des motifs qui sont en quelque sorte l'âme de la sentence, qui sont avec elle dans un rapport si étroit qu'ils participent nécessairement à l'autorité attachée au dispositif. Exemple: vous me demandez le paiement d'une somme de tant. Je vous oppose la compensation; mais le jugement, écartant mon moyen de défense dans ses motifs, me condamne, dans son dispositif, à vous payer la somme réclamée. Je ne pourrais ensuite vous demander ladite somme que je prétends m'être due par vous, car il résulte des motifs du jugement que vous ne me la devez pas. On voit donc qu'ici les motifs ont indirectement autorité de chose jugée, parce qu'ils se trouvent avoir un lien nécessaire avec la sentence.

Again he says:

§ 15537. Les décisions formellement exprimées dans le jugement ne sont pas les seules qui bénéficient de la présomption de vérité. Il en est de même de celles que le jugement implique nécessairement, sans les déclarer cependant d'une façon expresse.

§ 15538. Ainsi le jugement qui valide les poursuites dirigées en vertu d'un titre implique que le titre est valable. V. M. Demolombe, XXX. No. 294; Cass., 4 dec. 1837. (S. 38. 1. 233.)

Continuing our citations, we beg to refer to Répertoire Général Alphabétique du Droit François (vol. 11, title "Chose Jugée," sec. 213), which says:

L'autorité de la chose jugée ne s'attache pas dans une sentence à toutes les paroles du juge; elle ne s'attache pas en principe aux motifs du jugement; elle ne s'attache pas non plus aux énonciations; mais elle appartient aux décisions implicites aussi bien qu'aux décisions expresses.

In the same line is the expression found, under the same title, in section 228, which reads:

D'autre part, alors même que le dispositif contient tout ce qui a été décidé, les motifs d'un jugement peuvent servir à éclairer le dispositif. Ce dernier est souvent très bref et ne ferait pas suffisamment connaître ce qui a été jugé. On peut, pour compléter le sens d'une décision et déterminer la chose jugée par elle, en interroger les motifs lorsqu'ils sont en harmonie avec le dispositif.

Again, we add from section 237:

* * * Aussi les décisions implicites sont-elles admises par la jurisprudence et par tous les auteurs. (Aubry et Rau, t. 8, p. 371, s. 769; Larombière, art. 1351, n. 27; Laurent, t. 20, n. 34; Demolombe, t. 30, n. 294; Garsonnet, t. 3, p. 240, s. 465, n. 13.)

Volume 25 of the same work, title "Jugement et Arrêt," section 392, says:

La règle que l'autorité de la chose jugée ne s'attache qu'au dispositif du jugement ne s'oppose pas toujours à ce que les motifs fassent partie de la décision définitive; les motifs participent à l'autorité de la chose jugée lorsqu'ils font corps avec le dispositif, *ou qu'ils en sont la base essentielle.* (V. supra, V° Chose Jugée, n. 226 et s.)

We find therefore that the common law and the civil law agree that the thing which is implied from the actual point of the decision, or which constitutes its necessary foundation (*base essentielle*), is as much a part of the *dispositif* or decisory part of the decision as if it had been fully expressed and had entered into its operative words.

Let us now, having established this principle, see the effect which has been given it by American, English, and civil law judges, and the extent to which in practice it has been carried.

Our contention is, of course, that the foundation of the principal sum, having been examined thoroughly by the Mixed Commission, and that Commission having determined the existence and amount of the principal and as a consequence the quantity of interest flowing therefrom, has settled all of these questions for all time to come.

An American case in point would be that of Edgell *v.* Sigerson (26 Missouri, 583), in which case, after judgment in favor of plaintiff upon a contract for the payment of money in installments, it was held that the only question open to litigation in respect to any subsequent installments was whether as to it the defendant was in default. The court in deciding the case used this language:

> The integrity of the note was necessarily and directly in issue in the suit brought to recover the annual installments of interest, and the judgment in that case having been rendered by a court of competent jurisdiction determined the question as to the alteration of the note and was conclusive between the same parties in another suit directly involving the same question.

A like decision has been made where a series of promissory notes had been given and prior litigation had been had with reference to one of them; for instance, in Meiers *v.* Purrier (21 Illinois Appeals, 551) the court held, in an action on the third of three notes given at the same time for the same consideration and as part of the same transaction, the record of a former suit on the other notes was admissible and conclusive of the partnership of the makers, which had then been in issue.

Again, in the case of Young *v.* Brehe (19 Nevada, 379; 3 American State Reports, 892; 12 Pacific Reporter, 564) it was held that where defense is interposed in a suit on a note that defendant made and executed to plaintiff a deed of land which was accepted in full payment of the note sued on and other notes due from the defendant to the plaintiff, the record of an action by the same plaintiff against the same defendant on one of the other notes, in which the same defense was made, and where it was decided that the deed was never delivered and accepted by defendant as alleged, was conclusive against the defendant in that action.

The courts have taken a similar position, the principle being the same, in cases involving the payment of successive installments. We will refer at this time simply to the case of Hobbolson *v.* Sherman (42 New York superior court; 10 Jones and S. 477), wherein a recovery in an action for the first installment under a contract calling for payment by installments was held conclusive as to the existence and validity of the contract in a subsequent action for other installments.

Rent cases are comparatively numerous. We will commence by referring to that of Love *v.* Waltz (7 California, 250), wherein it was held that judgment for a quarter's rent under a lease is conclusive evidence, so far as it goes, in an action of forcible entry for nonpayment of another quarter's rent under the same lease between the same parties. Of course it would not in itself be evidence conclusive of the existence of a subsequent lease or of actual payment or nonpayment under the latter.

See also Kelsey *v.* Ward, 38 New York, 83; Tysen *v.* Tompkins, 10

Daly, 244; Drydock, etc., Railroad Company *v.* N. and A. Railroad Company, 22 New York Supplement, 556.

The doctrine of the cases last above mentioned is recognized In re Johnson (4 Court of Claims, 248), wherein it was held that a judgment of the Court of Claims, determining the annual rental value of private property of which the United States has possession, is conclusive on the claimant as to the measures of damages for occupation subsequent to its date.

The general underlying principle receives full application in the case of Empire State Nail Company *v.* American Solid Leather Button Company (74 Federal, 864; 21 C. C. A., 152; 33 U. S. Appeals, 520), wherein the view was taken that where it appears of record that in a prior suit any particular question has been actually adjudicated the prior judgment is to that extent conclusive in any subsequent suit between the same parties or their privies relating to an instrument which forms the basis of the litigation in each.

The doctrine is fully recognized in the case of New Orleans *v.* Citizens' Bank (167 U. S., 371), wherein (on p. 398) the court said:

> It follows, then, that the mere fact that the demand in this case is for a tax for one year does not prevent the operation of the thing adjudged, if in the prior case the question of exemption was necessarily presented and determined upon identically the same facts upon which the right of exemption is now claimed.

The case last quoted from cites with approval the opinion of Justice Cooley in his work on Constitutional Limitations, wherein (on p. 47) he declares that—

> The estoppel extends to every material allegation or statement which, having been made on one side and denied on the other, was at issue in the case and was determined therein.

We may close our citations of American authorities by referring to the case of Black River Savings Bank *v.* Edwards (10 Gray, Mass., 387), in which the position was taken by the court that recovery by judgment of a sum claimed to be due as interest on a promissory note precludes the defendant from contesting the payment of the principal on the ground that the note was procured by fraud.

For a complete review of the positions taken by the text writers with relation to this subject, we beg leave to refer to the comprehensive brief of Mr. Doyle, to be found on pages 12 et seq., Diplomatic Correspondence.

In a brief prepared last year by Messrs. Ralston & Siddons, in reply to a letter of Señor Mariscal, and given in full in the Diplomatic Correspondence, pages 51 et seq., this subject is further discussed from the standpoint of the civil law.

To the citations already given from the civil law others of importance remain to be added. We quote from Répertoire Général Alphabétique du Droit Français (vol. 11, title "Chose Jugée"):

> § 255. Je réclame à titre d'héritier le paiement d'une dette; mon adversaire prétend qu'il est l'héritier du défunt et que, par suite, la confusion a éteint la dette dont il était tenu. Le tribunal déclare que c'est moi qui suis l'héritier, et condamne, en conséquence, le défendeur à verser entre mes mains la somme que je lui ai réclamée. Si plus tard j'agis de nouveau, contre la même personne, pour lui réclamer une maison dépendant de la succession, elle ne pourrait pas être admise à contester ma qualité d'héritier; je suis en droit de soutenir qu'il y a dans les deux procès identité d'objet. Il est vrai que dans le premier procès j'ai réclamé une somme d'argent, et que dans le second je réclame une maison; mais les deux procès ont mis en jeu un même droit, mon droit héréditaire; les deux instances ont, en réalité, le même objet.

(Bonnier, n. 869; Larombière, art. 1351, n. 86; Colmet de Sauterre, t. 5, n. 328, bis-VI; Demolombe, t. 30, n. 303; Garsonnet, t. 3, p. 251, sec. 467; Griolet, p. 104.)

§ 256. Il a été jugé, en ce sens, que le jugement rendu au sujet d'un des intérêts divers qui se fondent sur une question d'état a l'autorité de la chose jugée, en ce qui concerne l'état contesté, quant aux autres prétentions qui, reposant sur la même base, pourraient ultérieurement se produire. (Paris 1er juill. 1861, Patterson (S. 62. 2. 71; P. 61, 1153; D. 61. 2. 137.) Sic, Aubry et Rau, t. 8, p. 399, sec. 769, texte et note 113; Larombière, art. 1351, n. 85.)

We think the following section excellently states the underlying idea, and, accepting it, we submit that the tribunal before which we have the honor to appear must give full force and effect to the prior decision as *res judicata:*

§ 258. En un mot l'idée qui doit servir de guide pour savoir, s'il y a ou non identité d'objet est la suivante: en statuant sur l'objet d'une demande, le juge est-il exposé à contredire une décision antérieure en affirmant un droit nié, ou en niant un droit affirmé par cette précédente décision? S'il ne peut statuer qu'en s'exposant à cette contradiction, il y a identité d'objet et chose jugée. (Macardé, art. 1351, n. 4; Demolombe, t. 30, n. 299; Baudry-Lacantinerie, t. 2, n. 1289.)

Continuing our citations of illustrative cases, we quote sections 259 and 260:

§ 259. Ainsi, par exemple, lorsqu'à l'occasion de la démande en paiement d'une partie d'une dette s'élève une difficulté concernant la créance tout entière, la décision qui tranche cette difficulté a l'autorité de la chose jugée à l'égard de la partie de la dette dont le paiement n'a pas été primitivement demandé et donne lieu à des poursuites ultérieures. (Aubry et Rau, t. 8, p. 390, sec. 769, note 33; Larombière, art. 1351, n. 50.)

§ 260. Conformément à cette règle, la cour de cassation a décidé que, si une somme d'argent payable en plusieurs termes est due en vertu d'une même obligation, et qu'une difficulté soit soulevée au sujet de la validité de l'obligation, le jugement qui résout la difficulté, et ordonne le paiement d'un terme a sur ce point l'effet de la chose jugée relativement aux autres termes. (Cass., 20 dec. 1830, Thevenin. (S. 31. 1. 41, P. Chr.) Sic, Demolombe, loc. cit.—V. aussi Cass., 4 nov., 1863, Larbana (S. 63. 1. 539, P. 64. 222, D. 64, 1. 38).)

Same authority, Title Chose Jugée, No. 226, says that—

La règle d'après laquelle l'autorité de la chose jugée ne s'attache pas aux motifs doit être écartée lorsque les motifs font corps avec le dispositif, lorsque, selon l'expression de la cour de cassation, ils sont nécessaires pour soutenir le dispositif. (Cass., 28 juin 1869; Biteau. (S. 69. 1, 422, P. 69. 1091. D. 71. 1. 223.) Sic Bonnier, N. 863. Laurent, t. 20. n. 30; Demolombe, t. 30, n. 29; Garsonnet, t. 3. p. 239 et 240, sec. 465. texte et note. 15.—V. aussi Cardot, Revue critique de leg. et de juris. 1863, p. 452.)

No. 227: Souvent en effet le dispositif ne contient qu'une partie de ce que le juge a décidé et l'autre partie se trouve dans les motifs. C'est ce qui se produit notamment lorsque le juge doit statuer successivement sur deux points et que la solution donnée pour le second est la conséquence nécessaire de celle qui est donnée pour le premier; le juge met la première solution dans les motifs sous forme de considérant, et le dispositif ne renferme que la seconde. Ainsi, au cas où le demandeur se prétend d'être le fils de telle personne décédée, et réclame à ce titre la succession, il peut se faire que le tribunal ne constate la filiation contestée que dans les motifs, et que le dispositif ne contienne simplement que l'attribution de l'hérédité. Il est manifeste que, dans les hypothèses de ce genre, l'autorité de la chose jugée ne doit pas s'attacher uniquement au dispositif; le jugement contient, en réalité, deux décisions, l'une renfermée dans le dispositif, l'autre insérée dans les motifs. (V. Trib. Castel-Sarrazen, 22 juin 1850, Nougaroles, S. 50. 2. 417.)

Bearing in mind the fact that Mexico distinctly contended that the Pious Fund was simply an arm of the Government and not a religious institution, and furthermore denied that the properties of the Pious Fund were as extensive as they were said to be by the claimants, we feel that all of the decisions to which reference has been given are directly in point. The issues above referred to having been clearly

raised, having been the subject of evidence and discussion on the part of both parties, being at the same time germane and in fact essential to a proper determination of the claim under the memorial, and the court having finally adjudicated upon the subject, nothing remains to prevent the old adjudication from being to the fullest extent *res judicata*, or forbids that there should flow from that decision the consequences claimed by the United States.

THE DOCTRINE OF OVERRULED CASES.

Señor Mariscal adduces in his letter of November 28, 1900, to Mr. Powell Clayton (Diplomatic Correspondence, p. 31) the existence of overruled cases in our common law courts as proof that the rule of *res judicata* is not always adhered to in them. He has been led into this error by losing sight of the inherent and essential distinction between the rule of *res judicata* and the maxim *stare decisis*. When a doubtful or disputed principle of law has been decided by a court of last resort, men adopt it as a guide in their future transactions, and hence justice and public policy demand adherence to it when the same question is again presented, in other cases having different parties. It is said, in English and American jurisprudence, to be a rule of decision. *From this rule of decision courts are at liberty but disinclined to depart.* This is all briefly expressed in the maxim *stare decisis*. If, as sometimes occurs, the same court afterwards concludes that it erred in its appreciation of law, it reconsiders the doctrine previously announced and overrules its former opinion; "such cases are called overruled cases." They are overruled as authoritative expositions of the law, because the court is convinced that it erred in pronouncing them. They no longer constitute a rule of decision.

The doctrine of *res judicata*, on the other hand, applies only to subsequent litigation between the same parties or their successors in interest or estate, called their privies. Where disputed matters are once determined by the final judgment of a court of competent jurisdiction, such judgment *is always, everywhere, and forever conclusive as to such matters between the same parties* and those claiming in privity with them. To this rule, there is absolutely no exception. *There are no overruled cases in the law of res judicata.* If courts were at liberty to overrule decisions when relied upon as *res judicata* and thereby destroy the effects of such judgments as *res judicata*, this principle would have to be abandoned; the two propositions involving a contradiction in terms.

With this distinction in mind, Señor Mariscal will recognize his misapplication of his suggestion of overruled cases.

CONSIDERATIONS WITH RELATION TO THE MERITS OF THE CLAIM.

It is not our intention to argue at any length the details affecting the merits of the claim for the Pious Fund. The United States relies absolutely, and, as we believe, with entire justice, upon the fact that these merits have once been the subject of consideration and examination by an entirely competent tribunal, and that tribunal having passed thereon, the American Government is relieved from any necessity for detailed discussion. Even if this were not the correct view, we would

be excused from entering upon the consideration of the merits as an independent proposition, because this branch of the subject has been so thoroughly treated by the Messrs. Doyle, of counsel, who have shown that a reexamination of the merits would bring about as its necessary result a judgment against Mexico considerably larger than that formerly awarded.

Notwithstanding the foregoing, and as bearing upon the justice of the contentions made on behalf of the United States, there are two or three features of the case to which we believe we are justified in inviting attention, and the first of these is that—

THE PIOUS FUND WAS AT ALL TIMES CONSIDERED AS RELIGIOUS IN CHARACTER, AND ITS BENEFICIAL OWNERSHIP VESTED IN THE CHURCH AUTHORITIES.

We need not do more than advert to the origin of this fund, springing as it did out of the pious desires of religious Catholics for the conversion of the heathen of the Californias to the truths of Christianity. While the fund remained under the control of the Jesuits these objects were faithfully promoted. When the Jesuits were removed, and for the default of other trustees the Spanish Government assumed control, its first act was (July 12, 1772) to carry out the desires of the founders; for the King's order (Transcript, p. 456) declared that he had assumed "all the rights of patronage which belonged to the regulars of the said order, and also those which they might possess in common with those other orders, *without prejudice to these being devoted to the same purposes which they were before the time of the expulsion.*"

When the Spaniards were expelled from Mexico the Mexican Government followed the same policy. We find that the law of May 25, 1832, already cited at large in this brief, provides the manner in which the Government shall lease the rural property belonging to the Pious Fund, and that (sec. 6) "the proceeds of such property shall be deposited in the mint of the Federal city, to be wholly and exclusively destined for the missions of the Californias." It was further particularly directed that the board of management, consisting of three persons, should include an ecclesiastic. Among its powers were:

9. To name to the Government the amounts which may be remitted to each one of the Californias in accordance with their respective expenses and their available funds.

When, later on, the bishopric of California was created, article 6 of the law of September 19, 1836, provided:

The property belonging to the Pious Fund of the Californias shall be placed at the disposal of the new bishop and his successors, to be by them managed and employed for its objects or other similar ones, always respecting the wishes of the founders of the fund.

When, still later, and on February 8, 1842, the Mexican Government reassumed the management of the Pious Fund, it particularly declared that the proceeds of the property assumed should be disbursed "in such way and manner as it shall direct for the purpose of carrying out the intention of the donor in the civilization and conversion of the savages."

Even when the fund was finally incorporated in the national treasury the Government, by the decree of October 24, 1842, after insuring the payment of its revenues, declared that "the department in charge thereof

will pay over the sums necessary to carry on the objects to which said fund is destined, without any deduction for costs, whether of administration or otherwise."

At the still later period, April 3, 1845, when the Government undertook to retrace its steps, it recognized the interest of the bishops in the subject-matter, for it provided:

All debts due to and other property belonging to the Pious Fund of the Californias which may be still unsold shall be forthwith restored to the right reverend bishop of that see, and to his successors, for the purpose stated in the sixth article of the law of the 19th of September, 1836, without prejudice to the action which Congress may take with regard to such as may have been sold.

It is therefore too late to be argued, as it was before the former Mixed Commission, that the purposes of the Pious Fund were political, or that the Pious Fund constituted an arm of the Government as distinguished from an assistance in the performance of a religious function.

Passing, therefore, from this subject, we desire to add something to the view presented by the Messrs. Doyle with relation to

THE OBLIGATION RESTING UPON MEXICO TO PAY INTEREST UPON PRINCIPAL AND INTEREST OF ITS OLD INDEBTEDNESS TO THE PIOUS FUND.

It appears from an examination of the various statements with relation to the properties of the Pious Fund, referred to in the foregoing statement of facts, and more at large set forth in the places in the record pointed out by the index, that at the time of incorporation of this fund into the treasury Mexico owed to the Pious Fund on account of principal $539,872.25, and on account of interest upon various items embraced in the foregoing sum total the additional amount of $564,968.54.

It was argued on behalf of Mexico before the Mixed Commission, and we presume the argument will be renewed, that Mexico should not have been charged with the principal of the above amounts, because they constituted merely an original indebtedness against the Government of such character that a mixed tribunal could not give it any special precedence over other obligations owned by other bonded or money creditors of the Government. It was contended, furthermore, that for a like reason any claim based upon interest must fail, as well as for the further reason that a claim upon such interest would amount to the compounding of interest upon a debt due by Mexico.

From our point of view, even if the matter were otherwise debatable, the foregoing contentions may not be sustained. The Messrs. Doyle have pointed out that they are not sustainable, for the reason that Mexico constituted herself a trustee by virtue of her assumption of the Pious Fund properties. We believe this position to be absolutely unassailable, but we desire to add certain other considerations.

The language of the decree of October 24, 1842, deserves careful analysis. This decree, after reciting that the decree of February was "intended to fulfill most faithfully the beneficent and national objects designed by the foundress, *without the slightest diminution* of the properties destined to the end; and whereas the result can only be attained *by capitalizing the funds and placing them at interest on proper securities*," etc., first incorporates into the national treasury "the real estate, urban and rural, the debits and credits, and all other property belong-

ing to the Pious Fund of the Californias." In our view, the purpose of this law was to cover the entire subject-matter, to absolutely wipe out the Pious Fund in its then existing form, and to start upon a fresh basis. From and after its passage there was not a Pious Fund consisting in part of certain indebtedness of the Government, with interest thereon, but there was, to all intents and purposes, a refunding of everything, and in the place of an aggregate of about $1,100,000 principal and interest, based upon the debt of the treasury, we were presented with a new principal of a like amount (excluding from our present calculation the real estate and other properties.) The debits due by the Government, being incorporated in the treasury, could no longer exist in their ancient form, and the only form they could assume was that of a new obligation to pay $1,100,000.

But what was the nature of this obligation? Was it to deliver over the principal of $1,100,000, or was it to pay interest thereon perpetually? The question is answered, as we believe, from a consideration of the following sections of the act.

The second section, referring to the real estate and other property belonging to the Pious Fund of the Californias, directs its sale and acknowledges an indebtedness of 6 per cent per annum on the total proceeds of sale, the lands being capitalized at that rate. This section refers, we take it, to the real estate and other property capable of sale and not to the debts due by the Government, which, being incorporated into the treasury, became incapable of disposition.

The third section, however, refers to the whole subject-matter. The "revenue from tobacco," it says, "is specially pledged for the payment of the income, corresponding to the capital of the said fund of the Californias, and the department in charge thereof will pay over the sums necessary to carry on the objects to which said fund is destined," etc.

To what was the revenue from tobacco pledged? Not simply, we think, to the payment of moneys arising from the sale of real estate, but to the payment of an annuity which ought to be paid because of the possession by the Government of all the properties belonging to the Pious Fund of the Californias which were incorporated into the national treasury.

The Government at the time this act was passed was fully acquainted with all the properties owned by the Pious Fund. Had its own records been deficient, its attention but eight months previously had been directed to the fact the Pious Fund largely consisted of national obligations, and we are not, therefore, permitted to believe that the Government legislated in ignorance or that it only legislated over a part of the subject-matter, for the decree of October, 1842, recites that the prior decree "was intended to fulfill most faithfully the beneficent and national objects designed by the foundress, without the slightest diminution of the properties destined to the end."

But what rate of interest should be paid because of the absorption by the Government of its own debts and overdue interest thereon? Surely the interest which was provided to be paid by section 2 was taken by the Government itself as a true measure of the advantage to be gained by it from the personal possession and extinction of the claim due by it to the Pious Fund. We have, therefore, in our opinion, the spectacle of the readjustment and recapitalization of the entire Pious Fund.

If this view were not correct, what position would we be obliged to

take? It would be, we submit, that while Mexico was willing to sell for its own temporary advantage and obtain the money from certain landed properties and to charge itself with interest thereon, it designed at the same moment to possess itself of all of the fund due by it to the Pious Fund of the Californias without rendering an equivalent, a supposition so offensive to the good name and credit of Mexico that we are by no means disposed to make it.

The view which we entertain is, as we believe, sustained by the language of the decree of April 3, 1845, which provided for the restoration "of all the debts due to and other property belonging to the Pious Fund of the Californias which may be still unsold."

The tangible property of the fund may well have been sold. The debts due the fund by individuals may likewise have been sold, but it is not conceivable that the debts due by Mexico to the Pious Fund could have been disposed of. When a man buys a debt due by himself, while he may create a new obligation of a like amount, the old debt no longer has an existence. Mexico, therefore, even after the passage of the law of April, 1845, had she restored the tangible property yet remaining in her hands and in other respects carried out the purposes of that law, would still be obliged to account for interest upon the remainder of the fund sequestered to her uses.

We do not ignore the fact that upon the former hearings the representatives of Mexico insisted that it was out of the question that Mexico should have charged herself with 6 per cent interest upon the entire principal and interest due by her when she was only obligated under the terms of the loans made to her to pay, for the most part, a lesser rate. The suggestion, as it occurs to us, is without legal force. The possession of hundreds of thousands of dollars' worth of property which could immediately be turned into ready money constituted sufficient legal consideration for an undertaking to pay an advanced rate upon other moneys fairly due by her, or to pay interest where before none might properly have been chargeable. And the argument from a moral point of view is equally efficacious, for surely if the proper administrators of the Pious Fund were first to be deprived of the opportunity of administering property originally in their possession, and next, without consultation with them, that same property was to be converted into cash, and they were to be compelled to accept the promise of a government then of uncertain stability, nothing could be more proper than that this changed position should be compensated for by a certain though advanced interest. The same remark holds good as to the securities of private individuals drawing a rate of interest less than 6 per cent. It may well have been that obligations of this nature could have been sold by Mexico for a larger sum than her own obligations would bring, and, gaining as she might have done in immediate cash by the transaction, she could well have afforded to promise to pay an increased rate of interest.

THE MORAL OBLIGATION RESTING UPON MEXICO.

Let us now, before closing this brief, consider for a moment the naked situation, forgetting all technical questions, such as might arise out of the doctrine of *res judicata*, or out of the construction of treaties, and regard only the fundamental position to which we must come, if the merits of the case are to be determined upon a basis of justice.

Mexico took from the possession of the bishop of California, its natural administrator, a fund which, including principal and interest, amounted to nearly $2,000,000. This fund, which, from every moral principle, it became the duty of Mexico to return intact to the former possessor, or for which she should have rendered a just equivalent, has, so far as this tribunal knows, never been returned, and ever since 1842 (save for trifling sums before the cession given to the bishop of California, and interest upon one-half of the principal, which was awarded to the bishops of California, for the term of twenty-one years) she has fully enjoyed, and, so far as the parties in interest are concerned, she continues to enjoy. If it be just that a nation, because of its might, should possess the power and ability to despoil her citizens and her corporations, of whatever nature, of the properties within their possession, then indeed is the claim of the United States unjust. But if, on the other hand, the rules of morality prevailing as between man and man should obtain as between a nation and its citizens or subjects, or the citizens or subjects of other nations, and property wrongfully taken by its authority, or an equivalent therefor or interest thereon, should in justice be returned to those who have been deprived of its benefit, then indeed is the claim of the United States just under the language of the protocol.

Believing that this tribunal will uphold the thing which is right, the United States confidently appeal for payment of the interest justly due and contracted to be paid by Mexico.

SUMMARY.

Reviewing the positions taken in the foregoing brief, we summarize them as follows:

AS TO RES JUDICATA.

The amount of the proper judgment in this case is fixed by the terms of the former award, because—

(*a*) The Mixed Commission had the right to pass, and did pass, upon its own jurisdiction.

(*b*) It was entitled to interpret, and did interpret correctly, the convention of 1868.

(*c*) Mexico waived her right to object to the jurisdiction of the Mixed Commission by entering upon the trial of the former case without reservation.

(*d*) Mexico further waived any right to object to jurisdiction by signing new conventions, extending the old, while the Pious Fund case was still pending and undetermined, Mexico not withdrawing the case from the commissioners or umpire, and therefore confessing jurisdiction; all of which will more readily appear by reference to the dates of the several supplementary conventions and the position of the Pious Fund case at the time of their signing or ratification.

(*e*) The doctrine of *res judicata* applies to arbitral decisions and to the findings of international commissions.

(*f*) There was no error in the former proceedings of any kind, much less one affecting the jurisdiction of the Mixed Commission, and this fact was recognized by Mexico, no allegation of error having been offered even after the award had been made public.

(*g*) The former award being *res judicata* of the matters directly and

impliedly in issue before the Mixed Commission, determines absolutely the amount of annual interest due by Mexico according to the decisions of both common-law and civil-law courts.

WITH RESPECT TO THE MERITS.

1. The Pious Fund was at all times considered as religious in its character, and its beneficial ownership vested in the Roman Catholic Church.

2. Mexico is under moral and legal obligation to pay interest upon both principal and interest of all of the property taken by her from the Bishop of California, and if this case be decided upon the merits her obligation is larger than it was before adjudicated to be.

Respectfully submitted.

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Agent, and of Counsel for the United States of America.

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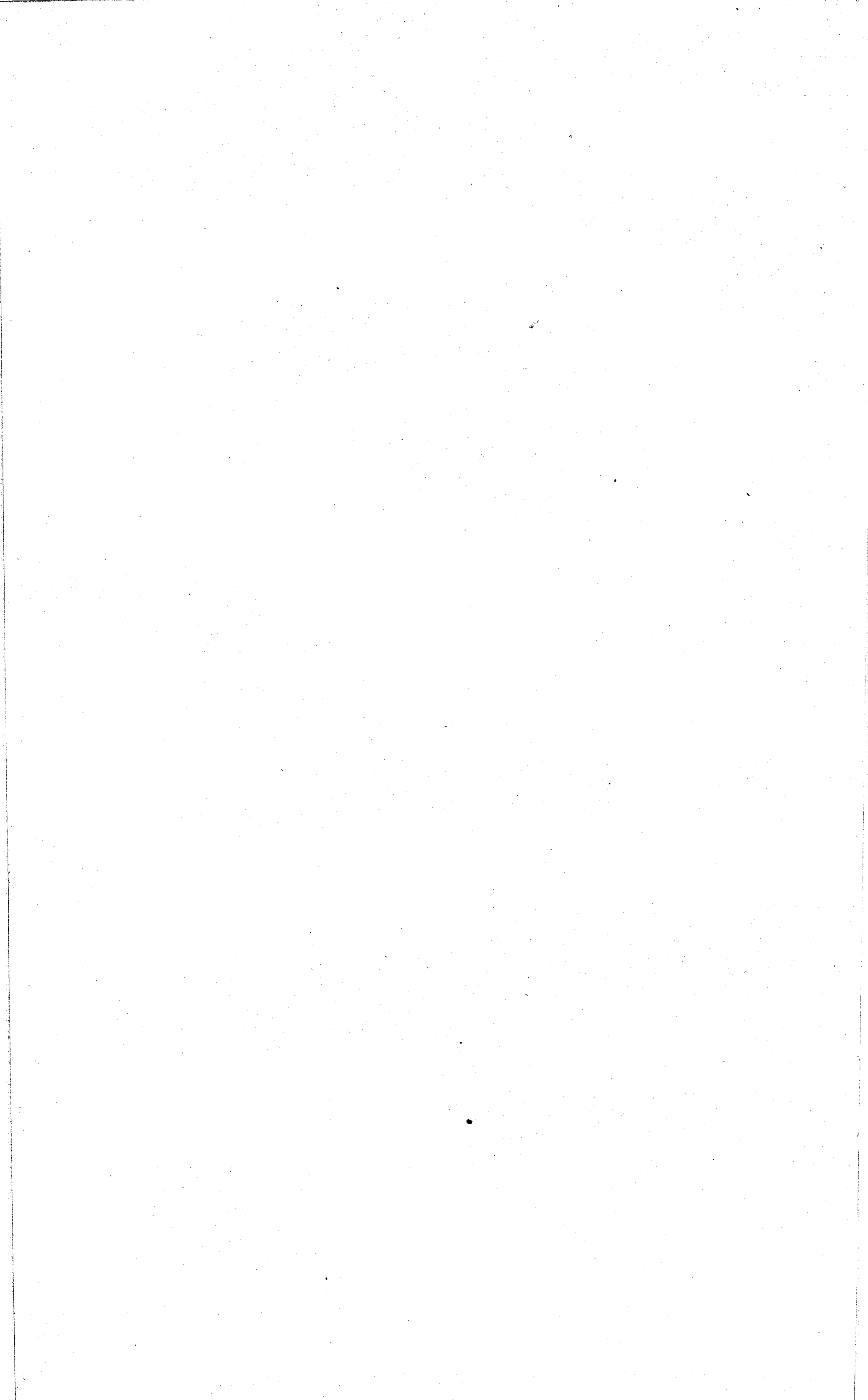

STATEMENT ON BEHALF OF THE UNITED STATES.

[Submitted by Senator William M. Stewart and Mr. C. J. Kappler.]

This controversy grows out of donations made by pious persons in the eighteenth century to create a fund for the civilization and conversion of the natives of the Californias, and for the maintenance and support of the Catholic religion in that country. The fund created by such donations was covered into the Mexican treasury by the decree of October 24, 1842, with an undertaking on the part of Mexico to pay interest thereon for the purposes intended by the donors. After the sale of California to the United States the Mexican Government failed to pay the agreed interest on that part of the principal belonging to the missions of Upper California. The questions as to the amount of the principal and the amount of the interest due thereon, with all collateral questions necessary to be decided for the determination of those questions, were submitted to arbitration by the United States and Mexico by the convention of July 4, 1868. The commissioners of the United States and Mexico failing to agree, Sir Edward Thornton, the British minister at Washington, made the decision as umpire, and found that the principal, which was a permanent investment, amounted to $1,435,033; that the part to be apportioned to Upper California was $717,516.50, and that the interest then payable amounted to $904,070.79. He therefore rendered judgment for such interest against Mexico and in favor of the bishops of California. Mexico thereupon paid the judgment, but she has paid no interest on the principal since October 24, 1868. The present proceeding is to determine what interest, if any, is now due and payable to the bishops of California.

I.

The United States contend that all questions relating to the principal investment and the annual interest due theron, and all questions of the rights of the bishops of California thereto, were determined and became *res judicata* by the decision in the former arbitration.

We will not now discuss the question of *res judicata*, but refer this honorable tribunal to the argument of the agent and counsel of the United States on that subject. We will, however, venture the assertion that no tribunal of recognized authority, whether national or international, having jurisdiction of the parties and the subject-matter has ever held that any question, either of law or fact, which it was necessary to decide to reach the final judgment was not *res judicata* and binding upon the parties and their privies in all subsequent proceedings involving the questions thus put in issue and decided. This principle is especially important in international courts of arbitration, because if matters decided by them are not finally settled such courts will naturally fall into disuse.

II.

We are now confronted with the denial by the representative of Mexico that anything became *res judicata* by the judgment in the former arbitration, except the duty of Mexico to pay the sum of $904,070.79 awarded, and also with his contention that every matter of law and fact upon which such judgment was founded and which was necessarily decided to reach the final conclusion, is still open to investigation and decision. We confess our surprise at the position taken by the representative of Mexico. But without waiving the question of *res judicata*, and being desirous of treating respectfully any argument the representative of Mexico may advance, we will make the following statement of the case:

The Californias consisted of the peninsula of California and the western part of the Spanish dominions in North America. The harbors of San Diego, Monterey, San Francisco, and numerous other harbors and landings were visited and the rivers and streams connected therewith explored a considerable distance inland by Spanish navigators and adventurers. The explorers had penetrated and described the country sufficiently to show that Upper California was a vast region, blessed by nature with a salubrious climate and boundless resources. It was occupied by numerous tribes of Indians, furnishing an almost unlimited field for the work of the Christian missionaries in converting the natives to the Catholic religion.

As early as 1697 donations were made, and thereafter continued to be made from time to time down to 1765, by the Christian people of Spain to the fund now known as the "Pious Fund of the Californias," to be used for the civilization and conversion of the natives of the Californias. These donations were made for the avowed purpose of civilizing and converting the natives to Christianity and for the maintenance and support of the Catholic missions in the Californias. In 1735 a large donation was made by the Marchioness de las Torres de Rada and the Marquis de Villapuente. The object and desire of the donors were then fully set forth and particularly described. The *habendum* of their deed, which is denominated the Foundation Deed, proceeds as follows:

> To have and to hold, to said missions founded, and which hereafter may be founded, in the Californias, *as well for the maintenance of their religions, and to provide for the ornament and decent support of divine worship*, as also to aid the native converts and catechumens with food and clothing, according to the destitution of that country; so that if hereafter, by God's blessing, there be means of support in the "reductions" and missions now established, as ex. gr. by the cultivation of their lands, thus obviating the necessity of sending from this country provisions, clothing, and other necessaries, the rents and products of said estates shall be applied to new missions to be established hereafter in the unexplored parts of the said Californias, according to the discretion of the father superior of said missions; and *the estates aforesaid shall be perpetually inalienable, and shall never be sold, so that, even in case of all California being civilized and converted to our holy Catholic faith, the profits of said estates shall be applied to the necessities of said missions and their support;* and in case that the reverend Society of Jesus, voluntarily or by compulsion, should abandon said missions of the Californias, or (which God forbid) the natives of that country should rebel and apostatize from our holy faith, or in any other such contingency, then, and in that case, it is left to the discretion of the reverend father provincial of the Society of Jesus in this New Spain for the time being, to apply the profits of said estates, their products and improvements, to other missions in the undiscovered portions of this North America, or to others in any part of the world, according as he may deem most pleasing to Almighty God; and in such ways that the dominion and government of said estates be always and perpetually continued in *the Reverend Society of Jesus and its prelates,*

so that no judge, ecclesiastical or secular, shall exercise any control thereon or intervene in or about the same; and all such rents and profits shall be applied to the purposes and objects herein specified, i. e., *the propagation of our holy Catholic faith.* And by this deed of gift, we, the said grantors, both divest ourselves of and renounce absolutely all property, dominion, ownership, rights, and actions, real and personal, direct and executive, thereover, and all others whatever which belong to us, or which from any other cause, title, or reason may belong, appertain to us; and we cede, renounce, and transfer the whole thereof to said Reverend Society of Jesus, *its missions of Californias, its prelates and religious, under whose charge may happen to be the government of said missions and of this province of New Spain,* now and at all times hereafter, in order that from the profits of said estates and the increase of their cattle, large and small, their other gains, natural or otherwise, *they may maintain said missions in the manner above proposed, indicated, defined, and laid down forever.* (Transcript, p. 106.)

III.

The above quotation, and in fact the entire deed, shows a very clear conception on the part of the donors of the magnitude of the undertaking to convert the natives of the Californias. It devotes the entire fund to the civilization and conversion of the natives and the maintenance and support of the Catholic religion in that country, and provides particularly that after the civilization and conversion of the natives, the proceeds of the fund are to "be applied to the necessities of said missions and their support" in the Californias. The language is as follows:

> And the estates aforesaid shall be perpetually inalienable, and shall never be sold, so that, even in case of all California being civilized and converted to our holy Catholic faith, the profits of said estates shall be applied to the necessities of said missions and their support. (Transcript, p. 106.)

The donors state in what events the proceeds of the Pious Fund may be diverted to the support of missions other than those in the Californias. This exception is so important in fixing the Californias as the place which the donors intended the proceeds of their gifts to be employed that we quote the language:

> And in case that the Reverend Society of Jesus, voluntarily or by compulsion should abandon said missions of the Californias, or (which God forbid) the natives of that country should rebel and apostatise from our holy faith, or in any other such contingency, then, and in that case, it is left to the discretion of the reverend father provincial of the Society of Jesus in this New Spain for the time being, to apply the profits of said estates, their products and improvements to other missions in the undiscovered portions of this North America, or to others in any part of the world, according as he may deem most pleasing to Almighty God; and in such ways that the dominion and government of said estates be always and perpetually continued in the Reverend Society of Jesus and its prelates, so that no judge, ecclesiastical or secular, shall exercise any control thereon, or intervene in or about the same; and all such rents and profits shall be applied to the purposes and objects herein specified, i. e., the propagation of our holy Catholic faith. (Transcript, p. 106.)

The natives did not rebel or apostatize and there is no pretext for claiming that exception as an excuse for the use of the Pious Fund elsewhere than in the Californias. The Reverend Society of Jesus did not voluntarily abandon the missions, but was expelled by the King of Spain. The reverend father provincial of the Society of Jesus in this New Spain did not order the fund to be used elsewhere because he was also expelled and deprived of his functions, so that he could not control the fund or order its use elsewhere. The royal decree of February 27, 1767, declares:

> Therefore, by virtue of the supreme authority vested in me by the Almighty for the protection of my subjects and maintaining the respect due to my crown, I have

decided to order the banishment from out of all my dominions in Spain, the Indias, Philippine, and other islands, of the regulars—both priests and laymen—of the Order of Jesus; also such as may have taken up vows and the novices who may desire to follow the calling; and that all the temporalities belonging to the order within my dominions be taken possession of; and for the uniform execution of the same I have given full powers and instructions to Count Arrauda, president of my council, to immediately proceed to take the necessary measures, as set forth by my other royal decree of the 27th of February. (Transcript, p. 410.)

The Pope, after the expulsion of the Jesuits by the King, suppressed the Order of Jesuits, which deprived them of the control of the Pious Fund and of the missions for which it was established. In his bull of July 21, 1773, he said:

But as regards the religious missions, we desire to extend and include all that has been decreed concerning the suppression of the society (of Jesuits), reserving (at the same time) the privilege of providing the means by which not only the conversion of the infidels, but also the peaceful settlement of dissensions may be obtained and secured with greater facility and stability. (Transcript, p. 335, par. 32.)

The Jesuits having thus been excluded and deprived of all participation in or control of the properties of the Pious Fund or the distribution of the proceeds thereof, the King of Spain assumed to himself the trusteeship of the Pious Fund and the management of the properties belonging thereto. The Franciscan Fathers were substituted in the place of the Jesuits as to Upper California to continue the work inaugurated by them in establishing missions and in educating and converting the natives. The King appointed agents to manage the properties of the Pious Fund, and to collect the proceeds thereof, and authorized the officers of the Spanish treasury to transmit the same to the fathers in the Californias.

IV.

On acquiring her independence Mexico, as we shall hereafter see, followed the policy of Spain and provided by law for the management of the properties of the Pious Fund and the collection and transmission of the proceeds thereof to the fathers conducting the missions in the Californias. In 1836 she made an important change. On the 19th of September of that year she passed a law petitioning the Pope to create the Californias into a diocese and to appoint a bishop therein. The Pope appointed as such bishop the Right Rev. Francisco Garcia Diego, who was consecrated on the 27th of April, 1840. (Transcript, p. 182.) The residence of the bishop was located at Monterey, in Upper California, about 500 miles northerly from the north line of Lower California, and in what was then about the center of the population of the missions in the Californias. The bishop of Monterey remained in office during his life.

The bishop of a diocese has charge of the Roman Catholic Church and all missions, charities, and Christian establishments in his diocese. He also has charge of *all* the temporalities and the receipt and disbursement of all moneys to be used or distributed within his jurisdiction. The creation of the Californias into a diocese and the appointment of the Right Rev. Francisco Garcia Diego bishop thereof conferred upon him and his successors in office the control of the temporalities of the church and the right to collect, receive, and disburse all moneys belonging to the church, the missions, and all Catholic establishments in such diocese. When, upon the petition of Mexico, a bishop was appointed for the Californias, it became the duty of such bishop to receive and distribute the proceeds of the Pious Fund in his diocese.

V.

We will now consider the action of Mexico in her dealings with the Pious Fund as successor of Spain.

On the 25th of May, 1832, Mexico passed a law providing for the renting and management of the properties of the Pious Fund, and created a board for that purpose. The sixth paragraph provides that—

> The proceeds of such properties (of the Pious Fund) shall be deposited in the treasury of the Federal city, to be solely and exclusively destined for the missions of the Californias. (Laws of Mexico, p. 2.)

And by the tenth paragraph, under subdivision 9, the board was required—

> To name to the Government the amounts which may be remitted to each one of the Californias in accordance with their respective expenses and available funds. (Laws of Mexico, p. 3.)

Thus it will be seen that Mexico commenced the discharge of her duties as successor of Spain by adopting a system entirely similar to the one established when the Jesuits were expelled.

A change of policy was adopted, as we have already shown, by Mexico on the 19th of September, 1836, when she applied to the Pope for the appointment of a bishop for the Californias. In the sixth article of that application is is provided that—

> The property belonging to the Pious Fund of the Californias shall be placed at the disposal of the new bishop and his successors, to be by them managed and employed for its objects or other similar ones, always respecting the wishes of the founders. (Laws of Mexico, p. 5.)

This article recognized the authority of the bishop of the Californias to manage the properties belonging to the Pious Fund which were situated outside of his bishopric and to use the proceeds thereof for the benefit of the missions in the Californias, which he accordingly did, and appointed Don Pedro Ramirez his general agent in Mexico, who received the rents, paid the expenses, and attended generally to the business of the Pious Fund.

On the 8th of February, 1842, President Santa Anna repealed Article VI of the law of 1836, above quoted, and Mexico again assumed the management of the properties of the Pious Fund (laws of Mexico, p. 5); but she did not attempt to deprive the bishop of the right to manage the temporalities of the church and receive whatever money and property which might be for the use of the missions and the Catholic Church in his diocese.

VI.

The officers of the Mexican Government then demanded a statement of the properties belonging to the Pious Fund from Ramirez, the general agent of the bishop of the Californias, which, after protest, he furnished. The properties embraced in the inventory, as computed in the memorial of the United States, amount to $1,853,361.75. (Memorial, p. 11.) Thereupon the Mexican Government, by the decree of October 24, 1842 (having the force of a legislative enactment), ordered the real estate and other property of the Pious Fund sold and the entire fund reported by Ramirez covered into the treasury, which was accordingly done. In the same decree Mexico undertook to pay interest on the capital so turned into the treasury at the rate of 6 per cent per

annum, and pledged the revenue from tobacco for the payment of such interest. The following is the language of the decree:

The revenue from tobacco is specially pledged for the payment of the income corresponding to the capital of the said fund of the Californias, and the department in charge thereof will pay over the sums necessary to carry on the objects to which said fund is destined without any deduction for costs, whether of administration or otherwise. (Laws of Mexico, p. 7.)

The revenue thus pledged was abundantly sufficient to pay the interest. Sr. Juan Rodriquez de San Miguel delivered a speech in the Mexican Congress on the 28th of March, 1844, in which he said that this revenue (from tobacco) was merely nominal, so far as the missions were concerned, but that the officers of the Government received from tobacco with the greatest punctuality the sum of $35,000 monthly. (See Mexican Pamphlets about the Pious Fund of the Californias, Nos. 24, 25, p. 12.)

The failure of Mexico to pay to the bishop of the Californias the interest due him from the revenue on tobacco was not because she did not know to whom the same ought to be paid, for we find in the Mexican archives an entry ordering $8,000 from such revenue transmitted to the bishop of the Californias. The following is the entry:

Minister of the Treasury Sec. 2° 297. His Excell. the President has been pleased to order me to inform your Excell., as I now do, to give an order on the maritime custom-house of Guymas, which shall be payable to Sr. Juan Rodrigues de San Miguel as the representative of the Rt. Rev. Bishop of the Californias for the sum of $8,000, on account of the income belonging to the Pious Fund of California, the properties of which were incorporated into the national treasury; and let this be done with the greatest punctuality, although it may be paid in partial payments. And let this order be obeyed with all exactness, notwithstanding my communication of yesterday to your Excells. under No. 277 that the former order of Jan. 30 should be without effect. Contracted in order that the quantity mentioned in it might be paid by the aforesaid custom-house; and without injury to the assignment of the $500 monthly made upon the product of tobacco from the State of Zacatecas. (Transcript, p. 149.)

Mexico also recognized the right of the bishop to receive the property of the Pious Fund by decreeing on April 3, 1845, that—

The credits and other properties of the Pious Fund of the Californias which are now unsold shall be immediately returned to the reverend bishop of that see and his successors, for the purposes mentioned in article 6 of the law of September 29, 1836, without prejudice to what Congress may resolve in regard to the property that has been alienated. (Laws of Mexico, pp. 7, 8.)

This decree would not have been made unless the bishop, as such, was entitled to receive the property referred to. The fact that no property was actually transferred does not affect the designation of the bishop as the proper official to receive any property that might be transferred.

We call attention to the treatment by Mexico of a fund contributed by the pious people of Spain for the establishment of missions in the Philippines, which is a precedent for the claim of the bishops of California.

In 1844, eight years after the independence of Mexico was acknowledged by Spain, a treaty was entered into for the settlement of a claim of the missions in the Philippines against Mexico. The property out of which the claim of the missions arose consisted of two haciendas, the *Chica* and the *Grande*, both situated in Mexico. By the latter convention Mexico agreed to pay, and did pay, $115,000 as principal and $30,000 in addition thereto as interest or rent. The money was

paid to Father Moran, the representative of the Philippine missions. (Transcript, p. 25.)

The fact that Mexico recognized the bishop of the Californias as the proper officer to receive the proceeds of the Pious Fund proves that she did not agree to pay interest, intending at the same time to avoid such payment for want of a person to receive the same.

We appreciate the honor of Mexico too highly to suppose for a moment that she would promise to pay interest on the Pious Fund, knowing her promise was nugatory for the want of a payee, and we hope that no one will hereafter accuse Mexico of such insincerity. But suppose that Mexico intended to confiscate the fund which she covered into her treasury and deny that anyone had a right to receive the interest which she agreed to pay, she has now made ample amends for such unfair conduct. She has agreed that this honorable tribunal, if it finds that the former judgment is not *res judicata*, shall determine "whether the claim be just," and "render such judgment or award as may be meet and proper under all the circumstances of the case." (Protocol, p. 3.)

VII.

We have already called attention to the foundation deed of the pious donors, and shown that they dedicated their donations to the Californias and did not authorize them to be used elsewhere, except under certain contingencies, and that such contingencies have not arisen. Consequently the United States have a right to insist that the money shall be used according to the designs of the donors, which is in accord with the repeated declarations of both Spain and Mexico.

The extract from the foundation deed quoted in the reply of the representative of Mexico is misleading. The parts omitted, and represented by stars, are essential in determining the intention of the donors. In order that the materiality of the parts omitted may be judged, we quote in parallel columns a true extract from the foundation deed and the extract used by the representative of Mexico. The parts omitted by the representative of Mexico are printed in *italics* in the true copy:

TRUE COPY.	MISQUOTED COPY.
This donation, *which* we make *good, pure, perfect and irrevocable, as a firm contract inter vivos from this day, henceforth and forever.*	This donation, we make
To have and to hold, to said missions founded, and which hereafter may be founded, in the Californias, as well for the maintenance of their religious, and to provide for the *ornament and decent* support of divine worship, as also to aid the native converts and catechumens *with food and clothing*, according to the destitution of that country;	to said missions founded, and which may hereafter be founded, in the Californias, as well as for the maintenance of their religious, and to provide for the support and conduct of divine worship, as also to aid the native converts and catechumens by the same (probably "from the misery") of that country;

so that if hereafter, by God's blessing, there be means of support in the "reductions" and missions now established, as ex. gr. by the cultivation of their lands, thus obviating the necessity of sending from this country *provisions*, clothing and other necessaries, the rents and products of said estates shall be applied to new missions *to be established hereafter in the unexplored parts of the said Californias, according to the discretion of the father superior of said missions; and the estates aforesaid shall be perpetually inalienable, and shall never be sold; so that, even in case of all California being civilized and converted to our holy Catholic faith, the profits of said estates shall be applied to the necessities of said missions and their support;* and in case *that* the *reverend* Society of Jesus, voluntarily or by compulsion, should abandon said missions of the Californias or (which God forbid) the natives of that country should rebel and apostatize from our holy faith, or in any other such contingency, then, and in that case, it is left to the discretion of the reverend father provincial of the Society of Jesus in this New Spain, for the time being, to apply the profits of said estates, their products and improvements to other missions in the undiscovered portions of this North America, or to others in any part of the world, *according* as he may deem most pleasing to Almighty God; and in such ways that the *dominion and* government of said estates be always and perpetually continued in the reverend Society of Jesus and its prelates, so that no judge, ecclesiastical or secular, shall exercise any control thereon, *or intervene in or about the same; and all such rents and profits shall be applied to the purposes*

so that if thereafter, by God's blessing, there be means of support in the "reductions" and missions now established, — as ex. gr. by the cultivation of their lands, thus obviating the necessity of sending from this country clothing and other necessaries, the rents and products of said estates shall be applied of (surely "to") new missions

* * * *

and in case the Society of Jesus, voluntarily or by compulsion, should abandon said missions of the Californias, or, which God forbid, the natives of that country should rebel and apostatize from our holy faith, or in any other such contingency, then, and in that case, it is left to the discretion of the reverend father provincial of the Society of Jesus in this New Spain, for the time being, to apply the profits of said estates, their products and improvements, to other missions in the undiscovered portions of this North America, or to others in any part of the world, as he may deem most pleasing to Almighty God; and in such a way that the government of said estates be always and perpetually continued in the reverend Society of Jesus and its prelates, so that no judge, ecclesiastical or secular, shall exercise any control therein,

* * * *

and objects herein specified, i. e., the propagation of our holy Catholic faith. And by this deed of gift, we, the said grantors, both divest ourselves of, and renounce absolutely all property, dominion, ownership, rights and actions, real and personal, direct and executive, thereover, and all others whatever, which belong to us, or which from any other cause, title, or reason, may belong, appertain to us; and we cede, renounce and transfer the whole thereof to said reverend Society of Jesus, its missions of Californias, its prelates and religious, under whose charge may happen to be the government of said missions and of this province of New Spain, now and at all times hereafter, in order that from the profits of said estates, and the increase of their cattle, large and small, their other gains, natural or otherwise, they may maintain said missions in the manner above proposed, indicated, defined, and laid down forever.	
And we, *the said grantors, both* desire that at no time shall any judge, ecclesiastical or secular, undertake to investigate or intrude himself to ascertain, whether the conditions of this donation be fulfilled; for our will is that in this matter, there shall be no pretence for such intervention, and that whether the said reverend Society fulfils or does not fulfil the trusts in favor of the missions herein contained, it shall render an account to God our Lord, alone."	we, desire that at no time shall this donation be set aside nor shall any judge, ecclesiastical or secular, undertake to investigate or intervene to ascertain, whether the conditions of this donation be fulfilled; for our will is that in this matter there shall be no pretence for such intervention, and that whether the said reverend Society fulfils or does not fulfil the trusts in favor of the missions herein contained, it shall render account to God our Lord, alone."
(Transcript, p. 106.)	(Answer to Memorial in English, p. 4.)

In comparing the foregoing extracts, the materiality of the parts omitted by the representative of Mexico will be readily observed.

VIII.

The contention of the representative of Mexico that all the natives in Upper California have been converted, and that, therefore, there

is no necessity for the use of the interest on the Pious Fund in that locality, rests on two mistakes:

1. There are many thousands of natives in Upper California who are still unconverted.

2. It was not the intention of the donors, as we have already seen, that the use of the proceeds of the Pious Fund should terminate upon the conversion of all the natives in the Californias. On the contrary, they intended that the use of such proceeds should be continued indefinitely for the benefit of Christian missions in that locality. For the purpose of calling particular attention to the provision in the foundation deed which makes the use of the Pious Fund in the Californias perpetual, we again quote one of the parts omitted in the extract from the foundation deed used by the representative of Mexico, which is follows:

> And the estates aforesaid shall be perpetually inalienable, and shall never be sold, so that, *even in case of all California being civilized and converted* to our holy Catholic faith, the profits of said estates shall be applied to the necessities of said missions and their support. (Transcript, p. 106.)

The foregoing provision shows that the donors anticipated the argument of the representative of Mexico that there would be no further use for the Pious Fund in the Californias after all the natives were converted and gave a complete answer thereto. Such conversion is not yet accomplished. The necessities for the continuance of the work of conversion and the maintenance of the Catholic faith in the missions will remain indefinitely, and the donors made special provision therefor.

IX.

The contention of the representative of Mexico that the United States, by the treaty of Guadalupe Hidalgo, proclaimed July 4, 1848, which, among other things, ceded a large territory, including upper California, to the United States for the sum of $15,000,000, discharged Mexico from all demands on account of the Pious Fund, can not be maintained. Article XIV of the treaty, quoted by the representative of Mexico as establishing a full defense to this proceeding, reads as follows:

> The United States do furthermore discharge the Mexican Republic from all claims of *citizens* of the United States, not heretofore decided against the Mexican Government, which may have arisen previously to the date of the signature of this treaty, which discharge shall be final and perpetual, whether the said claims be rejected or be allowed by the board of commissioners provided for in the following article, and whatever shall be the total amount of those allowed. (Appendix to record, p. 16.)

There are several conclusive reasons why the foregoing article does not discharge Mexico from the obligation she assumed to pay interest on that part of the Pious Fund dedicated to Upper California. The United States did not undertake to exonerate Mexico from her obligations to persons who were then Mexican citizens and who might thereafter become citizens of the United States on compliance with the provisions of the treaty. The undertaking of the United States was confined to the *then* citizens of the United States. Neither the Roman Catholic Church nor its dignitaries or members of its fold were citizens of the United States at the time ratifications of the treaty were exchanged. Whether they would ever become citizens of the United States depended upon an election or option to be exercised by them after such exchange of ratifications.

The Pious Fund, by the action of Mexico, was a permanent investment upon which she agreed to pay interest annually. No claim for interest has been made by the United States in behalf of the bishops of California for any installment of interest which became due and was payable previous to July 4, 1848, but interest arising after that date was submitted to arbitration under the convention of July 4, 1868, and decided in favor of the United States. The claim for interest in this proceeding has arisen subsequent to October 24, 1868. There is nothing in the treaty which can give the slightest pretext for the assertion that the United States either agreed to extinguish the obligations of Mexico to Mexican citizens or to pay the debts of Mexico to citizens of the United States which might become due after the execution of the treaty.

X.

The recital of the representative of Mexico of various statutes of his Government confiscating church property, barring debts by limitation, and fixing times within which demands against the Mexican Government must be presented has nothing to do with this proceeding. Whatever efforts Mexico may have made to close her own tribunals against the claim of the bishops of California by her local legislation do not concern us. It is sufficient for the purpose of this proceeding that both the United States and Mexico have agreed that the alleged obligation of Mexico to pay interest to the bishops shall be tried before this honorable tribunal.

Fortunately, Mexico does not now repudiate the various recitals in her statutes that her intention was to preserve, maintain, and apply the Pious Fund to the conversion and civilization of the natives of the Californias and for the maintenance and support of the Catholic religion in that country, but on the contrary agrees that this honorable tribunal shall, in the event the matters are not *res judicata*, determine whether the beneficiaries of the Pious Fund have a just claim against Mexico, and "render such judgment as may be meet and proper under all the circumstances of the case."

This honorable conduct on the part of Mexico ought not to be disparaged by her own representative or anyone else by an intimation that she is willing to oppose the rendering of a judgment which shall be just and equitable. Even if Mexico had confiscated the Pious Fund before California became a part of the United States, why has she not the right to waive any advantage such confiscation or any other arbitrary act might afford her and submit the justice of the claim as it originally existed to arbitration? If the claim is just, no act of Mexico, however arbitrary or wrong, stands in the way of a judgment directing the payment thereof, because by her agreement to arbitrate she has swept away all defenses to the claim of the beneficiaries of the Pious Fund except the plea that it is unjust.

Can there be any question of the justice of the claim? If there was no Pious Fund of the Californias, why did Mexico, by the law of May 25, 1832, provide for leasing the same? If the proceeds of such property when leased did not belong to the missions of the Californias, why did Mexico declare, in the sixth section of that law, that "the proceeds of such property shall be deposited in the treasury of the federal city to be solely and exclusively destined for the missions of the Californias?" If the proceeds were not to be remitted to the Californias, why did Mexico, in section 10, subdivision 9, of that law require

the administrators of the fund "to name to the Government the amounts which may be remitted to each one of the Californias in accordance with their respective expenses and available funds?"

Again, why did Mexico on the 24th of October, 1842, in the preamble of the decree directing the sale of the Pious Fund, say that the decree of February 8, 1842, "was intended to fulfill most faithfully the beneficent and national objects designed by the foundress without the slightest diminution of the properties destined to the end?" Why did Mexico pledge, by the third section of that act, the revenues arising from tobacco for the payment of interest on the Pious Fund, "without any deduction for costs, whether of administration or otherwise?" Why did Mexico, by the law of April 3, 1845, order all unsold property of the Pious Fund restored to the bishop if it was not the property of the missions and the Catholic Church of the Californias?

In short, why did every law or decree enacted or promulgated by Mexico recognize the existence of the Pious Fund, and also that it belonged to the missions of the Californias and the Catholic Church in that region? Why was neither the existence of the Pious Fund nor the objects and purposes of its founders not questioned until after the beneficiaries of the fund became citizens of the United States? If the Pious Fund was not the property of the missions and the Catholic Church of the Californias, why did not Mexico claim it as her own? Why did she continually declare, in effect, that it was not her property by asserting that it belonged to the missions and the Catholic Church of the Californias?

Very different questions are submitted to this tribunal from those which the arbitration under the convention of 1868 was called upon to decide. Under that convention the arbitrators were not authorized to disregard any defense which would be allowed under the ordinary rules of procedure in courts of justice. Confiscation, or any other arbitrary act which would have been a bar in Mexico to the recovery of the Pious Fund while California was a part of that country, might have been urged as a defense under the general language of Article II of the protocol of 1868. But the issue submitted to this tribunal, in case the matters are not *res judicata*, is different in that it submits *the justice of the claim* without regard to technical defenses. This tribunal is not restrained from "rendering such a judgment as may be meet and proper under all the circumstances of the case" by any matter not affecting the justice of the original claim. All honor is due to President Diaz for the liberal conditions of this arbitration. He has fully reciprocated the example of the United States in returning to Mexico the money awarded by the former arbitration to Weil and La Abra, hereafter mentioned. His agreement that full justice shall be done to the missions and the Catholic Church of California, waiving all excuses and objections not affecting the *justice of the claim*, is a full and cordial response to the action of the United States in protecting Mexico from dishonest demands.

XI.

The complaint of the representative of Mexico, under various headings, that the United States are demanding of Mexico extravagant and inequitable claims is unreasonable. The United States demand nothing from Mexico which the officers of the United States do not believe, after careful investigation, to be absolutely just. The good faith of

the United States is illustrated by their treatment of the Weil and La Abra claims. Those claims were submitted to and decided by the arbitration under the convention of July 4, 1868, and the aggregate of the judgments in the two cases rendered against Mexico amounted to $1,130,506.55. Upon the suggestion by Mexico to the United States of a discovery of false evidence and perjury in obtaining such judgments, the United States, although Mexico had paid the money into their treasury, refused to pay the same to the claimants. Congress thereupon passed a law giving the courts of the United States jurisdiction to hear and determine both of those cases, and after a full and fair hearing such courts held that the claims were fraudulent; whereupon all the money deposited in the treasury for the payment of the Weil and La Abra claims was refunded to Mexico in gold coin. But the United States have continued to insist upon the solemn obligation of Mexico to pay to the bishops of California the interest on the Pious Fund dedicated for use in the Californias. The character and standing of the various Secretaries of State of the United States who have called the attention of Mexico to and reminded her of her obligation to make such payment ought to be accepted as some proof of the good faith of that Government.

The following is a list of the officers of the United States who have conducted the negotiation with Mexico which has terminated in the present proceedings:

Hon. William F. Wharton, Acting Secretary of State, August 3, 1891. (Transcript, Diplomatic Correspondence, p. 23.)

Hon. James G. Blaine, February 19, 1892. (Same, p. 24.)

Hon. John W. Foster, September 15, 1892. (Same, p. 24.)

Hon. Walter Q. Gresham, June 8, 1893. (Same, p. 24.)

Hon. John Sherman, October 30, 1897. (Same, p. 122.)

Hon. W. R. Day, Acting Secretary, July 17, 1897. (Same, p. 22.)

Hon. John Hay, December 4, 1899. (Same, p. 46.)

XII.

We will now briefly consider the complaints of extravagant demands and bad faith made by Mexico against the United States.

The claim of the United States that the interest due to the bishops of California should be paid in the gold coin of Mexico and not in depreciated currency is made one cause of complaint. Mexico can hardly afford to insist upon paying the bishops of California in silver, since she has recognized her duty to pay her other foreign obligations in gold. The interest on her bonded debt which is dealt in by foreigners is paid in gold. Her recognition of the money current in commercial nations has strengthened her credit and been of great benefit to her both at home and abroad. The payment to the bishops in silver would be grossly inequitable.

At the time Mexico sold the estates belonging to the Pious Fund and covered the entire property belonging to that fund into her treasury, and undertook to pay interest thereon, her silver coin was at a premium over the gold coin of any other country. In the second section of the act of October 24, 1842, we read:

> The minister of the treasury will proceed to sell the real estate and other property belonging to the Pious Fund of the Californias for the capital represented by their annual product at six per cent per annum. (Laws of Mexico, p. 7.)

In the unsettled and revolutionary condition of Mexico the vast haciendas belonging to the Pious Fund could not possibly have produced a net income corresponding to their actual value. Mexico had just passed through a struggle for independence and was in a revolutionary condition. It is certain that no hacienda in that country was producing at the time a net revenue equal to 6 per cent on the value of the property. It is even doubtful if 2 per cent was then realized upon any hacienda in the Republic. The property sold must have been worth at least three times what was received and covered into the treasury. The former members of the tobacco monopoly, to wit, Messrs. Don Francis de Paula Rubio and brother, Don Manuel Fernandez, Don Joaquin Maria Errazu, Don Felippe Neri de Barrio, Don Manuel Escandon, Don Benitto de Magua, and Muriel Brothers, made an offer of purchase within twenty-four hours from the passage of the law. These gentlemen knew the value of the property and were ready to purchase as soon as, and perhaps before, the law was passed. Their prompt action indicates that they realized that the sale of the haciendas at the price fixed was an opportunity to make money. (See deed, Exhibit D, to replication on behalf of the United States.) Since Mexico by that sale must have sacrificed a very large part of the property of the Pious Fund, it would be extremely inequitable to allow her to pay such an obligation in depreciated money. If Mexico keeps in circulation depreciated currency, it should not affect the claim of the bishops. She coins both gold and silver, and her gold coin corresponds in value to the money she covered into her treasury belonging to the Pious Fund; but her silver coin is at a discount, when compared with gold, of nearly 60 per cent.

While Mexico may require her citizens to receive any kind of money which by her law is current, it is grossly inequitable for her in her capacity as trustee to pay in a depreciated currency an obligation contracted by her when her money was gold or its equivalent. Notwithstanding Mexico, as we have already seen, forced the sale of the properties of the Pious Fund without the consent of the beneficiaries, she has failed to perform her undertaking as trustee in the payment of interest. The former award reduced the annual installments of interest due the bishops to $43,080.99, which must be accepted if the matter is *res judicata*. In that case simple interest at 6 per cent on each of such installments from the time it became due, without including the principal, amounts to $2,858,652, which, according to the principles of equity, Mexico ought to pay in gold. It is not "meet and proper under all the circumstances of the case" to exonerate Mexico from the payment of interest and permit her to pay in depreciated currency. Article X of the protocol, submitting the kind of currency in which the judgment is to be paid, must be considered in connection with the power conferred upon this honorable tribunal to do justice between the parties.

XIII.

There is another consideration which the representative of Mexico has entirely overlooked, and that is the liberality shown to Mexico in the judgment rendered by Sir Edward Thornton, the umpire, in allowing Upper California only one-half of the interest due on the Pious Fund belonging to the two Californias. The donations were made for

the conversion of the natives of the Californias and for the maintenance and support of Catholic worship in that region. It is true that the work was commenced by the Jesuits in Lower California, because that locality was more easily reached from Mexico than the great body of the country contemplated by the donors. Comparatively little was accomplished in Lower California on account of the barren and desolate character of the country, which afforded sustenance for only a very few natives, and could not be made the home of any considerable population. Father Rubio, who gave evidence before the mixed commission in 1868, declared that he was 68 years of age at that time; that he had resided at the Mission of San José for thirty years, and at the Mission of Santa Barbara nine years; that he had been most of that time a vicar general in the Catholic Church, and had been engaged in instructing and converting the natives. He testified that the number of missions in Upper California was 21 and in Lower California 13, giving the date of the establishment of each; that in Upper California in 1832, when he first went there to reside, there were 17,364 converted natives living at the several missions; that in Lower California there were scarcely any Indians in the missions; that in some of the missions there were none; that more than seven-tenths of the whole population of the Californias subject to the missions belonged to Upper California. (Transcript, p. 148.) The reason for the diminution of the population of Lower California was the want of water and fertile soil.

In 1857 Mexico appointed a commissioner by the name of Ulises Urbano Lassépas to examine into and report upon the resources and population of Lower California. The examination was very thorough and the report exhaustive. The country was found to be practically a rocky, barren waste, almost destitute of water, and the population to be very small and continually growing less. The report fully verifies the testimony of Vicar-General Rubio. (See De La Colonization de la Baja California, by Ulises Urbano Lassépas-Primer Memorial. 1859.)

The writer visited the missions of Upper California in 1850. At that time he conversed with many reliable persons familiar with Lower California, who described to him the country and the inhabitants thereof. Lower California was said to be destitute of water for irrigation and practically uninhabited. The missions of Upper California were in a more prosperous condition. They had immense herds of cattle, horses, and sheep, and cultivated fields sufficient to more than supply the inhabitants with vegetables and cereals. Their vineyards and orchards were especially important. They furnished grapes and fruit for a population of many thousands of miners.

The writer was much impressed with the fact that the greater part of the Pious Fund was not only intended to be used but was actually used in the fertile valleys of Upper California, where the field for missionary work and the necessity for funds for that purpose were many times greater than in Lower California. If the work done and the natives converted in the two Californias, when the writer visited that country in 1850, were compared, it would be an exaggeration to assume that as much as one-tenth of the proceeds of the Pious Fund was required to be used in Lower California. Certainly the result produced by the expenditure was at least as much as ten to one in favor of Upper California. The statement of Vicar-General Rubio that in 1832 seven-tenths of the whole population of the Californias subject to the missions belonged to Upper California was undoubtedly true.

Notwithstanding these historical facts, the umpire in the former case, to make it as easy for Mexico as possible, gave only one-half of the interest on the Pious Fund to Upper California. If the matter were not *res judicata*, but were open to reexamination as to all the facts, the United States would confidently contend for 85 per cent of the interest instead of one-half, which would then be a more liberal allowance to Lower than to Upper California.

XIV.

The statement of the representative of Mexico that there is no legal basis on which to claim anything from the donation of properties made by the Marchioness de las Torres de Rada and the Marquis de Villapuente to the Pious Fund is not sustained by the evidence. He has not pointed out how Mexico has lost one dollar by any alleged defective title of the estate of the marquis, nor what claims the heirs of the marquis have against Mexico in consequence of the sale of the property and the covering of the proceeds thereof into the treasury. On the contrary, the value of the estate which the umpire rejected and excluded from the fund was more than the amount demanded by the claimants under the marquis in full satisfaction of their pretended judgment. (Transcript, p. 520.) In addition to that, the representative of Mexico has utterly failed to show by the evidence adduced that Mexico has not retained in her treasury the entire proceeds from the sale of the Ciénaga del Pastor, amounting to $213,750. The evidence of such disbursements, if it exists, is in the possession of Mexico, and that Government not having furnished such evidence it is fair to presume no disbursements have been made in consequence of the alleged attachment.

It must be presumed, in the absence of evidence to the contrary, which, if it existed, Mexico could and would produce, that the entire proceeds of the sales of the property of the Pious Fund were covered into the treasury and there remain. There is no evidence whatever in the record to warrant the exclusion of the $213,750 for which the Ciénaga del Pastor was sold.

The amount now due, if the matter is not *res judicata*, as we have already seen, is $1,853,361.75, but the American commissioner, in the arbitration under the convention of 1868, leaving out sundry small items as bad debts or claims not sufficiently proved, and also the value of the Ciénaga del Pastor, reduced the total to $1,436,033. The umpire at first concurred in this amount, but afterwards deducted $1,000 on account of an error in calculation. He found the principal to be $1,435,033, and awarded one-half thereof, or $717,516.50, to Upper California.

On an accounting, if the matter is not *res judicata*, the claimants would contend that the Ciénaga del Pastor, valued at $213,750, with 6 per cent interest thereon since July 4, 1848, together with the other items mentioned in the memorial, should be added to the capital of the Pious Fund, and that the bishops are entitled to 85 per cent thereof, making an aggregate of at least $3,108,207.52 now due. (Memorial, p. 11.)

The charge of exaggeration of amounts must be disregarded, because Mexico has the records to prove such exaggerations, if they exist, and no such proof has been furnished. In the former arbitra-

tion Sir Edward Thornton, although he felt constrained to adopt the views of the commissioner of the United States, who excluded from his finding a large portion of the claim, was manifestly dissatisfied because the Mexican Government did not exhibit in its defense the records in its possession showing the actual amount which was covered into the treasury. He said:

> A larger sum is claimed on the part of the claimants, but even with regard to this larger sum the defense has not shown, except indirectly, that its amount was exaggerated.
>
> There is no doubt that the Mexican Government must have in its possession all the accounts and documents relative to the sale of the real property belonging to the Pious Fund and the proceeds thereof; yet these have not been produced, and the only inference that can be drawn from silence upon this subject is that the amount of the proceeds actually received into the treasury was at least not less than it is claimed to be. (Transcript, p. 609.)

Notwithstanding the matter was called to the attention of Mexico by Sir Edward Thornton thirty-three years ago in the forcible language above quoted, the records and accounts referred to by him are still retained in the archives of Mexico, to which the claimants have no access. The nonproduction of the records which ought to show the amount of the Pious Fund covered into the Mexican treasury leaves no other inference than that "the amount of the proceeds actually received into the treasury was at least not less than it is claimed to be."

The introduction of a book relating to legal proceedings which took place long ago without proving that it affected the fund covered into the treasury, is indirect evidence that there is nothing in the Mexican archives showing that the amount claimed is excessive. The inventory of Ramirez and the items particularly described in the memorial can not be charged by the defense as excessive in the absence of proof to sustain such charge. The basis for everything claimed in the memorial must have been of record and must now be in the possession of the defense. No evidence having been produced by Mexico to contradict the claimants' case, the presumption that the amount stated is correct will prevail.

XV.

We have made the foregoing statement of the case, not because we doubt that the decision in the former arbitration is *res judicata* as to the amount of interest annually due to the bishops of California from the Mexican Government, but to answer charges of unfairness against the United States.

William M. Stewart,
Charles J. Kappler,
Of Counsel.

POINTS SUBMITTED BY MESSRS. DOYLE & DOYLE, OF COUNSEL FOR THE PRELATES.

(The references, unless otherwise expressed, are to the pages of the printed Transcript.)

The case we present to the court is historical, and carries us back to the close of the seventeenth century, when, all previous attempts to colonize the peninsula of Lower California having failed and been abandoned as impracticable, the Jesuits, encouraged by their success in establishing missions throughout the northern frontier of Mexico, offered the services of their members for the like purpose in California, on condition that they might themselves select the civil and military officers to be employed. This proposal was assented to by the Crown, it being formally stipulated that possession of the country should be taken in the name of the King, and that the royal treasury should not be called on for any of the expense of the enterprise without His Majesty's express order. The fathers proceeded at once to collect alms (limosnas) for the purpose, and commenced the work. The first mission, that of Our Lady of Loretto, was founded in 1698, and that of San Francisco Xavier, the second, in 1699. These were followed by others founded at intervals down to 1757, when that of San Francisco Borja, the last of those of Lower California, was established. We have no full record or account of the amounts collected in smaller sums, though we know that they must have been considerable, as the historian mentions casually over $17,000 collected in minor sums from a few benefactors in January, 1697. It was, however, considered that the income of $10,000 would be needed for the support of each mission, and charitable persons were asked to contribute for the undertaking that amount or multiples of it. Thus the 13 missions of the peninsula represented a capital of $130,000, contributed by the following persons, viz:

Don Juan Caballero y Ozio	$20,000
Don Nicolas de Arteaga	10,000
The congregation de los dolores in Mexico	10,000
The Marquis de Villa-Puente	40,000
Don Luis de Velasco	20,000
Padre Juan Luyando	10,000
Doña Rosa de Peña	10,000
The Duchess de Gandia	10,000
Total	130,000

These sums with the smaller ones above referred to and subsequent accretions obtained the name of the Pious Fund of the Californias, by which name the capital in question has ever since been known.

In 1735 the Marquis de Villa-Puente and his lady, the Marchioness de las Torres de Rada, by a deed of gift *inter vivos*, donated to the Jesuits, for the missions of California, estates and properties of great extent and value; a copy of the conveyance, certified by the successor of the notary before whom it was executed, forms part of the record

of the former arbitration respecting this matter, presently to be mentioned. The value of this contribution was estimated, even at that early day, at over $400,000. Another large contribution came from the will of Doña Josefa Paula de Argüelles, a wealthy lady of Guadalajara, amounting to over $600,000, as nearly as we can ascertain, and still another from the will of the Duchess of Gandia, who having bequeathed large sums to provide annuities for her servants, directed that as the life estates fell in the capitals should be added to the Pious Fund. From this source $62,000 had been realized in 1747, with as much more to come in.

The Jesuits, as is known, were excellent financial managers, always putting that department of their affairs into the hands of the most capable of their members. The Pious Fund was invested by them in productive property, urban and rural, and its revenues well cared for and economized, so that it increased largely in amount and importance.

The pragmatic sanction of 1767 expelling the Jesuit order from all the Spanish dominions was put into effect in California in 1768, and the missions were turned over to the Franciscans. Afterwards, when those establishments were advanced farther up the coast into Upper California, those of the peninsula were confided to the Dominicans, and those of Upper California to the Franciscans. These friars made their first *entrada* into the upper province in 1769, when the mission of San Diego was founded, and they continued thereafter to advance the spiritual conquest of the country and established within the limits of the present State of California in all 21 missions, the latest of which was founded in the year 1823. These were maintained out of the income of the Pious Fund.

On the expulsion of the Jesuits from its dominions the Spanish Crown succeeded to the administration of the Pious Fund as trustee, and in like manner Mexico, on achieving her independence, succeeded to the former sovereign; each of them, however, recognized the trust character of the estate and the duty of applying its income to the support of the missions. During the trusteeship of Spain the monarch sometimes borrowed portions of the capital to supply the ripe wants of the viceroyalty, but always inscribed the sums so taken on the register of his probity, and made promise of repayment with interest; and Mexico, among the earliest acts of her independent sovereignty, solemnly recognized the debts of the viceroyalty as due and to be paid by the Mexican nation, which succeeded it, and recognized those debts to the Pious Fund originally of the viceroyalty as due by the Mexican Republic.

The property of the Fund continued to be managed by a *junta*, or board of public officers, under Spain and Mexico successively, until the year 1836, when it was determined to apply to the Holy See for the establishment of a bishopric in the Californias, and as an inducement to assent to the arrangement the act of the Mexican Congress proposed to commit to the incumbent of the new diocese the management of the Pious Fund. The Right Rev. Francisco Garcia Diego, who had till then been president of the missions, was accordingly raised to the episcopal rank, and fixed his see at Monterey, in Upper California. He continued in the management of the Fund, which he received November 2, 1840 (Transcript, pp. 495, 520), applying its income to the support of the missions, as before, down to February, 1842, when the Mexican Government, by a decree of President Santa Anna, resumed the management of it, and the properties of the Fund,

real and personal, were turned over to Gen. Gabriel Valencia, his chief of staff, appointed for the purpose by him, accompanied by a formal inventory, of which a copy is contained in the record of the former arbitration, presently to be referred to. Of the particulars of the rural property delivered to General Valencia we are but imperfectly informed. On October 24, 1842, by another decree of October 24, 1842, the whole property of the Fund was incorporated into the public treasury of Mexico, ordered to be sold, and the Government, always respecting the intentions of the founders, undertook to pay interest on the proceeds at the rate of 6 per cent per annum, to be applied to the missions as before.

Upper California was ceded to the United States by the treaty of Guadalupe Hidalgo, February 2, 1848, the United States paying therefor $18,250,000—$15,000,000 in cash and $3,250,000 by releasing her from demands amounting to that sum, due to American citizens.

After the separation of Upper California from Mexico the latter ceased to make any payments of interest on the Pious Fund to the benefit of the ceded territory, and after vain demand therefor and application to the Government of the United States for its interposition with Mexico to obtain satisfaction, the bishops of the American State of California, successors of Francisco Garcia Diego, bishop of Monterey, presented their claim for arrears of interest accrued on the Pious Fund since the 2d of February, 1848, before the Mixed American and Mexican Commission created by the convention of July 4, 1868. After proofs and arguments the case was submitted to the Commissioners, who differed in opinion on it and filed their several opinions in May, 1875. The case was then referred to the umpire, Sir Edward Thornton, who concurred in opinion with the American Commissioner and declared the annual interest undertaken to be paid by Mexico on the fund to amount to the sum of $86,101.98, of which he decided that the claimants were entitled to one-half, say $43,050.99, of which he awarded the claimants 21 installments for the twenty-one years elapsed between October 24, 1848, and February 1, 1869. After correcting an arithmetical error, to be noted further on, this amounted to $904,070.79, all of which has since been paid by Mexico, in accordance with the terms of the convention.

The present demand is for the installments of interest that have accrued since February 1, 1869, now 33 in number, and in reference thereto the Government of the United States, acting on behalf of the prelates, is of opinion and insists that the determination of 1868 establishes conclusively against Mexico both the liability and the amount demanded, under the well-known rule of law, "*res judicata pro veritate accipitur.*" This claim Mexico denies. The prelates, and the United States on their behalf, also claim that if not so established as *res judicata*, the demand they make is a just one, and that for want of complete information on their part, at the time of discussing the former case, of material facts since discovered by them, and an error of judgment committed by the umpire, the former award was made for a sum materially less than justice required, and that if open to reexamination on the merits the award now to be made should be for a considerably larger annual interest than was awarded in the former judgment.

Hence the two questions to be decided by the present high court are: (1) Whether the decision of the present demand is controlled by the determination of the former award as *res judicata?* And (2) if

not so controlled is this a just claim? And they are so stated in the protocol under which the court is constituted.

I. The first question proposed has been fully and ably discussed by the agent of the United States, and his views on it are, in our opinion, entirely in accordance with sound principles and the highest interests of civil society; for the practice of international arbitration is so conducive to the welfare of all nations that the interests of civilization demand that the highest authority be accorded to the judgments of such tribunals; and indeed while the final decision of any court of justice is held to be conclusive on the parties to the proceeding, as to the truth of any disputed fact determined by it, we can not conceive that that of an international tribunal whose high office it is to administer justice between sovereigns[a] can command less authority. Indeed the eminent secretary of state of the Mexican Republic recognizes this truth, in his correspondence with the United States, saying,[b] "the principle of *res judicata pro veritate accipitur* is one admitted in all legislation," adding that "a tribunal established for international arbitration gives to its decisions, pronounced within the limits of its jurisdiction, the force of *res judicata*." His zeal appears, however, to affect his judgment in the practical application of this conceded rule to the present case, and leads him to deny the conclusiveness of the decision of the Mixed Commission of 1868. He deems the award made by it invalid, apparently, for two reasons, viz: First, because he does not consider the preliminary presentation of the claim to the United Stated Government with a request for its intervention satisfactory; and, second, because he claims that only such matters as are expressed in what he terms the decisory part of the judgment have the force of *res judicata*.

Without the least disrespect to the judgment of the eminent gentleman who presses these views, we are unable to assent to the accuracy of either proposition; for to take them in inverse order, the last-mentioned objection is really based on the requirements of the French law of civil procedure (perhaps adopted in some other continental States) which regulates the forms of judicial sentence in civil cases.[c]

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[a] "Justiciâ gentes frenare superbas" Virg.

[b] Letter of November 28, 1900, par. 17. (Dip. Cor., pp. 31 and 39.)

[c] Code de procedure Civile; Liv. 11. Tit. VII. Jugements.

Sec. 141. La rédaction des jugements contiendra les noms des juges, du procurer du roi, s'il á été entendu, ainsi des avoués; les noms professions et demeures des parties, leurs conclusions, l'exposition summaire des points de fait et de droit, les motifs et le dispositif des jugements. (L 16–24 Août 1790, art. 15. L 20 Avril, 1810, art. 7.)

Les codes annotés de Sirey. Edition entièremen refondue par P. Gilbert. Paris Marchal Billard et cie. Place Dauphine, 27. 1875.

See, also—

Repertoire universelle et raisonné de jurisprudence, 5me edition par M. Merlin, ancien Procurer Général à la Cour de cassation. Bruxelles, H. Tarlier, 1826. Tom. XVI. p. 180. Tit. jugements, § 11.

"§ 2. Da la rédaction, de la date et de la signature des Jugements. I. Pour les 'matières civiles, l'art. 15. du tit. 5 de la loi du 24 Août, 1790, contenait sur la rédaction des judgements, une disposition ainsi conçue.

"La rédaction des jugements tant sur l'appel qu'en première instance, contiendra quatre parties distinctes:

"Dans la premiére, les noms et les qualités des parties seront enoncés;

"Dans la seconde, les questions de fait et de droit, qui constituent les procès, seront posées avec précision;

"Dans la troisieme, le résultat des faits connus ou constatés, par l'instruction, et les motifs qui auront determiné le jugement, seront exprimés; La quatrième enfin contiendra le dispositif du jugement.

"Toute contravention à cette règle *emportait nullité*. Cela résultait de l'art. 2 de la loi du 4 germinal an 2."

But such laws have no application to the judgments of international tribunals, which adopt whatever forms and modes of procedure they deem most convenient and appropriate. Doubtless the conclusiveness of the adjudication extends no further than the matters actually decided or necessarily implied in it; but it does not depend on what part of the decision the fact in question is found, but upon whether it is really found therein. Here the demand was for annual installments of interest at 6 per cent per annum on a certain sum of money. The award, therefore, necessarily involved the determination of the amount of the principal and the time elapsed; and as only a portion of the whole was demanded the ratio of division between the two parties interested had also to be decided.

Now, the opinion of Commissioner Wadsworth (pp. 525-526), which the umpire adopted (p. 609), leaves no room to doubt the actual decision on any one of the points. He defines the capital, enumerating the several items constituting it, fixes the rate of interest at 6 per cent per annum, and the time elapsed at twenty-one years; the rate of division between the two provinces he says should be equality, in all which decision the umpire concurs; but the counsel for Mexico having called the attention of the latter to an arithmetical error in Mr. Wadsworth's addition of the items, he corrected it by making the necessary deduction. (Transcript, p. 650.) We scarcely suppose that this correction of an obvious clerical error is to be relied on to impeach the validity of the judgment. If it is, the ready answer arises, that having been made at the instance of Mexico, her assent to it is undeniable; from the character of the mistake, too, that of the United States and of Mr. Commissioner Wadsworth must also be presumed.

The suggestion that the claim did not come within the jurisdiction of the Commission of 1868 is more than once alleged by Señor Mariscal in his correspondence, but the grounds of such contention are not specified; so that we are left to infer them from the arguments of Mr. Cushing and Señor Avila. (Transcript, pp. 71 and 635, § 126.) The latter gentleman contends that the preliminary informal presentation of the claim called for by the convention was defective, while the former considers that the injuries complained of preceded the treaty of Guadalupe Hidalgo and were excluded from the cognizance of the Mixed Commission by that fact.

1. This last objection was, we think, satisfactorily answered in the argument of Mr. Doyle. (Transcript, pp. 93 et seq.) The ground was there taken that the word "injury" is a very broad one in law and includes any deprivation of legal right—"*quidquid est contra jus*"—and we think that it can not be doubted that the withholding of money due *ex contractu*, or the ommission of a trustee to apply money in his hands to the purposes of his trust in accordance with its terms, is an injury to the beneficiary or *cestui qui trust*. That view the tribunal sustained, and we have seen no argument to shake our conviction of its soundness. We did not base our complaint on the taking of the property by Mexico, and probably could not have done so successfully, as the President's decree had the force of law. Our complaint was, that having taken the property under a distinct promise to pay a certain price for it, the Mexican Government *failed to pay the price*.

2. As to the objection that the preliminary presentation of the claim was defective, it is, we think, easily disposed of. The object of preliminary presentation was to identify the matter forming the subject

of the claim and to afford opportunity for any inquiries needed. No particular form was required, and we are not aware that a single claim was dismissed for defect in the form of presentation. Here counsel laid the matter of the diversion of the Pious Fund before the Secretary of State of the United States, requesting the interposition of his Government with Mexico to obtain redress for his clients as early as July 20, 1859. He did not presume to define what the Secretary of State should demand, but stated the facts, leaving the measure of redress to be asked to the discretion of the Government of the United States. We deem this presentation all that was needed to fulfill the descriptive words of the convention of 1868; so that criticism on Mr. Casserly's misunderstanding of the telegram[a] sent him March 28, 1869, is from the purpose. But the jurisdiction of the Mixed Commission of 1868, even if originally doubtful, was afterwards fully affirmed and submitted to by Mexico herself, and can not now be disputed. The case is strictly analogous to what in English and American law is called a plea to the jurisdiction, and in the law of Spain and Mexico "*excepcion declinatoria.*" Such a defense must always be interposed preliminarily, and the right to offer it is waived by pleading to, or going to trial on, the merits. This is equally the rule of the common and of the civil law, and is so logical and just that it may fairly be presumed to prevail under all systems of jurisprudence in civilized countries. Mexico went to trial on the merits of the Pious Fund case, and the objection here relied on to defeat the jurisdiction was only brought forward after judgment on the merits had been signed by the umpire.

Again, all objections to the jurisdiction of the Mixed Commission of 1868 were expressly waived by Mexico, and this not once, but many times. Indeed, power to decide this case was expressly conferred on it by treaty, for the period for its decision of all claims was originally limited to two years and six months from July 31, 1869, and accordingly terminated on January 31, 1872. At that time the Pious Fund claim, *as set forth and defined in the Memorial of the Prelates of California* (pp. 9, 54), was pending before the Commission. A motion to dismiss it had been made by the counsel for Mexico based on several grounds (not, however, on any defect in the preliminary presentation of the claim), argued on both sides, and awaited decision. By a supplementary convention, the ratifications of which were exchanged on February 8, 1872 (after the original Commission had by lapse of time expired), it was recalled into life to determine the claims pending before it when it expired, and the period for making its awards was extended for a year, i. e., till January 31, 1873. That was a resubmission by both parties of all those pending cases, with authority to decide them. Further supplementary conventions extended the time as follows, viz: That of November 27, 1872, two years more, or till January 31, 1875. That of November 20, 1874, one year more, or till January 31, 1876, with six months additional for the umpire to complete his labors, and by one of April 29, 1876, the powers of the umpire were further extended till November 20, 1876. Each of these several conventions extending the time for decision, whether by the commission or by the umpire, referred to the cases then pending and undecided, and distinctly assumed that their decision, by the commission or the umpire, as the case might be, was within the competency

[a] See testimony of John T. Doyle.

of the tribunal. If Mexico had at any time before April 30, 1876, deemed this Pious Fund Case beyond the jurisdiction designed to be given to the commission, it was in her power before assenting to any one of these supplementary conventions to expressly except it from the submission. She might have said "we never intended to submit this claim to the commission, and we will not, by prolonging the time for deciding it, consent that it be determined by that tribunal." Or "we claim that it was not presented seasonably, and will not, by any present action, waive that objection."

This was the course adopted by Great Britain, under analogous conditions, at the great Geneva arbitration, and the magnitude and character of this claim forbid the supposition that it was on any occasion overlooked or forgotten. Its repeated submission, therefore, was intentional and deliberate and it is quite too late now to question the jurisdiction of the tribunal to whose determination it was voluntarily submitted.

All this is the more emphatically true from the fact that the jurisdiction and powers of the Mixed Commission had lapsed before the first supplementary convention became effective by the exchange of its ratifications. The tribunal was dead, and the parties voluntarily revived it and charged it with the determination of the cases before it undecided at the time of its decease. This was a resubmission of all those cases, including that of the Pious Fund. Still further, the arbitrators had failed to agree on the case, filed their opposing opinions, and referred the decision to the umpire as early as May, 1875.[a] It was pending and undecided before him when the convention of April 29, 1876, was concluded, the *scope of which was confined to cases wherein such difference of opinion had arisen and which had been so referred to the umpire.* It gave him in express terms additional time, till November 20, 1876, to determine them. If that convention was not an express authority to him to determine each and every case, coming within the category described of cases referred to the umpire, it is difficult to say what it was.

There is therefore no room for any suggestion of error, ignorance, or oversight in this case. The nature, particulars, and amount of the claim were well known to the Mexican Government, and especially to the officers who negotiated these various conventions. Don Manuel Aspiroz, who agreed on and signed the first supplementary convention, was one of the counsel for Mexico before the Commission, and filed an elaborate argument in the case. Its repeated resubmission to the Commission, and finally to the umpire, was clearly intentional, and Mexico can not now be heard to object to the tribunal she deliberately invited to make the decision.

We do not lose sight of the well-settled principle that the decision of the Commission as to its own jurisdiction (there being no mode of reviewing its decisions provided) must be final and conclusive. This is obviously a necessary logical sequence from the origin and nature of the court, and has received repeated judicial recognition. It has also been fully discussed by the counsel for the United States, and we therefore limit ourselves to the other grounds above stated, especially as they go more directly to the absolute merits of the question.

In this connection, too, the peculiar language of the convention of

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[a] For all these dates, see Docket Entries, p. 3.

1868 and its attendant circumstances are significant. It must be remembered that the treaty of Guadalupe Hidalgo contained (Art. XXI) a general promise to treat future international differences, if such arose, in a spirit of friendship, and to seek to adjust them, if possible, by arbitration. For twenty years thereafter many circumstances occasioned complaints by citizens of each of the Republics against the government of the other. Anxious to settle all of these, and to "increase the friendly feelings between the two nations, as well as to strengthen the system and principles of republican government on the American continent," the two Republics entered into the convention of 1868, wherein, after reciting the existence of numerous claims, as above, by citizens, etc., "for injuries to their persons or property," they agree to refer all such to the Mixed Commission provided for therein, and to an umpire, in case of disagreement, and by Article II "solemnly and sincerely engage to *consider the decision of the commissioners conjointly, or of the umpire, as the case may be, as absolutely final and conclusive upon each such claim decided by him or them, respectively*, and to give full effect to such decisions without any objection, evasion, or delay whatsoever."

The object and intent of this convention being plainly to put an end, once and forever, to the whole mass of diversified claims which had accumulated during the long period of disorder referred to, the words "injuries to their persons or property" were employed as "*nomina generalissima*," or the broadest and most comprehensive known to the law, for the purpose of including all complaints of every kind. While refusing consideration to claims antedating the treaty of Guadalupe Hidalgo (February 2, 1848), it was agreed to provide for the decision, by a judicial tribunal, of all subsequent to that date. And as if anticipating, from the large number and great variety of cases to come before it, that a question might be raised after decision as to whether a particular case came within the class submitted, they inserted the clause quoted above, from Article II, to *hold the decision of the arbitrators or umpire on that point also conclusive*, and that they would "give full effect thereto without objection, evasion, or delay," adding in Article III, as if for more abundant caution, that "it should be competent for the commissioners or the umpire to decide, in each case, whether any claim had been duly made, preferred, laid before them," etc., and agreeing, in Article V, "to consider the result of the proceedings of the Commission as a full 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" (February 1, 1869.)

The inevitable corollary and effect of the decision of the umpire was and is to establish that the principal sum on which Mexico promised by the decree of October 24, 1842, to pay interest at 6 per cent was $1,435,033; that the prelates of California as successors of the former bishop were entitled to one-half of that annual payment for the twenty-one years between October 24, 1848, and February 1, 1869, amounting to the sum awarded, viz, $904,070.99. The arithmetical calculation is just as much a part of the decision as the product reached by it.

Finally. The memorial of this claim, in exactly the shape in which it was decided, accompanied by historical references, was filed before the Commission December 31, 1870. On April 24, 1871, Mexico, by

Mr. Cushing, moved to dismiss it on other grounds, going to the nature of the claim, the title of the claimants, and their capacity to sue, but offering no objection to the jurisdiction of the Commission based on the insufficiency of the preliminary presentation (p. 67). He also filed an argument in support of his motion. On March 1, 1872, arguments thereon on the part of the claimants were also filed (pp. 72, 80). Then, after long delay and no decision of this motion, the counsel for both parties offered proofs, which were filed between March 1, 1873, when those of the claimants were filed, and October 30, 1873, when Mexico's proofs were put in. The argument of Don Manuel de Aspiroz on the merits on behalf of Mexico was filed on the last-named day, and was replied to by Mr. Doyle on January 25, 1875 (pp. 222, 369). On May 19, 1875, the conflicting opinions of the commissioners were filed (pp. 523, 527).

During these five years and over of litigation before it, no word of objection to the preliminary presentation of the claim was heard from Mexico, nor did the Mexican commissioner give expression in his opinion to such a thought. The case then went to the umpire. It was argued before him by Don Eleuterio Avila for Mexico in a brief filed July 10, 1875, and by counsel for the claimants filed July 24 of the same year. Still no mention of any objection to the jurisdiction.

November 29, 1875, the umpire signed his opinion and allowed it to become known. On January 29, 1876, Mexico, through Mr. Avila, petitioned for a rehearing, and then, for the first time, denied the jurisdiction of the tribunal—five years and ten months after the presentation of the case. And on September 19, 1876, eight and two-thirds months thereafter, presented an argument in support of such petition, wherein this objection to the presentation of the claim was brought forward. (Transcript, p. 635.)

The discussion of it commences at paragraph 125 (p. 635) of his argument, wherein he complains that instead of presenting their demand to Mexico they allowed year after year to elapse till July, 1859, when they brought it forward in an exaggerated form, demanding the whole of the fund, interest, and principal, citing and commenting on the letter of Mr. John T. Doyle to Mr. Secretary Lewis Cass, of July 20, 1859, and that of Mr. Eugene Casserly to Mr. Secretary Fish, of March 30, 1870.

With reference to this matter Mr. Doyle has been examined as a witness, and his testimony, coupled with that of Archbishop Alemany, shows pretty satisfactorily that the claim was on July 26, 1852, presented by the latter to the Mexican Government in writing (contrary to the supposition entertained by Sir Edward Thornton), and after a delay of two months was, on September 29 of the same year, distinctly refused. His evidence further explains his demand of July 20, 1859, and shows the instruction he telegraphed to Mr. Eugene Casserly as to presenting the claim to the Mixed Commission. For the formal deviation from this instruction the claimants are hardly to be held responsible at this late day. Had attention been called to it at the time it could have been amended, for the Commission had power by the convention to enlarge the time for presenting claims three months. No objection, however, was made to either presentation until six years and a half after the latest one was made. Señor Avila in then bringing it forward practically admitted that it was entirely too late, but sought to throw it in as a makeweight to induce the umpire to adopt

a suggestion that he put forward in his petition for a rehearing, viz, that the umpire should reconsider the amount of his award, and while reducing the aggregate make it include the portion of the capital of the fund which he awarded to Upper California. (See paragraphs 140, 158, 173, et seq. to the end, Transcript, p. 637, etc.)

It is not to be supposed that this was designed to entrap the umpire into making an award which transcended his power, but there is little doubt that had he complied with it he would have done so.

That the decision of the Mixed Commission of 1868 would determine the amount annually due from Mexico *once for all* as *res judicata* did not escape the discernment of the representatives of Mexico at the time it was uttered. Señor Zamacona, the Mexican commissioner, says (Transcript, p. 543): "This situation the claimants now desire to alter and to oblige Mexico to pay the *perpetual tribute* of a rent to certain American corporations." A little farther on (id.) he speaks of it as "a sort of perpetual annuity which they want to secure in favor of their churches." (Transcript, p. 643.)

Señor Avila presses the same idea, saying (Transcript, p. 551):

Y á fé si en efecto echó mano el Gobierno de México de los restos del fondo de misiones para sostener la guerra contra los Estados Unidos á cuyo término perdió mas de la mitad del territorio nacional—inclusa la Alta California—sería curioso que hoy se le hiciese pagar en beneficio de los Estados Unidos y de una secta religiosa que tiende á predominar en ellos, no solamente lo que entónces tomara de dichos fondos, sino un *tributo perpétuo* como réditos del mayor valor que alguna vez pudieron tener.

Again (Transcript, pp. 554–555):

Sería una iniquidad monstruosa, * * * al Gobierno de México, si le compeliera á pagar un tributo *perpétuo* á los Obispos de California.

The same gentleman, in his petition for a rehearing (Transcript, p. 612), says:

Cómo puede creerse que el Gobierno de México se constituyese un tributario *perpétuo* de una Iglesia extrangera?

II. It is, however, our duty, under the terms of the protocol, to consider the case on the assumption that the court may be of the opinion that the judgment of the Mixed Commission of 1868 is not conclusive, and to discuss the justice of the claim of the church for the interest on the Pious Fund. This we shall do but briefly.

1. The question whether the prelates of the church are proper parties to demand fulfillment of Mexico's obligation to pay the portion corresponding to Upper California of the price she promised to pay for the Pious Fund when she incorporated it into the national treasury is answered by many notable precedents and decisions of eminent legal authorities. These were cited in the former argument (Transcript, pp. 86–93, 471), and we shall not weary the court by further reference to them or by a discussion of the point. This question cuts no figure here—nor is it a question for this or any other international court. The Government of the United States is the party to decide whether it will demand from a foreign government payment of a debt on behalf of its citizens who are interested. It represents them, and is competent to represent them at all times and places and to all intents and purposes, and the fact that the United States makes the demand on behalf of any of its citizens is conclusive as to its authority to do so.

2. As to the liability of the Mexican Government for the fulfillment

of the promise made when taking the Pious Fund into the treasury, it is really a question of simple good faith. The fund was composed wholly of means donated by private individuals, placed in the hands of trustees, and devoted to a specific pious and benevolent purpose. Neither the Crown of Spain nor the Mexican Government ever contributed to it a single *maravedi*. As said by Commissioner Wadsworth in his opinion:

> The fund does not belong to the Government of Mexico—not a dollar of it; it is private property, sacredly devoted by the piety of a past age to Christian charity and fortified against political spoliations by all the sanctions of religion and all the obligations of good faith. (Transcript, p. 527.)

We have had intimations that the fund came originally from the Crown of Spain, and General Santa Anna's act has been called a *resumption* of public funds; but this is to miscall it. We have repeatedly challenged proof of the contributions to it by either Government of a single dime. None such has been offered, nor can it be produced. The Crown on a few rare occasions gave, we believe, some assistance to the missions, e. g., bells for the chapels, vessels for the altar, or a few head of cattle to commence a settlement, but nothing to the Pious Fund.

The writer has read everything on the subject in print or in manuscript that it has been possible to find in the last forty years and over, and is led to believe that so small a sum as $5,000 would cover all that either Spain or Mexico ever contributed toward aiding the missionary efforts of the religious orders toward conversion and civilization of the native tribes or in any way to the support of religion in the Californias.

3. As to the amount of the fund. We have shown the historical evidence from works of recognized authority printed and published *longe ante litem motam* the following large donations. Of the numerous smaller ones, which, however, aggregated a large amount, we take no account, it being naturally impossible to make any proof of or follow such sums.

(*a*) The early subscriptions mentioned in Venegas, California, the *Nachrichten*, the *Tres Cartas*, and the Documentos para la Historia de México, amount to (see extracts, Transcript, pp. 187–221; Tr. Cartas, carta 2da, p. 48)	$130,000
(*b*) The *donatio inter vivos* by the Marquis de Villapuente and his lady, of which a duly certified copy is among the proofs forming the record of the former arbitration (Transcript, pp. 99, 104, 111), shows a contribution of property valued at	408,000
(*c*) The donation of the Duchess of Gandia, say $60,000, and as much more bequeathed by her will (Transcript, p. 198)	120,000
(*d*) Three-eighths of the residuary estate of the Señora Josefa Paula de Argüelles, of Guadalajara, the exact amount of which we can not state, but which certainly exceeded [a]	600,000
Amounting in all to	1,258,000

[a] With the exception of two small estates, called, respectively, *la Chica* and *la Grande*, the missionary funds of the Philippine Islands, so far as they existed in Mexico, were derived from the bequest of Señora Josefa Paula de Argüelles, who by her will bequeathed her residuary estate to the missions of California and the Philippines, to be equally divided between them. The portion belonging to California was added to the Pious Fund. Mexico sold the estates in which the Philippine missions were interested, and in the report of Manuel Payno (Transcript, pp. 23, 24) we find that up to May 7, 1814, there had been paid into the Mexican treasury from this source $306,901.75 for the account of the missions of the Philippine Islands; a like

As said above, we take no account of minor donations, and count nothing upon the natural increase of the property from judicious investment and employment of the funds in the careful and skillful hands of the Jesuits, who were and are noted for their success, resulting from the habit of placing their finances in the hands of their members most competent for the purpose. The object of these historical citations is to demonstrate the existence of a fund of great magnitude at this early date devoted to the objects we have indicated. Mexico has in her possession, among the archives of the viceroyalty and of the nation since its independence, exact accounts of all these details. We claim the presumption that must arise, in every candid mind, from her omission to produce any of them.

4. The original trustees of those large funds were the Jesuits. By an act of arbitrary power the Spanish Crown dispossessed and exiled them, seizing on all their possessions. (Pragmatic Sanction. Novísima Recoplacion. Lib. I, tit. 26, Ley. III.) It acknowledged the trust character of this fund and took upon itself its administration and application to the purposes of its foundation. (Pragmatic Sanction, *supra*, sec. 3, anexo 17, p. 317.) On attaining its independence Mexico succeeded to this possession of the property and acknowledged the attendant duty of administration. (Law of June 28, 1824; treaty with Spain December 28, 1836.) During the troubled period of the struggle for independence irregularities and lapses occurred in the management, but the duty was never denied, and with honorable pride the newly emancipated State made haste to acknowledge its liability for the debts of the viceroyalty, to the possessions and powers of which it succeeded. (Law of June 28, 1824; treaty of December 28, 1836.) The record contains two or three "*estados*," more or less complete, of the fund at different dates (Transcript, pp. 174, 220, 221), which by the names of the landed estates belonging to it and other

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amount, as shown in the same report, belonged to the Pious Fund. Besides this amount, three-fourths interest in the hacienda Cienaga del Pastor came from the same source; this interest was afterwards sold for $216,750. To these sums must be added the value of the three-fourths interest in the houses 11 and 12 Vergara street, which was sold for $52,000, thus making a total of $575,651.75. Besides this we are led to believe that there was other property derived from the same sources.

Confirmation of the general accuracy of these figures, from an independent source, is derived from the *estado* of the Pious Fund on November 16, 1792, given in the Pandectas Hispano-Mexicanos, volume 2, page 173, which shows:

Cash in hands and invested		$180, 973. 61
Haciendas (value)		647, 962. 27
Total capital of the fund at that time		828, 936. 08
Annual income (average of five years)		55, 177
Less care of the property, etc	$24, 150	
Expense of missions	22, 550	
		46, 700
Surplus applicable to the founding of a college for missionaries, etc., per year		8, 477

This was *before anything was derived from the estate of Madame Argüelles,* the final judgment in whose case was only pronounced in the spring of 1793, and communicated to the viceroy under date of Aranjuez, March 16, 1793, reaching Mexico in June of the same year. (See anexos 16 and 17 to the argument of D. Manuel de Aspiroz, Tr., pp. 315, 317.) Adding the $600,000 from Madame Argüelles to the capital above the amount would be $1,428,036, which is materially over our estimate above.

hall-marks show its identity with that founded in 1697 by Frs. Salvatierra and Ugarte, increased by the above-mentioned donations of the Marquis de Villapuente and his wife, the Duchess of Gandia, and Señora Argüelles.

5. The offer to place the possession and management of the fund in the hands of the bishop of California (law of September 19, 1836) simultaneously with the creation of the diocese, whether we regard it as an inducement to the Holy See to consent to that step or as a formal acknowledgment of the right of the prelate to the control of funds destined to the promotion of religious instruction in his diocese, confirms the acknowledgment of the trust character of the estate theretofore held by the Government and the identity of the beneficiaries.

6. In the year 1842 we find it possessed and administered by Bishop Francisco Garcia Diego, as trustee, for the missions of California, over which he had been called to preside as bishop. General Santa Anna was then provisional President of Mexico, with extraordinary powers conferred by the fundamental law, proclaimed under the title of the "Bases of Tacubaya." His power was practically that of a Roman dictator.

By an act of this extraordinary power he (February 8, 1842) took from the bishop the administration and management of the Pious Fund and appointed Gen. Gabriel Valencia, his chief of staff, to be its trustee and manager on the part of the Government. Bishop Diego was at the time in California, having left the management of the properties of the fund in the hands of Don Pedro Ramirez, as his *apoderado*, or attorney in fact. Ramirez being far advanced in life, the management of the rural properties of the fund were especially intrusted to Don Miguel Balaunzaran. Called on suddenly by General Valencia to surrender and turn over to him the properties of the Pious Fund, Ramirez strove to obtain a sufficient delay to enable him to communicate with his principal, the bishop; but not being successful in this he complied with the demand and turned over the property to General Valencia, accompanied by an "*instruccion circunstanciada*," or detailed inventory of it.[a]

This, though incomplete, is the latest and last authentic declaration of the properties and credits of the fund that we possess. It was taken as the basis of his award by the American commissioner in 1875, in which the umpire concurs, and shows, in brief, that the capital of the fund consisted of:

Amount due from Government for loans	$1,082,078
Debts of individuals	72,122
Annual rent of real properties, $17,330, equal at 6 per cent per annum to capital of	288,833
Total capital	1,443,033

These figures, derived entirely from contemporaneous data, fully sustain the former judgment; and the award of interest on the capital at 6 per cent per annum is in conformity not only to the scale fixed by the decree taking the fund into the treasury, but with the rate Mexico herself deemed reasonable, and paid to other creditors representing like demands, as shown by the report of Manuel Payno, which

[a] See the correspondence proved as Exhibit A to the deposition of Padre Romo de Jesus (Transcript, pp. 159-180; repeated, pp. 470-525). Demand for delivery by inventory No. 6 (p. 164; repeated, p. 483; translation, p. 505).

is in evidence. (Transcript, pp. 22 et seq.) It was in fact a low rate for the time. The United States paid 6 per cent for loans till a much later date.

Now, if the former award is not to be deemed conclusive, there are additions to be made to this capital, as follows:

1. In making it, Mr. Commissioner Wadsworth, whose award was adopted by the umpire as his own, threw out of the account the valuable estate of *Cienaga del Pastor* (which was bringing in an annual rental of $17,100, of which three-fourths belonged to the Pious Fund), because the *instruccion circunstanciada* stated that the property had been attached by a certain Señor Jauregui, and the ultimate fate of that attachment suit was not shown. This would represent at 6 per cent a capital of $213,750. As to this item the decision of the court took the writer by surprise. It appeared to him then that if that property or any part of it was lost to the Pious Fund in consequence of the result of that attachment suit, it was for Mexico to show it, and no effort was made on our part to prove the outcome of the litigation. In fact, it was obviously out of our power. This opinion we still consider a correct statement of the rule of evidence. But having since obtained certain evidence on the subject we have laid it before this court. It appears from page 32 of a pamphlet published in the City of Mexico in 1845 by D. Juan Rodriguez de San Miguel (a gentleman whose writings on the subject are quoted as authority by Señor de Aspiroz, par. 76), and entitled *Documentos relativos al Fondo Piadoso de Misiones, etc., de la Antigua y Nueva California, etc.*, that on October 25, 1842, the very day after General Santa Anna's decree incorporating the properties of the Pious Fund into the public treasury, *Sr. Trigueros*, of the Ministerio de Hacienda, communicates in writing to the "Señores encargados de la tesoreria general" that the "liquidatarios y demas socios de la estinguida empresa de tabacos" had on the preceding day made an offer to purchase from the Government the hacienda Amoles with its *anexas*, the three-fourths of the Ciénaga del Pastor with its *anexas*, both properties of the Pious Fund of California, for a price to be computed by capitalizing their annual rents at 6 per cent per annum, on terms which the President had accepted. And from another communication of the same official, published at page 33 of the same pamphlet, we learn that $3,000 additional were allowed by the purchasers for the *llenos* on the property, they taking the risk of the ownership thereof in case they should be claimed by third persons. Following this is a certificate by Ramon Villalobos that the *escritura de venta* of the property had been executed in the register of the treasury department. The United States has demanded a discovery by Mexico of these letters and this *escritura de venta* under the provision of the protocol constituting this tribunal, and although the demand has not as yet been complied with, we must assume that it will be, and therefore call attention to the fact that it shows that the escritura in question bears date November 29, 1842, and was executed in the presence of Ramon Villalobos by the Señores D. Tranquilino de la Vega and D. Nicolas Maria Fagoagas, ministers of the general treasury of the nation, and that by it they sell and convey to the parties referred to, for the price of $428,500, the three-fourths of the Ciénaga del Pastor with its *anexas*, the Hacienda San Agustin de los Amoles with its *anexas*, viz, San José, La Vaya, San Ignacio del Buey, el Custodio, and Buena Vista.

Now, as the last-named six properties produced a rent of $12,705 per annum, representing at 6 per cent a capital of $211,750, the remainder of the consideration money must have been the price of the Ciénaga del Pastor with its *llenos*.[a]

This discovery renders it unnecessary to inquire into the fate of Mr. Jauregui's attachment suit, for, attached or not attached, the Government sold the property for $216,750, and that sum should be added to the amount of capital allowed by Commissioner Wadsworth and the umpire.

2. He also deducts from the amount of the Government indebtedness to the fund the sum of $7,000, *as a bad debt*, under the date of October 29, 1829. This deduction was erroneous, and the adjudged capital of the said fund should be augmented by the said sum, and the income of the fund by the interest thereon, amounting to $420 per annum. The said commissioner and umpire designate the said sum as a bad debt, referring to the *instruccion circunstanciada* of Don Pedro Ramirez, from which the item is taken; but the text of said document shows this to be an error, resulting from a misunderstanding of its language. The passage in the *instruccion circunstanciada* referring to said item is as follows: "Otro de siete mil ps., que por órden ejecutiva del supremo gobierno, para que entregaren á los Señores Revillas veinte mil, exibió su apoderado, Don Francisco Barrera, en 20 de Octubre de 1829, y un pagaré contra la compañia Alemana-Mexicana que no se cobró" (p. 172), which has been misunderstood. The words "*que no se cobro*" in this passage evidently refer to the *pagaré* or promissory note of the German-Mexican Company, not to the "órden ejecutiva del supremo gobierno." The instruccion circunstanciada of Mr. Ramirez does not therefore designate this item as a bad debt, but states the circumstances out of which it arose, viz., that the Government, desiring to pay Srs. Revilla $20,000, gave an order on the trustees or managers of the Pious Fund for $7,000 thereof, in favor of Don Francisco Barrera, *apoderado* of the Señores Revilla, payable out of the Pious Fund, which he presented on October 20, 1829, leaving, either as a counter security or for some other reason, a "pagaré" or promissory note of the German-Mexican Company, which was not paid. (See testimony of John T. Doyle, and consult the interpreters.)

3. Besides these two corrections, amounting to $223,730, there is the following evidence that on or about July, 1834, the Government borrowed from the fund sums amounting to $22,763.15 under the following circumstances: A law had been passed in 1833 to secularize the missions of California; under this they were to be turned into pueblos, the missionaries exchanged for parochial clergy, etc. Connected with this general scheme it was determined to send a colony up from Mexico to settle in the country. Colonists were invited and enrolled whose expenses, including a small daily personal allowance to each, were to be defrayed by the Government, and the expedition was to set out from San Blas in the corvette *Morelos* and the brig *Natalia*.

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[a] "*Llenos*" as here employed is not to be found in any dictionary. We understand it is a local form of expression for the tools, implements, machinery, etc., on such an estate. Its etymology also suggests that it might include the crop on hand, or, as termed in English law, emblements, *continens pro contento*. This is fully confirmed by the fact that the rent of the three-quarters of the Ciénaga is givên at $12,825, representing at 6 per cent a capital of $213,750, which, with the $3,000 for the *llenos*, makes up exactly the total of the purchase price.

In the same letter (No. 1, Transcript, pp. 160, 500) Mr. Ramirez states that he had paid more than $30,000 on account of a loan of $60,000 which the Mexican Government had raised on mortgage of the Pious Fund, drawing interest at *2 per cent per month*, and that he was under pressing demand for $2,000 more drawn for on him by the Government in favor of Mr. Eustace Barron, British consul, for money furnished to the colonization expedition. These two sums, amounting to $32,000, should, if the matter be open to question, be added to the capital of the fund, together with the above indebtedness of $223,730, amounting altogether to $278,493, and making its total capital $1,714,526, the annual interest on which at 6 per cent is $102,871.56. (See Ramirez, letter 1, above cited.)

The colonization scheme proved an expensive failure, and there is so much reason, on the face of these papers and other circumstances, to suggest the probability that the whole expense of it was defrayed out of the Pious Fund, that if we could persuade ourselves that there is any probability that the court would go behind the award of the Mixed Commission of 1868, we would follow up the clues with confidence of obtaining proof of large sums so expended. But to us it is incredible that this high permanent international court will ever so far undervalue its own decisions as to hold that a demand solemnly adjudged by a similar tribunal can be reopened at the instance of either party; hence, we follow this inquiry no further.

4. In the memorial of the present claim we have said:

> 6. If the adjudication of the tribunal constituted under the convention of July 4, 1868, is not deemed conclusive as to the amount due the claimants on account of the Pious Fund, neither is it conclusive as to the proportion in which the income should be divided between Upper and Lower California, and an equal division between the two former provinces (of Mexico), whatever excuse may have appeared to exist for it in 1875, is at the present day wholly unjust and, indeed, absurd.

Lower California was the name applied to the peninsula that separates the sheet of water called the "Gulf of California," and sometimes the "Mar de Cortés," from the Pacific Ocean. It is a prolongation of the chain of coast mountains of the mainland lying to the north down to Cape San Lucas, where their summits cease to appear above the sea level. It has not a single permanent river, a most scanty rainfall, a very considerable area of desert, and a very small area of arable land; the greater part of it is mountain summits. Prior to the expulsion of the Jesuits its population (almost wholly Indian) may be assumed almost at 50,000. After that event disease speedily set in. Sailors visiting the coast introduced smallpox, measles, and nameless contagious diseases, which swept away the wretched population; "under the austere rule of the Dominicans the majority of the converts relapsed into barbarism."[a] We have two authentic accounts of the general condition of the country from independent observers, and know of no others of any value. Venegas' California, published in Madrid in 1759, and a report made to the Mexican Government, by "Citizen Ulises Urbano Lassépas," and printed in the City of Mexico a hundred years later. Neither the account of the French expedition under Chappe d'Auteroche to observe the transit of Venus, in 1767, nor the Apostólicos Afanes, give general information on the subject. During the period that elapsed between the expulsion of the Jesuits and the publication of Lassépas' book, the ruin of the missionary establishments and the decrease of the inhabit-

[a] Greehow's Oregon, Ch. III, p. 107.

ants of the country are manifest. Venegas' book is accessible in public libraries, and from that of Lassépas (which we believe to be a publication of the Mexican Government), we will append hereto extracts confirming this statement. Upper California, on the other hand, at the time the Pious Fund came into existence, though without definite boundaries, was understood, in Spain and Mexico, to extend up the coast of North America as far as Spain claimed, and eastward indefinitely. In proof of this claim of Spain at the time and after, we need only refer to the difficulty with England about Nootka Sound in 1790, where she asserted sovereignty as far up as latitude 60°. Coronado's great march of discovery (1540–1542), is now known to have taken him as far east as the present State of Kansas. In this enormous stretch of country, called by the Spaniards Alta California, and referred to in the foundation deed, have since grown up several flourishing American States—California, Oregon, Washington, Nevada, Utah, the two Dakotas, Colorado, and Montana. The population of these, according to the last United States census, is 3,714,000, and other statistics as given in the Catholic Directory are as follows:

State or Territory.	Churches.	Mission churches.	Total churches.	Catholic population.
California	162	143	305	317,000
Oregon	42	40	82	50,000
Washington	47	57	104	50,000
Montana	30	33	63	50,000
Nevada and Utah	9	11	20	9,500
Colorado	57	88	145	70,000
Total	347	372	719	632,500

The object of missionary effort lies always in the future. No one who has read anything of Catholic missions among barbarous people will fail to recognize that their leading idea was to get control of and educate the children in Christian habits and morals. They could expect to accomplish little with the adult population beyond inducing them to abandon their nomadic life and dependence on the chase, in favor of stable residence in villages and the cultivation of the soil, to clothe themselves decently, and abstain from polygamy and wars. To divide equally a fund destined for missionary purposes between the inhabitants of two countries so widely dissimilar in character, prospects, population, and the capacity to support population as Upper and Lower California is, as it seems to us, rightly characterized as absurd.

We are aware of and do not undervalue the excuse for it that existed twenty-seven years ago, when the judgment of the Mixed Commission was pronounced. It was then contended by the leading counsel for the claimants that a division in the proportion of 9 to 1, or, perhaps, 8 (Transcript, p. 477) to 1, would be proper, in view of the extent and capabilities of the two countries, but this claim was opposed by gentlemen, resident on the spot, his juniors, who had been retained to assist him and who, regarding the whole business of missions as analogous to commercial partnerships for gain, and relying on judicial decisions that, in the absence of evidence to the contrary, the interests of partners would be presumed to be equal, declared an equal division to be the just one (p. 594). The anticipations of 1875 have been realized by the close of the century, as the above figures show.

The last Mexican census appears to give an increase of population to the peninsula. Assuming its correctness, we have claimed in the memorial in the present case 85 per cent of the income for Alta California against 15 per cent for the peninsula, which is a division decidedly liberal to the latter.

From a publication entitled "*Diccionario Universal de Historia y de Geografia, 10 vols., 4to., México Libreria de Andrade, 1853*," we find that the population of both the Californias in 1793, as stated in the report of Conde Revilla-Gigedo, was 12,666. In 1805 the population of Lower California is laid down as 4,669. In 1810 it is stated at 4,496; in 1842 as 3,766; and in 1851 as 8,290. (Tomo II, pâg. 50 et seq. Verb. Antigua California.)

III. Something should perhaps be said as to the money in which the award should be made, and in reply to the suggestion of Sr. Avila, that interest on so much of the public debt as went to make up the capital of the Pious Fund should not be allowed, for the reasons assigned in his argument for rehearing. (Transcript, p. 642; secs. 158–159.)

These matters may be briefly discussed together. In 1842, when the Pious Fund was incorporated into the public treasury, the standard of money value was the gold dollar. The great depreciation of silver has occurred since that time. As said above, when a sovereign constitutes himself trustee his duties are precisely the same as those of a private person in like case. Were an individual to allow the trust funds in his hands to remain invested in securities that were steadily falling in value, until from par they had gradually sunk to 40 or 35 per cent, or whatever the present value of silver is, no court would hold him free from blame or entertain any excuse for it. And here the trustee is not such by the appointment or will of the founder of the trust established, nor at the suggestion of the beneficiaries; he has thrust himself in the office against the will of both. The Marquis de Villapuente and his wife provided distinctly in the foundation deed (Transcript, 103), "que ambos otorgantes queremos que en tiempo alguno se inculque, ni por ningun juez eclesiástico ó secular se entrometa á saber si se cumple la condicion de esta donacion, pues nuestra voluntad es que en esta razon haya lugar ninguna pretension, y que cumpla ó no cumpla la Sagrada Compañia con el fin de las misiones, en esta materia, solo á Dios nuestro Señor. tendrá que dar cuenta, pues tenemos la entera satisfaccion de que cumplirá con su obligacion, y hara lo que fuere mas del agrado de Dios neustro Señor."

The bishop who represented the beneficiaries protested against the act. A trustee who comes in thus *in invitum* can hardly be heard to allege any reason for failing to pay his own indebtedness to the trust estate. And the excuse which Señor Avila puts forward for him is of the flimsiest sort. He says (Transcript, p. 644, § 171): "Por último, obligar al Gobierno de México al pago de réditos de una parte de su, deuda pública, cuando es notorio que no pueda pagarlos á todos sus acreedores, es establecer un privilegio irritante en beneficio de una corporacion Americana," etc., but the court will not fail to remark that the privilege is the direct and necessary consequence of the acts of Mexico herself. She was not asked to take upon herself the position of a trustee. She did it *ex motu proprio*, and in doing so gave to the *cestuis que trustent* or beneficiaries the right to say, "we are not ordinary public creditors. We have ceased to be such by your act. You,

by forcing yourself on us as trustee, have made us preferred creditors. Whatever reduction, abatement, or concession you may make with other creditors, you have by your new act bound yourselves to pay us in full. You have sunk your character of sovereign in that of trustee and must abide the consequences."

Such was the view taken of the case by the former Mixed Commission, and its judgment is binding on both parties, not only by the nature of the case, but by the express terms of the convention of 1868, as above quoted.

The obligation of a trustee to pay what is due by him to his *cestui que trust* is held sacred the world over. We do not believe that a bankrupt or insolvent law of any country provides for the discharge of the debtor from such debts. Here the the question propounded by the protocol is, *Is this a just claim?* We answer it by the counter question, *Can any upright mind doubt it?*

Writing without any knowledge of what may be alleged on the other side by the eminent gentlemen charged with the defense of the interests of Mexico in the present case, except so far as may be surmised from the former one, we have omitted the discussion of questions then considered, in the confidence that the learned judges presiding here will do us the honor to read our arguments before that tribunal, at pages 80, 462, and 557 of the printed Transcript. The only matter discussed in them to which we shall specially allude here is the transactions between Mexico and Spain as to the fund of the Philippine missions, regarding which we are now better informed than we then were. As stated in a note to page 16, all the endowment of the Philippine missions existent in Mexico, except two estates of minor importance, was derived from the residuary estate of Señora Arguelles already mentioned. During the war of independence remittances of the income to the Philippines were suspended, but after the establishment of Mexican independence an agent of those missions came to Mexico to obtain the arrears. The two small estates called "la chica" and "la grande" had been sold, and Mexico agreed to pay for them the sum of $115,000, besides $30,000 additional for back rents or interest. This agreement was evidenced by a convention between Spain and Mexico dated November 7, 1844, the text of which is to be found in the "Colleccion de tratados con las naciones estranjeras, leyes y decretos que forman el derecho internacional Mejicano" (Mexico, 1854), at page 516. This was Mexico's formal acknowledgment of what she regarded as her duty in that case. On the former arbitration, D. Manuel de Aspiroz fell into the error of supposing that this concession to Spain was one of the inducements to her acknowledgment of Mexican independence (p. 249, par. 136, etc.). But this was shown (at p. 474) to be a mistake, for Spain acknowledged the independence of her former colony by the treaty of Madrid, December 28, 1836, eight years before the signing of the convention of November, 1844.

The latter, however, only disposed of the two haciendas mentioned which have been alienated. The interest of the Philippine missions in the residuary estate of Señor Arguelles remained, and could not be denied. Of these properties, too, some at least had been sold, and Mexico agreed to pay over the prices received for them. She seems also to have made some arrangement by which the three-fourths of the "Cienega del pastor" and the house on Vergarra street, which had

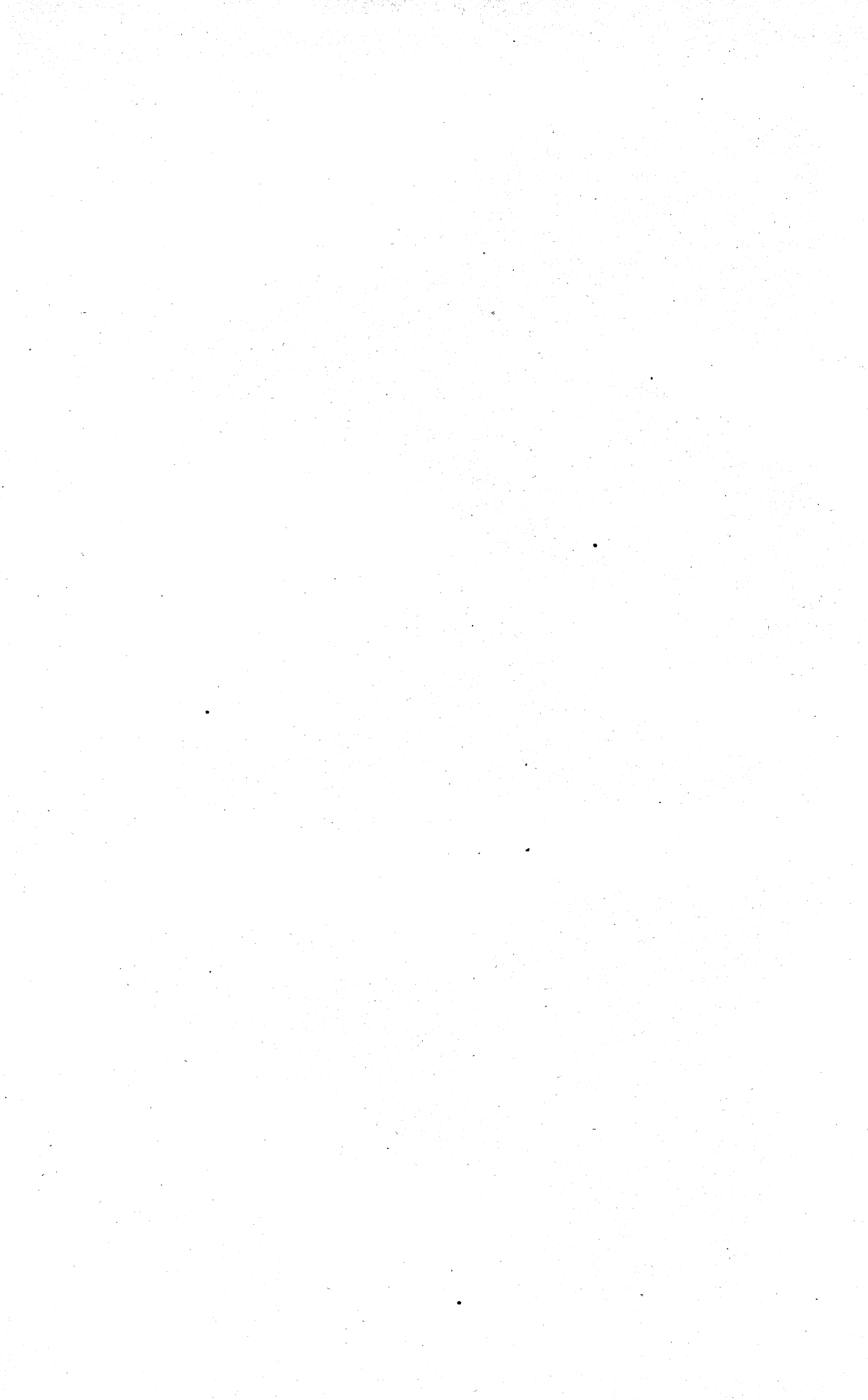
been owned by the Philippine missions and the Pious Fund in common, should thereafter belong to the latter in severalty,[a] and further negotiation with Padre Moran and the Spanish minister led to a second convention, of December 6, 1851, which is found at page 32 of the Transcript, followed by a statement of the sums paid and remaining due under it, taken from Manuel Payno's report. The author earnestly resents agreeing to pay the sums shown by the books of the treasury department to have been received for the property, instead of calling on Spain to prove them by other evidence. Payno's statement is too lengthy to be summarized here, but fully bears out all we have claimed for it.

With this imperfect review of it, we respectfully submit the case to the impartial and enlightened consideration of the court, with the final observation that the promise to pay the interest is dated October 24, and in the absence of a special agreement the installments of interest mature on that day, in each succeeding year thereafter. The latest included in the former award was that which matured October 24, 1868. Thirty-three have since accrued, and another will become due October 24, 1902. A table showing the dates and amounts herein discussed will be hereto annexed, or presented herewith.

JOHN T. DOYLE,
W. T. SHERMAN DOYLE,
Of Counsel for the Prelates.

MENLOPARK, CAL., *August, 1902.*

[a] They probably bought out the Philippine mission interest with moneys of the Pious Fund.



SUPPLEMENTAL BRIEF ON BEHALF OF THE UNITED STATES.

[Prepared by Mr. Garret W. McEnerney.]

The memorial presented to the former Arbitral Court by the Archbishop and the Bishop of California (Transcript, p. 9) was accompanied by a "Brief history of the Pious Fund of the Californias," prepared by Mr. John T. Doyle, who has had professional charge of the matter since 1853. This history will be found in the Transcript, pages 17–22. Mr. Doyle also prepared, and there was likewise presented to the former Arbitral Court, a collection of the extracts necessary to sustain the citations of certain historical and other authorities referred to in the "brief history" in support of its text. (For these "extracts" in the original French, Italian, Spanish, and German, but untranslated, see the Transcript, pages 187–221. The United States has prepared an English translation of these extracts for the use of the court.)

The "brief history" was in no way impeached by Mexico at the hearing of the former arbitration, nor upon the argument thereof.

Upon the contrary, it was in all its essential features confirmed by the text of the written argument of Don Manuel de Azpiroz, counsel for Mexico, and by the appendixes attached to his argument. (Transcript—English, pp. 369–462; Spanish, pp. 222–369.)

We might therefore safely rely upon the "brief history" for a full, fair, and undisputed statement of our case. But during the progress of the former arbitration the accuracy of the "brief history" was often confirmed by additional and later investigation as well as by evidence produced by Mexico.

We think that the proof obtained from these two sources will materially assist in properly presenting the facts of the case to the court.

We shall not be content, therefore, merely to refer the court to the "brief history" for the facts of the case. But we shall, in considering the propositions hereinafter made, refer the court to the particular facts which we consider appropriate to illustrate the point or enforce the argument with which we may be dealing at the moment.

I.

THE PIOUS FUND OF THE CALIFORNIAS HAD AN UNBROKEN AND GENERALLY RECOGNIZED EXISTENCE FROM 1697 DOWN TO THE CESSION OF UPPER CALIFORNIA TO THE UNITED STATES OF AMERICA BY MEXICO IN THE TREATY OF GUADALUPE HIDALGO (OR OF QUERETARO) OF FEBRUARY 2, 1848.

The period from 1697 to 1716.

It has come to be an accepted fact that "the Pious Fund of the Californias" had its origin in 1697 in money collected from charitable

people to enable Fathers Salvatierra, Kuhn (Kino), Ugarte, and Piccolo to commence their missionery efforts in California.

While but two of these four missionaries actually labored in the Californias, nevertheless all four were engaged in the missionary enterprise.

Attached to the argument of Señor de Aspiroz will be found the permission of the viceroy, dated February 6, 1697, whereby the missionaries were granted permission "to penetrate into the provinces of California and convert the Gentiles there residing, upon the terms and conditions set forth in this instrument." (Transcript—English, pp. 401–403; Spanish, pp. 254–255.)

In his argument Señor de Azpiroz said that "the conquest of California was commenced by the Society of Jesus upon the charitable contributions collected by Fathers Salvatierra and Ugarte, at the beginning of 1697, and was thus continued for some time without becoming a burden upon the royal treasury, which was one of the conditions contained in the permission authorizing it." (Transcript—English, p. 374; Spanish, p. 226.)

He also mentions a number of contributions to the fund made as early as 1703, which aggregate $55,000. (Transcript—English, p. 374; Spanish, p. 227.)

Señor de Azpiroz also states upon the pages last cited that—

> Up to this time (that is, the year 1716) the means belonging to those (that is, the missions) already established had not been delivered to the society; the founders retained it in their possession and paid the annual interest, which reckoned for each of them from the date of their establishment. * * * Father Salvatierra in 1717 requested and obtained permission to receive the capitals and invest them in real estate, which he did through Father Romano, the attorney of the missions. This permission was indispensable, because the Society of Jesus was not competent to acquire temporalities.

Accepting this statement as true—we have no information by which we are able to affirm or deny it—it will be seen that until 1716 the principal donations for the propagation and maintenance of the Catholic religion in California had a close analogy to what is known in English and American jurisprudence as "a covenant to stand seized to the use of another."

The chief contributors to this fund, beginning with the year 1697 and running down to the year 1716, in substance covenanted to hold to the use of the missions the capital of their contributions, and of course to pay over, from time to time, the income or interest thereon.

It may be said, therefore, that the twenty years intervening between 1697 and 1717 saw the origin and early growth of the Pious Fund and the delivery of the capital thereof to the Jesuits for administration.

The period from 1717 to 1768.

The Jesuits had possession of this fund and administered it during the next fifty years; that is, from 1717 until their expulsion from Mexico in 1768, under royal decree of Charles III, dated February 27, 1767, which will be found in the Transcript—English, page 410; Spanish, page 262.

During this period of fifty years the fund grew to great proportions.

Minor contributions amounted in 1731 to $120,000. (Statement and brief on behalf of the United States, p. 8.)

In 1735 there were conveyed *to the missions* by deed of the Marquis de Villapuente and the Marquesa de las Torres de Rada estates of great area and value. The estates comprised 450,000 acres of land and were estimated to be of the value of $408,000. The deed by which this enormous benefaction was conferred upon the missions was evidently drawn with much skill and care. It is to be found in English on pages 104 and 452 of the Transcript, and in Spanish on pages 99 and 309.

In the deed (Transcript, foot of p. 104) it is recited that the Marquesa de Rada is indebted to the Marquis de Villapuente in the sum of $204,000, "whereby our rights in the premises are just and equal." This recital shows that the grantors formally estimated the estates conveyed at the value of $408,000.

The legacies of the Duchess of Gandia to the fund amounted, it is supposed, to $120,000. The account of this benefaction is taken from Clavigero's History of California (Venice, 1789). The extract, in Italian, is to be found in the Transcript, page 198. It is also to be found in English in the translation of extracts, pages 8 and 9. The translation reads as follows:

Two things were needed to advance the missions to the northward as the missionaries desired, namely, the capital to found them and the locations to establish them in, and there was no hope of the one or the other until God moved the mind of an illustrious and most noble benefactress. This was the Duchess of Gandia, Doña María Borja, who, having heard an old servant of hers who had once been a soldier in California speak of the sterility of that region, the poverty of the Indians there, and the apostolic labors of the missionaries, thought that she could not do anything more pleasing to God than to devote her fortune to the aid of these missions. She therefore ordered in her will that there be provided out of her ready money those large annuities which she left her servants during their lives, and that all the rest of her estate should go to the missions of California, together with the capitals of the above-mentioned annuities after the death of those who enjoyed them; and that a mission, consecrated to the honor of her beloved ancestor, St. Francis Borgia, be founded in said peninsula. The sum of money acquired from this legacy by these missions amounted in 1767 to $60,000, and a like amount ought to be obtained after the death of the pensioned servants over and above some very large debts which there was hope of recovering. With such a large capital many missions could be founded in California, as in fact they would have been founded if the Jesuits had not been obliged in the above-mentioned year to abandon that peninsula. (Id., pp. 139, 140.)

Under the will of Señora Arguelles, who died before the expulsion of the Jesuits, and through power to appoint to missionary uses, exercised by the Spanish Crown in favor of the Pious Fund of the Californias, the fund received a benefaction of $600,000.[a] (Transcript, p. 467.)

The will of Señora Arguelles was the subject of litigation for more than twenty-five years, and the fund did not receive this benefaction until after the close of the litigation, which occurred in 1793. (Transcript, annexes 16 and 17 to the argument of Señor de Azpiroz—Spanish, pp. 315, 317; English (memorandum), pp. 456–457; see also Payno's report, Transcript, pp. 23–24.)

In speaking of the Arguelles benefaction, Mr. Doyle said in his argument before the former arbitral court (Transcript, p. 467):

On May 29, 1765, Doña Josepha Paula de Arguelles, a wealthy lady of Guadalaxara, executed her will, wherein she bequeathed $10,000 to a foundling hospital at Manila, one-fourth of the residue of her property to the Jesuit College of St. Thomas Aquinas, in Guadalaxara, and the other three-quarters to the missions in China and New Spain. She died about a year and a half thereafter, leaving an estate of about

$600,000.[b] The Jesuits, at that time pressed by a storm of obloquy in Spain and Portugal, renounced the legacy in their favor, and the heirs of the deceased lady brought an action to have her declared intestate as to all her estate save the small legacy to the foundling hospital. The Crown intervened in the action, claiming the portion bequeathed for missions, and one Agustin de Mora in like manner put forward a claim for "sustitucion vulgar" with respect to the quarter bequeathed to the college, but on behalf of what institution or in what right I have been so far unable to discover. It will be remembered that at this time the missions, both in New Spain and the Philippines, were in the hands of the Jesuits, *so that if their renunciation could affect the bequests in favor of the missions in their charge, the heirs had as clear a case as to the three-fourths bequeathed to the latter as they had for the quarter bequeathed to the college.* The case, after going through the lower courts, came before the "Audiencia Real" of New Spain on appeal, which tribunal on June 4, 1783, gave judgment denying Mora's claim for the "sustitucion vulgar" as to the quarter bequeathed to the college, and declared the deceased, in consequence of the renunciation of the Jesuits, *intestate as to that quarter.* As to the other three-quarters, however, it decided that *the missions took under the will, and* declared that said three-quarters, therefore, vested in the Crown,[c] to be employed in the conversion of the infidels in this Kingdom and the Philippines (one-half in each) under the orders of the King, whom it especially concerns; and that a report be made to His Majesty to the end that he may be pleased to determine what may be his sovereign will with respect to the *direction, consistency, and security* of the funds so destined for the pious work of missions. This decree simply vested in the Crown a power of appointment as to what particular missions should be supported out of the bequest, subject to the sole condition that one-half should be destined to Asia and the other to America.

The Crown exercised its power of appointment by ordering one-half of the three-quarters so devised to be aggregated to the Pious Fund of California, and the other half to the missionary fund of the Philippine Islands. The decree was carried by appeal before the council of the Indies, where the *fiscal defensor del fondo piodoso de las Missiones de California* was made respondent, and where the judgment was finally affirmed. The Crown then directed the property to be sold and invested at 5 per cent per annum in the best real estate securities, *para invertir sus productos en la subsistencia y aumento de dichas missiones.* The sums derived from this bequest are enumerated in the treasury report contained in Manuel Payno's work on Mexico and her financial questions, which has been heretofore referred to and put in evidence. In that report three-eighths, i. e., one-half of three-quarters of each sum as received in the treasury is credited to the Philippine Missions; other three-eighths belonged

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[a] After the lapse of so long a time it is impossible to state with exactness the value of the Arguelles estate or the amount of the benefaction received therefrom by the Pious Fund of the Californias. At one time it was supposed that the entire estate amounted to only $600,000. In a report by the district attorney of the circuit court at Guadalajara, made for the Mexican Government on August 25, 1871, for use before the former arbitral court, it is said that the Arguelles estate amounted to more than $800,000, and that the inventories were in Spain. (Transcript, pp. 458–459.)

It is now believed that the benefaction received by the Pious Fund alone amounted to a sum variously estimated from $450,000 to $600,000. We know that there was paid to the public treasury from the Arguelles estate for the account of the Pious Fund $306,901. (Transcript, p. 24.) The Cienaga del Pastor was sold by Mexico on November 29, 1842, for $213,750, and the personal property thereon sold for $3,000 more. (Replication, p. 47.) This property came from the Arguelles estate.

The houses on Vergara street, which likewise came from the same estate, were rented for $3,500 per annum. (Transcript, pp. 512–513.) The Pious Fund owned a three-fourths interest. Three-fourths of $3,500 capitalized at 6 per cent corresponds to $43,750. The sum total of the four principal amounts above mentioned is $567,401.

It is possible that some undivided interest in the Cienage del Pastor and in the houses on Vergara street were purchased by the Pious Fund with surplus moneys on hand. (Brief of Messrs. Doyle & Doyle, p. 27.) If so, the amount of the Arguelles benefaction could be ascertained with reasonable definiteness by subtracting from the $567,401 the sum paid for the acquisition of interests held by other persons and secured by the Pious Fund. In any event, however, the amount received by the Pious Fund by way of benefaction from the Arguelles estate ranged in value from $450,000 to $600,000.

[b] This decree passed after the expulsion, indeed after the suppression of the Jesuits; hence the trust devolved of necessity on the Crown as *parens patria.*

and were credited to the Pious Fund of California, and the remaining one-fourth to the heirs of the decedent, who, as to that one-fourth, were decreed to take *ab intestato.*" [a]

A reference to Manuel Payno's report (pp. 22–24) will show that there was received into the treasury of New Spain for the account of the California missions, arising out of the Arguelles benefactions, $306,901. This report of Manuel Payno's is a publication made by authority of the Mexican Government, as will be seen from the deposition of Mr. Payno (Transcript, p. 36). It is stated in the report (Transcript, p. 22) that it was prepared in anticipation of a financial arrangement then about to be made between the Republic of Mexico and "the commission of the three allied powers." It seems clear that the three allied powers referred to were France, Great Britain, and Spain, for on October 31, 1861, these powers entered into a convention for concerted action against Mexico upon claims due to their subjects. (2 Moore's International Arbitrations, pp. 1289–1291.)

During the period we have been now considering, from 1717 to 1768, thirteen missions were founded in Lower California, as follows (Transcript, p. 150):

San José del Cabo, Santiago de los Coras, N. S. de Loreto, San José Comondu, La Purisima de Cadegomo, N. S. de Guadalupe, Todos Santos, Francisco Xavier, Santa Rosa de Muleje, San Ignacio, Santa Gertrudes, San Francisco de Borja, Santa Maria de los Angeles.

The period from 1768 to 1821.

The independence of Mexico is regarded to have been achieved in 1821 (2 Moore's International Arbitrations, p. 1209), although the treaty by which Spain recognized that independence was not concluded until December 28, 1836.

From the expulsion of the Jesuits in 1768 until Mexico achieved her independence the fund was administered by the Crown of Spain through officials appointed for that purpose.

The trust character of the fund and its inviolable dedication to the establishment and maintenance of the Catholic religion in the Californias were always recognized.

In the royal decree of the 27th February, 1767, concerning the banishment of the Jesuits, it is said (Transcript, p. 411, subdivision 5):

> I further declare that the taking possession of the temporalities belonging to the order embraces their property real and personal, as well as the ecclesiastical revenues which legally belong to it, within the Kingdom, but *without prejudice to such charges as may have been imposed upon them by their endowers.*

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[a] The money received for the heirs is conceded to be a trust fund coming into the treasury as one of its *ramos ajenos*. That received from the Philippine missions was in the same category, and on demand of the King of Spain the arrearages were paid to Father Moran, representing the president and chief ecclesiastical authority of those missions, as the proper person to demand and receive it. How can the demand of the bishops of California for the remaining three-eighths be resisted? "*Ubi eadem est ratio idem jus.*"

Other legal corollaries are suggested by these legal proceedings. Why was the renunciation of the Jesuits effectual as to the quarter bequeathed to the college, and otherwise as to the bequest in favor of the missions in their charge? Obviously, because the former was their private foundation and property, while the latter belonged to the beneficiaries for whom they were but trustees, and whose right they could neither renounce nor forfeit.

In the course of his argument before the former arbitral court Señor de Azpiroz, counsel for Mexico, said:

> Upon the expulsion of the regulars the King took possession of their temporalities within his dominions, and among these was included the Pious Fund of the Californias. Nevertheless, this was separately administered and its proceeds continued to be employed *for the purposes for which they were instituted* by the civil officers of the Crown. (Transcript, p. 375, par. 33.)

In an official report on the state of the missions, made in obedience to a royal order dated January 31, 1784, it is stated:

> Each missionary receives a stipend of $350 per annum, which is paid out of the gross of the Pious Fund acquired by the Jesuit Fathers, and to which I will refer in its proper place. (Transcript, p. 420, par. 19.)
>
> They receive no contributions or duties, but each mission receives a stipend of $400 per annum drawn from the Pious Fund left by the extinct regulars. One thousand dollars from the same fund is also furnished both to the Fernandinos and Dominicans, respectively, for the establishment of each new mission. (Transcript, p. 423, par. 38.)

We learn from the official archives kept by Spain and preserved by Mexico, which contain an official history of "the Pious Fund of the Californias" (see anexo No. 6 to the argument of Señor de Azpiroz, par. 3: English, p. 425; Spanish, p. 277), that the Spanish Crown—

> *without losing sight of the pious purpose to which they were devoted*, by order of the 12th October, 1768, directed Fernando Mangino, the director of temporalities, *to pay special attention to the examination of the property destined for the propagation of the faith in that peninsula, which worthy object demanded every care.*

In the same official history (from which we have just quoted) it appears that the annual salaries for the administration of the fund were fixed at $1,000, "with which the fund was charged." Furthermore, it is therein recited that "to such religious ends as the propagation of the faith there were, and still remain, *dedicated* the extensive estates" of which the Pious Fund was comprised. It proceeds to name them. (Transcript, p. 136, pars. 4, 5.)

We also find in the official history a "statement of funds on hand, exceptional deposits and bonds, which constituted the Pious Fund on the 16th of November, 1792, together with the yearly income estimated by periods of five years, the expenses of the missions, and other ordinary expenses of the fund." (Transcript, p. 432.)

The total amount of the fund is said to have been at that time $828,936.14. The gross income is fixed at $55,177.38. The expenses of the missions are $22,550 and the other expenses $24,150. This leaves an annual excess of income over expenditure amounting to $8,473.37. It is said in this official history "that this yearly excess ought to be applied to the establishment of a college as a place of rest for the missionaries, according to the wishes of the Marquis de Villapuente, the pious endower of the missions, and although more than $100,000 has been gotten together for this purpose, it became necessary to invest this amount in various indispensable works erected at the hacienda of Arroya Zarco." (Transcript, pp. 432-433.)

From the same official history, paragraphs 7 and 9, we learn (Transcript: English, p. 426; Spanish, p. 278) that an agreement was made, March 21, 1772, between the board of war and treasury department on the one hand and the Dominicans and Franciscans on the other, by which it was agreed that the Dominicans should have charge of

the missionary work in Lower California and that the Franciscans should have charge of the missionary work in Upper California.

Before this time, however, to wit, on the 8th of April, 1770, His Majesty the King of Spain, by royal order, had directed a division of the missions between the Dominicans and Franciscans. (Transcript—English, p. 426; Spanish, p. 278.)

The missionary labors of the Franciscans in the Californias began earlier than 1770, for we find that in 1769 they journeyed overland from Lower California to Upper California, and on their way thither founded in the same year the Mission of San Fernando de Villacata, which was then the most northerly mission in Lower California. (Transcript, p. 19.)

The action of the Spanish Crown in relation to the missions and their conduct by the Dominicans and Franciscans, make it clear that there was no intention on the part of that Government to divert or attempt to divert the Pious Fund from the support of the missions in California. It is obvious that but for this Fund the missionary work in that country would have been abandoned. It was impossible to carry on the work without the financial support derived from the Pious Fund, which was relied upon by the Franciscans and Dominicans.

It is idle therefore to stop to consider whether the Spanish Crown would have had the power to divert these funds or not. If it had any such power it never exercised it; on the contrary, if there was any power exercised it was one of renewed dedication of the Pious Fund to the missions of the Californias.

It must also be kept in mind that neither the Franciscans nor the Dominicans could have engaged in this missionary work without the consent of the Holy See. Also that the Holy See is the ecclesiastical superior of all religious orders and of all the clergy of the Roman Catholic Church. In the matter of the administration of the religion and worship of that church it must be conclusively presumed that the orders of the church consent to what the Holy See requires to be done.

By the year 1823 the Franciscans had established in Upper California 21 missions, which, with the mission founded by them in Lower California in May, 1769, as already stated, made their foundations in the Californias 22 in number.

The 21 missions founded by the Franciscans in Upper California, with the date of the foundation of each, is as follows (Transcript, p. 150):

Name.	Date.	Name.	Date.
San Diego	1769	La Purisima	1787
San Carlos or El Carmelo	1770	San Luis Rey	1790
San Gabriel	1771	La Soledad	1791
San Antonio	1771	Santa Cruz	1791
San Fernando	1771	San Miguel	1797
San Luis Obispo	1772	San Juan Bautista	1797
San Juan Capio	1776	San José	1797
San Francisco Assis	1776	San Ynez	1804
Santa Clara	1777	San Rafael	1817
San Benaventura	1782	San Francisco Solano	1823
Santa Barbara	1786		

In the report of the treasury of Mexico which relates to "The Pious Fund," compiled June 17, 1793 (Transcript—English, pp. 135–146; Spanish, pp. 124–135), we find repeated acknowledgments of the trust character of the fund.

It also therein appears that His Majesty the King of Spain directed that "the administration of the said fund shall be kept with entire separation" (Transcript, p. 143, sec. 20), also that on October 1, 1781, the viceroy communicated to the director of the temporalities a royal decree, shortly before that time made, whereby it was provided that the director of temporalities "shall proceed immediately to the sale of those (i. e., the properties) of the Pious Fund, and that you shall secure the amount thereof *in favor of the missions*, giving due advice thereof to the department under my (the viceroy's) charge." (Transcript, p. 143, sec. 22.)

It having been brought to the attention of His Majesty, however, that such a sale was contrary to the expressed wish and will of the Marquis de Villapuente, another royal decree was made on December 14, 1785, whereby, in view of these facts, His Majesty "has been pleased to order that, for the present, the sale shall be suspended and the administration continued," and whereby, furthermore, His Majesty "bearing in mind the instructions of the Marquis of Villa Puente, who gave his estates for that purpose, has been pleased to order that the surplus money shall be invested in safe landed property for the increase of the funds." (Transcript, p. 144, secs. 26, 28.)

The period from 1821 to November 2, 1840.

From some date which can not be ascertained with precision (but which occurred after the achievement of Mexican independence in 1821) until the surrender of the properties of the Pious Fund of the Californias by Mexico to Bishop Francisco Garcia Diego, on November 2, 1840 (Transcript, p. 520), these properties were under the care and control of Mexico.

There is, however, no claim that she ever disputed the trust character in which she held them.

Indeed, it is claimed in the answer of Mexico to our memorial upon the present arbitration (Replication, p. 20), that—

> The Mexican Government, which succeeded the Spanish Government, was, as the latter had been, trustee (comisario) of the fund, and in this conception, successor of the Jesuit missionaries, with all the rights granted to them by the founders.

It will be seen, therefore, that it is an admitted fact in this case that Mexico always held and administered the Pious Fund *as a trust estate*.

She herself claims, in the answer already mentioned, that she had all of the rights of the Jesuits. This argument necessarily concedes that she, Mexico, had all the duties of the Jesuits in respect of the Fund.

We shall hereafter consider precisely what the duties of Mexico were with respect to the Fund.

But for our immediate purpose we rely upon the deliberate admission of Mexico that she held the Pious Fund as trustee. (The law of May 25, 1832.)

Among the proofs of her recognition of her duties as trustee is that contained in the legislative act of Mexico, dated May 25, 1832, which

provides that the rural properties *belonging* to the Pious Fund of the Californias should be leased.

The full text of the act is as follows:

LAW: That the Government proceed with the lease of the rural property belonging to the Pious Fund of the Californias.

ARTICLE 1. The Government shall proceed to rent the rural property belonging to the Pious Fund of the Californias for a term which shall not exceed seven years.

2. These leases shall be contracted at public auction in the capitals of the States or Territories or in the Federal city, according to the location of the property.

3. These leases shall be announced by the public crier within three months of the date of this decree for thirty days, and at least for the same period shall be announced by printed notices in the Federal city, in the capitals of the States and Territories, and in the principal places of the districts, departments, or region in which the properties may be situate, and in such other places as the Government may deem expedient, and these announcements shall be inserted in at least one newspaper of the Federal city.

4. The conclusion of any lease shall, within three months, be announced by the public crier, or, if there be no lessee, the announcement shall be made every six months.

5. The making of the lease shall be subject to the approval of the Government, to which the papers in the case shall be submitted for this purpose within fifteen days after the making thereof.

6. The proceeds of such properties shall be deposited in the treasury of the Federal city, to be solely and exclusively destined for the missions of the Californias.

7. The direction and management of these properties, not only with respect to their administration, but with respect to the collection and employment of their proceeds, shall be under the charge of a board accountable to the Government through the office of the secretary of foreign affairs.

8. This board shall be composed of three persons, appointed by the Government, one of them to be an ecclesiastic. Commencing with the member last appointed, one of the board shall be retired, and a person appointed in his place each year; the members are eligible for reappointment.

9. This board shall have a secretary, with a compensation of 600 dollars per annum, payable from the funds in question.

10. The powers of the board shall be as follows:

First. To see that the rural and city properties belonging to the Pious Fund in question be suitably leased.

Second. To submit to the Government the conditions under which the leases should be made, and the minimum sum to which the rent of each estate should amount.

Third. To examine the papers relative to the making of the leases, and to advise the Government if the leases should be approved or if the propositions made by some other applicant are more advantageous.

Fourth. To submit to the Government the number of persons that it deems absolutely necessary for the administration of the rural properties when the said properties can not be leased for want of bidders.

Fifth. To submit the amount of compensation of the administrators and of the bond with which each must guarantee his management.

Sixth. To see to it that the lessees or administrators submit information as to the qualifications of their respective sureties and the certification of survivorship.

Seventh. To lay before the auditor-general a general account of the proceeds of the properties of the Pious Fund accompanying those of the administrators, if any, for which purpose these accounts shall be seasonably demanded from the latter.

Eighth. To see to it that the lessees and administrators on their part shall in their turn and at the proper time verify the deposits in the treasury.

Ninth. To name to the Government the amounts which may be remitted to each one of the Californias in accordance with their respective expenses and available funds.

11. The secretary shall keep a journal of the proceedings of the board, statement of moneys deposited in the treasury, the entries in which shall be supported by the vouchers delivered by the superintendent of said treasury, and another book of the amounts which are drawn against the same. All the entries, whether of debit or credit, in the treasury shall be signed by the members of the board.

12. The superintendent of the treasury shall receive 1 per cent premium on the

amounts that may be deposited with him, shall be responsible for the same, and such payments only shall be credited to him as he may make under warrants signed by the members of the board, authorized by the secretary of the said board, and with the approval of the secretery of foreign affairs.

13. The board shall, within three months after its organization, frame its internal regulations and submit the same to the approval of the Government.

The first important point in that act which should be noted is that Mexico expressly declares that the rural properties *belong* to the Pious Fund.

Secondly, there is no power exercised, nor is any power claimed, to dispose of the property, except to remit "to each one of the Californias, in accordance with their respective expenses and their available funds." (Sec. 10, subdivision 9.)

There are other legislative evidences that Mexico recognized her duty as a trustee throughout the period under consideration. These need not, however, be cited. It is sufficient for the present controversy that it is an undisputed proposition, made so by the answer of Mexico, that she never made any claim of title to this property, except as a trustee thereof.

THE LAW OF SEPTEMBER 19, 1836.

The law of September 19, 1836, "concerning the erection of a bishopric in the two Californias" (Transcript, p. 580), with which the court is already familiar, is another recognition by Mexico of its duty with respect to the Pious Fund.

In that act it is provided that "the property *belonging* to the Pious Fund of the Californias shall be placed at the disposal of the new bishop *and his successors*, to be by them managed and employed for its objects or other similar ones, always respecting the wishes of the founders of the Fund."

The full text of that act is as follows:

LAW: For the establishment of a bishopric in the two Californias.

ARTICLE 1. The Government, after hearing such parties as by law may be entitled to a hearing on the subject, and such other persons as it may think proper to hear, shall thereupon make a report with regard to the necessity of creating a bishopric in the two Californias.

ART. 2. If the report should show that there is such a necessity, the Holy See shall be duly informed of the report, for it to approve of it and create such a see.

ART. 3. The Government shall select from three nominees, presented by the archbishop's council, the person whom it thinks most suitable, and submit his name for appointment to His Holiness.

ART. 4. The person elected shall receive from the public revenues six thousand dollars per annum, until such time as the bishopric shall be in receipt of a sufficient income.

ART. 5. During a continuation of the same circumstances the public revenue shall furnish a subsidy of three thousand dollars for despatching the bulls and the traveling expenses of the episcopate.

ART. 6. The property belonging to the Pious Fund of the Californias shall be placed at the disposal of the new bishop and his successors, to be by them managed and employed for its objects or other similar ones, always respecting the wishes of the founders.

By the enactment of this law, and by the subsequent surrender of the property belonging to the Pious Fund to the Bishop of California, presently to be mentioned, Mexico simply discharged its clear duty as a trustee in possession of the fund.

THE LAW OF APRIL 1, 1837.

On April 1, 1837, Mexico enacted the following law:

LAW: The Government is authorised to negotiate a loan, which shall not exceed $60,000, for one year, with the least possible interest, by a mortgage of the fund of the Californias.

ARTICLE I. The Government, *by means of the directive board of the Pious Fund of the Californias,* shall negotiate a loan for a sum which shall not exceed $60,000, for one year, with the least possible interest.

ART. II. *For its payment the said Government shall deliver over to the board orders for the whole sum* against the maritime custom-houses, which are not exclusively assigned to the support of the army in Texas, over which it will not subsequently give preference to others; *moreover, it will mortgage said fund, coming upon this point to an agreement with the ecclesiastical authority.*

ART. III. No sum derived from the loan or order of which there is mention made in foregoing articles shall be devoted to any other employment than to put in order the department of the Californias, or to discharge said debt, the Government rendering an account to Congress, with respect to the first purpose, every three months, and the board, with respect to the second, every six.

On April 27, 1840, His Holiness Gregory XVI, upon the petition of Mexico, erected Upper and Lower California into a diocese and appointed as its first bishop Francisco Garcia Diego, at that time and for some time before president of the missions of the Californias. (Transcript, p. 182.) Bishop Diego was consecrated on October 4, 1840. (Transcript, p. 21.) On November 2, 1840, the properties of the Pious Fund were surrendered to him by Mexico in conformity to its duty as trustee, recognized by its legislative act of September 12, 1836 (Transcript, pp. 495, 520).

Upon the surrender of properties of the Pious Fund by Mexico to Bishop Diego, he appointed as his agent to manage these estates in Mexico (his see in Monterey in Upper California being several hundred miles distant) Don Pedro Ramirez. He also appointed as special agent for the rural estates Miguel Balanzaran. Mr. Ramirez received the rents, paid the expenses, and attended generally to all the business of the Pious Fund. He was *apoderado* or attorney in fact. (Transcript, p. 149.)

The period from November 2, 1840, to February 2, 1848.

From November 2, 1840, until the cession of Upper California to the United States under the treaty of Guadalupe Hidalgo of February 2, 1848, in consideration of $18,250,000, Mexico took no measures with respect to the properties of the Pious Fund, except those to be hereinafter noted.

On January 26, 1842, the minister of justice wrote to Señor Ramirez requesting him that he pay out of the Pious Fund to the English consul at Tepic $2,000, advanced for an expedition which took settlers to Upper California. (Transcript, p. 499.) Mr. Ramirez replied to this letter under the date of January 28, 1842, and suggested, among other things, that as the Government was indebted to the bishop of the Californias in the sum of $8,000 and over on account of the salary assigned to him for his support, it (the Government) should itself pay the $2,000 on account of the $8,000 due. (Transcript, p. 500.)

The only reply to this letter was one of February 5, 1842, wherein the minister of justice says:

It being necessary for this ministry to know all the goods and properties constituting the Pious Fund of Californias, I hope you will be pleased to transmit immediately the corresponding information. (Transcript, p. 501.)

On the same day Mr. Ramirez replied, giving a brief report of the properties of the Pious Fund. (Transcript, p. 501.)

The next communication was a notice from the minister of justice to Mr. Ramirez under the date of February 8, 1842, that President Santa Anna had made the decree of February 8, 1842. (Transcript, p. 502.)

THE DECREE OF FEBRUARY 8, 1842.

The decree of February 8, 1842, reads as follows:

DECREE OF THE GOVERNMENT: The Government reassumes the administration and investment of the Pious Fund of the Californias.

Antonio Lopez de Santa Anna, etc., know ye:

That whereas all the purposes for which the Pious Fund of the Californias is intended are truly of a general and national importance, and should therefore be under the immediate care and management of the supreme government as it formerly was, I have made the following decree:

ARTICLE 1. The sixth article of the law of the 19th of September, 1836, by which the Government relinquished the management of the Pious Fund of the Californias, and the same was then placed at the disposal of the right reverend bishop of the new diocese is hereby repealed.

ART. 2. The administration and employment of this property shall therefore again become the charge of the supreme government, in such way and manner as it shall direct, for the purpose of carrying out the intention of the donor, in the civilization and conversion of the savages.

Wherefore I order the present to be printed, published, circulated, and duly observed.

It will be seen that Mexico did not repudiate the trust character of the property, but expressly recognized it. She also expressly engaged in the act to administer the property "for the purpose of carrying out the intention of the donor in the civilization and conversion of the savages."

THE APPOINTMENT OF GENERAL VALENCIA, FEBRUARY 21, 1842.

On February 21, 1842, President Santa Anna appointed General Gabriel Valencia, chief of staff, as "general administrator of said goods (that is, the properties of the Pious Fund) upon the same terms and with the same powers as were conferred to the board (junta) of the same department (ramo) by the decree of the 25th of May, 1832." (Transcript, p. 505.)

Thereupon some correspondence was exchanged between Valencia and Ramirez looking to the surrender of the properties. On February 28, 1842, Pedro Ramirez forwarded to General Valencia a full and detailed statement of the condition of the Pious Fund and its properties. The receipt of this statement was acknowledged by General Valencia under the date of March 4, 1842. (Transcript, p. 508.)

The detailed account of the condition of the Pious Fund and the list of the properties thereof which was delivered to General Valencia by Mr. Ramirez is also contained in the Transcript, pages 512–523.

All of the documents, books, and papers concerning the Pious Fund and the properties were surrendered on April 8, 1842, by Mr. Ramirez to Mr. Ignacio de Cubas, who had been appointed "secretary in the administration of the goods of the Pious Fund of the missions of the Californias." (Transcript, pp. 510, 512.)

THE DECREE OF OCTOBER 24, 1842.

The decree of October 24, 1842, recites that the decree of February 8, 1842, "was intended to fulfill most faithfully the beneficent and

national objects designed by the founders without the slightest diminution of the properties destined to the end."

The act then provides that *all* of the properties "*belonging* to the Pious Fund of the Californias are incorporated into the national treasury," and also provides that "the revenue from tobacco is specially pledged for the payment of the income corresponding to the capital of the said fund of the Californias."

The act furthermore provided that "the department in charge of the revenues from tobacco *will pay over* the sums necessary to carry on the objects to which the said fund is destined, without any deductions for costs, whether of administration or otherwise."

The text of the decree is as follows:

Decree of the Government respecting the incorporation into the public treasury of all the properties of the Pious Fund of the Californias.

Antonio Lopez de Santa Anna, etc., know ye:

That whereas the decree of February 8 of the present year, directing that the administration and care of the Pious Fund of the Californias should redevolve on and continue in the charge of the Government, as had previously been the case, was intended to fulfill most faithfully the beneficent and national objects designed by the foundress without the slightest diminution of the properties destined to the end; and whereas the result can only be attained by capitalizing the funds and placing them at interest on proper securities, so as to avoid the expenses of administration and the like which may occur; in virtue of the power conferred on me by the seventh article of the Bases of Tacubaya, and sanctioned by the nation, I have determined to decree as follows:

ARTICLE 1. The real estate, urban and rural, the credits, and all other property belonging to the Pious Fund of the Californias are incorporated into the national treasury.

2. The minister of the treasury will proceed to sell the real estate and other property belonging to the Pious Fund of the Californias for the capital represented by their annual product at 6 per cent per annum, and the public treasury will acknowledge an indebtedness of 6 per cent per annum on the total proceeds of the sales.

3. The revenue from tobacco is specially pledged for the payment of the income corresponding to the capital of the said fund of the Californias, and the department in charge thereof will pay over the sums necessary to carry on the objects to which said fund is destined without any deduction for costs, whether of administration or otherwise.

Wherefore, etc.

THE TREASURY ORDER OF APRIL 23, 1844.

It appears by the testimony of Father Rubio (Transcript, p. 149) that in or about the year 1845 he saw in the Diario de Mexico an official notice, dated April 23, 1844, an order made by the minister of the treasury, from which it appeared that the President of Mexico had given an order on the custom-house of Guaymas, payable to the representative of Bishop Diego, "for the sum of $8,000 on account of the income belonging to the Pious Fund of California, the properties of which were incorporated into the national treasury." (For the text of this official notice in Spanish see Transcript—English, p. 149; Spanish, p. 88.)

Neither its genuineness nor authenticity was disputed upon the former arbitration.

It must therefore be taken to be conceded that as late as April 23, 1844, the Mexican Government affirmatively recognized its obligation to the missions arising out of the facts above stated.

THE ACT OF APRIL 3, 1845.

On April 3, 1845, Mexico passed a law concerning the restitution of debts and properties of the Pious Fund of the Californias. (Transcript, p. 581.)

The act reads as follows:

LAW: For the restitution of the interests and properties of the Pious Fund of the Californias.

The most excellent president *ad interim* has been pleased to forward to me the following decree:

José Joaquin de Herrera, general of division and president *ad interim* of the Mexican Republic, to the inhabitants thereof:

Know ye that the general Congress has decreed and the executive sanctioned the following:

The credits and other properties of the Pious Fund of the Californias which are now unsold shall be immediately returned to the reverend bishop of that see and his successors, for the purposes mentioned in article 6 of the law of September 29, 1836, without prejudice to what Congress may resolve in regard to the property that has been alienated.

The foregoing are the only material facts which need necessarily be stated in connection with the proposition we have hereinabove had under consideration, viz, that the Pious Fund of the Californias had an unbroken and generally recognized existence down to the cession of Upper California to the United States of America by Mexico, under the treaty of Guadalupe Hidalgo (sometimes called Queretaro), dated February 2, 1848.

II.

AT NO TIME DURING ITS EXISTENCE, BEGINNING WITH 1697 AND CONTINUING TO FEBRUARY 2, 1848, "THE PIOUS FUND OF THE CALIFORNIAS" CONSIDERED TO BE OTHER THAN A TRUST FUND, ITS CHARACTER AS SUCH WAS CONTINUOUSLY AND REPEATEDLY RECOGNIZED, FIRST BY SPAIN AND THEREAFTER BY MEXICO.

We have unavoidably dealt with this proposition under the one lastly considered.

We think it has been already sufficiently shown that "The Pious Fund of the Californias," *a name by which these properties became known shortly after the expulsion of the Jesuits (1768)*, was always treated as a trust fund by Spain.

We submit that it also appears that it was likewise so treated by Mexico.

It is true that the two decrees of 1842, i. e., of February 8 and October 24, imply that at that time Mexico claimed the right to manually possess and conserve these properties. But there is nothing in either decree which involves a repudiation by her of the idea that the properties were dedicated to the purposes of the founders, which purposes were to convert to the Catholic faith the inhabitants of the territory known as the Californias, and, after their conversion, to continue to maintain and support the Catholic religion in that country.

In addition to having already shown this, we again call attention to the fact that it is expressly conceded by Mexico in her answer to our memorial that the property was given in trust, and that its trust character was never disavowed.

The following we quote from the answer of Mexico (Replication, pp. 19, 20):

The claimants agree with the Government of Mexico in admitting the following facts, proved by irrefutable documents:

First. The Jesuits were the original trustees or administrators of the properties which constituted the Pious Fund of the Californias up to the year 1768, when they were expelled from Spanish dominions.

Second. The Spanish Crown, in place of the Jesuits, took possession of the properties, which constituted the aforesaid Pious Fund, and administered them by means of a royal commission until the independence of Mexico was achieved.

Third. The Mexican Government, which succeeded the Spanish Government, was, as the latter had been, trustee (comisario) of the fund, and in this conception successor of the Jesuit missionaries, with all the rights granted to them by the founders.

III.

THE TRUST PURPOSE OF THE PIOUS FUND OF THE CALIFORNIAS WAS THROUGHOUT ITS EXISTENCE THE CONVERSION OF THE NATIVES OF THE TWO CALIFORNIAS, UPPER AND LOWER, AND THE ESTABLISHMENT, MAINTENANCE, AND EXTENSION OF THE CATHOLIC CHURCH, ITS RELIGION AND WORSHIP, IN THAT COUNTRY. THIS PURPOSE MEXICO CONSISTENTLY RECOGNIZED.

It is conceded by Mexico that the trust purposes of the Pious Fund of the Californias was the conversion of the natives of the two Californias, Upper and Lower. It is stated in paragraph 4 of Mexico's answer (Replication, p. 30):

> The claimants state that the object of the Pious Fund of the Californias was to provide for the conversion of the Indians and for the support of the Catholic Church in the Californias. This being a double object, it is necessary to distinguish between the two parts which constitute it. The first part, the conversion of the pagan Indians to the Catholic faith and to the obedience of Spanish authority, is unquestionable, and must be considered as the principal and direct object of the missions intrusted to the Society of Jesus by the Catholic King, indorsed by the founders of the Pious Fund, and subsidized by the public treasury of Mexico. The other part of the object—that is, the support of the church of California—was not the principal or direct object of the establishment of the fund, but the means of carrying out the spiritual conquest of uncivilized Indians through the religious missionaries.

We do not concede, as is claimed by Mexico in the foregoing extract, that the Pious Fund had for its object the conversion of the pagan Indians to obedience to Spanish authority, nor that the fund was ever subsidized to the extent of a single dollar "by the public treasury of Mexico."

These propositions, heretofore and now advanced by Mexico, were considered (Transcript, pp. 463–468, pars. I, II) in the arguments upon the former arbitration and are referred to in other arguments for the claimant submitted to this court; they need not be dwelt upon here.

It will be seen that the extract from the answer of Mexico, above quoted, states that one of the objects of the Pious Fund was "the conversion of the pagan natives to the Catholic faith." Mexico says that this proposition "is unquestionable." Mexico likewise concedes that another purpose of the Pious Fund was "the support of the church in California." She concedes this point, although she also claims that this purpose was subordinate to the spiritual conquest of the uncivilized Indians.

Mexico therefore does concede, and we have hence very justly claimed that *one* of the purposes of the donors of the Pious Fund *was "the support of the church in California."*

Even without this admission the proof upon the point is complete.

The Pious Fund of the Californias was, as its name implies, a fund to be devoted to pious uses in the Californias.

The object of all missionary endeavor is, first, to establish religion, and thereafter to maintain it.

The purpose of the donors of the Pious Fund was to bring the inhabitants of the Californias, present and future, within the fold of the Catholic faith, and thereafter to maintain such inhabitants in that faith.

It is absurd to suppose that they could have intended to create a benefaction for the foundation of religion and have also intended to withdraw the benefaction so soon as the religion had gained a foothold, rendering nugatory by such a withdrawal the work already accomplished.

The deed of the Marquis de Villapuente and the Marquesa de la Torres de Rada has been called the foundation deed of the fund.

It is the foundation deed of this fund in a historical sense only. The donation granted by the deed was one of the largest, if not the largest, ever made for missionary work in the Californias. The intention of the grantors was primarily to establish and maintain the missions of the Californias.

The donors had a clear and definite *religious* object, which manifests itself in every line of the instrument.

The Villapuente deed is the only formal instrument which we have wherewith to indicate in a definite manner the purpose of any one of the chief contributors to this fund. This deed was executed in 1735, when the contributions to the fund were inconsiderable in amount if compared to the benefactions which it subsequently received.

In 1731 the fund amounted to only $120,000. Of this $120,000, $40,000 had been contributed by the Marquis de Villapuente. The benefactions, therefore, which preceded the deed of 1735 constituted a small fraction (viz, only $120,000) of the fund as it existed from 1821 to 1842, and of this the Marquis de Villapuente had contributed one- ($40,000).

The Villapuente deed may be truly said to have been a declaration, made at the very origin of the fund, of the religious objects in the Californias for which the fund was created.

The contributions which followed the magnificent endowments of the Marquis de Villapuente and the Marquesa de la Torres de Rada were necessarily given for the same religious objects as those for which the Villapuente donation had been made. Every inference to be drawn from the history of the fund demonstrates its homogeneity of religious purpose. There is not even a suggestion that any part of the fund was to be devoted to purposes other than those which formed the object of the remainder.

It is proper therefore that the deed of the Marquis de Villapuente and the Marquesa de las Torres de Rada should be looked to for a reasonably definite knowledge concerning the religious purposes of the remaining donors in making their contributions to so publicly recognized a religious purpose.

As already pointed out, this deed was drawn with much precision and care.

Construing the deed according to English and American jurisprudence, *it would appear that the missions themselves were the grantees of the donations.*

The language of the habendum clause is "to have and to hold to said missions founded and which hereafter may be founded, in the Californias." (Transcript, p. 106.)

(This clause tends to confirm the claim put forward at the former arbitration that, according to the law of Spain and of Mexico, each

mission, parish, bishop, and religious institution was deemed to have a corporate capacity).

It may be that the legal effect of this deed according to the law of Spain was to pass the title to the missions as religous institutions having capacity to take under the law of New Spain; or it may have been a conveyance which vested the title in the Society of Jesus, or it may have been a conveyance in the nature of a covenant to stand seized to the missions or to the Society of Jesus.

We are not concerned with any of these questions in connection with the point we now have under consideration, nor do we admit this question to have any bearing on the case.

We have pointed out, however, that the *habendum* clause of the Villapuente deed is to the "Missions founded and which hereafter may be founded in the Californias" to show that it was the intention of the grantors in that instrument to confer the benefaction in the first instance upon the missions of the Californias, or to grant it for their use.

We will consider later in this brief the effect of that clause of the deed whereby, in a given contingency, the reverend father provincial of the Society of Jesus in New Spain would have power to devote these properties to other missions.

We assume, therefore, that the gift of the Marquis de Villapuente was to the "missions founded, and which hereafter may be founded, in the Californias."

Let us now consider what the religious purposes were for which the donations were made.

The deed is clear upon this subject.

The purposes were "for the maintenance of their religious, and to provide for the ornament and decent support of divine worship; * * * *in case of all California being civilized and converted to our holy Catholic faith, the profits of said estates shall be applied to the necessities of said missions and their support.*"

The deed furthermore provides (Transcript, foot p. 106) that for all time and in all events the "rents and profits shall be applied to the purposes and objects herein specified—i. e., the propagation of our holy Catholic faith."

The Villapuente deed therefore leaves no room for discussion about the intention of the Marquis de Villapuente, and the Marquesa de Rada. They granted their estates to "the propagation of our holy Catholic faith."

This is equally true of the two other chief historical donations to the fund.

We learn from Clavigero, in the extract already quoted, that the Duchess of Gandia, "having heard an old servant of hers who had been a soldier in California speak of the sterility of that region, the poverty of the Indians there, and the apostolic labors of the missionaries, thought that she could not do anything more pleasing to God *than to devote her fortune to the aid of these missions.* She therefore ordered in her will that * * * all the rest of her estate *go to the missions of California.*" The historian estimated that this gift amounted to at least $120,000.

It can not be doubted that these moneys so given to the missions of California were given to the support of religion in that country.

The same is likewise true of the Arguelles benefaction. That dona-

tion was appointed by the King of Spain to the Pious Fund of the Californias. The Arguelles benefaction was therefore, equally with the Villapuente and Gandia benefactions, given for the propagation of religion in that country.

It will now be seen that the Pious Fund of the Californias was, from the beginning of the eighteenth century, an historical and religious benefaction of very remarkable amount. It must necessarily have been familiar to all throughout the dominion of Mexico; and we believe we have demonstrated that it had for its object pious uses to be achieved in the Californias—pious uses which had been clearly and definitely determined.

All contributions to the fund were therefore made with the purpose of serving those religious objects in the Californias which have already been accurately defined.

We therefore submit that we have established the proposition lastly under consideration, which was that the trust purpose of the Pious Fund of the Californias always was the conversion of the natives of the two Californias, Upper and Lower, and the establishment, maintenance, and extension of the Catholic Church, its religion and worship, in that country.

IV.

THE SOCIETY OF JESUS HAS HAD NO ESTATE IN THE PROPERTIES OF THE PIOUS FUND SINCE 1773, NOR HAS IT HAD SINCE THAT TIME ANY INTEREST THEREIN SUCH AS WOULD IN ANY MANNER INTERFERE WITH THE LEGAL OR MORAL RIGHT OF THE UNITED STATES OF AMERICA TO DEMAND FROM MEXICO THE AWARD WHICH IS HERE SOUGHT.

It was claimed by Mexico before the former arbitral court that the archbishop and the bishop of California were not entitled to demand from Mexico the moneys asked for and recovered before that court; and Mexico claimed this upon the ground, among others, that the archbishop and the bishop did not "profess to derive title by any act of the Jesuits" (Transcript, p. 69).

In speaking of this argument it was said by Messrs. Phillips and Wilson, on behalf of the archbishop and the bishop of California, that—

> If to "derive title" it is necessary to show a regular chain of conveyances from the Jesuits to the present corporators, there will be some force in the objection when the time properly arrives for the hearing of such an exception.
>
> No such derivation of title, however, need be looked for in such a case as this. The nature of the property, as well as the character of the tenure, render all such technical conveyances not only needless but inappropriate. The property was held by the Jesuits not in their own right, but in trust. They held it not in their individual names, but in the official relation they bore to the Catholic Church.
>
> Thus when they were expelled they did not carry away either the property or the title to the same. Nor did their expulsion work any forfeiture. The property and its proceeds remained. The trust estate continued, though the trustee was no longer in condition to carry out the trust. In such a case as this equity would appoint a new trustee, and those who remained at the head and in control of the church became the proper parties to give effect to the dedication of the property. (Transcript, p. 74.)

In answer to this same argument, which was based by Mexico on the Villapuente deed, it was said by Mr. Doyle:

> On the face of this deed it needs no argument to show that the Jesuits were mere trustees and administrators of the funds and property donated; true, they were trustees in whom the donors reposed unbounded confidence, and to whom they meant

to intrust the largest powers and discretion; but it is incontestible that the missions of California founded, and which thereafter might be founded, were the beneficiaries or *cestuis que trust* under the deed, and entitled to the beneficial use and enjoyment of the funds. A change of the trustees by death, dissolution, forfeiture, or the like would work no change in the beneficial ownership of the *cestui que trust.* This is a principle of universal law, indeed, of common honesty, and it has never yet been denied by either Spain or Mexico that it was applicable to this property and to the trust attached to it. On the contrary, while the Spanish Crown, on the expulsion of the Jesuits, took to itself the property of the order, it distinctly recognized the trust character of the Pius Fund and administered it as a trustee, succeeding to the estate, duties, and powers of the original donees, the Jesuits, down to the cessation of Spanish rule in Mexico. Mexico, succeeding to the sovereignty of Spain over its own territory, succeeded to the property and the trust, and continued the administration in the same way as trustees only. (Transcript, pp. 80, 81.)

It seems to us that these two quotations fully dispose of the point made by Mexico before the former arbitral court. This was evidently the opinion of that tribunal, for the archbishop and the bishop of California obtained an award against Mexico.

The point was therefore necessarily decided in their favor and against the contention of Mexico.

It is said, however, that there is a provision in the Villapuente deed which reserves to the Society of Jesus power to apply the profits of the Villapuente and De Rada estates to missions in other parts of the world, and hence that the society has an interest in the fund, and that those who demand the income of those estates for application to pious uses must claim through the Society of Jesus.

The particular clause in the Villapuente deed upon which this argument is based is to be found at the foot of page 106 in the Transcript, and reads as follows:

And in case that the reverend Society of Jesus, voluntarily, or by compulsion, should abandon said missions of the Californias, or [which God forbid] the natives of that country should rebel and apostatize from our holy faith, or in any other such contingency, then, and in that case, it is left to the discretion of the reverend father provincial of the Society of Jesus *in this new Spain,* for the time being, to apply the profits of said estates, their products and improvements to other missions in the undiscovered portions of this North America, or to others in any part of the world, according as he may deem most pleasing to Almighty God; and in such ways that the dominion and government of said estates be always and perpetually continued in the reverend Society of Jesus and its prelates, so that no judge, ecclesiastical or secular, shall exercise any control thereon, or intervene in or about the same; and all such rents and profits shall be applied to the purposes and objects herein specified, i. e., the propagation of our holy Catholic faith. (Transcript, p. 106.)

To this argument we make the following replies:

(*a*) The contingency mentioned in the above-quoted clause of the Villapuente deed never occurred within either the letter or the spirit of that conveyance.

The decree for the expulsion of the Jesuits by Charles III., King of Spain, is dated February 27, 1767. (Transcript, p. 410.) The order was suppressed by a papal bull of Pope Clement XIV dated July 21, 1773. (Transcript, p. 461.) From the time of its suppression until its restoration by Pope Pius VII, on August 17, 1814, the Society of Jesus had no existence whatever. It is true that those who were its priests at the time of its suppression continued to be priests of the Roman Catholic Church, for, as is needless to say, a priest of the Roman Catholic Church, once ordained, is a priest forever. But there was no congregation of the Society of Jesus. In 1801, indeed, Pius VII., at the request of the Czar of Russia, as it is said, did permit a group of former Jesuits to live in community in Russia under the

name of the "Congregation of the Sacred Heart," and shortly after, at the request of Ferdinand, King of Naples, he also permittted a second body to live in community in Naples under the same title; but for forty-one years the Society of Jesus had no existence whatever, and during all that time it continued to be under decree of banishment from all the Spanish dominions.

Keeping these facts in mind, we feel more than safe in maintaining the claim that the contingency comtemplated by the Villapuente deed never happened. It is therein provided that in a given event, namely, the voluntary or compulsory abandonment of the missions in the Californias by the Society of Jesus, then the father provincial of the Society of Jesus "in this New Spain" shall have power to divert the funds of the missions of the Californias and apply them to missions elsewhere.

The contingency specified by the grantors in the Villapuente deed clearly contemplated the continued existence of the Society of Jesus as a religious body and its continued domicile "in this New Spain," but by the decree of Charles III, and the papal bull of suppression of Pope Clement XIV, the Society of Jesus, as we have already seen, ceased to exist as a religious order, either "in this New Spain" or indeed in any other quarter of the world.

It is evident, therefore, that as regards the contingencies necesarily contemplated by the Marquis de Villapuente and the Marquesa de Rada, to wit, the compulsory abandonment of the missions on the part of the Jesuits, accompanied by their continued existence as a religious body and continued domicile in New Spain, these contingencies never occurred. It is submitted, therefore, that the contingency upon which turns the clause giving power of diverting the income of the Villapuente and de Rada estates from the missions of the Californias to missions in other parts of the world never took place.

(*b*) The power granted to the "reverend father provincial of the Society of Jesus *in this New Spain*" to divert the income of the estates to missions in other parts of the world was ineffective from the banishment and suppression of the Jesuits (1767 and 1773) for want of the religious person designated to exercise the power. From 1773 there was no father provincial in New Spain, nor elsewhere, and no Jesuit or Jesuit mission in all the world.

(*c*) Even if the power to divert these funds from the missions of the Californias, to whose use they were granted in the deed, did survive to the Society of Jesus and its reverend father provincial "*in this New Spain*," they renounced the right by failing ever to put forward a claim to its enjoyment. It is not suggested that since 1768, now one hundred and thirty-four years ago, the Society of Jesus has put forward a claim of power over or right or title in the property of the Pious Fund of the Californias.

It may be asserted, therefore, that by a long, unbroken, and unequivocal course of conduct the Society of Jesus, its officers, and members, have renounced their right, if it ever existed, to divert to missions in other parts of the world the moneys of the Pious Fund dedicated to the support of the missions of the Californias.

(*d*) The power granted to the Society of Jesus in the Villapuente deed of applying the profits of the estates to missions in other parts of the world, under the specified conditions—that power *was religious in its nature, and personal to the Jesuits*. It proceeded from two sources: The purely religious intention of the donors, and the unlimited confi-

dence specially reposed in the Jesuits by the Marquis de Villapuente and the Marquesa de Rada. This double intention is explicit and patent in clause after clause of the deed.

No one could be substituted in the place of the Jesuits in the exercise of the discretion to divert the fund from the missions of the Californias to missions in other portions of the world, without doing great violence to the intentions and desires of the donors of the Villapuente donation.

We therefore respectfully insist that this power of diversion was personal to the Society of Jesus and did not survive the royal banishment and the papal suppression of that society.

(*e*) Even if it be conceded that if the contingency contemplated by the deed did occur, and even if the power to divert was not personal to the Society of Jesus, but did survive to and devolve upon the Spanish Crown, then we answer that the power to divert these funds from the missions of the Californias to missions in other parts of the world was never exercised by Spain. On the contrary, the dedication of the properties as a fund for the maintenance of the missions in the Californias was repeatedly confirmed by Spain, and all power to divert them to other parts of the world was waived and abandoned. Indeed, the earliest royal decrees of Spain, following the banishment of the Jesuits, recognized and affirmed the devotion of the properties to the support of the missions of the Californias. The very division of the missions between the Franciscans and the Dominicans, with the consent and approval and by the direction of the Spanish Crown, and the entire treatment of the problem of the missions in Upper and Lower California by Spain was based upon the idea that the *Pious Fund belonged to the missions of the Californias.* If this fund had not been treated by Spain as a fund for the support of the missions of the Californias, upper and lower, those missions of necessity would have had to be abandoned.

(*f*) The Villapuente deed, in which this power is reserved to the Jesuits, constituted only a portion of the Pious Fund, and by the course of history, and with the concurrence and by the direction of two Governments, Spain and Mexico, the Villapuente and De Rada properties were merged in the other properties of the fund, and for three-quarters of a century (from 1768 to 1842) all of these properties were treated as constituting the Pious Fund of the Californias—a fund devoted, as its name implies, to pious uses to be achieved in the Californias.

(*g*) The court will remember that the religious orders of the Roman Catholic Church are not purely self-existent bodies. They are each of them attached to the See of Rome in a particular manner, and that See is for each of them the ultimate superior. The acts of the Holy See in respect of the functions of any particular order have not only the general authority recognized in the See of Rome by all Catholics, but they have also a particular authority, and may be regarded as acts undertaken by the order itself.

The whole history of the religious orders, including that of the Society of Jesus, will show no exception to the rule that they all regard this particular authority of the Holy See, and submissive concurrence in its commands, as a necessary condition of their very existence. It conclusively follows from this universally admitted principle that whatever the Holy See directs or permits in the case of a religious order may be presumed to be an act of that order itself; nor

could a better example of this principle be adduced than the submission of the Jesuits themselves to the papal bull of 1773.

The Franciscans and Dominicans could not have taken over the administration of the missions of the Californias without the consent of the Holy See, a consent to which the Jesuits (not yet suppressed when the missions were taken over) must be deemed, from the principle enunciated above, to have been a party.

The same is true of every subsequent act, authorized or permitted, by the Holy See in connection with the administration of the missions and the application of the Pious Fund of the Californias to their use. It will also be evident that as the archbishop and the bishop of California were permitted to present the claim which they made before the former arbitral court, the validity of that claim was implicitly conceded and agreed to by the Society of Jesus. Another evidence of this concurrence is the acceptance by the Society of Jesus of the sum of $20,000, under the apportionment by the Holy See, on March 4, 1877, of the recovery in the former arbitral court.

The present claim made by the United States of America on behalf of the archbishop and the bishop of California (these latter necessarily acting with the leave of the Holy See), will be conclusively presumed to have been made with the active and passive concurrence of the Society of Jesus. And it will be furthermore presumed as a part of this final suggestion that any act of that society necessary to perfect the claim here urged has been duly had and taken in due season by said society.

(*h*) The Dominicans and Franciscans, and after them Bishop Diego and his successors in title and interest, acquired prescriptively the title of the Society of Jesus. This was done with the expressed and consent of Spain and Mexico, seasonably made.

Herbert on Prescription, pp. 12–20.

Wheaton's (Boyd) International Law, sec. 164.

(*i*) The title, if any, and whatever its character, was abandoned by the Society of Jesus; whether compulsorily or not is not important.

Abandonment is one of the means by which titles may be lost.

In this connection read the argument of Messrs. Phillips and Wilson at page 74 and that of Mr. Doyle at pages 80–81 of the Transcript. These we have quoted at pages 25 and 26 of this brief.

V.

THE QUESTION WHETHER EITHER SPAIN OR MEXICO MIGHT HAVE DIVERTED THE FUND TO OTHER MISSIONS IS NOT INVOLVED IN THIS CASE, AND IS THEREFORE PURELY ACADEMIC. WERE SUCH A POSITION MAINTAINED, IT COULD BE CONCLUSIVELY ANSWERED BY THE FACT THAT NEITHER SPAIN NOR MEXICO EVER DID SO DIVERT THE FUND AND NEITHER OF THEM EVER CLAIMED THE RIGHT TO DO SO.

Our position with respect to the effect of the act of October 24, 1842, is well stated in one of the arguments of Messrs. Phillips and Wilson before the former arbitral court, where it is said:

By the act of 1842 the Mexican Government had taken to itself private property contributed to the church for a special purpose, and bound itself to make good by paying a certain annual interest. Can there be a doubt that the church in California was then entitled to receive from the Government this annual payment, to be applied to the purpose for which the fund was originally created? We find nothing to indi-

cate at this time any intent to repudiate its obligation by any direct act, or by the adoption of any such arguments as are now urged to this end.

On the contrary, the Government acknowledged its indebtedness in the most formal and solemn manner, in the very act by which it placed in its treasury the proceeds of this property. The obligation thus assumed by Mexico toward a portion of its citizens was as perfect and binding upon it as if the same had been contracted by an individual. Nor is the obligation at all impaired by its own default in making payment, nor by the fact that, owing to its sovereign character, there were no means to enforce payment by judicial process. No suit can be maintained in the courts of the country against the United States, and yet its public debt constitutes an obligation as binding upon it as if judgment and execution could be invoked to enforce it.

When, by the treaty of 1848, California was ceded to the United States full guaranties were given for the protection of the rights of persons and property. The allegiance of the inhabitants was changed. But in no wise was any change made in legal liabilities between Mexico and the inhabitants.

If any were debtors to the Mexican Government, the obligation remained unimpaired by the transfer of dominion. So, if the Mexican Government was debtor to them while Mexican citizens, the indebtedness was not canceled by their becoming American citizens. (Transcript, pp. 75-76.)

It was argued, however, by Señor de Azpiroz that the fund might have been diverted by Spain or Mexico. This position, which we suppose will be reasserted in the present controversy, is so well answered by Mr. Doyle that nothing can be added to his argument on the point, which was as follows:

In view of the clear recognition by Mexico in the decree of October, 1842, of a debt equal to the proceeds and value of the property taken into the treasury, and of the promise to pay interest thereon at 6 per cent, I have deemed it unnecessary to notice many points in the argument of Don Manuel Azpiroz based on matters long antecedent to that date—such as the alleged incapacity of the Society of Jesus to acquire property; the suggestion that their estates were confiscated on their expulsion from the Spanish dominions, and that the Pious Fund came to the monarch's hands as a temporality; that the validity of the constitution of the Pious Fund required the sanction of the Pope; that portions of the fund, derived from bequests destined by the donors to missions in general, were not necessarily applicable to California missions in particular, and hence were properly incorporated into the Pious Fund of California; questions whether the church of California could have complained if the funds destined for the propagation of the gospel here had been, while the sovereignty of Mexico yet extended over the country, diverted to missions in other parts of the Republic; whether, if the Pious Fund had remaind invested in real estate down to the time of the treaty of Quer taro, it could have been successfully claimed by the church of California, which, by that treaty lost its status of Mexican citizenship, and the like—because, *as it seems to me, none of these questions can affect the decision of this claim.* It is not disputed that the Jesuits did in fact receive these donations in trust for the pious purposes designed by the founders, and neither the binding force of the trust nor their right and duty to administer it was ever questioned by Spain or Mexico. The legality of the additions made to it were also unquestioned at the time, and have since remained so, and it is not denied that they were in fact made.

The acquiescence of the Government and of all others interested for a long series of years entitles us to a presumption, juris et de jure, that all these things were rightly done and legal, as no doubt they were. Nor is it disputed that the Crown received the funds on the expulsion of the Jesuits, and assumed to succeed to the same title, rights, and duties as had previously devolved on them, and administered the trust thereunder down to the epoch of independence, when Mexico succeeded in like manner to Spain, and continued to administer in the same way down to the year 1836. Neither power, during this long period of over a hundred years, raised any of these questions, and I submit with entire confidence that it is too late to entertain them here and now.

So the question whether either Spain or Mexico *might* have diverted the fund to other missions is conclusively answered by the fact that *they never did so, and never claimed the right to do so.* The decree of October 24, 1842, was practically a purchase of the properties of the fund by the Government at the price represented by their income capitalized at 6 per cent, and a promise to pay therefor by an annuity equal to that interest. By it the real estate of the Pious Fund was sold and converted into personal property in the form of a demand on the treasury for the annual payments. And as all this occurred some years before the cession of California to the United States, it seems unimportant to inquire what would have been the *status* of the par-

ties or the question between them had the fund remained invested in real estate down to that event. (Transcript, pp. 471-472, par. VI.)

We therefore submit that neither Mexico nor Spain ever claimed the right to divert or attempted the diversion of the Pious Fund. It is hence unnecessary for us to debate the purely academic point as to whether Spain or Mexico ever possessed the right suggested.

VI.

THE RIGHTS OF THE BENEFICIARIES OF THE PIOUS FUND OF THE CALIFORNIAS WHICH ARE ASSERTED HERE ARISE OUT OF THE PROMISE MADE BY MEXICO ON OCTOBER 24, 1842, AND THE DUTY OF MEXICO TO THOSE BENEFICIARIES AS A TRUSTEE OF THE FUND.

When Mexico made her decree of October 24, 1842, she promised to pay 6 per cent upon the capital of the Pious Fund for the uses and purposes to which the fund had been dedicated by the donors. This engagement was no mere gratuity. There is not only a sufficient but an ample consideration for the promise. She incorporated the entire Pious Fund into her national treasury. The least she could do in honor was to promise to pay interest upon the fund. Mexico not only agreed to pay the interest, but she agreed to pay it to the religious objects specified and intended by the founders of the fund, which, as we have already pointed out, were the conversion of the natives of the Californias, Upper and Lower, and the establishment, maintenance, and extension of the Catholic Church, its religion and worship, in that country.

At the time she made the engagement Mexico sustained the relation of a trustee to the beneficiaries and to the fund. This, as we have pointed out, is conceded in her answer to our memorial. Her promise therefore is to be read in the light of her duty as trustee. The promise which Mexico made was to pay an annuity in perpetuity. Her promise was also to pay it to certain religious purposes to be accomplished in Upper California and certain religious purposes to be accomplished in Lower California. Upon the cession of Upper California to the United States by Mexico, for a consideration of $18,250,000, the obligation to pay the equitable portion due for application to the religious purposes to be accomplished in Upper California was not canceled. It survived for the benefit and behoof of the inhabitants and citizens of the ceded territory, whose American citizenship, as it was to be thenceforth, entitled them to demand performance through the interposition of the United States. It is this demand which they made with success under the convention of 1868 and which they are now endeavoring to make with the same success before this court.

VII.

ALL OF THE EVENTS PRECEDING OCTOBER 24, 1842, ARE IN THE NATURE OF MATTERS OF INDUCEMENT, AS THAT TERM IS USED IN ENGLISH AND AMERICAN JURISPRUDENCE. THE OBLIGATION OF OCTOBER 24, 1842, IS TO BE READ IN THE LIGHT OF THESE EVENTS, IN ORDER THAT IT MAY BE PROPERLY INTERPRETED. BUT MEXICO'S OBLIGATION ARISES OUT OF ITS LEGISLATIVE DECREE OF OCTOBER 24, 1842, AND ITS PRECEDENT TRUSTEESHIP.

In the law of pleading, as it is established in American and English jurisprudence, we have what are known as "matters of inducement." These are matters appropriately to be stated in a pleading, in order

that the court to which the pleading is submitted may the more intelligently appreciate the force of the particular transaction out of which arises the cause of action or the matter of defense. In this case the cause of action upon which the claims are made is the engagement in the light of the historical circumstances which preceded it. These circumstances enable one to appreciate the exact legal and moral obligation which Mexico assumed by the act of October 24, 1842, whereby she incorporated *all* the property of the Pious Fund into the Mexican treasury, and agreed to pay 6 per cent thereon annually and in perpetuity.

It is not necessary therefore to dwell upon the power Spain or Mexico *might* or *might not* have exercised with respect to the Pious Fund. We are not concerned with the powers which might have been exercised by these countries. We are claiming under the power which Mexico did exercise. She took our property and agreed to pay for it in an annuity. We are here demanding performance of that promise.

VIII.

IT WAS THE DUTY OF MEXICO, DURING THE PERIOD WHEN IT MANAGED THE PIOUS FUND OF THE CALIFORNIAS, PRIOR TO THE APPOINTMENT OF THE BISHOP OF THE CALIFORNIAS, TO PAY OVER THE INCOME THEREOF TO THE MISSIONARIES IN CHARGE OF THE MISSIONS, IN FURTHERANCE OF THE PURPOSE OF THE DONORS.

The Pious Fund was devoted, during the early period of its history, to the payment of very modest salaries to the missionaries ($350 per annum). The payment of these salaries (Transcript, p. 420, sec. 19) and the erection of suitable houses of worship and abodes for the missionaries, with additional conveniences for the housing and care of the inhabitants of the Californias, were the specific purposes to which the fund, in pursuance of the purposes of the donors, were necessarily limited in the early history of its administration.

From the very nature of the case there was no means of devoting the income to the conversion of the natives and to the establishment, maintenance, and extension of the Catholic Church, its religion and worship, except to pay over the income so to be applied to the missionaries and officiating priests laboring in the country under the direction and with the sanction of the church. The donations in the beginning were committed to the charge of the Jesuits for investment and conservation, and necessarily for direct application to the pious uses, because it was impossible directly to apply the moneys and property of the fund to these uses except by paying the same over to the Jesuits, who constituted the sole medium by which those pious uses were achieved.

Upon their expulsion and the subsequent division of the missionary labors between the Franciscans and the Dominicans, the moneys were paid by Mexico to the Franciscans and the Dominicans.

The act of May 25, 1832, already quoted, provided that the governing board having charge of the "rural property belonging to the Pious Fund of the Californias" should "name to the Government the amounts which may be remitted to each one of the Californias, in accordance with their respective expenses and their available funds." (Laws of Mexico, pamphlet, p. 5, ninth subdivision.)

There was no one else to whom the remittance could have been made except the missionaries. From the very circumstances of the case

there was no one else who could possibly apply the fund to its religious objects. These missionaries were, therefore, until the erection of the Californias into a bishopric, the only persons who, from the nature of the case, could apply the funds to the purposes intended by the donors.

It follows as a consequence that these missionaries, until the erection of the Californias into a diocese with a regularly appointed bishop, had the right to demand the payment to them of the fund and of its income, for its application by them to the pious uses of the donors. As they were the only persons who could apply it to these uses, they were the only ones, necessarily, who had the right to demand its payment.

The one necessarily follows from the other.

IX.

THIS DUTY WAS SOLEMNLY RECOGNIZED BY MEXICO AND WAS NEVER REPUDIATED.

By the act of May 25, 1832, creating a board for the control of the rural property belonging to the Pious Fund of the Californias, it was provided that that board should "name to the Government the amounts which may be remitted to each one of the Californias, in accordance with their respective expenses, and their available funds." (Laws of Mexico, pamphlet p. 5, ninth subdivision.)

It will be seen from this provision that the moneys were to be remitted to the Californias with due regard to the needs and funds of each of them.

This provision for remittance can have no other meaning imputed to it than that the remittance was to be to the missions.

The act of September 19, 1836, is a similar recognition of the duty owed by Mexico to the Catholic Church, its prelates, clergy, and fold, to pay over the income, and, indeed, the capital, to the officials of the church, in conformity with the purposes of the donors of the fund. This duty was furthermore impliedly, if not expressly, recognized by the decree of February 8, 1842, which expressly declared it to be the purpose of the Mexican Government to administer the fund in conformity to the will of the donors.

The same recognition is manifested in the appointment on February 21, 1842, of Don Gabriel Valencia, chief of staff, to be general administrator of the goods of the Pious Fund of the Californias, "upon the same terms, and with the same powers as were conferred to the board (junta) of the same department (Ramo) by the decree of the 25th May, 1832." (Transcript, p. 505.)

The act of April 3, 1845, directing that the debts due to, and the unsold properties of, the Pious Fund should be delivered to the bishop of the Californias is a further legislative recognition of this duty.

So likewise is the order made by the minister of the treasury of Mexico on April 3, 1844, whereby he commanded the custom-house of Guaymas to pay to the bishop of the Californias "the sum of $8,000 belonging to the Pious Fund, the properties of which were incorporated into the national treasury." (Transcript—English, p. 149; Spanish, p. 88.)

X.

FROM THE CONSECRATION OF FRANCISCO GARCIA DIEGO AS FIRST BISHOP OF THE CALIFORNIAS, UPPER AND LOWER, WHICH OCCURRED OCTOBER 4, 1840, THE PROPER PERSONS TO RECEIVE THE INCOME OR INTEREST UPON THE PIOUS FUND HAVE BEEN THE BISHOP OF THE CALIFORNIAS AND HIS SUCCESSORS IN TITLE AND INTEREST.

On April 27, 1840, Francisco Garcia Diego was appointed bishop of the Californias. (Transcript, p. 183.) Bishop Diego was consecrated on October 4, 1840. (Transcript, p. 91.) He died on April 30, 1846. (Transcript p. 182.) His successor, Joseph Sadoc Alemany, was appointed on May 1, 1850. (Transcript, p. 183.) He was consecrated on June 30, 1850 (Transcript, pp. 12, 182), and arrived in California in December, 1850 (Transcript, p. 182).

From the death of Bishop Diego on April 30, 1846, to the appointment and consecration of Bishop Alemany the bishopric was administered by the Very Reverend Joseph Gonzalez Rubio (Transcript, pp. 12, 148), who, however, during that period, enjoyed and exercised the faculties of a bishop.

Changes have been made from time to time in the geographical boundaries of the diocese of California, and the diocese has been divided several times.

The claimants before the former arbitration as well as those upon whose behalf the Government of the United States negotiated the convention upon which this court is organized are the successors in title and interest to Francisco Garcia Diego, first bishop of the Californias.

We have pointed out above that while the missions were in the charge of one of the orders of the church, called in canon law the regulars, the very necessities of the case demanded that the moneys appropriated to the use of the missions of the Californias should be paid to those regulars. We believe we have shown that it was impossible for anyone else to apply the income to the pious purposes of the donors, and that from the very necessities of the case the income of the fund was legally and morally payable to such regulars.

Upon the consecration of Bishop Diego, in 1840, the control of the spiritual direction of the missions and the management of their temporalties passed to him, as the bishop of the diocese.

He was entitled by virtue of his office to control the spiritual management of his church, and had necessarily to apply the funds devoted to that purpose. From his appointment, therefore, it is clear that the duty of the person in charge of the administration of the fund was to pay over its income to him. It follows as a consequence that the like duty continued in favor of his successors in title and interest.

Mr. Doyle's argument upon this point is to be found in the Transcript, pages 86–92; also 471, Paragraph V. Particular attention is called to the decision of the United States Land Commission for settlement of land titles in the State of California, treated of by Mr. Doyle at pages 89–92 of the Transcript, and again at page 564. The settlement made by Mexico with Spain in 1844, for moneys due to the Philippine missions, depending upon practically the same facts as those relating to the missions of the Californias, is discussed by Mr. Doyle in the Transcript, pages 14, 92, 474.

XI.

THE CESSION OF UPPER CALIFORNIA TO THE UNITED STATES BY MEXICO DID NOT DESTROY THE RIGHT OF THE BISHOP OF THE CALIFORNIAS TO DEMAND THE PROPORTION OF THE INTEREST EQUITABLY CORRESPONDING TO UPPER CALIFORNIA FOR DEVOTION IN THAT COUNTRY TO THE PIOUS OBJECTS OF THE DONORS.

We deem this proposition to be beyond the need of discussion.

It is supported by a very early decision of the United States Supreme Court, now be to considered.

It appeared in Terrett *v.* Taylor (9 Cranch, U. S., 43), that while Virginia was a colony of Great Britain, and the Episcopal Church was the established religion, certain glebe lands came into possession of the church. Virginia, after the Revolution had established its independence, undertook to pass an act authorizing the overseers of the poor of each parish to sell these glebe lands and appropriate the proceeds to the use of the poor. (Transcript, p. 586.)

In commenting on this, the Supreme Court of the United States says in its opinion, which was written by Mr. Justice Joseph Story, on behalf of Chief Justice John Marshall, and his associates:

Be however the general authority of the legislature as to the subject of religion as it may, it will require other arguments to establish the position that at the Revolution all the public property acquired by the Episcopal churches, under the sanction of the laws, became the property of the State. Had the property thus acquired been originally granted by the State or the King there might have been some color (and it would have been but a color) for such an extraordinary pretension. But the property was, in fact and in law, generally purchased by the parishioners, or acquired by the benefactions of pious donors. The title thereto was indefeasibly vested in the churches, or rather in their legal agents. It was not in the power of the Crown to seize or assume it nor of the Parliament itself to destroy the grants, unless by the exercise of a power the most arbitrary, oppressive, and unjust, and endured only because it could not be resisted. It was not forfeited, for the churches had committed no offense. The dissolution of the Regal Government no more destroyed the right to possess or enjoy this property than it did the right of any other corporation or individual to his or its own property. The dissolution of the form of government did not involve in it a dissolution of civil rights, or an abolition of the common law under which the inheritances of every man in the State were held. The State itself succeeded only to the rights of the Crown, and, we may add, with many a flower of prerogative struck from its hands. It has been asserted as a principle of the common law that the division of an empire creates no forfeiture of previously vested rights of property. (Kelly *v.* Harrison, 2 John C., 29; Jackson *v.* Lunn, 3 John C., 109; Calvin's case, 7 Co., 27.) And this principle is equally consonant with the common sense of mankind and the maxims of eternal justice. (Transcript, p. 586.)

XII.

THE UNITED STATES IS THE CLAIMANT HERE. IF ANY OF ITS CITIZENS ARE BENEFICIALLY INTERESTED IN THIS FUND OR ENTITLED TO RECEIVE THE WHOLE OR ANY PART OF IT OR TO HAVE IT LAID OUT OR EXPENDED TO THEIR USE, THE UNITED STATES FULLY REPRESENTS THEM AND IS ENTITLED TO URGE THE CLAIM UPON THEIR BEHALF.

If it be once established that Mexico is bound to pay over an equitable proportion of the Pious Fund, considering the relative rights of Upper and Lower California, all other questions are foreign to the case.

It must be assumed that the United States will act in good faith and in accordance with the rights of all persons in interest in distributing the award, if one be made in this case.

It is for that Government to say which of its citizens are entitled

to the moneys awarded, and in what proportions. And if it be necessary juridically to establish the persons and the proportions in which they are to share in it, the United States can do that by appropriate legal remedies pursued according to the jurisprudence which obtains in that country.

XIII.

THE AMOUNT OF THE PIOUS FUND AND THE PROPERTIES OF WHICH IT CONSISTED ON OCTOBER 24, 1842, AS FIXED BY THE FORMER ARBITRAL COURT, WERE DEFINITELY ESTABLISHED BY THE PROOFS PRESENTED TO THAT COURT. IF THE CASE IS NOT CONTROLLED BY THE PRINCIPLE OF RES JUDICATA, WE CLAIM THAT THE TOTAL AS FIXED BY THE FORMER ARBITRAL COURT SHOULD BE INCREASED BY $381,518.15.

The amount of the Pious Fund and its condition on October 24, 1842, were proved in the former arbitration by the inventory delivered by Pedro Ramirez, agent of the Right Rev. Francisco Garcia Diego, bishop of the Californias, to Gen. Gabriel Valencia on February 28, 1842. (Transcript, p. 508.)

This report is called "a detailed statement" and is to be found in English in the Transcript, pages 512–518.

It is also set forth in the record in Spanish. (Transcript, pp. 488–493, 169–175.)

In deciding the case, Mr. Wadsworth, the American commissioner (Transcript, p. 525), said:

> I take the report of Pedro Ramirez of February 28, 1842, upon the condition of the fund, made to Ygnacio de Cubas, Exhibit A to the deposition of José Maria de Romo, as a sufficiently accurate and satisfactory account.

(Ygnacio de Cubas was secretary to General Valencia in the administration of the Pious Fund. Transcript, p. 510.)

This opinion of the American commissioner as to the amount of the Pious Fund was approved by the umpire. If the case is not controlled by the award of the former arbitral court, operating as res judicata, then it is claimed by us that the following items should be added to the capital adjudged by the American commissioner and the umpire.

1. The Cienaga del Pastor was sold November 29, 1842, by Mexico, for $213,750, under the decree of October 24, 1842. (Replication, p. 47.) This estate was not calculated as a part of the capital of the Pious Fund by the former arbitral court, for the reason that it appeared by the report of Pedro Ramirez that the property had been attached, "and there is no evidence in this record that the Government ever obtained the property or derived any benefit from it." (Transcript, p. 526.) In the present arbitration we have produced proof that the Cienaga del Pastor was sold by Mexico under the decree of October 24, 1842. (Replication, p. 47.) We are therefore entitled to have added to the capital of the Pius Fund $213,750.00
2. Personal property belonging to the Pious Fund sold with the Ciénaga del Pastor (Replication, p. 47) for 3,000.00
3. A debt of the Mexican Government rejected by the former arbitral court because it was supposed to have been given up as a bad debt by Pedro Ramirez. In point of fact the debt was secured by collateral which Pedro Ramirez said was bad. Hence the mistake. (Transcript, p. 515) 7,000.00
4. Moneys borrowed from the Pious Fund by Mexico for colonization purposes, for the particulars of which see Ramirez-Valencia correspondence (Transcript, English, p. 500; Spanish, pp. 478–479, 160) 22,763.15

5. Payment by Mr. Ramirez (Transcript—English, p. 500; Spanish, pp. 478-479, 160), on account of a loan of $60,000 to the Mexican Government, secured by a mortgage made by it on the Pious Fund. A law passed by Mexico April 1, 1837, provides for the execution of the mortgage (see p. 16 of this brief) $30,000.00
6. There was paid into the general treasury for the account of the Pious Fund of the Californias from the estate of Señora Argüelles $306,901.64. (Payno's report, Transcript, pp. 23-24.) Of this sum we received credit in the Ramirez inventory and from the former arbitral court (Transcript, pp. 517, 526) for the sum of $201,896.75, and no more. The difference between these two sums, which we now claim, is 105,004.89

381,518.15

XIV.

IT IS A WELL-ESTABLISHED PRINCIPLE OF JURISPRUDENCE THAT A LITIGANT IS TO BE JUDGED BY THE PROOF WHICH IT IS WITHIN HIS POWER TO PRODUCE, COMPARED WITH THE PROOF WHICH HE IN FACT PRODUCES. THE PRESUMPTION IS THAT PROOF WITHHELD WOULD BE ADVERSE TO THE PARTY WITHHOLDING IT IF IT WERE PRODUCED.

These principles are applicable to the present case.

In the former arbitration Mexico disputed our claim with respect to the amount of the Pious Fund. But while she did so, she did not produce from her records and archives the proofs which must certainly have existed there. Mexico certainly had accounts from which it would appear to the smallest fractional coin of her currency precisely what amounts were received by her for the property of the Pious Fund.

It is proper, therefore, for us to invoke the principle stated above.

It is a presumption that the proof which Mexico has in her possession, and which she deemed it proper not to present, would have been adverse to her case here if it had been produced.

We have already shown that a board was appointed under the act of May 25, 1832, for the administration of the rural properties of the Pious Fund. (Statement and brief on behalf of the United States, pp. 11-14.)

We have also pointed out that General Valencia was appointed administrator of the fund with the same powers as the board of May 25, 1832. (Transcript, p. 505.)

The provisions of sections 11 and 12 of the act of May 25, 1832, read as follows:

11. The secretary shall keep a journal of the proceedings of the board, statement of moneys deposited in the treasury, the entries in which shall be supported by the vouchers delivered by the superintendent of said treasury, and another book of the amounts which are drawn against the same. All the entries, whether of debit or credit, in the treasury shall be signed by the members of the board.

12. The superintendent of the treasury shall receive 1 per cent premium on the amounts that may be deposited with him, shall be responsible for the same, and such payments only shall be credited to him as he may make under warrants signed by the members of the board, authorized by the secretary of the said board, and with the approval of the secretary of foreign affairs.

It will be seen from these provisions that the accounts of the administration of the Pious Fund were required by law to be kept.

The accounts of both administrations of the Pious Fund must exist among the archives of Mexico. That we are not able to obtain the accounts from the archives of Mexico is our misfortue; but while we

suffer therefrom, we are entitled to have the countervailing advantages arising from the application, in the consideration of this case, of the salutary and just presumption which we here invoke.

XV.

IT IS CONCEDED BY MEXICO THAT THE PRINCIPLE OF RES JUDICATA APPLIES TO INTERNATIONAL ARBITRATIONS.

In his letter addressed to Mr. Powell Clayton, American minister to Mexico, under date November 28, 1900, Mr. Mariscal, minister of foreign affairs of Mexico, concedes that the principle of *res judicata* does apply to the awards of international arbitrations.

He contends, however, that the award of the arbitral court created under the convention between the United States and Mexico of July 4, 1868, has not the force of *res judicata* for two reasons:

(*a*) The award was not pronounced within the limits of the jurisdiction of the arbitral court created under the convention of July 4, 1868.

(*b*) *Res judicata* is limited in its application to the condemnatory portions of judgments and does not embrace the premises upon which such portions are based.

We quote the language of Mr. Mariscal (Diplomatic Correspondence, p. 31):

> That *res judicata pro veritate accipitur* is a principle admitted in all legislation and belonging to the Roman law certainly no one will deny. Nor is it denied that a tribunal or judge established by international arbitration gives to its decisions "*pronounced within the limits of its jurisdiction*" (in the language of the authority cited by Mr. McCreery) the force of *res judicata;* but to give in practice the same force, as that directly expressed in the decision to close the litigation, to the considerations or premises not precisely expressed as points decided by the judge, but simply referred to by him in the bases of his decision, or assumed as antecedents necessary for the party in interest, who interprets the decision, is a very different thing, and can not be considered in the same way.

The first letter in the Diplomatic Correspondence in which the claim is made that the decision of the former arbitral court is *res judicata* is one addressed to Mr. Mariscal, minister for foreign affairs of Mexico, by Mr. Clayton, American minister to Mexico. It is dated September 1, 1897. (Transcript Diplomatic Correspondence, p. 6.)

The United States addressed a number of communications to the foreign office of Mexico in connection with this claim from 1891 to 1897. No answer was made to any of them until Mr. Clayton wrote the above-mentioned letter to Mr. Mariscal. To this Mr. Mariscal replied, under date of October 4, 1897, that the propositions laid down in the decision made in the former arbitration "are not exact in the historical conception, nor reasonable in the juridical." (Transcript Diplomatic Correspondence, p. 5.)

Mr. Mariscal's letter was the subject of a reply laid before the Secretary of State of the United States by Mr. John T. Doyle. (Transcript Diplomatic Correspondence, p. 12.) This reply by Mr. Doyle was forwarded by the Secretary of State of the United States to Mr. Clayton March 10, 1898 (Transcript Diplomatic Correspondence, p. 12), and was laid before Mr. Mariscal by Mr. Clayton in an informal way on or before May 4, 1898. (Transcript Diplomatic Correspondence, p. 3.)

No reply having been received from Mexico, Mr. Hay, Secretary of

State, under date December 4, 1899, addressed a letter of instructions to Mr. Clayton setting forth the views of the United States with respect to *res judicata* in this matter. (Transcript Diplomatic Correspondence, p. 46.) These views were laid before Mr. Mariscal by Mr. Clayton in a conversation which took place between them on December 18, 1899. On the following day, December 19, 1899, Mr. Clayton forwarded to Mr. Mariscal a copy of the letter of Mr. Hay, dated December 4, 1899. (Transcript Diplomatic Correspondence, p. 11.)

On June 7, 1900, Mr. Hay forwarded to Mr. Clayton an authority on the law of *res judicata.* (Transcript Diplomatic Correspondence, p. 47.) This authority was laid before Mr. Mariscal by Mr. McCreery on June 14, 1900. (Transcript Diplomatic Correspondence, p. 11.) To this Mr. Mariscal made reply in a letter to Mr. Clayton dated November 28, 1900. (Transcript Diplomatic Correspondence, p. 27.) It is from this letter that the extract above quoted is taken. To the arguments of Mr. Mariscal contained in his letter replies were made and laid before the Secretary of State on February 21 and 22, 1901, by Messrs. Ralston & Siddons and Messrs. Doyle & Doyle, respectively. (Transcript Diplomatic Correspondence, pp. 51–66.)

These replies to Mr. Mariscal's argument were forwarded to Mr. Clayton in a letter written to Mr. Clayton by Mr. Hay, Secretary of State, under date July 18, 1901. (Transcript, Diplomatic Correspondence, p. 48.)

In this letter is contained a suggestion that the claim should be submitted to a new tribunal which should be empowered and required to decide upon the two questions which, by the protocol of May 22, 1902, are submitted to this court for decision. This was agreed to early in December, 1901. (Transcript, Diplomatic Correspondence, pp. 44, 45.) The result was the organization of this court for the decision of the controversy.

An examination of this correspondence will show that Mr. Mariscal objected to the application of the principle of *res judicata* to the present controversy upon two grounds only:

(*a*) He questions the competence of the former arbitral court to pronounce the decision which was rendered in favor of the archbishop and the bishop of California and against the Republic of Mexico.

(*b*) He also contends that the principle of *res judicata* applies only to the condemnatory part of a judgment, and not to the fundamental bases thereof.

These two objections, urged by Mr. Mariscal against the application of the principle of *res judicata* to the dispute at present before the court, will now receive our attention.

XVI.

THE AWARD OF THE ARBITRAL COURT CREATED UNDER THE CONVENTION OF JULY 4, 1868, WAS WITHIN THE LIMITS OF ITS JURISDICTION.

There are five grounds upon which we claim that the decision of the arbitral court created under the convention of July 4, 1868, had jurisdiction to make the award which it did make in favor of the archbishop and the bishop of California and against the Republic of Mexico.

We will state these five grounds in their order:

1. The first ground upon which we support this proposition is that

the arbitral court created under the convention of July 4, 1868, *did decide* that it had jurisdiction and had the power so to decide, because such power is inherent in such an arbitral court. In fact, it is almost axiomatic that the basic proposition which a court decides in every case which it proceeds to try is that it has jurisdiction of that case. In many instances this decision is not final, but is open to review by some other tribunal.

SUCH REVIEW IS IMPOSSIBLE IN THE CASE OF AN INTERNATIONAL ARBITRAL COURT.

This point is very ably supported in the statement and brief on behalf of the United States (pp. 22, 29), and we shall not here enlarge upon the argument thereof.

There is, however, an additional authority which we desire to quote.

This authority arises out of the first convention between the United States and Mexico for the settlement of claims.

The convention was signed April 11, 1839 (2 Moore's International Arbitrations, 1218).

A question arose before the commission whether certain claims for damages said to have resulted from the seizure on the high seas of the schooner *Topaz* were within the jurisdiction of the court.

In answer to a formal inquiry by the Mexican commissioners to the Secretary of State of the United States, Daniel Webster, who then filled that office, said (2 Moore's International Arbitrations, 1242) that—

"While it was not the province of the Executive of the United States to express an opinion upon the business which the convention has confided to the board of commissioners," yet he would add for the purpose of information that "if all claims of citizens of the United States involved in the case of the schooner *Topaz*, or in any other cases embraced by the first article of the convention, shall be considered and disposed of by the board according to the terms of the convention, it is certain that this Government will not deem them a subject for any further negotiation with that of the Mexican Republic." "*The Mixed Commission under the convention with that Republic*," said Mr. Webster, "*has always been considered by this Government essentially a judicial tribunal, with independent attributes and powers in regard to its peculiar functions. Its right and duty, therefore, like those of other judicial bodies, are to determine upon the nature and extent of its own jurisdiction, as well as to consider and decide upon the merits of the claims which might be laid before it.*"

In considering the character and nature of the Commission created by the convention of April 11, 1839, Mr. Moore says (2 International Arbitration, 1242):

> The same position was maintained by Mr. Webster in other cases. On June 21, 1841, one of the claimants, named Santangelo, requested him to direct the diplomatic representatives of the United States in Mexico to ask the Government for certain papers which the Commission had, on an equal division, refused to demand. Mr. Webster declined to grant the request, saying that the functions of the Department of State in relation to the claims were "expressly limited by the convention to the transmission to the board of commissioners of such documents as the Department may receive." Subsequently when the request was renewed he declared that the Executive of the United States had "no right to interfere for the redress of our citizens who may suppose themselves to have been aggrieved by decisions of the commissioners under the convention with the Mexican Republic. *That body is in effect a judicial body, and it belongs to its members alone to determine the rights of claimants under the convention.*"

2. Our second point is that Mexico expressly stipulated in Article III of the convention of July 4, 1868, that (appendix, p. 32)—

It shall be competent for the commissioners conjointly, or for the umpire, if they differ, *to decide in each case whether any claim has or has not been duly made, preferred, and laid before them, either wholly or to any and what extent, according to the true intent and meaning of this convention.*

In other words, it was the duty of the commission, and it was given power by the agreement of the contracting parties—Mexico and the United States—to decide whether any claim came properly within the true intent and meaning of this convention.

The question of jurisdiction raised by Mr. Mariscal is whether the claim upon which the former award was made came within the true intent and meaning of the convention of July 4, 1868.

As we shall hereafter show, he does not deny the jurisdiction of the former arbitral court upon any other ground.

Article 48 of the Hague Convention, for which see appendix, page 78, reads as follows:

The tribunal is authorized to declare its competence in interpreting the "compromis," as well as the other treaties which may be invoked in the case, and in applying the principles of international law.

We claim that this article is a mere codification of the law and does not establish any new rule in whole or in part. We furthermore insist that the authority granted to the tribunal under the Hague Convention is not more comprehensive (if, indeed, it be as comprehensive) than that conferred upon the tribunal created by the convention of July 4, 1868, by the above-quoted provision of that convention.

3. The memorial of the archbishop and the bishop of California was filed with the Commission under the former convention on December, 31, 1870.

After that time Mexico entered into several conventions with the United States, all of which were supplementary to that of July 4, 1868.

By the terms of these conventions Mexico expressly stipulated for a continuance of the Commission for the decision of cases undecided, and *in one of these supplementary conventions she stipulated to revive the Commission after it had expired by the limitation expressed in the preceding convention.*

The commission was so revived to decide the undecided causes.

By agreeing for the extension of the life of the Commission and for its revival after it had expired by limitation, in order to enable it to decide cases then not decided, Mexico expressly and solemnly agreed that the commission had power to decide and should decide the cases before it.

It was suggested upon the oral argument, by Sir Edward Fry, that these supplementary conventions implied, or might imply, that the arbitral court had power to decide *some* cases, but not necessarily *all* cases at the time before it. We submit that as all of the cases were before the court, and as the arbitral court was engaged in the consideration of them, that the powers entering into the supplementary convention must be held to have covenanted each with the other that the arbitral court had power to decide *all* the cases; for it was the duty of the powers, if they claimed, or ever intended thereafter to claim, that the arbitral court had no power to decide any particular case or cases, to withdraw these cases from the consideration of the tribunal.

Mexico is bound by those express engagements.

Moreover, she must be presumed to have intended the ordinary consequences of her acts.

4. The jurisdiction of an arbitral court is created by the agreement of parties. The maxim that consent can not give jurisdiction has no application to a tribunal which is created and whose jurisdiction is defined by agreement or consent of the parties litigant.

It is a universally recognized principle of jurisprudence that ratification, which is after the fact, is equivalent to precedent authorization.

If Mexico had power to confer jurisdiction upon the commission of 1868, she had power to ratify the exercise of jurisdiction by the commission.

Her ratification might have been in express words or it might have been implied by a course of conduct.

Her course of conduct might have created against her what is known in English and American jurisprudence as an estoppel *in pais*. By such an estoppel she would be prevented from asserting that the court had no jurisdiction.

We invoke all of these principles in support of our present point.

Mexico made no objection whatever to the jurisdiction of the arbitral court formed under the convention July 4, 1868, until the writing of Mr. Mariscal's letter on November 28, 1900. (Diplomatic Correspondence, p. 27.)

Mr. Cushing's motion to dismiss the claim "because the injuries complained of were done before February, 1848, and this commission has no jurisdiction of the claim" (Transcript, p. 68), implied that the commission had the power to hear and determine the question whether the injuries complained of were within the true intent and meaning of the convention of July 4, 1868. The very submission of the motion to the commission implied the power and duty of the commission to decide it.

The objection was not to the jurisdiction of the court to decide upon the claim, although it was stated in that form, but it was a claim by Mexico that the demand of the archbishop and the bishop of California were not within the provisions of the convention. The motion of Mr. Cushing was therefore not an attack upon the jurisdiction of the court. On the other hand, it was an affirmation of its jurisdiction to decide whether the particular claim here involved came within the intent and meaning of the convention of July 4, 1868.

During the pendency of the case before the former arbitral court it was not intimated by Mexico that she claimed, or would claim, that the former commission had not power to decide this case.

In the correspondence which took place between the two Governments subsequent to the award of the former arbitral court (Transcript, Diplomatic Correspondence, pp. 77-83) it will be seen that the jurisdiction of the former arbitral court was not called in question. Mexico represented to the United States that—

Though the final award in the case only refers to interest accrued in a fixed period, said claim should be considered as finally settled *in toto*, and any other fresh claim in regard to the capital of said fund or its interest, accrued or to accrue, as forever inadmissible. (Transcript, Diplomatic Correspondence, p. 78.)

In his letter of reply the Secretary of State of the United States said:

I must decline, however, to entertain the consideration of any question which may contemplate any violation of or departure from the provisions of the convention as to

the final and binding nature of the awards or to pass upon or by silence to be considered as acquiescing in any attempt to determine the effect of any particular award. (Transcript, Diplomatic Correspondence, p. 79.)

To this Mexico replied that the writer intended by this letter "to avoid if possible a future claim from the interested parties through the United States Government, *but does not pretend to put in doubt the present award.*" (Transcript, Diplomatic Correspondence, p. 80.)

Thus after the decision of the former arbitral court Mexico recognized the binding force of the award and in express words confirmed its validity.

In his argument for revision Señor Avila does indeed make a point that the claim insisted upon before the umpire differed in some of its features from the claim presented to the Secretary of State of the United States by Mr. John T. Doyle, July 20, 1859 (Transcript, pp. 6–8) and by Mr. Eugene Casserly, March 30, 1870 (Transcript, pp. 8, 9).

This argument is to the effect, practically, that there was a variance between the memorial and the two communications referred to, but Señor Avila never suggested that the court did not have jurisdiction of the matter.

The most that can be said for Señor Avila's argument is that the commission should have decided for Mexico upon the ground of variance of decision.

Variance is one thing, want of jurisdiction is quite another thing.

Jurisdiction involves the power to commit error.

And this proposition of a variance was not suggested until after the umpire had made his award.

Throughout the litigation, therefore, both preceding the umpire's decision and subsequent to it, Mexico impliedly and by a uniform course of conduct conceded to the former commission the power to decide this case.

Mexico accepted the opportunity of success with its accompanying chances of defeat. She will not now be heard to say, having lost, that the tribunal had no jurisdiction to render the decision.

Whatever jurisdiction the tribunal had it obtained through the consent of Mexico.

Mexico is therefore estopped from claiming that it did not have the jurisdiction which she necessarily conceded to it and assumed it to possess by her course of conduct at the time.

5. By the convention of July 4, 1868, it is provided that "all claims on the part of corporations, companies, or private individuals, citizens of the United States, upon the Government of the Mexican Republic, *arising from injuries to their persons or property by the authorities of the Mexican Republic,*" which had been presented to the United States for its interposition with Mexico since February 2, 1848, should be referred to the commission.

The ratification of this convention of July 4, 1868, took place on February 1, 1869.

It was therefore competent, under the terms of the convention, to present to the commission all claims for injuries to the persons or property of citizens of the United States accruing between February 2, 1848, and February 1, 1869, a period of exactly twenty-one years. The claim here submitted to the former arbitral court was called to the attention of and presented to the United States on July 20, 1859,

and again on March 30, 1870, by the communications already mentioned. (Transcript, pp. 5-9.)

The claim urged before the former commission was that there had accrued to American citizens on October 24, 1848, and on that day of every year thereafter to February 1, 1869, an annual obligation on the part of Mexico to pay the proportion due to Upper California of the annual interest upon the Pious Fund.

This payment Mexico has withheld.

The withholding by Mexico of an obligation to an American citizen, when due, was an "injury" within the meaning of the convention, according to all accepted definitions of that word.

This point is argued to completion by Mr. Doyle in his reply to Mr. Cushing. (Transcript, pp. 93-99.)

Mr. Doyle there takes the incontrovertible position that "injury" in law corresponds to the Latin "*injuria*," and that "any violation or denial of legal right is '*injury*,' both by the common law and the civil law." (Transcript, p. 96.)

It is not to be supposed that two countries would provide for the settlement of claims *ex delicto* and not for the settlement of claims *ex contractu*.

It is evident that in concluding the convention of July 4, 1868, the United States did not intend to restrict the scope of the commission to claims *ex delicto*.

We find that as early as April 6, 1861 (seven years before the convention of July 4, 1868), Mr. Seward, then Secretary of State of the United States, said in a letter of instruction addressed to Mr. Corwin, then United States minister to Mexico (2 Moore's International Arbitrations, 1291):

> I find the archives here full of complaints against the Mexican Government for *violation of contracts* and spoliations and cruelties practiced against American citizens. These complaints have been lodged in this Department from time to time during the long reign of civil war in which the factions of Mexico have kept that country involved, with a view to having them made the basis of demands for indemnity and satisfaction whenever Government should regain in that country sufficient solidity to assume a character for responsibility. It is not the President's intention to send forward such claims at the present moment. He willingly defers the performance of a duty which at any time would seem ungracious until the incoming Administration in Mexico shall have had time, if possible, to cement its authority and reduce the yet disturbed elements of society to order and harmony. *You will, however, be expected, in some manner which will be marked with firmness as well as liberality, to keep the Government there in mind that such of these claims as shall be found just will in due time be presented and urged upon its consideration.*

It is hardly to be expected in view of such circumstances that the United States would agree to a convention for the settlement of claims *ex delicto* and omit from the consideration of the convention claims *ex contractu*.

Nor is it to be presumed that Mexico had any such thought in mind.

It is interesting to note in this connection that Mr. Moore says (2 International Arbitrations, 1292) that an examination of the provisions of the convention of July 4, 1868, "will disclose the fact that it was framed on the lines of the convention between the United States and Great Britain, February 8, 1853, which Mr. Seward, in view of the success of the London convention, adopted as a model for his claims treaties."

We have no doubt that a reference to the proceedings of the London

convention will show that a large number of the claims there considered were claims *ex contractu*, and it is undoubtedly true that many of the claims considered and decided before the arbitral court created under the convention of July 4, 1868, were demands *ex contractu*.

The convention of July 4, 1868, contained the following clause (Appendix, p. 32):

It is agreed that no claim arising out of a transaction of a date prior to the 2d of February, 1848, shall be admissible under this convention.

By the supplementary convention of February 8, 1872, the United States and Mexico gave this clause a binding interpretation. It is recited in the supplementary convention that the convention of 1868 was "for the settlement of outstanding claims that have originated since the signing of the treaty of Guadalupe Hidalgo on the 2d of February, 1848." (Appendix, p. 36.)

This is the true construction of the convention of 1868, and it is the one which was adopted by Sir Edward Thornton in this case, and also in the case of Belden *v.* Mexico, also decided by him. (Transcript, p. 588.)

The former arbitral tribunal had power to interpret the convention of 1868. If it had no such power, it would follow that the moment there was a suggestion made that a particular claim was not within the convention, that moment the arbitral court would cease to entertain the claim. For, if the court had no power to decide that the claim *came* within the convention, it had no power to decide that it *did not come* within the convention. But, as we have above shown, it was expressly agreed between Mexico and the United States that the umpire had power to decide in each case whether any claim "has or has not been duly made, preferred, and laid before them, either wholly or to any and what extent, according to the true intent and meaning of this convention." (Appendix, p. 32.)

We therefore submit upon the five grounds above stated that the commission organized under the convention of July 4, 1868, had jurisdiction to make the award which it did in favor of the archbishop and the bishop of California and against the Republic of Mexico.

XVII.

IT IS A SETTLED RULE OF ENGLISH AND AMERICAN JURISPRUDENCE THAT THE PRINCIPLE OF RES JUDICATA APPLIES NOT ONLY TO THE THING DIRECTLY ADJUDGED BUT ALSO TO ALL MATTERS NECESSARILY INVOLVED THEREIN, I. E., IN THE THING DIRECTLY ADJUDGED.

The leading case in English jurisprudence on the law of *res judicata* is the Duchess of Kingston's case. This is accepted in America as the leading case in the jurisprudencc of that country. By the decision in the Duchess of Kingston's case it is expressly decided that the principle of *res judicata* applies not only to the thing directly adjudged but as well to all matters *necessarily* included therein.

This rule has been very fully discussed upon the adjudged cases in English and American jurisprudence in the statement and brief filed on behalf of the United States, and no argument need be added thereto.

It is well, however, in considering this case to keep in mind that the value of the principle of *res judicata* would dwindle into insignificance if

the principle were limited to the thing expressly adjudged and did not include the matters necessarily involved in it, i. e., the thing directly adjudged. Nearly all the litigation in America involving the principle of *res judicata* arises out of cases where the principle is invoked, not with respect to the thing directly and explicitly adjudged, but with respect to matters *necessarily and organically* included therein.

This may be well illustrated by a hypothetical case.

The judgments of the courts of the American States respecting real property never possess any extra territorial effect. They are not operative as enforceable judgments beyond the limits of the State in which they are rendered.

There is a provision of the Constitution of the United States, however, whereby it is provided that full faith and credit must be given in each of the American States to the proceedings of courts in the other States.

It results from this provision that the judgments of the courts of one American State have in all other American States the same force of *res judicata* as have the domestic judgments of the courts of the several States within their own limits.

In this juridical matter they are not regarded as foreign states, although their courts are those of independent states and pronounce judgments having no extra territorial effect.

It frequently happens that a citizen of the United States possesses real property in several or many of the States of the American Union. When he dies, it is a question of frequent dispute to whom his property should descend. Let us assume a case where he is believed to be a widower and is known to have left a number of children by a deceased wife. A woman comes forward in one of the States of the American Union, say New York, and claims to be the widow of the deceased; her claim is disputed by the children. As the alleged widow, she claims an undivided interest in the real property of the deceased. She brings an action of ejectment in New York against all the children of the deceased to recover an undivided interest in the real property in that State. It is impossible for her to bring an action in New York for the recovery of real property in California. Her action in New York, therefore, is limited to real property situated within that State. Her claim of widowhood, however, if established, would entitle her to an interest in real property in California. But upon the trial of the action of ejectment in New York, where the whole controversy is waged over the question of her widowhood, it is decided that she was not the widow of the deceased, and hence not entitled to any interest in his real property in New York. In that action of ejectment the matter directly adjudged would be that she was not entitled to recover possession of any interest in the real property in New York. The matter *necessarily included* in the thing directly adjudged would be that she was not the widow of the deceased.

And it is the law, according to the American jurisprudence, that the judgment in the action in New York would include *res judicata* as to her widowhood and could be so pleaded against her in an action of ejectment involving an interest in real property in California claimed by her under her alleged widowhood.

This rule is based upon the idea that the question of widowhood is necessarily included in the thing directly adjudged in and by the

former judgment, although that judgment simply determined that she had no interest in the real property in the State of New York, which alone was sued for in the action.

If this application of the principle of *res judicata* were not the true one, we should be overwhelmed with litigation.

The office and function of the principle of *res judicata* is to put an end to disputes. It is to the interest of society that when a judgment has once been pronounced between two litigants that judgment should be forever final as to all matters necessarily therein decided.

Nor is this the only, though the most direct, interest which society enjoys from the principle of *res judicata.* The existence of that principle is necessary to the stability of all juridical systems and to the maintenance of respect for judicial officers. Courts and judges are not the fountains but the expositors of the law. In theory and according to the acceptance of universal jurisprudence courts declare but do not make the law. It would be impossible to maintain the theory upon which judicial tribunals are now sustained if one court were to decide a case one way upon a controversy between two parties and another court of equal rank and dignity were thereafter to decide the case the other way upon the same question between the same parties.

It is said by Mexico in the diplomatic correspondence and in her answer that the reasons for a decision are not *res judicata.* We concede this point. The reasoning of the judge is not *res judicata* according to either the English or American system.

But there is a very great distinction between the reasoning of the judge and his determination on points which are necessarily, that is to say, *organically*, involved in the judgment.

As to those points so necessarily or *organically* included, the judgment has the force of *res judicata.* As to all points other than those necessarily and *organically* included, and as to the reasoning by itself (which is something quite distinct from such matters), there is no *res judicata.*

For an exhaustive consideration of the law on this subject we refer the court to Chand on Res Judicata (pp. 1–4, 40, 46, 48–51, 60, 65, and 127–136).

XVIII.

THE OBJECTIONS URGED BY MEXICO AGAINST THE DECISION OF THE FORMER ARBITRAL COURT DO NOT, AS SHE MAINTAINS, IMPEACH THE JURISDICTION OF THAT TRIBUNAL, BUT RATHER ATTACK THE JUSTICE OF THE DECISION UPON THE MERITS.

We have already considered the question whether the award of the former arbitral court was within the limits of its jurisdiction; and we believe that we have shown the award to be within these limits upon five different grounds.

We shall now directly, but briefly, refer to the points advanced by Mr. Mariscal upon which he makes the claim that the decision of the former arbitral court was beyond the limits of its jurisdiction.

His argument on this point is contained in his letter of November 28, 1900. (Transcript, Diplomatic Correspondence, p. 27.)

The particular portion to which we desire to call attention will be found at the foot of page 28.

Mr. Mariscal there advances the claim that the decision should have been in favor of Mexico on several different grounds. Now, this argument is not, as he claims, an argument against the jurisdiction of the court, but obviously an argument that the case was improperly decided on its merits.

Jurisdiction is defined in all systems of jurisprudence as the power to hear and determine a case. The existence of jurisdiction does not depend upon its rightful exercise. A case may be within the jurisdiction of a court whether correctly or incorrectly decided. This very obvious proposition has been overlooked by Mexico.

XIX.

NEITHER THE CLAIM PRESENTED TO THE FORMER ARBITRAL COURT NOR THE CLAIM PRESENTED HERE WAS BARRED BY THE TREATY OF GUADALUPE HIDALGO.

It was urged by Mexico before the former arbitral court that the claim presented there was barred by the treaty of Guadalupe Hidalgo.

This point was decided against Mexico by the former tribunal and its decision, operating as *res judicata*, is conclusive now that she attempts to renew the same argument.

Even though the question were an open one, it would not be difficult to show that there is no merit in this argument which Mexico advances.

The two points upon which it was shown to the former court on behalf of the archbishop and bishop of California that their claim was not barred by the treaty were these:

1. By the treaty of Guadalupe Hidalgo the Government of the United States only released Mexico from claims (*a*) brought by citizens of the United States (*b*) if those claims had arisen previously to the second day of February, 1848.

The political *status* of the Roman Catholic Church in Upper California was that of a Mexican citizen, certainly (and at the very earliest), till the exchange of ratifications at Queretaro, which exchange occurred on May 30, 1848. Whatever claims existed in favor of the prelates, clergy, and laity of that church, arising out of the existence of the Pious Fund, and held by them to the tune of the treaty of Guadalupe Hidalgo, existed in favor of Mexican citizens. Hence they were not released by that treaty.

2. The claim presented to the former arbitral court accrued after the ratification of the treaty of Guadalupe Hidalgo on May 30, 1848. This is evident, for the demand presented to the former arbitral court was one for interest which accrued on *October 28, 1848*, and upon the 24th of that month in each year thereafter up to and including 1868, twenty-one years in all.

This matter was argued by Mr. Doyle before the former arbitral court (transcript, pp. 93–99), and to that argument we desire to refer the court.

In examining this point we may consult with profit the history of the arbitrations between Mexico and the United States, preceding that of July 4, 1868, which will be found in Moore's International Arbitrations (Vol. II, pp. 1209–1286).

XX.

OF THE FACTS NECESSARY TO AN AWARD IN FAVOR OF THE UNITED STATES THE ONLY ONE WHICH IS NOT RES JUDICATA UNDER THE JUDGMENT OF THE FORMER ARBITRAL COURT IS THAT OF NON-PAYMENT OF THE ANNUAL INTEREST SINCE FEBRUARY 1, 1869. THIS FACT IS CONCEDED BY THE PROTOCOL. THE WHOLE CASE IS THEREFORE CONTROLLED BY THE PRINCIPLE OF RES JUDICATA.

If we are correct in our contention that *res judicata* applies not only to the thing directly adjudged, but to all matters necessarily included therein, there is nothing to be decided in this case, except to apply the principle in the present matter. For all questions necessary to sustain our case here were necessary to sustain our case before the former arbitral court.

A matter is said to be necessarily included in a thing directly adjudged if the thing directly adjudged could not have been so decided without deciding the matters claimed to be necessarily included therein.

No one of the claims brought forward upon the present arbitration could have been decided against the claimants in the former arbitration without defeating their application for an award. If Sir Edward Thornton, as umpire at the former arbitration, had decided any one of the points against us for which we now contend, his decision would have been against us and in favor of Mexico. But his decision was against Mexico and in our favor.

Hence all of the propositions upon which we rely here for an award were included in the thing which he directly adjudged.

It being conceded in the protocol that the installments have not been paid since February 1, 1869, we are entitled by the force of *res judicata* to the award which we demand in our memorial.

XXI.

THE DEFENSE OF THE STATUTE OF LIMITATIONS IS NOT OPEN TO MEXICO.

Mexico claims in her answer to our memorial that this claim is barred by section 1103 of her Civil Code and by an act passed September 6, 1894, whereby she barred all debts which had not been presented to her for examination and funding under a decree of June 22, 1885.

In article 4 of the convention of July 4, 1868 (Appendix, pp. 432–433), provision was made for the payment of the awards made under that convention by annual installments of amounts not exceeding $300,000 in any one year. The awards against Mexico having exceeded those against the United States, Mexico was compelled under the treaty to pay the difference, in accordance with the above-mentioned provision of the treaty.

Her first payment was made January 31, 1877. (2 Moore's International Arbitrations, p. 1321.) The second payment was made January 31, 1878. (2 Moore's International Arbitrations, p. 1322.)

The last payment was made on January 21, 1890.

On March 1, 1890, Senator William M. Stewart, counsel for the bishops of California, addressed to the Department of State of the United States a request for the interposition of that Government with Mexico for payment of the interest from February 1, 1869. (Tran-

script, Diplomatic Correspondence, foot p. 23.) On August 3, 1891, Mr. Thomas Ryan, then United States minister to Mexico, was directed by the Department of State of the United States to forward this claim or demand against the Republic of Mexico to its foreign office. (Transcript, Diplomatic Correspondence, p. 23.) This Mr. Ryan did on August 17, 1891, as will appear by his letter to Mr. Mariscal of date August 17 (Transcript, Diplomatic Correspondence, p. 8), and his report to that effect to the Secretary of State of the United States under the same date. (Transcript, Diplomatic Correspondence, p. 8.)

Several representations were made by the minister of the United States to Mexico during the following six years; but no answer thereto was ever made until the letter of Mr. Mariscal to Mr. Clayton of October 4, 1897. (Diplomatic Correspondence, p. 4.)

It will be seen, therefore, that there has been no laches in the prosecution of this demand. The last payment under the old award was January 21, 1890. The bishops within forty days thereafter requested the intervention of their Government. In less than two years from the last payment under the former arbitration the matter had already become the subject of renewed diplomatic representation to Mexico by the United States.

We submit further that the statute of limitations is not open to Mexico and we base our proposition upon the reasons here below stated:

1. Such a plea is not now allowable under the protocol of May 22, 1902.

By that convention two questions have been submitted for decision:

(*a*) Is the claim as a consequence of the former decision within the governing principle of *res judicata?* and

(*b*) If not, is the same just?

A claim barred by limitation is as much a just claim as one not so barred. If a system of jurisprudence withholds a remedy through the operation of a statute of limitations it is not upon the theory that the right has been extinguished, but in pursuance of a policy by which it is in effect declared that the law assists those who are vigilant, and not those who sleep upon their rights. The statute of limitations is generally admitted to be one of repose, and not one of presumption. The enactment of a statute of limitations is based upon the idea that sound public policy requires disputes to be brought to a close within a reasonable period.

But it is not presumed that the obligation has been canceled and therefore should not be the subject of litigation.

The function of this tribunal (if the case be not controlled by the principle of *res judicata*) is to decide whether the claim here made is just or not.

It is not its function to undertake to determine what the courts of Mexico would have decided had we taken our case to those courts, as suggested by Mr. Mariscal. (Diplomatic Correspondence, pp. 33, 34.)

2. A statute of limitations is a law of the forum. In this case whatever the statute of limitations may be in Mexico, it is a law for Mexican tribunals alone, and not for international courts.

3. We submit that it ought not to be, and that it is not allowable under the law of nations for a sovereign, while the claim of a citizen of another sovereign is the subject of diplomatic negotiation between the powers, to pass a law of limitation and thereby bar or attempt to

bar the claim. This claim became the subject of diplomatic negotiation on August 17, 1891. (Transcript, Diplomatic Correspondence, p. 8.)

And yet Mexico claims in her answer that the claim became barred by a statute of limitations enacted by her September 6, 1894. (Replication, p. 30.)

4. There is no statute of limitations in international law except such as may be agreed to exist for a particular case by provision in a convention between two or more powers.

5. The statutes of limitations of Mexico have no extraterritorial effect and can not destroy the claim of nonresident creditors.

6. If Mexico had desired to avail herself of the plea of her statute of limitations, she should have declined to arbitrate or (failing that) she should have insisted upon a provision in the protocol whereby she could have obtained the decision and judgment of the court upon the question whether this claim was effectively barred in an international tribunal by a law peculiar to Mexico, territorially limited, and enacted to control proceedings and remedies in her own domestic courts. She failed to take either of these steps.

7. Lastly, there is nothing to show that the legislation referred to by Mexico in her answer does bar the claim or demand urged here.

XXII.

THE DEFENSES ATTEMPTED TO BE SET UP BY MEXICO IN HER ANSWER ARE NOT SUFFICIENT TO DEFEAT THE AWARD CLAIMED BY THE UNITED STATES.

We now turn to the consideration of Mexico's answer.

In her answer filed here Mexico undertakes to set forth certain propositions of fact and law to defeat the award claimed by the United States in its memorial.

The answer is to be found in the replication (pp. 19 to 36).

In some of the paragraphs a number of objections are made to the case of the United States.

We shall proceed to state these propositions in the order in which Mexico states them.

1. The defense made by Mexico in paragraph (I) of her answer is that the archbishop and the bishop of California have no title by which they are authorized to make the present demand. Mexico argues that she succeeded the Spanish Government and "was, as the latter had been, trustee (comisario) of the fund and, in this conception, successor of the Jesuit missionaries, with all the rights granted to them by the founders."

The claim of Mexico is that unless the archbishop and the bishop show title in succession and interest to that formerly held by the Mexican Government they are without standing.

Mexico then proceeds to argue that the archbishop and the bishops claim title by succession through the law of Mexico dated September 19, 1836, but that this title is without validity; and, furthermore, that the act was repealed on February 8, 1842. It is further suggested by Mexico that as the act of April 3, 1845, is limited to *unsold* properties, the archbishop and the bishop could derive no title through that act.

These arguments of Mexico show that she does not appreciate the

claim made by the United States upon behalf of the archbishop and the bishop.

That position was plainly set forth in this litigation as early as January 1, 1875. We find, in a reply of the claimants to the argument of Señor de Azpiroz (one made before the former arbitral court by Mr. John T. Doyle), the following (Transcript, pp. 470, 471):

To avoid misunderstanding, I repeat here explicitly that I do not claim and never have claimed the *ownership* of this fund for the bishops plaintiffs. The *ownership* of it was never in their predecessor, Bishop Diego. It was from the time of its creation a trust fund devoted by its founders to the extension and support of the Catholic Church in California. The first trustees were the Jesuits; it will not be denied that they acknowledged the trust character of the estate. They were succeeded by the Crown of Spain, which took of necessity, and to prevent a failure of the trust, just as in England the Crown takes a trust estate where the trustee dies without heirs, but took *cum onere*, and acknowledging the trust, as has been shown by the *Pandectas Hispano-Mexicanas* and other authorities. Then came the Republic of Mexico, which succeeded to the sovereign rights of Spain; she still held and administered the fund as a trustee. She devolved the administration of it on the bishop by the act of 1836, and resumed it to herself by that of February, 1842. *During all these changes of the trustees, there was none whatever in the objects to which the incomes were to be applied, nor any pretense of such, nor any claim of a right to make such.* The church of California—missionary during its infancy, as all churches were, afterwards fully organized by the appointment of a bishop—was the beneficiary throughout, and neither Spain nor Mexico ever denied the fact until it was questioned for the first time in this proceeding by the learned and distinguished counsel who defends the Mexican Republic.

This same point is enforced in the Diplomatic Correspondence (p. 49) wherein Mr. Hay, Secretary of State of the United States, in his letter of July 18, 1901, addressed to Mr. Clayton, minister of the United States to Mexico, declares that the archbishop and the bishops are themselves, in their right to exact this fund, trustees "for its beneficiaries, the object of the bounty of the founders of the charity."

In answer to this position of Mexico, we may further reply:

(*a*) That the former arbitral court decided the archbishop and the bishop have the right to insist upon the payment to them of the interest due to Upper California, and we maintain that this decision is conclusive.

(*b*) That the archbishop and the bishop had and have, for the reasons stated in Point X of this brief, the rights claimed for them before the former arbitral court and before this court.

(*c*) That in order to establish that the United States has a right to the award claimed in this case, it is not necessary to establish that the archbishop and the bishop had the right to demand this interest. If it appears that Mexico was under an obligation to devote this money to the support of Catholicism in the Upper and Lower Californias, the United States has the right to demand the portion due for application in Upper California and to distribute it according to its own jurisprudence.

(*d*) That the bishops do not claim that they derive their title under the act of September 19, 1836. They claim that the act of September 19, 1836, did not create the rights of the bishop, which are therein granted to him. He held these rights before the act was passed. *The act was simply an act of recognition.*

(*e*) That it is true (as Mexico says) that the act of April 3, 1845, is limited to the debts and the *unsold* properties of the Pious Fund, and does not include properties that had been *sold*. But Mexico loses sight of the fact that this act is itself a legislative recognition by Mexico herself of the right of the bishop and his successors to receive what-

ever was due to the Pious Fund on account of properties which were sold. The act is not a grant with respect to properties which had been sold, but it is evidence of a general right, being itself an admission by Mexico.

Its value as far as property sold is concerned is evidentiary.

2. The second paragraph of Mexico's answer is devoted to stating its claim that the Catholic Church of Upper California was never made the beneficiary of the Pious Fund either by the founders or by the Jesuits, and hence that Mexico had the uncontrolled discretion to use these funds for the support of missions in countries other than Upper California.

Our answers to these propositions are numerous:

(*a*) The former arbitration court decided that Mexico had no such power, and this decision is conclusive here.

(*b*) We have maintained elsewhere that Mexico had no such power. The power was granted to the Society of Jesus and was personal in character. Upon their banishment from the dominions of Spain *and upon their suppression by papal bull* this power of appointment became incapable of execution. The Jesuits never undertook to exercise it. It was in the nature of a right of reentry upon breach of condition subsequent.

No advantage was taken by the Jesuits or by anyone else of the occurrence of the condition specified, which condition happened, if at all, in 1768.

Our rights arise out of an occurrence which took place in 1842, seventy-four years after the expulsion of the Jesuits.

The Spanish Government never undertook to exercise any discretion to bestow these properties elsewhere than to the missions of the Californias, but on the contrary the properties were known from the time of the expulsion of the Jesuits to the cession of Upper California to the United States as "The Pious Fund of the Californias."

What better name could have been given them? None.

They were devoted to pious uses.

These pious uses were to be achieved in the Californias.

It is true that there was an alternative power of appointment which governmental and papal power had rendered ineffective, which was never exercised, and under which no claim was ever made.

In English and American jurisprudence presumptions have been indulged after undisputed recognition of title for seventy-five years that the title is supported by a lost deed. This has been done even in cases where the circumstances tended to support the idea that the deed had never been executed. The fiction was indulged for the sake of justice.

(*c*) If Mexico had any power or discretion to appoint these funds to missions other than those of the Californias, she never exercised the power. On the contrary, her entire course of conduct from 1821 to 1848 was an uninterrupted recognition that these moneys were legally and morally applicable to the support of religion in the Californias, Upper and Lower. These were existing rights recognized by Mexico at the moment of the cession of Upper California to the United States. That act did not destroy the rights.

(*d*) The case bears analogy to, and may be properly controlled by, the reasoning of the United States Supreme Court in Terrett *v.* Taylor (9 Cranch, 43), which we have already cited.

A statement of the facts of the case, and the quotation which makes clear the conclusion of the court, will be found in the Transcript (p. 586).

3. Paragraph III of the answer of Mexico is devoted to sustaining seven positions.

They are these:

(*a*) The Villapuente deed confers no rights upon the claimants.

(*b*) "The immutability of a judgment and its force as *res judicata* belong only to its conclusion."

(*c*) The claim for the interest demanded in this court could not have been considered under the treaty of July 4, 1868.

(*d*) The demand here made, as well as the demand upon which the award was made at the former arbitral court, were discharged by the treaty of Guadalupe-Hidalgo, of February 2, 1848.

(*e*) The claim here demanded was barred by acts passed by Mexico in 1856 and 1859, disentailing and nationalizing church property.

(*f*) The claim demanded is barred by the statute of limitations.

We shall consider these points in the order in which they are stated.

(*a*) The claim of Mexico that the Villapuente deed confers no rights upon the archbishop and the bishop of California has been considered in other places in this brief, and need not here be dwelt upon.

(*b*) The proposition of Mexico that "the immutability of a judgment and its force as *res judicata* belong only to its conclusion" has also been considered elsewhere and will not now be dwelt upon.

(*c*) Mexico claims that "the interest demanded in this court could not have been considered under the treaty of July 4, 1868." The argument is that the convention of July 4, 1868, was limited to claims which accrued between February 2, 1848, and February 1, 1869—a period of exactly twenty-one years. This is the view the counsel for the claimants have always taken. We have never assumed that the former arbitral court had power to award more interest than that which accrued between those two dates. In fact, that was the theory upon which the case before the former arbitral court was tried and decided. It was conceded in the diplomatic correspondence that this is the correct interpretation of the convention of 1868. (Transcript, p. 15.)

We may therefore concede that the arbitral court did not award any interest for a period subsequent to February 1, 1869. And of course the claim here urged is for interest which has accrued since that date.

(*d*) The claim of Mexico that both the present demand and the former demand made before the arbitral court of 1868 should be barred by the treaty of Guadalupe-Hidalgo is briefly considered elsewhere in this brief, and is fully answered in the brief of Mr. John T. Doyle in reply to Mr. Cushing's motion to dismiss the claim. (See Points IV and V, Transcript, pp. 93–99.)

(*e*) The claim of Mexico that the acts passed by her in 1856 and 1859 (eight and eleven years, respectively, after the cession of Upper California to the United States), disentailing and nationalizing church property, had the effect of destroying this claim hardly needs any reply. If the claim existed in favor of the church in perpetuity from the cession of that territory to the United States by Mexico, it was not within the power of Mexico to pass any act whereby the right of property was barred.

(*f*) The seventh point made by Mexico under Paragraph III of her

answer is that the claim is barred by the statute of limitations. That point we have already considered and shall not now dwell upon.

4. The fourth paragraph of Mexico's answer is devoted to the proposition that the Pious Fund was created to provide a fund for the conversion of Indians, and that the Indians have become extinct. Mexico assumes from these premises that the trust purpose has failed, and that the obligation of the trustee can no longer be enforced.

We have always insisted and heretofore contended in this brief that the trust purpose of the Pious Fund of the Californias was, throughout, the conversion of the natives of the two Californias, upper and lower, and the establishment, maintenance, and extension of the Catholic Church, its religion and worship, in that country.

We have pointed out that it would be absurd to suppose that the missions were to be founded for the establishment of Catholicism, and should, to achieve the purpose of the donors, be abandoned upon the conversion or extinction of the natives.

It is hardly open to Mexico, moreover, to claim that, because the natives were unconverted and extinguished for want of the funds which she should have paid promptly, that therefore she should not pay at all.

In point of fact, however, as the proofs abundantly show, the Indians have not become extinct.

In the course of this paragraph of her answer (IV) it is admitted by Mexico that among the objects of the Pious Fund was "the support of the church," but it is said that this "was not the principal or direct object of the establishment of the fund, but the means of carrying out the spiritual conquest of uncivilized Indians through the religious missionaries."

At the time the great contributions to this fund were made the country was in an uncivilized condition, and inhabited by uncivilized tribes. The gift was to the missions of the Californias. Those missions had not for their sole object the conversion of the natives. They were religious foundations designed to endure as long as the see of Rome (to which they owed religious fealty) continued to exist.

It is not true, as claimed in this paragraph, that the purpose of the Pious Fund was the conversion of the pagan Indians "to the obedience of Spanish authority."

At the former arbitration the argument was made that the Californian missions were political institutions. It is quite the dominant note in Señor de Azpiroz's argument.

To that argument Mr. Doyle made a full and effective reply (Transcript, pp. 463–466, Par. I). We may rely upon this reply to show that the missions were not political institutions. Once resolved that they were not political institutions, it follows that it was not the object of the missionaries nor of those who contributed to the fund to subject the natives to Spanish authority.

In this paragraph of the answer (IV) Mexico also renews the argument that the discretion lay with her to give or to withhold the income of the Pious Fund from the missions. This claim is contrary to repeated legislative recognitions; among others to the provisions of the law of May 25, 1832, in which it is provided (sec. 6) that the proceeds of such properties shall be deposited in the treasury of the Federal city, *to be solely and exclusively destined for the missions in the Californias;* also, by the provision in the same act which authorizes the board of administration (junta) to "name to the Government the amounts which may be remitted to each one of the Californias, in accordance with their

respective expenses and available funds," the only provision in the act for the disbursement of the fund.

5. The fifth paragraph of the answer of Mexico is to the point that the right of investing the Pious Fund and applying the proceeds according to the intentions of the donors of the properties were legitimately exercised by the Mexican Government.

This claim upon the part of Mexico is largely, if not entirely, academic. Mexico did invest the fund. She did administer it. She did control it. But to the time of the cession of Upper California to the United States (February 2, 1848) she never disputed her duty to pay over these moneys to the support of the missions of the Californias.

And when she passed the act under which we claim on October 24, 1842, she provided that:

> The revenue from tobacco is specially pledged for the payment of the income corresponding to the capital of the said fund of the Californias, and the department in charge thereof will *pay over* the sums necessary to carry on the objects to which said fund is destined, without any deduction for costs, whether of administration or otherwise.

By an examination of the act of May 25, 1832, already quoted, we find that these properties were "solely and exclusively destined for the missions of the Californias." The provision in the act of October 24, 1842, whereby it was provided that "the department in charge will pay over the sums necessary to carry on the objects to which said fund is destined" admits, therefore, of no other meaning than that these sums were to be paid over to the missions of the Californias, Upper and Lower.

The two acts must be read together, and as by the act of May 25, 1832, the property "was solely and exclusively destined for the missions of the Californias," the provision of the decree of October 24, 1842, directing the payment of the income to "the objects to which said fund is destined" is a legislative direction to pay that income to the missions or to their use.

In either event the result is the same in this case. An obligation to pay to the missions is enforceable by the claimants here. An obligation to pay to the use of the missions is likewise enforceable by them.

It may be added in passing that when reading the act of May 25, 1832, in conjunction with the act of October 24, 1842, it is well to keep in mind that the Government of Mexico as late as February 21, 1842, appointed Gen. Gabriel Valencia to be general administrator of the properties of the Pious Fund of the Californias upon the same terms and with the same powers as were conferred on the board (*junta*) bythe same department (*ramo*) by the decree of the 25th of May, 1832. (Transcript, p. 505.)

We submit, therefore, that Mexico, by her act of October 24, 1842, directed the income to be paid to the missions.

She did not nullify the obligation prior to the cession of Upper California to the United States, and the right which appertained to the citizens of the ceded territory passed with them into their new citizenship.

We may fairly ask, as was asked in one of the arguments at the the former arbitration (Transcript, p. 586):

> Can any Government free itself of its obligations to administer a trust by the simple process of denationalizing the cestuis que trust, and transferring them to the jurisdiction of a foreign government?

6. The proposition advanced by Mexico in Paragraph VI of her answer is the same as that advanced by her in other paragraphs thereof. It is to the effect that she had the right, as trustee to the fund, in succession to the Jesuits, to apply the fund to other missions. We have replied to that point in several rejoinders we have made to various paragraphs of Mexico's answer, wherein she advanced the same argument.

Whatever power Mexico had in the matter may be laid out of view. She exercised certain powers. In the exercise of these powers she made certain agreements. Those agreements we are endeavoring to enforce against her.

7. The seventh paragraph of Mexico's answer (VII) is devoted to three propositions:

(*a*) That the award in this case, if any be made, should be made payable in Mexican silver dollars.

(*b*) That the division claimed by the United States of 85 per cent to Upper California and 15 per cent to Lower California is unfair.

(*c*) That after the Marquis of Villapuente and the Marquesa de las Torres de Rada had conveyed their estates to the missions in 1735, the title of the Marquesa acquired in the administration of the estate of her husband, viz, the Marquis de Rada, was invalidated, and hence the donation to the Pious Fund failed.

These propositions we shall treat in the order named.

(*a*) This point is dealt with in the brief of Messrs. Doyle and Doyle (pp. 25, 26) and in that of Messrs. Stewart and Kappler (pp. 21, 22), and need not detain us.

(*b*) This point is likewise dealt with in the briefs of Messrs. Doyle and Doyle (pp. 22–25) and Messrs. Stewart and Kappler (pp. 23 and 24), and we shall not discuss it.

(*c*) It is not claimed by Mexico that she did not sell the properties belonging to the Pious Fund, including those which had been derived under the Villapuente deed. But she offers in evidence a volume to show that the title conveyed by the grantors to the missions failed in litigation which arose concerning it.

Even if this were so, Mexico would still be answerable for the prices realized upon the sale of the properties. These properties were in the possession of the bishop in 1842. The decree which Mexico now invokes to defeat the award asked for here bears date 1749, ninety years before the incorporation of the fund in the national treasury. This defense by Mexico is offered in her answer as though the matter were new to this controversy. It is to be found dealt with, however, in the Ramirez-Valencia correspondence. (Transcript, pp. 518–523.) The whole history of the litigation is stated by Pedro Ramirez in a communication which he addresses to three lawyers of the City of Mexico, asking their opinion upon the matter. If this statement for an opinion submitted by Mr. Ramirez, with the opinion of the attorneys, is examined it will be found that the facts relied upon by Mexico do not warrant the conclusion which she seeks to draw from them.

A synopsis of the facts which appear in the "Pleito Rada" are stated as Exhibit B to the Replication (pp. 37–44).

The facts of this litigation were these:

The Marquis de Rada died on April 23, 1713. Appraisers were appointed and proper inventories of his estate returned to the probate court. His widow, the Marquesa de Rada, claimed the entire estate,

"founded on her dowry and the tutorship of the children of her first marriage," as well as on account of other obligations due to herself from her deceased husband.

The court awarded the entire estate to the Marquesa de Rada on September 9, 1713. (Replication, p. 38.) In 1718 the heirs of the Marquis de Rada claimed that there had been concealment of goods and undervaluation by the appraisers, and that the estate of the Marquis was more than sufficient to satisfy the demands of the Marquesa against it. They also insisted that there should be a surplus, to which they were entitled as heirs. These claims of the heirs were rejected in several of the courts through which the litigation passed.

It will therefore be seen that the question in the litigation was whether there was an excess or a deficiency of assets. In the meantime the property which had been surrendered to the Marquesa de Rada under the original award of the court passed to the Pious Fund of the Californias.

The controversy was appealed to the Royal and Supreme Council of the Indies at Madrid. By that court the inventories were canceled, and all persons in interest were remitted to the court of first instance for further hearing and proofs. Its decree was made April 16, 1749.

On the return of the case to the court of first instance the cause was retried, and finally decided on January 31, 1829. By the judgment of January 31, 1829, it was decreed that the missions should pay to the heirs of the Marquis de Rada $158,175, reserving questions concerning rents covering a certain period.

This judgment, in effect, was a decree that the properties of the Marquis which had been taken over by his widow, the Marquesa, and conveyed to the Pious Fund, were more than sufficient to discharge all of her rights by the sum of $158,175, and that accordingly her grantee should pay this sum to the persons legally entitled to the excess. This judgment had not been paid by the year 1842, and at that time certain property held by the Pious Fund was seized.

The properties seized were the estate of Cienaga del Pastor and the Vergara street houses, which were derived, not through the Villapuente donation, but through the Arguellas donation. (Transcript, p. 520.)

The record does not show how this judgment of $158,175 was discharged, nor, indeed, that it ever was discharged, nor whether the litigation was prosecuted to other courts and the judgment of January 31, 1829, reversed or annulled; but the record does show that the right of the missions as successors in interest to the Marquesa were recognized, subject to a lien of $158,175.

A clear idea of this litigation will be derived from the reading of the document in the transcript (Transcript, pp. 518–523) and Exhibit B, in the replication (pp. 37–44).

The former arbitral court refused to make any allowance in the amounts decreed to be the principal of the Pious Fund on account of the Cienaga del Pastor, upon the ground that it had been attached to satisfy the above-mentioned lien of $158,175, besides interest, "and there is no evidence in this record that the Government (of Mexico) ever obtained the property or derived any benefit from it. (Transcript, p. 526.)

By proof produced before this court through discovery from Mexico, we have shown that the Cienaga del Pastor was sold by the Govern-

ment of Mexico November 29, 1842, for $213,750, and the personal property thereof for $3,000. (Replication, p. 47.)

As hereinabove stated, we seek to charge Mexico with these two sums in the event that the whole case is not deemed *res judicata*.

It will be seen from the foregoing that the properties of the Pious Fund devoted by the Marquis de Villapuente and the Marquesa de Rada were never lost to it. The only damage which it sustained was to labor under an attachment of $158,175 and interest. Whether that attachment was paid or otherwise discharged does not appear by the record.

It is respectfully submitted that the award of this court should be for the amount asked for in the memorial of the United States, based upon the idea of the principle of res judicata controls here, and failing that, that the award should be for the United States, based upon the demand stated in its memorial as the true amount due in the event that the principle of res judicata is held to not control the decision of this court.

GARRET W. MCENERNEY,
Of Counsel for the United States.

THE HAGUE, *September 25, 1902.*

[Submitted by Messrs. Doyle and Doyle.]

OBSERVATIONS ON THE ANSWER OF MEXICO TO THE MEMORIAL OF THE UNITED STATES.

This document has rather the character of an argument than a pleading in the modern sense. It does not, so far as we can discover, either controvert or confess and avoid a single allegation of fact in the memorial, but denies the *effect* of the former decision as *res judicata*, and seeks to deduce from the evidence given on the former trial a different verdict from what the tribunal then arrived at, as if this were a court of appeal competent to review that former decision, as well on the facts as on the questions of law involved. Such, however, is not the office of this court. The only question it has to decide with reference to the tribunal of 1868 is sharply defined by the protocol under which it is acting, and reads: "Is said claim (the claim on behalf of the Catholic Church of Upper California), as a consequence of the former decision, *within the governing principle of res judicata?*"

What is the governing principle of *res judicata?* We think it may be defined as a legal principle declaring that "the truth of the disputed right having once been inquired into and decided by the final judgment of a competent legal tribunal, having jurisdiction of the parties and the controversy, can not thereafter be called in question by either of them or by any party claiming or deriving title under either of them.

In his answer to the memorial the pleader seeks, in the application of the rule "*res judicata pio veritate accipitur*," to distinguish between decisions of courts of justice organized by authority of the sovereign for the administration of justice, which he terms "decisions pronounced by judges invested with lawful authority to decide the case, its reasons and consequences," and these "pronounced by arbitrators, who have no actual jurisdiction nor any greater powers than what are granted to them by the terms of the submission," and he claims, with respect to the latter, a most strict interpretation of everything relating to an action or defense founded on *res judicata*.

A general discussion of the differences in this respect between the consequences of an arbitral decision and those of the judgment of a court of law would be inappropriate here; for while there are many different varieties of arbitration, from the wager, left to the offhand decision of some third person, up to the international tribunal, which, under the most solemn responsibilities, decides between sovereigns controversies of the greatest magnitude and highest moment (such as the two arbitrations between the United States and Great Britain under the treaty of Washington), the court is not here required to lay down any general rule for such cases, nor for any particular class of them. We are only concerned here with the value, as *res judicata*, of a decision pronounced by the international tribunal created by the

convention between the United States and Mexico of July 4, 1868. For this we look naturally, first, to the terms of the convention which called the tribunal into existence and defined its powers. In it we find that the commissioners were required by Article I, before proceeding to business, to make and subscribe a solemn declaration that they will "impartially and carefully examine and decide to the best of their judgment and according to public law, justice, and equity, without fear, favor, or affection to their own country, upon all such claims above specified, as shall be laid before them," etc. The umpire also is to "make and subscribe a solemn declaration in form similar" to the above.

The commissioners were provided with two secretaries and empowered to hear testimony and decide not only each one of the cases presented to them, but also, by Article III, the question of their own jurisdiction and authority, if questioned. "It shall be competent," says the convention, Article III, "for the commissioners conjointly (or for the umpire, if they differ) to *decide in each case whether any claim has or has not been duly made, preferred, and laid before them, either wholly or to any and what extent*," and by Article II "the parties" solemnly and sincerely engage to consider the decision of the commissioners, conjointly, or of the umpire, as the case may be, as absolutely final and conclusive upon each claim decided upon by them or him respectively and to *give full effect to such decisions without any objection, evasion, or delay whatsoever*. The Spanish is, if possible, even stronger; they promise—

> Considerar la decision de los commisionados, de acuerdo, ó del arbitro segun fuese el caso, como absolutamente final y definitiva, respecto de cada una de las reclamaciones falladas por los commissionados, ó del árbitro, respectivamente, y á dar entero cumplimiento á tales decisiones sin objecion, evasion ni delacion ninguna.

These are unusually strong expressions on the subject of the effect of the awards, as will be seen by comparison with other conventions of like nature.

We are not then treating of any informal or extemporized arbitration, but of the determination of a tribunal constituted in all respects on the lines of a high court of justice, composed, too, of men of exalted character, and distinguished as well for moral and intellectual qualities as for learning. True, it derived its authority from the consent of the two Governments; but, according to the American idea, on which both the litigant States are founded, the consent of the governed is the foundation of all the just powers of government. The tribunal created by the convention of 1868 may be called, if you please, a commission of arbitration, but it was in fact an international court of the highest rank and dignity, just such a court as the present one. It dealt with over eight hundred cases, all of them of magnitude and importance, rendering judgments for and against two sovereign States.

To ascribe to the decisions of such a tribunal less authority or less effect than to those of any ordinary court of justice is to dwarf and belittle the whole subject. If its adjudications did not possess all the authority of *res judicata*, neither will those of the present court, for it also derives its jurisdiction only from consent of parties, though, unlike the other, it is constituted, so far as its *personnel* is concerned, *ad hoc* only and has jurisdiction of but a single case. Now, we ask with all confidence, is it possible that, should the decision in the present case be against the United States, the relators will be at liberty again next

year, or a year thereafter, to put forward another claim for subsequent interest, claiming that the whole question is still open to reexamination and that the decision your honors make is that of mere arbitrators and does not constitute a *res judicata?* It is incredible that this court will, in advance, set so light a value on its own judgment, and it is certain that that of the court whose judgment is under consideration has all the weight and force that one to be pronounced here will have.

The pleader who drew the answer of Mexico, or at least this portion of it, lost sight, too, of the instruction to be derived from the expression of his illustrious client, the Mexican foreign secretary, who, in his letter to Mr. Powell Clayton of November 28, 1900 (Dip. Cor., p. 35 and seq.), said, with characteristic directness (p. 39):

Que es un principio admitido en todas las legislaciones, y perteneciente al derecho Romano, el de *res judicata pro veritate accipitur, no* habrá, de seguro, quien lo niegue. *Tampoco se disputa que un tribunal o juez, establecido por Arbitraje internacional, comunica a sus redoluciones pronunciados dentro de los limites de su jurisdiccion* (como la expresa la cita hecha por el Señor McCreery) la autoridad de cosa juzada; pero que deba darse, en la práctica, la misma fuerza que á lo directamente resulto en la sentencia para terminar el litigio, á las consideraciones ó premisas, no enumeradas expresamente como puntos decidos por el juez, sino simplemente referidos por él en los fundamentos de su fallo, ó supuestos como antecedentes necesarios, por el interseado que interpreta la sentencia, eso es cosa muy diferente y sobre la cual no puede haber el mismo acuerdo.

We quote this passage in the language of its author because, in our opinion, the English version, though generally faithful and idiomatic, does not at this point fully convey the exact sense of the original. The word "*legislaciones*" in the first sentence is not, we think, properly rendered by legislation, for the author is not speaking of legislation, but of jurisprudence; it rather means *systems of law;* and the words "las consideraciones ó premisas, no enumeradas, expresamente como puentos decidados por el juez, sino simplemente referidos por él, en los fundamentos de su fallo, ó supuestos como antecedentes necessarios, *por* el enteresado que interpreta la sentencia" are not adequately expressed by the English version on page 31 of the diplomatic correspondence. We retranslate the paragraph here, from which the precise extent and materiality of this criticism will appear. That "*res judicata pro veritate accipitur,*" a principle of the Roman law, is admitted in every system of jurisprudence, is undeniable; nor is it denied that a tribunal established for international arbitration gives to its judgments *pronounced within the limits of its jurisdiction* (in the language of the authority cited by Mr. McCreery) the force of *res judicata;* but that in practice the same authority attributed to the judgment which terminated the litigation is to be given to considerations or facts leading up to it, not expressly mentioned by the judge as decided, but only referred to by him in reasoning out his determination, or assumed as necessary antecedents to it, *by* the interested party, invoking it, is quite a different thing, and one on which the same consensus of opinion can not be expected. I leave to the judgment of any lawyer who is a good Spanish scholar whether this is not the true sense of the passage in question. In it the words "*no enumeradas expresamente como puntos decididos por el juez*" (not expressly mentioned by the judge, as decided) are material and, indeed, controlling. Now, it is certain that the tribunal of 1868, in order to decide the case before it, had necessarily to determine the capital of the fund, the rate of interest it bore, and the length of time elapsed;

for the demand was distinctly for interest, as such, and the award followed it; hence it was impossible to fix on the amount due without a computation of which those three elements formed the basis. And we are not left in any uncertainty as to what the court decided with respect to them. We have but to read page 526 of the Transcript, where, in the opinion of Mr. Commissioner Wadsworth (in which the umpire concurs, p. 609), we find that he recognized the capital of the Pious Fund to be $1,436,033, the rate of interest on it 6 per cent per annum, and the time elapsed twenty-one years. These facts were, therefore, necessary parts of the decision, and are expressly mentioned by the court as such. The case therefore comes plainly within even the lines laid down by the honorable Mexican secretary himself.

But, says the pleader, who evidently sees the weakness of his first position, these constituent items, amount of capital, rate of interest, and length of time, are not contained in what is termed the *decisory* part of the judgment. So that how clear soever the ascertainment and decision of such constituent facts, or however plain the announcement of such decision by the court, unless it be expressed in a particular portion of the decision, it is of no effect. The origin of this strange idea is, we believe, to be found in the enactment of the French constituent assembly of 4th germinal, 1790, cited on page 6 of our points heretofore submitted; but what authority has enacted, or could enact, forms to be observed by international tribunals? They make their own rules and devise their own forms of pleading and procedure, controlled only by the conventions which give them birth.

A witty Frenchman said that while it is true that divine Providence governs this world, it is also a fact that it ordinarily makes use of France for the purpose. Even such a wag as he would scarcely claim for French enactments the control of international tribunals. The question for us, therefore, is, *what* did the tribunal of 1868 decide in this respect? not in what paragraph or portion of its judgment is it found. Are we seriously asked to believe that the decision by such a tribunal on controverted facts shall depend for its validity on whether it is found on page 7 or page 8 of the opinion of the court or if it is not stated in the precise form prescribed by the French constituent assembly for the courts of that country when remodeling its judicial system and practice a century ago? We can not think so, and find no ground for such extravagant respect for mere forms, which are neither spoken of nor referred to in the mutual covenants of the two nations, which agree to 'consider the decision of the commissioners conjointly, or of the umpire, as the case may be, as absolutely final and conclusive and to give full effect to such decisions without evasion or delay. How can such effect be given if, on a supplemental bill for subsequent installments of the same interest, on the same capital, the losing party is at liberty to reopen and retry the whole question of liability already tried and determined, and this on the very same evidence? One of the logical effects of a judgment by a competent court as a controverted case is to establish the right on the basis of *res judicata*, the most solid known to the law. To refuse to give this effect to a judgment is to deny it more than half its value in violation of the convention.

A suggestion is made on page 7 of Mexico's answer that the United States has expressly repudiated the application of the doctrine of *res judicata* to the awards of international tribunals, referring to a cor-

respondence with the Spanish minister in 1887 in support of his assertion. But this is an entire mistake, resulting from the same failure to recognize the difference between the rule of *stare decisis* applied to questions of law and the maxim as to the conclusiveness of res judicata as to the facts decided. The discussion related to certain cotton belonging to the Spanish subjects captured and confiscated by the United States after Lee's surrender but before the final close of hostilities. The Spanish minister quoted, in support of his views of the law applicable to the case, decisions of the international commission which sat at Halifax to hear cases regarding the Newfoundland fisheries, which he thought affirmed legal principles favorable to his clients. Mr. Bayard, in his reply, says to Mr. Muriaga:

> I must be allowed to remind you that the decisions of international commissions are not to be regarded as establishing principles of international law.

The whole passage is instructive, but wholly fails to touch the question of *res judicata.*

In the opening of the answer the pleader traces the succession to the administrations or management of the trust estate called the Pious Fund through the King of Spain to the Government of Mexico as one of the points on which we agree with him. The fact that King Charles III of Spain, by an act of arbitrary power as cruel and tyrannical as any that history records, seized upon the properties of the Pious Fund, extruded the trustees selected by the donors, and thrust himself into their places, is true. He became thereby trustee *de facto* of the fund, and, therefore, we have rightly claimed, and he himself admitted, that he thus became subject to all the duties and responsibilities and exercised the powers of such trustee. We do not wish, however, to be regarded as conceding the moral rightfulness of his succession.[a]

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[a] The act by which he intruded himself into the place is briefly told, as follows: Having secretly decided on the measure, letters were sent to every city where the Jesuits had an establishment of any kind, addressed to the chief local authorities, and only to be opened on a day and hour indicated on the envelope. Under the royal order inclosed every college, noviciate, or other house of the Jesuits was at midnight surrounded by a guard of soldiers, and the inmates, roused from sleep in the dead hour of the night, were assembled in the chapel. There they were informed that His Majesty had been graciously pleased to banish them all from every part of his dominions. A few moments were allowed them to "put on manly readiness" and enter the carriages waiting at the door, to transport them to the nearest seaport, where ships were already prepared to carry them beyond the seas. They were allowed to take their breviaries and beads, a change of clothihg and a prayer book or two, and forbidden all communication with their fellow-creatures from the moment when they learned their destiny till they had left the shores of Spain, and thus they vanished as silently as a passing summer cloud, not leaving a trace behind.

> Nos patriæ fines, nos dulcia linquimus arva,
> Nos patriam fugimus.'

Opinions may differ as to their virtues or offenses, the advantage or disadvantage of their presence in the community, but they were at least human beings. So deep was the shame of the monarch for his act of brutal tyranny that he forbid his subjects to speak of, write about, or discuss it, as His Majesty reserved the motives and causes of it all in his own royal bosom. The document is quoted from memory, but its text is before the court and speaks for itself. Instead of the mass of treasure expected to be realized from the expulsion of the Jesuits, the total amount of money found in all their houses proved less than $9,000. The missions of California, supposed to be plethoric with the accumulated economies of the income of the Pious Fund and other gifts, yielded in all less than a hundred dollars. Knight's English Cyclopedia-Biography, Vol. III, p. 960 (Tit. Loyola Ignatius), has a brief colorless relation of the story.

That by this act of cruelty, however, the King of Spain did successfully intrude himself into the office of trustee of the Pious Fund is not disputed. But he did not succeed to it by the will of the donors or founders, but by his own act of usurpation. He exercised the powers of the original trustees, and subjected himself to the responsibilities of the office. The beneficiaries remained unchanged, and the trustee, as such, had no power to make any change in the terms of the trust.

Mexico succeeded to the sovereignty of Spain and to the position of trustee of the Pious Fund, and to the latter by a title, which, if not better, was infinitely more honorable than that of her predecessor.

But in considering and discussing this we must not confound the powers of the trustee with those of the sovereign. The latter had the *power* to confiscate the fund or devote its proceeds to any other purposes than those designed by its founders, but it must be shown that such was done by an act of sovereignty, and had such been done, by such an act, we would have been without redress. But neither Spain nor Mexico did anything of the kind; on the contrary it has been abundantly shown that both those Governments recognized the duty of applying the fund sacredly to the objects designated by the founders. Misappropriations of the fund were the unauthorized acts of individuals. Wherever the Spanish Crown or the Mexican Government applied any portion of the Pious Fund to secular uses it was recognized as a loan; taken "*con calidad de reintegro*," and usually the rate of interest was expressed at the time. It was ordinarily 6 per cent, but in one instance as low as 3.

The other matters set up in the answer seem but repetitions of grounds of defense urged on the former trial, more or less varied in form. They were answered in our arguments before the commissioners and before the umpire in that case, which we could hardly expect to improve even if the exigencies of time permitted the attempt; and we therefore beg to refer to them where they appear in the printed volumes: In the Transcript at pages 99, 462 to 477, and 557 to 574, as well as the arguments on pages 575 and 594, and in the Diplomatic Correspondence at pages 12 to 21, 58 to 66, and those of our then associate, pages 51 to 58.

Very respectfully submitted.

John T. Doyle,
W. T. Sherman Doyle,
Of Counsel for the Prelates Representing the Church.

September 18, 1902.

PART V.

EXHIBITS.

Laws of Mexico relating to the Pious Fund.

Translation of extracts referred to in the brief history of the Pious Fund of the Californias, and to be found on pages 187–221 of the record in the case of Alemany *v.* Mexico.

Powers of attorney from the bishops of Sacramento and Monterey to the archbishop of San Francisco.

Proof of succession of the Most Rev. Patrick W. Riordan, archbishop of San Francisco.

Proof of succession of the Right Rev. George Montgomery, Roman Catholic bishop of Monterey.

Deposition of the Most Rev. Patrick W. Riordan, archbishop of San Francisco, dated July 24, 1802.

Deposition of Mr. John T. Doyle, dated August 26, 1902, with exhibits.

Affidavit of the Most Rev. Patrick W. Riordan, archbishop of San Francisco, dated September 16, 1902.

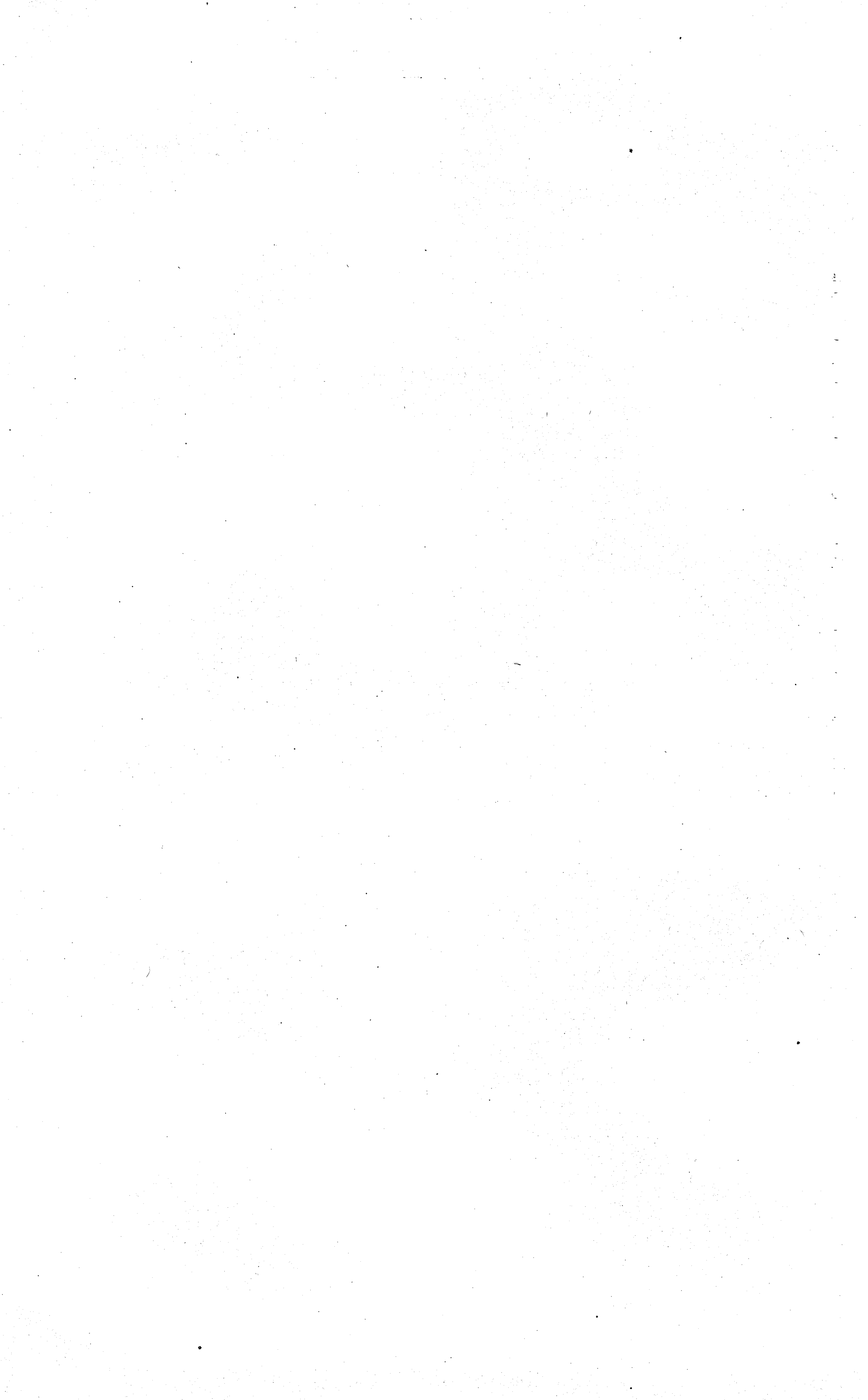
Answer to Mexican call for discovery with relation to the Indian populations of California.

Mexican call for discovery, dated August 12, 1902, and supplemental affidavit of the Most Rev. Patrick W. Riordan with relation thereto.

Letter of the Mexican legation at Rome to the Holy See, dated April 6, 1840, and affidavit of the Most Rev. Patrick W. Riordan with relation thereto.

Translation of extracts from "Noticias de la Californias."

Translation of motion and argument of Señor Avila, not submitted to the tribunal, inserted to complete the record of the former case of Alemany *v.* Mexico.



LAWS OF MEXICO RELATING TO THE PIOUS FUND.

For the convenience of the court the Mexican laws and decrees materially affecting the Pious Fund case have been collected and chronologically arranged in the following pages.

May 25, 1832.

[Leg. Mex. 1827-1834, p. 435.]

Ley. Que el gobierno proceda al arrendamiento de las fincas rústicas pertenecientes al fondo piadoso de Californias.

ART. 1. El gobierno procederá al arrendamiento de las fincas rústicas pertenecientes al fondo piadoso de Californias por término que no pase de siete años.

2. Estos arrendamientos se contratarán precisamente en pública subasta, en las capitales de los Estados ó Territorios, ó en la ciudad Federal, segun la ubicacion de las fincas.

3. Estos arrendamientos se sacarán al pregon dentro de tres meses de la fecha de este decreto, por treinta dias, y á lo mémos con el mismo término se anunciarán por rotulones en la ciudad Federal, en las capitales de los Estados y Territorios, en las cabeceras de los Partidos, Departamentos ó Cantones en que se hallen ubicadas las fincas, y en los demas lugares que tuviere á bien el gobierno; y estos anuncios se inserterán á lo ménos en un periódico de la ciudad Federal.

4. Se sacarán tambien al pregon dentro de tres meses de concluido cualquier arrendamiento ó cada seis meses sie no hubiere arrendatario.

Law. That the Government proceed with the lease of the rural property belonging to the Pious Fund of the Californias.

ART. 1. The Government shall proceed to rent the rural property belonging to the Pious Fund of the Californias for a term which shall not exceed seven years.

2. These leases shall be contracted at public auction in the capitals of the States or Territories or in the Federal city, according to the location of the property.

3. These leases shall be announced by the public crier within three months of the date of this decree for thirty days, and at least for the same period shall be announced by printed notices in the Federal city, in the capitals of the States and Territories, and in the principal places of the districts, departments, or region in which the properties may be situate, and in such other places as the Government may deem expedient, and these announcements shall be inserted in at least one newspaper of the Federal city.

4. The conclusion of any lease shall, within three months, be announced by the public crier, or, if there be no lessee, the announcement shall be made every six months.

5. La aprobacion del remate de arrendamiento se hará prévia la del gobiernia, á cuyo efecto se le remitirá el expediente dentro de quince dias de verificado aquel.

5. The making of the lease shall be subject to the approval of the Government, to which the papers in the case shall be submitted for this purpose within fifteen days after the making thereof.

6. Los productos de estos bienes se depositarán en la casa de moneda de la ciudad Federal, para destinarlos única y precisamente á las misiones de Californias.

6. The proceeds of such properties shall be deposited in the treasury of the Federal city, to be solely and exclusively destined for the missions of the Californias.

7. Lo directivo y económico de estos bienes, así por lo tocante á su administracion, como para conservar é invertir sus productos, estará á cargo de una junta dependiente del gobierno por la Secretaría del despacho de Relaciones.

7. The direction and management of these properties, not only with respect to their administration but with respect to the collection and employment of their proceeds, shall be under the charge of a board accountable to the Government through the office of the secretary of foreign affairs.

8. Esta junta se compondrá de tres individuos, uno de ellos eclesiástico, nombrados por el gobierno, que se renovarán saliendo uno cada año, comenzando por el último, y podrán ser continuados.

8. This board shall be composed of three persons, appointed by the Government, one of them to be an ecclesiastic. Commencing with the member last appointed, one of the board shall be retired and a person appointed in his place each year; the members are eligible for reappointment.

9. Esta junta tendrá un secretario, con la dotacion de six hundred pesos anuales, pagaderos de los fondos de que se trata.

9. This board shall have a secretary, with a compensation of six hundred dollars per annum, payable from the funds in question.

10. Las atribuciones de la junta serán:

10. The powers of the board shall be as follows:

Primera. Cuidar de que se arrienden con oportunidad las fincas rústicas y urbanas, pertenecientes al fondo piadoso de que se trata.

First. To see that the rural and city properties belonging to the Pious Fund in question be suitably leased.

Segunda. Proponer al gobierno las condiciones con que hayan de hacerse los arrendamientos, y la cantidad á que por lo ménos deberá ascender la renta de cada finca.

Second. To submit to the Government the conditions under which the leases should be made and the minimum sum to which the rent of each estate should amount.

Tercera. Examinar los expedientes de los remates, y consultar al gobierno si es de aprobarse el arrendamiento, ó si las propuestas hechas por algun otro licitante son mas ventajosas.

Third. To examine the papers relative to the making of the leases, and to advise the Government if the leases should be approved or if the propositions made by some other applicant are more advantageous.

Cuarta. Proponer al gobierno el número de individuos que juzgue

Fourth. To submit to the Government the number of persons

absolutamente necesarios para la administracion de las fincas rústicas, cuando no puedan arrendarse por falta de postores.

Quinta. Proponer el sueldo de los administradores, y la cantidad con que cada uno haya de caucionar su manejo.

Sexta. Cuidar de que los arrendatarios ó administradores presenten la informacion de idoneidad de sus respectivos fiadores, y la certificacion de supervivencia.

Sétima. Presentar á la contaduría general de propios, la cuenta general de los productos de los bienes del fondo piadoso, acompañando las de los administradores cuandolos haya, á cuyo efecto las exigira de éstos con la oportunidad necesaria.

Octava. Cuidar de que los arrendatarios y los administradores, á su vez, verifiquen á su debido tiempo los enteros en la casa de moneda.

Novena. Proponer al gobierno las cantidades que puedan remitirse á cada una de las Californias, segun sus respectivos gastos, y la existencia que haya de caudales.

11. El secretario llevará un libro de actas de la junta, otro de los caudales que entraren en depósito en la casa de moneda, cuyas partidas se comprobarán con los recibos que expida el superintendente de ella, y otro de las cantidades que se libraren contra éste. Todas las partidas, sean de cargo ó data, á la casa de moneda, las firmarán los individuos de la junta.

12. El superintendente de la casa de moneda se abonará el 1 por ciento de premio sobre las cantidades que recibiere en depósito, será responsable de éstas, y solo se le pasarán en data los pagos que hiciere en virtud de libramiento firmado por los individuos de la

that it deems absolutely necessary for the administration of the rural properties, when the said properties can not be leased for want of bidders.

Fifth. To submit the amount of compensation of the administrators and of the bond with which each must guarantee his management.

Sixth. To see to it that the lessees or administrators submit information as to the qualifications of their respective sureties, and the certification of survivorship.

Seventh. To lay before the auditor-general a general account of the proceeds of the properties of the Pious Fund accompanying those of the administrators, if any, for which purpose these accounts shall be seasonably demanded from the latter.

Eighth. To see to it that the lessees and administrators on their part shall in their turn and at the proper time verify the deposits in the treasury.

Ninth. To name to the Government the amounts which may be remitted to each one of the Californias, in accordance with their respective expenses and available funds.

11. The secretary shall keep a journal of the proceedings of the board, statement of moneys deposited in the treasury, the entries in which shall be supported by the vouchers delivered by the superintendent of said treasury, and another book of the amounts which are drawn against the same. All the entries, whether of debit or credit, in the treasury shall be signed by the members of the board.

12. The superintendent of the treasury shall receive 1 per cent premium on the amounts that may be deposited with him, shall be responsible for the same, and such payments only shall be credited to him as he may make under warrants signed by the members of the

junta, autorizado por el secretario de ella, y con el dése del secretario del despacho de Relaciones.

13. La junta, dentro de los tres meses siguientes á su instalacion, formará su reglamento interior, y lo pasará á la aprobacion del gobierno.

(Se circuló por la Secretaría de relaciones en dicho dia 25, y se publicó en bando del 1° de Junio.)

board, authorized by the secretary of the said board, and with the approval of the secretary of foreign affairs.

13. The board shall, within three months after its organization, frame its internal regulations and submit the same to the approval of the Government.

(Published by the department of foreign affairs on the said 25th day, and promulgated by proclamation on the 1st of June.)

September 19, 1836.

[Leg. Mex., 1835-1840, p. 194.]

Ley: Sobre ereccion de un obispado en las dos Californias.

ART. 1. El gobierno, oyendo á los que por derecho toque, y á los demás que jusgue oportuno, formará un expediente instructivo de la necesidad que haya de erigir un obispado en las dos Californias.

ART. 2. Si del expediente resultare haber aquella necesidad, dará cuenta con él á la Santa Sede para la aprobacion y ereccion de dicha mitra.

ART. 3. El gobierno escogerá la persona que creyere mas conveniente, de la terna que al afecto forme el cabildo metropolitano, y la propondrá á Su Santidad.

ART. 4. Al electo se le acudirá del erario público con seis mil pesos anuales miéntras el obispado no cuente con rentas suficientes.

ART. 5. Durante las mismas circunstancias se le auxiliará del proprio erario con tres mil pesos para la expedicion de las bulas y traslacion á su silla episcopal.

ART. 6. Se pondrán á disposicion del nuevo obispo y de sus

Law: For the establishment of a bishopric in the two Californias.

ART. 1. The Government after hearing such parties as by law may be entitled to a hearing on the subject, and such other persons as it may think proper to hear, shall thereupon make a report with regard to the necessity of creating a bishopric in the two Californias.

ART. 2. If the report should show that there is such a necessity, the Holy See shall be duly informed of the report, for it to approve of it, and create such a see.

ART. 3. The Government shall select from three nominees, presented by the archbishop's council, the person whom it thinks most suitable, and submit his name for appointment to His Holiness.

ART. 4. The person elected shall receive from the public revenues six thousand dollars per annum, until such time as the bishopric shall be in receipt of a sufficient income.

ART. 5. During a continuation of the same circumstances the public revenue shall furnish a subsidy of three thousand dollars for despatching the bulls and the traveling expenses of the episcopate.

ART. 6. The property belonging to the Pious Fund of the Cali-

sucesores, los bienes pertenecientes al fondo piadoso de Californias, para que los administren é inviertan en sus objetos ú otros análogos, respetando siempre la voluntad de los fundadores.

Se circuló en el mismo dia 19 por la secretaría de justicia, y se publicó en Vando de 22.

fornias shall be placed at the disposal of the new bishop and his successors, to be by them managed and employed for its objects or other similar ones, always respecting the wishes of the founders.

The present was put in circulation on the same day—the 19th—by the department of justice, and was officially made public on the 22d.

February 8, 1842.

[Leg. Mex., 1841-1844, p. 111.]

Decreto del gobierno: Reasume el gobierno la administracion é inversion del fondo piadoso de Californias.

Decree of the Government: The Government reassumes the administration and investment of the Pious Fund of the Californias.

Antonio Lopez de Santa Anna, etc., sabed:

Que siendo de un interés general y verdaderamente nacionales todos los objetos á que está destinado el fondo piadoso de Californias, y debiendo por lo mismo estar bajo el inmediato cuidado y administracion del supremo gobierno, como ándes lo habia estado, he venido en decretar:

Art. 1. Se deroga el Artículo 6 del decreto de 19 Setiembre, 1836, en que se privó al gobierno de la administracion del fondo piadoso de Californias, y se puso á disposicion del reverendo obispo de esa nueva diócesis.

Art. 2. En consecuencia volverá á estar á cargo del supremo gobierno nacional la administracion é inversion de estos bienes en el modo y términos que este disponga, para llenar el objeto que se propuso el donante, con la civilizacion y conversion de los bárbaros.

Por tanto, mando se imprima, publique, circule y se le dé el debido cumplimiento.

Antonio Lopez de Santa Anna, etc., know ye:

That whereas all the purposes for which the Pious Fund of the Californias is intended are truly of a general and national importance, and should therefore be under the immediate care and management of the supreme government as it formerly was, I have made the following decree:

Art. 1. The sixth article of the law of the 19th of September, 1836, by which the Government relinquished the management of the Pious Fund of the Californias, and the same was then placed at the disposal of the right reverend bishop of the new diocese is hereby repealed.

Art. 2. The administration and employment of this property shall therefore again become the charge of the supreme Government, in such way and manner as it shall direct, for the purpose of carrying out the intention of the donor, in the civilization and conversion of the savages.

Wherefore, I order the present to be printed, published, circulated, and duly observed.

October 24, 1842.

[Leg. Mex., 1841-1844, p. 301.]

Decreto del gobierno: Sobre incorporacion al erario de todos los bienes del fondo piadoso de Californias.

Antonio Lopez de Santa Anna, etc., sabed:

Que teniendo en consideracion que el decreto de 8 de Febrero del presente año que dispuso volviera á continuar al cargo del supremo gobierno el cuidado y administracion del fondo piadoso de Californias, como lo habia estado anteriormente, se dirige á que se logren con toda exactitud los benéficos y nacionales objetos que se propuso la fundadora, sin la menor pérdida de los bienes destinados al intento; y considerando asi mismo, que esto solo puede conseguirse capitalizando los propios bienes é imponiéndolos á rédito, bajo las debidas seguridades, para evitar así los gastos de administracion y cualesquiera otros que puedan sobrevenir; usando de las facultades que me concede la séptima de las bases acordadas en Tacubaya y sancionadas por la nacion, he tenido á bien decretar lo siguiente:

Art. 1°. Las fincas rústicas y urbanas, los créditos activos y demas bienes pertenecientes al fondo piadoso de Californias, quedan incorporados al erario nacional.

2°. Se procederá por el ministerio de hacienda á la venta de las fincas y demas bienes pertenecientes al fondo piadoso de Californias, por el capital que representen al 6 por 100 de sus productos anuales, y la hacienda pública roconocerá al rédito del mismo 6 por 100 el total producido de estas enagenaciones.

3°. La renta del tabaco queda hipotecada especialmente al pago de los réditos correspondientes al

Decree of the Government: Respecting the incorporation into the public treasury of all the properties of the Pious Fund of the Californias.

Antonia Lopez de Santa Anna, etc., know ye:

That whereas the decree of February 8 of the present year, directing that the administration and care of the Pious Fund of the Californias should redevolve on and continue in the charge of the Government, as had previously been the case, was intended to fulfill most faithfully the beneficent and national objects designed by the foundress without the slightest diminution of the properties destined to the end; and whereas the result can only be attained by capitalizing the funds and placing them at interest on proper securities, so as to avoid the expenses of administration and the like, which may occur, in virtue of the power conferred on me by the seventh article of the bases of Tacubaya, and sanctioned by the nation, I have determined to decree as follows:

Art. 1. The real estate, urban and rural, the credits, and all other property belonging to the Pious Fund of the Californias are incorporated into the national treasury.

2. The minister of the treasury will proceed to sell the real estate and other property belonging to the Pious Fund of the Californias for the capital represented by their annual product at 6 per cent per annum. And the public treasury will acknowledge an indebtedness of 6 per cent per annum on the total proceeds of the sales.

3. The revenue from tobacco is specially pledged for the payment of the income corresponding to the

capital del referido fondo de Californias, y la direccion del ramo entregará las cantidades necesarias para cumplir los objetos á que está destinado el mismo fondo, sin deduccion alguna por gastos de administration, ni otro alguno.

Por tanto, etc.

capital of the said fund of the Californias, and the department in charge thereof will pay over the sums necessary to carry on the objects to which said fund is destined without any deduction for costs, whether of administration or otherwise.

Wherefore, etc.

April 3, 1845.

[Leg. Mex. 1845-1850, p. 13.]

Ley: Sobre devolución de créditos y bienes del fondo piadoso de Californias.

El Excmo. Sr. presidente interino se ha servido dirigirme el decreto que sigue:

José Joaquin de Herrera, general de division y presidente interino de la República mexicana, á los habitantes de ella, sabed:

Que el congreso general ha decretado y el ejecutivo sancionado, lo siguiente:

Los créditos y los demas bienes del fondo piadoso de Californias que existan invendidos, se devolverán immediatamente al reverendo obispo de aquella mitra y sus sucesores, para los objetos de que habla el art. 6° de la ley de 29 de Setiembre de 1836, sin perjuicio de lo que el congreso resuelva acerca de los bienes que están enajenados.

Law: For the restitution of the interests and properties of the Pious Fund of the Californias.

The most excellent president *ad interim* has been pleased to forward to me the following decree:

José Joaquin de Herrera, general of division and president *ad interim* of the Mexican Republic, to the inhabitants thereof:

Know ye that the general Congress has decreed and the executive sanctioned the following:

The credits and other properties of the Pious Fund of the Californias which are now unsold shall be immediately returned to the reverend bishop of that see and his successors, for the purposes mentioned in article 6 of the law of September 29, 1836, without prejudice to what Congress may resolve in regard to the property that has been alienated.

TRANSLATION OF EXTRACTS REFERRED TO IN THE "BRIEF HISTORY OF THE PIOUS FUND OF THE CALIFORNIAS," AND TO BE FOUND ON PAGES 187 TO 221 OF THE RECORD IN THE CASE OF ALEMANY *v.* MEXICO.

EXTRACTS FROM THE WORK ENTITLED "ACCOUNT OF CALIFORNIA, AND OF ITS TEMPORAL AND SPIRITUAL CONQUEST UP TO THE PRESENT TIME, TAKEN FROM THE MANUSCRIPT HISTORY, MADE IN MEXICO IN THE YEAR 1739, BY FATHER MIGUEL VENEGAS, OF THE SOCIETY OF JESUS, AND FROM OTHER REPORTS AND ACCOUNTS, ANCIENT AND MODERN, DEDICATED TO THE KING OUR LORD BY THE SOCIETY OF JESUS OF THE SUPREME COUNCIL OF THE INQUISITION, 1757." MADRID: PRESS OF THE WIDOW OF MANUEL FERNANDES AND THE SUPREME COUNCIL OF THE INQUISITION, 1757.

This work is commonly called Venegas' California, by which title we have cited it. It is believed to have been compiled from Venegas' MS., and original documents by Andres Marc Buriel.

In the early part of the year 1697 Father Salva-Tierra, having been given permission by the superiors of the society to ask alms with which to undertake a work that the Kings with such increased expenses could not accomplish, arrived in Mexico from Tepotzotlán. He found in Mexico a good companion in Father Juan Ugarte, who was reading philosophy in the college. Father Ugarte was imbued also with the same desire for this undertaking. Among other qualities which made him highly esteemed within and without the house, was a singular ability for dealing with temporal affairs and for bringing them to successful culmination.

The spiritual conquest of California could not be undertaken unless there should remain in Mexico an active and diligent agent (procurador) who would overcome any difficulties and look after the collecting and forwarding of continued support to those who were engaged in the work. Father Ugarte did this with zealous activity, thus aiding from Mexico the conquest which Father Salva-Tierra took up in California.

God rewards the constancy of His servants after having purified them, since in the remaining days of January Don Alonso Davalos, Count of Miravalles, and Don Matheo Fernandez de la Cruz, Marquis de Buena Vista, promised them about two thousand dollars, and, following their example, from other benefactors they collected about fifteen thousand—five (thousand) cash and ten (thousand) on promise. Don Pedro Gil de la Sierpe, treasurer of Acapulco, offered to lend a vessel for the transportation and to present them with a small launch. But as this did not assure the conquest, since it had no estate with annual incomes, the congregation of Our Lady of Sorrows of Mexico, founded in the College of San Pedro and San Pablo, gave eight thousand dollars for the establishment of a mission, to which was afterwards added two thousand more, because an annual income of five hundred dollars was deemed indispensable for each mission, since the location was remote and without supplies. In addition Don Juan Cavallero y Ozio, priest in the city of Queréto, agent of the Inquisition, a man of great wealth and of no less religious liberality, to which his famous pious works all over the Kingdom testify, offered twenty thousand dollars for the endowment of two other missions and promised Father Salva-Tierra that he would cash all drafts bearing his (Father Salva-Tierra's) signature.

With such an auspicious beginning it now seemed necessary to ask authority from the viceroy, who at that time was His Excellency Don Joseph de Sarmiento y Valladares, Count of Montezuma, distinguished knight, whose memory should never be forgotten by New Spain and, much less, by the society. The father provincial, Juan de Palacios, addressed this officer by means of a carefully drawn-up memorial. There were great embarrassments in the royal assembly, but after some representation, and inasmuch as now nothing was asked of the King, and as, according to the royal accounts, which were examined, the expedition of Admiral Otondo had cost His Majesty two hundred and twenty-five thousand four hundred dollars, the authority was at last granted on the 5th of February, 1697—a special day for the society, because the feast of the three Japanese martyrs is celebrated on that day. The venerable Father Juan María Salva-Tierra received the despatches permitting him and Father Kino to enter California upon two conditions: First, that they should incur no cost or charge against the royal treasury without an express order of the King, and, second,

that they should take possession of the country in the name of His Majesty. Their powers were construed to be, to take with them at their own cost soldiers, who should escort them; to elect their commander; to dismiss him or the soldiers upon making a report to the viceroy; that the soldiers be furnished with all necessaries and their services be rewarded as though rendered in active war, and, lastly, that the fathers should appoint justices in the new country for good government. (Part 3, sec. 1, Vol. 2, p. 11, etc.)

This apostolic Jesuit (Father Kino), who, as we remarked, had enthused Salvo-Tierra to undertake the enterprise in California, had endeavored, from Sonora, where, on account of physical disability, he was held prisoner, to support the work by collecting alms and sending through the ports of Guaymas and Hiaqui furniture, milk animals, and supplies gathered in the mines and missions. But his great mind was not limited to the present time, nor to little things, nor was that of the venerable Salva-Tierra. Both hoped to conquer, and make subject to God and the King, the vast countries of America which border upon the Pacific, one of them spiritual conquests through the north of California, and the other across the American continent at least as far as the country along the frontier of the port of Monterey and Cape Mendocino, in case California was found not to be an island, Christianizing the intermediate countries. These great men could not execute all they had planned, nor have the Jesuits, who succeeded them in their missions and work; hitherto been able to accomplish it. (Part 3, sec. 5, vol. 2, p. 75.)

In this same year (1716) the venerable Father Salva-Tierra had, among many trials, the consolation of seeing secured in the way he desired the donations made by different benefactors of the missions already founded and a better form of temporal government established. This affords us the opportunity of touching upon the spiritual and temporal branches of the policy inaugurated in California by Father Salva-Tierra, before we give an account of his death. Immediately upon his arrival in California, the venerable father saw that it was necessary to have in Mexico an agent (procurado), whose duty it should be to collect the incomes for the missions founded, alms and assistance contributed by benefactors—the goods, clothing, and provisions which should be bought for the fathers, soldiers, and seamen engaged in the "reduction," and for the churches and Indians; that he should also be charged with the despatch of any business of the mission pending before the real audiencia or the viceroy; that he should look after the purchase, construction, and repair of vessels; and in a word, that he should watch over the temporal needs of so distant, so dangerous, and yet necessary an undertaking. Father Juan Ugar te was charged with this duty for the first few years, until he became a missionary. Father Alexander Romano, of the order of *N. P. General*, succeeded him as agent of California, representing Father Salva-Tierra, so that the latter had only to conduct the affairs of the missions. This was not only because there was needed an agent unhampered by any other occupation, but also *in order that the funds of California should not in any way be mixed with others of the colleges or of the province; and that they should not be touched, confused, or employed for any other purpose than that desired by the benefactors.* Father Romano carried on this work for eighteen years with great zeal—until, in 1719, he became provincial of New Spain. Father Joseph de Escheverría succeeded

him for eleven years—until 1729—when he was appointed inspector of California. Brother Francisco Tompes then succeeded to the post and served with great activity and benefit to the mission until his death in May, 1750.

The sum allowed by the King for the missions of New Spain, not only for those administered by the Jesuits, but also by other sacred orders, is three hundred dollars annually, which may be used for support of the missionary and to meet his expenses with the Indians, unconverted as well as converted. This amount, which may seem excessive to the inexperienced in Europe, is, in fact, very little in America, especially with respect to remote missions, not only because of the lesser estimation in which silver is held for purposes of exchange and trade, but also because of the high price of European goods, and even more because of the difficulty and expense of transporting them, which at times do not arrive wholly undamaged. Because what must it cost to undertake a journey of four or five hundred or even more leagues through uninhabited country, for the most part, over rugged mountains for many leagues, it being necessary to carry all the food for themselves and for their pack horses on the road? The sum allotted each missionary was fixed at five hundred dollars annually, as in California the expenses were much increased because of its remoteness, the expense of transportation, loss of supplies, and barrenness of the land even for the supply of food; and, accordingly, those who desired to found a mission gave ten thousand dollars, the interest of which, placed at five per cent, yielded the necessary sum for the support of the missionary. All the missions of California are up to this time the foundations of private parties, and none depend upon the royal treasury; because, although His Majesty directed that new missions be founded on his account, this has not yet been done. The benefactors and founders did not turn over these donations to the society, but retained them, paying only the interest each year from the founding of the mission, until Father Juan María de Salva-Tierra, being provincial and on a visit to California, thought it would be better to invest the principals in country estates, not only because they would not be risked in the whirl of their owners' trade (as happened in the case of Don Juan Bautista Lopez, founder of San Juan de Liguí, who lost his property, and with it that of that mission), but also because California being obliged for its maintenance to buy in New Spain cattle and provisions these could be supplied at less cost from the output of its own estates.

He asked the opinion of Father Ugarte, in whom he had much confidence because of his great virtue and intelligence. Father Ugarte praised and approved the plan. Having returned to Mexico to settle this matter, with the customary reflection and wisdom of the society, he submitted it to the provincial council. All the fathers, including Father Alexander Romano, agent of California, and shortly afterwards provincial, approved the plan. Only one adviser hesitated, doubting whether it was in conformity with the rule of the society to have missions endowed with productive estates or otherwise. One objection, however, could not prevail against the determined views of the others. Nevertheless, it sufficed for Father Juan María to hold the matter in abeyance until he could consult the father-general and receive his opinion from Rome. The father-general replied that it was not against the rule to hold missions endowed with estates, or in any other man-

ner, since, in the eighth general congregation, by decree 27, thanks were directed to be given, in the name of the society, to Don Fernando Fuste, to Don Fernando Fustemberg, bishop, and Prince of Munstér and Paderborn, for the endowment which he made of fifteen missions in Japan, in Germany, and other places in the north; that these foundations should be regarded in the same way as those of the colleges (since, although the Jesuits can receive no salary, compensation, or alms for their ministrations, it is necessary that the society attend to providing food and clothing for them), and that for this purpose there may be estates and endowments in those places where alms can not be solicited for their support, as is done by the higher branches of the church, which are the houses of the professed in which endowments can not be made even for the churches.

This letter reached Father Salva-Tierra in the year 1716, and he forthwith directed Father Romano to collect the property and purchase country estates, which he should administer for the benefit of the mission. This was accomplished by the purchase in turn of the estates of *Guadalupe, in the valley of Acolmán or Oculma, Huasteca de Ovejas of Huapango, and of Arroyo-Sarco.*

There was employed in the purchase of these estates all the principal of the seven missions already founded and in existence up to the death of Father Salva-Tierra; also, five thousand dollars bequeathed to California in the will of his excellency the viceroy, Duke of Abrantes and Linares; another four thousand dollars from a gentleman of Guadalajara, and a large part of the lesser alms contributed by different persons to the mission. (Part 3, sec. 11, vol. 2, pp. 230–236.)

On the 13th of November, 1744, an exhaustive cedula was despatched by King Philip V to his excellency the Count of Fuen-Clara, viceroy, and other cedulas to several private persons, requesting reports upon various important subjects. Father Christoval de Escobar y Llamas, provincial of Mexico, forwarded a very extensive report, signed on the 30th of November, 1745. This reached Madrid on the 9th of July, 1746, when our most virtuous monarch, Fernando VI, had ascended the throne. The King was animated with the same zeal and magnanimity as his glorious father. Upon the advice of the council, reported to His Majesty by his excellency the Marquis de la Ensenada, then secretary of state and of the Indian office, his royal mind being inclined to a favorable view, the King commanded the issuing of a cedula broader in its terms than the earlier one, which he ordered to be inserted, addressed to his excellency the present viceroy of New Spain. This decree it has seemed to me well to copy, because no document can more truly show the sovereign and august intentions and ardent zeal of both monarchs, the wisdom, circumspection, and foresight of their supreme council, and the broad views, prudence, religion, and energy of their ministers. It reads, then, as follows:

The King, to Don Juan Francisco de Guemes y Horcasitas, lieutenant-general of my most royal armies, viceroy, governor, and captain-general of the province of New Spain, and president of my real audiencia there, residing in the City of Mexico:

On the 13th of November, 1744, a cedula of the following tenor was sent to the Count of Fuen-Clara, your predecessor in office.

[Here follows the royal cedula of King Fernando Triviño, printed in the Transcript at pp. 436–441.]

And now being informed that the aforesaid viceroy, Count of Fuen-Clara, has

received the present decree, and that he had begun to collect information and to take the other necessary measures to facilitate the execution of its demands; and bearing in mind that upon your arrival, and with the indispensable occupations of entry into your government, it will not be possible to make much headway in the matter; and, finally, a full report having been received from Father Christoval de Escoval y Llamas, provincial of that province, of the Society of Jesus, written in that capital on the 30th of November, 1745, to carry out what was advised by the decree of even date with the one above inserted, which report contains information of the greatest importance, and sets forth the situation, climate, and conditions of the above referred to province of California, and the great difficulties which are encountered to congregate the natives into towns, because of the barrenness of the land in much of the province, and of even greater difficulties in founding Spanish posts, and of providing them and the converted Indians with all necessities, and suggests, at the same time, the means and expedients by which these difficulties and embarrassments may be overcome. All this having been taken into consideration by my council of the Indies with the foregoing information on the subject, and having considered the statement made by my attorney, laid before me on the 24th of August, of this year, I have determined to transmit to you a copy of the aforesaid report of the father provincial, and to direct and command you, as in fact do, that being advised perfectly of its contents, you take steps to inform yourself concerning persons that seem more suitable to attain the desired result, and that you consider and deliberate fully upon all the matters in the communication of the aforesaid father provincial; *and that after considering the practicability or impracticability of the means and expedients proposed, you yourself shall determine, without awaiting further orders, upon the putting into effect of those measures that may seem most practicable for the accomplishment of the objects set forth in the decree, above inserted, so far as may be possible, and should there be no serious obstacle or danger, bearing in mind the condition of my royal treasury in your provinces, so that no exorbitant or unnecessary expenses may be incurred;*[a] and you will report as often as opportunity may offer upon the progress that is being made in this very important affair, which at the same time concerns the propagation of our holy faith, my royal service, and the security and defense of the tribes already conquered and converted; and I especially charge you that, after conferring with the aforesaid persons, you seriously consider the advisability of completing the conversion of the Seris tribe, bordering upon the province of Sonora; that of the Pymos Altos, and that of the Papagos, taking care also to restrain and prevent the continued unfriendliness and hostilities of the Apache tribe; and, in the same manner, I direct you to use your authority with the new bishop of Durango in order that from this time he may approve the concessions which the same father provincial made to your predecessor of twenty-two missions, which are suitable for parishes for secular clergy, so far as may be advisable: This being my will.

Dated in Buen-Retiro, December 4, 1747.

I, THE KING.

By command of our lord the King:

DON FERNANDO TRIVINO.

(Part 3, sec. 21, vol. 2, pp. 500–520.)

EXTRACTS FROM THE WORK ENTITLED "HISTORY OF CALIFORNIA, POSTHUMOUS WORK OF THE NOBLE ABBOT DON FRANCISCO SAVERIO CLAVIGERO." VENICE, 1789.

Besides this gift of the viceroy, there was another from the pious Marquis of Villapuente, who, desirous of the conversion of the heathen, contributed the capital for the foundation of a new mission in the port of "La Paz," and wanted the same Father Bravo to be the founder. This man willingly took charge of this arduous and dangerous task,

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[a] In the paper entitled "Establecimento y progresos de las missiones de la Antigua California, dispuestos por un religioso del santo evangelio de México," which forms the fifth volume of the "Documentos para la historia de México, cuarta serie," the receipt of the foregoing cedula is mentioned as follows:

"On the 3d of November, 1744, a royal cedula arrived which was very honorable to California, and in terms which would have been very useful, *if they could have been carried out without expense to the royal treasury, for which reasons its execution was suspended.*"

and having bought all that was necessary at that time for the colony he embarked from Acapulco, in the new boat borrowed from the viceroy, and reached Loreto. (Vol. 2, p. 19.)

We can not say in particular what Father Guillen had to do and suffer in the foundation of that mission and in the twenty-five years while he was in charge of it, but it is known that with indescribable sufferings he passed through the woods and congregated the scattered Indians in new populations, three of which were joined to the mission of St. Louis Gonzaga, which, at the cost of the most noble Mexican, Don Louis de Velasco, Count of St. James, was founded in 1747. It is known also that the territory of his mission was so large that it extended from one ocean to the other; there was not an Indian left who was not made a Christian, or at least a catechumen. The said sufferings being augmented by the great sterility of all that territory, except in a small area of *Apate*, in which a little corn was sown. This mission of the *Señora Adorada* served as a refuge to missionaries and neophytes during the rebellion of *Perecui*, in 1734, concerning which we shall presently speak. (Id., p. 42.)

At the close of the year 1706 it was very much desired to establish a mission in *Kadakaaman*, an inland place situated at the foot of the mountains at the 28th degree of latitude and distant about seventy miles to the north of the mission of *Guadalupe*, which was then the mission farthest north; but the scarcity of missionaries and the foundation of other missions that seemed more necessary delayed its establishment until 1728. Father Juan Bantista Luyando, a Mexican Jesuit,[a] not only gave a part of his fortune for the foundation of this mission, but asked permission of the superior to go in person to establish it. Finally being ordered to California, he set out from Loreto at the beginning of the year above named, accompanied by nine soldiers and arrived at *Kadakaaman* on January 20. (Id., p. 48.)

The missionaries found no other remedy to put a stop to these evils (uprisings) of which they were afraid except that of increasing the number of missions in that region. Their desires were seconded by the inexhaustible generosity of the pious Marquis of Villapuente and of his cousin, known by the name of Doña Rosa de la Peña. The marquis furnished the capital to found a mission near Cape San Lucas, and Doña Rosa the capital for another which should be established in the port of Palmas, where the one of Santiago was already situated. (Id., p. 69.)

Two things were needed to advance the missions to the northward, as the missionaries desired, namely, the capital to found them and the locations to establish them in, and there was no hope of the one or the other until God moved the mind of an illustrious and most noble benefactress. This was the Duchess of Gandia, Doña María Borja, who, having heard an old servant of hers, who had once been a soldier in California, speak of the sterility of that region, the poverty of the Indians there, and the apostolic labors of the missionaries, thought that she could not do anything more pleasing to God than to devote her fortune to the aid of these missions. She therefore ordered in her will that there be provided out of her ready money those large annuities which she left her servants during their lives, and that all

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[a] Of a very noble family, and descended from the first gentleman who established the Jesuits in Mexico.

the rest of her estate should go to the missions of California, together with the capitals of the above-mentioned annuities after the death of those who enjoyed them, and that a mission, consecrated to the honor of her beloved ancestor, St. Francis Borgia, be founded in said peninsula. The sum of money acquired from this legacy by these missions amounted, in 1767, to sixty thousand dollars, and a like amount ought to be obtained after the death of the pensioned servants, over and above some very large debts which there was hope of recovering. With such a large capital many missions could be founded in California, as in fact they would have been founded if the Jesuits had not been obliged in the above-mentioned year to abandon that peninsula. (Id., pp. 139, 140.)

Much more noteworthy was another renunciation made by the same Jesuits in the year following that of 1767. Doña Josefa de Arguelles y Miranda, a Mexican lady, not less pious than rich, devised to the missions of California and to the College of Guadalajara her large estate, which was valued, according to common opinion, at six hundred thousand dollars. A capital so large would have greatly assisted the progress of Christianity in said peninsula, except that the Jesuits, fearing to excessively provoke the enemies of their order (having already suffered so much from calumnies in Portugal, France, and other States in Europe), solemnly renounced said immense legacy in favor of the Government of Mexico. (Id., p. 170.)

The church and the houses of the missionary and soldiers which were built there were miserable huts of wood, covered with the leaves of the above-mentioned palms. This mission bore the name of Santa María, consecrating it to the mother of God in memory of the Duchess of Gandia, notable benefactress of those missions, at whose expense this was and the others were to be founded. This missionary, in order not to neglect any work which might prove to be to the advantage of his mission, cultivated a small field near the stream, and there sowed corn and cotton, both of which were in good condition in January, 1768, when the Jesuits were obliged to abandon these missions. (Id., p. 182.)

EXTRACTS FROM WORK ENTITLED "ACCOUNT OF AMERICAN PENINSULA OF CALIFORNIA," WRITTEN BY A PRIEST OF THE SOCIETY OF JESUS, WHO WITHIN THE LAST YEAR LIVED AS SUCH. MANHEIM, 1772.

[Clavigero, in his Storia della California, alludes to this work as written by the Rev. James Begert (Bägert), a German Jesuit, who spent seventeen years on the mission in California.]

At about this time lived Father Juan Maria Salvatierra, a Spanish Jesuit, who was formerly a missionary in Tarrahumara. He was virtually the head of all missions, and subsequently provincial of New Spain or of the Mexican Jesuit province. He was a man of known zeal for the salvation of souls, of great mind, and not without humility, meekness, patience, and gentleness, together with a healthy, strong body and splendid energy, of which he gave many evidences and which can be read in his biography.

While Salvatierra was performing his duty of visiting the missions, Father Kino often spoke to him concerning California. Both longed to go to that region and both asked for mission duty in California in order to make a beginning toward the conversion of the Californians.

This honor, however, was destined by God to be given only to Father Salvatierra, who finally, after much opposition, as well from his superior as from the high council and viceroy of Mexico, and after many solicitations and presentations and after the lapse of considerable time, he received permission to go to California on condition, made by the viceroy, that the whole undertaking should be at the expense of the fathers, without expectation or hope of obtaining any assistance from the treasury. Salvatierra had practically nothing outside of several good friends, a great mind, and his trust in God. These did not forsake him, but on the contrary did him no little good in getting the assistance of benevolent people who desired to participate in such a holy work. Among others, a missionary priest from Queretaro, by the name of Juan Cavillero y Ozio, gave him not less than twenty thousand dollars, with additional promises that he would honor any drafts that Salvatierra should draw upon him and promptly pay the same. A rich man from Acapulco, named Gill de la Sierpe, loaned him, besides giving certain donations or alms, a small vessel, and presented him also with a boat (p. 198).

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In the meantime—although innumerable dangers beset the missionaries, such as many shipwrecks, hard work, cares, hunger, and suffering, and also skirmishes with the Indians and uprisings of the Californians, because of all of which the entire mission was often upon the point of being destroyed and entirely annihilated—in the meantime, I say, they did not only fortify the two missions already established, named Loreto and St. Xavier, but they established thereafter eighteen other missions. The illustrious Philip V contributed much toward such establishments. Scarcely had he ascended the Spanish throne than he ordered his viceroy in Mexico to pay yearly to the missionaries in California, and also to others, six hundred florins for their maintenance; to furnish their churches with bells, vestments, and other necessary things; to supply a company of twenty-five soldiers; to prepare a ship with a pilot and eight sailors for the service of the missionaries, and to remit to them each year, for the permanent support of the missions, the sum of thirteen thousand dollars, or twenty-six thousand florins, the same to be taken out of the treasury of Guadalajara. These were the King's commands. Many years passed, however, before these commands were executed. The report from Mexico of the nonexecution of these commands not reaching Madrid for many years, the same were accordingly repeated in the years 1705, 1708, and 1716, until finally in the year 1716 the order for the payment for the first time was obeyed, up to which time—that is, from the year 1697 to 1716—the poor California missions cost over three hundred thousand dollars—that is, six hundred thousand florins—which sum, although not so large in the New as in the Old World, was still not a small or paltry amount for Father Salvatierra and his coworkers to obtain through donations from generous and benevolent private individuals.

The generosity of rich pious Spaniards toward the poor Californians in America, inspired by love of God, was not fruitless of results in inducing others to contribute.

Besides these donations, the noble Marquis of Villapuente (whose coffers in Mexico for the Californian and similar missions, as also for other spiritual and corporal work of mercy, were always open) came into a large inheritance, with which, after making certain alms and

donations, he furnished an entire regiment of soldiers for the service of his King in the long drawn out Spanish war of succession.

Father Salvatierra, who was in California at the moment in which his good friend Don Gill de la Sierpe was dying in Mexico, saw in a vision fifty innocent, nicely dressed children leading his good friend into heaven. He related this vision to those who were around him, and he soon thereafter received information from Mexico that his vision was true, and that on the very day and hour he had the vision the death of his good friend occurred. The children he had seen, however, were fifty pure, baptized young Californians, since there had been just so many converted and no more up to that time.

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Of these fifteen missions established, the Marquis of Villapuente endowed six; the duchess of Gandia, from the House of Borja, two; the missionary priest, Juan Cavillero y Ozio, two; Don Arteaga, one; Luyando, a Jesuit from Mexico and a Californian missionary who took the money out of his inheritance, one; the Marquis Louis Peña, one; the Marquis Luis Velasco, one; and lastly, a certain brotherhood in Mexico, also one, which for the everlasting glory and heartfelt gratitude toward the magnanimous donors and benefactors shall be here recorded (p. 214).

INCOME AND MANAGEMENT OF THE MISSIONS IN CALIFORNIA.

With the income out of which the missionaries and many Indians were nourished and clothed and likewise their churches maintained they were safe and sure from other accidents (the dangers of the sea excepted). This money provided them with necessaries which would otherwise have to be obtained by tilling the soil after much labor on the part of man and beast, upon which subject more will be said in the following fifth and sixth sections. Each mission had an endowment of one thousand florins each year, which was provided by those who had founded the same. This money was applied to the support of the missionaries.

By the wish, indeed by the command, of Philip V, there was ordered to be given to each of the Californian missionaries, and also to others who in the vineyard of the Lord under Spanish dominion in America worked as missionaries, six hundred florins yearly out of the royal treasury. These offers, however, were not accepted, partly because it was not sure that the money would be received, because for many years under like circumstances the King's orders for money had not been paid; partly because it did not appear to be sufficient, considering the unproductiveness of the land in the Californias and its remoteness from Mexico, where the money that was donated had to be spent in obtaining everything needed for the support of the missions, such as food, clothing, etc., and partly, also, because there was always a number of benevolent people who would offer one thousand florins to establish missions, and probably, also, because it was foreseen that for some time to come California would contribute very little to the royal treasury, while on the other hand the expenses incurred on account of ships and soldiers were already very large, and in the future would undoubtedly grow larger.

Therefore it will be seen that all the missions in California from 1697 to 1768 were not supported by the Catholic King, but by donations from private individuals. These, nevertheless, gave for every new mission either twenty thousand florins cash or as much in property as would produce yearly an income of one thousand florins.

EXTRACT FROM THE WORK PUBLISHED UNDER THE TITLE OF "DOCUMENTOS PARA LA HISTORIA DE MEXICO,"[a] FOURTH SERIES, MEXICO, 1857, PUBLISHED BY VINCENTE GARCIA TORRES, NO. 3 SAN JUAN DE LETRAN STREET.

[From the Informe, on the "Condition of the missions of California" by Rev. Padre Presidente Fr. Francisco Paloú, addressed to "Rev. Padre Guardian Fr. Rafael Verger," in response to his letter of inquiry of June 1, 1671 (1771).]

Very Reverend Father Friar Rafael Verger, my true father guardian (p. 137):

* * * * * * *

With reference to the last point, that I inform you of all that would be advisable for the spiritual and temporal advancement of the missions, there is much to say in addition to what I have intimated to your reverence in this; but since much, or the greater part thereof, I have written by Father Ramos, I will not here repeat it. But indeed I can not do less than to repeat that you should try to procure from his excellency the restraint of the governor, that he should not interfere with that which does not belong to him, and that the civilization, education, and improvement of these poor neophytes be left to us, because otherwise the Government is about to make it public, and then it will be impossible to repair the damage.

Nor can I do less, considering the great poverty of the Indians of these missions, than to point out to you the advisability that from the funds of these missions they be supplied annually with clothing to cover their nakedness, since here the means are lacking and most of the missions will never be able to meet these expenses, and it is a source of much distress to the missionaries to see them naked and to have not even a rag to give them. In order that this petition may show not only the need, which is actual (and to which everyone can testify, especially those who have been in these parts), also that, without the least expenditure from the royal treasury, his excellency can do this service to these poor creatures, since there are fine properties for the purpose which belong to these missions, I obtained an unsigned paper giving account of these lands, and in order that they may be useful to this end I have not failed to copy it and to insert it in this report in order that your reverence may know of it. I do not know positively whence came the paper; but I judge, with some foundation, that it came from those belonging to the faculty of the College of San Andrés of that city at the time of the expulsion of the fathers, where, since that was the principal office of the agent of California, the papers which give an account of the whole matter should be found.

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[a] Each volume commences with a certificate of the correctness of the copies contained in it. That at the commencement of volume 6, from which these extracts are made, is as follows: "This volume is a faithful copy of its original. Mexico, Dec. 3, 1792. Fr. Francisco Garcia Figueroa." Who or what he was or for what purpose the papers were certified I am unaware.—J. T. D.

List of the pious works founded by various subjects for the spiritual conquest of California.

Year.		
1698.	Don Juan Caballero founded the first mission; he gave for the purpose the sum of	$10,000.00
1699.	The same person founded the second	10,000.00
1700.	Don Nicolas Arteaga founded the third with the same amount	10,000.00
1702.	Several subjects, through the Jesuit Father José Vidal, founded the fourth	7,000.00
1704.	The Marquis de Villapuente founded the fifth with the sum of	10,000.00
1709.	The same person founded the sixth with	10,000.00
1713.	The same person founded the seventh with	10,000.00
1718.	His Excellency Don Juan Ruiz de Velasco founded the eighth with	10,000.00
1719.	The Marquis de Villapuente founded the ninth with	10,000.00
1725.	The Jesuit Father Juan María Luyando founded the tenth with	10,000.00
1731.	Doña María Rosa de la Peña endowed one of those founded by the Marquis de Villapuente with	10,000.00
1746.	The Marquis de Villapuente founded the eleventh with	10,000.00
1747.	Her excellency Doña María de Borja, duchess of Gandia, named in her will as her heirs the missions of California, and there only appears as having been received	62,000.00
	Total in alms	170,000.00

Properties and funds found at the time of the expulsion of the Jesuit fathers.

In money which was found in the office of the agent of California at the time of the expulsion	$92,000.00
For the goods which were found in the warehouse of said agency, valued by Spanish and Mexican merchants at	27,255.06
Goods found in the warehouse of Loreto, according to the prices at which they were charged and sold	79,377.03
Total amount from goods and moneys	199,033.01

Loans made through the general agency of California of the funds of the missions and evidenced by their respective instruments.

To the college of San Ildefonso de Puebla, at 3½ per cent	$22,000.00
To the college of San Ignacio de Puebla, with interest at 4 per cent	5,000.00
To the college of San Pedro and San Pablo of Mexico, without stating the interest	29,100.00
To the college of San Ildefonso of Puebla, at 3 per cent	23,000.00
To the college of San Gerónimo of Mexico, at 3 per cent	38,500.00
To the college of San Ildefonso de Puebla, at 3 per cent	9,000.00
Total amount of loans	126,600.00

General summary.

Total in alms	$179,000.00
Total in goods and moneys	199,033.01
Total in loans	126,600.00
Grand total	504,633.01

Besides these capitals there are the estates called "Ibarro," whose manager reports that in ordinary years they produce from rents $20,000 over and above all expenses, to which amount should also be added the proceeds of the estates of Arroyo-sarco: *so far the paper.*

With reference to this paper I am informed that said estates Ibarra and Arroyo-sarco, of which it speaks in conclusion, were purchased by the alms of benefactors in order to obviate the difficulty which was at first experienced of intrusting $10,000 to any private individual in

order that he might pay over the five hundred dollars interest for the salary of the missionary father, which private individual was accustomed to fail and the investment lost, and they found themselves obliged to seek another benefactor or to abandon the mission, as is related in the history of Father Venegas. That this might not be repeated, they decided to purchase these estates and operate them, and what they produced went to pay the annual salaries, and what remained over and above this enabled them to send supplies to the poor missions, as is shown in the mission books which they kept. From which I infer that at the time of the expulsion of the Jesuit Fathers there remained only the said estates, with the stock in hand and loans amounting to $325,633 and 1 real. From these large amounts as well as from the proceeds of the estates see if annual donations of clothes for these poor Indians could not be made. I do not speak only for those already converted, but for those yet to be converted in the north of California as far as Monterey, and by this means they might be attracted to our holy Catholic faith, which was the purpose of the benefactors. I trust that your reverence will avail yourself of every possible means to accomplish this as well as everything else conducive to the spiritual and temporal advancement of these old missions as well as the new ones, that from God you may receive the reward, as I ask Him in my poor prayers and in the holy sacrifice of the mass, and that he will spare your life many years with good health, and preserve you in His holy grace.

From this mission of your reverence of Our Lady of Loreto of California on the 12th day of February, 1772.

My reverend father superior.

The humble servant of your reverence kisses your hand.

FRAY FRANCISCO PALOÚ.

[Vol. 6, pp. 174–179.]

DIVISIONS OF THE MISSIONS OF CALIFORNIA BETWEEN THE DOMINICANS AND FRANCISCANS—EXTENT OF THE TERRITORY KNOWN BY THE NAME OF CALIFORNIA.

The Reverend Father Iriarte presented the royal cedula to His Excellency Don Antonio María Bucareli y Ursua, viceroy of this New Spain, and, in view thereof and of the fact that the reverend father superior of my college had formerly proposed to relinquish control of some of the old missions, observing that new ones were being founded, and so great an extent of territory populated by heathen had been opened in San Diego and Monterey that the college could not take charge of so many, as I have already explained at the meeting of the prelates.

His excellency called a meeting of the war and treasury board on the twenty-first of March, 1772, by which it was determined that the reverend father superior of the Franciscans and the vicar general of the Dominicans should convene and settle between themselves the division of the missions in accordance with the above-cited cedula of His Majesty, and they agreed on what is set forth in the *concordat*, which the royal board, together with his excellency the viceroy approved, of which the father superior sent me a copy, from which the following is an extract:

COPY OF THE CONCORDAT.

YOUR EXCELLENCY: Friar Rafael Verger, present superior of the college of *propaganda fide* of San Fernando, of Mexico, and Friar Juan Pedro de Iriarte, minister of the Holy Order of Preachers (the Dominicans) and head of the mission, which, by order of His Majesty (whom God preserve), he brought to this Kingdom for the Peninsula of California, obeying the superior decree of your excellency of the 1st of the month of April of the present year of 1872, in which you order them to divide between them the missions of the Peninsula of California for their respective missionaries, in accordance with the royal cedula, dated in Madrid on the eighth of April, of 1770, say that, having deliberated and considered in frequent conferences upon the matter, that it is the most powerful will of our sovereign and Catholic Monarch that the reverend Dominican Fathers, with their minister, the above-mentioned Friar Juan Pedro Iriarte, should enter the said peninsula of the Californias, because he so ordered it in his royal cedula of November 4, 1768, and afterwards in the above-mentioned one of April 8, 1770, in which, after having ordered and commanded concerning said division, he concludes repeating the same order notwithstanding the observations opposed by His Excellency the Marquis of Croix, predecessor of your excellency, and of the general inspector, Don José de Galvez, not deeming it well for his royal service that one order and much less one convent or college should occupy a peninsula of so great an area, and at the same time bearing in mind that this college alone has now under its charge not only the whole peninsula, but also all the territory discovered from the port of San Diego to that of San Francisco, which is about two hundred leagues distant, and bearing in mind that this division ought to be, in accordance with the royal cedula, with fixed boundaries for each order with the idea of a total separation and independence of action, so that in this way one will not conflict with the other, and to thus avoid the dissensions which might otherwise result, and likewise considering that the whole body of the peninsula, on account of the conformation of its surface, does not permit of a variation in the boundary lines; it only has one frontier, which is that of San Fernando Villacata, because the place called San Juan de Dios, which was once thought suitable for another boundary, upon word of Captain Don Fernando Rivera y Moncada, who has stated many times that it is not large enough for one ranch, in which also many fathers of this college agree, all of which we submit with due respect to your excellency, so that time as well as the proceeds of the pious endowments may not be uselessly spent. Bearing in mind all that has been said, and desiring to fulfil exactly the sovereign will of our Catholic Monarch, they have agreed to the following division:

That the Dominican Fathers take charge of the old missions which said order has in California, and the so-called frontier of San Fernando Villacata, following up its new conversions in this direction until they reach the boundaries of the mission of San Diego in that port, placing their last mission on the stream of San Juan Bautista, the boundary of which shall be five leagues farther on, along a line coming out of the Sierra Madre, and ending before reaching the shore, and whence it may turn to the east with a slight deviation to the northeast, so that it ought to come out at the junction of the Gulf of California and the Colorado River, following thereafter the course

which your excellency indicated in the royal order, and if in the intermediate territory between the Colorado and said San Diego another boundary shall be designated running north or northeast, they can also take the territory thus cut off in charge without prejudice to another order; and that the Franciscan Fathers maintain those (missions) which they occupy and continuing from said port of San Diego, in the direction of Monterey, to the port of San Francisco, and farther on.

In this way, your excellency, it will be accomplished that the long coast of southern California and mainland which follows it will not be under the charge of one order alone, which seems to be the principal intention of our Sovereign, and that the two orders of Dominican and Franciscan Fathers have in it their separate fields, and we do not consider it unjust that the college of San Fernando shall give up said missions, because it would otherwise be impossible to carry out the intention of His Majesty on account of which the father superior makes this division of them, hoping that with the efficacious aid your excellency has given the new settlements of the said port of San Diego and Monterey can subsist, and that care also will be taken that a suitable herd of cattle and sheep be transported for each of the new missions, as I pray to your excellency in the statement which I present under date of October 26, 1771, that this conquest being of such importance and consequence as His Majesty states in said royal cedula, you will not withdraw your powerful assistance until it is accomplished, even in the case (which God forbid) of some misfortune having happened in said port of San Diego or in any of the other missions. Therefore, they humbly beg that your excellency approve the said agreement and at the same time order that it have its proper effect, giving to each an authorized copy with the resolution of your excellency in which they will be favored, etc.

Mexico, April 7, 1772.

Friar RAFAEL VERGER, *Superiór.*
Friar JUAN PEDRO DE IRIARTE, *Vicar-General.*

DECREE.

MEXICO, *April 24, 1772.*

Let it be transmitted to the office of my superior government in charge of Don José Gorraez, so that, together with the other prior proceedings, it may be presented to the board ordered to meet on Thursday, the 30th instant. *Bucareli.*

[A translation of the following *junta* and *decreto* will be found at pp. 426–429 of the Transcript, pars. 9 and 10.]

The foregoing agrees with its original, which I transmitted to the office of the secretary of his excellency, viceroy of this Kingdom, Don Antonio Maria, to whom I respectfully submit, and in order that the reverend father superior of the college of *propaganda fide* of San Francisco of this court may be notified; in accordance with the command of the superior decree above set forth I issue this in Mexico on May 12, 1772.

JOSÉ DE GORRAEZ.

(Id., pp. 186–195.)

COMMENT UPON THE PIOUS FUND OF THE MISSIONS.

Before proceeding I can not do less (although briefly) than invite attention to the remarks of Don Fernando Mangino, the director general of church revenues relating to the Pious Fund, which were brought to light upon the departure and expulsion of the Jesuits, inasmuch as in the twenty-eighth chapter of the first part there appears a report which he made to the reverend father superior of our college of San Fernando concerning the funds which he found, sending him a copy of an anonymous paper which came into my possession while I was in California, and which appears in its proper place in this volume. Upon comparing it (the paper) with the statement of his excellency, the director, I find some discrepancies, and in order that the two papers may not seem inconsistent to anyone reading them state the facts bearing on subject.

The anonymous paper reads as follows:

> That the total amount in charity given by the benefactors to guarantee the salaries of the missionary fathers is $178,000.

And the director, although he does not state the amount of alms, says that they are included in the estates and in the sums loaned by the Pious Fund to different colleges. According to the reports of the director and the anonymous paper, the loans amount to $126,600, which through the investments of the Jesuit fathers yielded annually $4,078, together with the $1,000 yielded from the $20,000 which was received as a legacy after the expulsion of the fathers, and invested at 5 per cent brought the annual interest up to $5,078, in addition to the $15,618 produced from the cultivation of the estates, it is clearly seen that the Pious Fund has a net income every year of twenty thousand six hundred and ninety-six dollars, five reals, eight grains, with the obligation of paying each of the salaries of the twenty-six Dominican missionaries of old California, which, at the rate of three hundred and fifty dollars each, amounts to $9,100, as well as the salaries of the fathers in charge of the five missions of Monterey at $800 per annum and the double rations of the ten missionaries and three other assistants, which cost every year $5,771, 3 reals, and 6 grains. Upon deducting these sums from the net income it is seen that (except for any accident or other extraordinary expense which may occur) there remain $5,817, 2 reals, and 2 grains, and out of this it seems to be necessary to pay the officers who manage the fund. As he states, there is only paid to him as director $600, to the accountant $300, and to a secretary $100, amounting to $1,000 yearly.

Again, the director says, that at the expulsion of the fathers there was found in money the sum of $92,000, while in the anonymous paper the amount is placed at $400 more in favor of the pious work. Without doubt it will be found that at the time of drawing up the paper there was this additional sum, and that before delivering it to the control of said director it was expended in the needs of the missions or in settling some outstanding account.

Thirdly. He says that an invoice of goods was found which appraised them at $27,250, 6 reals, which agrees with the statement in the anonymous paper, and which were sold at an advance of their valuation. Thus there was placed in the treasury $28,220, 5 reals. This, together with the ready money, amounts to $120,220, 5 reals. This sum, together with the proceeds from the estates during the period of

almost six years which had elapsed since the expulsion (amounting, according to the statement of the director, to $110,312, 3 reals, 5 grains), brings the funds up to $230,533, 5 grains.

From this Pious Fund, since the expulsion of the fathers, there has been paid, in transporting the missionaries to California and for their daily supplies and salaries, $78,211, 4 reals, 3 grains.

There has also been paid, says the director, by order of the decree of their excellencies, the viceroys Marquis de Croix and Señor Bucareli, the sum of $136,184, 3 reals, 9½ grains for the purposes expressed therein—to fit out the warehouse of the city of Loreto for the department of San Blas, costs of the expeditions on land and sea on account of harbors of San Diego and Monterey, and for the Indians of California.

For these latter I do not know whether there has been anything more distributed than the clothing received at Loreto in the year 1767, which, according to the invoice sent me by the inspector-general, was valued at $8,500, as is stated in Part I, Chapter XV, and therefore all the remaining sum was employed for the purposes stated in the said decrees.

The director concludes by stating that at that day, July 19, 1773, there was in the funds' treasury, net, $26,137, 11½ grains, from which the officers of the colleges of Pueblo and Querétero had to be paid $4,782, 4 reals, 9 grains for a bill of clothing for the employees of the estates, and this account settled there would remain $21,354, 4 reals, 2½ grains. Added to this $8,783, 1 real, 2 grains, which the colleges owed the fund as interest, and which when collected will bring the account up to $30,037, 5 reals, 4½ grains, from which sum, according to the decision of his excellency in the royal assembly, there must be paid promptly for the first time $10,000 and the annual salaries of all the missionaries in new as well as in old California.

In the said anonymous paper it is stated that the valuation of the invoice of goods found in the warehouse of Loreto of the Californias was fixed at $79,307, 3 reals.

And the reason that the director does not give account of this is undoubtedly because it did not come under his control; but it is evident that these goods and effects were received by the governor, D. Gaspar de Portola, who was so commissioned, and from which the soldiers of the peninsula were being paid at the time of the arrival of the inspector-general, when the control of the warehouse was handed over to Don Francisco Trillo y Bermudez, who was named commissioner of warehouses, and who was continuing in the same manner to pay the soldiers from the goods and effects and supplying the missions from the amount due them on account of the warehouse of Loreto, and against the same goods the said Commissioner Trillo made out a bill amounting to about $20,000 for the department of southern California in order to put in operation another warehouse for that department.

Of all this the director was ignorant, who, if he had known it, would have reported it to his excellency, so that the said sums might be returned to the Pious Fund, since they made up the deficiency due on account of the salary of the soldiers, which, during those years, had not been paid, as he says in his report that he has asked that the sums taken from the fund by orders of other departments, chargeable by right with such expenses, be repaid.

On account of what has been said, it seems to me that the said papers, viz, the unsigned paper and that of the director-general, coincide. (Id., pp. 597–601.)

[For the substance of the extract from the work entitled "History of the Society of Jesus in Spain," which Father Francisco Javier Alegre was writing at the time of the expulsion (three volumes, Mexico, J. M. Lara, 1842), see Transcript, page 109, where a translation from the French is given.]

EXTRACTS FROM THE MEMBRETE OF THE VICEROY, COUNT REVILLA-GIGEDO, DATED APRIL 12, 1793, CONTAINED IN THE WORK ENTITLED "SUPPLEMENT TO THE HISTORY OF THE THREE CENTURIES OF MEXICO," BY FATHER ANDRES CAVO; PRESENTED TO LIC. CARLOS MARIA BUSTAMENTE, THE AUTHOR CONTINUING THE WORK." VOLUME 3, P. 112 ET SEQ.

[The sections are numbered as in the original.]

PIOUS FUND OF THE MISSIONS.

9. Missions were erected and maintained with the funds which the zeal and apostolic labors of the above-mentioned fathers of the Society of Jesus acquired for the spiritual conquest of the Indians of California, the principal benefactors and founders of those pious funds being the Marquis of Villapuente and the Marquis de las Torres de Rada.

10. Although the remote territories of New Spain, known by the name of the outlying or western territories of California, have not been occupied with other organized establishments than the above-mentioned fifteen missions and the garrison of Loreto, all the territory lying along the coast of the continent as far north as explored is comprehended and considered under the Spanish dominion, and exploration has already been made as far as the forty-third degree of latitude, where the river called "Los Reyes" is found.

16. From this time missions began to be built adjoining the new garrisons of San Diego and Monterey, the expense being borne by the pious funds which the Jesuits had left invested at the time of their expulsion, and it was thought to be possible that the department of San Blas should be paid from the proceeds of the contiguous salt mines (which had already begun to be administered on account of the royal treasury), and with other means of lesser consideration.

17. This advantage has never been attained; the expenses of the department of San Blas have been continually increased, and those expenses caused by its establishment and the conquests of Sonora and the Californias were of necessity a considerable drain upon the royal treasury from 1768 to 1771, notwithstanding that the large donations collected and the pious funds of the missions went towards defraying these heavy expenses.

200. I repeat, then, my opinion that, setting aside all costly and difficult projects, we necessarily confine our expenses to preventing the encroachments of the English establishments and of any other foreign power upon our peninsula of the Californias, by speedily occupying, as we have already determined on, the port of Bodega and if necessary the Columbia River, putting in a condition of good defense these two important places and the posts of San Francisco, Monterey, San Diego, and even that of Loreto, which garrison the above-mentioned peninsula, removing as soon as possible the seat of government (departamento) from San Blas to Acapulco, and looking to the preser-

vation and encouragement of the Pious Funds and of the salt mines of Zapotillo, so that the royal treasury may not be burdened with future payment of missionaries of the Californias and that the net proceeds from salt may help to defray the expenses of the department of marine.

201. These five points are the ones that I shall submit and recommend, first of all giving due consideration to the design of foreign powers upon the coast lands in northwestern America, to the advantages of fur trade, and to good reasons for preventing illegal trade which the English may conduct in the Spanish harbors of the Pacific.

231. The fourth proposition of this communication should be regarded as incidental to the second and the fifth as incidental to the third, because the latter is directed towards the encouragement of the salt mines at San Blas, the proceeds from which are to be used for the expenses of the seat of government (departamento), and that the greatest care may be taken that the Pious Funds of the missions of California are not dissipated, entailing a new burden upon the treasury.

232. If these funds are preserved they will be sufficient to support the present missions; but since the expulsion of the Jesuits who administered the estates, the receipts, which were employed for the purpose of pious works have begun to diminish.

233. For this reason it seemed more advisable to take away from the department of church affairs the care of the said estates, placing them, by virtue of a royal order, in the charge of the former custodian of the royal treasury; but upon the death of the minister a greater falling off was noticed in the funds.

234. There were many claimants for this vacant trust, but my predecessor, Don Manuel Antonio Flores, thought that it would be safer to place the charge under the care and joint responsibility of two ministers of the above-mentioned treasury.

235. So he settled it, reporting to His Majesty, by copy of the despatch, No. 159, of the 27th of January, 1789; but, later, in a despatch of the 27th of the following March, No. 178, it was shown that far from this measure having produced a good result, the funds were speedily going to destruction, and that such disaster could only be prevented by an active, intelligent, and zealous general manager, who would frequently visit the estates, who would know how to increase the output, selling it with discretion, who would keep a watch upon the conduct of the local managers, who should be engaged in no other employment or work, and who should receive appropriate compensation.

236. These despatches he addressed to the Marquis of Bajamar, as I did by No. 22, of the 26th of November of the same year, 1789, concurring in the view of my predecessor concerning the confiding of the estate to a general manager of the Californias; because I had observed, among other important things in this administration, that improvements upon the estate known as Arroyozarco having been estimated at four or five thousand dollars, there had been expended upon it, without completing it, more than forty thousand.

237. Later, by a despatch, No. 202, of the 30th of November, 1790, I transmitted a copy of a report upon the matter, made with a view to carrying out the royal order of May 20, 1781, which ordered the sale of the country estates of the Pious Funds and the placing of their proceeds at assured interest.

238. These provisions were not put into effect because the treasurer, D. Francisco de Sales Carillo, interposed a lengthy protest, arguing that the Pious Funds would deteriorate more if the country estates should be sold, and that properly cared for those estates known as Ibarra would bring in forty thousand dollars annually, and that of the Arroyozarco four or five thousand.

239. Upon these flattering expectations the sale of the estates was suspended; and the solicitor of the royal treasury having been heard, and upon the consulting vote of the royal council the viceroy, Don Matias de Galvez, made a report to His Majesty, by despatch No. 670, of April 27, 1784, whereupon it was decided by a royal order of the 14th of December, 1785, to approve the recommendations of Carrillo until its results could be observed.

240. They (the results) were very evident; as, far from there being shown an annual net income of forty thousand dollars from the estates of Ibarra, it yielded, in the five years from 1784 to 1788 (when Carrillo died) thirty thousand one hundred and twenty-three dollars, there being lost on the estate of Arroyozarco in the five-year period from 1785 to 1789 one thousand three hundred and twenty-four dollars.

241. For these reasons the solicitor of the royal treasury requested, the counsellor-general approved, and I directed accordingly, that the country estates of the Pious Funds of the missions of California should be placed at public auction, knocking them down to the best bidder or bidders, upon the express condition of receiving for them a perpetual annuity, without requiring any payment on account of the principal; but securing the annuity by proper guarantees, and in the same manner the value of the cattle and other live stock.

242. I thus stated it in my said letter No. 202, proposing, also, that in the case the suggested sale of the haciendas could not be favorably accomplished they be put under the charge of a general manager of the qualifications recommended by my predecessor, even though his salary should cost three times the amount that the administrators of this treasury receive for the management and care of the Pious Funds, which they can not free from debt, because the more engrossing requirements of their employments prevent them entirely from making the visits and personal investigations of the country property, whose decline is every day becoming more apparent, since the expenses were already $98,800, and more than one hundred and forty thousand dollars were still necessary in order that the improvements of the Arroyozarco might be completed, as the engineer Don Miguel Costanzó had calculated.

243. This estate has suffered most on account of its crops being worthless and the large expenditures required to continue it in operation, it having become necessary to rent it, contracting thereby other interminable expenditures on account of the insufficiency of the bondsmen of the tenants, now dead, and on account of the frequent complaints and discontentment of the "colonos" or under tenants of the same estate.

244. Of these latter events the Marquis de Bajamar also gave account in letter No. 283, of July 26, 1791, repeating the proposition that the properties be sold, which was taken note of by my predecessor and myself, and asking that I be advised as promptly as possible of the supreme determinations of His Majesty, in order to guard against the general funds of the treasury being burdened with a considerable part

of the expenses caused by the California missions, when they can not be supported by the Pious Fund.

246. Their rural properties are valued at $526,700; its invested capital or irregular deposits amount to $188,500, and all amount to the large sum of $711,500, whose annual interest, regulated at 5 per cent, should be $35,575; so that it would be paying each year a little more than $22,000 on account of salaries of the missionaries. There should also be a surplus every year of from $12,000 to $13,000, to go towards the expenses of new missions and the equipments and journeys on land or sea of the same missionaries.

246. These two last items, not being of frequent occurrence or very costly, would average yearly about $2,000 or $3,000, which, deducted from what has been considered as a surplus, the remainder would go towards increasing the Pious Fund, and as properties of greater value they could be securely invested, so that the present expenses could not only be paid, but also those which would be incurred in the future by reason of the spiritual conquest or suppression of the heathen Indians, but all of these desirable conditions will disappear if the rural properties are allowed to decrease.

247. The proposed sale of the properties can be obviated and likewise the suggestion of placing them in the charge of an intelligent, honest, and zealous general manager, although in my opinion it would be better to sell them under the conditions proposed by the solicitor of the royal treasury, whose resolutions are and will have to be definitely suspended until your excellency advises me of His Majesty's wishes or of the course of action I am to pursue in accordance with his royal pleasure.

EXTRACTS FROM THE WORK OF M. DUFLOT DE MOFRAS, ENTITLED "EXPLORATION OF THE TERRITORY OF OREGON AND THE CALIFORNIAS," ETC. WORK PUBLISHED BY ORDER OF THE KING: PARIS, 1847.

What is remarkable in the foundations of these missions is that they cost the Government no sacrifice. At the beginning of the settlement of Lower California the viceroys furnished some aid. Philip V allowed them during the first years of his reign thirteen thousand dollars, but in 1735 the Jesuits, having received large donations, knew so well how to employ them that not only were they able to provide for the needs of their missions, but to buy some new lands. In 1767 a lady of Guadalajara, Doña Josefa de Miranda, left by her will, to the College of the Society of that city, a legacy of more than one hundred thousand dollars, which the Jesuits, being already the objects of the calumnies of all Europe, had the delicacy to refuse.

The properties of the Pious Fund with their successive gains are composed today of:

The estates (haciendas) of San Pedro, Torreon, Rincon, Las Golondrinas, including many mines, buildings, and immense herds and lands of more than five hundred square leagues, all situated in the new Kingdom of Leon, or the province of Tamaulipas. These properties were freely given to the society by the Marquis of Villapuente, high chancellor of New Spain, and by his wife, the Marchioness of Torres, on the 8th of June, 1735.[a]

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[a] Archives of the royal notary, Don Pedro del Valle, in Mexico, to-day in possession of Don Ramon Villalobos.

Other legacies enriched the Society of Jesus with large properties, existing near San Luis de Potosí, Guanajuato, and Guadalajara.

The estate known by the name of the "hacienda of Ciénega del Pastor," which is situated near the last-named city, notwithstanding its state of dilapidation and its poor administration, is still rented annually for more than twenty-four thousand dollars. Another estate belonging to the society, the hacienda de Chalco, is part of the Pious Fund, which possesses, besides, a very large number of houses and other real estate situated in the cities, particularly in Mexico.

In 1827 the Government forcibly took the sum of eighteen thousand dollars in specie, deposited in the mint at the capital, and which resulted from the sale of the Arroyo Zarco, a property belonging to the society. The Pious Fund was also despoiled of immense estates by the Congress of Jalisco, and we have already said that President Santa Anna had sold as a whole the Pious Fund to the house of Barrio and to Messrs. Rubio Brothers.

Under the Spanish Government the income amounted to nearly fifty thousand dollars, which served to pay the salary (*sinodo*) of the friars, fifteen Dominicans, at six hundred dollars, and forty Franciscans, at four hundred dollars. This total of twenty-five thousand dollars being deducted, the remainder was employed in buying clothes, machines, implements, vestments, and ornaments for religious worship. The Royal Government repaid to the agent of the missions in Mexico the value of the supplies furnished to the soldiers in the presidios. The agent converted this money into supplies, which he sent overland, at his expense, to the port of San Blas, and from there twice a year vessels took them free of charge to the several ports of California.

During the flourishing reign of Charles III the port and arsenal of San Blas became of great importance. An intelligent agent, sent by the Spanish Government, went to teach the religious to raise and market hemp, and as many of the mission lands united conditions favorable to the cultivation of this plant, the friars applied themselves with a good deal of success, so that they began every year to send large quantities of rope to San Blas. The value of these products was punctually paid to the agent of the missions in Mexico by the royal treasury.

For twenty years this valuable branch of industry has remained inactive, and in all the ports on the western coast of Mexico ships can only procure, often at a very high price, cordage coming from Europe or the United States.

From 1811 to 1818, and after 1823 to January, 1831, the missionaries ceased to fulfil regularly their appointments, on account of the political troubles which during these periods agitated Spain and Mexico, so that, in adding to the sums due the Franciscans of Upper California alone, and these amounted to one hundred and ninety-two thousand dollars, the seventy-eight thousand dollars forcibly confiscated from the religious, the two hundred and seventy-two thousand dollars of which the missions of Upper California were despoiled for supplies furnished the troops of the *presidios*, and the revenues from the estates of the Pious Fund during more than ten years, a total of more than one million dollars would be obtained, of which the Mexican Government has despoiled the association of missions in defiance of the intentions of the testators.[a]

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[a] Report presented to Congress in January, 1831, by Don Lucas Alaman, minister of state.

On the 25th of May, 1832, the Congress of Mexico rendered a decree by which the executive power was charged to rent for seven years the estates of the Pious Fund, causing the proceeds to be paid into the national treasury. A second decree of Congress of the 19th of September, 1836, ordered that the Pious Fund be placed at the disposition of the new bishop of California and of his successors, to the end that these prelates to whom the administration was entrusted might employ it to the development of the missions or analogous enterprises, respecting, always, the will of the founders.

On the 8th of February, 1842, General Santa Anna, provisional president, acting by virtue of his discretionary power, withdrew from the bishop of California, notwithstanding his protestations, the administration of the Pious Fund, and, by a decree of the twenty-first of the same month, gave charge of it to General Valencia, chief of staff of the army.[a]

For those who knew the country, the word *administrate* had a very plain signification. This was before the actual sale, the last blow aimed at the organization created by the Jesuits. Nevertheless, to be just, we add that up to the present the few Franciscans who remain in California have received the assistance of four hundred dollars annually, in merchandise, quoted at exorbitant prices. (Vol. 1, pp. 266, 271.)

Last account of the goods of the Pious Fund which the sale of the properties el Torreon, Huerta de Santa Cruz, Rio Chico, Baño de Atotonilco, Juana Gonzales, Labor de la Natividad, Hacienda del Maguey, y Estancia de Organos produced, all which properties belonged to the civilization and conversion of the heathen, and which account was last given to the viceroy and is to be found in the report made by the royal *junta* of auctions. The treasury, which only held these sums in deposit, disposed of them and owes them up to now.

Inform me what is the state of the proceedings in the estate of Doña Francisco de Paula Argüelles, who left large properties for the purpose of founding pious works, in which were included the missions of California and of China; who is charged with this administration; to what sum the annual receipts into the treasury amount, and if there are any sums derived from this source in it. D. May 25, 1816. Rubric. Ministers of the general treasury.

[No. 3067.]

YOUR EXCELLENCY: An account of the proceedings concerning the estate of Senora Doña Josefa de Paula Argüelles is not to be found in this general treasury, nor was it ever deposited in it, except only that the quantities which were deposited by the attorneys and administrators of the estates, which consisted of several rural properties and two urban properties in this capital, were received. The Marquis of Santa Cruz de Ynguanzo, who was the administrator in the year 1804, made the last deposit of eighteen thousand dollars on the 9th of February of that year, but without any explanation to this treasury that we know of. In April of the last year the above-mentioned estates were sold, the price obtained being four hundred and thirteen thousand seven hundred and thirteen dollars two reals nine grains, of which amount

[a] Sec: "Diario del Gobiernio de la Republica Mexicana," Nos. 8 and 21, of February, 1842.

there were placed in the treasury ten thousand dollars to the account of the pious work of the "Niños del Carro" of Manila, according to the disposition of the testatrix, and four hundred and three thousand seven hundred and thirteen dollars two reals nine grains to the account of the missions of the Californias and of the Philippines, half to each, following out the tenor of her will. In the years 1805, 1806, and 1807 nothing appears to have been deposited by the Marquis of Santa Cruz de Ynguanzo, nor since the time that he has been administrator of the estates of Don Juan Antonio Ayerdi. The greatest part of said goods was sold at the auction of December 15, 1808, as follows:

The hacienda of Torreon, Huerta de Santa Cruz, and Baña de Atotonilco, Rio Chico, Juana Gonzales, and Labor de la Natividad, to Doña Josefa Gonzales Guerra, who deposited on various dates one hundred and eighty-eight thousand dollars. The haciendas of Maguey and Estancia de Organos were knocked down to Don Fermin Antonio de Apecechea, who also, upon different dates, deposited one hundred and eleven thousand three hundred and fifty dollars, five reals, six grains, over and above fifteen thousand seven hundred and two dollars, seven reals, and nine grains of interest from the time that he made no payment on the principal. The hacienda of Ciénega and the urban properties appear to have remained unsold, concerning which the said Ayerdi, now handling what ought to be deposited on account of their products, could give an explanation. This same individual is the attorney for the heir of Señora Argüelles, who is interested to the extent of a one-fourth part in the estate left by her will, and to whom twenty thousand three hundred and thirty-seven dollars, five reals, four and one-half grains remain owing, on account of the fourth part of the properties sold, and out of which he has received fifty-four thousand five hundred dollars. In the treasury there ought to be left two hundred and fifty-nine thousand five hundred and fifty-three dollars, five reals, three grains; of which twenty thousand three hundred and thirty-seven dollars, five reals, four and one-half grains belong to the heir, and to the missions of California and Manila and the Philippines, half to each, two hundred and thirty-nine thousand two hundred and fifteen dollars, seven reals, ten and one-half grains, which is as much as we can tell your excellency in compliance with your superior order of the 25th instant. God guard your excellency many years. Mexico, May 25, 1816. To His Excellency José Montér, Antonio Batres, His Excellency Don Felix Maria Calleja. In the margin. Mexico, June 12, 1816. To the attorney of the royal treasury for the service of the Government of Count del Valle. Wherever the proceedings concerning the estate of Marchioness de Paula Argüelles may exist, considering the desire of the attorney Don Juan Antonio de Ayerdi, in which he asks permission to leave this capital, without designating any time, in order that he may move in the premises, and concerning the last, state if the stay of Ayerdi is necessary here. Rubric.

REPORT MADE BY THE GENERAL BOARD OF THE PIOUS FUND THROUGH DON FERNANDO MANGINO TO THE VICEROY, MARQUIS DE CROIX, RELATIVE TO THE GENERAL AGENCY OF THE MISSIONS OF CALIFORNIA.

SEC. 62. Since the agency of the missions of the Californias was situated in the College of San Andrés, of this capital, which the Society of Jesus occupied at the time of the expulsion of its members, his excel-

lency the viceroy, Marquis of Croix, instructed Don José Basarte that simultaneously with the taking possession of the properties of the college he should likewise assume control of those belonging to the Pious Fund, and in order that I may be able to relate to your highness systematically the condition in which they were found, that in which they were at the end of last year—1776—and the other circumstances which I have promised to add in this third part, I have thought it well and conducive to greater clearness to do it in the following tables:

Funds and goods on hand.

In the office of the agency there was found in cash	$92, 400. 0. 0
In golds and effects sold previously by the depositario general, Don Eugenio Daza	28, 626. 5. 0
The silver ore sent by the missions of California to the city of Guadalajara, 100 marks, 6½ oz., which converted into money in this capital leaves net, after paying the duty thereon	954. 4. 6
Amounting to	121, 881. 1. 6

NOTE.—With a portion of this sum an attempt was made to establish the house of refuge or rest for old and decrepit missionaries, as was ordered by the Marquis de Villapuente, one of the founders, in his last will. This result, however, was never attained.

PIOUS FUND OF THE CALIFORNIAS—MATTERS WHICH APPEAR IN THE REPORT WHICH THE SECRETARY OF INTERIOR AND EXTERIOR PRESENTED TO THE CHAMBERS IN 1830.

The Pious Fund of the Californias has suffered a very deplorable fate, notwithstanding that it is very valuable, not only on account of the value of its estates, but also on account of its capital invested. The former do not produce as much as they should, on account of the want of ready money necessary for their cultivation; nor do the latter produce any important revenues, because they are partly loaned to persons guaranteeing to pay annuities, many of whom fail to pay; and partly to the public treasury, which does not pay either, nor can it do so at present, on account of its well-known distresses. Thus it is that for many years past there have been very considerable arrearages in the payment of the salaries to the missionaries, so that the amounts which are now owing them on this account form a very large sum, which, according to the most recent accounts that exist in the department in my charge, can not be less than one hundred and thirty thousand dollars.

The document No. 3, prepared in view of the last examined and approved accounts, up to the year 1827, gives a clear and detailed idea of the properties belonging to the fund, the successive falling off of the proceeds of the principal estate in which it has an interest being shown therein.

It is clear that those territories, concerning whose economic and political importance there is no doubt, find themselves very much neglected in their civil and religious administration, and it is the more so because their advance in every branch involves no expense upon the national treasury. The Pious Fund belonging to these territories would be sufficient of itself to completely fulfill these important ends, if its proceeds were put to use, and in order to attain this object, the Government proposes to concentrate upon this point the special attention which it merits, at least in so far as returns can be expected from

the country properties, which are very susceptible of improvement. Never, however, will these proceeds to the extent that they can be turned into cash suffice of themselves alone for the endowment of the missions and other uses for which they were intended. In order to fulfill this completely, it would be necessary to add to them the properties of the missions of the Philippines, which certainly can not be applied to a purpose more analogous, nor more in conformity with the original will of the founders.

Document No. 3 (número 3), Transcript, page 220, is a recital of some of the capitals of the Pious Fund, which up to 1827 was invested as there indicated.

The next table shows the yearly proceeds and expenses of the hacienda Ciénega del Pastor for the years therein indicated. Then follows a list of some of the amounts due the Pious Fund of California by the national treasury, together with their unpaid interest, until the year 1842. This corresponds in the main with the inventory presented by Don Pedro Ramirez.

POWERS OF ATTORNEY FROM THE BISHOPS OF SACRAMENTO AND MONTEREY TO THE ARCHBISHOP OF SAN FRANCISCO.

SACRAMENTO, CAL., *July 30, 1902.*

Most Rev. P. W. RIORDAN, *Archbishop of San Francisco.*

MOST REVEREND DEAR ARCHBISHOP: I enclose herewith my general power of attorney. You may need it before the arbitral court of the Pious Fund claim at The Hague. By this I appoint you to act in my stead for the collection of said moneys of the Pious Fund.

Yours truly in Christ,

[CORPORATE SEAL.] THOMAS GRACE,
Roman Catholic Bishop of Sacramento.

Know all men by these presents, that the undersigned, the Roman Catholic Bishop of Sacramento, a corporation sole, has made, constituted, and appointed, and by these presents does make, constitute, and appoint Most Rev. Patrick W. Riordan, archbishop of San Francisco, its true and lawful attorney for it and its name, place, and stead, and for its use and benefit, to ask, demand, sue for, recover, collect, and receive all such sums of moneys, debts, dues, accounts, legacies, bequests, interests, dividends, annuities, and demands whatsoever as are now or shall hereafter become due, owing, payable, or belonging to it; and have, use, and take all lawful ways and means in its name, or otherwise, for the recovery thereof, by legal process, and to compromise and agree for the same, and acquittances or other sufficient discharges for the same, for it and in its name, to make, seal, and deliver; to bargain, contract, agree for, purchase, receive, and take lands, tenements, hereditaments, and accept the seisin and possession of all lands and all deeds and other assurances in the law thereof; and to lease, let, demise, bargain, sell, remise, release, convey, mortgage, and hypothecate lands, tenements, and hereditaments upon such terms and conditions, and under such covenants as he shall think fit.

Also to bargain and agree for, buy, sell, mortgage, hypothecate, and in any way and in every way and manner deal in and with goods, wares, and merchandise, choses in action, and other property in possession or in action; and to make, do, and transact all and every kind of business of what nature and kind soever; and also, for it and in its name, and as its act and deed, to sign, seal, execute, deliver, and acknowledge such deeds, leases, assignments of leases, covenants, indentures, agreements, mortgages, hypothecations, bottomries, charter parties, bills of lading, bills, bonds, notes, receipts, evidences of debt, releases and satisfactions of mortgage, judgment and other debts, and such other instruments in writing of whatever kind and nature as may be necessary or proper in the premises.

Giving and granting unto its said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as it might or could do if personally present, hereby ratifying and confirming all its said attorney shall lawfully do or cause to be done by virtue of these presents.

In witness whereof the undersigned, the Roman Catholic Bishop of Sacramento, a corporation sole, has caused these presents to be executed by the incumbent thereof, and the corporate seal to be thereunto affixed this 30th day of July, in the year 1902.

[SEAL OF CORPORATION.]

THE ROMAN CATHOLIC BISHOP OF SACRAMENTO,
THOMAS GRACE, *Incumbent.*

Signed, sealed, and delivered in the presence of—
WM. H. DEVLIN.
MALCOLM C. GLENN.

STATE OF CALIFORNIA,
County of ———, *ss:*

On this 30th day of July, in the year one thousand nine hundred and two, before me, William H. Devlin, a notary public in and for the said county, residing therein, duly commissioned and sworn, personally appeared Thomas Grace, known to me to be the incumbent of the corporation sole, The Roman Catholic Bishop of Sacramento, the corporation that executed the within instrument and acknowledged to me that such corporation executed the same.

In witness whereof I have hereunto set my hand and affixed my official seal at my office in the county of Sacramento the day and year in this certificate first above written.

[NOTARIAL SEAL.]

WM. H. DEVLIN,
Notary Public in and for the County of Sacramento,
State of California.

Know all men by these presents, that The Roman Catholic Bishop of Monterey, in the State of California, a corporation sole (the Right Reverend George Montgomery being the incumbent and as such bishop successor of Thadeus Amat, deceased), has made, constituted, and appointed, and by these presents does make, constitute, and appoint the Most Reverend P. W. Riordan, archbishop of San Francisco, his true and lawful attorney, to represent him, and in his name, as such

bishop, to make to the Secretary of State of the United States and to any other officers or diplomatic agents of the same such communications as may be desired of his wishes, election, or consent to any act, agreement, election, or other proceeding had or taken or to be had or taken by the Government of the United States towards bringing to a conclusion and settlement, whether by arbitration or otherwise, the controversy between the Government of the United States and that of the Republic of Mexico regarding the claim made by the Roman Catholic archbishop of San Francisco and himself as Roman Catholic bishop of Monterey, against the Republic of Mexico for payment of the arrears due for the Pious Fund of the Californias heretofore taken possession of by the said Government of Mexico; and to agree, in his name, on any nomination of arbitrators or umpire and the place of arbitration and other details of the arbitration of said controversy proposed to be had between the said Governments; and also to agree upon any compromise or settlement of the said claim, or any claim for further payments on account of the said fund, or for the release of the said Republic therefrom; and for all or any of the purposes aforesaid to consent to and as such attorney to execute any papers or documents needed in the course of said business and to affix his signature thereto; and an attorney or attorneys under him for all or any of the purposes above expressed to appoint; and all or any of the powers so granted by him to any such subordinate attorneys to condition, limit, or revoke at his discretion, and counsellors at law for any of the purposes aforesaid or other needed assistance to retain, agree upon the compensation of, and dismiss in his discretion.

Giving and granting unto the said attorney and his substitute or substitutes full power and authority in the premises to do or cause to be done any of the acts aforesaid which the said Roman Catholic Bishop of Monterey might or could do if personally present and acting; hereby ratifying and confirming all that said attorney or his substitute or substitutes shall lawfully do or cause to be done hereinunder.

In witness whereof the corporate seal of the said corporation, The Roman Catholic Bishop of Monterey, has been hereto affixed and these presents duly signed by the said Right Reverend George Montgomery, incumbent of said bishopric, this 23rd day of January, A. D. 1902.

[SEAL.] THE ROMAN CATHOLIC BISHOP OF MONTEREY,
A Corporation Sole,
By THE RIGHT REVEREND GEORGE MONTGOMERY,
Incumbent.

Witnesses:
JOHN J. CLIFFORD,
CLEMENT MOLONY.

UNITED STATES OF AMERICA,
State of California, County of Los Angeles, ss:

I, J. Wiseman Macdonald, a notary public in and for the said county, an officer having authority to take the acknowledgment of deeds, do certify that on the 24th of February, A. D. 1902, before me, came the Right Reverend George Montgomery (a corporation sole), known to me to be the same person described in, and who, as such corporation sole, executed the foregoing warrant of attorney and acknowledged to me that he executed the same as such corporation sole, for the uses and purposes therein mentioned, by affixing thereto the cor-

porate seal of the said corporation, and attesting the same by his signature. The said George Montgomery also then and there acknowledged that he had so executed said warrant of attorney in the presence of John J. Clifford and Clement Molony, the two witnesses whose names are subscribed thereto as such. And I further certify that at the time of making such acknowledgment I read and fully explained said warrant of attorney to the said George Montgomery.

In witness whereof I have hereunto set my hand and affixed the official seal of my office in said county of Los Angeles the day and year in this certificate above written.

J. WISEMAN MACDONALD,
Notary Public in and for Los Angeles County, Cal.

PROOF OF SUCCESSION OF THE MOST REVEREND PATRICK WILLIAM RIORDAN, ARCHBISHOP OF SAN FRANCISCO.

[In the matter of "the Roman Catholic archbishop of San Francisco," a religious corporation sole.]

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

DECLARATION AND NOTICE OF CORPORATE SUCCESSION.

Whereas the Roman Catholic archbishop of the archdiocese of San Francisco did heretofore, under and by virtue of the act of the legislature of the State of California entitled "An act concerning corporations," passed April 22, 1850, and of the act amendatory thereof, approved May 4, 1852, become a religious corporation sole by the title of "The Roman Catholic Archbishop of San Francisco," for the purpose of the administration of the temporalities of the Roman Catholic Church in the said archdiocese of San Francisco, and the management of the estate and property of said church;

And whereas the proper certificate or declaration of such incorporation was heretofore duly made by Most Rev. Joseph S. Alemany, who at the time was the duly appointed Roman Catholic archbishop of the said archdiocese;

And whereas the said declaration, together with the bull or commission of his appointment as such archbishop, was, on the twenty-fourth day of February, A. D. 1854, duly recorded with the county clerk of the city and county of San Francisco, State of California, the said city and county being the see and place of residence of the said archbishop;

And whereas the said Most Rev. Joseph S. Alemany has resigned his said see and office of archbishop of said archdiocese;

And whereas the Most Rev. Patrick William Riordan is the present incumbent of said see and of said corporation;

Now therefore we, the undersigned, the said Joseph S. Alemany, the said former incumbent, and the said Patrick William Riordan, the said present incumbent, do hereby certify and declare:

That the said Most Rev. Patrick William Riordan was, by the constituted authorities of said church, viz, His Holiness Pope Leo XIII, on the seventeenth day of July, in the year of our Lord one thousand eight hundred and eighty-three, duly appointed archbishop coadjutor of said archdiocese with the right of succession to said see and to said

office of archbishop of said archdiocese on the occurrence of a vacancy therein;

That the said Most Rev. Joseph S. Alemany thereafter duly resigned his said appointment, and his resignation was duly accepted on the twenty-first day of December, in the year of our Lord one thousand eight hundred and eighty-four, by the constituted authorities of said church, viz, His Holiness Pope Leo XIII;

That the said Most Rev. Patrick William Riordan thereupon became the successor of said Most Rev. Joseph Alemany as such archbishop; and as such has become and is now entitled to hold, manage, and administer the temporalities, property, and estate of said Roman Catholic Church in said archdiocese;

That a copy of the bull or letter of commission, in the Latin language, appointing said Patrick William Riordan such archbishop coadjutor with said right of succession, duly attested, together with a true and sworn translation thereof, has been recorded with the said county clerk, together with a copy, duly attested, of the letter of acceptance of the said resignation of said Joseph S. Alemany, in the Latin language, and a true and sworn translation thereof;

And we, the undersigned, the said Joseph S. Alemany, the former incumbent, and said Patrick William Riordan, the present incumbent, do hereby certify to all and singular the premises, and give notice thereof to all persons whom it concern; and we further give notice and declare that all the property heretofore held by said Joseph S. Alemany, as such corporation, is now held by said Patrick William Riordan, as his successor and as such corporation, in trust for the use, purpose, and behoof of said Roman Catholic Church, and that the said Joseph S. Alemany, the former incumbent of said office and corporation, has delivered and surrendered to his successor, the said Patrick William Riordan, the present incumbent of said office and corporation, all property and all archives, books, papers, and the corporate seal of said corporation.

In witness whereof, we have hereunto subscribed our names this 25th day of March, A. D. 1885, and have acknowledged these presents before a notary public; and I, the said Patrick William Riordan, as present incumbent, have also signed hereto the corporate name of said corporation, and affixed hereto its corporate seal, and have also acknowledged these presents as the act of said corporation.

JOSEPH S. ALEMANY.
PATRICK WILLIAM RIORDAN.
[SEAL.] ROMAN CATHOLIC ARCHBISHOP OF SAN FRANCISCO.

STATE OF CALIFORNIA,
City and county of San Francisco, ss:

On this 25th day of March, in the year of our Lord one thousand eight hundred and eighty-five, before me, John E. Hamill, a notary public of the State of California, in and for said city and county of San Francisco, duly commissioned, personally appeared Joseph S. Alemany and Patrick William Riordan, known to me to be the persons whose names are subscribed to the within instrument, and each of them for himself, respectively, acknowledged to me that he executed the same; and at the same time personally appeared the said Patrick William Riordan, the present incumbent of the corporation described in said instrument, viz, "The Roman Catholic Archbishop

of San Francisco," and acknowledged to me that such corporation executed the same.

In witness whereof I have hereunto affixed my signature and name of office, and also my official seal, at my office in said city and county, the day and year in this certificate above written.

[SEAL.] JOHN E. HAMILL, *Notary Public.*

I, Albert B. Mahony, county clerk of the city and county of San Francisco, State of California, and ex-officio clerk of the superior court in and for said city and county, hereby certify the foregoing to be a full, true, and correct copy of the original declaration and notice of corporate succession in the above-entitled cause, filed in my office on the 25th day of March, A. D. 1885.

Attest my hand and seal of said court this 13th day of June, 1902.

[SEAL.] ALBERT B. MAHONY, *Clerk,*
By JOSEPH RIORDAN, *Deputy Clerk.*

(Endorsed:) 9639. In the matter of "The Roman Catholic Archbishop of San Francisco," a religious corporation sole. Declaration and notice of corporate succession. Filed March 25, 1885. Jas. J. Flynn, clerk. By Jno. J. Mott, deputy clerk.

CERTIFICATE OF ELECTION TO CONTINUE THE EXISTENCE OF THE CORPORATION UNDER THE PROVISIONS OF THE CIVIL CODE OF THE STATE OF CALIFORNIA APPLICABLE THERETO.

Whereas the Roman Catholic archbishop of the archdiocese of San Francisco did heretofore, under and by virtue of the act of the legislature of the State of California entitled "An act concerning corporations," passed April 22nd, 1850, and of the act amendatory thereof, approved May 4th, 1852, become a religious corporation sole, under the title of "The Roman Catholic Archbishop of San Francisco," for the purposes of the administration of the temporalities of the Roman Catholic Church in the said archdiocese of San Francisco and the management of the estate and property of said church; and

Whereas a proper certificate or declaration of such incorporation was heretofore duly made by the Most Reverend Joseph S. Alemany, who at the time of the making of such certificate or declaration was the duly appointed and acting Roman Catholic archbishop of the said archdiocese; and

Whereas the said declaration, together with the bull or commission of his appointment as such archbishop, was on the 24th day of February, A. D. 1854, duly recorded with the county clerk of the city and county of San Francisco, State of California, the said city and county being the see and place of residence of the said archbishop; and

Whereas the Most Reverend Patrick William Riordan was, by the constituted authorities of said Roman Catholic Church, namely, His Holiness Pope Leo XIII, on the 17th day of July, in the year of our Lord one thousand eight hundred and eighty-three, duly appointed archbishop coadjutor of said archdiocese with the right of succession in said see and to said office of said archbishop of said archdiocese on the occurrence of a vacancy therein; and

Whereas the said Most Reverend Joseph S. Alemany duly resigned his said position and office as Roman Catholic archbishop of the said

archdiocese, and his resignation was duly accepted on the 21st day of December, in the year of our Lord one thousand eight hundred and eighty-four, by the duly constituted authorities of said church, namely, His Holiness Pope Leo XIII; and

Whereas a copy of the bull or letter of commission in the Latin language appointing said Patrick William Riordan such archbishop coadjutor with such right of succession duly attested, together with a true and sworn translation thereof, was on the 25th of March, 1885, recorded with the county clerk of the city and county of San Francisco, together with a copy duly attested of the letter of acceptance of the said resignation of said Joseph S. Alemany in the Latin language, and a true and sworn translation thereof, and thereupon and in pursuance of his said appointment as archbishop coadjutor of said archdiocese the said Most Reverend Patrick William Riordan became the successor of said Most Reverend Joseph S. Alemany as such archbishop, and as such became, ever since has been, and now is entitled to hold, manage, and administer the temporalities, property, and estate of said Roman Catholic Church in said archdiocese, and also the successor of said Most Reverend Joseph S. Alemany in his corporate capacity as a religious corporation sole under the title of The Roman Catholic Archbishop of San Francisco; and

Whereas a certificate of such succession by said Patrick W. Riordan to said Joseph S. Alemany in the position and office of the Roman Catholic archbishop of the archdiocese of San Francisco, and of his corporate capacity as a religious corporation sole under the name and designation of The Roman Catholic Archbishop of San Francisco, was duly executed and acknowledged by the said Joseph S. Alemany, the former incumbent, and the said Patrick William Riordan, the present incumbent, and by said Patrick William Riordan, archbishop as aforesaid, as the corporation sole hereinbefore mentioned on the 25th day of March, A. D. 1885, and which certificate was thereafter and on the 25th day of March, 1885, duly filed at the office of the county clerk in and for the city and county of San Francisco,

Now, therefore, the said religious corporation sole, "The Roman Catholic Archbishop of San Francisco," the Most Reverend Patrick William Riordan incumbent thereof, does hereby elect to continue its existence under the provisions of the civil code of the State of California, applicable thereto, and especially under the provisions of section 602 of said civil code, and the undersigned Patrick William Riordan, the Roman Catholic archbishop of the archdiocese of San Francisco, and the incumbent and possessor of the corporate franchise of said religious corporation sole known as and called "The Roman Catholic Archbishop of San Francisco," do hereby certify that such election was duly made by said corporation and by said Patrick William Riordan, the incumbent and possessor of said corporate franchise.

In witness whereof the said Patrick William Riordan, the Roman Catholic archbishop of the archdiocese of San Francisco, has hereunto signed his name and official title and has also signed hereto the corporate name of said corporation, and affixed hereto its corporate seal, and has also acknowledged these presents as the act of said corporation.

PATRICK WILLIAM RIORDAN,
The Roman Catholic Archbishop of the Archdiocese of San Francisco.

THE ROMAN CATHOLIC ARCHBISHOP OF SAN FRANCISCO,
By PATRICK WILLIAM RIORDAN, *Incumbent.*

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

On this seventeenth day of February, in the year one thousand eight hundred and ninety-six, before me, Donzel Stoney, a notary public in and for the said city and county of San Francisco, State of California, duly commissioned and sworn, personally appeared Patrick William Riordan, who is personally known to me to be the incumbent of the office of the Roman Catholic archbishop of San Francisco, and as such the only member of the corporation sole known as and called The Roman Catholic Archbishop of San Francisco, the corporation sole that executed the foregoing instrument and acknowledged to me that such corporation sole executed the same.

In witness whereof I have hereunto set my hand and affixed my official seal at my office in said city and county of San Francisco, the day and year in this certificate first above written.

[NOTARIAL SEAL.] DONZEL STONEY,
Notary Public in and for the City and County of San Francisco, State of California.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

On this seventeenth day of February, in the year one thousand eight hundred and ninety-six, before me, Donzel Stoney, a notary public in and for the said city and county of San Francisco, State of California, duly commissioned and sworn, personally appeared Patrick William Riordan, the Roman Catholic archbishop of the archdiocese of San Francisco, known to me to be the person whose name is subscribed to, and who executed the within instrument, and acknowledged that he executed the same.

In witness whereof I have hereunto set my hand and affixed my official seal at my office in the said city and county of San Francisco, the day and year in this certificate first above written.

[NOTARIAL SEAL.] DONZEL STONEY,
Notary Public in and for the City and County of San Francisco, State of California.

I, Albert B. Mahony, county clerk of the city and county of San Francisco, State of California, and ex-officio clerk of the superior court in and for said city and county, hereby certify the foregoing to be a full, true, and correct copy of the original *notice of election to continue existence of corporation under the codes of the State of California*, in the above entitled cause, filed in my office on the 18th day of February, A. D. 1896.

Attest my hand and seal of said court this 13th day of June, 1902.

[SEAL.] ALBERT B. MAHONY,
By JOSEPH RIORDAN, *Deputy Clerk.*

(Endorsed:) No. 9639. In the matter of The Roman Catholic Archbishop of San Francisco, a religious corporation sole. Notice of election to continue existence of corporation under the codes of the State of California. Filed Feb. 18, 1896. C. F. Curry, clerk. By Wm. R. A. Johnson, deputy clerk.

ROME, *the 31st December, 1884.*

Most Reverend FATHER JOSEPH ALEMANY,
Archbishop of San Francisco. Sacred Congregation of Propaganda Secretariship. N. 3169–Object.

MOST ILLUSTRIOUS AND REV. SIR: The humble petition of your lordship by which you asked of His Holiness Leo XIII to be exonerated from the weighty burthen of governing your archdiocese was laid before His Holiness on the 21st day of December of the present year. And His Holiness, having maturely considered the weighty reasons which have induced your lordship to send this supplication, has favorably considered your petition and has vouchsafed to accept your resignation. Your lordship has indeed managed with signal care the religious affairs in your archdiocese for a long space of time, and has endeavored to cultivate the vineyard of the Lord with unwearied labor and to make it prosperous. Therefore, I regret that the archdiocese should be deprived of so worthy a pastor; but, on the other hand, it appears just that after having endured so many and such great labors you should be permitted to spend the remainder of your life free from all solicitude, in peace and tranquillity. For the rest, I trust that your coadjutor, under your direction, has acquired sufficient knowledge and experience in the administration of the archdiocese, so that he may direct and govern the church in a proper manner.

But as after the acceptance of the renunciation you no longer have the title of that archdiocese, I will endeavor to provide you with some new titular archiepiscopal see.

Finally, it being altogether just that you should receive the means of an honest sustenance from the church over which you exercise the apostolic ministry, a congruous and sufficient pension shall be assigned you, on the amount of which you may agree amicably with the new Archbishop Riordan. Meanwhile, I pray God long to preserve you.

Your lordship's most devoted brother,

JOHN CARDINAL SIMEONI, *Prefect.*

P. S.—I request your lordship to notify your coadjutor, who succeeds to the see made vacant by your resignation, that I have communicated to him, with power of substitution, all faculties, both ordinary and extraordinary, a printed copy of which shall soon be sent.

+D. ARCHIEP. TYREN, *Secrius.*

Congregazione di Propaganda.
Segretaria.
N. 3169—Oggetto.
Roma li 31 Decembre, 1884.
Iltme ac Rme Domine.

Die 21 Decembris, currentis anni S. Smo. D. N. Leoni XIII relatus est supplex libellus R. T. que expostulabas ut te gravi pondere istius Archidioceseos regdenae exonerare placeret.

Sanctites vero sua mature perpensis non levis momenti rationibus, quae A. T. ad hanc supplicationem porrigendum impulerunt, benigne preces Tuas exipere, ac renuntiationem acceptare dignate est. Certe A. T. per longum temporis spatium magna cura negotia religionis in

ista Archidiocesi gessit, ac vineam Domini tibi commissam indefesso labore colere, ac secundare studuit.

Quapropter aegre fero Archidiocesim tam digno viduari pastore, attamen ex altera parte aequum esse perspicio, ut post tot tantosque exautlates labores reliquam vitam expertem ab omni sollicitudine impare, et tranquillitate transigere possis.

De caetero confido Coadjutorem tuum sub tua directione Archidiocesanae administrationes sufficientem scientiem experientiem acquisivisse ita ut aequa par est ratione, istam Ecclesiam regere ac gubernare valeat.

Cum autem post acceptatam renunciationem non amplius titulum istius Archidioceseos habeas te de nova aliqua sede titulari Archiepiscopali providere curabo.

R. P. D. JOSEPHO ALEMANY,
Archiep^{o}. S. Francisci.

Demum cum aequitati omnino consonet ut, in quo Aplcum. ministerium exercuisti, inde honestate substentationes media capias, hinc de aerario archidiocesano tibi congrua ac sufficiens pensio dignanda erit; de cujus quantitates de terminatione cum nov. Archiep^{o} Riordan convenire poteris.

Interea Deum precor ut te diutissime sospitet, A. T.

Uti Frater addictissimus,

JOHANNES CARD. SIMEONI, *Præfectus.*

P, 8. Rogo A. T. ut coadjutorem tuum, qui sedi per renuntiationem a te missam vacanti succedere debet, certiorem facias. Ipsi communicavi et quidem cum protestate sub delegandi omnes facultates tam ordinarias, quam extraordinarias. quarum exemplar typis impressum brevi mittetur.

+D. ARCHIEP. TYREN, *Secrius.*

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Patrick William Riordan, being duly sworn, deposes as follows:

I am the Roman Catholic archbishop of San Francisco, and the present incumbent and the successor of the Most Reverend Joseph S. Alemany; the original bull accepting the resignation of the said Joseph S. Alemany as archbishop of San Francisco, as aforesaid, is written in the Latin language, and is now among the archives of the archiepiscopal see of the Roman Catholic archdiocese of San Francisco, and is in my custody as such archbishop. I am competent to translate Latin into English, and I hereby certify and declare, on oath, that I have carefully compared the foregoing instrument, written in the Latin language, with the original bull, aforesaid, and the same is a full, true, and correct copy of said bull; I further certify and declare, on oath, that the foregoing instrument, written in the English language, is a true and correct translation from Latin into English of the said bull.

PATRICK WILLIAM RIORDAN.

Subscribed and sworn to before me this 24th day of March, A. D. 1885.

[NOTARIAL SEAL.]

JOHN E. HAMILL,
Notary Public.

[Certificate attached.]

STATE OF CALIFORNIA,
State and County of San Francisco, ss:

I, Albert B. Mahony, county clerk of the city and county of San Francisco, State of California, hereby certify the foregoing to be a full, true, and correct copy of the original acceptance of resignation of Joseph S. Alemany, filed in my office on the 25th day of March, A. D. 1885.

Attest my hand and my official seal this 14th day of June, A. D. 1902.

[SEAL.] ALBERT B. MAHONY,
County Clerk.
By JOSEPH RIORDA,
Deputy County Clerk.

(Endorsed:) 9639. In the matter of The Roman Catholic Archbishop of San Francisco, a religious corporation sole. Acceptance of resignation of Joseph S. Alemany. Filed March 25, 1885. Jas. J. Flynn, clerk. By Jno. H. Mott, deputy clerk. 9639.

LEO P. P. XIII.

Dilecte Fili salutem et apostolicam benedictionem. Annis et laboribus fractus adversaque laborans valetudine Venerabilis Frater Josephus Sadoc Alemany Archiepiscopis S. Francisci in California ad explendas pastorales curas quum alterius ope indigeat supplex Nos rogavit, ut ei adiutorem cum successionis jure assignare velimus. Hinc necessitati consulere cupientes egimus hac de re cum Venerabilibus Fratribus Nostris S. R. E. Cardinalibus Christiano Nomini propagando praepositis diligenterque omnibus perpensis et consideratis hujusmodi munus de eorumdem Venerabilium Fratrum Nostrum consilio tibi, delecte fili, hujus pietas, doctrina, prudentia excellentis commendatur testimoniis, demandatum censuimus. Itaque te quem per similes Litteras Nostras hoc ipso die datas Archiepiscopum titularis Ecclesiae Cabasensis fecimus ac renuntiavimus, peculiari benevolentia complecti volentes, at a quibusvis excommunicationis et interdicti aliisque ecclesiasticis sententiis censuris et poenis quovis modo vel quavis de causa latis, si quas forte incurreris, hujus tantum rei gratia absolventes et absolutum fore censentes, Apostolica auctoritate Nostra harum litterarum vi coadiutorem praedicti Venerabilis Fratris Josephi Archiepiscopi S. Francisci in California cum futurae successionis jure eligimus et instituimus. Igitur quandocumque Archiepiscopalis Sedes supradicta per obitum dicti Archiepiscopi, vel aliam quamlibet ob causam vacaverit, a vinculo quo titulari Ecclesiae Cabasensi adstrictus detineris nunc pro tunc ex Apostolicae potestatis nostrae plenitudine solventes Archiepiscopum S. Francisci in California facimus et constituimus cum omnibus et singulis juribus, honoribus, privilegiis et facultatibus quae ex jure vel ex consuetudine Archiepiscoporum sunt propriae. Volumus autem ut vivente praefato Venerabili Fratre Josepho Archiepiscopo S. Francisci eatenus te ingeras in Diocesis procuratione quatenus ille voluerit ac mandaverit. Parecipimus deinde omnibus ad quos spectat, au spectare poterit, ut, juxta praesentium Litterarum tenorem ad Coadiutoris afficium, et suo tempore in Archiepiscopum memoratae Sedes S. Francisci in California recipiant et admittant, tibique fave-

ant preasto sint ac pareant, tuaque salubria monita reverenter excipiant atque efficaciter adimpleant alioquin sententiam seu poenam, quam in rebelles rite tuleris vel statueris ratam habebimus eamque faciemus auctorante Domino usque ad conde quam satisfactionem inviolabiliter observari. Non obstantibus constitutionibus et ordinationibus Apostolicis, et si opus sit dictae Archieposcopalis Ecclesias S. Francisci etiam iuramento confirmatione apostolica vel quavis firmitate alia roboratis statutis, et consuetudinibus caeterisque contrariis quibuscumque. Datum Romae apud S. Petrum sub annulo Piscatoris die XVII Julii MDCCCLXXXIII Pontificaius Nii Anno sexto.

TH. CARDIS. MERTEL.

(Leo Pont. Max.)

Dilecto Filio, Patritio Guilielmo Riordan, Rectori Ecclesiae ad honorem S. Jacobi in Civitate Chicagii.

To our beloved son, Patrick William Riordan, rector of the Church of St. James, in the city of Chicago.

LEO XIII, PEPE.

Beloved son, health and apostolic benediction! Our venerable brother Joseph Sadoc Alemany, archbishop of San Francisco in California, debilitated by years and labors and suffering infirm health, has humbly petitioned us that, as he needs assistance in the discharge of his pastoral cares, we would deign to appoint a coadjutor to him with the right of succession. Wherefore, we being desirous of providing for this necessity, having first duly advised thereupon with our venerable brethren the Sacred College of Cardinals, charged with the propagation of the Christian faith, and all things having been diligently weighed and duly considered, according to their usual course in like cases, and upon the advice of our venerable brethren aforesaid have decided that the office of coadjutor aforesaid should be entrusted to you, beloved son, whose piety, learning, and prudence are attested by excellent testimonials. Therefore longing with a special affection to embrace you, whom we have by letters of even date herewith constituted and proclaimed archbishop of the titular diocese of Caves, and thereupon absolving you and declaring you absolved from all and every excommunication, interdict, or other ecclesiastical sentence or censure or penalty of whatever nature, and for whatsoever cause pronounced (if perchance you may have incurred any such), by our apostolic authority, and in virtue of these letters we have elected and constituted you coadjutor of our above-named venerable Brother Joseph, archbishop of San Francisco, in California, with the right of future succession to the said archbishopric. Therefore whenever the archiepiscopal see before mentioned shall become vacant, either by the death of the aforesaid archbishop, or from any other cause, by the plenitude of our authority, releasing you *nunc pro tunc* from the bond by which you are held to the titular church of Caves, we make and constitute you archbishop of San Francisco, in California, with all and each of the rights, honors, privileges, and prerogatives thereunto pertaining whether by right or custom. Nevertheless, it is our desire that, during the lifetime of the venerable brother Joseph, archbishop of San Francisco, you should take such part in the administration of the diocese as he may request and empower you to do. And finally we commend all whom it concerns, or may concern, that in accordance

with the tenor of the present letters they receive and admit you into the office of coadjutor and in the proper time as archbishop of the aforesaid see of San Francisco, and that they respect and obey you therein, and that they reverently receive your salutary admonitions and efficaciously carry them out, failing which we will ratify whatever sentence or judgment you may lawfully pronounce or ordain against the refractory, and we will continue to do this, the Lord confirming it, until perfect satisfaction be had. The constitutions and apostolic ordinances, and if need be the statutes of the aforesaid archiepiscopal church of San Francisco, confirmed even by sworn or apostolic ratification or fortified by any other power whatsoever, and all customs and other things to the contrary notwithstanding. Given at St. Peter's in Rome, under the seal of the fisherman's ring, the 17th day of July, MDCCCLXXIII, in the sixth year of our pontificate.

TH. CARDL. MERTEL.

(Leo XIII. Pont. Max.)

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Patrick William Riordan, being duly sworn, deposes and says as follows: I am the Roman Catholic archbishop of San Francisco, and the present incumbent, and am successor of the Most Reverend Joseph S. Alemany; that the original bull, or letter, of my appointment by His Holiness Pope Leo XIII is written in the Latin language and is now among the archives of the archiepiscopal see of the Roman Catholic archdiocese of San Francisco, and is in my custody as such archbishop. I am competent to translate Latin into English, and I hereby certify and declare on oath that I have carefully compared the foregoing instrument, written in the Latin language, with the original bull aforesaid, and that the same is a full, true, and correct copy of said bull. I further certify and declare on oath that the foregoing instrument written in the English language is a true and correct translation from Latin into English of said bull.

PATRICK WILLIAM RIORDAN.

Subscribed and sworn to before me this 24th day of March, A. D. 1885.

[NOTARIAL SEAL.] JOHN E. HAMILL,
Notary Public.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

I, Albert B. Mahony, county clerk of the city and county of San Francisco, State of California, hereby certify the foregoing to be a full, true, and correct copy of the original proof of appointment and succession of Archbishop Patrick William Riordan, filed in my office on the 25th day of March, A. D. 1885.

Attest my hand and my official seal this 14th day of June, A. D. 1902.

[SEAL.] ALBERT B. MAHONY, *County Clerk,*
By JOSEPH RIORDAN, *Deputy County Clerk.*

(Endorsed:) 9639. In the matter of "The Roman Catholic Archbishop of San Francisco," a religious corporation sole. Proof of appointment and succession of Archbishop Patrick William Riordan. Filed March 25, 1885. Jas. J. Flynn, Clerk. By Jno. H. Mott, Deputy Clerk.

PROOF OF SUCCESSION OF THE RT. REV. GEORGE MONTGOMERY, R. C. BISHOP OF MONTEREY.

[Stat. 1852, p. 168, Civ. Code, sec. 602.]

STATE OF CALIFORNIA,
County of Los Angeles, *ss:*

Know all men by these presents, that whereas, the Right Reverend Thadeus Amat, being duly constituted the bishop of the Roman Catholic Church in the diocese of Monterey, did, for the purpose of the administration of the temporalities of the Roman Catholic Church in said diocese and the management of the estate and property of said church, become incorporated as a religious corporation sole, by a certificate, under his hand and official seal, bearing date the ninth day of December, 1870, and duly recorded in the office of the county clerk of the county of Monterey in Book A of miscellaneous records at page 19, on December 12th, 1870.

And whereas I, Francis Mora, was afterwards, to wit, on the 20th day of May, A. D. 1873, by bulls or letters of appointment from His Holiness Pope Pius IX, given at Rome, under the seal of the fisherman's ring, bearing date the day and year last mentioned, duly appointed to be the coadjutor bishop of said diocese, with the right of succession thereto, on the death of the said Thadeus Amat or other vacancy occurring therein.

And whereas, afterwards, to wit, on the 12th day of May, 1878, the said Right Reverend Thadeus Amat departed this life, whereby I, the said Francis Mora, have succeeded to the said bishopric of Monterey and become the incumbent of the said diocese and of the corporation sole.

Now, therefore, for proof of such death and of my appointment as such bishop and of my succession as such incumbent, I annex hereto the affidavit of the rector of the parish, showing the decease of the said Right Reverend Thadeus Amat, and simultaneously herewith I cause to be recorded a duly attested copy of my said letter of appointment as such bishop, the same being in the Latin language, and also a duly attested translation thereof, in the office of and with the county clerk of Monterey County, my episcopal residence being in said county.

In witness whereof I have hereunto set my hand and the corporate seal of the said diocese and corporation sole this 29th day of June, 1878.

[SEAL.] FRANCIS MORA, *Bishop of Monterey.*

STATE OF CALIFORNIA,
City and County of Los Angeles, *ss:*

On the twenty-ninth day of June, A. D. one thousand eight hundred and seventy-eight, before me, A. C. Holmes, a notary public in and for said Los Angeles County, residing therein, duly commissioned and sworn, personally appeared Francis Mora, bishop of Monterey, known to me to be the person described in, whose name is subscribed to, and who executed the within instrument, and he duly acknowledged to me that he executed the same.

In witness whereof I have hereunto set my hand and affixed my

official seal, at my office, in the city and county of Los Angeles, the day and year last above written.

[SEAL.] A. C. HOLMES, *Notary Public.*

STATE OF CALIFORNIA,
City and County of Los Angeles, ss:

I, the Rev. Peter Verdaguer, rector of the Cathedral of St. Vibiana and of Our Lady of Angels, being duly sworn, depose and say that I knew the late Right Rev. Thaddeus Amat, bishop of Monterey; that said bishop died in the city of Los Angeles the 12th day of May, 1878; that I saw his corpse after his demise, attended at the funeral, and witnessed the remains being deposited in the basement of the cathedral.

In witness whereof I set my hand and seal it with the seal of the parish this day, the 28 of June, A. D. 1878.

[SEAL.] REV. PETER VERDAGUER, *Rector.*

Subscribed and sworn to before me this 29th day of June, A. D. 1878.

[SEAL.] A. C. HOLMES, *Notary Public.*

STATE OF CALIFORNIA,
County of Los Angeles, ss:

Francis Mora, being duly sworn, deposes and says—

That he is the duly constituted Roman Catholic bishop of Monterey and the same person to whom the commission, or letter of appointment, a copy of which is annexed hereto, is addressed. That the said copy has been by him compared with the said original commission, or letter of appointment, in his possession, and is a full, true, and correct copy thereof, and of the whole thereof.

FRANCIS MORA,
Bishop of Monterey.

Subscribed and sworn to before me this 29th day of June, 1878.

[SEAL.] A. C. HOLMES,
Notary Public.

Dilecto filio Francisco Mora, Presbytero, Vicario Generali Diocesis Montereyensis et Angelorum in California.

PIUS P. P. IX.

Dilecte fili, salutem et Apostolicam Benedictionem! Simul ac Nos venerabilis Frater Thaddeus Amat, Episcopus Montereyensis atque Angelorum, enixis rogavit precibus, ut attentis valetudinis, quibus conflictatur incommodis subsidium sibi Coadjutoris Episcopi, cum futuro successionis jure decernevemus, Nos de spirituali—illius Ecclesio bono solliciti, cum venerabilibus Fratribus Nostris, Sanctae Romanae Ecclesiae Cardinalibus, negotiis Propagandae Fidei praepositis, rem communicavimus, omnibusque rationum momentis sedulo attenteque perpensis, et votis memorati Autistis obsecundandum, et tibi, dilecte Fili istudmunus demandandum existimavimus, procerto habentus, te,

pro eaqua egregio commendaris, religionis, prudentiae, expectationi Nostrae cumulatissime responsurum. Quae cum sita sint, te quem per similes Nostras litteras, hoc ipso die datas, Episcopum Mossynopolitamum, in partibis infidelium, renuntiavimus, hisce litteris ab quibisvis excommunicationis et interdicti aliisque ecclesiasticis censuris, sententiis et poenis, quovis modo, vel quovis de cause latis, si quas forte incurristi, hujus tantum rei gratia absolventes et absolutum fore consentes, de praedictorum V. V. Fratrum Nostrorum consilio, Coadjutorum praefati Episcopi Montereyensis atque Angelorum, cum futurae successionis jure, Auctoritate Nostrae Apostolica, facimus et renuntiamus; teque quando cumque per obitum dicti Autistitis, vel aliam quamlibet ob causam Montereyensis et Angelorum. Sedes vacaverit, a vinculo, quo tuae isti Mossynopolitanae Ecclesiae adstrictus deteniris, nunc pro tunc, de Apostolicae potestatis Nostrae plenetudine, solventes in Episcopum Montereyensis atque Angelorum, nunc item pro tunc facimus et constituimus, cum singulis atque universis honoribus, facultatibus, juribus et praerogativis solitis, et consuetis. Volumus autem, ut viventi Montereyensi atque Angelorum Episcopo, te eatenus ingeras in Dioecesis administratione, quatenus ille valuerit, ae mandaverit. Porro omnibus et singulis ad quos pertinere poterit jubemus, ut te in Coadjutorem hujusmodi, et suo tempore in Episcopum Montereyensem atque Angelorum excipiant, admittant, tibique in omnibus faveant, praesto sint ac pareant tuaque salubria monita et mandata reverenter excipiant atque efficaciter ad impleant; secus sententiam seu poenam, quam vite tuteris staturisve in rebelles, ratam habebimus, cumque fociemus auctorante Deo, atque ad satisfactionem condignam inviolabiliter observari. Non obstantibus Apostolicus atque in universalibus Provincialibus que et synodalibus conciliis editis, generalibus, vel specialibus constitutionibus et ordinationibus, nec non dictae ecclesietum Mossynopolitanae cum Montereyensis atque Angelorum etiam juramento confirmatione Apostolica vel quavis firmitate alia roborati. Statutis, consuetudinibus caterisque contrariis quibuscumque.

Datus Romae, apud Sanctum Petrum sub Annulo Piscatoris die XX Maii MDCCCLXXIII Pontificatus Nostri anno vicesimo septimo.

(Soc. Sigil.) F. Card. Asquinius.

State of California,
City and County of San Francisco, ss:

John T. Doyle, being duly sworn, deposes and says:

That he is acquainted with and versed in the Latin and English lauguages; that the original commission, or letter of appointment, constituting the Right Reverend Francis Mora coadjutor bishop of Monterey County (a copy of which is prefixed hereto) is in the Latin language, and that the paper hereto annexed is a correct translation thereof into the English language.

John T. Doyle.

Subscribed and sworn to before me this 26th day of June, 1878.

[seal.] James L. King,
Notary Public.

[Translation.]

To our beloved son, Francisco Mora, priest, vicar general of the diocese of Monterey and Los Angeles in California.

POPE PIOUS IX.

Beloved son, health and apostolic benediction.

No sooner did our venerable Brother Thaddeus Amat, bishop of Monterey and Los Angeles, beseech us with ardent entreaties that, having regard to the infirmity of his bodily health, we would furnish him the assistance of a coadjutor bishop with the right of future succession, than we, solicitous for the spiritual welfare of that church, took counsel thereupon with our venerable brethren, the cardinals of the Holy Roman Church, who preside over the congregation of the propagation of the faith; and having diligently and attentively considered and weighed the reasons in support of such petition, decided to comply with the wishes of the aforesaid prelate, and to entrust to you, beloved son, the duty of such office; as we feel well assured by the most excellent reputation you enjoy for piety, prudence, and learning that you will, in the discharge of that office, most abundantly correspond to our expectation. Wherefore, we, who by a similar document issued by our authority, and bearing even date herewith, have nominated you bishop of Mossynopolis, *in partibus infidelium*, by this letter, and only for the purpose of the office herein referred to, absolving you and considering you as having been absolved from whatever excommunication, interdict, or other ecclesiastical censure, sentence and penalty, if any, in whatever manner, and for whatever reason incurred, do, in accordance with the advice of our aforesaid venerable brethren, in virtue of our apostolical authority, create and publicly declare you coadjutor of the above-mentioned bishop of Monterey and Los Angeles, with the right of succession to said diocese; and whenever by the death of the aforesaid prelate, or for whatever other reason, the see of Monterey and Los Angeles shall become vacant, we, releasing you *nunc pro tunc* from all obligation binding you henceforth to your church of Mossynopolis, do, in virtue of the plentitude of our apostolical power, likewise create and constitute you, *nunc pro tunc*, bishop of Monterey and Los Angeles, with all the honors, powers, rights, and prerogatives usual and customary. It is, however, our will that, while the present bishop of Monterey and Los Angeles lives, you will lend him your assistance in the administration of said diocese only in accordance with his desires and mandates. Moreover, we command every one and all who are or may be concerned to receive and acknowledge you as such coadjutor, and at the proper time, as such bishop of the diocese of Monterey and Los Angeles, and hereby enjoin on all the obligation to extend to you their favor, assistance, and submission in everything, and to receive with reverence your salutary admonitions and injunctions, and to carry them into execution, and if they should ever fail to do so, we shall ratify the sentence or penalty that you may have rightfully pronounced against or inflicted upon them, and shall by means of the power committed to us by God, inviolably enforce the said sentence or penalty, so as to exact condign satisfaction. And all our injunctions hereby decreed will have their full vigor, all and singular other contrary apostolical constitutions and regulations, general or special, issued either in universal or provincial or synodical

councils, and likewise all statutes, customs, and other rules of the aforesaid churches of Mossynopolis and Monterey and Los Angeles, even if ratified by oath and apostolical confirmation, or corroborated by any other ratification whatever, to the contrary notwithstanding.

Given at Rome, at St. Peter's, under the seal of the fisherman's ring, on the 20th day of May, 1873, the 27th year of our pontificate.

[SEAL.] F. CARDINAL ASQUINI.

STATE OF CALIFORNIA,
County of Monterey, } *ss:*

I, J. D. Kalar, county clerk of said Monterey County, and ex officio clerk of the superior court in and for said county, do hereby certify that the foregoing is a full, true, and correct copy of the original proof of the succession of Francis Mora to Thadeus Amat as Roman Catholic bishop of Monterey, a corporation sole, as the same appears of record in my office in Book B, miscellaneous records of Monterey County, California, at page 3 and following.

And the same has been compared by me with the original.

Witness my hand and seal of said court this 13th day of June, A. D. 1902.

[SEAL.] J. D. KALAR, *Clerk.*

CITY OF LOS ANGELES, COUNTY OF LOS ANGELES,
State of California, Diocese of Monterey and Los Angeles.

I, the undersigned, George Montgomery, bishop of the diocese of Monterey and Los Angeles, do hereby certify and declare that the rules, regulations, and discipline of the Roman Catholic Church in the United States of America, and in said diocese, require for the administration of the temporalities of said church and for the management of the estate and property in said diocese that the bishop of said diocese should become and be a religious corporation sole. I also certify and declare that the manner in which any vacancy occurring in the incumbency of such bishop is required by the rules, regulations, and discipline of said church to be filled by appointment by the Roman Catholic chief bishop of said church, to wit, the Pope. According to the customs and usages of the church, the selection of a bishop is determined as follows: Six of the most prominent priests of the diocese, representing all the priests thereof, and known as the bishops' council, meet in consultation and agree upon a list of three names marked respectively as follows, to wit, one is marked *worthy*, another *worthier*, and the other *worthiest*. This list is then sent to the archbishop of the province. The archbishop thereupon calls a meeting of all the bishops of the province to either ratify the list proposed by the priests, or to select another list. If the bishops approve the list proposed by the priests it is forwarded to the Pope. If they propose a new list, they mark it in the same way and forward both lists to the Pope, with whatever remarks they may think fit to make; and from one of these two lists the Pope selects the appointee.

I further certify and declare that heretofore, to wit, prior to the year A. D. 1894, it being thought that a coadjutor bishop of said diocese should be appointed to assist the Rt. Rev. Francis Mora, who ever

since the year 1873 had been, first coadjutor bishop and then bishop of said diocese; thereupon in accordance with the said rules for the selection of an appointee for said position of coadjutor bishop for said diocese the required list of names was prepared and duly authenticated and forwarded to the Pope, to wit, Leo XIII, one of which said names so fowarded was that of the undersigned George Montgomery. That afterwards and in accordance with said rules and practices regulating such appointments, to wit, on the 26th day of January, 1894, the said Pope Leo XIII duly issued his letters of appointment duly attested, designating and appointing the said undersigned "coadjutor of the aforesaid bishop of Monterey and Los Angeles with the right of succession," as will more fully appear by said original letters of appointment, a copy of which is attached hereto, marked "Exhibit A," and also by reference to a duly authenticated translation thereof into English, hereto attached and made a part of this statement, and marked "Exhibit B."

I do certify and declare that under and in pursuance of said appointment the said undersigned duly assumed and entered upon the discharge of the duties of said office in the month of April, 1894, and has continued to discharge said duties ever since.

I further certify and declare that heretofore—to wit, on or about the first day of February, 1896—said Rt. Rev. Bishop Francis Mora duly tendered to the Pope his resignation as the bishop of said diocese, requesting to be relieved of said office, and that thereafter—to wit, on the sixth day of May, A. D. 1896—the said resignation was duly accepted by said Pope Leo XIII. All of which will more fully appear by reference to a duly authenticated copy of the Pope's original letter of the last-named date accepting said resignation, which said copy is attached hereto, marked "Exhibit C," and by a duly authenticated translation thereof hereto attached, marked "Exhibit D," all of which said documents are made a part hereof.

I further certify and declare that by reason of the premises and of the said appointment of the undersigned as coadjutor bishop of said diocese with the right of succession, and by reason of the said resignation of said Rt. Rev. Francis Mora of his said office of bishop of said diocese, and the acceptance of said resignation by the said Pope, the said undersigned has succeeded to and now holds said office of Roman Catholic bishop of the said diocese of Monterey, a religious corporation sole, duly incorporated and existing under the laws of the State of California, residing and having its principal place of business in said city of Los Angeles, county of Los Angeles, State of California.

And in proof of my appointment and selection as such bishop as aforesaid, I cause to be recorded herewith a duly attested copy of my commission or letter of appointment constituting me the coadjutor bishop of said diocese with the right of succession; also a duly attested copy of the letter of Pope Leo XIII accepting the resignation Rt. Rev. Francis Mora, my predecessor, to whose said office I have succeeded; also a duly authenticated translation of each of said letters.

In witness whereof I have hereunto signed my name and the name of said office and religious corporation sole, and affixed my episcopal seal, being the seal of said corporation sole, together with my verification of the truth of this statement.

[CORPORATION SEAL OF THE R. C. BISHOP OF MONTEREY.]

GEO. MONTGOMERY.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

On this 13th day of October, in the year one thousand eight hundred and ninety-six, before me, William R. Burke, a notary public in and for said county of Los Angeles, State of California, personally appeared Geo. Montgomery, known to me to be the person whose name is subscribed to the within instrument, and acknowledged that he executed the same.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[NOTARIAL SEAL.] WILLIAM R. BURKE
Notary Public in and for Los Angeles County,
State of California.

EXHIBIT A.

Leo P. P. XIII. Dilecti fili: Salutem et Apostolicam benedictionem:

Cum Venerabilis Frater Franciscus Mora Episcopus Montereyenis et Angelorum provinciae Ecclesiasticae S. Francisci in Statibus foederatis Americae Borealis instanter petiisset, ut Coadjutorem sibi largiremur, quo cum ipse aetate gravis laborisque confectus onus administrandae dioceseos dividere posset. Nos huiusmodi causis maturae perpensis, de consilio etiam venerabilium Fratum Nostrorum S. R. E. Cardinalium S. Congregationi Fidei Propagandae xx praepositorium, memorati Antistitis precibus annuendum densuimos, teque, dilecti fili quem eximio laudem testimonia commendant, ad hoc manus eligendum existimavimus. Te igitur dilecte fili, quem per similes Nostras litteras hos ipso die datas titularis Ecclesiae Thumitensis Episcopum, renuntiavimus, peculiari benevolentia complectentes, et a quibus vis excommunicationis et interdicti aluisque ecclesiasticis sententiis censuris et poenis quovis modo vel causa latis se quas forte incurreris, huius tantum rei gratia absolventes et absolutem fore censentes, hisci litteris in Coadjutorem cum futura successione praefati Episcopi Montereyensis et Angelorum auctoritate nostra Apostolica facimus et constituimus teque quandocumque per obitum dicti Antistitis vel aliam quam libet causam sedes Episcopalis Montereyensis et Angelorum vacaverit, in Episcopum eiusdem Sidis nunc pro tunc eligimus et constituimus, cum omnibus et singulis honoribus, facultatibus, privilegiis, quae de iure vel consuetudine Episcoporum sunt propria. Dicernimus insuper, ut per huiusmodi successionem tuam memorata Sedes titularis Thumuiteniis eo ipso vacet teque similiter nunc pro tunc de Apostolicae potestatis nostrae xxxxxx plenitudine a praefactae Sedis vinculo absolvimus. Volumus autem, ut vivente memorato Antistite eatenis te ingeras in Diocesus administrationem quatenus ipse voluerit ac mandaverit. Jubemus denique omnibus ac singulis ad quos spectat seu spectavit, ut te ad hoc Coadjutoris xx officium et suo tempore in Episcopum memoratae Sedes Montereyensis et Angelorum recipient et admittant tibique in omnibus pareant faveant, ac praesto sint tuaque mandata reverenter suscipiant atque ad impleant secus sententiam seu poenam, quam in rebelles rite tuleris seu statueris rotam habebimus, at que faciemus usque ad satisfactionem condignam inviolabiliter observari. Non obstantimus in contrarium facientibus quibuscumque.

Datum Romae apud S. Petrum sub annulo Piscatoris die XXVI Januari MDCCCXCIV. Pontificatus Nostri Anno Decimosexto.

Pro Don Card, Serafini:.

[L. S.] NICOLAUS MARICI SUB.

Dilecto Filio GEORGIO MONTGOMERY.

EXHIBIT B.

Leo, the Thirteenth Supreme Pontiff. Beloved son, health and apostolic benediction.

When our venerable brother, Francis Mora, bishop of Monterey and Los Angeles, with whom he, overpowered by age and heavy labors, might share the burden of the administration of the diocese, we, having carefully considered the reasons of this request and having taken counsel with our venerable brothers, the cardinals of the holy Roman Church, who preside over the sacred congregation of the propagation of the faith, have decided to comply with the wishes of the aforesaid bishop, and have determined to choose for that office you, beloved son, whom excellent testimonies of praise recommend to us. Therefore, beloved son, we, cherishing with special benevolence you, whom by similar letters we have announced as the bishop of the titular church of Thumi, only on account of this office absolving you and wishing that you be absolved from whatever excommunication and interdict or other ecclesiastical judgment, censure, and penalties, in whatsoever manner and for whatsoever reasons imposed, if by chance you have incurred any, do by these letters and by our apostolic authority make and appoint you coadjutor of the aforesaid bishop of Monterey and Los Angeles, with the right of succession, and whenever by the death of the said bishop or for whatever other reason the episcopal see of Monterey and Los Angeles will become vacant, we now for then choose and appoint you the bishop of this same see, with all the honors, powers, and privileges which by right or custom belong to bishops. Moreover, we decree that by this your succession the aforesaid titular see of Thumi becomes vacant; and likewise we, by the plenitude of our apostolic authority, now for then, free you from the charge of the aforesaid see. However, we desire that, while the aforesaid bishop lives, you will assist in the administration of the diocese as much as he will wish and command. Finally, we order all and every one to whom it will now or will concern to receive and acknowledge you for this office of coadjutor and in the proper time as the bishop of the aforesaid see of Monterey and Los Angeles and in all things obey, favor, and assist you and reverently to undertake and fulfil your commands, otherwise we will ratify and inviolably enforce, until condign satisfaction be made, the sentence or penalty which you will have rightfully inflicted or pronounced against the rebellious, anyone acting to the contrary nothwithstanding.

Given at Rome at St. Peter's, under the seal of the fisherman, on the twenty-sixth day of January, in the year of our Lord eighteen hundred and ninety-four and of our pontificate the sixteenth.

For His Eminence Cardinal Serafini.

NICOLAS MARICI.

To our beloved son GEORGE MONTGOMERY.

EXHIBIT C.

Leo PP. XIII. Venerabilis Frater Salutem et Apostolicam Benedictionem. Apostolatus afficcium, meritis licet imparibus. Nobis ab alto commissum, quo Ecclesiarum omnium regimini divina providentia praesidemus utiliter exsequi adjacente Domino satagentes sollivete corde reddimur at Solertes, ut sum de earumdem Ecclesiarum regiminibus agitur Committendes, tales cis in Pastores praeficere studeamus, qui populum suae curae creditum sciant non solum doctrina verbi, sed etiam exemplo boni operis informare, commissas que sibi ecclesias pacifico et tranquillo velint et valeant auctore Domino salubriter regere et gubernare. Dudum siquidem provisionem Ecclesiarum omnium nunc vacantium et in posterum vacaturum ordinationi et dispositioni nostrae reservavimus, decernentes ex tunc irritum et inane si secus super his a quo quam quavis auctoritate scienter vel ignoranter contigerit attentari. Iam vero Episcopali Ecclesia titulari Hieropolitana in Phrygia salutari sub Archiepiscopo Synnadensi Pastoris solatio certo modo destituta Nos ad ipsius provisionem in qua nemo praeter Nos se potest, rec poterit immiscere, reservatione ac decreto superdictis obsistentibus, paterno studio intendentes, post deliberationem, quam hac super re cum Venerabilibus Fratribus Nostris S Romanae Ecclesiae Cardinalibus negotus Propagandae Fidei praepositis habuimus diligentem ad te Venerabilis Frater, qui Montereyensem Angelorum Ecclesiam sponte in manibus nostris demisiste, oculos mentis nostrae convertimus. Quare te a vinculo ipsius dimissae Ecclesiae quatenus opus sit de apostolicae potestatis plenitudine solventis et a quibusvis excommunicationis et interdicti aliisque Ecclesiasticis censuris, sentenus ac poenis, si quas forto incurreris, hujus tantum rei gratia absolventos et absolutum fore concentes, eadem Auctorisiam transferimus, teque illi in Episcopum praeficimus et Pastorem, curam, regimen et administrationem eiusdem Ecclesiae tibi in spiritualibus et temporalibus plenare Committendo certa spé freti, te omnia ad majorem Dei gloriam, sempiternamque animarum salutem esse expleturum. Verum tamen tibi indulgemus ut donec praedicta Hieropolitana Ecclesia inter mere titulares consistet, ad illam accedere et apud eam personaliter residere minime tenearis. Non obstantibus constitutionibus et ordinationibus Apostolicis, nec non dictarum Ecclesiarum Montereynsis Angelorum et Hieopolitanae etiam, juramento, confirmatione apostolica, vel quavis firmitate alia roboratis statutis et consuetudinibus caeterisque contrariis quibuscumque.

Datum Romae aqud Sanctum Petrum Sub Annulo Piscatoris die VI Maii MDCCCXCVI.

Pontificatus Nostro Anno Decimonono.

[L. S.] C. CARN. DE RUGGIENO.

Venerabili Fratri FRANCISCO MORA,
Episcopo dimissionario Montereyensi Angelorum.

EXHIBIT D.

Leo the Thirteenth, Supreme Pontiff. Venerable brother, health and apostolic benediction.

Desirous, with the divine assistance, to discharge usefully the duty

of the apostolic ministry entrusted by God to us, although unworthy, whereby we by Divine Providence preside over the government of all churches; whenever there may be a necessity of providing for the government of these churches, we are solicitous and careful to appoint such pastors as are qualified to instruct the people entrusted to their care, not only by inculcating sound doctrine but also by their good example, pastors who with the Divine assistance are willing and able to rule and govern judiciously and to maintain in peace and tranquillity the churches committed to their charge. Also, since we have reserved to ourselves the appointment to all churches at present vacant or likely to be vacant at any future time, we declare as null and void any appointment which may be made knowingly or ignorantly by any other authority. But now the Titular Episcopal Church of Pieropolis in Phrygia, subject to the archbishop of Synnada, being in a certain sense destitute of the comfort of a pastor, and in making provision for it, in which duty no one except us is able or will be able to interfere, by reason of our aforesaid decree and reservation, we, in our paternal zeal, after diligent deliberation with our brothers, the venerable cardinals of the Holy Roman Church, appointed to superintend the propagation of the faith, have turned our attention to you, venerable brother, who has willingly resigned into our hands the church of Monterey and Los Angeles.

Wherefore, freeing you from the charge of this resigned church, and, as far as there is need, by the plenitude of our apostolic authority absolving you and wishing on this account that you be absolved from all excommunications, interdicts, and ecclesiastical censures, judgments, and penalties, if by chance any be incurred, we, by our same authority and by these presents, transfer you to the abovesaid church of the Hieropolis, and by committing you to the care, government, and administration of this same church, in spirituals and temporals, appoint you its bishop and pastor, relying on the assurance that you will discharge all the things for the greater glory of God and the eternal salvation of souls. However, we grant that, as long as the abovesaid church of Hieropolis remains merely a titular one, you will not be obliged to go to it and personally reside there. Apostolic constitutions and ordinances, also those of the said churches of Monterey and Los Angeles and Hieropolis, even those approved by oath, apostolic confirmation, or by any other power, and all statutes, and customs whatsoever to the contrary notwithstanding.

Given at St. Peter's, Rome, under the seal of the fisherman, on the sixth day of May, in the year of our Lord eighteen hundred and ninety-six and of our pontificate the nineteenth.

[L. S.] C. CARDINAL DE RUGGIENO.

To our venerable Brother FRANCIS MORA,
Retired Bishop of Monterey and Los Angeles.

STATE OF CALIFORNIA,
County of Los Angeles, City of Los Angeles, ss:

I, the undersigned, Joachim Adam, being duly sworn, depose and say: I understand and am versed in the Latin and English languages and I have carefully compared the foregoing document marked "Exhibit A" with the original letters of Pope Leo XIII dated January 26, 1894, appointing George Montgomery coadjutor bishop of the diocese of Monterey and Los Angeles with the right of succession, and

said Schedule A is a full, true, and correct copy of said original. I have also carefully compared the foregoing document marked "Exhibit B" in English with the said original letters of appointment in Latin and find that the said Exhibit B is a full, true, and correct translation of said original letters of appointment. I have also carefuly compared the foregoing document in Latin marked "Exhibit C" with the original letters of Pope Leo XIII dated May 6, 1896, accepting the resignation of Rt. Rev. Francis Mora as bishop of said diocese, and find said Exhibit C to be a full, true, and correct copy of said original. I have also carefully compared the foregoing document in English marked "Exhibit D" with the said original document in Latin, and find the same to be a full, true, and correct translation in the English from the Latin of said original.

JOACHIM ADAM.

Subscribed and sworn to before me this 13th day of October, A. D. 1896.

[NOTARIAL SEAL.] WILLIAM R. BURKE,
Notary Public in and for Los Angeles County,
State of California.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

I, the undersigned, George Montgomery, bishop of Monterey and Los Angeles, being duly sworn, depose and say: I have read the foregoing declaration and statement and know the contents thereof, and the same are true of my own knowledge, except as to the matters therein stated on my information and belief, and as to these matters I believe it to be true.

[CORPORATE SEAL.] GEORGE MONTGOMERY.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

On this 13th day of September, A. D. 1896, before me, William R. Burke, a notary public in and for said Los Angeles County, duly commissioned and sworn, personally appeared George Montgomery, known to me to be the person whose name is subscribed to this instrument, and also known to me to be the Roman Catholic bishop of the diocese of Monterey and Los Angeles, otherwise called the diocese of Monterey, a religious corporation sole, that executed the within instrument and acknowledged to me that such corporation sole executed the same.

[NOTARIAL SEAL.] WILLIAM R. BURKE.

STATE OF CALIFORNIA,
County of Monterey, ss:

I, J. D. Kalar, county clerk of said Monterey County, and ex officio clerk of the superior court in and for said county, do hereby certify that the foregoing is a full, true, and correct copy of the original letters of succession, etc., relating to the succession of Rt. Rev. George Montgomery to the office of bishop of the diocese of Monterey and Los Angeles as successor of Rt. Rev. Francis Mora, resigned, as the

same appears on file and of record in my office, and the same has been compared by me with the original.

Witness my hand and seal of said court this 10th day of July, A. D. 1902.

[SEAL.] J. D. KALAR, *Clerk*,
By ——— ———, *Deputy Clerk*.

(Endorsed:) No. 159. Original. Documents relating to the succession of Rt. Rev. George Montgomery to the office of the diocese of Monterey and Los Angeles, as successor of Rt. Rev. Francis Mora, resigned. Recorded at the request of Wells, Fargo & Co., Oct. 17th, 1896, at 22 minutes past 9 a. m., in vol. 50 of deeds, page 36, records of Monterey Co., Cal. W. H. Pyburn, county recorder, by ——— ———, deputy. Recorder's fees, $4.50. Filed Jul. 9, 1902. J. D. Kalar, clerk, by ——— ———, deputy. Filed Nov. 8, 1899. C. W. Bell, clerk, by Sam Kutz, deputy.

DEPOSITION OF THE MOST REVEREND PATRICK WILLIAM RIORDAN, ARCHBISHOP OF SAN FRANCISCO.

UNITED STATES OF AMERICA,
State of California, City and County of San Francisco, ss:

Be it remembered that on the 24th day of July, 1902, before me, John P. Cashin, a notary public in and for the said city and county of San Francisco, in the State of California, United States of America, personally appeared Patrick William Riordan, Roman Catholic archbishop of San Francisco, who, being by me first duly sworn, according to the laws of the State of California, deposed and said as follows:

My name is Patrick William Riordan; I was born in New Brunswick, Canada; my age is nearly sixty-one years; my residence is in the city of San Francisco, California, of which archdiocese I am the Roman Catholic archbishop.

I have no personal interest in the claim in support of which my testimony is taken; but I am the actual incumbent as the corporation sole which will doubtless be one of the recipients, for the purpose of administration, of any sum collected in this case.

Joseph S. Alemany was my predecessor as archbishop of San Francisco aforesaid, and remained such down to the 28th day of December, 1884, when he resigned this archbishopric, and was afterwards translated to the diocese of Pelusium.

I had been his coadjutor with the right of succession from the 16th of September, 1883, and on his resignation succeeded to the office.

He went to Spain and remained there until his death.

I have been charged with the administration of the affairs of the archdiocese of San Francisco since the 28th day of December, 1884.

Before that date I assisted Archbishop Alemany in such administration.

I know from my own knowledge that since I became connected with the administration of this archdiocese and from my intimate acquaintance with the archives of the said archdiocese antecedent to that time that no money whatever has been received from the Government of Mexico on account of the interest of the Pious Fund of the Californias accrued since the year 1868.

The moneys due by Mexico for interest on said Pious Fund under the award of the mixed commission created by the convention of July 4, 1868, had been paid to the extent of several installments prior to my connection with the archdiocese, and the practice had been adopted after the payment of expenses to apportion or distribute the same to the various dioceses and apostolic vicariates within the territory understood to be included in the term Upper California as used when the Crown of Spain held sovereignty over the country, having regard to the population, number of missions, churches, and missionaries in each.

Concerning the statistics of the Catholic Church in America.

There is a publication called the Catholic Directory published annually. It is accepted as authentic, and is, I believe, correct, saving casual trifling errors incident to all publications.

I present a copy of the issue of it for the year 1902, which the notary marks "Exhibit Number One," and I have identified by my signature.

Its statistical information is undoubtedly correct.

In the event that the bishop is absent from his diocese, the vicar-general fills his place.

[SEAL.] PATRICK WILLIAM RIORDAN,
Archbishop of San Francisco.

And therefore I, John P. Cashin, a notary public in and for the city and county of San Francisco, State of California, hereby certify that the foregoing deposition made by Patrick William Riordan, Roman Catholic archbishop of San Francisco, was reduced to writing by me personally, and was thereafter carefully read by me to the said deponent, and was signed by him in my presence.

I further certify that I am not the attorney for either of the parties in the above-entitled suit, and have no interest in the claim before the court, nor am I the attorney for any person having any such interest.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year first above written.

[SEAL.] JOHN P. CASHIN,
Notary Public in and for the City and County of San Francisco, State of California.

DEPOSITION OF MR. JOHN T. DOYLE, WITH EXHIBITS.

UNITED STATES OF AMERICA,
State of California, County of San Mateo, ss:

Be it remembered that on the 26th day of August, 1902, before me, Jas. T. O'Keefe, a notary public in and for the county of San Mateo, State of California, United States of America, personally appeared John T. Doyle, who, being by me first duly sworn according to the laws of the State of California, deposed and said as follows:

My name is John T. Doyle, age eighty-two and a half years, residence Menlo Park, near San Francisco, California. I was born in the city of New York. I was admitted to the bar in May, 1842, in New York; afterwards I practiced law in San Francisco for very many years, but ceased to do so about 1889. Since then I have been a person of leisure. I am and have been from the time this claim was first presented to the Government of the United States one of the counsel

for the bishops of California in the demand for the interest of the Pious Fund. I am interested personally in the case to the extent of any fee I may receive for my services, and have the natural interest a lawyer feels in the success of a case to which he has devoted much time and attention. If such things could bias my testimony (which I do not believe they could) I must be accounted a biased witness.

My first connection with this business resulted from being professionally employed by Bishop Joseph S. Alemany, then bishop of Monterey, and the immediate successor of Francisco Garcia Diego, the first bishop of the Californias, to recover from the Government of the United States the mission buildings, churches, graveyards, vineyards, and orchards belonging to twenty-one missions within the State of California, and one or two ranches claimed under grants from Mexico. The decision in that case was in favor of the claimant, and patents were afterwards issued in pursuance of the adjudication of the land commission for these properties. During the course of that proceeding Bishop Alemany called on me, I should say from memory, about the summer of 1854, though it may have been earlier, and showed me a bundle of papers which he had found in the archives of the diocese, transmitted to him from his predecessor in office, from which it seemed to him he had some claim perhaps against the Government of the United States as successor of Mexico in the sovereignty of California. He wished me to read the papers over and tell him what I thought of it. The papers consisted of five small pamphlets printed in Mexico and the collection of letters (copies) constituting a correspondence between Don Pedro Ramirez (the apoderado of Bishop Diego) and General Gabriel Valencia, appointed by the Mexican Government to administer the Pious Fund under a decree of February 8, 1842, and some other papers which were put in evidence on the first arbitration.

I examined these papers and advised the bishop that he had no claim against the Government of the United States, but I thought he had a valid claim against the Republic of Mexico, which at some time or other might be recoverable whenever a claims convention might be agreed upon between the two Governments. After that—but I can not fix the date—he spoke to Mr. Casserly and myself about employing us in the effort to recover whatever was due to him from the Pious Fund, and in the spring of 1857, as I was then about to remove to New York, he pressed us to enter into a contract with him and Bishop Amat for professional services in the case for a percentage of the amount collected. We assented, and as I was leaving before the contract could be executed, I asked Mr. Casserly to draw it up and sign for me. Some time in June or July, 1857, I learned from Mr. Casserly that he had signed such a contract, but I never saw the text of it nor knew its exact terms till long afterwards, I received a power of attorney from Bishop Alemany who had by that time been translated to the newly created see of San Francisco, as well as one from Bishop Thadeus Amat, who had succeeded him in the diocese of Monterey, authorizing me to represent them in the demand on Mexico for whatever they were entitled to from the Pious Fund and to request the interposition of the United States Government to that end. In July, 1859, on their behalf, I addressed a letter to the Hon. Lewis Cass, then Secretary of State of the United States, outlining in a general way the right of the bishops to the Pious Fund and asking his interposition with Mexico for redress.

My object in presenting the claim at that time to him was to have it on the files of the Department of State so that if afterwards a claims commission were constituted it might be included. Not knowing what view of the claim might be taken by the United States authorities or what the terms of the possible future convention, the claim was stated in a very general way, the facts given, and the aid of the Government asked. Thereafter I continued to search for information concerning the Pious Fund, concerning which all I had learned so far was what was shown by the papers the bishop showed me. I read all the Mexican history and politics I came across, and everything that held out any hope of information on the subject. The political condition of Mexico at that time, and for many years thereafter, was so disturbed that the prospects of a claims convention seemed very remote, and my study of the case was rather a matter of duty, and to a certain extent for historical interest, than with any immediate hope of being able to present it judicially. I returned from New York to San Francisco and resumed practice there in the summer of 1863.

In 1868 Mr. Casserly was elected to the United States Senate and took his seat in Washington in 1869. On the 27th of March, 1870, I learned of the convention of July 4, 1868, between the United States and Mexico and having examined it, sent, on the 28th of March, a telegram to Mr. Casserly, who was in Washington, of which I now hand the notary a copy transcribed from one made by me at the time. It is marked by him "Exhibit No. 1" to this deposition. I was not then on good terms with Mr. Casserly, and as Archbishop Alemany was absent from the State, I thought it judicious to have my telegram confirmed and countersigned by the vicar-general of the diocese, Reverend James Croke, as coming authentically and by authority, which was done. I learned afterwards from him that Mr. Casserly wrote him that he had received it seasonably and had presented the claim, but I had no answer from Mr. Casserly himself. I never knew till after the case was decided the form in which Mr. Casserly had presented the claim to the commission. I learned, however, that he had employed Mr. Nathaniel Wilson, in Washington, to act with him in the case, at or about the time of receiving my telegram, and after vain efforts to obtain from them a copy of the rules of the commission, I was finally fortunate enough to obtain a copy of them in the city of San Francisco from Don Juan Robinson, and drew up the memorial of the claim for the commission. It was printed, signed, and sworn to by Bishop Alemany, who had by that time returned, and sent to Mr. Wilson seasonably to file with the commission within the time allowed by law. Somebody there—I presume Mr. Casserly and Mr. Wilson—detached the last leaf of the memorial, containing a few lines of the text, viz., beginning with the word "estrangeros" and ending with the words "page 516," and the signatures and jurat, printed my concluding lines with two additional paragraphs, added my name to it, and had it verified by Reverned Hugh Gallagher, who was in Washington and held a power of attorney from the bishops, and in that altered condition, as shown on page 15 of the printed transcript, it was filed. I state these facts because Mr. Avila in his argument of the case suggests that my memorial was an ingenious effort to change the form of the claim from that adopted by Mr. Casserly; but that is an error on his part, as will be seen from the above.

Among the papers given me by Archbishop Alemany in 1853 or 1854, whichever it was, was the one which I now produce authenticated by my signature (and which the notary marks "Exhibit No. 2" to this deposition), being the answer to his demand on Mexico for moneys of the Pious Fund made in 1852. It has remained in my possession ever since it was given me by him. I produce it in evidence because Sir Edward Thornton in his decision of the case indulged the presumption that the Archbishop's demand on Mexico and Mexico's refusal to pay must both have been verbal, and I produce this paper to show that such was not the case. I did not put it in evidence before the former arbitral court because I did not, at the time, regard it as important.

With respect to the sale of the hacienda Ciénega del Pastor by the Mexican Government a discovery has been asked from Mexico, first, of the letter from Señor Trigueros dated October 25, 1842, to the Señores Encargados de la Tesoreria General, and, second, of the official communication of Señor Trigueros of the ministerio de hacienda dated November 23, 1842, to the same parties with endorsements thereon and the memorandum of November 24, 1842, etc. While I assume that such discovery will be made by Mexico in pursuance of the engagements of the protocol, yet lest anything should prevent the same I should state here that the copy, which in the demand for discovery is proposed for admission as authentic in case of the discovery not being made, is taken from a pamphlet the full title of which is as follows: "Documentos relativos al piadoso fondo de misiones para Conversion y Civilizacion de las numerosas tribus bárbaras de la Antigua y Neuva California, Publicalos el lic. Juan Rodriguez de S. Miguel, apoderado del illmo. Sr. Don Fr. Francisco Garcia Diego, primer Obispo de aquella Diócesis. Mexico Año de 1845, Imprenta de Luis Abadiano y Valdés, Calle de las Escalerillas Numo. 13."

In the said pamphlet the text of said first-mentioned letter is given as in the copy thereof I now hand the notary, and which is marked "Exhibit No. 3" to my deposition, with the following entry immediately after it shown on said Exhibit No. 3; and that of the second letter above mentioned is given in the same pamphlet in the words of the copy thereof I now hand the notary, and which is marked by him "Exhibit No. 4" to my deposition, with the entry and memorandum immediately after it as if copied from the letter itself, as shown on said Exhibit No. 4.

I am also informed by a person whose name I do not feel at liberty to give, but whom I confidently believe to be correctly informed, that the *escritura de venta* in the exhibits referred to is now in the official custody of a notary in the City of Mexico named Gil Mariano Leon; that it bears date November 29th, 1842; was executed in the presence of the notary, D. Ramon Villalobos, by Señores D. Tranquilino de la Vega y D. Nicolás María Fagoaga, como Ministros de la Tesorería General de la Nacion, and conveys to the Señores Liquidatários y demas socios de la estinguida empresa del Tabaco, las tres cuartas partes que le supreme gobierno tenía en la hacienda Ciénaga del Pastor y sus anexas, y en la hacienda San Augustin de Amoles con sus anexas de San José, Lavaya, San Ignacio del Buey, Custodio, Buena Vista, y todas las otras tierras y rancherías que constan en los respectivos documentos y se han considerado y consideran como pertenecientes á dicha finca, excepto la de San Pedro de Ibarra. Estan ubicadas estas propiedades

en los estados de Guadalajara, San Luis Potosi, y Tamaulipas; Fueron pertenencia del fondo piadoso de Californias; el precio de venta fué de $428,500. And that the document contains an entry in the words:

Acceptaron la escritura los Señores Francisco Paula Rubio y Manuel Fernandez como socios liquidatarios, y en representacion de los Señores Rubio Hermanos, Joaquin Maria Errazu, Filipe Neri del Barrio, Manuel Escandon, Benito de Maqua y Muriel Hermanos, que formaron la estinguida empresa del tabaco.

The price named, $428,500, is arrived at by capitalizing the several sums which said several properties produced as rent and adding thereto $3,000 for the *llenos* on the Ciénaga del Pastor; thus, the rent of the haciendas "San Agustin de Amoles," "El Custodio," "San Ignacio del Buey," and "La Baya" was $12,705; three-fourths of the rent of the "Ciénaga del Pastor" was $12,825; total rents, $25,530.

The price of the three-fourths of the Ciénaga del Pastor therefore was $12,825 capitalized at 6 per cent, which was $213,750, plus $3,000 for the llenos makes $216,750. This item we were entitled to our share of, but lost it by the deduction made in consequence of an attachment, which appears not to have affected the price for which Mexico sold it.

2. The charge in the memorial that $7,000 was erroneously deducted from the capital of the fund *as a bad debt* involves merely a correct appreciation of the expression of D. Pedro Ramirez in his enumeration of *créditos activos del fondo*, under the heading *la hacienda pública*, in these words:

Otro de siete mil ps (pesos) que por órden executiva del supremo Gobierno para que entregaren los Señores Revillas veinte mil, exibió su apoderado D. Francisco Barrera en 20 de Octubre de 1829, y un pagaré contra la Compañia Alamania Mexicana, que no se cobró.

In this passage the words "*que no se cobro*" (which was not collected) refer in my opinion to the *pagaré* or promissory note of the German Mexican Company, and I therefore understand the transaction here mentioned to have been this: The Government, desiring to pay to the Señores Revillas $20,000, ordered that amount to be paid to their apoderado D. Francisco Barrera, *out of the Pious Fund*, on his depositing against it the *pagaré* of the German Mexican Company for $7,000 of the amount. The relation is not complete, but considering the habit of the Government of resorting to the Pious Fund, when other sources of ready cash were not available, this appears to me the most probable interpretation of it, and if it be correct, instead of asking for seven thousand dollars here, I should have demanded $20,000. It is for the official interpreters of the tribunal to say whether my interpretation of it is correct. I think it undoubtedly was intended to state a demand on behalf of the fund against the Government, which must have been solvent for this sum as for the other and larger demands enumerated against it.

My authority for stating in the memorial, on information and belief, that the Mexican Government borrowed from the Pious Fund about July, 1834, various sums amounting to $22,763.15 is the letter of D. Pedro Ramirez of January 28th, 1842, addressed to the minister of justice and public instruction, where, discussing the question whether the costs of the expedition of colonization therein mentioned should be borne by the Pious Fund, he mentions (Transcript, p. 160) that, examining last evening a bundle of papers containing an account of the rents of the Arroyo Sarco, which was one of the estates of the fund, he found an acknowledgment that there had been taken from

that source $5,200 for the purpose, and in another it is seen that the late General Parres, who then administered the hacienda Ciénega del Pastor, had expended $6,000 in the comisaria de Jalisco, which were remitted to the treasurer of the navy at San Blas for the expense of embarking, and that in another it appeared that the late junta del fondo piadoso had turned over $5,154.4 reals which were in the fund for its proper objects, and had given a draft in favor of the supreme Government for $6,008 dollars odd reals and grains for the same purpose, to which should be added $400 already employed in the same way, amounting in all to $22,763 and over.

The name of the vessel (*La Corbetta Morelos*) and the point of embarcation (San Blas) identify this enterprise with the colonization (expedition) which sailed from San Blas about August 1st, 1834, under Padres and Hijar, of which an account will be found in any history of California of that period. In Bancroft's it occurs at Vol. III, page 259 et seq.

The same letter of Ramirez discloses another transaction of the Mexican Government with the Pious Fund, which should lead to an augmentation of its capital over what the Mixed Commission allowed it, is that, as Mr. Ramirez points out, the Government had borrowed sixty thousand dollars at two per cent per month interest, and hypothecated the whole of the Pious Fund as security for the loan. Mr. F. Ramirez had already paid more than thirty thousand dollars out of the fund on account of this transaction, for which reason he was forced to ask indulgence in the way of time to pay Mr. Barron two thousand which he was pressed to do (p. 160, Transcript).

After the ratification of the treaty of Guadaloupe Hidalgo, between the United States and Mexico, the U. S. Congress passed an act under which a commission was appointed for ascertaining and settling private claims to land in the State of California. It consisted of three commissioners, with their secretary and interpreters, and before them all private claims to land within the State were required to be presented and proved. The United States were represented before the tribunal by a law agent and his assistant, as mentioned in the first part of this deposition. I was retained, in conjunction with Mr. Eugene Casserly, by Rt. Rev. Joseph S. Alemany, then R. C. Bishop of Monterey (who was afterward translated to the archdiocese of San Francisco), to present to and prove before this commission court the claim of the Catholic Church, represented by him, to the church edifices, cemeteries, mission buildings, orchards, vineyards, and gardens, etc., at each of the missions in this State, as well as some other lands claimed by the church under grant from the Mexican Government for ecclesiastical purposes, as, ex. gr., the support of a particular church, the founding and support of a college, etc., and with Mr. Casserly conducted the said proceedings.

Certain correspondence between Bishop Francisco Garcia Diego and the Supreme Government of Mexico, a copy of which, certified by the U. S. surveyor-general for this State (in whose custody the records of the proceedings of said commission court are now retained by law), is now produced and maked Exhibit No. 5 to the deposition of John T. Doyle, and identified by my signature. That correspondence was proved, offered, and accepted in evidence in the aforesaid proceedings in the said land commission court. I have myself compared the

copy certified by the surveyor-general of the "*peticiones que ha hecho al Supremo Gobierno el I. Sr. Obispo de Californias*" and the official memorandum and certificate at the end thereof, which occupy the first six pages of said exhibit, with the original document on the files of the surveyor-general's office, and found the same to be a correct copy thereof and of the whole thereof. The seventh page of said exhibit I did not personally compare.

The lands petitioned for by said Bishop Alemany in said proceeding were, by decree of said commission court, confirmed to him on behalf of the church, and patents therefor were duly issued by the United States, under which said lands are now held. I now present an extract from the opinion and decision of the court in that case, which is marked Exhibit No. 6 to the deposition of John T. Doyle, and identified by my signature. It is a correct and true extract from said opinion and shows the ground on which the decision proceeded. The whole opinion is too long to be quoted *in extenso*, as, besides quoting decisions by other courts of the legal questions presented, it contained a description of the various parcels of land, the title of which was confirmed, rendering it of very great length.

The appeal from the decision of the land commission court to the district court of the U. S., which was by the law directed in all cases where the decision was adverse to the United States, was dismissed by the Attorney-General of the U. S. of his own motion, thus distinctly acquiescing in the propriety of the decision of the commission court.

In examining the printed transcript I have discovered various typographical errors, more especially in the paper in foreign languages. Most of them I think are to be accounted for by the bad handwriting in which originals are written, and in almost all instances the errors are explainable on the face of the papers. On page 172, however, the words "*que no sé cobro*" are omitted at the end of line 25 and should be supplied as [illegible word] correctly on page 491, line 12, where the same document is repeated. The bull of appointment of Bishop Alemany on pp. 43 and 44 is full of blunders, but they are of no materiality, and I believe the document appears correctly in another part of the transcript.

JOHN T. DOYLE.

And therefore I, James T. O'Keefe, being such notary public, in and for the county and State aforesaid, hereby certify that the foregoing deposition so made by said John T. Doyle was reduced to writing by me personally and was thereafter carefully read by me to the said deponent and was corrected and signed by him in my presence.

I further certity that the said deponent, John T. Doyle, is personally known to me and that he is entitled to full faith and credit in everything he says. I further certify that I am not the attorney for either of the parties in the above-entitled suit and have no interest in the claim before the court. Nor am I the attorney for any person having such interest.

In witness whereof I have hereunto set my hand and affixed my official seal the 26th day of August, 1902.

[SEAL.] JAS. T. O'KEEFE,
Notary Public in and for said San Mateo County,
State of California.

EXHIBIT No. 1.

[Copy telegram.]

SAN FRANCISCO, *March 28th, 1870.*

EUGENE CASSERLY,
U. S. Senate, Washington:

Present to joint commission, sitting in Washington, a claim by Archbishop Alemany and Bishop Amat, successors of Francisco Garcia Diego, bishop of the Californias, on behalf of themselves all interested, for the income of proceeds of property belonging to Pious Fund of the missions of California. The fund arose entirely from private contributions, beginning with a donation to the Jesuits, by Marquis of Villa-Puente, in 1735, upon trust for the maintainance and propagation of the faith in California. After 1767 it was administered by trustees, appointed first by the Crown, afterwards by the Republic. The sixth section of act of Mexican Congress, Sepr. 19, 1836, gave administration to the bishop aforesaid, to whom claimants respectively succeeded; it was taken from Diego's possession by Santa Anna's decrees February 8th and October 24th, 1842, both of which acknowledge and promise to fulfil the trust. This claim first became due American citizens by treaty Queretaro whereby both trustees and beneficiaries became Americans. Amount is three millions. All rents and proceeds received since February 2d, 1848, fall within convention of July 4th, 1868; prior spoliations perhaps released. Thursday is last day.

JOHN T. DOYLE.

Confirmed.

JAMES CROKE, V. G.

For identification.

JOHN T. DOYLE.

Before the arbitral court under the Hague Convention, in the case of the United States of America against the Republic of Mexico. Exhibit No. 1 to the deposition of John T. Doyle.

JAS. T. O'KEEFE, *Notary Public.*

EXHIBIT No. 2.[a]

MINISTERIO DE JUSTICIA Y NEGOCIOS ECLESIÁSTICOS.

I. S.: Se habia demorado la contestacion debida á la nota que S. S. I. dirigió á este Ministerio en 26 de Julio último relativa á que fuesen auxiliadas las miciones del Obispado de Monterrey con los bienes que los fundadores del fondo piadoso de Californias dejaron segun se dice para atender á la convercion de infieles de aquel pais por que era preciso reunir

DEPARTMENT OF JUSTICE AND OF CHURCH AFFAIRS.

SIR: An answer to the note which your illustrious highness addressed this office on the 26th of last July, relative to whether the missions of the bishop of Monterey might be assisted with the properties which the founders of the Pious Fund of the Californias left, as is asserted, for the conversion of infidels of that country, has been delayed because it was

[a] English translation added for the convenience of the court.

antecedentes é inspeccionar antiguos documentos que diesen la luz necessaria para la resolucion justa y conveniente de este negocio; mas habiendose esto verificado ya y resultando que las cuantiosas donaciones que formaban aquel fondo no tenian por objeto el esclusivo de atender á las miciones de California sino á la conversion de infieles en la America Septentrional á eleccion (faltando en cualquier caso a quellas miciones de personas determinadas en las fundacion) y á las que ha succedido el Gobierno ne la República por el patronato que le compete en esta clace de bienes; S. A. el. Sr. Presidente no puede conceder derechos en los bienes del fondo ya mencionado á la Iglesia de la Alta California separada en la actualidad de la nacion y aunque desearìa ministrarle algunas sumas en calidad de auxilio no puede verificarlo por la penuría conocida del Erario público y por la situacion de pobreza y atrazo en que se hallan las miciones que bajo su amparo ecsisten en el territorio de la Republica y á las que debe atender preferentemente.

Tengo el honor de decirlo asi á S. S. I. en debida contestacion á su nota relativa y de protestarle las distinguidas consideraciones de mi apprecio.

Dios y Libertad.

México, Setiembre 29 de 1852.

AGUIRRE.

I. S. D. Fr. JOSÉ SADA ALEMANI,

Obispo de Monterey en la Alta California.

necessary to collect information and examine old documents that would throw needed light for the just and proper decision of the matter.

The subject has now been examined, and as it shows that the large donations which composed that fund had not for an exclusive object the aiding of the missions of California, but also for the conversion of infidels in North America at discretion (there being in any case in those missions a lack of the persons indicated in the foundation), and (for the aid of the missions) to which the government of the republic has succeeded through the right which is its due in such properties. His Excellency the President can not grant to the church of Upper California, which is now separated from the nation, a right to the properties above mentioned. And although it might wish to donate some moneys in the way of assistance, it can not do so on account of the well-known penury of the public treasury and on account of the state of poverty and backwardness in which the missions under its protection in the territory of the republic are found, and those missions that it ought preeminently to aid.

In having the honor to state the foregoing to your illustrious highness, in due reply to your note, I beg to assure you of my distinguished regard.

God and Liberty.

Mexico, Sept. 29, 1852.

AGUIRRE.

Your illustrious highness JOSÉ SADA ALEMANI,

Bishop of Monterey in Upper California.

Before the arbitral court under the Hague Convention on the case of The United States of America, on behalf of the R. C. Church of Upper California, against the Republic of Mexico.

For identification: JOHN T. DOYLE.

Exhibit No. 2 to the deposition of John T. Doyle.

JOS. T. O'KEEFE, *Notary Public.*

Exhibit No. 3.

Ministerio de hacienda, Seccion Núm. 2711. T. Núm. 4916. *para a cuerdo. Enterados de pronto los cincuenta mil pesos.* Octubre 27. S. Tesoraria. Los liquidatorios y demas socios de la estinguida empressa de tabacos han hecho las siguientes proposiciones.

Primera. Compramos al Supremo Gobierno, la hacienda conocida con el nombre de Amoles con sus anecsas, Y las tres cuartas partes que le pertenecen en la de Ciénega del Pastor y sus anecsas, ubicadas la primera, en el departamento de San Luis Potosí, y la segunda en el de Guadalajara, pertenecientes ambas al fondo piadoso de Californias, y cuyo valor se calculará por lo que produzcan sus actuales arrendamientos á razon de un 6 por 100 al año; es decir, que si estos producen anualmente 24 mil ps. el precio de estas dos fincas será el de 400 mil. ps. y en la misma proporcion si el arrendamiento es mayor ó menor. Daremos en pago 50 mil ps. que se enterarán inmediatamente en la tesorería general. Doseientos cincuenta mil pesos que por resultado de nuestra cuenta con el Banco nos deben ser pagados en abonos de 35 mil ps. mensuales con los productos de la renta del tabaco de las administraciones de Zacatecas y Guadalajara, tan luego como se amortizen las órdenes anteriores que se nos están pagando en la actualidad, por las mimas administraciones con arreglo al decreto supremo de 12 de Noviembre de 1841.

2°. Lo que faltare hasta completar el total valor de dichas hacien-

[Translation.[a]]

Department of Finance (hacienda).—Section . . . No. 2711. T. No. 4916, October 27, S. Treasurer's Office.— Memorandum.— The five thousand pesos immediately deposited. The liquidators and the other members of the extinct tobacco monopoly have made the following proposal:

1st. We will buy from the supreme Government the estate known by the name of "Amoles," with its outlying properties (anexas) and three-fourths of the Ciénega del Pastor and its outlying properties (anexas), which also belong to it; the first situated in the District of San Luis Potosí, and the second in that of Guadalajara, both belonging to the Pious Fund of Californias, the value of which shall be determined by the capital which at the rate of 6 per cent per annum would produce their present rents; that is to say, that if these yield annually twenty-four thousand dollars, the price of these two estates shall be four hundred thousand dollars; and in the same proportion if the income from rents be greater or less. We will give in payment fifty thousand dollars, to be deposited immediately in the general treasury. Two hundred and fifty thousand, which as a result of our account with the bank (banco) ought to be paid us in monthly installments of $35,000, together with proceeds of the revenues of tobacco from the districts of Zacatecas and Guadalajara as soon as the above orders shall fall due, which are being paid at present by said districts in accordance with the supreme order of the 12th of November, 1841.

2nd. The amount lacking to complete the total value of the said

[a] This translation does not form a part of the exhibit, but is incorporated herein for the convenience of the tribunal.—J. H. Ralston, Agent of the United States.

das, lo entregaremos en la tesorería general *en créditos reconocidos por la nacion*, verificándolo en el término de ocho meses que se contarán desde la fecha de la aprobacion de esta propuesta.

3°. El supremo gobierno saneará en todo caso la venta de dichas fincas, y cualquiera reclamacion que pueda hacerse contra las mismas será de cuenta del gobierno satis facerla; sin que por ningun motivo se nos inquiete en la pacifica posesion de ellas, y n cualquiera gasto ó perjuicio que se nos pueda originar por este motivo nos deberá ser indemnizado por la hacienda pública.

4°. No estaremos obligados á ecshibir ninguna otra cantidad que las ya espresadas por esta compra.

5°. Nos obligamos á cumplir las escrituras de arrendamiento de dichas haciendas hasta su término, si en ellas se espresare que los arrendatarios no deben ser molestados ni aun en el caso de enagenacion de las mencionadas fincas. Y en virtud de la autorizacion que concede el gobierno el *decreto de esta fecha* admite el Ecsmo. Sr. presidente provisional esta proposicion, bajo el concepto de que los cincuenta mil pesos que se ofrecen entregar en numerario se ecshibirán en al acto. Dios y libertad. México, Octubre 25 de 1842. *Trigueros.* Señores encargados de la teroseria general. En 26 del mismo entregaron los 50 mil ps. que recibió la tesorería en clase de depósito, segun consta del certificado que dió á los interesados.

estates we will pay into the general treasury in notes approved by the nation; redeeming the same in the period of eight months, which will be counted from the approval of this offer.

3rd. The supreme Government shall guarantee in every case the sale of said estates; it shall be the obligation of the Government to satisfy any claims whatsoever that may be brought against the estates, so that we may not for any cause be disturbed in the peaceful possession of them, and any expense or loss which may originate through this cause must be made good by the public treasury (hacienda).

4th. We will not be held liable for any other amount than those already stated by reason of this purchase.

5th. We bind ourselves to carry out the contracts of the leases of said estates until their expiration, if therein it be provided that the tenants must not be disturbed even in case of the sale of the said estates. And in virtue of the authority conceded to the Government by the decree of this date, his excellency, the provisional president, accepts this offer upon the condition that the $50,000 which is offered to be paid in coin be delivered immediately. God and liberty. Mexico. October 24, 1842. Trigueros. Gentlemen in charge of the general treasury. On the 26th of the same month they delivered the $50,000, which the treasury received as a deposit, as will appear from the certificate which it gave to the interested parties.

EXHIBIT No. 4.

Ministerio de hacienda. Seccion 2. Núm. 2803. T. Núm. 5346. Dada cuenta al Escmo. Sr. presidente sustitute con el ofico de V.SS. núm. 201 de 17 del que rige en que consultan si al venderse las hacien-

Department of finance (hacienda). "Section second, number two thousand eight hundred and three. T. Number five thousand three hundred and forty-six. His excellency the provisional president

das de Ciénaga del Pastor y San Agustin de los Amoles, pertenecientes al fondo piadoso de Californias, *se tuvo presente el valor de los llenos, ecsistencia deudas y mejoras;* se ha servido acordar S.E. diga á V.SS. en contestacion, como lo verifico, que teniendo en consideration el supremo gobierno que se computaron los llenos de las haciendas referidas para apreciar sus arrendamientos, á los que se acomodó el precio ó valor contenido en el contrato celebrado con los liquidatarios y demas socios de la estinguida empresa del tobaco, para la venta de las fincas espresadas, cuya aprobacion comuniqué á V.SS. bajo el núm. 2711, en 25 del último Octubre, no se insiste en que sean pagados por separado. En consecuencia dispone S.E. *se admita la propuesta que han hecho los interesados verbalmente, reducida á ecshibir tres mil pososen el ceto*, y con calidad de que si los llenos aparecieren pertenecer á tercera persona, será de cuenta de los mismos su devolusion ó contenta, sin que esta incluy responsabilidad alguna que tenga que cubrir el gobierno. De suprema órden lo comunico à V.SS. para su intelegencia, y que desde luego se proceda á otorgar la correspondiente escritura de enagenacion. Dios y Libertad. México, Noviembre 23 de 1842. *Trigueros.* Señores encargados de la tesoreria general. Noviembre 24. Seccion de créditos. Rubricado por el Sr. Fagoaga. En esta fecha y en protocolo de esta tesorería general otorgaron los Señores ministros la escritura de venta prevenida.

México, Noviembre 29 de 1842.

RAMON VILLALOBOS.

having been notified by the letter of your excellencies, No. 201 of 17 instant, in which you discuss as to whether or not account was taken of the utensils (llenos), stock, debts, and improvements of the hacienda Ciénega del Pastor and San Augustin de los Amoles belonging to the Pious Fund of Californias at the time of their sale, his excellency has seen fit to say in reply to your honors, to which I attest, that inasmuch as the supreme Government took into consideration the farming utensils (llenos) on the said estates in order to determine their rents, by means of which the price of value contained in the contract made with the liquidators of the extinct tobacco monopoly for the sale of the aforesaid estates was computed, the approval of which contract I communicated to your honors under number 2711 on the 25th of October last, it is not required that the utensils be paid for separately. Therefore his excellency orders the acceptance of the proposal made verbally by the parties interested, provided three thousand dollars be paid down, and with the understanding that should the utensils (llenos) thereon belong to a third party it will be the duty of the purchasers to restore the same or give satisfaction, relieving the Government from all responsibility. By supreme order I communicate the same to your honors for your information and that you may forthwith proceed to execute the corresponding deed of sale. God and liberty. Mexico, November 23, 1842. Trigueros gentlemen in charge of the general treasury. November 24, department of credits. Signed by Señor Fagoaga. On this day and in the record of this general treassury the ministers executed the deed of sale aforesaid.

Mexico, November 29, 1842.

RAMON VILLALOBOS.

Before the arbitral court under the Hague Convention in the case of The United States of America (on behalf of the R. C. Church of Upper California) against the Republic of Mexico. For identification:

JOHN T. DOYLE.

EXHIBIT No. 4 to the deposition of John T. Doyle.

JAS. T. O'KEEFE,
Notary Public.

EXHIBIT No. 5.

PETICIONES QUE HA HECHO AL SUPREMO GOBIERNO EL Y. SR. OBISPO DE CALIFORNIAS EN SU NOTA DE 7 DEL CORRIENTE Y CARTA PARTICULAR DE LA MISMA FECHA.

Desde que se quitaron á los misioneros las temporalidades que ellos mismos crearon y aumentaron, con su trabajo personal y sus sinodos, entraron á disfrutar los bienes de las, misiones los seculares y sus familias y entre ellos algunos que no conozco á quienes no se podia fiar ni aun una pequeña cantidad. Ya se deja entender la ruina de tales bienes en semejantes manos. En el ministerio de V. E. deben exister los reclamos, que sobre eso tengo hechos, y por los que el congreso general dió una ley suspensiva de la que mandaba la secularizacion de misiones, la que hasta ahora segun entiendo no se ha cumplido quizas por justas consideraciones del gobierno. En posteriores reclamos que hice en el año treinta y seis, informé al Supremo Gobierno de los males que los misioneros padecen y entre ellos no es el menor, qui los administradores de la misiones se apoderaron de las casas en que vivian los padres; unas casas fabricadas por los religiosos, y en cuya construccion invirtieron los sinodos que percibian y el trabajo de sus manos. Se han visto reducidos a vivir allí como arruinados y con bastante incomodi-

PETITIONS WHICH WERE MADE TO THE SUPREME GOVERNMENT BY THE BISHOP OF CALIFORNIAS IN HIS NOTE OF THE 7TH OF THE PRESENT MONTH AND IN A PRIVATE LETTER OF THE SAME DATE.

Since there has been taken from the missionaries the properties which they established and increased by their personal labors and with their allowances, the secular and their families have begun to enjoy the properties of the missions, and among them some I am not acquainted with and who could not be trusted with even the smallest amount. Already the ruin of the properties has begun in such hands. In the department of your excellency there must be the reclamations which I have made, and for which the General Congress made a law suspending that which ordered the secularization of the missions, which up to this time, as I understand, has not been carried out, perhaps through just considerations of the Government. In the later reclamation which I made in the year 1836, I informed the Supreme Government of the injuries suffered by the missionaries, and not the least of them was that the administrators of the missions took possession of the houses in which the fathers were living; some houses having been built by the religious, and in whose construction were applied the allowances which they received

dad como yo mismo lo ví. Tienen en la misma habitacion á unas gentes que en muchas noches no los dejan descanzar por las embriagueses, juegos óbailes que con escandalo estan presenciando los neo fitos! Vida insufrible ciertamente! Vida amarguisima para unos religiosos recoletos, y tanto que muchos de ellos han pensado abandonar las misiones, y retirarse á buscar la tranquilidad y paz de sus espiritus! Vida penosa que ha retraido y retrae à muchos de ir á las misiones por no exponere á tantos padecimentos y desprecios de su caracter! Mas no se crea por esto que quiero se lleve á efecto la entregada de las temporalidades á los religiosos. Sé muy bien y aun lo tengo dicho al gobierno que dentro de breve tiempo ya no nabra nada de los bienes que tenian aquellas opulentas misiones los que recibieron los administradores cuando los padres las entregaron. Lo que quiero es que para las misiones nuevas que se vayan estableciendo, se tomen medidas legislativas para que no se repitan las graves desordenes. De otro modo, Que padre misionero habrá que quiera trabajar por aumentar los bienes de los Yndios infelices si sabe por experiencia que se les han de quitar á sus legitimos dueños, y se han de entregar á otros para que los disfruten, roben, y tiren sin haberles costado ningun trabajo? Cual será el religioso que quiera hacer casa ni plantar huerta para su recreo y su comodidad, si ha visto que con la moyor injusticia se las quitan, y entran á poseerlas hombres que antes se socorrian con limosnas por los mismos misioneros y que repentinamente se mudan los Señores y tienen los infelices padres que vivir á sus espensas? En lo que insisto é insistiré siempres es, en que queden á los misioneros las casas y huertas que ellos ó sus antecesores hicieron que estan contiguas á las iglesias y con inmediata comunica-

and the work of their own hands. They were compelled to live in them as ruined and with great inconveniences as, I myself saw. There were in the same building some persons who, many nights, would not allow them to rest for their drunkenness, games, and dances in which the neophytes scandalously indulge! A life most distressing for religious recluses; indeed, so very distressing that many of them have thought of abandoning the missions and retiring in search of tranquility and peace of spirit! This painful life has dissuaded and does dissuade many from going to the missions, not wishing to expose themselves to such abuses and depreciations! But it must not be thought by this that I wish to cause the transfer of the properties to the religious. I know very well, and yet I have told the Government that within a short time there will remain nothing of the properties which belonged to those such missions and which were received by the administrators when the fathers turned them over. What I wish is that for the new missions which are about to be established legislative measures be taken to prevent the repetition of such serious disorders. Otherwise, what missionary father is there who wants to labor to increase the properties of the unfortunate Indians if he knows by experience that they are to be taken from their legitimate owners and are to be delivered to others to enjoy, plunder, and waste without having cost them any exertion? Where could be found the religious who would wish to erect a house or plant a garden for his diversion and convenience, if he has seen them taken from him with the greatest injustice and men entering into their possession who had formerly been aided with alms by the same missionaries, and suddenly the superiors are changed

cion á ellas. Los administradores (como que tienen á su disposicion á los Yndios y los intereses de las misiones) pueden hacer casa para elles, y dejar á los padres quietos y en paz. Esta medida la juzco tan necesaria que sino se toma no habra quien quiera ir á servir las misiones, yo desde ahora lo prevengo al Supremo Gobierno; y si para los misioneros es una medida tan necesaria, que se debe decir con respecto al obispo? Esto será une cosa bien dura que mientras puede edificar su casa, no tenga en donde recogerse con su familia ni en donde poner sus estudiantes y ministros, ni en donde dar principio á su seminario? Por esto pues suplico al Supremo Gobierno.

1°. Que se da una orden (la misma que yo llevaré) para que se entreguen á los misioneros las casas y huertas de las misiones, y que la de San Diego ó la de San Luis Rey sea ocupada interinamente por el obispo y sus familiares juntamente con el padre misionero, hasta que el obispo pueda hacer su casa episcopal y el edificio para su seminario.

2°. Los administradores niegan por lo regular los servicios de los Yndios á los padres, y esto aun pagandoles lo justo. Esto exige otra disposicion del Supremo Gobierno para que se me franqueen sirvientes con sus salarios equitativos y no arbitrarios. Juntamente suplico se me dé el terreno para edicifar mi iglesia, mi casa y mi seminario.

and the unfortunate fathers have to live at their own expense. What I insist on and always will insist is that there shall belong to the missionaries the houses and gardens they or their predecessors made which are contiguous to the churches and immediately communicating with them. The administrators (inasmuch as they have under their control the Indians and the interests of the missions) can build a house for them, and leave the fathers in quiet and peace. This measure I consider so necessary that unless it be taken there will be no one to go to serve the missions, of which fact I now warn the supreme Government; and if this measure be so necessary for the missionaries, what should be said with regard to the bishop? Would it not indeed be a hardship if while he might build his house he would have no place in which to bring his family nor in which to place his students and ministers, nor in which to start his seminary? Therefore I petition the supreme Government:

1st. That an order be given (the same as I shall deliver) that the houses and gardens of the missions be delivered to the missionaries, and that that of San Diego or that of San Luis King be occupied temporarily by the bishop and his associates, together with the father missionary, until the diocese can erect its episcopal house and the building for its seminary.

2nd. The directors commonly withheld the services of the Indians from the fathers, even though they paid them a just compensation. This necessitates another arrangement on the part of the Supreme Government in order that servants may be allowed me with equitable and not arbitrary salaries. At the same time I pray that land be allowed me in order that I may build my church, my house, and my seminary.

3°. Bien sabe el Supremo Gobierno que no tengo en mi obispado mas eclesiasticos que los religiosos Fernandinos, Zacaltecanos y Dominicos de esta Provincia de Mexico, y si los prelados de estas corporaciones nos quitan á sus subditos las gracias que por misioneros tienen en su orden, y esta medida influiria mucho para que aquellos vinieron y para que otros no vayan á las misiones, y debe extraerles la consideracion de que los sacrificios que hacen le son inutiles en su religion. Vengo pues al Supremo Gobierno que oficio al Reverendo Padre Provincial para que no se haga innovacion alguna y que sigan los misioneros lo mismo que estan hasta que el obispo tenga clerigos que puedan ocupar su lugar, y ellos puedan dedicarse á las conversiones vivaces. Quiero ademas que el Gobierno me recomiende con los Reverendos Padres Guardianes de Guadalupe de Zacatecas y San Fernando para que me auxilien con religiosos, y que si algunos me quieren acompanar no se les impida.

4°. El Supremo Gobierno pidió al Santo Padre por conducto de nuestro enviado á Roma, que se me concediera llevar á mi obispado á cuantos sacerdotes quisieran acompañarme y fueran de mi aprobacion sin que sus respectivos prelados pudieran estorbarlo. Tal facultad no vino entre las que tengo en mi poder. Quisiera por tanto que se le reclamara al Señor Montaya sobre el particular y en el entretanto que Gobierno se interesara con los prelados, cuando alguno, ya sea del clero secular ó regular le escriba que quiere acompañarme y yo diga al mismo Gobierno que es de mi aprobacion.

5°. Como una de mis principales miras debe ser la convercion de

3d. The Supreme Government well knows that I have not in my bishopric other priests than the Franciscans, Zacaltecans, and Dominicans of this province of Mexico, and if the prelates of these orders deprive us of the privileges which their brethren have as missionaries in their orders, this measure would be of great influence, so that the latter might not and others would not come to the missions, and that the considerations that the sacrifices which they make are of no avail in their order ought to be removed from them, I appeal further to the Supreme Government that it may intervene with the reverend fathers provincial in order that no change be made and that the missionaries pursue their present course until the bishop may have priests who can take their places and the former may apply themselves to new conversions. Furthermore, I wish that the Government would aid me with the reverend father superiors of Guadelupe de Zacatecas and San Fernando in order that they may aid me with priests, and that if any wish to accompany me they be not hindered.

4th. That the supreme Government ask of the Holy Father, by means of our envoy to Rome, that I be allowed to receive in my bishopric as many priests as wish to accompany me as I may approve without their respective superiors being able to prevent it. Such power does not come within those which I possess. I desire therefore that a demand be made of Señor Montaya on this particular point and that in the meantime the Government interest itself in those priests, when any of them, secular or regular, who writes that he wishes to accompany me and I notify the Government of my approbation.

5th. Since one of my principal objects ought to be the conversion

los gentiles y propagacion de la fé, es indespensable pue tenga operacion para el logro de mis deses. Los colegios aprobados de la republica estan acabando, excepto el de Guadelupe y de Zacatecas, y apenas podrá cubrir las diez misiones de que se tiene cargo. Creo pues de necesidad que me conceda liciencia para fundar en mi obispado colegio de misioneros para que estos sigan formando nuevas misiones ó pueblos, y suplico al Gobierno que por conducto de nuestro enviado á Roma impetre del Santo Padre pueda yo proceder á la fundacion aunque sea con un solo religioso para que este dé habitos y propriones á los que quieran dedicase á la importantisima conversion de gentiles. Ygualmente suplico se me dé para local de este colegio la isla llamada de los Angeles ú otro terreno aproposito.

6°. Las niñas en general han carecido de educacion y de eseñanza, para que sean utiles á la sociedad: quiero pues fundar en el lugar de mi residencia un colegio de educandas, para el que tambien necesito terreno suficiente.

7°. Por una anomalia que no entiendo se ha estado cobrando ne mi obispado los diezmos por parte del Gobierno civil de Sonora. Debe pues prohibirse esto á aquellas autoridades para que queden los fieles libres para darlos á la Yglesia en lo sucesivo, lo que aunque paucos ayundarán á los grandes proyectos de publica beneficencia que tengo formados.

8°. El Gobierno gravó al Fondo Piadoso de mi Yglesia con un prestamo que hizo el Señor Teren de sesenta mil pesos el ruinoso lucro de dos por ciento mensuales, se comprometió el Gobierno á abanar dos cientos y mas pesos diarios (segun estoy informadó)

of the heathen and the propagation of the faith, it is necessary that I may have the necessary assistance to succeed in my desires. The colleges approved by the Republic are falling off, except that of Guadelupe and Zacatecas, and that can scarcely take care of the ten missions which it has in its charge. I think, therefore, that it is necessary that license be granted me to found in my bishopric a college of missionaries, in order that they may continue founding new missions or villages, and I pray the Government that by means of our envoy to Rome it intercede with our Holy Father that I may be allowed to proceed with this foundation, although it be with but one priest, so that he may afford an example to those who wish to devote themselves to the most important conversion of the heathen. Likewise I pray that there be given me for the site of this college Angel Island, or another suitable place.

6th. The girls in general have lacked the education and learning that would make them beneficial to society; I wish, therefore, to found in the neighborhood of my residence a school for girls, and for this, also, there is need for sufficient land.

7th. By some disobedience of rules, which I do not understand, tithes have been collected in my bishopric by the government of Sonora. This ought to be forbidden those authorities, in order that the faithful may be free to give them to the church in the future, and which, although small, will be of assistance to the great projects of public welfare which I have formed.

8th. The Government has burdened the Pious Fund of my church with a loan which Señor Teran made of $60,000 with the ruinous interest of 2 per cent per month. The Government promised to pay daily installments of 200 odd dollars (as I am informed) in order to

para estinguir esta deuda ominosa. Cumplió este promiso por un poco de tiempo y despues lo ha dejado al cargo del Fondo quien por no perder su capital amenazado por las mismas condiciones del prestamo ha estado haciendo sacrifios asi para amortizar la deuda como para pagar los reditos mensuales. En tales circunstancias se halla dicho Fondo sin arbitrios para dar los sinodos á los misioneros cuyos libramientos tiene pendientes y sin poderme ayudar á mi en los gastos que debo hacer para marchar á mi diocesis, los que son muchos como no se oculta á la penetracion de V.E. Es pues justicia que pido el que se arbitre algunos medios por el Gobierno para cubrir cuanto antes la deuda del Señor Teran para que quede libre el Fondo.

extinguish this threatening debt. It fulfilled this promise for a short time and afterwards left it to the charge of the fund, which, in order that it may not lose its capital by the very terms of the loan, has been making sacrifices not only that it may extinguish the debt, but also pay the monthly interests. Said fund is in these circumstances without means of paying the salaries of the missionaries whose drafts it has outstanding, and without being able to help me in the expenses which I ought to incur to my diocese, which are great, as is not unknown to your excellency. In justice, therefore, I ask that some means be taken by the Government to discharge, as soon as possible, the debt of Señor Teran, in order that the fund may remain unincumbered.

En mi oficio se me pasó decir que deseo poner mis edificios, ó mas bien fundar una poblacion en un rancho que se halla frente de San Diego asi por la comodidad que presenta de agua, de leña; como por no estar litoral y espuesto á la invasion de algun pirata. Es ademas de muy buen temperamento. Si el Gobierno quisiera poner alli alguna fuérza militar seria de suma importancia para la comunicacion con Senora, pues contendria á los Yndios del Rio Colorado, y tambien seria muy al caso para intentar la reduccion de estos probrecitos y on felicidad espiritual y temporal. Estoy persuadido que con esta medida se facilitaria la comunicacion con el interior de nuestra republica, y el Gobierno tendria mas frecuentes noticias de aquel departamento.

In my official letter I forgot to say that I wish to erect my buildings, or rather to establish my settlement, on a ranch which is situated opposite to San Diego, not only on account of the supply of water and wood which it affords, but also because it is not near the coast and exposed to the invasion of any pirate. Besides, it has a very good climate. If the Government should desire to place a military force there, it would be of the greatest importance in communicating with Sonora, because it would be a check to the Indians of the Colorado River, and also it would be material in the reduction of those unfortunates and to their spiritual and temporal welfare. I am persuaded that by this means the communication with the interior of our Republic would be facilitated and that Government would have more frequent advices from that region.

Nov. 17 de 1840. El Exmo. Presidente se ha servido proveer de conformidad con todo lo pedido por el Reverendo obispado de Californias en esta nota hasta donde alcanzan las atribuciones de S. E.

Nov. 17, 1840. His Excellency the President has seen fit to grant everything which has been asked by the reverend bishop of the Californias in his note as far as his excellency's powers extend, and

y da lugar el decreto del congreso de 7 de Nov. de 1835, que mando reponer las misiones á su antiguo estado; á cuyo fin se estenderá orden general al Señor Gobernador de Californias, para que por medio de las autoridades subalternas se restituya sin dilacion ni embarazos á los Padres Misioneros las posesiones y bienes que usaban bajo su administracion para la conversion de los infieles, y esa y las demas ordenes que han de espedirse en obsequio de la peticion del Reverendo Obispo se pondran en mano de S. Y. para su meior éxito, y se le dará otra orden, á fin de que el Señor Gobernador le auxilie en cuanto importe á la fundacion del obispado. Y por lo toea á los terrenos de que no esté ó hayan estado en posesion de las misiones librese oficio á la Junta Directiva del (Ramo?) á fin de que acuerde con S. Y. hasta dondo pueda su notoria piedad lo que mas facilite sus peticiones; y en lo que no alcanzan los arbitrios del (Ramo?) le manifiesta al Gobierno para que se inicie al Poder Legislativo á se provea como haya lugar en derecho: y contestese con este decreto al Reverendo Obispo.

Es copia. Mexico, Nov. 21 de 1840.
(Firmado) Y. YTURBIDE.

MEXICO, *Oct. 8 de 1852.*
Conforme.
[SELLO.] JOSÉ M. DURAN.
(Sella cuarto un real 1852, 1853.)

he is permitted by the decree of Congress of the 7th of November, 1835, which ordered that the missions be restored to their old standing, to which end a general order will be transmitted to the governor of the Californias in order that by means of the subordinate authorities the possessions and properties which they were accustomed to use under their administration for the conversion of the heathen be restored to the missionary fathers without delay or hindrance, and this and the other orders which are to be given in accordance with the petition of the reverend bishop shall be placed in your excellency's hands in order that it may be better carried out, and another order will be given you to the end that the governor may aid you as much as may be necessary in the foundation of the bishopric, and that he may give an order to the directive board of the department with respect to the lands of which the missions are not or may not have been in possession, to the end that it may agree with your highness in so far as his well-known piety may be able to further your desires, and concerning that to which the powers of the department do not extend he may make it known to the Government in order that the legislative authority may be properly invoked and answer the reverend bishop with this decree.

A copy. Mexico, November 21, 1840.
(Signed) Y. YTURBIDE.

MEXICO, *Oct. 8, 1852.*
Compared.
[SEAL.] JOSÉ MARÍA DURAN.
(A stamp of one real, 1852–1853.)

OFFICE OF THE
U. S. SURVEYOR-GENERAL
FOR CALIFORNIA.

I, surveyor-general of the United States for the State of California,

and as such, having in my office and in my charge and custody a portion of the archives of the former Spanish and Mexican Territory or Department of Upper California, as also the papers of the late board of commissioners to ascertain and settle the private land claims in California, by virtue of the powers vested in me by law, do hereby certify that the seven preceding and hereunto annexed leaves, numbered from one to seven, inclusive, and written on one side only, exhibit a true, full and correct copy of the original "Exhibit No. 1, P. L., annexed to deposition of José Miguel Gomez, Dec. 29, 1854. Joseph S. Alemany. Lands of the Catholic Church (C.) filed in office Dec. 29, 1854. Geo. Fisher, Recorder in Rec. of Evid., vol. 18, p. 571 to 574," and also "Exhibit No. 2, P. L., annexed to deposition of José Miguel Gomez, Dec. 29, 1854. Joseph S. Alemany. Lands of the Catholic Church. Filed in office Dec. 29, 1854. Geo. Fisher, Recorder in Record of Evidence, vol. 18, pp. 775 and 779," and now on file in this office and in my custody; that I have carefully compared the same with said originals, and that the same are a correct transcript therefrom and of the whole of such originals.

In testimony whereof I have hereunto signed my name officially and caused my seal of office to be affixed at the city of San Francisco, this twenty-fifth day of August, 1902.

W. S. GRAHAM,
U. S. Surveyor-General for California.

Seal surveyor-general's office, California.

(Endorsed on back): Exhibit No. 5 to the deposition of John T. Doyle. Jas. T. O'Keefe, notary public. For identification: John T. Doyle.

El infrascrito oficial major del Ministerio de Relaciones Certifica: ser autentica la firma que antecede (de) del Sr. D. José Ma. Duran official mayor del Ministerio de Justia.

Mexico, Octubre 8 de 1852.

J. MIGUEL ARROYO.

The undersigned, chief clerk of the department of foreign relations, certifies that the foregoing seal of Don José Maria Duran, chief clerk of the department of justice, is authentic.

Mexico, October 8, 1852.

J. MIGUEL ARROYO.

MINISTERIO DE LA INTERIOR.

YLMO. SOR: Dada cuenta al E. S. Presid[te] con el oficio de V. S. Y. de 7 del corriente é impuesto de todo cuanto en él expone con el objeto de dar lleno á sus graves onligaciones como obispo de Californias, se ha servido proveer de conformidad con todo lo pedido en el citado oficio y con lo que tambien solicitó en carta separada de igual fecha hta. donde el alcanzan las atribuciones de S. E. y dá lugar el decreeo del congreso grāl. de 7 de Novb. de 835 que dispuso se mantubieran las misiones en el estado que tenian antes de la Ley de 17 de Agosto de 1833 á cuyo fin se libra orden por este Minist[o]. al E. S. Gobr. de Californias para que por medio de las autoridades subalternas se restituya sin dilaciones ni embarazos á los Padres Misioneros las posesiones y bienes flüe estaban bajo su administracion para la conversion de los infieles.

Y lo digo á V. S. Y. en contestacion.

Dios y Libertad, Mexico.
Novb. 17 de 1840.

MARIN. (Rúbrica.)

Y. S. OBISPO DE CALIFORNIAS.

DEPARTMENT OF THE INTERIOR.

ESTEEMED SIR: Information having been given to His Excellency the President by the official letter of your highness of the 7th instant, and taking into account all that is expressed in it with a view to accomplishing your weighty obligations as bishop of the Californias, he has been pleased to concur with all that is asked in the said letter, as well as with that which was asked in a separate letter of the same date, as far as his power extends, and as he is authorized by the decree of the General Congress of the 7th of November, 1835, which ordered that the missions be continued in the state which they had before the law of the 17th of August, 1833, to which end an order has been made by this department to his excellency the governor of the Californias, so that by means of the inferior authorities he may restore without any delays or hindrances to the missionary fathers the possessions and properties which were under their administration for the conversion of the heathen. And I say this to your excellency by way of answer.

God and liberty, Mexico.
November 17, 1840.

(Rubric.) MARIN.

His Excellency the BISHOP OF THE CALIFORNIAS.

A pedimento del Señor Obispo de Californias, certifico por la presente quo la firma agreda á este documento es la del Ministro del Interior, de aquella época del

At the request of the bishop of the Californias I certify by these presents that the seal attached to this document is that of the minister of the interior of that

Señor Marin segun me consta por otros documentos oficiales, que he visto de dicho Señor.

San Francisco, Diciembre 20, 1851.

[Rúbrica] W. SCHLEIDEN,
Vice-Consul de la Republica Mejicana en San Francisco.

(Sello. Viceconsulado de la Republica Mejicana en San Francisco.)

time, Senor Marin, as appears to me by other official documents, which I have seen of said officer.

San Francisco, December 20, 1851.

[Signed]
W. SCHLEIDEN (Rubric),
Vice-Consul of the Mexican Republic in San Francisco.

[Seal vice-consulate of the Mexican Republic in San Francisco.]

EXHIBIT No. 6.

[Extract from the opinion and decision of the U. S. Land Commission in the case of Joseph S. Alemany, bishop of Monterey, *v.* The United States; deposed to by me before James T. O'Keefe, notary public, August 20th, 1902.—John T. Doyle.]

These decisions do but recapitulate the principles laid down in all the books which discuss the subject of right to property by dedication. They are, however, more especially valuable here because they both declare the principle and make the application of it to cases of dedication arising, like that now under consideration, under Spanish and Mexican law. They show that there as well as here under our law, although the mere naked title were in the Government, the usufruct of the property might be in the church, and that the dedication of such usufruct constituted a right to the estate which would never have been violated by the former sovereign, and which neither conquest nor revolution nor cession can destroy.

Ecclesiastical property was here, as under the civil law, known as a class of property standing by itself in legal nomenclature and governed by rules not applicable to other estates, intended to protect and perpetuate its use to the benefit of the church. By the laws of Spain as well as by the canon law which was recognized throughout the Spanish dominions, ecclesiastical property was regarded as comprised in two classes: The *first* embraced property usually denominated *sacred*, and which was in a formal manner consecrated to God and destined to the purposes of divine worship as its instruments. Such are the church edifices, the cemeteries, the sacred vessels of the altar, the vestments, etc. The *second* class comprised property of whatever kind which was held by the church or the ministers who officiated at the altar, by any temporal title, and which was appropriated to the maintenance of divine worship or to the support of the officiating ministry. These are not, like the first class, consecrated directly to divine purposes, but since they yield a support to the clergy and the service of the temples they are considered indirectly set apart for the worship of God, and therefore of divine right. Under this class were included lands occupied for the residence of the priest and other buildings necessary for his convenience, the gardens and grounds used for the supply of his table or of any of the sacramental purposes of the church and that

from which revenue was derived for its support. Property falling within the class of *ecclesiastical* can be alienated only when certain necessities arise, and then under the proceedings provided by the canon law. Such property was regarded as withdrawn from the dominion and traffic of man; in the expressive language of the civil law, it was "out of commerce." Every church was required to have upon its organization an endowment for its support, and property which it had long held for such uses was presumed, where no other title was shown, to have been acquired by donation or by gift for its endowment, and property produced by the labor of persons devoted to the service of religion became ecclesiastical property. (Ferraris Biblio, verb. alienare, I Sala Mexicano, 226. 1 Febrero, Mex., 297, Escriche verb. Bienes Ecclesiasticos.)

These concurrent proofs bring us irresistibly to the conclusion that before the treaty of Guadalupe Hidalgo these possessions were solemnly dedicated to the use of the church and the property withdrawn from commerce. Such an interest is protected by the provision of the treaty and must be held inviolable under our laws.

Exhibit No. 6 to the deposition of JOHN T. DOYLE.

J. T. O'KEEFE, *Notary Public.*

For identification:

JOHN T. DOYLE.

AFFIDAVIT OF MOST REV. PATRICK W. RIORDAN, ARCHBISHOP OF SAN FRANCISCO, DATED SEPTEMBER 16, 1902.

KINGDOM OF HOLLAND, *The Hague:*

Patrick William Riordan, being first duly sworn, on oath deposes and says:

I am Patrick William Riordan, am sixty-one years of age and upwards. My place of birth is Chatham, New Brunswick, but I am a citizen of the United States, naturalized by law. My occupation is that of a Roman Catholic archbishop of the diocese of San Francisco, California, in which city and State I have resided since November, 1883. I have no direct interest in the claim embodied in the above-mentioned suit; my interest being merely that of an administrator on behalf of the church, without being personal to myself, and I should not in my own individual right receive any portion of any sum which might be awarded by this court. I am not an agent or attorney or otherwise interested in the claim, except as above indicated.

I have carefully examined the affidavit of P. E. Mulligan, secretary of the diocese of San Francisco, and am fully acquainted with its contents, and within my own knowledge the facts therein stated are correct. I am familiar with the pontifical document, a copy of which is attached to the said affidavit, and recognize it as being a correct copy of the instrument which it purports to repeat. I am furthermore familiar with the Latin in it and have compared the translation, hereto annexed and now shown to me with the original Latin, and find such translation to be accurate.

I am acquainted with all of the facts relative to the distribution of the proceeds of the judgment obtained in the case of Amat *v.* Mexico, referred to in said pontifical document, and am personally cognizant of the fact that distribution of all the said proceeds was made in strict conformity with the terms of said instrument, and myself supervised the distribution of seven out of fourteen of the installments thereof, having received the necessary receipts from all of the parties in interest.

PATRICK WILLIAM RIORDAN.

Sworn to and subscribed before me this 16th day of September, 1902.

JOHN W. GARRETT,
Secretary of Legation.

LEGATION OF THE UNITED STATES,
The Hague, Holland, ss:

I, John W. Garrett, secretary of the legation of the United States of America at The Hague, Holland, and duly commissioned and sworn as such, do hereby certify that I have no interest in the claim to which the testimony heretofore annexed relates, and that I am not the agent or attorney of any person having any interest in said claim; that on the sixteenth day of September, A. D. 1902, before me, as such secretary of the legation at The Hague, Holland, personally came Patrick William Riordan, the witness named in and whose name is subscribed to the annexed deposition; that the said Patrick William Riordan was thereupon then and there sworn by me in due form of law, as a witness in the matter of the claim above mentioned therein, to testify and declare the truth, the whole truth, and nothing but the truth, and the said witness, having been so by me duly sworn, then and there deposed to the matter contained in his said deposition annexed hereto and identified by my signature. I further certify that the witness, Patrick William Riordan, is personally well known to me and known by me to be a credible and truthful witness. I further certify that the testimony of the said witness was then and there reduced to writing in my presence by J. J. Haledon Rix, a person having no interest in, and not being the agent or attorney of any person having an interest in, the claim above mentioned, and that the said depositions were then and there carefully read by me to the said witness, and being signed by me was then and there signed by the said witness in my presence. I further certify that the exhibit of the affidavit of P. E. Mulligan was exhibited to the said witness, together with the annexed Latin exhibit and translation thereof, and marked by me as an exhibit hereto, was then and there produced and shown to the said deponent and by him deposed unto, and that the said exhibits are the same exhibits referred to by the said witness in his said deposition. The deposition of said Patrick W. Riordan was reduced to writing in the form of typewriting, and signed by him, and is annexed to this certificate.

In witness whereof I have hereunto set my hand and affixed the seal of the said legation this sixteenth day of September, A. D. 1902, at The Hague, Holland, aforesaid.

[SEAL.]

JOHN W. GARRETT,
Secretary of Legation.

EXHIBIT No. 1—J. W. G.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

I, P. E. Mulligan, secretary of the Roman Catholic archbishop of San Francisco, Patrick W. Riordan, incumbent, hereby certify that as said secretary I have in my possession and am the custodian of all the books, records, files, papers, and documents of the said Roman Catholic archbishop of San Francisco, and that the annexed document is a full, true, correct, and verbatim copy of the pontifical decree directing the distribution of the monies of the Pious Fund, which said pontifical decree is among the files, papers, and documents of the said Roman Catholic archbishop of San Francisco.

In witness whereof I have hereunto set my hand and affixed the seal of the Roman Catholic archbishop of San Francisco at the city and county of San Francisco, State of California, this twenty-ninth day of August, A. D. 1902.

P. E. MULLIGAN.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

P. E. Mulligan, being first duly sworn, deposes and says: That he is the secretary of the Roman Catholic archbishop of San Francisco, Patrick W. Riordan, incumbent, and that the facts stated in the foregoing certificate are true and correct.

P. E. MULLIGAN.

Subscribed and sworn to before me this 29th day of August, 1902.

JOHN P. CASHIN,
Notary Public in and for the City and County of San Francisco, State of California.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

I, Albert B. Mahony, county clerk of the city and county of San Francisco, State of California, and ex officio clerk of the superior court thereof (which court is a court of record, having a seal), do hereby certify that John P. Cashin, whose name is subscribed to the annexed instrument and thereon written, and before whom the annexed oath or affidavit was taken, was at the time of taking such oath or affidavit a notary public in and for the city and county of San Francisco, residing in said city and county, duly authorized to take the same, and an officer duly authorized by the laws of said State to take and certify the acknowledgment and proof of deeds to be recorded in said State. And further, that I am well acquainted with the handwriting of such officer, and verily believe that the signature to such jurat or certificate is genuine.

In witness whereof, I have hereunto set my hand and affixed the seal of the said superior court at my office in said city and county this 29th day of August, A. D. 1902.

ALBERT B. MAHONY, *Clerk.*

EXHIBIT No. 2.—J. W. G.

EX. AUDENTIA SSMI HABITA DIE 4 MARTII, 1877.

SSmus Dominus Noster Pius Divina Providentia P. P. IX referente me infrascripto S. Congnis de Progaganda Fide Secretario auditis riteque perpensis iis omnibus, quae a RR. PP. DD Archiepiscopo S. Francisci et Episcopo Vallispratensi ex una parte, atque a R. P. D. Episcopo Montereyensi et Angelorum ex alia relata fuerunt quoad distributionem pecuniae summae a Mexicano Gubernio solvendae tribus praefatis Diocesibus provinciae ecclesiasticae Sancti Francisci in Superiori Caliphornia, juxta arbitramentalem sententiam editam a judicibus, qui a Gubernii, Mexici atque Foederatorum Septemtrionalis Americae Statum designati fuerant, jussit praedictam distributionem perficiendam esse prout infra; videlicit ut, detractis litis expensis summaque viginti sex millium (26,000) scutatorum familiae Aguirre solvenda, dummodo sufficienter constiterit prudenti dictorum Praesulum judicio hanc summam eidem familiae debitam esse, persolutisque viginti quatuor millibus (24,000) scutatorum R. P. D. Archiepiscopo Oregonopolitano pro missionibus provinciae ecclesiasticae ejusdem nominis nec non Vicariatus Apostolici Idahensis impendentis, et quadraginta millibus scutatorum (40,000) Patribus Ordinis S. Francisci ac Patribus Societatis Jesu aequaliter inter eos dividendis, ex reliqua summa septem fiant partes aequales quorum una missionibus Territorii de *Utah* perpetuo maneat assignata, atque aliae sex aequaliter inter tres supramemoratos Episcopos provinciae ecclesiasticae S. Francisci dividantur graviter onerata eorum conscientia super tutiori et utiliori quam fieri possit acceptae pecuniae favore ecclesiae investimento. Simul jussit Sanctitas Sua ut super ita peracta distributione singuli interesse habentes omnino acquiescant.

Datum Romae ex Aedibus dictae S. Congregationis de Propaganda Fide, die et anno ut supra.

ALEX CARD. FRANCHI, *Praef.*
J. B. AGNOZZI, *Sect.*

EXHIBIT No. 3.—J. W. G.

[Translation of the annexed document.]

EXTRACT FROM AN AUDIENCE HELD BY THE HOLY FATHER ON THE 4TH MARCH, 1877.

Our most Holy (Father and) Lord, Pius, by the Divine Grace Pontifex Maximus, the ninth of that title, through me, the undersigned secretary of the Sacred Congregation for the Propagation of the Faith, having fully heard and weighed all those matters which the Right Reverend and the Most Reverend Archbishop of San Francisco and Bishop of Grass Valley, on the one part, and the Right Reverend Bishop of Monterey and Los Angeles, on the other, had brought before him with regard to the repartition of certain sums of money which

were to be paid by the Mexican Government to the aforesaid three dioceses in the ecclesiastical province of Upper California, according to the arbitral sentence given by the judges who had been named by the Mexican Government and that of the United States of North America.

DECREED that the aforesaid repartition should be made as follows, namely: That there having been deducted from the whole sum the expenses of the suit and the sum of $26,000 to be paid to the family of Aguirre (since it is plainly evident that such a sum is due to the aforesaid family), and payment having been made of $24,000 to the Right Reverend the Archbishop of Oregon for the missions of the ecclesiastical province of that name, and the Vicariate Apostolic of Idaho, and $40,000 to the Fathers of the Order of St. Farncis and the Fathers of the Society of Jesus, to be equally divided between them; of the remaining sum there shall be taken seven equal parts, of which one shall remain perpetually assigned to the missions of the Territory of Utah, and the remaining six shall be divided equally between the three above-named bishoprics of the ecclesiastical province of San Francisco, they being strictly charged upon their conscience to invest the same monies, upon their reception, in favor of the church as safely and as usefully as may be.

His Holiness decreed at the same time that all parties having interests in the matter should thoroughly acquiesce in this repartition so made.

Given at Rome, from the palace of the Sacred Congregation for the Propagation of the Faith on the aforesaid day and year.

ALEX. CARD. FRANCHI, *Praef.*
J. B. AGNOZZI, *Sect.*

DISCOVERY MADE BY UNITED STATES, ON MOTION BY MEXICO, RELATIVE TO INDIAN POPULATION OF CALIFORNIA.

[Translation.]

No. 293.]

EMBASSY OF THE MEXICAN
UNITED STATES IN WASHINGTON,
Bayshore, N. Y., August 21, 1902.

MR. ACTING SECRETARY: By direction of my Government, and in accordance with Article IV of the protocol of agreement between the Republic of Mexico and the United States of America for the settlement of certain questions raised in respect to the so-called Pious Fund of the Californias, signed on the 22d of May last, I have the honor to ask of the Department in your worthy charge a statement as to whether it is true that there are Indians who are not Christianized or who are still free from obedience to the authorities in the State of California.

I take pleasure on this occasion in renewing to you the assurances of my high consideration.

JOSÉ F. GODOY.

Hon. ALVEY A. ADEE.

[No. 17089.]

UNITED STATES OF AMERICA,
Department of State.

To all to whom these presents shall come, greeting:

I certify that the document hereunto annexed is under the seal of the Department of the Interior of the United States, and is entitled to full faith and credit.

In testimony whereof I, John Hay, Secretary of State of the United States, have hereunto subscribed my name and caused the seal of the Department of State to be affixed.

Done at the city of Washington this 9th day of September, A. D. 1902, and of the Independence of the United States of America the one hundred and twenty-seventh.

[SEAL.] JOHN HAY.

Refer in reply to the following: Land 50909—1902. Special.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, September 8, 1902.

The honorable the SECRETARY OF THE INTERIOR.

SIR: I have the honor to acknowledge the receipt, by Department reference for immediate consideration and report, of a communication dated August 23, 1902, from the Secretary of State, setting forth that in accordance with Article IV of the protocol of agreement between the Republic of Mexico and the United States, for the settlement of certain questions raised in respect to the claim known as the Pious Fund of the Californias, signed on May 22, 1902, the Mexican Government has called upon the Department of State for a statement as to "whether it is true that there are Indians who are not Christianized or who are still free from obedience to the authorities of the State of California."

The Secretary of State requests that such a statement be furnished to his Department for communication to the Mexican Government as speedily as possible, and that if the statement be made by the Commissioner of Indian Affairs his official character should be certified to under the seal of the Interior Department.

By the term "not Christianized" is understood by this office to mean those Indians of California and their descendants who were not brought under the charge of the Franciscan fathers at or near the missions from and after 1769, the date of the founding of the Mission of San Diego de Alcala, at Diego, by Father Junipero. These Indians are to this day designated as "Mission Indians," though in an official sense that designation is now applied only to the descendants of the Mission Indians living in Southern California.

The words Indians "who are still free from obedience to the authorities of the State of California" are presumed to mean Indians who are residing on Indian reservations within the exclusive jurisdiction of the United States.

The Mission Indians are probably all "Christianized," but with the exception of a few bands are occupying tribal reservations over which the State of California does not exercise jurisdiction. The bands not subject to State control are as follows:

San Manuel (P.).
Twenty-nine Palms (P.).
Ramona (P.).
Cahuilla.
Mesa Grande (P.).
Inaja (P.).
La Posta (P.).
Manzanita (P.).
Laguna (P.).
Campo (P.).
Cuyapipe (P.).
San Pasqual.
San Jacinto.
Aqua Caliente (P.).
Los Coyotes.
Torros.
Augustine (P.).
Santa Rosa.
Morongo.
Santa Ysabel (P.).
Cabezon (P.).
Tule River.

The reservations marked "P." have been patented as "reservations" to the Indian bands or villages under the provisions of section 3 of the act of January 12, 1891. (26 Stats., 712.)

The Indians of the Hoopa Valley Reservation are not "Christianized" so far as this office is aware, and are still free from State control.

The Indians of the Round Valley Agency are not known to be "Christianized." Having been given allotments of land in severalty, they are, by the act of February 8, 1887 (24 Stats., 388), declared to be citizens of the United States and subject to all the laws of the State. They are therefore no longer free from obedience to the State authorities.

Since the foregoing was prepared this office received, by Department reference, a communication dated September 3, 1902, from the Acting Secretary of State, transmitting a copy of a cablegram dated September 2, 1902, from Mr. Ralston, agent and counsel of the United States in the matter of the arbitration of the Pious Fund claim, calling for information of the same character for the States of California, Oregon, Washington, Idaho, Montana, and Utah, as well as for the last three reports of this office. Mr. Ralston desires that the information reach him at The Hague by September 20, 1902.

The information respecting the State of California being hereinbefore given, the other States will be taken up in their order.

IDAHO.

Coeur d'Alene Reservation.—De Smet Mission (Roman Catholic) established under authority of act of March 3, 1891 (26 Stats., 1029). No statistics that Indians are "Christianized." Indians are not under jurisdiction of State.

Fort Hall Reservation.—No Roman Catholic missions established. Reservation to be allotted and surplus lands opened to settlement under agreement of March 3, 1891, ratified by the act of June 6, 1900 (31 Stats., 672), when the Indians will fall under the jurisdiction of the State.

Lapwai (Nez Percés) Reservation.—Roman Catholic mission school established in 1860. No statistics as to "Christianizing" of Indians who are under jurisdiction of State.

Lemhi Reservation.—No Roman Catholic institutions established. Indians not under jurisdiction of State.

MONTANA.

Blackfeet Reservation.—Roman Catholic schools established in 1889 and 1894. No data as to Indians being "Christianized." Indians are under exclusive jurisdiction of United States.

Crow Reservation.—Roman Catholic missions and schools established in 1886, 1888, 1890, 1891, 1894, and 1895. Not known if Indians are "Christianized." When allotments now being made shall have been completed the Indians will become citizens and be subject to the laws of the State.

Fort Belknap Reservation.—Roman Catholic church and school established in 1887. No record as to Indians being "Christianized." Indians not under control of State.

Fort Peck Reservation.—Roman Catholic (Jesuit) mission and church established in 1900. No statistics as to "Christianization" of Indians, who are under exclusive jurisdiction of the United States.

Jocko (Flathead) Reservation.—St. Ignatius (Roman Catholic) mission established in 1854. No date as to "Christianization." Indians not under jurisdiction of State.

The Indians of the Yuma reservation, California, may possibly be regarded as "Christianized," inasmuch as a branch of the Roman Catholic Sisterhood for years had charge of the Indian school there. They are not subject to State control.

The communications from the Acting Secretary of State are herewith returned, with a copy of this report and copies of the annual reports of this office for the years 1899, 1900, and 1901. The annual report for 1902 has not as yet been submitted to the Department.

Very respectfully, your obedient servant,

W. A. JONES, *Commissioner.*

E. B. F. (G.) DEPARTMENT OF THE INTERIOR,
September 8, 1902.

I certify that W. A. Jones, who signed the forgoing communication, was, at the time of such signing, Commissioner of Indian Affairs.

[SEAL DEPARTMENT OF INTERIOR.] E. A. HITCHCOCK,
Secretary.

[Endorsement.]

8114.]

INDIAN OFFICE, *September 8, 1902.*

Reports on request of State Department relative to Indians of certain States who are not christianized or who are still free from State control.

4 incls.

F. M. W. (Copy).] DEPARTMENT OF THE INTERIOR,
Washington, September 9, 1902.

The Honorable the SECRETARY OF STATE.

SIR: Referring to Department letter of 8th instant, transmitting a communication of the same date from the Commissioner of Indian Affairs, on the subject of Indians who are not "Christianized," or who are still free from State control in California and certain other Western

States, I have the honor to transmit herewith, as a supplemental statement, a letter from the Commissioner of Indian Affairs, dated the 9th instant, containing certain information which was inadvertently omitted from his report of yesterday.

In accordance with the desire of your Department I have certified to the official character of the Commissioner in the same manner as in yesterday's letter.

Very respectfully,

E. A. HITCHCOCK,
Secretary.

8147, Ind. Div., 1902. 1 inclosure.

No. 17110.]

UNITED STATES OF AMERICA,
Department of State.

To all to whom these presents shall come, greeting:

I certify that the document hereunto annexed is under the seal of the Department of the Interior of the United States, and is entitled to full faith and credit.

In testimony whereof I, John Hay, Secretary of State of the United States, have hereunto subscribed my name and caused the seal of the Department of State to be affixed.

Done at the city of Washington this 10 day of September, A. D. 1902, and of the Independence of the United States of America the one hundred and twenty-seventh.

[SEAL DEPARTMENT OF STATE.] JOHN HAY.

Refer in reply to the following: Land, 50909—1902. 52763—1902. Special.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, Sept. 9, 1902.

The honorable the SECRETARY OF THE INTERIOR.

SIR: Referring to office report of yesterday's date, in response to the inquiry of the Department of State, as to whether there are any Indians in certain Western States who are not "Christianized," or who are still free from obedience to the State authorities, I have the honor to state that the data respecting the States of Nevada, Oregon, Utah, and Washington were inadvertently omitted from said report.

The Indians who are still free from State control in Nevada are those of the Pyramid Lake, Walker River, and Western Shoshone reservations; in the State of Utah, those of the Uintah Reservation, and in the State of Washington the Indians of the Columbia and Spokan reservations, under the Colville Agency. The Indians of Oregon are all under the jurisdiction of that State.

This office has no definite information that the Indians of said States are or are not "Christianized."

It is requested that this statement be transmitted to the Secretary of State to be regarded as supplemental to the statement contained in office report of the 8th instant.

Very respectfully, your obedient servant,

W. A. JONES, *Commissioner.*

E. B. F.
F.

DEPARTMENT OF THE INTERIOR,
September 9, 1902.

I certify that W. A. Jones, who signed the foregoing communication, was at the time of such signing Commissioner of Indian Affairs.

[SEAL DEPARTMENT OF INTERIOR.]

E. A. HITCHCOCK,
Secretary.

[Endorsement.]

8147. Commr. Ind. Affrs., Sept. 9, 1902. Submits supplemental report rel. Inds. who are not Christianized or who are still free from State control in certain Western States. 1 incl.

EXHIBIT A.

EXHIBIT WITH RELATION TO CATHOLIC MISSION INDIAN SCHOOLS.

[Submitted by the agent of the United States.]

Reference to page 27 of the report of the Commissioner of Indian Affairs for the fiscal year ending June 30, 1901, shows the following Catholic mission Indian schools within the limits of the territory expressly conveyed to the United States by Mexico under the provisions of the treaty of Guadalupe Hidalgo:

State.	School.	Enrollment.
California	Banning	139
Do	San Diego	82
Do	Kelseyville (St. Turibius)	13
		234
New Mexico	Bernalillo	79
	Day schools.	
Arizona	San Xavier	100
Do	St. John's Mission	83
		183
California	Pinole	16
Do	Ukiah	11
Do	Kelseyville (St. Turibius)	7
		34
	Catholic schools in additional territory, apparently originally claimed by Spain as part of California.	
Idaho	De Smet	93
Montana	Blackfeet	78
Do	Flathead	163
		241
Oregon	Kate Drexel's	69
Washington	Colville	66
Do	Puyallup	85
Do	Tulalip	93
		244
	Total enrollment	1,177

EXHIBIT B.

Indians to be found in the States and Territories embraced within the limits of Upper California, indicated by the map attached to the treaty of Guadalupe Hidalgo.

State, name of agency, and tribe.	Population.
ARIZONA.	
Colorado River Agency:	
Mohave on reserve	662
Mohave at Fort Mohave	1,200
Chemehhevi	250
Mohave at Needles	300
Fort Apache Agency:	
White Mountain Apaches	1,952
Under school superintendent:	
Hopi Moqui	1,841
Navaho	1,837
Navaho Agency:	
Navahos on reserve	12,000
Navahos off reserve	8,000
Pima Agency:	
Maricopa	350
Pima	4,400
Papago	1,300
Papago, nomadic	2,100
Papago at San Xavier	516
Under industrial teacher:	
Havasupai	243
Walapai	573
San Carlos Agency:	
Apache	2,542
Mohave	473
Apache on San Pedro River	300
Apache near Mohawk, on Lower Gila River	300
	41,139
CALIFORNIA.	
Under farmer:	
Digger	35
Hupa Valley Agency under school superintendent:	
Hupa	417
Lower Klamath	560
Mission-Tule River Agency:	
Mission	2,856
Tule River	146
Round Valley Agency under school superintendent:	
Concow	164
Little Lake and Redwood	121
Nomelaki and Pit River	71
Wailaki and Yuki	281
Under school superintendent:	
Yuma	655
Near Fort Bidwell School:	
Paiute	200
Pit River	500
Not under an agent:	
Wichumni, Kawai, Pit River, and others	9,371
	15,377

State, name of agency, and tribe.	Population.
COLORADO.	
Southern Ute Agency:	
Capote, Moache, and Wiminuche Ute—	
Allotted	413
Unallotted	528
	941
NEVADA.	
Nevada Agency, under school superintendent:	
Paiute of Pyramid Lake Reservation	656
Under Carson school superintendent:	
Paiute of Walker River Reservation	413
Western Shoshoni Agency, under school superintendent:	
Paiute	223
Shoshoni	223
Not under an agent	3,701
	5,216
NEW MEXICO.	
Mescalero Agency, under school superintendent.	
Mescalero Apache	466
Jicarilla Agency:	
Jicarilla Apache	813
Under Albuquerque school superintendent:	
Pueblo at—	
Acoma	650
Santa Ana	228
Zuni	1,541
	3,698
UTAH.	
Uinta and Ouray Agency:	
Uinta Ute	457
Uncompahgre Ute	820
White River Ute	371
Under day school-teacher at St. George.	
Kaibab	105
Shivwits	128
Kaibab at Cedar City	45
Paiute at Kanosh, Grass Valley, and Rabbit Valley	100
	2,026
Total Indian population	68,397

EXHIBIT C.

Indians contained within additional territory believed to have been formerly claimed by Spain as part of Upper California.

State, name of agency, and tribe.	Population.
IDAHO.	
Fort Hall, an agency:	
Bannock and Shoshoni	1,408
Not under agent:	
Band of Camas Jim, near Bliss, Idaho.	35
Lemhi Agency:	
Bannock	99
Sheepeater	98
Shoshoni	301
Nez Percé Agency:	
Nez Percé	1,567
	3,508
MONTANA.	
Blackfeet Agency:	
Piegan	2,043
Flathead Agency:	
Charlot's Band of Flathead	157
Confederated Flathead, Pend d'Oreille, Kutenai	1,310
Kutenai from Idaho	41
Lower Kalispel	53
Spokan	77
	3,681
OREGON.	
Grande Ronde Agency, under school superintendent:	
Clackamas	65
Cow Creek	32
Lakmuit	30
Marys River	45
Rogue River	53
Santiam	27
Umpqua	86
Wapeto	20
Yamhill	34
Klamath Agency:	
Klamath	740
Modoc	226
Paiute	107
Pit River	82
Siletz Agency, under school superintendent:	
Chetco, Joshua, Klamath, Mikonotuni, Rogue River, Sixes, Yuchi	456
Umatilla Agency:	
Cayuse	374
Umatilla	184
Walla Walla	525
Warm Springs Agency, under school superintendent:	
Paiute	78
OREGON—continued.	
Warm Springs Agency, under school superintendent—Continued.	
Warm Spring	391
Wasco and Tenino	316
	3,871
WASHINGTON.	
Colville Agency:	
Cœur d'Alène	474
Columbia (Moses's Band)	320
Colville	296
Kalispel	150
Lake	307
Lower Spokan	371
Nez Percé (Joseph's Band)	126
Okinagan	575
Sanpoil and Nespelim	400
Upper and Middle Spokan on Cœur d'Alène Reserve	98
Upper and Middle Spokan on Spokan Reserve	184
Neah Bay Agency.	
Hoh	66
Makah	369
Ozette	45
Quileute	234
Puyallup Agency, under school superintendent:	
Chehalis	156
Georgetown	115
Humptulip	19
Quaitso	59
Quinaielt	131
Nisqualli	107
Puyallup	536
Sklallam, at Jamestown	235
Sklallam, at Port Gamble	82
Skokomish	165
Squaxon	118
Tulip Agency, under school superintendent:	
Lummi	340
Muckleshoot	148
Port Madison	150
Crow	6
Swinomish	313
Tulalip	488
Yakima Agency:	
Yakima	2,311
Not under an agent:	
Nooksak	200
Wenatchi, near Wenatchi River	166
	9,860
Total	20,920

MEXICAN CALL FOR DISCOVERY.

EMBASSY OF MEXICO,
Washington, August 12, 1902.

Mr. ACTING SECRETARY: By direction of my Government, and in accordance with Article IV of the protocol of arbitration between the Republic of Mexico and the United States of America for the settlement of certain questions arisen in regard to the so-called "Pious Fund of the Californias," signed on May 22, 1902, I ask that there be made known to the Government of Mexico, as part of its evidence, the following facts and documents:

1. Whether the bishops of California received the sum of $904.700.79 Mexican gold, referred to in Mixed Commission's decision of November 11, 1875.
2. To what purpose the said sum was applied.
3. Before whom were the accounts of expenditure rendered.
4. What are the documents in which the said accounts are recorded that are to be exhibited hereafter.

I have to say, in addition, that the foregoing request is understood to be without prejudice to such as may be presented later regarding other facts and documents appertaining to the subject-matter.

I take pleasure, etc.

JOSÉ F. GODOY.

His Excellency A. A. ADEE,
Etc., etc., etc.

SUPPLEMENTAL AFFIDAVIT OF THE MOST REVEREND PATRICK WILLIAM RIORDAN, ARCHBISHOP OF SAN FRANCISCO.

KINGDOM OF HOLLAND, *The Hague, ss:*

Patrick William Riordan, being first duly sworn, on oath deposes and says:

I am the same Patrick William Riordan who has heretofore been sworn in this case, under date of September 16, 1902, and whose affidavit is filed herein, and I desire now to reaffirm the facts therein stated, and to make the former affidavit a part of the present one.

Desiring more specifically to answer the call for discovery served upon the United States, under date of August 12, 1902, by Sr. José F. Godoy, chargé d'affaires, of the Republic of Mexico, I depose and say:

1. The bishops of California did receive the sum of $904,070.79, Mexican gold, referred to in the decision of November 11, 1875, and as corrected as to amount by the umpire on November 18, 1876.

2. The said sum, first deducting the amounts necessarily expended for costs and attorneys' fees, was applied to religious purposes by the orders to whom the same was paid, under the papal decree of distribution attached to my former deposition.

The sums paid to said orders were expended within the limits of Alta California, according to the boundaries thereof as they were formerly claimed by Spain and within the territory ceded by Mexico to the United States under the treaty of Guadalupe Hidalgo. The moneys

paid to the several bishops were applied by them to religious purposes within their respective dioceses.

3. At all of the times stated herein and in my deposition above referred to said orders and said bishops, by the laws of the Roman Catholic Church, were required to keep accounts of all moneys paid to them or disbursed by them for religious purposes, including the moneys paid by me and by my predecessor, as archbishop of San Francisco, to them out of the moneys received upon the former award.

4. The accounts of distribution, so far as the moneys passed through my own hands or through the hands of the archbishopric of San Francisco before I became the incumbent thereof, are contained in the books of the bishopric, to be found in the office of the bishopric in the city of San Francisco; but inasmuch as the account books are large and numerous, and it is practically impossible to secure their physical presence before this tribunal, I have testified already of my own knowledge as to the distribution.

5. On the first day of January, 1875, and ever since that time, the State of Nevada has been, and it now is, a part of one of the dioceses of California. The present States of Washington, Idaho, and Montana were at the same date, and have since remained, and now are, suffragan to the metropolitan see of Oregon City, State of Oregon. Continuously since the same date, to wit, the 1st of January, 1875, the present State of Utah, formerly the Territory of Utah, has been, and now is, suffragan to the see of San Francisco.

That there are in the State of California, as it now exists politically, the archdiocese of San Francisco and the two suffragan dioceses of Sacramento and of Monterey and Los Angeles, the diocese of Sacramento being the direct successor of the old diocese of Grass Valley, which was represented by its bishop in the memorial filed in the case of Amat et al vs. Mexico before the Mixed Commission in 1870.

6. That within the knowledge of this deponent all of the twenty-one missions founded by the Franciscans in Upper California are still in existence and in constant use either as missions or as Roman Catholic churches, except the missions of Santa Cruz, San Rafael, and San Francisco Solano, which are extinct, and excepting, furthermore, the two missions of La Purisima and San Antonio, as to which missions this deponent hath no personal knowledge, leaving, therefore, within his knowledge sixteen out of the twenty-one missions still performing religious work.

7. That in addition to the Indian mission schools controlled by the Catholic Church and assisted by the Government, and referred to in the extracts from the report of the Indian Commissioner for 1901, already filed in this cause, there are established in California a Catholic Indian mission school at Hopland, Mendocino County, California, with an attendance of about seventy-five, and at Lower Lake, Lake County, California, with an attendance of about thirty to forty Indian boys and girls; that, furthermore, a Catholic Indian church is maintained at Marshall, California.

PATRICK WILLIAM RIORDAN.

Subscribed and sworn to before me this thirtieth day of September, A. D. 1902.

[SEAL.] STANFORD NEWEL,

Envoy Extraordinary and Minister Plenipotentiary from the United States of America to The Hague, Netherlands.

LEGATION OF THE UNITED STATES,
The Hague, Holland, ss:

Stanford B. Newel, envoy extraordinary and minister plenipotentiary of the United States of America at The Hague, Holland, and duly commissioned and sworn as such, do hereby certify that I have no interest in the claim to which the testimony heretofore annexed relates, and that I am not the agent or attorney of any person having any interest in said claim; that on the thirtieth day of September, A. D. 1902, before me, as such envoy extraordinary at The Hague, Holland, personally came Patrick William Riordan, the witness named in and whose name is subscribed to the annexed deposition; that the said Patrick William Riordan was thereupon then and there sworn by me, in due form of law, as a witness in the matter of the claim above mentioned, therein to testify and declare the truth, the whole truth, and nothing but the truth, and the said witness having been so by me duly sworn then and there deposed to the matter contained in his said deposition annexed hereto and identified by my signature. I further certify that the witness Patrick William Riordan is personally well known to me, and known by me to be a credible and truthful witness. I further certify that the testimony of the said witness was then and there reduced to writing in my presence by J. J. Haledon Rix, a person having no interest in, and not being the agent or attorney of any person having an interest in the claim above mentioned, and that the said deposition was then and there carefully read by me to the said witness, and being signed by me was then and there signed by the said witness in my presence. The said deposition of said Patrick William Riordan was reduced to writing in the form of typewriting, and signed by him, and is annexed to this certificate.

In witness whereof I have hereunto set my hand and affixed the seal of the said legation this thirtieth day of September, A. D. 1902, at The Hague, Holland, aforesaid.

[SEAL.] STANFORD NEWEL,
Envoy Extraordinary and Minister Plenipotentiary of the United States of America to the Netherlands.

LETTER OF THE MEXICAN LEGATION AT ROME TO THE HOLY SEE, DATED APRIL 6, 1840, AND AFFIDAVIT OF MOST REVEREND PATRICK WILLIAM RIORDAN.

LEGACION MEJICANA
CERCA DE SU SANTIDAD,
Roma, 6 de April en 1840.

42.

El ynfrascrito encargado de negocios de la Republica Mejicana tiene el honor de dirigirse á Su Emza. el Sr. Cardinal Lambruschini, Secretario de Estado de S.Sd. para manifestarle que el Gobierno de Mejico ha con-

MEXICAN LEGATION
TO HIS HOLINESS,[a]
Rome, April 6, 1840.

The undersigned, in charge of the affairs of the Republic of Mexico has the honor to address himself to his eminence Cardinal Lambruschini, secretary of state of His Holiness, to inform him that the Government of Mexico

[a]Translation made by direction of Jackson H. Ralston, American Agent.

siderado de absoluta necesidad que la Peninsula de Californias se gobierne en lo eclesiastico con total independencia de la Mitra de Sonora, á la cual hasta ahora habia estado sugeta asi por su vasta extension, como por la grande distancia que la separa de la Capital de la Diocesis, por cuya razon su Obispo no puede visitarla, ni proporcionarle todos los aucsilios pastorales que necesitan aquellos fieles, tan numerosos, como poco civilizados.

Para asegurar el acierto en tan importante resolucion el Presidente en virtud de un Decreto del Congreso nacional, mandó formar un expediente instructivo, del que resultó comprobada su conveniencia y utilidad por el testimonio y parecer tanto del Prelado del Colegio Apostolico de S. Fernando, á cuyo zelo habian estado confiadas aquellas misiones, como del Gobernador de la Mitra de Sonora. Ygual opinion dieron sobre la necesidad de esta medida el antiguo Obispo de esta Diocesis el. Sr. D. Angel Angel Morales, el Rev. Obispo de la Puebla de los Angeles, y el Cabilda Gobernador del Arzobispado.

En consecuencia, previos los requisitos legales, El Gobierno propone á S.Sd. la aprobacion, y ereccion de esta Mitra; y para su primer Obispo al R. P. F. Francisco Garcia Diego quien ademas de su literatura, y virtudes cristianas, y politicas reune un conocimiento practico de aquel pays donde ha desempeñado por algun tiempo el cargo de Comisario Prefecto de las Misiones, segun consta del proceso canonico formado por el Rev. Obispo de Puebla, comisionado de S.Sd. que va adjunto.

El Ynfrascrito podrá añadir que el Gobierno le recomienda solicite de S.Sd. el que en atencion á la

has considered it absolutely necessary that the peninsula of the Californias should be governed in ecclesiastical matters with entire independence from the see of Sonora, to which it has been until now subject, as well by reason of its vast extent as because of the great distance which separates it from the capital of the diocese, for which reason the bishop can not visit it, nor apportion to it all the pastoral aids which the faithful, who are as numerous as they are uncivilized, need.

To ensure the effecting of such an important resolve, the President, by virtue of a decree of the National Congress ordered a report from which it resulted that its convenience and usefulness was demonstrated by the testimony and opinion not only of the superior of the apostolic college of S. Fernando, to whose zeal these missions have been entrusted, but also the governor of the see of Sonora. The former bishop of this diocese, Sr. Don Angel Morales, the bishop of the village of Los Angeles, and the governor of the chapter of the archbishopric, give the same opinion with regard to this necessity.

In consequence, the requisite legal steps have been taken, and the Government proposes to His Holiness the approval and erection of his see; and for its first bishop, the Rev. Father Francisco Garcia Diego, who to his learning and Christian and political virtues unites a practical knowledge of that country, where he has for some time filled the place of president (comisario prefecto) of the missions, as appears from the canonical report made by the rev. bishop de Puebla, commissioned by His Holiness, which is annexed.

The undersigned may add that the Government desired him to beg of His Holiness to give atten-

grande distancia en que se halla este departamento, no solo de la Silla Apostolica, sino tambien de la Metropolitano, y por la necesidad en que se encontrará el nuevo Obispo de crearlo todo, siendo una parte de aquellos pueblos poco civilizados, y la mayor parte neofitos ó barbaros, se le autorice por S. Sd. extraordinariamente con cuantas facultades sean necesarias para que pueda ocurrir á todos los casos, y allanar todos los obstaculos que deben presentarsele en la ereccion de aquella Yglesia; para que pueda llevar consigo los sacerdotes que quieran seguirlo, ya sean seculares ó regulares, sin que sus prelados respectivos puedan impedirselo, y para que todos los religiosos Misioneros que alli ecsisten le queden sugetos, esceptuando solamente al Comisario Prefecto, y á los Misioneros que se ocupen en la formacion de nuevas misiones, adelantando la conquista y propagacion de la fé entre las tribus barbaras; pues estos deberan usar como hasta aqui de todas las facultades con que estan revestidos por Bulas y decretos Pontificos.

[a] *Tambien es conveniente hacer presente á Vtra. Ema. que el Gobierno Mejicano ha dictado todas las medidas oportunas para que no falte al nuevo prelado la Congrua decente que el corresponde para sostenor los gastos y decoro de la dignidad Episcopal; y que ademas ha de ponerse á su disposicion conforme á un decreto del Congreso el fondo piadoso destinado al fomento de Misiones de Californias.*

El Ynfrascrito tiene el honor honor de reiterar á su Ema. Rma. las seguridades de su distinguida consideracion, y respeto.

T. M. MONTOYA.

A Su Ema. Rma. el Sr. Cardinal LAMBRUSCHINI, *Secretario de Estado de Su Santidad.*

tion to the great distance of this district, not only from the Apostolic See, but also from the metropolitan, and because the new bishop will find it necessary to organize everything, it being a part where the people are uncivilized, neophytes or barbarians, that His Holiness would grant him extraordinary powers, authorizing him to take whatever steps may be necessary in cases which may arise, and to smooth all the obstacles which must present themselves in the erection of that church; so that he can take with him the priests who wish to follow him, be they secular or regulars, without their respective superiors being able to hinder their going, and so that all the religious missionaries which are there already shall remain his subordinates, except only the president of the missions, and those missionaries who are occupied in forming new missions, advancing the conquest and propagation of the faith among the barbarous tribes; for they should enjoy as formerly all the powers with which they have been invested by bulls and pontificial decrees.

Also it is proper to inform your eminence that the Mexican Government had taken all proper measures so that the new prelate may not lack a decent income which is necessary to sustain the expenses and respect and the dignity of a bishop; and in addition, according to a decree of Congress, the pious fund destined for the support of missions in the Californias is to be placed at his disposal.

The undersigned has the honor to reiterate to your eminence the assurance of his distinguished consideration and respect.

T. M. MONTOYA.

To His Eminence Cardinal LAMBRUSCHINI, *Secretary of State to His Holiness.*

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[a] Not italicized in original.

KINGDOM OF HOLLAND, *The Hague, ss:*

Patrick William Riordan, being first duly sworn, deposes and says that he arrived at The Hague on August 25, 1902; that between the day last named and the 31st of August, 1902, at the request of Jackson H. Ralston, esquire, agent of the United States in the above-entitled arbitration, he wrote to Rome to have search made among the papal archives for documents if any could there be found, addressed by Mexico to the Holy See on or before the 27th day of April, 1840, requesting the erection of the Californias into a bishopric.

A few days after writing to Rome for the purpose aforesaid affiant received replies from the persons to whom he had written informing him that search had been instituted and was being prosecuted for the purpose aforesaid. No information concerning the existence of any of the documents mentioned was received by affiant until September 20, 1902, when he received a memorandum of entries in the papal archives showing that Mexico had made representations to the Holy See in the year 1840, and prior to April 27th thereof, in relation to the erection of the aforementioned bishopric. It was impossible to ascertain from the entries mentioned whether the representations of Mexico were oral or in writing or their precise nature or character. On September 30, 1902, affiant received the annexed document bearing date April 6, 1840, which he is informed and believes to be a true copy of an original in the archives of the Holy See.

Affiant has received no other document purporting to have been addressed by Mexico to the Holy See in relation to this subject, nor any information that any other exists; and affiant has received no information of, nor any document from, the Holy See to Mexico in relation to the said bishopric. The only other documents concerning which affiant has received any information are memoranda concerning the erection of the see which he is informed and believes to be part of the archives of the Holy See and which he is prepared to produce.

Affiant believes that within fourteen days from this date he can procure from Rome a copy like the one attached to this deposition, certified and verified to be a true copy of the original by the custodian of the original and in conformity with the provisions of Paragraph IV of the protocol.

The affiant is unable to say how continuous a search has been made in the papal archives for the documents above-mentioned, as he has no personal knowledge upon that subject, but he is informed and believes that a search was ordered to be made prior to September 5, 1902, and began on or before that day, and that the search has been prosecuted with diligence continuously since said day last mentioned.

PATRICK WILLIAM RIORDAN.

Subscribed and sworn to before me this first day of October, 1902.

[SEAL.] STANFORD NEWEL,

Envoy Extraordinary and Minister Plenipotentiary of the United States of America to the Netherlands.

PAPAL BULLS WITH RELATION TO CALIFORNIA BISHOPRICS.

EXTRACTUM COLLECTIONIS JURIS PONTIFICII DE PROPAGANDA FIDE.

[Partis I, Vol. V, pag. 233, Roma, ex typographiae Polyglotta S. C. de PropagandeFide, MDCCCXCIII.]

Nova Erectio Californien, in America.

Gregorius Episcopus, Servus Servorum Dei, ad Perpetuam rei Memoriam.

1. Apostolicam sollicitudinem, qua tenemur omnium ecclesiarum, nullo non modo locorum intervallo aut fidelium longinquitate debilitari et dimminui, sed augeri potius, atque inflammari exinde videtur. Cum enim difficillius remotissimis ovibus ad hoc catholicae unitatis centrum effugium pateat, nec frequentibus eas monitis, consiliis, exhortationibus, spiritualibus denique quibuscumque subsidiis recreare, aut illarum vulneribus peropportune mederi naturali regionum conditione ac distantia queamus, illud profecto nobis usu venit, quod pientissimae matri a filiis longe seiunctae interdum contingit, quos quidem eo majori prosequitur caritatis amore, quo minus ad omnia absentibus praestanda praecipuae dilectionis officia se parem animadvertit. Hinc non tantum coelestium benedictionum cumulum hujuscemodi gregis parti, quam in animo gerimus, quotidie precamur, sed nihil insuper infectum relinquimus, quod spirituali ejusdem saluti aliquatenus benevertat. Haec nobis assidua mente revolventibus, qui in Mexicana Americae Septentrionalis ditione rerum summa potiuntur, humillime supplicarunt, ut a dioecesi de Sonora intra limites ejusdem Mexicanae ditionis posita, Californiam avellere, atque inibi sedem episcopalem Californiensem nuncupandam erigere, eidemque proprium praeficere episcopum apostolica auctoritate vellemus. Licet enim Sonorensis dioecesis origo non sit altius repetenda anno MDCCLXXIX, eademque ex apposita finitimarum dioecesum de Guadalaxara ac de Durango dismembratione coaluerit, nihilo, tamen secius territorium illud tam late protenditur, ut non modo ingentes provincias, de Sonora, Hostimuri et Cinaloa, sed universam insuper Californiam vastissimo sane ambitu concludat. Haec vero, quae septingentas, uti ferunt, excedit leucas, in veterem ac novam dividitur; illa Peninsulam Californiam complectitur quam veteres rerum naturalium scriptores insulam esse maluerunt; ista autem per istmum quendam ignotum veteri Californiae conjungitur ac consociatur; ambae vero unam ex Mexicanis provinciis in praesentiarum constituunt. Quod si mens convertatur ad maximam viarum asperitatem, ad praecipites fluminum cursus, quae trajici interdum nequeunt, atque insuper ad ingentium montium catenam, quos sylvestres homines incolunt, plane apparebit, Sonorensem Episcopum hisce de causis praepediri quominus gregem suae fidei traditum ea quae ceteroquin necessario foret, utilitate regat ac moderetur, integram dioecesim perlustret, atque in eorum conversionem totus incumbat, quos Evangelii luce carentes, densissimis errorum tenebris involutos vehementer ingemiscimus. Quo teterrimo omnium malo peculiarem in modum tum vetus, tum nova California laborat. Quamvis enim missionarii ex Ordine Sancti Dominici ac Sancti Francisci spiritualem illarum curam gerant, utraque tamen in extrema Sonorensis dioeceseos parte sita est, neque idcirco Pastoris praesentia juvatur, qui potens opere ac sermone plebem verbo aedificet atque

exemplo, depravata corrigat, disrupta consolidet, delibes in fide confirmet, coecos illuminet.

2. Haec aliaque rationum momenta a Guberno Mexicanae ditionis per suum apud Apostolicam Sedem negotiorum gerem allata tanti ponderis apud nos pestorunt, ut, omnibus matura deliberatione per pensis, inspectaque maxima rei utilitate, porrectis postulationibus libentissime obsecundaremus. Itaque ex certa scientia, apostolicae potestatis plentitudine, ac etiam motu proprio, concensui ven. fr. Lazzari de la Garza hodierni Episcopi de Sonora, aliorumque quorum interesse potest, derogantes, universam praedictam Californiam, tam veterem, scilicet, quam novam, unam cum omnibus et singulis paroeciis, ecclesiis, conventibus et monasteriis, aliisque quibuscumque saecularibus ac quorumvis ordinum regularibus beneficiis ibidem forsitan existentibus, itemque utriusque sexus personis, habitatoribus, et incolis tam laicis, quam clericis presbyteris, beneficiatis ac religiosis cujuscumque gradus, status, ordinis et conditionis ibi pariter degentibus, a dioecesi de Sonora, ad quam spectabant, perpetuo dismembramus, secernimus, separamus; terram insuper seu civitatem a S. Didaco nuncupatam in nova California, existentem, quae in media California posita est quaeque prae ceteris locis aptior dignoscitur, cum suis curia et cancellaria ecclesiastica, cum omnibus ac singulis honoribus, juribus, privilegiis et praerogativis quibus caeterae civitates pontificali sede in Mexicanae ditione insignitae earumqve cives utuntur et gaudent, in civitatem episcopalem erigimus atque instituimus.

3. Ecclesiam majorem in praefata terra Sancti Didaci in civitatem erectam, ad honorem et dignitatem ecclesiae cathedralis evehi atque attolli, et in ea sedem atque cathedram pontificalem pro uno deinceps Episcopo Californiensi nuncupando, qui eidem ecclesiae, civitati et dioecesi infra assignandae, ejusque clero et populo praesit, synodum convocet, atque omnia et singula jura, officia ac munera episcopalia habeat atque exerceat cum suis capitulo, arca, sigillo, mensa ut infra constituenda, ceterisque cathedralibus et pontificalibus insigniis, juribus, honoribus, praeeminentiis, gratiis, favoribus, indultis, jurisdictionibus et praerogativis, quibus reliquae cathedrales ecclesiae Mexicanae ditionis earumque paesules potiunter, dummoda ex peculiari indulto seu privilegio non sint eis attributa, perpetuo pariter erigi atque institui mandamus.

4. Cathedrali ecclesiae Californiensi hoc modo erecta ut propria deinceps dioecesis tribuatur, illius Antistiti universam novam ac veterum Californiam a Senorensi dioecesi ut supra avulsam et disjunctam pro dioecesi novi episcopatus Californiensis adjudicamus et adsignamus, quam quidem Californiam sic attributam atque adsignatum ac in ea existentes seu existentia paroecias, ecclesias, conventus, monasteria et quaecumque alia saecularia ac quorumvis ordinum rigularia beneficia, utriusque sexus personas et incolas tam clericos quam laicos, non tamen exemptos, cujuscumque gradus ordinariae novi pro tempore existentis Anistitis ecclesiae Californiensis jurisdictioni, regimini, potestati ac superioritati perpetuo similiter subjicimus, eique pro civitate, territorio, dioecesi, clero et populo perpetuum pariter in modum adsignamus atque attribuimus.

5. Ut autem futurus pro tempore existens Episcopus Californiensis suam possit decenter tueri dignitatum et Vicario Generali, curiaque episcopali apte providere, congruam in bonus stabilibus dotem, quam

Mexicanum gubernium ex data fide constituet, mense episcopali adscribimus atque attribuimus.

6. Quod vero attinet ad fabricam novae cathedralis ecclesiae Californiensis, eam similiter dotem pro illius manutentione perpetuum in modum adscribimus atque adjudicamus, quam idem gubernium se traditurum spopondit, proprias aedes pro futuri Episcopi habitatione ejusque curiae episcopalis residentia decente forma et commodo loco et proximiores quantum fieri poterit ecclesiae cathedrali, quamprimum adsignari atque attribui volumus: quae si modo desint easque conduci opporteat, rationem pensionis pro illarum conductione solvendae habendam esse decernimus.

7. Quod spectat ad erectionem capituli cathedralis ecclesiae, ejusque dotationem similiter in bonis stabilibus nec non ad erectionem ac dotationem ecclesiastici clericorum seminarii, memoratum gubernium, cum primum pro locorum ac temporum adjunctis datum fuerit, id omne praestabit, quod aliis capitulis cathedralibus et seminariis ecclesiasticis Mexicanae ditionis tribui solet.

8. Praefatam Ecclesiam Californiensem sic constitutam Archiepiscopo Mexicano motropolitico jure subjici mandamus, iisque omnibus frui statuimus facultatibus, exemptionibus et juribus, quae ad caeteras suffraganeas metropolitanae Mexicanae ecclesiae pertinent.

9. Fructus vero ejusdem novae Ecclesiac Californiensis de more taxari ad florenos auri de Camera tringinta tres ac tertiam floreni partem, atque hujusmodi taxam in libris camerae apostolicae et sacri Collegii describi jubemus.

10. Ut vero cuncta a nobis ut supra disposita ad su um perducantur effectum, venerabili fratri Emmanueli Posada y Garduno metropolitanae ecclesiae Mexicanae Archiepiscopo, quem harum nostrarum litterarum exequutorem elegimus ac deputamus, necesarias omnes et opportunas ad praemissorum effectum plenarie consequendum tribuimus facultates, ut ipse per se vel per aliam personam in ecclesiastica dignitate constitutam ab eo subdelegandam omnia statuere ac decernere valeat atque etiam cum facultate eidem exequutori, sive ejus subdelegato, definitive, libere ac licite pronunciandi super quacumque oppositione in actu executionis quomodolibet forsitan oritura, injunctaque ipsi obligatione diligentes in decreto exequutoriali describendi fines praesertim novae Californiae ac mittendi ad Apostolicam Sedem intra sex menses ab expleta litterarum opostolicarum exequutione exemplar authentica forma exaratum decretorum omnium, quae in harum litterarum exequutionem emittet, ut in tabulario Congregationis rebus consistorialibus praepositae de more asservetur.

11. Praesentes autem litteras, et in eis contenta quaecumque, etiam ex eo quod quilibet interesse habentes, vel habere praetendentes, vocati et auditi non fuerint, ac praemissis non consenserint, eorum consensui quatenus opus sit, de apostolicae potestatis plenitudine supplentes, nullo unquam tempore de subreptionis vel obreptionis aut nullitatis vitio, seu intentionis nostrae vel aliquo alio etiam substantiali defectu notari, impugnari aut in eis controversiam vocari posse, sed semper et perpetuo validas et efficaces existere et fore, suosque plenarios et integros effectus sortiri et obtinere, ac ab omnibus ad quos spectat, inviolabiliter observari debere volums atque decernimus.

12. Non obstatibus de jure quaesito non tollendo, de suppressionibus committendis ad partes, vocatis quorum interest aliisque nostris et

cancellariae apostolicae regulis ac in synodalibus, provincialibus universalibusque conciliis editis specialibus ac generalibus constitutionibus et ordinationibus apostolicis, et quibusve alliis Romanorum Pontificum praedecessorum nostrorum dispositionibus, caeterisque contrariis quibuscumque.

13. Volumus praeterea ut harum literarum transumptis etiam impressis, manu tamen alicujus notarii publici subscriptis, et sigillo personae in ecclesiastica dignitate constitutae munitis, eadem prorsus fides adhibeatur, si forent exhibitae vel ostensae.

14. Nulli ergo omnino hominum liceat hanc paginam nostrarum dismembrationis, sejunctionis, separationis, erectionis, institutionis, assignationis, attributionis, subjectionis, concessionis, indulti, decreti, dorogationis et voluntatis infringere, vel ei ausu temerario contraire. Si quis autem hoc attentare praesumpserit, indignationem omnipotentis Dei beatorum Petri et Pauli Apostolorum ejus se noverit incusurum.

Datum Romae, apud S. Petrum anno Incarnationis dominicae millesimo octingentesimo quadragesimo, quinto kalendas maias, pontificatus notri anno decimo.

[Translation of foregoing.]

EXTRACT FROM THE COLLECTION OF PONTIFICAL JURISPRUDENCE OF THE PROPAGATION OF THE FAITH.

[Part I, Vol. 5, p. 233. Rome, the Polyglot Press of the Propagation of the Faith, 1894.]

On the new Californian creation.

Gregory the Bishop, servant of the servants of God, that the matter may be kept in perpetual memory.

1. That apostolical solicitude which we feel for all the churches should not only not be weakened or diminished by the great distance of certain places and the far removal of the faithful, but should rather it should seem to be by that very cause increased and inflamed. When therefore the sanctuary of this centre of Catholic unity is the more difficult to our most distant flocks and when we are not able, on account of the natural condition of the territory and on account of distance, to refresh them with frequent admonitions, counsels, exhortations, and, finally, with certain spiritual aids, nor to heal their wounds, then we use to do as does an affectionate mother when she is long separated from her sons; she loves them indeed with the greater ardour from their remoteness and turns herself with a special care to all those offices which may be of use to her absent ones. Hence not only do we daily pray for the most bountiful of celestial blessings to fall upon this part of the flock which we ever have in mind, but also we leave nothing undone which may in any way turn to the spiritual welfare of the same. As we were turning over these matters carefully in our mind those who are situate under the Government of Mexico in Northern America humbly appealed to us that we should separate California from the diocese of Sonora (which is situate within the confines of the aforesaid Government of Mexico) and should there erect an episcopal see to be called the see of California; they beg also that we would deign to give it a bishop of its own endued with apostolical authority. It is indeed admitted that the

origin of the diocese of Sonora is not to be sought before the year 1779, and that it was brought into being by the fixing of new limits for the dioceses of Gaudalaxara and Durango, but a little while after that territory spread so widely that not only the great provinces of Sonora, Hostmura, and Sinaloa, but thereafter and above them the whole of California, which is certainly of the vastest extent, was included in that diocese. This last territory (California), which they say spreads for more than seven hundred leagues, is divided into old and new California. The first of these includes the Peninsula of California, which the old writers upon natural philosophy believed to be an island. The second, however, is joined to old California by an isthmus of which they were ignorant. At the present time they together constitute a single one of the Mexican provinces. If there be considered the great roughness of the roads, the rapidity of the rivers (which it is sometimes impossible to cross), and, moreover, the chain of immense mountains which are inhabited by barbarians, it will easily be seen that the bishop of Sonora is by these causes impeded from affording all that is necessary to the flock which has been committed to his care, from advantageously governing and administering them, from traveling over the whole of his diocese, and from seeing to their conversion in the thorough manner that should appertain to his office, by which accident the inhabitants lack the light of the gospel and are plunged into the densest darkness of error, a thing which we most bitterly deplore. This worst of all evils, both old and new California suffer in a peculiar way, for although the missionaries of the orders of St. Dominic and St. Francis minister to the spiritual needs of these provinces, yet each of them is situated in the most extreme part of the diocese of Sonora, and on this account they can not enjoy the presence of their pastor, which would be powerful in confirming the people by word and deed, by precept and example, which would correct what had become corrupted, and would rejoin what had become separate, which would strengthen in their faith the weak and illumine the blind.

2. These and other good reasons of moment having been brought before the Holy See by the ambassador of the Mexican Government accredited to it, were presented to us with such weight that after having weighed all these matters with due deliberation, and having observed the great advantage that the step would have, we very willingly acceded to those who made the request. Therefore, with an exact knowledge of the matter and from the fulness of our apostolical power, as also of our own initiative, and with the agreement of our venerable brother, Lazzari de la Garza, the present bishop of Sonora, and of such others as the matter might concern, we cut off, dismember, and separate forever from that diocese of Sonora, under which they formerly lay, all the aforesaid territory of California, old and new, together with all and singular of its parishes, churches, convents, and monasteries, and other seculars and regulars who may be there situate with their benefices, as also all persons of either sex, inhabitants and natives, clerk and lay, beneficed clergy and religious of whatever grade, status, order, or condition who may there be found. We, moreover, erect and institute as the episcopal city that territory or city situate in new California and called after St. Didacus, the said city being placed in the midst of California and being recognized as more apt than other places for this function. And we erect this episcopal city, with its

court and ecclesiastical chancery and all and singular honors, rights, privileges, and prerogatives which the other episcopal sees in Mexican territory use and enjoy.

3. We moreover perpetually erect and institute by our order the principal church in the aforesaid territory of St. Didacus to the honor and dignity of a cathedral church, and we place there the seat and pontifical throne of one who is henceforth to be called the bishop of California, who shall in the future preside over the said church, episcopal city, and diocese, its clergy and people, shall call together his synod, and shall have and exercise all and singular rights, offices, and privileges of a bishop, having his chapter, seal, episcopal chest, board, after the manner hereinafter laid down, and all those other titles, rights, honors, precedents, graces, favors, indulgences, jurisdictions, prerogatives, etc., which appertain to cathedrals and episcopal sees, such, in a word, as the other episcopal sees of Mexico and their incumbents enjoy, always excepting any special and individual privilege which may be attributed to them.

4. To the cathedral church of California thus created we adjudicate and assign all that old and new California which as above was cut off and disjoined from the diocese of Sonora in order that for the future it may be regarded as a separate diocese. This province of California which we have thus attributed and assigned to the new diocese, as well as the parishes now existing or to exist within it, its churches, convents, monasteries, secular and regular benefices, its persons of either sex, and inhabitants, both clerk and lay (not, however, those specially exempt), of whatever order, we also subject and attribute to the new bishop of the church of California, who is so named *pro tempore*, to his jurisdiction, governance, power, and supremacy, as over the see, territory and diocese, clergy and people.

5. In order, moreover, that the bishop of California (existing for the moment) may for the future be able to preserve his dignity and make decent provision for his vicar-general and episcopal court, we ascribe and attribute to the maintenance of the aforesaid that suitable fund invested in safe goods which the Mexican Government may appoint as it has promised.

6. As for what regards the fabric of the new cathedral church of California, we similarly ascribe and adjudicate perpetually that fund for its maintenance which the said Government has promised to give, and we wish that in the first place there should be assigned and attributed suitable accommodation for the residence of the future bishop and his episcopal court of proper size and of convenient situation as near as may be to the cathedral church; if there is no such edifice, and if it is necessary to erect one, we decree that a portion of the revenue should be spent on such erection.

7. As for what regards the erection of a chapter for the cathedral church and its similar endowment in stable investments, as also the erection and endowment of a seminary for the clergy, a Government order which will be given when the localities and dates are fixed upon will suffice for these, and will afford them whatever it is customary in the case of the other cathedral churches and ecclesiastical seminaries under the Mexican Government.

8. We order that the aforesaid church of California, constituted in the above manner, shall be subjected to the metropolitan jurisdiction of the archbishop of Mexico, and shall enjoy all those faculties, exemp-

tions, and rights which pertain to the other suffragan sees of that province.

9. We order that the fruits of this same new see of California should be taxed as the custom is, of 33 out 1/3rd golden florins for the apostolic treasury, and we have ordered this tax to be inscribed upon the books of the apostolic treasury of the Sacred College.

10. Now, in order that all the matters which we have arranged above may be brought into effect, do we chose and depute as the executor of these our letters, our venerable brother, Emanuel Posada y Carduno, the archbishop of the Metropolitan Church of Mexico, and we attribute to him all the necessary faculties whereby he may give full effect to the above, so that either he himself, or another acting for him in that ecclesiastical dignity and capacity, and delegated by him, may lay down all matters and decide upon them, and also by the same faculties of executor, he may himself, or through his delegate, definitely, freely, and lawfully pronounce upon any opposition which he may meet in the active execution of these things, however such opposition may arise. We lay upon him further the obligation of delimiting the exact frontiers of New California in this executive decree of ours, and of sending to the Holy See within six months of the complete fulfilment of these our apostolic directions (letters) an exemplar in certified form, showing that all the decrees whose execution has been ordered in these presents have been carried out, and such an exemplar is to be filed, as the custom is, in the records of the congregation to which is intrusted our consistory affairs.

11. Now these present letters and whatsoever things are contained in them it shall not be possible to impugn, nor to call in question, even by those who have, or who may maintain that they have, some interest in these matters, and who have not hitherto been called or heard upon them, or have not consented to the above, for from the plenitude of our apostolical power we ourselves will supply that consent, inasmuch as it may be necessary; moreover, these presents can not be attacked at any time upon a plea that they are imperfect by addition or subtraction, or nullity, or by a plea of our intention, or of any other substantial defect. They shall stand and be ever and perpetually valid and efficacious, and shall have their full and integral effect, and shall be inviolably observed by all those whom it may regard, for such is our will and decree.

12. (And it shall be so) notwithstanding appeals as of right upon matters committed to parties called "quorum interest," and notwithstanding our other rules and synodal regulations and those of our apostolic chancery, and notwithstanding the provincial and general councils, special decrees, general constitutions, apostolical ordinations, and whatever other things the Roman pontiffs, our predecessors, were wont to use; notwithstanding, indeed, all other contrary matters whatsoever.

13. We desire, moreover, that the transactions of these letters be printed, and also be subscribed by the hand of a notary public, and furnished with the seal of some person clothed with the necessary ecclesiastical dignity, so that they may have in the future the same credence as matters duly exhibited and published.

14. Therefore let no man be permitted to infringe this page in which we decree the aforesaid dismemberment (of the old bishopric), segregation, separation, erection, institution, assignation, attribution,

subjection, concession, indulgence, decree, derogation, and in which we have expressed our will; nor let any man dare to act contrary to it. If, however, anyone should so dare, may he discover that the anger of the Omnipotent God and of the blessed Apostles Peter and Paul has fallen upon him.

Given at Rome at St. Peter's, in the year of the incarnation of our Lord, one thousand eight hundred and forty, on the fifth day before the kalends of May (27th April, 1840), in the tenth year of our pontificate.

PIUS PP. IX.

Ad futuram rei memoriam.

1. Ad animarum regimen et salutem curandam necesse intelligimus dioeceses partiri, quae nimis amplis finibus contineri videantur.

2. Jamvero, quamquam pars illa dioecesis Montereyensis, quae ad Rempublicam Mexicanam pertinet, sejuncta nuperrime fuerit et Archiepiscopo Mexicano titulo administrationis apostolicae regenda commisa sit, illa tamen adhuc latissime patere noscitur sic, ut hodiernus Episcopus Montereyensis atque una simul Archiepiscopi et Episcopi foederatorum Statuum Americae Septemtrionalis ex Baltimorensi Concilio petendum a nobis curarunt ut ex dioecesi Montereyensi ea pars secernatur quae definitur ad Orientem *flumine Colorado*, ad Septemtrionem 42 latitudinis gradu, ad Occidentem Mari Pacifico, ad Meridiem parallelo Meridionali, paroecia vici vulgo *Pueblo S. Joseph*, ex eaque regione sic vivisa nova per nos erigatur dioecesis, cujus sedes constitute sit in a civitate S. Francisci. Cum vero aliae sedes archiepiscopales plurimum distent, ac perutile videatur novam in Superiori California constituere ecclesiasticam provinciam, idcirco praefati Antistites nobis postulaverunt ut novam S. Francisci ecclesiam metropolitanam declaramus, (sic) utpote quae pluribus ex capitibus opportunior sit, eidemque metropolitanae ecclesiae suffraganeam adsignemus episcopalem ecclesiam Montereyensem.

3. Nos igitur prius de hac re cum venn. fratribus nostris S. R. E. Cardinalibus Propagandae Fidei praepositis deliberavimus, ac singulis accurate perpensis, proterea quod ex hac archiepiscopalis ecclesiae erectione non mediocris videatur utilitas obventura spirituali Christifidelium regimini, dictorum Antistitum votis aequo animo ac libenter annuimus. Quapropter certa scientia ac matura deliberatione nostra deque apostolicae potestatis plenitudine partem illam superius memoratam dioecesis Montereyensis juxta descriptos limites a dioecesi praedicta dividimas ac saparamus, ex eaque regione peculiarem ac proprie dictam archiepiscopalem ecclesiam erigmus ejusque sedem in civitate S. Francisci figimus ac constituimus.

4. Porro eidem ecclesiae ejusque Antistitibus omnia et singula privilegia, honores, officia volumus attributa, quae ex jure vel consuetudine episcopalium sedium et episcoporum propria sunt.

5. Non obstante nostra et cancellariae apostolicae, etc.

Datum Romae, apud S. Mariam Majorem sub annulo Piscatoris, die XXIX. Julii MDCCCLIII, pontificatus nostri anno VIII.

Extractum Collectionis Juris Pontificii de Propaganda Fide, Partis I, Vol. VI, Romae ex Typographia Polyglotta, 1894, pag. 187.

[Translation of foregoing.]

PIUS IX, PONTIFEX MAXIMUS.

That the memory of the thing may be in the future preserved.

1. We believe it to be necessary for the governance of souls and for the care of their salvation that those dioceses which may appear to reach to too extended limit should be divided.

2. Now, although that part of the diocese of Monterey which belongs to the Republic of Mexico was lately cut off and put under the archbishop of Mexico, to be ruled by his apostolic administation, yet the said diocese is recognized to have so wide an area that the present bishop of Monterey, together with the archbishops and bishops of the United States of North America, have had a care to petition us from their council in Baltimore that there should be (further) divided from the (said) diocese of Monterey that part which is bounded (as follows): To the east by the river Colorado; to the north by the 42d degree of latitude; to the west by the Pacific Ocean, and to the south by the southern parallel passing through the town commonly known as Pueblo San Joseph, and they pray that we may erect a diocese out of the region so divided, and that its seat shall be placed in the city of San Francisco. Moreover, since the other archiepiscopal sees are very distant, and it would seem of the greatest advantage to create a new ecclesiastical province in Upper California, therefore the aforesaid prelates have begged us to declare metropolitan this new church of San Francisco (since this one is the more convenient under many heads), and (they beg) that we should assign the episcopal church of Monterey as suffragan to such a metropolitan see.

3. We therefore, having first deliberated with our venerable brothers their eminences the cardinals entrusted with the propagation of the faith, and having accurately weighed each matter, seeing that by the erection of this archiepiscopal see no small advantage that would seem to fall to the spiritual governance of Christians, we freely and cheerfully agree to the petition of the aforesaid prelates. Wherefore with full knowledge, and after mature consideration and on the fulness of our apostolic power, we divide and separate that upper part of the diocese of Monterey which is described above, according to the limits there set down, from the aforesaid diocese, and we erect that region into a separate and specially named archiepiscopal see, and we place its seat in the city of San Francisco.

4. Moreover we desire that there should be attributed to the said see and to its prelates all and singular, of those privileges, honours, and offices which by right or custom belong to bishops and episcopal sees.

5. Notwithstanding anything that our apostolic chancery and we ourselves may, etc.

Given at Rome at St. Mary Majors under the seal of the fisherman, on the 29th day of July, 1853, in the eighth year of our pontificate.

Extract taken from the Collection of Pontifical Jurisprudence on the Propagation of the Faith, Part I, vol. 6. Printed by the Typographia Polyglotta at Rome, 1894 (page 187).

EXTRACTS AND TRANSLATIONS FROM "NOTICIAS DE CALIFORNIAS," ETC.

EXTRACT FROM THE WORK ENTITLED "NOTICIAS DE LA PROVINCIA DE CALIFORNIAS EN TRES CARTAS DE UN SACERDOTE RELIGIOSO HIJO DEL REAL CONVENTO DE PREDICADORES DE VALENCIA Á UN AMIGO SUYO. EN VADENCIA POR LOS HERMANOS DE ORGA. MDCCXCIV. CON LAS LICENSIAS NECESARIAS."

Nómina de las misiones fundadas por los padres expulsos, con la expresion del año y de sus bienhechores.

		Años.
1.	Nra. Sra. de Loreto fundada por D. Juan Caballero y Osio	1698
2.	San Francisco Xavier, por el mismo	1699
3.	Santa Rosalía Molexé, por Don Nicolas de Arteaga	1700
4.	Los Dolores, por su Congregacion de México	1701
5.	S. Josef Comundú, por el Marques de Villapuente	1704
6.	Nra. Sra. de Guadalupe, por el mismo	1709
7.	La Purísima, por el mismo	1713
8.	San Luis, por D. Luis Velasco	1718
9.	Santiago, por el mismo	1719
10.	S. Ignacio, por el Padre Juan Luyando	1725
11.	S. Josef del Cabo, por el Marques de Villapuente	1730
12.	S. Rosa, por Doña Rosa de la Peña	1731
13.	S. Francisco de Borja, por la Duquesa de Gandia	1757

NOTA.—Quedáron suprimidas S. Luis y Santa Rosa; pero esta se trasladó á Todos Santos: asimismo se suprimió la de los Dolores, y el principal de la San Josef del Cabo sirvió para la de Santa Gertrudis en el año 1746, y hoy exîste. (Carta Segunda, pp. 48–49.)

EXTRACTS FROM THE WORK ENTITLED "NOVÍSIMA RECOPILACION DE LAS LEYES DE ESPAÑA MANDADA FORMAR POR EL SEÑOR DON CARLOS IV."

LEY III.

D. Carlos III por pragmática-sancion de 2 de Abril de 1767.

Extrañamiento de los Regulares de la Compañía de Jesús de todos los dominios de España é Indias; y ocupacion de sus temporalidades.

Habiéndome conformado con el parecer de los de mi Consejo Real, en el extraordinario que se celebró con motivo de las resultas de las ocurrencias pasadas en consulta de 29 de Enero de 1767, y de lo que sobre ella, conviniendo en el mismo dictámen, me han exquesto personas del mas elevado carácter y acreditada experiencia; estimulado de gravísimas causas, relativas á la obligacion en que me hallo constituido de mantener en subordinacion, tranquilidad y justica mis pueblos, y otras urgentes, justas y necesarias, que reservo en mi Real ánimo; usando de la suprema autoridad económica que el Todo-poderoso ha depositado en mis manos para la proteccion de mis vasallos, y respeto de mi Corona, he venido en mandar extrañar de todos mis dominios de España é Indias, é islas Filipinas y demas adyacentes, á los Regulares de la Compañía, así Sacerdotes como Coadjutores, ó Legos que hayan hecho la primera profesion, y á los Novicios que quisieren seguirles; y que se ocupen todas las temporalidades de la Compañía en mis dominios: y para la execucion uniforme en todos ellos he dado plena y privativa comision y autoridad por otro mi Real decreto de 27 de Febrero al Presidente del mi Consejo, con facultad de proceder desde luego á tomar las providencias correspondientes.

* * * * * * *

5. Declaro, que en la ocupacion de temporalidades de la Compañía se comprehenden sus bienes y efectos, así muebles como raices, ó rentas

eclesiásticas que legítimamente posean en el Reyno; sin perjuicio de sus cargas, mente de los fundadores, y alimentos vitalicios de los individuos, que serán de cien pesos durante su vida á los Sacerdotes, y noventa á los Legos, pagaderos de la masa general que se forme de los bienes de la Compañía.

* * * * * * *

10. Sobre la administracion y aplicaciones equivalentes de los bienes de la Compañía en obras pias, como es dotacion de parroquias pobres, Seminarios concilares, casas de misericordia y otros fines piadosos, oidos los Ordinarios ecliásticos en lo que sea necesario y conveniente, reservo tomar separadamente providencias; sin que en nada se defraude la verdadera piedad, ni perjudique la causa pública ó derecho de tercero.

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(Edicion citada Vol. I, pp. 183–184.)

[Translation.]

EXTRACT FROM THE WORK ENTITLED "ACCOUNT OF THE PROVINCE OF THE CALIFORNIAS, IN THREE LETTERS, WRITTEN BY A PRIEST, A MEMBER OF THE ROYAL CONVENT OF PREACHERS OF VALENCIA, TO A FRIEND. PRINTED IN VALENCIA BY DE ORGA BROTHERS. MDCCXCIV. WITH THE NECESSARY AUTHORITY."

List of the missions founded by the banished fathers, with mention of the year and of the benefactors.

		Year.
1.	Our Lady of Loreto, founded by Don Juan Caballero y Osio	1698
2.	San Francisco Xavier, by the same	1699
3.	Santa Rosalia Molexé, by Don Nicolas de Arteaga	1700
4.	Los Dolores, by the congregation of Mexico	1701
5.	S. Josef Comundú, by the Marquis de Villapuente	1704
6.	Our Lady of Guadalupe, by the same	1709
7.	La Purísima, by the same	1713
8.	San Luis, by D. Luis Velasco	1718
9.	Santiago, by the same	1719
10.	S. Ignacio, by Father Juan Luyando	1725
11.	S. Josef del Cabo, by the Marquis de Villapuente	1730
12.	S. Rosa, by Doña Rosa de la Peña	1731
13.	S. Francisco de Borja, by the Duchess of Gandia	1757

NOTE.—S. Luis and Santa Rosa have been suppressed, but the latter was removed to Todos Santos. Likewise the mission of Los Dólores was suppressed, and the garrison of San Josef del Cabo served for the mission of Santa Gertrudis in the year 1746, and it still exists. (Second letter, pp. 48–49.)

EXTRACT FROM THE WORK ENTITLED "LATEST COMPILATION OF SPANISH LAWS, DIRECTED TO BE MADE BY DON CARLOS IV."

LAW III.

D. Carlos III by royal decree of April 2, 1767:

Banishment of the regulars of the Society of Jesus from all the dominions of Spain and the Indies, and the taking possession of their temporalities.

Being in accord with the views of my royal council in the extraordinary session called as a result of past events, and set forth in the

report of January 29, 1767, and with the opinion which persons of the highest standing and recognized experience have expressed which conform to said report—impelled by gravest motives concerning the duty imposed upon me to maintain my people in peace, tranquillity, and justice—and for other urgent, right, and necessary causes, touching which I reserve comment:

In virtue of the supreme economic authority vested in me by the Almighty for the protection of my subjects and to insure the respect due my crown, I have determined to order the banishment from all my dominions in Spain, the Indies, and the Philippines, and other adjacent islands of the Regulars of the Society of Jesus—both priests and lay friars—who have taken their first vows, and novitiates who should wish to follow them; and the taking possession of all the temporalities of the society in my dominions.

For the uniform execution of these orders, I have given full and special instructions and powers to the president of my council by another royal decree of the 27th of February, with authority to immediately proceed to take the necessary action.

* * * * * * *

5. I further direct that the taking possession of the temporalities of the society is to include the effects and property, real and personal, or the ecclesiastical revenues which lawfully belong to it within the Kingdom, without prejudice to the trusts imposed by the founders and to the maintenance of the members, which shall be $100 for the priests during their lifetime and $90 for the lay friars, payable out of the general assets obtained from the property of the society.

* * * * * * *

8. With regard to the administration and proper application of the property of the society for pious purposes, such as the endowment of poor parishes, colleges, houses of mercy, and other pious objects, after hearing from the ordinary clergy concerning what may be necessary and proper, I reserve individually the adoption of appropriate measures, without true piety being in any way defrauded or the public cause or rights of third parties being injured.

[Translation.]

Thadeus Amat and others *v.* Mexico. No. 493.

ARGUMENT FOR THE DEFENSE BEFORE THE HONORABLE UMPIRE.

The present case is of the greatest weight and importance, not only on account of the questions which are raised, but also because of the result which the decision rendered may have for Mexico in the future.

The undersigned, feeling sure that the umpire will examine with his accustomed care, and even if it be possible with more diligence, all the circumstances set forth in the papers in the case, does not doubt that he will give to the clear argument of the defense written by Señor Aspiroz all the attention which, under whatever aspect the case be examined, ought not to be refused it by one who is conscientiously to decide the case. (It is the Document No. 46.)

It is pardonable if the agent of Mexico should make an especial recommendation to the umpire asking that he give close attention to the opinion of the Mexican commissioner, since, being called on to settle the difference of opinions of the commissioners, it would be almost an offense to his high sense of justice to suppose that he would not study with particular interest the elements of those opinions.

All the questions of the present case having already been treated with that intelligence and attention with which they have in the argument and brief mentioned, it would be a vain presumption on the part of the undersigned to attempt to say anything whatever new and worthy to be on an equal footing with said works.

But, without any such pretension, and on the contrary, asking indulgence for the plainness of this writing, he, who to-day has the honor to represent the Mexican Government before the Commission, is about to try to make only some observations and a demonstration upon the point of view from which he thinks the case should be considered in conformity with the convention, by virtue of which it has been presented.

I.

In order to form an opinion favorable to the claimants, the commissioner of the United States commences by upholding, or rather by taking for granted, that the fund of the missions of the Californias always had an object *exclusively* religious and not political in any sense.

The contrary is demonstrated with irrefutable historical proofs in the argument of Señor Aspiroz and in the opinion of Señor Zamacona.

But, whatever may have been the character of said fund on account of the intentions of the founders, the American commissioner recognizes that since the expulsion of the Jesuits to whom they (the founders) had intrusted the employment of the properties of which there is question here, the sovereign assumed, by virtue of his eminent domain, the powers necessary to accomplish the execution of the wish of those who had created the fund.

Mr. Wadsworth admits not only that the bishop of California, and before him that various religious corporations, and at least one lay corporation, succeeded one another in the management and employment of the fund solely by permission of the National Government, but also the ample power of the said Government to intrust with this management and employment anyone who in its judgment, being trustworthy, was best able to accomplish the ends for which it was instituted.

It appears, nevertheless, that the American commissioner attributes to the appointment of the bishop of California, by the said Government, and on account of the said charge, a permanent effect and the transmission of a perfect and irrevocable right in the bishop and his successors.

And, as a foundation for such deduction (which is also the foundation of the present claim) he cites the decree of October 24, 1842, which, for that reason, ought to be borne in mind as one of the most important pieces of evidence.

It runs as follows:

That whereas the decree of February 8 of the present year, directing that the administration and care of the Pious Fund of the Californias should redevolve on and continue in the charge of the Government, as had previously been the case, was intended to fulfill most faithfully the beneficent and national objects designed

by the foundress without the slightest diminution of the properties destined to the end; and whereas the result can only be obtained by capitalizing the funds and placing them at interest on proper securities, so as to avoid the expenses of administration and the like, which may occur. In virtue of the power conferred on me by the seventh article of the Bases of Tacubaya, and sanctioned by the nation, I have determined to decree as follows:

ART. 1. The real estate, urban and rural, the credits, and all other property belonging to the Pious Fund of the Californias are incorporated into the national treasury.

2. The minister of the treasury will proceed to sell the real estate and other property belonging to the Pious Fund of the Californias for the capital represented by their annual product at 6 per cent per annum. And the public treasury will acknowledge an indebtedness of 6 per cent per annum on the total proceeds of the sales.

3. The revenue from tobacco is specially pledged for the payment of the income corresponding to the capital of the said fund of the Californias, and the department in charge thereof will pay over the sums necessary to carry on the objects to which said fund is destined without any deduction for costs, whether of administration or otherwise.

It is seen, therefore, that this decree, the foundation of the claim, declares the objects for which the fund in question was destined to be *national*. It is also seen that it left such funds *incorporated* into the *national treasury* of Mexico; but especial attention should be directed to the fact that in no part of the said decree is mention made either of the bishop or church of California.

How is it, then, that in this decree they pretend to found the right which is alleged?

How, from the fact that the Government of Mexico proposed to continue employing to its beneficent and *national* end the funds which it declared to be under its exclusive charge, can it be deduced that these funds had to be administered and employed perpetually by the church of the Californias, which Mr. Wadsworth sustains?

If it (the decree) had explicitly and in so many words ordered that the necessary quantities of the proceeds should be paid over to the bishop of California, which the said decree destined to the objects of the original foundation, nevertheless the title under which the successors of said bishop could have and reclaim such quantities, from the moment when the objects in which these quantities should have been employed in California ceased to be of a *national* interest to Mexico, would be more than doubtful.

According to the judgment of Mr. Wadsworth, not only did the necessities for which the fund of the missions was destined by its founders continue to exist in the locality we have just mentioned, but also that they had been augmented by the influx of adventurers of the whole world and by the Chinese immigration. The undersigned doubts if the commissioner of the United States expressed this thought hoping that it would be taken seriously, and he is more inclined to suppose that the commissioner wished to lighten with a joke the dryness of the subject with which he was occupied.

What is there in common between the object of protecting and civilizing the aboriginees of this continent and the converting to Catholicism the Chinese and other heathen European immigrants who, in an avalanche, precipitated themselves upon the rich prize wrested from Mexico, and the treasures of which offered a greater incentive to licentiousness than to the elements of religious advancement?

But, supposing that to-day it were as necessary as before the annexation of California to the United States to employ certain sums for the

conversion of the infidels or pagans or protestants to Catholicism, what kind of obligation is the Mexican Government under to furnish these sums? A national one, like that which every sovereign is under to satisfy the public needs? Then it is not from that Government, but from the Government of the United States, which succeeded to all Mexico's rights and obligations with respect to Upper California, from whom the bishops can ask the fulfillment of such an obligation. Is this of a private character, as Mr. Wadsworth pretends? Whence does it proceed?

It has already been seen that it is not derived from the decree of October 24, 1842, in which there is no mention either of the bishop or of the church of California.

Not from the will of those who established the fund, because they placed it exclusively in the charge of the Jesuits, and not in the charge of anyone who might find himself at the head of a church which, at the time of the foundation, did not even exist.

Not, finally, from the objects to which said fund was destined, because the claimants have never fulfilled them, nor is it probable that they will.

And, nevertheless, for Mr. Wadsworth, the supposed obligation of the Government of Mexico to pay over to the bishops of California a large portion of the proceeds of said funds is of a character so absolute that he compares it to that of an individual in whose power said fund is found, and whom the ordinary tribunals could not do less than condemn to the payment of said proceeds.

But would they do it in such a case unless the claimants should prove their right, or rather their title to them? Evidently not.

And what is the title which those who make reclamation against the Government of Mexico present to this high tribunal?

A decree which gives them none—more than that—which withdrew the only one which the Government had seen fit to give to the ecclesiastical dignitary from whom they pretend to derive the right which they allege; that is to say, the simple administration of the fund of which there is question.

It is to be remembered that the decree of October 24, 1842, commences by reiterating that which was enacted in the one of February 8 of the same year, by which the management of that fund was taken away from the bishop of California, it being declared that its administration and its *employment* should remain under the charge of the supreme national Government of Mexico, *in the manner and terms which it should adopt*, in order to fulfill the object which the donors proposed—the civilization and conversion of the *barbarians*. (Not of the Chinese nor of the Europeans.)

It would be extremely doubtful, if the Jesuits had continued without interruption to discharge the trust of the founders of the so-called fund of the missions, and if the properties which formed it had not gone out of the control of said trustee, whether the said corporation of Jesuits could to-day reclaim for the benefit of Upper California—separated from Mexico—the proceeds of any properties situated in the territory of that Republic.

But when a century has passed since the discharge of said trust by the Jesuits ceased; when, since the time of their expulsion from the dominions of Spain, all their temporalities have been incorporated into the royal treasury; when, by the same decree in which it is pretended

that this reclamation is founded, the goods destined to the national object of civilizing the savages ceased to constitute a special fund so that it was confounded with the other public moneys, whose management and employment are the exclusive prerogative of the sovereign; and when, in a word, there is in the bishops of Upper California neither the representation of the Jesuits—of whom they are not successors—nor the authorization of the Government of Mexico, which could not exist, since the said Government lacked the indispensable means of superintending the carrying out of such authorization, which are impossible in a territory now subject to a foreign power, it is scarcely conceivable that said bishops have come to believe that they have any right to make the claim which they have presented to this tribunal.

When did the right which they allege originate? At the moment when Upper California was separated from Mexico? On the day that the exchange of ratifications of the treaty in which said Republic ceded that territory to the United States?

Who at that time enjoyed the right to which the bishops, whose sees did not then exist, now pretend to succeed? Was it an individual? Was it a corporation? Was it the whole of the people of Upper California?

If the first, the individual who possessed the pretended right was certainly not an American, nor could he begin to be an American until after the expiration of one year, according to Article VIII of the treaty of which mention has been made; that is to say, not before the 30th of May, 1849.

If the second, the corporation lost all its rights which it had with respect to Mexico and its Government, because not only were they not reserved in the treaty, but there was not even mention made in it of corporations, care being taken nevertheless to guarantee the rights of private individuals, and this only in their new relations with the United States and not with respect to their rights or interests existing in Mexico.

Finally, if there is question of the collective rights of the people of Upper California, the correlative duties with respect to them passed without any exception to the new sovereign, the prerogatives of sovereignty having been transmitted to it without restriction.

But let us return to the first of these three suppositions, which seems to be that which serves as a foundation for the claim—that is to say, that it was an individual who, by virtue of an ecclesiastical minister, the immediate successor of Bishop Diego, possessed the right which is claimed. Was he really entitled to receive any part of the proceeds of the fund of the missions in May, 1848 or 1849? Had he been receiving any sums by this title up to those years? It is not even intimated by the claimants.

What then is the pretended right to which they were the successors?

Only a vain hope, only a vanishing and perhaps already forgotten illusion.

If the decree which withdrew from the bishop of California the duty of administering and employing the fund of the missions did not say a word as to whether there should be delivered over to the same bishop in the future the sums necessary for the objects of that extinct fund, how could he believe that it would be so for him in the year 1842?

Three years passed without such belief being realized, and the afore-

said bishop, taking advantage of an accidental preponderance of the church party in the Government of Mexico, obtained in 1845, a promise more explicit, though probably not less illusive.

Such promise was contained in a decree which the claimants have only cited, but which the commissioner of the United States has not thought it convenient to take into consideration in his opinion.

It is dated April 3, 1845—later than the one which is taken as the foundation of the claim—and it runs as follows:

> The credits and other properties of the Pious Fund of the Californias which are now unsold shall be immediately returned to the reverend bishop of that see and his successors for the purposes mentioned in Article VI of the law of September 29, 1836 (in order that they may administer and employ them in its objects and other analogous ones, respecting always the wish of the founders) without prejudice to what Congress may resolve in regard to the property that has been alienated.

In this decree there is, as has been said, an explicit promise to the bishop of California; but what is it? Perhaps that there shall be delivered to him and his successors the interests of which the decree of the 24th of October, 1842, speak? No, certainly not.

The decrees of February and October, 1842, had taken from the bishop of California all interference in the management and employment of the funds of the missions, the public power of Mexico exercising the same liberty with which it had before intrusted the said management to the above-mentioned bishop. "*Hujus est tollere cujus est condere.*"

The decree of April, 1845, a measure of the clerical party, conferred anew on the bishop of California the trust of the Government of which three years before he had been dispossessed; but during this time the funds had no doubt considerably diminished, and so great must have been their diminution at the time of the issuance of the decree that in it the credits are mentioned first; from which it may be inferred that they constituted the greater or most important class of property in hand. These (*the properties not sold by virtue of the decree* of 1842) were the *only properties* ordered to be delivered *immediately* to the bishop of California and his successors. As to the sold properties, Congress reserved the right to later determine what should be deemed advisable concerning them.

Another three years elapsed from the issuance of that decree before the exchange of ratifications of the treaty which separated Upper California from Mexico.

What was done, during those three years, with the remainder of the fund of the missions?

Did the bishop, to whom the property should be delivered *immediately* after the issuance of the decree, receive anything from it in accordance with its provisions?

Very probably he would only receive the credits which could have but an insignificant value, being in large part evidences of public debt. The rest (if there happened to be more than such credits), it is very probable, might have been consumed in the public expenses of the war with the United States.

If it were so, what better employment could be given to the funds destined for the political and religious conquest of the Californias than the defending of the territory acquired by means in the employment of which those properties had so important a share?

And if in fact the Mexican Government did use the remainder of

the fund of the missions to maintain the war against the United States, at the close of which it lost more than half of the national territory, including Upper California, it would be strange if to-day it should be made to pay, for the benefit of the United States, and for a religious sect which is endeavoring to predominate there, not only what they may have taken from said funds, but a perpetual tribute as an income reckoned upon the greatest value that they ever had.

And it is no less strange that this is claimed by invoking the very decree which declares the objects to which those funds were destined to be of truly *national interest.* The attorney of the bishops (page 10 of the printed argument), in an edifying manner, observes that the Duchess of Gandia, having heard an old servant of hers, who had been a soldier in California, speak of the barrenness of that country, of the miserable condition of the Indians, and of the suffering and apostolic labors of the consecrated missionaries for the betterment of that unhappy race, resolved to bequeath a part of her fortune for the aid of those missions, and forthwith he inquires what the pious donor would think if her legacy should finally have been destined to enter into the public treasury of Mexico.

The undersigned answers the question with others: What would the Duchess of Gandia think if the church which was to be favored with her munificence should cease to belong to her native country; if that country, whose barrenness and poverty had moved her charity, should come to be one of the richest of the world; if those miserable Indians, whose situation she pitied, instead of profiting from the fertility of the the soil, would be driven from it by the new sovereign, and if those holy missionaries, whose apostolic zeal and heroic abnegation she admired and intended to encourage, had been supplanted by the high dignitaries of a wealthy church?

And when things have so much changed from what they were known to be by the founders of the fund of the missions, is when the bishops of California come to reclaim their participation—more than that—their propriety in them?

And why?

Are they, peradventure, to fulfill the objects of the founders?

Are they about to bring to the unhappy Indians, relegated to the borders of the territory which was theirs, the light of the evangelist and the blessings of Christian charity?

If at least they propose to do it, it would be neither for the benefit of Mexico nor could the Government of that Republic see that the quantities received by the bishops, claimant, were employed for their real objects.

But let us return to the point of departure.

We have seen that in April, 1845, a decree ordered that the credits and other properties not sold of the funds of the missions should be *immediately* returned to the Bishop of California and to his successors, and it is excusable to say that upon intrusting the administration of such properties to the said bishop, the Mexican Government could scarcely have thought that some strangers not recognized by the said Government, nor named by any intervention on its part, would figure as successors of Bishop Diego, in whose nomination it had a voice.

The only credits and properties whose administration and employment the Government confided to him were immediately either returned, or they were not returned, to Bishop Diego. Whichever it was, the

decree of April 3, 1845, should have been executed *immediately* or it should have remained without any further effect. Afterwards Bishop Diego died and no successor was named in the manner in which he had been named; the war between Mexico and the United States intervened, which was terminated by the treaty of February 2, 1848. Not one word is said in it about corporations, and still less about churches, the United States simply guaranteeing to Mexican citizens who should continue living in the territory conquered by them (the United States) the free exercise of their worship and the secure enjoyment of their properties situated in the same territory.

So the Catholic Church of Upper California did not retain by the treaty of Guadalupe-Hidalgo its character of a corporation recognized by a new sovereign, nor with rights recognized, not only on the part of the government of the nation which the members and pastors of that church had ceased to defend, but even with respect to the properties to which the said church could have believed itself entitled, in the territory in which it was established.

Years passed, and said church continued to pursue a private existence without legal existence in the United States. The Pope, who was the only power with whom it had relations, considered it advisable—of course without any knowledge whatever of the Government of Mexico—to name a new bishop for Upper California, to establish therein another bishopric, and soon afterwards an archbishopric, and to designate for these high offices naturalized citizens of the United States. These changes in and additions to the personnel might of themselves alone have operated so that the Government of Mexico would not have left in the hands of persons thus named the charge of trust conferred at another time upon the Mexican Bishop Diego.

Meanwhile, if the new dignitaries of the church of California did not acquire from their immediate predecessor any property or rights through any individual act, as by conveyance or will, one or the other in conformity with the laws of the United States, by reason of office they could not maintain any legal title in the United States while they had not commenced to represent an association recognized in the civil order by virtue of its formal incorporation.

This took place in the year 1854. (See documents Nos. 3 and 10). The legal existence of the Catholic Church of California, in the United States, dates from that time forward; and only from that time forward could that corporation acquire rights and enforce them under the protection of the laws and of the authorities of the country.

Before its formal incorporation this church did not have collective rights, and its members and ministers alone had the legal ability to acquire individual rights. How, then, could the rights which Bishop Diego may have had in 1842 be transmitted to the bishops claimant?

It seems that they pretend to attribute this effect to the canons of the Catholic Church.

But how can such an absurdity be sustained?

The canon law only produces civil effects within the territory whose government gives them such, and neither did the United States upon annexing Upper California make this or any other concession to the Catholic Church therein, nor could Mexico on relinquishing its control over that territory leave the canon law in force therein.

Let it be supposed, nevertheless, that this right continued in full force and effect, of itself, notwithstanding the change of government in the

locality of which there is question. Is there in it any provision which obliges a government to place its trust in foreign prelates for the administration and distribution of funds incorporated in its treasury and intended for purposes of *truly national* interest?

And if there be such a canon law, is there a tribunal not ecclesiastical that would attempt to enforce it?

The attorney for the bishops who understands that it would not be favorable to the interests which he defends to invoke as a title the simple authorization of the Government of Mexico in favor of Bishop Diego, wishes to maintain that the properties which are under consideration belong by absolute right to the Church of Upper California, and that the incorporation of these properties into the royal treasury when the Jesuits were expelled from the dominions of Spain about a century ago, was one unlawful sequestration of the property, and the second incorporation of the same properties into the public treasury in 1842 was another, it being worthy of note that it is on the very decrees of that year that the demand is founded.

So that said attorney energetically repudiates (citing as authority Catholic writers) the principle which considers as public property that which is devoted to the church in countries in which there is but one religion, under the exclusive protection of the state.

As much as might be said upon the above-indicated abstract principle would be foreign to the question which occupies us; it is sufficient to remark that it does not concern this tribunal to call to account the Government of Spain, nor that of Mexico, nor any other for the nationalization of church properties.

The question is simply as to whether the bishops of California have had a right to receive interests on certain properties *nationalized, or incorporated into the treasury of Mexico*, whether it were done in accordance with law or not.

After the Catholic Church of California had complied with the requisites of incorporation necessary to give it a legal existence in the United States, one of the ministers of that church—the pastor of Santa Clara—demanded of a private individual the possession of a property known by the name of "Orchard," which formerly belonged to the mission of Santa Clara.

The lawsuit followed, with all its judicial proceedings, both litigants presenting all the arguments they could to elucidate the questions raised upon the rights of the church of California to the properties which at earlier times had formed the fund of the missions.

Accompanying this argument is a complete copy of the opinion in that case from the work, "Reports of Cases Argued and Determined in the Supreme Court of the State of California," Vol. VI, p. 325 *et pas.*

Judge Heyndfelt, in announcing the final judgment, expressed himself in these terms:

> According to all the Spanish and Mexican authorities (which have been well collated in the respondent's argument), the missions were political establishments and in no manner connected with the church.
>
> The fact that the monks and priests were at the head of those institutions proves nothing in favor of the claim of the church to universal ownership of the property.
>
> * * * * * * *
>
> The lands settled by them were not conveyed to anyone, neither to priest nor neophyte, but remained the property of the Government.
>
> * * * * * * *
>
> Our conclusion is that the plaintiff has no right to the property in question and, therefore, the judgment of the court below is affirmed.

When competent tribunals have thus decided, treating of property situated in the United States, what should be said of these pretended rights of the church of California against the Government of Mexico for interests on properties situated in Mexico, and, which, far from having been acknowledged as belonging to that church, were explicitly declared to be *national?*

It would be a monstrous injustice, considering that squatters on properties situated in the United States, and which formerly belonged to the missions, and to which they had no title, were upheld in their possession, if the Government of Mexico be condemned to pay a perpetual tribute in favor of the bishops of California simply because at one time it has seen fit to intrust to an ecclesiastical prelate, subject to its dominion, the administration and employment of some funds which ought to be destined to objects of national interest.

II.

The convention of July 4, 1868, submitted to the examination and decision of this tribunal all the reclamations of individuals, corporations, and companies which, being citizens of the United States, had suffered injuries in their persons or their properties inflicted by the Mexican authorities.

That which is to be ascertained, therefore, in each case, is if any authority of the nation defendant has done an injury to the party claimant in his person or his property.

The first observation which occurs in this regard, on examining the present case, is that neither the Government of Mexico nor any authority of that country has had the slightest notice of the existence of the gentlemen, Messrs. Alemany and Amat, nor of the corporation which they represent.

This corporation commenced to exist legally in the United States, or rather in the State of California, in the year 1854, when the require ments for incorporation were complied with. From that time the said gentlemen could represent the rights and civil interests of their respective churches in the United States; but did the Government of Mexico know anything of it? By whom and at what time was it given notice of it?

Upon this particular there is not the slightest mention in the record.

And is it not truly extraordinary that the persons of whose individual existence or of whose character as representatives of a corporation the Government of Mexico did not have the slightest notice should declare themselves injured?

That the claimants have been injured in their properties by said Government is demonstrated to be entirely false, because neither the fund of the missions—first incorporated into the treasury of Spain and afterwards into the treasury of Mexico as national property—nor the proceeds of that fund, whose employment has remained under the charge of the Government since the expulsion of the Jesuits from the dominions of Spain, have never been the property of the bishops of the church of California.

But, above all, whatever may be the right that the claimants deduce concerning the Pious Fund or its proceeds, nobody will dare to maintain that said right is clear, evident, *unquestionable.*

Therefore, the fact that the said right is doubtful is enough to show that the claimants can not say that they are injured by the omission of

the Government of Mexico to carry it out *without the slightest action or solicitude on the part of those interested.*

When, indeed, nothing more than a problematical obligation is treated of, as is the one which it is pretended that the Government of Mexico has failed to fulfill, and not of one well defined and explicit, as that proceeding from a contract, it could not be said that an injury had been done to the interested parties with regard to its fulfillment, except when the latter prove that they have asked its performance diligently without having obtained it. Only then ought it to be investigated, whether the refusal of the Government demanded constituted an injury as being unjust or unfounded.

The claimants say that in 1859 (very late to be sure) they presented their claim to the United States.

Such would have been the case; but as the latter Government did not take any steps to prosecute this claim, nor even give notice of its existence to the Government of Mexico; with respect to the latter it was just the same as though it had not been made.

What, then, is the injury of which the claimants complain?

Have they at any time asked of the Government of Mexico the recognition of the right which they pretend to have to the proceeds of the fund of the missions?

Not only have they not proved, but they do not even allege having made such a demand.

And could they reasonably expect that, it not having occurred to themselves to take any action to press their pretended right (even though they did not think that they had it), the Government of Mexico should have begun to punctually pay them the interests which they now seek to collect since the year 1848?

Such an exaggerated pretension could not be qualified except as absurd.

Supposing the condition in which the funds were in the year 1845, supposing the complete change in the mode of existence of Upper California produced by the war and the treaty which terminated it, and suppose finally that by virtue of this change the objects to which said funds were destined in Upper California were no longer of a national interest for Mexico, nor that the Government of said Republic could superintend their employment, it is the most natural thing in the world that the said Government would not in any manner think that the ministers of the Catholic Church of Upper California would allege rights to the said funds.

How then can the ignorance, or the nonperformance, of an obligation, which it did not suspect being under and which the claimants had never demanded, be classed as an injury on the part of the Mexican Government?

If there was question of a formal agreement contracted by the Government of Mexico in favor of the claimants in incontrovertible terms, nevertheless it would not be equitable to listen to the complaint of those who had not theretofore diligently endeavored to procure the recognition and execution of such contract; what should be said therefore, when a decree, in which there is no mention of the entity represented by the claimants, is alleged as a foundation for the demand? What should be said when that entity had ceased to exist in the manner in which it did exist when the Government of Mexico turned over to it, not the titles to, but only the management of, the properties whose

proceeds are claimed—circumstances and conditions affecting this confidential trust, as may be understood by reading the decree of September 29, 1836—and, finally, what should be said when the right alleged, although it might exist, is certainly not clear, obvious, and unquestionable? It would be necessary to change the meaning of the word *injury* in order to say that anything that merits this name had been practiced on the part of the Government of Mexico in the present case.

Wherefore, even on the absolutely unfounded supposition that the bishops of California could deduce any right to a part of the proceeds corresponding to the properties of the fund of the missions sold by virtue of the decree of October 24, 1842, their demand is not open to the investigation and decision of this tribunal, because it is not founded upon an *injury* done to the citizens of the United States by the Government of Mexico, nor since February 2, 1848, when the person from whom they pretend to derive their right had no citizenship which could be taken into account, nor since 1854, when they began to have legal representation, nor at any other time prior to the exchange of ratifications of the convention of July 4, 1868, because they have not had recourse to that Government with their pretensions, as was indispensable that they should previously in order that the justice of the claim might be examined. Thus, then, without taking into consideration the foundations of it, the claim should be rejected.

ELEUTERIO AVILA.

[Translation.]

Thadeus Amat and Joseph Alemany *v.* Mexico. No. 493.

PETITION FOR REHEARING.

The Government of Mexico does not doubt that the honorable umpire has rendered the decision in this case in accordance with the dictates of his conscience; but it believes it to be its unavoidable duty to present the important reasons which perhaps the umpire did not take into consideration when he rendered his judgment, reasons which establish the basis for the necessity of a rehearing.

The undersigned has therefore received instructions from his Government to immediately solicit the rehearing of this case, and he having found it convenient to make the petition before the functions of the commissioners have ceased, will only indicate in this document some of the reasons that exist for the rehearing, reserving the right to enlarge upon them when this motion shall have been granted.

The first point to which the attention of the umpire should be called is that, whatever the right of the petitioners might be for themselves or as representatives of a corporation to a part of the Pious Fund of the Californias, there is no *injury* to be regarded in this case, since the Government of Mexico has not done any *injury* to the claimants by not recognizing in them such a right, it not having been required to do so.

"The Pious Fund," says the memorial, "being the property of the church of both Californias, Upper and Lower, and being devoted to the propagation of the Catholic faith in both countries, *it would have*

been necessary to divide it when Upper California was separated from the dominion of Mexico and was annexed to the United States. This fact and the consequent separation of the ecclesiastical jurisdictions should have made necessary a proportional division of the interests and proceeds which ought to have accrued after the treaty of Guadalupe."

This part of the statement made by the claimants points out two different periods at which the division of the fund ought to have taken place, viz, when the territory of Upper California was separated from Mexico and when the ecclesiastical jurisdictions were separated.

Would it be reasonable to claim that at either time it was obligatory for the Government of Mexico to take steps to bring about the apportionment of the fund?

When the treaty of peace between the Republics of Mexico and the United States was celebrated, by which treaty the first of said Republics ceded to the latter part of its territory, it became the duty of the United States Government to secure all the rights and interests of those who were about to become its citizens, and no omission in this respect can be charged against the Mexican Government.

When later the churches of Upper and Lower California were separated, it was the duty of the representatives of the former to take steps in order that the apportionment of the fund might be brought about.

The very terms of the memorial presented by the claimants clearly show that no formal step was ever taken in that direction.

"But this apportionment," it says, "was never made, and the claimants allege and demand that it be made, taking as a basis the respective populations."

No matter how just it might be to make an apportionment, since it was never demanded, and now, after the exchange of ratifications of the convention of July 4, 1868, for the first time the interested parties allege *and demand* that it ought to be made, there has been no injury on the part of the Mexican Government.

Neither was the convention negotiated nor the Commission created in order to liquidate debts or apportion undivided properties, but solely and exclusively to repair *injuries;* and evidently in this case there is no *injury* to repair.

If, notwithstanding all that has been said, it be insisted that it is part of the Commission's duty to make the apportionment solicited, justice and equity demand that it first be determined what is to be apportioned, whether the properties of the fund in question or its proceeds, and in what proportion such division ought to be made.

The Pious Fund of the missions consisted of rural and city estates, part ownership in others, capital invested in annuities, or mortgages upon estates and other assets.

By the second article of the decree of October 24, 1842, it was ordered that the *estates and other properties* belonging to the Pious Fund of the Californias be sold for the price which *their annual proceeds* represented, capitalized at 6 per cent, and that the public treasury would recognize at the said rate of 6 per cent the sum produced by those sales.

In no way is it to be understood that amongst said properties to be sold the *assets* (*créditos activos*) of the fund were to be included, because although mentioned in the first article of the decree, they are not referred to in the second; since it would not be rational to suppose

that the Mexican Government would offer for sale credits of which it was itself the debtor, and most of which bore an interest of less than 6 per cent, and others bearing no interest at all; and, lastly, because in the later decree of April 5, 1845, it was ordered that the *credits and other properties* which remained unsold should be returned to the Bishop of California, which clearly proves that such credits had never been offered for sale.

The Government undertook to pay 6 per cent, not upon the nominal value of the properties belonging to the Pious Fund, but upon the total produced by those whose sale might be effected, and since the sale of the credits was not ordered, nor does it appear that it was made, but quite the reverse, the obligation of the Government of Mexico to pay interest upon such credits can not be deduced from the decree of 1842, and they ought in any event to be separated in this respect from the divisible interest.

The justice of this separation is still more clearly perceived by noticing that the greater part of said credits consisted of unpaid interests, and which certainly yielded no annual income, which was the basis for estimating the values in conformity with the decree of October 24, 1842.

The first of the assets against the public treasury is a capital of $20,000, which it acknowledged with an interest of 5 per cent per annum, said $20,000 having been deposited in the treasury during the time of the Spanish rule. Its interests were paid until the year 1812, but since then to February, 1842, they have not been paid, and amount to $29,166 5 reals 4 granos. (Inventory of Don Pedro Ramirez.) These twenty-nine thousand and odd dollars yielded no annual income.

There follows another capital of $201,856 6 reals 4 grains *at the same rate of interest* (5 per cent), which was borrowed by the Spanish Government to meet its expenses. The interest on this amount was also paid until the year 1812, but not afterwards, and the accrued interest down to February, 1842, amounted to $294,434 2 reals 5 granos. (Inventory above cited.) These interests yielded no annual income either.

The third item of credits against the public treasury is $162,618 3 reals 3 grains which was acknowledged by the "*Tribunal of the Consulate*" at 6 per cent per annum since the year 1810, and which had remained a burden upon the public treasury. Two hundred and six thousand five hundred and twenty-one dollars 2 reals 11 grains were owed as back interest. Neither did these interests produce any annual income.

Thirty-four thousand eight hundred and forty-two dollars 4 reals were also owed as interest upon two other debts.

There was also a debt of $68,160, another for $7,000, another for $3,000, and an acknowledgment for $15,973 5 reals, which bore no interest and consequently produced no annual income.

If, by the decree of October 24, 1842, the Government of Mexico only held itself responsible to the Pious Fund of California for the amount of 6 per cent per annum on the total produced by the sale of the estates and other properties belonging to said fund (its assets being excluded), the basis for the value of the property being represented by 6 per cent of *its annual income;* if, moreover, supposing said assets to be included, their unpaid interests did not produce any *annual income;* and, finally, if far from there being any proof that such cred-

its were really sold, it appears that in April, 1845, they were ordered to be returned to the Bishop of California, they ought not to be included in the capital whose interests are to be divided by virtue of the decree of 1842.

This does not mean to say that, supposing that the right of the claimants to a part of the properties of the fund of the missions may be acknowledged, they are not to have a right also to part of the already mentioned assets; but only that the division of the latter can not be made in conformity with the above-mentioned decree.

By the decree of April 3, 1845, the credits and other properties not sold were to be returned to the bishop of California, and, with respect to those which were sold, it was agreed that Congress should make disposition afterwards. From the latter decree spring the rights which the bishop of the Californias could have enforced in 1848, and which his successors, the claimants, could later on have derived, since it was in force at the time Upper California was separated from Mexico.

They could have demanded the evidences of debt and that there be turned over to them the portion due them of the proceeds of the property sold.

What else could they expect that the Mexican Congress would decree concerning such property?

How could it be believed that the Government of Mexico would constitute itself a perpetual tributary (*tributario*) of a foreign church?

It would have preferred, without doubt, to make any sacrifice in order to free itself at once from such a burden, even if it had considered it just.

But this it could not be under any aspect, since by it it would be obliged to pay a part of its public debt or its interest in preference to the rest.

The most advantageous settlement that the bishops of California could have made with the Government of Mexico would have been that the latter should turn over to them a part of the proceeds of the properties of the Pious Fund sold in conformity with the decree of October, 1842, and the evidences of public debt which belonged to them proportionally.

If Upper California had continued to belong to Mexico after 1848, and only by reason of local contingencies the jurisdiction of its bishop had been limited to that region, he could not, in strict justice, have demanded of the Government of Mexico more than the delivery of the part proceeds of the properties sold of the fund of the missions which it was his right to administer, and the evidences of public debt proportional to it.

The greater part, almost the whole, of that debt was contracted by the Spanish Government, and the Government of Mexico has only been responsible for its payment as successor thereto.

It might be contended that the Government of the United States, having succeeded to that of Mexico in the rights and obligations which the latter derived from Spain with respect to Upper California, should to-day be responsible for said indebtedness. But even if it were not so, evidently neither the Government of Mexico nor that of the United States has intended to submit to this commission claims for the collection of the public debt.

The interposition of these Governments in favor of their respective citizens is for the double object of repairing the *injuries* done by the

authorities and suffered by said citizens, and to effect a complete, perfect, and final settlement of every claim which might proceed from transactions of a date prior to the exchange of ratifications of the convention of July 4, 1868 (articles 1 and 5).

The undersigned sincerely believes that the claimants in this case can not complain of an *injury* done to them by the Government of Mexico from the 2d of February of 1848 to February 1, 1869, because they never notified it of the rights which they allege before this Commission.

If at any time (as the umpire seems inclined to believe, bearing in mind the position and character of him who alleges it, who is the bishop of San Francisco) he demanded from the Mexican Government the payment of the interest or the capital of the Pious Fund, and said Government replied that it could not grant such petition; the umpire also recognizes that it is not possible to form any judgment on the subject because of the absolute lack of documentary evidence.

But since, for reasons not understood by the undersigned, this case is considered as one of *injury* and coming, therefore, within the scope of the convention of July 4, 1868, at least it seems that in conformity with its spirit, the case should form the basis for a complete, equitable, perfect, and final settlement.

If the interested parties had taken the proper steps for this settlement, through the mediation of the Government of the United States, it is very probable that it would not have been relatively more onerous for Mexico than that reached by it with the Government of Spain concerning the Philippine fund of December 7, 1844, and which the claimants have cited in support of their pretensions.

The want of diligence on the part of the interested parties, which ought to be prejudicial to no one more than to themselves, increases to-day the burden of the depleted Mexican treasury; but, at least, the the settlement of this debt ought to be reduced to reasonable bounds and have a definite character.

Several of the donations which helped to form the Pious Fund were especially intended for the missions of Lower California, and the undersigned will present in evidence the deeds relating thereto, which he has just received from his Government.

If formerly no observations were made nor evidence presented by the defense concerning the amount claimed in this case, it was not because the Government defendant acknowledges such an amount, but because the question as to whether this case was by its nature one proper for the consideration of this commission was previously to be determined.

How was it possible, for instance, that said Government could acknowledge its responsibility for bad debts of individuals to the Pious Fund and to the payment of interest at 6 per cent in lieu of interest at 5 per cent on debts contracted by the Spanish Government?

How in justice could it be claimed that the fund, having lost the lawsuit which it conducted with respect to the Ciénega del Pastor, said Government should make good what, without the least neglect on its part, was lost to the fund on that account?

And notwithstanding all this, account has been taken of it in the claim.

No; the Mexican Government hoped that this case would be decided to be outside the jurisdiction of the commission, and for this reason

had refrained from disputing the statement of amounts made by the claimants.

In deciding the case of Edgar Keller (No. 95) the claimant was invited to present proofs which he had omitted with respect to the true amount of his claim. Why, then, should the right be denied the Mexican Government, in this case, to take part in the liquidating of a debt for which it did not believe itself obliged to answer before this commission?

On account of the foregoing, the undersigned considers that the equitable and just basis for the division of the Pious Fund of the Missions, which the bishops of Upper California have demanded before the commission, would be to deduct that which was especially designed for Lower California; to estimate the cash values of the estates and other properties, sold in conformity with the decree of October 24, 1842; and that the Government of Mexico pay the portion of this sum corresponding to Upper California and interests from said date to the time of final settlement.

A correct estimate of the available assets of the fund in February, 1842—that is to say, a few months before the above-mentioned decree—seems to be the following:

Value corresponding to the annual rent of $2,625 of houses Nos. 11 and 12 Vergara street	$43,750	
Id. corresponding to the rent of $2,000 of the hacienda de Ibarra	33,333	
Id. corresponding to $12,705, for the rent of the three estates leased to Señor Belaunzaran	211,750	
		$288,833
Capital for which the hacienda Sta. Lugarda and its annexes were mortgaged		42,000
Id. for which the hacienda Arroyozarco was mortgaged		40,000
		370,833

If half of this capital were to be applied to Upper California, its share would be $185,416.50.

As regards the assets of the fund represented by debts against private individuals, it is not conceivable how the Mexican Government could be held responsible for them.

In no way would it be just to exact from it the payment of those which were not recoverable, as according to the inventory of Sr. Ramirez most of them were, except the debt of $13,997, 4 reals, owed by Sr. Vertiz.

Adding, therefore, half of this amount to the share assigned to Upper California, the total would be $199,414.

This sum, with interest at 6 per cent per annum since October 24, 1842, would be the most that the Government of Mexico should be obliged to pay to the bishops, plaintiffs, as a final settlement.

With respect to the credits of the fund against the public treasury prior to that date, the most that could be done would be to grant the claimants the right to half of said credits, so that they might take steps for their recovery just as any other creditors of the treasury of Mexico.

The undersigned respectfully asks of the umpire that, being willing to open this case for a new examination under the points of view indicated, he permit him to enlarge upon the reasons which demand a modification of the decision.

ELEUTO. AVILA.

JANUARY 28, 1876.

[Translation.]

Thadeus Amat and Others *v.* Mexico. No. 493.

ARGUMENT FOR A REHEARING.

§ 1. While petitioning for a rehearing, on the 29th of January last, of the present case by the commissioners, the undersigned offered to develop the grounds for his motion.

§ 2. Hoping that the umpire, upon completing the difficult task which he has with such good will endeavored to fulfill, will not refuse to correct the errors into which he may have fallen, the undersigned asks him to consent to devote a few moments to the perusal of this document; and in case he finds in it anything which merits his attention, he will not deny the Government of Mexico the revision which it solicits, nor permit it to suffer greater burdens than those which in justice and equity, and in accordance with the convention of July 4, 1868, it must bear.

§ 3. The points to which the undersigned especially desires to call the umpire's attention are the following:

I.

The Government of Mexico did not do the claimants any injury by failing to recognize in them a right which, if they had, they did not try to enforce at the proper time and in the manner and with the diligence necessary.

II.

By the decree of October 24, 1842, the Government of Mexico did not obligate itself to pay 6 per cent on the *nominal* value of the properties belonging to the Pious Fund of the Missions of the Californias, but only upon the total sum *produced* from the sales of the estates and other properties which might be made by virtue of said decree, estimating their value "*by the capital represented by its annual product capitalized at 6 per cent.*"

III.

By the later decree of April 3, 1845, the assets and other properties belonging to the Pious Fund were ordered to be returned to the bishop of California and his successors, further providing that those which remained unsold should immediately be turned over to him in order that he might administer and employ them to their proper ends according to the law of September 29, 1836, which law had been repealed in this respect by the decree of February 8, 1842.

IV.

If the claim submitted by virtue of the convention of July 4, 1868—that is to say, the one presented within the time designated and in the way of a "complete, perfect, and final settlement"—is to be decided, it ought to be decided upon the right of the church not with respect to the proceeds or income of the fund, but to the fund itself, to *the possession of which the representatives of said* church claimed to have a right, and should any part of the properties of the fund be adjudged to them it ought to be in the nature of a final settlement.

V.

The commission can not decide with respect to the credits of the fund against the public treasury of Mexico contracted as loans and before the bishop of the Californias was deprived of the administration of said fund.

I.

§ 4. This argument would seem out of place were it to demonstrate that the fund here treated of never did by any exclusive right belong to the Catholic Church of the Californias, nor that the Government of Mexico ought to have considered itself under obligation to devote its entire value, or a part of it, or a part of its proceeds, to the benefit of the inhabitants of a region which at that time did not belong to said Republic; but, at least, there is one thing that no one will undertake to deny, and that is that neither the right which the claimants seek to enforce before this commission, nor that which it has conceded them, has ever been able to be considered as *clear, evident, and unquestionable.*

§ 5. Because, who can maintain that the archbishop and bishops of Upper California ought to receive from the Government of Mexico the whole of the fund of the missions and its proceeds which were not delivered to Bishop Diego, which was the claimant's allegation in 1859 and in March, 1870?

§ 6. Nor how could the following proposition be held as an indubitable fact since the 30th of May, 1848?

> The Catholic Church of Upper California has a right to one-half the interest at 6 per cent on the total nominal value of the properties, debts, and interest not paid to the fund of the missions on February 28, 1848.

§ 7. Before the American commissioner had for the first time given expression to this view, absolutely no one had ever conceived such an idea. The claimants themselves said, in July, 1859 (See No. C), that they believed that the Mexican Government was indebted to them in not less than *the total value of the Pious Fund;* on the 30th of March, 1870, they alleged that "they had a just claim for a large amount of money, to wit, for three million dollars, and that they had a right to the *possession of the whole fund*" (No A), and still later, on December 28 of that year, the claimants so expressed themselves in their memorial:

> Whatever be the method of apportionment adopted, the share corresponding to the Catholic Church of Upper California *could not be less than* seven-tenths of the whole.

§ 8. And, nevertheless, the umpire has decided that "there can be little doubt that Lower California needs the beneficial assistance of the Pious Fund *as much as or more* than Upper California, and that an equal division of the interest seems to be most just."

§ 9. The right alleged before the commission being, therefore, so doubtful that not even the claimants themselves could define it, how can blame be attached to the Government of Mexico because it did not recognize such right of its own motion?

§ 10. Even in treating of an obligation to deliver an *ascertained* sum to an *ascertained* person, if he does not take steps for its recovery, its

simple omission can not properly be said to be an *injury*. How, therefore, can the omission to pay over an *unascertained* quantity to a person or persons equally *undetermined* be considered such?

§ 11. And if the difference existing between the obligations of private persons, whose individuality never changes, and those of governments, which change form, is taken into consideration, then such charge would have still less foundation.

§ 12. In order that this might be so, it would be necessary that at the time Upper California was separated from Mexico the Government of that Republic was *actually* paying to the Catholic Church of that part of the country a sum specially designed for its use, and that there was no reason whatever for doubting that it ought to continue paying said sum after the separation; and even in that case it could be said only with excessive hardship that it was bound to make such payment without anyone soliciting it, because that this might be so, it would have to commence by inquiring who the person was, legally entitled to receive it, and even to incur the expense necessary for the remission of the sum of which it might consist.

§ 13. But since for six years before Upper California ceased to belong to Mexico the fund of the missions had ceased to exist in fact and no sum was paid to anyone on account of it; since there was no law which obliged the Government of Mexico to pay any *determined* or *undetermined* sum to the bishops of the Californias, and much less any provision or agreement to set aside a determined portion for Upper California, and since, finally, such bishop did not exist, nor did any person assert the alleged right of that church, it is more than a hardship—it is a veritable injustice—to charge the Mexican Government with the violation of rights. Certainly no government in the world can be charged with violation of rights under such circumstances.

§ 14. It has been said on the part of the claimants that the true scope of the convention of July 4, 1868, was to submit to the commission "all the claims presented, etc., for damages, either to their persons or rights of property, sustained since the date of the treaty of Guadalupe-Hidalgo, proceeding from acts or wrongful *omissions* of the authorities, etc."

§ 15. But what is here contended would add in a very arbitrary manner to the text of the convention, which does not speak of damages, but of *injuries*, not of omissions, but only of *acts* (*injuries made, etc.*). Everybody knows, and the claimants themselves have said in some of their arguments, that there can be damage without injury, "damnum absquè injuria," and this commission has decided in a great number of cases that although the interested parties had suffered damages or could have rights against the government sued, no injury had been done them, and their complaints could not, therefore, in accordance with the spirit of the convention, be considered.

§ 16. With respect to omissions, even in the text improvised by the claimants it is necessary, in order that they may be a proper subject for the consideration of this tribunal, that they constitute a notorious wrong—that is, that they imply the violation of an unquestionable right or the failure to comply with a clear and well-defined obligation, or that they consist in positive acts, as would have been in case a petition *duly presented* requesting the acknowledgment of such rights herein considered had been denied.

§ 17. All that there is in the evidence upon this point is the state-

ment made by one of the claimants, the archbishop of San Francisco, to the effect that "when he was in Mexico in 1852 he asked the Government to turn over to him the amounts or property of the Pious Fund, and having received no reply he repeated his request until he was officially notified that the Government could not accede to it;" that is, to a vague petition concerning sums of money and property.

§ 18. Without questioning the truth of said statement, the undersigned can not do less than designate the action of Mr. Alemany as informal, because neither the demand of which there is mention nor the reply made to it seems to have been in writing, as has been observed by the umpire, and because in July, 1859, it was told the secretary of state, on behalf of the claimants, that taking into consideration the difficulties in which the Government of Mexico found itself, there had been a delay in making the application to it for payment (No. "G" should be "C"); which proves that they did not consider the petition before referred to as formal, if, in effect, any was made by the person so affirming, and who, no matter how respectable he may be, is undoubtedly interested in the claim.

§ 19. It has also been alleged that even if some claims have not been covered by the convention they ought to be considered and decided by this tribunal, because otherwise it would result that the Government of Mexico would remain absolutely discharged of all the claims of whatever class, while satisfaction could only be had of those proceeding from *injuries* to person or property.

§ 20. This observation refers to the article by which the two Governments agreed to consider the *result* of the proceedings of this commission as a complete, perfect, and final settlement of every claim presented or not presented proceeding out of transactions of a date prior to the date of the exchange of ratifications.

§ 21. But this does not mean that every claim should be specially allowed or disallowed, since in the last part of article 3 it was provided that the commissioners—or in case of disagreement, the umpire—should decide whether a claim had been duly made, presented, and submitted to the commission.

§ 22. In the exercise of this power the commissioners and the umpire have omitted to consider several claims, not because they denied to the interested parties the rights which they sought to enforce, but leaving the rights which they had intact, and simply declaring that in such cases there was no injury to repair.

§ 23. Thus, for example, in claims arising out of forced loans which were not considered by the present umpire because such loans imposed upon American citizens in Mexico did not constitute an injury, surely the right which they might have had to be repaid the value of such loans has not been denied to the claimants.

§ 24. In the decision rendered in the case of Treadwell & Co., No. 149, the umpire has thus expressed himself:

> The umpire can not doubt that, if well founded, the claims will be finally paid by the Mexican Government, to which, the claimants state in their memorial, they have never been finally presented.

§ 25. The same could have been declared in this case, and the undersigned asks that it be so declared, without depriving the claimants of the right, which they may have, to a share of the Pious Fund of the Missions.

II.

§ 26. But if the umpire should find in this case any *injury* to be repaired, done by the Government of Mexico since February 2 or May 30, 1848, or shall he believe that the division requested by the claimants ought to be made by this commission, he ought very carefully to investigate whether on the above-mentioned dates the Government of Mexico was under any obligation to the Catholic Church of Upper California.

§ 27. The last laws relative to said fund were, that of February 8, 1842, that of October 24, of the same year, and that of April 3, 1845.

By the first of these the care and administration of the fund were turned over to the Government, as they had been until the close of 1836, when they were intrusted to the bishop of the Californias by the second; the sale of the productive properties of the fund was ordered so as to avoid the expense of administration, and by the third the properties which had not been sold were ordered to be returned to said bishop, and the right to dispose of those sold was reserved to Congress.

§ 28. With respect to the decree of October 24, 1842, the following points should be examined:

A. What were the properties belonging to the Pious Fund of the Californias ordered sold by its second article besides the estates?

B. What was the price assigned to the estates and other properties which were to be sold?

C. What was the total amount upon which the obligation to pay interest at 6 per cent was imposed upon the public treasury?

A and B.

§ 29. The properties of the fund consisted of the following:
Country real estate.
Money invested on mortgages on country real estate.
A "censo enfiteútico" upon city real estate.
Debts of private parties in favor of the fund.
Debts against the national treasury.

§ 30. The objects for which the decree herein referred to was made were undoubtedly two: First, that the fund should produce an income without deduction on account of expense for administration or any other; and, second, to enable the Government to obtain advantages with the proceeds of the sale of such properties.

§ 31. The first of these objects is textually set forth in the preamble of the decree; the second is so obvious that no one can place it in doubt.

§ 32. When by virtue of the decree of February 8, 1842, General Valencia, who had been appointed administrator of the properties of the fund, demanded the titles of the property, Señor Ramirez, who then administered them as attorney in fact of the bishop of the Californias, said to him under date of March 4 of that year:

I hope that you will tell me, for the sake of the fund, what means you have adopted to secure your contracts, when you yourself did not have any, and on account of which a great loss will result to it, because I must in any event *obtain the money necessary* for the sacred purpose to which the Government applies it, and

which was the will of the testator, if interpreted with the prudence and patriotism necessitated by the actual condition of affairs. (No. 15, Exhibit "A," pp. 19 and 20.)

It seems that the purpose to which this letter referred was the defense of the integrity of the national territory.

§ 33. Therefore, if the Government, in order to obtain the resources which it needed, realized upon the saleable properties of the fund less than their real value, it does not seem just to burden the fund with the consequent loss; but neither would it be just to hold the Government responsible for properties from which it was not able to derive any benefit because they had no cash value.

§ 34. Even the American commissioner has recognized this principle of justice and equity in his opinion in favor of the claimants.

"It will be seen," says he, "that I take no account of the estate of Ciénega del Pastor *because* it was attached and held by Sr. Jauregui, *and there is no evidence in this record that the Government ever obtained the property or derived any profit from it.*"

§ 35. Thus, therefore, the decree of October 24 ought to be interpreted in such a manner that by it the Pious Fund should not suffer any loss nor that the Mexican treasury should feel any burden. The properties of that fund ought to be worth the same after the decree as they were before it—no more nor less.

§ 36. In order that this might be so, the same decree adopted the most just method which could be adopted to determine the cash value of these properties.

§ 37. Considering that 6 per cent would have to be paid upon such value, this value could not be other than what the properties represented by their proceeds capitalized at 6 per cent. For example, the estates of Santa Lugarda and its annexes were mortgaged to the fund for $42,000 at 5 per cent per annum. If the Government should have been obliged to pay 6 per cent upon the same capital, there would have resulted a gain to the fund and an unjust loss to the treasury of $420 per annum.

§ 38. But in conformity with the decree it could not be so, because the two following operations would have to take place: First, $42,000 at 5 per cent produce $2,100 annually; second, $2,100 interest at 6 per cent represents $35,000. Result: The public treasury would acknowledge an indebtedness in favor of the fund of $35,000 at 6 per cent, in lieu of $42,000 at 5 per cent, the fund receiving, therefore, the same amount as before, no more, no less.[a]

§ 39. For the computation of values upon this basis, established by this decree, there is a necessary condition that the properties to which it refers should have an annual income, because the only thing which the Government promised to do was to see to it that these proceed, were not less than those which the fund received previous to the decrees *and not to give it those which it did not have.*

§ 40. The advantage for the fund was to consist in not incurring any expense of administration, and for the Government in making use of the proceeds of the sale for its momentary necessities.

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[a] In the brief history of the fund, presented by the claimants on page 5, the following is said: "On October 24 another decree was issued by which it was ordered that the properties belonging to said fund should be sold for the sum which their income represents (capitalized at the rate of 6 per cent); that the products of this sale be incorporated into the public treasury, and that an obligation to pay an interest of 6 per cent upon the above-mentioned capital be recognized on the part of the Government."

C.

§ 41. Therefore, it follows that in order to collect the interest accrued by virtue of the decree of October, 1842, the claimants ought to have proved, not what the nominal value of the properties of the fund was, but *what was the total produced* by the sales made in conformity with said decree.

§ 42. When its 3rd article pledged the revenue from tobacco "*for the payment of the interest corresponding to the capital of the Pious Fund of the Californias,*" it undoubtedly referred to the capital which would bring in an income in *accordance with said decree*, that is to say, to the capital produced from the sales of the properties which at the time produced annual incomes, estimating its value by that which corresponds to said products capitalized at 6 per cent.

§ 43. To interpret that article without relation to the preceding one is contrary to the principles of equity, which does not permit one party to better his condition to the detriment of the other. "Natura non partitur aliquem locupletio rem fieri cum alterius jactura." (L. 206, de Reg. jus.)

§ 44. To condemn the Government of Mexico to pay interest on nominal values and even upon doubtful assets, which had no value and which produced nothing at the time in question, is clearly to make the fund of the missions richer than it then was at an enormous cost to said Government.

§ 45. A court of equity, such as is this commission, can not proceed against the fundamental principle of natural equity. A learned judge can not interpret a part of an instrument without reference to its object and to the fundamental idea of its text.

§ 46. The first steps toward ascertaining the obligations contracted by the Government of Mexico in virtue of the aforesaid decree must be, therefore, to determine the cash value of the properties belonging to the fund of the missions of the Californias *by the amount represented by their annual proceeds capitalized at 6 per cent.*

§ 47. In accordance with the detailed inventory delivered by Señor Ramirez, attorney for the bishop of Californias, to the administrator of the fund on the 28th of February, 1842, in consequence of the decree of the 8th of the same month and year (eight months before the 24th of October), the following settlement may be proposed:

PROPERTY HELD IN EMPHYTEUSIS.

	Interest.	Capital.
The fund received in this manner by the disposition made of the houses Nos. 11 and 12 Vergara street and of an outbuilding in the Betlemitas alley, $2,625 annually, which represents, at 6 per cent, $43,750	$2,625.00	$43,750.00

CITY PROPERTIES.[a]

	Interest.	Capital.
The first mentioned in the inventory is the estate Ciénaga del Pastor, whose value is not to be taken into account for the reason set forth in the opinion of the American Commission. (§ 34.)		
The estate San Pedro de Ybarra was rented for $2,000 annually, which represents, at 6 per cent, a capital of $33,333⅓	$2,000.00	$33,333.33⅓

[a] This undoubtedly should be country properties.—Translator.

	Interest.	Capital.
The estates Custodio, San Agustin de los Amoles, and outlying properties yielded $12,705, which, at 6 per cent, represents a capital of $211,750	$12,705.00	$211,750.00
Secured by mortgage.—The estate Sta. Lugarda was mortgaged to the fund for $42,000 at 5 per cent, the annual proceed of which, $2,100, represents, at 6 per cent, a capital of $35,000	2,100.00	35,000.00
	$19,430.00	$323,833.33⅓

§ 48. The Pious Fund owned no other properties besides those mentioned which actually yielded an annual income, and, therefore, according to the decree of October 24, 1842, the public treasury of Mexico only acknowledged itself indebted to said fund in the sum of $323,833.33⅓,[a] which at an interest of 6 per cent would produce annually $19,430.

§ 49. Therefore, according to this decree, there corresponds to the church claimant an annuity of but $9,715.

§ 50. But it will be said that no matter how little the claims of the Pious Fund against private individuals may be worth, it was not just that the fund be deprived of their value, whatever it might be, and that they be incorporated into the national treasury of Mexico, the former losing forever all right to receive any revenue therefrom.

§ 51. Certainly it was not the object of the decree to confiscate the assets of the Pious Fund; and inasmuch as equity does not permit of the improvement of the condition of this fund, neither does it permit of its deterioration.

§ 52. It is necessary therefore, in order to proceed justly and equitably, to find a means to avoid both of these extremes, which are equally opposed to natural equity.

§ 53. It would be as unjust to require of the Mexican Government the payment of interest upon capitals which were not yielding any when they were incorporated into the national treasury and upon debts which could not be collected as it would be to declare these capitals and these debts totally lost to the fund.

§ 54. In order to proceed justly it is necessary to examine one by one the sums incorporated into the treasury of Mexico, bearing in mind that the meaning of the decree of incorporation was neither to decrease nor increase the amount of the fund, but simply to do away with the expense of administration and to afford resources to the Government.

§ 55. If the object of the decree had been to give to the fund more than it had had, to guarantee all debts in its favor, however irrecoverable they might be, and to tax the national treasury with the payment of interest upon amounts which previously yielded nothing, and at a greater rate than that apportioned to some of the capitals, the decree would have been enacted simply in these terms:

All properties and assets of the Pious Fund of the Californias shall be incorporated into the national treasury, which will recognize an indebtedness at 6 per cent on the *entire amount* which they now represent.

§ 56. But since, instead of this, the decree directed that the acknowl-

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[a] According to the report of the Secretary of the Treasury for the year 1843, presented by the claimants, up to December 31 of said year there had been paid into the national treasury on behalf of the Pious Fund of the Californias the sum of $323,274.51; that is to say, very nearly the value of the productive properties above expressed, with the difference of less than $558.82.

edgment of an indebtedness at 6 per cent would be only on the amount produced by the sales of real estate and other properties for the sum which their annual proceeds represent at 6 per cent, there is no doubt that there was no intention of taxing the public treasury with the payment of interest upon amounts which had not previously yielded any, nor with an increase of the rate of interest on amounts whose proceeds had been less than 6 per cent.

§ 57. What, then, will be asked, was the object of article 3 of the decree?

It was to insure the payment of interests—referred to in article 2—on the properties which constituted the capital of the fund, in conformity with that article—of the properties whose administration was a source of expense to the fund, but which produced regular revenues; because the Mexican treasury was not in so flourishing a condition that it could not only insure the fund against losses, but increase it at its own expense with proceeds which formerly the properties had not yielded to it nor would subsequently yield to the treasury.

§ 58. Consider, with an unprejudiced mind, how absurd a different interpretation of said article would be.

§ 59. "The revenue from the tobacco," it says, "is hereby specially pledged for the payment of the interest on the *capital of said* fund of Californias, and the director of the office (tobacco revenues) will deliver the *necessary amount* for the fulfillment of the objects for which said fund is intended, without any deduction for costs of administration or for other purposes."

§ 60. Now, then, why should it be construed that the interest *corresponding to the capital of the fund* should be 6 per cent of the entire nominal value of the principal and *interests* and assets of the fund?

§ 61. Does not the decree immediately before say that only that sum, which its annual proceeds capitalized at 6 per cent would represent, would be acknowledged at 6 per cent as the capital of the fund?

Therefore by interests corresponding to the *capital* of the fund is to be understood those which *correspond* to 6 per cent on the capital which yielded annual proceeds, said capital being the only one whose administration occasioned expense.

Any other interpretation is arbitrary, because it has no foundation either in the letter or in the spirit of the decree, and is contrary to natural equity because it would enrich the fund with serious loss to the Mexican treasury.

§ 62. The most that can be said with respect to the assets of the fund is that the state of those incorporated into the national treasury will be *neither improved nor injured* from what it was prior to their incorporation.

Let us see, now, what was this condition.

§ 63. The undersigned, in order that this document may be no longer than necessary, has deemed it advisable to limit his remarks upon these assets to those considered as good by the American commissioner, whose figures the umpire has adopted.

§ 64. After repeated efforts to solve the problem concerning which of these assets are the ones which are considered to amount to the sum of $72,122, or the ones which have been disallowed to the extent of $46,617, the undersigned has discovered that there has been an error in the arithmetical operations employed.

§ 65. These amounts could be no others than the following:

Debts of private individuals to the fund taken into consideration.

1. Mortgage upon the estate Santa Lugarda		$42,000.00
2. Dn. Luis Vazquez:		
Capital	$3,000.00	
Interest	2,275.00	
		5,275.00
3. Administratrix of Sra. Huesca		9,850.00
4. Dn. Juan de Dios Navarro		13,000.00
5. Admx. of Sr. Velez Escalante		33,782.62½
6. Daughters of General Cosio		325.00
7. Dn. Manuel Prieto		316 00
8. Da. Agustina Montenegro		193.00
9. Bondsmen of Dn. Ramon Vertiz		13,997.00
Total		118,738.62½

In order to facilitate the calculation, the *five reales*, or 62½ cents, of the fifth item were taken as a dollar, and by this means the sum obtained was $118,739.

§ 66. The following were deducted as bad debts:

The fourth	$13,000
The fifth	33,783
The sixth	325
The seventh	316
And the eighth	193
Total	47,617

The following were considered as good:

The first	$42,000
The second	5,275
The third	9,850
And the ninth	13,997
Total	71,122

In this manner, then, was charged an additional thousand dollars to the good accounts, failing, however, to deduct an equal amount from the bad ones.[a]

§ 67. The first of these accounts qualified as good has already been considered by the undersigned among the properties which actually yielded annual proceeds; not, however, at its nominal value, but at the *value of the capital* represented by its proceeds capitalized at 6 per cent, in accordance with the express provision of the decree of the 24th of October, 1842. (See §§ 37 and 38.)

§ 68. The second account considered as good was found, according to the inventory of Señor Ramirez, to be in the following condition:

Don Luis Vazquez, upon his estate Minyo, situated in the department of Yxmiquilpan, which was sold at public auction in the year 1826, acknowledges in favor of the Missions $3,000 *at 5 per cent*, to which amount the $20,000 with which it was encumbered in 1872 (I think this should be 1827, S. Doyle) had been reduced. *It appears*, from what can be gathered, that the interest was paid only the first year, and that accrued from 1827 to February 28, 1842, *is still due*, amounting to $2,275.

§ 69. That is to say that this capital remained sixteen years in an

[a] This arithmetical error implies a charge of $1,260 upon Mexico from the point of view of the decision rendered; that is to say, for interest at 6 per cent for twenty-one years.

unproductive condition, which obliged Señor Ramirez to express himself in the résumé of his inventory in these terms:

Inasmuch as no agreement has been reached for the payment of the interests upon the capital secured by a mortgage of the estate Minyo, *no mention is here made of its proceeds.*

§ 70. How then could such a debt be considered good? It would be necessary to presume that as soon as it became incorporated into the national treasury with the right to collect it, its entire amount was paid in and commenced to produce a greater income than it had previously yielded, inasmuch as the capital having been invested *at 5 per cent* a claim is now brought for interest *at 6 per cent* upon the capital and the unpaid interests.

What proof is there that the Mexican Government ever received one cent from such a debt? (§ 34.)

§ 72. If in each of the sixteen years elapsed the debtor was unable to pay the $150, how could he be expected to pay the $5,275 in cash?

§ 73. Supposing that the title or right to collect this debt had not been granted to the public treasury, what can reasonably be supposed were the fund's prospects of collecting it?

Certainly nothing for interest in arrears, and at the most, after great expense, the payment of the interest as it falls due.

§ 74. Having considered these circumstances, if this debt is to be taken into account, its cash value should be estimated at half of its total amount, that is to say, $1,500.

§ 75. If the Government is to be held responsible for all the capital, it should not be made liable for the interest in arrears, because the interest owed was as bad a debt as any of those so qualified by the American commissioner and by the umpire; no doubt worse than the debt owed by Dn. Manuel Prieto, who had only paid $100 on account.

§ 76. Now, then, since the revenue from this capital, bearing 5 per cent, would be $150 per annum and as this amount corresponds at 6 per cent to a capital of $2,500, only the latter sum can be charged to the Government of Mexico, according to the decree of October, 1842, and in conformity with natural equity. (See §§ 37 et passim.)

§ 77. The third debt considered as good is mentioned by Señor Ramirez in these terms:

Señora Doña Dolores Reyes, resident of Puebla, who as testatrix represents Doña Petra Garcia de Huesca, owes $9,850 for *interest in arrears* on the $42,000 secured by a mortgage on the Santa Lugarda estate and its annexes before their sale to Sr. Barrientos. *Many attempts have been made to collect this debt, without result,* and therefore an agent was to have been appointed to make this collection.

§ 78. That is to say, that this was a debt not acknowledged, and not then secured by mortgage (because the estate had already passed out of the control of the debtor), and against the estate of a widow, represented by another woman.

§ 79. What were the probabilities of obtaining the payment of this debt? There were none, or at least they were remote.

§ 80. And since it has not been proved on the part of the claimants that the Mexican Government has received one cent of this debt, could it be just and equitable to charge the *entire* amount to said Government?

No matter how little one reflects upon it, one can not answer this question in the affirmative. (See §§ 33 and 34.)

§ 81. It would have been a veritable fortune to the fund to have recovered, after a costly and lengthy litigation, one-third or one-fourth of said debt.

§ 82. If, then, any conjectural cash value is to be given to this debt, it can not be more than $4,525, it being worthy of notice that this debt represents the interest at 5 per cent since the capital of $42,000 was invested in a mortgage at that rate upon the Sta. Lugarda estate.

§ 83. With regard to the last debt held as good, the undersigned will only remark that although in the inventory of Sr. Ramirez it is stated that that debt had been acknowledged twenty days previously (February 8, 1842), it does not mention when it had to be paid, nor that it will bear interest.

§ 84. As has been shown, the other debts of private individuals for which the Mexican Government can be held responsible, supposing the capital secured by a mortgage upon the estate Sta. Lugarda be in the situation and of the value in which it was considered by the undersigned (§ 47), are the following:

	Amounts.	Annual revenues.
Mortgage upon the estate Minyo	$2,500	$150.00
Debt of the executrix of Señora Huesca	4,925	295.50
Id of Dn. Vertiz	13,997	839.82
	21,422	1,285.32

§ 85. The undersigned has observed that the American commissioner and the umpire did not take into account the debt charged to the Messrs. Revilla, mentioned in the inventory of Señor Ramirez in these terms:

The firm of the Messrs. Revilla, for the balance of the estate Arroyozarco, which it bought from the Spanish Government, acknowledges an indebtedness of $40,000, at 6 per cent annually. *It owes the interest accrued up to the 28th of February of the current year, $26,770 3 reals 1 grano.* Suit was brought for this amount by the abolished *junta*, and a receiver appointed, through which, I am informed, resulted serious losses to both the debtors and to the fund, wherefore it was deemed advisable to divide it into installments, and to accept payment of it in small amounts, *in hope of a suitable opportunity presenting itself for better securing the debt.*

§ 86. This signifies that the firm, the debtor, was virtually in a state of bankruptcy, that it owed back interest covering a period of more than eleven years, and that it had been granted an indefinite extension in which to meet its payments.

Under these circumstances the debt was absolutely worthless.

§ 87. Did the opportunity which was awaited ever arrive for improving it? Could anything be obtained for it? Was it secured by mortgage? Nothing of this sort appears, and for these reasons the undersigned is compelled to believe that this debt was not taken into account.

§ 88. But if this debt had been allowed, it surely would not have been for the whole of its nominal value, because no one could estimate what it might bring. The most that could possibly be obtained for a debt of this kind would be to collect half of the capital and nothing for the back interest; that is to say, $20,000.

§ 89. But, on the other hand, the liabilities of the fund, which amounted to $32,350, have not been taken into account, and which the claimants themselves admitted ought to be deducted when they first presented their claim to the Government of the United States in July,

1859, until their last argument, dated January 1, 1875, prepared by Mr. John T. Doyle, who first made the claim of 1859. (Document No. 54).

§ 90. And as such discount has not been made without giving any reason for it, the undersigned believes that the amount of said liabilities has purposely been offset, with the greatest possible value of the asset chargeable against Señores Revilla. It is impossible that anyone would have knowingly acted against the well-known principle of law, "Bona intelliguntur deducto ære alieno." (L. 72, De jure dotale.)

§ 91. Let us proceed now to examine the debts against the public treasury prior to the 28th of February, 1842, date of the inventory of Señor Ramirez, although such debts were not offered for sale, nor could they be incorporated into the national treasury, as that same treasury was the debtor:

No. 1.

A capital of $20,000, which the public treasury acknowledged at *an annual interest of 5 per cent*, which was deposited in the "Caja de Consolidacion" *during the time* of the Spanish Government.

No. 2.

Another sum of $201,856 6 reals 4 grains, at the same rate of interest, which the *Spanish Government* took on *irregular* deposit to meet its urgent deficiencies, pledging its entire revenue for its payment.

No. 3.

Another sum of $162,618 3 reals 3 grains, which the "Tribunal del Consulado" of this city acknowledged at 6 per cent, with a lien upon the revenue from the tobacco since the year 1810, and which is at present chargeable against the public treasury, which is now responsible for the debts of said corporation. This sum was derived from the sale which was made of the estate Arroyozarco to Don Juan Angel and Don Antonio Revilla.

No. 4.

Another sum of $38,500, which the college of San Gregorio acknowledged at 3 per cent, in favor of the fund prior to the first expulsion of the Jesuits, and which is now recognized by the public treasury, as Don Antonio Ycara has informed me.

No. 5.

Another sum of $68,160, 3 reals, which in 1825 was deposited in the national mint (it having been ordered that the capital of the fund be so deposited) by Don José Yldefonso Gonzalez del Castillo, who administered these affairs. This amount he received from the Señores Revilla on account of the value of the estate Arroyozarco, which property was disposed of by Sr. Esteva, as is stated in the document from which I derived this information.

No. 6.

Another of $7,000, which, in consequence of an executive order of the supreme Government, that the Srs. Revillas should pay $20,000, their attorney, Don Francisco Barrera delivered on the 20th October, 1829, together with a promissory note against the German-Mexican Company.

No. 7.

Another sum of $3,000 borrowed from the fund, on promise of repayment, to cover the expenses mentioned in Article 5 of the law of September 19, 1836. (For the promulgation of the bulls of the bishop of California and for his transportation to the Episcopal See.)

No. 8.

A certificate of deposit for $15,973, 5 reals, payable whenever the cash shall be available in "the ten per cent fund," proceeding from the loan of $60,000 negotiated by the Supreme Government, which was secured by a mortgage upon the properties of the Californias.

§ 92. It appears, then, that the debts of the national treasury to the fund were the following:

	Capital.	Annual interest.
No. 1 at 5 per cent	$20,000.00	$1,000.00
No. 2 at 5 per cent	201,856.79	10,092.84
No. 3 at 6 per cent	162,618.40	9,757.10
No. 4 at 3 per cent	38,500.00	1,155.00
No. 5 without interest	68,160.37½	
No. 6 without interest	7,000.00	
No. 7 without interest	3,000.00	
No. 8 without interest	15,973.62½	
Total	517,109.19	22,004.94

§ 93. If the decree of October 24, 1842, had referred to these assets on ordering the sale of the properties of the fund, and if this sale had been possible in pursuance of the same decree, the interest to be paid after the issuance of the decree would have amounted to the same as before the issuance of said decree, except that instead of representing a capital of $422,975.19 at different rates of interest it would represent $366,749 at 6 per cent, which is the capital represented at this rate by the income of $22,004.94, namely:

	Capital.	Annual interest.
The asset of $20,000, which, acknowledged at 5 per cent, would produce $1,000 per annum, in accordance with the decree, should be estimated at $16,666.66, which is the capital represented by that income at 6 per cent	$16,666.66	$1,000.00
That of $201,856, 6 reals, 4 grains, also recognized at 5 per cent, would produce $10,092.84 per annum, and this income at the rate of 6 per cent corresponds to a capital of $168,214	168,214.00	10,092.84
That of $162,618.40, acknowledged at 6 per cent, would have remained, in accordance with the decree, at its integral value	162,618.40	9,757.10
That of $38,500, acknowledged at 3 per cent, should produce $1,155, and this annual yield at 6 per cent represents a capital of	19,250.00	1,155.00
Total assets which might be considered as included in the debt acknowledged at 6 per cent interest	366,749.06	
Total interest which these assets would produce after the issuance of this decree		22,004.94

§ 94. With regard to the amounts which were due for interest for a long time back, they would have been left, after the decree, in the same condition as they were before, without yielding interest, because neither did the decree require, nor is it reasonable to suppose that such was the intention of the legislator, since it was clearly stated that his aim was none other than that of economizing the expenses of administration of the fund and not to increase its income; and this was true to such an extent that in order to equalize the rate of interest on the capital that yielded an annual income it was ordered that the capital that earned less than 6 per cent should remain only of the value that would represent this same income estimated at 6 per cent.

§ 95. According to the inventory of Señor Ramirez, the following amounts were due for interest:

On asset No. 1	$29,166.66½
On asset No. 2	294,434.30
On asset No. 3	206,521.36
On asset No. 4	34,842.50
Total	[a]564,964.82½

Therefore the unpaid interest on the assets, which caused the same, amounted then to more than all the assets, including those which did not yield interest. (See § 92.)

§ 96. It should be borne in mind that Señor Ramirez's inventory was made, not by virtue of, and in relation to, the effects of the decree of October 24, 1842, but eight months before that decree was issued—on February 28th of that year—solely for the purpose of delivering the properties of which said gentleman, as attorney for the bishop of the Californias, was actually or virtually in possession, and in compliance with the decree of the 8th of the same month and year, which, article 6 of the decree of September 19, 1836, having been repealed, again charged the Government with the administration and employment of the Pious Fund of the Californias.

§ 97. So that on adding in said inventory the amount of the interest due to the assets upon which it had accrued, nothing else was done except to form a total of the amounts which the Government owed under both aspects, which might have been done at any other time.

§ 98. For instance, if after the decree of February 8, 1842, no other decree than that of April 3, 1845, had been issued, whereby it was ordered to return to the bishop of the Californias, and his successors, the administration of the Pious Fund, which had been taken from him by virtue of said decree, the account concerning the values of the public debt could have been none other than the following:

Capital	$517,109.19
Interest due up to February 28, 1842	564,964.82
Interest from that date to April 3, 1845	95,969.79
Total	1,178,043.80

§ 99. Because upon what ground could it be maintained that from the day on which the administration of the fund was taken from the bishop the securities of the public debt which before did not bear interest should begin to do so; and, further, that compound interest should commence to run on the amount of the accrued interest?

There certainly could have been no reason for such a decision, because the decree of February 8, 1842, did not authorize it.

And it is equally true that *it was not authorized* by the decree of October 24 of that same year.

Therefore, there is no reason for computing interest from the date thereof on capital that did not bear interest, nor upon interest accrued up to February 28, 1842.

§ 100. If the intention of the decree of October 24 had been to make so important an innovation, it would undoubtedly have been made in terms so clear that there would have been no room to entertain the least doubt about it.

§ 101. Because the burden that such an innovation would have imposed upon the depleted treasury of Mexico would reach annually the following amount:

Increase of 1 per cent on $20,000 capital, which bore interest at 5 per cent	$200.00
Increase of 1 per cent on the asset of $201,856.79, which bore interest at the same rate	2,018.56

[a] Adding this sum to the capital represented by the interest, $517,109.19, makes a total of $1,082,074, leaving a difference of $4, compared with the total stated in the inventory, due to an error by its author in calculation, he giving as a total of the amounts $206,521.36 and $162,618.41, $369,143.77 instead of $369,139.77.

Increase on the asset of $38,500, which bore interest at 3 per cent	$1,155.00
Increase to 6 per cent on the asset that did not bear interest (marked on the list as Nos. 5, 6, 7, and 8), amounting to $94,134	5,648.04
Increase to 6 per cent on $564,964.825, which was the amount of the interest accrued on the assets that bore interest	33,897.89
Annual amount of the burden	42,919.49

Is it reasonable to presume that *this new debt* should be imposed upon the Treasury without even expressing it in a clear manner in the text of the decree?

§ 102. And what is there in said decree which, though not explicit, may even reasonably be so construed?

There is certainly nothing in article 1; in article 2 there is *only* the obligation to pay interest at 6 per cent on the *total produced* from the sales of city and country real estate and other properties (it is understood that they were marketable), estimated by the capital which their *annual proceeds capitalized at 6 per cent* represent; that is to say, on the capital that yielded a yearly income, not upon that which was neither capital nor produced incomes; not upon the amount of the unpaid interest, nor of the assets which did not bear interest; and, finally, in the third article the pledge of the revenue of tobacco for the payment of the interest corresponding to the *capital* of said fund.

§ 103. If then, in the other two articles, it is not stated that the assets which before bore no interest should commence to draw interest, nor that the assets which before bore interest at 5 per cent and at 3 per cent should bear afterwards 6 per cent, nor that the amount of the accrued and unpaid interest should in future bear interest at 6 per cent, to declare that *all these provisions* were comprised in the words "to the payment of the interest *corresponding to the capital* of the said fund," is to interpret in the most arbitrary manner a phrase whose clear, obvious, and logical meaning is that the revenue from tobacco was pledged to the payment of the interest that should be paid to the fund by the public treasury, according to the provision immediately preceding.

§ 104. The agreement contracted by the Government of Mexico with respect to the fund in question being thus interpreted, let us see how it has been practically construed in the present case, and how it should be construed in justice and equity.

§ 105. The commissioner of the United States, in his decision, says:

> By the decree of October 24, 1842, the public treasury acknowledged an indebtedness to the Pious Fund of the Californias of 6 per cent per annum on the *total proceeds of the sales* and pledged the revenue from the tobacco for the payment of the *income*. This pledge was never kept, but the revenue from the tobacco was otherwise appropriated by the Government. Nevertheless, *there is an acknowledged indebtedness of 6 per cent on the capital of the fund, payable annually. This amounts to the sum of $86,161.98, and the first installment was due October 24, 1848.*

§ 106. There is in these words a true and an erroneous idea, which, consequently, caused an incorrect calculation.

It is true that by the decree of October 24, 1842, it was acknowledged that the national treasury would pay to the fund 6 per cent per annum *on the proceeds of the sales* that might be made by virtue of it, but it is *not true* that interest should be paid at this rate upon the total *nominal* value of the fund, but only upon the amount which the sales of country and city real estate and other properties that could be sold, and which *yielded revenues*, fixing the price at the sum which

the actual proceeds of such property capitalized at 6 per cent, would produce.

§ 107. Therefore, the foundation of the argument of the American commissioner should have been the following:

By the decree of October 24, 1842, the public treasury acknowledged an indebtedness to the Pious Fund of the Californias of 6 per cent per annum *on the proceeds of the sales of the property of the fund that produced revenues, these being estimated as if they represented capitals bearing 6 per cent interest*, or, in other words, *the Government agreed to pay to the fund as interest the same amount that the fund received before as* revenues of the property which constituted said fund.

In the second place, it should have determined what were the actual cash proceeds of the fund, and not what was its nominal value, and finally to designate only the amount of said proceeds as being the sum upon which the Government had to pay interest to the fund.

That is to say, the same settlement that the Government made with regard to the revenues of the hacienda de Ibarra, of the houses Nos. 11 and 12 Vergara street, of the three haciendas that were previously leased to Mr. Belaunzaran, it should have made with regard to the capital secured by a mortgage on the hacienda de Santa Lugarda, and as regards the capital secured by a mortgage in the hacienda de Minyo, if said Government found more reason to estimate its revenues than for taking into account those of the hacienda of Ciénega del Pastor; and if it should also wish to estimate as saleable property the securities against the treasury, it was not the nominal amount of these securities but that of their revenues which ought to have been taken into consideration.

§ 108. But if, under the supposition that all the goods and *assets* of the fund were sold, he preferred to charge interest at 6 per cent upon the total produced by such sale, without taking into consideration the sums which such properties had produced, then, in order to be consistent with the plan adopted by him of not taking into consideration sums which did not appear to have been converted to the use of the Government (see § 34), he ought to search in the record for the evidence concerning what properties of the fund entered into the Mexican treasury, and in view of the data which appeared concerning this subject, to have formed the following statement:

In accordance with the report of the treasury department for the year 1843, presented by the claimants (No. 54, p. 196), up to December 31 of that year, the receipts of the treasury for the mission fund amounted to the sum of	$323, 274. 51
According to the report of the treasury department for 1844, also presented by the claimants (No. 54, p. 196), the receipts of the treasury in that year from said fund amounted to the sum of	124, 726. 01
Total receipts of which there is any evidence	448, 000. 52
Annual interest corresponding to this sum	26, 880. 03
Half corresponding to Upper California	13, 440. 015

§ 109. It should therefore have devoted to the claimants half of this interest from October 24, 1849, as they themselves requested, until 1868, which amounts to $268,880.30.

§ 110. Indeed, if the decree of October 24, 1842, is taken as the basis of the decision, the important thing to verify is not *what* properties were sold in conformity with that decree, but *how much their sale produced*, because, as has already been shown, by that decree it was only acknowledged that the national treasury would pay interest at the rate of 6 per cent on the proceeds of the sale of the properties of the

fund. If, then, some of the properties were not sold, there should not be charged upon their value interest in accordance with said decree.

§ 111. The claimants have said in their brief history of the fund (p. 5), the following:

> The properties of the Pious Fund at the time of the decree of October 24, 1842, consisted of real estate, urban and rural; demands on the Public Treasury for loans theretofore made to the State; moneys invested on mortgage and other security, and the like. * * * The greater part of the property was sold in pursuance of the last-mentioned decree for the sum of about *two million dollars* of Mexican money, being the equivalent of that sum in gold coin of the United States (certainly not so at the present time). Although the names of the purchasers are not known to the claimants, they are stated by Mr. Duflot de Mofras * * * to have been the house of Baraío and Messrs. Rubio Brothers. In the above-mentioned sale of the properties of the Pious Fund *were not included the securities of the said fund against* the Government by reason of loans, etc.

§ 112. It is evidently inaccurate to say that the sale of the properties of the fund, without including the securities against the Treasury, produced *two million dollars*, because, supposing that all those stated by Sr. Ramirez in his inventory should have been realized upon at the nominal value stated in said inventory, they would only have been worth $649,047.34, namely: [a]Capital, representing an annual income at 6 per cent of $34,665 (including that derived from the hacienda "Ciénega del Pastor"), $577,583.33; and debts of private individuals (not excluding the bad ones), $71,464.01.

§ 113. But since the claimants knew, through M. de Mofras, who the persons were who paid the *two millions of dollars* for properties whose entire nominal value did not amount to a third of this sum, and since it evidently devolved on them who collect interest on the proceeds of the sale of the fund to prove the amount of those proceeds, it is logical to believe that they have tried to do so, and that the only existing data are those which they have furnished to the commission.

§ 114. Therefore, to said commission, the only thing which the party who was bound to furnish the proof has demonstrated, is, that the sale of the properties of the fund, made in accordance with the decree of October, 1842, yielded the amount of $448,000.52, and if there should only be granted to the claimants what belongs to them by virtue of said decree, the amount assigned to them should not be more than half of the interest upon said sum. As to the lack of contradictory proofs on the part of the Mexican Government, even supposing that said Government is bound to produce them when it did not acknowledge in said commission the authority to take cognizance of this case, the only thing that can be legally presumed is that the statement concerning the properties and assets which constituted the fund presented by the claimants is correct, but not that all of said properties and assets were sold for their nominal value, which is the essential basis in the application of the decree of October, 1842.

III.

§ 114a. But if this case is to be decided—supposing that the commission believe itself authorized to do so—by the last obligation contracted by the Government, defendant, with regard to the fund, prior to February 2, 1848, that which there is to be assigned to the church, claim-

[a] See note of the fourth settlement at the end of this argument.

ant, is not a part of the revenues of the fund, but that share of the *fund itself* which might correspond to the church.

In giving to this claim the support which was at the last two sessions of the commission systematically given to the greatest possible number of claims presented against Mexico, the American commissioner not discovering any act of the Government, defendant, which merited the name of injury, proven, the only thing he said was the following:

I am firmly convinced that whatever the right or *interest* of the church of Upper California in the fund for the aid of the works of its missions might have been before the cession of Upper California, that right or interest continued as before; it suffered no alteration.

That is to say, it is sufficient that the church, claimant, had a right or interest, whatever it might be, in the fund of the missions, *before the annexation* of Upper California to the United States, in order that such right continue *afterwards*.

§ 116. If such a conviction be believed sufficient in order to allow the demand as if the commission were created to render effective all rights or interests of Americans, what remains for it to determine is, what was the right or interest of the church, claimant, at the time of the annexation of Upper California to the United States. In order to accomplish this, it is necessary to take into consideration not the provisions made since the creation of the fund, nor the condition the latter may have been in during its most prosperous period, but the last enactment relative thereto, and the condition in which it was at the time of said annexation.

§ 117. The last enactment was to the effect that the assets and properties of the fund remaining unsold be returned to the bishop of California, or his successors, to carry out the purpose of article 6 of the decree of September 29, 1836, without prejudice to the right of Congress to decide in regard to such of the property as had been sold; and the fact is, that when said last enactment was made, the greater part of the fund had already been sold.

§ 118. But as this tribunal can not extend its investigation further back than the 2d of February, 1848, and in this case not even so far, but only to the 30th of May of that year, when said tribunal considered the church as being possessed of American citizenship, it is necessary, for the only presumption that can benefit the church, to suppose that the devolution had been ordered on May 31, 1848, and that on the same date the claimant requested its fulfillment.

§ 119. They would then have been obliged to formulate their demand in these terms:

The Government has engaged to deliver to the successors of the bishop of the Californias the unsold properties of the fund of the missions. We are the successors of said bishop in upper California; we ask, therefore, that our share of this property be delivered to us. When the bishop ceased to administer the fund, an inventory was made of the properties that formed it, according to which they should be returned to us less those which may be proved to us to have been sold.

§ 120. With regard to the proceeds which those properties yielded while their administration was in charge of the Government, the claimants have no right to exact an account of their employment at a time when they could not claim them as American citizens.

§ 121. The umpire, in giving utterance to the opinion that "the assets of which mention is made in the law of April 3, 1845, should include the debt of the Government for payment of interest upon the proceeds

of the properties sold which had been incorporated in the national treasury," certainly referred to the time when this law was put in force and to the person who could then demand its fulfillment—that is to say, the Mexican bishop of the Californias—to whom should be delivered, according to the opinion of the umpire, the interest the Government agreed to pay by the decree of October 24, 1842.

§ 122. But this interpretation, even being well founded, would only be applicable to the claimants by the commission, if they had had not only the right to exact the interests, but also the right to claim them before the commission; and it is such a well-known fact that they did not have such rights, that it has believed itself able to concede to them only one-half of the interest accrued since the church acquired American citizenship. In other words, the right of the Mexican bishop of the Californias, if he had any, to receive the proceeds of this fund continued in force until the 29th of May, 1848, and this commission is not empowered to inquire whether such right was or was not respected. The right of the American bishop of Upper California commenced, as is said, on the 30th of May, 1848, and only from that date could the part of the fund which should have been delivered to them in conformity with the law of April, 1845, commence to yield profits to them.

IV.

§ 123. But the interested parties, instead of presenting their claim at the proper time and in due form to the Government of Mexico, let years and years elapse without advancing any until July of 1859, when they presented the exaggerated claim (qualifying it in the most favorable manner possible) in which they took unto themselves all the properties of the fund, without excluding even a small share for Lower California, and all the interests that had not been surrendered to the bishop of the two Californias.

§ 124. As foundation for this claim they quoted neither the decree of October 24, 1842, nor that of the 3d of April, 1845, but solely a fictitious contract between the Government of Mexico and the Pope, by which the former was bound to confide the administration and employment of the fund of the missions to the bishop of the Californias.

§ 125. The undersigned understands that it would be useless for him to attack before the umpire this and the other grounds of the pretended right of the church claimant to the fund in question. It is sufficient at present for his purpose to quote the terms in which this claim, under date of July 20, 1859, was presented to the Government of the United States, begging its interposition with that of Mexico, by means of a petition signed by Mr. John T. Doyle, attorney for the claimants.

They [says that petition] claim that the Government of Mexico is indebted to them, as trustees for the Catholic people of California, *in the total amount* of the aforesaid Pious Fund, with the arrears of interest thereon.

They not only, therefore, demanded the interests of the fund, but the entire capital of said fund, and, in addition, its unpaid interests.

§ 126. The Government of the United States paid no attention to this claim, and did not even give notice of it to the Mexican Government. *Nine years after, and very probably without having taken it into account, the two Governments negotiated the Convention of July 4, 1868*, article 1 of which says:

All claims on the part of corporations, etc., citizens of the United States, arising

from *injuries* to their persons or property by the authorities of the Mexican Republic, *which may have been presented* to either Government, for its interposition with the other since the Treaty of Guadalupe Hidalgo * * * and which yet remain unsettled, as well as any other such claim *which may be presented within the time hereinafter specified*, shall be referred to two commissioners, etc.

Article 3, which specifies said time, directed that it should be eight months, counted from the first meeting of the commissioners, and at the *most* an addition of three months was allowed in the cases where the causes of delay were satisfactorily proved.

§ 127. *The first meeting of the commissioners occurred on August 1, 1869*, and on the 31st of March terminated the ordinary time for the presentation of the *claims referred to them* by the convention.

§ 128. On the day previous, the 30th of March, 1870, Mr. E. Casserly presented the following claim:

Joseph S. Allemany, archbishop of San Francisco, and Thadeus Amat, bishop of Monterey, California, successors of Francisco Garcia Diego, bishop of the Californias, *in their own behalf* and in the behalf of all interested, represent that they have a just claim against the Republic of Mexico for a very large sum of money, to wit, for the sum of three millions of dollars. That *said claim had its origin in the seizure by the authorities of Mexico* of moneys belonging to and property purchased with the proceeds of a fund known as the Pious Fund and created by private contributions, etc. * * * Said Joseph S. Allemany and Th. Amat claim, that as the successors of the said bishop of the Californias they are entitled to the *possession of said moneys and of said property*, and to the increase, profits, rents, and proceeds of said fund. They therefore ask the aid and intercession of the Government of the United States in obtaining from Mexico *recompense for the wrongful seizure of said fund moneys and property*, and for the detention of the same, and the payment of all damages resulting from said seizure and detention. (Letter A.)

§ 129. There elapsed afterwards the extra term of three months in which other claims could be presented, and nothing further was offered in this case; and it remained, in consequence, *referred to the decision* of the commissioners, as above set forth.

§ 130. Any impartial person whatever, and even the American commissioner himself, could do no less than refuse the claim thus formulated, noticing only that the seizure of the fund by the Mexican authorities, to which it makes allusion, occurred before the 2d of February, 1848.

§ 131. The interested parties must have understood it thus, so they sought a means of transferring the transaction which should serve as a base to the claim to the time over which the jurisdiction of this tribunal extends. But it appears that such means did not occur to them until the term for the presentation of claims had already expired.

§ 132. This, nevertheless, was not an obstacle to putting it into execution, since *on the 31st of December, 1870, under the guise of a memorial of the claim presented in the proper time, they presented another claim entirely distinct.*

§ 133. In the former they demanded all the capital of the fund and its accrued interest; in the latter they asked neither the one thing nor the other, but simply the revenues due since 1848; in the former the seizure of the fund by the Government of Mexico was alleged as the cause and origin of the claim; in the latter an agreement to pay certain revenues annually; in the former was asked the reparation for an injury (recompense for the wrongful seizure); in the latter simply a division without alleging, much less proving, any injury.

§ 134. In order to show more clearly the essential difference between the first and second claim, let us suppose a private individual in the place of the corporation that presents it, since for the purposes of the convention the case is identical. Juan Fernandez, a Mexican citizen by

birth and a resident of Upper California, by having continued his residence there after the 30th of May, 1848, without manifesting the desire to preserve his original citizenship, became a citizen of the United States, *when the year designated in the treaty of Guadalupe Hidalgo had elapsed*—that is to say, the 31st of May, 1848; certainly not before, since until the day immediately preceding he had only to go out of the American territory to preserve his Mexican citizenship.

Let us suppose that in 1859 Fernandez presented a claim to his new Government against Mexico, alleging that the latter in 1842 had seized some properties that belonged to him, and asking that the return of these properties be demanded of it and the delivery of the profits which they had yielded during the time of their detention. This tribunal having been instituted, Fernandez repeated the same claim *within the limit fixed for the purpose*—that is, the 30th day of March, 1870.

How would the commission have decided? Surely it would have denied it, as it has denied No. 114 of Antonio Miranda, No. 141 of Melquiades and Josefa Chavez, No. 379 of Irinea and Francisca Baca, No. 386 of Mariano Armijo, No. 942 of Alejandro Valle, 945 and 946 of Donaciano Vigil, and various others presented by Mexicans by birth, but naturalized citizens of the United States by virtue of the treaty of the 2d of February, 1848, for alleged injuries to their persons and property caused before that date.

§ 135. Therefore, if the Catholic Church of Upper California, which it was decided to consider as a citizen of the United States by virtue of said treaty (as if it were a private individual), should not be privileged further by distinguishing its claim, without any reason, from that of any private individual formerly a Mexican citizen and to-day an American citizen, then the claim which it presented *within the time fixed in the convention* should be disallowed in conformity with the spirit of said convention.

§ 136. The fact that the American commissioner who denied the aforesaid claims took the latter into consideration is sufficient to show that the claim presented in December, 1870, is essentially distinct from the former, since, although the decided inclination of that functionary to favor the American claimants can not be doubted, it would be necessary to attribute to him a complete change of opinion to suppose that solely because the claim in question was made by the Catholic Church he violated knowingly the most explicit stipulation of the international agreement which created this commission.

§ 137. And even supposing that he had carried to this limit his disregard for the stipulations of said compact, the umpire, who has refused to sanction many other transgressions of authority attempted by that functionary, surely would not have supported him in this case.

§ 138. He has done it, without doubt led by the American commissioner into the error that the claim referred to is the one presented in December, 1870 (which was not the case), *in conformity with the convention, and not the one presented on March 30 of that year; that is, not the one in which the division of the revenues of the fund in question has been claimed according to the decree of the 24th of October, 1842, but that in which the same fund was asked, it being alleged that the claimant church had been deprived of it.*

§ 139. This grave error being discovered, since the decision rendered under such misapprehension has not a final and irrevocable character, because *the proceedings of the commission have not yet terminated*, it

ought to be entirely corrected, declaring that the claim *referred to it* in the present case, not being within the jurisdiction of this tribunal, must remain among the ones rejected for the same reason.

§ 140. But the undersigned can scarcely hope, although he asks it in justice, that after having rendered a judgment so favorable to the church claimant for the benefit not only of the heathen to be converted, but also of the inhabitants of Upper California and the whole people of the United States, it will be entirely reversed.

§ 141. Considering this, the undersigned was compelled to suggest a point of view by which it may be possible to combine the character of the decision with that of the claim legally presented, even if that point of view does not conform to the text of the convention, which can in no way support the pretension of the claimants, even should he endeavor to reconcile the desire to consider such pretensions in the spirit of said convention.

§ 142. The umpire has formed the opinion that it is morally just that the funds of the missions be employed for the purposes designated by those who created it; that it was intended partly for Upper California, and that the ecclesiastical authorities are the best fitted to employ the share of the fund intended for that region, without taking into consideration the circumstance that Upper California, having ceased to form part of the Mexican Republic, may have prejudiced in some way its right to share in the fund. This judgment once having been formed against the opinion of the Mexican commissioner, the umpire saw in the opinion of the American commissioner the question formulated in these terms:

The question turns upon the amount of the proceeds of the fund that ought to be applied to each one of the Californias, and upon the total of those proceeds.

And honestly considering such question as the one referred to this tribunal by the Governments that created it, the umpire sought a way that would express his opinion in the sense referred to.

§ 143. Certainly the undersigned can not believe that the umpire has formed the opinion that the Government of Mexico was obliged by law to remit each year on the 24th of October a certain amount of money to the bishops of California, in virtue of a decree that does not so provide, and without it previously having been determined what share of said fund corresponds to Upper California, or even if the latter had any right to such share after its separation from Mexico.

§ 144. No; such obligation could not have been created, except impliedly and upon the supposition that the division which the claimants solicited in December, 1870, had been made since the 30th of May, 1848. The undersigned feels fully assured in asserting it thus that he can not be contradicted.

§ 145. By decree of February 8, 1842, the charge of administering and employing the fund of the missions for the purposes designed was withdrawn from the bishop of the Californias, and on October 24 of that same year, when said bishop, not being so charged, on the properties of the funds being ordered sold, it was simply provided that those in charge of the revenue of the tobacco that remained pledged for the payment of the interest at 6 per cent upon the capital to which the decree refers should furnish the sums necessary to fulfill the purposes for which the fund was intended.

§ 146. In order to declare that according to this provision the Government of Mexico has been obliged to remit to the claimants each

year since 1848 the amount of $43,080.99, the following suppositions are necessary:

1. That either by the decree of October 24, "issued *as supplementary* to that of February 8 of said year, which provided that the supreme Government should resume the care and administration of the Pious Fund of the Californias, as formerly had been the case," that the decree of February 8, 1842, was repealed with respect to that portion by which the bishop of the Californias was retired from the administration of the fund, or that such decree (that of the 8th of February) was entirely null and void because it violated a contract made with the Holy See in 1836, as the claimants alleged in 1859.

2. That where the decree of October 24 says simply "those having the revenue of tobacco in charge will furnish *the sums necessary* to accomplish the purposes of the fund," it must be understood that it orders that each year, on the date of the decree, *all the interests* on the capital of the fund should be delivered to the bishop of the Californias.

3. That although by the same decree the public treasury should acknowledge an interest of 6 per cent only upon *the total produced by the sales* which were made conformably to said decree, of the estates and other properties of the Pious Fund of the Californias, for the capital represented by their proceeds capitalized at 6 per cent, it is to be understood by *capital* of the fund for the purposes of said decree, the nominal value of the estates, properties and assets of the fund, and the interests accrued upon such assets.

4. That either the same decree provided that one-half of the sums to be paid should be destined for Upper California, or that on its separation from Mexico it was determined that this part belonged to it and should immediately be turned over to its ecclesiastical authorities.

§ 147. It is seen that in this series of deductions and suppositions the moral conviction that the bishop of the Californias always had the right to administer the fund in question enters largely, and that the text of the decree endeavored to be applied, and that of the 8th of February, 1842, for whose completion the former was issued, are of no value.

§ 148. The umpire in support of his opinions has made the following observations:

> Neither by the Spanish nor the Mexican Government was it ever pretended that the proceeds of the fund were not finally to find their way into the hands of the ecclesiastical authorities or that they were to be applied to any other objects than those pointed out by the donors. After the decree of October 24, 1842, the Mexican Government admitted its indebtedness and the obligation it was under to remit the proceeds of the fund to the bishop of the Californias by issuing orders in his favor upon the custom-house at Guaymas

The undersigned does not believe that these observations are other than supplementary deductions for want of a positive proof. With respect to the first, it seems to him that it is certainly not the same thing not to oppose a thing going into the hands of a certain person as to be obliged by law to remit it to him; and with regard to the orders issued in favor of the bishop (only one of which the undersigned has been able to see in a printed copy of one of the arguments presented by the claimants), the only thing they prove is that once or several times it was ordered that there be paid to the bishop of the Californias certain sums, but not that the scope of the decree of October 24, 1842, should be extended by informal orders, and much less that by the same means be annulled the decree of February 8 of that year,

which revoked the last part of the law of 1836, and returned to the Government the administration and employment of the fund, as the umpire has considered in his decision.

§ 149. The last deduction in it, concerning the obligation of the Government of Mexico to remit the properties of the fund to the bishop of the Californias, is the following:

Such obligation is recognized also by the law of the Congress of April 3, 1845, in which is ordered the return to the bishop of the Californias and to his successors of all of the assets and properties of the Pious Fund that had not been sold, for the purposes expressed in the law of September 29, 1836, without prejudice to what Congress might determine with respect to the properties which had already been sold.

§ 150. The undersigned does not see how anything else can be deduced from this law than the fact that properties belonging to the fund of the missions had been sold. Beyond this there is only the declaration that *hereafter* the bishop of the Californias would be the one to administer the unsold properties of the fund, putting into effect anew that portion of the law of 1836 bearing on the subject which had been revoked in February, 1842. So then, far from recognizing that the bishop of the Californias should have received the proceeds of the fund as legally charged with its employment between 1842 and 1845, it shows that he did not have such charge *lawfully* during that time, since had he held it legally it would not have been deemed necessary to restore it to him, citing the law which had at one time conferred it upon him and which had been formally revoked in this respect in February, 1842; and at no time previous to the 3d of April, 1845, again put in force in the necessary form, to wit, in that of a law or decree.

§ 151. The undersigned, on showing thus the tenor of the law of the 3d of April, 1845, does not intend in any way to reflect upon the interpretation of the umpire but only to demonstrate that this, just as the preceding observations made with the same intent, has for a foundation not the legal antecedents of the transaction but a moral conviction; not the substance of a law in which is confided to the bishop of the Californias the charge of administering and employing the fund of the missions but the moral conviction that that bishop was the only person for such charge; because, it must be repeated by the written law, just or unjust, he was deprived of it on the 24th of October, 1842, and so remained until April 3, 1845.

§ 152. Undoubtedly for a tribunal not of equity or conscience but a civil one, there is in the present case no other law to consider than that of April 3, 1845, nor other *positive* obligation to be enforced against the Government of Mexico in behalf of the bishop of the Californias and his successors, than that of returning to them the properties of the fund of the missions unsold at that date.

§ 153. If, therefore, this commission, which is not a court of equity, should not in this case enforce a moral obligation on the part of the Government, defendant, as it has justly refused to enforce all those of like character in other cases, the only thing it can declare is whether the church, claimant, in its character as citizen of the United States has the right to ask the fulfillment of that law, and what part should be intrusted to it of the properties of the fund to which said law refers.

§ 154. In this manner would have been decided the only claim referred to this tribunal, which, although exaggerated as all are, in spite of coming from holy persons, can not but be considered as the

claim that the share which legally might belong to it of the fund of the missions be assigned to the Catholic Church of Upper California. The claimants ask all the fund and all its former proceeds. It is for the commission to decide (if it believes itself to be competent), according to article 3 of the convention, what part of the claim *duly made, presented, and submitted* ought to be allowed to the interested parties; that is to say, what part of the fund is to be intrusted to them.

§ 155. But also, according to the convention, it is necessary that in the interest of the two Governments that celebrated it, and in conformance with the spirit in which it was negotiated, the case be decided in a manner complete, perfect, and final, bearing in mind that "*the claim presented in it and referred to the commission* will be considered and treated, the proceedings concerning it having been concluded, as finally settled, rejected, and forever inadmissible."

The claim presented in this case previous to the convention, and afterwards within the time allowed it, and consequently *the one referred* to the commission, concerns the delivery of the fund, and the proceedings of the commission having terminated, it ought to be considered by the two Governments interested as forever settled, notwithstanding the reservation made by the claimants at the end of their memorial, or, more exactly, the new claim of December 28, 1870.

§ 156. But if the decision rendered is sustained, the claimants will probably pretend to give it a permanent effect, alleging that by it they have been adjudged entitled to receive a determined sum annually. The Government of Mexico, which can not believe itself bound, according to the convention, except for the payment of the sum that may be charged against it as balance, a balance having been struck between the amounts of the indemnities expressly assigned to the claimants, one country against those of the other, shall refuse to extend the effect of such judgment after the 24th of October, 1868; and it will be necessary to discuss anew the question whether the decree of the 24th of October, 1842, gave to the Catholic Church of Upper California the right to receive annually $43,080.99 or any other quantity whatsoever.

§ 157. The immense sacrifice the Mexican people has made to free its own country from the ecclesiastical yoke are well known to the world. How, therefore, would they receive the claims which would constitute it a perpetual tributary to a foreign church? Would this be the way "to maintain and increase the friendly relations between the Mexican Republic and the United States," which was the object of the celebration by the two Governments of the convention of July 4, 1868?

It would have a contrary effect certainly, and for this reason the undersigned has said that the present case should be decided conformably to the spirit of the convention; that is to say, without leaving any motives or pretexts for fresh claims.

V.

§ 158. The point of view proposed by the undersigned for the decision of this case being adopted (which point of view is only suggested because of the reason shown in § 140), there must be determined what are the properties of the fund in question, of whose value a share must be assigned to the church claimant, according to the law of April 3, 1845.

§ 159. This law directed that there should be returned *immediately* to the bishop of the Californias and his successors the assets and other

properties belonging to the Pious Fund remaining unsold, but since those which were then sold, not having been designated, we suppose that the Government contracted the obligation to return all the assets and properties of the fund in the same state they were in when the attorney of said bishop delivered them in virtue of the decree of February 8, which took from him the charge of administering and employing them for their objects.

§ 160. In respect to the proceeds which such assets and properties had yielded during the time the Government had them in charge, if it did not employ them for the purposes for which they were intended no one had the right to demand from it any account of them.

§ 161. Let us suppose, moreover, that no properties nor debts against private parties were returned to the bishop of the Californias, and let us examine this point relative to the return of the debts owed by the public treasury.

§ 162. In regard to them, what was there that should be returned? Certainly not the amounts which they were worth, but the titles that represented them—that is, the right to collect them. Just as in the return of a debt owed by a private person, for example, that of $13,997 that the bondsmen of Dn. Ramon Vertiz had promised to pay to the fund, not the sum due but the security given by said bondsmen on February 8, 1842, would have been returned to the bishop, so also the return of the debts against the Treasury should have been made by the delivery of their titles.

§ 163. But in the instruction or inventory which the attorney of the bishop delivered with the properties of the fund we find the following note:

> Only a few days ago was I able to recover of the debts (against the public treasury) the certificate of indebtedness for the capital of $162,618 3 reals 3 granos that the consulate received. All that is known of the others is that the interest was paid by the general treasury, and these items can be proved by the books which are there kept.

So it is seen that only one of the sums was represented by transferable security. The others were only recorded in the book of the public debt.

§ 164. How, therefore, could the delivery of those sums be made? Purely and simply by the effect of the law or *ipso jure*. From the moment it was ordered that the debts against the public treasury be returned *immediately* to the bishop of the Californias it must be understood that the right to collect them was returned to him, that he received the titles necessary to that end. In going to the treasury to demand the payment of the interest he would not have had to present any other title than the law which had returned those estates to him, even with respect to the only one which was acknowledged, since it is sufficient that they belong to the fund in order that by virtue of that law the bishop of the Californias might have the legal personality necessary to that end.

§ 165. So it is that by a simple supposition, but one according to law, the credits of the Pious Fund against the national treasury ought to be considered as returned to the bishop of the Californias April 3, 1845, by virtue of and the immediate effect of the law of that date; said law being entirely fulfilled in this part, and the above mentioned bishop being in possession of all those assets.

In consequence according to that law, nothing can be conceded to

the claimants in respect to the assets, because the only thing they could ask as successors of the bishop of the Californias he had obtained.

§ 166. But the ground of their claim in regard to the assets of the fund against the national treasury is distinct from the rest of it. In their "Brief History of the Fund, etc.," presented on December 31, 1870, as an exhibit attached to the new claim which they made under the guise of a memorial, we read the following:

> In the said sale (the one made in virtue of the decree of October 24, 1842), the assets of the fund against the Government, by reason of loans, *were not included* * * *. Some of these debts (the largest certainly) antedated the separation of Mexico from the dominion of Spain; but as they were debts of the viceroyalty of New Spain they were assumed and recognized as debts of the Mexican Republic, not only by the law of the 28th of June, 1824, but also by article 7 of the treaty of December 28, 1836, between Mexico and Spain. The interest of this capital must therefore be added to that of the proceeds of the sale in order to determine the amount of the revenue due and now unpaid by Mexico to the Pious Fund. (Page 6.)

Therefore the claimants demand that the commission compel the Government of Mexico to pay a part of its public debt simply *because by a law and a treaty it acknowledged itself responsible for the debts contracted by the viceroyalty of New Spain.*

§ 167. In order that we may see more clearly the character of the claim, it is convenient to consider it as that of an individual, as has been done with the other in § 134.

The Juan Fernandez who was there mentioned presents the following claim:

> My ancestors possessed large estates in Mexico at the time when it was a Spanish colony. The viceroys demanded of them various loans to cover the public expenses. After Mexico became independent it acknowledged the debts of the viceroyalty. In my inheritance I acquired the right of recovering the debts originated by those loans, but during the time I was a Mexican citizen I could obtain nothing for them. Now that I am a citizen of the United States I ask the commission that it direct that they be paid to me.

§ 168. Could such a claim be successful before this tribunal? The undersigned believes he can assure himself it would not, basing his opinion on all the decisions of analogous cases.

In the first place the commission is not competent to determine if the loans from which the debt claimed proceeded were legally exacted or constituted an injury, because they date from an epoch over which the jurisdiction of this tribunal does not extend; in the second place, although such loans had been exacted from an individual or a corporation with American citizenship after February 2, 1848, according to the decisions of the umpire, they should not be considered, from a general point of view, as matter proper for the cognizance of the commission; and finally, there is set up as an origin for the claim the enforcement of a contract made with Spain, or one which the law by which the Mexican Government acknowledged the debts of the viceroyalty implies, then, as this species of contract was made when the church claimant did not have American citizenship, the case becomes identical in this respect to that of Morris Taussig (No. 39 R. A.), in the decision of which the umpire expressed himself as follows:

> This contract was made some time before Morris Taussig became a citizen of the United States * * * the umpire *does not think that the commission can make any award* in compensation for losses suffered on account of a contract entered into before Taussig was a citizen of the United States.

Secondly, if the fact that the party claimant is a religious corporation does not give it any privilege over any other private individual, a

citizen of the United States, a demand for the enforcement of the contract entered into by the Government of Mexico before said party possessed American citizenship should not be allowed.

§ 169. Summing up all that has been said in relation to the assets of the fund against the public treasury there results:

1. That they are not claimed (nor can be claimed) according to the decree of October 24, 1842, because they were not nor could have been affected by it; because it is absurd to suppose that a debtor incorporates into his treasury his own debt; because the claimants declare that the debts against the State were not included in the sales of the properties of the fund; and, finally, because by said decree the Government did not contract *further obligation* than that of paying to the fund (not to the bishop of the Californias) interest at 6 per cent on the proceeds of the sales of the country estates and other properties of the fund for the sums represented by their proceeds capitalized at 6 per cent.

2. That, according to the law of the 3d of April, 1845, the only obligation contracted by the Government in regard to assets was to return them to the bishop of the Californias; and this obligation was entirely fulfilled in regard to the debts against the public treasury by the imme diate effect of the same law.

3. That this commission can not, if it is to be consistent with its own decisions and be subject to the convention that created it, order paid debts contracted by the Spanish Government only because the Government of Mexico acknowledged them in the years 1824 and 1836, since neither the jurisdiction of said tribunal extends over said epoch, nor had the legal person making the collection when the obligation originated the citizenship which he to-day claims. This is applicable also to the sums borrowed from the fund by the Mexican Government, for the recovery of which the claimants do not allege any reason.

For these reasons the commission ought not to decide anything respecting the debts of the fund against the public treasury of Mexico proceeding from loans which antedate the separation of the management of the same fund from the bishop of the Californias.

§ 170. But there is even another motive for this refusal to decide, which the undersigned respectfully submits to the consideration of the umpire. Since the obligation of the Government of Mexico regarding the debts contracted by the viceroyalty in favor of the fund to cover the public expenses of what was then the colony of New Spain proceeds from the fact that that Government on succeeding the Spanish in the representation of the sovereignty became substituted in the agreements to pay the debts contracted by the public administration, the Government of the United States should also, as successor of Mexico in Upper California, pay *pro rata*, or proportionally to the territory acquired by it, the part of the debt contracted to defray the general expenses of the colony of which that territory formed part.

If it should appear improper for this tribunal to decide it thus, it is no less so to determine any other question whatever relating to the public debt of the Government of Mexico, especially taking into account the debt contracted in an epoch to which the jurisdiction of this commission does not extend. And for this reason it can not be declared whether the Government is obliged to pay the capital taken by its predecessor and by it *as a loan* before February 2, 1848, nor can anything be determined in respect to the interest of that capital,

because to order their payment would be absolutely the same in principle as to order the payment of the capital.

§ 171. Finally, to oblige the Government of Mexico to pay the interest of one part of its public debt—when it is well known that it can not pay it to all of its creditors—is to establish an irritating privilege in favor of an American corporation which could not even make valid this title at the time of the origin of the debt.

§ 172. Having treated of the points indicated at the beginning of this argument, it remains for the undersigned to respectfully request the umpire that, weighing carefully the arguments set forth, he adopt for his final decision the point of view that appears to him most just, equitable, and proper, with respect to the two parties interested, further taking into consideration that since February 2, 1848, the Government of Mexico has not received any benefit from the fund in question, and if the Catholic Church of Upper California has had the right since May 30 (1848) to the amount that to-day may be assigned to it of the capital of this fund, it has been the fault of its representatives not to have diligently demanded the division of the fund from that time forth. It is not just, therefore, to burden that Government with the payment of interest on that sum, for the same reason given by the umpire for not conceding to the claimants the payment of compound interest, to wit, that the refusal of the Government to adjust this matter at the proper time is not satisfactorily proved. The payment of interest for a sum is either the return of proceeds received or a penalty for culpable delay, and in the present case there is neither one reason nor the other for pronouncing in favor of such payment.

§ 173. According to what has been shown, the writer could limit himself to the formulation of the following:

PETITION.

That if the umpire finds sufficient reasons for considering this claim as coming within the jurisdiction of the commission, he will decide the claim completely, assigning to the Catholic Church of Upper California the share *of the capital of the fund* to which he believes it is entitled, excluding the debts against the public treasury, without granting it interest for the time in which the representatives of the church should have taken steps for the division of the fund and failed to do so.

Supposing that the share assigned to said church be half of the fund, its amount would be the following:

For half of the cash value of the properties of the fund (see § 47)	$161,916.66½
For half of the cash value of the debts against private parties (see §§ 63-90)	10,711.00
Total	172,627.66½

§ 174. But as the undersigned can not hope that his observations are formulated with sufficient clearness for their importance to be perceived, he deems it convenient to present also the other settlements which could be made in the decision of the case, on the basis that may be adopted for it, to wit:

1. Granting interest upon the amount assigned as half of the capital of the fund for the time elapsed since the church claimant might have recovered it until July 31 of the present year, the period of time designated for interest in the cases in which it has been granted.

2. Assigning to the church claimant half of the capital of the debts of the fund against the public treasury.

3. Granting interest upon the half assigned of said debt also from May 30, 1848, to July 31, of the present year.

4. Insisting on assigning to the church, claimant, only interest, as if the decree of October 24, 1842, had given it right to receive it; but regulating its settlement according to said decree.

5. Conceding, moreover, the payment of the interest, which can be considered as acknowledged as being due on the debts of the fund against the public treasury on account of the law of June 28, 1824, and article 7 of the treaty of December 28, 1836, between Mexico and Spain—the only grounds alleged in support thereof, and the only provisions applicable in this particular case.

First settlement.

Annual interest upon the sums of \$172,627.66½, \$10,357.66, computed from May 30, 1848, to July 31, 1876	\$291, 746. 09

NOTE.—This settlement is made from May 30, 1848, that being the date from which the umpire has considered the claimant as having American citizenship; but according to the treaty of Guadalupe Hidalgo the Mexican residents of Upper California were not to be considered as American citizens until after May 30, 1849.

Second settlement. (*See* § *91.*)

Half of the debt of \$20,000 placed in the *Caja de Consolidacion* during the Spanish rule	\$10, 000. 00
Half of \$201,856, 6 reals 4 grains which the Spanish Government took from the fund for its necessities	100, 928. 37½
Half of \$162,618, 3 reals 3 grains that the *Tribunal del Consulado* owed.	81, 309. 20
Half of the capital of \$38,500 that the College of San Gregorio owed to the fund	19, 250. 00
Half of \$68,160, 3 reals that Minister Esteva distributed in 1825	34, 080. 18½
Half of \$3,000 taken from the fund to promulgate the bulls of Bishop Fr. Francisco G. Diego	1, 500. 00
Half of a note for \$15,973, 5 reals due when a certain mortgage on the fund (not well defined) should be paid	7, 986. 81
Total	255, 054. 57

NOTE.—The debt, of \$7,000, classed as bad by the American commissioner, is not included.

Third settlement.

Interest, at 5 per cent, on half of the debt of \$20,000, this being the rate which the public treasury acknowledged according to the instruction of Sr. Ramirez, \$500. Amount of this interest from May 30, 1848, to July 31, 1876	\$14, 083. 56
Interest, at 5 per cent, on half of \$201,856, 6 reals 4 grains taken at that rate by the Government according to the instruction mentioned	142, 143. 13
Interest, at 6 per cent, on half of the debt acknowledged at this rate by the Tribunal del Consulado	137, 414. 72
Interest, at 3 per cent, on the half of the debt acknowledged at this rate by the College of San Gregorio	16, 266. 51
Total	309, 907. 92

NOTE.—The interests have been computed at the rate of their respective investments and only upon the assets that yielded them, because neither the law of June 28, 1824, nor article 7 of the treaty of December 28, 1836, nor any law or decree changed the rates of the interest of the public debt to the fund, nor was the part of that debt which yielded no income acknowledged as bearing interest.

Fourth settlement.

Half of the annual interest on the value of the properties of the fund, estimated according to the decree of October 24, 1842—that is, by that corresponding to their proceeds calculated at 6 per cent (see § 47), $9,715. Amount in twenty years, viz, from October 24, 1849, until the same date of 1868	$194, 300. 00
Half of the annual interest of the proceeds of the debts of fund against private parties (see §§ 63-90), $642.66, amounting in the time stated in the previous item to	12, 853. 20
Total	207, 153. 20

NOTE.—The interests have been computed only from October 24, 1849, because the claimants themselves have recognized that it should be thus, expressing themselves in these terms:

"*We have no right to claim* all that was due and remained unpaid before the treaty of Guadalupe Hidalgo, because until that time the nationality of the church had not changed, and the damage (*absque injuria*) was not caused to citizens of the United States. But the first payment after that date became due *on October 24, 1849, and then, for the first time, it could have been demanded* (although it was not)." (See the last reply of Mr. Doyle, dated January 1, 1875, No. 50.)

Thus, to grant interest to the claimants from the year 1848, inclusive, is to give them more than what they themselves ask, and, as it is said, "to show one's self more popish than the Pope."

Fifth settlement.

Annual interest upon half of the first debt of the fund against the public treasury at the rate of its investment, $500. Amount in twenty years from 1849 to 1868	$10, 000. 00
Annual interest upon half of the second debt at the same rate of 5 per cent, $5,046.41	100, 928. 20
Annual interest upon half of the third debt at 6 per cent, which was the rate of its investment, $4,878.55. Amount in twenty years	97, 571. 00
Annual interest upon half of the fourth debt at 3 per cent, the rate recognized, $577.50	11, 550. 00
Total	220, 049. 20

NOTE.—The reasons for this proposed settlement are the same as expressed in the notes to settlements 3 and 4.

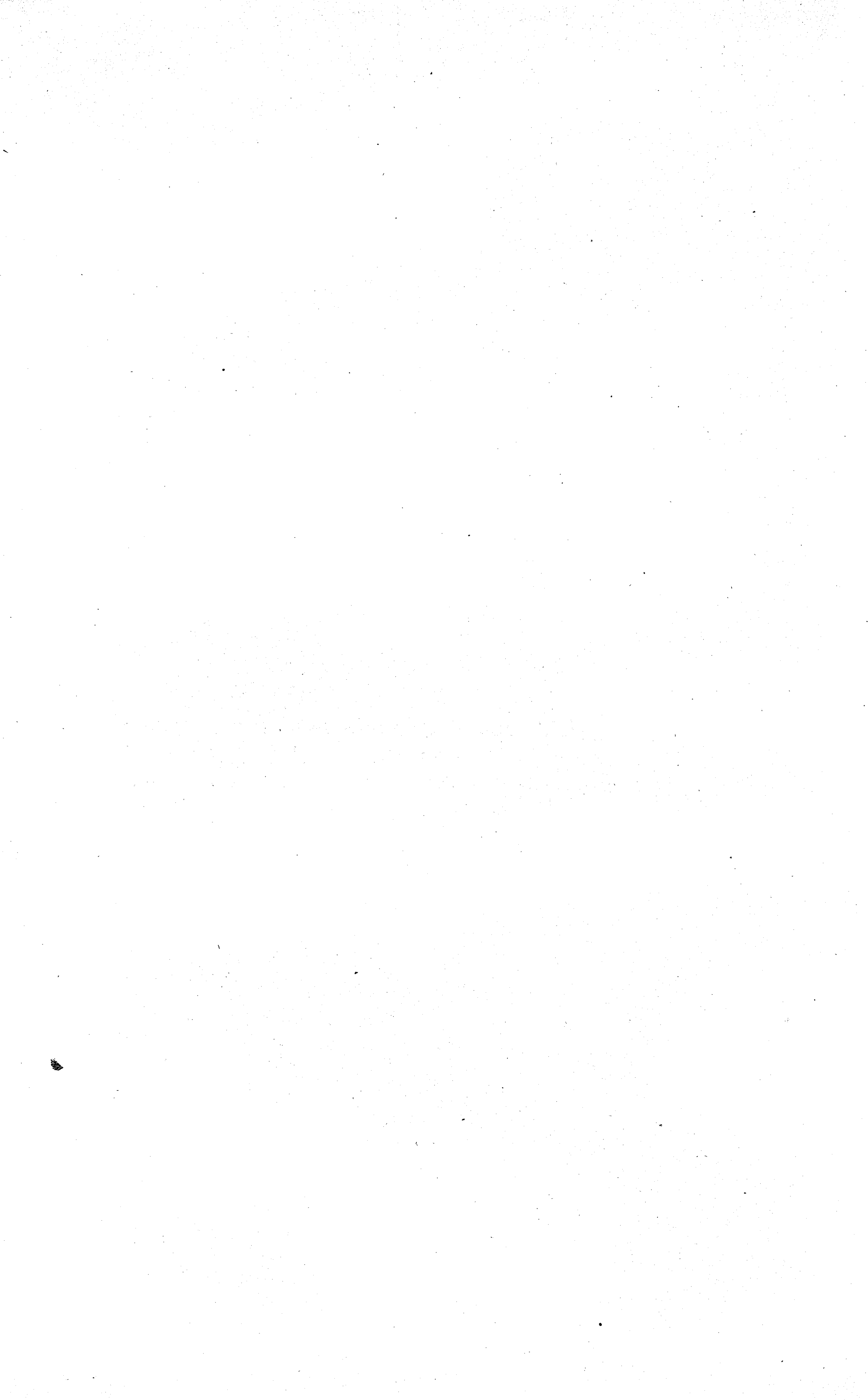
The Government of Mexico trusts that the umpire examining this case anew will render finally a decision on it that, without depriving unjustly the inhabitants of Upper California and all the people of the United States of the benefits to which they may be entitled with respect to the Pious Fund of the missions, will either leave the question intact as outside the jurisdiction of this tribunal or decide it in a complete manner and without imposing more hardship upon the Mexican people than that which legal justice, equity, and the principles of public law require.

ELEUTERIO AVILA.

WASHINGTON, *September 19, 1876.*

PART VI.

Record of proceedings before the Permanent Court of Arbitration under The Hague Convention of 1899 in the matter of the Pious Fund of the Californias, from September 15, 1902, to October 14, 1902, including copy of the official minutes, or procès-verbaux, with index.



RECORD OF PROCEEDINGS.

In the judge's room before the opening of the sessions of the Tribunal, the following address of welcome was delivered by Baron Melvil van Lynden, President of the Administrative Council:

"MESSIEURS LES MEMBRES DU PREMIER TRIBUNAL ARBITRAL: C'est avec un véritable intérêt et un sentiment, je dirais presque d'allegresse, que nous vous faisons accueil au nom du Conseil Administratif dans ces locaux, destinés au fonctionnement de la Cour Permanente d'Arbitrage.

"Ladite Cour, dont vous êtes les représentants, a été instituée par l'entente commune des Puissances, qui se sont réunies sur la généreuse initiative de l'Auguste Souverain, Empereur de toutes les Russies, pour diminuer autant qu'il leur serait possible les horreurs de la guerre, et, en premier lieu, de les prévenir, en fournissant au monde une autre manière de résoudre les difficultés et les questions qui surgiraient entre Nations. Cette entente a mené à la conclusion de la Convention de La Haye pour le règlement pacifique des conflits internationaux, par laquelle, entre autres moyens, un système d'arbitrage a été élaboré, partant du principe que la décision des questions internationales serait dévolue aux hommes les plus compétents, désignés à cet effet par les Gouvernements signataires, et jouissant d'une indépendance complète. Les hommes éminents, ainsi désignés, formeraient la Cour Permanente d'Arbitrage, du sein de laquelle seraient pris les juristes, qui composeraient pour chaque cause le Tribunal arbitral. En son entier, la Cour ne se réunit jamais; mais chaque Tribunal arbitral la représente, en quelque sorte comme dans la procédure ordinaire chaque Chambre d'une Cour rend ses arrêts au nom de cette Cour.

"Après la conclusion de la Convention on a de suite procédé aux mesures nécessaires pour la mettre à exécution, en sorte qu'au premier janvier 1901 tout se trouvait prêt pour mettre en activité le système d'arbitrage. Les locaux se trouvaient préparés, les fonctionnaires du Bureau International étaient nommés, les services étaient organisés, un nombre suffisant de Membres de la Cour étaient désignés, on n'attendait plus que les causes à juger, mais—comme si les questions n'abondaient pas—les causes faisaient défaut. Personne ne semblait vouloir inaugurer une manière de procéder, que tous avaient pourtant jugé être la meilleure.

"Il était réservé au Nouveau-Monde de donner l'exemple et de réveiller la Vieille Europe, qui semblait assoupie, ou du moins insoucieuse à cet égard. La grande République de l'Amérique du Nord et sa voisine, celle du Mexique, voyant que personne ne bougeait, et qu'une institution, qu'elles aussi avaient contribué à fonder, risquait de tomber dans l'oubli par désuétude, se sont mises d'accord pour montrer au monde civilisé que ce n'est pas à une vaine chimère qu'elles avaient adhéré en constituant cette Cour, mais qu'elles entendaient en faire vraiment un instrument vivant de paix et de concorde, en lui déférant la solution de différences d'opinion existant depuis longtemps entre elles.

"Eh bien, Messieurs, le Conseil Administratif, qui n'a ni le droit ni le désir de s'immiscer dans la jurisprudence de la Cour, a pourtant senti le besoin de vous témoigner la vive satisfaction qu'il éprouve à la suite de ce noble exemple, donné par les deux Républiques d'outremer, et de venir vous souhaiter, à vous, premiers Arbitres fonctionnant de la manière prévue par la Convention de la Haye, la bienvenue dans ces lieux à l'occasion de votre première séance. Il met à votre pleine et entière disposition le personnel et les locaux du Bureau International et il exprime le vœu, qu'une fois entamée, l'action de la Cour Permanente d'Arbitrage ne cessera pas tant que des causes de dissentiment continueront à exister entre les Nations, et que son intervention, appellée par celles-ci de leur propre gré et ne s'imposant par la force à personne, contribuera puissamment au maintien de la paix du monde."

To the foregoing address of welcome Prof. H. Matzen, president of the tribunal, replied as follows:

"EXCELLENCES: Au nom du Tribunal ici présent j'ai l'honneur de remercier Votre Excellence pour les bonnes et aimables paroles qu'Elle a bien voulu nous adresser, ainsi que toutes Vos Excellences ici présentes, Président et Membres du Conseil administratif de la Cour Permanente d'Arbitrage, du courtois accueil qu'Elles ont bien voulu nous faire.

"Je tiens à vos exprimer notre sincère gratitude pour toutes les mesures efficaces que vous avez prises pour l'installation de la Cour d'Arbitage et de ses différents services administratifs, dont nous sommes les premiers à profiter.

"Nous espérons que Vos Excellences nous feront l'honneur d'assister à la première séance du premier Tribunal d'Arbitrage émané de la Cour Permanente d'Arbitrage, qui a été établie par les Puissances des deux Mondes pour faciliter le recours à l'Arbitrage et le Tribunal actuellement constitué est la preuve évidente que l'institution de la Cour n'a pas été infructueuse.

"Le Tribunal représente les premiers de ces fruits. Peut-être dira-t-on que ces fruits sont encore un peu rares et plutôt modestes et qu'une hirondelle ne fait pas le printemps, mais il nous est permis d'espérer néanmoins que dans l'avenir sous l'égide et grâce aux bons soins du Conseil administratif, représentant les Puissances réunies qui ont créé l'Institution, elle portera de plus en plus de bons fruits de sorte que la Ville de la Haye, la Résidence Royale, où siège la Cour sous les auspices de Sa Majesté l'Auguste Souveraine des Pays-Bas, deviendra de plus en plus le centre de la justice internationale et par cela même le foyer de la paix d'où rayonne la bonne et cordiale entente entre les Nations."

RECORD OF PROCEEDINGS BEFORE THE SPECIAL TRIBUNAL.

Séance du 15 septembre 1902 (matin).

L'audience est ouverte à 11½ h. du matin sous la présidence de M. Matzen.

M. MATZEN prend place au fauteuil de la Présidence et pronounce le discours suivant:

EXCELLENCES! MESSIEURS! Comme Président du Tribunal d'Arbitrage, institué en vertu du traité conclu à Washington le 22 mai 1902

entre les Etats-Unis de l'Amérique et les Etats-Unis Mexicains, je déclare la première séance du Tribunal ouverte.

"C'est la première fois qu'a été constitué un Tribunal d'Arbitrage, siégeant sous le régime de la Convention de la Haye sur l'Arbitrage International et composé de membres de la Cour Permanente d'Arbitrage, crée par la Convention; et je remercie Vos Excellences ici présentes, Président et Membres du Conseil Administratif de la Cour Permanente, d'avoir bien voulu nous faire l'honneur d'assister à la première séance du premier Tribunal d'Arbitrage, émané de la Cour permanente.

"Ce premier Tribunal est constitué grâce à l'initiative de deux Grandes Puissances du Nouveau Monde, qui, animées du même sincère désir de faire règler un différend survenu entre eux à l'amiable et d'une manière satisfaisante et juste, sont tombées d'accord de le soumettre à un Arbitrage conforme dans son essence aux règles de la Convention de la Haye.

"Toutes les stipulations du traité susmentionné relatives à la constitution de ce Tribunal d'Arbitrage ont été dûment exécutées.

"Les Membres du Tribunal ici présents sont prêts à remplir consciencieusement la tâche importante et honorable, qui leur a été confiée.

"Les Arbitres, choisis par les puissances, brillent au premier rang des jurisconsultes du monde et sont bien au-dessus des mes éloges.

"Le fait d'avoir été appelé par leur vote, à présider leurs séances est considéré par moi comme un grand honneur illustrant toute mon existence, mais il serait de nature à m'effrayer, si je n'avais pas la ferme certitude de pouvoir compter sur leur constante et bienveillante collaboration.

"Au nom du Tribunal je souhaite une respectueuse et cordiale bienvenue aux illustres personnages représentant les Puissances devant le Tribunal et aux Conseils éminents, qui les assistent de leurs lumiéres, dont les savants discours élucideront les faits et fixeront des bases pour nos délibérations.

"Au moment de l'ouverture des séances du Tribunal j'émets le vœu qu'il nous soit donné, grâce aussi au concours zèlé et à la collaboration des Hautes Parties d'inaugurer les travaux des tribunaux d'arbitrage de la Convention de la Haye d'une manière conforme à la pensée sublime qui l'a inspirée et au but glorieux, qu'elle est appelée à faciliter: le règlement pacifique des litiges entre les États sur la seule base solide, la base du respect du droit."

Avant de procéder à l'instruction, j'ai encore quelques communications à faire. Les arbitres choisis par les Puissances, et qui m'ont fait l'honneur de me mommer président du Tribunal, sont:

"Le Très Honorable Sir Edward Fry, docteur en droit, siégeant à la Cour d'Appel, membre du Conseil Privé de Sa Majesté Britannique, membre de la Cour Permanente d'Arbitrage, arbitre désigné par les États-Unis d'Amérique;

"Son Excellence Mr. de Martens, Conseiller privé, membre du Conseil du Ministère impérial des affaires étrangères á Saint Pétersbourg, membre de la Cour permanente d'arbitrage, arbitre désigné par les États-Unis d'Amérique;

"M. T. M. C. Asser, docteur en droit, membre du Conseil d'État des Pays-Bas, ancien professeur à l'Université d'Amsterdam, membre de la Cour Permanente d'Arbitrage, arbitre désigné par les États-Unis Mexicains;

"M. le Jonkheer de Savornin Lohman, docteur en droit, ancien ministre de l'Intérieur des Pays-Bas, ancien professeur à l'Université libre d'Amsterdam, membre de la seconde Chambre des Etats-Généraux, membre de la Cour Permanente d'Arbitrage, arbitre désigné par les Etats-Unis Mexicains.

"Les agents des parties sont:

"M. Jackson Harvey Ralston, agent pour les Etats-Unis d'Amérique, et Son Excellence M. Emilio Pardo, envoyé extraordinaire et ministre plénipotentiaire du Mexique près de Sa Majesté la Reine des Pays-Bas, agent pour les Etats-Unis Mexicains.

"Les conseils sont:

"Pour les Etats-Unis d'Amerique:

"Mr. William Lawrence Penfield, juge,

"M. le Sénateur Stewart,

"M. le Chevalier Descamps, sénateur du royaume de Belgique, Secrétaire-Général de l'Institut du droit international, membre de la Cour Permanente d'Arbitrage,

"Mr. Charles J. Kappler,

"Mr. W. T. S. Doyle,

"Mr. Garrett W. McEnerney.

"L'agent des Etats-Unis Mexicains sera assisté de Son Excellence M. Beernaert, ministre d'Etat membre de la Chambre des représentants de Belgique, membre de la Cour Permanente d'Arbitrage.

"Aux termes de l'article 4 (1) de la convention de La Haye, le Président doit nommer les secrétaires. J'invite donc M. Ruyssenaers, Secrétaire-Général de la Cour Permanente d'Arbitrage, à remplir les mêmes fonctions auprès du Tribunal d'Arbitrage.

"Comme secrétaires lui sont adjoints:

"Mr. Walter S. Penfield.

"M. Luis Pardo, premier secrétaire de la Légation du Mexique à La Haye, et M. le Jonkheer W. Röell, premier secrétaire du bureau international de la Cour Permanente d'Arbitrage.

"D'après l'article 38 de la Convention de La Haye, le Tribunal décide du choix des langues dont il sera fait usage et dont l'emploi sera autorisé devant lui. Le Tribunal a décidé que la langue officielle devant lui serait la langue française, mais il a autorisé l'emploi des langues française et anglaise. Les procès-verbaux seront en rédigés en français et sous une forme concise; cependant les Parties seront libres d'engager des sténographes pour les comptes-rendus des débats.

"D'après l'article 41 de la Convention de La Haye, le Tribunal, avec l'assentiment des Parties, a décidé que les débats seront publics, mais á cause de la place restreinte dont il dispose, l'admission aux séances sera réservée aux personnes munies de cartes à délivrer par le Secrétaire-Général du Tribunal.

"Telles sont les communications que j'avais à faire.

"M. l'agent des Etats-Unis d'Amérique du Nord a la parole."

Mr. Jackson Harvey Ralston, Agent des Etats-Unis d'Amérique, prononce le discours suivant:

"On behalf of the United States, it is my honor and pleasure to offer a brief reply of thanks to the courteous sentiments of the distinguished president of this court.

"At this moment, permit me to express my appreciation of the action of the Netherlands Government in extending many courtesies in connection with the establishment of the court of arbitration, as well

as in facilitating the work of the first litigants, and furthermore to acknowledge most heartily the compliment shown by the attendance on this occasion of the members of the administrative council.

"We, who represent the United States, esteem highly the opportunity of presenting before this learned body a controversy involving the two foremost nations of the North American continent. It is perhaps natural that we should felicitate ourselves upon the fact that the first nations to resort to this tribunal are of the Western Hemisphere, and are nations which may take pride in the fact that they are legitimate offspring of the peoples of Europe, and as such, inheritors of centuries of a common civilization, the most advanced that the world has ever known.

"We of the United States find satisfaction in the fact that the first suggestion of arbitration of the question now offered for your consideration was made by Mr. Secretary Hay, of the United States, whose fame as a diplomatist and as a statesman knows no national bounds. We congratulate our neighbours upon the other side that after this suggestion Mr. Hay and the distinguished secretary of foreign affairs of Mexico, Mr. Mariscal, came to a speedy accord upon the proposition to refer the proposed arbitration for settlement under the provisions of The Hague Peace Convention.

"On May 22, 1902, the protocol was signed at Washington, and without loss of any time the Mexican Senate, on May 30, validated its requirements by ratifying the instrument.

"That the two countries should have been willing to arbitrate their differences before five members of the permanent court of arbitration is, I venture to say, conclusive evidence of belief in the impartiality and ability which would be displayed by those whom the signatories of The Hague Convention had designated from among their most eminent jurists and publicists.

"Inaugurating our proceedings under such circumstances, I may assure you, Mr. President and honorable arbitrators, that the determinations of this court, whatever they may be, will command and receive the respect and unquestioned acquiescence of the United States. After your award shall have been rendered, no matter what our previous opinions may have been, we will remember the language of a distinguished English jurist who, on the occasion of a famous international arbitration, said:

> I hope that the English people will obey the decisions of the judges with the submission and respect due to the decision of a tribunal whose decree they have freely agreed to accept.

"I do not wish to take my seat without expressing the hope of my country that the precedent of appealing to the judges forming the Permanent Court of Arbitration may be followed with increasing frequency as years go by. While the unique honor must remain to the United States of America and the United Mexican States of being the first voluntarily to submit their differences to the jurisdiction of this court, it will be a source of the greatest satisfaction to my Government if the action thus taken should pave the way to similar settlements in the future, whereby in later cases misunderstandings which might otherwise lead to conflicts between states may receive peaceable adjustment, believing as it does that the most happy rivalry that can possibly exist between nations is to be found in a common effort to excel in whatever tends to bring about the contentment and well-being of mankind. The good of humanity is an end to which the United States

steadily and consciously struggles, and toward the same end, we believe, assuredly the formation and the extension of the employment of the Permanent Court of Arbitration must largely contribute.

"In again thanking you, Mr. President, for your own expressions of courtesy and good will, let me once more express the hope that our labors may conduce towards the coming of the time when, to paraphrase the language of England's great poet:

> The war drum throbs no longer,
> And the battle flags are furled
> In the parliament of man,
> The federation of the world.

M. LE PRÉSIDENT. M. l'agent des Etats-Unis Mexicains a la parole.

Son Excellence M. EMILIÓ PARDO, agent des Etats-Unis Mexicains, prononce le discours suivant:

"MESSIEURS! Au nom du Gouvernement des Etats-Unis Mexicains, je profite de cette occasion solennelle pour exprimer ses remercîments très sincères et très cordiaux aux éminents publicistes qui forment la Cour Permanente d'Arbitrage, appelée à prononcer la dernière parole sur le différend suscité entre les représentants de l'Eglise Catholique de la Haute Californie et mon Pays, au sujet de la réclamation, désormais célèbre, du Fond Pie de Californie.

"Je me fais un devoir de remercier également le Gouvernement des Pays-Bas, pour l'hospitalité si franche et si généreuse qu'il a bien voulu nous accorder, et qui rentre si bien dans les traditions du peuple Néerlandais, et je me permets de présenter la reconnaissance de mon Pays et de son Gouvernement aux très distingués membres du Corps Diplomatique qui ont bien voulu honorer de leur présence, cette imposante cérémonie.

"La grande institution créée par le Congrès de la Paix, est appelée pour la première fois à rendre ses importants services à la cause du Droit et de la Justice, et je m'empresse de faire profession publique de la foi du Gouvernement Mexicain en la sagesse, en la science et en l'impartialité de la Cour qui vient d'être installée.

"Quoiqu'il en soit pour nous du jugement de la Cour, nous pouvons dire avec le plus légitime orgueil que, comme le prouve la correspondance diplomatique échangée entre les deux Gouvernements en cause, pour préparer la signature du Protocole du 22 mai dernier, le Mexique fut le premier à proposer l'application de l'arbitrage international établi par la Convention du 29 juillet 1899.

"L'événement, dont nous sommes les témoins, marquera, j'en suis sûr, une date inoubliable dans les fastes de l'histoire de l'arbitrage international, si modeste que soit le litige qui a motivé la convocation de la Cour, et nous devons espérer tous, les puissants et les faibles, tous égaux devant la Justice, que l'exemple donné par les deux Républiques de l'Amerique du Nord ne restera pas infécond et isolé."

(L'audience est suspendue à 11 h. 45 du matin.)

DEUXIÈME SÉANCE.

15 septembre 1902 (après-midi).

L'audience est reprise à $2\frac{1}{4}$ heures de l'après-midi, sous la présidence de M. Matzen.

M. LE PRÉSIDENT. Je donne la parole d'abord à M. le Secrétaire-

Général, pour faire lecture des communications qui ont été adressées au Tribunal d'Arbitrage, par l'intermédiaire du Secrétaire-Général de la Cour Permanente.

M. LE SECRÉTAIRE-GÉNÉRAL. Voici la liste des communications reçues:

1°. Déposition notariée du 24 juillet 1902 de l'archevêque de San Francisco;

2°. Catholic Register de 1902;

3°. Annexe de la Réponse du Mexique "Pleito de Rada;"

4°. Deux copies certifiées conformes du compte-rendu en la cause de Alemany et al. vs. le Mexique, dans lesquelles se trouvent reliées: des copies certifiées conformes de la correspondance diplomatique entre les Hautes Parties, concernant l'affaire soumise au Tribunal, ainsi que le Memorandum de l'Amérique se rapportant à cette affaire et l'original du compte-rendu susmentionné;

5°. Deux enveloppes scellées, concernant les nominations de l'archevêque de San Francisco: Mgr. Riordan, et de l'évêque de Monterey; Mgr. George Montgomery;

6°. Lettre de l'agent du Mexique du 3 septembre 1902 avec une traduction anglaise de la réponse de Mexique du 6 août 1902 aux demandes Américaines.

7°. Lettre de l'agent d'Amérique du 3 septembre 1902 concernant la communication à l'agent du Mexique du volume contenant le compte-rendu en la cause Alemany et al. v. le Mexique;

8°. Lettre de l'agent d'Amérique du 4 septembre 1902 au sujet du discours à prononcer par M. le sénateur Stewart.

Communication addressée à M. Pardo à ce sujet.

9°. Des extraits assermentés de publications se rapportant à l'affaire soumise au Tribunal;

10°. Sept extraits assermentés de l'ouvrage intitulé "Noticias de la Provincia de Californias," etc.

11°. Deux copies certifiées conformes du traité de Washington;

12°. Une copie certifiée conforme du document intitulé "Testimonio de la escritura de venta," etc.;

13°. Une lettre de l'agent d'Amérique du 12 septembre 1902 faisant part d'une communication faite par lui le 12 septembre à S. E. M. Pardo, pour lui faire savoir que les documents déposés au Secrétariat-Général par Mr. Ralston peuvent étre consultés par l'agent du Mexique;

14°. Une lettre de l'agent d'Amérique du 13 septembre 1902 notifiant qu'il sera assisté en qualité de conseils par M. le juge William Lawrence Penfield, M. le sénateur W. M. Stewart, M. le Chevalier Descamps, sénateur du Royaume de Belgique, Secrétaire-Général de l'Institut du droit international d'Arbitrage; Mr. Charles J. Kappler, Mr. W. T. S. Doyle, Mr. Garret W. McEnerney.

15°. Une lettre du Ministre d'Amérique du 12 septembre 1902 pour transmettre au Tribunal deux enveloppes scellées contenant la déposition de Mr. John T. Doyle et les pièces justificatives dans l'affaire soumise au Tribunal;

16°. Une lettre du S. G. du 13 septembre 1902 au Tribunal portant à sa connaissance que Son Excellence Mr. Emilio Pardo qui sera assisté de Son Excellence Mr. Beernaert en qualité de conseil, a été nommé agent des Etats-Unis mexicains;

17°. Une lettre du chargé d'affaires d'Amérique communiquant que M. Jackson H. Ralston, qui sera assisté de M. William Lawrence

Penfield en qualité de conseil, a été nommé agent des Etats-Unis d'Amérique.

M. le Président. Maintenant je demande aux Parties si elles ont encore des actes ou des documents à nous communiquer.

M. Delacroix. En l'absence de M. Pardo, qui va arriver, j'ai l'honneur de vous faire savoir que le Mexique a en effet encore des documents qui lui sont annoncés, qui devront être déposés et qui n'ont pas été communiqués plutôt à raison de certaines circonstances qui seront exposées et qui expliquent le retard. Cependant, s'il convient au Tribunal d'entendre des plaidoiries, sous réserve de notre droit de déposer certains documents dès qu'ils nous parviendront, nous serions à la disposition du Tribunal.

Mr. Ralston. If I might speak in English upon that subject, we have made certain demands for discovery upon Mexico. Some of these demands have been met. The protocol, you will recall, permits one party to demand certain information from the other. The demands which have been made relate simply to the correctness of certain documents which are contained in the volume which you have before you, and I am correct in saying that while the Mexican Government has made certain corrections in the Spanish referred to, yet the English translation of those in question contained in the document is in substance correct.

We have also demanded from Mexico the production of a document known as the Escritura de Venta, in other words, the deed (in English) of a hacienda, or place, ranch, known as Ciénega del Pastor. That discovery has been made by Mexico, and a copy of the deed has been placed in the hands of the secretary general, and in a moment I will furnish this tribunal with a translated copy.

Mexico has made certain demands upon us. We nave telegraphed to Washington and to San Francisco for suitable responses to those demands. We expect them to arrive almost daily. They will certainly, I think, reach here before Monday, but there will be nothing contained in them, I am satisfied, which will in any way interfere with the case proceeding immediately. I should add that we are ready to submit certain documents, arguments, and other papers which I think fully state our case, aside perhaps from the discoveries of which I have spoken. We are ready now to submit them in writing, and I will place them before the court and in a word explain exactly for what purpose they are placed before the court, with your permission.

Our memorial, which is in substance the claim of the United States, has already been filed with the secretary-general as a part of the volume before you. At the end of the volume is a copy in English of our memorial. The answer of Mexico, I understand, has not yet been filed.

M. Pardo. Elle doit être avec le dossier envoyé par le département d'Etat des Etats-Unis.

Mr. Ralston. Certainement non.

M. Pardo. D'après le protocole, cette réponse devait être déposée par le Département des Etats-Unis.

Mr. Ralston. J'ai des copies en espagnol, mais cela ne vaut rien je pense devant ce Tribunal.

However, I have been able to place before the gentlemen of this tribunal an English copy of the Mexican answer—a translation. I have presumed that Mexico would file here its own pleadings, there-

fore I have not filed a Spanish copy. I want to say, and I should explain to Mr. Pardo, that I am about to place before the tribunal again a copy of the English translation. Some little inaccuracies were noted in the translation submitted to Mr. Pardo. Some little corrections have been made in the English turns of expression. The translation, in other words, is, I think, a little better. We have adhered with as great fidelity as has been possible to the Spanish original; but I have thought it proper to call Mr. Pardo's attention at this moment that, word for word, the translation which will now be submitted is not identical with the translation already submitted, while I do not believe there is any departure of any possible moment. I think it is simply perfected, not changed.

With this explanation, I desire to submit to this honorable court, first, what I have taken the liberty of terming, in accordance with the law to which I am accustomed, a replication; that is to say, en Français, "réplique," to the answer—to the response—of Mexico to our memorial. I have discussed the points which have been raised by Mexico in her answer, and I have undertaken to answer them. To this réplique I have added, as exhibits, certain documents. The first is the English translation of the answer of Mexico, with footnotes in the way of corrections, which it seemed to me proper to make. There were various manifest errors which crept into the answer of Mexico, mistranslations perhaps in some cases of the documents referred to, references to wrong pages, and to matters of that sort which the court will find corrected in the footnotes of the document about to be submitted. I have added a further exhibit, which is entitled "Résumé of litigation, relating to the de Rada property," referred to in the answer of Mexico. The secretary-general has placed before the court the volume entitled "Pleito de Rada," which is entirely in Spanish, and I might say, very ancient Spanish; but we have undertaken at considerable toil to extract the substance of that volume, I think correctly, and we have added a statement in Exhibit B of the effect of that volume, and copied entirely the decree upon which Mexico relies, and which is found at its end, giving an English translation parallel with the Spanish.

We have also added as Exhibit C a statement taken from a work of authority, tending to show the amount of the Indian populations of Lower California. You gentlemen, and honorable members of the court, will understand the difference between Lower and Upper California, as it will be termed in the discussions; Lower California being a peninsula, as will be pointed out, and Upper California, or as we say simply California, now being a part of the United States. We have concluded the exhibits with a copy in Spanish, with parallel English translation, of the document of which I have already spoken, the Escritura de Venta, the deed of a property formerly belonging to the Pious Fund of Mexico, and of which we asked discovery from Mexico. That discovery was given, and, as I take the liberty of saying, the document so discovered, has been translated and is added as an exhibit to our replication. In addition, I desire to present at this time for the convenience of this court, and I trust for the convenience of Mr. Pardo as well, and ourselves, a translation of the laws of Mexico relating to the Pious Fund, the matter out of which the present dispute arises. In some of the briefs and memoirs which will be submitted, this honorable court will find references to various laws, but the trans-

lation was made many years ago, and in one or two instances, in our judgment, not made with sufficient care, and we should much prefer, and I believe on examination Mr. Padro, the agent of Mexico, will agree with me, that the translation of these laws, which is now submitted, is much more carefully and accurately done.

I shall also desire to submit a statement and brief of the counsel and agent of the United States. I may say that this is designed to embrace practically all of the points, which we believe will call for the consideration of this court, and while its length may alarm you, I trust that it may, nevertheless, prove somewhat useful.

At the same time, in submitting all of our papers to this honorable court and to the inspection of our friends upon the other side, I desire to add a brief, which has been prepared by Senator Stewart and Mr. Kappler on behalf of the United States, and also a similar brief prepared by Messrs. Doyle and Doyle, the senior of these gentlemen having been connected with the litigation, of which this is an outgrowth, from its very commencement. (I shall at this moment take the liberty of asking the secretary to hand to the court several of these documents.)

M. LE PRSÉIDENT. Est-ce que l'un des délégués a encore des documents à produire?

M. EMILO PARDO. Avec la permission de la Cour. Quand nous sommes venus ici pour la première fois, je me suis addressé officiellement à Mr. Ralston pour lui proposer de demander au Tribunal ou à son Secrétariat-Général la permission de nous renseigner sur le dossier qui avait été envoyé par le Département des Etats-Unis. J'ai renouvelé cette démarche auprès de Mr. Ralston; mais peut-être à cause de ce que les correspondances respectives étaient écrites en espagnol il ne m'a pas bien compris, et au lieu de répondre à ma demande de faire une démarche collective pour permettre aux Parties et aux conseils de voir les dossiers, il m'a répondu en m'envoyant le volume imprimé que Messieurs les Arbitres connaissent. Ce n'est qu'au dernier moment, c'est à dire hier, que nous avons pu nous expliquer devant l'honorable Président du Tribunal, et que Mr. Ralston a manifesté son bon vouloir de nous permettre de nous renseigner sur le dossier. Il est bien vrai qu'on nous a dit que dans le volume imprimé qui se trouve entre les mains de Messieurs les Arbitres, et dont Mr. Ralston a bien voulu nous envoyer des exemplaires, se trouve tout le dossier, c'est-à-dire toutes les pièces qui ont été présentées à la commission mixte qui a siégé à Washington, les allégations des Parties, la correspondance diplomatique échangée entre les deux Gouvernements, et même une annexe qui contenait les divers traités qui sont pertinents dans l espèce; mais je viens d'apprendre de la bouche de M. Ralston que la réponse du Gouvernement Mexicain ne se trouve pas dans le dossier. Cependant dans le protocole du 22 mai dernier se trouve le passage suivant que je veux tâcher de traduire en français:

ART. 5. Tout témoignage oral qui ne se trouve pas dans les archives du premier arbitrage pourra être déposé par l'une ou l'autre des Parties, pourvu que le témoignage soit rédigé par écrit, qu'il soit signé par le temoin et légalisé par le fonctionnaire devant lequel il aura été rendu. Il devra être dirigé vers le Tribunal étant scellé. Il sera confié au Département des affaires étrangères du Mexique pour qu'il soit remis au Tribunal qui est établi quand celui-ci sera réuni.

ART. 7. Dans le délai de 40 jours après la déposition du mémorial, l'agent ou l'avocat du Mexique fera part à son Département de la même façon avec les mêmes références, de ses allégations et arguments pur réfuter à la réclamation.

Ainsi donc, c'est le Département d'Etat des Etats-Unis qui est chargé de présenter à la Cour le dossier des réclamations; ce dossier comprend l'ancienne instruction faite devant la commission mixte et la réponse du Gouvernement mexicain, parce qu'elle a été communiquée au Département des Etats-Unis.

Je viens donc d'apprende de la bouche de Mr. Ralston que cette réponse ne se trouve pas dans le dossier. Alors nous avons de quoi nous étonner, et c'est pourquoi j'ai insisté tant sur la prétention de connaître le dossier, d'être en mesure de nous renseigner sur les pièces qu'il renferme.

Si cette réponse ne se trouve pas dans le dossier, le Tribunal sera forcé de nous admettre à la présenter; cette réponse est d'ailleurs déjà traduite en français; le Tribunal en effet ne peut pas juger l'espèce actuelle sans connaître la réponse du Gouvernement Mexicain.

Nous avons entendu que, d'après diverses clauses du protocole, même après cette espèce d'instruction préalable, l'agent des Etats-Unis du Mexique avait le droit de présenter de nouveaux arguments, de nouvelles défenses ou exceptions à la demande, et tous les documents ou pièces qu'il jugerait convenable. Ainsi donc le Gouvernement mexicain par mon conduit s'est réservé expressément le droit de présenter ses pièces, et il les présentera sans délai, c'est-à-dire à la prochaine audience.

Il y avait un point sur lequel la difficulté était un peu plus grande: c'est au sujet du livre imprimé dont MM. les agents américains connaissent le texte et qui fut annexé à la réponse du Gouvernement mexicain. Cependant on dit que cette réponse ne se trouve pas dans le dossier, alors que cependant le livre s'y trouve à ce qu'il paraît! Nous étions forcés de faire les démarches nécessaires pour obtenir l'authenticité de ces documents, notamment de la partie qui contient la décision rendue dans le procès entamé entre les héritiers de la principale donatrice des biens qui constituent le Fonds pieux de la Californie. Sur ce sujet, heureusement, M. Ralston et moi nous sommes d'accord, et cette question peut être considérée comme écartée. Nous pouvons admettre—je prie Monsieur l'agent des Etats-Unis de prendre note de mes paroles—nous pouvons admettre comme prouvé et établi le jugement prononcé dans le procès dont je viens de parler et qui se trouve à la fin du volume imprimé présenté avec la réponse du Gouvernement Mexicain.

Quant aux exhibitions qui viennent d'être faites par l'agent des Etats-Unis, le Tribunal ne peut pas s'étonner si nous nous réservons le droit de voir tout cela, le droit de voir quelles sont ces pièces, quelle est leur opportunité dans ce procès, et le droit aussi de présenter des preuves à l'encontre des documents et des pièces produits par le Gouvernement de Etats-Unis.

Enfin je crois que notre conseil, M. Delacroix, a déjà dit au Tribunal que nous étions tout à fait disposés à ce que la plaidoirie d'un des avocats américains soit entendue tout de suite, sous réserve, d'après les termes exprès du protocole, de produire les documents qui font partie intégrale de la réponse du Gouvernement mexicain, parce que autrement le procès serait jugé sans preuves, et le Gouvernment mexicain se trouverait dans une situation tout-à-fait pénible parcequ'il serait jugé vraiment sans être entendu.

Je renouvelle donc la réserve de droits qui vient d'être faite par M. Delacroix, et je prie le Tribunal de vouloir bien prendre note de

ces réserves, sous la réserve de présenter des documents à la prochaine audience.

M. DELACROIX. Ou plutôt à une des prochaines audiences: il y a des documents qui ne sont pas encore reçus.

M. PARDO. C'est toujours compris dans les termes du protocole.

M. LE PRÉSIDENT. Alors après-demain nous aurons la réponse du Gouvernement Mexicain?

M. PARDO. Je demande la permission au Tribunal de mous permettre de connaître le dossier pour savoir si la réponse du Gouvernement mexicain s'y trouve ou non; parce que c'est une découverte tout-à-fait extraordinaire que nous venons de faire, à savoir que le Gouvernement américain chargé de présenter un dossier n'a pas voulu consigner la réponse du Gouvernement mexicain!

M. BEERNAERT. Je n'ai demandé la parole que pour appuyer ce que vient de dire M. Pardo. Nous sommes dans une situation assez extraordinaire; il a été entendu et stipulé que le dossier commun serait déposé à Washington; il semble que rien n'etait plus naturel que de nous mettre à même de vérifier ce dossier; or c'est en vain que M. Pardo d'un côté et M. Delacroix envoyé par moi à La Haye pour cela, ont demandé à prendre connaissance de ce dossier.

Il est donc indispensable que le dossier soit mis à notre disposition et puisse être vérifié. C'est une besogne à laquelle nous pourrons nous mettre dès demain, mais il est indispensable qu'elle soit faite. C'est une réserve à ajouter à celles qui viennent d'être exprimées.

Mr. RALSTON. I wish to confirm what has been said by the agent of the Mexican Government upon the question of the authenticity of the Pleito de Rada, the printed document presented by Mexico. We cheerfully admit that it is an authentic copy of the proceedings of which it purports to be a copy. There is no question between us. I think there are perhaps some misunderstandings of no great moment, if I have carefully followed the address of the agent, and which may be speedily explained. The provisions of the protocol say, on page 50, section 3:

> All pleadings, testimony, proofs, arguments of counsel, and findings or awards of commissioners or umpire, filed before or arrived at by the mixed commission above referred to, are to be placed in evidence before the court hereinbefore provided for, together with all correspondence between the two countries relating to the subject-matter involved in this arbitration, originals or copies thereof duly certified by the Department of State of the high contracting parties being presented to said new tribunal.

Reference to that paragraph will show, I think, to the court that it has no regard whatever to the proceedings before the present tribunal, but refers entirely to everything which happened before the tribunal of some thirty years ago. All of the proceedings before that tribunal, absolutely everything, is to be found in the printed volume at the disposal of this honorable court, and which has been filed here now some two weeks, and there have also been deposited with this court two copies of that same record duly certified, as provided by this article. More than that the United States was not obliged to do in that respect. We have filed at the same time our original memorial, and according to the practice with which we have any familiarity, it is the duty of the defendant to file his own answer to the complaint which is made by the complainant (le demandeur). However, if the agent of Mexico so desires, and if I catch his point correctly, there is no possible objection on the part of the United States to file with the secretary-general

of this court a copy of the Mexican answer in Spanish. We certainly want to have no delay, because on our part we have misapprehended our duty, although to our mind the view taken by the agent of Mexico is extraordinary. There has been some correspondence between the agent of Mexico and myself relative to what is termed in Spanish the "expediente," a word with which we are not familiar in English, and these technical words always present some difficulty of translation. We understood the "expediente" to relate to all the papers in the old case. They are filed here and are before this court in the printed volume.

Sir EDWARD FRY. I would like to put a question. Do you propose to file a replication; that is to say, a reply to the Mexican answer? It appears to me that if you refer to the compromis, that provides for two pleadings. By the language of Section VI, the United States, through their agent or counsel, shall prepare and furnish to the Department of State aforesaid a memorial in print of the origin and amount of their claim, and Section VII provides for the delivery by Mexico of its memorial or statement of the case, but it makes no provision for a replication by the United States to the pleadings of Mexico. It seems to me if we allow that we must allow a reply by Mexico, and we would go on ad infinitum.

Mr. RALSTON. That perhaps is correct. There is no express provision in the protocol.

Sir EDWARD FRY. There is not.

Mr. RALSTON. It is quite possible, but perhaps I have in mind the usual practice in our cases at law.

Sir EDWARD FRY. This is the code [referring to the protocol].

Mr. RALSTON. I submit to that.

M. ASSER. Monsieur le Président; je voudrais m'associer à l'observation de mon honorable collègue, et je me permettrais d'ajouter ceci: M. l'agent et les conseils des États-Unis du Mexique ont entendu ce qui vient d'être dit; d'après le compromis il n'y a que deux mémoires, un mémoire du demandeur et un mémoire du défendeur; maintenant, nous trouvons dans les documents qui viennent de nous être produits un deuxième mémoire du demandeur. La question est de savoir si le défendeur permet que ce deuxième mémoire reste au dossier, ce que j'espère on permettra, mais si dans ce cas on ne demandera pas aussi d'avoir l'autorisation de répondre par un mémoire.

M. BEERNAERT. Cela est évident. Nous ne faisons pas objection à ce qu'on produise une seconde fois les documents de l'adversaire, mais à la condition d'y pouvoir répondre.

M. RALSTON. C'est chose entendue.

With the permission of Mexico, if I correctly understand, we may present this replication. I have your permission?

M. PARDO. Nous sommes d'accord d'avoir l'occasion de connaître ce mémoire.

M. BEERNAERT. Nous y répondrons d'une manière complète lorsque nous aurons été à même de prendre connaissance du dossier, que nous n'avons pas encore vu.

M. LE PRÉSIDENT. Est-ce que l'agent des Etats-Unis Mexicains admet de faire le Statement des Etats-Unis d'Amérique?

M. BEERNAERT. En effet, mais sous la condition expresse, à laquelle adhère le représentant des Etats-Unis, que de même qu'il a eu le droit de faire une réplique nous avons le droit de faire une réponse.

Sir EDWARD FRY. Ecrite?

M. BEERNAERT. Bien entendu.

M. LE PRÉSIDENT. Nous sommes d'accord que c'est admis sous réserve d'y répondre par écrit.

Mr. RALSTON. May it please your honors, if it is understood, and I suppose it will be, that the filing of this replication, so called by us, does not involve any unusual delay to the case, I will cheerfully agree to the reservation made by the agent of Mexico. Otherwise it seems to me to be simply this: That we would change the title of "replication" to that of "argument," and submit an additional argument at this moment; so I think that we may assume that the agent of Mexico will have as much time to reply to this as to anything else, no more, no less. We have wished to place our case fully before the court, absolutely to put the court in possession of everything which might be of any assistance to it in reaching a just conclusion, and it is for that reason that we have thought it convenient at this moment to put our additional considerations upon the answer of Mexico in the form of a replication. If the name be objectionable, we will change it to an argument.

M. DE MARTENS. Je crois, si j'ai bien compris, qu'il n'y a pas de malentendu sur le fond de la question. Tout le monde est d'accord que d'après le protocole de Washington il n'y a qu'un mémorial et une réplique écrite; maintenant, si une des parties présente au Tribunal encore une réplique ou un mémoire—— * * *

M. BEERNAERT. C'est fait.

M. DE MARTENS. Sans doute alors l'autre partie a le droit de donner sa réplique; seulement je ne vois aucune nécessité que la réplique soit écrite.

M. BEERNAERT. Si, elle sera écrite: nous y tenons.

M. DE MARTENS. Je crois que dans ce cas l'autre partie a le droit de faire d'autres réponses devant le Tribunal et de réfuter ce que l'autre partie a dit oralement ou par écrit.

M. BEERNAERT. Nous répondrons par écrit: il est préférable que la même forme soit toujours observée.

M. DESCAMPS. Il est entendu qu'en ce qui concerne les plaidoiries qui auront lieu ultérieurement, si celui qui a plaidé désire remettre une conclusion écrite de ce qu'il aura dit il pourra le faire?

M. BEERNAERT. Parfaitement.

M. DESCAMPS. Sous ce rapport je ne comprends pas bien la situation qui nous est faite. Les Etats-Unis ont déposé autant de pièces qu'ils ont pu en déposer; d'autre part il n'y en a pas d'autres.

M. BEERNAERT. Il y a eu une mission commune.

M. DESCAMPS. Nous avons fourni à nos adversaires un très grand nombre de documents; évidemment cela présente une très grande importance; ils pourront y répondre; seulement il doit être bien entendu qu'en ce qui concerne les plaidoiries qui auront lieu on pourra remettre sous forme de conclusions les éléments essentiels permettant au Tribunal de se rendre un compte absolu et par écrit de l'opinion du défenseur.

M. BEERNAERT. Nous sommes tout à faint d'accord.

Mr. RALSTON. I suppose that the answer to the replication, if we may be permitted so to term it, will come within ample time, within the thirty days, and that the presentation of the replication will not be a cause for delay beyond that time; otherwise I will withdraw the title at any rate.

M. PARDO. Je dois appeler l'attention du Tribunal sur le point que l'agent des Etats-Unis a eu l'occasion de connaître la réponse du Gouvernement mexicain depuis le 12 du mois dernier, c'est-à-dire qu'il a eu tout le temps nécessaire pour préparer la réplique que l'on vient de nous distribuer. Nous sommes d'accord sur la nécessité de faire marcher la procédure pour finir le plus tôt possible, mais je crois qu'il est d'équité, de justice, de nous permettre de disposer au moins du temps nécessaire pour nous renseigner sur ce mémoire. Pour le dire en très peu de mots, l'agent du Gouvernement des Etats-Unis mexicains est tout-à-fait d'accord que tous les documents, toutes les pièces, toutes les argumentations qui seront présentés des deux côtés, soient mis à la disposition du Tribunal, parceque le but que poursuit le Gouvernement mexicain est que cette question soit résolue en pleine connaissance de cause. Tous les documents de nature à éclairer la religion de la Cour doivent donc être admis. Le gouvernement Mexicain ne s'y oppose pas du tout, mais il demande, car c'est la justice et l'équité, d'avoir les mêmes droits que ceux qui ont été exercés par l'agent des Etats-Unis.

Mr. RALSTON. I wish to add one word with reference to the testimony. There are in the volume submitted to you certain extracts from Spanish works, commencing about page 187 or 189, and running to page 221. The translations into English of these Spanish works were not made before the old tribunal. We have caused them to be prepared for the use of this tribunal, and with your permission, and under such reservations as the agent of Mexico may agree to make with regard to our translations, we shall desire to submit them, but the printing will not be completed before Wednesday morning.

Before presenting Senator Stewart, whom we will ask to make the first speech, with your permission, there is one question which has arisen between the agent of Mexico and myself upon which I should be pleased to have the court pass, as it may determine the course of the arguments somewhat. According to English, I think, and I know to American, practice the complainant (demandeur, so to speak) has the right to open and to close the case; to make the opening argument and the closing argument. The defender may make two or three or more intervening arguments, or if there be a large number of counsel the counsel should arrange it in such manner the closing speech is made on the part of the plaintiff (demandeur). I know that this practice is an absolutely uniform one.

Sir EDWARD FRY. Not in England.

Mr. RALSTON. It is with us. I want to submit the question of the order of debate at this time to the decision of the court.

M. LE PRÉSIDENT. Est-ce que vous demandez une décision du Tribunal sur cette question?

Mr. RALSTON. S'il vous plaît.

M. LE PRÉSIDENT. Est-ce que l'agent des Etats-Unis mexicains est d'accord?

M. PARDO. La remarque faite par l'agent des Etats-Unis d'Amérique prouve ce que je m'étais permis d'indiquer dans une réunion préalable de la Cour: la nécessité absolue de fixer la procédure à suivre. Le protocole n'a pas pu comprendre tous les détails de cette procédure; il faut absolument, pour éviter une discussion à chaque pas, que le Tribunal daigne fixer une bonne fois au moins les éléments d'une procédure régulière, autrement nous serons à chaque instant l'une et l'autre

partie aux prises pour savoir combien de fois chacun des avocats peut parler, si les documents peuvent être produits pendant l'audience ou en dehors. Il faut je crois que le Tribunal daigne fixer une bonne fois la procédure qui doit être suivie devant elle, autrement le procès sera embrouillée d'une façon telle que nous ne nous entendrons jamais.

J'adhère donc à la proposition de M. l'agent des Etats-Unis, et je demande au Tribunal de fixer une bonne fois la procédure à suivre devant lui.

(MM. les arbitres se concertent à voix basse.)

M. LE PRÉSIDENT. Le Tribunal en délibérera après la cloture de la séance et prendra une décision sur les questions que les agents ont relevées.

Mr. RALSTON. If the court is prepared at this moment, or as soon as the court will be prepared, Senator Stewart is ready to proceed to address the court whenever the court desires.

(Discussion between the members of the court as to order of debate.)

Mr. RALSTON. If you will, the Senator will wait until the court shall decide the question before it.

M. LE PRÉSIDENT. Alors Monsieur le conseil das Etats-Unis de l'Amérique du Nord peut commencer à discuter; nous nous retirerons après.

M. BEERNAERT. Il est bien entendu, Messieurs, qu'en entendant Mr. Stewart nous n'abandonnons pas les questions préalables, et que c'est sous le bénéfice de nos réserves que nous écouterons Mr. Stewart.

M. LE PRÉSIDENT. La question n'est pas décidée maintenant, nous la déciderons plus tard. Je donne la parole à Mr. Stewart, avocat des Etats-Unis d'Amérique.

Mr. STEWART. Mr. President and honorable arbitrators: This controversy grows out of donations made by pious persons in the eighteenth century to create a fund for the civilization and conversion of the natives of the Californias, and for the maintenance and support of the Catholic religion in that country. The fund created by such donations was covered into the Mexican treasury by the decree of October 24, 1842, with an undertaking on the part of Mexico to pay interest thereon for the purposes intended by the donors. After the sale of California to the United States the Mexican Government failed to pay the agreed interest on that part of the principal belonging to the missions of Upper California. The questions as to the amount of the principal and the amount of the interest due thereon, with all collateral questions necessary to be decided for the determination of those questions, were submitted to arbitration by the United States and Mexico by the convention of July 4, 1868. The commissioners of the United States and Mexico failing to agree, Sir Edward Thornton, the British minister at Washington, made the decision as umpire, and found that the principal, which was a permanent investment, amounted to $1,435,033; that the part to be apportioned to Upper California was $717,516.50; and that the interest then payable amounted to $904,070.79. He therefore rendered judgment for such interest against Mexico and in favor of the bishops of California. Mexico thereupon paid the judgment, but she has paid no interest on the principal since October 24, 1868. The present proceeding is to determine what interest, if any, is now due and payable to the bishops of California.

I. The United States contend that all questions relating to the principal investment and the annual interest due thereon, and all questions of the rights of the bishops of California thereto, were determined and became *res judicata* by the decision in the former arbitration.

I will not now discuss the question of *res judicata*, as that subject will be fully treated in the argument to be made by the agent and counsel of the United States. I will, however, venture the assertion that no tribunal of recognized authority, whether national or international, having jurisdiction of the parties and the subject-matter, has ever held that any question, either of law or fact, which it was necessary to decide to reach the final judgment was not *res judicata* and binding upon the parties and their privies in all subsequent proceedings involving the questions thus put in issue and decided. This principle is especially important in international courts of arbitration, because if matters decided by them are not finally settled, such courts will naturally fall into disuse.

II. The United States are now confronted with the denial by the representative of Mexico that anything became *res judicata* by the judgment in the former arbitration, except the duty of Mexico to pay the sum of $904,070.79 awarded, and also with his contention that every matter of law and fact upon which such judgment was founded and which was necessarily decided to reach the final conclusion, is still open to investigation and decision. I confess my surprise at the position taken by the representative of Mexico. But without waiving the question of *res judicata*, and being desirous of treating respectfully any argument the representative of Mexico may advance, I will make the following statement of the case:

The Californias consisted of the Peninsula of California and the western part of the Spanish dominions in North America (indicating on map). The harbors of San Diego, Monterey, San Francisco, and numerous other harbors and landings were visited and the rivers and streams connected therewith explored a considerable distance inland by Spanish navigators and adventurers. The explorers had penetrated and described the country sufficiently to show that Upper California was a vast region, blessed by nature with a salubrious climate and boundless resources. It was occupied by numerous tribes of Indians, furnishing an almost unlimited field for the work of the Christian missionaries in converting the natives to the Catholic religion.

As early as 1697 donations were made, and thereafter continued to be made from time to time down to 1765, by the Christian people of Spain to the fund now known as the "Pious Fund of the Californias," to be used for the civilization and conversion of the natives of the Californias. These donations were made for the avowed purpose of civilizing and converting the natives to Christianity and for the maintenance and support of the Catholic missions in the Californias. In 1735 a large donation was made by the Marchioness de las Torres de Rada and the Marquis de Villapuente. The object and desire of the donors were then fully set forth and particularly described. The *habendum* of their deed, which is denominated the foundation deed, proceeds as follows:

To have and to hold, to said missions founded, and which hereafter may be founded, in the Californias, *as well for the maintenance of their religious, and to provide for the ornament and decent support of divine worship*, as also to aid the native

converts and catechumens with food and clothing, according to the destitution of that country; so that if hereafter, by God's blessing, there be means of support in the "reductions" and missions now established, as ex. gr. by the cultivation of their lands, thus obviating the necessity of sending from this country provisions, clothing, and other necessaries, the rents and products of said estates shall be applied to new missions to be established hereafter in the unexplored parts of the said Californias, according to the discretion of the father superior of said missions; and *the estates aforesaid shall be perpetually inalienable, and shall never be sold, so that, even in case of all California being civilized and converted to our holy Catholic faith, the profits of said estates shall be applied to the necessities of said missions and their support;* and in case that the reverend Society of Jesus, voluntarily or by compulsion, should abandon said missions of the Californias or (which God forbid) the natives of that country should rebel and apostatize from our holy faith, or in any other such contingency, then, and in that case, it is left to the discretion of the reverend father provincial of the Society of Jesus in this New Spain for the time being, to apply the profits of said estates, their products and improvements, to other missions in the undiscovered portions of this North America, or to others in any part of the world, according as he may deem most pleasing to Almighty God; and in such ways that the dominion and government of said estates be always and perpetually continued in *the reverened Society of Jesus and its prelates,* so that no judge, ecclesiastical or secular, shall exercise any control thereon, or intervene in or about the same; and all such rents and profits shall be applied to the purposes and objects herein specified—i. e., *the propagation of our holy Catholic faith.* And by this deed of gift we, the said grantors, both divest ourselves of, and renounce absolutely all property, dominion, ownership, rights and actions, real and personal, direct and executive, thereover, and all others whatever, which belong to us, or which from any other cause, title, or reason may belong, appertain to us; and we cede, renounce, and transfer the whole thereof to said reverend Society of Jesus, *its missions of Californias, its prelates and religious, under whose charge may happen to be the government of said missions and of this province of New Spain,* now and at all times hereafter, in order that from the profits of said estates, and the increase of their cattle, large and small, their other gains, natural or otherwise, *they may maintain said missions in the manner above proposed, indicated, defined, and laid down forever.* (Transcript, p. 106.)

Sir EDWARD FRY. May I interpose a question?

Mr. STEWART. Certainly.

Sir EDWARD FRY. If you take this deed, you will find that it provides on page 106 for the expulsion and abandonment of the missions by the Jesuits, and then it proceeds in these terms:

And in case that the reverend Society of Jesus, voluntarily or by compulsion, should abandon said missions of the Californias, or (which God forbid) the natives of that country should rebel and opostatize from our holy faith, or in any other such contingency, then, and in that case, it is left to the discretion of the reverend father provincial of the Society of Jesus in this New Spain, for the time being, to apply the profits of said estates, their products and improvements, to other missions in the undiscovered portions of this North America.

Now, that event has happened. The Jesuits have been compelled to abandon the missions. Therefore the contingency has happened. Then it is left with the Society of Jesus to do as they think fit. How can that deed help you?

Mr. STEWART. It helps us very much if the whole document is considered. The fund was to be used in the Californias unless the reverend father provincial of the Society of Jesus of this New Spain ordered it to be used elsewhere. He never did so order. On the contrary, the fund was used in the Californias from the time of the expulsion of the Jesuits until the cession of Upper California to the United States. It makes no difference what reason the reverend father provincial of the Society of Jesus had for not acting. It is sufficient for the purposes of this case that he did not act. The reverend father and every member of the Jesuit order were expelled from the Spanish dominions by the King of Spain and suppressed by the bull of the Pope. The King then assumed the management of the fund as trustee and proceeded to carry out the designs of the donors. He first divided the Californias

into two provinces, Upper and Lower California. He assigned the Dominicans to Lower California and the Franciscans to Upper California to continue the work of converting, civilizing, and educating the Indians at the missions and the creation of new missions. He appointed a royal commission to manage the estates of the Pious Fund, collect the proceeds, and deposit the same in the treasury, and assigned the duty to certain officers of the treasury department to transmit the same to the missions in the Californias.

III. The above quotation, and, in fact, the entire deed, shows a very clear conception on the part of the donors of the magnitude of the undertaking to convert the natives of the Californias. It devotes the entire fund to the civilization and conversion of the natives, and the maintenance and support of the Catholic religion in that country, and provides particularly that after the civilization and conversion of the natives the proceeds of the fund are to "be applied to the necessities of said missions and their support" in the Californias. The language is as follows:

> And the estates aforesaid shall be perpetually inalienable and shall never be sold, so that, even in case of all California being civilized and converted to our holy Catholic faith, the profits of said estates shall be applied to the necessities of said missions and their support. (Transcript, p. 106.)

The donors state in what events the proceeds of the Pious Fund may be diverted to the support of missions other than those in the Californias. This exception is so important in fixing the Californias as the place which the donors intended the proceeds of their gifts to be employed that I quote the language:

> And in case that the reverend Society of Jesus, voluntarily or by compulsion, should abandon said missions of the Californias, or (which God forbid) the natives of that country should rebel and apostatise from our holy faith, or in any other such contingency, then, and in that case, it is left to the discretion of the reverend father provincial of the Society of Jesus in this New Spain for the time being to apply the profits of said estates, their products, and improvements to other missions in the undiscovered portions of this North America, or to others in any part of the world, according as he may deem most pleasing to Almighty God, and in such ways that the dominion and government of said estates be always and perpetually continued in the reverend Society of Jesus and its prelates, so that no judge, ecclesiastical or secular, shall exercise any control thereon, or intervene in or about the same; and all such rents and profits shall be applied to the purposes and objects herein specified, i. e., the propagation of our holy Catholic faith. (Transcript, p. 106.)

The natives did not rebel or apostacise, and there is no pretext for claiming that exception as an excuse for the use of the Pious Fund elsewhere than in the Californias. The reverend Society of Jesus did not voluntarily abandon the missions, but was expelled by the King of Spain. The reverend father provincial of the Society of Jesus in this New Spain did not order the fund to be used elsewhere, because he was also expelled and deprived of his functions, so that he could not control the fund or order its use elsewhere. The royal decree of February 27, 1767, declares:

> Therefore, by virtue of the supreme authority vested in me by the Almighty for the protection of my subjects and maintaining the respect due to my crown, I have decided to order the banishment from out of all my dominions in Spain, the Indias, Philippine and other islands of the regulars, both priests and laymen, of the Order of Jesus; also such as may have taken up vows and the novices who may desire to follow the calling; and that all the temporalities belonging to the order within my dominions be taken possession of; and for the uniform execution of the same I have given full powers and instructions to Count Arrauda, president of my council, to immediately proceed to take the necessary measures, as set forth by my other royal decree of the 27th of February. (Transcript, p. 410.)

The Pope, after the expulsion of the Jesuits by the King, suppressed the order of Jesuits, which deprived them of the control of the Pious Fund and of the missions for which it was established. In his bull of July 21, 1773, he said:

> But as regards the religious missions, we desire to extend and include all that has been decreed concerning the suppression of the society (of Jesuits), reserving (at the same time) the privilege of providing the means by which not only the conversion of the infidels, but also the peaceful settlement of dissensions may be obtained and secured with greater facility and stability. (Transcript, p. 335, par. 32.)

The Jesuits having thus been excluded and deprived of all participation in or control of the properties of the Pious Fund or the distribution of the proceeds thereof, the King of Spain assumed to himself the trusteeship of the Pious Fund and the management of the properties belonging thereto. The Franciscan Fathers were substituted in the place of the Jesuits as to Upper California, to continue the work inaugurated by them in establishing missions and in educating and converting the natives. The King appointed agents to manage the properties of the Pious Fund and to collect the proceeds thereof, and authorized the officers of the Spanish treasury to transmit the same to the fathers in the Californias.

IV. On acquiring her independence Mexico, as we shall hereafter see, followed the policy of Spain and provided by law for the management of the properties of the Pious Fund and the collection and transmission of the proceeds thereof to the fathers conducting the missions in the Californias. In 1836 she made an important change. On the 19th of September of that year she passed a law petitioning the Pope to create the Californias into a diocese and to appoint a bishop therein. The Pope appointed as such bishop the Right Rev. Francisco Garcia Diego, who was consecrated on the 27th of April, 1840. (Transcript, p. 182.) The residence of the bishop was located at Monterey, in Upper California, about five hundred miles northerly from the north line of Lower California, and in what was then about the center of the population of the missions in the Californias. The bishop of Monterey remained in office during his life.

The bishop of a diocese has charge of the Roman Catholic Church and all missions, charities, and Christian establishments in his diocese. He also has charge of *all* the temporalities and the receipt and disbursement of all moneys to be used or distributed within his jurisdiction. The creation of the Californias into a diocese and the appointment of the Right Reverend Francisco Garcia Diego bishop thereof conferred upon him and his successors in office the control of the temporalities of the church, and the right to collect, receive, and disburse all moneys belonging to the church, the missions, and all Catholic establishments in such diocese. When upon the petition of Mexico a bishop was appointed for the Californias, it became the duty of such bishop to receive and distribute the proceeds of the Pious Fund in his diocese.

V. I will now consider the action of Mexico in her dealings with the Pious Fund as successor of Spain.

On the 25th of May, 1832, Mexico passed a law providing for the renting and management of the properties of the Pious Fund, and created a board for that purpose. The sixth paragraph provides that:

> The proceeds of such properties (of the Pious Fund) shall be deposited in the treasury of the Federal city, to be solely and exclusively destined for the missions of the Californias. (Laws of Mexico, p. 2.)

And by the tenth paragraph, under subdivision nine, the board was required:

To name to the Government the amounts which may be remitted to each one of the Californias, in accordance with their respective expenses and available funds. (Laws of Mexico, p. 3.)

Thus it will be seen that Mexico commenced the discharge of her duties as successor of Spain by adopting a system entirely similar to the one established when the Jesuits were expelled.

A change of policy was adopted, as we have already shown, by Mexico on the 19th of September, 1836, when she applied to the Pope for the appointment of a bishop for the Californias. In the sixth article of that application it is provided that:

The property belonging to the Pious Fund of the Californias shall be placed at the disposal of the new bishop and his successors, to be by them managed and employed for its objects or other similar ones, always respecting the wishes of the founders. (Laws of Mexico, p. 5.)

This article recognized the authority of the bishop of the Californias to manage the properties belonging to the Pious Fund, which were situated outside of his bishopric, and to use the proceeds thereof for the benefit of the missions in the Californias, which he accordingly did, and appointed Don Pedro Ramirez his general agent in Mexico, who received the rents, paid the expenses, and attended generally to the business of the Pious Fund.

On the 8th of February, 1842, President Santa Anna repealed Article VI of the law of 1836, above quoted, and Mexico again assumed the management of the properties of the Pious Fund (Laws of Mexico, p. 5); but she did not attempt to deprive the bishop of the right to manage the temporalities of the church and receive whatever money and property which might be for the use of the missions and the Catholic Church in his diocese.

VI. The officers of the Mexican Government then demanded a statement of the properties belonging to the Pious Fund from Ramirez, the general agent of the bishop of the Californias, which, after protest, he furnished. The properties embraced in the inventory, as computed in the memorial of the United States, amount to $1,853,361.75. (Memorial, p. 11). Thereupon the Mexican Government, by the decree of October 24, 1842 (having the force of a legislative enactment), ordered the real estate and other property of the Pious Fund sold, and the entire fund reported by Ramirez covered into the treasury, which was accordingly done. In the same decree Mexico undertook to pay interest on the capital so turned into the treasury at the rate of six per cent per annum, and pledged the revenue from tobacco for the payment of such interest. The following is the language of the decree:

The revenue from tobacco is specially pledged for the payment of the income corresponding to the capital of the said fund of the Californias, and the department in charge thereof will pay over the sums necessary to carry on the objects to which said fund is destined without any deduction for costs, whether of administration or otherwise. (Laws of Mexico, p. 9.)

The revenue thus pledged was abundantly sufficient to pay the interest. Sr. Juan Rodriquez de San Miguel delivered a speech in the Mexican Congress on 28th of March, 1844, in which he said that this revenue (from tobacco) was merely nominal, so far as the missions were concerned, but that the officers of the Government received from tobacco with the greatest punctuality the sum of $35,000 monthly.

(See Mexican Pamphlets about the Pious Fund of the Californias, Nos. 24, 25, p. 12.)

The failure of Mexico to pay to the bishop of the Californias the interest due him from the revenue on tobacco was not because she did not know to whom the same ought to be paid, for we find in the Mexican archives an entry, ordering $8,000 from such revenue transmitted to the bishop of the Californias. The following is the entry:

> Minister of the treasury sec. 2° 297. His excell. the President has been pleased to order me to inform your excell., as I now do, to give an order on the maritime custom-house of Guymas, which shall be payable to Sr. Juan Rodrigues de San Miguel, as the representative of the rt. rev. bishop of the Californias, for the sum of $8,000, on account of the income belonging to the Pious Fund of California, the properties of which were incorporated into the national treasury; and let this be done with the greatest punctuality although it may be paid in partial payments. And let this order be obeyed with all exactness, notwithstanding my communication of yesterday to your excells. under No. 277 that the former order of Jan. 30 should be without effect. Contracted in order that the quantity mentioned in it might be paid by the aforesaid custom-house; and without injury to the assignment of the $500, monthly made upon the product of tobacco from the state of Zacatecas. (Transcript, p. 149.)

Mexico also recognized the right of the bishop to receive the property of the Pious Fund by decreeing on April 3, 1845, that—

> The credits and other properties of the Pious Fund of the Californias which are now unsold shall be immediately returned to the reverend bishop of that see and his successors, for the purposes mentioned in article 6 of the law of September 29, 1836, without prejudice to what Congress may resolve in regard to the property that has been alienated. (Laws of Mexico, pp. 7, 8.)

This decree would not have been made unless the bishop, as such, was entitled to receive the property referred to. The fact that no property was actually transferred does not affect the designation of the bishop as the proper official to receive any property that might be transferred.

I call attention to the treatment by Mexico of a fund contributed by the pious people of Spain for the establishment of missions in the Philippines, which is a precedent for the claim of the bishops of California.

In 1844, eight years after the independence of Mexico was acknowledged by Spain, a treaty was entered into for the settlement of a claim of the missions in the Philippines against Mexico. The property out of which the claim of the missions arose consisted of two haciendas, the *Chica* and the *Grande*, both situated in Mexico. By the latter convention Mexico agreed to pay, and did pay, $115,000 as principal and $30,000 in addition thereto as interest or rent. The money was paid to Father Moran, the representative of the Philippine missions. (Transcript, p. 25.)

The fact that Mexico recognized the bishop of the Californias as the proper officer to receive the proceeds of the Pious Fund proves that she did not agree to pay interest, intending at the same time to avoid such payment for want of a person to receive the same.

The United States appreciate the honor of Mexico too highly to suppose for a moment that she would promise to pay interest on the Pious Fund, knowing her promise was nugatory for the want of a payee, and we hope that no one will hereafter accuse Mexico of such insincerity. But suppose that Mexico intended to confiscate the fund which she covered into her treasury, and to deny that anyone had a right to receive the interest which she agreed to pay; she has now made ample amends for such unfair conduct. She has agreed that

this honorable tribunal, if it finds that the former judgment is not *res judicata*, shall determine "whether the claim be just," and "render such judgment or award as may be meet and proper under all the circumstances of the case." (Protocol, p. 3).

M. Pardo. Nous présenterons à la Cour avant l'ouverture de la prochaine audience la réponse du Gouvernement mexicain en espagnol, avec sa traduction en français et avec les documents cités à l'appui.

M. le Président. M. l'agent des Etats-Unis a été assez bon de dire tantôt qu'il mettrait à la disposition du Tribunal le Code Civil de Californie; je le prie, s'il le veut bien, de nous le fournir.

Mr. Ralston. Je le demanderai par le télégraphe.

(L'audience est levée à 3 h. 45 et la suite des débats renvoyée au mercredi 17 Septembre, à 9½ h. du matin.)

TROISIÈME SÉANCE.

17 septembre 1902 (matin).

L'audience est ouverte à 9 h. 45 sous la présidence de M. Matzen.

M. le Président. Je donne d'abord la parole à notre Secrétaire-Général pour lire quelques décisions que le Tribunal a prises à l'occasion des discussions qui ont eu lieu à la dernière séance.

M. le Secrétaire-Général. Voici la première décision, qui a été communiquée aux deux agents par écrit:

Le Tribunal: Attendu que l'agent de la partie défenderesse (Etats-Unis Mexicains) a consenti à ce que la réplique écrite de la partie demanderesse (Etats-Unis d'Amérique) soit jointe au dossier, sous la condition que la partie défenderesse ait le droit d'y répondre par écrit, a décidé que ladite réplique sera acceptée par le Tribunal et que la partie défenderesse aura le droit d'y répondre par écrit, pourvu que cette réponse soit déposée au greffe du Tribunal en manuscrit au plus tard le 25 de ce mois, et qu'au plus tard le même jour une copie en soit remise à la partie demanderesse.

Le Tribunal autorisé M. le Secrétaire-Général à notifier cette décision aux agents des deux parties.

Seconde décision:

Vu la nécessité de fixer l'ordre des plaidoyers et se conformant au réglement de la procédure arbitrale, consigné dans la Convention de la Haye de 1899 (art. 30 et suivants), le Tribunal a décidé ce qui suit:

1°. Attendu que ce sont les représentants des Etats-Unis d'Amérique qui ont ouvert les débats en leur qualité de partie demanderesse, la parole sera donnée aux représentants des Etats-Unis Mexicains comme partie défenderesse aussitôt que la partie demanderesse aura terminé son plaidoyer. Ensuite les deux parties, si elles le désirent, alterneront encore une fois dans le même ordre.

2°. Les parties ont le droit de faire parler tous leurs conseils tant pour le premier plaidoyer que pour la réponse. Pour la réplique et la duplique chaque partie désignera un seul de ses conseils pour prendre la parole, sauf le droit des autres conseils d'intervenir pour répondre aux objections qui concerneraient spécialement les discours qu'ils ont prononcés.

M. le Président. Monsieur l'agent des Etats-Unis d'Amérique a la parole.

Mr. Ralston. I will ask the permission of this tribunal for an opportunity to examine more carefully the decision of the court just read, and to consider the exact order in which we will offer our counsel. I suppose I may have that opportunity, perhaps, at noon hour—this noon, between the morning and evening sessions.

The President. You will get a copy of the decision.

Mr. Ralston. Thank you. For the present upon that point I would simply say that Senator Stewart having opened the debate will conclude

it—with your permission, will conclude his speech for the United States; and, if I understand correctly what has been read, and the disposition, I believe, of the court, it is the desire of this tribunal that in our case—all the points of our case that we consider necessary to be relied upon—should be fully presented, offered to the court, before the Mexican reply; and if I understand correctly, for the purpose of obtaining that end it will be proper for Senator Stewart to be followed by another of our counsel who will complete the opening of our case. That will be, with the permission of the court, Mr. McEnerney, who will follow Senator Stewart, and who, I hope, will be able to finish to-day what he may desire to present to the court, although I want to safeguard what I say by saying that perhaps part of his argument may go over until Monday. But that is not our desire. We desire to present, and hope to be able to present, our opening of the case fully at this session.

Now, having said this much, I promised the court at its last session that I would present for its consideration a translation into English of a number of pages in the record, the dossier, of the old case, which are there found in Spanish, French, Italian, and German, and the translation has been completed and printed, and I therefore take pleasure in handing to the secretary-general a number of copies for the court, individual members of the court, and for the files of the court, and also in delivering some copies to the agent of Mexico. Mr. President and honorable arbitrators, you will note, of course, on the face of the paper that it is a translation of extracts which are to be found on pages 187–221 in the large printed volume of the record you have before you.

Furthermore, Mr. President, about three weeks ago, scarcely that much, I received information from the Department that Mexico had made a demand upon the United States for a discovery as to what had become of the proceeds of the award which was made against Mexico more than 26 years ago in the case before you. While we do not admit, and in fact expressly deny, that information of that nature comes within the design of the Protocol of last May, because we do not think that it is in any degree pertinent to the present case, and that when the award was made it became a matter of absolute indifference to Mexico what was done by the Catholic bishops of California in distributing the money—while I say that is our position, nevertheless, subject to the reservations which I now make as to the materiality and the relevancy and the pertinency of the demand made by Mexico, I stand ready to answer the demand, as I at once telegraphed for the specific information desired by Mexico. This I indicated would be here shortly. I so indicated at the last session of the court, and in fact it was delivered to me Monday evening.

Mr. Asser. It was a written document?

Mr. Ralston. Yes, it was a written document, the contents of which I will very briefly explain.

Sir Edward Fry. It should be handed to the other side, so that they can use it.

Mr. Ralston. As the court will. We were required to produce it.

Sir Edward Fry. You produce it and leave it. They can use it if they see fit.

Mr. Ralston. Very well; and for the convenience of the court, if the court desires hereafter to examine it, we have prepared printed

copies of the same, coupled with the affidavit of the archbishop of San Francisco to the truth of the facts.

Sir EDWARD FRY. This is not part of your case. It is part of the Mexican case. Under these circumstances you produce it and leave it to them to use it.

Mr. RALSTON. So be it.

M. LE PRÉSIDENT. Est-ce que M. l'agent des Etats-Unis Mexicains a quelques observations à faire à présent?

M. PARDO. L'agent Mexicain a entendu la décision de la Cour; il s'y soumet naturellement. Il se réserve de répondre aux communications qui viennent d'être faites par l'agent des Etats-Unis une fois qu'il aura pris connaissance des documents qui viennent d'être mis à sa disposition.

M. LE PRÉSIDENT. Le Tribunal décide maintenant d'entendre le représentant de l'Amériquè du Nord. M. le sénateur Stewart a la parole.

Mr. STEWART. Mr. President and honorable arbitrators: I will again call attention for a few moments to what is called the "foundation deed." This deed so clearly declares the purposes and designs of the donors, and is so frequently referred to by both sides, that I will be indulged in reading a small portion of it. It was made in 1735, although there were many donations made previous to that time, which we have not in writing. This is taken by both sides as a sample of the donations, and indicating the purposes of the donors. The tribunal will pardon me for rereading the portion of the foundation deed presented to you last Monday. I read from the habendum:

To have and to hold, to said missions founded, and which hereafter may be founded in the Californias, *as well for the maintenance of their religious, and to provide for the ornament and decent support of divine worship,* as also to aid the native converts and catechumens with food and clothing, according to the destitution of that country; so that if hereafter, by God's blessing, there be means of support in the "reductions" and missions now established, as ex. gr. by the cultivation of their lands, thus obviating the necessity of sending from this country provisions, clothing, and other necessaries, the rents and products of said estates shall be applied to new missions, to be established hereafter in the unexplored parts of the said Californias, according to the discretion of the father superior of said missions; and *the estates aforesaid shall be perpetually inalienable, and shall never be sold, so that, even in case of all California being civilized and converted to our holy Catholic faith, the profits of said estates shall be applied to the necessities of said missions and their support;* and in case that the reverend Society of Jesus, voluntarily or by compulsion, should abandon said missions of the Californias or (which God forbid) the natives of that country should rebel and apostatize from our holy faith, or in any other such contingency, then, and in that case, it is left to the discretion of the reverend father provincial of the Society of Jesus in this New Spain for the time being to apply the profits of said estates, their products and improvements, to other missions in the undiscovered portions of this North America, or to others in any part of the world, according as he may deem most pleasing to Almighty God, and in such ways that the dominion and government of said estates be always and perpetually continued in *the reverend Society of Jesus and its prelates,* so that no judge, ecclesiastical or secular, shall exercise any control thereon, or intervene in or about the same, and all such rents and profits shall be applied to the purposes and objects herein specified, i. e., *the propagation of our holy Catholic faith.* And by this deed of gift we, the said grantors, both divest ourselves of and renounce absolutely all property, dominion, ownership, rights, and actions, real and personal, direct and executive, thereover, and all others whatever which belong to us, or which from other cause, title, or reason may belong, appertain to us, and we cede, renounce, and transfer the whole thereof to said reverend Society of Jesus, *its missions of Californias, its prelates and religious, under whose charge may happen to be the government of said missions and of this province of New Spain,* now and at all times hereafter, in order that from the profits of said estates and the increase of their cattle, large and small, their other gains,

natural or otherwise, *they may maintain said missions in the manner above proposed, indicated, defined, and laid down forever.* (Transcript, p. 106.)

I am still of the opinion that the exception discussed on Monday emphasized the intention of the donors that the fund should be used in the Californias. That exception reads as follows:

> And in case that the reverend Society of Jesus, voluntarily or by compulsion, should abandon said missions of the Californias, or (which God forbid) the natives of that country should rebel and apostatise from our holy faith, or in any other such contingency, then, and in that case, it is left to the discretion of the reverend father provincial of the Society of Jesus in this New Spain for the time being to apply the profits of said estates, their products and improvements, to other missions in the undiscovered portions of this North America, or to others in any part of the world, according as he may deem most pleasing to Almighty God; and in such ways that the dominion and government of said estates be always and perpetually continued in the reverend Society of Jesus and its prelates, so that no judge, ecclesiastical or secular, shall exercise any control thereon, or intervene in or about the same; and all such rents and profits shall be applied to the purposes and objects herein specified, i. e., the propagation of our holy Catholic faith. (Transcript, p. 106.)

It is not claimed that the Jesuits voluntarily abandoned the missions, nor that the natives rebelled or apostatized, nor that any other contingency arose whereby the proceeds of the Pious Fund might be used elsewhere than in the Californias. The expulsion of the Jesuits undoubtedly meant a condition of things which would make it impossible for them to continue their work of converting the natives in the Californias. It could not have had reference to the expulsion or removal of the Jesuits by the King and the substitution in their place of the Franciscan order, nor to the suppression of the Jesuits by the Pope. It was as well known then as now that the King had power to expatriate the Jesuits and that the Pope had power to suppress them, but in that case other orders of the church would take their place. The bishops, for example, in most all religious organizations have charge of the temporalities of the church, but they have no property rights in such temporalities, and when they are removed another church official is substituted. The temporalities of the church are then under the charge of the new official. It is very certain that the Pious Fund was not diverted from the Californias or used elsewhere by virtue of the exception under consideration.

The conveyance was made to the *Missions*. The language is:

> To have and to hold, to said missions founded, and which hereafter may be founded, in the Californias, as well for the maintenance of their religious, and to provide for the ornament and decent support of divine worship as also to aid the native converts and catechumens with food and clothing according to the destitution of that country.

The object of the exception under consideration manifestly was to maintain the existence of the fund, and if it could not be used in the Californias, the reverend father provincial of the Society of Jesus might order its use elsewhere; but the time never arrived when it was not used in the Californias, and the time never arrived when the reverend father provincial of the Society of Jesus ordered its use elsewhere. It must be remembered also that the Jesuit Order itself was under the control of the Catholic Church and could be removed from the Californias and another order substituted, as was done in this case.

Mr. RALSTON. At this point will you allow an interruption?

Mr. STEWART. Certainly.

Mr. RALSTON. If the tribunal please: After consultation with other

counsel in the case, we will not insist upon the objection I had thought it my duty to call to the attention of the tribunal with reference to this exhibit, but we will offer it on our own account.

I may state in just a word the substance of its contents, as it has an important bearing upon the argument made by Senator Stewart, and upon the point to which he is now addressing himself. I have stated the purport of the demand by Mexico. I have here, to begin, the affidavit of the secretary of the Roman Catholic archbishop of San Francisco to the effect that he has in his possession and is the custodian of "all the books, records, files, papers, and documents of the Roman Catholic archbishop of San Francisco." This is on page 3. And that the "annexed document is a full, true, correct, and verbatim copy of the pontificial decree directing the distribution of the monies of the Pious Fund, which said pontificial decree is among the files, papers, and documents of the said Roman Catholic archbishop of San Francisco."

Then we have on page 4 the Latin copy of the pontifical decree, and on page 5 an English translation of the same, wherein it appears that by the decree "there having been deducted from the whole sum the expenses of the suit and the sum of $26,000 to be paid to the family of Aguirre (since it is plainly evident that such a sum is due to the aforesaid family), and payment having been made of $24,000 to the right reverend the archbishop of Oregon for the missions of the ecclesiastical province of that name and the vicariate apostolic of Idaho, and $40,000 to the fathers of the Order of St. Francis and the fathers of the Society of Jesus, to be equally divided between them; of the remaining sum there shall be taken seven equal parts, of which one shall remain perpetually assigned to the missions of the Territory of Utah and the remaining six shall be divided equally between the three above-named bishoprics of the ecclesiastical province of San Francisco." The rest is not material upon that point. To this is added upon page first the affidavit of the archbishop himself, the material part for your consideration being particularly the last paragraph:

> I am acquainted with all of the facts relative to the distribution of the proceeds of the judgment obtained in the case of Amat *v.* Mexico, referred to in said pontifical document, and am personally cognizant of the fact that distribution of all the said proceeds was made in strict conformity with the terms of said instrument; and myself supervised the distribution of seven out of fourteen of the installments thereof, having received the necessary receipts from all of the parties in interest.

I may very briefly explain to the tribunal that there were claims presented before the former commission on behalf of citizens of the United States against Mexico, and by citizens of Mexico against the United States, and when the proceedings of the court were terminated a balance was struck and it was found that a considerable excess became payable to citizens of the United States, and Mexico paid that excess in different instalments, the last payment being made in 1890.

Just one word before I close. It will be noted that the division was made among a number of States which were considered as forming part of what was anciently known as Upper California, on behalf of which we claim: First of all, all California shares in the division; next, Oregon, forming part of ancient California; next Idaho, which runs up to the British possessions on the north; and Utah, which is in itself a very large State.

Nevada then belonged to the California dioceses, and Washington, Idaho, and Montana were attached to the Oregon diocese.

So that we have this whole extensive country, many thousands, in fact several hundreds of thousands, of square miles in extent, with an extremely large population and many thousand Indians, perhaps fifty to one hundred thousand, who shared in the benefits of the former award as against the narrow and barren strip of Lower California, which was adjudged by Sir Edward Thornton as entitled to one-half of the entire interest under the whole award.

Mr. STEWART. That evidence confirms to some extent my opinion of the clause "by compulsion." It had reference to some circumstance other than the regular change which the church had the power to make in the society or church officialc which should take charge of the missions. It will be seen that there was $40,000 of this money given to the Jesuits. The Jesuit Order was not perpetually suppressed. It was revived in 1814. It is doing service in many parts of the world, and particularly in Upper California. The reception of a part of the Pious Fund recovered in the former arbitration after a century of silent acquiescence, removes any pretense that the order ever had even a desire that the Pious Fund should be used elsewhere than in the Californias. It appears then that the reverend father provincial not only did not order the fund to be used elsewhere, but the entire society remained silent on that subject for many years after the order was revived, and finally received and used a portion of the fund in the Californias. It will be seen by the following paragraph of the bull of the Pope suppressing the Order of Jesus that he intended to promote, and not to destroy, the work of establishing missions and converting the heathen in the Californias:

> But as regards the religious missions, we desire to extend and include all that has been decreed concerning the suppression of the Society (of Jesuits), reserving (at the same time) the privilege of providing the means by which not only the conversion of the infidels but also the peaceful settlement of dissentions may be obtained and secured with greater facility and stability. (Transcript, p. 335, par. 32.)

Sir EDWARD FRY. Where is that bull to be found? The only note I have is page 461.

Mr. STEWART. It is in Spanish, and this is a translation, paragraph 32, page 335.

Sir EDWARD FRY. Where is it to be found; in what book?

Mr. RALSTON. Transcript page 323, in Spanish.

Mr. STEWART. And we have it translated.

Sir EDWARD FRY. That is all right. I only wanted to get it.

Mr. STEWART. It is also translated in the answer of the representative of Mexico.

At all events, this part of the bull of the Pope shows that the intention was to secure peaceable administration of this fund and to make larger provisions if necessary.

VII. I now call attention to the foundation deed for the purpose of showing that the representative of Mexico was misled in his answer to the memorial of the United States by the omission from his extract, quoted from that document, of most essential parts. His extract is certainly most misleading.

The parts omitted and represented by stars are essential in determining the intention of the donors. In order that the materiality of the parts omitted may be judged, I quote in parallel columns a true extract from the foundation deed and the extract used by the repre-

sentative of Mexico. The parts omitted by the representative of Mexico are printed in *italics* in the true copy:

TRUE COPY.

This donation, *which* we make *good, pure, perfect, and irrevocable as a firm contract inter vivos from this day, henceforth and forever.*

To have and to hold, to said missions founded, and which hereafter may be founded, in the Californias, as well for the maintenance of their religious, and to provide for the *ornament and decent* support of divine worship, as also to aid the native converts and catechumens *with food and clothing*, according to the destitution of that country, so that if hereafter, by God's blessing, there be means of support in the "reductions" and missions now established, as ex. gr. by the cultivation of their lands, thus obviating the necessity of sending from this country *provisions*, clothing, and other necessaries, the rents and products of said estates shall be applied to new missions *to be established hereafter in the unexplored parts of the said Californias, according to the discretion of the father superior of said missions; and the estates aforesaid shall be perpetually inalienable, and shall never be sold, so that, even in case of all California being civilized and converted to our holy Catholic faith, the profits of said estates shall be applied to the necessities of said missions and their support;* and in case *that* the *reverend* Society of Jesus, voluntarily or by compulsion, should abandon said missions of the Californias, or (which God forbid) the natives of that country should rebel and apostatize from our holy faith, or in any other such contingency, then, and in that case, it is left to the discretion of the reverend

MISQUOTED COPY.

This donation, we make to said missions founded, and which may hereafter be founded, in the Californias, as well as for the maintenance of their religious, and to provide for the support and conduct of divine worship, as also to aid the native converts and catechumens by the same (probably "from the misery") of that country; so that if thereafter, by God's blessing, there be means of support in the "reductions" and missions now established,—as ex. gr. by the cultivation of their lands, thus obviating the necessity of sending from this country clothing and other necessaries—the rents and products of said estates shall be applied of (surely "to") new missions

* * * * *

and in case the Society of Jesus, voluntarily or by compulsion, should abandon said missions of the Californias or, which God forbid, the natives of that country should rebel and apostatize from our holy faith, or in any other such contingency, then, and in that case, it is left to the discretion of the reverend father provincial of the Society of Jesus in this New Spain for the time being to apply the profits of said estates, their products and improvements, to other missions in the undiscovered portions of this North America, or to others in any part of the world, as he may deem most pleasing to Almighty God; and in such a way that the government of said estates be always and perpetually continued in the reverend Society of Jesus and its prelates, so that

father provincial of the Society of Jesus in this New Spain for the time being to apply the profits of said estates, their products, and improvements to other missions in the undiscovered portions of this North America, or to others in any part of the world, *according* as he may deem most pleasing to Almighty God; and in such ways that the *dominion and* government of said estates be always and perpetually continued in the reverend Society of Jesus and its prelates, so that no judge, ecclesiastical or secular, shall exercise any control thereon, *or intervene in or about the same; and all such rents and profits shall be applied to the purposes and objects herein specified, i. e., the propagation of our holy Catholic faith. And by this deed of gift we, the said grantors, both divest ourselves of and renounce absolutely all property, dominion, ownership, rights, and actions, real and personal, direct and executive, thereover, and all others whatever which belong to us, or which from any other cause, title, or reason may belong, appertain to us; and we cede, renounce, and transfer the whole thereof to said reverend Society of Jesus, its missions of Californias, it sprelates and religious, under whose charge may happen to be the government of said missions and of this province of New Spain, now and at all times hereafter, in order that from the profits of said estates and the increase of their cattle, large and small, their other gains, natural or otherwise, they may maintain said missions in the manner above proposed, indicated, defined, and laid down forever.*

And we, *the said grantors, both* desire that at no time shall any judge, ecclesiastical or secular, undertake to investigate or intrude himself to ascertain whether the conditions of this donation be fulfilled; for our will is that in this matter there shall be no pretence no judge, ecclesiastical or secular, shall exercise any control therein.

* * * * *

we, desire that at no time shall this donation be set aside, nor shall any judge, ecclesiastical or secular, undertake to investigate or intervene to ascertain whether the conditions of this donation be fulfilled; for our will is that in this matter there shall be no pretence for such intervention, and that whether the said reverend Society fulfils or does not fulfil the trusts in favor of the missions herein contained, it shall render account to God our Lord, alone.

(Answer to Memorial in English, p. 4.)

for such intervention, and that whether the said reverend society fulfils or does not fulfil the trusts in favor of the missions herein contained it shall render an account to God our Lord alone.
(Transcript, p. 106.)

In comparing the foregoing extracts the materiality of the parts omitted by the representative of Mexico will be readily observed.

VIII. The contention of the representative of Mexico that all the natives in Upper California have been converted, and that therefore there is no necessity for the use of the interest on the Pious Fund in that locality, rests on two mistakes:

1. There are many thousands of natives in Upper California who are still unconverted.

2. It was not the intention of the donors, as we have already seen, that the use of the proceeds of the Pious Fund should terminate upon the conversion of all the natives in the Californias. On the contrary, they intended that the use of such proceeds should be continued indefinitely for the benefit of Christian missions in that locality. For the purpose of calling particular attention to the provision in the foundation deed which makes the use of the Pious Fund in the Californias perpetual, we again quote one of the parts omitted in the extract from the foundation deed used by the representative of Mexico, which is as follows:

And the estates aforesaid shall be perpetually inalienable, and shall never be sold, so that *even in case of all California being civilized and converted* to our holy Catholic faith the profits of said estates shall be applied to the necessities of said missions and their support. (Transcript, p. 106.)

The foregoing provision shows that the donors anticipated the argument of the representative of Mexico that there would be no further use for the Pious Fund in the Californias after all the natives were converted and gave a complete answer thereto. Such conversion is not yet accomplished. The necessities for the continuance of the work of conversion and the maintenance of the Catholic faith in the missions will remain indefinitely, and the donors made special provision therefor.

IX. The contention of the representative of Mexico that the United States, by the treaty of Guadalupe Hidalgo, proclaimed July 4, 1848, which, among other things, ceded a large territory, including Upper California, to the United States for the sum of $15,000,000, discharged Mexico from all demands on account of the Pious Fund can not be maintained. Article XIV of the treaty, quoted by the representative of Mexico as establishing a full defense to this proceeding, reads as follows:

The United States do furthermore discharge the Mexican Republic from all claims of *citizens* of the United States, not heretofore decided against the Mexican Government, which may have arisen previously to the date of the signature of this treaty: which discharge shall be final and perpetual, whether the said claims be rejected or be allowed by the board of commissioners provided for in the following article, and whatever shall be the total amount of those allowed. (Appendix to Record, p. 16.)

There are several conclusive reasons why the foregoing article does not discharge Mexico from the obligation she assumed to pay interest

on that part of the Pious Fund dedicated to Upper California. The United States did not undertake to exonerate Mexico from her obligations to persons who were then Mexican citizens and who might thereafter become citizens of the United States on compliance with the provisions of the treaty. The undertaking of the United States, was confined to the *then* citizens of the United States. Neither the Roman Catholic Church nor its dignitaries or members of its fold, were citizens of the United States at the time ratifications of the treaty were exchanged. Whether they would ever become citizens of the United States depended upon an election or option to be exercised by them after such exchange of ratifications.

The Pious Fund by the action of Mexico, was a permanent investment upon which she agreed to pay interest annually. No claim for interest has been made by the United States in behalf of the bishops of California for any instalment of interest which became due and was payable previous to July 4, 1848, but interest arising after that date was submitted to arbitration under the convention of July 4, 1868, and decided in favor of the United States. The claim for interest in this proceeding has arisen subsequent to October 24, 1868. There is nothing in the treaty which can give the slightest pretext for the assertion that the United States either agreed to extinguish the obligations of Mexico to Mexican citizens or to pay the debts of Mexico to citizens of the United States which might become due after the execution of the treaty.

X. The recital of the representative of Mexico of various statutes of his Government confiscating church property, barring debts by limitation, and fixing times within which demands against the Mexican Government must be presented, has nothing to do with this proceeding. Whatever efforts Mexico may have made to close her own tribunals against the claim of the bishops of California by her local legislation do not concern us. It is sufficient for the purpose of this proceeding that both the United States and Mexico have agreed that the alleged obligation of Mexico to pay interest to the bishops shall be tried before this honorable tribunal.

Fortunately, Mexico does not now repudiate the various recitals in her statutes that her intention was to preserve, maintain, and apply the Pious Fund to the conversion and civilization of the natives of the Californias, and for the maintenance and support of the Catholic religion in that country, but on the contrary agrees that this honorable tribunal shall, in the event the matters are not *res judicata*, determine whether the beneficiaries of the Pious Fund have a just claim against Mexico, and "render such judgment as may be meet and proper under all the circumstances of the case."

This honorable conduct on the part of Mexico ought not to be disparaged by her own representative, or any one else, by an intimation that she is willing to oppose the rendering of a judgment which shall be just and equitable. Even if Mexico had confiscated the Pious Fund before California became a part of the United States, why has she not the right to waive any advantage such confiscation or any other arbitrary act might afford her, and submit the justice of the claim as it originally existed to arbitration? If the claim is just, no act of Mexico, however arbitrary or wrong, stands in the way of a judgment directing the payment thereof, because by her agreement to arbitrate she has

swept away all defenses to the claim of the beneficiaries of the Pious Fund, except the plea that it is unjust.

Can there be any question of the justice of the claim? If there was no Pious Fund of the Californias, why did Mexico, by the law of May 25, 1832, provide for leasing the same? If the proceeds of such property when leased did not belong to the missions of the Californias, why did Mexico declare, in the sixth section of that law, that "the proceeds of such property shall be deposited in the treasury of the Federal City to be solely and exclusively destined for the missions of the Californias?" If the proceeds were not to be remitted to the Californias, why did Mexico, in section 10, subdivision 9, of that law, require the administrators of the fund "to name to the Government the amounts which may be remitted to each one of the Californias, in accordance with their respective expenses and available funds?"

Again, why did Mexico on the 24th of October, 1842, in the preamble of the decree, directing the sale of the Pious Fund, say that the decree of February 8, 1842, "was intended to fulfill most faithfully the beneficent and national objects designed by the foundress without the slightest diminution of the properties destined to end?" Why did Mexico pledge, by the third section of that act, the revenues arising from tobacco for the payment of interest on the Pious Fund, "without any deduction for costs, whether of administration or otherwise?" Why did Mexico, by the law of April 3, 1845, order all unsold property of the Pious Fund restored to the bishop if it was not the property of the missions and the Catholic Church of the Californias?

In short, why did every law or decree enacted or promulgated by Mexico recognize the existence of the Pious Fund and also that it belonged to the missions of the Californias and the Catholic Church in that region? Why was neither the existence of the Pious Fund nor the objects and purposes of its founders not questioned until after the beneficiaries of the fund become citizens of the United States? If the Pious Fund was not the property of the missions and the Catholic Church of the Californias, why did not Mexico claim it as her own? Why did she continually declare, in effect, that it was not her property, by asserting that it belonged to the missions and the Catholic Church of the Californias?

XI. Very different questions are submitted to this tribunal from those which the arbitration under the convention of 1868 was called upon to decide. Under that convention the arbitrators were not authorized to disregard any defense which would be allowed under the ordinary rules of procedure in courts of justice. Confiscation or any other arbitrary act, which would have been a bar in Mexico to the recovery of the Pious Fund while California was a part of that country, might have been urged as a defense under the general language of Article II of the protocol of 1868.

Article II of that protocol contains the following:

> The commissioners shall then conjointly proceed to the investigation and decision of the claims which shall be presented to their notice, in such order and in such manner as they may conjointly think proper, but upon such evidence or information only as shall be furnished by or on behalf of their respective governments. They shall be bound to receive and peruse all written documents or statements which may be presented to them by or on behalf of their respective governments in support of or in answer to any claim, and to hear, if required, one person on each side in behalf of each government on each and every separate claim. (Appendix to Record, p. 31.)

Under such a submission any defense might have been interposed that would be good in ordinary proceedings at law. There was no revising of contracts, no reforming of instruments authorized.

But the issue submitted to this tribunal, in case the matters are not *res judicata*, is different. It submits the justice of the claim without regard to technical defenses. The protocol reads:

> 1. If said claim, as a consequence of the former decision, is within the governing principle of *res judicata*.

That is the first question this tribunal is to consider.

> If not, whether the same be just.
>
> And to render such judgment or award as may be meet and proper under all the circumstances of the case. (Protocol, p. 3.)

This is the broadest possible pleading. No court can have more liberal rules to redress wrongs of whatever nature than are prescribed in the protocol in this case. This tribunal is directed in so many words "to render such judgment or award as may be meet and proper under all the circumstances of the case." The question submitted is untrammeled by any rules of pleading or practice, and this tribunal is directed to the one issue: *Is it just?*

I am not familiar with the pleadings and rules of practice in any country where the English language does not prevail, but whatever rules may exist anywhere which would prevent this tribunal from deciding this case according to the principles of justice must be disregarded.

The courts of equity in England and America redress many wrongs which can not be adjudicated in courts of law. I will read, for an illustration, a passage or two from Bouvier's Law Dictionary, Pawle's Revision, Vol. I, page 684:

> Third, where the courts of equity administer equitable relief for the infraction of legal rights, in cases in which the courts of law, recognizing the right, give a remedy according to their principles, modes, and forms, but the remedy is deemed by equity inadequate to the requirements of the case. This is sometimes called the concurrent jurisdiction. This class embraces *fraud, mistake, accident, administration, legacies, contribution*, and cases where justice and conscience require the *cancellation, or reformation of instruments, or the rescission, or the specific performance of contracts*.
>
> The courts of law relieve against fraud, mistake, and accident, where a remedy can be had according to their modes and forms; but there are many cases in which the legal remedy is inadequate for the purposes of justice.
>
> The modes of investigation and the peculiar remedies of the courts of equity are often of the greatest importance in this class of cases.
>
> Sixth. Where, from a relation of trust and confidence, or from consanguinity, the parties do not stand on equal ground in their dealings with each other: As, the relations of *parent* and *child, guardian* and *ward, attorney* and *client, principal* and *agent, executor* or *administrator*, and *legatees* or *distributees, trustee* and *cestui que trust*.

If a court of equity could have full jurisdiction to investigate all matters culminating in the act of October 24, 1842, whereby the real property of the Pious Fund was sold and the entire fund covered into the Mexican treasury, a much larger judgment might be rendered against Mexico than the United States ever demanded.

This tribunal is not restrained from "rendering such judgment or award as may be meet and proper under all the circumstances of the case" by any matter not affecting the justice of the original claim. All honor is due to President Diaz for the liberal conditions of this arbitration. He has fully reciprocated the example of the United States in returning to Mexico the money awarded by the former arbitration to Weil and La Abra, which I will hereafter mention. His

agreement that full justice shall be done to the missions and the Catholic Church of California, waiving all excuses and objections not affecting the *justice of the claim*, is a full and cordial response to the action of the United States in protecting Mexico from dishonest demands.

XII. The complaint of the representative of Mexico, under various headings, that the United States are demanding of Mexico extravagant and inequitable claims, is unreasonable. The United States demand nothing from Mexico which the officers of the United States do not believe, after careful investigation, to be absolutely just. The good faith of the United States is illustrated by their treatment of the Weil and La Abra claims. Those claims were submitted to and decided by the arbitration under the convention of July 4, 1868, and the aggregate of the judgments in the two cases rendered against Mexico amounted to $1,130,506.55. Upon the suggestion by Mexico to the United States of a discovery of false evidence and perjury in obtaining such judgments, the United States, although Mexico had paid the money into their treasury, refused to pay the same to the claimants. Congress thereupon passed a law giving the courts of the United States jurisdiction to hear and determine both of those cases, and after a full and fair hearing such courts held that the claims were fraudulent; whereupon all the money deposited in the treasury for the payment of the Weil and La Abra claims was refunded to Mexico in gold coin. But the United States have continued to insist upon the solemn obligation of Mexico to pay to the bishops of California the interest on the Pious Fund dedicated for use in the Californias. The character and standing of the various Secretaries of State of the United States who have called the attention of Mexico to and reminded her of her obligation to make such payment, ought to be accepted as some proof of the good faith of that Government.

The following is a list of the officers of the United States who have conducted the negotiation with Mexico; which has terminated in the present proceeding:

Hon. William F. Wharton, Acting Secretary of State, August 3, 1891. (Transcript, Diplomatic Correspondence, p. 23.)
Hon. James G. Blaine, February 19, 1892. (Same, p. 24.)
Hon. John W. Foster, September 15, 1892. (Same, p. 24.)
Hon. Walter Q. Gresham, June 8, 1893. (Same, p. 24.)
Hon. John Sherman, October 30, 1897. (Same, p. 122.)
Hon. W. R. Day, Acting Secretary, July 17, 1897. (Same, p. 22.)
Hon. John Hay, December 4, 1899. (Same, p. 46.)

These men have world-wide reputations. They have figured in the great affairs which the United States have had with the balance of the world for many years.

XIII. I will now briefly consider the complaints of extravagant demands and bad faith made by Mexico against the United States.

The claim of the United States that the interest due to the bishops of California should be paid in the gold coin of Mexico and not in depreciated currency is made one cause of complaint. Mexico can hardly afford to insist upon paying the bishops of California in silver since she has recognized her duty to pay her other foreign obligations in gold. The interest on her bonded debt, which is dealt in by foreigners, is paid in gold. Her recognition of the money current in commercial nations has strengthened her credit and been of great

benefit to her both at home and abroad. The payment to the bishops in silver would be grossly inequitable.

At the time Mexico sold the estates belonging to the Pious Fund and covered the entire property belonging to that fund into her treasury, and undertook to pay interest thereon, her silver coin was at a premium over the gold coin of any other country. In the second section of the act of October 24, 1842, we read:

> The minister of the treasury will proceed to sell the real estate and other property belonging to the Pious Fund of the Californias for the capital represented by their annual product at six per cent per annum. (Laws of Mexico, p. 7.)

In the unsettled and revolutionary condition of Mexico the vast haciendas belonging to the Pious Fund could not possibly have produced a net income corresponding to their actual value. Mexico had just passed through a struggle for independence, and was in a revolutionary condition. It is certain that no hacienda in that country was producing at the time a net revenue equal to six per cent on the value of the property. It is even doubtful if two per cent was then realized upon any hacienda in the Republic. The property sold must have been worth at least three times what was received and covered into the treasury. The former members of the tobacco monopoly, to wit, Messrs. Don Francis de Paula Rubio and brother, Don Manuel Fernandez, Don Joaquin Maria Errazu, Don Felippe Neri de Barrio, Don Manuel Escandon, Don Benitto de Magua, and Muriel Brothers, made an offer of purchase within 24 hours from the passage of the law. These gentlemen knew the value of the property, and were ready to purchase as soon as, and perhaps before, the law was passed. Their prompt action indicates that they realized that the sale of the haciendas at the price fixed was an opportunity to make money.

For example, Mexico sold the Hacienda del Pastor capitalized at six per cent on $17,000 income per annum. The purchasers immediately thereafter rented this hacienda for more than $24,000 per annum, which would have made a difference in price of more than $100,000. (See Deed, Exhibit D to Replication on behalf of the United States.)

Since Mexico by that sale must have sacrificed a very large part of the property of the Pious Fund, it would be extremely inequitable to allow her to pay such an obligation in depreciated money. If Mexico keeps in circulation depreciated currency, it should not affect the claim of the bishops. She coins both gold and silver, and her gold coin corresponds in value to the money she covered into her treasury belonging to the Pious Fund, but her silver coin is at a discount, when compared with gold, of nearly 60 per cent.

While Mexico may require her citizens to receive any kind of money which by her law is current, it is grossly inequitable for her, in her capacity as trustee, to pay in a depreciated currency an obligation contracted by her when her money was gold or its equivalent. Notwithstanding Mexico, as we have already seen, forced the sale of the properties of the Pious Fund without the consent of the beneficiaries, she has failed to perform her undertaking as trustee in the payment of interest. The former award reduced the annual instalments of interest due the bishops to $43,080.99, which for 33 years amounts to $1,420,682.27, which sum must be accepted if the matter is *res judicata.*

Sir EDWARD FRY. The amount is $1,420,682.67?

Mr. STEWART. Yes. In that case simple interest at six per cent on each of such instalments from the time it became due, without includ-

ing the principal, amounts to $2,858,652, which, according to the principles of equity, Mexico ought to pay in gold. It is not "meet and proper under all the circumstances of the case" to exonerate Mexico from the payment of interest and at the same time permit her to pay in depreciated currency. Article X of the protocol, submitting the kind of currency in which the judgment is to be paid, must be considered in connection with the power conferred upon this honorable tribunal to do justice between the parties.

XIV. There is another consideration which the representative of Mexico has entirely overlooked, and that is the liberality shown to Mexico in the judgment rendered by Sir Edward Thornton, the umpire, in allowing Upper California only one-half of the interest due on the Pious Fund belonging to the two Californias.

The King of Spain ordered his council, immediately upon the expulsion of the Jesuits, to make a division of the Californias in order that he might place the Franciscans in one part and the Dominicans in the other. You will see that here [indicating on the map] is the dividing line. The eastern boundary of the Californias must have been at that time somewhat indefinite. California was separated from Mexico by the Gulf of California, and then came the Colorado River. Bishop Alemany, in his testimony which is printed in the transcript, bounds this country by the Colorado, the upper branch of the Colorado River being called the Green River, terminating up here somewhere [indicating]. All this belongs to the watershed of the Pacific; consequently when the Pious Fund was distributed by the bishops parts were given to Utah, Idaho, Oregon, Nevada, and California. The King assumed the trusteeship of the fund and designated the Franciscans to take charge of the missions and use a part of the fund in Upper California and the Dominicans to do likewise in Lower California. The officers of all churches to a greater or less extent, whether they be priests, preachers, or bishops, have charge of the temporalities of the church and officiate wherever directed by the governing power of the church. When the Jesuits were removed and suppressed the Franciscans were substituted by the authority of the King with the approval of the church to do the work of the missions, while the King himself acted as trustee for the property, the proceeds of which were transmitted to the missions.

Mr. DE MARTENS. Can you fix the boundaries of the Californias as they were at the end of the 18th century? We can not quite fix the boundaries of California at this time from the geographical point of view.

Mr. STEWART. The State of California is bounded thus [indicating it on the map]. That is the State of California as it now is. I was there before California became a State with General Vallejo and other residents (Mexicans). They claimed then that it would follow up the Colorado River. They wanted more country taken in, but that was the division that was made by the United States. The eastern boundary at the time these donations were made in 1735 probably had not been traced. They followed up the Colorado River on the east and the Pacific coast on the west, which was all Spanish country, clear over to the Mississippi River. The western part of Spain's vast dominion was called the Californias. There was no other name for it that we know of. The rivers and harbors along the coast had been explored, and upon that exploration the title of Spain rested.

It might not have been exactly known at that time how far the Californias extended east, but it was the name of the western coast. Subsequently this has been treated by the church according to the boundary suggested by Bishop Alemany. He was undoubtedly correct, as he did not go east of the watershed flowing into the Pacific ocean. It was the great western coast, a vast region.

It is true that the work was commenced by the Jesuits in Lower California, because that locality was more easily reached from Mexico than the great body of the country contemplated by the donors. Comparatively little was accomplished in Lower California on account of the barren and desolate character of the country, which afforded sustenance for only a very few natives, and could not be made the home of any considerable population. Father Rubio, who gave evidence before the mixed commission in 1868, declared that he was sixty-eight years of age at that time; that he had resided at the mission of San José for thirty years, and at the mission of Santa Barbara nine years; that he had been most of that time a vicar general in the Catholic Church, and had been engaged in instructing and converting the natives. He testified that the number of missions in Upper California was twenty-one and in Lower California thirteen, giving the date of the establishment of each; that in Upper California in 1832, when he first went there to reside, there were 17,364 converted natives living at the several missions; that in Lower California there were scarcely any Indians in the missions; that in some of the missions there were none; that more than seven-tenths of the whole population of the Californias, subject to the missions, belonged to Upper California. (Transcript, p. 148.) The reason for the diminution of the population of Lower California was the want of water and fertile soil.

In 1857 Mexico appointed a commissioner, by the name of Ulises Urbano Lassépas, to examine into and report upon the resources and population of Lower California. The examination was very thorough and the report exhaustive. The country was found to be practically a rocky, barren waste, almost destitute of water, and the population to be very small and continually growing less. The report fully verifies the testimony of Vicar General Rubio. (See De La Colonization de la Baja California by Ulises Urbono Lassépas-Primer Memorial: 1859.)

I visited the missions of Upper California in 1850. At that time I conversed with many reliable persons familiar with Lower California, who described to me the country and the inhabitants thereof. Lower California was, I was told, destitute of water for irrigation and practically uninhabited. The missions of Upper California were in a more prosperous condition. They had immense herds of cattle, horses, and sheep and cultivated fields sufficient to more than supply the inhabitants with vegetables and cereals. Their vineyards and orchards were especially important. They furnished grapes and fruit for a population of many thousands of miners.

If the work done and the natives converted in the two Californias, when I visited that country in 1850, were compared, it would be an exaggeration to assume that as much as one-tenth of the proceeds of the Pious Fund was required to be used in Lower California. Certainly the result produced by the expenditure was at least as much as ten to one in favor of Upper California. The statement of Vicar-General Rubio that in 1832 seven-tenths of the whole population of the Californias subject to the missions belonged to Upper California,

was undoubtedly true. Notwithstanding these historical facts, the umpire in the former case, to make it as easy for Mexico as possible, gave only one-half of the interest on the Pious Fund to Upper California. If the matter were not *res judicata*, but were open to reexamination as to all the facts, the United States would confidently contend for 85 per cent of the interest instead of one-half, which would then be a more liberal allowance to Lower than to Upper California.

XV. The statement of the representative of Mexico that there is no legal basis on which to claim anything from the donation of properties made by the Marchioness de las Torres de Rada and the Marquis de Villapuente to the Pious Fund, is not sustained by the evidence. He has not pointed out how Mexico has lost one dollar by any alleged defective title of the estate of the Marquis, nor what claims the heirs of the Marquis have against Mexico in consequence of the sale of the property and the covering of the proceeds thereof into the treasury. On the contrary, the value of the estate which the umpire rejected and excluded from the fund was more than the amount demanded by the claimants under the Marquis in full satisfaction of their pretended judgment. (Transcript, p. 520.) In addition to that, the representative of Mexico has utterly failed to show by the evidence adduced that Mexico has not retained in her treasury the entire proceeds from the sale of the Ciénaga del Pastor, amounting to $213,750. The evidence of such disbursements, if it exists, is in the possession of Mexico, and that Government not having furnished such evidence it is fair to presume no disbursements have been made in consequence of the alleged attachment.

It must be presumed, in the absence of evidence to the contrary, which, if it existed, Mexico could and would produce, that the entire proceeds of the sales of the property of the Pious Fund were covered into the treasury and there remain. There is no evidence whatever in the record to warrant the exclusion of the $213,750 for which the Ciénega del Pastor was sold.

The amount of the fund, if the matter is not *res judicata*, as we have already seen, is $1,853,361.75, but the American commissioner, in the arbitration under the convention of 1868, leaving out sundry small items as bad debts or claims not sufficiently proved, and also the value of the Ciénaga del Pastor, reduced the total to $1,436,033. The umpire at first concurred in this amount, but afterwards deducted $1,000 on account of an error in calculation. He found the principal to be $1,435,033, and awarded one-half thereof, or $717,516.50, to Upper California.

On an accounting, if the matter is not *res judicata*, the claimants would contend that the Ciénaga del Pastor, valued at $213,750, with six per cent interest thereon since July 4, 1848, together with the other items mentioned in the memorial, should be added to the capital of the Pious Fund, and that the bishops are entitled to 85 per cent thereof, making an aggregate of at least $3,108,207.52 now due, as the following figures show:

Grand total	$1,853,361.75
The interest on this at 6 per cent per annum is	111,201.70
85 per cent of the last-named sum is	94,521.44
33 instalments of $94,521.44 amount to	3,108,207.52

(Memorial, p. 11.)

The charge of exaggeration of amounts must be disregarded, because Mexico has the records to prove such exaggerations, if they exist, and no such proof has been furnished. In the former arbitration, Sir Edward Thornton, although he felt constrained to adopt the views of the Commissioner of the United States, who excluded from his finding a large portion of the claim, was manifestly dissatisfied because the Mexican Government did not exhibit in its defense the records in its possession showing the actual amount which was covered into the treasury. He said:

A larger sum is claimed on the part of the claimants, but even with regard to this larger sum the defense has not shown, except indirectly, that its amount was exaggerated.

There is no doubt that the Mexican Government must have in its possession all the accounts and documents relative to the sale of the real property belonging to the Pious Fund and the proceeds thereof; yet these have not been produced, and the only inference that can be drawn from silence upon this subject is that the amount of the proceeds actually received into the treasury was at least not less than it is claimed to be. (Transcript, p. 609.)

Notwithstanding the matter was called to the attention of Mexico by Sir Edward Thornton thirty-three years ago in the forcible language above quoted, the records and accounts referred to by him are still retained in the archives of Mexico, to which the claimants have no access. The nonproduction of the records, which ought to show the amount of the Pious Fund covered into the Mexican treasury, leaves no other inference than that "the amount of the proceeds actually received into the treasury was at least not less than it is claimed to be."

The introduction of a book relating to legal proceedings which took place long ago, without proving that it affected the fund covered into the treasury, is indirect evidence that there is nothing in the Mexican archives showing that the amount claimed is excessive. The inventory of Ramirez, and the items particularly described in the memorial, can not be charged by the defense as excessive in the absence of proof to sustain such charge. The basis for everything claimed in the memorial must have been of record and must now be in the possession of the defense. No evidence having been produced by Mexico to contradict the claimant's case, the presumption that the amount stated is correct will prevail.

XVI. I have gone into the details of this case, not because I doubt that the decision in the former arbitration is *res judicata* as to the amount of interest annually due to the bishops of California from the Mexican Government, but to answer charges of unfairness against the United States.

I thank you for your kind attention.

M. LE PRÉSIDENT. Maintenant, avant de donner la parole à un autre conseil des Etats-Unis d'Amérique, je dois l'avertir que le Tribunal sera ajourné à 11 h. ¾; peut-être alors le conseil préférera-t-il commencer son discours lundi matin à 10 heures. Le Tribunal siégera alors et continuera de siéger tous les jours; le matin et après le déjeûner; alors j'espère que les débats marcheront bien rapidement.

Mr. RALSTON. I wish to speak a moment to Mr. McEnerney, whom we have contemplated would follow Senator Stewart, if you will permit me just a moment to explain to him what you have said.

M. BEERNAERT. Je demande la parole.

M. LE PRÉSIDENT. M. Beernaert a la parole.

M. BEERNAERT. Serait-il absolument impossible que le second conseil des Etats-Unis d'Amérique prît encore la parole cette après-midi, par exemple? S'il faut que la semaine prochaine nous répondions immédiatement à sa plaidoirie cela nous offrira de très grandes difficultés, parce qu'il ne nous est pas possible d'apprécier complètement la plaidoirie à une simple audition. Nous la faisons sténographier, il nous la faut faire traduire; par conséquent l'intervalle qui s'écoulerait entre la journée d'aujourd'hui et celle de lundi serait extrêmement utile au point de vue de l'éclaircissement du débat.

M. LE PRÉSIDENT. Il nous faut continuer lundi matin.

M. BEERNAERT. Sans doute, Monsieur le Président; mais je demandais si les convenances du Tribunal ne lui permettraient pas de nous donner encore une séance cette après-midi—cela avait été entendu je crois—ce qui nous permettrait d'avoir une connaissance complète de la plaidoirie de la partie demanderesse.

M. LE PRÉSIDENT. Ce n'est pas possible; des membres du Tribunal ne seront pas présents cette après-midi.

M. BEERNAERT. Je me permets de faire remarquer d'avance la situation dans laquelle nous nous trouverions en présence d'une plaidoirie à laquelle nous devrions répondre sans la connaître suffisamment.

M. LE PRÉSIDENT. Alors; nous nous retirons un moment pour délibérer.

(L'audience est suspendue pendant quelques instants).

M. LE PRÉSIDENT. La séance est reprise. Le Tribunal a décidé qu'il siégerait encore jusqu'à midi et qu'il y aurait une séance à $2\frac{1}{2}$ h. Je donne la parole au conseil des Etats-Unis d'Amérique.

Mr. RALSTON. I understand, Mr. President, that we will proceed now until 12 o'clock, and at half past two o'clock we will begin again, and for what time, how long will the sessions continue?

Mr. PRESIDENT. Until about five o'clock.

Mr. MCENERNEY. Mr. President and honorable arbitrators: The State of California became a State of the American Union on September 9, 1850. In anticipation of its admission to the American Union, the question was largely debated whether as a State it should adopt for the basis of its jurisprudence the civil law or the common law. By a small majority it was finally determined to adopt the common law as the basis of its jurisprudence.

Consequently, the lawyers educated for practice at the California bar deal almost exclusively with a jurisprudence which has its origin in the common law of England. I am one of the number, and I have accordingly been accustomed to the jurisprudence of the common law and have but a fragmentary acquaintance with the civil law. It will be necessary for me, therefore, to discuss this case largely from the outlook of one acquainted only with the common law of England. I console myself, however, with the recollection that a court has everywhere been defined to be a place where justice is judicially administered. The function of all courts, the function of all systems of jurisprudence, is the attainment of justice, and in the essentials which find their origin in the moral law all nations and all peoples think alike. So, if I shall be able to establish in this discussion any proposition which, according to the jurisprudence of the common law, is deemed consonant with and the result of the application of justice, I

feel assured that the members of this court will find something closely analogous to it in the system of jurisprudence with which they themselves are perhaps more familiar.

If in the course of this argument I shall frequently refer to the system of jurisprudence to which I have been accustomed, it will not be on account of any belief on my part that it is a system superior to the continental system. My resort to it will arise out of the necessity of the case, which is, that being conversant with but the one system of jurisprudence, I can argue this case only in the light of its jurisprudence.

Our case, as appears from the title, is the case of the Pious Fund of the Californias. It is the subject which you are here called upon to consider. And naturally you are prompted of the outset of the inquiry to ask, What is the Pious Fund? When did it have its origin? Who created it? What is its history? When did it come to a close? What work did it accomplish? What were its objects? Were they changed or altered by the flood of time? Because Plato has said that "Time and time alone is the maker of states," likewise is it true that time and time alone is the maker of all great historical institutions; and the Pious Fund of the Californias, far away on the Western Hemisphere, has been a great historical institution.

I shall therefore in the exposition of this case, and in consonance with what I conceive to be the logical order, first concern myself with what the Pious Fund was. The first proposition to which I shall address myself is that "the Pious Fund of the Californias has had an unbroken and generally recognized existence from 1697 down to the cession of Upper California to the United States by the treaty of Guadalupe Hidalgo, exchanged February 2, 1848."

Upon the former arbitration, there was submitted to the tribunal, in support of the memorial of the archbishop and the bishop of California a brief history, so called, of the Pious Fund of the Californias, compiled by Mr. John T. Doyle, who has had charge of this case for now fifty years, and whose advanced age and infirmities make it impossible for him to appear before this tribunal to sustain the cause, which he has so successfully sustained in the past.

The brief history of the Pious Fund will be found in the transcript which you have, pages 17 to 22. Accompanying that brief history of the Pious Fund was a production by Mr. Doyle, which we know as "Extracts from various historical works bearing upon the Pious Fund." These extracts, in the original French, Italian, Spanish, and German, but not translated, are found in the Transcript, pages 187 to 221. The United States have prepared and presented a translation of these extracts. The brief history and these extracts were submitted to the former arbitral court at the beginning of the litigation. In no essential was the correctness of either the history or the extracts disputed by Mexico; and we could safely rely upon that brief history for a full, fair, and unchallenged account of our case were it necessary for us to do so. The brief history was very largely confirmed by subsequent investigations made upon behalf of the archbishop and the bishop, the results of which were laid before the former tribunal. It was also confirmed in so many particulars by the argument of Sr. Don Manuel de Azpiroz, counsel for Mexico, and I shall have occasion in treating of this question to make frequent use of his argument for confirmation, extension, and elucidation of our theory of the case, a theory from

which we have not deviated from the beginning. And it will be found that most of the facts which I shall have occasion to call to the attention of this honorable tribunal are to be found either expressed or implied in the brief history.

Having made this preliminary statement with respect to the sources from which the proofs will be forthcoming, I shall now recur to the first proposition, which I propose to sustain and which I have already stated to your honors.

It is that the Pious Fund of the Californias has had an unbroken and generally recognized existence from 1697 down to the cession of Upper California to the United States of America by Mexico by the treaty of Guadalupe Hidalgo, of date February 2, 1848. It has come to be an accepted fact that the Pious Fund of the Californias had its origin in 1697 in money collected from charitable people to enable certain Jesuit priests to commence their missionary effort in the Californias. Attached to the argument of Sr. de Azpiroz will be found the permission of the viceroy, dated February 6, 1697, whereby the missionaries were granted permission (quoting the language) "to penetrate into the provinces of California and convert the gentiles there residing upon the terms and conditions set forth in this instrument." The document appears at page 401 in English, Anexo n°. 1.

In his argument, Sr. de Azpiroz stated, page 374 in English and 226 in Spanish, that the conquests of California were commenced by the Society of Jesus upon the charitable contributions collected by Fathers Salvatierra and Ugarte in the beginning of 1697, and were continued for some time without becoming a burden upon the royal treasury, which was one of the conditions contained in the permission authorizing the undertaking.

Sr. Aspiroz also mentions, at page 374 in English and 227 in Spanish, a number of contributions to the fund, made as early as 1703, which aggregated fifty-five thousand dollars. He also says at the page to which I have last referred you, "up to this time"—meaning the year 1716—"the means belonging to those already established"—that is, the missions—"had not been delivered to the Society. The founders retained it in their possession, and paid the annual interest, which reckoned for each of them from the date of their establishment." And then, after recounting that one of the gentlemen who had made a contribution to the missions became bankrupt, the missions in consequence losing his donation, he goes on to say that "Father Salvatierra in 1717 requested and obtained permission to receive the capitals and invest them in real estate, which he did through Father Romano, the attorney of the missions. This permission was indispensable, because the Society of Jesus was not competent to acquire temporalities." Accepting this statement as true, for we have no evidence or information which would enable us to either affirm or deny it, it will be seen that until 1716, the principal donations for the propagation and maintenance of the Catholic religion in California had a close analogy to what is known in English and American jurisprudence as a covenant to stand seized to the use of another. The donors agreed to hold the property for the benefit of the missions. They said: "We contribute ten thousand dollars; we pay you interest upon that sum;" the interest was computed at 5 per cent and amounted to five hundred dollars annually. In the early history of this fund it was supposed, and the idea prevailed in Mexico, that five hundred dollars was a sufficient

sum for the maintenance of one mission for one year. Contributions for the purpose of founding missions were accordingly asked in the sum of ten thousand dollars each, each ten thousand dollars founding a separate mission.

I have now carried the history of the Pious Fund from 1697 to 1716, a period of twenty years. The period saw the origin of the fund, saw the first work of the missionaries, and saw the chief event with which I close the period, namely, the delivery of the capital, which theretofore had been held by the contributors, into the possession of the Jesuits for administration.

The next period with which I propse to deal covers fifty years, starting with 1717, when the Jesuits were permitted by law to assume the corporal possession of the property, and ending with 1768, the year in which they were expelled from Mexico by virtue of a royal decree passed in the preceding year. During that period the Jesuits had possession of the fund and administered it. A copy of the royal decree of February 27, 1767, of Charles III, banishing the Society of Jesus and taking possession of their temporalities will be found in the transcript at page 410. During these fifty years, from 1717 to 1768, the fund grew for that age to enormous proportions. We find it historically stated in a work devoted to the history of California that the minor contributions amounted in 1731 to one hundred and twenty-thousand dollars. In 1735 came the Villapuente benefaction, evidenced by a conveyance undoubtedly drawn by some one versed in the law of Mexico. By examining that deed, you will notice that the conveyance is to the missions. The language is "To have and to hold to the said missions." Whether the object or function of that conveyance was to pass the title to the missions or to the Society of Jesus, my unfamiliarity with the Mexican system of jurisprudence will not allow me to say; but it is evident to demonstration that the benefaction was intended for the benefit and behoof of these missions, subject, if you please, to the exercise of a power which I shall have occasion hereafter to discuss. This benefaction given by the Marquis of Villapuente and his cousin or wife, the Marquesa de la Torres de Rada, conveyed to the missions properties of great area and value. The area was four hundred and fifty thousand acres, and the estimated value of the donation was four hundred and eight thousand dollars. The value as estimated at that date is derived from a recital in the deed, at the foot of page 104 of the transcript, which is to this effect:

> And, whereas, the said Marquis of Villapuente, my cousin, is my only creditor, he having supplied me out of his own means with over two hundred and four thousand dollars, which he has furnished me, the receipt whereof is hereby acknowledged, and which is well known whereby our rights in the premises are just and equal

In other words, the Marquis of Villapuente and the Marquesa de la Torres de Rada, undertaking to donate an estate to the missions owned by the Marchioness de Rada, but subject to a lien in favor of the Marquis de Villapuente, recited and engaged between themselves that her right in the property, after the debt was paid, was equal to the debt; consequently, according to the values which they put upon the transaction, now one hundred and sixty-five years ago, his donation was two hundred and four thousand dollars, and her donation was two hundred and four thousand dollars. The deed is found in English in two places in the transcript, and it is in Spanish in two places. In English it is found at pages 104 and 452 and in Spanish at pages 99 and 309.

L'audience est levée à midi et renvoyée à 2 h. 1/2 de l'après-midi.

17 septembre 1902 (après-midi).

A la reprise de la séance à $2\frac{1}{2}$ heures M. McEnerney continue son discours jusqu'à $4\frac{1}{2}$ heures.

Mr. RALSTON. With the permission of Mr. McEnerney, and to prevent any misunderstanding, I simply want to announce that in view of the terms of the order passed by the court and read this morning, to which we have given careful consideration, that I shall follow Mr. McEnerney on Monday, with your permission, in the presentation of the case of the United States, and while I have not, unfortunately, had an opportunity to consult with Monsieur le Chevalier Descamps, I anticipate that he will close the opening arguments for the United States. In reply to the argument from Mexico, which will thereafter be presented, we shall have the pleasure of the assistance of Mr. Penfield, the solicitor of the Department of State.

Mr. MCENERNEY. Mr. President and honorable arbitrators: At the time the tribunal rose for midday intermission we had under discussion the period of the Pious Fund, which I have arbitrarily assumed to have begun with 1717 and to have continued for fifty-one years—that is, to the expulsion of the Jesuits under the royal decree of Charles III of Spain. We had pointed out that to 1731 the minor donations to this fund aggregated $120,000, and that in 1735 a donation was made estimated by the grantors between themselves to have been worth $408,000. The next donation to which I shall call your attention is that made by the Duchess of Gandia, which amounted, according to the historical authority which we have for it, to about $120,000.

You will realize that it was impossible upon the former arbitration to account, item by item and donation by donation, for this great benefaction extending over a period of one hundred years. When we came to make our claim we made it upon the condition of the fund as it existed in 1842. But it was necessary for us, in view of its magnitude, to trace the history of this fund, to show that its proportions, as we claimed them, were no exaggeration; and therefore we were entitled to refer, and we did refer, to the history of the early Californias to show that pious and wealthy people had contributed to it benefactions of great value and extent, approximating the proportions of the fund as we claim them to have existed in 1842.

I have already shown you benefactions amounting to half a million dollars—more than $520,000. The historical reference by which it is shown that the Duchess of Gandia contributed to this fund $120,000 is one of the extracts to be found in the original at the foot of page 198 of the transcript. It is taken from the "Story of California," printed in Venice in 1789. I desire, with the permission of your honors, to read that extract from the translation on page 8 of the translation of extracts furnished to you this morning:

Two things were needed to advance the missions to the northward as the missionaries desired, namely the capital to found them and the locations to establish them in; and there was no hope of the one or the other until God moved the mind of an illustrious and most noble benefactress. This was the Duchess of Gandia, Doña Maria Borja, who having heard an old servant of hers, who had once been a soldier in California, speak of the sterility of that region, the poverty of the Indians there and the apostolic labors of the missionaries, thought that she could not do anything more pleasing to God than to devote her fortune to the aid of these missions. She therefore ordered in her will that there be provided, out of her ready money, those large annuities which she left her servants during their lives, and that all the rest

of her estate should go to the missions of California, together with the capitals of the above-mentioned annuities, after the death of those who who enjoyed them; and that a mission, consecrated to the honor of her beloved ancestor, St. Francis Borgia, be founded in said peninsula. The sum of money acquired from this legacy by these missions amounted, in 1767, to sixty thousand dollars, and a like amount ought to be obtained after the death of the pensioned servants, over and above some very large debts which there was hope of recovering. With such a large capital, many missions could be founded in California, as in fact they would have been founded, if the Jesuits had not been obliged in the above-mentioned year to abandon that peninsula.

I now pass to what is known as the Arguelles benefaction, under which, from Señora Arguelles, who died before the expulsion of the Jesuits, the fund received what is estimated to be $600,000. This benefaction passed to the missions of the Californias under the following circumstances. Señora Arguelles bequeathed one-quarter of her estate to a college in Guadalajara owned by the Jesuits; three-quarters of her estate she devised in trust to the missions. The Jesuits renounced the benefaction and thereupon an officer, representing the State, and claiming that the benefaction should not lapse either as to the quarter or as to the three-quarters, intervened on behalf of the Government. The case continued in litigation for more than twenty-five years; and it was finally decided that the gift of the one-quarter lapsed, I presume upon the theory that the devise of the one-quarter was a gift to the Jesuits personal in character, given to their college as a private institution. But it was decided as to the other three-quarters, that it did not fail; because, presumably, it was a public charity, and it is the law the world over, that public charities do not fail for want of a trustee; the declination of the trustee to whom property is given or devised for charitable uses can not cause the trust to lapse, nor does he control its destinies nor defeat its execution. In the court of last resort in Spain it was decided as to the three-quarters of the estate, that one-half of it should go to the Philippine missions in accordance with Señora Aguellas' will, and that the other half should go in accordance with an appointment which His Majesty the King of Spain should thereafter make. His majesty appointed that the benefaction should go to the Pious Fund of the Californias. This appointment was final and irrevocable; no attempt has ever been made to retract or alter it.

I wish the members of this court to keep in mind the fact just stated, that half of the Arguelles benefaction went to the Philippine missions. It is connected with an important event in the history of Spain and Mexico, upon which we rely as a precedent to establish the rights we are contending for before this tribunal. The Arguelles estate was thereafter distributed: $10,000 as a legacy to the children of Carro; one-fourth of the estate to the heirs at law, because as to the one-fourth subject to the $10,000 it was decided that the declination of the Jesuits defeated the gift; the other three-quarters in equal shares to the Philippine missions and to such other missions as the king should designate (the California missions being subsequently designated by him).

I invite the attention of the members of this tribunal, in connection with this Arguelles benefaction, to a report in the record at page 22, which has been called throughout the litigation "Manuel Payno's report." It commences on the middle of page 22 and continues to the top of page 36. Mr. Payno's deposition follows, and then the certificate of the consul of the United States to Mexico at the top of page 37.

It appears by Mr. Payno's deposition that in 1862 he was commissioned by the Mexican Government to prepare a history of its financial condition. He says, at page 22:

Being commissioned by the Supreme Government to make a report upon and adjust the debt contracted in London, the diplomatic conventions—and some other financial affairs which should be arranged by the treaty about to be made between the Republic and the commissioners of the three allied powers—I have endeavored in the short space of time at my disposal scrupulously to examine the records and books of the public offices, with the object of treating every affair separately, by forming a concise historical extract of each, and giving at the end a statement of what the treasury owes up to date.

It is interesting to ascertain who the three powers were to which reference is made in Payno's report, and this happily we are able to do by a reference to the second volume of Moore's International Arbitrations, page 1289.

He says:

October 31st, 1861, France, Great Britain, and Spain entered into a convention with reference to combined operations against Mexico for the enforcement of claims.

Mr. Moore premises the account of this convention with a statement that there were complaints to various nations from their subjects having domicile in Mexico that their claims were not recognized and discharged by the Government of Mexico.

Returning now to the Payno report.

We know that Mr. Payno's report was prepared bv him with great care and in obvious hostility to the claims of the Philippine missions and that the report is an official publication of the Republic of Mexico, which she can not and never has disputed.

I invite your attention to an item of this Payno report on page 23. You will notice that it is a list of the sums, according to the journals of the general treasury, that were received into the treasury on account of the property bequeathed by Doña Josefa de P. Arguelles to the missionaries of the Philippine Islands;

which list is formed in virtue of the supreme order of the 1st of the present month of May, number 191, and in conformity with the agreement entered into between the supreme government and the agent of those missionaries; which was communicated to the general treasury on the 24th of December, 1845 (of this document we have asked discovery from Mexico); it being observed that the present list shall serve for no other purpose than as evidence to the Spanish legation; for which object it is remitted to the finance department in compliance with the said supreme order.

Now note:

As appears by the entry of the 2d of August, 1803, up to that date there had been delivered on account of the property of Doña Josefa de P. Arguelles the sum of $544,951.10, of which $10,000 corresponded to the children of Carro; and of the remainder, one-quarter part to the heirs and the residue in equal parts between the Californian and Philippine missions; consequently to these latter $200,606.54.

And so on, item for item, until the sum total was $306,901.62, not $316,901.62, for you will notice that on the 15th of May, 1804, $10,000 was assigned to the children of the Carro. Keep in mind that the estate went $10,000 to the children of the Carro; one-fourth to the natural heirs, one-half of three-quarters, or three-eighths, to the Pious Fund of the Californias, and the other three-eighths, one-half of three-quarters, to the Philippine missions.

That I may make this matter clear beyond all question I beg to invite the attention of your honors to an extract from one of the briefs of Mr. Doyle (which will be found at page 467 of the Transcript),

where he gives the history of these Arguelles benefactions. If I may be permitted to read it, I think it will help to simplify the labors of your honors:

On May 29, 1765, Doña Josefa Paula de Arguelles, a wealthy lady of Guadalajara, executed her will, wherein she bequeathed $10,000 to a foundling hospital at Manila, one-fourth of the residue of her property to the Jesuit College of St. Thomas, Aquinas, in Guadalajara, and the other three-quarters to the missions in China and New Spain. She died about a year and a half thereafter, leaving an estate of about $800,000. The Jesuits, at that time pressed by a storm of obloquy in Spain and Portugal, renounced the legacy in their favor, and the heirs of the deceased lady brought an action to have her declared intestate as to all her estate, save the small legacy to the foundling hospital. The Crown intervened in the action, claiming the portion bequeathed for missions. And one Agustin de Mora in like manner put forward a claim for "Sustitucion vulgar," with respect to the quarter bequeathed to the college, but on behalf of what institution or in what right I have been so far unable to discover. It will be remembered that at this time the missions both in New Spain and the Philippines were in the hands of the Jesuits, *so that if their renunciation could affect the bequests in favor of the missions in their charge, the heirs had as clear a case as to the three-fourths bequeathed to the latter as they had for the quarter bequeathed to the college.* The case, after going through the lower courts, came before the "audiencia real" of New Spain on appeal; which tribunal on June 4, 1783, gave judgment denying Mora's claim for the "sustitucion vulgar" as to the quarter bequeathed to the college, and declared the deceased, in consequence of the renunciation of the Jesuits, *intestate as to that quarter.* As to the other three-quarters, however, it decided that *the missions took under the will,* and declared that said three-quarters, therefore, vested in the Crown [a] to be employed in the conversion of the infidels in this Kingdom and the Philippines (one-half in each), under the orders of the King, whom it especially concerns; and that a report be made to His Majesty to the end that he may be pleased to determine what may be his sovereign will with respect to the *direction, consistency,* and *security* of the funds so destined for the pious work of missions. This decree simply vested in the Crown a power of appointment as to what particular missions should be supported out of the bequest, subject to the sole condition that one-half should be destined to Asia and the other to America. The Crown exercised its power of appointment by ordering one-half of the three-quarters so devised to be aggregated to the Pious Fund of California, and the other half to the missionary fund of the Philippine Islands.

Then Mr. Doyle continues, but I shall not read further.

Mr. DE MARTENS. May I ask a question? On page 467 (of the Transcript, line 14) there is no number of dollars given.

Mr. MCENERNEY. There is not, your honor, and I cannot tell you what it is. We shall be able to furnish you that from the original, but I cannot give it exactly now.

Mr. W. T. S. DOYLE. It is $600,000.

Mr. MCENERNEY. It should be $600,000.

Mr. MCENERNEY (continuing). This will of Senora Arguelles was the subject of litigation until 1793, about twenty-five years after the expulsion of the Jesuits, when its benefaction was confirmed to and became a part of the Pious Fund. During the seventy years from 1697 to 1768 the Jesuits founded in Lower California thirteen missions, as you will see by reference to the testimony of Father Rubio, pages 148 to 150. You will find there stated the missions founded in Upper California and the missions founded in Lower California. Father Rubio was the vicar-general of the first bishop of the Californias, who was appointed, as I shall presently have occasion to show you, in 1840. The bishop died in 1846, and Father Rubio was vicar-general from 1846 until 1850, the year in which the second bishop—Bishop Alemany, who was one of the claimants before the former arbitral court—was consecrated.

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[a] This decree passed after the expulsion—indeed, after the suppression of the Jesuits; hence the trust devolved of necessity on the Crown as *parens patriae.*

I have now stated the chief events connected with the Pious Fund during the period which I have taken as covering the years 1717 to 1768. I now come to the period from the expulsion of the Jesuits to the time of Mexican independence, which is stated by Mr. Moore (second volume of Moore's International Arbitration, 1209) to have been achieved in 1821, although the treaty with Spain recognizing it is of date December 28, 1836.

From the expulsion of the Jesuits in 1768 until Mexico achieved her independence the fund was administered by the Crown of Spain through officials appointed for that purpose. The trust character of the fund and its dedication to the establishment and maintenance of the Catholic religion in the Californias was always recognized.

In the royal decree of February 27, 1767, at page 410 of the Transcript, concerning the banishment of the regulars of the Society of Jesus and the taking possession of their temporalities, we find in paragraph 5, which occurs on page 411 of the Transcript, that it is declared by His Majesty:

> I further declare that the taking possession of the temporalities belonging to the order embraces their property, real and personal, as well as the ecclesiastical revenues which legally belong to it within the kingdom, but without prejudices to such charges as may have been imposed upon them by their endowers.

This is an express recognition of the obligation assumed by the Crown when it took over trust properties.

And we have it upon the authority of Mr. Azpiroz, counsel for Mexico, in his argument before the former arbitral court, paragraph 33, page 375:

> Upon the expulsion of the regulars, the King took possession of their temporalities within his dominions, and among these was included the Pious Fund of the Californias. Nevertheless, this was separately administered and its proceeds continued to be employed for the purposes for which they were instituted by the civil officers of the Crown.

In other words, when the King made his royal decree he said, "I take over these properties subject to these obligations." And we have it upon the authority of the learned counsel for Mexico, now its minister plenipotentiary at Washington (who executed the protocol under which this tribunal is organized), that the King not only promised, in the decree whereby he expelled the Jesuits and took possession of their properties, to assume the obligations attached to those properties, but that he actually carried out this promise.

At the end of an official publication of New Spain, which is anexo No. 5 to the argument of Mr. Azpiroz, found between pages 416 to 425 of this record, your honors will find it stated (see top of page 425) that the "foregoing is taken from the 42d volume of the Section of History belonging to the general archives of the nation." All that I desire to call to your attention in this report at the present time are paragraph 19, on page 420, and paragraph 38, on page 423. Paragraph 19, page 420, says:

> Each missionary receives a stipend of $350 per annum, which is paid out of the gross of the Pious Fund acquired by the Jesuit fathers, and to which I will refer in its proper place.

And it is said, in paragraph 38, page 423:

> They receive no contribution or duties, but each mission receives a stipend of $400 per annum, drawn from the Pious Fund left by the extinct regulars. One thousand dollars from the same fund is also furnished both to the Fernandinos and Dominicans, respectively, for the establishment of each new mission.

Sir Edward Fry. I do not quite understand what amount is to be received—what mission or missionary is to receive the three hundred and fifty dollars and what four hundred dollars.

Mr. McEnerney. Both paragraphs deal with the missions of California. One says that each missionary receives $350, and the other says each mission receives $400.

Official archives were kept by Spain and preserved by Mexico, containing an official history of the Pious Fund of California (see English translation, page 425 of the transcript and continuing to the foot of page 433). You will notice the extract is certified by Mr. Azpiroz, as chief clerk, presumably of the foreign office, before he became counsel for Mexico. Under date of Mexico, September 27, 1871, he says:

> "The foregoing is a copy of the original found in a book called Fondo de Piadoso de California, belonging to the general archives."

Here we have it clearly stated that in the archives of Mexico there was kept an official record devoted to the Pious Fund of the Californias. This name—The Pious Fund of the Californias, here mentioned in the certificate—is not only the common and ordinary designation of the fund, but, as will appear, document after document, official recognition after official recognition, make use of this designation as the official title of these properties. They were from a period shortly after the expulsion of the Jesuits down to 1842 known officially, by the action of the Crown in one instance and by the Government in the other, as the "Pious Fund of the Californias," a name denoting first that they were devoted to pious uses, and, secondly, to pious uses in the Californias.

I was speaking of and had referred you to the official history of the Pious Fund of the Californias, and I desire to read to you two or three lines from paragraph 3 on page 425 (of the transcript):

> The superior government, without loosing sight of the pious purpose to which they devoted, by order of the 12th of October, 1768, directed Fernando Mangino, the director of temporalities, to pay special attention to the examination of the property destined for the propagation of the faith in that peninsula.

From this same official history of the Pious Fund we find (page 426, paragraph 9) that an agreement was made March 21, 1772, between the board of war and the treasury department on the one hand and the Dominicans and Franciscans on the other, by which it was agreed that the Dominicans should have charge of the missionary work of Lower California and the Franciscans of the missionary work in Upper California.

In other words, we find four years after the Jesuits had been expelled, that is in 1772, that the religious orders of the church, by agreement with the Government and, of course, necessarily and presupposing the confirmation of their ecclesiastical superior, agreed upon a division of this missionary work—the Dominicans assuming the labors in Lower California and the Franciscans assuming them in Upper California. I ask your honors to dwell upon that fact because I shall hereafter undertake to enforce an argument upon one branch of this case predicated upon the fact that the Spanish Government did make that agreement and that from it there followed consequences shortly to be considered.

But even before that time—even before 1772—to wit, on the 8th

of April, 1770, His Majesty the King of Spain, by royal order, had directed a division of the missions between the Dominicans and Franciscans. That will be found stated in the transcript, English translation, page 426, in the recital of the proceedings which occurred in 1772. But although that order had been made in 1770, the missionary work of the Franciscans commenced even earlier than that date; for we find that in 1769 they journeyed overland from Lower California to Upper California, and on their way thither founded the mission of San Fernando de Villacate in 1769, which was then the most northerly mission in Lower California. By the year 1823 (from 1769 to 1823, 54 years) they founded in Upper California 21 missions, making, with the mission which they founded in Lower California, 22 in all. The 21 missions which they founded in Upper California, with the date of the foundation of each, will be found in Father Rubio's deposition, page 150 of the transcript. An examination of that list of missions will give you the beginnings of all the civil and the social history of California; for we find among these mission foundations that of San Francisco, now the chief metropolitan city of the Pacific coast, founded in 1776; we find the mission of San Rafael, a well-known town in California; of Santa Cruza, another well-known place; of Santa Barbara; of San Buenaventura, of San Luis Obispo, all well-known places; and finally of San Diego, also very well known, the most southerly mission of Upper California.

In the report of the treasury of Mexico, to which I invite your attention (the English translation of which will be found from pages 135 to 146) there will be found repeated acknowledgements of the trust character of these properties subsequent to the expulsion of the Jesuits. For instance, it appears therein that his majesty the King of Spain directed that "the administration of the said fund shall be kept with entire separation" (page 143, section 20). It also appears there that on October 1st, 1781 (I now ask your attention to section 22) the King ordered the sale of the properties. Listen to the conditions attached to the authority to make this sale: "Your excellency shall proceed immediately to the sale of those of the Pious Fund"—that is, the properties of the Pious Fund—"and that you shall secure the amount thereof in favor of the missions, giving due advice thereof through the department under my charge," meaning under the charge of the viceroy, who communicated the order to the director of the temporalities by whom the sale was to be made.

It having, however, been brought to the attention of his majesty that such sale was contrary to the expressed wish and will of the Marquis de Villapuente, another later decree was issued on December 14, 1715, whereby, in view of these facts, his majesty (see paragraph 26) "has been pleased to order, that for the present the sale shall be suspended and the administration continued," and whereby (paragraph 28), "His majesty . . . . bearing in mind the instructions of the Marquis de Villapuente, who gave his estates for that purpose, has been pleased to order that the surplus money shall be invested in safe landed property for the increase of the funds and that reports shall be made immediately, etc., etc."

This brings us to the period from the independence of Mexico to November 2, 1840, the day of the transfer of these properties to the first bishop of the Californias.

Mr. DE MARTENS. You were speaking about the different missions in San Francisco and other places. Have you some facts concerning the situation of these missions?

Mr. MCENERNEY. There are reports in the record. For instance, one of the publications to which I have referred you is a report on the condition of the missions. The proof on that subject is very meager, however. But there is a report showing how the missions are controlled, what their source of revenue is, whether there are contributions of the natives, and what the source of revenues of the missionaries are, etc. (Of course, there are reliable histories published in California which give an authentic history of the missions.) It appears by one of the paragraphs I read that they had no revenues except those derived from the Pious Fund. In other words, the natives had no means to assist the missionaries and they were dependent on the revenues derived from the Pious Fund.

Sir EDWARD FRY. Were there also payments by the Government?

Mr. MCENERNEY. There were payments ordered, but never made. There is not a single fact here to show that any payment was ever made for the missions as such—for the military service—yes—for the Presidio as distinct from the missions.

I have now come to the period commencing with the Mexican independence and running down to November 2, 1840.

At what date subsequent to the attainment of its independence Mexico actually took possession of these properties the record does not say. But we do know that it passed a law on May 25, 1832, for the leasing of these properties by a board of directors, created by that act, and called a "junta," in which it was expressly stated that the moneys derived from the leasing of these properties should be paid into the mint or treasury for the account of the missions for which the funds were "solely and exclusively destined."

There is not in the entire history of this fund, from the year in which Mexico achieved its independence down to the cession of Upper California to the United States on February 2, 1848, a single repudiation of the obligation under which Mexico labored with respect to this fund. Not one.

To illustrate this I quote from Mr. Azpiroz (paragraph 99, page 390):

> Hence both the civil and canonical law clothed the endowment fund with the character of a trust, and acknowledged the same respect with regard to the intention of the founders or endowers as to those of the devisers. In fact no name better suits the class of pious funds to which the "fund" of the mission belongs, than that of trust, for the purpose of designating the legal effects of its creation. It is still more convenient for us to do so, for in doing so we agree with the claimants.

Sir EDWARD FRY. In 1772 the King, after taking possession of this property, issued a direction (page 456) to all the representatives of the Jesuits, etc. Then he goes on to say that these purposes shall be "carried into effect by my said viceroys and governors in my name as part and parcel of my royal crown." Is that consistent with his being a trustee?

Mr. MCENERNEY. I think that you must interpret the royal decree by the conduct of the Crown. It will appear by all of the documents which we cite that it was administered by him in his capacity as a trustee.

And again Mr. Azpiroz says (paragraph 92, page 388):

> Still, as the owners of their property they could or not contribute it to the establishment of the missions, and in so doing they had the right to place conditions upon

the administration and employment of their property. In fact they made use of this legal right and the Society of Jesus when it accepted their alms as their trustee, which it was, and upon the conditions prescribed, beyond doubt compromised its principal, the Government, to respect the intentions of the donors, to the same extent that they themselves were bound. This fact has always been recognized by the Spanish sovereign and his successor, the Mexican Government.

Indeed in the answer of Mexico to our memorial (Replication, page 20) it is said:

The Mexican Government which succeeded the Spanish Government, was, as the latter had been, trustee (comisario) of the fund, and in this conception successor of the Jesuit missionaries, with all the rights granted to them by the founders.

It will be seen, therefore, that it is an admitted fact in this case that Mexico always held and administered the fund as a trust estate. She herself claims in the answer already mentioned that she had the rights of the Jesuits. This argument necessarily implies that she, Mexico, had all of the duties of the Jesuits in respect of the fund.

We shall hereafter consider what the duties of Mexico were with respect to the fund, but for our immediate purposes we emphasize the deliberate admission of Mexico that she held the Pious Fund as trustee. Among the evidences of her recognition of her duties as trustee is that contained in the legislative act of Mexico, dated May 25, 1832, providing that the rural properties belonging to the Pious Fund of the Californias should be leased.

This law is to be found on the first page of the pamphlet, Laws of Mexico Relating to the Pious Fund. It is provided in paragraph 6, on page 4, that—

The proceeds of such properties shall be deposited in the treasury of the Federal city, to be solely and exclusively destined for the missions of the Californias.

It is also provided in subdivision 9 of section 10 (on page 5, near the bottom) that this board shall—

name to the Government the amounts which may be remitted to each one of the Californias, in accordance with their respective expenses and available funds.

And there is no provision in this act for any distribution of these moneys or for the diversion of any part of the income except to the Californias, according to the state of their funds and according to the state of their necessities.

The title of this act is "Law. That the Government proceed with the lease of the rural property belonging to the Pious Fund of the Californias;" and in Article I it is provided that "The Government shall proceed to rent the rural property belonging to the Pious Fund of the Californias." It is to be noted that I read those two clauses for the reason that in them Mexico declares that these properties *belong* to the Pious Fund of the Californias.

I have already called to your attention section 10, subdivision ninth, and have pointed out that there is no provision for the disbursement of those funds to any missions other than the missions of the Californias. But there are other legislative evidences that Mexico recognized her duty as trustee throughout the period under consideration. These need not, however, to be cited. It is sufficient for the present controversy that it is an undisputed proposition, made so by the answer of Mexico, that she never made any claim of title to this property except as a trustee thereof. I may stop for a moment, however, to speak of one or two of these laws. The law of September 19, 1836, concerning the erection of the bishopric in the two Californias, with

which your honors are already familiar, is another recognition by Mexico of its duty with respect to the Pious Fund. In that act it is provided that the property belonging to the Pious Fund of the Californias shall be placed at the disposal of the new bishop and his successors, to be by them managed and employed for its objects, or other similar ones, always respecting the wishes of the donors of the fund.

By the enactment of that law and the subsequent surrender of the property to the Bishop of California, presently to be mentioned, Mexico simply discharged its clear duty as a trustee in possession. On April 27, 1840, His Holiness Gregory XVI, upon the petition of Mexico, erected Upper and Lower California into a diocese, and appointed as its first bishop Francis Garcia Diego, at that time, and for some time before, president of the Missions of the Californias. You will find that fact established at page 182, by the deposition of Archbishop Alemany, claimant before the former arbitral court.

Bishop Diego was consecrated October 4, 1840, as is stated at page 91 of this record. On November 2, 1840, the properties of the Pious Fund were surrendered to him by Mexico, in conformity to its duty as trustee, recognized by the legislative act of September 19, 1836—a fact shown by some of the correspondence of Pedro Ramirez, to be found at page 520 in English and 495 in Spanish. This brings us to November 2, 1840.

Within the period from November 2, 1840, to February 2, 1848—from November 2, 1840, until the cession of Upper California to the United States under the treaty of Guadalupe Hidalgo of February 2, 1848, made in consideration of $18,250,000—Mexico took no measures with respect to the properties of the Pious Fund except those to be now stated. The first one was the decree of February 8, 1842, by which it is provided:

Article 1. The sixth article of the law of the 19th of September, 1836, by which the Government relinquished the management of the Pious Fund of the Californias, and the same was then placed at the disposal of the right reverend bishop of the new diocese, is hereby repealed.

Article 2. The administration and employment of this property shall therefore again become the charge of the Supreme Government, in such way and manner as it shall direct, for the purpose of carrying out the intention of the donor, in the civilization and conversion of the savages.

This decree of February 8, 1842, is preceded by correspondence, to which I shall refer your honors and pass on. It is the correspondence called the Valencia-Ramirez correspondence. It covers two or three months in 1842. It opens on page 499 with a letter of January 26, 1842, wherein the minister of justice asked Mr. Ramirez, as the agent of Bishop Diego, to pay $2,000 due to the English consul for money laid out, which it was claimed by the Government of Mexico was lawfully chargeable against the Pious Fund.

The answer to this was made on the 28th of January, 1842 (page 500) by Mr. Ramirez. It is substantially to the effect that the condition of the fund was such that he could not pay the $2,000; and he suggested that, as under the law of 1836 more than $8,000 was due to the bishop from Mexico on account of the $6,000 per annum which she agreed to pay for the support of the bishopric, it would be proper for the Mexican Government to pay the $2,000 out of that money. There followed a short letter from the minister of justice to Mr. Ramirez, on the 5th of February, and his reply thereto; and finally came the decree of

February 8, 1842, to which I have referred you. The correspondence will be found from page 499 to the foot of 502.

On February 21, 1842, as will be seen by a reference to page 505, Gen. Santa Anna, President of the Mexican Republic, having legislative power, appointed Gen. Gabriel Valencia, his chief of staff, "general administrator of said goods, upon the same terms and with the same powers as were conferred to the board (junta) of the same department (ramo) by the decree of the 25th of May, 1832."

Next follows the decree of October 24, 1842. This decree of October 24, 1842, recites that the decree of February 8, 1842, "was intended to fulfil most faithfully the beneficent and national objects designed by the foundress without the slightest diminution of the properties destined to that end." The act then provides that all of the properties belonging to the Pious Fund of the Californias are incorporated into the national treasury, and further provides that the revenue from tobacco "is specially pledged for the payment of the income corresponding to the capital of the said fund of the Californias." It furthermore provides that the Department in charge of the revenues "will pay over the sums necessary to carry on the objects to which said fund is destined, without any deduction for costs, whether of administration or otherwise."

You will note that this act provides that the department of tobacco will pay over these moneys to the objects for which the fund is destined. Note that a few months before this decree was passed Gen. Gabriel Valencia was appointed to manage the fund upon the terms upon which it was managed by the junta under the law of May 25, 1832; and note, furthermore, that it is recited in the law of May 25, 1832, that the funds are solely and exclusively destined for the missions of California.

It is evident, when the act of May 25th, 1832, the appointment of General Valencia February 21, 1842, and the decree of October 24, 1842, are read together, that there can be no doubt that the decree of October 24th, 1842, was intended to recognize the rights of the missions of the Californias, and was also intended to contain a recognition of the fact that the properties of the Pious Fund were solely and exclusively destined and designed for and dedicated to the use of the missions of the Californias.

I next come to the treasury order of April 23, 1844, which will be found on page 149 of the record, in the deposition of Father Rubio. The same order in Spanish is a footnote on page 88 of the record. Father Rubio, whom you will remember was first the secretary and then the vicar-general of the bishop, and also exercised the faculties of a bishop *ad interim* from 1846 to 1850, deposed that he saw in about the year 1845 this official notice in the diary of Mexico. That it is a genuine and authentic document was not disputed upon the former hearing, and the fact stated in it was equally unchallenged. It was an order made by the minister of the treasury of Mexico, from which it appears that the President of Mexico had given an order on the customhouse of Guaymas, payable to the representative of Bishop Diego. The language is this:

> For the sum of $8,000, on account of the income belonging to the Pious Fund of California, the properties of which were incorporated into the national treasury.

This document, the genuineness and authenticity of which, I say, are not disputed—there being no evidence that the document did not exist

or that the notice was not given—is proof that as late as April 23, 1844, the Mexican Government affirmatively recognized its obligation to the missions arising out of the facts already stated.

I come now to the act of April 3, 1845, also to be found in the pamphlet, which is a law passed by Mexico concerning the restitution of debts and properties of the Pious Fund of the Californias. By this act it is provided that the debts and other properties of the Pious Fund of the Californias which are now unsold shall be immediately returned to the right reverend bishop of California and his successor, "for the purposes mentioned in article 6 of the law of September 19, 1836, without prejudice to what Congress may resolve in regard to the property that has been alienated." No property was ever returned pursuant to this statute. We quote it here only for its evidential value. From the foregoing facts as I have detailed them to you I deduce the proposition which I enunciated at the beginning: That from 1697 down to the cession of California to the United States by Mexico, under the treaty of Guadalupe Hidalgo, the Pious Fund of the Californias had a generally recognized existence and a continuous life.

The second proposition which I desire to advance is, "That at no time during the existence of this fund, beginning with 1697 and continuing to February 2, 1848, was the Pious Fund of the Californias considered to be other than a trust fund. Its character as such was continuously and repeatedly recognized by Spain and thereafter by Mexico." Not only was it recognized as a trust in the abstract, but during all the period of time from the expulsion of the Jesuits down to the cession of California to the United States by Mexico, it was recognized as a trust in favor of the missions of the Californias. This proposition was unavoidably but only partially dealt with in the discussion of my first proposition. It appears that during all the years from the expulsion of the Jesuits down to the cession of California to the United States, in all of the documents issued under the Crown of Spain and the Government of Mexico, this fund, consisting of the properties which I have described, bore the title which we claim designated both its purposes and the persons for whose benefit it existed. In other words, in all the documents of this period the fund is specifically called "The Pious Fund of the Californias." It is true that the two decrees of February 8 and October 24, 1842, implied that on those days Mexico claimed the right to manage and possess (that is, take into her keeping) these properties; but there is nothing in either decree which involves a repudiation by her of the idea that the properties were to be devoted to carrying out the intention of the donors, namely, the conversion to the Catholic faith of the inhabitants of the territory known as the Californias, and after their conversion the continued maintenance and support of the Catholic religion in that country.

In addition to what we have already shown to be the facts, we again call to your attention that it is expressly conceded by Mexico in her answer to our memorial that the property was given in trust and that the trust character was never disavowed. We wish to emphasize the declaration made by her minister of foreign affairs in the answer which he has sent here for the consideration of the members of this tribunal. He says that the fund was a trust estate and that Mexico never denied its trust character. Let me read from the Eng-

lish translation of Mexico's answer, to be found in the replication, pages 19 and 20:

The claimants agree with the Government of Mexico in admitting the following facts, proved by irrefutable documents:

First. The Jesuits were the original trustees or administrators of the properties which constituted the Pious Fund of the Californias up to the year 1768, when they were expelled from Spanish dominions.

Second. The Spanish Crown, in place of the Jesuits, took possession of the properties which constituted the aforesaid Pious Fund, and administered them by means of a royal commission until the independence of Mexico was achieved.

Third. The Mexican Government, which succeeded the Spanish Government, was, as the latter had been, trustee (comisario) of the fund, and, in this conception, successor of the Jesuit missionaries, with all the rights granted to them by the founders.

The claim by the Mexican Government that it succeeded to the Jesuits in this benefaction, with all the rights granted to the Jesuits by the founders, carries with it, as a consequence, that it also assumed all the correlative duties. If Mexico obtained, by reason of her subrogation, so to speak, all of the rights, she became burdened with all of the duties. The assumption of all of the rights necessarily carried with it and connoted the assumption of all of the duties.

I therefore pass the proposition that the Pious Fund was recognized as a trust estate by Spain and Mexico. We have Mexico's deliberate admission that our claim in that regard is true. I come, then, to the point that the trust purpose of the Pious Fund of the California mission was the conversion of the natives of the two Californias, Upper and Lower, and the establishment, maintenance, and extension of the Catholic religion and worship in that country. It is conceded by Mexico that the trust purpose of the Pious Fund of the Californias was the conversion of the natives of the two Californias, Upper and Lower. This is stated in paragraph 4 of her answer, Replication, page 30:

The claimants state that the object of the Pious Fund of the Californias was to provide for the conversion of the Indians and for the support of the Catholic Church in the Californias. This being a double object, it is necessary to distinguish between the two parts which constitute it. The first part, the conversion of the pagan Indians to the Catholic faith, and to the obedience of Spanish authority is unquestionable, and must be considered as the principle and direct object of the missions entrusted to the Society of Jesus by the Catholic King, endorsed by the founders of the Pious Fund, and subsidized by the public treasury of Mexico. The other part of the object, that is, the support of the church in California, was not the principal or direct object of the establishment of the fund, but the means of carrying out the spiritual conquest of uncivilized Indians through the religious missionaries.

We do not concede, as is claimed by Mexico in the foregoing extract, that the Pious Fund had for its object the conversion of the pagan Indians to obedience to Spanish authority, nor that the fund was ever subsidized to the extent of a single dollar "by the public treasury of Mexico."

These propositions heretofore and now advanced by Mexico were considered in the arguments upon the former arbitration and are referred to in other arguments for the United States already submitted to this tribunal, and need not now be dwelt upon.

It will be seen from the extract above quoted from the answer of Mexico, that it is therein stated that one of the objects of the Pious Fund was the conversion of the natives to the Catholic faith. Mexico says this proposition is unquestionable. Mexico likewise concedes that another purpose of the Pious Fund was the support of the church

in California. She so concedes, although she also claims that this purpose was subordinate to the spiritual conquest of the uncivilized Indians. But Mexico does concede, and we have properly claimed, therefore, that one of the purposes of the donors of the Pious Fund was the support of the church in California; but even without this admission the proof upon this point is complete. The Pious Fund of the Californias was, as its name implies, a fund to be devoted to pious uses in the Californias, and to pious uses of the Roman Catholic type. But how can you devote properties to pious uses of a Roman Catholic type in California without devoting them to the support of the Roman Catholic Church and the extension of her religious work there? The object of all missionary work is first to establish religion, and having established it, next, to maintain it. To establish it and then to abandon it is to have wasted and misspent your means.

What the object of this fund in the Californias was in the beginning is clearly shown by the deed of the Marquis of Villapuente and the Marchioness of Torres de Rada, executed in 1735. As I have already called to your attention the contributions to the fund in 1731, four years before the Villapuente donation, amounted to $120,000. Of that sum the Marquis of Villapuente had contributed $40,000 himself, so that all of the contributions to this fund, of which we have any evidence, prior to the de Rada donation, amounted to about $80,000.

The contributions to the fund which followed the munificent endowment of the Marquis of Villapuente and Marchioness of Torres de Rada were necessarily given to objects in close affinity to those for which the Villapuente and de Rada donation was given. Let us examine the Villapuente and de Rada deed for the purpose of ascertaining what religious object was sought to be achieved thereby. I shall come afterwards, and under a separate head which I have designed for it, to the question as to what effect the clause of that deed mentioned by Sir Edward Fry during the course of the argument yesterday, has upon the case; but I desire now to examine the deed to ascertain for what religious objects in the Californias the Marquis of Villapuente and the Marchioness of Torres de Rada made this great donation. I called to your attention this morning that the deed is a deed in terms to the missions. I desire to read to you an extract, commencing with the word "and," about the middle of page 104, in a line which contains the words "of all things visible and invisible." What goes before is a mere religious preamble:

> And whereas the reverend Society of Jesus, with its well-known religious zeal, has been heretofore employed and is steadily engaged in the conversion of the heathen natives of the Californias; and its members, by preaching and instruction, have drawn into the fold of our holy Catholic faith great numbers of those barbarous people, to whom they have devoted and are devoting themselves, according to their institute; sacrificing their lives and exposing themselves to contumely from the heathens, solely for the greater glory of our Lord God. And whereas, in the propagation of His holy faith (which at the sacrifice of so much labor they have established), and in order also that the many other tribes which are now at the doors of the church, as well as those remaining yet undiscovered, may not be deprived of the same advantages, they need human aid as a means of successfully prosecuting their labors; considering all which, and that we both are without forced heirs, who have the right to succeed to our inheritance, and are without hope of having such.

I next desire to quote two lines, the thirteenth and fourteenth lines, on page 105:

> We give to the missions of the Society of Jesus founded, and which in after times the said society may found in said Californias, the above-mentioned estate.

Here follows a description of the estates granted until we reach the middle of page 106, where the description ends.

The habendum clause then commences.

It reads as follows:

To have and to hold, to said missions founded, and which hereafter may be founded, in the Californias, as well for the maintenance of their religious, and to provide for the ornament and decent support of divine worship, as also to aid the native converts and catechumens with food and clothing according to the custom of that country; so that if hereafter, by God's blessing, there be means of support in the reductions, and missions now established, as ex. gr. by the cultivation of their lands, thus obviating the necessity of sending from this country provisions, clothing, and other necessaries, the rents and products of said estates shall be applied to new missions to be established hereafter in the unexplored parts of the said Californias according to the discretion of the father superior of said missions; and the estates aforesaid shall be perpetually inalienable, and shall never be sold, so that even in case of all California being civilized and converted to our holy Catholic faith, the profits of said estates shall be applied to the necessities of said missions and their support.

In other words, the fund, except in a given contingency, which I shall consider under another head of my argnment, is granted first for the support of the missions which then existed, then for additional missions, and finally, in the case that all California became civilized and converted to the holy Catholic faith, the fund, or profits of said estate, for the necessities of all of the missions of the Californias and their support. So far as that clause of the deed is concerned, the fund was to be a perpetual endowment for the support of religion in that country.

Again, it is said at the first line on page 107: "We the said grantors" (continue reading on the fifth line of said page).

Renounce and transfer the whole thereof to said reverend Society of Jesus, its missions of Californias, its prelates and religious, under whose charge may happen to be the government of said missions and of this province of New Spain, now and at all times hereafter, in order that from the profits of said estates, and the increase of their cattle, large and small, their other gains, natural or otherwise, they may maintain said missions in the manner above proposed, indicated, defined, and laid down forever.

Then two lines below:

And we give power and authority, so far as by right may be required, for said missions and said reverend Society of Jesus, that of their own right and authority, as they may be advised, they may take the seizin and possession of said estates

and the like.

I desire to call your attention to the clause commencing on the seventeenth line of page 108:

And we, the said grantors, both desire that at no time shall any judge, ecclesiastical or secular, undertake to investigate or intrude himself to ascertain whether the conditions of this donation be fulfilled, for our will is that in this matter there shall be no pretence for such intervention, and that whether the said reverend society fulfils or does not fulfil *the trusts in favor of the missions herein contained* it shall render an account to God our Lord, alone, for we have entire confidence that it will comply with its duty and do what may be most pleasing to God. And Father, John Fraucis de Tompes, of said reverend Society of Jesus, the attorney in fact to that end, instructed and named by the most reverend Father Andrew Nieto, late provincial of said society, in and by the power of attorney given him in this city November 3, 1729, before John Alvarez de la Plata, royal notary, for all things concerning the missions of the Californias, being also present, declares: That by virtue of said power he accepts the donation in manner and form as above made, expressed, and declared, and from this time forth he acknowledges, *in the name of said missions*, to have received the said estates.

I therefore say that whether the Villapuente deed, considered tech-

nically, was a conveyance to the missions of the Californias founded and to be founded, or a conveyance to the Society of Jesus, or however it operated, considered as a technical conveyance, it certainly was a benefaction to the missions and had for its object the promulgation of the Roman Catholic religion in the Californias, and the maintenance and extension of that religion in the same country.

It is true that there is a clause in the deed, called to attention by Sir Edward Fry, by which the properties are authorised to be diverted in a given contingency. I shall consider this clause shortly; but we are now dwelling upon the deed to ascertain what the religious motive was which actuated the donors to make it. Laying aside for the moment its technical legal effect, we submit that it is very clear that it was the object of the grantors of that deed (and of all who, after them, contributed to the Pious Fund of the Californias) to establish a fund for the foundation and support of pious works of the Roman Catholic type in the Californias.

In passing I may say that it was claimed upon our behalf before the former arbitral court that, according to the law of Mexico, each bishop, parish priest, monastery, hospital, and religious foundation had legal personality, was, in law, a corporation, and had capacity to receive conveyances of real property. To this contention the very form of the Villapuente deed lends support. The habendum clause is "to have and to hold to the said missions." It may be in view of these facts that technically the conveyance was to the missions.

It is not important to our case, however, whether this be true or not. It is not to be expected that we shall be able to trace each piece of property into this great historical fund, comprising properties aggregated in the manner which I have attempted to detail, by the same clear chain of title, by which owners of real property trace the title to their estates. We made no attempt to trace titles in this manner before the former arbitral tribunal, nor do we undertake to do so before this tribunal. We proved to the satisfaction of the former tribunal the amount and value of the fund on October 24, 1842. Upon that proof, supplemented by some evidence since discovered, and over and above all upon the conclusive effect of the judgment of the former arbitral court, we submit this branch of our case to this tribunal.

We come now to the proposition that the Villapuente deed is the foundation deed of this fund. It is such in an historical sense only, not in a technical sense.

Let it be kept in mind that from the expulsion of the Jesuits down to the decree of October 24, 1842, all of the estates embraced in the Villapuente and de Rada deed were uninterruptedly devoted to the purposes to which the grantors in that deed designed them to be devoted; so that the main intent of the deed was adhered to.

One clause only had been abandoned.

There was no exercise by the Jesuits of the power given to them in the instrument and exercisable by them in a given contingency.

Let me read the clause.

It is provided in the deed, Transcript, page 106, that:

> And in case that the reverend Society of Jesus, voluntarily or by compulsion, should abandon said missions of the Californias or (which God forbid) the natives of that country should rebel and apostatize from our holy faith, or in any other such contingency, then, and in that case, it is left to the discretion of the reverend father provincial of the Society of Jesus in this New Spain, for the time being, to apply the profits of said estates, their products and improvements, to other missions in the undiscovered portions of this North America.

The clause authorizes properties previously dedicated to the missions of California to be diverted elsewhere, in a contingency which involved the continued existence of the reverend father provincial of the Society of Jesus "in this New Spain." In other words, the compulsory retirement upon which that officer of the Society of Jesus "in this New Spain" was to exercise these functions, did not contemplate a retirement brought about by the entire suppression of the order and the consequent destruction of all its ecclesiastical functions. I say, then, that if you stop to dwell upon the single word "compulsion" it is true that the contingency did happen, for you may say that Jesuits did abandon the missions by compulsion, but they did not abandon them by the compulsion contemplated by the makers of this instrument, who assumed the abandonment of the missions and the existence of the society as a coexistent fact. From 1773, however, the reverend father provincial of "this New Spain" could not exist, because the order was banished from all the Spanish dominions, nor could he exist in any quarter of the globe, because the order itself had been suppressed.

The first point I make, therefore, with respect to the above-quoted clause is that the contingency mentioned in it never happened, either within the spirit or the letter of the deed. It is the function and office of all courts and tribunals charged with ascertaining the true meaning and intent of an instrument to attempt to place themselves in the position of the donors.

If we place ourselves in the position occupied by the grantors of the Villapuente deed at the time of its execution, we will surely see that they contemplated the abandonment of the missions by the Jesuits under such circumstances only as would involve the continued existence of the order in New Spain, and its continued existence as a religious order of the Roman Catholic Church. The circumstances, as they actually transpired, involved the banishment of the Society of Jesus from Spanish dominions by royal decree and the suppression of the order by Papal bull. It is evident, therefore, that the emergency, as it was contemplated, did not occur.

Before I pass to my second point, I call particular attention to the circumstance that under the deed the Jesuits were only authorized to divert funds which had been already dedicated to the missions of the Californias. The fund had already been given to the missions. The power conferred upon the Jesuits was to recall the gift. This is evident from the words of the deed: "To have and to hold to said missions." I put particular stress upon these words for the reason that they show that the gift was already executed to the missions of California. Whether the transfer operated as a technical grant or conveyance is not important. Disregarding technicalities it is evident that the Villapuente and de Rada donation was made to the missions of the Californias, and was only to be defeated by the exercise of a privilege given to a particular Jesuit and exercisable only in a given contingency—a contingency which, I have already argued, never occurred within the letter or spirit of the instrument.

Let us assume, however, that the contingency did happen; assume that the circumstances were such as the Marquis of Villapuente contemplated; then the person at whose discretion the funds of the missions in California could be diverted to other fields was clearly designated to be the "reverend father provincial of the Society of Jesus in New Spain." But such a person as the "reverend father provincial of New

Spain" did not exist. He could not exist in Spain by reason of royal decree; he could not exist in any quarter of the world, because he and his order had been suppressed by papal bull, and his title, powers, and office had all ceased to exist. To sum up: The first point I have made is that the contingency never happened; secondly, if the contingency did happen, the power could not have been exercised because conditions had made the exercise of it impossible.

My third point is that if the contingency did happen, and if the power could have been exercised, the Jesuits have waived the right to exercise it by a long, unbroken, and unequivocal course of conduct. The very doctrine of prescription, which obtains in the civil and the common law, has been sustained in the jurisprudence of some nations by the fiction, which is allowed to prevail even contrary to the fact, of the existence of a lost deed. A man who has been in the unbroken possession of property for a long time is entitled in aid of his title to have it presumed that the last man to whom the title regularly descended had executed a grant to the one in possession.

My fourth point is that the power to divert the fund was personal to the Jesuits; that it was intended to be exercised by a specified religious and monastic officer; that it was intended to be exercised by a person who by reason of his religious office had obtained the confidence in an unusual degree of the Marquis of Villapuente. If there ever was in the eighteenth century a religious devotee, I venture to say that he was the Marquis of Villapuente. You will find in this record, commencing at the top of page 109, a biographical sketch of his career. You will there find that the dominant motive by which his life seemed to be actuated was a religious one. This likewise breathes in every line of his deed. When he conveyed these properties he relied on the honesty of the grantees and provided that the Jesuits should never be called on to account to any court or tribunal, ecclesiastical or lay, for the due administration of these trusts. He evinced beyond peradventure that his donation or grant to them, with a power to divert that estate, was personal in character, and when they, by reason of papal suppression, were unable to exercise it, the result was that the property already donated to the missions of California, or for the enjoyment of the missions of the Californias, could not, like the right which we have in the common law to reenter for breach of condition, be ever exercised. The gift made by the Villapuente deed did not, in the first instance, require the intervention of the Jesuits. It was a gift to the missions in the first instance, with the right in the missionaries to the exercise of a power, not for the aggrandizement of the Jesuits, not for their benefit and behalf at all, but it was a right to be exercised by them according to their discretion.

These considerations, I fear, involve too technical a point of view for such a case in such a tribunal. The history of this fund was made by three-quarters of a century's treatment of it by two governments, and we rely on that treatment, culminating in the engagement in 1842. It is not necessary that our case, as we understand it, be dealt with in purely technical fashion. All of these considerations, however, lead us to see the case in its true light, and, seeing it, we are able to clearly understand what justice demands.

I have now dealt with four propositions in relation to the clause of the deed whereby the Jesuits were authorized to divert the fund to other missions. The fifth is that if the contingency happened, if the

power did survive but could not be exercised by the Jesuits, and if it did devolve upon the Spanish crown, the power to appoint to other missions was never exercised. On the contrary, one of the earliest royal decrees recognized and confirmed the devotion of these properties to the Californias; and, as I have taken occasion to repeat three or four times, in all the official decrees and legislative acts of these two Governments from shortly following the expulsion of the Jesuits down to 1848, the official title of these properties was the "Pious Fund of the Californias."

Mr. ASSER. I very well understand your first, second, fourth, and fifth proposals concerning this point; but as to the third, I would be very glad to have some further information. What is your meaning concerning the third point?

Mr. MCENERNEY. I say that they waived the right.

Mr. ASSER. By what means?

Mr. MCENERNEY. By a long, unbroken, and unequivocal refusal to claim. The Jesuits were restored in 1814 by Pius VII. They have been an order in the church since that time. They received of the former award, as proved by the deposition filed to-day, in response to a demand by Mexico, under an apportionment by the Holy See, to be devoted to the propagation of religion in the Californias—one-half of $40,000—that is, $20,000.

The Jesuits knew that they had this power of appointment. Their attorney received the deed from the grantors (Tr., 108). Since their restoration as a religious order in the church they have never put forward any claim to the Pious Fund. More than that: It is not necessary to prove that the Roman Catholic Church as it exists the world over is a papal church. The Holy See is the head and front of it. He is the legislative, the judicial, and the executive departments of the church. All the orders of the church are in subordination to him. These properties had passed to the control of other orders and of other officers of the church under permission, necessarily, of the Holy See. When the Pope appointed Francisco Garcia Diego first bishop of California, he did it in response to the solicitation of the Mexican Government. The Government then tendered the bishop the Pious Fund, which the Jesuits had formerly controlled. To this disposition of it the Jesuits are deemed to have consented, not only because they offered not one word of objection, but also because they were bound by the constitution of the church to which they belong to yield obedience to the head of that church, their ecclesiastical superior, the bishop of Rome.

(La seance est levée et le Tribunal s'ajourne à lundi le 22 septembre à 10 heures du matin.)

CINQUIÈME SÉANCE.

Lundi 22 septembre 1902 (matin).

Le tribunal s'est réuni à 10 heures, tous les arbitres étant présents.

M. LE PRÉSIDENT. Je donne la parole au secrétaire-général pour lire le protocole des séances précédentes.

M. LE SECRÉTAIRE-GÉNÉRAL (donne lecture du protocole des séances des 15 et 17 septembre 1902).

M. LE PRÉSIDENT. La parole est au conseil des Etats-Unis d'Amérique.

M. BEERNAERT. Je demande la parole pour une observation d'importance très secondaire, mais sur laquelle nous serons je pense d'accord. C'est que le dossier déposé par les Etats-Unis est en réalité un dossier commun, ainsi que cela avait été convenu à Washington; ce sont donc des pièces communes, réunies par l'une des parties, mais pour le compte des deux. Il semblait que quelques mots de ce que M. le Secrétaire-Général a lu tout-à-l'heure auraient pu comporter à cet égard quelques doutes, et c'est la raison de mon observation.

M. LE PRÉSIDENT. On prendra acte de cette déclaration. La parole est à M. Ralston.

Mr. RALSTON. I perhaps did not catch entirely all that Mr. Beernaert said.

The PRESIDENT (explains what Mr. Beernaert said).

Mr. RALSTON. Assuredly, assuredly.

M. LE PRÉSIDENT. La parole est au conseil des Etats-Unis.

Mr. MCENERNEY. Mr. President and honorable arbitrators, in the considerations which I had the honor to submit for your consideration on Wednesday last, I had concluded the discussion of three propositions.

1. "The Pious Fund of the Californias" had an unbroken and generally recognized existence from 1697 down to the cession of Upper California to the United States of America by Mexico in the treaty of Guadalupe Hidalgo of February 2, 1848.

2. At no time during its existence, beginning with 1697 and continuing to February 2, 1848, was "The Pious Fund of the Californias" considered to be other than a trust fund. Its character as such was continuously and repeatedly recognized, first by Spain and thereafter by Mexico.

3. The trust purpose of "The Pious Fund of the Californias" was throughout its existence the conversion of the natives of the two Californias, Upper and Lower, and the establishment, maintenance, and extension of the Catholic Church, its religion and worship, in that country. This purpose Mexico consistently recognized.

In addition to having concluded the consideration of these three propositions, I was engaged when the tribunal rose for its adjournment on Wednesday last with a consideration of the connection and relation which the Society of Jesus bore to the fund from and after the expulsion and suppression of the society, a proposition which I have since that adjournment formulated and which I desire to express as follows:

4. The Society of Jesus has had no estate in the properties of the Pious Fund since 1773; nor has it had, since that time, any interest therein such as would in any manner interfere with the legal or moral right of the United States of America to demand from Mexico the award which is here sought.

I undertook, in the course of the considerations which I had the honor to submit to you, to establish in connection with this proposition the following:

(*a*) The contingency mentioned in the above-quoted clause of the Villapuente deed never occurred within either the letter or the spirit of that conveyance.

(*b*) The power granted to the "reverend father provincial of the Society of Jesus *in this new Spain*" to divert the income of the estates to missions in other parts of the world was ineffective from the banishment and suppression of the Jesuits (1767 and 1773), for want of the religious person designated to exercise the power. From 1773

there was no father provincial in New Spain, nor elsewhere, and no Jesuit nor Jesuit mission in all the world.

(*c*) The Society of Jesus renounced the right by failing ever to put forward a claim for its enjoyment.

(*d*) The power was religious in its nature and personal to the Jesuits.

And I had reached and had under discussion at the moment the tribunal rose the fifth point, which is this:

(*e*) Even if the contingency contemplated by the deed did occur, and even if the power to divert was not personal to the Society of Jesus, but did survive to and devolve upon the Spanish Crown, then we answer that the power to divert these funds from the missions of the Californias to missions in other parts of the world was never exercised by Spain. On the contrary, the dedication of the properties as a fund for the maintenance of the missions in the Californias was repeatedly confirmed by Spain, and all power to divert them to other parts of the world was waived and abandoned. Indeed, the earliest royal decrees of Spain following the banishment of the Jesuits recognized and affirmed the dedication of the properties to the support of the missions of the Californias.

The very division of the missions between the Franciscans and Dominicans, to which, when I had occasion heretofore to refer to it I begged you to impress upon your attention, for the reason that I intended thereafter to make the point at which I have now arrived. That point is that the very division of the missions between the Franciscans and the Dominicans, with the consent and approval and by the direction of the Spanish Crown, and the entire treatment of the problem of the missions in Upper and Lower California by Spain, was based upon the idea that the *Pious Fund belonged to the missions of the Californias.* If this fund had not been treated by Spain as a fund for the support of the missions of the Californias, Upper and Lower, those missions of necessity would have had to be abandoned.

It would have been impossible without the dedication of these funds to the missions of California for the Franciscans or the Dominicans to have carried on that work. The very agreement of Spain for a division of the missions between the Franciscans and the Dominicans was, under these circumstances, a reaffirmation by that country of the dedication of these properties to the missions of the Californias.

I pass to the sixth point, which is this:

(*f*) The Villapuente deed, in which this power is reserved to the Jesuits, constituted only a portion of the Pious Fund, and by the course of history and with the concurrence and by the direction of two Governments, Spain and Mexico, the Villapuente and De Rada properties were merged in the other properties of the fund, and for three-quarters of a century (from 1768 to 1842) all of these properties were treated as constituting "The Pious Fund of the Californias," a fund devoted, as its name implies, to pious uses, to be achieved in the Californias.

I pass now to the seventh point, which I had occasion in a faint way to foreshadow to the tribunal on Wednesday last. It is this:

(*g*) The court will remember that the religious orders of the Roman Catholic Church are not purely self-existent bodies. They are each of them attached to the See of Rome in a particular manner, and that See is for each of them the ultimate superior. The acts of the Holy See in respect of the functions of any particular order have not only

the general authority recognized in the See of Rome by all Catholics, but they have also a particular authority, and may, for the considerations which I shall hereafter advance to you, be regarded as the acts of the order itself.

The whole history of the religious orders, including that of the Society of Jesus, will show no exception to the rule that they all regard this particular authority of the Holy See, and submissive concurrence in its commands, as a necessary condition of their very existence. And we need not stop to dwell upon that longer than a moment, because as they exist by virtue of permission issued from the Holy See, concurrent submission to its authority is a condition, a fundamental condition, to the existence of religious orders within the pale of the Roman Catholic Church. It conclusively follows from this universally admitted principle that whatever the Holy See directs or permits in the case of a religious order may be presumed to be an act of that order itself; nor could a better example of this principle be adduced than the submission of the Jesuits themselves to the papal bull of 1773 by which that order was suppressed.

Coming now to apply those principles stated in the abstract to our case in the concrete, we say that the Franciscans and Dominicans could not have taken over the administration of the missions of the Californias without the consent of the Holy See—a consent to which the Jesuits (not yet suppressed when the missions were taken over) must be deemed, from the principle enunciated above, to have been a party. The Holy See permitted the Franciscans and Dominicans to take over the missions of the Californias. What the Holy See permitted to be done from the very fundamental notion of the attachment of the religious orders to the Holy See, that act of the Holy See must carry with it the concurrence of the Jesuits.

The same idea is true of every subsequent act authorized or permitted by the Holy See in connection with the administration of the missions and the application of the Pious Fund of the Californias to their use. It will also be evident that as the archbishop and the bishop of California were permitted to present the claim which they made before the former arbitral court the validity of that claim was implicitly conceded and agreed to by the Society of Jesus. Another evidence of this concurrence is the acceptance by the Society of Jesus of the sum of $20,000 under the apportionment by the Holy See on March 4, 1877, of the recovery in the former arbitral court.

The present claim, the one before this tribunal, made by the United States of America on behalf of the archbishop and the bishop of California (these latter necessarily acting with the leave of the Holy See), will be conclusively presumed to have been made with the active and passive concurrence of the Society of Jesus. And it will be furthermore presumed as a part of this suggestion that any act of that society necessary to perfect the claim here urged has been duly had and taken in due season by said society.

In other words, it will be presumed under the circumstances that if any act could be done by the Jesuits to make effectual the claim that act has been duly performed in due season by that society. This is no novel principle of jurisprudence to put forward in a judicial tribunal, because it bears a close analogy to the presumption of a modern lost grant indulged in the law of England in support of a title by occupancy.

I desire to briefly refer to Herbert's Law of Prescription, an essay to which was awarded the York prize in the University of Cambridge in 1890.

I shall read a few short extracts, commencing on page 12 and ending on page 20.

It appears that in order to sustain a title by prescription according to the English law, in the early history of that law, it was necessary for the claimant of title to show occupancy during the period of legal memory fixed in English jurisprudence as running back to the time of Richard the First, or 1189. It came in the evolution of the English law that this necessity was satisfied by proof of twenty years' occupancy, from which it would be presumed, in the absence of other testimony, that the occupancy had dated back to this twilight of time represented by the year 1189.

Sir EDWARD FRY. Is not this rather a too technical point for us?

Mr. MCENERNEY. We would not have considered it necessary to argue this point but for a question addressed by Sir Edward Fry to Senator Stewart during the course of his argument.

Sir EDWARD FRY. I only throw it out to you as a too technical point for this court.

Mr. MCENERNEY. I think it is very technical; and as I have heretofore had occasion to say, I do not think the case can be in any manner affected by these considerations. I determined to submit them, however, on account of the question put by Sir Edward Fry to Senator Stewart. I will pass on——

Sir EDWARD FRY. I do not wish to stop you.

Mr. MCENERNEY. I do not care to go on. I am very glad that you made the suggestion. I thank you for it.

Mr. MCENERNEY (continuing). I will state now two additional grounds and then pass on. They are these:

(*h*) The Franciscans and Dominicans, and after them Bishop Diego, his successors in title and interest, have acquired, prescriptively, the right of the Jesuits, with the consent, seasonably made, of both Spain and Mexico.

And, lastly—

(*i*) The title, if any, and whatever its character, was abandoned by the Jesuits; whether compulsorily or not is unimportant. And abandonment is one of the methods by which title may be lost.

I therefore pass to my fifth proposition in the case, which is:

5. The question whether either Spain or Mexico might have diverted the fund to other missions is not involved in this case, and is therefore purely academic. Were such a position maintained, it could be conclusively answered by the fact that neither Spain nor Mexico ever did so divert the fund and neither of them ever claimed the right to do so.

In connection with this point I beg to invite your attention to an argument made before the former tribunal, printed at pages 75–76 of the Transcript.

It reads:

By the act of 1842 the Mexican Government had taken to itself private property contributed to the church for a special purpose, and bound itself to make good by paying a certain annual interest. Can there be a doubt that the church in California was then entitled to receive from the Government this annual payment, to be applied to the purpose for which the fund was originally created? We find nothing to indi-

cate at this time any intent to repudiate its obligation, by any direct act, or by the adoption of any such arguments as are now urged to this end.

On the contrary, the Government acknowledged its indebtedness in the most formal and solemn manner, in the very act by which it placed in its treasury the proceeds of this property. The obligation thus assumed by Mexico towards a portion of its citizens was as perfect and binding upon it as if the same had been contracted by an individual. Nor is the obligation at all impaired by its own default in making payment, nor by the fact that, owing to its sovereign character, there were no means to enforce payment by judicial process. No suits can be maintained in the courts of the country against the United States, and yet its public debt constitutes an obligation as binding upon it as if judgment and execution could be invoked to enforce it.

I now invite your attention to the reply, by Mr. Doyle, at page 47 of the Transcript, Paragraph VI. It is this:

In view of the clear recognition by Mexico in the decree of October, 1842, of a debt equal to the proceeds and value of the property taken into the treasury, and of the promise to pay interest thereon at six per cent, I have deemed it unnecessary to notice many points in the argument of Don Manuel Aspiros, based on matters long antecedent to that date—such as the alleged incapacity of the Society of Jesus to acquire property; the suggestion that their estates were confiscated on their expulsion from the Spanish dominions, and that the Pious Fund came to the monarch's hands as a temporality; that the validity of the constitution of the Pious Fund required the sanction of the Pope; that portions of the fund, derived from bequests destined by the donors to missions in general, were not necessarily applicable to California missions in particular, and, hence, were improperly incorporated into the Pious Fund of California; questions whether the church of California could have complained if the the funds destined for the propagation of the gospel here had been (while the sovereignty of Mexico yet extended over the country) diverted to missions in other parts of the Republic; whether, if the Pious Fund had remained invested in real estate down to the time of the treaty of Queretaro, it could have been successfully claimed by the church of California, which, by that treaty, lost its *status* of Mexican citizenship, and the like—because, as it seems to me, none of these questions can affect the decision of this claim. It is not disputed that the Jesuits did, in fact, receive these donations in trust for the pious purposes designed by the founders, and neither the binding force of the trust nor their right and duty to administer it was ever questioned by Spain or Mexico. The legality of the additions made to it were also unquestioned at the time, and have since remained so, and it is not denied that they were, in fact, made. *The acquiescence of the Government, and of all others interested, for a long series of years, entitles as to a presumption, juris et de jure, that all these things were rightly done and legal, as no doubt they were.*

And that is what we say to you to-day that the acquiescence of the Government and of others interested for a long series of years entitles us to the presumption that these things were rightly done and legally, just as the foundation to much of the territory the world over has been upon unquestioned occupancy during a long series of years—sometimes not longer than seventy-five years and oftentimes less.

Sir EDWARD FRY. The treaty of Querétaro?

Mr. McENERNEY. It is the treaty of Guadalupe Hidalgo. The ratifications took place at Querétaro. The treaty was signed at Guadalupe Hidalgo.

Sir EDWARD FRY. I thought so.

I continue with Mr. Doyle's argument:

Mr. McENERNEY:

Nor is it disputed that the Crown received the funds on the expulsion of the Jesuits, and assumed to succeed to the same title, rights, and duties as had previously devolved on them, and administered the trust thereunder down to the epoch of independence, when Mexico succeeded in like manner to Spain, and continued to administer in the same way down to the year 1836.

Neither power, during this long period of over an hundred years, raised any of these questions, and I submit with entire confidence that it is too late to entertain them here and now.

So the question, whether either Spain or Mexico *might* have diverted the fund to other missions, is conclusively answered by the fact that *they never did so, and never claimed the right to do so.*

We therefore submit that neither Mexico nor Spain ever claimed the right to divert or attempted the diversion of the Pious Fund. It is hence unnecessary for us to debate the purely academic point as to whether either Government ever possessed the right suggested.

This carries me to the sixth question with which I propose to deal, and that is:

6. That the rights of the beneficiaries of the Pious Fund of the Californias which are asserted here arise out of the promise made by Mexico on October 24, 1842, and the duty of Mexico to those beneficiaries as a trustee of the fund.

When Mexico made her decree of October 24, 1842, she promised to pay 6 per cent upon the capital of the Pious Fund for the uses and purposes to which the fund had been dedicated by the donors. This engagement was no mere gratuity. There was not only a sufficient, but an ample consideration for the promise. She incorporated the entire Pious Fund into her national treasury. The least she could do in honor was to promise to pay interest upon the fund. Mexico not only agreed to pay the interest, but she agreed to pay it to the religious objects specified and intended by the donors of the fund, which, as we have already pointed out, were the conversion of the natives of the Californias, Upper and Lower, and the establishment, maintenance, and extension of the Catholic Church, its religion and worship, in that country.

At the time she made the engagement Mexico sustained the relation of a trustee to the beneficiaries and to the fund. This, as we have pointed out, is conceded in her answer to our memorial. Her promise, therefore, is to be read in the light of her duty as trustee. The promise which Mexico made was to pay an annuity in perpetuity. Her promise was also to pay it to certain religious purposes to be accomplished in Upper California and certain religious purposes to be accomplished in Lower California. Upon the cession of Upper California to the United States by Mexico, for a consideration of $18,250,000, the obligation to pay the equitable portion due for application to the religious purposes to be accomplished in Upper California was not canceled. It survived for the benefit and behoof of the inhabitants and citizens of the ceded territory, whose American citizenship, as it was to be thenceforth, entitled them to demand performance through the interposition of the United States. It is this demand which they made with success under the convention of 1868, and which they are now endeavouring to make with the same success before this court.

The seventh point is that:

7. All of the events preceding October 24, 1842, are in the nature of matters of inducement, as that term is used in English and American jurisprudence. The obligation of October 24, 1842, is to be read in the light of these events, in order that it may be properly interpreted. But Mexico's obligation arises out of its legislative decree of October 24, 1842, and its precedent trusteeship.

In the law of pleading, as it is established in American and English jurisprudence, we have what are known as "matters of inducement." These are matters appropriately to be stated in a pleading, in order that the court to which the pleading is submitted may the more intelligently appreciate the force of the particular transaction out of which arises the cause of action or the matter of defence. In this case the

cause of action upon which our claim is made is the engagement in the light of the historical circumstances which preceded it. These circumstances enable us to appreciate the exact legal and moral obligation which Mexico assumed by the act of October 24, 1842, whereby she incorporated *all* the property of the Pious Fund into the Mexican treasury, and agreed to pay 6 per cent thereon annually and in perpetuity.

The next point to which I desire to call the attention of the tribunal is that—

8. It was the duty of Mexico during the period when it managed the "Pious Fund of the Californias" prior to the appointment of the bishop of the Californias to pay over the income thereof to the missionaries in charge of the missions, in furtherance of the purpose of the donors.

I support this proposition with the argument that as the missionaries alone were in the possession of the spiritual faculties having relation to the missions, as the spiritual faculties of the missions were their very life and very existence, as they had no other, and as that spiritual life, its foundation, and support were the objects which appealed to the donors, it follows as a consequence that the only persons who, from the very necessity of the case and the very circumstances of the missions, could administer these funds to the pious uses specified by the donors were the missionaries themselves. Hence out of the very necessity of the case they were entitled to receive the funds, and as it was intended by the donors to make their gifts effectual, it must be conclusively presumed that they intended the funds to go to those persons who alone were capable of administering them for the purposes which the donors had in mind.

The next proposition is that—

9. This duty was solemnly recognized by Mexico and was never repudiated.

It was solemnly recognized by Mexico in 1832, when she provided in the act of May 25th for the leasing of the rural properties *belonging* to the Pious Fund. Mark the emphasis which I place upon the word "*belonging*" to the Pious Fund. I so emphasize the word because it is stated in the act of May 25, 1832, that these properties "belong to the Pious Fund." And it is provided that the moneys shall be paid into the treasury "to be solely and exclusively destined for the missions of the Californias."

And, again, there is the provision that the board shall "name to the Government the amounts which may be remitted to each one of the Californias, in accordance with their respective expenses and available funds."

There is no other provision of any kind in that act of 1832 which contemplates the disbursement of any of these moneys except to these Californian missions.

I say, therefore, as it is provided that these moneys shall be remitted to the missions, and as it is said in the act that the moneys are "solely and exclusively destined" for these missions, and as it is also said therein that the properties *belong* to the Pious Fund of the Californias, that we have made good, so far as the act of 1832 is concerned, the proposition which we now have under consideration—namely, that the duty of remitting to the missionaries prior to the appointment of the bishopric was recognized by Mexico.

Then, again, its duty to remit to the bishops was recognized by the act of September 19, 1836—the act in relation to the creation of a bishopric—by which Mexico solicited the Holy See to create a bishopric in the Californias and pledged for its support six thousand dollars per annum. In this act it is provided that all of the properties of the Pious Fund should be passed to the possession of the bishop for administration in conformity to the will of the donors or similar objects.

Again, after the passage of the act of February 8, 1842, which affirms the trust character of the properties, General Santa Anna, President of the Mexican Republic, appointed Don Gabriel Valencia, chief of staff, to be the general administrator of the funds. This you will find stated at page 505 of the Transcript.

In a letter from the minister of justice to Don Pedro Ramirez, dated February 21, 1842, it is stated that General Gabriel Valencia is appointed general administrator of said goods upon the same terms and with the same powers as were conferred upon the board under the act of May 25, 1832. (Transcript, p. 505.)

And what were those powers? They were to conserve the properties and to remit to the missions of the Californias under the act, which said that the funds were solely and exclusively destined therefor.

In further recognition of Mexico's duty to remit to the missions is the order of the President of the Mexican Republic of April 3, 1844, to which I had the honor to call your attention on Wednesday, in which the custom-house of Guaymas is directed to pay $8,000 to the bishop of the Californias on account of the income from the Pious Fund, which had been incorporated into the national treasury.

My next proposition is that:

10. From the consecration of Francisco Garcia Diego as first bishop of the Californias, Upper and Lower, which occurred October 4th, 1840, the proper persons to receive the income or interest upon the Pious Fund have been the bishop of the Californias and his successors in title and interest.

As I have heretofore had occasion to call to your attention, Bishop Diego was appointed April 27, 1840. He was consecrated (as you will find by turning to page 91 of the Transcript) on October 4, 1840. He died April 30, 1846. His successor, Joseph Sadoc Alemany, was appointed May 1, 1850; consecrated June 30, 1850, and arrived in California in 1850. (See Transcript, pages 182, 183, and 12.)

From the death of Bishop Diego until the appointment of Bishop Alemany the bishopric was administered by the vicar-general, Father Rubio (whose deposition was submitted in the former arbitral court and is shown in this transcript), who exercised that post with the faculties of a bishop.

We have pointed out to you that from the very necessity of the case, prior to the appointment of the bishop, it was necessary to forward the funds for application to the pious uses for which they were designed directly to the missionaries. After the appointment of the bishop it was necessary in the nature of things, as he was in exclusive charge of the spiritualities and temporalities of the church, that he should apply them. It was, from the very nature and constitution of the Roman Catholic Church, its maintenance and extension, impossible for it to be applied by any other persons.

Upon this point I desire to call to the attention of the tribunal the argument made by Mr. Doyle (commencing at the top of page 86 of

the Transcript, point II, and continuing to the foot of page 93, the end of point III) in which he discusses this question.

From this discussion I shall make a short extract:

> This brings us to the consideration of the next question suggested by the counsel for Mexico, viz: Whether the bishops of the Church of California are the proper persons to demand, before the commission, the performance of this duty. This I think presents no serious difficulty. The church is a mystical body; it consists of the bishops and clergy and the body of the laity under their government and in communion with the See of Rome. As a body it is deemed a corporation in all countries having an established religion. Throughout the United States the absolute severance of church and state has led to the corollary of ignoring the corporate existence of any particular denomination as such, because the state having no official communication with it can not take notice of its doctrines, discipline, or organization. But statutes in all the States have, I believe, without exception, provided for the formation of religious corporations, representing the body of believers, usually in such form as each particular denomination may desire . . .

Mr. Doyle continues at the top of page 87:

> In view of these considerations the bishops of the church (even if unincorporated) would be the proper persons, on behalf of their respective flocks, to demand before an international tribunal, like the present, fulfillment by Mexico of the duty it assumed by the decree of 1842.

Since that argument was made, and since the former award was made, a considerable body of jurisprudence has grown up in America relating to controversies about church property. In the absence of a corporate capacity the property is treated as owned by a number of persons in communion for particular purposes, like any unincorporated association for literary, benevolent, or scientific purposes. That is the status of all religious sects in the United States which are unincorporated, at least so far as their properties are concerned.

The argument which we now have under consideration, that the bishop was the proper person to demand performance here, is a rule settled in the jurisprudence of the United States in relation to land grants by Mexico to these missionary uses immediately preceding the cession of Upper California to the United States.

Shortly after the cession of California to the United States and its admission into the American Union, the Congress of the United States passed an act to settle private land titles in the State of California. This act, which was passed in 1851, provided a commission to ascertain whether grants of land which it was claimed had been made by Mexico were valid. If valid they were to be given force and recognition by a patent issued by the United States. This act of 1851 provided for the creation of a board of land commissioners, to which every person having or claiming to have a title derived from Mexico was required to present his claim. Upon the adjudication of the commission, either for or against the grant, the case passed by appeal to the United States district court and thence, if need be, to the United States Supreme Court. Under that act the bishop of the Californias, Joseph Sadoc Alemany, presented to the board of land commissioners a claim for all of the properties of the church which had been granted to religious persons or which had been dedicated without any formal conveyance to missionary or other religious uses. The question arose in that case whether the bishop was the proper person to come forward on behalf of the undefined communion known as the Roman Catholic Church in California to claim patents and whether he appropriately represented the church. Our courts decided against their own Government, because if these grants were not valid the property claimed under them remained

a part of the public domain of the United States. Our courts, I say, held that those were effectual grants to be carried out by the United States under its obligation to treat as valid and effective grants previously made by the Government of Mexico, and furthermore decided in accordance with the contention which Mr. Doyle made before the former arbitral court, and which he indeed made before the land commission upon behalf of the bishop, that the bishop appropriately represented the church, the clergy, and the laity—both those actually and those potentially within the fold—and was entitled to receive the patents for church lands.

It is that principle established by the courts of the United States that we invoke for application here.

At page 564 Mr. Doyle says, third line:

When the territory of Upper California was ceded by Mexico to the United States it was held by the judges, in a suit between the Government and the church, that the latter had become the owner of these properties so appropriated by dedication of the Government.

Please keep in mind that some of these grants were affirmed, not on the ground that the Government had made a written instrument by which it conveyed the property to the church, but for that it recognized the use by the church for religious purposes. It had dedicated the property by its express consent, or by a course of conduct amounting to acquiescence, just as a man suffers a right of way to grow up by usage if he permits the public to travel over his domain from a time out of mind.

I now return to the extract which I was reading from Mr. Doyle's brief at page 564 of the Transcript.

He says:

And this doctrine received the sanction of the Supreme Court of the United States, in the case of Beard *vs.* Federy, 3 Wall., 479 (492). The United States only asks in this case the same recognition of the rights of the church to property, expressly dedicated *ad pios usus*, by individuals which their judiciary enforced against themselves in a case of dedication of portions of the public domain, in respect to which they had succeeded to all the right of Mexico implied in the vice-regal license under examination.

This point is also dealt with, commencing with the words "Another precedent occurred," etc., on page 89 of the Transcript, and continuing to the words "why not also the interest," on page 92. At page 89 will be found extracts from the decision of the United States land commission upon the application of the Roman Catholic bishop of Monterey for a patent to the properties claimed by the church. In this case all of the questions with which we are now concerned are dealt with, and it was there decided that the bishop was the proper person to receive the patent.

On this same point I desire to refer the tribunal to paragraph 5 of one of Mr. Doyle's briefs, page 471. I shall not read it.

There is another precedent upon which we rely—one established by Mexico in a treaty with Spain, made in 1844. Of that precedent it is said at page 92:

In this connection, and in order to present the whole argument together, I take occasion to repeat *in extenso* the reference to the precedent (quoted in our memorial) of the missionary fund of the Philippine Islands. In its general character and the objects to which it was devoted it was analogous to the Pious Fund of the Californias. Its income had been, down to the severance of Mexico from the Spanish dominion, periodically remitted to the ecclesiastical authorities in those islands. Shortly after the declaration of Mexican independence the properties of this fund

were seized and embargoed by the Mexican Government, and further remittances of their proceeds forbidden. This embargo was afterwards raised; but two haciendas belonging to the fund had been appropriated by Mexico, so that their value, with indemnity for past rents, remained due to the Philippine missions; and this was made the subject of diplomatic representations by Spain to Mexico after the recognition of her independence by the former power. These negotiations resulted in the convention of November 7th, 1844, whereby the Republic of Mexico bound itself to pay *to the president of the Philippine missions* the sum of $115,000, the agreed value of the property, and $30,000 of indemnity, in satisfaction of said claim. The total of $145,000 was to draw interest at six per cent per annum until extinguished, from the particular revenues which were specifically pledged for the purpose.

That same incident is dealt with in the first memorial, at page 14, and again in Paragraph XII, page 474, of the transcript.

We therefore conclude that from the time of the appointment of the bishop until the cession of California to the United States it was the duty of Mexico to remit these moneys for administration to the bishop.

We support this contention with two precedents, one derived from the jurisprudence of America in a controversy between the church, claiming title derived from Mexico, on the one hand, and the United States on the other; the other a precedent established by Mexico in a convention with Spain having relation to the Philippine missions.

I desire to call to the attention of the tribunal that the matters which were the subject of this treaty by Mexico arise out of the Arguelles benefaction, which is the subject of Payno's report, at pages 23 and 24. Three-eighths of the estate belonged to the Philippines missions and three-eighths to the California missions. The law for the Philippine missions in that case must be the law for the California missions in this case, and as Mexico accounted to Spain for the income properly appertaining to the Philippine missions we say that it is likewise her duty to account to the United States for the income appertaining to the missions of Upper California.

The duty in each case depends upon precisely the same facts.

11. My next proposition is that whatever the rights of the American church were before the cession of the territory, they remained afterwards. In support of that proposition, although the circumstances are slightly variant, I desire to quote to you a decision referred to on page 586 of the transcript. It is a decision of the United States Supreme Court, written by one of the most distinguished judges who ever sat upon the American bench, Mr. Justice Joseph Story, and concurred in by the most distinguished judge America has produced, Chief Justice John Marshall.

These were the facts:

While Virginia was a colony of Great Britain and the Episcopal Church was the established religion, certain glebe lands came into possession of the church. Virginia, after the Revolution had established its independence, undertook to pass an act authorizing the overseers of the poor of each parish to sell these glebe lands and appropriate the proceeds to the use of the poor.

In commenting on this, the Supreme Court of the United States said:

Be however the general authority of the legislature as to the subject of religion as it may, it will require other arguments to establish the position that at the Revolution all the public property acquired by the Episcopal churches, under the sanction of the laws, became the property of the State. Had the property thus acquired been originally granted by the State or the King there might have been some color (and it would have been but a color) for such an extraordinary pretension. But the property was, in fact and in law, generally purchased by the parishoners or acquired by the benefactions of pious donors. The title thereto was indefeasibly vested in the

churches, or rather in their legal agents. It was not in the power of the Crown to seize or assume it, nor of the Parliament itself to destroy the grants, unless by the exercise of a power the most arbitrary, oppressive, and unjust, and endured only because it could not be resisted. It was not forfeited, for the churches had committed no offence. The dissolution of the regal Government no more destroyed the right to possess or enjoy this property than it did the right of any other corporation or individual to his or its own property. The dissolution of the form of government did not involve in it a dissolution of civil rights, or an abolition of the common law under which the inheritances of every man in the State were held. The State itself succeeded only to the rights of the Crown, and, we may add, with many a flower of prerogative struck from its hands. It has been asserted as a principle of the common law that the division of an empire creates no forfeiture of previously vested rights of property. Kelly vs. Harrison, 2 John C., 29; Jackson vs. Lunn, 3 John C., 109; Calvin's case, 7 Co., 27. And this principle is equally consonant with the common sense of mankind and the maxims of eternal justice.

This principle was recognized by the United States in its treatment of the municipal corporations, known as pueblos, existing by virtue of Mexican law. They were recognized as existing bodies until they were reorganized under municipal laws enacted by California as one of the States of the American Union.

12. We now pass to the proposition that the amount of the Pious Fund, and the properties of which it consisted on October 24, 1842, as fixed by the former arbitral court were definitely established by the proofs presented to that court. If the case is not controlled by the principle of res judicata, we claim that the total as fixed by the former arbitral court should be increased by $381,518.15.

The amount of the Pious Fund before the former arbitral court was ascertained and fixed by the aid of the inventory and appraisement of those properties, prepared by Pedro Ramirez upon the demand of the Mexican Government, and which accompanied the surrender of the fund to General Gabriel Valencia, appointed, as I before shown to the tribunal, on February 21, 1842. The inventory is to be found in English, commencing on page 512 and continuing down to 518.

It is styled:

Detailed statement of the condition in which I received as attorney of the Most Illustrious Lord Don Fray Francisco Garcia Diego, bishop of Californias, the properties which constitute the Pious Fund of his missions, and of their condition at this date, as noted in my official letter of the 28th of February last.

The inventory is also set forth in the record in Spanish, transcript 488 to 493 and 169 to 175.

If the members of the tribunal will turn to the opinion of the American commissioner, which was affirmed or approved by the umpire, they will find at page 525 that Mr. Wadsworth said:

I take the report of Pedro Pamirez of February 28, 1842, upon the condition of the fund made to Ygnacio de Cubas, Exhibit A to the deposition of José Maria de Romo, as a sufficiently accurate and satisfactory account.

Ygnacio de Cubas was secretary to General Valencia in the administration of the Pious Fund (Tr., 510).

If this case is not controlled by the former decision, then we ask to add the following items to the capital of the Pious Fund as fixed by the former arbitral court:

The Cienega del Pastor, which was sold November 29, 1842, by Mexico for $213,750.00.

Sir EDWARD FRY. $213,750.00.

Mr. McENERNEY. $213,750.00.

The deed by which this sale was made is to be found in the replica-

tion, page 47. Other estates were also conveyed by the same instrument, but it is shown in a brief here, filed by Messrs. Doyle and Doyle, and can not be disputed, that the price of the Cienega del Pastor was $213.750.00. This estate was not calculated as a part of the capital in the former arbitration for the reason that it appeared by the report of Pedro Ramirez that the property was under attachment to secure a lien of $158,000, and there was nothing in the record to show that Mexico had ever sold it or that she ever derived a dollar from it. Under a demand for discovery Mexico has produced the conveyance in the replication at page 47, by which it does appear that Mexico did, one month and seven days after the decree of October 24, 1842, sell this property for $213,750.00.

Our second item is $3,000.00, which is for personal property belonging to the Pious Fund, sold with the Cienega del Pastor, as will be found by an examination of the same deed.

The third item is $7,000.00. That is a debt due from the Mexican Government to the Pious Fund, which the former arbitral court rejected because of a mistaken understanding, as we believe, of the report of Mr. Ramirez in connection with it. The money was advanced by the fund at the request of the Mexican Government to a third person. The third person to secure the money delivered to the administrator of the Pious Fund an obligation, promissory in character, as collateral. Ramirez styled the collateral as a bad debt. The American Commissioner in making up his report assumed that the original obligation was the bad debt; hence the mistake.

The fourth item is $22,763.15, moneys borrowed from the Pious Fund by Mexico.

Sir EDWARD FRY. The amount please?

Mr. MCENERNEY. $22,763.15, moneys borrowed from the Pious Fund by Mexico for colonization purposes, for the particulars of which see Ramirez-Valencia correspondence, in English at page 500, Spanish pages 478–479 and 160.

The fifth item is $30,000.00. A payment by Mr. Ramirez, shown in his correspondence at page 500, of $30,000 on account of a loan of $60,000 to the Mexican Government, secured by a mortgage of the Pious Fund.

The sixth item and the last is $105,004.89. It appears by Payno's report, transcript, pages 23 and 24, that there was paid into the general treasury for the account of the Pious Fund of Californias from the Arguelles estate $306,901.64.

Mr. ASSER. Is it not $316,000?

Mr. MCENERNEY. No; the last item, $10,000 to the foundling asylum in Manila or the children of Carro, should be deducted, leaving the sum of $306,901.64. Of this sum, presumably for the want of knowledge, Mr. Ramirez claimed for the Pious Fund in his inventory the sum of $201,896.75 only. The difference between these two sums, which we now claim, is $105,004.89. You will find Mr. Ramirez's figures at pages 517 and 526; 517 Mr. Ramirez's and 526 the American Commissioner's. The difference between these sums is $105,004.89. The total of the foregoing items is $381,518.15.

Mr. Sir EDWARD FRY. $381,518.15?

Mr. MCENERNEY. $381,518.15.

13. The next proposition which I desire to advance for the consideration of the members of this tribunal is that it is well established

that in the disposition of causes a litigant is to be judged by the proof which it is within his power to produce, compared with that which he in fact produces. It is a supplementary principle in the decision of causes that the presumption is that proof withheld would be adverse to the party withholding it if it were produced. We invoke these principles to draw the conclusion that as Mexico has full possession of all of the books, papers, vouchers, and accounts with respect to the Pious Fund, she can establish to the smallest fractional account of her currency what was received, and it should be therefore presumed that if all of the accounts with respect to the Pious Fund were produced by Mexico they would show a larger liability than we have been able to prove. It will be kept in mind that by two sections of the act of May 25, 1832, sections 11 and 12, books of account of the Pious Fund were required to be kept; also that General Valencia was appointed general administrator of the Pious Fund in 1842 with the same powers and, of course, with the same duties as had the board (junta) under the law of 1832; so that these two administrations, provided for by law, were by the law of their appointment required to keep accounts of the Pious Fund. It must be presumed that the accounts were kept, for it is a presumption existing in all jurisprudence that every public officer does his duty.

14. I come now, perhaps rather tardily, to what we conceive to be the controlling question in this case, and that is the first question propounded in the protocol for decision by this tribunal, namely, whether this controversy is, by virtue of the former award, operating as res judicata, foreclosed from consideration upon its merits.

In considering this question I propose to briefly advance four propositions, leaving their extension and amplification for other counsel, particularly for the learned agent of the United States, who has given this question the careful, diligent, and learned investigation which its importance and far-reaching effect demand.

The four propositions which I propose to advance in connection with the question are:

1. The principle of res judicata does apply to international arbitrations.

2. The former arbitral court had jurisdiction to make the award which it did make.

3. The force of the principle of res judicata extends to all of the matters which are necessarily included within the condemnatory part of a judgment; in other words, that a judgment of any tribunal the world over includes not only the thing spoken, but all things organically a part of it.

4. That all matters necessary to an award here in favor of the United States, except the one question of nonpayment since February 1, 1869, were determined, and necessarily determined, in and were organically a part of the former award.

Before proceeding to show that the principle of *res judicata* does apply to international arbitration, it is appropriate that I should mention to you that it is frequently stated by the law writers that the principle of *res judicata* is a fundamental concept of every jural society.

If the principle is a fundamental concept of every jural society, it must necessarily apply to matters international.

We need not be long detained, however, in arguing that the principle does apply to international arbitration, because Mexico has

declared in unmistakable terms and conceded that the principle does apply to international arbitrations.

In his letter addressed to Mr. Powell Clayton, American minister to Mexico, under date of November 28th, 1900, Mr. Mariscal, minister of foreign affairs of Mexico, concedes that the principle of res judicata does apply to the awards of international arbitrations. The particular part of the letter which I propose to quote presently will be found in the middle of page 31.

Mr. Mariscal, while admitting the existence of res judicata generally, contends, however, that it should not be applied in the present case, for two reasons:

1. The former award was not pronounced within the limits of the jurisdiction of the arbitral court created under the convention of July 4, 1868.

2. Res judicata is limited in its application to the condemnatory portions of judgments, and does not embrace the premises upon which such portions are based.

I now quote from the Diplomatic Correspondence, page 31. This is Mr. Mariscal's letter. And, although the members of this Tribunal have read it, it will bear repetition:

> That, says Mr. Mariscal, *res judicata pro veritate accipitur* is a principle admitted in all legislation and belonging to the Roman law, certainly no one will deny. Nor is it denied that a tribunal or judge established by international arbitration gives to its decisions "*pronounced within the limits of its jurisdiction*" (in the language of the authority cited by Mr. McCreery) the force of *res judicata;* but to give in practice the same force, as that directly expressed in the decision to close the litigation, to the considerations or premises not precisely expressed as points decided by the judge, but simply referred to by him in the bases of his decision, or assumed as antecedents necessary for the party in interest, who interprets the decision, is a very different thing, and can not be considered in the same way.

It will be seen, as I have contended, that Mr. Mariscal concedes that res judicata does apply to international awards. It furthermore appears that the only objections which Mr. Mariscal can interpose to the application of that principle here are two:

1. That the former decision was in excess of the jurisdiction of the former arbitral tribunal; and

2. That the function and force of res judicata do not extend beyond the bare condemnatory portion of the judgment.

This last proposition we meet by showing, as we hope to be able to show beyond peradventure, that res judicata not only extends to the condemnatory part of the judgment, but to all matters necessarily a part of it; to those matters without the decision of which the conclusion reached could never have been attained. We then apply the principle here and claim that there is no question involved in the present case and necessary to a decision in favor of the United States which could have been decided against our present contention by the former arbitral court without having defeated us in that court.

It is important, in considering the admission of Mexico, to briefly refer to the diplomatic correspondence which preceded Mr. Mariscal's letter. The letter practically closed the discussion upon the subject of res judicata. It was followed by a suggestion on the part of the Government of the United States, cheerfully and promptly agreed to by Mexico, to submit the questions as they are stated and framed in the protocol to the decision of an impartial tribunal.

The first letter in which this question of res judicata is suggested is

at page 6 of the Diplomatic Correspondence—a letter from Mr. Clayton, minister of the United States to Mexico, addressed to Mr. Mariscal, minister of foreign affairs, under date of September 1, 1897, five years to a day before the initial meeting of this tribunal.

After mentioning the claim, Mr. Clayton says:

I need only refer to the findings of the American and Mexican joint commission under the convention of July 4, 1868, which established the following propositions:

1. That the Roman Catholic Church of Upper California is a corporation of citizens of the United States.
2. The obligation of the Mexican Government to pay to the bishops of California and their successors the interest on the proceeds of the property belonging to the fund, same being held in trust by the Mexican treasury for the purpose of carrying out the wish of the founders of the fund.
3. That the claimants are the direct successors of the bishops of California, and should, therefore, receive a fair share of the interest upon the proceeds of the fund.
4. That the archbishop and bishops of that church are the proper parties to demand and receive it.
5. That the case is one in which all inhabitants of the State of California, and even the whole population of the United States, are interested, and is, therefore, a proper one for the diplomatic intervention of the United States Government.

These propositions being, as it were, "res judicata," and the Mexican Government having paid no interest upon the fund since the payments made under the award of the Joint Commission, I respectfully call your excellency's attention to that fact, and request that I may be informed of the purposes of the Mexican Government in relation to this claim.

The United States addressed a number of diplomatic communications to Mexico in connection with this claim from 1891 to 1897. No answer was made to any of them until Mr. Clayton wrote the above-quoted letter to Mr. Mariscal. To this Mr. Mariscal replied, page 5 of the Diplomatic Correspondence, in which he said:

Therefore, claims arising or filed against either of the contracting Governments after the 1st of February, 1869, were not the object of said convention; neither could they therefore, nor in a general way could the questions which, not treating directly upon injuries indemnifiable in money, refer to points of fact or of right such as those set forth in the note which I answer, and which your excellency considers as decided in the decision pronounced by the arbitrator on the 11th of November, 1875, be a matter for the arbitration provided in said convention.

Meaning thereby to argue that the former award by its own force and virtue did not compel the Mexican Government to make the payment claimed.

Mr. Mariscal, continuing, said:

Said decision condemned the Mexican Republic to pay to the Catholic Church of Upper California a determined sum of money which amounted to the interest calculated on one-half of the so-called Pious Fund of the Californias, corresponding to the twenty-one years included between the dates of the signature and exchange of ratifications of the said convention.

In other words, from February 2, 1848, the date of the signature of the treaty of Guadalupe Hidalgo, to February 1, 1869, the date of the exchange of the ratifications of the treaty of 1868, was precisely twenty-one years.

Mr. Mariscal then says:

From what has been stated it follows that the debt imposed upon the Mexican Republic by the arbitral decision of November 11, 1875, or the res judicata, as your excellency designates it, was extinguished.

Again, on the same page, he says:

If it is now alleged that the reasons on which said decision was founded justify an analogous claim, though subsequent to the one decided by it, such argument lacks the force attributed to it. It is well understood that only the conclusion of a sen-

tence or decision passes into authority of res adjudicata. The considerations that served it as premises are subject to controversy in the future, are perfectly impugnable, and therefore do not constitute the legal truth.

And further:

The Mexican Government will demonstrate fully the falsity and injustice of the *foundations* of the decision pronounced in favor of said church.

I lay particular emphasis and stress on the word "foundations," because Mr. Mariscal is of the opinion that res judicata does not apply to the foundations of a judgment, while we claim that it does apply. We insist that the foundations of a judgment are organically part of it.

This reply by Mr. Mariscal was the subject of a rejoinder forwarded to the Secretary of State by Mr. Doyle, which is to be found in the Diplomatic Correspondence.

I read one brief paragraph from his letter, page 13, where he says:

These suggestions of Señor Mariscal proceed upon a misapprehension of the scope claimed for the doctrine of *res adjudicate* invoked by Mr. Powell Clayton in his communication to which the Mexican secretary replies. That doctrine, briefly expressed in the civil-law maxim, "*Res adjudicata pro veritate accipitur,*" has been declared by eminent jurists to be a necessary concept of every jural society, and is accepted as axiomatic in every system of law which has ever prevailed in any civilized society. It has been so often invoked, defined, sustained, and commented upon by the highest judicial tribunals of England and America, and expressed in the language of the most eminent jurists of the world, that it would be presumptuous in me to state it in language of my own.

And again (third line from the bottom of page 14):

The principle of *res adjudicata* renders the adjudication in question conclusive evidence in any future contest between the same parties (or between parties deriving under them), not only of the ultimate conclusion of indebtedness existing at that time, but of each of the constituent facts from which that conclusion resulted. In fact it is apparent on the least reflection that such is the necessary logical result of its conclusiveness on the question of indebtedness. For indebtedness is not a primary fact, but is necessarily the result of other and antecedent facts. A man is indebted for money borrowed. Why? Only because he borrowed the money. The tribunal which adjudges him indebted must, of necessity, determine the cause of such indebtedness, *i. e.*, the act of borrowing and the amount borrowed; so that what decides the indebtedness, which is the consequence, necessarily determines also the fact of borrowing, and the amount of the loan which constitute the cause.

Mr. Doyle then proceeds, and I shall not trouble the tribunal to read it, commencing at the foot of page 15 and continuing to the top of page 17 to quote a number of well-known American law writers dealing with this question. He concludes at the top of page 17 with the quotation which I referred some time since, from Mr. Black, who says, speaking of *res adjudicata:*

It is not too much to say that this maxim is a fundamental concept in the organization of every jural society.

On December 4, 1899, in a letter addressed by Mr. Hay, Secretary of State of the United States, to Mr. Clayton (pages 46-47 of the Diplomatic Correspondence) the principle of res judicata is enforced in language no less clear and vigorous. On June 7th, 1900, Mr. Hay forwarded to Mr. Clayton an authority or statement from Merignhac, which was laid before Mr. Mariscal (page 11) by Mr. McCreery. Merignhac said that "The sentence, duly given within the limits of the convention, decides the question between the parties in a definitive manner." It is this authority to which Mr. Mariscal referred in saying, "Nor is it denied that a tribunal or judge established by international arbitration gives to its decisions, 'pronounced within the lim-

its of its jurisdiction' (in the language of the authority cited by Mr. McCreery), the force of *res judicata*."

We therefore start with the proposition that it is conceded by Mexico that the principle of *res judicata* does apply to the awards and judgments of international courts. Indeed, it seems to be so assumed in the protocol, which, as Sir Edward Fry has said, constitutes the code for this court.

Let me read a short extract from the protocol, which will also show some of matters which Mexico concedes were decided by the former arbitral court:

Whereas, under and by virtue of the provisions of a convention entered into between the high contracting parties above named, of date July 4, 1868, and subsequent conventions supplementary thereto, there was submitted to the mixed commission, provided for by said convention, a certain claim advanced by and on behalf of the prelates of the Roman Catholic Church of California against the Republic of Mexico for an annual interest upon a certain fund known as "The Pious Fund of the Californias," which interest was said to have accrued between February 2, 1848, the date of the signature of the treaty of Guadalupe Hidalgo, and February 1, 1869, the date of the exchange of the ratifications of said convention above referred to; and

Whereas said mixed commission, after considering said claim, the same being designated as No. 493 upon its docket, and entitled Thaddeus Amat, Roman Catholic bishop of Montery, a corporation sole, and Joseph S. Alemany, Roman Catholic bishop of San Francisco, a corporation sole, against the Republic of Mexico, adjudged the same adversely to the Republic of Mexico and in favor of said claimants, and made an award thereon of nine hundred and four thousand seven hundred and 99/100 (904,700.99) dollars; the same, as expressed in the findings of said court, being for twenty-one years' interest of the annual amount of forty-three thousand and eighty and 99/100 (43,080.99) dollars upon seven hundred and eighteen thousand and sixteen and 50/100 (718,016.50) dollars, said award being in Mexican gold dollars, and the said amount of nine hundred and four thousand seven hundred and 99/100 (904,700.99) dollars having been fully paid and discharged in accordance with the terms of said convention.

Sir EDWARD FRY. Those figures are not quite correct.

Mr. MCENERNEY. No. In the petition for revision, filed by Señor Avila, he pointed out that there had been a mistake in addition so that the fund was erroneously calculated to be one thousand dollars more than in truth it was. Twenty-one years' interest at 6 per cent on a thousand dollars is $1,260; half of that would be $630, so that the sum instead of $904,700, should have been $904,700 less $630, which is $904,070. Sir Edward Thornton corrected the award accordingly (Tr., 650).

I continue with the reading of the protocol:

Whereas the United States of America on behalf of said Roman Catholic bishops, above named, and their successors in title and interest have since such award claimed from Mexico further instalments of said interest, and have insisted that the said claim was conclusively established, and its amount fixed as against Mexico and in favor of said original claimants and their successors in title and interest under the said first-mentioned convention of 1868 by force of the said award as *res judicata;* and have further contended that apart from such former award their claim against Mexico was just, both of which propositions are controverted and denied by the Republic of Mexico, and the high contracting parties hereto, animated by a strong desire that the dispute so arising may be amicably, satisfactorily, and justly settled, have agreed to submit said controversy to the determination of arbitrators, who shall, unless otherwise herein expressed, be controlled by the provisions of the international convention for the pacific settlement of international disputes, commonly known as The Hague Convention, and which arbitration shall have power to determine—

1. If said claim, as a consequence of the former decision, is within the governing principle of res judicata; and,
2. If not, whether the same be just.

And to render such judgment or award as may be meet and proper under all the circumstances of the case.

Having now called to your attention that it is conceded by Mexico that the principle of *res adjudicata* does apply to international arbitrations, I desire briefly to call to your attention the law and the history of the principle of *res adjudicata* as we understand them.

To this end I desire to read a few quotations from Chand on Res Judicata, a work which has considerable circulation in America—one written by a British India judge.

Sir EDWARD FRY. I did not catch the name.

Mr. McENERNEY. Hukm Chand. Mr. Chand died a short time ago, after having written some other legal works.

The work is dedicated to the Right Honorable Baron Herschell, lord high chancellor of England.

Mr. McENERNEY (continuing). On page 1 of this work it is said:

> The doctrine of *res adjudicata* is of universal application, and in fact (quoting again the language which I have repeated so often) a fundamental concept in the organization of every jural society. Justice requires that every cause should be once fairly tried, and public tranquillity demands that, having been tried once, all litigation about that cause should be concluded forever between those parties.
>
> The maintenance (quoting Judge Campbell, one of the early judges of the United States Supreme Court and a man of great distinction and learning) of public order, the repose of society, and the quiet of families require that what has been definitely determined by competent tribunals shall be received as irrefragable legal truth. If it were not for the conclusive effect of all such determinations there would be no end of litigation and no security for any person, the rights of parties would be involved in endless confusion, and great injustice often done under cover of law, while the courts, stripped of their most efficient powers, would become little more than advisory bodies, and thus the most important function of government, that of ascertaining and enforcing rights, would go unfulfilled.

On page 2 the author says:

> The term "*res adjudicata*" is derived from the Roman law, and in its most obvious and general meaning it signified at Rome, as it signifies in England and in America, that a matter in dispute had been considered and settled by a competent court of justice. A judgment of the court among the Romans always operated as an novation of the original cause of action which was deemed to merge in it. . . . This effect did not attach, however, to the judgments of the praetor's court, which were regarded as foreign judgments, but allowed to be pleaded by way of confession and avoidance.

And it is said (p. 2), speaking of the rule according to Roman law:

> *The conclusiveness of the judgment extended to every point necessarily decided.*

The author also says (page 2):

> *These maxims having stood the test of centuries, still retain their original place in the jurisprudence of every civilized country of to-day.*

It being established that *res adjudicata* does apply to the awards of international courts, the next question to be considered is whether the award of the arbitral court created under the convention of July 4, 1868, was within the limits of its jurisdiction. You will recall that it is urged by Mr. Mariscal that the award of the former arbitral court was not within the jurisdiction of that court. He therefore invokes in italics the limitation upon the doctrine, contained in the authority cited by Mr. McCreery, that the former award had not the force of *res adjudicata* unless the award was within the jurisdiction of the court which made it, the idea being that, if the court has no jurisdiction, its judgment is void and has not the force of *res adjudicata* nor any force whatever. It will be, therefore, necessary to consider the propositions advanced by Mr. Mariscal that the former arbitral court acted beyond its jurisdiction.

We claim that the court had jurisdiction upon five different grounds. Our first ground is that the court decided that it had jurisdiction, and its decision that it had jurisdiction being an inherent function, is conclusive before all courts in all places. What is jurisdiction? It is the power to hear and determine a cause. The possession of jurisdiction does not involve, of necessity, its rightful exercise. Jurisdiction involves the power to commit error, because when you assert that a court has jurisdiction, you necessarily assert that it has the power in the exercise of that jurisdiction to correctly or incorrectly interpret the law, to correctly or incorrectly understand, appraise, and weight the facts. It has come to be axiomatic that the first thing that a court decides, that the fundamental decision of every court in every country, in every place, in every case, is that it has jurisdiction, because, when a court sits to hear a case, it necessarily affirms that it has the power to hear it, and when it determines it, it necessarily determines that it has the power to adjudge the case.

There is, therefore, necessarily involved in the hearing and determination of every case a judicial determination (usually implied) by the court that it has power to hear and determine the cause.

(A midi la séance est suspendue jusqu'à 2 heures.)

SIXIÈME SÉANCE.

22 septembre 1902 (après-midi).

La séance est ouverte à 2 h. 20 sous la présidence de M. Matzen.

M. le PRÉSIDENT. La parole est à l'agent des Etats-Unis de l'Amérique du Nord.

Mr. RALSTON. I want to say just one word in reply to the observation of Mr. Beernaert of this morning, a word which perhaps is entirely unnecessary, but as an observation of the same general tenor has been several times submitted, it seems to me that our ground should be made absolutely and entirely clear.

The protocol under which we are acting provides that—

all pleadings, testimony, proofs, arguments of counsel, and findings or awards of commissioners or umpire filed before or arrived at by the mixed commission above referred to, are to be placed in evidence before the court hereinbefore provided for, together with all correspondence between the two countries relating to the subject-matter involved in this arbitration, originals or copies thereof, duly certified by the departments of state of the high contracting parties being presented to said new tribunal.

The record of the old case, what we term in English the record, and which is termed on the continent "dossier," happened to be entirely in the possession of the Department of State of the United States, and for that reason, and for that reason alone, and not because there was any special understanding between the parties, the United States printed that dossier, that record, and it is before you. The United States also had printed a complete copy of the diplomatic correspondence between the parties, contained in the same volume; but I desire to state, and to make entirely clear, that that was not printed because any special duty so to do rested on the United States more than upon Mexico, for, as is stated, "originals or copies thereof, duly certified by the departments of state of the high contracting parties, being presented to said new tribunal," it therefore became equally the duty of Mexico to present certified copies of that diplomatic correspondence.

The United States chose to perform that duty, and Mexico did not, but that has not involved any hardship or inconvenience to the court, one copy having been presented. Perhaps what I am saying is entirely unnecessary, but I want to make clear the situation of the United States. I think there has been a confusion between us in the application of the word "dossier." When we have said that it was our duty to present it, we have referred to the "dossier" of the old case, and it was our duty to present that, because it rested entirely within our control. The special duty rested on us to present that, but so far as what you may term the "dossier" of the present case is concerned, it is our clear and manifest understanding that each party, Mexico as well as the United States, shall present to this court such documents and such pleadings, allegations, as it may see fit, and as it may think incumbent upon it to present or advantageous to present. I want to make this absolutely and entirely clear to my friends upon the other side, so that they may not think that we regard any duty resting upon us which in fact does not rest upon us under the protocol. We have stood ready to perform our whole duty under the protocol. We hold ourselves ready still to do it, but we do not wish our willingness to be made the foundation of any claim of right.

M. LE PRÉSIDENT. L'agent des Etats-Unis Mexicains a la parole.

M. EMILIO PARDO. Je crois que l'incident qui vient d'être provoqué par M. l'agent des Etats-Unis n'a qu'une importance tout-à-fait secondaire, parceque nous pouvons dire que l'incident est vidé une fois que la réclamation des Etats-Unis et la réponse du Gouvernement Mexicain avec les pièces à l'appui ont été présentés à la Cour. Cependant, comme il y a, plus ou moins caché, une espèce de reproche contre la conduite du Gouvernement Mexicain dans cette affaire, je dois appeler l'attention de la Cour sur un point qui me paraît tout-à-fait bien établi par le protocole du 22 mai dernier. D'après ce protocole, article 7:

> Dans les 30 jours suivant le dépôt du mémorial à l'ambassade mexicaine, l'agent ou l'avocat de la République du Mexique déposera au Département d'Etat de la République des Etats-Unis de la même façon et avec la même référence un mémorial de son opposition à ladite réclamation.

D'accord avec cet article, mon Gouvernement, dans le délai fixé par le protocole a déposé au Departement d'Etat des Etats-Unis la réponse de la République Mexicaine. Il a déposé cette résponse, et il l'a accompagnée d'un livre imprimé qui se trouve à la disposition de la Coúr.

Quand nous nous sommes aperçus que la réponse du Gouvernement mexicain n'avait pas été envoyée par le Départment d'Etat des Etats-Unis, nous avons eu de très justes motifs pour nous étonner, d'autant plus que cette réponse n'ayant pas été remise le livre imprimé se trouvait cependant dans les mains de l'agent américain et était présenté devant la cour, sans prendre soin de faire remarquer que cette pièce appartenait à la réponse du Gouvernement mexicain, et que si l'annexe était présente le mémorial, qui contient la réponse de mon Gouvernement, devait aussi être présent.

Peut-être n'avons-nous pas bien compris les termes du protocole, mais nous pouvons citer à l'appui de la conduite du Gouvernement Mexicain le texte sur lequel je viens d'appeler l'attention de la cour. Nous avions entendu et compris que toutes les pièces présentées à la cour formaient le dossier commun, et c'est justement la remarque que M. Beernaert, notre conseil, a eu l'occasion de faire devant la cour

dans l'audience d'aujourd'hui, c'est-à-dire que ce dossier ne peut pas être considéré comme appartenant exclusivement aux Etats-Unis, mais qu'il contient les pièces et documents que le Mexique a l'honneur de présenter à la cour, avec sa réponse et les annexes présentées avec cette réponse.

Je crois que l'incident, comme je le disais tout à l'heure, n'a aucune importance et qu'il peut être considéré entièrement vidé; mais je me suis considéré comme obligé de justifier devant cette Cour la conduite de mon Gouvernement, invoquant le texte si précis et si clair de l'article dont lecture vient d'être faite.

Mr. RALSTON. Mr. President and honorable arbitrators, just to add one word. I quite agree with the honorable agent for Mexico that the matter is of entirely secondary importance, and I would not have thought of troubling you with the slightest reference to it to-day had it not been on several different occasions made the subject of apparent complaint against the United States. For that reason and for that reason alone I mention it, not because it is of any importance. I should be very sorry, however, if any words which I have said should be construed in any manner as a reproach on the Mexican Government, for anything of that kind is as far removed from my thought as can possibly be. I assume that the agent of Mexico performs his duty and his whole duty according to his understanding of the requirements of the case. I trespass upon your time for a moment more. The protocol does not, in our opinion, require that Mexico should have served upon us the written document to which allusion has been made, the Pleito de Rada. It was so served before I left Washington, although the protocol only provided that it be deposited with the Mexican embassy, and that we have an opportunity to examine it; but having been delivered to us, we have felt it our duty to bring it here at the earliest possible moment, and to safeguard ourselves to deposit it with the secretary-general of this court. It is entirely open to both parties; everything that we have placed before the court is open to the court and to our friends on the other side.

M. LE PRÉSIDENT. La première question c'est que tous les documents sont à la disposition des deux parties; l'autre question est sans importance; nous donnerons seulement acte au protocole des déclarations de MM. les agents.

M. EMILIO PARDO. Puisque nous sommes en train de faire des rectifications, je me permettrai d'appeler, un peu tardivement, l'attention de la Cour sur un point qui peut avoir une certaine importance. Je dois commencer par avouer que j'aurais dû faire cette observation avant, mais il est toujours temps de réparer une erreur, et je me hâte de faire la rectification suivante: Dans les procès-verbaux qui ont été lus à l'audience de ce matin on a fait constater que j'avais l'honneur de comparaître devant la Cour en qualité de ministre plénipotentiaire et d'envoyé extraordinaire de la République mexicaine auprès de la Cour des Pays-Bas. Le fait n'est pas tout-à-fait exact: bien que j'ai reçu de mon Gouvernement ma nomination de ministre plénipotentiaire je ne suis pas encore accrédité; par conséquent en ce moment je ne comparais devant la Cour qu'en ma qualité d'agent du Gouvernement mexicain et non en qualité d'envoyé extraordinaire de la République du Mexique que je n'ai pas encore parce que je n'ai pas eu l'occasion de presenter mes lettres de créance. La remarque a son importance,

parce qu'une fois mon caractère diplomatique établi et mes lettres de créance remises, je ne pourrai pas continuer la représentation de mon gouvernement comme agent de la République mexicaine.

Je prie la Cour de faire constater dans le procès-verbal cette rectification parce que j'y tiens absolument comme ayant une importance spéciale.

M. DE MARTENS. Mais, Monsieur PARDO, vous avez signé le procès-verbal.

M. EMILIO PARDO. On y fait plusieurs fois mention de ma qualité de ministre plénipotentiaire et d'envoyé extraordinaire et on m'attribue un appointement que je n'ai pas encore devant la Cour.

M. DE MARTENS. Alors, vous désirez que ce soit supprimé?

M. EMILIO PARDO. Absolument.

M. LE PRÉSIDENT. Maintenant l'incident est clos, et le conseil des Etats-Unis de l'Amérique du Nord a la parole.

Mr. MCENERNEY. Mr. President and honorable arbitrators:

At the hour when the tribunal rose this forenoon I was addressing myself to the first of the five grounds upon which we claim that the arbitral court of 1868 had jurisdiction to make the award that it did make in favor of the archbishop and the bishop of California against the Republic of Mexico. You will recall that the argument in support of this proposition was that the former arbitral court did decide and had inherent power to decide that it had jurisdiction of the particular case. The decision of a court that it has jurisdiction of a cause is often not final. It is often not final in the sense that its decision that it does possess jurisdiction is open to review in a higher court. This can not be true of an international court, because in the very nature of things, there is no tribunal to which the decision of an international court holding that it has jurisdiction of a particular case can be appealed. This proposition is reasoned out to completion and sustained by ample precedent in the statement and brief of the United States, written by the learned agent of the United States. I shall not stop to dwell upon the argument which he makes, nor refer to the authorities with which he sustains his proposition. There is, however, one precedent to which I desire to call the attention of the tribunal, not to be found in the brief of the learned agent of the United States. It is to be found in 2 Moore's International Arbitrations, page 1242. It refers to the convention between the United States and Mexico created under the treaty of 1839.

Sir EDWARD FRY. What volume?

Mr. MCENERNEY. 2 Moore's International Arbitrations, page 1242.

From 1821 down to this time there have been five treaties between Mexico and the United States. Four of them were ratified; one not ratified; these were the treaties of April 11, 1839, January 30, 1843, November 20, 1843 (not concluded), February 2, 1848, July 4, 1868, and May 22, 1902. A history of all these treaties and the proceedings under them will be found in Mr. Moore's work on International Arbitrations (pp. 1209–1286).

During the session of the joint commission created by the treaty of 1839 claims were presented against Mexico for damages which were said to have been sustained on account of the seizure of an American schooner called the "Topaz." This seizure had been made the subject of diplomatic negotiations between the United States and Mexico for the settlement of some claims asserted by the United States as a sov-

ereign. The Mexican commissioners thereupon applied to Daniel Webster, then the Secretary of State of the United States, to know whether these diplomatic negotiations excluded from consideration by the mixed commission claims presented by individuals for damages claimed on account of the seizure of the "Topaz."

The following is an extract from Mr. Webster's reply addressed to the Mexican commissioners:

> The Mixed Commission under the convention with that Republic has always been considered by this Government essentially a judicial tribunal with independent attributes and powers in regard to its peculiar functions. Its right and duty, therefore, like those of other judicial bodies, are to determine upon the nature and extent of its own jurisdiction as well as to consider and decide upon the merits of the claims which might be laid before it.

And in connection with other claims before that same commission, Mr. Webster said, as is reported by Mr. Moore in the same volume and on the same page:

> That body is in effect a judicial body, and it belongs to its members alone to determine the rights of claimants under the convention.

With the citation of this precedent, I pass to the second ground upon which we support the affirmation by us that the arbitral court of 1868 had jurisdiction to make the award which it did make.

I invite the attention of the tribunal to Article III of the treaty of 1868, at page 32 of the appendix.

It is there provided that:

> It shall be competent for the commissioners conjointly, or for the umpire, if they differ, to decide in each case whether any claim has or has not been duly made, preferred, and laid before them, either wholly or to any, and what, extent, according to the true intent and meaning of this convention.

In other words, it was the duty of the commission, and it was given power by the agreement of the contracting parties, Mexico and the United States, to decide whether any claim came properly within the true intent and meaning of this convention.

The question of jurisdiction raised by Mr. Mariscal is whether the claim upon which the former award was made came within the true intent and meaning of the convention of July 4, 1868.

It is therefore a point which his Government expressly stipulated that court should decide.

Our third point is that Mexico, after our claim had been presented and while it was under consideration by the Mixed Commission, extended the life of the commission, extended the time within which it should do its work, and in one instance revived the commission after it had expired by limitation. The convention which revived the commission after it had expired by limitation is to be found at page 38 of the appendix.

The preceding treaty expired on the 31st of January, 1873, while the treaty at page 38 was not ratified until March, 1873, and not exchanged nor proclaimed until July, 1873. So that after this claim had been presented to the arbitral court for its determination and after the power of that arbitral court had lapsed, because the time within which the decision had to be rendered and within which the court might live had expired, Mexico covenanted and agreed to revive that same arbitral court.

Sir EDWARD FRY. I have not heard the exact date of the presentation of the memorial.

Mr. McEnerney. You will find it on the first page of the docket entries, at page 3 of the Transcript. It is December 31, 1870. You will notice, and I might call to your attention in passing, the first three items of the docket entries. The arbitral court of 1868 was required to meet within eight months after the exchange of ratifications. Its time for meeting expired July 31, 1869. On that day there was one commissioner present, who continued the session until the 10th of August, 1869, when, the other commissioner being present, the court was organized (2 Moore, 1296–1297).

By reference to the first item of the docket entries, page 3, it will be seen that on August 13, 1869 (three days after the organization of the arbitral court), the Department of State of the United States referred the claim of the archbishop and bishop of California to the arbitral court, (Tr., p. 3). On that day, to wit, August 13, 1869, there was no other claim pending before the Department of State except the claim of date July 20, 1859, (Tr., 5–8). Subsequently, to wit, on March 31, 1870, a statement was filed (Tr., 3). This statement is to be found in the record (pp. 8–9). The original memorial was filed December 31, 1870. The memorial is in the Transcript (pp. 9–15). April 24, 1871, a motion to dismiss the claim and a brief in support of that motion were filed by Mr. Cushing. To this motion and brief a reply on behalf of the United States was filed March 1, 1872 (Tr., 3). All of these steps had been taken prior to the expiration of the life of the arbitral court, which expired on January 31, 1873, under the treaty to be found at page 35 of the appendix. By ratifying the treaty, to be found at page 38, Mexico revived the arbitral court. We insist that in so doing she revived it for the decision of all undecided cases. By implication she covenanted that the commission had power to decide the cases.

Sir Edward Fry. Some of them.

Mr. McEnerney. We submit that she covenanted that the arbitral court had power to decide all of the cases. If Mexico did not intend to agree that the arbitral court had power to decide all of the cases, she should have specified those which she claimed the commission had no power to decide. Of course, we do not claim that Mexico covenanted that the commission could *rightfully* decide all or any of the cases *against her*. But we do insist that by reviving the arbitral court, and failing to withdraw, or except from its consideration, any of the cases then before the court, she necessarily agreed *that it had power to hear and determine all of them.*

The fourth point upon which we predicate the jurisdiction of the arbitral court of 1868 will require a short statement.

We rely upon the proposition that the jurisdiction of an arbitral court is created by the agreement of parties. The maxim that consent can not give jurisdiction has no application to a tribunal which is created and whose jurisdiction is defined by agreement or consent of the parties litigant.

It is a universally recognized principle of jurisprudence that ratification is equivalent to precedent authorization. What Mexico could have agreed to do in advance she could have ratified after it had been done. If Mexico had power to confer jurisdiction upon the commission of 1868, she had power to ratify the exercise of jurisdiction by the commission. Her ratification might have been expressed in words or it might have been implied from a course of conduct. Her course

of conduct might have created against her what is known in English and American jurisprudence as an estoppel *in pais*, or some bar of that general nature. By such an estoppel she would be prevented from asserting that the court had no jurisdiction.

We assert that it is not open to Mexico to claim that that tribunal did not have jurisdiction. Mexico made no objection to the jurisdiction of the arbitral court formed under the convention of July 4, 1868, until the writing of Mr. Mariscal's letter on the 28th of November, 1900, forty-two years after the convention of 1868, and ten years after she had made the last payment under the former award. His letter is at page 27 of the Diplomatic Correspondence. During the pendency of the cause before the former arbitral court it was not intimated by Mexico that she claimed or would claim that the former commission had no power to decide the case.

Mr. Cushing's motion to dismiss the claim "because the injuries complained of were done before February, 1848, and this commission has no jurisdiction of the claim" (Tr., 68), implied that the commission had the power to hear and determine the question whether the injuries complained of were within the true intent and meaning of the convention of July 4, 1868. The very submission of the motion to the commission implied the power and duty of the commission to decide it.

The objection was not to the jurisdiction of the court to decide upon the claim, although it was stated in that form, but it was a claim by Mexico that the demand of the archbishop and the bishop of California were not within the provisions of the convention. The motion of Mr. Cushing was therefore not an attack upon the jurisdiction of the court. On the other hand, it was an affirmation of its jurisdiction to decide whether the particular claim here involved came within the intent and meaning of the convention of July 4, 1868.

After it had been decided there was an exchange of diplomatic representation between the two Governments, but the jurisdiction of the arbitral court was not called into question. On the contrary, as I shall presently show you, the jurisdiction was affirmed by Mexico.

I now refer to the Diplomatic Correspondence, commencing at page 77 and concluding on page 83.

The commission under the convention of 1868 and the conventions supplementary thereto expired by limitation on November 20, 1876. On the next day, November 21, 1876, Mr. Avila, counsel for Mexico, addressed a letter to Mr. Mariscal, then envoy extraordinary and minister plenipotentiary to Washington, in which he called his attention to three matters: First, the Weil and La Abra Mining Company's claim; second, the Pious Fund; and third, cases where the umpire had made allowances, subject to proof that the claimants enjoyed American citizenship.

Following is what Mr. Avila said (Diplomatic Correspondence, p. 77):

> In the case No. 493, of Thaddeus Amat and Others *vs.* Mexico, the claim presented to the United States Government on the 20th of July, 1859, and to this commission during the term fixed for the presentation of claims in the convention of July 4, 1868, was to the effect that the "Pious Fund" and the interest accrued thereon should be delivered to claimants; and though the final award in the case only refers to interest accrued in a fixed period, said claim should be considered as finally settled in toto, and any other fresh claim in regard to the capital of said fund or its interest, accrued or to accrue, as forever inadmissible.

In letter No. 2 (Diplomatic Correspondence, p. 78) Mr. Mariscal

forwards Mr. Avila's letter to Mr. Hamilton Fish, the Secretary of State of the United States, who replied under date of December 4, 1876. In his letter he says that by the second article of the treaty of 1868 Mexico had agreed to consider the matters adjudged by the commission as final and conclusive, etc.

Mr. Fish then added:

I must decline, however, to entertain the consideration of any question which may contemplate any violation of, or departure from, the provisions of the convention as to the final and binding nature of the awards, or to pass upon, or by silence to be considered as acquiescing in, any attempt to determine the effect of any particular award.

To this Mr. Mariscal replied four days later, and said:

In his second statement (that relating to the Pious Fund) Sr. Avila intended only to express his Government's opinion as to the impossibility of claiming at any future time the capital of the Pious Fund, the accrued interest on which is now going to be paid in conformity with the award. He endeavors to avoid, if possible, a future claim from the interested parties, through the United States Government, *but does not pretend to put in doubt the present award.*

In other words, Mr. Mariscal not only does not dispute the validity of that award, but when the Secretary of State of the United States declares to him that he (the Secretary) will not undertake to determine in a diplomatic way what the effect of that award may be, nor will he permit Mr. Mariscal by his (the Secretary's) silence or acquiescence to put a construction upon it, Mr. Mariscal, thereupon and upon behalf of Mexico, promptly answers that he only seeks to interpret the award, *but does not pretend to put in doubt its validity* (foot of page 80). Mr. Mariscal forwarded the correspondence to the foreign office in Mexico. Hence we have the statement of the minister of foreign affairs of Mexico, at the foot of page 81, under date of May 1, 1877, five or six months afterwards, in which he says:

In regard to the case of the archbishops and bishops of California, the Mexican Government, *far from putting in doubt the final effect of the awards,* has declared in the second of said statements that, in conformity to article 5 of the convention, the whole claim presented to the commission must be considered and dealt with as finally arranged.

In other words, Mexico contended that the award was valid. She insisted that the award foreclosed all claims for subsequent instalments. By this insistence she claimed the benefit of that award; claimed that it was valid. When Mr. Avila wrote his letter he attempted to forestall all further claim. He realized the effect of the decision, for he said in section 156 of his argument in support of a petition for revision (Transcript, foot of page 640):

If the decision rendered is sustained, the claimants will probably pretend to give it a permanent effect, alleging that by it they have been declared a right to receive a determined sum annually.

We do insist that the decision is entitled to a permanent effect, and that by it we have been declared a right to receive a determined sum annually.

Mr. Avila realized that we would certainly make this claim, and that is the reason why he sought to interpret, through the medium of diplomacy, an award or judgment, the validity of which, with all his learning and familiarity with the case, he never dreamed of calling into question.

I shall pass the question of the jurisdiction of the former arbitral court with the following brief observations: Mexico had the power

to confer jurisdiction; she had the power to ratify the exercise of it. It would not be consistent with the dignity of a nation nor the obligation of a litigant to accept an opportunity of success without its accompanying opportunity of defeat. Mexico never challenged the jurisdiction of the court which she created by her own solemn act and before which she went for judgment, a judgment by which we would have been bound had we lost; a judgment by which Mexico is bound, she having lost. It is a fundamental rule of the jurisprudence with which I am familiar, and it must be a fundamental principle in all jurisprudence that *res judicata* and estoppels generally are mutual. Where they bind one of the litigants they bind the other.

Defeat upon the merits before the arbitral court of 1868 would have concluded us for all time from asserting the validity of our claim. Hence it must likewise conclude Mexico for all time, as she lost and we prevailed.

In this connection permit me to just read two or three lines from Chand on Res Judicata, page 46:

> The general rule of law may be briefly stated to be that where a recurring liability is the subject of a claim, a previous judgment dismissing the suit upon findings which fall short of going to the very root of the title upon which the claim rests, can not operate as *res judicata; but if such previous judgment does negative the title itself, the plaintiff can not reagitate the same question of title by suing to obtain relief for a subsequent item of the obligation.*

If we had been defeated before the arbitral court of 1868 upon the ground that our case lacked merit, we would have been foreclosed and properly and rightfully foreclosed forever. If it should be decided that we have no claim, that this decision is not controlled by the former award operating as *res judicata* and is not just, would it be in accordance with the jurisprudence which pertains to all the countries of the world for us next year, the year after, and the third year to request our Government to intervene with Mexico for the payment of annual interest commencing with October 24, 1903, upon the ground that those installments had not been the subject of consideration by this tribunal? That is the question to be decided here.

The fifth point upon which we affirm the jurisdiction of the tribunal of 1868 is that as an open question the convention of July 4, 1868, had jurisdiction to hear and determine the case of the Pious Fund. What was the claim made before the former tribunal? It was that on the 24th day of October, 1848, and on the same day in each of twenty years thereafter, making twenty-one in all, there had accrued to American citizens claims against Mexico. It was for the settlement of just such claims that the tribunal of 1868 was created and organized.

The treaties use the word "injuries" originating within the twenty-one years. Of course it was the function of the commission to decide what an injury was. The tribunal will find on pages 93–99 of the transcript an argument by Mr. Doyle which, it seems to me, forecloses reply. The argument is that an "injury" within the meaning of the law is the withholding of a right by one person from another.

It is true that the convention of July 4, 1868, contained the following clause (Appendix, p. 32):

> It is agreed that no claim arising out of a transaction of a date prior to the 2d of February, 1848, shall be admissible under this convention. (Appendix, 32.)

But in the supplementary convention of February 8, 1872, the United

States and Mexico gave this clause a binding interpretation. It is recited in the supplementary convention that the convention of 1868 was "for the settlement of outstanding claims that have originated since the signing of the treaty of Guadalupe Hidalgo on the 2d of February 1848." (Appendix, 36.)

This is the true construction of the convention of 1868, and it is the one which was adopted by Sir Edward Thornton in this case, and also in the case of Belden *vs.* Mexico, likewise decided by him. (Tr., 588.)

The former arbitral tribunal had power to interpret the convention of 1868. If it had no such power, it would follow that the moment there was a suggestion made that a particular claim was not within the convention, that moment the arbitral court would cease to entertain the claim; for if the court had no power to decide that the claim *came* within the convention, it had no power to decide that it *did not come* within the convention. But, as we have above shown, it was expressly agreed between Mexico and the United States that the umpire had power to decide in each case whether any claim "has or has not been duly made, preferred, and laid before them, either wholly or to any, and what extent, according to the true intent and meaning of this convention." (Appendix, 32.)

I submit that upon all five of these grounds the arbitral court had jurisdiction to make the award which it did make. In the consideration of this question of jurisdiction I beg you, Mr. President and honorable arbitrators, to keep in mind that jurisdiction is the power to hear and determine a cause. Jurisdiction does not depend upon its rightful exercise. Jurisdiction does not depend upon the correctness of the decision. If it were otherwise, nobody would ever know whether a tribunal had or did not have jurisdiction. It would then be said: The tribunal had jurisdiction if it correctly decided the case, but it did not have jurisdiction if it incorrectly decided the case.

I come now to the proposition, the third in our case so far as *res judicata* is concerned, that—

15. It is a settled rule of English and American jurisprudence that the principle of *res judicata* applies not only to the thing directly adjudged, but also to all matters necessarily involved therein, i. e., in the thing directly adjudged.

The agent of the United States has devoted much learning and research to establishing the proposition that this same rule obtains in all European countries. I shall argue this question but briefly, leaving the exposition of the doctrine to him. I shall argue the rule as it exists in English and American jurisprudence and I shall attempt to show that it has its foundation in a wise philosophy which must underlie all systems of jurisprudence and which must exist among all the peoples of the earth.

I leave to be discussed by the learned agent for the United States authorities to be found at pages 48–49 of Chand, which deal with cases involving installments and recurring liabilities like those involved here.

I desire to call to your attention the decision in Outram *vs.* Morewood 3 T. R., 346, by Lord Ellenborough, when Chief Justice of England, and cited by Chand, page 4.

Lord Ellenborough said:

A recovery in any one suit upon issue joined on matter of title is equally conclusive upon the subject-matter of such title; and a finding upon title in trespass not only operates as a bar to the future recovery of damages for a trespass founded on the

same injury, but also operates by way of estoppel to any action for an injury to the same supposed right of possession . . . . And it is not the recovery, but the matter alleged by the party, and upon which the recovery proceeds, which creates the estoppel. The recovery of itself in an action of trespass is only a bar to the future recovery of damages for the same injury; but the estoppel precludes parties and privies from contending to the contrary of that point or matter of fact which, having been once distinctly put in issue by them, or by those to whom they are privy in estate or law has been, on such issue joined, solemnly found against them.

Chand says (page 40, section 28):

A matter in issue in a suit is also distinct from the subject-matter, and the object of the suit, as well as from the relief that may be asked for in it, and the cause of action on which it may be based; and the rule of res judicata requiring the identity of the matter in issue will apply even when the subject-matter, the object, the relief, and the cause of action are different. There is a general unanimity as to the matter in issue being altogether independent of the internal character of the subject-matter of the suit.

Let me illustrate with a case within my own experience. Several years ago a very rich man died in San Francisco. A woman claimed to be his widow. She filed a petition in the court of administration, in which she asked that she be allowed five thousand dollars per month for her support. The children of the deceased filed an answer, in which they denied that she was the widow of the deceased or had ever been married to him. The trial of that case occupied forty-five days. There was no question in the case but the question of whether the relation of husband and wife had ever existed between the parties. When the case came to be decided the judge entered an order in which he denied her application. The order (or judgment) read: "It is hereby ordered that the petition of (naming her) be, and the same is hereby, denied." The condemnatory part of the judgment was simply a denial of the petition. The only thing litigated in the case was the question whether she was the wife of the deceased or not. This issue was necessarily included in the judgment, because if she had been the wife she was entitled to the money; if she had not been she was not entitled to it. So that the judgment organically included the question of whether she was his wife or not. Subsequently, upon a petition to the probate court for the distribution of the estate, the woman came forward again. She said: "I am the widow. My former petition was for a widow's allowance; now it is for an undivided interest in the estate."

The court held that res judicata applied and in effect said:

The decision denying to you a widow's allowance was predicated upon the finding of fact that you were not the widow of the deceased, and as that finding was necessarily involved in the decision denying you any money for support during the administration of the estate, you stand foreclosed from asserting your widowhood in any litigation between you and the children of the deceased, whatever form the litigation may take.

It is that principle which we seek to establish as the law of *res judicata* applicable to this controversy.

It is said by a continental writer cited by Chand, which will be referred to by the agent of the United States—indeed it is obvious—that *res judicata* would have no function—it certainly would have no function in America, where it constitutes a very large body of the jurisprudence—if it were limited to the condemnatory part only. All or nearly all the litigation to which *res judicata* is applicable involves cases where it is invoked to bar litigation about matters which form

the fundamental bases of the condemnatory part of a previously pronounced judgment.

The next point to which I pass is that—

16. Of the facts necessary to an award in favor of the United States the only one which is not res judicata under the judgment of the former arbital court is that of nonpayment of the annual interest since February 1, 1869. This fact is conceded by the protocol. The whole case is therefore controlled by the principle of res judicata.

The validity of this proposition requires the consideration of but one question, which is a very simple one. What question here urged to defeat a recovery would not have defeated the recovery in the former arbital court? Not one. Read the opinion of the umpire, also that of the American commissioners. The umpire's was necessarily brief for the reason that he had hundreds of cases under consideration within the year previous to the expiration of the commission. But take and read either of those opinions and then ask yourselves what fact necessary to an award here was not necessary to an award there? What question can be litigated here which could not have been litigated there? What question—save the question of the statute of limitations—urged here would not have defeated an award there had Sir Edward Thornton and the arbital court, under the act of 1868, taken the view then advanced and now advanced by Mexico? Some questions of fact and some questions of law were involved there as well as here. That tribunal, like this tribunal, was a judicial body. So Mr. Webster said and so all the publicists have said when dealing with this subject.

What question then decided by that tribunal against Mexico can now be decided in its favor without involving a decision that the conclusion reached by the former arbital court was incorrect either in point of law or point of fact? That is the test. If there is no proposition now necessary to our case which was not necessary to the former award, then there is no question not concluded by the principle of *res judicata.*

The seventeenth point—and I merely state it—is that—

17. The objections urged by Mexico against the decision of the former arbital court do not, as she maintains, impeach the jurisdiction of that tribunal, but rather attack the justice of the decision upon the merits.

Mexico's entire argument, when analyzed, is to the effect that the former arbital court misdecided the case. I have already had occasion to say that the jurisdiction of a tribunal does not depend upon the rightful exercise of that jurisdiction.

18. I now pass to the point advanced in the answer of Mexico, which is that this claim is barred by the statute of limitations.

Under the treaty of 1868, and under certain supplements to that treaty, it was provided that the Government which was debtor at the close of the commission should pay to the Government which was creditor a named sum of money on the 31st of January, 1877, and pay the balance in equal installments of not less than $300,000 each year thereafter. Mexico made her first payment on the day it became due, which was January 31, 1877. Her last payment was made on January 21, 1890. Forty days after that date, on March 1, 1890, Senator William M. Stewart, counsel for the bishops of California, addressed to

the Department of State a request for its intervention with Mexico for the payment of the later installments. A reference to this letter will be found at the foot of page 23 of the Diplomatic Correspondence in the Transcript. The date of this letter was March 1, 1890, forty days to a day after Mexico had made her last payment under the former award. On August 3, 1891 (page 23, Diplomatic Correspondence), the matter of these installments became the subject of diplomatic representation by the United States to Mexico, and was the subject of diplomatic negotiations to May 22, 1902. I call your attention to the fact to show that there has been no delay upon the part of the persons in interest in the assertion of this claim. Within forty days after the last payment under the old award they requested the intervention of their Government, and within eighteen months after that last payment the Government of the United States had moved in the matter.

New Mexico, among other defences, claims that the demand is barred by section 1103 of her Civil Code and by an act passed by her in 1894, three years after this claim had become the subject of diplomatic representation by the one government to the other.

Our answers to this claim, based upon the statute of limitations, are these:

1. Such a plea is not allowable under the protocol of May 22, 1902.

By that convention two questions have been submitted for decision.

(*a*) Is the claim, as a consequence of the former decision, within the governing principle of *res judicata?* and

(*b*) If not, is the same just?

A claim barred by limitation is as much a just claim as one not so barred.

2. A statute of limitations is a law of the forum. In this case whatever the statute of limitations may be in Mexico, it is a law for Mexican tribunals alone, and not for international courts.

3. We submit that it ought not to be and that it is not allowable under the law of nations for a sovereign, while the claim of a citizen of another sovereign is the subject of diplomatic negotiation between the powers, to pass a law of limitation and thereby bar or attempt to bar the claim. This claim became the subject of diplomatic negotiation on August 17, 1891 (Tr., Diplomatic Correspondence, 8).

And yet, Mexico avers in her answer that the claim became barred by a statute of limitations enacted by her September 6, 1894. (Replication, 30.)

4. There is no statute of limitations in international law except such as may be agreed to exist for a particular case by provision in a convention between two or more powers.

Of course, in this connection I draw the distinction, which is drawn by all the text writers, between prescription which is a method of acquiring title to land or other properties, by occupation, and a formal enactment which bars the remedy but does not destroy the right.

5. The statutes of limitations of Mexico have no extra-territorial effect and cannot destroy the claim of non-resident creditors.

6. If Mexico had desired to avail herself of the plea of her statute of limitations, she should have declined to arbitrate or (failing that) she should have insisted upon a provision in the protocol whereby she could have obtained the decision and judgement of the court upon the question whether this claim was effectively barred in an international

tribunal by a law peculiar to Mexico, territorially limited, and enacted to control proceedings and remedies in her own domestic courts. She failed to take either of these steps.

7. According to the law of Mexico the claim is not barred.

19. I have now arrived at the last subdivision of the argument as I planned to make it to you, Mr. President and honorable arbitrators. I shall not undertake to consider this head in any great detail, although I have prepared it in considerable detail and shall furnish it for the consideration of the tribunal. It is that the defences attempted to be set up by Mexico in her answer are not sufficient to defeat the award claimed by the United States. I consider these defences one after another in my brief, now nearly prepared. I need not consider them all orally. I shall therefore pass to the last point which Mexico makes in her answer, and that is with respect to the point which constitutes the volume called "Pleito de Rada."

I think that we shall be able to make the nature and history of the litigation very clear to this tribunal. Mexico, in the seventh paragraph of her answer, declares that no doubt the counsel for the United States will be very much surprised to know that the title to the estates conveyed to the Pious Fund by the Villapuente and De Rada deed had been defeated in litigation and therefore lost to the fund. If the title had been defeated by litigation, it would not make any difference to our case, because we are here claiming under a sale made by Mexico.

The Villapuente and De Rada property, moreover, was in the possession of the bishop of the Californias in 1842. Possession is proof of title, which will not be overcome by an interlocutory and unexecuted judgment of 90 years before. Mexico claims that the title was invalidated in 1749, ninety-three years before the time when the bishop was in the peaceful possession of the property and surrendered it to Mexico. What we rely upon here is the sale of that property by Mexico. Whether she sold a good title or a bad title is unimportant. She is answerable in either event for the price.

I shall presently show to you, however, that the construction which the learned counsel upon the other side put upon this litigation is not sustained in any degree.

What were the facts?

The Marquis de Rada died in 1713, one hundred and thirty years before the act of October 24, 1842.

His widow, the Marquesa de Rada, claimed his entire estate in the probate court. She based her claim upon her dowry and her rights as tutor of two sons by a former husband; also on certain other indebtednesses due from the marquis to her. She claimed that the marquis owed to her more than the value of the entire estate. The estate was appraised. Upon the petition of the marquesa and upon proof that the estate was insufficient to pay her debt, and upon a comparison of the debt and the value of the estate, the whole estate was awarded to the marquesa. This occurred in the year of her husband's death, 1713. In 1718 the heirs of the Marquis de Rada instituted litigation and made two charges—concealment of goods and undervaluation. They insisted that the marquis had had other property which had been hidden, and that the appraisers have undervalued the property which had been exhibited. They charged that it was not true that the estate was insufficient to pay the debt and averred that it was more than sufficient so to do. They insisted that the result of the concealment of goods and of

the undervaluation by the appraisement was that the Marquesa de Rada had obtained the entire estate of her husband, when the estate was not only sufficient to pay her debt, but sufficient to leave an excess to the heirs. They, the heirs, therefore prayed that the appaisement should be set aside and the case reheard. They (these heirs) were defeated in all of the courts to which they appealed until the case came before the royal and supreme council of the Indies at Madrid, where, in 1749, the inventories were set aside, and the cause was remitted to the court of first instance to hear and determine the rights of the parties. It is down to this date that this bound volume called the "Pleito de Rada," produced by Mexico, brings the history of the litigation.

If you will look at the Transcript from pages 518 to 523 you will see a statement made by Pedro Ramirez for the opinion of counsel upon this subject of the litigation. Mr. Ramirez' statement continues the history of the litigation to the year 1842. It appears therein that on January 31, 1829, the Pious Fund was condemned to pay $158,175.00 to the heirs of the Marquis de Rada. The old decree of the court of last resort, you will keep in mind, was made in 1749, and the last decree in 1829, eighty years afterwards. One will naturally inquire, how did it happen that this litigation culminated in a decree that the heirs of the Marquis de Rada should receive from the Pious Fund of the Californias $158,175.00. The inquiry is easily answered. The marquesa had transferred her estates to the Pious Fund of the Californias. The Pious Fund of the Californias was thereafter successor in title and interest of the Marquesa de Rada. The court evidently found that the estate of the marquis exceeded the debts due to the marquesa by $158,175.00. The court therefore necessarily confirmed the title of the marquesa already transferred to the Pious Fund, subject to a lien of $158,175.00.

This is not the last we hear of that $158,175.00. Whether that judgment was ever paid or discharged, or whether it was upon appeal or in any other litigation, or before the court which rendered it, or otherwise set aside or annulled, we have no means of ascertaining.

In 1842 an execution was levied upon the Cienega del Pastor, the estate of which I spoke this morning, and which we claim should be added to the capital of the Pious Fund, if the cause is not controlled by res judicata, to satisfy the judgment for $158,175.

These were the proofs made before the former arbitral court. What happened? The American commissioner said, at page 526, that the Cienaga del Pastor belonged to the Pious Fund, but that he found that it was subject to an attachment for $158,175, issued in the litigation already detailed, and as there was no evidence to show that Mexico ever sold the property, or obtained anything for the property, he refused to allow the Cienaga del Pastor to be calculated as a part of the capital of the Pious Fund. The necessary evidence has been *now* produced by us to show that Mexico did sell this property for $213,750, and unless she can show that she paid the judgment of $158,175 we are entitled to have the price added to the capital, unless the case is concluded by *res judicata.*

We submit that instead of defeating the benefaction by the Pleito de Rada, we find that Mexico defeated us out of the allowance of $213,750 on the last arbitration to satisfy the only claim that the heirs of the Marquis de Rada had upon the benefaction conferred of the Marquesa de Rada and the Marquis de Villapuente upon the Pious Fund.

I am about to bring this much protracted argument to a close.

In doing so, I desire to express my deep appreciation, Mr. President and honorable arbitrators, for the patience and attention which you have granted to me.

It must be very gratifying to the high contracting parties by which the present tribunal was constituted that after many years of dispute the contention between them is soon to be closed forever.

But it is not alone to the two leading Republics of the New World, who have brought a controversy involving New World questions to the Old World for decision—I say it is not to these two Republics alone that the present arbitration is of great interest and moment.

It should be, and no doubt it is, highly gratifying to the powers signatory to the convention which created the Permanent Court of Arbitration at The Hague that the first case is to be submitted for decision to jurists chosen by the high contracting parties from the most distinguished in all Europe, with the single eye to a decision which, from the character and great learning of those who make it, should command and would receive universal acceptance.

For the high purpose with which these two high contracting parties were thus animated, they deserve the respect and commendation of all civilized society.

It is not alone on account of the large amount involved, nor for the reason that it is to settle a dispute between two conspicuous nations of the world that this case is of universal interest and transcendent importance; but it is important in a far greater degree, because it is intimately connected with a movement of recent times to put the intercourse amongst nations on a high and permanent plane, consistent with the objects of good government, which are the peace of the world and the welfare of human society.

This tribunal has in its keeping in no small measure the future of that great movement.

And in submitting our case, whatever may be its results, we feel certain that the tribunal will enter upon its consideration and decision with the learning, rectitude of purpose, and sense of responsibility which are befitting its greatness and importance.

Mr. RALSTON. I submit to the desire of the court either to proceed this afternoon or to defer until to-morrow morning.

M. LE PRÉSIDENT. Vous pouvez procéder, s'il vous plait.

Mr. RALSTON. Mr. President and honorable arbitrators: In the proper and orderly presentation of the case brought before you, it has seemed fit on behalf of the United States that there should first be presented and dwelt upon with thorough emphasis and elaborate discussion the various facts which led up to the former decision, and I think I may congratulate myself personally upon the fact that the various elements which entered into the judgment before reached have received ample and elaborate discussion before you. I believe it has been made manifest from the argument which has so far proceeded that there *was* a Pious Fund of the Californias; that it was a fund of vast extent, a well-known fund; that its proper administrators were the Catholic Church through its various agents; that Mexico, having had control of that fund, and having herself voluntarily assumed a certain relationship to it, by virtue of these several facts entered into a distinct obligation to a certain branch of the Catholic Church—and that was to pay the interest of the fund to its representatives. All these facts, I say,

I believe have been thoroughly demonstrated. They were demonstrated before the former court. All of the considerations which have been discussed here to-day and up to this time, in the course of the argument, were considered by the former court—the incidental questions of church and state, the obligations the state might put itself under to render certain services or to pay certain moneys to a particular religious body, all were amply considered.

While, therefore, we have believed on behalf of the United States that there should be the fullest, the most complete exposition of all of these preceding facts, at the same time it has strongly been borne in upon us that the substantial, that the real question upon which this case must turn would be whether the decision of the prior arbitral court created that state of affairs to which we in English give the name *res judicata*—borrowing the term from the Latin—and which on the continent is better known in civil jurisprudence under the name of *chose jugée*. We have believed that the facts to which I have adverted brought about in themselves when embodied in a judgment that condition or force which constituted *chose jugée* and would govern this case, and we primarily rely upon this position.

Chose jugée is said to rest—giving a free interpretation to the Latin maxims—upon two things, first, that the interest of the public requires that an end should be put to suits; and second, that no one should be twice vexed for the same cause, and we invoke this principle on behalf of the complainant here.

The question first offering itself for the consideration of this tribunal is to a degree a novel one, and that is whether there should be given to the utterances of an arbitral court all of the weight which we attribute to courts in general. And that is the first proposition to which I desire to address myself.

We shall insist that an arbitral court is a court of high dignity; that in favor of its jurisdiction all necessary intendments are to be indulged; that its awards are to receive as full execution as would be granted to the awards of any other court.

I say in international jurisprudence the question may, I believe, be regarded as a novel one. I am not able to cite this tribunal to any case where it has been distinctly stated that the judgments of arbitral courts as between nations are to be given the same sanctity as will be accorded to the judgments of the most ordinary courts passing upon the most trivial disputes between man and man. And I count it—if I may be permitted so to say—I count it a matter of extreme good fortune, a matter of the gravest importance to public interest, to international interest, that the first case presented before this tribunal should involve a question of such widespread importance and dignity, deeply involved as it is in the successful conduct of arbitrations for the entire future.

For, as it seems to us, if the judgments of arbitral courts are not to be given at least as high sanctity as is now accorded to a judgment of the most inferior courts, then may we not expect that such courts will be resorted to in the future.

Mr. McEnerney in his very thorough and very learned address has pointed out to you the fact that the Mexican minister of foreign affairs himself admitted that the judgments of arbitral courts were entitled to the benefit of the plea, or exception as it is termed in the language of Europe as a rule, and that the plea of *res judicata* is as to them to be

accorded as great dignity and has as much force as pertains to those of any other nature.

But the language used on behalf of Mexico has not always been uniform.

In order that its change of position may be most clearly understood, I refer to the Mexican answer contained in the exhibits attached to the replication, in which the quotation is made from the letter of Secretary Bayard. It is said on page 26:[a]

> Decisions of international commissions . . . are not regarded as authoritative, except in the particular case decided. . . . They do not in any way bind the Government of the United States, except in those cases in which they were rendered.

At the foot of page 26 I have given the entire language contained upon this particular point in the letter of Mr. Bayard, and I quote it for a moment:

> But, aside from this criticism, I must be allowed to remind you that decisions of international commisions are not to be regarded as establishing principles of international law. Such decisions are moulded by the nature and the terms of the treaty of arbitration, which often assume certain rules in themselves deviations from international law, for the government of the commission. Even when there are no such limitations, decisions of commissioners have not heretofore been regarded as authoritative, except in the particular case decided. I am compelled, therefore, to exclude from condsideration the rulings to which you refer, not merely because they do not sustain the position for which they are cited, but because, even if they could be construed as having that effect, they do not in any way bind the Government of the United States, except in those cases in which they were rendered.

It seems proper at this time, and in connection with the citation from Secretary Bayard's communication, to make a certain explanation. There is known in the English and American law the doctrine of *stare decisis*—a doctrine which, I believe, perhaps does not exist under continental jurisprudence. That is to say, our courts consider themselves bound by the decisions of law had in prior cases. The rule is not one uniform at all in its operations. If the court to-day believes that the prior enunciations of law have been erroneous, the court will often diverge from them; but it is held many times that it is even better to adhere to an erroneous view of law, which has been accepted by the general public and acted upon, than to depart from it and establish a new line of decision.

It is conceded under English and American practice that when decisions with relation to the law are given, the general public will be so controlled by them in their relations of property that to depart from them would involve hardship. That may not be conceded with regard to the doctrine of *res judicata*, nor is there the slightest connection between the two.

Res judicata refers to litigation had between the same parties and having relation to the same general matter. Then the doctrine of *res judicata* compels adherence to the finding of fact, or of law in connection with the fact, once found by the court. The doctrine of *stare decisis*, which is really the doctrine upheld by Señor Mariscal, applies and refers to general enunciations of law, and does not ever affect subsequent proceedings between the same parties and having relation to the same subject-matter. And when we come, in the light of this explanation, to examine the paragraph cited from Secretary Bayard, we find that there was an attempt made on the part of the Spanish Government to invoke in its favor a decision had in a certain case which had existed between the United States and England. The facts in

[a] Page 26, this volume.

the two cases were somewhat different, the parties were entirely different. And so, while Señor Muruaga might have seen fit to appeal to the decision between the United States and England as tending to establish a certain principle of law, certainly Señor Mariscal could not appeal to the expression of Secretary Bayard as referring to *res judicata*. It was a matter had between other parties, the subject-matter somewhat varying. We are not compelled to discuss the question as to whether Secretary Bayard was correct or was not correct in saying that certain enunciations of law would not be considered as binding in subsequent international relations.

Now I mention this matter particularly and at this point because the same error, the same confusion, continues to exist in Sr. Mariscal's mind, and is illustrated in the correspondence between the two Governments, and is also illustrated by the example to which I have just called attention, to be found in his answer; so much so that Sr. Mariscal, states that it does not appear that arbitral decisions have the force of *res judicata*.

But what is the rule of *res judicata* as it prevails in English and American jurisprudence? • I quote from my own brief, which is before this tribunal, and reading from page 20 [a]—

The English and American rule is summed up in the first edition of the American and English Encyclopaedia of Law, title "Res Judicata," volume 21, page 128, as follows: When a matter has once properly passed to final judgment without fraud or collusion in a court of competent or concurrent jurisdiction, it has become *res judicata*, and the same matter between the same parties can not be reopened or subsequently considered.

And we find to similar effect, article 1351 of the French civil code, which I think has been subsequently followed throughout the countries of Europe:

L'autorité de la chose jugée n'a lieu qu'a l'égard de ce qui a fait l'objet du jugement. Il faut que la chose demandée soit la même, que la demande soit entre les mêmes parties et formée par elles et contre elles en la même qualité.

The declaration of law which I have already indicated is entirely applicable to English and American jurisprudence. The first point, then, which will arise when we come to consider particularly the American and English definition is whether the matter which was formerly adjudicated upon passed to judgment in a court of competent or concurrent jurisdiction. In other words, was the former tribunal competent to pass upon the matters presented to it? Its jurisdiction was fixed by the treaty of 1868. That its judgments were intended to be final and conclusive is, I think, a matter of important consideration at this moment, and we find that the President of the United States of America (I read from Appendix, page 32 [b]) and the President of the Mexican Republic

hereby solemnly and sincerely engage to consider the decision of the commissioners conjointly or of the umpire, as the case may be, as absolutely final and conclusive upon each claim decided upon by them or him, respectively, and to give full effect to such decisions without any objection, evasion, or delay whatsoever.

And again, from the last part of the second paragraph of Article III on the same page: [c]

It shall be competent for the commissioners conjointly, or for the umpire if they differ, to decide in each case whether any claim has or has not been duly made, preferred, and laid before them, either wholly or to any and what extent, according to the true intent and meaning of this convention.

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[a] Page 212, this volume. [b] Page 141, this volume. [c] Page 142, this volume.

In other words, they were given the entire jurisdiction to pass upon the matters brought before them.

Sir EDWARD FRY. Would you allow me to interrupt you at this moment? In Article II it is agreed that no claim arising out of a transaction of a date prior to the 2nd of February, 1848, shall be admissible under this convention. Did not your claim arise out of the decree of 1842?

Mr. RALSTON. That is a question which was very greatly discussed before the former tribunal, and the answer to it, I take it, is this: It is true there was a transaction had before 1842 which fixed the relation of the parties, but the transaction upon which the suit was brought was the subsequent taking of the interest by Mexico—the taking of the money after the exchange of ratifications of the treaty of 1848. That is to say, the groundwork, if you trace it back, is to be found long prior to 1848, but the transaction in relation to which suit was brought was the taking of the money.

Mr. McEnerney calls my attention to this, which occurs on page 35.[a]

Sir EDWARD FRY. Page 35 of what?

Mr. RALSTON. 35 of the appendix.

Whereas a convention was concluded on the 4th day of July, 1868, between the United States of America and the United States of Mexico, for the settlement of outstanding claims that have originated since the signing of the treaty of Guadalupe Hidalgo on the 2nd of February, 1848, by a mixed commission limited to endure for two years and six months from the day of the first meeting of the commissioners, etc.

In the same sense that this case might be said to arise out of a transaction prior to the 2nd of February, 1848, referring to, let us say, the Republic of Mexico, it might be said to have arisen out of the prior action of Spain with relation to the same affairs, or out of any act which went toward constituting or creating the Pious Fund.

I am discussing at the present moment the question of the jurisdiction of this tribunal. Mr. McEnerney has referred in his argument to the fact that the jurisdiction of the tribunal to pass upon the question just mentioned, as well as upon all the other questions which might be raised before the court, was confessed by Mexico. In the first part of my brief, and beginning on page 6,[b] I have tried to arrange the dates in such manner that the attitude of Mexico at particular times and the condition of this particular case would appear together. It will be borne in mind that there were some four extensions of the original convention of 1868. At the time of the first extension a motion to dismiss had been filed by Mr. Cushing, which raised absolutely the right of the tribunal to proceed, and raised particularly the question just mentioned. I have cited in my brief, on page 4,[c] the motion to dismiss of Mr. Cushing. It is found on page 67 of the Transcript.

Sir EDWARD FRY. What was the date of that motion?

Mr. RALSTON. The date of that motion was April 24, 1871.

Sir EDWARD FRY. It is not given on page 67, is it?

Mr. RALSTON. I think so. It is given in the docket entries on page 3.

Sir EDWARD FRY. April 24, 1871?

Mr. RALSTON. Yes, sir; April 24, 1871; motion to dismiss filed by Mr. Cushing, and I will read it, as it is a matter of some importance. He moved to dismiss:

1. Because the act of incorporation of the petitioners as corporation sole did not authorize them to claim property beyond the limits of the State of California.
2. Because the petitioners show no legal interest in or title to the Pious Fund in controversy.

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[a] Page 145, this volume. [b] Page 201, this volume. [c] Page 200, this volume.

3. Because the petitioners had a legal remedy in the Mexican courts which they were bound to pursue and exhaust before coming here.
4. Because the injuries complained of were done before February, 1848, and this commission has no jurisdiction of the claim.

The very question of jurisdiction was raised and was before the tribunal at the time the decision was reached. Knowing that fact as Mexico did; knowing that the tribunal's jurisdiction was challenged,—for it was done by herself—she proceeded to conclude the extension. The convention providing for the extension of the time within which the joint commission should settle claims was signed between the two countries April 19, 1871. That was five days before the motion, and the ratifications—for the convention had, of course, no validity whatsoever until the exchange of ratifications—the ratifications were exchanged February 8, 1872. Note the further fact in this connection that the exchange of ratifications occurred eight days after the original convention had expired by limitation.

Sir EDWARD FRY. The ratifications of December, 1871?

Mr. RALSTON. I do do not think I can have made any mistake.

Sir EDWARD FRY. The proclamation was February, 1872.

Mr. RALSTON. That is the one signed April 19th.

Mr. MCENERNEY. At the top of page 38 is the treaty which was ratified after the other had expired.

Sir EDWARD FRY. According to your book, it was ratified December, 1871.

Mr. RALSTON. If I may ask the court to turn to page 35, it was signed April 19. Ratified means to say, ratified by the Senate of the United States, but a treaty does not become effective on ratification by the Senate of the United States. That has simply reference to the action of the United States, not the action of Mexico, but the joint action which gave life to the whole convention, and before which it had no life whatsoever, took place, as stated, on February 8, 1872, and was therefore, eight days after the original tribunal had ceased to have any powers whatsoever, and while yet this motion was pending before it, Mexico, by the exchange of ratifications, for she was bound by nothing until the ratifications were exchanged, gave new life and new force to the commission, with all the pending questions before it.

Let us go a step further. A second convention is provided for. The convention to which reference has just been made extends the powers of the commission to January 31, 1873, as will appear stated on page 6. Now, on January 31, 1873, the date of the expiration of the second convention, to which reference has been made, the motion to dismiss, filed by Mr. Cushing, was still pending and undetermined, although, on March 1, 1872, a reply thereto had been filed on behalf of the claimants at that time. Now then, with that motion then pending for more than a year previously—eighteen months previously—on November 27, 1872, a further convention is concluded, extending the joint commission not exceeding two years, etc.

We have, therefore, a second act by Mexico again referring, for that is the practical effect of it, to the old commission the determination of this very motion to dismiss. Now the point becomes of some importance. (I may perhaps be pardoned for a moment for digressing from what I intended as the order of my remarks.) The point becomes of some importance when we bear in mind the unquestioned rule with regard to arbitral tribunals that the party submitting the question has

the right to withdraw that question from the jurisdiction of the tribunal before which he has placed it. It was in the power of Mexico, notwithstanding even the first submission, if you will—it was in the power of Mexico to say, "we will agree to extend the functions of this commission, but we will withdraw from it the consideration of the Pious Fund case because we do not believe it comes within the purview of its powers." Mexico never said that. I think the language of all the text writers with regard to arbitration (I have summed up many of them in the brief before you) is in substance that before the arbitral action be taken one party or the other may withdraw from the arbitration, and in the very withdrawal cancel jurisdiction. No such step was taken by Mexico. Now, reading from the brief, page 6:[a]

On November 27, 1872, a further convention was concluded, reviving and extending the duration of the joint commission for a period not exceeding two years from the day on which the functions of the commission would have terminated according to the convention of April 19, 1871. In other words, the commission was extended until January 31, 1875. Ratifications of this convention were exchanged July 17, 1873, nearly six months after the commission had expired by virtue of the convention of April 19, 1871, and it was proclaimed July 24, 1873.

We have, therefore, this condition of affairs that not once, but twice, Mexico agreed, even after the functions of the commission had expired, to extend its powers and complete all the work there was before it—to decide the pending case, for the extension meant nothing else. There was, therefore, one period of eight days, a second period of six months, during which the convention was *functus officio*.

At the time of this second extension, reading from the brief, page 6:[a]

At the time of the expiration of the functions of the commission by the convention signed April 27, 1872, and ratified July 17, 1873, to wit, on January 31, 1875, final argument for the claimants and an exhibit attached thereto had been offered by the agent of the United States (January 25, 1875).

The original motion submitted by Mexico to dismiss the cause yet remained pending and undetermined.

Again we find that by the further convention, concluded November 20, 1874, ratifications of which were exchanged January 28, 1875, and proclamation issued January 25, 1875, the functions of the commission were extended to January 31, 1876. And at this time when this extension went into effect the Pious Fund case was still pending and undetermined, the difference of opinion being announced on May 19, 1875. Here we note something of a change of condition. There had been the disagreement between the two arbitrators resulting in sending the case to the umpire, and while that new condition of affairs existed Mexico agreed to a new convention allowing the umpire to determine the very question upon which the arbitrators had differed, and the award of the umpire was made November 11, 1875, about ten months after the exchange of ratifications, and but for that exchange of ratifications there would have been no final judgment in this case, for the arbitrators had disagreed and the case rested undetermined. So that I say, step by step, not once but twice, three times, four times over, Mexico has confessed the jurisdiction of the former tribunal over this very subject-matter, and we insist that it does not lie in the mouth of Mexico, to use the legal expression, now to say, after her repeated submissions of this cause to the former arbitration, that there was want of jurisdiction, or that this claim originated before 1848, or that the facts were other than were found by the umpire, nor can she present

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[a] Page 201, this volume.

any defense which finds its foundation in any fact prior to the date of the rendition of the judgment by the umpire.

M. DE MARTENS. May I ask you, Mr. Ralston, could Mexico stop the submission of the umpire?

Mr. RALSTON. Yes, sir.

M. DE MARTENS. How could she do it? She was obliged to put it before the umpire.

Mr. RALSTON. No, if you will pardon me. She may well have been obliged to submit the first question before the umpire, yes; but she was not obliged to continue the case before the umpire after the first convention had expired by its terms. She could have said, yes, we will agree to a new convention, but we do not think that the arbitrators have control over this particular case; we do not think that this particular case comes within the purview of the original convention, and therefore we will decline to allow the Mixed Commission to take further cognizance of it. That in brief is our position.

M. DE MARTENS. But I think Mexico was obliged to accept the jurisdiction of the umpire in the whole case, do you not think so?

Mr. RALSTON. Precisely. I think so absolutely, because I think the umpire had the absolute right to determine his jurisdiction and to determine all questions which might be raised before him in connection with this matter. I think the court had a right to determine all questions of jurisdiction, precisely as I think this court has the express right to determine any questions before it.

Sir EDWARD FRY. It has the express power.

Mr. RALSTON. Yes; the express right is given under Article XLVIII of this convention. Nevertheless, the court would have the right without it, and I will have to submit yet some observations upon that point.

I stated a moment ago that in our belief, and it is our position, that an arbitral body has a right to determine its competency under the compromis. That power is particularly given this court by article 48.

This part of our contention, and one of the first principles that we would lay down, is that an arbitral court possesses inherent power to pass upon its own jurisdiction, and we believe that the former court, the court of thirty years ago, possessed the power to pass upon its own jurisdiction. Ordinarily, as we know, in the due course of law, appellate courts are provided which have the power of review over the actions of lower courts. In this case (that arising under the convention of 1868) no such power exists—no such power of review exists. It must have rested then with the court itself, for who else was to pass upon the question of jurisdiction? Not the parties, surely. For if the parties themselves were to exercise the power of review of the judgments of arbitral courts upon questions of jurisdiction, it would result simply in setting at naught the arbitration. Not a superior court, for there was none. Not a later court, because, except by a convention of the parties, the later arbitral court can only have the express powers given it under the protocol. If such power be given under the protocol expressly, well and good, but certainly not otherwise; and that power has not been given here.

In discussing, therefore, this particular subject, I say in my brief:[a]

> We have adverted to the principle that power must rest somewhere to determine the jurisdiction of an arbitral court, and in the case under consideration, this power not having been reserved for any other authority, must, as we believe, be considered to rest in the court itself.

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[a] Page 213, this volume.

The analogy existing between international and private arbitrations is such that we are justified in believing that if private arbitrators possess the power to determine their own jurisdiction and to interpret the instrument creating them, for stronger reasons must the same power be regarded as resting in international arbitral courts, bodies of infinitely greater dignity and importance, and from whose actions consequences may flow of vastly more importance to the welfare of mankind.

I am reading now from the top of page 23[a] of the Statement and Brief on Behalf of the United States. The first reference, as you will note, is to Répertoire Générale Alphabetique du Droit Français:

Tout tribunal a le droit et la devoir de statuer sur sa propre compétence.

"Civil law judges," as we find, "have many times passed upon the powers of arbitral courts in this respect, and have held: Que les arbitres peuvent connaître de leur compétence bien qu'ils n'y soient pas expressément autorisés par le compromis," which is precisely our contention. Even though no express authorization be given in the compromis itself, nevertheless the arbitrators must pass upon that question—must have that power.

Ce n'est pas la juger hors des termes du compromis: le droit de juger de leur propre compétence est la conséquence naturelle du caractère de juges dont ils sont investis par les parties.

From this flow the natural consequences expressed under the same title in paragraph 60:

Lorsque le tribunal se déclare compétent il doit nécessairement statuer sur la cause qui lui est soumise à peine de déni de justice.

The rule so laid down by the civil law authorities is the rule followed also by common law courts. I read for the moment just a single citation from volume 2 of the American and English Encyclopædia of Law. I have had bound together from that work the single title, "Arbitration and award," which is at the service of the tribunal. I read from page 795:

Where the parties agree to submit certain legal questions to the decision of an arbitrator, and one of the parties subsequently sued the other, and the subject matter of such suit was the same as that upon which the arbitrator's decision was rendered, it was held that the award was the law which governed the case.

Again:

An award under a common law arbitration is not required to be made a judgment of any court. It is binding between the parties until set aside—

which could not be true except it be that the arbitral court has power to pass upon its own jurisdiction.

Now the question as to the right of a mixed commission or international board of arbitrators to pass upon its own powers has several times been under active consideration. The earliest example in American practice is discussed in Moore's International Arbitrations, and relates to the commission formed under Article VII of the treaty between the United States and Great Britain of November 19, 1874. (I am reading still from page 23 of the brief.[b]) "In that case the British commissioners attempted by withdrawal to deny the power of the court to determine its own jurisdiction, but the British Government refused to sustain them in their position."

We have quoted somewhat at length from the opinion of Mr. Gore, one of the American commissioners:

A power to decide whether a claim referred to this board is within its jurisdiction appears to me inherent in its very constitution, and indispensably necessary to the discharge of any of its duties.

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[a] Page 213, this volume. [b] Page 214, this volume.

To decide on the justice of the claim it is absolutely necessary to decide whether it is a case described in the article. It is the first quality to be sought for in the examination. To say that power is given to decide on the justice of the claim, and according to all the merits of the case, and yet no power to decide or examine if the claim has any justice, any merit even sufficient to be the subject of consideration, is to offer in terms a substance, in truth a phantom.

To my mind there can be no greater absurdity than to conceive that these two nations appointed commissioners with power to examine and decide claims, prescribe the rules by which they were to examine them, authorize them for this purpose to receive books, papers, testimony, examine persons on oath, award sums of money, and solemnly pledge their faith to each other that the award should be final and conclusive both as to the justice of the claim and to the amount of the sum to be paid, and yet give them no power to decide whether there is any claim in question.

It is a contradiction in terms to say that a measure adopted shall terminate all differences, and yet that the very measure presupposes a new negotiation on what are the differences.

The objection that the board is incompetent to decide whether these cases, or any of them, are within the description submitted arrests and stops all proceeding and, in fact, renders the article null and illusive.

To say that the board has authority to decide that a cause is not within its jurisdiction, and yet no authority to decide that a case is within its jurisdiction, appears to be a contradiction too glaring to be persisted in. That the commissioners have a right to decide in favor of one party only—in favor of the party complained against, but not in favor of the complainant—can not be true.

Mr. Pinkney, the other American commissioner, followed, expressing substantially the same view. And our own idea with regard to the position taken by the American commissioners receives more than ample confirmation in the fact that when this question, the very question arising in this case, was referred, as it was, to Lord Chancellor Loughborough, of England, he said:

The doubt respecting the authority of the commissioners to settle their own jurisdiction was absurd; and they must necessarily decide upon a case's being within or without their competency.

We have, therefore, a position taken by the American commissioners in favor of the tribunal passing finally upon its own jurisdiction, the British representatives withdrawing, the question being referred by them to Lord Loughborough, or by the English State Department to Lord Loughborough, and his decision confirming the position taken by the American commissioners. And to that position we adhere, and we say with Lord Loughborough that a doubt respecting the authority of the commissioners to settle their own jurisdiction would be absurd. They must have that right. And that is the first, the primary question, for discussion when we consider whether the case coming before this tribunal be *res judicata* or not. Had the former tribunal a right to pass upon its own jurisdiction? Did it pass upon that jurisdiction? According to Lord Loughborough these questions, both questions, must be decided in the affirmative. The former tribunal had the right to pass upon its jurisdiction. It did pass upon it and it passed upon its jurisdiction, sustaining it.

I have referred to one or two other cases, which happen to be American ones, one between the United States and Venezuela, in which questions were raised as to whether the court should or should not take jurisdiction of a given claim, and in the particular instance the court declared themselves competent. If they had declared themselves incompetent surely they would have been within the exercise of their powers. The converse of the question ought to be and must be true that they were within their powers when they declared themselves competent.

I take the liberty of reading, because I think it is important in an historical sense as bearing upon article 48 to which reference has been made, an extract from the Chronique des Faits Internationaux, Revue Générale de Droit International, contained on page 25[a] of the brief:

L'arbitrage tend à devenir de plus en plus le droit commun international pour la solution judiciaire des conflits entre les Etats; si cela est, ne faut-il pas, dans le doute, se prononcer pour tout ce qui peut en favoriser l'extension?

Les arbitres doivent donc être seuls juges de leur compétence. Cette doctrine est conforme à la nature des choses: l'affirmation de ses pouvoirs est un attribut naturel de toute autorité. La règle que le juge de l'action est aussi le juge de l'exception est universellement admise dans les rapports de droit civil; pourquoi en serait-il différemment dans l'ordre international?

Telle est au surplus l'opinion de la plupart des écrivains du droit des gens; et l'Institut de droit international, réunion des jurisconsultes les plus considérables du monde entier, a donné à cette thèse l'appui de son autorité; le 28 août 1875, dans sa session de la Haye, il a en effet déclaré, à l'unanimité, que les arbitres doivent prononcer sur les exceptions tirées de l'incompétence du tribunal arbitral. Dans le cas où le doute sur la compétence dépend de l'interprétation d'une clause du compromis, les parties sont censées avoir donné aux arbitres la faculté de trancher la question, sauf clause contraire. (Art. 14, secs. 2, 4.)

M. DE MARTENS. I think, Mr. Ralston, all this question was raised by the case of the Alabama arbitrations. That provoked all that the writers upon the subject of jurisdiction have written since the raising of the question in 1873.

Mr. RALSTON. Yes. The question arose before the arbitral tribunal as to whether the United States had the right to press the claim for indirect damages, and that particular question was never in form submitted to the Geneva tribunal, but nevertheless the judges came together and they expressed their opinion upon that, not upon the question of jurisdiction exactly, but they said that they did not think they could permit indirect damages to be allowed.

Now, the question is interesting, and I have discussed it somewhat in the brief from this point of view. England, at that time, said in effect, that if that question were pressed she would withdraw or perhaps insist upon a new convention. Certainly she would withdraw. She would not allow that question to be passed upon.

In such reading as I have been able to give to the various writers upon the subject of international law there is but one who has denied the right of England to withdraw from that tribunal under such circumstances had she seen fit to do so. That is our suggestion with regard to the position of Mexico when these different new conventions were signed, or even without the signing of any new convention, that if she had chosen absolutely to withdraw the case she might have done it.

Sir EDWARD FRY. Withdraw *from* the case. She could not withdraw the case. What you mean is they might have retired and left the tribunal to go on if they chose.

Mr. RALSTON. Yes, sir. And I think that that is the view of practically all the writers with whom I have any acquaintance on international law, with a single exception, and he goes further in the position which I take than I think it is necessary for us to go, for he denies the right of England even to withdraw. For he says that she, having entered into the arbitration—having once entered into it was bound by such interpretation as the tribunal saw fit to give to the convention itself. In other words, that she submitted absolutely to the jurisdiction of the court in the same sense that a private party submits to the

[a] Page 215, this volume.

jurisdiction of a court and she had not the right to withdraw under any circumstances. It is M. Rolin-Jaequemyns who takes that view, but I think he is a solitary exception upon the point.

All that we insist upon in that regard is what we believe to be the universal language of writers of international law, and that is that there must have been a withdrawal to avoid a decision upon the subject of jurisdiction, and there being no withdrawal there was a full and absolute submission to the right of the arbitrators and ultimately the umpire to pass upon this very question of jurisdiction or of *compétence*.

Now, the opinion of M. Calvo upon the right of interpreting the compromis, is quoted (page 25[a] of the brief):

Ils ont le droit d'interpréter le compromis, préalable intervenu entre les parties, et par conséquent de prononcer sur leur propre compétence.

But without foregoing the point to which I desire particularly to call the attention of the court, we have next the unanimous declaration of the session of The Hague, of what the gentlemen there assembled conceived to be an absolute principle of international law at that time—in 1875. That is, that the arbitrators themselves should pronounce upon the pleas or the exceptions relating to the incompetency of the arbitral tribunal. I think we may regard that expression of opinion as the immediate forerunner of the expression which is now embodied in The Hague Peace Convention under which we are operating.

And going back even the year previously, we find M. Goldschmidt discussing the matter in 1874 (cited on page 26[a] of the brief):

Le danger d'un excès de compétence ne justifie point une immixtion préjudicielle du tribunal officiel. Dans l'arbitrage international il y a cette raison de plus, qu'une procédure judiciaire préliminaire est impossible.

Without troubling you by reading at length, we next have the authority of M. Pradier-Fodéré. He finds that, in principle, arbitrators are judges of their competence; that have the right to interpret the compromis.

And the author continues:

Les arbitres doivent donc être considérés comme juges de leur compétence avec le consentement tacite des parties, dans le silence du compromis et en l'absence de toute clause ultérieure; de plus, ce consentement tacite produit sons effet autant que les parties donnent suite à l'arbitrage sans manifester une volonté contraire.

Now, upon that principle we absolutely rely. We have the tacit consent of Mexico that the court should determine its own jurisdiction. We may say that we have the absolute or express consent of Mexico that the jurisdiction should be so determined, because we have her repeated extensions of powers to that tribunal even after it has ceased to have any power in itself. It has then been reinvoked and brought into new being.

I have believed it fair and just to the court that I should cite and I have cited in the course of this brief, the only authorities which might be conceived—the only authorities that I at least have been able to find after a very considerable research—which might be conceived to be in derogation of the powers which we contend belong to all arbitral courts—the court of 1870 by virtue of which we claim and this court—one and the other equally. The only two authorities which I have been able to find which present to the slightest degree any different view are M. Rivier and M. Bonfils. I have cited already a number of authorities

[a] Page 215, this volume.

to the other side. I am justified in relying upon the unanimous opinion of the jurisconsults who were present here at The Hague in 1875. I am justified, as I shall endeavor to show in regarding the declaration contained in The Hague Convention as a declaration of antecedent law and not the making of any new rule of action whatsoever in this respect.

M. Rivier regards a collection of arbitrators as merely an assemblage of mandataries and not a court—a position which I can hardly conceive capable of favorable analysis.

But, nevertheless, M. Rivier although he takes that position, joined with the other gentlemen named at the foot of page 26[a] in the brief in reporting what I have just now read, which I believe to be absolutely law and of great force in this particular case.

M. Rivier says, at least, the committee says, M. Rivier being part of it:

Les exceptions tirées de l'incapacité des arbitres, doivent être opposées avant toute autre. Dans le silence des parties toute contestation ultérieure est exclusе, sauf les cas d'incapacité postérieurement survenus. Les arbitres doivent prononcer sur les exceptions tirées de l'incompétence du tribunal arbitral, sauf le recours dont il est question à l'art. 24, 2me. al., et conformément aux dispositions du compromis. Aucune voie de recours ne sera ouverte contre des jugements préliminaires sur la compétence, si ce n'est cumulativement avec le recours contre le jugement arbitral définitif.

No tribunal of review whatsoever was provided for the old commission. He continues, or the committee continues:

Dans le cas où le doute sur la compétence dépend de l'interprétation d'une clause du compromis, les parties sont censées avoir donné aux arbitres la faculté de trancher la question, sauf clause contraire.

exactly agreeing with the declaration at The Hague, in fact forming part of the declaration of 1875.

Now we think we may, upon that particular proposition, quote M. Rivier against M. Rivier. And when we find M. Rivier in committee in accord with the great weight of authority, we may be justified in believing that that time at least he has been right.

I said there was one other author whose expressions tended to deny the right of the arbitrators to pass upon their own jurisdiction—M. Bonfils.

(La séance est levée à 5 heures et le tribunal s'ajourne au lendemain à 10 heures.)

SEPTIÈME SÉANCE.

23 septembre, 1902 (matin).

La séance est ouverte à 10¼ heures du matin; tous les arbitres étant présents.

M. LE PRÉSIDENT. Je donne la parole au secrétaire-général pour lire une décision du tribunal.

M. LE SECRÉTAIRE GÉNÉRAL. Voici cette décision:

Afin de garantir la marche régulière et continuelle des débats, le tribunal décide ce qui suit:

1°. Les séances du tribunal auront lieu tous les jours de 10 heures à midi, et de 2 h. ½ à 5 heures jusqu'a la fin des débats.

2°. Toute proposition ou demande des parties en litige concernant la marche de la procédure arbitrale ou l'interprétation des règles établies devra être formulée par écrit.

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[a] Page 216, this volume.

M. LE PRÉSIDENT. Cette décision sera communiquée aux parties immédiatement. La parole est à l'agent des Etats-Unis d'Amerique pour continuer son discours.

Mr. RALSTON. Before continuing my remarks upon the subject-matter of the dispute, I desire to present to the Court, if it be not in opposition to the last clause read, a telegram from M. le Chevalier Descamps, in which he says:

Reine morte. Pourrai plaider lundi. Priez mes confrères de me reserver la réplique. Descamps.

I desire to say with reference to this that our arrangements are such that it will not be possible to reserve for M. Descamps, as he requests, the final reply on the part of the United States. That particular duty falls to the Solicitor of the State Department of the United States. We are, however, very greatly disappointed that M. Descamps can not be here this morning. We had confidently counted upon his presence and his assistance. Under the unfortunate circumstances, for which we should not ourselves desire to suffer, nor should we desire, if it may be, that M. Descamps should lose the opportunity of presenting the considerations which most strongly appeal to him in the case—under the unfortunate circumstances I beg to present to the court an application, if it be not in opposition to the rule already announced, an oral application for the privilege to be granted M. Descamps to speak at some subsequent time—say, as he suggests, Monday—but not to interfere with the final reply on behalf of the United States which remains to Mr. Penfield. I appeal simply to the good graces of the court in the matter, without in any degree presenting it, of course, as a matter of right in view of the rules already adopted by the court. Nevertheless it is something which we would highly appreciate, and I am sure would be appreciated by M. Descamps.

M. LE PRÉSIDENT. Nous avons à délibérer sur la question de savoir si nous pourrions ajourner les séances, mais nous sommes arrivés au résultat qu'il faut continuer les débats.

M. BEERNAERT. Je demande la parole.

M. LE PRÉSIDENT. M. Beernaert a la parole.

M. BEERNAERT. J'ai l'honneur d'annoncer à la Cour que je la saisirai d'une demande analogue à celle de M. Descamps, mais dans une beaucoup moindre mesure. La Cour sait quelle est la position politique que j'ai occupé et que dans une certaine mesure j'occupe encore. Quelque soit mon désir de tenir compte de l'intention qu'a exprimée la Cour de terminer promptement les débats—je n'ai pu en donner une meilleure preuve qu'en m'excusant au Congrès de Hambourg—il est cependant impossible que je n'assiste pas aux funérailles de la Reine. Je bornerai donc la demande écrite dont je vais avoir l'honneur de saisir le Tribunal aux séances de jeudi et de vendredi. Dans cette hypothèse, il me semble que nous pourrions avoir promptement fini. Mr. Ralston a annoncé l'intention de terminer aujourd'hui, si jé ne me trompe. . . . .

Mr. RALSTON. Je le pense.

M. BEERNAERT. Il finirait donc aujourd'hui, et il resterait la séance de demain—mercredi—pour entendre M. Descamps, s'il prend part à la première plaidoirie. Si M. Descamps ne prend pas part à la première plaidoirie et se réserve la réplique, M. Delacroix prendrait la séance de demain, nous reprendrions samedi, et je ne pense pas que pour ce qui nous concerne il nous faille plus de deux séances, c'est-à-dire celle de mercredi si M. Descamps ne parle pas et celle de samedi.

Dans l'autre cas, il nous suffirait des audiences de samedi et de lundi. La Cour voit que nous sommes extrêmement préoccupés de tenir compte de ses convenances que nous comprenons, mais j'espère qu'elle voudra bien aussi tenir compte de la situation dans laquelle nous nous trouvons par suite d'un évènement aussi malheureux que possible et assurément imprévu. J'aurai l'honneur de la saisir de ma demande écrite.

Je dois ajouter, messieurs, que je ne suis pas seul dans ces conditions: Son Excellence M. Pardo, la Cour le sait, est accrédité auprès de la Cour de Belgique comme il l'est auprès de la Cour de Hollande; il doit donc nécessairement lui aussi—il est invité officiellement à la cérémonie—quitter La Haye; nous partirons ensemble aussi tard que possible, c'est-à-dire demain mercredi soir.

Mr. RALSTON. Mr. President and honorable arbitrators:

Recognizing the unhappy circumstances of the case, we should certainly not think of opposing the proposition of Mr. Beernaert; that is, that the court adjourn on Thursday and Friday, which would enable Mr. Beernaert and Mr. Pardo to attend the funeral of the Queen. Unfortunately I have not been able to see M. Descamps since last Tuesday, and I can not speak of his engagements other than may be indicated by the telegram which I have before me. It is not, of course, my desire in any degree to disarrange the order of speeches already laid down by the court. In his telegram, as read, he asks leave, if possible, to address the court on Monday—"Pourrai plaider lundi"—and it is that request that I desire to submit. I assume from the contents of the telegram that it would not be possible for him to be here to-morrow. If he could be here then, I should personally much prefer that he proceed at that time. I submit, therefore, the question to the consideration of the court as to whether he may speak, even out of order, arriving on Monday.

M. LE PRÉSIDENT. M. Descamps ne peut donc plaider demain?

M. DE MARTENS. Si vous avez la bonté, Mr. Ralston, de prévenir M. Descamps que le tribunal a décidé de siéger continuellement, peut-être alors prendra-t-il des arrangements afin de pouvoir, s'il le faut absolument pour lui, assister à l'enterrement de Sa Majesté la Reine de Belgique, et, comme la distance entre Bruxelles et La Haye est seulement de 3 heures, je crois que pendant une journée il pourrait parfaitement faire ce voyage à Bruxelles et revenir. Il me paraît qu'une demande catégorique de votre part le mettra tout-à-fait en état de s'arranger afin d'être ici s'il est possible demain.

Mr. RALSTON. I will then have a telegram sent, with the permission of the court, addressed to M. Descamps, urging him by all means to appear here to-morrow, and that despatch will go immediately. I can not anticipate the exact length of my own argument, but I do not anticipate it will take all of to-day, so there may be a hiatus perhaps between the end of my speech and the coming of M. Descamps.

Mr. RALSTON. Mr. President and honorable arbitrators:

I desire to sum up for a moment, in opening this morning, some of the positions to which the attention of the court was invited on yesterday.

After the preliminary observations and a discussion of the foundation of the claim we considered the jurisdiction of the mixed commission as fixed by the convention of 1868, and as admitted by Mexico because of her repeated extensions of the function of the original

mixed commission without any objection to the consideration by it of the question of the right of the United States to maintain this action in the face of the provisions of the original convention of 1868.

Sir EDWARD FRY. Did you not go over this yesterday?

Mr. RALSTON. Yes, sir. This is only, if your honor please, by way of inducement. I desire, however, to call the attention of the court to the further consideration which was not discussed in this connection yesterday, but which is found in the original project of M. Goldschmidt, referred to on page 30[a] of my brief. It will be seen that that writer considered that it was the duty of the party objecting to the competency of the court to raise that objection at the first opportune moment. And the particular language used by him, to which I invite your attention, is this:

Si l'exception d'incompétence n'est pas opposée au premier moment opportun ou si l'exception opposée en temps utile ayant été repoussée par le tribunal arbitral, les parties passent outre sans faire de réserves, toute contestation ultérieure de la compétence est exclue.

I call the attention of this tribunal to the fact that the parties did pass beyond the question of competency without making any reservation of any rights of discussion of it in any future time.

The same view we also find, noted on the brief at the same page, was entertained by M. Rolin-Jacquemyns and also by M. Calvo in his work in the following language:

La partie que soulève ainsi devant les arbitres une exception d'incompétence a le droit d'y ajouter des réserves formelles de nullité totale ou partielle de la sentence à intervenir pour le cas où l'exception serait rejetée par les arbitres. A défaut de présenter de pareilles réserves, la partie que soulève l'exception est censée avoir accepté d'avance la décision arbitrale comme définitive et sans appel.

Repeating what, I say, we find here that the parties passed beyond the question without the formal reserves in the case of the exception being rejected by the arbitrators. Without reading it in extenso, we also find the language of M. Pradier-Fodéré to the same intent, quoted on page 31[a].

So that from our point of view the question of jurisdiction and the question of the right of the former tribunal to pass absolutely and finally upon its jurisdiction are settled because of the making of further conventions and because of the absence of any reserves noted by Mexico in connection with the decision of the question.

The point at which discussion ceased yesterday had reference to the differences of opinion entertained by M. Rivier on two several occasions, and I made the statement that I was able to find but two who entertained the idea that the arbitral court was not, in fact, a true court, M. Rivier and M. Bonfils.

I call your attention to the language of M. Bonfils, on page 27[b] of the brief, in which he is quoted as saying, among other things:

Les arbitres ne peuvent pas statuer eux-mêmes sur leurs pouvoirs et déterminer les limites de leur compétence. Bluntschli pensait autrement; mais son opinion est erronée. Un mandataire ne saurait fixer lui-même la portée et l'étendue de son mandat. Si des doutes se produisent, les arbitres doivent en référer à leurs mandats et leur demander l'extension de leurs pouvoirs et une fixation plus nette et plus précise de l'objet du compris.

Now the two theories, therefore, with regard to the arbitral courts are, on the one hand, that they constitute true courts, with all the powers and with all the attributes of courts. They have power or faculty of passing upon the instrument which creates them or determining

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[a] Page 219, this volume.

[b] Page 216, this volume.

their own powers as any other court of last resort would do. The other view is that they are simply a collection of agents who, in the case of any doubt being raised, must refer the question for solution to their mandants. As between the two views, it seems to me there should be little doubt as to the correct one. And I find even that such is the opinion, apparently, of the editor of the work of M. Bonfils, who says that article 48 of the Hague Convention, "a consacré l'opinion de Bluntschli," that the arbitrators could determine their own powers and pass absolutely upon the question of competency.

I have cited in the brief, commencing on page 28[a], references to a number of writers on the subject of international law covering this particular question. We have an eminent English authority in the person of Mr. Hall, who finds in accordance with the ideas we present that: "The arbitrating person or body forms a true tribunal, authorized to render a decision obligatory upon the parties with reference to the issues before it. It settles its own procedure when none has been prescribed by the preliminary treaty; and when composed of several persons it determines by a majority of voices."

And the opinion of M. Calvo is also to the point:

> Les arbitres, une fois nommés, forment, bien qu'ils ne tiennent leurs pouvoirs que des parties, un corps indépendent, un véritable tribunal judiciaire. Ils ont le droit d'interpréter le compromis préalable intervenu entre les parties et par conséquent de prononcer sur leur propre compétence.

I have quoted in the brief, as it has happened, M. Descamps. I need hardly explain to this tribunal that at the time this brief was prepared in America it was as far from my thoughts as well could have been that M. Descamps would appear in this case or have any possible connection with it. The brief was printed in the Government Printing Office in Washington six weeks or two months ago, so that when I quote the opinion of M. Descamps it will be well understood it is not the opinion of the advocate, but M. Descamps, when speaking as a jurist before an eminent collection of jurists and with reference to the action of such a collection of publicists. So we find his language:

> L'arbitrage n'est pas une tentative de conciliation. L'arbitre est juge et statue comme tel.

Before all, the language so far quoted, is, as we see from further inspection, in exact line with the language of the civil law quoted in the brief. And upon the question of "Arbitrage," we find in Vol. IV, Répertoire Générale de Jurisprudence:

> Le droit de juger leur propre compétence est la conséquence naturelle du caractère de juges dont ils sont investis par les parties.

We find them spoken of, therefore, by the best authority of which I have any knowledge under the civil law; the best collection, at least of authors of which I have any knowledge, as judges.

> Il est vrai que les arbitres ne sont pas revêtus de fonctions publiques et que leurs pouvoirs n'ont d'autre source que la volonté des parties. Mais il faut remarquer que le législateur ne considère pas les arbitres comme de simples mandataires;

differing absolutely, as will be noted, from the language of MM. Rivier and Bonfils in the passages quoted from them. It continues:

> Leur sentence a par elle-même autorité de chose jugée; de plus, elle ne peut pas être revisée, quant au fond, par le juge qui est chargé d'y apposer son ordonnance d'exéquatur. C'est donc que les arbitres ne sont pas seulement des mandataires,

[a] Page 217, this volume.

mais aussi des juges; et par conséquent, leur sentence doit avoir la même force probante que les jugements.

And according to our view that probative force which attaches to the judgments is conclusive in its nature. It determines all the issues, as we shall come to see, properly placed before the court.

As fortifying the view which we have desired to present, it has seemed well to us to call the attention of this honorable tribunal to the general rule of interpretation applicable to the "compromis" and applying with absolute force to the body before which we have the honor of appearing, and which in our judgment applied with equal strength and force to the proceedings of the commission of 1868.

We find that this has been discussed in the following manner. I read from my brief, on page 29[a]:

Some of the writers upon international law have laid down a rule for the interpretation of the compromis, which rule seems to us in accord with common sense and with the necessities of the situation, and presents to us the point of view from which former Mixed Commission may properly have regarded the instrument they were called upon to construe.

Dans tous les cas où le tribunal arbitral entretient des doutes sur l'étendue du compromis, il doit l'interpréter dans son sens le plus large.

In other words, it ought to interpret it in the sense confirmatory of its own powers. It ought not to give a narrow, restricted interpretation to the instrument under which it acts.

And we have the further consideration suggested by M. Rolin-Jacquemyns (page 29[a] of the brief):

La question de compétence ne doit pas être résolue par une stricte interprétation du compromis, mais qu'il faut dans le doute la trancher affirmativement.

Now, if it be granted in an argumentative way that there was a question of doubt raised on behalf of Mexico before the former tribunal, then it became the duty of the former Mixed Commission to interpret the instrument before it in the largest sense and not to give it a strict interpretation. But if we were to say, on the one hand, that it was the duty of the former Mixed Commission to interpret its powers broadly and largely for the purpose of carrying out all the ends sought to be obtained by the two countries, and if we were, on the other hand, to say that nevertheless that interpretation so reached were to be regarded as a nugatory thing, we would place ourselves, as we submit, in an entirely incompetent and entirely contradictory position. We can not say in the one instance, "give this instrument a large interpretation," and in the other, "if you give it the large interpretation we will disregard what you do." So that we claim for the action and the interpretation of the former Mixed Commission all the effects which naturally flow from the decision of any court whatsoever being competent to pass upon its own powers as this was.

I have inserted at this point, as having a tendency to support the argument now presented, reference to the decision of the Court of Appeals of England, cited in 62 Law Journal (page 29[a] of the brief), Gueret *v.* Andoury, wherein it was held that where parties to a contract have referred to arbitrators the question of its construction, their award is conclusive evidence as to the construction in a subsequent action brought for other breaches of the same contract. And if that rule may prevail, as it undoubtedly does, in disputes which exist between private individuals and where the arbitrator is not invested with any

[a] Page 218, this volume.

powers proceeding from the consent of governments in themselves sovereign, surely the same rule must apply with added, with multiplied, force in the case of tribunals solemnly sitting to judge questions which have arisen between nations.

The next question to which I desire to invite the attention of this tribunal is: Does the doctrine of *res judicata* apply to arbitral decisions?

It would seem to us in fact, without any extensive argument, that an affirmative answer must follow from the considerations which have already been adduced. But we have not felt at liberty to present this case to this honorable tribunal upon any assumptions, either of fact or of law, and we are fortunately able to sustain the position we take by a plentitude of citation, both from the civil law and from the common law.

I shall therefore trouble you with references sustaining our position, which will occupy me for a few moments, reading largely from my brief. We find the civil-law rule as follows, as stated in the Répertoire Générale de Jurisprudence, Volume IV (page 31[a] of the brief):

> Les sentences arbitrales acquièrent autorité de chose jugée comme les autres jugements, dès quelles sont devenues inattaquables par l'expiration de délais établies.

And again, under another title, in the same work (page 32[a] of the brief):

> Les sentences arbitrales sont de véritables jugements; elles sont donc investies de l'autorité de la chose jugée.

As indicated, the consequence necessarily flows from the existence of the precedent condition that they are true courts.

I am fortunately again able to say that on a proposition of this importance in the discussion of a question of this magnitude the common law of England and America is at one with the civil law of the continent of Europe. And the declaration of the rule of common law, cited in my brief, page 32,[a] is that—

> An award of arbitrators with jurisdiction can not be collaterally impeached for errors or irregularities in the proceedings.

And again:

> Whenever any person is given authority to hear and determine any question, such determination is in effect a judgment having all the properties of a judgment pronounced in a legally created court of limited jurisdiction.

I desire for a moment to fortify the situation already given by another reference, which is not in my brief, and which I should be obliged if the court would kindly note, to the American and English Encyclopædia of Law, on "Arbitration and award," page 795, wherein it is said that, "Even when erroneous, the award, if fairly made, is binding."

I do not know, but I may fairly presume, that it will be the contention of Mexico that the former award was erroneous; that the court failed to properly appreciate some of the suggestions or implications of evidence from the standpoint of view of Mexico.

But if we could grant that—and on behalf of the United States we deny it—if we could grant that the award being fairly made is binding, and it is a pleasure to be able to say that the fairness of the former award has never been in the slightest degree attacked. We stand here with no suggestion of unfairness of treatment, with no suggestion of evidence wrongly presented before the court, with no suggestion of fraudulent conduct on the part of anybody, and under

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[a] Page 220, this volume.

such circumstances, the award being fairly made, we claim it as binding.

And again I read from the Encyclopædia of Law (p. 794), not, however, cited in the brief:

The rule is that an award is a final judgment, both at law and in equity, in regard to all the matters within the scope of the submission disposed of by it as between the parties thereto, binding on them for all time, unless it is expressly provided that it shall have binding force and effect for a limited time only.

Following further the discussion contained in the brief (p. 32:)[a]

The weight of authority in the United States leans toward making absolute the certain and simple rule that the award of arbitrators, when made in good faith, is final, and that it can not be questioned or set aside for a mistake, either of law or of fact.

I read next from one of the most celebrated of American jurists, one whose name in the United States is national, whose words are always quoted with respect, and who presided over the highest court of the State of Massachusetts for a long term of years, and did much toward settling the jurisprudence of that State as well as of the United States, Mr. Chief Justice Shaw. Speaking of the weight to be given to the finding of arbitrators, Justice Shaw said:

It is within the principle of *res judicata*. It is the final judgment for that case and between these parties. It would be as contrary to principle for a court of law or equity to rejudge the same question as for an inferior court to rejudge the decision of a superior, or for one court to overrule the judgment of another, where the law has not given an appellate jurisdiction or a revising power acting directly upon the judgment alleged to be erroneous.

And again there are many American and English citations, contained on page 805 of the Encyclopædia of Law, to which I have referred, to the effect that "where an award is admissible in evidence, it is conclusive between the parties." And that is the language also of the most excellent English writer cited on several occasions by Mr. McEnerney in his very able exposition of this case on yesterday:

A decision in a former suit in accordance with an award of the arbitrators, to whom the matter should have been referred, would be *res judicata;* such an award having, as observed by Mr. Justice Bell, in Lloyd *v.* Barr, the same legal effect as the verdict of a jury and judgment thereon under an issue strictly made up. Mr. Herman, speaking of the law of the American courts, says that a judgment on an award is to all intents exactly of the same force as a judgment on a verdict.

Sir Edward Fry. From what book are you quoting?

Mr. Ralston. Page 125 of Chand on the Law of Res Judicata, referred to yesterday by Mr. McEnerney in his able presentation of the case.

The next question in the regular development of the argument which I have laid out for myself is: Does the docrine of *res judicata* apply to international arbitral decisions?

We may refer, as incidentally bearing upon the argument, to article 18 of the Hague Convention, which to our mind is rather a declaration of principle than merely an exposition of law intended to apply solely to future arbitrations. For that article says (page 33[b] of the brief):

La convention d'arbitrage implique l'engagement de se soumettre de bonne foi à la sentence arbitrale.

M. de Martens. We have this already before us, I think.

Sir Edward Fry. I believe we have all read your brief.

(Some discussion among the arbitrators).

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[a] Page 220, this volume. [b] Page 221, this volume.

M. DE MARTENS. Yes; we have.

Mr. RALSTON. If you have, that will shorten materially my argument. I have further discussed this matter in my brief and need not spend any particular time now over the subject as to when arbitral awards may be attacked. I have sought to refer to the authorities which were available to me upon that subject.

Sir EDWARD FRY. I am not aware of any attack being made. Mexico has not attacked the award.

Mr. RALSTON. Yes; if I may be pardoned, there is an intimation, a strong intimation, in the answer of Mexico that she intends to attack this arbitral award. She attacks it when she says that it has no force, that she is entitled to go back of it, and that she is entitled to ask at your hands a review of all the facts leading up to the former adjudication. That, as it seems to us, is a very direct attack upon the arbitral award of the Mixed Commission of thirty years ago, and it is for that reason that I have spent as much time and labor as I have in discussing that question. We have to consider the question as to whether the former arbitral award was or was not conclusive of the facts of the case.

I say that Mexico has attacked it. Of necessity she has done so, as will appear from the careful consideration of her answer attached to the replication, for if she admits the jurisdiction of the court, which, in my mind, she does not do by her answer—if she admits the jurisdiction of the court—then the only question which remains, as it would seem to me, for consideration by this tribunal is whether the consequences which we claim flow from the former adjudication; and that is the question to which I desire to address myself.

It is the contention of Mexico that, even granting the jurisdiction of the former tribunal, granting that it had the power to adjudicate all that it then adjudicated, nevertheless that adjudication is not binding for future time as to the amount justly due by her on later instalments to the bishop of California, represented here by the United States. Her contentions, therefore, are two-fold: First, that the former adjudication had no binding character whatsoever upon this court; and, secondly, that whatever weight might be given to it, the consequence which we claim from it as fixing the annual amount of interest to be paid by Mexico does not flow.

It is contended on behalf of Mexico in the letter of Sr. Mariscal, the secretary for foreign affairs, contained in the diplomatic correspondence, that there is but one part of the judgment which is to be considered as decisory in its character, and that we must reject all the considerations leading up to that one single point of final determination. In his letter he contends to the effect that only the "*dispositif*" or decisory part of the judgment has the force of *res judicata*. We prepared and submitted to the State Department an answer to that contention on behalf of Mexico, the answer so submitted commencing on page 51 of the diplomatic correspondence. On page 54 the effect of the citation from Laurent is discussed.

Mr. Laurent had been quoted as follows:

> The creditor sues his debtor for interest of the principal sum, the judge condemns the debtor to pay. Is there *res judicata* in respect to the principal? It is supposed that the decisory part of the decision fixed the amount of the principal, and it has been decided that a decision in these terms does not give the force of *res judicata* with respect to the principal itself.—Citing Dalloz, Chose Jugée.

Beneath is to be found the exact citation from Dalloz to which

M. Laurent refers, and, as we argued then, we think on examination it proves to be without force to sustain the contention urged, and, furthermore, as noted below, we find on the very same page of Laurent a discussion of the principle which states it in terms which would be applicable to the present case:

Un jugement accorde à une personne des aliments en qualité d'enfant. A-t-il l'autorité de chose jugée sur la question de filiation? Si la question a été débattue entre les parties, l'affirmative n'est point douteuse.

The questions which were discussed before the former tribunal, as this tribunal is aware, were the existence of the fund, which was a fact found; the purposes for which that fund was intended, which was found; the obligation of Mexico to pay the California bishops their due proportion of the income of that fund, which was found; the amount so payable, which was fixed, and including in that the rate per cent per year. All of these were fixed, and in addition, the number of years for which there had been default, and, summing up these various elements, the conclusion was reached that some forty-three thousand dollars per year was the quantity which should be paid to the Roman Catholic bishops. The contention of Mexico is, if I correctly apprehend it, that the former adjudication, if *res judicata* at all, was conclusive merely as to the decisory part, and that decisory part was nothing more than the direction to pay some $904,000, but was not conclusive as to the various elements without which that decisory part could not have existed. Our contention in answer to that is two-fold in character; the first is, that in point of fact the adjudication as to the annual interest does form part of the decisory portion of this judgment, for we find in the opinion of the umpire, given on page 609, the direct statement that—

The annual amount of interest, therefore, which should fall to the share of the Roman Catholic Church of Upper California is $43,080.99, and the aggregate sum for twenty-one years will be $904,700.79.

These are not the last words, of course, of the opinion, but they are as much the decisory part as they could possibly be. They sum up his opinion in a few words, although the concluding lines are:

The umpire consequently awards that there be paid by the Mexican Government, on account of the above-mentioned claim, the sum of nine hundred and four thousand seven hundred Mexican gold dollars and seventy-nine cents ($904,700.79) without interest.

Our first contention, therefore, is that the award itself has included that very thing in its decisory part, and under that contention may be embraced the further one that it is stipulated by the protocol under which this court is convened, that that very fact was found by the arbitrators, for it will be found, reading from page 48[a] of the Appendix, and referring to the protocol under which we are acting.

M. DE MARTENS. Which page?

Mr. RALSTON. Page 48.

Whereas said mixed commission, after considering said claim, the same being designated as No. 493 upon its docket, and entitled Thaddeus Amat, Roman Catholic bishop of Monterey, a corporation sole, and Joseph S. Alemany, Roman Catholic bishop of San Francisco, a corporation sole, against the Republic of Mexico, adjudged the same adversely to the Republic of Mexico and in favor of said claimants, and made an award thereon of nine hundred and four thousand seven hundred and 99/100 (904,700.99) dollars; the same, as expressed in the findings of said court, being for twenty-one years' interest of the annual amount of forty-three thousand and eighty and 99/100 (43,080.99) dollars upon seven hundred and eighteen thousand and six-

[a] Page 158, this volume.

teen and 50/100 (718,016.50) dollars, said award being in Mexican gold dollars, and the said amount of nine hundred and four thousand seven hundred and 99/100 (904,700.99) dollars having been fully paid and discharged in accordance with the terms of said convention, etc.

So that, I think, we are justified in saying that the matter in point of fact is beyond discussion by the very terms of the protocol; but inasmuch as in the answer of Mexico this point is renewed on her behalf, we find ourselves compelled to continue the discussion beyond the point to which it has so far been carried. As this honorable tribunal is familiar with the brief placed before you, I need only state that the common law and the civil law authorities therein contained reach the position that whatever was of necessity implied or flowed as a necessary consequence from the finding of the judgment is to be considered as an integral part of it, and not to be divorced from it, and such has been the language in effect of many French and English courts cited in the brief, and such is the language as cited also from Chand and given by him on pages 48 and 49, not cited in the brief, with illustrations there given. I take a moment to read these citations, as they are not contained in the brief, and I commence on page 47 as giving examples of the rule:

In Gardner *v.* Buckbee, also, the suit was on a promissory note. The defendant alleged that that note with another was given for the price of a shop which was sold fraudulently by plaintiff. The plaintiff replied that the issue as to the sale being fraudulent had been decided against the defendant in a former suit on the other note, and that decision was held to be *res judicata*. In *Van Dolsen* v. *Abendroth* and *Cleveland* v. *Creviston*, a decision for the plaintiff for the amount of the interest claimed in respect of a bond was held to be *res judicata* in a suit for the amount of the bond, as to the plea of the bond being invalid for fraud, on the ground that that plea ought to have been raised in the former suit. Mr. Herman, citing a number of other cases, says: "In an action on a promissory note where the defence was fraud and the judgment was rendered for the defendant, the verdict was held in another action on another ground, growing out of the same transaction, conclusive evidence of the fraud. * * * On the same principle in an action of *assumpsit* for goods sold and delivered, a verdict against the vendee on the ground that the same was fraudulent as against the vendor's creditors is conclusive of fraud in the subsequent action between the same parties for other goods which were not included in the first action."

Then there are a large number of citations of similar effect, with which I shall not trouble the court at the present time, simply making the reference.

In the discussion of this general subject, contained in the answer of Mexico, reference has been made to Griolet as an authority upon the subject of *res judicata*, to the discussion of Savigny, which is quite notable in the history of jurisprudence, and to Pantoja upon certain incidental points. I may say that unfortunately I think every reference contained in the answer of Mexico has been erroneous. I should make one single exception—the reference to the letter of Secretary Bayard. We have, with exceeding great difficulty, verified all of them and given the correct pages in the notes, except the reference to Pantoja. That we are entirely unable to verify. We can not find any corresponding pages. I call the attention of the agent of Mexico to that at this time, with the request that he will kindly furnish us with the correct reference to Pantoja. The others, as I have stated, we have found with a great deal of labor.

The first authority discussed by Mexico to the proposition that the legal principle of *res judicata* applies exclusively to the decision or to the decisory part of the judgment, and that the reasons are not

embraced in it, is that of Savigny. That is not the doctrine of Savigny, although that inference might perhaps be drawn from the manner in which the printer has presented the answer of Mexico. Savigny refers to it as a doctrine entertained by various ancient authors, a large number of authors, as he says, but it is not his doctrine, and he so expressly states. But the discussion by Savigny of the general underlying principle is one which I am sure the court must have found extremely interesting, for his discussion is referred to very generally, I suppose, by European writers, and his conclusion might be briefly expressed as that the force of *res judicata*, or *chose jugée*, applies to what he terms the objective parts of the judgment; that is, the things which must be found by the court in order to reach a given conclusion, as, for instance, applying it to this case, the amount of annual interest which had to be found before fixing the sum total for twenty-one years, but does not apply to what he terms the subjective reasons or the reasons which bring the mind of the court to conclude that particular things essential in the formation of a judgment are existent; for instance, the force of *res judicata*, under the doctrine of Savigny, would apply to the fact found that $43,000 per year was due by Mexico to the Roman Catholic bishops of California, but would not apply to the particular reasons which induced the mind of the court to reach that conclusion, and the particular things concluded, the things which enter into, which form the integral and inseparable part of the judgment, *form* part of the *res judicata*. Thus he says:

Les motifs (meaning in this sense, as my contention is, as explained by him; that is to say, the objective *motifs*) font partie intégrante du jugement, et l'autorité de la chose jugée a pour limites le contenu du jugement y compris ses motifs.

He further comments:

Ce principe important, conforme à la mission du juge, a été formellement reconnu par le droit romain et appliqué dans tout son extension.

So that we may cite with absolute reliance, so far as our position is concerned, Savigny, an author of the very highest repute. It is true that Griolet, an author, we may say fairly and justly of very much less celebrity, has been cited on behalf of Mexico as differing from Savigny, and his particular language in the way of difference has been quoted in the answer of Mexico, but, as will appear by reference to the Replication on behalf of the United States, even Griolet qualifies his own language of criticism of Savigny, and so qualifies it as to make that criticism, in our judgment, meaningless, for we find, quoting from the foot of page 5 of the Replication,[a] referring to the distinctions made by Savigny between objective and subjective motifs, that Griolet says:

Cette théorie est exacte dans sa plus grande partie, parce qu'on voit que M. Savigny considère comme motifs objectifs de la sentence les rapports de droit en vertu desquels la condamnation est demandée, et les rapports de droit que le défendeur oppose au demandeur, pour neutraliser en quelque sorte l'effet des rapports de droit qu'on invoque contre lui, et éviter ou amoindrir la condamnation.

And we follow our citation from Griolet, with illustrative cases given by him, tending to sustain the very doctrine for which we contend here to-day, and showing, as appears by the extracts on page 6, and which I will not trouble you by reading, that when he comes to apply his own theory of law, he exactly accords in application with Savigny, and agrees with the contention now advanced by us.

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[a] Page 59, this volume.

I desire now, and in connection with the discussion of this question at this point, to refer the court to some statements of principle to be found in another treatise upon this subject, the treatise of M. Lacombe, "De l'autorité de la chose jugée." I shall read from paragraph 68, on page 67, as illustrative of his belief in the absolute necessity for what I may term a substantial following of the doctrine of Savigny, although, as I shall note, he makes some minor criticisms which have no effect or force, so far as this case is concerned, in view of the summing up of his doctrine to be given hereafter. He says:

Je dois dire tout d'abord que l'autorité de la chose jugée restreinte au dispositif seul ne donnerait nullement satisfaction aux nécessités sociales qui l'ont fait instituer, que les auteurs et les tribunaux qui ont proclamé en principe cette restriction n'auraient jamais pu l'appliquer rigoureusement à la pratique, et qu'ils ont dû, tout en la maintenant en théorie, y apporter dans l'application des dérogations sous le nombre et l'importance desquelles elle disparaît presque complètement.

I think the remark just made has a very direct bearing upon the course taken by M. Griolet in this work upon the same subject—that is, as laying down the principle that the force of *chose jugée* attaches only to the *dispositif* of the judgment, immediately proceeding as he does to give a succession of cases cited in the replication of the United States which show absolutely that the formal application of such a rule to a state of facts at all similar to that presented before this honorable tribunal is absolutely impossible. He does not apply the rule laid down by him when the necessity arises.

The writer from whom I am now quoting, M. Lacombe, on page 68 indicates the way, however, which has been resorted to by such writers as M. Griolet to avoid the effect of the rule which he has undertaken to maintain, and in the note this writer says:

Nous devons du reste ajouter immédiatement que la jurisprudence applique la faculté d'interprétation du dispositif par les motifs d'une manière très large, ce qui arrive à restreindre dans une forte proportion les inconvénients de la doctrine que nous combattons,

in other words, to get rid of their own doctrine by interpretation so as to enable courts to arrive at a reasonable result.

Another contention, I read from page 74, paragraph 74:

74. C'est donc dans l'ensemble du jugement sans égard à sa division en diverses parties qu'il faut puiser tous les renseignements qui feront connaître si l'exception est ou non applicable.

The summing up in a few words of this particular author of his theory is contained in a note at the foot of page 79, as follows:

L'autorité de la chose jugée couvre non-seulement la solution proprement dite donnée par le juge, mais encore tous les rapports de droit qui sont liés à cette solution par le rapport de principe à conséquence, et peu importe, quant à ce, que l'opinion du juge à leur égard se trouve exprimée dans le dispositif du jugement ou dans ses motifs.

We have therefore the opinion of the continental text writers sustaining the position taken by the United States that the elements which of necessity enter into the judgment form part of the *chose jugée*. We have the opinion of the French courts, innumerable opinions, almost, cited in the brief to precisely the same effect. We have the opinion of Savigny indicating the same, and I am happy to be able to add, as I have in a note on page 7[a] of the replication, that the courts of the Netherlands entertain precisely the same view, and we see in the brief it is the same as that of the courts of the United States and of Eng-

[a] This volume, page 60.

land. In fact, when it comes to a careful analysis of the situation, the objection which is raised by Mexico on this behalf seems absolutely to disappear, for if it were otherwise, when would there be an end to litigation? Suppose the position taken by Mexico were correct; suppose that it might be said that the *dispositif* of the judgment is the only thing to be looked at, and in that *dispositif* you must only look at the one fact that the defendant has been compelled to pay a certain sum without having the liberty of analysing that statement into its respective and necessary parts, the parts which come together to form the whole; let us therefore imagine for a moment the position in which Mexico might be placed. It calls for the exercise of imagination, as I think must be conceded. We obtained, let us say, under the former arbitral convention, an award against Mexico for $904,000. According to Mexico's contention, nothing is settled by the *dispositif* except that single fact. Well and good. The United States on a subsequent occasion, or the bishops under whatever form of pleading may be appropriate under the circumstances, bring a suit for one of the installments embraced in that twenty-one years. If the doctrine of Mexico be correct, why might they not do it? Mexico might say, You obtained an award against us once for $904,000, and the reply of the United States, assuming Mexico's position, would be, Yes, we received an award of $904,000, but you can not plead that award, because the court has no right to analyse its parts and see what years that particular award covered. Therefore, accepting the very position of Mexico, she would be unable to plead that prior judgment as against a subsequent demand covering part of the same period made by the United States, unless the second tribunal possessed the right to inspect the whole record and to determine from that whole record whether the particular question was in point of fact presented to, discussed by, and passed upon by the preceding court; so that it seems to us that the contention of Mexico, if it be once carefully examined, can be reduced to what logically we might term an absurdity, and that I say, of course, with every respect for my friends on the other side.

While I do not care to trouble this tribunal with reading of matters already submitted to it in printed form, I may be pardoned for again inviting your attention particularly to the decisions of the Netherlands, which seem to us to be in exact accord with right reason upon this point, and we find a case before the Netherlands high court of justice in which it was advised by the procureur-général that every decision of the judge which by reason of the contentions of the parties he might and has given with regard to their rights, is included in the subject-matter of his judgment, no matter in what particular part thereof the decision might be found.

And again, in the discussion by Dr. Opzoomer:

Whatever has once passed through all the forms of a suit and is legally decided by the judge must never afterwards be subject to any doubt.

And further discussing, he says:

From what has been here discussed, it appears that as the legal bases are actually fundamental parts of the judgment of the judge, they should be entirely independent of the place in which they appear in such a judgment. Whether they are found in the so-called *dispositif*, or whether they be anywhere else, is a matter of perfect indifference. They become authority not because of the place in which they appear, but because of the inseparable connection in which they stand to the immediate decision. Those who tear the legal basis from the decision follow the abstract method of treat-

ment, which in the nature of things regards as divided that which our reasoning power divides.

And so there are other decisions quoted, and these decisions are given a practical application by the courts in this country, as well as, I should say, by the courts of England, France, and America, and by the courts of Germany, if we assume as authoritative the opinion of Savigny.

There is one point to which I want to invite your attention for just a moment, a point which I think was not mentioned in the prior arguments, and to which brief reference might be made, and that is the legal position occupied by the bishop of California at the time of the cession of Upper California to the United States. Our contention is that the bishopric was at that time a corporation, and such also is the language of the Mexican representative on the occasion of the former hearing, for he says in the Transcript, page 395, paragraph 126:

The merely canonical creation of the Church of California may have given it a standing in the Universal Church as a religious body, but it would not have been sufficient to entitle it to the recognition of the sovereign of the country, hence the said church was created by virtue of a decree of the Mexican Congress. This, which occurred in a nation officially Catholic, is the same as is established by the laws of the United States to entitle a corporation to be acknowledged by public law, as has been repeatedly decided, in accordance with the public law of all nations.

The point is a minor one, but before concluding I wanted to call your attention to it as illustrating that at the time of the cession of Upper California the Roman Catholic bishop of California was a corporation, was entitled to hold as such, and to all the rights as such, and when Upper California passed into the control of the United States, then, as matter of public international law, his corporate capacity, which had been fixed under the Mexican law, still adhered to him. It is true there was and is no established church in the United States, but churches are in the United States recognized as corporate bodies. Probably the laws of every State provide for their actual incorporation, so that they may sue and they may receive devises of property, and they may make conveyances and accept gifts as may a private individual.

Sir Edward Fry. I suppose you will show the succession of the present bishops to the bishops in 1875?

Mr. Ralston. That is in evidence.

Sir Edward Fry. That is not before us.

Mr. Ralston. I beg your pardon, it is already filed—filed but not printed. It was filed with the secretary-general, I think, before the meeting of the court, but we did not have it printed, and we have not laid great stress upon the fact, for the reason that officially, at least, the United States of America is the plaintiff here, and we have assumed that it may be presumed to be the party plaintiff, suing on behalf of all persons who may be interested, and that it would be charged, in the event of a judgment in its favor, with the duty of distributing the funds to whoever might be interested without there existing any necessity from the point of fact for a formal presentation of these persons before this court. We proceed upon that theory, at least we entertain that theory rather than proceed upon it. We entertain that theory, because it was, for instance, the theory entertained at the time of the Geneva award. It will be recalled that there a large sum of money was awarded against England because of certain injuries found to have been inflicted on American citizens. The question as to

what particular American citizens were injured, or the proof of injury in certain instances, was not brought to the attention of that tribunal, but it was apparently, if I remember correctly, conceded that that was a question between the United States and its citizens rather than one which would be considered by the arbitral court. I make these suggestions as to our own view concerning the principle controlling the case, notwithstanding the fact that we have filed proofs of succession. We have not, therefore, for the reasons indicated, laid any great stress upon them.

Above and beyond all the matters which we have submitted, or at any rate which have been submitted by me, rests the fact, the substantial fact to our minds, of the innate justice of the claim, and without undertaking to refer even to all the details of evidence which have been presented here, and well presented, by Senator Stewart and Mr. McEnerney, I simply want to take the liberty of calling your attention to this single thing: That there was a Pious Fund of large amount; that the bishops were in the enjoyment of that property; that it was devoted to certain ecclesiastical uses and was intended so to be devoted by the various donors, who had contributed to it for the period of substantially one hundred and fifty years; and that, without warning, and without reason, save it may have existed in the revolutionary or warlike necessities of the moment so far as Mexico was concerned, that fund was laid hands upon and was turned to a purpose far from that to which it had been intended, devoted to entirely other ends, and remains—so far as we are aware, except for the amount paid pursuant to the award of 1875—remains to this day devoted to entirely other purposes, setting at defiance the will of the donors and, as we contend, setting at defiance the natural and intrinsic justice of the case. And we may, for the moment, brush aside all the considerations of *res judicata*, which are considerations of substantial moment and substantial justice in themselves, and look to this one solitary fact—the people and religious institutions to which this fund was devoted primarily have been deprived of it. And we stand here, on behalf of the Government of the United States, which may not be assumed to be ecclesiastically in any particular sympathy with one church rather than another—we stand here, as I say, on behalf of these institutions, and on behalf of the Government of the United States, asking this court to rectify what we believe to be a great wrong to American citizens entitled to American aid and to American intervention.

And we assume that this fact of substantial right may not be lost sight of, as we can not believe it will be lost sight of, in any of your deliberations concerning this question, and that you will note, and as I am sure you will take pleasure in noting, that while, on the one hand, you can sustain the adjudication of the former Mixed Commission and thereby give renewed dignity and solemnity to the adjudications of every commission and every arbitral court yet to come for hundreds of years—while that rests in your hands, that great, magnificent power I might almost say rests in your hands, at the same time, it will be possible for you to exercise it and exercise it in the fullest without in any degree derogating from those principles of natural right and intrinsic justice to which it is always our pleasure to appeal.

My attention is called to the fact that before closing I ought not to neglect to say that this claim was promptly presented to the attention

of the Government of Mexico after the severance of Mexico from the United States. You, Mr. President and honorable arbitrators, will have found reference in the decision of the umpire to the fact that the archbishop had stated that he had in 1852 presented this claim to the attention of the Government of Mexico and that it had been refused, but that the arbitrator did not desire that such presentation should be considered as inaugurating a right to claim interest upon interest from the date of such presentation, particularly because there was no written evidence of the fact. While offering to the court at the present time very little evidence that may be considered as strictly new, we have filed with the secretary-general, but it has not yet been printed, the deposition of Mr. Doyle, and attached to that we have the original letter written by the Mexican officials in answer to the demand made by the archbishop at that time—1852—so that which rested merely in word of mouth in 1875, and upon which for that reason the umpire was unwilling to base any portion of his award, has now been fully proven, and adds, if such a thing might be necessary, additional force to the award given by the umpire in 1875.

At the same time it justifies me in calling attention to one further feature of the award of 1875, and that is the liberality displayed by the umpire toward Mexico. He rejected the payment of interest upon interest at that time because of the want of this particular proof that we adduce to-day, and he accepted as fair, under all the circumstances of the case, an equal division between Upper and Lower California—a division which to-day would not be, as we shall submit further in evidence (the particular evidence will be before the court before the week terminates), which would not be in any degree fair, for while in Lower California there are, so far as any evidence before the court tends to show, not to exceed two thousand Indians if division among Indians be the basis of division, in the State of California there are *fifteen* thousand, and in the territory which we regard as forming part of Upper California under the treaty of Guadalupe Hidalgo there are sixty-eight thousand. So that, if we are to assume the number of Indians in the first instance to be the basis we should have as seven to one, and if we assume the other method of division as two to sixty-eight.

Mr. ASSER. Is this all of this territory?

Mr. RALSTON. Yes; it is all of this territory, except that as we understand Spanish claims extended far enough to include Oregon, Washington, Idaho, and part of Montana and Wyoming.

That whole vast territory known under the name of Upper California under Mexico included California, Nevada, Utah, part of Colorado, Wyoming, and New Mexico, and all of Arizona.

Sir EDWARD FRY. Were they known as California at the date of the severance?

Mr. RALSTON. Yes, sir; at the date of the treaty of Guadalupe Hidalgo, 1848.

Sir EDWARD FRY. The Territory of Washington surely was part of the United States before 1848?

Mr. RALSTON. Yes, sir; the State of Washington, as it is now going up to Puget Sound and to the British possessions (showing the map). I will give you a fair illustration of the size of these countries by comparing this State of Nevada, which is only about half in area of the size of California, by comparing this State of Nevada with Holland.

This single State is eight times as large as Holland, and the State of California is about fifteen times as large as Holland. There are 180,000 square miles, roughly, in the State of California and over 90,000 in the State of Nevada.

So we submit that when we ask the court to rest whatever conclusions it may reach primarily upon this question of *res judicata*, we are asking something which is really in the interest of Mexico; but at the same time that we ask that, we are asking, as we believe, the affirmation of a principle of the highest possible importance in all international discussions.

Mr. President and honorable arbitrators, I thank you for your attention.

M. LE PRÉSIDENT. Le tribunal se retire pour délibérer et la séance est suspendue jusqu'à 2 h. ½.

(La séance est suspendue jusqu'à 2½ heures.)

HUITIÈME SÉANCE.

23 septembre 1902 (après-midi).

La séance est ouverte à 2 h. 45 sous la présidence de M. Matzen.

M. LE PRÉSIDENT. M. le Representant des Etats-Unis de l'Amérique du Nord a la parole.

Mr. RALSTON. In conformity with the order of court this morning, I desire to present for the consideration of this tribunal the following written application on behalf of M. Descamps, premising the same by saying that immediately upon the opening of the morning session a telegram was sent to M. Descamps, and no response has yet been received:

The agent of the United States has the honor respectfully to state to this honorable tribunal that he has been handed a telegram from M. Descamps, by which he is informed that that gentleman desires to address the court Monday; that he (the agent) had expected to be followed to-day by M. Descamps, but in view of the obligations placed upon that gentleman because of the regretted death of the Queen of Belgium, he has been unable to be present. The agent, therefore, has the honor to ask this tribunal that permission may be granted to M. Descamps to address the court on next Monday, giving, if desired, full opportunity to the agent and counsel of Mexico to reply to the arguments advanced by him before the réplique on the part of the United States, which last argument will be offered by Mr. Penfield, the solicitor of the Department of State of the United States.

M. LE PRÉSIDENT. Le Tribunal délibérera sur la demande qui vient d'être faite. La parole est au conseil des Etats-Unis Mexicains.

M. DELACROIX. Est-ce que la question qui vient d'être posée ne doit pas être résolue avant de me donner la parole, Monsieur le Président?

M. LE PRÉSIDENT. Non, le Tribunal se retirera pour délibérer sur cette question.

M. BEERNAERT. Je me permets cependant de faire remarquer que la question posée par M. Ralston est en quelque sorte préalable; vous avez décidé qu'une fois la première plaidoirie finie et notre tour commencé, il n'y aurait plus place que pour les répliques qu'elles devraient être confiées à une seul orateur; par conséquent, si M. Delacroix prend la parole, le demande de M. Ralston pourrait devoir être considerée comme implicitement rejetée. Je crois devoir en faire l'observation.

M. LE PRÉSIDENT. Le Tribunal a décidé que la demande de l'agent des Etats-Unis de l'Amérique du Nord ne peut pas être admise.

PLAIDOIRIE DE M. DELACROIX.

MESSIEURS: Vous avez entendu plusieurs beaux discours en faveur des Etats-Unis du Nord, et s'il fallait en juger par la multiplicité des brochures qui vous ont été distribuées il faut avouer que la cause du Mexique semblerait compromise. Cependant, nous ne le croyons pas, et je puis dire dès à présent à la Cour que nous serons beaucoup plus courts, beaucoup moins longs que nos honorables contradicteurs, parce que nous croyons que notre thèse se défend en quelque sorte d'elle-même.

Il nous paraît impossible que les éminents jurisconsultes qui composent le tribunal arbitral n'aient pas aperçu le vice de l'argumentation de nos honorables contradicteurs. Ces Messieurs vous ont établi—et ils l'ont fait avec succès, avec fondement—que la volonté primitive des donateurs du Fonds Pieux de Californie n'est pas aujourd'hui réalisée par le Gouvernement mexicain. Nous sommes d'accord, et non seulement nous sommes d'accord mais nous renforcerons encore si possible la thèse qui vous a été présentée par les Etats-Unis d'Amérique sur ce point. En effet, les donateurs primitifs ont eu en vue de faire une donation aux Jésuites; c'était si bien leur préoccupation de faire une donation aux Jésuites, de vouloir que les Jésuites seuls et exclusivement puissent disposer de ces fonds, que dans notamment le testament de M. le Marques de Villapuente il est dit que ni les autorités séculières ni les autorités religieuses, en un mot ni le clergé ni l'autorité laïque, ne pourront intervenir.

Donc, puisque telle a été la volonté des donateurs de favoriser exacte ment les Jésuites, il est clair, et, nous devons l'avouer, que la volonté des donateurs sur ce point n'est pas réalisée aujourd'hui, puisqu'il n'y a plus de Jésuites ou qu'il semble qu'il n'y en ait plus.

Les donateurs ont voulu appliquer le Fonds Pieux aux Missions. Les Missions, que je définirai tout-a-l'heure, c'est une œuvre de conquête spirituelle et temporelle, si vous voulez, l'un et l'autre; mais, comme le disent tous les auteurs dont je parlerai, c'est une œuvre de réduction: on veut subjuguer la Californie au point de vue politique et au point de vue religieux: c'est une œuvre de réduction religieuse en même temps qu'une œuvre de réduction politique. Cela est si vrai qu'il n'y a plus de Missions qu'il ne pourrait plus y en avoir sur le sol de la Libre Amérique; pas plus aux Etats-Unis d'Amérique, où la liberté de conscience est aujourd'hui complète et entière qu'au Mexique d'aujourd'hui il ne serait possible d'établir encore de ces œuvres de réduction ou de conquête religieuse pas plus que de conquête politique.

Donc, il n'y a plus de Missions, et à ce second point de vue la volonté primitive des donateurs, n'est pas respectée.

Enfin, messieurs, les donateurs ont eu surtout en vue de favoriser une des populations les plus déhéritées de la terre, les Indiens, les sauvages, ces gens qui se trouvaient encore dans la ténèbres du paganisme. Voilà ceux qui avaient appelé la préoccupation des donateurs, et je puis bien le dire, heureusement pour la Californie, il n'y en a plus . . . ou plutôt je m'expliquerai sur ce point.

A ce troisième point de vue encore, la volonté des donateurs primitifs ne peut pas être réalisée.

Mais, messieurs, si sur cette prémisse nous sommes d'accord avec nos honorables contradicteurs, où nous ne sommes plus d'accord c'est sur la conclusion qu'ils en tirent, ou plutôt sur la seconde prémisse,

lorsqu'ils disent: Les Jésuites c'est nous, les Missions c'est nous, les Indiens c'est nous. Là nous ne sommes plus d'accord, et vous apercevez aisément que le titre, la preuve à juridique de cette allégation fait défaut.

Mais, messieurs, vous serez aussi certainement été frappés de ce qu'il semble que l'histoire traditionnelle des peuples condamne la réclamation d'aujourd'hui; vous aurez été frappés des conséquences de la décision qui serait rendue conformément à la demande, puisque vous devez en quelque sorte par votre sentence réviser l'Histoire.

Si nous relisons l'histoire du 18e siècle, nous voyons que toute la seconde période de ce siècle s'est trouvée agitée par ce fait mondial de la suppression des Jésuites; les intrigues, les démarches, les luttes de tout genre, ont eu lieu autour de cette question: Les Jésuites doivent-ils être maintenus, ou doivent-ils être expulsés?

Louis XV en France et son premier ministre Choiseul, se sont préoccupés de cette question des Jésuites: ils redoutaient les Jésuites qui semblaient devenir une puissance trop grande dans l'Etat. Charles III, en Espagne, sujet fidèle de l'Eglise, ayant les meilleurs rapports avec le Pape, s'en préoccupe également, et en arrive à décider, lui aussi, la suppression des Jésuites.

Il suffit, messieurs, d'ouvrir l'histoire de cette époque pour voir à quelles querelles, à quels pamphlets, à quelles discussions de tout genre cette lutte entre les amis et les adversaires des Jésuites a donné lieu.

Lorsque les souverains catholiques, l'un avant, l'autre après, ont supprimé les Jésuites, ils ont d'abord rencontré dans la Papauté, c'est-à-dire dans le pape Clément XIII, un adversaire qui aurait voulu défendre les Jésuites; mais Clément XIV lui a succédé, a fini pencher du côte delinus adversaires et les a supprimés.

C'est un fait que cette suppression des Jésuites. Nous savons qu'une des raisons qui ont déterminé leur suppression était leurs richesses considérables; et voilà que dans tous ces Etàts nous voyons les richesses des Jésuites passer non pas entre les mains de l'Eglise, entre les mains des archevêques et des évêques de l'époque, et sans protestation aucune, nous constatue ce fait que chez tous ces souverains, sans protestation aucune je le répète, même du Pape, les biens des Jésuites passent entre les mains des souverains.

Il y a eu, messieurs, en dehors de ce fait, dans l'Histoire, chez tous les peuples il y a eu des suppressions d'ordres religieux ou bien d'ordres à la fois militaires et religieux, comme l'Ordre des Templiers, l'Ordre Teutonique, etc., et toujours c'est le Gouvernement, c'est le souverain qui s'est substitué à eux, qui s'est approprié leurs biens.

Et il s'agirait aujourd'hui de méconnaitre l'Historie il s'agirait alors que pendant des siècles, cela a été admis, avec le consentement de l'Eglise ou sans protestation de sa part au point de vue des biens—comme nous l'établirons plus tard—il s'agirait de réviser cette jurisprudence traditionnelle de l'Histoire.

Il n'est pas de pays où la décision que vous rendriez dans le sens qui est sollicité de l'autre côté de la barre n'eût un retentissement! Permettez-moi de vous citer un exemple sur lequel j'appelle les meditations de mes honorables contradicteurs. Il y avait en France, en Alsace-Lorraine, des biens ecclésiastiques, il y avait des Jésuites, il y avait des communautés religieuses; lorsque sont intervenus, le décret de Louis XV de 1773 dont je vous dirai un mot plus tard, puis la loi

du 2 novembre 1789 que je vous citerai également, lorsque ces évènements se sont produits, presque dans les mêmes termes les Gouvernements se sont approprié ces biens, mais toujours en s'appropriant ces biens les Gouvernements disaient qu'ils tiendraient compte des volontés des fondateurs, qu'ils appliqueraient les biens au service du culte, à l'entretien des ministres du culte et au soulagement des pauvres. Il en a été ainsi en 1763 et en 1789; depuis lors l'Alsace et la Lorraine ont été l'objet d'une conquête analogue à celle de la Californie par les Etats-Unis; il y a eu un traité qui était analogue au traité de Guadalupe-Hidalgo; eh bien, messieurs, si l'analogie entre ces deux cas est complète—et je ne demande pas mieux que d'insister sur cette comparaison—serait-il possible aujourd'hui, comme un écho de la sentence que vous rendriez, que la Prusse ou que les évêques d'Alsace-Lorraine vinssent dire: il y avait autrefois des biens de communautés religieuses, ces biens ont été donnés dans une pensée pieuse, ils appartenaient donc à l'Eglise, nous sommes les successeurs de l'Eglise, par conséquent nous demandons que ces biens nous soient attribués.

A notre sens—c'est un exemple que j'ai mûri—il nous semble que l'analogie est complète, et qu'étant données les idées que nous constatons après plus d'un siècle que ces événements se sont passés, il est impossible que l'on puisse dire lorsque l'on voit de telles conséquences, que le raisonnement de la partie adverse ne doive pas avoir un vice que nous chercherons à dégager.

Mais, messieurs, il y a encore un sentiment qui a dû vous choquer lorsque vous avez examiné la réclamation de la partie adverse, avant même d'aborder son côté juridique. Vous vous êtes dit que cette donation considérable qui avait formé le Fonds Pieux de Californie émanait de Mexicains. Elle émanait de personnages qui ont occupés au Mexique une situation importante. On nous dit aujourd'hui que c'étaient des Chrétiens, que c'étaient des gens pieux je le crois: sans aucun doute la préoccupation religieuse devait déterminer dans une large mesure le sacrifice qu'ils faisaient; ce qu'ils voulaient, c'était sans aucun doute faire de ces Indiens égarés dans les abîmes du paganisme des soldats de Dieu, c'est incontestable. Mais, qui oserait dire que ces personnages n'étaient pas en même temps des patriotes? Qui oserait dire que ces Mexicains n'avient pas la préoccupation de faire de ces Indiens barbares des sujets du Roi?

J'entendais un de mes honorables contradicteurs dire à une précédente audience que c'était la volonté de ces donateurs qu'il fallait rechercher, et il en déduisait que ce fonds devait être donné aux Etats-Unis, c'est-à-dire que le Mexique devait être condamné à payer un tribut perpétuel pour un service public étranger, pour un budget des cultes de l'étranger, rente perpétuelle, service perpétuel, exonération perpétuelle: Il aurait donc fallu que ces fonds aillent aux mains des étrangers c'est-à-dire d'une autre race qui n'est plus la race espagnole: Et l'on pourrait dire que ce serait là la volonté des donateurs? . . . Nous ne le croyons pas, et vous vous le serez dit déjà.

Il y a enfin, messieurs, un autre fait qui vous aura frappés. La Californie a fait l'objet d'un partage en 1848: la moitié, la Haute Californie, a été attribuée aux Etats-Unis, la Basse Californie est restée au Mexique. Il y a encore un évêque mexicain; il ne me sera pas difficile de vous démontrer qu'au point de vue des lois mexicaines une réclamation qui serait produits en justice par l'évêque de la Basse

Californie serait non recevable et ne pourrait être accueillie en aucune manière.

Alors, ne vous êtes-vous pas dit: Voilà un fonds qui appartiendrait en copropriété, à titre d'indivision, d'une part à un mexicain, d'autre part à un étranger, et on nous demande de dire que l'Etat est le débiteur de l'étranger, alors qui le mexicain ne peut rien réclamer à l'Etat, que l'Etat n'est pas son débiteur.

Examinons donc de plus près:

Une première question que vous vous serez posée est celle-ci: une Cour d'arbitrage est instituée: Quel est le droit qu'il faut appliquer? quelle est la loi qui nous régit?

A ce point de vue, messieurs il ne faut pas de confusion. Quelles sont les parties que vous avez devant vous? Sont-se les Etats-Unis qui sont demandeurs? Non, les Etats-Unis ne sont pas demandeurs: les Etats-Unis sont au procès pour appuyer une réclamation d'un ou de plusieurs de leurs sujets, c. a. d. à titre de bons offices.

On a dit que les Etats-Unis étaient au procès pour représénter les évêques de Californie. Si le mot "représenter" devait être employé dans son sens juridique il serait évidemment inexact: les Etate-Unis ne réclament rien pour eux-mêmes.

Je regrette, messeurs, au point de vue de la facilité de ma tâche et de la brièveté du débat, que ce ne soient pas les Etats-Unis qui soient au banc des demandeurs, parce que s'il en était ainsi nous aurions bien vite fini; nous dirions: Il y a un traité entre nous, le traité de Guadalupe Hidalgo; aux termes de ce traité les Etats-Unis ont reconnu que nous ne leur devions plus rien; c'est d'ailleurs de l'essence d'un traité de mettre fin à toutes revendications ou réclamations réciproques: aux termes de ce traité de 1848 non-seulement les Etats-Unis reconnaissent qu'ils n'ont aucune créance comme Gouvernement vis-à-vis du Mexique, mais ils paient aux Etats-Unis mexicains 15 millions de dollars. J'aurai l'occasion, lorsque j'en viendrai à l'examen du traité de Guadalupe-Hidalgo, de vous montrer quelle a été la pensée des plénipotentiaries qui l'ont discuté; pour le moment je me borne a rappeler qu'aux termes de ce traité les Etats-Unis d'Amérique paient 15 millions de dollars aux Etats-Unis mexicains à raison de l'enlèvement d'une partie de leur territoire et notamment de la Californie. Nous pouvons donc affirmer que les Etats-Unis n'avient pas d'autre créance et ne s'en réservaient aucune puisqu'ils l'auraient déduite de la somme à payer.

Je ne dois pas insister puisque les Etats-Unis ne sont pas demandeurs; pas plus aujourd'hui que lorsqu'ils ont comparu devant la Commission Mixte en 1869 ou 1870. Et, s'il fallait une démonstration sur ce point je me permettrais de vous signaler la première lettre qui a engagé ce débat: celle du 17 août 1891 insérée dans le livre rouge à l'endroit oú se trouve la Correspondance diplomatique (page 8), lettre addressée par M. Ryan à M. Mariscal; dans cette lettre le Ministre des Etats-Unis à Mexico écrit au Ministre des affaires étrangères:

> Monsieur le Ministre: J'ai des instructions formelles pour attirer l'attention de Votre Excellence sur les rélations légales du Gouvernement Mexicain à l'égard du Fonds Pieux de Californie, etc. . . Parmi les réclamations présentées contre le Gouvernement du Mexique devant cette commission il y en avait une de l'archevêque et des évêques de l'Eglise catholique romaine de la Haute Californie intitulée, etc.

Plus loin, dans la lettre, il est dit que c'est aux évêques et à l'archevêque de cette Eglise qu'il appartient de réclamer et de recevoir—ce

sont les Etats-Unis qui le disent—le cas est de ceux où peut s'exercer l'intervention diplomatique.

Intervention diplomatique. Il arrive en effet constamment qu'un Gouvernement, s'intéressant au sort de l'un de ses sujets qui a une réclamation vis-à-vis d'un autre Gouvernement, s'interpose: c'est l'interposition diplomatique.

Plus loin on ajoute:

L'archevêque de San Francisco et l'évêque de Monterey, agissant au nom de ladite eglise, représentent maintenant au Départment d'Etat de Washington qu'il ne leur a rien été payé en sus du revenu . . . ses bons offices en leur faveur afin que l'attention de Votre Excellence soit attireé, etc.

Ce que l'on demande ce sont de "bons offices," c'est une intervention diplomatique, pas autre chose.

Je m'excuse, messiers, d'avoir insisté un moment sur ce point, car je pense que cela n'est pas contredit. Ce n'est pas un conflit entre deux Etats, c'est un conflit entre des citoyens d'une part et d'autre part un Gouvernement. Il en résulte qu'il ne s'agit pas d'un arbitrage international, un arbitrage international fait supposer nécessairement un conflit entre deux Etats, deux Gouvernements souverains.

La question est importante, parce que s'il s'agissait d'un conflit entre deux Etats quelle est la loi qu'il faudrait appliquer? Il n'y a pas de loi, ce ne peut pas être la loi d'un pays plutôt que la loi de l'autre, ce ne pourrait être en tout cas que la loi commune des deux pays c'est-à-dire un disposition qui serait commune aux deux législations, et, pour le reste, ce serait dans le fonds commun des notions juridiques de l'humanité que les arbitres devraient chercher les éléments devant régir et guider leur décision.

Mais, messieurs, il ne s'agit pas de cela; il s'agit d'un conflit qui normalement aurait dû être résolu par les tribunaux, par les institutions judiciares qui existent au Mexique pour résoudre ces cas.

Cependant, sans que nous en fassions un reproche à nos honorables contradicteurs on a estimé que comme il s'agissait ici non seulement d'une question importante mais d'une question qui soulevait des principes d'ordres divers où même peut-être la question nationale ou patriotique aurait pu jouer un certain rôle, on a estimé qu'il était préférable d'avoir des arbitres internationaux au lieu de soumettre le cas aux juges mexicains qui en étaient les juges naturels, et voilà pourquoi vous cour internationale, vous avez pris la place des tribunaux mexicains; vous êstes substituée à eux, vous jugez à leur lieu et place; par conséquent vous jugerez en adoptant les règles et les principes qui auraient dû régir ces tribunaux s'ils avaient jugé.

La question qui nous occupe, n'est pas d'ailleurs une question de droit public; il peut y avoir, au cours de ce débat, des questions d'ordre public accessoires qui doivent être appréciées et résolues par vous, mais le fond du litige n'est pas de droit public; il ne s'agit pas d'actes souverains en conflit, non, il s'agit d'un droit civil, et par conséquent ce sont les régles du droit international privé qui doivent nous régir.

Droit privé, droit d'un citoyen . . . On dit: Étranger, j'ai un droit privé contre l'Etat mexicain, je le revendique et je l'exerce. L'Etat mexicain répond: Quel est votre titre? Voilà le procès.

Donc, droit privé et droit civil. Droit civil, droit positif; quel droit civil et quel droit positif? Droit positif mexicain parce que les lois mexicaines continuent à régir le Fonds Pie.

Les demandeurs ont admis que ce Fonds Pieux continuait à rester et

devait perpétuellement rester entre les mains du Gouvernement mexicain. J'aurai à vous expliquer la genèse ou l'origine de la réclamation actuelle et pourquoi elle a été présentée sous cette forme, ce sera un autre point de ma plaidoirie, mais pour le moment je signale simplement au Tribunal arbitral que les Evêques Americains acceptent que ce Fonds Pieux de Californie reste entre les mains du Gouvernement mexicain, que c'est lui qui continue à le régir, mais bien entendu, disent-ils, il en doit un intérêt intégral à 6 pour cent par an en or.

C'est donc la loi mexicaine qui, à ce point de vue encore, va continuer à régir ce Fonds.

D'ailleurs, il s'agit d'une réclamation qui aurait dû être présentée devant le Tribunal mexicain; à ce titre, je le disais, c'est la loi mexicaine qui doit régir le débat. Du reste c'est le Mexique qui était débiteur et les actes sur lesquels on va s'appuyer sont des actes mexicains: donc, à tous égards c'est la loi mexicaine qui doit être appliquée.

Messieurs, le fait que je vous signale est important, lorsque j'aurai à faire l'exposé des diverses lois qui vont avoir à régir le litige, la question sera vite résolue. Aussi mes honorables contradicteurs s'en défendent-ils . . . . sans le dire. Ils nous disent: Mais non, ce qu'il faut voir ce n'est pas la loi, c'est si la réclamation est juste ou si elle n'est pas juste.

On invoque alors le compromis du 22 moi 1902 reproduit dans le volume que vous connaissez (page 49) et on dit: Le Tribunal arbitral est chargé de résoudre deux questions: la première y-a-t-il "res judicata?" et la seconde: la réclamation est-elle juste? Est-ce juste, ou non, dit-on, et vous serez peut-être surpris de la déduction que la justice exclut le droit:

Sans doute, messieurs, le juge rend la justice, mais il la rend conformément au droit, et assurément c'est la première fois que j'ai entendu induire de ces mots "est-ce que la réclamation est juste?" cette conséquence que le juge aurait à faire abstraction du droit.

La justice de la case. . . . Qu'entendez-vous par justice? Vous avez dit: "équité." . . . Ah! équité, c'est déjà autre chose; équité, c'est un mot dangereux, parce qu'il ne faut pas que les Cours d'arbitrage jugent avec arbitraire, il faut qu'elles aient des règles, et ces règles c'est le droit.

Comment serait-il possible de dire que les deux parties ont voulu donner à Messieurs les arbitres le droit, le pouvoir ou le mandat de s'affranchir du droit? Comment le Gouvernement mexicain aurait-il pu même sans l'intervention de sa législation mettre sa signature au bas d'un compromis dans lequel il aurait été dit que les arbitres auront à faire abstraction du droit mexicain? C'eut été impossible.

Non, messieurs, et d'ailleurs c'est un terrain où la fantaisie est trop grande pour que mes honorables contradicteurs puissent s'y aventurer avec sûreté Lorsqu'on quitte le droit il n'y a plus de sûreté. C'est presque un axiome, mais permettez-moi d'en faire l'application à la cause.

Vous dites: Faisons abstraction des lois, faisons abstraction du droit, ne regardons qee l'équité.

Et le second de mes contradicteurs vous disait: l'équité, c'est la volonté des donateurs!

L'Equité, mais alors où serait le droit des Jésuites? Il existe encore des Jésuites, car si un bref de Clément XIV les a supprimés en 1773, Pie VII les a rétablis, et il y a à ce sujet une bulle de 1801 et une

autre bulle de 1814, qui sont très intéressantes toutes deux. Si on considère la volonté les donateurs, ce devrait donc être aux Jésuites à revendiquer le Fonds Pieux! Eh bien, ils ne sont pas là.

Il y avait une autre idée qui me venait: L'équité absolue, ne serait-ce peut-être pas que les héritiers des donateurs primitifs pussent revendiquer ce qui vient de leurs auteurs? En effet, si les donateurs, le marquis de Villapuente, la Marquise de la Torres de Rada ou d'autres, ont fait le sacrifice de se dépouiller de fortunes considérables aux dépens des leurs pour enrichir ce fonds, ils ont voulu que ce fût aux Jésuites que ces biens allassent, c'était à leur profit qu'ils en faisaient le sacrifice, pour les Missions Indiennes; eh bien, s'il n'y a plus de Jésuites, d'Indiens, de Missions, les héritiers de ces donateurs ne pourraient-ils en équité venir dire: Le Fonds n'ayant plus d'objet il doit nous revenir? . . . Est-ce là l'équité? Mais, ce sont là des digressions et je m'en excuse, car vous avez à juger d'après le droit.

Nous avons devant nous des juges. Des juges? Ce matin, mon honorable contradicteur, M. Ralston, vous citait l'opinion d'un de nos éminents collègues que nous regrettons de ne pas voir ici, M. le Chevalier Descamps, disant: "L'arbitre juge et statue comme tel" (page 28 de l'ouvrage); et il citait encore l'opinion de M. Lambermont, qui écrivait: "Arbitre et non médiateur, je n'avais qu'à dire le droit."

Messieurs, lorsque l'on veut que l'arbitre ne soit pas un juge il faut le dire; il est alors amiable compositeur, et assurément ce n'est pas là ce que l'on a voulu dire quand on vous a confié le soin de décider si la réclamation est juste!

Dès lors, aux demandeurs qui se présentent devant vous et qui réclament l'attribution de certaines sommes d'argent, nous avons tout d'abord à demander d'établir le fondement juridique de leur réclamation: vous êtes demandeurs, à vous à prouver et à justifier de votre titre.

Mais d'abord, messieurs, je demande à la Cour la permission de lui faire un court exposé des faits; non pas que j'aie l'intention de vous rappeler des faits que vons connaissez mieux que moi et qui vous ont été longuement exposés; non, je ne veux pas faire perdre son temps à la Cour; mais je pense qu'il est indispensable que nous caractérisions chacun des faits au point de vue juridique pour que la Cour puisse immédiatement apprécier ce qui nous divise.

En effet, si nous sommes d'accord sur la matérialité des faits dans leur ensemble, nous différons d'appréciation au point de vue du caractère juridique de chacun d'eux, et de là des différences essentielles que je dois signaler.

Le Roi d'Espagne eut de bonne heure l'attention attirée sur la Californie. Vous savez que c'est en 1534 que Cortez en avait fait la découverte et y avait planté le drapeau espagnol. Seulement, ce n'était guère qu'une conquête nominale. L'Espagne avait proclamé sa souveraineté en Californie comme dans toutes les parties du Nouveau Monde où ses navigateurs avaient mis les premiers les pieds; mais il fallait autre chose. Et ici l'attention du souverain était d'autant plus appelée que la Californie avait pour lui une importance considérable; ses côtes inhabitées et désertes devenaient un repaire de corsaires et la navigation s'y trouvait exposée, notamment vers les Philippines; le Roi d'Espagne se préoccupait donc de créer là des établissements, d'assurer les côtes, d'avoir des ports, et ses préoccupations se traduisirent par de nombreuses expéditions.

Et voilà qui va nous servir à caractériser les Missions. C'est le Roi qui veut la conquête, c'est le Roi qui envoie des expéditions. Ce sont des expéditions militaires et coûteuses; leur but est une conquête politique.

Mais toutes ces expéditions échouent, ce sont des échecs successifs; cela se comprend: les soldats passaient, les expéditions ne s'implantaient pas dans le pays et leur influence était éphémère.

La dernière de ces expéditions eut le 29 décembre 1579 et coûta 225,400 dollars, nouveau capital inutilement englouti.

Alors arrive l'heure de l'intervention des Jésuites. On les avait vus réussir au Paraguay, au Pérou, au Brésil, et l'on se dit: Ils réussiront peut-être là où les militaires ont échoué; et le Roi proposa aux Jésuites de faire la conquête de la Californie en son nom et à ses frais.

Les Jésuites prirent le conseil de leur Provincial et refusèrent; on leur demandait d'être les agents directs du Roi, ils devaient être payés par lui, et il aurait payé aussi la force armée dont le concours était nécessaire, les officiers notamment auraient été à la solde du Roi et les abus qui avaient déterminé l'échec des expéditions précédentes se seraient inévitablement renouvelés.

Telle était l'opinion des Jésuites; ils ne voulaient rien tenter que si on leur donnait une autorité absolue, même quant au choix des officiers.

Prétention grave, messieurs, et devant laquelle le Roi hésita; mais les représentations des Pères Jésuites Salvatierra et Quirno l'emportèrent, et un décret du 5 février 1597 (reproduit à la page 401 du livre rouge) confia aux Jésuites la mission de faire la conquête spirituelle et temporelle de la Californie.

Conquête spirituelle et temporelle. Spirituelle, c'est incontestable: ce sont des Jésuites, et par conséquent ce sont avant tout des soldats de Dieu. Mais conquête temporelle aussi, car il s'agit du Roi et c'est lui qu'ils doivent représenter. Le Roi intervient pour leur permettre de partir et de s'établir dans ce pays qui est le sien; le Roi intervient pour leur donner le pouvoir exorbitant de diriger l'administration militaire de la Californie, même qaint à la nomination des officiers; ce sont eux qui les choisiront, qui les payeront, qui les révoqueront au besoin, même on leur donne un droit de conscription militaire, une loterie militaire. Mais en même temps le Roi leur dit: Vous irez en mon nom, vous planterez mon drapeau, c'est l'étendard d'Espagne qui doit flotter au-dessus de l'établissement des Missions.

J'oubliais un point essentiel: Le Roi leur donne même le pouvoir d'administrer la justice. Ah! la justice! cette grande institution, où l'homme juge ses semblables, se substituant en quelque sorte à Dieu! mission divine aussi, celle-là. Eh bien, le Roi qui détient ce pouvoir auguste comme monarque de droit divin, va le confier aux Jésuites; et d'après la partie finale du décret du 5 février 1597 c'est eux qui désormais jugeront et puniront.

Voilà, messieurs, dans quelles conditions partent les Jésuites.

Mais il fallait le nerf de la guerre, il fallait de l'argent. L'intention du Roi avait été de faire face aux frais, mais les Jésuites avaient repoussé cette combinaison. Ils comptaient sur les fonds qu'ils pourraient recueillir, sur la générosité des fidèles.

Mais ici encore il fallait l'intervention du Roi; lui seul pouvait leur permettre de recueillir des aumônes; ce pouvoir, le Roi le leur donne, et c'est encore par le décret du 5 février 1597; l'autorisation du Roi est donc encore ici la base des Missions et leur condition d'existence.

Et ici pas la moindre intervention de l'Eglise. Je démontrerai tout-à-l'heure qu'elle n'est pas intervenue à la suppression des Missions; mais voici qu'à leur naissance, dans leur acte de baptême, si je puis m'exprimer ainsi, on ne voit pas non plus d'autre parrain que le Roi.

Les Jésuites vont donc en Californie comme délégués du Roi, comme agents du Roi, et c'est comme tels, en vertu de ce pouvoir que le Roi personnifie mais qu'il leur délègue, qu'ils vont en Californie pour en faire la conquête temporelle et spirituelle . . . Temporelle et spirituelle; à cette époque, le Roi n'en faisait pas d'autres; il tient son pouvoir de Dieu, il ne connaît qu'une religion, et par conséquent rien de plus naturel que de faire des chrétiens en même temps que des sujets.

Les Jésuites n'avaient pas attendu le décret du 5 fevrier 1597 pour recueillir des aumônes. Ces sommes, ils les ont employées de suite naturellement, et en capital. Mais elles se trouvérent absolument insuffisantes. Déjà, en 1700; nous voyons le Père Salvatierra, le premier Jésuite parti pour la Californie, qui avait refusé toute allocation de subsides, obligé après trois ans d'adresser une requête au Roi pour en solliciter. Alors Philippe V, par deux décrets successifs, aloua sur sa cassette personnelle une somme annuelle d'abord de 6,000, puis de 12,000 dollars pour les fonds des Missions de Californie.

En Californie, comme dans tous leurs autres établissements du Nouveau Monde, les Jésuites réussirent, ils forcerent l'admiration, et la charité chrétienne, la générosité chrétienne qui se montre partout intervint largement. Les Missions s'organisèrent et se multiplièrent.

Qu'était-ce qu'une Mission? Déjà je l'ai définie tout-à-l'heure au point de vue juridique: c'était une œuvre religieuse et politique, mais politique surtout. Une Mission se composait d'un établissement où se trouvait le Père ou les Pères Jésuites qui le dirigeaient, et le "presidio," ou en langue moderne la caserne, avec la force militaire, le capitaine et ses soldats, également subordonnés aux Pères comme nous le disions tout-à-l'heure; puis, plus loin, le "pueblo," ou le village, où se trouvaient les Indiens employés aux travaux agricoles et qui étaient en même temps les néophytes et les nouveaux sujets du Roi, qu'au besoin l'on vêtait et nourrissait. Le tout était sous la direction, sous la tutelle des Pères.

Les Missions étaient donc une œuvre de conquête, un établissement gouvernemental. Et où se trouvaient les missions d'alors? En Californie, et à cette époque on croyait communément que c'était une île, ainsi qu'on peut le voir dans l'ouvrage du Père Venegas, qui est certainement un des auteurs les plus considérés au point de vue des questions qui nous occupent et qui date de 1757.

Cependant à cette époque, déjà d'autres mieux éclairés y voyaient une presqu'île. Pour tous la Californie se terminait à l'extrémité du golfe, c'est à dire en-dessous des limites de la Basse Californie actuelle.

Au cours de ma plaidoirie, messieurs, j'aurai l'honneur de donner lecture d'un décret du Roi que rapporte le Père Venegas, et vous y verrez ce qu'on pensait alors des Missions et de la Californie; en un mot, vous aurez l'impression du temps. Mais, si vous me donnez crédit jusqu'à tout à l'heure, je continue mon exposé, me bornant à exposer qu'à cette époque la Californie n'était que la Basse Californie d'aujourd'hui, et à constater que les Jésuites n'ont jamais établi de

Missions que dans ces limites; c'est là un point important qui n'est pas contesté.

Au cours de ce débat, nous aurons à examiner les différents actes de donation qui ont servi à la constitution du Fonds Pieux, et nous aurons vite fini, car je vous annonce qu'il n'y en a que deux.

On parle de la volonté des donateurs; mais elle doit être constatée dans des actes; or, nous ne possédons que l'acte relatif à la donation d'ailleurs considérable du Marquis de Villapuente et du la Marquise de la Torres del Rada de 1735, puis il y a la succession Arguelès dont j'aurai à vous parler; il n'y a pas d'autre acte. Nos honorables adversaires veulent le prendre comme actetype — cela facilitera peut-être leur thèse, mais nous verrons tout à l'heure ce qu'il en faut admettre.

Je vais prendre cet acte. Le Marquis de Villapuente y donne aux Jésuites des biens considérables, plus de 400,000 piastres. Ce document est très intéressant au point de vue du procès, il est reproduit à la page 452 du livre; il donne aux Jésuites les droits les plus absolus et il les leur donne, sans réserve, pour toujours, sans possibilité d'intervention ou de contrôle, soit pour l'autorité religieuse, soit pour l'autorité temporelle.

Les donateurs se dépouillent en vue des Missions de Californie, — mais les circonstances peuvent changer; ou la conversion des Indiens sera complète, ce qui rendrait l'œuvre inutile, ou quelque révolte peut rendre la situation des Jésuites impossible. Dans ce cas, ils pourront porter leur œuvre ailleurs, non seulement en Amérique, mais dans l'Universo Mundo. Les biens sont à leur discrétion, les donateurs ont en eux pleine confiance, ils feront ce qu'ils voudront, c'est à Dieu seul qu'ils pourraient avoir à rendre compte.

Mais semblable confiance est toute personnelle, et les Jésuites seuls ont été investis de ce pouvoir discrétionnaire.

Or, jamais avant leur expulsion ils n'ont dépassé les limites de la Basse Californie et toutes les Missions se trouvaient dans le territoire qui est encore aujourd'hui Mexicain. Ainsi l'éventualité prévue par les donateurs ne s'est point réalisée, elle n'aurait pu l'être que par la volonté des Jésuites, et nous en conclurons qu'elle ne peut plus être entrevue.

Telle est donc la donation Villapuente, l'acte-type d'après les demandeurs: Tous pouvoirs sont donnés aux Jésuites.

Au point de vue du droit à qui pourrait bien être la propriété des choses données?

Il y a un pouvoir qui était en dehors de la volonté du Marquis de Villapuente, le pouvoir du Roi, ce que l'on appelle en droit moderne le domaine éminent du souverain. Lorsqu'il s'agit d'un établissement de mainmorte, d'une personnalité civile, d'une fiction légale, d'une entité juridique qui n'a d'existence que par la volonté du souverain, celui qui a donné la vie s'est toujours réservé de modifier ses conditions d'existence, ou même de supprimer celle-ci, en faisant rentrer dans son domaine ce qu'il avait permis d'affecter à un objet spécial. C'est là une qualification moderne, mais la notion a existé dans tous les âges: Nous aurons l'occasion de vous citer un décret de Charles Quint, de 1520, où, souverain d'Espagne comme des Pays-Bas, se préoccupant de la mainmorte il disait que les personnes morales ne pourraient acquérir qu'avec son consentement. C'est cette notion juridique, que vous concevez mieux que moi, messieurs, et d'aprés laquelle, du moment où il

s'agit non d'un être en chair et en os, mais d'un être qui n'a d'existence que parce que le Roi l'a voulu, celui-ci reste maître de la reprendre.

Je reprends mon exposé. Les Missions continuent à être prospères * * * trop prospères; la prospérité amène toujours des ombrages * * * et les Jésuites ont un succès tel qu'il inquiète les Gouvernements. C'est la période à laquelle je faisais allusion il y a quelques instants, c'est la période où les souverains qui avaient favorisé les Jésuites, qui leur avaient donné le moyen de devenir puissants et prospères, s'émeuvent * * * du moins les souverains catholiques, car, phénomène curieux, ce sont les souverains protestants, c'est Catherine II, c'est Frédéric de Prusse, qui donnent asile aux Jésuites quand ils sont chassés par des Gouvernements catholiques.

En 1763, Louis XV prend l'initiative; le 27 février 1867, Charles III expulse les Jésuites de tout son empire Ce document très important est reproduit à la page 410 du volume rouge. On y voit le Roi d'Espagne proclamer deux choses: Le bannissement des Jésuites, et la prise de possession de leurs biens temporels. Dans l'intitulé de ce document, lorsque le Roi lui-même le résume, il dit:

> Décret royal du 27 février 1767 comprenant; 1° le bannissement des membres de la Société de Jésus; 2° la prise de possession de leurs biens temporels.

Le Roi chasse donc les Jésuites, et emploie vis-à-vis d'eux les mesures les plus rigoureuses; non seulement il les bannit mais il ne veut plus qu'il y en ait un sur son territoire, il édicte les peines les plus sévères contre les gouverneurs qui les toléreraient encore; il veut que tous soient mis dans un navire et transportés dans les Etats Romains.

Alors le pape Clément XIII proteste. Il écrit à Charles III, son fidèle enfant, son Roi bienaimé, il lui dit que le plus grand chagrin de son pontificat serait la suppression des Jésuites, que jamais il n'avait cru que le Roi d'Espagne aurait fait un acte pareil, et il le supplie dans les termes les plus touchants de revenir sur sa décision. Il fait allusion au décret royal du 27 février 1767 que Charles III lui avait envoyé; il y a vu que Charles III, qui va prendre possession des biens temporels des Jésuites, a décidé de donner à chaque Jésuite une pension alimentaire de 100 piastres par an, et il dit au Roi: Je ne recevrai pas les Jésuites que vous annoncez devoir m'expédier, je ne les recevrai pas parce qu'une fois dans mes Etats il faudrait les nourrir; vous dites bien dans votre décret que vous leur donnerez une pension de 100 piastres par an, mais qui me garantit que vous la paierez?

Je ne prends dans ce livre que ce que je viens de vous citer.

M. Asser. Quel est le titre de l'ouvrage?

M. Delacroix. "Histoire du Pontificat de Clément XIV, page 82."

M. de Martens. Quel en est l'auteur?

M. Delacroix. Je ne l'ai pas; c'est un auteur de l'époque.

Il est donc intervenu un décret qui à révolutionné le monde; qu disait-il donc?

> Qu'il soit pris possession de tous les biens temporels appartenant à l'ordre dans mes possessions.

Et plus loin, paragraphe 5:

> De plus, je déclare que la prise de possession des biens temporels appartenant à l'ordre comprend leurs propriétés—littéralement réelles et personnelles, c'est-à-dire foncières et mobilières—ainsi que les revenus ecclésiastiques qui leur appartiennent également dans le royaume, mais sans préjudice aux charges qui peuvent leur avoir été imposées par les donateurs, etc.

Voilà donc un décret d'appropriation ou de confiscation . . . J'aurai l'honneur tout-à-l'heure de démontrer à la Cour et à mes honorables contradicteurs que le mot m'est indifférent; que ce soit l'usage d'un droit préexistant, que le Roi en s'appropriant les biens des Jésuites ait fait ce qu'il avait le droit de faire de par les lois existantes, de par les principes existants, ou bien qu'il ait fait ce qu'il n'avait pas rigoureusement le droit de faire, c'est-à-dire qu'au lieu d'être une appropriation ce soit une confiscation, dans les deux cas c'est un acte souverain et par conséquent unacte qui impose le respect ici. C'est un acte souverain, et il ne peut appartenir ni à la Cour arbitrale ni à mes honorables contradicteurs de discuter un acte souverain, ou de le discuter utilement bien entendu, parce que, comme il s'agit d'un conflit de droit positif, ainsi que je l'ai indiqué en commençant, ce sont des lois qui nous régissent tous, que nous pouvons interpréter, que nous pouvons discuter, dont nous pouvons demander l'application, mais dont nous ne pouvons pas demander la révision.

Si je me suis permis, messieurs, d'évoquer la lecture que j'ai faite dans ce document de l'Histoire du pontificat de Clément XIV, si je me suis oublié à faire cette digression et à vous parler de cette lettre du pape suppliant le Roi de revenir sur sa décision, c'est parse que j'y vois que le pape qui suppliait ne songeait pas à critiquer cette partie du décret qui avait pour objet l'appropriation ou la confiscation des biens: il estimait que c'était un acte souverain qui donnait si peu naissance à une créance civile permettant un débat devant les tribunaux civils et donnant naissance à un droit privé, qu'il n'était même pas sûr que le Roi paierait les 100 piastres par an de pension à chaque Jésuite et qu'il se disait: comment pourrais-je l'y contraindre?

N'est-ce pas encore là la reconnaissance qu'il ne s'agit pas de droits civils, mais d'un acte souverain ne devant recevoir d'autre exécution que celle que le Roi voudra bien lui donner?

En 1768, l'année suivante, le décret royal reçut son exécution au Mexique. Les supplications du pape n'ont pas arrêté le Roi souverain. Charles III va ordonner que sa décision soit mise à exécution au Mexique, que les Jésuites soient expulsés de Californie et il va confisquer leurs biens: c'est l'application du principe qu'il a proclamé le 17 février 1767.

J'ai signalé tout-à-l'heure que l'Eglise n'était pas intervenue à la naissance du Fonds Pieux; voici que ce Fonds Pieux qui était entre les mains des Jésuites va passer en d'autres mains; est-ce que l'Eglise va intervenir? Pas davantage; pourquoi? Parce que l'Eglise n'a jamais considéré ce fonds comme bien ecclésiastique, par la raison que ce qui caractérise même en droit canon le bien ecclésiastique c'est l'intervention de l'Eglise ou de ses représentants pour en permettre la constitution, c'est la conservation pour l'Eglise du droit de demander compte et l'exercise de ce droit. Ici, messieurs, ni à la naissance ni à la fin l'Eglise n'intervient, et vous allez voir qu'en 1773, par un document nouveau, c'est-à-dire par la bulle du Pape Clément XIV qui se trouve reproduite page 332, texte espagnol, livre rouge, ce pape va supprimer les Jésuites et ne va pas faire allusion à cette confiscation.

Il va faire allusion au décret du Roi Charles III, il va ratifier cette décision; il va dire que c'est à la demande des princes chrétiens qu'il agit.

Notez que nous sommes en 1773; c'est depuis 1763 que Louis XV a expulsé les Jésuites en confisquant leurs biens comme je vous le dirai,

c'est depuis 1767 que Charles III a confisqué leurs biens; le pape connaît les décrets; qu'est-ce qu'il va faire? Il a vu que ces décrets proclament la confiscation par le Roi, l'appropriation des biens par lui; est-ce qu'il va protester? Non, messieurs: il va ratifier, et cette bulle va être publiée en Californie en vertu d'une cédule royale qui en autorise la publication.

De telle sorte, messieurs, que l'Eglise représentée par ses autorités les plus éminentes va admettre la thèse critiquée aujourd'hui, va admettre qu'il ne s'agit pas de biens ecclésiastiques mais qu'il s'agit de biens que le Roi a le droit de s'approprier, elle va ratifier cet acte souverain au lieu d'en demander la révision et de protester, et il faudra attendre plus d'un siècle, il faudra attendre que votre Cour suprême soit constituée ou que la Commission mixte soit constituée pour que ces droits et ces principes soient mis en question!

Sir EDWARD FRY. Il n'y a pas la date de la bulle dans le livre rouge.

M. DELACROIX. C'est à la page 332, elle est en espagnol.

M. RALSTON. Ce n'est pas traduit en anglais; il y a un sommaire où la pièce est indiquée.

M. DELACROIX. C'est un document que nous ferons traduire.

Sir EDWARD FRY. Cela n'est pas nécessaire.

M. DELACROIX. Je pense qu'il pourrait être intéressant pour le Tribunal et c'est la raison pour laquelle j'ai demandé moi-même la traduction que je donne á la Cour, je pense qu'il sera utile qu'elle l'ait également.

Voilà donc, messieurs, que le pape Clément XIV supprime sans protestation les Jésuites, et c'est pour constater cette absence de protestation que le document est intéressant.

Mais, me dira-t-on, il reste dans ce décret de Charles III une indication que vous omettez: Charles III, lorsqu'il confisque les biens, lorsqu'il se les approprie, a soin d'ajouter que c'est sans préjudice aux charges qui peuvent avoir été imposées par les donateurs et aux moyens d'existence des Jésuites, et ces charges, le Roi les a assumées.

Certainement. Il y avait, pour le Roi avant même qu'il n'eût énoncé cette volonté, une obligation morale; il y avait, si je puis employer cette expression, qui, lorsqu'il s'agit d'un Etat n'est cependant pas toujours en situation, une obligation de conscience de la part du souverain qui confisquait les biens, de dire; je dois leur donner une destination conforme à la volonté de ceux qui ont constitué le Fonds Pieux. C'était une obligation morale ou de conscience préexistante, et le Roi catholique, le roi de droit divin, le roi qui a le plus grand intérêt à ce que le nombre des sujets catholiques augmente il va avoir soin de dire: Je respecterai cette obligation morale, je respecterai la volonté des fondateurs, je m'en charge.

Mais, messieurs, dans l'histoire, lorsqu'un souverain confisque des biens, c'est une ajoute qu'il fait toujours: C'est ainsi que j'ai eu la curiosité de rechercher la loi du 2 novembre 1789 par laquelle la Révolution Française a nationalisé tous les biens ecclésiastiques. En les confisquant elle a eu soin de dire (je prends le texte même de la loi):

> Tous les biens ecclésiastiques sont à la disposition de la nation, à la charge de pourvoir de manière convenable aux frais du culte, à l'entretien de ses ministres et au soulagement des pauvres.

En bien, je vous le demande, est-ce qu'avec ce billet-là on pourrait s'adresser à un Tribunal et demander que l'Etat soit condamné à payer les ministres du culte, à soulager les pauvres et à entre-tenir les églises?

Evidemment non; pourquoi? Parce que ce n'est pas un contrat, parce que ce n'est pas un acte donnant naissance à un droit civil: c'est une loi, c'est un acte souverain, c'est un acte due pouvoir législatif, c'est un acte qui va donnor naissance à des obligations pour les sujets mais non pas à des droits civils à leur profit. Par conséquent, si dans le décret de Charles III il y a l'expression d'une volonté royale, c'est une intention, c'est la volonté souveraine qu'il fait connaître, mais il dépend de lui de la réaliser, c'est un acte souverain dont il est par conséquent souverain juge tant au point de vue de sa promulgation que de son exécution.

Voilà, messieurs, le caractère juridique de ce décret. Ce que le Roi fait là c'est l'énoncé d'une intention, d'une volonté respectable qui correspondait à une obligation morale comme elle correspondait à un intérêt bien compris. Il devait souhaiter que les Missions de Californie fussent maintenues; c'est si vrai que lorsque 50 ans plus tard le Gouvernement méconnaîtra ses obligations morales, la Californie ne sera pas loin de lui échapper; l'événement l'a prouvé.

Je continue. En 1769, l'administration due Fonds Pieux fut confiée par le Roi à des commissaires laïques. C'était une nécessité. Le Roi confisque les biens des Jésuites, il faut bien qu'il les fasse administrer; il va les faire administrer par des commissiares royaux, et il va confier le produit de ce Fonds aux Franciscains, c'est-à-dire qu'il va décider quels sont ceux qu'il va choisir pour être ses délégués et pour accomplir l'œuvre primitive des missions, c'est-à-dire la conquête spirituelle et temporelle de la Californie. Il va s'adresser aux Franciscains; les Franciscains vont s'y installer en 1769. Le Roi leur dit qu'il leur donnera 400 piastres par tête, c'est-à-dire que chaque père Franciscain recevra pour son entretien et celui de sa mission 400 piastres; puis il lui donnera, quand il le trouvera bon, un supplément de 1,000 piastres pour les distributions qui seront faites en vêtements, nourriture, etc., aux habitants des missions.

En 1772, les Dominicains ont, eux aussi, voulu s'installer en Californie, ils trouvaient que c'était une œuvre qui méritait leur attention; ils prenaient aussi en considération les émoluments royaux qui étaient attachés à la tâche; c'est ainsi que les Dominicains vinrent—si je puis me servir d'une expression dont je m'excuse—faire une concurrence pour la bonne cause aux Franciscains en Californie.

Alors on a décidé de faire un partage. Qui est-ce qui va faire le partage? C'est le Roi, c'est le Gouvernement; le Gouvernement va dire: les Franciscains iront dans le Nord et les Dominicains dans le Sud; c'est-à-dire qu'aux Dominicains on va confier les Missions de la Basse Californie, et aux Franciscains celles qu'ils voudront constituer dans la Haute Californie. Ce partage fut réalisé par un décret du 30 avril 1772.

Je dois ici ouvrir une parenthèse pour exposer un autre fait assez caractéristique qui a eu son dénouement en 1783. Il s'agit d'un procès auquel avait donné lieu la succession Arguelles. Je vous ai dit que le Fonds Pie avait été constitué par des donations diverses, notamment par la donation considérable du marquis de Villapuente, et aussi par une donation de la Doña Josepha de Arguelles. Cette personne fort désireuse d'avantager les Jésuites était décidée à leur donner tout ce qu'elle avait. Elle avait disposé que les Jésuites auraient un quart de sa fortune pour leurs colléges, leurs pensionnats, leurs établissements

d'instruction, et que les trois autres quarts, donc le reste de sa fortune, seraient donnés aux Jésuites moitié pour les Missions de Californie et moitié pour les Missions des Philippines. Seulement, messieurs, il se fait que ce procès traîne beaucoup: il n'y avait pas encore la procédure des Tribunaux internationaux d'arbitrage et les procès de ce temps-là, comme certains procès de nos jours, duraient longtemps; de telle façon que le procès n'était pas fini lorsque les Jésuites ont été expulsés. Le procès a continué et les héritiers ont dit: Puisque notre auteur a donné aux Jésuites et que ceux-ci n'existent plus, qu'ils ont été chassés par le Roi, que leur Ordre a été supprimé par le pape, eh bien, le testament est nul et par conséquent la fortune est pour nous.

Alors, messieurs, la Cour des Intestats, en suite d'une décision du Conseil royal des Indes, a décidé par une sentence reproduite à la page 456 du volume rouge, du 4 juin 1783, ceci; elle a dit: en ce qui concerne le quart de la fortune, qui avait été légué aux Jésuites en vue de leurs collèges, la disposition n'est pas valable, ce quart sera pour la famille, parce que les collèges des Jésuites n'existent plus, parce que dans tous les cas il n'y a plus de personnalité capable de recevoir; cette donation est nulle, et par conséquent c'est l'héritier légal, c'est-à-dire le plus proche parent, dit la sentence, qui va recevoir ce quart. Il est à remarquer que nul ne songe à revendiquer pour l'Eglise ce legs fait au profit des Jésuites expulsés et devenu exclu. Quant aux trois autres quarts—ceci est intéressant parce que cela va peut-être faire la chose jugée—le Conseil des Indes va décider que ces trois quarts qui avaient été donnés de par la volonté de la donatrice aux Jésuites, vont être mis "à la disposition de Sa Majesté, à laquelle la succession appartenait originellement."—je lis les propres termes de la sentence.

Voici donc qu'à une époque où l'on pouvait apprécier mieux qu'aujourd'hui quelle avait été la vonlonté des donateurs, notamment par les circonstances ambiantes, on décide—et c'est le Conseil royal des Indes qui décide après une longue procédure—que ces biens qui avaient été destinés aux Missions de Californie et des Philippines seraient à la disposition de Sa Majesté, à laquelle la succession appartenait originellement.

Et qui plus est:

Il est finalement ordonné, dit l'arrêt, que la copie en double des délibérations, c'est-à-dire de la procédure, soit soumise à Sa Majesté afin qu'Elle puisse signifier son SOUVERAIN PLAISIR quant à la direction, subsistance et sécurité des fonds voués à l'œuvre des missions pieuses.

Voici donc que le 4 juin 1783 la question qui s'agite aujourd'hui devant vous était jugée; il était jugé que les biens destinés aux Missions, devaient après la disparition des Missions et des Jésuites être à la disposition du Roi pour qu'il en use suivant son souverain plaisir.

Je continue. Nous arrivons ainsi à la fin du 18e siècle et au commencement du 19e. Nous avons terminé l'étude de la période de prospérité et de grandeur des missions, de leur période de succès, de la période pendant laquelle le Roi peut dire qu'en Californie son peuple lui est attaché. Mais alors va commencer une période troublée; c'est le moment où le Mexique estime qu'il peut se passer de l'intervention de la métropole. A ce moment commencent des ferments de trouble, des ferments d'agitation dans le Mexique. De là les préoccupations du Roi, non pas seulement au sujet du Mexique et de la Californie, mais de toute cette contrée; constamment il est obligé d'envoyer des expéditions militaires pour maintenir en respect ses sujets en révolte.

Cela coûte de l'argent, et déjà alors il semble que les menses des Franciscains n'étaient plus régulièrement payées. Nous voyons dans les ouvrages de l'époque que l'on se plaint, que les Franciscains en arrivent bientôt à devoir abandonner certaines missions. Les concours qu'ils demandent ne leur sont plus donnés, et nous arrivons ainsi, messieurs, à la période de l'indépendance mexicaine, qui date de 1827. C'est l'époque où le Mexique va se substituer au Roi d'Espagne.

Il y avait là un fonds constitué par des mexicains, composé de biens mexicains; ce fonds va passer au nouvel Etat, c'est-à-dire à l'Etat nouvellement constitué, à l'Etat indépendant du Mexique, qui va se substituer au Roi d'Espagne.

Immédiatement l'Etat mexicain va avoir, lui aussi, à prendre des mesures pour l'administration de ce Fonds. Est-ce qu'il va dire: ce sont des biens d'Eglise, je vais les remettre à l'Eglise? Non. Il va prendre une loi du 25 mai 1832, loi qui est pubilée avec le concours de nos honorables contradicteurs dans la petite brochure jaune que vous possédez—c'est la première des lois publiées. Dans cette loi le Gouvernement du Mexique va affirmer sa volonté souveraine comme le Roi d'Espagne l'avait affirmée précédemment. Dans cette loi presque à chaque article, il est question du droit exclusif du Gouvernement; le Gouvernement crée un bureau chargé d'administrer les propriétés et composé de trois personnes.

Mes honorables contradicteurs triomphent parce que parmi ces trois personnes il y a un ecclésiastique. Mais enfin est-ce parce qu'un administrateur sur trois porte soutane que le Gouvernement perd ses droits?

Le Gouvernement affirme son droit dans chaque article. A l'article 8 il dit que ce bureau sera composé de trois personnes "nommées par le Gouvernement." A l'article 10 il est dit que c'est au nom du Gouvernement que des sommes pourront être envoyées en Californie. Le bureau est chargé de "proposer au Gouvernement" l'envoi de telle ou telle somme en Californie, mais c'est toujours le Gouvernement qui dépose comme c'est à lui de dire dans quelles conditions les biens pourront être loués, adjugés, vendus. Tout cela se fait publiquement, suivant les règles applicables aux biens de l'Etat.

Ainsi que je vous le disais, il est arrivé au Gouvernement de ne pas toujours se préoccuper suffisamment des Missions. Il les a laissés péricliter. C'était un tort; ces Missions ont été ainsi abandonnées; des ferments de discorde se sont développés, et au bout de peu de temps la Californie a été détachée du Mexique en fait avant d'en être détachée en droit.

Donc, le roi d'Espagne avait eu tort, et le Mexique a eu tort, mais le roi d'Espagne et le Mexique ont fait ce qu'ils avaient incontestablement le droit de faire; s'ils ont mal administré, c'était leur droit; s'ils ont dans l'exercice de leur pouvoir souverain commis des fautes, je dirai que c'était leur droit de commettre des fautes. Est-ce que l'Etat agissait là comme Gouvernement ou comme particulier? je vous le demande. Est-ce que la question se pose? Est-ce que c'était la personne publique qui agissait ou la personne civile de l'Etat? Est-ce que la question a besoin d'une réponse? Il est bien certain que ce sont là tous actes souverains; ce sont des lois, des décrets, est-ce que cela ne suffit pas à résoudre la question? Le Roi agissait comme il l'entendait; il agissait mal, il commettait une faute qui était une faute politique, mais qui ne pouvait donner naissance à une demande de dommages-intérêts.

Lorsque le Gouvernement administrait mal la Californie, envoyait trop peu de fonds, s'en préoccupait trop peu, lorsqu'il avait toute sa préoccupation attirée d'un autre côté et affectait toutes les ressources dont il pouvait disposer à an autre point de son territoire—il pouvait avoir tort—mais est-ce que, si je puis employer cette expression, l'article 1382 pouvait être invoqué, et peut-il être question de dommages-intérêts? Non, en droit, juridiquement, ce n'est pas sérieusement discutable.

Mais, le 18 août 1833 et le 16 avril 1834, le Gouvernement mexican a pris des arrêtés de sécularisation. Il avait installé luimême les Fransciscains en Californie, et voici qu'il prend des arrêtés par lesquels il sécularise, il supprime les Franciscains; il leur permet de subsister, mais comme curés intérimaires, c'est-à-dire que ce ne sont plus religieux qui seront là, non, ce seront des curés, le Gouvernement ne connaît plus de religieux. C'est ce qui résulte des deux décrets que je viens de citer.

Alors, messieurs, il y eut une très mauvaise organisation, parce qu'il n'y avait plus de chef, plus de direction, il n'y avait plus d'unité de vues. C'était une faute politique dont le Gouvernment n'a pas tardé à se rendre compte, et aussitôt nous voyons poindre l'intervention politique des Etats-Unis dans la Californie; comme toujours—c'est l'histoire de tous les peuples—quand il y a un territoire troublé, bouleversé, un voisin plus puissant intervient et profite de son intervention pour faire œuvre de conquête. C'est ce qu'ont fait les Etats-Unis.

Alors le Gouvernement mexican comprit sa faute et voulut créer un chef. Ce chef, il le choisit parmi les anciens missionnaires, parmi les anciens Franciscains, c'est Don Garcia Diego; il le désigne comme évêque: puisque les Franciscains étaient devenus curés, leur chef devait étre un évêque.

C'est ainsi que le Gouvernement en est arrivé le 19 septembre 1836 à prendre un arrêté par lequel il prépara la création d'un évêché; il sollicita l'intervention du pape pour la constitution de cet évêché; et nous voyons dans le susdit décret préparatoire que l'on va décider de confier à cet évêque nouveau l'administration du Fonds Pie, du fonds des Missions, et cette mesure sera justifiée par la nécessité de la défense dela Californie centre les Etats-Unis.

Telle est la raison du décret du 19 septembre 1836. Ce décret, vous le connaissez, on en a suffisamment parlé, mais nous y reviendrons lorsque nous examinerons le titre des demandeurs.

L'article 6 est intéressant parce qu'il décide que les biens du Fonds Pieux seront mis à la disposition de nouvel évêque pour être administrés et appliqués à certains objets—nous reviendrons sur ces mots, je les indique maintenant parce que je fais l'exposé:

Ces biens seront mis à la disposition pour être administrés.

J'anticipe peut-être, mais je me souviens que dans les décrets de la Révolution Française, lorsque le Gouvernement confisqua tous les biens ecclésiastiques, tous les biens des églises, il a agi à peu près ainsi; il s'est trouvé embarrassé par les cathédrales, les métropoles, les églises qu'il avait prises et dont il ne pouvait guère tier un revenu utile; alors il les a mises "à la disposition des évêques" cela se trouve dans les décrets. Jamais cependant on n'a considéré que les évêques en fussent propriétaires, et la jurisprudence unanime décide que ce sont les villes, les communes, qui sont propriétaires des cathédrales, des églises, etc. Cependant le même mot se trouvait dans le Concordat du 26 Messidor an IX.

Voici donc, messieurs, que l'évêque va être nommé en suite du décret du 19 septembre 1836. Dans l'esprit du Gouvernement, c'est un fonctionnaire à qui l'on va donner un traitement de 6,000 piastres. L'article 1er le dit: "Il aura un traitement annuel de 6,000 piastres." Puis à l'article 5 il est dit qu'on lui donnera 3,000 dollars pour payer les frais d'expédition des bulles—et de déménagement je pense—Voilà ce qui lui est alloué.

Plus tard nous aurons à examiner les conséquences juridiques que mes honorables contradicteurs déduisent de ce décret. Ils vont dire qu'ils puisent dans ce décret un droit de créance, que par ce décret du 19 septembre 1836 le Gouvernement mexicain en mettant les biens du Fonds Pie à la disposition de l'évêque pour être administrés, ne substituait pas un nouveau "manager" aux commissions créées par la loi du 23 mai 1832, mais se dépouillait de ses droits de propriété au profit de l'évêque.

Nous répondrons plus tard; nous dirons notamment: Vous oubliez que c'est un décret, que c'est une loi, que c'est un acte du pouvoir souverain, et que ce n'est pas un titre de reconnaissance civile, que ce n'est pas un transfert de propriété. Nous discuterons cela.

Donc, messieurs, le 19 septembre 1836 le Gouvernment confie l'administration des biens du Fonds Pie à l'évêque. Mais, il y a probablement dans l'histoire du Mexique ce que nous retrouvons dans l'histoire d'autres peuples, une balance des partis: peut-être y avait-il là des conflits entre cléricaux et libéraux; je ne connais pas assez l'histoire du Mexique pour préciser; mais je sais qu'un décret du 8 février 1842 va reprendre à l'évêque l'administration qu'on lui avait confiée en 1836. Son pouvoir a été éphémère car il n'a été en réalité nommé qu'en 1840, et déjà au commencement de 1842 le Gouvernement lui reprend le pouvoir d'administration qu'il lui avait confié.

Nous aurons à dire plus tard: Mais quoi! vous prétendez que le 19 septembre 1836 le Gouvernement mexicain a transféré un droit privatif, un droit de propriété, un droit de créance, un droit civil à l'évêque? mais alors, s'il le lui reprend, il doit l'exproprier; si le droit est entré dans le dominium de l'évêché et est devenu son patrimoine à quelque titre que ce soit, et si on le lui reprend c'est une expropriation, parce que donner et retenir ne vaut.

Mais, messieurs, le Gouvernement mexicain ne croit pas qu'il en soit ainsi; il reprend tout simplement par un acte du pouvoir souverain du 8 février 1842 ce qu'il avait concédé par un autre acte du pouvoir souverain le 19 septembre 1836. Ce qui est un acte du pouvoir souverain n'est jamais perpétuel; en matière politique surtout rien n'est éternel; par conséquent, une autre administration succédant à la précédente, on a supprimé, on a rapporté, suivant l'expression textuelle, le décret du 19 septembre 1836. L'Etat a repris l'administration des biens, il a dit: Je m'en chargerai moi-même, j'emploierai mieux moi-même les fonds au but pour lequel ils étaient destinés, je ferai cela plus directement moi-même. Alors, par un décret du 24 octobre 1842 le Gouvernement cette fois voulant en finir, a nationalisé le bien, il l'a incorporé au Trésor national et il a dit qu'il en paierait un intérêt de 6 pct., ou plutôt qu'il affecterait un intérêt de 6 pct. "aux objets de bienfaisance et nationaux" qui avaient été visés par les donateurs.

Nous aurons à examiner—j'indique la question, je ne la résous pas—si ce décret du 24 octobre 1842, qui est tout spécialement invoqué par les demandeurs, conférait à quelqu'un un droit civil, si, quand le

Gouvernement disait: "j'affecterai 6 pct.," il y avait quelqu'um qui était institué comme ayant droit à ces 6 pct., si en d'autres termes le Gouvernement, quand il signait ce décret, s'était enlevé un droit pour le donner à un autre, et nous nous demanderons quel était cet autre. Ce n'était pas l'évêque, puisque précisément ce décret avait pour effet de lui enlever ce qu'il lui avait donné en 1836; ce n'était pas l'Eglise; ce n'étaient pas les Indiens; nous examinerons cela, et nous dirons qu'il n'y avait pas de créancier constitué à charge de l'Etat par ce décret de 1842.

Vous verrez alors que les faits vont se compliquer et ce précipiter jusqu'en 1848. C'est une époque de fièvre, d'agitation au Mexique; cette question des Californies a beaucoup préoccupé les Gouvernements, cette succession de décrets le prouve. Un représentant de l'évêque, Don Ramirez, avait été chargé d'administrer les biens à Mexico. Ces biens étaient situés à Mexico, l'évêque devait aller en Californie, il n'y avait pas alors les facilités de communication d'aujourd'hui; de telle sorte que l'évêque ne pouvait pas à la fois administrer les Missions, faire son apostolat, et en même temps administrer les biens de Mexico; il devait avoir un représentant à Mexico: ce fut Don Ramirez.

Don Ramirez était devenu âgé; il était assisté d'un avocat, Don Miguel; quand ils virent que le Gouvernement le 8 février 1842 reprenait à l'évêque l'administration due Fonds Pie, que le 21 octobre 1842 il nationalsait le Fonds Pie, l'incorporait au Trésor, Don Ramirez et Don Miguel son conseil dirent au Gouvernement mexicain: Faites attention, l'œuvre que vous accomplisez est une œuvre néfaste parce qu'elle consomme la ruine des missions.

A cette époque, messieurs, il faut bien le reconnaître, les envois de fonds qui étaient faits aux anciens Franciscans devenaient de plus en plus rares; le Gouvernement, ou plutôt les Gouvernements successifs avaient d'autres préoccupations. En 1845, dans un document important, l'avocat de l'évêque va prendre la parole et va demander compte au Gouvernement de ses actes; il va lui signaler le danger de son attitude, de l'abandon des Missions, dans le document mémorable qui est reproduit dans le volume rouge à la page 385 (Mémoire de M. Aspiroz, N°. 77 et annexe N°. 25) et nous allons voir pour la première fois ce que pense l'évêque. Il s'agit due décret de 1836 qui a donné à l'évêque l'administration du Fonds Pie, du décret du 8 février 1842 qui lui a enlevé cette administration et du décret de 24 octobre 1842; et lévêque par l'organe de celui qui est attitré pour parler en son nom va dire ceci:

> Ni le prélat de de Californie ni ses agents de fait *n'ont prétendu ni même rêvé de prétendre à la propriété du fonds pour le révérend évêque ou pour la mître.* . . . . Le révérend évêque n'a formulé et ne formule aucune prétention semblable. Les biens qu'une loi du régime république a placés entre ses mains lui ont été arrachés, il a élevé la voix vers le Congrès le priant de mesurer la justice de cet acte et ses conséquences; il a placé devant lui les documents et les contrats qui démontrent et l'origine et la destination du Fonds. Si dès lors le Congrés décide que le Département a bien agi et que le Fonds est propriété nationale, les devoirs du révérend évêque auront été accomplis. Le représentant de l'évêque ne se con sidérait pas plus comme le propriétaire du Fonds que le député ne l'est de son département.

Nous avons là, messieurs, un témoignage important, le témoignage de l'évêque ou de son représentant. On lui a arraché les biens, il va dire ce qu'il pense, il va protester, et il va bien marquer la nuance, il va dire: je proteste parce que c'est une faute politique énorme, parce

que si vous ne vous préoccupez pas des Missions, je ne réponds pas de la Californie.

Don Miguel aurait raison: ce fut une faute; mais il le dit respectueusement, condamnant d'avance la thèse qui est présentée ici: je ne prétends pas à une propriété qui n'appartient pas à la mître, je ne suis pas plus propriétaire qu'un député ne l'est de son département, je ne suis là qu'un fonctionnaire. C'est-à-dire qu'il caractérise la situation juridique de l'évêque, son mandant; par conséquent, il y a une autorité incontestable qui s'attache à ce document.

(La séance est levée à 5 heures et le Tribunal s'ajourne au lendemain à 10 heures du matin.)

NEUVIÈME SÉANCE.

24 septembre 1902 (matin).

La séance est ouverte à 10 heures du matin, tous les Arbitres étant présents.

M. le Président. La parole est au conseil des Etats-Unis mexicains.

SUITE DE LA PLAIDOIRIE DE M. DELACROIX.

Messieurs: Je continuerai, avec la permission de la Cour, l'exposé que j'ai commencé hier.

La Cour aura remarqué par la revue des faits que nous avons rapidement passée hier, que tant que les Jésuites sont restés à la tête du Fonds Pie ils en ont disposé seuls, et que l'intervention du Roi, du souverain, ne s'est produite que pour les autoriser, les diriger, tout au plus les contrôler. Mais à partir du moment où l'ordre des Jésuites a été aboli, où les Jésuites ont été expulsés, alors le Roi, le pouvoir souverain dispose, lui, des biens des Jésuites comme les Jésuites en avaient disposé antérieurement.

Un autre fait qui ne vous aura certainement pas échappé, c'est que tandis que nous voyons constamment cette intervention du Roi déjà lorsque les Jésuites disposent du Fonds, par un contrôle, une surveillance, une intervention, une autorisation, et plus tard par un droit de disposition et d'affectation, l'Eglise d'autre part n'intervient jamais, ni à la naissance de l'ordre des Jésuites en Californie, ni à la suppression, ni à aucun moment par la suite.

Nous en arrivons ainsi, messieurs à la période qui a son point final en 1844.

Je dois ici exposer à la Cour la succession des faits relatifs à l'incident appelé affaire des îles Philippines. Vous vous souvenez que doña Josepha Arguelles, qui avait disposé au profit du Fonds Pie à concurrence d'une somme que l'on chiffre par 800,000 piastres, avait divisé sa fortune en quatre parties; toutes les quatre parties étaient données aux Jésuites, mais un quart était destiné à leurs collèges tandis que les trois autres quarts étaient destinés pour moitié aux Missions des Philippines et pour l'autre moitié aux Missions de Californie. En 1827, lorsque l'indépendance du Mexique a été proclamée, lorsque le Mexique s'est séparé de l'Espagne, le Gouvernement mexicain a trouvé cet ensemble de biens qui a reçu le nom de Fonds Pie, qui avait été constitué par des mexicains et qui se trouvait composé de biens situés au Mexique. Le gouvernement mexicain s'est approprié ces biens, c'est-

à-dire que de son propre mouvement il s'est substitué au roi d'Espagne dans les droits que celui-ci pouvait avoir sur ces biens.

Mais, messieurs, si le roi d'Espagne avait laissé faire, il n'avait pas encore ratifié cette situation. Il s'est produit alors des réclamations de la part des Dominicains chargés des Missions des îles Philippines. Ceux-ci faisaient valoir—et il faut bien reconnaître qu'ils le faisaient valoir à juste titre—que si le roi d'Espagne avait la disposition de l'ensemble du Fonds Pie pour des Missions situées dans deux parties de ses Etats, d'une part en Californie, d'autre part aux îles Philippines, si alors la Californie attenant au Mexique était détachée de l'Espagne, et si on pouvait admettre que le Gouvernement mexicain prît la place du roi d'Espagne dans ses droits sur le fonds en tant qu'ils affectaient les missions de Californie, il ne se concevrait pas que le roi d'Espagne abdiquât ses droits sur ces fonds en ce qui concerne la partie qui affectait les îles Philippines. Le roi d'Espagne avait l'ensemble des droits sur l'ensemble du Fonds Pie, mais il avait en même temps l'ensemble des Missions à diriger, à entretenir; il pouvait donc se concevoir que puisque c'étaient des biens mexicains d'un fonds mexicain constitué par des Mexicains, le nouveau Gouvernement de Mexique se substituât au roi d'Espagne, mais seulement pour autant que ces biens n'eussent pas été affectés aux Missions des Philippines; le roi devait conserver cette partie puisqu'il avait l'intégralité des droits jusque-là.

C'étaient là, messieurs, il faut bien le dire, des raisons profondément juridiques et profondément justes que faisaient valoir les Missions des Philippines par l'organe du Ministre du roi d'Espagne. Le Gouvernement mexicain le comprit . . . que dis-je? le gouvernement mexicain fut heureux de ce que le roi d'Espagne voulait bien reconnaître que le gouvernement mexicain se substituait à lui pour cette partie du Fonds Pie qui concernait la Californie, à la simple condition qu'on reconnût au roi d'Espagne la conservation de la partie du Fonds qui était destinée aux iles Philippines. Aussi, messieurs, le gouvernement mexicain a-t-il accepté de faire le traité du 14 octobre 1836 par lequel il a reconnu au roi d'Espagne le droit sur la partie du Fonds destinée aux îles Philippines.

Ce n'était que juste: le roi d'Espagne était maître du tout, il conservait une partie de la charge, il conservait par le fait la propriété, la disposition d'une partie du fonds. Cette raison seule eût dû suffire pour que le Gouvernement mexicain s'empressât d'accepter les propositions qui lui étaient faites par l'Espagne sous la forme d'une revendication. Mais il y était d'autant plus incité que d'autres considérations d'ordre politique venaient appuyer ces propositions. Le Gouvernement mexicain qui s'était déclaré indépendant depuis 1827. était toujours préoccupe de faire reconnaître cette indépendance par le roi d'Espagne, par le Gouvernement espagnol dont il s'était affranchi, dont il s'était séparé, et voilà pourquoi il était pressé de faire cet accord, qui devait être suivi de l'accord relatif à la reconnaissance de son indépendance.

Cela est si vrai, messieurs, qu'à peine le traité du 14 octobre 1836 est-il intervenu au sujet du partage du Fonds Pie que le 28 décembre 1836, c'est-à-dire deux mois et demi après, un traité reconnait l'indépendance du Mexique. Vous le voyez, ces deux négociations étaient concomitantes et le Gouvernement mexicain avait trop de raisons pour ne pas s'empresser de donner cette satisfaction pécuniaire au Gouvernement espagnol.

Mais, messieurs, si ce traité du 14 octobre 1836 reconnaissait ainsi les droits du Gouvernement espagnol—lequel s'était déchargé des missions aux Philippines sur les missionnaires Dominicains—sur tous les biens qui avaient été destinés aux missions des Philippines, cette tradition des biens ne s'était pas effectuée d'une manière définitive, claire et effective dès 1836, et c'est ainsi que nous allons voir que quelques années après, l'un des biens qui étaient destinés aux Missions des îles Philippines, qui appartenaient à ces Missions ou au roi d'Espagne pour ces missions, l'un de ces biens avait été vendu. Alors en vertu de la déclaration de principe, de la reconnaissance existant dans le traité du 14 octobre 1836, le Gouvernement espagnol représenté par son ministre et les Missions dominicaines représentées par le pèpre Moran, ont réclamé à Mexico en disant: Voilà un bien qui était destiné aux îles Philippines, vous l'avez reconnu, or vous l'avez vendu, c'est un tort—et c'était incontestablement un tort.

Aussi, messieurs, par une convention du 7 novembre 1844 le Gouvernement mexicain a consenti à transiger, et il a remis pour les missions des îles Philippines une somme principale de 115,000 piastres et une somme accessoire de 30,000 piastres à titre d'indemnité, soit en tout 145,000 piastres. C'était une transaction.

Tout ce que je dis ici, messieurs, se trouve notamment rapporté dans le mémoire de M. Azpiroz, page 397 du livre rouge, sous le N°. 136.

Quelle était l'importance des îles Philippines? Je ne connais pour ma part comme biens du Fonds Pie spécialement affectés aux îles Philippines que la moitié des trois quarts de la succession de Madame Arguelles. Cette succession, vous disais-je tout-à-l'heure, devait s'élever à plus de 800,000 piastres, et si je le dis, c'est parce qu'un rapport du 23 auût 1871, un inventaire de ces biens, amène à cette constatation qui était faite par le notaire de l'époque. De telle façon que si un quart appartenait aux Jésuites pour leurs collèges et trois quarts pour leurs missions, il y avait une somme de 600,000 piastres au moins qui devait être partagée par les Missions de Californie et par celles des Philippines. C'est sur cette base qu'une transaction est intervenue.

Il y avait, paraît-il aussi—mais ici la précision n'est pas possible—d'autres petits biens qui auraient été donnés également à la fois pour la Californie et pour les îles Philippines et qui auraient été compris dans cette transaction dont je parlais il y a un instant. Dans tous les cas ce point n'a d'intérêt qu'au point de vue de la chronologie des faits. Mes honorables contradicteurs en ont parlé parce qu'ils y voyaient un argument, ils disaient: Nous sommes, nous, dans la situation des îles Philippines, nous sommes dans la même situation que les missions dominicaines, et puisque le Gouvernement mexican a reconnu le droit des Missionnaires des îles Philippines, pourquoi ne reconnaît-il pas celui des Missionnaires de Californie?

Je n'ai pas besoin de vous démontrer, messieurs, que l'analogie dont on fait état n'existe absolument pas. La situation est toute différente, parce que d'abord je pourrais déjà dire: Vous argumentez d'une transaction, et le caractère essentiel d'une transaction c'est précisément d'écarter la reconnaissance du droit qui pouvait être discuté.

Mais, messieurs, en dehors même de cette considération qui vous aura frappés, vous vous serez dit assurément que la situation n'est pas différente parce que celui avec lequel on transigeait avait tous les droits; il voulait bien en abandonner la plus grande part, on lui en laissait une faible partie pour les Missions dont il conservait la charge. Ce n'est

pas assurément la situation aujourd'hui des demandeurs, qui, eux, n'auront pas tous les droits puisqu'ils n'ent ont aucun, et qu'ils revendiquent des droits que certes ils ne possédaient pas autrefois.

C'était là, messieurs, le fait qui avait eu sa conclusion par la convention du 7 novembre 1844. Vous vous souvenez qu'à cette époque la législation qui régissait cette question des Missions se trouvait dans les deux décrets de 1842, des 8 février et 24 octobre. Aux termes de ces décrets le Gouvernement mexicain avait repris à l'évêque de Californie l'administration qu'il lui avait confiée due Fonds Pie, il la lui avait reprise en disant qu'il se chargerait lui-même des besoins de ses Missions ou qu'il se chargerait lui-même des nécessités de la situation en Californie; il avait annoncé également qu'une somme de 6 pct. sur la valeur de ce Fonds serait ainsi affectée par lui.

Mais, messieurs, en 1845 un revirement se produit dans la législation. J'ai tout-à-l'heure argumenté de cette circonstance que les formes de gouvernement ne sont pas perpétuelles, qu'elles ne sont pas éternelles; assurément le Mexique nous en donne un exemple dans cette période de l'histoire. Voici donc que l'on va revenir en 1845 à la situation que l'on avait créée en principe en 1836, et fait en 1840, et que l'on avait abolie en 1842.

Le 3 avril 1845 intervient un nouveau décret; aux termes de ce décret le gouvernement va rendre à l'évêque l'administration du Fonds Pie, c'est-à-dire l'administration de ce qui reste du Fonds Pie, car, il ne faut pas l'oublier, en 1842 le gouvernement avait décidé la vente des biens, de telle façon qu'il ne pouvait plus disposer en 1845 que de ce qui restait des biens du Fonds Pie. Aussi dit-il qu'il confie à l'évêque l'administration de ce qui reste, sans préjudice du droit du Gouvernement de disposer en ce qui concerne le surplus.

Le surplus, qu'était-ce? Mais, le surplus, ce n'était que les 6 pct. qui restaient encore, dont le Gouvernement avait indiqué l'intention d'employer le montant aux besoins des Missions de Californie. C'était là ce qui restait encore. En bien, quant à ce reste-là, quant à ces 6 pct., il annonce que le Congrès en disposera comme il l'entendra.

C'était donc un décret d'une importance secondaire ou d'une conséquence relative puisque ce décret du 3 avril 1845 ne restituait en réalité à l'évêque que la disposition ou l'administration des biens qui n'étaient pas aliénés.

Ce décret, messieurs, n'eut pas une application bien longue, parce que nous nous rapprochons de la date finale de la conquête de la Californie par les Etats-Unis.

Déjà en 1842, les moyens de communication n'étant pas rapides comme ils le sont aujourd'hui, on avait cru à un certain moment que les Etats-Unis avaient déjà pris la Californie; c'était un faux bruit; mais en 1846 ce fut une réalité; Monterey fut occupé par les troupes des Etats-Unis, et par conséquent ce fut le fait qui fut consacré par le droit plus tard; à partir de 1846 la Californie était occupée par les Etats-Unis, était considérée comme une conquête des Etats-Unis.

Cette situation de fait, cette conquête de la Californie par les Etats-Unis, réalisée en 1846, fut consacrée légalement le 2 février 1848 par le traité de Guadalupe-Hidalgo.

Ce traité avait été naturellement l'objet de discussions préliminaires nombreuses. C'était un traité important. Déjà depuis plusieurs années existaient des ferments de discorde nombreux entre les Etats-Unis et le Mexique; or voici que la conquêt s'était produite. . . . J'ai

lu dans un document qui émane de mes honorables contradicteurs que la Californie avait été achetée par les Etats-Unis au Mexique; c'était une de ces ventes où la partie venderesse n'a pas la faculté de disposer ou de choisir. . . . L'on avait conquis, puis il fallait bien voir à quelles conditions on voulait faire ratifier la conquête, mais la conquête était faite, le fait brutal, le fait de la force primant le droit était accompli. Mais on fait un traité.

Ce traité devait prendre in place de bien d'autres conventions internationales qui avaient été signées entre les deux pays ou avaient été proposées pour régler les conflits entre eux. On avait constaté qu'il existait entre les deux pays une série de conflits pécuniaires qui venaient encore aggraver la situation irritante des rapports entre ces deux Etats, et pour y mettre fin l'on débat d'abord une indemnité pécuniaire à payer par les Etats-Unis au Mexique. Le fait de la conquête, le fait du détachement du Mexique de toute cette partie de territoire qui était le Nouveau Mexique et qui comprennait la Californie, était un fait qui s'était produit de la part des Etats-Unis par la conquête et sur lequel ils n'admettaient plus la discussion; ces états seraient détachés du Mexique pour être incorporés par les Etats-Unis, mais il fallait traiter, ratifier, conclure. On admet la discussion sur une indemnité.

J'aurai l'honneur dans une autre audience de vous indiquer ce que furent les préliminaires de ce traité, mais dès à présent je vous dis qu'on avait indiqué quelle devait être la bas de la fixation de cette indemnité. La Californie et les états détachés du Mexique constituaient une charge pour le Mexique et aussi une source de revenus; c'était cette considération qui devait être la base de la discussion. Ainsi, par exemple, le Mexique avait une dette nationale, cette dette nationale avait été créée pour les besoins de l'ensemble du territoire, c'était l'ensemble du territoire qui en avait profité, et il allait de soi que si une partie de ce territoire était détachée il fallait que cette dette nationale qui pesait alors sur la partie restante reçût un soutien, une contribution de la part du pays qui avait conquis le nouveau territoire. C'était là une notion profondément juste et juridique. Il fallait pour déterminer le chiffre de cette contribution tenir compte non pas seulement des charges que le Mexique restreint allait supporter seul, alors qu'il pouvait autrefois les répartir sur l'ensemble de son territoire, mais il fallait aussi tenir compte des avantages que pouvait en retirer le Nouveau Mexique, c'est-à-dire les charges dont il était débarrassé et dont il passait la main au nouveau gouvernement conquérant.

Voilà, messieurs, ce qui fit l'objet de la discussion, et ce débat amena le traité du 2 février 1848. On fixa une indemnité: 15 millions de dollars. Le gouvernement des Etats-Unis voulait bien dire: finissons-en, en ce qui concerne ce que peuvent être les rapports pécuniaires d'Etat à Etat, ces rapports pécuniaires qui peuvent être la conséquence du détachement d'une partie du territoire du Mexique pour son incorporation dans le territoire des Etats-Unis, nous allons fixer une somme débattue, chiffrée, 15 millions de dollars, et moyennant cette somme c'est fini, d'Etat à Etat il n'y a plus de rapports pécuniaires, il n'y a plus de dettes ou de créances parce que ces dettes ou ces créances entre les deux Etats se trouvent liquidées par le paiement de la somme qui constitue la différence entre ce que peuvent être le doit et l'avoir.

Voilà la première stipulation essentielle de ce traité du 2 février 1848: liquidation des droits d'Etat à Etat.

Mais, messieurs, les parties voulant aller plus loin encore, voulant faire en sorte qu'il n'y eût plus de sujet de conflit entre les deux Etats, ont dit: nous allons créer ici une situation exceptionnelle.

La situation que j'indiquais tout-à-l'heure était logique, elle était normale, elle est dans la plupart des traités; mais voici qu'ici on veut aller plus loin et on dit: Il y a des citoyens d'un Etat qui ont des droits individuels civils ou privés, vis-à-vis de l'autre Etat, c'est asussi un sujet de conflit parce que ces citoyens créanciers d'un Etat sollicitent l'intervention diplomatique ou les bons offices de leur gouvernement vis-à-vis de l'autre Etat; encore une fois, c'est un sujet de discussion, une cause d'acrimonie entre les deux pays. Pour y mettre fin, on décide que le Gouvernement des Etats-Unis donne décharge au gouvernement mexicain pour toutes les créances que des citoyens des Etats-Unis peuvent avoir vis-à-vis de l'Etat Mexicain.

C'était une chose anormale, car les Etats-Unis n'avaient pas qualité pour donner décharge des créances civiles que leurs citoyens pouvaient avoir vis-à-vis des citoyens d'un autre Etat, mais ils acceptent de prendre la place de l'Etat mexicain vis-à-vis d'eux, c'est-à-dire qu'ils disent: Vous allez, vous, Etat mexicain, me payer une somme de, un forfait de 3,250,000 dollars, et moyennant cette somme je me charge de payer touts les créances que des citoyens américains peuvent avoir vis-à-vis de vous.

C'est donc une décharge absolue par la substitution d'un débiteur à un autrè; c'est, si je puis employer cette expression de droit civil, une novation qui est opérée, et qui implique une décharge absolue—la décharge se trouve d'ailleurs dans l'article 14 du traité de 1848.

Voici donc que les deux Etats voulant aplanir toutes les difficultés, supprimer tous les sujets de conflit, avaient fait des choses extraordinaires, le Gouvernement des Etats-Unis acceptant de payer les dettes, quelles qu'elles fussent, du Gouvernement mexicaine vis-à-vis des citoyens américains. Le Gouvernement américain acceptait cette charge et de par le traité lui-même il était entendu qu'il aurait institué une commission américaine qui aurait été chargée de juger la valeur des créances produites par les citoyens américains vis-à-vis de l'Etat mexicain, de les apprécier, d'en fixer le chiffre, et le Gouvernement américain les aurait réglées quel qu'en fût le montant.

Est-ce que le Mexique, en présence, de cette double décharge, décharge de la part de l'Etat, décharge de la part des citoyens Américains, pouvait croire encore, en signant ce traité, qu'il conservait une dette vis-à-vis de cet Etat abandonné, détaché de son territoire, vis-à-vis de l'Eglise de la Haute Californie? Nous examinerons plus tard ce traité, et nous verrons que s'il y avait des droits appartenant à une collectivité quelconque dans la Haute Californie, c'était assurément le gouvernement américain, qui prenait le soin de ce nouvel Etat, qui en prenait la charge, alors qu'il prenait cet Etat sous sa tutelle, qu'il représentait cette collectivité de la nation nouvelle, lui qui assurément aurait dû faire valoir ses droits lors du traité de Querétaro.

Messieurs, le Gouvernement mexicain devait être d'autant plus rassuré que dans un premier texte du traité, dans l'article 9 notamment, il avait été indiqué que les associations, communautés ecclésiastiques ou autres, les institutions jouissant de la personnalité civile au Mexique, auraient continué à en jouir dans le nouvel Etat, mais que le Sénat américain n'a pas accepté cette formule. Le Sénat américain n'acceptait pas d'être lié par une législation qui n'était pas la sienne, il n'ac-

ceptait pas que des citoyens du nouvel Etat de Californie pussent encore se réclamer d'une législation qui n'était plus la leur parce qu'elle leur était devenue étrangère; le Sénat américain exigea donc que le texte définitif du traité fût celui que vous possédez entre les mains, et tout ce qu'il consentit à dire c'est que chacun aurait le droit d'avoir les croyances, la religion qu'il lui conviendrait, sans que la liberté de conscience fût atteinte; mais quant à reconnaître une personnalité civile en vertu d'une législation étrangère, le Governement américain ne le voulut pas.

Dès lors, messieurs, il semble que le Gouvernement mexicain devait être de par le traité de Querétaro à l'abri de toute espèce de préoccupation; il devait se dire: je ne puis plus avoir de créanciers qui puissent faire valoir de créances, et s'il existait encore un citoyen américain qui pût avoir une créance vis-à-vis de moi elle se trouve supprimée par le traité de Querétaro et par la volonté du Gouvernement américain; c'est donc fini. Il devait le croire, il l'a cru, et tout le monde l'a cru.

Je continue. En 1850 un être nouveau va apparaître, l'Eglise américaine, un évêché d'abord, puis un archevêché américain dans la Haute Californie. Cet être nouveau va devoir son existence à la législation américaine naturellement. A partir de 1848 le Gouvernement des Etats-Unis agissait comme il l'entendait dans le nouveau territoire conquis, il y appliquait la législation qu'il lui convenait, il y appliquait ses lois, et c'est en vertu de ses lois qu'il a créé des êtres nouveaux, c'est-à-dire de ces fictions légales, de ces entités juridiques qui sont une portion de la nation nouvelle.

C'est ainsi que l'Eglise américaine de Californie prend naissance en 1850.

A cette époque le nouveau prélat qui était à la tête de l'Eglise nouvelle de Californie a dû nécessairement se renseigner sur ses droits, sur l'etendue de ses droits, parce que pour un prélat ses droits sont en même temps ses devoirs; il devait donc se renseigner. C'est ce qu'il fait. Il paraît même qu'il se serait rendu en 1852 à Mexico et qu'il y aurait formulé une réclamation verbale. Il le dit, il l'affirme, ce doit donc être exact. Mais, messieurs, c'était évidemment une de ces réclamations assez extraordinaires en matière administrative où les réclamations se font toujours par écrit et où les autres n'ont pas de valeur.

Quoi qu'il en soit, de 1850 à 1859 il n'y a pas de réclamation, et il n'y en aura pas encore jusqu'en 1870. Mais, s'il n'y a pas de réclamation de la part des évêques nouveaux de Californie vis-à-vis de l'Etat mexicain depuis 1850 jusqu'en 1870, il peut y avoir de leur part une préoccupation: ils se demandent s'ils n'ont pas des prétentions à faire valoir.

Je dis qu'ils se le demandent parce qu'ils essaient de présenter une réclamation vis-à-vis des autorités américaines. C'est ainsi qu'il y avait dans la Haute Californie des biens qui ne faisaient pas à proprement parler partie du Fonds Pie de Californie, il y avait notamment des terrains qui avaient été acquis par les missionnaires, les Franciscains, dans la Haute Californie; les Franciscains ayant été supprimés, l'évêque nouveau de la Haute Californie dit: Ces biens acquis par les Franciscains, c'est moi qui en suis l'héritier.

Il y a eu un procès en Haute Californie, procès américain auquel le Mexique est resté absolument étranger. Ce procès relaté à la page

343 du livre rouge s'est terminé en octobre 1856; c'était un procès intitulé "Nobile versus retman." Je lis seulement la notice de la décision qui se trouve en tête du paragraphe:

Les missions établies en Californie avant son acquisition par les Etate-Unis étaient des établissements politiques et n'avaient en aucune manière de relations avec l'Eglise. Le fait que des moines ou des prêtres étaient à la tête de ces institutions ne prouve rien en faveur de la réclamation de l'Eglise au sujet de leur propriété universelle.

Eh bien, qu'est ce que cela veut dire? C'est qu'en 1856 les Etats-Unis d'Amérique représentés par leurs institutions nationales avaient jugé la prétention de l'Eglise et avaient dit: Comment! vous vous prétendez les successeurs des missionnaires, des apôtres, de ceux qui étaient des conquérants? mais non, c'est une erreur, le fait que des moines ou des prêtres étaient à la tête de ces institutions ne donne pas à ces institutions la nature de propriétés ecclésiastiques, pas plus que quand Richelieu ou Mazarin étaient à la tête du Gouvernement ce qu'ils touchaient n'acquérait la valeur de biens ecclésiastiques, c'étaient des agents du roi, des agents du gouvernement.

Voilà, messieurs, un appréciation qui a été formulée par des institutions américaines, et qui condamne naturellement la prétention des demandeurs actuels; c'était une appréciation de tribunaux.

Ah! je sais que l'on nous a dit à la précédente audience que cependant les archevéques et évêques de Californie avaient présenté à un bureau institué par la loi américaine l'indication des propriétés qu'ils revendiquaient, qu'ils considéraient comme étant les leurs comme successeurs des missionnaires, et que leurs droits ont été reconnus. Je n'en disconviens pas; cependant, messieurs, si je donne cette indication de décision c'est parce que vous voyez qu'en Amérique, où les droits eussent été, semble-t-il, sanctionnés en faveur des évêques américains, ce que je dis ici a été jugé par les tribunaux américains.

Cette circonstance, messieurs, comme d'autres que je vais vous indiquer, devait faire écarter la prétention des évêques américains si elle avait été présentée devant une juridiction américaine. Et quelle juridiction américaine? Nous croyons que la juridiction qui était compétente au premier chef pour juger cette question, c'était la commission américaine à laquelle je faisais allusion il y a quelques instants. Je vous disais que le traité de Guadalupe-Hidalgo avait prévu l'institution d'une commission américaine chargée de juger les conflits entre les citoyens américains et l'Etat mexicain et chargée de les régler moyennant une somme forfaitaire. C'eût été alors les Etats-Unis qui eussent été les défendeurs ou les intéressés dans ce débat. Les évêques américains auraient dû dire: Nous sommes les successeurs des évêques mexicains, ceux-ci avaient une créance qui a son origine dans le décret de 1842 ou dans celui de 1845 ou encore dans celui de 1836, nous avons une créance qui a son origine dans un droit antérieur à 1848 et nous étions alors les créanciers de l'Etat mexicain, puisque vous, Etats-Unis, vous vous êtes substitués par une novation aux obligations de l'Etat mexicain, vous allez nous régler la créance, et c'est la commission chargée d'en juger qui va en être saisie. Ils ne l'ont pas fait.

Mais nous apprenons qu'en 1859 l'honorable M. Doyle, qui était le conseil des avocats d'alors, présenta au secrétaire d'État des Etats-Unis la réclamation actuelle; cette réclamation fut présentée par M. Doyle à la date du 20 juillet 1859 par une lettre qui est la première du livre rouge (page 5 et suivantes). Cette lettre de réclamation était accompagnée d'un mémoire assurément admirablement concorde dans

lequel toute la réclamation avec tous les éléments qui pouvaient en asseoir le fondement étaient produits. Les Etats-Unis cette fois étaient juges, ils allaient voir si la pretention des évêques avait une valeur. Il était temps de réclamer: nous sommes en 1859, le traité est de 1848, si une réclamation est encore fondée de la part de citoyens devenus américains, de la part d'une institution ou d'une collectivité de la Haute Californie, c'est-à-dire de ce territoire détaché, les Etats-Unis vont s'empresser de se retourner vis-à-vis du Mexique et de lui dire: Ah: pardon, nous avons fait un traité en 1848, nous nous sommes donné une décharge absolue, mais il y a encore quelque chose, il y a là une obligation qui ne peut pas même être déterminée en chiffres, mais qui va faire l'objet de notre part de négociations; nous avons dans la nouvelle Californie la charge d'un service public qui est le budget des cultes, il y a là par conséquent quelque chose; vous avez jadis reçu des fonds que vous avez nationalisés et dont la destination antérieure était précisément l'entretien du culte; nous vous avons payé 15 millions de dollars, mais vous nous devez encore quelque chose.

Les Etats-Unis comme gouvernement, je le démontrerai, auraient eu seuls qualité pour réclamer, ils auraient dû immédiatement prendre la place des évêques et réclamer en leur nom s'ils avaient un droit vis-à-vis du gouvernement mexicain. Mais, messieurs, c'est par le silence qu'on accueille cette réclamation, du moins à notre connaissance nous ne savons pas si une suite quelconque a été donnée à cette lettre du 20 juillet 1859; si j'en juge par les documents qui ont été fournis, le Gouvernement des Etats-Unis n'aurait pas répondu ou n'aurait donné aucune suite à la réclamation. Dans tous les cas, ce qu'il y a de certain c'est que le Gouvernement des Etats-Unis n'a pas songé pendant plus de dix années à réclamer quoi que ce soit à l'Etat mexicain. La réclamation aurait dû naître en 1848, elle aurait dû apparaître tout au moins en 1850, en 1859 il était peut-être déjà trop tard; mais comment pouvait-on encore attendre dix ans avant même qu'une représentation diplomatique quelconque fût faite au Mexique?

Nous voyons alors que c'est le 30 mars 1870, par une lettre qui se trouve dans le livre rouge à la page 8 qu'un autre avocat des évêques, M. Casserly, adresse au Secrétaire des Etats-Unis américains, l'honorable Hamilton Fish la réclamation qui fut ensuite, je le suppose, par l'intermédiaire de la commission mixte présentée au Mexique. Je dis que je le suppose parce que je n'ai pas trouvé dans le livre la lettre par laquelle le Gouvernement américain se serait adressé au Gouvernement mexicain.

M. EMILIO PARDO. Il n'y en a pas eu.

M. DELACROIX. Alors cela explique que je ne l'ai pas trouvée.

Dans cette lettre du 30 mars 1870 la réclamation était présentée dans la forme que vous verrez: elle avait pour objet les propriétés du Fonds et elle avait pour objet la créance intégrale, le capital comme les intérêts.

Ainsi présentée, la réclamation devait se heurter à une exception d'incompétence de la part de la commission mixte et à une fin de non recevoir que je vais indiquer.

Je dis à une exception d'incompétence, parce que la commission mixte instituée par la convention du 4 juillet 1868 ne pouvait être saisie que des réclamations qui avaient une origine postérieure au traité de 1848; jamais le Mexique n'aurait apposé sa signature au bas d'une convention qui aurait permis de remettre en question une pré-

tention ou un droit antérieur à 1848; il aurait dit: Mais pardon, nous avons fini, j'ai une décharge, le traité de 1848 me permet de ne plus écouter de réclamation venant de l'autre côté de la frontière et qui aurait son origine dans un fait antérieur à 1848.

Mais, je le veux bien, il y avait des réclamations d'origine postérieure à 1848, il y avait un enchevêtrement dans les relations entre les citoyens de ces deux Etats, des citoyens américains prétendaient constamment avoir des réclamations à formuler vis-à-vis de l'Etat mexicain; et il faut dire que la séparation entre les deux pays, la séparation des deux territoires n'avait pas mis fin à ces difficultés. Il y a donc des faits postérieurs à 1848 qui, prétend-on, vont donner des droits à des citoyens americains vis-à-vis du Mexique. Alors on fait une convention par laquelle on charge une commission mixte composée de commissaires ou de délégués des deux Etats et chargée de juger les différends de la nature que je viens d'indiquer, c'est-à dire de juger les différends de citoyens d'un Etats vis-à-vis de l'autre gouvernement et réciproquement, mais pour autent que les réclamations aient toujours une origine postérieure au 2 février 1848.

Donc, messieurs, si la réclamation avait été maintenue telle qu'elle était présentée dans la lettre du 30 mars 1870 par M. Casserly, avocat des évêques, cette réclamation se serait heurtée à une exception d'incompétence parce que la commission mixte aurait dû dire: Vous demandez le capital, vous demandez les propriétés du Fonds, vous vous fondez sur des décrets antérieurs à 1848, c'est impossible, je ne suis pas compétente.

Elle aurait ajouté: mais, votre réclamation n'est même pas recevable parce que ayant une base antérieure au traité de Queretaro, les Etats-Unis ayant donné décharge au Mexique pour toutes réclamations antérieures à 1848 tant de la part du gouvernement des Etats-Unis que des citoyens américains, votre réclamation se heurte à une exception d'incompétence et à une fin de non recevoir.

Voilà ce qu'aurait dit la commission mixte.

Aussi, alors, la réclamation ne fut pas définitivement présentée dans ces termes, et les demandeurs d'alors se bornérent à demander les intérêts annuels; c'était, pensaient-ils—je crois qu'ils se trompaient—le moyen d'écarter et l'exception d'incompétence et la fin de non recevoir, puisqu'ils disaient: nous demandons les intérêts échus chaque année, le droit naît chaque année, nous n'étions donc pas créanciers en 1848 et nous n'avons pas pu donner décharge d'une créance qui n'existait pas, donc nous demandons les intérêts. Et comme il y avait en 1870 21 années d'intérêts échus on ne demandait que les 21 années d'intérêts. C'est conformément à cette thèse qu'aujourd'hui on demande 33 années d'intérêts, mais on ne demande pas le capital.

Voilà, messieurs, comment la réclamation fut présentée en 1870 à la commission mixte: demande de 21 années d'intérêts.

Alors la commission mixte statue. Vous le savez, chacun des délegués des Etats émet un avis contradictoire. Il fallait recourir à un troisième arbitre: c'est Sir Edward Thornton, ministre plénipotentiaire d'Angleterre à Washington, qui est chargé de vider le différend; il vide le différend relatif à ces 21 années d'intérêts en faveur des demandeurs.

Je vais lire immédiatement, pour ne plus avoir à y revenir, cette sentence qui ne doit pas, pensons-nous, être discutée ici par la raison que nous croyons que la Cour d'arbitrage actuelle a son indépendance

la plus absolue, qu'elle est saisie d'une question nouvelle et d'éléments nouveaux sur lesquels elle aura à statuer. Mais, messieurs, il m'est imposible en passant de ne pas faire remarquer que l'honorable arbitre de 1875 commençait sa sentence en disant:

L'arbitre se trouve dans l'impossibilité de discuter les divers arguments qui ont été formulés par les deux parties sur la réclamation de Amat, évêque de Monterey et Alemany, archevêque.

Cet honorable surarbitre dit en commençant: je ne puis pas examiner tous ces arguments. Peut être n'était-il pas jurisconsulte, je l'ignore, mais dans tous les cas il n'a pas examiné les arguments; mais il va nous dire sur quoi il a fondé sa conviction.

Il s'est dit: le seul point que je doive examiner est celui-ci: est-ce que les donateurs primitifs qui ont constitué le Fonds, qui ont donné des biens en vue d'un but déterminé, en vue d'une conquête spirituelle et temporelle, en vue d'une œuvre pieuse et nationale, ont eu plutôt une pensée politique? L'honorable surarbitre a voulu peser les mobiles qui avaient déterminé les donations primitives, il a voulu sectionner ces mobiles, et il s'est dit: Est-ce que c'était une pensée pieuse? Est-ce que c'étaient des chrétiens avant d'être des patriotes, ou étaient-ce des patriotes avant d'être des chrétiens?

Eh bien, messieurs, je crois qu'ils étaient à la fois patriotes et chrétiens, que le but qu'ils avaient en vue était une conquête spirituelle et temporelle, que par conséquent on ne pouvait pas sectionner ces mobiles, qu'il était en tout cas difficile de les deviner et de savoir quelle était la prépondérance que les uns devaient avoir sur les autres.

Nous croyons qu'il y avait d'autres éléments qui devaient être pris en considération par le Tribunal d'alors comme par le Tribunal d'aujourd'hui pour déterminer sa conviction; ce sont ces éléments que nous avons l'honneur de vous soumettre.

Donc, les demandeurs ont eu gain de cause, ils ont obtenu satisfaction: une condamnation à 904,000 dollars.

Le montant de la condamnation a été réglé, et par conséquent ceci me permet une rectification en passant. L'un de mes honorables contradicteurs disait à la précédente audience que le Mexique acceptait un arbitrage en vue de s'y soumettre s'il lui était favorable et en vue de s'y soustraire s'il aboutissait à un échec. Non, il y avait là un litige relatif à une somme de 904,000 dollars, nous avons été condamnés, nous avons payé, mais nous disons que c'est tout ce qui a été jugé.

Messieurs, je m'excuse de faire en quelque sorte une incursion dans ce domaine de la chose jugée, je ne vous en parlerai pas car cette partie de la discussion voudra bien être traitée exclusivement par mon éminent confrère M. Beernaert.

Lorsque la somme a été payée il a fallu partager; comment a-t-on partagé? Nous le savons aujourd'hui par la communication que nos honorables contradicteurs ont bien voulu nous faire. Dans une petite brochure qui vous a été distribuée, vous trouvez à la page 5 l'indication du partage qui a été fait sur l'intervention de Sa Sainteté le 4 mars 1877. On a recouru à cette haute autorité pontificale pour intervenir et faire le partage de la somme qui avait fait l'objet de la condamnation. Nous voyons alors que la Congrégation sur laquelle le Pape s'était déchargé du soin de l'étude de cette question et de l'indication du partage a effectué ce partage de la manière que voici.

Il y a d'abord, après déduction des frais, une somme de 26,000 dollars qui est payée à la famille de Aguirre—je ne sais pas pourquoi. Il y a ensuite une somme de 24,000 dollars qui est allouée aux Missions de l'Orégon . . . pourquoi de l'Orégon? Puis une somme de 40,000 dollars allouée aux pères Franciscains et aux pères de la Société de Jésus . . . Jadis ils avaient tout, aujourd'hui on leur donne 40,000 dollars. Le reste est divisé en sept parties: il y a 1/7 qui est donné aux Missions du territoire d'Utah, et les six autres septièmes sont attribués par 1/7 à chacun des évêchés de la Haute Californie.

Voilà, messieurs, une répartition qui a sans doute provoqué chez vous un point d'interrogation: Pourquoi le Fonds Pie de Californie est-il partagé entre des Missions d'autres territoires? C'est un point d'interrogation sur lequel nous reviendrons.

Donc, messieurs, en 1877 le partage fut effectué, la répartition eut lieu, le paiement fut réglé.

Mais, lors de ce paiement est-ce qu'on s'est dit: ah mais! nous sommes en 1877, les 21 années sont expirées depuis 1870, il y a déjà six autres années, il faut les payer en même temps? Non, et on vous dira, messieurs, quel fut le seul mot prononcé à ce sujet, ce fut l'ffirmation par l'avocat du Mexique que moyennant le réglement des 904,000 dollars c'était fini in toto, que c'était un réglement final, qu'il n'y avait plus de réclamation à formuler au sujet de ce Fonds Pie. Les Etats-Unis ont-ils répondu: non, vous nous devez les six années écoulées puis le capital et un intérêt perpétuel? Non. Le Gouvernement américain a dit: je ne veux pas discuter la portée de la décision de la commission mixte et je n'entends pas que l'on mette en discussion cette portée; et le Gouvernement mexicain a dit: nous n'entendons pas discuter la portée de la décision de la commission mixte.

Messieurs, après cet échange de vues, jusqu'au 17 août 1891 il n'a plus été formulé de réclamation; le Gouvernement des Etats-Unis n'a plus réclamé, il n'a pas dit: vous me devez tous les ans 43,000 dollars. Il devait dire déjà en 1877 lorsqu'il recevait le réglement des 904,000 dollars pour 21 années dont la dernière arrivait à échéance en 1870: il y a encore 7 années qui font sept fois 43,000 dollars en plus. Il ne le dit pas, et non seulement il ne le dit pas mais il ne va pas réclamer jusqu'au 17 août 1891. C'est à cette époque seulement que la réclamation va reparaître, alors que l'on prétend aujourd'hui qu'il y avait une somme annuelle qui était due en vertu d'un jugement définitif et sur lequel il n'y avait plus à revenir.

J'arrive ainsi, messieurs, à la fin de cet exposé.

Le 22 mai 1902 un tribunal arbitral a été constitué pour juger et décider les différents points entre les deux pays et juger ces deux questions, d'abord s'il y avait res judicata quant à la sentence arbitrale quant au droit perpétuel, et en second lieu si la réclamation était fondée.

Je vais maintenant, beaucoup plus brièvement parce que je me suis peut-être un peu trop étendu sur l'examen des différents faits dont la succession doit appeler votre attention, je vais maintenant examiner les fondements de la demande, les demandeurs, leur titre, leur prétention.

La question qui vous est soumise, je vous l'ai déjà dit, est intéressante à ce point de vue spécial que la même question peut apparaître dans tous les Etats, et spécialement dans tous les Etats d'Europe. Il

n'y a pas un Etat, ni en Angleterre, ni en Allemagne, ni en Espagne, ni en France, ni en Prusse où à un moment donné on ne s'est pas approprié des biens de personnes civiles, de communautés religieuses, militaires ou autres. Cela s'est fait presque toujours dans les mêmes termes comme je vous l'ai indiqué et comme j'y reviendrai. Aujourd'hui, la question qui se pose est celle de savoir si ces actes accomplis par les Gouvernements peuvent être mis en discussion, s'ils peuvent être révisés, s'il appartiendra à un tribunal d'aıbitrage de réviser ces actes du pouvoir souverain et par le fait de réviser l'histoire.

La question est grave à un autre point de vue, parce que, messieurs, telle qu'elle est présentée, il faut bien le dire, elle doit créer à la charge du Mexique une charge morale beaucoup plus que pécuniaire qui sera toujours pénible. Le Mexique n'a pas de budget des cultes chez lui, il estime que les fidèles de la religion catholique sont suffisamment généreux pour entretenir leur culte, et le Mexique, qui n'a pas de budget des cultes chez lui, devrait perpétuellement entretenir un budget des cultes à l'étranger! Ce sera toujours une charge morale à laquelle il aura toujours beaucoup de mal à se soumettre, surtout lorsqu'il se souviendra que ce budget étranger qu'il devra alimenter est celui d'un pays conquis!

La réclamation, quelle est-elle? Avant d'employer un terme juridique je verrai ce qu'elle est. Les demandeurs nous disent: Nous avons un droit perpétuel, un droit absolu, un droit irrévocable sur le Fonds Pie.

Droit perpétuel: c'est leur prétention, il faut qu'annuellement et indéfiniment la somme de X dollars leur soit payée. Droit absolu: pas de contrôle de la part du Mexique, plus de volonté mexicaine intervenant dans la disposition de ses fonds, plus d'administration de la part du Mexique. Droit absolu, sans conditions, et droit irrévocable puisque, quelles que soient les législations mexicaines postérieures, d'après les demandeurs l'obligation doit subsister indéfiniment.

Qu'est-ce que c'est, messieurs, que ces trois attributs que je viens de vous indiquer? Ce sont les attributs de la propriété, ce sont les attributs des droits civils, de la créance civile, et je puis mesurer quelle en est la conséquence. Ainsi, non seulement les demandeurs prétendent pour eux à tous les droits sur les produits du Fonds Pie mais même ils dénient au Mexique un droit quelconque: plus de droit de contrôle, plus de droit d'administration, plus aucun droit. Donc, c'est la propriété en leur nom.

On nous dit: Non, ce n'est pas un droit de proprété, c'est un droit de trust, les Jésuites étaient trustees, le gouvernement était trustee et nous sommes trustees aussi.

Messieurs, c'est un mot dont on use et dont on abuse peut-être. Sans doute les évêques sont les trustees de leurs diocèses, les gouvernements sont les trustees de l'Etat, le général ou le provincial des Jésuites était le trustee de sa communauté. Mais si nous laissons les mots de côté—los mots sont parfois si bizarres—et si nous reverons aux notions juridiques du droit qui est invoqué, nous voyons que ce n'est pas le trust qu'est le contrat dont on parle.

Qu'est-ce que c'est que le trust? C'est un mandat compliqué d'un dépôt. Le trust suppose, suivant une expression ancienne, un être qui lui doit posséder l'intégralité du droit au profit de qui le trust existe; il faut en un mot un propriétaire, un être sujet du droit, et un autre qui administre, qui a le mandat, qui a le dépôt, qui a des droits

peut-être qui doivent être respectés même par le propriétaire, par celui qui truste, mais il y a toujours un de ces éléments essentiels.

Un autre élément du trust c'est que le trustee doit rendre compte, en droit civil. Par conséquent il ne suffit pas de dire: il doit rendre compte à Dieu. Quand nous disons "doit rendre compte" cela veut dire qu'il a une obligation civile de rendre compte, obligation qui peut l'amener devant les tribunaux.

Eh bien, cela n'existe pas dan la prétention des demandeurs. Les demandeurs disent: nous ne devons pas compte. Ils n'indiquent pas quel serait le propriétaire, quel serait le sujet du droit . . . . nous examinerons tout-à-l'heure qui il pourrait être, si c'est la collectivité des Indiens, si c'est l'Eglise catholique; mais si c'est l'Eglise catholique ce n'est plus un trust, c'est elle qui est propriétaire, c'est elle qui demande!

Ne confondons pas, n'est-ce pas, les évêques avec les évêchés. Ceux qui sont demandeurs ce sont les évêchés, c'est-à-dire l'Eglise catholique constituée en évêchés, c'est cette personne morale qui demande pour elle la propriété, elle ne demande pas un trust elle demande un droit absolu. De leur part tous les droits, de l'autre aucun! Voilà la demande.

Alors, nous disons aux demandeurs ce que j'ai déjà indiqué à la précédente audience: Vous invoquez un droit de propriété ou de créance civile, un droit absolu vis-à-vis de nous, quel est votre titre? justifiez votre demande.

Ce titre il faut le produire. Nous sommes en matière civile, en matière juridique, il faut produire votre titre. Il n'est pas permis de dire: je ne produis pas de titre parce que je me fonde sur l'équité. Non, pas d'arbitraire, pas de fantaisie, montrez le titre! vous nous actionnez devant un Tribunal et devant un Tribunal il ne suffit pas de dire: je vais deviner la pensée des donateurs. Non, le titre!

En bien, messieurs, ce titre ne peut se trouver que dans les actes de donation primitifs ou bien dans les décrets et lois mexicains de 1836 à 1848. Nous examinerons successivement ces deux points, et nous verrons d'abord si les demandeurs produisent un titre, s'ils puisent un titre, un droit dans les actes de donation primitifs.

Et, puisque nous parlons des actes de donation primitifs, le Tribunal aura immédiatement fait cette réflexion: quels sont ils? est-ce qu'on possède les actes de donation primitifs? Vous apercevez immédiatement la lacune: il n'y a que le testament du Marquis de Villapuente que l'on puisse produire.

On dit alors: nous le considérerons comme l'acte-type. Vous le dites, mais puisque vous allez puiser un droit, vous allez montrer l'existence d'une inténtion chez le donateur, intention qu'il va peut-être être difficile de discerner. Il va falloir peser des mobiles, il faudra voir s'il a eu une intention pieuse dominant ses préoccupations politiques ou patriotiques. Eh bien, alors, il faut le titre pour que nous puissions peser, et nous ne l'avons que pour le testament du Marquis de Villapuente.

Nous allons alors, messieurs, la lacune, l'absence du titre qui doit exister au moins pour la plus grande partie de la prétention étant constatée, nous allons voir ce que l'on trouve dans le testament lui-même du Marquis de Villapuente que les demandeurs considèrent comme l'acte type.

Nous voyons, messieurs, que le donateur tient à donner tous ses biens

aux Jésuites. Je n'ai plus à revenir sur ce que je vois ai dit à ce sujet; je vous ai montré que ce que voulait le donateur primitif c'était l'abandon absolu de tout son domaine aux Jésuites et aux Jésuites exclusivement, puisqu'il veut interdire au pouvoir séculier et au pouvoir régulier d'intervenir. Il va plus loin que ce qui est son droit et il marque si bien que sa volonté est d'avantager les Jésuites exclusivement—la Mission des Jésuites, je vais y venir—qu'il ajoute, voulant montrer sa pensée finale: Ils n'auront de comptes à rendre qu'à Dieu, c'est à dire pas à un humain. Il n'y a donc personne qui puisse veria prétendre d'après l'acte de donation primitif à un droit à côté de celui des Jésuites sur ses biens, puisque le donateur entend les donner tous aux Jésuites; il n'en réserve aucun pour qui que ce soit à côté d'eux.

Ah! sans doute, messieurs, les donateurs avaient un but, une préoccupation en donnant aux Jésuites; ils savaient qui étaient les Jésuites, ils savaient que les Jésuites avaient une organisation en Californie, cette organisation que j'ai caractérisée quand j'ai parlé de leurs missions; ils savaient que les Jésuites étaint allés en Californie comme délégués et mandataires du Roi, qu'ils étaient les agents du Roi là-bas, qu'ils étaient chargés d'administrer la justice, qu'ils étaient chargés de la direction militaire, qu'ils étaient chargés de la conquête, de la réduction de ce pays que l'on avait vainement tenté de réduire jusque-là. Ils savaient tout cela, ils savient que le drapeau que les Jésuites allaient planter en Californie c'était le drapeau du Roi d'Espagne, et c'est aux Jésuites qu'ils ont voulu donner.

On nous dit aujourd'hui: c'est à l'Eglise? Non, ce n'est pas à l'Eglise, c'est aux Jésuites, ils l'ont précisé, c'est à eux seuls qu'ils ont voulu donner et qu'ils ont donné.

Mais, ajoute-t-on, les Jésuites c'étaient les mandataires de l'Eglise. Non, s'ils étaient même mandataires ils étaient les mandataires du Roi; l'Eglise, si elle était mandante aurait dû intervenir lorsqu'ils ont réuni des fonds et sont partis pour leur conquête; nous, nous ne les voyons que comme les mandataires du Roi.

Mais en tout cas, messieurs, tout cela, ce ne sont que des hypothèses, mais dans l'acte nous ne voyons que les Jésuites, et pas autre chose.

Il y a, messieurs, dans ces testaments une chose qui est curieuse; c'est que dans ces titres les donateurs ont voulu créer une œuvre longue, une œuvre qu'ils ont cru appelée à une durée indéfinie. Ils ont par conséquent prévu des éventualités nombreuses: ils ont prévu, comme je le disais à une précédente audience, l'éventualité de l'expulsion des Jésuites du territoire Californien, l'éventualité de l'insurrection des indigènes, mais il y a une chose qu'ils n'ont pas prévue, c'est la suppression de l'Ordre des Jésuites. Par conséquent, lorsque vous voulez trouver un titre dans les actes de donation vous devez deviner, vous devez faire une hypothèse, une supposition gratuite, puisque c'est là une éventualité que les donateurs n'ont pas pu prévoir, car s'ils l'avaient prévue ils l'auraient indiquée dans l'acte. Quand ils prévoient une éventualité ils disent quelle sera leur volonté; mais celle-ci, ils ne l'ont pas prévue, ils n'ont donc pas exprimé leur désir pour ce cas; cette éventualité ils ne pouvaient pas même y penser, la concevoir, ils ne l'ont donc pas prévue.

Il faut donc deviner quelle aurait été la volonté des donateurs pour le cas où les Jésuites auraient été supprimés. Voulez-vous deviner? Je veux bien, je veux vous suivre même sur ce terrain.

Je suppose qu'ils aient eu cette pensée; les Jésuites un jour seront

supprimés, que deviendront les biens? Ils devaient se dire ce qui était la loi, ils devaient connaître ce qui était l'histoire traditionelle et par conséquent la législation traditionelle, ils devaient se dire que puisque les Jésuites étaient allés installer là une œuvre nationale au nom du Roi si ces Jésuites étaient supprimés c'était le Roi qui rentrait dans la pleine propriété.

Je pense, messieurs, qu'ils n'y ont pas pensé, mais s'ils y avaient pensé ils auraient dû conclure ainsi.

On nous dit: c'étaient des biens ecclésiastiques. Ah! non! Des biens ecclésiastiques? Est-ce que mes honorables contradicteurs feraient cette confusion de croire que l'on doit considérer comme biens de l'Eglise tous les biens qui appartiennent à toutes les communautés religieuses, militaires et autres, du moment où il y a une certaine pensée pieuse qui les dirige? C'est impossible, et encore une fois ici je vous oppose le jugement de l'Histoire. Est-ce que l'English a jamais revendiqué les biens des communautés religieuses? Est-ce que dans tous les pays nous n'avons pas vu depuis Philippe le Bel qui supprimait les Templiers bien d'autres souverains qui ont supprimé l'Ordre teutonique, l'Ordre des Chevaliers de Malte et celui de Notre Dame du Mont-Carmel? Est-ce que jamais l'Eglise a dit; leurs biens sont à moi?

Du reste, messieurs, je trouve dans les documents mêmes du procès la preuve qu'il n'en est pas ainsi. A la page 181 du livre rouge vous trouverez un document important, c'est la déposition de Sa Grandeur Mgr. Alemany, évêque de San Francisco, et à la page 183, sous le N°. 7, vous verrez ce ci: c'est que, "en vertu du décret du Conseil plénière de Baltimore . . ." Il faut savoir que l'Eglise américaine se trouve sous la tutelle immédiate d'un Conseil composé de tous les archevêques et évêques des Etats-Unis, et qui forme le Conseil de Baltimore qui est l'intermédiaire entre le Pape et les évêques individuellement.

> En vertu du Décret du Conseil plénière de Baltimore, qui est en vigueur dans tous les Etats-Unis, les propriétés ecclésiastiques de chaque diocèse dans les Etats Unis appartiennent, etc. . . . excepté celles qui peuvent appartenir aux ordres, aux monastères et aux congrégations religieuses.

Voici donc que lorsque l'Eglise va instituer l'évêque de San Francisco, lorsqu'elle va lui donner des pouvoirs, et lorsque le Conseil de Baltimore, qui est une autorité religieuse, va déterminer quels sont les pouvoirs de l'évêque il va dire qu'il a le droit de revendiquer tous les biens de l'Eglise, mais il va en excepter, entre parenthèses, comme une chose qui a à peine besoin d'être dite, les biens des communautés religieuses et des congrégations. Ce qui prouve, messieurs, qu'aujourd'hui comme de tout temps l'Eglise n'a pas prétendu à la propriété des biens des communautés religieuses.

Mais, messieurs, je n'ai pas besoin de vous dire cela; dans la précédente audience je vous montrais quelle était l'indication donnée par le conseil de l'évêque, qui disait: "Je ne prétendais pas à la propriété du Fonds."

Est-ce que d'ailleurs l'on peut concevoir qu'une personne civile, une œuvre de la loi, une personne morale, une entité juridique qui représente une collectivité, une portion de la nation, qui a cette existence fictive dérivant du pouvoir souverain venant à disparaître les biens puissent aller ailleurs qu'à celui qui représente toute la nation. Est-ce que ce n'est pas un principe de droit commun général que les biens sans maître—et du moment où l'entité juridique disparaît les biens

deviennent sans maître—retournent à la nation et à celui qui la représente, c'est-à-dire au Roi ou au Gouvernement?

Donc, messieurs, ce qui se trouve confirmé ici dans la déposition de l'honorable Mgr. Alemany est une vérité de droit commun et de principe général. Ce ne sont pas des biens ecclésiastiques que les biens des Jésuites parce que lorsqu'il s'agit d'un bien de l'Eglise celle-ci y met sa marque. Sa marque, c'est son intervention à la constitution du bien, à la constitution du droit. Quand il s'agit d'un bien de l'Eglise, l'autorité de l'Eglise intervient toujours à l'acquisition, et elle intervient à la suppression, à l'aliénation, à la passation d'un sujet du droit dans un autre.

Ici, ai-je besoin de vous faire remarquer que jamais elle n'est intervenue, confirmant par conséquent ainsi ce qui était dans les actes, à savoir que les actes disent "les Jésuites" et non pas "l'Eglise," et par conséquent l'excluent expressément?

Messieurs, lorsque ce testament est fait, lorsque cette donation est créée, nous voyons que les Jésuites interviennent par un procurateur, par un mandataire; c'est ainsi que vous verrez à la finale de ce document intéresant que les biens sont acceptés par les bénéficiaires; c'est-à-dire que nous trouvons là une relation de droit civil, un transfert de droits qui suppose toujours deux parties, le donateur et l'accepteur; on ne conçoit pas un acte de volonté unilatérale pouvant en général créer un droit synallagmatique, c'est une notion qui est commune.

Voilà donc que les donateurs entendent disposer au profit des Jésuites exclusivement; ce sont les mandataires du Roi; en tout cas ce n'est pas l'Eglise.

Mais, messieurs, nous voyons dans le testament autre chose; on dit que la donation est faite au profit des Missions des Jésuites. Vous avez entendu qu'à une précédente audience on vous disait: C'est pour les Missions, donc c'est pour une œuvre pieuse, donc c'est pour l'Eglise. Messieurs, les Missions c'est une chose bien spéciale, surtout qu'on les entendait; le missionaire c'est un apôtre; le missionnaire n'est pas la même chose, même au point de vue de l'Englise, que l'ordinairé, n'est-ce pas? Ce sont des notions aussi différentes que les notions de civil et de militaire alors que tous deux sont des laïques; ce sont des notions bien distinctes. Les Missions étaient une œuvre que vous connaissez et qui a été caractérisée: une œuvre nationale, politique, de conquête, de réduction politique et religieuse; moi, jene sépare pas, parce que je pense que la volonté des donateurs a été de ne pas séparer les donataires. Les donateurs ont su ce qu'ils faisaient, ils ont voulu donner pour une œuvre déterminée qui était une œuvre de conqête à la fois religieuse et temporelle. Mais cette œuvre-là n'existe plus, ne peut plus exister, je l'ai déjà indiqué à une précédente audience: est-ce qu'il serait possible de concevoir encore, dans un pays où la liberté de conscience est proclamée comme un axiome, comme étant la base de la Constitution comme en Amérique, des Missions telles que les comprenaient les donateurs, c'est-à-dire cette œuvre de réduction religieuse comme de réduction politique?

Voyez donc quelle aurait été la situation des parties, par exemple en 1848; le Gouvernement mexicain aurait dit: J'ai des fonds qui m'ont été remis pour les Missions de Californie, vous m'enlevez la Californie, je garde les fonds, mais je vais continuer les Missions. Le Gouvernement des Etats-Unis aurait répondu: Comment est-il possible de concevoir que vous veniez continuer une œuvre qui est des siècles passés,

qui n'est plus concevable avec les idées que nons avons dans notre gouvernement moderne? Et comment le Mexique aurait-il pu songer à continuer ces Missions? Comment même un gouvernement comme les Etats-Unis, Etat protestant, aurait-il pu continuer ces Missions chez lui? C'est une conception qui n'est plus possible parce que le temps et les circonstances ont changé.

Mais, messieurs, dans les actes de donation nous trouvons encore que les donateurs ont voulu avantager les Missions des Jésuites de Californie. Quelles étaient ces Missions de Jésuites de Californie? Elles se trouvaient dans la péninsule, dans cette partie de territoire qui est aujourd'hui appelée la Vieille ou la Basse Californie, mais dans cette partie qui est restée mexicaine; c'est là seulement que les Jésuites ont installé des Missions, et si nous voulons compulser les actes de donation primitifs nous voyons que les donateurs ont eu en vue les Missions des Jésuites, et des Jésuites de Californie, de ce que eux considéraient comme la Californie alors, de ce que les Jésuites considéraient comme la Californie, de ce pays qui était la seule préoccupation des Jésuites d'alors. c'est-à-dire de la Vielle Californie.

Par conséquent, comment les demandeurs pourraient-ils à un titre quelconque trouver dans les documents de l'époque, dans les actes de donation, un titre en leur faveur?

Messieurs, je vous demanderai la permission de vous faire une réplique de quelques pages, cela me permettra d'abréger ce que j'ai à vous dire, c'est une des seules lectures que je me permettrai de faire, sachant combien les moments de la cour sont précieux. Vous avez à la page 436 du livre rouge un document qui est un document historique: c'est un décret du roi du 13 novembre 1734 qui est traduit dans l'Histoire de la Californie du Père Venegas, c'est donc un document que les Jésuites eux-mêmes considéraient comme ayant une importance capitale. Si je vous demande la permission de vous lire ce document c'est parce que je veux que vous entendiez une parole qui ne soit plus la mienne mais celle d'un homme de l'époque, c'est-à-dire du roi, qui va vous parler des missions et qui va vous dire comment on comprenait ces missions alors; vous verrez s'il est encore possible, alors que les donateurs ont dit que c'était à ces missions-là qu'ils voulaient faire une donation, de soutenir que ce soit, à l'exclusion du gouvernement, l'église qui aurait été avantagée. Voici ce document:

Le Roi.

Don Juan Francisco de Guemes et Horcasita, lieutenant-général de mes armées, Vice-roi, Gouverneur et capitaine général des provinces de la Nouvelle-Espagne, et président de mon audience royale résidant dans la ville de Mexico: On envoya le 13 de novembre 1734, à votre prédécesseur dans ces emplois, le comte de Fuen-Clara, un ordre conçu en ces termes:

Le Roi.

Comte de Fuen-Clara, mon cousin, chevalier de l'Ordre de la Toison d'Or, gentilhomme de ma chambre, gouverneur et capitaine général de provinces de mon royaume de la Nouvelle-Espagne, et président de mon audience royale, résidant dans ma ville de Mexico. L'archevêque vice-roi, votre prédécesseur dans ces emplois, m'ayant par une lettre du 23 d'avril, 1735, et par une autre du 10 du même mois 1737, envoyé un détail de ce qui s'est passé dans la révolte des Indiens dès nations appelées Pericues et Guaicura dans la province de Californie, des mesures qu'on a prises et des dépenses qu'on a faites pour les soumettre et les faire rentrer dans la tranquillité où elles se trouvent actuellement, par la bonne conduite du gouverneur de Sinaloa. Ces mémoires ont été présentés à mon conseil des Indes pour en délibérer, ensemble avec l'origine, les progrès et l'état présent de la conquête spirituelle et temporelle de ladite province de Californie, et ayant, à la requête du Père Attamirano de la Société de Jésus, et agent général pour ses provinces dans les Indes, et particulièrement des missions de son Ordre dans la Californie, approuvé les mesures qu'on a prises et les

dépenses qu'on a faires pour les réduire, comme je vous l'ai signifié dans ma lettre du 2 d'avril de l'année dernière, on a jugé à propos, en attendant les mémoires et les instructions relatives à ces lettres, qu'on attend journellement de la Californie, de délibérer dans mon susdit conseil sur les mesures qu'il convient de prendre pour l'entier accomplissement de la réduction et de la conquête en question, laquelle a été tentée depuis l'année 1523, premièrement par Don Ferdinand Cortez, Marquis del Valle, premier vice-roi de ces provinces; et depuis, par quelques-uns de ses successeurs et par divers particuliers en différents temps. Et quoiqn'il en ait coûté de grandes sommes à mon trésor royal, cependant cette entreprise n'a jamais eu d'effet, à cause des malheurs qu'on a éprouvés et des difficultés insurmontables qu'on a rencontrées, quoiqu'on fût porté à cette conquête par l'appât flatteur de la pêche des perles. Sur le rapport qui m'a encore été fait de la docilité des naturels du pays, et de l'inclination qu'ils ont d'embrasser notre sainte religion, et un genre de vie civilisé ainsi que l'ont confirmé les missionnaires Jésuites, entr'autres les pères Jean-Marie de Salva-Tierra et Eusèbe François Kino, dans l'année 1698, et plus particulièrement le père François Piccolo dans l'année 1716; lesquels m'ont représenté que par le zèle infatigable des religieux de la Société de Jésus, les seuls qui se soient dévoués à ce service recommandable, et à l'aide des contributions des fidèles, ces missions et ces conversions étaient déjà fort avancées; j'ai fourni de mon trésor royal un subside annuel de 13,000 piastres depuis l'année 1703, dans la vue principalement de défrayer les dépenses d'un corps de soldats pour les missions, et payer les officiers et l'équipage de la barque destinée à transporter les missionnaires de la côte de Cinaloa dans la Californie; sur quoi mon dit Conseil des Indes ayant revu et examiné avec la plus grande diligence et la plus exacte ponctualité les différents articles relatifs à ce chef, de même que les rapports des auditeurs, en présence du susdit père Pierre-Ignace Attamirano et autres personnes judicieuses de cet Ordre, et versées dans ces conversions: Oui, le rapport de mon solliciteur sur le tout, on m'a représenté dans mon Conseil du 12 de mai de cette année, qu'il était de la dernière importance que l'on prît immédiatement les mesures les plus efficaces pour faire rentrer ladite province de Californie dans le sein de l'église et sous ma domination; que cette entreprise avantageuse, quoique vigoureusement appuyée du zèle catholique de mes glorieux prédécesseurs, et par les vicerois de ces provinces, avait si souvent échoué, qu'on n'était pas maître d'une pied de terre dans cette vaste contrée, et que pour y réussir plus efficacement, il fallait établir pour base fondamentale de cette conquête la conversion des Indiens à notre sainte religion, en la confiant aux missionnaires Jésuites, qui ont fait de si grands progrès parmi eux et parmi toutes les nations infidèles dont ils ont pris la conduite dans toute l'étendue de l'Amérique; et en outre fonder dans tous les ports que l'on rencontreroit dans les contrées voisines, une colonie espagnole avec un fort et une garnison, et dans le centre de chaque province, une ville espagnole pour tenir en bride les Indiens et servir de retraite aux missionnaires en cas de révolte. Et comme le transport des familles de ce royaume dans ces colonies espagnoles occasionnerait bien des difficultés et des dépenses, indépendamment du besoin qu'on peut en avoir pour d'autres établissements, on a trouvé à propos que ces émigrations se fissent de la ville de Mexico et des provinces voisines; sur quoi nous attendons les rapports et les informations que nous avons demandés pour nous déterminer là dessus. Le Conseil m'a encore représenté que pour réduire plus promptement les Indiens des Californies, il seroit à propos que les missionnaires Jésuites entrassent dans la province du côté opposé à celui par lequel y sont entrés ceux qui s'y trouvent actuellement, c'est-à-dire par la partie du nord où cette province confine avec le continent; vu qu'on a découvert, et qu'on assure que la province de Californie n'est point une île, comme on le croit communément, mais une terre ferme, qui confine du côté du nord avec celle du Nouveau-Mexique; car au moyen de ces mesures, les peuples qui l'habitent se trouveroient enfermés ou comme isolés sans aucun passage ou communication dans les terres des autres sauvages Indiens; au moyen de quoi, les missionnaires s'avançant le long de leurs différens départemens vers le centre du pays, on abrégeroit beaucoup la réduction totale de la province. Mais pour exécuter ce projet, on croit qu'il est d'une grande conséquence qu'il y ait deux missionnaires dans les missions de tous les départemens d'Indiens qu'on a déjà réduits, et qu'il est absolument nécessaire de pousser la conquête dans les contrées contigues aux Indiens qu'on n'a pas encore soumis, vu qu'indépendamment des avantages communs à tous, un des missionnaires venant à passer dans les territoires des infidèles pour les convertir, les cantons habités ne seroient privés des instructions nécessaires et auroient toujours chez eux une personne intelligente et en état de veiller sur tous les mouvemens qui tendent à la trahison ou à la révolte, ce qu'on auroit toujours à craindre, si ces peuples étoient abandonnés à eux-mêmes.

Il convient encore d'établir sur toutes les frontières des pays qu'on a réduits, une garde de soldats tant pour la sûreté des missionnaires et des Indiens, que pour escor-

ter les missionnaires dans les territoires des infidèles, lesquels soient toujours sous la direction des religieux, et n'agissent que par leurs ordres, de peur que par des châtimens indiscrets ou des courses imprudentes ils n'alarment les Indiens. On espère par cette méthode de faire de grands progrès dans les districts où l'on a établi des missions. On juge encore à propos pour hâter la conquête de cette province avec le secours des missions, qu'on les étende vers le midi, mais dans un sens opposé, pour qu'elles se rencontrent avec celles du nord; et pour que les mesures susdites puissent aisément se pratiquer dans les missions du même ordre établies dans les montagnes des Pimas et dans la province de Sonora, on doublera les missionnaires dans tous les districts convertis qui confinent avec les infidèles, en leur donnant la garde spécifiée ci-dessus. Au moyen de quoi les missionnaires établis dans les montagnes des Pimas continuant à réduire les nations des Cacomaricopas et des Yumas, qui confinent avec la rivière du nord, qu'on appelle aussi Colorado, près de l'endroit où elle se jette dans le golfe de Californie; les Jésuites espèrent, suivant les premières relations qu'ils ont données, de trouver un accueil favorable chez ces nations, et fondant un village des Indiens convertis sur les bords du même Colorado, ils pourront aisément passer sur l'autre côté de la Californie, où après avoir réduit les Hoabonomas et les Bajiopas, qui sont des peuples très dociles et très traitables, ils pourront y fonder un autre village pour assurer le passage des deux côtés de la rivière, et établir une communication avec la terre ferme; s'avançant de là vers le midi, à travers la Californie, jusqu'aux anciennes missions. Quant à la garde que l'on demande pour les Pimas montagnards, on juge que le détachement posté à Terrenate, ou l'autre qui est à Pitiqui suffiront, vu qu'il paraît par le rapport de Don Augustin de Vildosola, gouverneur de la province de Cinaloa, que tous les deux ne sont point nécessaires; cependant, pour plus grande sûreté on pourra faire passer le détachement de Pitiqui à Terrenate et envoyer celui-ci aux missions des Pimas montagnards, au moyen de quoi on pourra fournir une garde convenable aux nouvelles et aux anciennes missions de la Californie sans qu'il en coûte davantage à mon trésor royal. Le même conseil m'a encore représenté qu'encore que les dépenses des missionnaires aient augmenté, on doit se souvenir que par une cédule de 1702 on donna ordre d'assister les missionnaires de la Californie dans tout ce qui pouvoit contribuer à leur soulagemens et aux progrès de l'ouvrage qu'ils avoient enterpris; et par un autre de 1723 que les religieux actuellement en place, ou qui passeront dans la suite dans la Californie eussent le même salaire que ceux de leur ordre, et fussent payés régulièrement et ponctuellement; on ne les a point exécutées jusqu'ici, et que cependant ces missions n'ont occasionné aucune dépense, et n'ont reçu ni appointement ni salaires: les quinze missions qui sont actuellement dans la Californie s'étant soutenues sans qu'il m'en ait rien coûté, par les libéralités de plusieurs particuliers, obtenues par le zèle et les bons offices des religieux de l'Ordre. Comme donc les moyens qu'on propose sont peu dispendieux, eu égard à l'avantage prodigieux qui doit en résulter, il convient que tous ces Ordres ou tels autres qu'approuveront les Jésuites, lesquels connoissent mieux le pays, et desquels j'attends de plus amples informations, soient exécutés; et que dès à présent même on leur fournisse de mon trésor royal les sommes nécessaires pour l'xécution de cette enterprise, et que l'on augmente le nombre des missionaires Jésuites: étant nécessaire qu'il y en ait deux dans chaque district conquis qui confine avec les Indiens infidèles.

Enfin, pour assurer la subordination, on remettra la paye des soldats aux missionnaires pour qu'ils la reçoivent de leurs mains. Voulant au cas qu'un soldat soit d'un caractère turbulent, ou se conduise mal, que les missionnaires puissent le renvoyer et en prendre un autre à sa place, vu que faute de ces précautions et de quelques autres dont quelques habiles missionnaires m'ont instruit relativement à ces provinces, les soldats par leur mavaise conduite ont extrêmement retardé la réduction des Indiens, qu'il est nécessaire de tenir dans la crainte et le respect pour les empêcher de tramer aucun complot, les traitant néanmoins avec douceur pour dissiper leurs soupçons et leur méfiance, leur faire goûter les instructions qu'on leur donne et les civiliser.

M. DE MARTENS. Est-ce qu'il n'y a pas une erreur? dans le livre rouge il est dit que ce document est de novembre 1734.

M. DELACROIX. C'est le document que je viens de lire.

M. DE MARTENS. Ce n'est pas possible, car au commencement on parle de 1735. De quelle année ce document est-il?

M. DELACROIX. Ce document en rappelle un autre; si vous voulez le regarder vous-même vous verrez qu'au commencement il est indiqué qu'on se réfère à un document de 1734.

M. DE MARTENS. Dans le livre rouge, à la page 441, à la fin du doc-

ument que vous avez lu il est dit qu'il est de 1734, mais dans ce document même on parle de 1735; vous avez corrigé en disant 1735?

M. DELACROIX. J'ai corrigé d'après le livre rouge. Il y a en effet une anomalie. Je vérifierai et tâcherai de trouver le nœud de cette énigme. En tout cas le document est antérieur à 1767 puisque c'est la date de la publication du livre.

M. BEERNAERT. C'est l'exemplaire de la Bibliothèque royale de Bruxelles, c'est une édition déjà fort ancienne; nous croyons que c'est l'ouvrage du père Venegas bien qu'il ne soit pas nommé; chose curieuse et même remarquable, il est dit que ce volume est traduit de l'anglais. En tête du volume il y a une mention fort ancienne, d'une écriture effacée, qui indique le nom du père Buriel.

M. DE SAVORNIN-LOHMAN. Cela peut s'expliquer en prenant la page 443.

M. DE MARTENS. Alors, il y aurait une faute d'impression.

M. DOYLE. Je crois que la date est 1744.

M. BEERNAERT. En tout cas, cela n'aurait pas grande importance.

(A midi la séance est suspendue jusqu'à $2\frac{1}{2}$ heures.)

DIXIÈME SÉANCE.

24 septembre 1902 (après-midi).

L'audience est ouverte à 2 h $\frac{1}{2}$ de l'après-midi sous la présidence de M. Matzen.

M. LE PRÉSIDENT. La parole est à l'agent des Etats-Unis de l'Amérique du nord.

Mr. RALSTON. With the permission of the counsel for Mexico, I want to make a slight explanation with regard to the territorial limits of California and to present a map to the court. The honorable members of the court will have noticed in the treaty of Guadalupe-Hidalgo a reference to the map which accompanied the treaty and which is really made part of it. I telegraphed to Washington for a certified copy of this map and I have it here, it having arrived this noon. I desire to file it with the court and at the same time to invite the attention of the court to it, so that no misunderstanding might arise out of anything that I stated yesterday with regard to the limits of California. According to the map which I have before me [Mr. Ralston indicates on the map], the northern limit of the territory ceded by Mexico is the 42d degree, and the 42d degree is carried as the northern limit out into the State of Wyoming. The exact point is a limit difficult to determine. And then, proceeding southward, it follows the line of the Colorado River substantially so far—it goes about here—[indicating on the map] and so on down to the Gulf of California. So that the territory actually obtained from Mexico by the treaty of Guadalupe-Hidalgo was the State of California, Nevada, Utah, Arizona, part of New Mexico, and a slight part of Colorado and Wyoming—and all of that, according to this map, passes under the name of "Alta California."

I have also a map which occurs in an official publication of the Government, and which I have just received, which shows the limits of the various acquisitions of territory by the United States; and which I will take the liberty for the moment of handing to the court, with the permission of the agent of Mexico. I am compelled to return this

volume, so I simply present it for your examination a moment. [Shows the book to Mr. Pardo and the court.]

I will add just one word. At one point in the record—I can not for the moment refer to it—it is stated on behalf of Spain that their discoveries went from the southern point of Lower California a distance of seven hundred leagues to the north. Seven hundred leagues carry the discoveries about to this line [indicating on the map], which would include both Washington and Oregon, both large States; so that we may regard the benefactions from our point of view as covering the whole territory of Washington and Oregon and the country adjacent, although the Alta California described by Mexico and referred to in the map (of the treaty) only includes California, Nevada, Utah, part of Wyoming, part of Colorado and New Mexico, and all of Arizona.

M. BEERNAERT. La Cour sait que les délais fixés par le protocole sont très courts et que nous n'avons eu que peu de temps à consacrer à l'étude de cette affaire. Nous n'avons donc pu songer à répondre par un mémoire développé au mémoire de la partie adverse; mais nous avons fait imprimer des conclusions qui résument en termes succincts mais complets tous les éléments de notre système de défense. Je vais avoir à l'instant l'honneur de faire distribuer ces conclusions à la Cour, des exemplaires en ayant été déjà remis à la partie adverse.

Je me permets, Messieurs, d'ajouter: Tout en sachant le plus grand gré à la cour de nous avoir mis à même, Son Excellence M. Pardo et moi, de prendre part demain à Bruxelles aux funérailles de ma regrettée Reine, je dois faire remarquer que les devoirs qui nous incombent à cette occasion nous rendront extrêmement pénible l'obligation de repartir pour La Haye le jour même. S'il pouvait entrer dans les convenances de la cour de ne siéger que vendredi après-midi, M. Pardo et moi lui en serions fort reconnaissants et elle répondrait en même temps au désir manifesté par notre honorable contradicteur, M. le Sénateur Descamps.

M. LE PRÉSIDENT. Par suite de la demande d'ajournement qui vient d'être faite, après cette séance le Tribunal s'ajournera à vendredi 2 h. ½.

M. BEERNAERT. Je remercie vivement la cour, au nom de Son Excellence M. Pardo et au mien.

M. LE PRÉSIDENT. La parole est au conseil des Etats-Unis mexicains pour la continuation de sa plaidoirie.

SUITE DE LA PLAIDOIRIE DE M. DELACROIX.

MESSIEURS: Au moment où l'audience a été levée, j'avais eu l'honneur de donner lecture à la cour d'un document qui, je crois, méritait son attention, et qui porte la date du 13 novembre 1744. C'est par erreur que nous avions indiqué 1734; vous trouverez à la page 196 du volume rouge le texte espagnol de ce document et il porte en effet la date de 1744; ainsi que l'a fait fort sagement remarquer l'un des membres du siège.

Messieurs, nous avons examiné ce matin si les demandeurs pouvaient puiser un titre à leur prétention dans les actes de donation primitifs. Nous avons constaté que ces actes donnaient les droits les plus absolus aux Jésuites de Californie, que ces droits étaient exclusifs, dans la pensée des donateurs, de toute intervention de l'église comme de toute intervention du pouvoir civil. Ces actes avaient été faits en

vue d'avantager les missions, œuvres de conquête, et les missions de Californie. Nous avons dit, documents en main, ce qu'était la Californie à l'époque où les donations ont été faites, quel était le pays, quel était le territoire que ces donateurs pouvaient avoir eu en vue.

Nous avons ajouté, messieurs—et j'en étais arrivé à cette question lorsque l'audience a été levé—que si les donateurs avaient attribué aux béneficiaires de ces donations, c'est-à-dire aux Jésuites, tous les droits, tous les pouvoirs qu'ils pouvaient leur conférer, si de leur part il n'y avait aucune restriction dans cette attribution de droits, il y en avait une qui dérivait de la loi, du pouvoir souverain.

C'est ici que se place une indication que j'avais fugitivement donnée à la cour: un édit de Charles Quint du 10 novembre 1520; reproduit dans les Placards de Brabant, 1e partie, p. 80 à 84, et reproduit dans les Placards de Flandre, 8e Partie, p. 10 à 17, disait ceci:

Chez nous les mainmortes ne pouvaient acquérir à cause de mort et entre vifs, il fallait l'autorisation du prince et des gens de loi.

C'est-à-dire que déjà du temps de Charles Quint, qui était le souverain tant des Pays-Bas que d'Espagne, on considérait qu'il y avait à se préoccuper de l'envahissement de la mainmorte, et que le souverain devait intervenir pour limiter le droit de posséder de ces personnes civiles, c'est-à-dire de ces entités morales qui ne trouvaient leur existence que dans la loi elle-même.

Cet édit, Messieurs, fut ratifié par Marie-Thérèse le 28 septembre, 1753, et c'est à l'occasion de cette ratification par Marie-Thérèse que nous trouvons la citation que je viens de faire et qui est reproduite dans les placards de Brabant et dans les placards de Flandre aux pages que j'ai indiquées.

Voici donc, Messieurs, que la loi déjà depuis le 16e siècle était intervenue, en concurrence en quelque sorte avec les droits des bénéficiaires de mainmortes. Ce qui est intéressant dans ce débat c'est que si à côté du droit du donataire il y a un autre droit qui vient se mêler à celui-là, ce n'est pas le droit de l'église, c'est le droit du souverain, le droit de celui qui représente la nation, l'ensemble de la collectivité.

A ce point de vue il est intéressant de signaler ce qui suit: Lorsque la présente question a été soumise à la commission mixte, l'honorable surarbitre a estimé que les biens dont il s'agit devaient être des biens ecclésiastiques, des biens de l'église, uniquement parce que la pensée qui avait dicté ces donations était une pensée pieuse, c'est-à-dire une pensée dont le but pieux devait prédominer sur le but politique. Eh bien, Messieurs, nous croyons qu'il ne suffit pas qu'une donation ait été faite dans une préoccupation pieuse pour que le bien appartienne à l'église, c'est là à notre sens une confusion absolue. En effet, lorsque nous regardons de près cet acte de donation de 1735, ne voyons-nous pas que ce qui a déterminé la donation c'était sans aucun doute une pensée pieuse, mais que c'était également une pensée politique?

Ce n'est pas le mobile que nous devons considérer, c'est le fait, c'est l'objet de la donation. Eh bien, je vous le demande, je suppose qu'on fasse une donation à une personne déterminée, je dis à telle personne: je vous donne mon bien, je vous donne un domaine qui m'appartient, je vous le donne en propriété absolue, mais je désire que vous l'employiez de telle et telle manière, je désire que vous y receiviez telle ou telle congrégation, telle ou telle personne, que vous entreteniez tels ou tels pauvres, que vous fassiez un établissement de bienfaisance, que

vous y recueilliez des vieillards pauvres; je suis guidé, en un mot, par une idée de bienfaisance quelconque; je donne à cette personne le pouvoir absolu en ce qui concerne ce bien, sauf que je lui fais une recommandation.

Dans notre législation moderne, une telle disposition serait dangereuse parce qu'il pourrait se faire que l'on dît que cette donation sera nulle, étant en contrariété avec certaines dispositions législatives positives; mais, d'une manière absolue, et laissant de côté cette question de nullité qui n'intéresse pas le débat actuel, n'est-il pas évident que cel ui qui serait le bénéficiaire de cette donation serait incontestablement l'individu lui-même et non pas l'église? Est-ce qu'il est possible de sanctionner par un arrêt que toute donation qui aurait été déterminée par un mobile religieux entraînerait une propriété de l'église? Ce n'est pas possible, ce n'est pas juridique.

Je me permets à ce point de vue d'en revenir à ce qui s'est passé lors de la Révolution Française et lors de la sécularisation qui s'en est suivie. Je vous parlais du décret du 2–4 novembre 1789 disant:

> L'assemblée Nationale décrète:
>
> Que tous les biens ecclésiastiques sont à la disposition de la Nation, à la charge de pourvoir d'une manière convenable aux frais du culte, à l'entretien de ses ministres et au soulagement des pauvres, sous la surveillance et d'après les instructions des provinces; que dans les dispositions à faire pour subvenir à l'entretien des ministres de la religion il ne pourra être assuré à la dotation d'une cure moins de 200 livres.

Puis, l'ouvrage que je tiens en ce moment à la main, le "Répertoire de l'Administration" dit:

> Le droit que l'Assemblée Constituante reconnaît à la Nation de disposer des biens ecclésiastiques n'est pas un droit nouveau qu'elle a créé tout exprès pour la circonstance; il préexistait; il est inhérent à toute nation comme la souveraineté dont il dérive; l'Angleterre, l'Autriche, l'avient exercé avant elle, l'Espagne l'a exercé depuis, et chaque peuple exercera losque la nécessité lui en fera un devoir.

Et plus loin:

> Vainement dirait-on que la nation n'avait pas le droit de supprimer le clergé; la noblesse et le tiers-orde comme corps politiques; ce serait refuser à une nation le droit de se constituer comme elle l'entend, ce serait inféoder les peuples à une forme de gouvernement qui une fois établie ne pourrait plus être changée quels que fussent les changements survenus dans les mœurs, les besoins et les intérêts de la société, ce serait saper la principe sur lequel reposent toutes les Constitutions anciennes et modernes. Disons donc avec assurance que la nation a le droit de supprimer tout ce qui n'existe que par sa volonté expresse ou tacite, et que le clergé une fois supprimé comme corps, les biens ecclésiastiques à sa disposition ne pouvaient plus appartenir qu'à l'Etat.

Il est bien entendu que je ne discute pas ici la légitimité au point de vue politique de telle ou telle mesure, telle par exemple que la suppression d'un corps ou d'une communauté religieuse, mais je dis ceci: c'est que de même que toutes les institutions gouvernementales sont sujettes à changement parce que les mœurs changent, parce que les besoins, les nécessités se modifient, tout ce qui est une institution gouvernementale, quelle qu'elle soit, est appelé à disparaître et à être remplacé par une autre; ce sont toujours des entités juridiques qui sont des émanations de la nation, qui n'existent que par la volonté de la nation, et par conséquent il appartient à celle-ci de les faire disparaître, que ce soit une faute ou non, et chaque fois c'est la nation qui rentre dans le dominium complet dont elle avait abandonné une part à une main-morte, à une personne civile.

Eh bien, messieurs, c'est cette éventualité que les donateurs primi-

tifs n'avaient pas prévue, ou, s'ils l'ont prévue ils l'ont acceptée avec toutes ses conséquences fatales, c'est-à-dire notamment avec cette conséquence que les biens devaient rentrer dans le dominium général.

Si j'ai insisté sur ce fait, messieurs, c'est qu'au point de vue de ma démonstration j'ai désiré être complet, parce que je ne pense pas que cette question ait dans le litige une importance essentielle. En effet, les actes de donation primitifs ont cessé d'avoir leur effet, leur vertu juridique, à partir du jour où le Roi y a substitué des actes nouveaux, c'est-à-dire des actes d'appropriation ou de confiscation.

J'ai cru devoir vous démontrer ce principe qui est à la base de toutes les législations, c'est que les biens sans maître appartiennent à l'Etat; mais je n'avais pas besoin de faire cette démonstration parce que le fait est là: un acte du souverain a déclaré qu'il en serait ainsi, et cet acte du souverain, messieurs, vous le connaissez, il se trouve dans le décret de Charles III de 1767 et dans le décret d'exécution de 1768. A partir de ce moment, les biens, quels qu'ils fussent, quelle que fût la légitimité de leur possession antèrieure, sont entrés dans le domaine du Roi, qui représente la nation, parce que le Roi, qui à cette époque surtout avait tous les droits, a estimé que ces biens qui étaient entre les mains des Jésuites devaient rentrer dans son domaine. Dès lors, comme je vous le disais, à mon sens les actes de donation primitifs ne pourraient en aucun cas être invoqués par nos honorables contradicteurs. Ils ne pouvaient pas l'être, messieurs, et en fait ils ne l'ont pas été. Cet argument n'est pas sans importance dans l'espèce, car si les demandeurs revendiquent une succession, une hérédité, s'ils appuient leur soutènement sur les actes de donation primitifs, à quelle époque, je vous le demande, devaient-ils faire valoir leur revendication ou leur pétition d'hérédité? N'est-ce pas au moment où les Jésuites cessaient d'exister, ou les biens ne pouvaient plus appartenir aux Jésuites? N'était-ce pas alors que celui dans le domaine de qui les biens devaient rentrer devait immédiatemente apparaître? Est-ce l'Eglise? est-ce le Roi? Si c'est l'Eglise ou si l'Eglise y prétend, elle ne va pas laisser passer ces biens dans le domaine du Roi sans protester. Elle ne proteste pas . . . . "qui ne proteste pas consent" . . . . elle acquiesce, elle accepte, c'est à-dire, messieurs, qu'elle ratifie tout ce que j'ai l'honneur de dire ici.

Ceci est donc le jugement de l'Histoire, le jugement de l'Eglise le plus solennel et le plus puissant, parce que, ne l'oublions pas, ce jugement date de plus d'un siècle.

Et dans quelles conditions cet acquiescement se présente-t-il? Je ne veux plus y revenir parce que vous connaissez les faits, et la bienveillante attention que vous m'avez accordé ne me permet assurément pas de revenir sur ce que j'ai dit. Mais je me permets cependant de vous rappeler combien à notre sens la bulle du pape Clément XIV qui supprimait l'ordre des Jésuites six années après le décret de Charles III, lequel a amené la confiscation des biens des Jésuites, avait son importance, et combien j'avais raison, me semble-t-il, de vous dire à une précédente audience que si l'Eglise avait une protestation à formuler elle devait la formuler dès 1767 et avant 1773, et qu'à partir du moment où le pape avait sanctionné ce décret plus personne ne pouvait au nom de l'Eglise formuler une revendication quelconque?

Donc, messieurs, à notre sens, la demande a pour objet de réviser un acte souverain, un acte de Charles III, et cette révision, outre qu'elle n'est pas admissible en droit, aurait dû amener une protestation à

l'époque, cette protestation n'a pas été produite alors, elle est tardive aujourd'hui.

Mais, messieurs, l'acte de Charles III, qui prend la place de l'acte de donation, comprenait, comme je l'ai dit à la précédente audience, une réserve. Charles III disait dans son décret de 1767 qu'il prenait les biens "saus préjudice aux charges qui sont imposées par les donateurs"—ce que mon honorable contradicteur traduisait en disant qu'il prenait les biens "cum onere."

Eh bien, messieurs, la traduction latine ne me paraît pas exacte, parce qu'elle implique une idée de droit civil, et qu'à notre sens des idées de droit civil ne pouvaient pas prendre place dans un décret de droit public.

Ce décret de 1767 est incontestablement un acte du pouvoir souverain. Le soverain, qui chasse les Jésuites, agit comme souverain, et l'acte qui décide, qui décrète que les biens appartenant à cette mainmorte seront au Roi est incontestablement aussi un acte du pouvoir souverain. Et voici que dans la thèse des adversaires, dans cet acte ayant à ce double titre le caractère d'acte souverain se serait glisée une disposition de droit civil? Non, jamais personne ne l'a cru, et certainement le Roi ne l'a pas voulu.

En effet, messieurs, qu'est-ce qu'une dispostion de droit civil? Elle suppose le transfert d'un droit qui appartenait à l'Etat dans le chef d'un autre sujet du droit; elle suppose donc la création d'une créance dans le chef d'un tiers à charge de l'Etat. Quel est ce tiers? et conçoit-on d'abord que le Roi, qui avait alors les prétentions que l'on sait, qui agissait avec cette toute-puissance qu'il s'attribuait de droit divin, ait admis qu'il se créait un créancier et que quelqu'un aurait pu l'actionner devant les tribunaux d'alors pour lui réclamer l'exécution de cet engagement? Ah non! c'était une disposition qu'il prenait de droit souverain, c'était une volonté qu'il exprimait, qui était destinée dans sa pensée à donner satisfaction à la population; mais il n'entendait pas aliéner ou diminuer ses droits.

D'ailleurs, messieurs, si j'y insiste maintenant, c'est que cette même idée va revenir lorsque nous analyserons les décrets du 19e siècle. Il ne peut pas se concevoir qu'une créance soit ainsi créée à charge de l'Etat dans la forme que nois connaissons. Une créance ne résulte pas d'un décret, d'un acte unilatéral du pouvoir souverain; le pouvoir souverain énonce une volonté politique. Est-ce que quelqu'un aurait pu venir devant les tribunaux discuter la manière dont le pouvoir souverain exercerait cette intention ou cette volonté? Evidemment non.

D'ailleurs, quel serait le créancier ainsi créée? Serait-ce l'Eglise catholique? Mais, messieurs, nous ne la voyons pas intervenir; comme je le disais, s'il y a un bien donné à l'Eglise nous devons toujours voir apparaître une autorité ecclésiastique pour l'accepter. Il en est si peu ainsi que le Roi, au lendemain du décret va instituer des commissaires royaux pour administrer les biens; puis il les donnera aux Franciscains, ensuite aux Dominicains; il donnera à l'un ce qu'il a retiré à l'autre. Cela se pourrait-il s'il y avait un droit civil? Non.

J'ai tort d'insister sur des notions aussi élémentaires et essentielles du droit.

Au surplus comment se produit le droit des demandeurs? d'où procède-t-il? quelle est sa filiation?

Les demandeurs, aujourd'hui, formuleraient une revendication au nom de l'Eglise en se fondant sur les actes de donation primitifes ou

sur le décret de Charles III; ils seraient héritiers à travers le Gouvernement mexicain, à travers le Roi d'Espagne, pour remonter jusqu'aux Jésuites. C'est une succession d'assez longue haleine, et on imagine difficilement que cette période de plus d'un siècle qui s'est écoulée entre le moment où la donation aurait été constituée et le moment où la revendication s'est produite, n'ait pas laissé une trace, l'affirmation d'un droit au profit de l'Eglise, que jamais un acte quelconque n'ait marqué son intervention, son droit, sa possession.

Je crois donc pouvoir conclure sur ce premier point que les demandeurs ne peuvent déduire ni de l'acte de donation ni du décret de Charles III aucun titre, aucun appui. Mais j'ajoute—et je termine sur ce point:—Pourquoi serait-ce l'Eglise de Californie qui pourrait réclamer plutôt que l'Eglise universelle? Il semble que ce soit l'Eglise universelle à certains égards qui revendique, ou qui ait revendiqué, puisque nous voyons que lors du précédent débat et de la précédente condamnation c'est le chef de l'Eglise universelle qui a réparti, qui a distribué le montant de la condamnation, et nous voyons que le produit de cette condamnation, a servi à différents pays et non pas seulement à la Californie.

Alors je me demande: où est donc le titre que l'on veut puiser dans les actes de donation, puisque nous savons que ce que l'on pouvait avoir en vue à cette époque ce n'était que la Californie de l'époque, c'est-à-dire la péninsule, que la veille encore on croyait une île; ce n'était donc pas la Haute Californie d'aujourd'hui.

Mais il y a plus. Les donateurs entendaient donner aux missions des Jésuites, et les Missions des Jésuites ont existé mais n'ont existé que dans la Basse Californie. Sans doute les donateurs disaient que les sacrifices qu'ils faisaient pourraient advantager aussi les Missions d'autres pays si elles étaient fondées par les Jésuites, c'est-à-dire que c'était une faculté laissée aux Jésuites de faire servir ces biens à des Missions d'autres pays, mais si les Jésuites n'ont pas usé de cette faculté, s'ils ont restreint leurs Missions à la Basse California, on se demande vraiment comment aujourd'hui l'on pourrait trouver un tire dans l'acte de donation de 1735 pour dire que c'était la Haute Californie, un pays où jamais les Jésuites n'ont créé une Mission, qui pourrait revendiquer le bénéfice des donations.

On a dit aussi, messieurs, que l'Etat, le Roi d'Espagne, aurait occupé ces fonds en qualité de trustee. C'est exact dans un sens, mais c'est erroné dans un autre sens. Il est incontestable que les biens en question—je parle de la notion juridique du fait—appartiennent à la nation, à l'Etat comme tel, ou à l'Eglise comme telle, que le Roi peut donc être considéré comme le commissaire, l'administrateur, le trustee comme l'evêque serait l'administrateur ou le trustee; mais on ne peut tenir compte de cette notion de trustee; le Roi comme tel, c'est-à-dire l'Etat espagnol qui était concentré dans la personne du Roi alors, avait tous les pouvoirs, il avait les pouvoirs les plus absolus; pourquoi? Parce que l'on ne m'indiquera pas quelq'un qui ait un droit privatif ou exclusif du sien. S'il y a une restriction dans ce droit de l'Etat, il faut qu'elle existe au profit de quelqu'un. Quel serait ce quelqu'un? On ne pourrait pas l'indiquer. Par conséquent les droits du Roi sont absolus, exclusifs. Et il ne s'agit pas d'un mandat; le Roi mandatire de qui? De la collectivité des Indiens? Ce n'est pas un être juridique!

J'en arrive ainsi, messieures, aux décrets de 1836, 1842 et 1845.

La situation juridique était donc à cette époque ce que je viens d'indiquer; je crois avoir démontré—et pour le moment je suppose que ma démonstration est complète—qu'en 1836 l'Eglise n'avait aucun droit sur ces biens, que les pouvoirs les plus absolus résidaient dans la personne du Roi ou de l'Etat, et dès lors cette démonstration étant faite, ou supposée faite, examinons la portée du premier décret qui est invoqué, celui du 19 septembre 1836. Ce décret vous le connaissez, il a pour objet l'institution éventuelle d'un évêché. Vous connaissez les raisons politiques qui avaient déterminé cette institution: il y avait là des curés intérimaires, les anciens Franciscains, qui n'avaient pas de chef, il fallait un évêque, on en avait senti la nécessite, car on voyait déjà poindre à l'horizon l'intervention de l'étranger.

On décide donc qu'il faudra un évêque, qu'on demandera l'intervention du pape. Tout cela se trouve réalisé en 1840; on alloue à cet évêque un traitement de 6,000 piastres, 3,000 piastres de frais de déplacement, etc, et on dit que le produit des propriétés sera administré et employé par lui suivant les vues des donateurs.

Qu'est-ce que cela? C'est un décret, n'est pas un contrat synallagmatique.

Eh bien, messieurs, je vous disais que lorsqu'un décret confie à un fonctionnaire un service public—et assurément on considérait en 1836 que les Missions de Californie constituaient un service public et un service public du plus haut intérêt puisqu'il était le moyen d'éviter l'intervention de l'étranger—il ne lui transfère pas de droits civils. En Belgique, il existe un partie des impôts dui est affectée aux villes, aux communes, c'est le Fonds communal; il y a certaines recettes de l'Etat qui sont affectées aux communes et qui sont distribuées entre elles; mais cette appropriation suppose-t-elle un droit civil? Non. Eest-ce que le gouvernement belge ne pourrait pas par une loi nouvelle changer demain ce qui a été décidé aujourd'hui? Si aujourd'hui il a convenu que le Fonds communal, que telles recettes du trésor, seraient affectés aux communes et distribués entre elles pour leurs besoins—les communes ont cependant bien la personnalité civile—est-ce que c'est une créance de droit civil qu'on leur donne? est-ce qu'elles pourront actionner l'Etat en paiement? Mais non! parceque c'est un acte des pouvoirs publics; c'est un décret, ce n'est pas un contrat, c'est un acte unilatéral, et que plus est, unilatéral du souverain qui décide, qui édicte.

Je suppose, messieurs, par impossible, que le gouvernement de 1836 ait eu l'intention de transférer à l'évêque de Californie les droits que lui Etat possédait jusque-là, qu'il ait voulu lui donner un droit civil, lui faire un abandon de propriété; je suppose cela; est-ce qu'il n'aurait pas eu soin de faire alors un contrat? Quand l'Etat aliène une de ses propriétés au profit d'un particulier il fait un acte de vente; s'il reconnaît une créance vis-à-vis d'un particulier il le fait dans une forme qui implique la reconnaissance d'obligations réciproque; cela se fait toujours dans une forme distincte d'un décret. Pourquoi? Parce qu'il faut des conditions, parce que si l'on vend, parce que si l'on abandonne un droit on demande quelque chose en retour, on impose des conditions, des obligations.

Concevez-vous, messieurs, que ce décret qui ne nommait pas encore l'évêque, qui ne l'instituait pas encore mais qui annonçait l'intention de de l'instituer, aurait eu pour objet un transfert de propriété ou la trans-

mission d'une créance civile au profit de l'évêque de San Francisco, ou au profit d'une personne que n'existait pas encore? C'est inadmissible:

D'ailleurs le texte du décret lui-même dit que les biens appartenant au Fonds Pie sont placés à la disposition du nouvel évêque pour être administrés. Ce sont les deux mots que j'ai indiqués; je ne puis plus y revenir, mais je vous ai dit que nous avions trouvé dans la législation française les mêmés mots lorsqu'on décidait dans le décret du 26 messidor, an IX, article 12:

Toutes les églises métropolitaines, cathédrales, paroissiales ou autres non aliénées sont mises à la disposition des évêques.

Est-ce que quelqu'un a jamais pensé que les évêques devenaient propriétaires des cathédrales parce que le Concordat en avait décidé ainsi? Mais non! Messieurs, et nous voyons dans l'article 91 de la loi de 1793, qui est postérieure:

Les habitations et emplacements nécessaires aux services de la commune, qui sont employés comme tels, comme les prisons, les presbytères ne peuvent cesser d'appartenir aux communes.

Vous voyez donc toujours dans le droit public cette notion de mise à la disposition de quelqu'un en vue de l'exercice d'un service public, comme le culte dans le cas que j'indique, et jamais on n'estime que c'est un transfert de propriété.

Nous avons d'ailleurs à ce point de vue des autorités irrécusables et qui ne seront certes pas récusées par nos honorables contradicteurs. En effet, je vous ai dit hier que nous avions pour nous l'autorité et l'aveu de l'évêque lui-même; je vous citais son aveu exprès par l'organe de l'avocat qui avait été' chargé de protester en 1842 contre des mesures dont je vais avoir à vous parler. Mais je vais maintenant vous indiquer son aveu tacite, car si un décret du 19 septembre 1836 avait mis les biens à la disposition de l'évêque un autre décret du 8 février 1842 lui reprenait ce qui lui avait été concédé. Ceci, à mon sens, est tout à fait décisif, parce que cela vous montre, d'abord ce que pensait le Gouvernement mexicain. C'est lui qui a fait le décret de 1836; s'il estime qu'il a renoncé à ses droits, qu'il les a abandonnés au profit de l'évêque, qu'il les lui a attribués, il ne peut pas reprendre ce qu'il lui a donné. Mais, avec la plus grande facilité, de même que ce décret avait été signé en 1836, un autre décret va reprendre ce qui été concédé, et on va dire que l'Etat va se charger directement de l'administration du Fonds et de l'application des produits de ce Fonds.

Comme je l'indiquais hier, si tant est qu'un droit civil fût né dans le chef de l'évêque, une expropriation était nécessaire. Or, non seulement l'Etat ne fait pas d'expropriation mais l'évêque n'en réclame pas, parce que l'évêque reconnaît que c'est le droit de l'Etat, qu'il n'a été investi de droits que dans la mesure du service qui lui était confié.

En 1842 l'Etat charge le général Valencia d'administrer le Fonds. Le 24 octobre 1842 le gouvernement va décider cette fois que les biens vont être nationalisés, incorporés au Trésor—ce sont les termes dont se sert le décret. C'est-à-dire que s'il pouvait rester encore un doute dans cette affaire, cet acte du pouvoir souverain du 24 octobre 1842 va le dissiper et l'anéantir définitivement. Et l'Etat annonce qu'il va affecter une somme représentant un intérêt de 6 pour cent du produit du Fonds à "des buts de bienfaisance et nationaux" conformes aux volontés des donateurs.

Ici, Messieurs, j'aurai vite fini, parce que je n'ai à me poser qu'une question: Est-ce que ce décret du 24 octobre 1842 aurait donné naissance à une créance civile que l'on pourrait faire valoir aujourd'hui?

Il faut se demander d'abord quel est ce créancier; serait-ce l'évêque? Mais, c'est impossible, puisque la loi de 1842 a eu précisément pour objet de retirer à l'évêque l'administration et la disposition qu'on lui avait données. Ce n'est qu'en 1845 qu'il sera question de lui rendre une partie de cette administration, mais en 1842 le décret du 24 octobre comme celui du 8 février nationalisaient, c'est-à-dire qu'on reprenait à l'évêque ce qu'on lui avait donné; ce n'est donc pas lui qu'on va créer créancier de l'Etat. Si ce n'est pas l'évêque, si ce n'est pas l'église, alors qui est-ce? Ce ne sont pas les Indiens; j'ai dit, en effet, individuellement ils n'ont aucun droit, collectivement ils ne sont rien ou ils sont représentés par la nation. Donc, Messieurs, il est impossible d'imaginer, d'indiquer le créancier que l'Etat se serait créé en 1842.

Ce décret, qui est l'expression d'une volonté unilatérale du pouvoir souverain, va être remplacé par le décret du 3 avril 1845. A cette époque l'on décide de rendre à l'évêque une certaine administration, l'administration de ce qui reste, de ce qui n'est pas aliéné.

Sur ce point, Messieurs, il n'y a pas de demande; mes honorables contradicteurs ne réclament pas de droits dérivant du décret de 1845 en tant qu'il aurait restitué à l'évêque l'administration des biens qui n'avaient pas été aliénés parce que ce serait la revendication d'un capital; or, cela on ne nous le demande pas.

Qu'est-ce qui reste alors dans le décret du 3 avril 1845? L'affirmation du pouvoir souverain, du droit du congrès de disposer du Fonds comme il l'entend, en tant que celui-ci a été aliéné. Or, en tant qu'il avait été aliéné, ce qui pouvait subsister c'était un revenu de 6 per cent que l'Etat avait indiqué comme devant être affecté à des objets de bienfaisance; on réserve au congrès le droit d'en disposer, il n'en a jamais disposé.

Mais cela ne suffit pas. Quelles que soient les conséquences de cet acte, quelle que soit la disposition qui est prise et que nous n'avons pas à discuter ici, ce que vous avez à rechercher et à proclamer c'est le caractère souverain de tous ces décrets, et cela, Messieurs, me parait indiscutable et incontestable. Est-ce que nous ne voyons pas dans cette succession même de décrets l'affirmation constante du pouvoir souverain au sujet de ce Fonds? Est-ce que ces modifications successives permettent encore que l'on vienne dire qu'il existait un droit privatif en dehors de l'Etat et contre l'Etat? Cela n'est pas possible.

Messieurs, la question avait déjà été examinée et résolue dans le procès auquel je faisais allusion dans l'audience d'hier, le procès relatif à la succession de Doña Josepha Arguelles. Vous vous souvenez que le Conseil des Indes, par une sentence du 4 juin 1783, avait décidé que les biens dépendant de cette succession, en tant qu'ils avaient été attribués aux missions des Jésuites, étaient à la disposition du Roi et à son bon plaisir. Est-ce que, Messieurs, une sentence pareille a pu intervenir sans contradiction de la part de l'autorité religieuse, et est-il possible qu'une autorité religieuse dise aujourd'hui que faisant valoir des droits de son auteur elle a des droits contraires à ceux qui ont été proclamés alors?

Il me paraît, Messieurs, que cette décision a une importance capitale à ce procès. Il y avait un quart qui a été abandonné par les Jésuites, auquel ils ont renoncé, qui était destiné aux collèges et qui ne leur a

pas été attribué: n'en parlons plus. Mais il y avait les ⅘ de la succession qui de par la donation étaient destinés aux missions des Jésuites. Le procès était considérable. Eh bien, voici que les Jésuites sont expulsés depuis 1768, qu'ils ont disparu, la famille conteste la donation, elle demande que ces biens lui soient attribués; alors si l'église est l'héritière des Jésuites, si elle est aux droits des Jésuites, n'est-ce pas elle qui va intervenir, et conçoit-on que sans protestation de la part de l'autorité religieuse la Cour Suprême d'alors ait pu décider que ces biens, par le fait qu'ils étaient donnés aux missions des Jésuites, appartenaient originellement au Roi et qu'ils devaient être mis à sa discrétion? Est-ce que cette absence de protestation n'est pas l'aveu le plus complet qu'on puisse souhaiter?

Je ne parle plus, parce que je vous en ai dit un mot ce matin, mais vous en retiendrez l'importance, du procès jugé dans l'Amérique même, dans la Haute Californie, depuis la suppression des Jésuites, et dans lequel nous avons vu cette affirmation formelle que les missions étaient des œuvres politiques et non pas des œuvres religieuses; et cela a été jugé depuis la séparation de la Californie.

D'ailleurs peut-on concevoir que quelqu'un puisse dire encore aujourd'hui: il y a des sommes qui ont été données aux missions et je les revendique au nom de la Haute Californie? Quelle serait la signification d'une telle demande? Le Gouvernement mexicain, le 16 janvier 1839, par l'organe de son ministre des affaires ecclésiastiques—c'est un document qui se trouve reproduit dans la défense de M. Azpiroz, page 393 du livre rouge—s'était exprimé dans les termes suivants:

> La Basse Californie doit maintenant devenir l'objet de toute la sollicitude du Gouvernement, en ce qui concerne ses besoins tant civils qu'ecclésiastiques, parce que ce territoire ayant été démembré en vertu du traité de Guadalupe Hidalgo la part qui nous reste a besoin de législations spéciales pour assurer son administration. Elle ne peut pas évidemment seule constituer l'évêché qui fut créé par décret du 19 septembre 1836. Le Gouvernement dirige son attention sur les intérêts des habitants de la région et il fera usage de tous ses pouvoirs constitutionnels dans ce but, sauf à demander au besoin aide et appui aux représentants de la nation.

C'est-à-dire, Messieurs, qu'en 1849, au lendemain du traité qui avait définitivement enlevé au Mexique les territoires du Nouveau Mexique et de la Haute Californie, le ministre des affaires ecclésiastiques, qui avait dans ses attributions le Fonds Pie, disait: Il faut maintenant s'appliquer à défendre, à protéger la Basse Californie. Le ministre d'alors se rendait compte de la faute politique que j'indiquais hier; on n'avait pas assez tenu compte des nécessités de ces pays de la côte; il y avait maintenant à se préoccuper avant tout de la Basse Californie, parce que la leçon avait profité.

Eh bien, je vous le demande, Messieurs, alors que le Gouvernement du Mexique comme pouvoir souverain va affecter toutes les disponibilités qu'il aura pour soutenir la Basse Californie et qu'il demandera même l'aide de la nation dans ce but, il sera permis à un tiers, à un étranger, de venir lui dire: Non, vous allez employer le produit de ce fonds Pie à la Haute Californie? C'est inadmissible. Et comme je le disais, est-il possible de fonder une réclamation pareille sur la volonté des donateurs primitifs, sur la volonté des Mexicains d'alors, de ceux qui devaient avant tout se préoccuper du territoire du Mexique, de la race mexicaine, de la race espagnole, de ceux qui ne pouvaient alors connaître que la Basse Californie? Et n'y a-t-il pas, par conséquent, en dehors de toutes les considérations juridiques que je viens de vous présenter, une antinomie absolue à venir réclamer au nom d'un Etat

étranger ou plutôt au nom d'évêques étrangers, l'application du produit du Fonds Pie au profit de la partie étrangère du territoire ancien au détriment de la partie du territoire restée nationale.

C'est important, parce que vous voyez immédiatement le caractère de la demande, qui est un caractère d'immixtion: on veut en somme empêcher le Gouvernement mexicain, qui a toujours été propriétaire ou titulaire de ce Fonds, de l'employer pour la Californie, Haute ou Basse, comme il l'entend; il n'a plus que la Basse Californie, on lui a conquis l'autre, et il ne pourrait pas y employer les fonds qu'il a à sa disposition.

Je passe, Messieurs, à l'examen d'un point tout différent, mais qui constitue à mon sens, elle aussi, une réponse décisive et péremptoire à la demande que est formulée devant vous. Cette réponse est puisée dans le traité de 1848.

Je n'ai plus à revenir sur les circonstances dans lesquelles ce traité a été conclu, vous les connaissez; mais je dois indiquer à le cour ce qui a été la pensée des parties au moment ou elles ont conclu ce traité, et surtout ce qu'elles ont abandonné, les décharges qu'elles se sont donnés et qui sont incompatibles avec la demande actuelle.

Comme je vous l'ai dit, Messieurs, de la part du Gouvernement américain une réclamation serait tout à fait impossible. Lorsque le traité a été débattu il l'a été pied à pied; il avait en grande partie pour objet une question d'argent; la conquête était réalisée depuis 1846, les territoires devaient être abandonnés, c'était entendu, les Etats-Unis vainqueurs n'admettaient plus la discussion de ce point; mais il y avait une question d'équité, il y avait une question d'argent à débattre. Comme vous l'avez vu, Messieurs, c'était en somme au point de vue superficiel la plus grande partie du territoire du Mexique qui était cédée aux Etats-Unis; c'était un abandon considérable qui avait pour conséquence de laisser toutes les charges du Mexique à la partie qui n'était pas détachée. C'est ce que se sont dit les plénipotentiaires qui sont intervenus à la conclusion de ce traité. Ils ont dit: il y a là une chose raisonnable, il faut que nous intervenions, non pas pour acheter le territoire comme on l'a dit—il n'en était pas question—mais pour rembourser une dette qui affectait ce territoire et qui serait laissée à la charge du pays vaincu. Par conséquent, il faillait fixer cette indemnité. Tous les éléments en ont été débattus; il y a eu naturellement des préliminaires nombreux, on a dû faire des calculs, établir des chiffres, et c'est ainsi que l'on est arrivé à fixer définitivement une somme de 15 millions de dollars qui a été payée. L'on a été plus loin encore, l'on a donné décharge au Gouvernement mexicain au nom des citoyens américains qui pouvaient être ses créanciers.

Quelle devient, je vous le demande, la prétention actuelle, dans ces conditions?

A ce moment-là les deux parties, après deux années de débats en arrivaient à un accord, à une décharge réciproque absolue; elles allaient aussi loin que possible dans les efforts tentés pour supprimer tout sujet de conflit dans l'avenir et elles auraient voulu réserver cet élément de discorde actuellement débattu? Est-ce possible?

Il y aurait eu quelqu'un à qui on aurait réservé un droit vis-à-vis du Mexique! qui était-il? Assurément s'il y avait eu quelqu'un qui eût pu prétendre à cette réserve? C'était l'Etat américain seul; il aurait pu tenir au Mexique ce langage: Vous avez un Fonds, vous avez des biens qui ont été donnés jadis pour l'ensemble du territoire mexicain

et plus spécialement pour la Californie, nous prenons une partie du territoire, donnez-nous une partie de ce Fonds. Ce à quoi probablement le Mexique aurait répondu: Pardon, je prends toute la dette, je prends toutes les charges, et je n'ai pas à vous donner une partie du Fonds.

Concevrait-on d'ailleurs qu'une telle prétention ait été formulée alors qu'il s'agissait de déterminer la somme que les Etats-Unis avaient à payer. Ils auraient pu faire valoir cette circonstance lorsqu'on débattait le chiffre de l'indemnité, je ne sais si cette prétention a été formulée, jepense qu'elle ne l'a pas été; mais dans tous les cas c'est alors et alors seulement qu'elle pouvait être produite utilement. Mais, si ce débat terminé la décharge était donnée réciproquement, que pouvait réclamer encore le Gouvernement des Etats-Unis, qui représentait naturellement la collectivité soit d'Indiens soit de catholiques qui aurait eu des droits vis-à-vis du gouvernement mexicain?

Or, messieurs, le Gouvernement américain donne quittance, il donne décharge sans réserve aucune; comment imaginer encore que le Mexique ait une dette soit vis-à-vis du Gouvernement américain soit vis-à-vis des collectivités qu'il représente? Vis-à-vis des citoyens américains il n'en pouvait avoir davantage. Sur ce point les adversaires ne contesteront certainement pas ce que j'ai dit ce matin, parce que c'est le texte de l'article 14 du traité qui le dit expressément:

> Le gouvernement donne décharge au nom des citoyens des Etats-Unis.

Et le texte de l'article 15 confirme cela de plus près puisque le Gouvernement Américain se charge de toutes les dettes que le Gouvernement Mexicain pouvait avoir vis-à-vis des citoyens des Etats-Unis moyennant la remise d'une somme de 3.250 000 dollars.

Dés lors, ni l'Etat ni les citoyens américains ne pouvaient avoir un droit réservé contre l'Etat mexicain.

Que restait-il? On nous dit: l'Eglise. J'ai répondu déjà en vous disant: l'Eglise, la collectivité des catholiques ou la collectivité des Indiens, c'était la nation, c'était le gouvernement qui les représentait qui devait faire une réserve pour eux. Mais à partir du traité de Guadalupe Hidalgo de 1848, le Gouvernement mexicain s'étant affranchi de toute dette vis-à-vis des citoyens et de l'Etat américains, il n'avait plus de dettes de l'autre côté de la frontière et il n'en pouvait plus avoir.

Que peut-il rester si l'Etat et ses sujets n'ont plus de créance? Il ne reste plus rien!

Mais on dit: ce ne sont pas des citoyens, c'est une personnalité civile. Non, elle n'existait pas, puisque l'Eglise comme personnalité civile dans la Haute Californie ne va naître qu'en 1854 en vertu d'une loi américaine; donc en 1848 elle n'existe pas, elle ne peut par conséquent pas être sujette du droit et conséquemment avoir une créance contre l'Etat mexicain.

Je vous ai rappelé, messieurs, cette circonstance caractéristique que dans un premier projet de traité il avait été stipulé que les communautés jouissant de la personnalité civile jusqu'en 1848 auraient momentanément continué à en jouir après 1848, c'est-à-dire après l'incorporation américaine: mais le Sénat de Washington n'a pas voulu de cette disposition et l'a remplacée par une disposition platonique que n'était que la confirmation du principe de la liberté de conscience de tous.

De telle façon, messieurs, que je mets encore ici mes honorés contradicteurs au défi de dire quelle était lors du traité de 1848 la

personne qui pouvait avoir un droit contre l'Etat mexicain? Si en 1848 l'Etat mexicain n'a plus de débiteurs, il ne peut appartenir à personne de l'autre côté de la frontière de lui réclamer l'exécution d'un engagement comme étant aux droits d'un débiteur de 1848.

Si le gouvernement mexicain n'a plus pris d'engagements depuis le traité de Guadalupe Hidalgo, s'il n'est plus intervenu pour se créer une charge en Haute Californie après 1848, il faut qu'on me démontre qu'à la date du 2 février 1848 il existait quelqu'un qui eût un droit; ce quelqu'un on ne me le nommera pas parce qu'il n'existait pas, parce qu'il ne pouvait pas exister!

Dans les préliminaires de ce traité de 1848 je trouve dans des documents officiels, dans des rapports qui étaient adressés au Gouvernement mexicain, les indications que voici:

> Les 15 millions convenus à l'article 12 et les stipulations des articles 13 et 14 sont l'indemnisation las plus claire que nous puissions obtenir comme compensation des dommages soufferts par la République; celle ci, diminuée par l'accroissement de territoire acquis par sa voisine, les mêmes obligations qu'elle avait auparavant vont peser sur un nombre moindre d'habitants et sur un pays moins grand et sont par conséquent plus onéreux. Ainsi, notre Dette intérieure et extérieure devra être satisfaite en entier par la partie du peuple mexicain qui concerve ce nom, tandis que sans la cession elle s'étendrait sur toute la République telle qu'elle était auparavant. Ce sont des dommages de cette nature qui dans la mesure du possible son réparés par l'indemnisation.

Vous voyez, messieurs, que ce que je vous disais tout-à-l'heure n'est pas neuf, mais que c'était la pensée due traité puisque je le trouve dans les travaux préparatoires. C'était une pensée d'ailleurs normale: Lorsqu'un territoire est détaché d'un autre à la suite d'une conquête il y a un compte à faire, et si la réclamation actuelle avait eu une valeur elle aurait dû prendre place dans ce compte. Mais aujourd'hui que ce compte est liquidé on ne conçoit plus qu'une nation vienne dire à l'autre: Nous avons traité, nous avons débattu, nous avons fait un compte, nous sommes arrivés à une somme de 15 millions de dollars, et nous exigeons encore aujourd'hui de nouveaux millions. C'est impossible.

Dans les mêmes travaux préparatoires je lis ce qui suit:

> La véritable utilité, disait le plénipotentiaire mexicain, des arrangements contenus dans les trois articles ne consiste pas précisément en ce que la République soit exonérée du paiement des sommes auxquelles il se réfère, quel qu'en soit le montant, petit ou élevé, mais dans le réglement de tous ses comptes avec la nation voisine, et á ce que rien ne reste pendant, susceptible d'altérer la bonne intelligence entre les deux gouvernements et de donner lieu à des contestations embrouillées et dangereuses. Cela est bien d'une importance capitale.

C'est-à-dire, messieurs, que la pensée qui avait animé les plénipotentiaires était cette pensée qui doit toujours guider ceux qui ont l'honneur de discuter un traité entre deux nations jadis en guerre: Il faut supprimer toute cause de conflit, il faut non seulement aplanir les difficultés du passé mais encore faire en sorte qu'il n'en puisse plus naître. C'est cette pensée que nous retrouvons ici, et c'est contre cette pensée que se heurte la demande actuelle.

Quelles sont les objections que l'on formule? car enfin cela semble si évident que l'on se demande comment l'on peut soutenir que le traite de 1848 a maintenu à la charge du Mexique une dette vis-à-vis de la nation ou d'une partie de la nation des Etats-Unis.

Il y a une double objection qui nous est faite; la première est celle-ci, on nous dit: Mais, les demandeurs, ce sont les évêques de Californie

ou plutôt ce sont les évêchés de Californie; ils n'existent comme personne morale que depuis 1854, ils n'existaient pas en 1848, par conséquent ils n'ont pas pu donner une décharge à cette date.

Ah! messieurs, j'allais dire et je m'en excuse: Le bon billet!... Comment! lorsque nous recherchons si lors du traité il y avait une réserve, c'est-à-dire s'il y avait encore un sujet de droits qui pût avoir une créance quelconque contre le Mexique, et qui pût recevoir par conséquent une obligation du Mexique, je démontre qu'il n'y en avait pas et qu'il n'en pouvait pas exister, et voici que les honorables contradicteurs qui doivent contester ce que je viens de dire invoquent les mêmes circonstances mais pour prétendre qu'ils ne pouvaient pas renoncer à un droit parce qu'ils n'existaient pas! Ce qui fait, messieurs, qu'après avoir reconnu ainsi implicitement la valeur de notre argument lorsque nous disions: vous ne pouvez pas avoir un droit parce que vous n'étiez pas encore; ils éludent l'argument en disant: nous n'avions pas de droits et nous ne pouvions donc pas y renoncer.

Mais vous ne pouviez pas renoncer parce que vous n'aviez pas de droits et vous n'aviez pas de droits parce que vous n'existiez pas. Nous en revenons donc toujours à ma thèse primitive, à savoir que lors du traité de 1848 il n'y avait personne qui eût un droit privatif vis-à-vis du Mexique.

L'autre objection est celle-ci: on nous dit: Nous n'avions pas de créance en 1848, notre créance n'a pris naissance que postérieurement. Et pour donner une apparence de fondement à cette thèse on nous fait observe que ce que l'on demande ce sont des intérêts et non le capital; "comme les intérêts coulent d'année en année, on peut ne pas avoir de créance en 1848 et avoir des droits aux intérêts en 1849!"

Je n'ai pas besoin, messieurs, de vous démontrer combien cette thèse me paraît—sauf le respect que je dois à mes honorés contradicteurs—peu juridique, parce qu'il me paraît impossible, si vous n'avez pas de droits de créance réservés en 1848, et si depuis lors le Mexique n'est pas intervenu pour vous en conférer, que vous puissiez en avoir un. Si vous n'aviez pas de créance en 1848 comment en auriez-vous acquis depuis, et comment est-il possible de dire que parce qu'on ne réclame que les intérêts et non le capital on ne se trouve pas atteint par la décharge de 1848? N'est-il pas évident, messieurs, que si des intérêts sont dus c'est en vertu d'un droit préexistant à 1848? Cela est apparu d'autant plus à l'évidence lorsque j'ai demandé tout-é-l'heure à mes honorables contradicteurs le titre, le fondement de leur créance, ce titre, ils ne le puisent que dans les décrets de 1836 à 1845 ou dans les actes de donation primitifs, c'est-à-dire dans des documents, dans des droits antérieurs à 1848. La créance devait exister, à terme ou non avant 1848, et si elle n'existait pas alors elle ne pouvait plus naître.

Notez que la thèse des adversaires revient à dire ceci: C'est que leur titre serait fondé sur une loi américaine, et que sans l'intervention due Mexique ce serait la loi américaine qui aurait donné naissance à la créance dont ils se prévalent aujourd'hui.

Et, messieurs, c'est bien leur thèse puisqu'ils disent qu'ils n'existaient pas avant 1854, que leurs droits ne pouvaient naître qu'à partir de la loi américaine qui leur a donné la personnalité civile.

Il en résulte d'abord ceci: c'est que s'il avait plu à l'Etat américain de ne pas mettre au monde cette entité juridique nouvelle, nous n'aurions pas eu de créanciers. Mais, s'il lui a paru avantageux de créer

cet être nouveau, s'ensuit-il que nous en devenions le parrain obligé et que nous devions alimenter perpétuellement cet être qu'il lui a plu de créér ? Ce n'est pas possible.

Est-il plausible qu'une loi d'un Etat étranger puisse avoir cette conséquence de créer une obligation civile privée à la charge d'un autre Etat? Si vous n'aviez pas de droits avant 1848 vous ne pouviez plus en acquérir et si vous en aviez un il est couvert par le traité de 1848 qui emporte la décharge la plus absolue.

Dans la thèse même des demandeurs les intérêts sont la contreprestation de l'exonération de la volonté des fondateurs: les fondateurs primitifs auraient eu la pensée que le revenu des biens qu'ils donnaient serait appliqué annuellement à une pensée de bienfaisance et religieuse, à l'exonération d'une Mission. Or, ils doivent reconnaître qu'ils n'existaient pas de 1848 à 1854; ils sont donc impuissants à être sujets du droit comme ils sont impuissants à exonérer une fondation, et malgré cela ils auraient droit année par année à ces intérêts, même pendant la période où ils n'existaient pas!

Vous voyez, messieurs, à quelle erreur juridique la thèse des demandeurs me paraît se heurter. En 1848, disons-nous, le Mexique avait le droit de croire qu'il n'avait plus de dette de l'autre côté de la frontière, il n'y avait plus d'être pouvant formuler une revendication civile vis-à-vis de lui, il avait obtenu une décharge, il avait même pris le soin de constituer un débiteur à sa place et ce débiteur c'était le Gouvernement des Etats-Unis; il lui avait remis une somme de 3,250,000 dollars pour qu'il se chargeât de payer à sa place toutes les dettes qu'il pouvait avoir de l'autre côté de la frontière. Conçoit-on que dans ces conditions un être puisse dire: Je n'existais pas, je n'avais pas de droits, et parce qu'une loi postérieure m'a donné naissance je puis puiser dans cette naissance le fondement d'une revendication? Messieurs, c'est impossible!

Nous croyons donc qu'à ce second point de vue encore la thèse des demandeurs n'est pas fondée, qu'il y a dans le traité à côté d'un élément juridique qui doit faire écarter la demande un élément moral dont la haute portée n'échappera pas à la Cour d'arbitrage.

Il y a une appréciation du traité qui doit être faite par vous. Vous devez vous rendre compte des difficultés qui ont pu naître au lendemain de conflits aussi aigus que ceux qui ont existé entre le Mexique et les Etats-Unis, de la pensée qui doit guider ceux qui font de tels traités, et vous devez vous dire, même s'il doit rester un doute dans vos esprits, que les auteurs du traité ont dû avoir la pensée de mettre fin à tout sujet de conflit.

Nous croyons avoir pu vous démontrer que c'était non seulement la pensée du Mexique mais aussi celle des Etats-Unis. Je vous ai indiqué en effet, lorsque j'ai eu l'honneur de vous exposer les faits, que la demande actuelle avait été déjà agitée par les honorables avocats de la Haute Californie à partir de 1852 ou 1859, qu'alors ils l'avaient étudiée, qu'ils l'avaient présentée aux Etats-Unis; et, messieurs, le gouvernement des Etats-Unis n'aurait certainement pas attendu que les intéressés lui adressassent des communications officielles s'il avait cru qu'il y avait eu un oubli dans le traité, s'il y avait eu une réserve qui n'avait pas été exprimée mais qui était implicite.

Messieurs, il ne fait rien pendant vingt années. Dix années après le traité, les évêques addressent à leur Gouvernement une réclamation, et il va encore se passer dix années sans que le gouvernement des Etats-

Unis formule une réclamation quelconque vis-à-vis du gouvernement du Mexique; il a fallu le hasard de l'institution d'une Commission mixte qui précisément avait été destinée à régler toute une série de conflits nés postérieurement à 1848, pour que les demandeurs trouvassent un Tribunal devant lequel ils pussent porter leur demande, sinon le gouvernement des Etats-Unis ne la prenait pas en main et par conséquent acceptait cette interprétation large mais cette interprétation rationnelle que nous donnons au traité de 1848.

Je passe, messieurs, à une autre proposition. Il s'agit d'une troisième réponse que nous faisons à la demande; nous disons: Les lois mexicaines sont applicables au Fonds Pie de Californie et elles ont nationalisé les biens ecclésiastiques. Ces lois de 1857 et 1859 ont été distribuées à la Cour ou se trouvent dans les documents du dossier.

Aux termes de cette législation, postérieure au traité de 1848, il y a au Mexique une interdiction absolue pour les communautés religieuses de posséder, elles ne peuvent avoir la personnalité civile. La loi de 1857 dont vous verrez les termes, est d'une violence—je puis bien m'exprimer ainsi—extraordinaire. Nous avions des lois de la Révolution Française qui s'étaient exprimées au sujet des biens ecclesiastiques dans des termes énergiques, mais les lois du Mexique de 1857 et de 1859 sont absolument radicales: c'est une interdiction absolue de posséder des biens, qu'il s'agisse de communautés religieuses, d'églises, d'ecclésiastiques séculiers ou réguliers.

Ce sont là des lois sur le mérite ou l'opportunité politique desquelles nous n'avons pas à nous prononcer, c'est la loi; une loi guidée par une pensée d'ordre public, bien ou mal entendue, opportune ou inopportune, mais la loi, ne sera-t-elle pas applicable au Fonds Pie?

Constatons tout d'abord que d'après les demandeurs eux-mêmes le Fonds Pie appartiendrait pour partie à l'Eglise de la Haute Californie et pour une autre partie à l'Eglise de la Basse Californie; on a partagé par moitié naguère; on réclame actuellement près de 9/10.

Et voici donc que la loi mexicaine serait nécessairement applicable à la partie du Fonds Pie qui serait affectée à la Basse Californie: l'évêque de la Californie ne pourra se présenter devant le Gouvernement mexicain et lui dire: j'ai une créance à votre charge, vous me devez telle somme, et pour l'obtenir, je m'adresse aux instituées pour juger le Governement mexicain. Sans aucun doute soumis à la loi mexicaine, les fonds qu'il réclamerait devraient être soumis à l'application de la loi de 1857; une telle demande de sa part serait donc certainement non recevable. Aussi n'a-t-elle pas été formulée.

Dès lors concevrait-on la logique du système qui consisterait à dire que cette loi ne serait pas applicable à l'autre partie du Fonds? Il s'agit d'un Fonds qui était composé autrefois d'immeubles réalisés pour la plus grande partie et aujourd'hui représentés par une créance hypothécaire. Je dis hypothécaire parce que le décret de 1836 affecte le revenu des Tabacs à la garantie du paiement de la somme à titre d'hypothèque; c'est-a-dire que le gouvernement a transformé un meuble en immeuble par destination et fait une créance réelle de ce qui aurait pu être une créance personnelle.

Voici donc en tout cas qu'il s'agit d'un fonds mexicain, qui d'après la théorie même des adversaires reste dans le chef du Mexique, dont le Mexique doit le produit dans l'hypothèse des adversaires; eh bien, je vous le demande, est-ce que cette loi ne sera pas applicable?

Sir Edward Fry. Où se trouve cette loi?

M. Delacroix. Elle doit être entre les mains de M. le Secrétaire général, elle est parmi les documents du dossier que nous avons déposé.

Donc, messieurs, cette loi devrait recevoir son application générale parce qu'elle est d'ordre public; elle devrait être appliquée par les tribunaux mexicains dont vous avez pris la place, auxquels vous êtes substitués. Il est certain que le défendeur étant le Mexique, la créance étant à sa charge, les fonds qu'on revendique étant mexicains, cette loi devrait être appliquée.

Ah! messieurs, j'ai dû le dire en commençant, il est de ces lois dont l'opportunité peut être critiquée, et l'on peut admettre qu'il y ait quelque chose de froissant à ce qu'une loi d'un pays puisee nuire à des intérêts de l'étranger; cela donne lieu alors à des représentations diplomatiques; seulement il n'en est pas moins vrai que dans la rigueur de la justice cette loi doit être appliquée. Est-ce qu'il n'existe pas dans certains pays une interdiction par exemple aux juifs de posséder, et dans d'autres pays d'une manière générale une interdiction aux étrangers de posséder? Eh bien, je vous le demande, si un étranger, par ignorance de ces lois ou par suite de certaines circonstances se trouvait en possession de biens, si la loi devait lui être appliquée ce serait dur, mais enfin elle devrait l'être. Tout au plus cela pourrait-il entraîner une intervention diplomatique, mais il n'en est pas moins vrai qu'on ne pourrait pas trouver la justification juridique de cette loi dans l'exclusion de son application au Fonds en question.

Comme je vous le disais, il y a ici un principe de droit international privé, c'est pourquoi dès le début j'indiquais à la Cour qu'il y avait à se préoccuper du droit qui régissait la créance; ce'st une créance privée que l'on fait valoir, c'est un droit civil qui fonde la demande des demandeurs, et par conséquent c'est un droit civil que vous devez apprécier d'après les lois civiles.

Cette loi a été prise dans des termes généraux; elle est d'une application générale et spécialement en ce qui concerne le Fonds Pie il est impossible qu'elle ne soit pas appliquée. Cette loi est intitulée "Loi de nationalisation des biens ecclesiastiques," et s'il y a dans ce fait qu'une loi étrangère peut être ainsi appliquée à un fonds revendiqué partiellement par des étrangers une anomalie, cette anomalie disparaît si l'on songe pour quelles raisons ce Fonds prétendûment appartenant à des étrangers se trouve encore entre les mains du Mexique.

Mais messieurs, n'est-il pas évident—et ceci vient confirmer ce que je vous disais tout à l'heure à propos du traité de Guadalupe Hidalgo—que si les Etats-Unis avaient eu un droit à prétendre sur le Fonds, soit pour eux-mêmes soit pour des collectivités qu'ils représentaient, ils devaient le faire valoir de suite? Est-ce que de la part des Etats-Unis ce n'était pas, si je puis m'exprimer ainsi, une imprudence tout au moins que de laisser ce Fonds Pie qui appartenait à eux ou à leur collectiviteé entre les mains du Mexique? Le fait qu'ils le laissaient à la disposition ou à la discrétion du Mexique devait aboutir à cette conséquence, que plus tard le Mexique pouvait adopter une législation funeste aux étrangers.

Donc, messieurs, s'il y a qulque chose dans cette argumentation, dans ce moyen, qui peut être froissant—le fait d'une législation aussi radicale étant imposée à un étranger et pouvant nuire à ses intérêts—cela dérive du fait des Etats-Unis eux-mêmes, qui s'ils avaient eu un droit en 1848 auraient dû prendre ce Fonds et l'administrer eux-mêmes immédiatement, le faire valoir, de façon à empêcher que le Mexique

prît plus tard une législation qui n'était d'ailleurs pas prise pour ce cas exceptionnel et qui pût nuire à des étrangers.

J'ajoute qu'à l'époque où ces lois mexicaines étaient adoptées il n'y avait pas encore de réclamation au sujet du Fonds Pie. La première réclamation n'a été adressée au Mexique—sauf une réclamation verbale sur le caractère de laquelle nous ne sommes pas édifiés—qu'à ladate de 1870 ou 1871; de telle façon que lorsqu'en 1857 et 1859 le Mexique adoptait ces législations qui excluaient toute espèce de revendication il le faisait dans la plénitude de son droit, parce que cette législation lui apparaissait comme opportune, comme conforme aux intérêts de sa nation.

Voilà donc, messieurs, une législation qui, spéciale au Mexique devait avoir pour conséquence d'interdire la réclamation actuelle, c'est pourquoi, lorsque le Mexique s'était présenté devant la première Commission mixte, il avait fait valoir cette circonstance que les évêques de Californie ne jouissaient de la personnalité civile que dans certaines limites, que le décret qui leur avait donné la personnalité civile limitait leurs pouvoirs aux biens situés dans leurs diocèses, que par conséquent ils ne pouvaient pas avoir de droits sur des biens qui auraient été situés à l'étranger.

Nous ne reproduisons pas ce moyen comme tel parce qu'il nous paraît qu'il devient inutile. La législation des deux pays se trouve en concours non en contradiction; de même que le Mexique dit: aucun ecclésiastique ne peut posséder, ne peut même administrer, de même aux Etats-Unis il avait été décidé que la personnalité civile qui avait été donnée aux évêques était limitée à l'exercice des droits situés dans leurs diocèses.

Ici, messieurs, je répare une omission qui s'est produite dans la plaidoirie que j'ai eu l'honneur de vous faire. J'ai oublié de vous dire que les Jésuites n'ont pas, d'après leur ordre, le droit de posséder; les Jésuites, d'après leur règle ne peuvent pas posséder de biens. Si donc ils ont eu des biens à un moment donné, s'ils ont reçu cette permission exceptionnelle et contraire aux règles de leur ordre ce n'était donc pas pour l'Eglise, en supposant qu'ils eussent qualité pour représenter l'Eglise, c'était pour l'œuvre à laquelle ils étaient spécialement attachés, et je vous ai démontré que cette œuvre avait un caractère politique et national de conquête militaire. Je crois donc vous avoir démontré que par les trois raisons que j'ai développées jusqu'ici la réclamation des demandeurs ne peut être accueillie.

M. DE MARTENS. Permettez-moi de vous poser une question: Est-ce que le Mexique a refusé de discuter ces prétentions devant les deux Commissions qui ont été nommées en vertu de l'arrangement de 1868 ou plus tard? Est-ce que le Mexique est entré en discussion de ces prétentions? Est-ce qu'il a refusé nettement ou bien est-ce qu'il a admis la possibilité de discuter cette question, qui est à présent portée devant ce Tribunal?

M. DELACROIX. Quelle question?

M. DE MARTENS. C'est-à-dire justement la prétention des évêques de Californie.

M. DELACROIX. Lors de la Commission mixte le Gouvernement a résisté, il a discuté, il a plaidé, il s'est défendu et il a succombé.

M. DE MARTENS. Vous dites que d'après le traité de Guadalupe Hidalgo le Mexique était en droit de refuser toutes les prétentions avant 1848 . . .

M. DELACROIX. Parfaitement.

M. DE MARTENS. Maintenant, cette prétention a été portée devant la commission?

M. DELACROIX. Parfaitement.

M. DE MARTENS. Est-ce que le Gouvernement mexicain a refusé d'entrer en discussion? Il pouvait refuser nettement, dire que c'était une prétention n'ayant pas une force légale.

M. DELACROIX. Voici la réponse. Comme j'ai eu l'honneur de vous le dire, le traité de 1848, d'après nous, excluait toute réclamation pour des faits antérieurs. Mais les demandeurs, au lieu de réclamer, comme cela se trouvait indiqué dans la lettre de 1859 comme aussi dans celle du 13 mars 1870, le capital, c'est-à-dire le Fonds lui-même, la créance dont l'origine évidemment était antérieure à 1848, ont réclamé seulement l'intérêt en disant: l'intérêt a une naissance postérieure à 1848, et par conséquent nous sommes recevables à en poursuivre la réclamation devant la Commission mixte. C'est ce point qui était débattu, il s'agissait de savoir si on pouvait demander les intérêts comme ayant une origine postérieure à 1848 et comme n'étant pas couverts par le traité. Ce point a été débattu devant la Commission mixte; la question de la créance ne pouvait être utilement discutée par la raison que la partie adverse avait dit d'avance: ce n'est pas la créance que je réclame, ce sont les intérêts d'année en année postérieurement à 1848.

M. DE MARTENS. Merci.

M. DELACROIX. J'ai maintenant à examiner, messieurs, quelques moyens subsidiaires que j'indique parce qu'ils dérivent de la nature des choses, qu'ils sont profondément juridiques, et je ne serais pas complet si je ne les avais pas indiqués.

Il s'agit d'autres lois mexicaines, de 1885 et de 1894. Vous savez, messieurs, que dans la première moitié du siècle le Mexique avait traversé une période de trouble et d'agitation, des gouvernements successifs avaient occupé le pouvoir, il y avait eu dans l'administration certaines lacunes comme cela peut se concevoir lorsqu'il s'agit d'un gouvernement jeune, âgé de quelques années seulement. En 1885, le Mexique a estimé qu'il ne pouvait pas arriver à avoir de bonnes finances s'il n'y mettait pas de l'ordre, et pour cela il a estime qu'il était nécessaire qu'il appelât tous ses créanciers pour qu'ils vinssent affirmer quel était le montant de leur créance. Le Mexique a alors, aux termes de cette législation spéciale que vous possédez également—lois de 1885 et de 1894—institué un Tribunal spécial—je crois même que Son Excellence M. Pardo était président de ce Tribunal—qui était chargé de juger toutes les créances existant à charge du Gouvernement mexicain, de telle manière que le gouvernement pouvait connaitre exactement le montant de sa dette et pouvait se convaincre qu'il n'avait pas de dettes en dehors de celles qui avaient été reconnues. Comme il existait un certain désordre dans l'établissement de la dette, c'était le moyen radical d'établir des finances nettes et claires.

Le Gouvernement, en vue de sanctionner la mesure qu'il prenait ainsi, avait décidé que ceux qui n'auraient pas produit leurs créances dans un certain délai, fixé d'abord à 8 mois, ensuite à 11 mois, seraient déchus de leurs droits de débiteurs. C'était radical mais c'était un acte du pouvoir souverain. L'Etat mexicain avait estimé que c'était pour lui une nécessité et de même que nous avons vu certains gouvernements se trouver à un moment obligés de tiercer leur dette, c'est-à-dire de diminuer la dette qu'ils avaient primitivement contractée, en

vue de consolider leurs finances, de même ici le gouvernement pouvait prendre cette mesure, qui pouvait être critiquée si elle affectait des étrangers et qui pouvait amener, comme je le disais précédemment, une intervention diplomatique, mais qui devait être en tout cas appliquée par les tribunaux.

Cette loi a été appliquée à des étrangers: il y avait de la dette vis-à-vis d'Anglais, vis-à-vis d'habitants de la Haute Californie, tous ont dû accepter cette loi et s'y soumettre, c'est-à-dire faire reconnaître leur dette au bureau constitué pour établir le bilan des dettes de l'Etat.

A cette législation les demandeurs ne se sont pas soumis; et il est d'autant plus étrange qu'ils ne s'y soient pas soumis que précisément je vous indiquais à une précédente audience qu'il était incroyable que si les demandeurs estimaient qu'ils avaient une créance annuelle aussi considérable à la charge de l'Etat mexicain, ils ne l'aient pas revendiquée à chaque échéance, et que depuis 1870 jusqu'à 1891 aucune demande n'ait été formulée.

Cet argument, que je vous citais en termes généraux à une précédente audience, est renforcé par cette circonstance qu'il existait au Mexique des lois de déchéance pour ceux qui n'auraient pas formulé leurs réclamations dans un certain délai. Vraiment, peut-on les plaindre de n'avoir pas fait ce qui était nécessaire pour maintenir, protéger et conserver leurs droits ?

Mais, messieurs, cette législation est-elle donc si exceptionnelle ? Est-ce que dans tous nos Codes nous n'avons pas une prescription de 20 ou 30 ans, qui exclut les revendications tardives ? Nous avons aussi dans la législation mexicaine une prescription quinquennale affectant les annuités qui ne sont pas réclamées. De telle façon, messieurs, qu'à tous égards nous constatons ici l'existence de prescriptions successives qui constituent des fins de non recevoir contre la réclamation actuelle.

Vous voyez qu'il nous est à peu près indifférent que l'on invoque ces dispositions générales de tous les Codes civils, de toutes les législations, ou que l'on invoque cette législation spéciale mexicaine de 1885 et de 1894. Vous voyez que tout cela entame par la base la réclamation des demandeurs. Est-ce que tout cela ne vous prouve pas que la créance n'était pas dans le patrimoine des demandeurs comme le serait une créance ordinaire ?

Et quand on songe que les demandeurs ont plaidé que non seulement ils avaient une créance, mais que cette créance était reconnue par un jugement international, qu'il y avait chose jugée sur la question ! et ils ne la produisent pas, et ils laissent malgré ce jugement atteindre leurs réclamations par ces prescriptions successives, spéciales et générales que je viens d'indiquer !

Tout cela vous démontre, messieurs, que la réclamation manque de fondement à tous égards et se heurte aux moyens divers que je viens de vous indiquer.

M. Asser. Je voudrais demander à M. Delacroix quelle est la date de la loi qui inscrit les prescriptions.

M. Emilio Pardo. 1884.

M. Delacroix. Tous les articles auxquels je viens de faire allusion ont été remis par M. le Ministre Pardo dans le dossier que possède le Tribunal et que détient l'honorable secrétaire général. Je n'ai pas donné lecture de toutes ces dispositions parce que je suis déjà confus d'abuser des moments de la Cour; elle les trouvera dans le dossier,

nous en avons d'ailleurs des copies. Vous trouverez toutes ces dispositions, qui sont, je le répète, communes à la plupart des législations.

M. ASSER. Avant ce Code Civil de 1884 est-ce que la prescription n'existait pas pour les rentes?

M. DELACROIX. Le premier Code civil qui a été promulgué au Mexique date de 1871; le Code de 1884 ne fait pas autre chose que de réduire le délai de la prescription.

M. ASSER. Je vous remercie beaucoup.

(Le Tribunal s'ajourne à vendredi à 2½ heures de relevée.)

ONZIÈME SÉANCE.

26 septembre 1902 (apès-midi).

Le Tribunal s'est réuni à 2½ heures de l'après-midi, tous les Arbitres étant présents.

M. LE PRÉSIDENT. Le parole est à M. l'Agent des Etats-Unis de l'Amérique du Nord.

Mr. RALSTON. On the 21st of August, the chargé d'affaires of Mexico in the United States addressed a demand for discovery upon the United States to the following effect: "Whether it is true that there are Indians who are not Christianized or who are wholly free from obedience to the authorities in the State of California." We have prepared our discovery and have it printed, and I will file, with the permission of the court, the original and certified documents, as well as printed copies, and we shall on our own account desire the evidence to be placed before the court. Adding one word, I may say that the exhibits which are attached to the letters certified by the Secretary of State are taken from the Annual Report of the Commissioner of Indian Affairs for the year ending June 30, 1901, which is the official document which I shall deliver to the secretary-general. The exhibits show that there are in the Catholic schools—Indian Catholic schools within the territories regarded as a part of California—1,177 Indians.

Sir EDWARD FRY. Not the State of California?

Mr. RALSTON. Not the State of California. In the State of California there are 234 attendants. The total is as I have stated. In addition there are in the State of California about 15,377 Indians, and in the limits of California as shown by the map filed here the other day—in Alta California—there are 68,397 Indians, and the additional territory which we consider was formerly claimed by Spain under the name of California has some 20,000 additional Indians. But at any rate, limiting ourselves to the territory ceded by the treaty of Gaudelupe Hidalgo, there are more than 60,000 Indians.

M. LE PRESIDENT. Nous prenons acte de votre communication. M. le Secrétaire général communiquera ce document à l'adversaire. La parole est au Conseil des Etats-Unis du Mexique, M. Delacroix.

FIN DE LA PLAIDOIRIE DE M. DELACROIX.

Messieurs: Pour terminer ma plaidoirie sur le fond du procès, je n'ai plus à analyser devant vous qu'un document de la plus haute importance, que nous considérons à lui seul comme décisif; nous croyons que s'il a pu rester encore après ces débats un doute dans

l'esprit de la Cour au sujet du fondement de la thèse que nous avons l'honneur de lui présenter au nom du Mexique, ce doute sera dissipé par le document que vous allez connaître.

Dans le livre rouge que vous possédez, il y a à la page 343 un document dont je veux vous faire une courte analyse parce que vous allez apercevoir immédiatement son importance.

Avant de formuler la réclamation dont le Tribunal est actuellement saisi, l'Eglise catholique de la Haute Californie avait formulé une prétention analogue devant le Tribunal américain de la Haute Californie. Sa prétention était celle-ci; elle disait: Il y a dans la Haute Californie des biens de Missions, des terres, des vergers, des propriétés, des établissements de tout ordre, qui ont été autrefois acquis par les Missions, nous sommes, nous Eglise catholique, évêchés de la Haute Californie, les successeurs des Missions, et par conséquent c'est à nous que ces biens appartiennent.

Ces biens, messieurs, avaient une importance considérable. La question a été soumise au Tribunal américain en octobre 1856, la Cour trouvera dans les pages 343 à 350 l'indication du système qui fut présenté devant le Tribunal américain par l'Eglise de la Haute Californie. Ce système, messieurs, vous le lirez, mais je demande la permission de vous indiquer et d'analyser devant vous la réponse qui fut faite, non pas pour l'Etat américain mais par tous ceux qui étaient intéressés à ce que ce ne fût pas l'Eglise de Californie qui eût l'attribution de la propriété de ces biens des Missions.

La question était importante, elle a été étudiée en droit de très près, et voici ce qui fut répondu par le sollicitor qui représentait les parties défenderesses. Il fut établi devant les tribunaux américains de la Haute Californie que l'Eglise américaine n'avait pas de personnalité civile et que par conséquent elle n'avait pas de capacité pour recevoir.

Cet argument est absolument décisif, puisque nous avons discuté jusqu'ici le point de savoir si les autorités, le pouvoir souverain du Mexique ou de l'Espagne, avaient transféré des droits civils au profit de l'Eglise, et je crois avoir démontré avec succès qu'il n'en est rien. Mais voici que maintenant, par une démonstration absolument décisive, nous en arrivons á pouvoir établir que non seulement on n'a rien transféré mais que l'Eglise était impuissante à recevoir. Voici donc (page 350) les quelques considérations qui ont été présentées:

1. L'Eglise, nous dit M. Horace Hawes, était originellement incapable d'acquérir, de posséder, de transférer des biens fonciers.

2. Subséquemment, quand ce pouvoir d'acquérir et de posséder (mais non d'aliéner) des biens temporels, fut conféré à l'Eglise, ce fut sous de grandes restrictions. Et il ne pouvait s'exercer sans l'expresse sanction, pour chaque acquisition, du pouvoir souverain.

3. Les modes par lesquels l'Eglise peut acquérir, ou les titres et documents nécessaires pour conférer le droit (de propriété) sont les mêmes que ceux requis dans le cas de particuliers ou d'autres personnes civiles, avec l'addition de la sanction souveraine.

4. Toutefois, contrairement au cas des particuliers, le droit de l'Eglise d'acquérir des biens fonds n'est pas inhérent, ni d'origine divine, mais purement d'ordre civil, créé par des lois civiles et sujet aux limitations qu'elles peuvent imposer.

Voici donc que l'honorable avocat qui défendait alors les intérêts dont nous avons la charge aujourd'hui—c'étaient les mêmes—disait: L'Eglise n'a pas par essence le droit de posséder ou d'acquérir des biens, il faut qu'une loi le lui ait attribué. Nous allons rechercher,

dit-il, quelle est la loi civile qui aurait donné à l'Eglise le droit de posséder; et il ajoute:

5. Bien que l'Eglise comme corps spirituel, restreinte aux objets spirituels de son institution divine, existe indépendamment de et en dehors du contrôle de l'Etat; cependant, envisagée comme corporation et propriétaire de biens temporels, elle est simplement une communauté politique, une partie constituante de l'organisation politique de la société, n'ayant que les droits de celles de sa catégorie, et sujets à tous les changements et modifications qui peuvent y être apportés.

6. Les acquisitions de l'Eglise, comme celles de toutes autres communautés politiques et au contraire des personnifications civiles fondées dans un but commercial, ne sont jamais, ni en tout ni en partie, la propriété de ses membres; elles ne sont pas davantage destinées à leur bénéfice individuel, mais aux usages d'utilité publique que la "corporation" a pour but de poursuivre.

Voici donc qu'il établit que l'Eglise, si elle a pu à un moment posséder, ne possédait pas au même titre qu'un particulier ou une société commerciale. Quand une société commerciale vient à se dissoudre, tous les éléments qui la composent, toutes les personnes qui en font partie ont une part du produit de la liquidation; tandis que l'Eglise catholique n'a rien pour ses membres, elle ne peut avoir que comme corps en vue de la destination que l'on a eu en vue.

7. L'Eglise, considérée sous l'aspect dont elle est revêtue dans les propositions précédentes, est donc à proprement parler un simple administrateur de propriété publique, placée sous sa gestion pour des raisons politiques et qui, en cas de dissolution de l'existence politique ou civile de l'Eglise, retourne ordinairement à la masse de la propriété publique, sous réserve de tous droits de reversibilité existant, le cas échéant, en faveur de ceux qui représentent les donateurs.

Messieurs, dans la prétention qui était présentée au nom de l'Eglise catholique, on avait dit: En Espagne, et plus tard au Mexique, le droit canon était en vigueur au moins pour toutes les dispositions qui n'étaient pas contraires au droit civil; or, d'après le droit canon, l'Eglise a le droit de posséder, par conséquent l'Eglise mexicaine aurait été susceptible de recevoir un transfert de propriété ou d'acquérir une créance contre le Gouvernement. C'est à cela, messieurs, que va répondre l'avocat des defendeurs:

Les membres des ordres religieux, dits clergé régulier, qui seuls furent employés comme missionnaires dans les Indes sont considérés en droit comme étant civilement morts ("morts pour le monde") et incapables d'acquérir ou de posséder en aucune manière.

Les Missions n'étaient pas des "corporations" mais des établissements fondés par le Gouvernement, pour le progrès de la population, de la civilisation et du christianisme. Le pouvoir ecclésiastique n'avait pas de contrôle sur elles, ni aucune possession de terres ou autre propriété dépendantes d'elles—et cette possession n'était pas davantage investie en les pères ou missionnaires religieux.

La seule possession distincte de celle des membres de la communauté était la possession du Gouvernement; les missions elles-mêmes et les pères, les escortes militaires et "administradores" étant de simples instruments et agents du Gouvernement.

Et alors, messieurs, voici que ce document nous apprend que par un décret espagnol du 27 septembre 1820, décret promulgué à nouveau en Espagne le 30 août 1836, il est décidé que les églises, monastères, couvents et communautés ecclésiastiques de toute nature quelconque, d'ordres tant séculiers que réguliers, hôpitaux, maisons de refuge, Hôtels-Dieu et d'instruction, confrèries, commanderies et autres établissements permanents aussi bien ecclésiastiques que laïques connus sous le nom de mainmorte n'auront désormais aucun pouvoir d'acquérir des biens immeubles dans aucune province de la monarchie ni par testament, ni par donation, achat, échange, etc.

Voici donc, messieurs qu'un décret espagnol promulgué en Espagne

à l'époque où le Mexique faisait encore partie de cette nation, c'est-à-dire le 27 septembre 1820, décide qu'aucune église, aucune communauté religieuse tant séculière que régulière, ne peut posséder, ne peut acquérir ni par testament, ni par donation; donc, s'il y avait une destitution de toute capacité de recevoir c'est bien dans ce décret que nous en trouvons la proclamation la plus absolue et la plus officielle. De telle sorte que si l'on prétendait que par les documents successifs, par les décrets de 1836, 1842 et 1845 l'Eglise avait acquis un droit, on devrait reconnaître que l'on serait revenu sur une législation promulguée en 1820.

En continuant la lecture de ce document, nous trouvons, à la page 352:

Arguilles, dans son "Dictionnario de Hacienda," article "Ventas" indique à propos des mémoires d'Ouvrard, publiés à Paris en 1806, qu'en novembre 1804, le Pape Pie VII a approuvé une cédule royale, signée par Charles IV, par laquelle était ordonnée la vente de toute la propriété ecclésiastique d'Espagne et des Indes.

Dans la suite de ce document vous allez voir la démonstration de ceci: c'est que le droit canon n'avait qu'une valeur coutumière en Espagne, que c'était dans l'échelle des lois le dernier échelon; et voici l'importance de ce fait: c'est que l'on avait dit: D'après le droit canon, l'Eglise, les évêchés, peuvent avoir des propriétés. A cela on répondait: Soit, d'après le droit canon, mais pour autant que le droit canon ne soit pas contraire à l'une ou l'autre des dispositions des lois civiles qui doivent le primer. Or il est établi que dans l'ordre de ces lois viennent en première categorie les lois nationales subséquentes à l'indépendance, puis les lois espagnoles promulguées avant l'independance, puis les réglements royaux, puis les réglements des alcades, puis telles et telles lois, et finalement et en dernier lieu les "Partidas." De façon qu'il n'y a pas de doute que d'après la loi espagnole—tout cela est développé ici avec une minutie qui ne pourra pas échapper au Tribunal lorsqu'il voudra bien consulter ce document—l'Eglise ne pouvait pas posséder, n'avait pas de capacité; et si elle n'avait pas de capacité le procès est résolu.

Nous avons jusqu'à présent démontré qu'on ne lui avait pas donné, mais si elle n'était pas capable de recevoir, toute discussion devient superflue.

Puis, nous voyons encore:

Toutes bulles, brefs et rescrits de conciles généraux ou autres dispositions ecclésiastiques, même si elles concernent des sujets de Foi et de discipline, doivent être soumis à et recevoir le "Pase" du gouvernement avant de pouvoir être promulgués.

Ceci était encore en vue d'établir que l'Eglise n'avait pas pu donner par un bref un droit civil à une autorité ecclésiastique, parce que ces bulles ne pouvaient avoir de valeur qu'à la condition d'être publiées, et elles ne pouvaient être publiées qu'avec une autorisation du pouvoir civil.

D'ailleurs, messieurs, il y a une distinction qui est très nettement établie par ce document: c'est la distinction dans l'autorité ecclésiastique entre le caractère civil et le caractère religieux. Tout ce qui concerne la partie religieuse des pouvoirs de l'autorité ecclésiastique relève du Pape, sous un contrôle plus ou moins précis de l'autorité civile; mais en ce qui concerne les droits civils que peut avoir une autorité religieuse ou une communauté religieuse, cela relève du Roi; c'est donc la loi qui doit prévaloir dans l'interprétation que nous recherchons ici.

Voici un nouveau décret que nous n'avions pas cité jusqu'ici:

Par décret du Congrès du Mexique en date du 16 mars 1822, les biens temporels des ordres religieux furent mis en vente, et le produit de cette vente consacré à l'entretien des troupes.

J'ai eu l'honneur de vous exposer hier, lorsque je faisais l'histoire des faits, qu'en 1820 notamment c'était une période d'agitation et de trouble, que l'Espagne était inquiète de voir se démembrer son territoire par l'indépendance qui serait proclamée au Mexique; elle est dans un moment de nécessité, que fait-elle? Elle prend les biens des ordres religieux et elle le fait pour entretenir les troupes.

Par autre décret du même Congrès, en date du 30 juin 1823, il est ordonné que la propriété de San Lorenzo sera délivrée aux citoyens de Chapalzingo selon un mode juste et équitable de distribution, etc.

Voilà que l'Etat distribue les biens. Cela vous montre combien l'Etat disposait de tous les biens sans que l'Eglise protestât.

Par autre décret, même Congrès, du 5 mai 1823, il est ordonné que les biens fonds de l'ex-Tribunal de l'Inquisition et d'autres communautés éteintes, soient cédés par petits lots. Le 16 du même mois, l'ordonnance est renouvelée et étendue à tous biens temporels. Par la loi générale du 4 août 1824, il est déclaré que les biens temporels (des ordres éteints et de l'ex-Inquisition) appartiennent à la Nation.

Ce document que je voulais faire passer sous vos yeux n'est pas une plaidoirie, ce n'est pas un développement, ce sont des faits, ce sont des décrets, qui vous montrent combien l'Etat se considère toujours comme le propriétaire de tous les biens dont s'agit. Il en dispose, et cette fois il en dispose sans réserve aucune, pour l'entretien des troupes, pour distributions diverses, il en dispose en maître, sans protestation aucune.

Par décret du Congrès général du 25 mai 1832, la possession et l'administration de ce Fonds pieux furent placées exclusivement entre les mains du gouvernement.

Ceci, vous le connaissez: c'est la loi que nous avons analysée, par moi hier, et qui, notez-le bien, est invoquée par des Américains; il s'agit d'un procès qui été plaidé dans la Haute Californie américaine, et cette loi a été invoquée dans le même sens que nous l'invoquons ici, à savoir que c'est un acte par lequel le gouvernement marque son intention de disposer des biens et règle les conditions dans lesquelles il voudra les louer, les administrer, etc.

Voici maintenant, messieurs, que, toujours dans le même document, on va établir le caractère des Missions. On a discuté devant vous le point de savoir si ces Missions avaient un caractère politique ou religieux, si l'un de ces caractères prédominait sur l'autre; comme il s'agit d'un procès analogue du notre, le même caractère a été discuté devant le Tribunal américain de la Haute Californie, et voici ce qu'un rapport américain va établir (page 354):

Le caractère de ces établissements est exactement indiqué au Rapport officiel qu'adresse au Gouvernement des Etats-Unis Wm. Carey Jones, en 1849.

Le gouvernement nouveau, le gouvernment conquérant, a pris possession de la Californie; il charge un agent américain—qui est donc l'organe de la partie contre laquelle nous avons l'honneur de plaider ici—de faire dès 1849 un rapport officiel au Gouvernement américain sur le caractère des Missions; voici ce qu'on y lit:

Dans le royal "Réglement pour les Presidios de la Péninsule de Californie, l'érection de nouvelles Missions, le développement de la population et l'extension de

l'établissement de Monterey," approuvé par le Roi le 24 octobre 1781, se trouvent des dispositions minutieuses concernant les Missions déjà fondées alors et celles qui devaient être fondées dans la Haute Californie: il suffit de les consulter, particulièrement le titre XV, pour constater que toutes les Missions dans cet Etat étaient, dans l'acception la plus stricte de l'expression, des établissements gouvernementaux, fondés, réglementés et gouvernés jusque dans les plus infimes détails, par le pouvoir civil et supportés exclusivement par le Trésor royal.

Voici donc que l'agent officiel des Etats-Unis apprécie ainsi ce que sont les Missions.

Sir EDWARD FRY. Où trouvez-vous cela ?

M. DELACROIX. A la page 354 du livre rouge. C'est toujours dans ce débat qui a eu lieu devant le Tribunal américain et où la même question que celle qui vient devant vous a été discutée, que nous trouvons cette série de documents officiels par lesquels je voudrais terminer ma plaidoire, afin de vous montrer que tout ce que nous avons dit se trouve appuyé par des documents émanant précisément des Etats-Unis.

Au rapport d'une Commission spéciale nommée par le Gouvernement mexicain pour présenter un plan de réglement applicable aux Missions de Haute et de Basse Californie, daté le 6 avril 1825, nous faisons l'extrait suivant :

La Junta reconnaît que le grand progrès fait par les Missions établies par les Jésuites de la Vieille Californie, comme par celles établies dans la Nouvelle, par les Ferdinandites (ou Franciscains) est attribuable au système espagnol de découvertes et de conquêtes spirituelles — elle sait aussi les éloges que ces établissements ont mérités non seulement de la part d'Espagnols, mais aussi d'étrangers éclairés.

L'état dans lequel les missions actuelles se trouvent ne correspond pas au grand progrès qu'elles ont fait au début. Cette décadence est notable dans la Basse Californie, et suffirait à prouver que le système doit être modifié et réformé. Mais parmi ces réformes, celle-là est indispensable qui a pour cause le détournement dont les Missionnaires ont eu à souffrir de leur ministère essentiel; ayant à s'occuper des intérêts temporels de chaque Mission, de son administration et Gouvernement. Indépendamment que ceci porte préjudice au but et à la destination principale des Missions (lesquels furent tout à fait politiques et d'ordre temporel), la chose n'est réalisable que moyennant d'entraîner un relâchement sensible des vœux professés par les fils de San Francisco, sans opposition avec l'esprit et la lettre de la bulle d'Urbain VII du 22 février 1633, laquelle ordonne que les moines missionnaires s'abstiendront de tout ce qui puisse avoir couleur d'affaires, marchandises ou trafic.

C'est-à-dire qu'à un moment donné un rapport officiel dit: C'est un tort de conserver à ces Missionaires ce charactère d'administrateurs, ils font des affaires, c'est contraire à leur essence religieuse, puisqu'ils font du commerce, ils font des affaires, ils vendent des marchandises, ils font du gouvernement, de l'administration, de l'art militaire, de la justice; mais alors ce ne sont plus des religieux, ils oublient leur caractère religieux, c'est contraire aux règles de leur ordre. Voilà ce qu'on trouve dans un rapport officiel.

Je continue, et je trouve à la page 355 :

Dans un rapport d'un Comité de la même Junta, daté du 13 mai 1827, concernant les réglements à adopter pour le Gouvernement des Californies, il est dit:

Même l'ordre du gouvernement en vertu duquel ce pays délicieux commença à être gouvernè fut original; les Missionnaires étaient à la fois gouverneurs civils et pères spirituels; ils établirent la vente ascendante de "reductions," missions et "pueblos," mais dans toutes ils étaient les gouverneurs, et le supérieur des Missions réunissait sous son couvre-chef l'authorité civile, ecclésiastique et militaire; les troupes de protection étaient sous ses ordres; de sorte que le renouvellement de la catastrophe qui s'est produite au Paraguay n'eût pas été surprenant.

Ce document officiel vous démontre que les pères Jésuites étaient considérés comme des agents du gouvernement.

Je ne vous lis pas les réflexions qui furent faites alors et les déductions qui furent tirées par l'avocat des Etats-Unis ou du défendeur

dans ce procès, parce que je veux me borner à des citations de documents officiels. En voici un autre:

En 1844, Manuel Castanares résidait à Mexico, en qualité de député élu au Congrès général pour le département de Haute Californie.

C'est ce député de la Haute Californie qui va prendre la parole à Mexico, et voici ce qu'il va dire le 13 mai 1844:

Il n'est pas douteux qu'à ces établissements cette péninsule doit l'origine de son existence politique; que les Missions constituaient son gouvernement primitif; qu'elles ont toujours été considérées comme alliées avec les formes antérieures de son administration et qu'en tout cas le système qui pourra être adopté quant aux Missions constituera une part essentielle de ce qui pourra être établi pour la prospérité et le développement du pays. Le plus grand tort qui ait pu être fait à mon Département était l'aliénation de la propriété appartenant au Fonds pieux de Californie par le gouvernement provisoire. Ce Fonds en lui-même constituait un levier suffisant pour donner une impulsion générale à ce pays, sans négliger pour cela l'objet d'origine de son institution.

D'autres citations sont faites qui sont également intéressantes et que je ne puis m'empêcher de vous indiquer. Dans un autre discours de ce même député de Californie, qui avait donc qualité pour prendre la parole au nom de la Californie, nous trouvons ce qui suit:

Je donnerai à Votre Excellence (le Ministre des Relations) une autre indication quant aux fonds qui peuvent en partie être consacrés à cette mesure, laquelle est le salut pour le territoire national: tous les biens temporels des missions sont une propriété leur appartenant en commun, et dans laquelle les Missionnaires et les ordres religieux dont ceux-ci dépendent n'ont rien au-delà de la mission de l'administration par délégation du gouvernement.

C'est donc le député de la Californie qui va lui-même dire quel est le rôle des missionnaires: ils n'ont rien, dit-il, sauf l'administration au nom du gouvernement.

Eh bien, je crois, messieurs, que ces citations n'étaient pas inutiles et qu'elles sont au contraire décisives en ce qui concerne le litige dont vous avez à connaître.

Il est encore dit, à la page 356:

Le réglement général sur la colonisation en date du 21 novembre 1828, article 17, stipule que "Dans ces territoires où il peut exister des missions, les terres que celles-ci occupent ne seront pas colonisées actuellement, ni jusqu'à ce qu'il soit décidé si elles devraient être considérées comme propriétés des 'reducciones,' néophytes, catéchumènes ou colons mexicains." Cette situation transitoire prit fin par acte du Congrès du 26 novembre 1833, stipulant que "le Gouvernement est autorisé à prendre toutes les mesures pouvant assurer la colonisation, et à réaliser la sécularisation des missions des Haute et Basse Californie, étant autorisé à employer dans ce but et de la manière la plus efficace les biens des 'obras pias' desdits territoires, afin de fournir des ressources à la Commission, ainsi qu'aux familles en destination (de ces territoires) qui sont actuellement dans cette capitale."

Ceci, messieurs, est extrêmement intéressant. En 1828 le gouvernement, qui se préoccupe de ces missions tombées en décadence, va charger des familles mexicaines d'aller peupler la Californie; qu'est-ce qu'on fait? On donne au gouvernement le droit de disposer de tout ce qui appartient aux missions pour entretenir ces familles. C'est une autre application du Fonds, de tous ces biens qui étaient aux Missions. Est-ce que ce n'est pas encore une affirmation en fait du droit que précisément possédait l'Etat de disposer de tous ces fonds?

Dans les réglements provisoires adoptés par Figueroa, le 9 août 1834, pour exécuter la loi du Congrès, il est pourvu que les vignobles, vergers et champs de blé seront cultivés par les Indiens en commun . . . jusqu'à ce que le Gouvernement suprême prenne une mesure définitive.

C'est-à-dire que dans toutes les dispositions législatives, dans toute cette série de décrets qui sont énumérés ici, vous voyez toujours qu'il est affirmé à chaque pas, à chaque page, que c'est le gouvernement qui dispose; et il dispose dans les formes les plus variées, il dispose suivant sa fantaisie. Est-ce qu'il pourrait le faire, je vous le demande, est-ce que cette série de décrets aurait été possible s'il s'agissait de biens d'Eglise? Est-ce que cette série de décrets que je viens d'énumérer devant vous ne constitue pas le renversement le plus absolu de toute la thèse que l'on peut présenter de l'autre côté de la barre?

Il serait superflu de mentionner en particulier chaque disposition des gouvernements, général ou départementaux, ou du Congrès, sur la question; les divers réglements de Figueroa, d'Alvarada, de Micheltorena et Pio Pico, dont les plus importants sont in extenso dans Rockwell, 455—477, et analysés dans le Rapport de Jones 8—22, prouvent sans laisser le vestige d'un doute, que ni les Pères missionnaires, ni l'Eglise, n'ont jamais eu titre ni propriété d'aucune des terres des Missions, mais que les premiers les administraient, pour employer les propes termes de Castañares déjà cité "en vertu d'une commission du gouvernement.

M. Asser. Je trouve, aux pages 358 et 359, le jugement de la Cour, rendu en appel dans cette affaire, confirmant, n'est-ce pas, le jugement de première instance?

M. Delacroix. Parfaitement.

M. Asser. Je voudrais vous demander, si la demanderesse était l'Eglise, qui était défendeur?

M. Delacroix. Je ne l'ai pas dit parce que précisément, cela ne s'y trouve pas. Il y a M. Horace Hawes qui se présente pour les défendeurs lesquels devaient être tous les intéressés à la possession du Fonds.

Il ne s'agissait que d'une seule affaire, de la Mission de Santa Clara, c'était un procès particulier à propos d'une affaire déterminée; mais il va de soi que cette décision devait avoir une portée considérable comme précédent, et c'est pourpuoi la question fut agitée dans son ensemble et que toute la question de droit fut discutée, mais elle n'affectait pas l'ensemble des missions.

M. Asser. Vous ne savez pas quel était le défendeur?

M. Delacroix. Non.

M. Beernaert. C'est un des points sur lesquels nous avons demandé des renseignements au Mexique; mais l'éloignement est tel et les délais qui nous sont impartis sont si courts que la réponse arrivera probablement quand vous aurez rendu votre sentence.

M. Delacroix. En ce qui concerne le demandeur je puis vous donner les reseignements que voici, qui se trouvent dans le livre rouge à la page 340, et cela réspond partiellement à la question de M. l'Arbitre:

Les terres occupées par ces missions ne furent pas transférées à qui que ce soit, mais demeurèrent la propriété du gouvernement; et même les bâtiments d'Eglise érigés sur ces terres ne devinrent pas la propriété de la corporation de l'Eglise avant le décret de sécularisation de 1833.

La plainte expose que le demandeur est le prêtre catholique romain et pasteur dûment constitué de la Mission et église de Santa Clara et que, selon les règles et la discipline de l'Eglise Catholique Romaine, il a l'administration des biens temporels de ladite église et mission, comme le droit à la possession de sa propriété meuble et immeuble; que le défendeur s'est illégalement emparé d'un certain lot de terre dans ledit comté, connu sous la désignation de Le Verger, appartenant à l'ancienne Mission de Santa Clara et aujourd'hui la propriété de ladite Eglise; et pour rentrer dans la possession dudit lot, le demandeur fait procès. La seule question dans l'espèce est le droit de l'Eglise Catholique Romaine aux terres des Missions dans cet Etat.

Donc, en ce qui concerne le demandeur, il n'y a pas de doute, c'est le représentant de l'Eglise, le curé, le prêtre séculier qui dit: Voilà un

bien appartenant aux Missions, je le revendique parce que j'ai qualité pour parler au nom de l'Eglise. Et alors celui qui détient le fonds répond: Non, vous n'êtes pas l'Eglise, vous n'avez pas de droits. Il est probable que le défendeur, Redman—c'est un renseignement que nous devrions avoir—avait été autorisé à posséder par le Gouvernement.

Un autre décret qui ne manque pas d'un certain intérêt est reproduit à la page 357: Le décret de Pio Pico du 28 octobre 1845 ordonnait ceci:

Art. 1. Seront vendues en cette capitale, au plus offrant, les Missions de San Rafael, Solores, Soledad, San Miguel et La Purisima, qui sont abandonnés par leurs néophytes. (Ce décret fut fait après due proclamation en conformité du décret du 28 mai 1845).

Donc le Gouvernement va décider la vente des biens appartenant à certaines Missions.

C'est intéressant, parce que quand une mission venait à être abandonnée par ses néophytes il était tout naturel que l'Eglise revendique les biens si elle avait des droits. Elle ne dit rien, c'est le Gouvernement qui en dispose sans protestation.

Et l'article 14 du décret du 28 octobre 1845 dit:

La location des Missions de San Diego, San Luis Rey, San Gabriel, San Antonio, Santa Clara et San José, aura lieu quand les difficultés qui existent actuellement en raison des dettes de ces établissements auront été surmontées et alors le public sera avisé.

Et, à la page 358:

Nous voyons donc que chaque acte du Gouvernement depuis la période la plus reculée, sans excepter le décret de Micheltorena et l'ordonnance alléguée du Gouvernement de Bustamente, du 17 novembre 1840, indépendamment de l'acquiescement constant du clergé, tendent à confirmer et à établir sans controverse possible, que les terres des Missions de toute nature, améliorées ou non, jardins, vergers et vignobles, sans excepter les bâtiments, étaient la propriété de la nation et sujettes à être administrées, vendues, louées, distribuées aux colons ou affectées à d'autres usages par le gouvernement en conformité des lois; de plus, que les Pères, ou le clergé séculier, ou l'Eglise, non seulement n'auraient pas et n'ont jamais prétendu avoir de droit de propriété à eux, mais qu'ils ne les ont jamais possédés; ou, pour exprimer cette conclusion plus clairement encore, dans les termes mêmes de Castañares et qui ne sont qu'une répétition de ceux de la savante Junta déjà citée "Les Missions ou les ordres religieux dont elles dépendent, n'avaient rien de plus que leur administration en vertu d'une délégation du Gouvernement."

J'ai ainsi terminé, messieurs, l'examen de cette procédure, je l'ai fait rapidement, mais la Cour analysera ces documents de près; nous y voyons une série de citations de la plus haute importance, l'énumération des décrets royaux depuis 1815 jusqu'à 1848 qui sont l'attestation la plus formelle du droit du Gouvernement comme aussi de la reconnaissance implicite de son droit résultant de l'absence de protestation aucune de a part du clergé.

La question ainsi portée devant le Tribunal américain a été résolue en faveur de la thèse que nous défendons ici et que défendait M. Horace Hawes. Voici la sentence de la Cour suprême de Californie:

L'avis de la Cour fut donné par le juge Heydenfeldt, le juge en chef Murray approuvant.

Le demandeur, qui est le pasteur de l'Eglise catholique de Santa Clara, poursuit pour la possession d'un lot de terre dit "le verger" qui appartenait à l'ex-mission de Santa Clara, alléguant que les terres des missions sont propriété de l'Eglise et que par les règles de celle-ci il est l'administrateur des biens temporels de cette église et missions en particular.

De longs débats se sont produits sur les questions du droit de l'Eglise d'acquérir la propriété sous les systèmes espagnol et mexicain, comme sur le droit du demandeur à triompher; mais l'opinion que j'ai formée rend cet examen superflu.

Selon toutes les autorités espagnoles et mexicaines (lesquelles ont été bien compilées dans le plaidoyer du défendeur) les missions étaient des établissements politiques, ne s'alliant en rien à l'Eglise.

Le fait que moines et prêtres étaient à la tête de ces institutions ne prouve rien en faveur du droit de l'Eglise à la propriété absolue. Il n'est pas nécessaire de déterminer ici dans quelle manière ou par quel mode de transfert l'Eglise comme corporation ou personne civile pouvait légalement avoir titre. Il suffit qu'il ait fallu quelque mode de ce faire, de manière à pouvoir enlever le titre du gouvernement, ou à des particuliers pour le conférer à l'Eglise—et certainement l'existence de rien de semblable n'a été démontrée. Si l'on excipe de ce qu'un prêtre ou moine avait l'administration et le contrôle de la mission, la réponse est simplement qu'ils en étaient les gouverneurs civils; et bien qu'ils combinassent avec le pouvoir civil les fonctions de pères spirituels, ceci n'était que pour assurer l'exécution plus efficace du but desdits établissements, but qui était la conversion et la christianisation des Indiens. Et il appert pleinement de toutes les investigations faites dans l'organisation espagnole et mexicaine en ce qui concerne les missions, qui ni celles-ci ni leurs prêtres n'étaient incorporés dans l'Eglise, ou placés d'une manière quelconque sous le contrôle et la direction de ses ecclésiastiques diocésains dont la suprématie était complète sur tous leurs subordonnés.

Ceci confirme ce que j'avais l'honneur de dire à une précédente audience, à savoir que les Jésuites comme Ordre n'avaient pas capacité pour posséder, que c'était contraire à leur institution; si donc des biens leur ont été attribués ce n'était que pour l'œuvre qu'ils réalisaient, c'était pour le Gouvernement dont ils étaient les administrateurs ou les délégués.

Au contraire, les Missions prirent naissance directement de par l'action et l'autorité du Gouvernement du pays . . .

Notez, messieurs, que c'est une Cour américaine quie dit cela!

. . . . lois et réglements leur furent appliqués par son autorité législative sans en référer à, ni consulter l'autorité de l'Eglise; les terres occupées par eux ne furent transférées à personne, ni prêtre, ni néophyte, mais demeurèrent la propriété de l'Etat; et il n'y a pas un mot dans tous les actes ou décrets du Gouvernement pour montrer que même les bâtiments d'Eglise consacrés au culte divin uniquement devinrent jamais la propriété de la corporation de l'Eglise jusqu'au décret de sécularisation de 1833.

Il est avancé par l'appelant que le décret fut suspendu par un décret subséquent et qu'il ne fut par conséquent jamais appliqué aux Missions de Californie.

En ce cas, comme l'Eglise n'avait pas de droits dans la Mission avant le décret de 1833, elle demeure sans droit, attendu que ce fut seulement par ledit décret que des droits quelconques, s'il en est, lui furent donnés; d'autre part, si elle prétend prendre en vertu de ce décret, les limitations qu'il contient ne conféreraient pas à l'Eglise de droits sur la propriété objet du procès actuel.

Notre conclusion est que le demandeur n'a pas droit à la propriété en question et, par conséquent, le jugement de la juridiction inférieure est confirmé. (Copie du Tome VI de la compilation intitulée "Comptes-rendus des procès plaidés et jugés par devant la Cour Suprême de Californie, pages 325 et suivantes.)

Ce document est une des annexes du mémoire de M. Azpiroz.

J'ai tenu, messieurs, à vous faire cette analyse, non pas seulement à raison de son autorité, qui est incontestable, puisqu'il s'agit d'un procès plaidé et jugé devant la Cour suprême de Californie—mais encore à raison des autorités multiples qui y sont citées par l'avocat des défendeurs devant ce Tribunal et qui sont décisives. Il en résulte que le droit de l'Eglise que nous discutons ici a été débattu aux Etats-Unis, qu'il a été discuté pied à pied, que les autorités ont été produites et que la décision a été ce que sera assurément la vôtre.

J'ai maintenant à vous dire quelques mots d'une question subsidiaire, c'est-à-dire du chiffre de la demande, ou de la composition du Fonds Pie de Californie.

Messieurs, en ce qui concerne le chiffre de la demande, le document le plus important que nous puissions discuter et consulter est assuré-

ment l'inventaire dressé par Don Ramirez, lequel était chargé de l'administration du Fonds au nom de l'évêque de Mexico, à la date du 28 avril 1842. Le texte de ce document important se trouve dans le volume rouge, en anglais, pages 512 à 523, et en espagnol pages 488 à 498.

Tout d'abord, messieurs, il faut que je vous dise quelles sont les circonstances dans lesquelles ce document a été dressé. Vous vous souvenez que par un décret du 19 septembre 1836 l'évêque Don Diego avait été chargé de l'administration du Fonds Pie et qu'il était allé s'installer en 1840 à Monterey, siège épiscopal. Comme les biens dont il s'agissait se trouvaient à Mexico il a chargé un homme respectable, Don Ramirez, de l'administration de ce Fonds à Mexico. Par un décret du 8 février 1842 le décret précédent a été rapporté et Don Ramirez a été chargé de rendre les biens au gouvernement; il en a fait une nomenclature, un inventaire détaillé. C'est la base de la demande: les demandeurs n'ont pas autre chose pour vous indiquer ce que serait le Fonds Pie de Californie; je prends donc ce document.

Nous y trouvons d'abord l'indication des biens fonds (page 512); ces biens fonds se divisent en biens urbains et en biens ruraux; c'étaient les maisons de la rue Vergara, qui avaient été données par Doña Josefa Paula Arguelles. Ces maisons étaient louées pour 3,000 piastres, nous dit Don Ramirez; elles étaient en mauvais état, et elles ont été vendues moyennant une rente annuelle de 3,500 piastres, payable par trimestres et par anticipation. Ainsi que je vous l'ai déjà indiqué, les biens de la succession Arguelles appartenaient pour un quart à la famille Arguelles, par suite de l'annulation de la disposition faite au profit des collèges des Jésuites, et pour les 3/4 au Fonds Pie, moité pour les îles Philippines et moité pour les Missions de Californie.

Le revenu de ces maisons est donc de 3,500 piastres; mais il faut en déduire, comme l'explique fort justement Don Ramirez, 1/4 pour la famille Arguelles, soit 875 piastres; il reste les trois autres quarts, soit 2,625 piastres, dont moitié pour les Missions de Californie et moitié pour les îles Philippines.

Don Ramirez nous apprend aussi (page 513) qu'un embargo avait été placé sur ces biens.

Le premier revenu est donc de 2,625 piastres. Maintenant, il y a des biens ruraux dont l'énumération se trouve à la page 513. Il y a l'Hacienda de Ciénega del Pastor; c'était une ferme importante qui était louée 17,100 piastres par an. Elle provenait aussi de la succession Arguelles, par conséquent il y en avait un quart pour les héritiers et la famille, soit 4,875 piastres, il restait donc un revenu annuel de 12,825 piastres. Il y avait aussi sur ce bien un embargo dont nous parlerons plus tard.

Le second fonds rural était l'Hacienda de San Pedro de Ibarra loué 2,000 piastres; puis les Haciendas de San Augustin de Amoles, El Custodio, San Ignacio del Buey et La Baya louées au total pour 12,025 dollars par an. Mais Don Ramirez nous apprend qu'il a pu résilier l'ancien bail et en faire un nouveau pour 12,705 piastres par an.

Il y avait encore des créances hypothécaires; il y en avait une de 42,000 piastres à 5 pct. due par Jose Barrientos et garantie par le domaine de Santa Lugardo et ses dépendances.

Il y avait une autre créance hypothécaire de 40,000 piastres à 6 pct. due par les banquiers Revillas, mais pour laquelle il y avait des arrières considérables: il y avait 26,800 piastres d'intérêts arrières sur

cette créance au capital de 40,000 piastres, ce qui représente un nombre d'années considérable. Don Ramirez nous apprend que des poursuites ont été intentées, mais que jusqu'alors elles n'ont donné aucun résultat.

Enfin, il y a 3,000 piastres à 5 pct. sur le domaine de San José Muiyo dont les intérêts ne sont plus payés depuis 1827—et nous sommes en 1842! Il y a 2,275 dollars d'arrière.

Cela, messieurs, étant énuméré, comme j'ai l'intention de vous indiquer d'une façon précise quelle est la composition du Fonds Pie, je vous renvoie au résumé fait par Don Ramirez, qui ne se trouve pas traduit dans le texte anglais mais que vous trouverez dans le texte espagnol, page 493.

On rappelle les 2,625 piastres de la rue Vergara, les 12,825 piastres de l'Hacienda de Cienega del Pastor, les 2,000 piastres de San Petro de Ibarra, les 12,705 piastres des haciendas de San Augustin et autres, les 2,100 piastres produites par le capital hypothécaire de 42,000 piastres, puis les 2,400 piastres produites par les 40,000 dues par la maison Revillas; cela fait au total 34.655 piastres.

Nous acceptons, messieurs, ce chiffre, sauf une réduction que vous trouverez assurément légitime: elle est relative aux 40,000 piastres dues par la maison Revillas; cette maison était dans des affaires tellement mauvaises que rien n'a jamais été payé, et l'on reconnaît que sur ce capital de 40,000 piastres il y avait des arrières d'intérêts pour 26,700 piastres; vous devrez admettre que c'était une créance d'un recouvrement difficile et qu'il serait peu admissible et peu équitable de mettre à la charge du Mexique la charge de cette mauvaise créance. D'ailleurs, Don Ramirez, dans l'énumération qu'il fait, lorsqu'il en arrive à la discussion de cette créance, dit qu'elle est tellement mauvaise qu'il a constitué un avocat pour faire des poursuites, et tout ce qu'on peut espérer c'est de recevoir de temps en temps de petits acomptes.

Donc, je déduis les 2,400 piastres qui ne sont pas payées, et j'en arrive à avoir un revenu du Fonds Pie de 32,255 piastres.

Conformément à la thèse des demandeurs, il faut capitaliser à 6 pct. ce revenu pour en avoir la valeur en capital. Cela fait exactement 537,583 dollars. Telle était la valeur du Fonds Pie au point de vue immobilier. Seulement, j'ajoute immédiatement qu'il faut déduire de ce capital la somme qui a été payée pour le fonds des îles Philippines, c'est-à-dire 145,000 dollars.

Messieurs, je viens de vous énumérer les immeubles qui composaient le Fonds de Californie, et je viens de vous en indiquer l'origine, notamment en ce qui concerne l'hacienda de Ciénega del Pastor et les maisons de la rue Vergara. Vous savez que les biens de la succession Arguelles appartenaient pour moitié au fonds des Philippines et pour moitié au fonds de Californie. Comme, à la suite d'un arrangement que les demandeurs approuvent—au point qu'ils y voient un précédent en leur faveur—il a été entendu que les biens qui revenaient aux îles Philippines resteraient la propriété du Roi d'Espagne ou des Missions d'Espagne, cette somme de 145,000 piastres doit incontestablement, et au minimum, être déduite du montant du fonds immobilier, c'est-à-dire des 537,583 piastres. Je dis que c'est un minimum parce que la succession Arguelles se composait d'autres éléments, et que dans une convention du 24 octobre 1836 intervenue entre l'Espagne et le Mexique il a été entendu que tous les biens qui provenaient de la succession

Arguelles appartiendraient pour moitié à l'Espagne en vue des îles Philippines.

Le fonds immobilier se trouverait composé ainsi d'une somme de 392,583 piastres.

Voyons maintenant quelles sont les créances actives du Fonds, que Don Ramirez va énumérer dans la suite de son inventaire.

A la page 514 "Créances actives du Fonds, recouvrables, dues par le Trésor Public", nous avons d'abord l'indication d'un capital de 20,000 piastres à 5 pour cent d'intérêt qui serait dû par le Gouvernement espagnol. Celui-ci aurait emprunté cette somme au Fonds Pie et il n'en aurait plus payé les intérêts, d'après ce que dit Don Ramirez, depuis 1812. Don Ramirez va ajouter que depuis cette époque jusqu'à présent—c'est-à-dire jusqu'en 1842—aucune somme n'a été reçue ni en capital ni en intérêts; de telle sorte, dit-il, que les intérêts courus depuis 1812 jusqu'à 1842 représentent 29,166 dollars.

Mais, messieurs, il y a une réflexion qui ne vous aura pas échappé; est-ce que les évêchés des Etats-Unis qui sont nés en 1850 ou 1854 vont pouvoir réclamer pour eux les intérêts courus depuis 1812, alors qu'à cette époque il est incontestable que c'était le Gouvernement espagnol et ensuite le Gouvernement mexicain qui était maître du Fonds et disposait de ses produits? Est-ce que par hasard la prétention des demandeurs serait d'exiger un compte du Mexique et du Gouvernement espagnol sur la manière dont ils disposaient des produits du Fonds pendant ces époques où assurément ils n'avaient de comptes à rendre à personne, et surtout pas aux évêques de Californie?

Donc, quand on demande des intérêts je ne comprends pas. Mais, voyons même quant au capital. Il s'agit d'une somme due par le gouvernement espagnol! Il est bien certain que le Mexique ne peut pas réclamer une somme au gouvernement espagnol pour la donner aux Etats-Unis ou aux évêques de Californie.

Don Ramirez ne nous dit pas à quelle époque le gouvernement espagnol a pris ce capital de 20,000 piastres, mais ce qu'il nous dit, c'est que depuis 1812 il n'a plus plu à l'Espagne d'en payer les intérêts. Et je le comprends; pourquoi? Le Roi d'Espagne était alors le maître de ce Fonds, il en disposait comme il l'entendait; s'il a pris 20,000 piastres et a dit: je les affecte à l'entretien des troupes, ou à toute autre dépense, il ne pourrait pas aujourd'hui en devoir compte aux évêques de Californie. Et cependant non seulement il en devrait compte, mais il devrait les intérêts qu'il n'a pas payés! Imaginez-vous cette créance civile créée par l'Espagne au profit des évêques de Californie nés en 1854? C'est vraiment insoutenable.

On nous répondra peut-être que lorsque le Mexique a pris la place de l'Espagne il a assumé les dettes et les obligations de l'Espagne. Mais il s'agirait d'établir que l'Espagne aurait entendu contracter et reconnaître une dette vis-à-vis du Fonds.

Je passe à la réclamation suivante: il s'agit d'un capital de 201,856 dollars que le gouvernement espagnol s'est approprié pour ses "nécessités." Don Ramirez veut bien nous dire (p. 514) que c'est pour des nécessités urgentes. A partir de 1812 le Gouvernement espagnol n'a plus affecté les intérêts de ce prélèvement aux objets du Fonds Pie. Depuis 1812 jusqu'en 1842 les intérêts arrières s'élèveraient d'après Ramirez à 294,434 dollars; il fait l'addition et il trouve que cela fait 496,291 dollars.

Je ne répète pas, messieurs, toutes les observations que j'ai présentées

à propos du chiffre, précédent et qui doivent s'appliquer ici. Si à une époque de son histoire l'Espagne se trouvant devant des nécessités urgentes—ce mot est très vague—au sujet desquelles elle n'avait pas à s'expliquer puisqu'elle était pouvoir souverain, a pris 200,000 piastres, est-ce que nous, Mexique, nous allons avoir à en rendre compte aux évêques de Californie?

Mais quels sont les titres de tous ces documents? Il est évident que c'est aux adversaires à nous indiquer quels sont les titres qui ont constitué la dette de l'Espagne.

J'arrive au troisième paragraphe de ce document, page 515; il s'agit d'un capital de 162,618 piastres qui est reconnu par le Tribunal du consulat de Mexico à 6 pct. Qu'est-ce que le Tribunal du consulat de Mexico? C'était le Tribunal de Commerce; ce serait donc un Tribunal qui aurait reconnu cette dette de 162,168 dollars à 6 pct. Mais Don Ramirez nous apprend que le gouvernement aurait repris cette créance. On voudra bien nous dire de quoi cela résulte? Surtout que nous apprenons que depuis 1820 l'intérêt n'a pas été payé. Je suppose qu'en 1820 le roi d'Espagne pour une raison politique quelconque ait dit au Tribunal du consulat de Mexico: Je vous décharge de votre dette, ou je vous dispense des intérêts; est-ce que par hasard le Mexique devra rendre compte aux évêques de Californie de cet acte du pouvoir souverain d'Espagne?

Depuis 1820 les intérêts s'élèveraient à 206,525 piastres; on les ajoute au capital et on arrive ainsi à la somme de 369,143 piastres.

Messieurs, si, contrairement à tout ce que nous avons plaidé, le Tribunal arbitral devait dire que le Mexique est condamné à une restitution, à un paiement en capital et intérêts ou en intérêts seulement du Fonds Pie, il est incontestable que vous ne vous contenteriez pas d'affirmations aussi légères que celles-ci, émanant d'un mandataire d'évêque dont les demandeurs actuels se prétendent les successeurs.

Mais, messieurs, il y a plus. Ici, nous allons voir la confirmation de tout ce que je viens de dire. Il s'agit d'une somme de 38,500 piastres due originairement par le collège de San Gregorio à 3 pct., et Don Ramirez nous apprend que cette somme est due depuis avant l'expulsion des Jésuites, donc depuis avant 1767. Il ajoute que le Gouvernement a repris cette somme à sa charge, d'après ce que lui a dit le Senor Don Antonio Icarra. Don Antonio Icarra a donc en conversation dit à Don Ramirez: le Gouvernement a repris cette dette du collège de San Gregorio . . . . et ce propos hypothétique suffirait pour que le Gouvernement mexicain soit condamné? . . . . et cela alors qu'il s'agit d'une créance ancienne, antérieure à l'expulsion des Jésuites, dont les intérêts n'ont plus été payés pepuis longtempts. Car, messieurs, c'est là ce qui est caractéristique: si ces fonds avaient cette vitalité que l'on semble indiquer de l'autre côté de la barre, si ces créances étaient réelles—et notez qu'il n'y a pas le moindre titre produit à l'appui de chacune de ces demandes ou de ces créances—si tout cela avait un fond sérieux, il est bien évident que les intérêts auraient été payés.

Depuis 1811 il n'a plus rien été payé, mais cela n'empêchera pas Ramirez d'en faire le calcul et de dire: cela représente 34,000 piastres. Il ajoute cette somme au capital, ce qui fait que l'on réclamera au Gouvernement un total de 73,342 piastres.

Puis, messieurs, il y a une somme de 68,160 piastres qui a été déposée en 1825 à la Monnaie par Don José Ildefonso Gonzalez del Castillo.

Sous le Gouvernement espagnol, toujours, une somme de 68,160 piastres qui provenait d'une dette des Senores Revillas aurait été déposée à la Monnaie; et on nous dit: cette somme est due.

Ici, messieurs, la question est plus délicate. J'avoue n'avoir pas très bien pu saisir le sens de cet alinéa, car il est dit que le Senor Estera aurait disposée de ces fonds. C'est un point sur lequel nous avons demandé quelques éclaircissements que peut-être nous pourrons vous donner plus tard; en tout cas, ce que nous apprend Don Ramirez c'est que cette somme aurait été déposée à la Monnaie sous le Gouvernement espagnol. C'est un dépôt dont M. Estrada a disposé; c'est très vague. Cette somme en tous cas ne produisait pas d'intérêts. Elle devrait en produire maintenant? Ce sont là des éléments à propos desquels encore une fois un titre serait nécessaire.

En ce qui concerne le numéro suivant, il s'agit d'une somme de 7,000 dollars qui aurait été payée par les señores Revillas le 20 octobre 1829. On leur demandait le paiement d'une somme de 20,000 dollars, ils n'en avaient que 7,000, et ils les ont payés par une lettre de change sur la Compagnie germano-mexicaine qui n'a pas fait honneur à la traite! Dans ces conditions cette somme de 7,000 dollars ne peut évidemment pas être due puis-qu'elle n'a pas été reçue par le Fonds.

Enfin il y a une somme de 3,000 piastres empruntée avec promesse de remboursement, nous dit Don Ramirez, pour couvrir les dépenses mentionnées dans le 5e article du décret du 19 septembre.

Voici ce que c'était. Lorsque le Gourvernement mexicain a décidé l'érection d'un évêché en Californie il a décidé de lui donner un traitement annuel de 6,000 dollars, et une somme de 3,000 piastres pour ses frais de voyage. Mais il se fait que le Gouvernement a pris cette dernière somme dans le Fonds Pie.

Mais, messieurs, s'il s'agissait d'un bien d'Eglise, il semble que c'était une dépense qui pouvait rentrer dans les obligations du Fonds; le transport de l'evêque était une dépense justifiée, on dit: c'est le Gouvernement qui doit payer. Par une de ces déductions un peu larges dont M. Ramirez est coutumier, il arrive à dire qu'il y a promesse de remboursement, parce que dans un décret on a décidé que l'évêque recevrait 3,000 dollars pour ses frais de déménagement.

Enfin, messieurs "une somme de 15,973 dollars, sous forme de certificat payable sur les ressources existant dans le Fonds, à 10 pct., faisait partie d'un emprunt de 60,000 dollars que le Gouvernement négocia avec hypothèque sur les biens du Fonds de Californie."

Si je comprends bien ce que je viens de lire le Gouvernement mexicain a emprunté 60,000 dollars et aurait donné—c'est toujours M. Ramirez qui parle—en hypothèque les biens du Fonds à concurrence de 15,973 dollars; et on dit aujourd'hui: le Gouvernement doit rembourser cette somme. Mais une hypothèque est une garantie; est-ce que le gage a été réalisé?

Il y a, de la part de M. Ramirez, une propension, une tendance à exagérer toujours les sommes qui composent le Fonds Pie; quand il s'agit d'un capital de 20,000 piastres il le fait monter à 49,000 en y ajoutant les intérêts; à un autre de 200 mille piastres il ajoute 296,000 piastres d'intérêts. C'est une tendance fâcheuse qui justifie pleinement ce que nous disons d'ailleurs à tout demandeur: vous formulez une réclamation, produisez vos justifications!

Les demandeurs ont montré que pour eux rien n'était secret, même

les archives mexicaines dont ils font état; ils ont tout vu; qu'ils veuillent donc bien nous renseigner!

Il s'agit ici d'une créance civile et on se fonde sur des actes du pouvoir souverain. Le Roi d'Espagne n'a pas dit seulement dans les décrets que j'ai analysés de 1767 et de 1768 qu'il s'appropriait les fonds des Jésuites et qu'il en disposerait suivant ses vues mais notamment encore dans un décret de 1772 qui se trouve reproduit à la page 456 il affirme à nouveau ses droits absolus. Voici en effet ce que je lis au deuxième paragraphe (p. 456):

Afin d'écarter ces difficultés et d'éviter le danger que pourraient créer le doute et l'ignorance, et en vue aussi de l'opinion donnée par mon procureur José Monno, et de la déclaration contenue dans mes lettres patentes du 14 août 1768, par lesquelles ma couronne et ma personne subrogeait tous ses droits, et à la prière de mon Conseil de donner des ordres correspondant aux vice-rois et gouverneurs de mes domaines des Indes, des Philippines et des îles adjacentes, déclarant que j'avais subrogé dans ma personne royale tous les droits qui appartenaient aux réguliers, de même que ceux qu'ils pouvaient encore posséder en commun avec d'autres Ordres, sans préjudice de ceux qui sont consacrés au même but qu'ils l'étaient avant l'époque de l'expulsion, et qui tous deux doivent être exécutés par mes vice-rois et gouverneurs en mon nom comme par le personnel de ma couronne royale, en tenant compte de chaque transaction dans les livres et archives des départments où les inscriptions doivent être faites. J'ai donc consenti à ce faire, à la charge à mon Conseil des Indes de mettre ceci à exécution. Je vous ordonne à chacun de vous d'accomplir respectivement le rôle qui vous appartient et de faire que mon ordre royal reçoive son accomplissement.

J'ai tenu, messieurs, à vous rappeler dans quels termes s'exprimait le Roi d'Espagne; il disait: les biens de ces corporations, je me les suis appropriés. Et dans ce texte de 1672 il ne fait pas même une réserve pour les titres des donateurs primitifs; c'est lui qui en dispose. Et, je vous le demande, si dans les moments difficiles que traversait l'histoire de l'Espagne il en a disposé, quel reproche peut-on lui en faire, et peut on aujourd'hui surtout en faire reproche au Mexique qui, lui, n'a pas hérité de ces Fonds, qui dans tous les cas ne les a pas perçus?

Je passe maintenant aux créances sur particuliers (p. 515). Nous trouvons d'abord une somme de 42,000 piastres qui etait garantie par hypothéque et qui se trouve déjà mentionnée dans le calcul que j'ai indiqué en parlant des biens immeubles; c'est donc une première somme qui doit être écartée, elle est comprise déjà dans les chiffres antérieurs.

Il y a ensuite une somme de 13,000 piastres. Don Ramirez, qui a fouillé les livres, a trouvé qu'un ancien administrateur de la ferme Ciénega, Don Juan de Dios Navarro "semble" avoir laissé dans son administration un déficit de 13,000 dollars; après plusieurs réclamations, un solicitor a été appointé pour recouvrer cette somme, mais jusqu'ici sans succès. Cependant on va porter cette somme au débit du Mexique! Don Ramirez n'ose pas affirmer qu'il y a eu un déficit, il dit que cela semble résulter de ses investigations, sur le caractère desquelles il ne nous renseigne d'ailleurs pas. Voilà donc cette somme qui lui semble être due par un ancien administrateur d'une ferme et qui figure comme étant due actuellement par le Mexique. Mais après tout, s'il y a eu un administrateur infidèle—cela arrive à tous les propriétaires—est-ce que c'est le Mexique qui va devoir supporter les conséquences de la faute de cet administrateur, surtout que cette somme a été prise probablement sur les revenus de la ferme?

Vient ensuite une somme de 33,782 piastres reconnue par Don Estevan Velez Escalante, syndic du collège de San Fernando. Don Ramirez

nous apprend que diverses démarches ont été faites en vue d'obtenir un remboursement partiel ou le paiement des intérêts, mais qu'elles n'ont rien produit. On a commencé une instance devant la Justice de Paix de Don Agustin, mais tout cela n'a rien produit. Voilà donc une mauvaise créance. Nous ne sommes pas renseignés parce que nous n'avons pas de titres; Don Ramirez nous dit qu'il y a une créance de 33,782 piastres, mais il ajoute qu'elle est mauvaise, qu'on a été devant le Juge de Paix, et que cela n'a abouti qu'à des frais. Et nous devrions non seulement payer ces frais, mais rembourser le capital! Est-ce possible? Est-ce admissible?

Il y a lors de petites sommes que j'indique parce qu'elles fixent le caractère de la demande: 325 piastres dues par les filles du général Cosio. Don Ramirez ajoute qu'elles sont parfaitement insolvables; vous devriez néanmoins comprendre cette comme dans le remboursement auquel nous devrions être condamné. Puis une somme de 416 piastres sur laquelle 100 piastres ont été payées, de façon qu'il reste 316 piastres dues par Don Manuel Prieto, qu'on n'a jamais pu retrouver. Ensuite, 193 dollars due pour location d'un verger; ici c'est plus fort: le débiteur nie sa dette et il est impossible d'en démontrer l'existence!

Enfin, il y a une somme de 13,997 piastres du par Don Ramon Vertis pour rupture du bail de l'hacienda de Amoles. Don Ramirez n'a rien obtenu, cependant il y a des garants qui se sont engagés à payer, mais cela ne produit rien.

Voilà ce que nous apprend Ramirez en ce qui concerne les créances sur particuliers. Tous voyez que ce Fonds Pie qu'on vous avait représenté d'abord comme considérable a valu au Mexique beaucoup de déboires et de màcomptes.

Mais ce n'est pas tout, messieurs, ce qu'il reste à voir ce sont les dettes du Fonds. Ici M. Ramirez, à la page 516, sous le titre de "Liabilities", indique ce qu'il y a à déduire de l'actif que nous avons indiqué tout à l'heure.

Il y a d'abord, au premier paragraphe, une somme de 5780 dollars qui est due à Don Eduardo Virmond. Voici ce qui s'était passé, Don Ramirez nous l'explique: A certains moments les Pères avaient besoin de fonds pour les Missions, et ils avaient eu l'autorisation du Comité qui s'occupait de l'administration du Fonds Pie de créer certaines traites. Il y a une traite qui a été tirée ainsi à concurrence de 5,780 piastres et qui est due; Don Ramirez nous indique que c'est une dette du Fonds, il n'y aurait pas à la contester.

Puis, dans le paragraphe suivant il y aurait d'autres traites du même genre dues à Don José Antonion Aguirre, s'élevant au total à 24,600 piastres, qu'il faut également déduire. Enfin il y a une somme de 2,000 piastres qui serait du à Don Ignacio Cortina Chavez: c'est une autre traite endossée par Don Virmond ainsi que nous l'indique Don Ramirez et qui a été créée en 1840.

Toutes les traites que je viens de vous indiquer ont été eréées en 1840, c'est-à-dire lorsque l'évêque de Californie, dont les demandeurs se disent les successeurs, a été provisoirement chargé de l'àdministration et de la disposition du Fonds Pieux; il a créé des dettes, ou il a autorisé de la création par les Pères de ces quelques traites, et par conséquent elles sont dues. Tout cela représente une somme d'une bonne trentaine de mille piastres, il y aura à les déduire lorsque nous ferons le compte final.

Mais alors, messieurs, vient un élément qui a dans ce procès une importance capitale et qui est décisif quant à l'importance du Fonds: il s'agit de l'affaire de la Marquise de la Torres de Rada.

Je m'excuse d'un sourire, messieurs, parce que j'ai à vous rendre compte d'un procès fantastique, d'un procès qui est digne d'alimenter les romans de Gaboriau ou de Paul de Kock, la succession de la Marquise de la Torres del Rada a donné lieu en Espagne et au Mexique a un procès qui a duré plus d'un siècle. Je vais vous le résumer rapidement; ce qui est intéressant pour vous c'est le judgement final qui ordonne, à charge du Fonds, la restitution d'une somme considérable. Ainsi, messieurs, après vous avoir démontré que le Fonds n'appartient certes pas aux demandeurs, je vous aurai démontré—ce qui aurait peut-être pu paraitre une gageure—qu'il n'y a pas de Fonds du tout!

Voici ce qu'était ce procès: Il est relatif à la donation qui a été faite par la Marquise de Villapuente en 1735.

La Marquise de Villapuente a été mariée trois fois. Elle était née Doña Gertrudis de la Pêna; elle s'était mariée d'abord à Don Martin Amor Ortanez, elle avait eu de ce premier mariage deux enfants. Son mari meurt le 12 mai 1694, elle reste donc veuve avec deux enfants. On procède à la liquidation de la succession de son mari et il est reconnu qu'elle a des reprises à exécuter pour 33,347 piastres, somme relativement modique, que la jeune femme avait apportée et qu'elle reprenait lors du décès de son mari. Outre cela, elle avait la tutelle de ses enfants et à ce titre elle recevait certaines sommes dont le chiffre n'est pas indiqué et que je réserve pour le moment.

En 1700, Dona Gertrudis, douairière de Don Martin Amor Ortanez, s'est remariée; elle a épousé le Marquis de la Torres del Rada. Les documents du procès nous apprennent que c'est son cousin, le Marquis de Villapuente, qui est allé à Vera Cruz, où se trouvait le Marquis de la Torres del Rada, négocier ce mariage . . . nouis allons voir que le Marquis de Villapuente avait de grandes attentions pour sa cousine, qu'elle était l'objet de toutes ses sollicitudes. Le Marquis de Villapuente fait donc le voyage de Vera Cruz et négocie un brillant mariage pour la douairière, sa cousine; puis il négocie aussi quelques questions relatives à la situation financière. Le Marquis de la Torres del Rada reconnaît en dot à sa fiancée 139,831 piastres. Nous savons qu'elle n'avait eu en réalité que 33,347 piastres.

Le Marquis de la Torres del Rada meurt subitement le 21 avril 1713. Il parait que lorsque le Marquis de la Torres del Rada est mort, le Marquis de Villapuente, le cousin—l'indispensable cousin—était dans la pièce voisine, et qu'immédiatement il a fouillé les documents, les papiers, le secrétaire.

On a très promptement procédé à la liquidation de la succession du Marquis de la Torres del Rada, le cousin intervenant toujours en faveur de la veuve. Il n'y avait pas d'enfants de ce second mariage, il n'y avait pas non plus de testament, de telle façon que la succession devait revenir à des collatéraux, ou plutôt à un neveu qui se trouvait en Espagne, Don José Lorenz del Rada. A la diligence du Marquis de Villapuente, le mandataire naturel de la Marquise de la Torres del Rada, un inventaire de la succession fut dressé. On constata que la fortune du Marquis de la Torres del Rada, qui était d'après la renommée considérable, était beaucoup moins importante qu'on ne l'avait cru; on s'aperçut d'autre part que les dettes de la succession étaient

bien supérieures à ce que l'on aurait pu deviner. De sorte, messieurs, que la situation qui résultait de cet inventaire était qu'au lieu d'un actif net il y avait un déficit, c'est-à-dire que la Marquise de la Torres del Rada, qui avait à recouvrer le montant de ses reprises s'élevant à 139,000 piastres reconnues par son contrat de mariage, qui avait à reprendre aussi les biens dont elle avait la tutelle et dont la jouissance avait passé naturellement à son second mari, ne pouvait pas rentrer dans l'intégralité des sommes qui lui étaient dues. Le montant total de la fortune s'élevait à 284,880 piastres; il y avait à en déduire les frais de funérailles, les dettes de tout genre, les messes dites pour 9,869 dollars, de façon qu'il restait liquide une somme de 204,390 piastres. Et il était établi que la veuve, du chef de ses 139,000 dollars de reprises et de ses créances diverses provenant notamment des biens dont elle avait la tutelle, avait une créance totale de 252,000 piastres; il y avait donc un passif non couvert de 47,600 piastres.

Que se passa-t-il? La Marquise de la Torres del Rada exigea qu'on fît avec le plus grand soin constater que l'inventaire avait été dressé minutieusement et sans fraude, et qu'on réservât tous ses droits pour le cas où l'on découvrirait d'autres biens non inventoriés, elle accepta de reprendre tout l'actif et tout le passif. Ainsi fut réglée, à la diligence du Marquis de Villapuente, la liquidation de la succession du Marquis de la Torres del Rada; la veuve disait: je me chargerai des dettes, je ne suis pas couverte de mes reprises, il reste un déficit, mais je me réserve de faire valoir mes droits le cas échéant.

A quelque temps de là s'est produit un événement qui était peut-être attendu: le Marquis de la Villapuente a épousé la veuve: c'est le troisième mariage.

Seulement, un procès fut entamé alors par le neveu, l'héritier du sang, Don José de la Torres del Rada; il prétendit que son oncle avait une fortune considérable: il était gouverneur, chancelier, il avait des charges de tout genre; il paraissait inadmissible que sa succession soldât par un déficit!

Le procès avait pour objet la discussion de l'inventaire. On lui répondit que la fortune du Marquis de la Torres del Rada avait été perdue dans l'expédition de l'Invincible Armada dans la baie de Vigo, que ses biens avaient été engloutis par la tempête. Il répliqua que les biens avaient été bel et bien vendus en Espagne.

On interrogea la Marquise pour lui demander si son mari avait des livres, elle répondit que non. Des témoins dirent qu'il en avait et le procès continua.

En 1735, le Marquis et la Marquise de Villapuente firent l'acte de donation que vous connaissez au profit des Jésuites. Ces donations considérables auraient bien pu avoir leur origine dans la fortune du Marquis de la Torres del Rada, mais c'est là la question que le procès va élucider.

Tout cela, messieurs, n'a qu'un intérêt historique, et je ne me serais pas permis d'y insister s'il ne m'avait pas paru qu'il était nécessaire pour le Tribunal de connaître la portée des décisions judiciaires qui vont intervenir et qui celles-là l'intéresseront au premier chef.

Dans le livre que vous possédez vous verrez l'intitulé suivant—je lis textuellement:—

Mémorial formé à la demande de Don José de Rada et en vertu de l'ordonnance du Conseil suprême, avec citation du procureur et celle de Don José déjà cité, de son instance, des actes suivis par lui et ses autres cohéritiers comme héritiers ab intestat

du Marquis de la Torres del Rada, son oncle, d'abord devant les juges des biens de morts de la ville de Mexico et ensuite dans cette audience. . . .

M. ASSER. Où est-ce?

M. DELACROIX. C'est dans un livre dont l'original seul a été trouvé et joint à la réponse déposée par le Mexique; c'est un livre du 18e siècle retrouvé par hasard.

Sir EDWARD FRY. Nous pourrons en avoir des copies?

M. DELACROIX. Parfaitement. Nous ne donnerons pas la copie de la traduction de tout le livre, parce que cela n'a pas d'intérêt; c'est un point d'histoire seulement que j'ai exposé. Ce qui a de l'intérêt, ce sont les décisions, car nous allons voir ce que le Tribunal va décider . . .

M. RALSTON. Vous avez la traduction?

M. BEERNAERT. La traduction ne porte pas sur tout le livre.

M. DELACROIX. Je vais y arriver.

Sur l'exhibition des lettres et papiers du Marquis de la Torres del Rada, nullité des inventaires, appréciation faite après sa mort . . . .
. . . . la tutelle de ses enfants mineurs.

J'ai fait traduire l'intitulé de chacun des chapitres du livre, parce que dans ce livre, comme certains romans, on fait dans l'intitulé du chapitre l'analyse du texte:

Chapitre Ier. Où l'on voit apparaître les mensonges, vices, défauts et nullités commis dans l'exécution des inventaires et évaluations des biens qui restèrent à la mort du Marquis de la Torres del Rada, et dans le jugement qui les a remis à Dona Gertrudis de la Pena, sa femme.

Chapitre 2. Où l'on découvre que la fortune du Marquis de la Torres del Rada était beaucoup plus considérable que les inventaires no le constatent.

Chapitre 3. Où l'on prouve que le montant du passif du Marquis del Rada était beaucoup moindre que les inventaires ne l'établissent.

Chapitre 4. Que si même la fortune du marquis n'avait pas été plus considérable que les inventaires le reconnaissent, elle aurait suffi sans toucher aux charges et titres au paiement intégral de la dot de Dona Gertrudis de la Pena et à la tutelle des enfants du premier mariage qui était beaucoup moindre qu'il n'apparaît des instruments produits par elle.

On va dans ce chapitre établir que même en supposant que l'actif n'eût pas été supérieur à ce qui été indiqué, comme le passif était moindre que l'a indiqué la dame douairière, il en résulterait qu'il n'y avait pas de déficit; et on va indiquer la conséquence:

Chapitre 5. Que même en supposant que la fortune n'ait pas suffi au paiement de la dot et de la tutelle, l'adjudication ne devait pas comprendre le titre et la dignité de Marquis, ni les charges de chancelier et contrôleur.

Ceci demande une explication. Le Marquis de la Torres del Rada, en dehors de sa fortune considérable, avait une charge de chancellerie qui rapportait 5,000 piastres par an; c'était une charge qui était l'accessoire de son marquisat et qui avait cette conséquence que même ses héritiers et successeurs pouvaient perpétuellement toucher ces 5,000 piastres par an. Et alors on dit: En supposant que la fortune ne fût pas plus considérable, dans tous les cas ce n'était pas la veuve qui aurait eu le droit de s'approprier les 5,000 piastres par an affectées à la continuation de la charge, cela apportenait aux héritiers, à l'héritier naturel Don José del Rada.

C'est alors qu'intervient le document relaté par M. Ralston et qui se trouve dans la réplique à la page 40.

J'en ai ici la traduction sous les yeux, mais puisque vous avez ce document entre les mains il sera peut-être préférable que j'en fasse une analyse, sauf à vous lire ensuite les termes de la sentence définitive.

Une sentence est intervenue en 1749, aux termes de laquelle il ne fut statué que sur une partie du litige. Ce litige était considerable, je viens de vous en indiquer le caractère quelque peu romanesque; il s'agissait d'aller chercher à de grandes distances des témoins que devaient venir établir en quelque sorte par commune renommée quelle était la consistance de la fortune du Marquis de la Torres del Rada; il s'agissait d'établir que le Marquis de Villapuente était entré dans la chambre du défunt immédiatement avant que les scellés fussent apposés ou que des mesures pussent être prises, qu'il avait pu faire disparaître les livres et documents pouvant établir la consistance de la fortune; il s'agissait en un mot d'un procès compliqué à tous égards

Une sentence était intervenue en 1749 de laquelle il résultait qu'en tout cas la charge de chancelier, c'est-à-dire ce produit annuel de 5,000 piastres que s'était attribué la marquise douairière, ne lui revenait pas et devait appartenir à l héritier du sang, à Don José. C'est ce qui fut décidé dans un jugement dont je vous lis la partie appelée décret:

Nous devons révoquer et rejeter les actes. . . . ordonnons et signons.

Cette sentence fut prononcée par la Cour suprême des Indes à Madrid le 16 avril 1749. Elle avait pour conséquence que pour une période de 37 ans la marquise ou ses ayants droit devaient rendre 5,000 piastres par an, soit 185,000 piastres. C'est ce qui se trouve dans le document que j'analysais tout à l'heure.

Après cette digression, messieurs, j'en arrive à l'établissement du passif du Fonds Pie, des restitutions importantes dues par lui et qui vont consister dans les sommes que je vais vous indiquer.

Ces sommes, Don Ramirez nous les indique à la page 517. Il y a d'abord la somme de 185,000 dollars due en comformité de ce que je viens de dire. Mais Don Ramirez nous apprend qu'il y a un autre jugement beaucoup plus récent, un jugement définitif du 31 janvier 1829, et il dit:

Il est dû au seigneur Don José Juaregui. . . .

Voici donc que Don Ramirez nous apprend qu'un jugement du 31 janvier 1829 a condamné le défendeur du Fonds Pie à payer une première somme de 155,875 piastres, plus les intérêts, ce qui fait au total 443,875 piastres.

Je récapitule, messieurs, les sommes que j'ai indiquées, 7,580 piastres, 24,600 piastres, 2,000 piastres, 443,875 piastres, et j'arrive à un total de 475,255 piastres. Or, nous avons établi que la consistance raisonnable du Fonds Pieux, capitalisé comme les demandeurs le soutiennent à 6 pct., ne faisait que 392,583 piastres. De telle sorte que nous arriverions à ce résultat que le Fonds Pie, au lieu d'exister en actif, consisterait en un passif représentant la différence entre les 475,255 piastres indiquées par Don Ramirez et l'actif de 392,583 piastres, soit un déficit de plus de 82,000 piastres, que pourraient à la rigueur combler les 68,000 dollars douteux ou incertains que nous avons indiqués comme ayant été déposés à la monnaie de Mexico.

M. Ramirez ajoute qu'il est très embarrassé, et je le comprends.

Il va consulter. Il écrit pompeusement la lettre que vous trouverez dans le livre rouge à la page 518 et consulte un avocat sur le moyen de payer 475,000 dollars avec un capital indéterminé que j'ai chiffré par 392,000 dollars. . . . Problème difficile!

Mais, messieurs, les conseils auxquels s'adresse Ramirez sont plus

embarrassés encore que lui; ils lui répondent que ne connaissant pas le dossier ils sont impuissants à lui donner la solution qu'il recherche.

Don Ramirez avait songé alors à une transaction et à payer les 475,000 piastres par une somme de 210,000 piastres à titre de forfait définitif; c'était sur l'opportunité de cette transaction qu'il avait demandé l'opinion d'honorables jurisconsultes de l'époque, au nombre de trois. Et ces trois messieurs lui répondent qu'ils ne sont pas suffisamment documentés pour lui donner un avis; je ne sais ce qu'ils attendaient: peut-être la découverte du livre que le Tribunal possède actuellement.

Quoi qu'il en soit, messieurs, nous avons maintenant la consistance active et passive du Fonds Pie d'après les documents que vous connaissez, et dès lors je me demande comment, en toute hypothèse, il serait encore possible de condamner le Mexique au paiement d'une somme quelconque.

Nous ne pouvons pas, sans doute, justifier d'un réglement définitif qui serait intervenu avec les héritiers de la Marquise de la Torres del Rada; nous voyons par le document de Don Ramirez qu'il y avait un embargo, une saisie qui avait été faite par Don José Juaregui au nom des héritiers d'Espagne; on avait d'abord saisi les maisons de la rue Vergara, puis on a consenti à lever cet embargo et on a saisi l'hacienda de Ciénega del Pastor. Nous apprenons par Don Ramirez—c'est intéressant—qu'on réclame l'annuité due pour la charge de chancellerie pendant 37 ans avec les intérêts jusqu'à la date de l'embargo. Cela suppose que cet embargo a donné un résultat sur le chiffre duquel je ne puis pas renseigner la Cour.

Quoi qu'il en soit, que le Gouvernement du Mexique ait payé ou non, qu'il soit débiteur ou non, il y a une chose certaine, c'est que, lorsque vous serez appelés à déterminer quel est le montant du Fonds Pie, il est impossible que vous fassiez abstraction des décisions judiciaires qui sont produites dans les documents de la cause et desquelles il résulte que le montant du passif du Fonds Pie est de 475,000 dollars. Il est impossible d'établir le montant de ces sommes dont nous aurions profité sans déduire de l'actif le montant du passif: c'est absolument élémentaire.

Donc, tout en réclamant l'indulgence de la Cour pour la sobriété des renseignements que j'ai pu lui donner, je la crois suffisamment édifiée maintenant sur la consistance du Fonds Pie pour que, sachant que ce sont les demandeurs qui doivent en établir la consistance et justifier de leur titre, elle dise que ce Fonds ne lui apparaît pas avec une consistance suffisante pour qu'une condamnation puisse être prononcée à la charge du Mexique dans ces conditions.

Mais il y a assurément, à propos de ces chiffres, une considération qui vous aura frappés: c'est qu'en réalité le seul titre qui soit produit, qui soit invoqué pour appuyer la demande, c'est le titre de donation du Marquis de Villapuente; en dehors de lui, les demandeurs ne possédent aucun titre, aucun document qui vienne appuyer leur réclamation. Cette donation du Marquis de Villapuente est précisément celle qui se trouve aujourd'hui fondue comme boule de neige.

J'aboutis à la fin des considérations que j'ai à vous présenter? On nous dit: Il faut partager le Fonds Pie entre la Haute et la Basse Californie et il appartient à la Cour de dire dans quelle proportion doit se faire le partage.

Je dis tout de suite: pourquoi une proportion? Les donateurs ont

eu en vue les Missions des Jésuites de Callfornie; j'ai indiqué à la Cour où étaient les missions des Jésuites; elles n'ont existé que dans la Basse Californie; alors où la Haute Californie trouve-t-elle un titre? Elle demande un partage, mais pour partager il faut consulter le titre. On ce titre ne confère de droits qu'aux Missions de Jésuites établies dans la Basse Californie.

Le titre prévoyait une éventualité, c'était l'établissement par les Jésuites de Missions dans d'autres contrées, mais comme les Jésuites n'ont jamais établi de Missions que dans la Basse Californie, que par conséquent cette éventualité ne s'est past réalisée, il est certain que c'est la Basse Californie seulement qui peut avoir un droit.

Une autre considération me vient à l'esprit: les demandeurs se fondent sur un titre dans lequel je lis ceci: Dieu seul pourra demander compte de l'emploi des fonds. C'est au profit des Jésuites que la donation est faite. Alors, si Dieu seul peut demander compte, pourquoi vous arrogez-vous le droit?

Enfin, messieurs, la partie adverse nous dit: Pour la proportion, il faut se baser sur la population. Messeurs, je ne pense pas qu'on puisse trouver dans les éléments de la cause une indication qui puisse appuyer ce soutènement. Dans la Haute Californie il y a une population aisée, très riche, une population de fidèles catholiques et de protestants; est-ce que ce serait en vue de cette population de fidèles de l'Eglise catholique que les donateurs auraient entendu disposer? Mais non! c'était au contraire au profit d'une population de sauvages, d'Indiens, de gens de couleur. Il y a, n'est-ce pas, dans tous les pays d'Amérique des Indiens; c'est une population que personne ne confondra avec une autre. C'étaient eux qui étaient l'objet de la sollicitude des Jésuites. Comment dans ces conditions la population tout entière pourrait-elle servir de criterium pour déterminer la proportion de ce qui peut être dû à la Haute ou à la Basse Californie?

Il s'agit aujourd'hui d'interdire au gouvernement mexician d'employer tout le produit de ce Fonds, d'ailleurs hypothétique, à la Basse Californie; cette base juridique—j'en reviens toujours là—nous ne pouvons la trouver dans aucun document.

Le seul document intéressant est celui relatif au partage de la première somme attribuée aux évêques de Californie. Vous y voyons que si certaines sommes ont été attribuées aux "Missions de l'Orégon," aux "Missions de l'Utah," en ce qui concerne la Californie la somme est donnée à l'Eglise pour être employée par les évêques "aussi sagement et aussi utilement que possible."

Loin de moi assurément la pensée de contester que les honorables évêques de Californie n'aient pas employé les fonds dans l'intérêt de leurs églises aussi sagement et aussi utilement que possible; mais là n'est pas la question: il s'agirait de savoir ce qu'ils ont fait de ces fonds pour les Indiens.

Il y a un autre point qu'il faut examiner, c'est celui-ci: Est-ce qu'il faut payer en or comme le réclament les demandeurs? En or? Qu'est-ce qui justifie ce paiement? L'étalon, vous le savez, au Mexique est l'étalon d'argent, tout le monde peut se libérer en argent; c'est la monnaie libératoire. La monnaie d'or, c'est une monnaie que l'on peut acheter à des prix variables, au prix du change, qui ne sera plus le prix de la relation d'autrefois de 15½ à 1, mais vraisemblablement de 32, 34, 35. Comment voudrait-on aujourd'hui condamner le Mexique à faire l'achat de cette monnaie d'or qui n'est pas sa monnaie libératoire pour payer une dette qui serait constatée à sa charge?

Il y a dans la loi gouvernementale du Mexique les articles 635 en 636 que je me permets de vous lire:

Art. 635. La base de la monnaie mercantile est la piastre mexicaine, et c'est sur cette base que se feront toutes les opérations commerciales et l'échange sur l'étranger.

Art. 636. Cette même base servira pour les contrats faits à l'étranger et qui devront avoir leur complément dans la République mexicaine, de même que pour les lettres de crédit, chèques tirés d'autres pays.

Peu importe donc qu'il s'agisse d'un étranger ou d'un mexicain, celui-ci comme le gouvernement mexicain peut se libérer en argent, c'est la loi qui le dit. Dès lors, messieurs, comment les demandeurs pourraient-ils justifier leur prétention de se soustraire à l'application de cette loi générale et demander pour eux le paiement en une monnaie autre que celle qui est la monnaie du Mexique, en une monnaie exceptionnelle qui devrait être achetée?

Notez, messieurs, que c'est d'autant plus injustifiable que, lorsque le Mexique a pu réaliser les propriétés, il en a reçu le produit en argent.

Je signale encore ceci, qui appellera peut-être une explication de mes honorables contradicteurs dans une autre audience: Pourquoi l'évêque de Grass Valley, dont le diocèse est un des trois de la Californie n'est-il pas au procès? Sur les trois diocèses de Californie deux seulement sont représentés, ceux de San Francisco et de Monterey, il y en a nécessairement un troisième qui n'est pas représenté et que ne peut pas obtenir condamnation à son profit. Lorsque le premier débat a eu lieu devant la Cour mixte, celle-ci a eu devant elle les trois évêques représentant les trois diocèses de Californie; j'ignore pour quelle raison le troisième n'est pas représenté aujourd'hui; mais je fais cette indication au point de vue du chiffre de la demande.

Enfin, il y a une considération qui en tout cas n'aura pas échappé à des jurisconsultes qui connaissent spécialement cette matière du droit international. Il est bien certain que si un peuple à un moment donné contracte une dette, cette dette doit être répartie sur l'ensemble du territoire. Si donc en 1842 ou en 1845 le Mexique a employé des fonds dans un but politique quelconque c'est l'ensemble de son territoire qui devra rembourser la somme parce que c'est l'ensemble du territoire qui est censé en avoir profité; or, comme une grande partie, plus de la moitié du territoire s'est trouvée enlevée au Mexique, il se trouverait que M. Ralston devrait à certains moments changer de barre et venir s'asseoir à nos côtés comme défendeur pour une partie de la demande, car ce seraient naturellement les Etats-Unis qui, ayant succédé dans les droits comme dans les devoirs que peut avoir cette partie du territoire, devraient par conséquent supporter cette charge; il y aurait là une répartition qui est juridique et élémentaire et qui assurément ne serait pas contestée par les Etats-Unis.

A toutes nos observations juridiques les demandeurs ont répondu: Est-ce juste? Eh bien, si nous avons démontré que c'est conforme au droit c'est juste, parce que ce qui est juste, c'est ce qui est conforme au droit. Nous disons donc que s'il devait être décidé que par le fait qu'on accepté un tribunal arbitral on fait abstraction de sa législation nationale, il est évident que ce serait le bouleversement de toutes les notions que nous pouvons avoir sur le Tribunal international, et ce n'est certainement pas ainsi qu'il interprétera sa compétence.

J'ai dit.

(La séance est levée à 5 heures et le Tribunal s'ajourne au lendemain à 10 heures.)

DOUZIÈME SÉANCE.

27 septembre 1902 (Matin).

Le Tribunal se réunit à 10 heures, tous les Arbitres étant présents.

M. LE PRÉSIDENT. Le parole est à Monsieur le conseil des Etats-Unis mexicains, M. Beernaert.

M. BEERNAERT. Messieurs, j'ai eu l'honneur de prévenir la Cour que ma plaidoirie complétera celle de M. Delacroix, et qu'elle sera elle-même complétée par une note rédigée par Son Excellence M. Pardo, l'agent spécial des Etats-Unis mexicains; il devrait être donné lecture de cette note pour qu'elle fasse partie de la plaidoirie, mais comme elle est à l'impression, peut-être la Cour trouvera-t-elle cette lecture inutile, la note devant être distribuée aux membres de la Cour et aux conseils de la partie adverse; la Cour y gagnera ainsi quelques heures de son temps précieux.

M. LE PRÉSIDENT. Le Tribunal prendra acte de cette déclaration. Je suppose que la note sera communiquée à la partie adverse?

M. BEERNAERT. Je viens de le dire, Monsieur le Président, je puis affirmer qu'elle pourra être distribuée aujourd'hui.

M. RALSTON. I suppose we shall have an opportunity to examine it.

M. LE PRÉSIDENT. La parole est au conseil des Etats-Unis mexicains, M. Beernaert.

PLAIDOIRIE DE M. BEERNAERT.

Messieurs de la Cour, de nombreuses questions de fait et de droit viennent d'être agitées devant vous, et vous voici en possession de tous les éléments du débat assurément grave et compliqué auquel donne lieu de Fonds Pie de Californie. Or, il se trouverait que c'était là un travail inutile! Naguère, devant la Commission mixte le procès n'a pas été plaidé, il n'y a eu que des échanges de notes; sans ces explications contradictoires qui éclairent toujours si utilement un différend judiciaire. La sentence du tiers-arbitre—il doit être permis de le dire—ne donne que de médiocres clartés, mais le débat actuel serait d'avance jugé pour toujours; tout serait dit, et votre tâche se bornerait à constater que vous n'avez rien à juger!

Sans doute, dit-on, l'Eglise catholique de Haute Californie n'a aucun droit sur le Fonds Pieux en lui-même, et ses évêques ne peuvent prétendre à aucune part de la propriété des biens qui le dotaient ou de la créance qui les a remplacés. On déclare que le propriétaire, c'est l'Etat mexicain. Mais cette propriété serait une charge et non un avantage. L'Etat mexicain se trouverait condamné à demeurer propriétaire, mais sans avoir rien à retirer de ce Fonds il aurait à payer à perpétuité 6 pct. d'intérêts sur le capital qui le représenterait. Et cette obligation perpétuelle, indéfinie, sans terme possible, il aurait à l'acquitter dans des conditions vraiment ruineuses et qui donneraient à la situation un caractère presque usuraire: il aurait à payer en or!

En bien, messieurs, sur tous ces points, il y aurait chose jugée, et tel est le moyen que l'on nous oppose en ordre principal.

J'estime, messieurs, que cette exception de chose jugée n'est nullement fondée, et j'appuie mon opinion sur trois moyens différents: Le premier, c'est que la demande actuelle n'a pas été jugée; et elle ne l'a pas été pour cette bonne raison qu'elle ne s'était pas produite, or jamais l'autorité de la chose jugée ne peut dépasser les limites du dictum

d'une sentence, et ce dictum lui-même ne peut sous peine d'annulation ou même de nullité, excéder les termes de la demande dont le juge est saisi. En second lieu, je dis qu'il n'y a pas chose jugée parce que l'objet de la demande d'hier était différent de l'objet de la demande d'aujourd'hui. Enfin, je dis qu'entre la demande d'hier et la demande actuelle il ne peut y avoir identité de cause, puisque l'on allègue des droits successifs venant à échéance chaque année, partant des lésions de droit différentes, et que dans ces conditions la cause ne peut pas être la même, les faits et le droit étant sujets à d'incessantes, à d'inévitables fluctuations.

C'est, messieurs, la triple démonstration que je veux entreprendre de vous faire.

Mais, avant d'en aborder les éléments, je demande à vous rappeler en quelques mots les circonstances dans lesquelles le premier procès s'est engagé, et celles où a surgi la seconde demande, car à mon sens elles s'accordent bien peu avec le caractère perpétuel et prétendûment indiscutable que l'on voudrait attribuer au droit que l'on réclame.

Vous savez, messieurs, que les Etats-Unis se sont emparés de la Haute Californie en 1846, et que cette annexion a été consacrée le 2 Février, 1848. Il n'y avait à cette époque qu'un seul évêché pour les deux Californies, et par suite du traité de Guadalupe Hidalgo, cet évêché se trouva à cheval sur les deux territoires, le diocèse s'étendant à une partie du territoire mexicain et à une partie du territoire devenu americain. Le siège épiscopal était établi à Monterey, c'est-à-dire dans la Haute Californie devenue américaine.

Mais précisément l'évêque Don Diego vint à mourir le 30 avril, 1846, au moment où ces choses se passaient. Il paraît—je dis qu'il paraît, parce que je n'ai pas trouvé au dossier de documents à cet égard—il paraît que le siège épiscopal de Monterey fut alors occupé par un vicaire apostolique à titre d'interim.

C'est en 1852 que cet unique diocèse fut fractionné. Il y eut désormais un évêché mexicain pour la Basse Californie, et l'on établit pour la Californie devenue américaine, deux diocèses, l'un archiépiscopal à San Francisco, et l'autre épiscopal à Monterey. Cette nouvelle institution fut régularisée comme elle devait l'être par un bref pontifical en date du 29 juillet 1853; il se trouve au livre rouge publié par les soins de nos très honorables contradicteurs.

La Cour sait que plus tard—en 1868—il y eut un nouveau fractionnement, et qu'alors on détacha du diocèse de Monterey certains territoires pour en faire le diocèse de Grass Valley.

S'il faut admettre la thèse des demandeurs, en 1848 des droits indiscutables se seraient ouverts en faveur des nouveaux diocèses catholiques de la Haute Californie; il y avait là une indivision qu'il était urgent de régler; cette nécessité devait apparaître plus vivement le jour où l'Eglise américaine se trouva régularisée.

Or, il est certains que ni le vicaire apostolique qui a fait l'interim du siège épiscopal, ni Monseigneur Alemany dont on connaît cependant le zèle, ne soulevèrent de réclamation d'aucun genre avant 1859. Ainsi, on aurait laissé passer plus de dix années sans faire valoir un droit que l'on représente comme évident!

Monseigneur Alemany a dit dans un affidavit publié au livre rouge qu'il s'était rendu à Mexico en 1852 et qu'il avait fait alors à ce sujet quelque réclamation. M. Thornton dans sa sentence dit qu'à raison de la qualité du personnage dont cette affirmation émane il n'y a pas

lieu de douter de son exactitude, mais en ajoutant qu'il n'y a point trace de la démarche alléguée. Ce langage, nous le reprendrons pour nous-mémes; mais comment tenir quelque compte d'une communication verbale dont il ne reste aucune trace écrite et dont on ne peut indiquer exactement l'objet?

Ni dans les archives épiscopales ni dans celles du Gouvernement mexicain, il ne reste aucun document se rapportant aux rapports qui se seraient établis à cette époque. Et la meilleure preuve qu'il n'y a pas d'importance à y attacher c'est qu'il n'y est même pas fait allusion dans le travail, d'ailleurs remarquable, que M. Doyle a fait à l'appui de la réclamation des évêques en 1859, M. Doyle que j'ai le regret de ne pas voir ici, à raison de son grand âge je pense, et à qui je prie son fils de transmettre mon salut de l'autre côté de l'Atlantique.

J'oubliais d'ajouter cette autre considération qu'en 1852 Monseigneur Alemany n'aurait eu aucune qualité pour revendiquer un droit au nom d'un diocèse américain, puisqu'à cette époque il n'y a aucune trace que cette Eglise nouvelle se fût fait incorporer et eût par conséquent l'existence officielle qui d'après la législation américaine lui permet de posséder et de recevoir. La déclaration des évêques et leur incorporation avec les droits qui en résultent, ne datent que de 1854—ce document se trouve au livre rouge—et on comprend qu'on ait attendu pour ce faire que l'Eglise américaine fût régularisée, par sa séparation de l'évêché mexicain; jusque-là l'incorporation eût amené je ne sais quelle existence hybride qui aurait prêté à des difficultés; sans doute on aura voulu y échapper.

Donc, messieurs, aucune réclamation de 1846—1848 jusqu'à 1854, et l'Eglise reconstituée n'y songe pas davantage avant 1859!

Chose assurément étrange, elle attend, pour faire valoir le droit qu'elle s'attribue, que précisément la législation mexicaine eût achevé de l'en priver en effet et qu'une loi du 5 février 1857, reprenant les dispositions le la loi espagnole dont argumentait hier M. Delacroix, nationalisa, confisquât si on veut, tous les biens d'Eglise. Il fallut, semble-t-il, que ce fait grave intervînt, pour que les évêques se souvinssent que depuis dix ans ils étaient fondés à réclamer une part considérable du Fonds Pieux de Californie.

La première réclamation est du 20 juin 1859, et, chose curieuse, à qui l'adresse-t-on? Est-ce au Mexique? Lui réclame-t-on ce règlement comme allant de soi? S'excuse-t-on de ne pas y avoir songé plus tôt? Pas le moins du monde: c'est au Gouvernement des Etats-Unis que l'on s'adresse, par un mémoire très remarquable de M. Doyle; mais ce Gouvernement parut n'y attacher aucune attention, au moins n'y donna-t-il point suite.

La Cour sait que dans ce procès nous sommes dans une situation vraiment difficile; le dossier est loin d'être complet, et nous n'avons guère que les pièces soumises naguère à la Commission mixte et qui ont été imprimées à Washington comme dossier commun; nous en avons réclamé avec instance à Mexico, mais la Cour sait que d'ici là il faut un long temps pour écrire et pour obtenir réponse; notre dossier n'est donc pas ce que je voudrais qu'il fût. Mais toujours est-il que, le livre rouge à la main, nous pouvons affirmer que la lettre du 20 juin 1859, première expression de la réclamation épiscopale, ne fut suivie ni d'une réclamation au Gouvernement mexican ni d'une réponse du Gouvernement des Etats-Unis aux évêques, ni même d'un simple accusé de réception.

Ce qui paraît plus étrange encore, c'est que Nos Seigneurs les évêques laissèrent passer dix années sans s'étonner de ce silence et sans même adresser au Gouvernement des Etats-Unis une lettre de rappel.

Mais alors la situation change. La Cour sait que de nombreux griefs privés étaient survenus depuis la séparation de la Californie du territoire mexicain; des citoyens des Etats-Unis disaient avoir des réclamations à faire à charge du Mexique et vice versa. L'on convint d'instituer une commission mixte et on lui donna des pouvoirs quasi-arbitraux.

Il importe, messieurs, de constater et je n'ai pas besoin d'y insister, que les pouvoirs de cette commission mixte ne visaient que des conflits entre citoyens de l'un des deux Gouvernements, mais qu'à aucun point de vue et à aucun titre la commission mixte ne pouvait avoir à statuer sur une difficulté quelconque, sur un différend quelconque entre les deux Etats. Ce n'est pas sous cette forme qu'aurait pu se vider un différend international.

Donc, institution d'une commission mixte pour statuer sur les différends des citoyens américains et les Etats-Unis et des citoyens américains et le Mexique.

Les évêques se décident à suivre la voie ainsi ouverte et à saisir la commission mixte de leurs prétentions, en recourant encore cette fois aux bons offices de M. Doyle, qui rédige pour eux un mémoire où il rappelle la lettre de 1859; et cette fois il réclame au nom des trois evêques intéressés; l'évêque de Grass Valley prend place à côté de l'archevêque de San Francisco et de l'évêque de Monterey.

Mais cette fois encore la réclamation n'est pas adressée au Gouvernement mexicain. A cette époque-là—en 1870—il n'est encore saisi de rien, M. Doyle s'adresse à M. Hamilton Fish, secrétaire d'Etat des Etats-Unis, et celui-ci saisit par un simple renvoi la commission mixte de cet objet comme des autres différends pendants.

Ainsi de 1846–1848 jusqu'en 1870, c'est-à-dire pendant 22 ou 23 ans, rien n'est demandé au Mexique, et il y a eu une seule réclamation dont on ne lui a pas même donné connaissance: la lettre de 1859 adressée aux Etats-Unis. Assurément ces faits, même au point de vue de la thèse que je plaide en ce moment, ne sont pas sans importance. Mais quant à la chose jugée ce qui suivit est peut-être plus intéressant encore.

La sentence de Sir Thornton est du 29 novembre 1875. Elle a porté sur la seule chose qui eût été demandée; rien du principal du fonds ou de la créance qui aurait pris la place de la valeur originaire; pas un mot dans la décision d'un droit perpétuel, d'une rente perpétuelle, d'une obligation perpétuelle de la part du Mexique envers les évêques américains. La condamnation ne porte que sur ce qui était demandé, c'est-à-dire sur 21 annuités partant de 1848 jusqu'à 1870.

Je fais remarquer en passant, messieurs, que l'allocation faite en vertu de cette première sentence partait du jour même de la séparation des deux territoires, et reconnaissait ainsi à l'Eglise américaine un droit qu'elle ne pouvait faire valoir aussi longtemps qu'elle n'était pas incorporée; jusque-là cependant elle était sans existence et ne pouvait être admise à faire valoir aucun droit. Observation que je ne fais d'ailleurs qu'en passant, car le Mexique s'est exécuté et ne réclame point.

Si la sentence alloue des intérêts depuis 1848, elle s'arrête à 1870, et voilà assurément quelque chose d'assez étonnant puisqu'elle est de 1875: cinq années s'etaient passées depuis la demande, cinq nouveaux "droits

annuels" s'étaient ouverts, quoi de plus simple que de les faire valoir en demandant aux juges d'y statuer en même temps que sur le reste? Eh bien, non, on ne le fait pas, et je vous dirai pourquoi. Pas même, à ce sujet, la moindre réserve.

Aussitôt après la sentence, le Gouvernement mexicain reçut une lettre de son avocat, M. Avila. Celui déclare (V. Correspondance diplomatique aux pages 77 et 78):

> Que quoique l'arrêt final se rapporte seulement à des intérêts accumulés, à une époque fixée, la réclamation doit être tenue comme réglée in toto, et que par conséquent toute nouvelle réclamation par rapport au capital du Fonds ou à des intérêts ultérieurs échus ou à échoir, serait à jamais inadmissible.

L'avis était catégorique, et il émanait de l'avocat du Gouvernement mexicain, qui avait dirigé le procès. Il semble que M. Avila se soit notamment inspiré de la vieille théorie romaine mieux connue encore en Espagne et au Mexique, d'après laquelle jamais un droit ne pouvait donner qu'une action. Ce n'est pas à vous, messieurs, que je rappellerai l'ancienne formule romaine accordée par le prêteur et cette règle invariablement suivie qui ne permettait pas une seconde action fondée sur une même base.

Donc, M. Avila dit à son gouvernement, lui qui vient de plaider l'affaire, que tout au moins c'est une chose finie, qu'on n'y reviendra pas, et que les 21 années d'intérêts payés, tout sera dit.

Le gouvernement du Mexique transmet — dès le lendemain je pense — cette lettre aux Etats-Unis en s'en appropriant les termes.

Que va-t-il arriver? Si le Gouvernement des États-Unis est d'avis qu'il y a au contraire une décision de principe, d'un effet permanent, il va assurément trouver cette lettre presque impertinente: Comment! vous prétendez que tout est réglé! que la décision relative à 21 années d'intérêts est une solution in toto! par exemple! mais c'est le principe qui est décidé; c'est un droit perpétuel qui est reconnu! Et à vous, Messieurs du Mexique, qui venez dire que vous n'aurez jamais plus rien à payer, je vous rappelle qu'à côté des 21 années allouées il y en a cinq qui sont dues encore, et par conséquent je vous prie de vous libérer immédiatement.

Voilà la réponse à laquelle il fallait s'attendre si la conviction des Etats-Unis était ce que l'on dit aujourd'hui. Eh bien, messieurs, ce n'est pas du tout cela: le Secrétaire d'Etat (sa lettre se trouve également au livre rouge, page 79) déclare qu'il ne veut pas s'expliquer; il ne le peut pas; il s'agit, dit-il, d'une décision de justice, elle est ce qu'elle est, on n'y peut rien changer. Seulement, s'il ne dit rien, il ne veut pas qu'on prenne ce défaut de réponse comme un acquiescement— et je n'ai garde de le soutenir.

A cette lettre qui ne dit rien, mais qui sûrement n'allègue aucun droit perpétuel et ne réclame pas même quant aux intérêts échus depuis 1870, M. Mariscal se borna à répondre (page 60) "que ni M. Avila ni lui ne songent à rouvrir une question close et à mettre en doute le caractère définitif et concluant de l'arrêt intervenu"— nouvelle affirmation de la même pensée.

La correspondance en resta là.

Et ce qui est assurément intéressant, c'est qu'ensuite les Etats-Unis ne réclament plus. Ce qui est plus extraordinaire encore, c'est que les évêques, qui viennent de gagner leur procès et à qui cinq années seraient dès lors dues, n'en demandent pas le paiement; et cette

indifférence des évêques, ce silence dure depuis 1875 jusqu'en 1891. Ils attendent qu'il y ait de nouveau 21 années d'intérêts échus comme la première fois—1870 à 1891.

Ainsi, messieurs, tandis que le Mexique dit que pour lui le débat est clos, qu'il y a jugement in toto, les évêques ne disent rien, ils ne réclament qu'après 21 années accumulées, 16 années après la première sentence. La lettre du M. Ryan qui rouvre le débat porte la date du 17 août 1891.

Puis, six années se passent et c'est sous la date du 1er septembre 1897 que le Secrétaire d'Etat, M. Clayton, appelle de nouveau l'attention du Mexique sur la réclamation des évêques.

La Cour sait que cette correspondance a abouti à la convention d'arbitrage ensuite de laquelle nous avons le très grand honneur de plaider en ce moment devant elle.

Il faut reconnaître, messieurs, que dans les circonstances que je viens de rappeler, l'allégation de la chose jugée d'un droit indiscutable auquel il n'y avait rien à objecter est bien un peu surprenante. Que de temps on aurait mis à s'apercevoir de ce droit et à en vouloir tirer fruit!

Mais c'est la question en elle-même que j'ai à examiner.

Nos honorables contradicteurs ont dépensé beaucoup de temps et beaucoup de talent pour établir des principes que nous ne songeons nullement à contester. Et tout d'abord la légitimité de cette fiction qui élève la chose jugée à la dignité d'une vérité. Elle existe, dit-on, dans toutes les législations, elle est nécessaire.

Je le reconnais volontiers: il ne faut pas que l'on puisse remettre en question ce qui a été jugé, et je sais que déjà Cicéron plaidant pour Scylla disait que cette fiction était le plus ferme soutien de la République.

Mais, si c'est une fiction nécessaire, ce n'est qu'une fiction. Toute œuvre humaine est sujette à l'erreur et notre pauvre raison n'a hélas! rien de commun avec l'absolu.

On voit la justice modifier incessamment l'interprétation de la loi: c'est ce qu'on appelle les variations de la jurisprudence. On voit les mêmes faits, les mêmes circonstances, établis appréciés ou interpretés de la façon la plus différente, le même contrat donner lieu à des procès successifs et lu à des aspects tout opposés.

Souvent donc le juge se trompe, mais la vérité de la chose jugée n'en est pas moins, et je le proclame avec vous, une fiction nécessaire.

Seulement, quel est le véritable caractère de cette notion? Quelle en est la portée? A-t-on eu cette prétention impossible que l'œuvre de la justice pût apparaître une, sans tache, sans faiblesse, sans contradictions? Du tout! C'eût été une entreprise impossible.

Non seulement les juges, mais le même juge peut varier du tout au tout dans l'appréciation des mêmes faits ou d'une même question de droit. Les tribunaux n'ont et ne peuvent avoir à cet égard qu'un seul guide, c'est leur conscience.

Mais ce qui n'est pas admissible, c'est que les mêmes querelles soient recommencées: la paix publique ne le permet pas.

Qu'est-ce donc que la chose jugée? Vérité tout ce que le juge a dit? Non, rien que ce qu'il a ordonné. La chose jugée reside seulement et exclusivement dans le dictum de la sentence, car c'est là qu'il parle comme juge.

Et encore dans ces limites il ne s'agit que d'une vérité relative; ce

qui est jugé n'est vrai que s'il s'agit de la même demande—eadem questio—si elle est basée sur la même cause et agitée entre les mêmes parties agissant en la même qualité.

Et c'est parce que tel est le caractère de notre fiction que les auteurs s'accordent à dire qu'il n'y a chose jugée ni quant aux constatations de fait ni quant au droit. Elle ne consiste que dans l'application emprique du droit à un fait déterminé à l'égard des parties en cause; une question de relation pas autre chose.

C'est, messieurs, ce que dit, et en fort bons termes, un auteur qu'on a cité et sur l'autorité duquel j'aurai à revenir, Griolet, dans sa Dissertation sur l'autorité de la chose jugée, notamment aux pages 7 et 9.

Autre conséquence grave et profondément juridique de ces prémisses: Le juge ne crée pas le droit et il ne l'éteint pas; le droit est dans la spère de l'absolu, nous ne l'atteignons guère, mais l'absolu existe et il n'appartient pas à l'homme d'y toucher.

Le droit est donc au-dessus des décisions de l'homme, il est ce qu'il est, et l'erreur du juge n'y peut rien changer.

Mais par sa décision le juge élève une présomption qu'il est impossible de surmonter; du moment où il a juge, il n'est plus permis de dire que le droit est autre que ce qui a été jugé. C'est si peu une chose absolue qu'il n'st pas permis au juge de suppléer l'exception de chose jugée; si les parties ne l'invoquent pas le juge n'a pas le droit de la faire; il a beau trouver au dossier la preuve que ce qu'on lui demande a été jugé et dans les conditions requises pour établir la chose jugée, il n'en peut tenir compte si on ne le lui demande point. Pourquoi? Précisément parce que ce n'est qu'une présomption d'une valeur relative et exclusivement réservée à l'ayant-droit. Si celui-ci a quelque trouble de conscience, s'il estime que la chose jugée en sa faveur a été mal jugée, il peut ne pas s'en prévaloir dans une autre instance; le juge n'y peut point contredire (Griolet).

Et allant plus loin encore, l'un des géants de l'ancien droit français, Cujas, disait que la chose jugée n'éteint pas même l'obligation naturelle; expression énergique de cette idée qu'il n'y a rien ici qui touche au droit en lui-même, mais seulement une présomption qui permet à celui qui a obtenu jugement d'empêcher qu'on ne remette son droit en question.

Il peut arriver, il arrive que dans un même procès, à propos d'une même question, il y ait tout à la fois présomption absolue de vérité pour le blanc et le noir, et un exemple n'est pas bien difficile à trouver. Nous poursuivons à deux le même droit, une succession, une revendication de propriété; le premier juge nous éconduit, il déclare notre réclamation non fondée: c'est le noir. Plus timide, l'un de nous s'abstient d'appeler, l'autre saisit le juge du degré supérieur de la même question et celui-ci réforme: c'est le blanc. Et la même présomption d'absolue vérité couvre ces deux décisions qui se contredisent.

Tout ceci, messieurs, n'établit-il pas la vérité de ce que j'affirmais: qu'il s'agit ici d'une fiction nécessaire mais qu'il faut ramener à ses véritables termes, et que comme le dit Griollet (page 68) il faut interpréter restrictivement comme toute exception?

Mais, revenons-en à ce qui est la chose jugée. La définition que j'en donnais tout à l'heure est empruntée à l'article 1351 du Code Napoléon, mais je crois qu'elle peut être considérée comme de droit universel.

Le texte de l'article 1351 est à peu près textuellement emprunté à l'une des sommités de la jurisprudence universelle, à Pothier, qui lui-

mêne avec les grands juristes des 16e, 17e et 18e siécles, l'avait déduit du droit romain.

Je parlerai peu du droit romain, messieurs, parce qu'en cette matière il prête peut-être à quelque confusion; à la notion de la chose jugée vient se mêler cette autre règle qu'un même droit ne peut donner qu'une action et que cette action une fois mise en mouvement s'éteint par sa consommation.

Tenons-nous en donc plutôt à l'article 1351 du Code Civil.

La vérité judiciaire ne s'applique qu'à ce qui a été jugé, et, partant, à ce qui a été demandé, car le juge ne peut jamais excéder la demande, elle ne porte que sur le dictum de la sentence et elle n'existe que dans les conditions que j'indiquais tout à l'heure. Il faut qu'il y ait eu identité de demande, identité de décision, identité d'objet et de cause, identité de parties, identité des qualités dans lesquelles ces parties agissaient.

Or, d'après nous il y a trois éléments de la chose jugée qui font ici défaut: La question d'aujourd'hui n'a pas été jugée; elle n'aurait pu l'être puisque la demande est nouvelle, l'objet de la demande est différent, enfin les deux demandes se fondant sur des causes successives ne peuvent avoir qu'une apparence d'identité.

Tels sont les points que je vais examiner.

D'après nos adversaires, la chose jugée résulterait non pas du dispositif de la sentence Thornton, qui ne porte que sur 21 années d'intérêts, mais de ses motifs; ils établiraient implicitement un droit permanent; et il y aurait eu chose jugée implicite pour l'avenir, même en l'absence de toute demande.

Il y a, messieurs, une remarque que je pourrais me dispenser de faire devant vous qui avez une si grande expérience des choses et du droit universel: c'est la différence de forme qui existe généralement entre les jugements du continent européen et d'une partie de l'Amérique, et une partie de ceux qui émanent des tribunaux américains ou anglais. Chez nous—je parle avec l'extension que je viens d'indiquer—il y a et il doit y avoir division entre les motifs et le dispositif, elle est prescrite, elle est nécessaire. En Angleterre et en Amérique, le juge a à cet égard plus de liberté, et il arrive que motifs et dispositif sont emmêlés dans une rédaction unique.

Mais ici, comme l'a plaidé hier M. Delacroix, nous avons à tenir compte de la forme des jugements continentaux parce que c'est celle usitée au Mexique et que c'est la législation mexicaine qu'il faut appliquer.

Or, il y a un point qui ne peut faire doute, c'est que en France, en Belgique, en Hollande, en Espagne, au Mexique, les motifs n'ont pas force de chose jugée. Comme je le disais tout à l'heure, les motifs disent quelle est la constatation de fait, quelle est l'appréciation du fait, quel est le thème de droit qui dicte la sentence; mais ce n'est pas la sentence, ce n'est pas le dictum du juge: c'en est la raison, l'explication, rien de plus. Or la vérité juridique couvre non ce que dit le juge, mais ce qu'il ordonne, quand il personnifie ainsi la puissance publique et que sa parole en est l'expression.

Ce que je dis là, messieurs, c'est en droit Français ou Belge l'enseignement de tous les auteurs.

Dalloz (V° jugements, 324, 958, etc.) dit:

> Le dispositif constitue le jugement proprement dit.
> C'est le dispositif qui constitue seul le judgement.

M. Larombière—la Cour sait quelle était la très haute autorité de cet ancien Premier Président de la Cour de Cassation de France—s'exprime ainsi:

M. DESCAMPS. Quel passage?

M. BEERNAERT. Sur l'article 1351, N°. 18:

La chose jugée réside exclusivement dans le dispositif du jugement, et non dans ses motifs.

Le Pandectes Belges . . . , la Cour sait peut-être que c'est une compilation fort importante déjà arrivée à son 70e volume et qui mérite assurément beaucoup d'attention . . . . s'expriment de même (V° Chose jugée, N°. 120 et suivants).

L'un de nos jurisconsultes les plus remarquables, M. Arntz, professeur á l'Université de Bruxelles, dit au Tome 3 de son Droit Civil, page 404:

La chose jugée résulte seulement du dispositif du jugement, non de ses motifs, quelle que puisse être l'opinion qui s'y trouve énoncée sur le point en contestation.

Laurent (N°. 29, Tome 20) est encore plus énergique:

Il est de principe que le dispositif seul des jugements a autorité de chose jugée [il ne discute pas, il affirme]. Les motifs donnés par le juge ne décident rien, il n'en peut donc résulter de chose jugée. Cela est fondé en raison; la présomption de vérité est attachée aux jugements afin de mettre fin aux procès et pour éviter qu'un second jugement contredise le premier. La chose jugée implique donc l'existence d'une décision judiciaire. Peu importe que les motifs expriment une opinion relative à un point contesté; si le dispositif ne consacre pas ce-t-te opinion en admettant ou en rejetant l'opinion énoncée dans les considérants, il n'y a pas de chose jugée. Un arrêt reconnaît dans ses motifs que le terrain litigieux est vague et que la commune demanderesse en doit être réputée propriétaire, mais le dispositif ne prononce rien à cet égard; il se borne à ordonner une expertise et en réservant le droit; la commune prétend qu'il y a chose jugée sur la nature du terrain et sur la question de propriété, en se fondant sur les motifs de l'arrêt. La Cour de Cassation de France a décidé que la chose jugée doit s'induire du dispositif, et non des motifs.

Et l'auteur continue.

Un autre jurisconsulte, peut-être l'un des plus remarquables qui aient écrit sur le droit civil français, Zacharie, professeur à l'Université d'Heidelberg, est plus énergique encore; voici ce que je lis au Tome 3 de son livre, paragraphe 769:

La chose jugée ne resulte pas des motifs, mais seulement du dispositif des jugements; aussi, bien que les motifs expriment relativement à un point quelconque des contestations une opinion explicite et formelle, il n'y a chose jugée sur ce point qu'autant qu'une disposition du jugement en a prononcé l'admission ou le rejet.

Le dispositif d'un jugement (et ceci est remarquable, messieurs) n'a l'autorité de la chose jugée que relativement au point qui s'y trouve décidé. C'est ainsi par exemple qu'un jugement qui sur la demande d'un créancier condamne le débiteur aux intérêts des intérêts déjà échus d'un capital dont le montant y est énoncé, n'a pas l'effet de de la chose jugée quant à la quotité de ce capital (c'est presque notre question). C'est ainsi encore qu'un jugement qui accorde des aliments au demandeur (c'est l'hypothèse signalée par Laurent dans un passage discuté par M. Ralston) en qualité de pére ou d'enfant du défendeur, n'a pas l'autorité de la chose jugée quant à la question de fraternité ou de filiation, lorsque cette question n'ayant pas fait l'objet de conclusions respectivement prises par les parties, n'a pas été posée et décidée par une disposition spéciale et explicite du jugement.

M. DESCAMPS. C'est clair!

M. BEERNAERT. Ce passage vous paraît clair?

M. DESCAMPS. Mais oui!

M. BEERNAERT. Eh bien! j'en suis enchanté, car il me paraît décisif! Montrez-nous donc, je vous prie, cette demande à un droit perpétuel que vous prétendez avoir été jugée! Montrez-nous donc, au moins dans le dernier état de la cause, les conclusions ou le mémoire où vous

auriez réclamé des intérêts non pour 21 années mais pour toujours! Ou dites-nous comment il aurait été possible au juge de statuer sur une demande qui n'était point faite!

Messieurs, puisque nos honorables contradicteurs paraissent d'accord avec ce que je viens de dire, je puis me dispenser d'accumuler les autorités.

Que la chose jugée n'est attribuée qu'aux motifs, cela est de jurisprudence constante et en France et en Belgique. J'ai là une longue série d'arrêts, mais je fatiguerais la Cour en la lisant; elle me permettra sans doute de lui remettre à cet égard quelques indications.[a]

Et le même principe est admis en Espagne et au Mexique. C'est ce que nous aurions voulu démontrer par le recueil de M. Pantoja auquel renvoie le mémoire de M. Azpiroz devant la Commission mixte; il nous est expédié, mais je crains qu'il ne nous arrive trop tard, et quant à l'exemplaire que nous adversaires, plus heureux que nous, possèdent, paraît-il, il semble que la pagination n'y soit pas concordante . . .

M. RALSTON. Il est à votre disposition.

M. BEERNAERT. Merci.

La même règle se trouve encore consacrée par une décision formelle de "Allgemeine Gesichtsordnung" d'Allemagne, que voici:

Les collèges de juges et les rédacteurs des jugements doivent distinguer soigneusement la décision réelle de ses motifs et leur donner une place différente sans les confondre jamais, car de simples motifs ne doivent jamais avoir l'autorité de la chose jugée.

Voilà pour l'Allemagne deux constatations intéressantes: "De simples motifs ne doivent jamais avoir l'autorité de la chose jugée;" et il est prescrit au juge de ne pas confondre ces deux choses, il doit séparer les motifs du dispositif.

Savigny, qui, vous le savez, enseigne une opinion différente et dont je parlerai tout à l'heure, se prononce dans notre sens par d'autres raisons; mais il reconnaît que sur cette question des motifs la plupart des auteurs allemands se prononcent dans un autre sens que lui, et son livre cite des décisions de la jurisprudence allemande qui décident la question comme les jurisprudences belge et française.

Et un autre auteur cité avec complaisance par nos honorables contradicteurs, M. Griolet, qui traite longuement la question, réfute la thèse de Savigny, et il y revient à maint endroit de son livre. Pour Griolet, il n'y a pas à tenir compte des motifs, ils n'ont que l'autorité du juge et ne participent en aucune façon—il le dit page 7—à la présomption de vérité attribuée à la chose jugée.

Il y revient page 9:

L'erreur de M. de Savigny commence quand il étend l'autorité de la chose jugée non plus seulement aux rapports de droit considérés comme motifs de la sentence, mais à des faits ou même à des droits qui ne sont pas *mis en cause*.

Et à la page 102, avec plus de précision, nous lisons:

Dans nos usages comme en droit romain, la sanction ou le refus de sanction constitue le dispositif du jugement . . . *aucun de nos auteurs* n'a enseigné un système analogue à celui de M. de Savigny sur l'autorité des motifs; et la jurisprudence reconnaît en principe que l'autorité de la chose jugée ne s'étend jamais à *aucun des motifs de la décision*.

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[a] C. C. F. 5 juin 1821, S. V. 1. 341, 21 décembre 1830, 31, 1, 152, 9 janvier 1838, 1. 550, 23 juillet 1839, 1. 560, 8 juin 1842. 1. 321, 30 août 1850. 1. 497, etc. Pandectes Belges, V° Chose jugée, N° 144 à 159.—Voir aussi C. C. B. 18 janvier 1877. P. 1. 85, 25 mars 1880, etc., Bruxelles 1 mars 1849. 1. 136, 2 août 1855. 2. 453, etc.

Vous retrouverez ailleurs encore cette même thèse—mais je ne veux pas abuser des citations.

Sir EDWARD FRY. Voulez-vous me prêter le livre?

M. BEERNAERT. Très volontiers, mais comme j'en aurai encore besoin, Votre Honneur voudra bien me le faire rendre.

Sir EDWARD FRY. C'est pour un instant seulement.

M. BEERNAERT. Je disais donc que l'ouvrage de Griolet confirme ma thèse en ce qui concerne l'absolue distinction à faire entre les motifs et le dispositif.

M. DESCAMPS. Voulez-vous avoir la bonté de m'indiquer les pages auxquelles vous vous référez, parce que c'est très important.

M. BEERNAERT. J'en ai indiqué plusieurs. Voyez aussi pages 102, 183, j'en signalerai d'autres encore.

Le principe que je viens d'indiquer a reçu diverses applications qui le mettent mieux en lumière. Non seulement les motifs d'une décision judiciaire n'ont aucune autorité de jugement, mais ils ne lient pas même le juge de qui ils émanent.

C'est la raison de cette règle fondamentale que l'interlocutoire ne lie pas le juge. Index ab interlocutorio discedere potest.

Et M. Larombière (N°. 16) fait remarquer que, pour qu'il en soit ainsi, il y a cette raison décisive qu'entre l'objet de la demande jugée par l'interlocutoire et la décision qui admet ou repousse cette demande au fond il ne peut y avoir identité, et que "l'identite d'objet est toujours l'une des conditions essentielles et fondamentales de la chose jugée." Sans doute le juge a exprimé son sentiment, et il peut l'avoir fait dans les conditions les plus explicites, les plus formelles; il n'y a plus qu'à en tirer la conclusion, mais peù importe, ce n'est qu'un sentiment, qu'un préjugé, et aussi longtemps qu'il n'y a pas jugement le juge est libre de changer d'avis.[a]

Je ne veux citer qu'un arrêt tout récent de notre Cour de Cassation (18 juillet 1901); et c'est là en jurisprudence une grande et très sérieuse autorité; plusieurs des membres de la Haute-Cour sont à même de confirmer ce que j'en dis.

"Considérant, porte cet arrêt, que le jugement du 19 novembre 1868 s'est borné à admettre la preuve de certains faits, que ce jugement est purement interlocutoire, que les appréciations qu'il contient sur le fond du procès ne constituent aucunement la chose jugée, celle-ci résidant exclusivement dans le dispositif des jugements."

Donc, le préjugé d'un jugement simplement interlocutoire n'a aucune force juridique, et voilà qui renforce mon argumentation de tout à l'heure.

Autre conséquence du même principe: Dans les Etats où, comme en France, en Belgique, et si je ne me trompe dans les Pays-Bas, la Cour Suprême n'a à juger que le droit et l'exacte application de la loi sans avoir à se préoccuper du fait, aucun recours en Cassation ne peut être admis si celle-ci ne vicie pas en même temps le dispositif. Des motifs erronés ne peuvent par eux-mêmes donner ouverture à cassation, car ne liant pas le juge ils ne disent pas le droit.

Cette question-ci, messieurs, ayant peut-être une relation plus directe avec la thèse que je défends, je me permettrai de vous indiquer quelques-unes des décisions de Cours Suprêmes qui l'ont ainsi jugée. Ce

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[a] V. C. C. F. 10 juin 1856 (D. P. 56. 1. 425).

C. C. B. 28 janvier 1848 (P. 48. 1. 296), 20 mai 1898 (98. 1. 191), 18 juillet 1901 (1901. 1. 349).

sont les arrêts de la Cour de Cassation de Belgique des 3 mars 1853 (Pasicrisie de Belgique 1853, 1. 249) 13 février 1865, et du 5 novembre 1888 (Pasicrisie, 1889. 1. 20). La Cour de Cassation de France l'a décidée aussi nettement par ses arrêts plus anciens des 8 février et 8 août 1837, 12 mars 1838, etc.

Si mince est l'importance des motifs au point de vue de la chose jugée qu'aucum pourvoi en Cassation n'est même admissible quand il y a contradiction, contradiction absolue, entre les motifs et le dispositif d'une même décision judiciaire. Ainsi, le jugement dit blanc dans ses motifs, noir dans son dispositif, la contradiction est absolue, peu importe l'erreur commise, il n'y a à tenir compte que du dispositif. C'est ce qu a jugé la Cour de Cassation de France—je suis confus de ces citations, mais peut-être sont-elles nécessaires—notamment le 11 février 1807, le 9 janvier 1839, le 23 juillet 1839, le 3 mai 1843.

Je crois donc, messieurs, pouvoir conclure de ce que je viens de dire que tout au moins au point de vue des législations qui procèdent du droit romain et spécialement de la législation hispano-américaine, on peut affirmer que la chose jugée réside exclusivement dans le dispositif, et ne s'étend jamais aux motifs d'un jugement.

Est-ce à dire que les motifs n'aient en pareil cas aucune importance? Ce n'est pas ma pensée. Les motifs peuvent être utilement invoqués pour déterminer le sens du dispositif, pour lui donner sa véritable portée, pour l'interpréter s'il est obscur; cela aussi est de jurisprudence, mais les motifs n'ont pas ici d'autre portée.

Il y a plus: les auteurs et la jurisprudence sont d'accord que même dans cette partie spéciale du jugement qui constitue le dispositif, la force de chose jugée ne s'attache qu'à ce que le juge ordonne et qu'il faut que ce soient des dispositions certaines: Sententia debet esse certa. De simples énonciations ou une condamnation sans précision ne participent pas à la présomption de vérité.

C'était déjà, messieurs, la disposition de la loi romaine; et Pothier la lui a empruntée. Vous pourriez voir aussi ce qu'en dit Larombière (Traité des Obligations, Tome 3, No. 19).

J'avais tantôt l'honneur de vous dire que sur cette question de la force des motifs, il y avait l'opinion divergente et qui assurément mérite d'arrêter l'attention de Savigny.

Il m'appartiendrait, messieurs, moins qu'à personne de ne point parler de cet illustre jurisconsulte avec le respect qui lui revient: je suis peut-être l'un des derniers auditeurs encore en vie de son cours de Berlin et je lui garde le plus reconnaissant souvenir. M. de Savigny n'étend pas l'autorité de la chose jugée à tous les motifs; il fait une distinction un peu nuageuse, peut-être trop nuageuse, entre ce qu'il appelle les motifs subjectifs et les motifs objectifs, et n'accorde qu'à ces derniers la force de la chose jugée. Pour lui, le motif subjectif n'est qu'accessoire, il peut avoir eu quelque influence sur l'esprit du juge, mais sans aller jusqu'à déterminer sa décision; le motif objectif, c'est le motif déterminant, celui-là devrait participer à la vérité de la chose jugée.

La Cour voit quel danger présenterait en pratique l'admission d'une semblable thèse, et combien serait délicate la recherche psychologique qu'il faudrait faire pour discerner les motifs décisifs et ceux qui n'ont qu'une valeur accessoire! Toujours est-il que telle est l'opinion de Savigny, et pour la préciser, il s'approprie ce que dit Bohmer:

> Les motifs qu'il faut retenir sont ceux qui forment l'âme de la sentence.

C'est la thèse que Griolet condamne avec une grande force de raisonnement, mais nous verrons tout à l'heure que par d'autres motifs Savigny nous donnerait raison, s'il était de nos juges.

De tout ce que j'ai dit jusqu'à présent je crois, messieurs, pouvoir conclure que l'exception de chose jugée ne pourrait nous être opposée que si dans la première sentence, la sentence de M. Thornton, il avait été statué sur notre cas; il aurait fallu que M. Thornton eût déclaré le droit des évêques, non pas seulement aux annuités qu'il a allouées, mais à un capital ou à la rente perpétuelle qui représenterait ce capital.

Or, messieurs, vous le savez, le contraire résulte du texte précis de la décision du tiers-arbitre qui ne porte condamnation qu'à 21 annuités seulement.

Et cela devient encore plus décisif lorsqu'on rapproche, comme il est toujours indispensable de le faire, la chose ainsi jugée de la demande dont le juge était saisi. C'est en effet une règle aussi élémentaire qu'universelle que le juge ne peut jamais dépasser les limites de la demande. La demande est la base du jugement, on ne peut l'excéder; c'est le vieux brocard: Tantum judicatum quantum litigatum. Et sous une autre forme c'est le principe proclamé par l'article 1351 du Code Civil; il n'y a, il ne peut y avoir chose jugée que sur ce qui a fait l'objet de la demande; telle est "l'âme"—je me sers à mon tour de cette expression—de l'article 1351.

En droit français, belge ou espagnol, si le juge a prononcé sur choses non demandées, il y a lieu à requête civile, et lui-même doit rétracter le jugement qu'il a rendu. C'est ce que portent les Codes de Procédure français et belge, article 480, N°. 3 et 4.

Laurent va plus loin: il n'admet même pas qu'il soit nécessaire d'une rétractation formelle; il ne faut pas, dit-il, tenir compte (Tome 20, N°. 13) du jugement en ce qu'il statue ultra petita.

Et je ne dois pas insister, puisque nos honorables contradicteurs eux-mêmes ont reconnu dans les documents distribués par eux que si des arbitres avaient statué au-delà de la demande, leur décision ne serait pas obligatoire. Savigny est du même avis.

Donc, les premiers juges n'auraient pu reconnaître un droit perpétuel et le consacrer que si pareille chose leur avait été demandée; il était impossible que leur sentence débordât la demande sans être nulle. Telle est la règle; elle est absolue et universelle.

Voyons ce qui a été demandé.

Au début, les évêques avaient annoncé une réclamation en capital; dans leur premiére lettre au Gouvernement des Etats-Unis, ils disaient qu'ils avaient à charge du Mexique des réclamations très importantes et se chiffrant par de grosses sommes—ils parlaient de 14 ou 1,500,000 dollars. Mais la partie demanderesse a plus tard changé complètement d'attitude pour ne plus demander que 21 annuités s'étendant de l'année 1848 à l'année 1870, et comme je le rappelais tout à l'heure, plus tard ils n'étendirent pas même leur demande aux annuités échues en cours d'instance, comme il eût été si naturel de le faire, sans même faire de réserves à ce sujet. Ainsi, ils réduisaient bien leur demande à 21 annuités, et lorsque Sir Thornton les a allouées il a fait exactement ce qu'on lui demandait; il ne lui eût pas été permis d'aller au-delà sans faire œuvre nulle.

Comment admettre dès lors que ses motifs eussent débordé et ce qu'il décidait et ce qu'on lui demandait de décider? En fait comme en droit c'était chose absolument impossible.

Et pourquoi, messieurs, ce changement d'attitude de la partie demanderesse? pourquoi aujourd'hui encore devant vous demandet-on, non pas la reconnaissance d'un droit perpétuel, mais seulement 32 annuités? La raison en est du plus haut intérêt et vous a déjà été indiquée.

C'est que le traité de Guadulupe Hidalgo avait donné quittance au Mexique à un double point de vue: de la part du Gouvernement des Etats-Unis il constituait un réglement formel, définitif et complet, écartant tout sejet de querelle, toute possibilité de conflit; et, chose plus importante à notre point de vue, ce même traité abolissait toutes les réclamations que pourraient avoir à faire des citoyens des Etats-Unis à charge du Gouvernement mexicain moyennant le paiement par le Mexique au Gouvernement américain d'une somme de 3,250,000 dollars; les Etats-Unis, en déchargent le Gouvernement mexicain, se chargeaient de faire eux mêmes droit à toutes les réclamations qui seraient reconnues fondées. Ainsi, désormais plus de réclamation possible par des citoyens de l'un des deux pays à charge du Gouvernement de l'autre, du moment où le principe ou la raison d'être de ces réclamations procédait de faits ou d'actes antérieurs à la ratification du traité.

Dans ces conditions, comment la réclamation d'une part du Fonds Pie pouvait-elle se produire? Comment réclamer à raison de faits, les uns datant d'un siècle ou d'un siècle et demi, les autres plus récents mais procédant du Gouvernement mexicain et des arrêtés par lesquels il a successivement donné puis enlevé à l'évêque de Californie l'administration des biens, mais tous bien antérieurs à la date du traité? C'était impossible, le texte était formel, et ce que les évêques américains ne pouvaient faire, il est évident que le Gouvernement des Etats-Unis l'aurait pu bien moins encore.

Sans le traité de Guadalupe Hidalgo, une réclamation du Gouvernement des Etats-Unis se serait présentée dans des conditions juridiques plus avantageuses que celle des évêques. Peut-être auraient-ils pu dire: Voici un Fonds ayant une destination publique, destiné à de grands intérêts, pour l'avantage d'un territoire qui est aujourd'hui divisé entre nous, partageons les ressources comme nous aurons désormais à nous partager les charges.

Mais le texte du traité de Guadalupe Hidalgo interdisait semblable langage.

On le comprit, et voilà pourquoi les évêques, après avoir annoncé une prétention à un capital ou à une rente qui représentait ce capital, se sont bornés à demander 21 annuités en disant que c'étaient là des droits qui avant 1848 n'étaient pas nés, qu'ils naissaient chaque année par le non paiement, que par conséquent il n'y avait pas été renoncé.

Le tiers-arbitre, messieurs, reconnaît la vérité de ce que je viens de dire; voici ce que je lis presque au début de sa sentence:

> Les réclamations antérieures à la ratification du traité de Guadalupe Hidalgo qui auraient pu être présentées avant cette date ne pouvaient être soumises à la Commission, mais on est recevable quant aux réclamations postérieures; et c'est ainsi qu'il alloue les interêts échus du 30 mars, 1848, jusqu'à ce jour.

"Jusqu'à ce jour" constituait une distraction—cela se voit même dans une œuvre de justice—car on était en 1875, et dans le dispositif l'arbitre n'alloue que les intérêts demandés, les seuls par conséquent qu'il pût allouer, c'est à dire jusqu'en 1870.—Ce montif-là du moins n'est pas invoqué comme valant chose jugée. . .

Ainsi, on ne pouvait pas réclamer un droit en principal, on ne l'a pas fait, et il n'y a pas été statué. Et, chose remarquable, aujourd'hui encore on reconnaît qu'on ne le peut pass! M. Ralston dit dans sa lettre du 21 février 1901.

Nous n'avons jamais réclamé la propriété ni le capital. C'eût été impossible, puisque les confiscations prononcées étaient des actes souverains.

On se trouvait donc devant une fin de non recevoir qu'on reconnaissait insurmontable, et voilà pourquoi on a transformé l'action en la réduisant à 21 ans, sous prétexte que le droit n'était violé que d'année en année et qu'ainsi il y avait autant de demandes annuelles différentes q'il y avait d'échéances.

J'avoue, messieurs, qu'en elle-même cette transformation de la demande me paraît injustifiable. Comment concevoir ce droit annuel qui n'aurait pas de principe? Comment naîtrait-il s'il n'y avait pas de droit antérieur? Ou bien vous aurait-il suffi de ne pas faire juger ce droit, de ne pas le faire reconnaître? Prétendriez-vous que votre titre s'imposait, qu'il faisait loi, qu'il ne fallait pas même le faire admettre, alors qu'il était si formellement contesté? Il faut bien que vous souteniez cela, car autrement la transformation de votre action ne se concevrait pas.

D'autre part, qu'est-ce donc que cet étrange respect des droits et des actes souverains du Mexique?—c'est le mot dont on se sert.

Le Mexique a nationalisé les biens du Fonds Pie, comme plus tard il a nationalisé tous les biens de l'Eglise, suivant en cela plus d'un précédent. On peut, dit M. Ralston, déplorer ces actes, les regretter—et je dois dire que sur ce point-là nous serions aisément d'accord; mais il reconnaît que c'est en vain que philosophiquement ou historiquement on les déplorerait, puisque telle est la loi. Et en effet, nous sommes ici non pas des hommes politiques mais des juristes: nous devons nous incliner devant la loi sans y contredire; la loi est comme les chiffres: on ne discute pas avec eux.

Mais qu'est-ce donc que cette façon de s'incliner? Vous reconnaissez que le Mexique est propriétaire du Fonds Pie que vous n'avez rien à réclamer à ce sujet; cette propriété il ne lui serait pas même permis de s'en dépouiller, il serait condamné à être propriétaire à perpétuité!—sorte de tunique de Nessus.—Mais en quoi consisterait ce droit que vous entendez respecter scrupuleusement? Dans l'avantage d'avoir à payer perpétuellement un intérêt de 6 per cent sur le capital soi-disant représenté, et cela indéfiniment, perpétuellement, et en or, et sans qu'on accorde au Mexique aucune intervention en ce qui concerne l'emploi des fonds, sans qu'on lui permette aucun contrôle!

Vous ne réclamez pas le capital, oh! non, vous respectez la loi mexicaine, vous reconnaissez que vous ne pouvez pas la discuter, il y faut obéir, mais vous réclamez tout ce que la propriété pourrait donner d'avantages, et même au-delà!

Quoi qu'il en soit de cette question que j'ai eu tort de traiter puisque M. Delacroix l'a fait hier de la manière la plus complète, il y a une chose ici qui me semble absolument inadmissible et sur laquelle je me permets d'appeler tout l'attention de la Cour: c'est que l'on plaide à la fois—qu'on ne peut réclamer le capital et qu'on s'est bien gardé de le faire, qu'on s'en garde encore aujourd'hui—et que cependant ce capital aurait été implicitement adjugé sous la forme d'une rente perpétuelle. Ce qu'on ne peut pas faire, c'est de prétendre en même

temps échapper à la fin de non recevoir que devait soulever nécessairement la demande de principe, et de dire que ce même principe a été jugé.

Il s'agirait, dit-on, d'un droit qui naît chaque année, et il serait jugé ad futurum, à perpétuité, relativement à des droits qui n'étaient pas nés!

Essayez donc de mettre tout cela d'accord. Pour moi je m'y essaie vainement.

Messieurs, on a eu pour le Gouvernement mexicain certains mots un peu vifs; je n'en veux point prononcer de semblables. La solennité de cette instance qui met pour la premiére fois en mouvement une institution à laquelle je tiens à grand honneur d'avoir pu contribuer, la personnalité de nos juges, la sphère élevée dans laquelle nous discutons doivent les exclure. Mais il doit m'être permis de dire qu'il y a ici de la part de nos adversaires une habileté d'attitude qui ne résistera pas à l'examen. A mon avis, il n'est pas correct de vouloir cumuler les avantages de deux situations contradictoires. Vous avez demandé 21 annuités d'intérêts et vous les avez obtenues; soit, cela a été jugé, la sentence a été exécutée; vous en demandez maintenant 32, vous y êtes recevables et je ne le conteste pas; mais je dis que quant à cette seconde demande succédant de si loin à la première j'ai le droit de me défendre sans que l'on puisse m'opposer la chose jugée, et vous ne pouvez le faire qu'en transformant le caractère de votre demande et en lui donnant dès la première instance ce caractère permanent et perpétuel qui l'aurait rendue absolument non recevable.

On a représenté ce qu'il y aurait d'étrange à voir ainsi soulever deux fois non pas la même demande mais la même question. Comment! dit-on, il a déjà été jugé que des intérêts sont dus, voici d'autres intérêts échus, et il faut un second procès!

Mais à qui la faute? A vous, et à vous seuls; qu'est-ce qui vous empêchait, si vous vous y croyiez fondés, de maintenir la forme que vous aviez originairement donnée à votre réclamation? Pourquoi ne pas demander la reconnaissance du droit allégué en principe? Pourquoi aujourd'hui encore ne le faites-vous pas? Pourquoi ne demandez-vous que 32 annuités, sans plus? Parce que vous ne le pouvez pas, parce que vous ne l'osez pas, parce que si vous donniez à votre demande une portée générale, le traité de Guadalupe Hidalgo se dresserait devant vous pour vous barrer le chemin. Donc ce n'est pas à nous qu'il faut s'en prendre de ce que vous dites une bizarrerie.

Et, tandis que je suis sur ce terrain, qu'il me soit permis de répondre à d'autres reproches que j'ai été surpris d'entendre dans la bouche de nos contradicteurs. Il n'est pas bien, a-t-on dit, d'accepter une sentence lorsqu'elle est favorable, pour la repousser dans le cas contraire; il ne se peut pas qu'on repousse la chose jugée sous prétexte qu'elle émanerait d'arbitres ou que l'on mette en doute leur compétence.

Où donc voit-on rien de semblable? Où le Mexique aurait-il manqué à ses devoirs de nation ou indiqué qu'il serait disposé à y manquer? Une première fois, il a admis l'arbitrage, et on a rappelé avec raison qu'il a eu ensuite dix occasions de s'y dérober puisqu'il a fallu proroger successivement les délais. Le Gouvernement mexicain n'y a pas songé; honnêtement et loyalement, il a reconnu qu'il y avait lieu pour lui de prolonger le terme du compromis, et, chose curieuse, on a paru vouloir en tirer argument contre lui!

Dans cet arbitrage, le Mexique n'a point contesté la compétence de la commission, il n'a contesté que la prétention de la saisir d'une réclamation à laquelle le traité de Guadalupe Hidalgo avait mis terme; et le Mexique avait raison puisque ce sont ces considérations qui vous ont déterminé à modifier la demande en lui donnant un autre caractère. C'est là, messieurs, ce que M. Azpiroz a fait remarquer dans le remarquable mémoire reproduit au livre rouge et sur lequel je me permets d'appeler l'attention de la Cour comme complément de notre plaidoirie: l'affaire est trop compliquée, trop touffue, trop longue, pour que l'on puisse tout dire.

M. Azpiroz disait que bien qu'on réduisît la demande à certaines annuités, elle avait la même nature; vous ne demandez, disait-il, que 21 années d'intérêts, mais ces 21 années supposent une base, un principe, et peut-être viendrez-vous dire plus tard que ce droit a été reconnu alors qu'il ne peut pas même être allégué. Et voici que précisément l'appréhension ainsi exprimée s'est réalisée. Il avait donc raison encore.

La défense du Mexique a été, à mon sens, absolument correcte. Mais il a succombé: le tiers arbitre s'est déclaré compétent pour la contestation limitée dont seul il s'est saisi. Et il a statué, statué sans grand examen, ou du moins sans examen de détail, puisque de tous les moyens et de tous les chiffres pue vous avez entendu discuter il n'est pas question dans la sentence. Mais le débat n'avait pas été éclairé par ces plaidoiries contradictoires qui font la lumière même pour les juges les meilleurs. Cette sentence, le Gouvernement mexicain l'a respectée, et pleinement exécutée, mais il doit être permis de dire, sans manquer de respect au juge qui l'a rendue, qu'elle n'annonce que des connaissances juridiques un peu sommaires. Lui-même le reconnaît d'ailleurs au début de sa sentence; Sir Thornton déclare ne pouvoir discuter les arguments formés par les deux parties, et décider d'après ce qu'il trouve juste et équitable.

Toujours est-il que le Mexique s'est soumis et a payé, comme il le devait. Nous reconnaissons à cette sentence, que je veux considérer comme arbitrale, force de chose jugée dans son dispositif. Mais nous plaidons, et nous avons le droit de plaider que la chose ainsi jugée se limite à la demande, qu'elle n'a pas statué pour l'avenir, et que la nouvelle demande dont vous êtes saisis nous trouve en possession de tous nos moyens de défense.

Pour le surplus, messieurs, la conduite du Mexique sera à l'avenir ce qu'elle a été jusqu'à présent. Son Gouvernement a trop le souci de la dignité nationale et le sentiment des devoirs que cette dignité commande pour qu'il soit permis d'en douter; ce n'est pas mon honorable et excellent collègue Son Excellence M. Pardo qui me contredira. Les critiques auxquelles je réponds en ce moment n'avaient donc pas même de prétexte.

Mais je reviens à mon sujet. Je crois avoir démontré qu'il ne faut tenir compte au point de vue de l'autorité d'un jugement que de son dispositif, de ce qu'il décide et a pu décider et non de ses motifs; mais je vous ai annoncé que j'avais encore à cet égard quelques mots à vous dire de Savigny.

Si Savigny, disais-je, était notre juge, il nous donnerait raison, malgré sa théorie contraire quant aux motifs; et voici à quel double point de vue. Savigny, lui aussi, veut que le juge ne puisse dire droit que sur ce qui lui est demandé, sans que jamais sa sentence puisse

excéder les limites de la demande, et il rend sa pensée en s'appropriant ces termes de Buchka:

"Le juge peut et veut prononcer sur tout ce qui est fixé comme *objet du litige par les actes de la procédure.*"

M. DESCAMPS. Quelle page?

M. BEERNAERT. Je vous l'indiquerai.

Messieurs, c'est en d'autres termes la reproduction de cette partie essentielle de l'article 1351 du Code Civil sur laquelle j'ai appelé votre attention, et qui vise l'objet de la demande et l'objet du jugement.

Eh bien, messieurs, si comme le dit Savigny le juge n'a pu statuer que sur l'objet du litige déterminé par les actes de la procédure, comment pourrions-nous être éconduits par la chose jugée?

Il y a un second point de vue auquel Savigny nous donne encore raison: c'est que d'après lui aussi jamais la chose jugée ne peut avoir d'influence sur des faits postérieurs. Le juge applique le droit à un fait accompli, mais il ne peut d'avance décider ce que sera le droit dans une hypothèse donnée. Le juge ne peut statuer ad futurum, cela n'est pas possible.

Vous pourriez encore, messieurs, consulter à ce sujet Laurent (T. 20 N° 37), un arrêt de la Cour de Cassation de France du 12 avril 1856 (D. P. 1. 260) etc.

Il y a une matière à propos de laquelle cette vérité juridique a été souvent mise en lumière: c'est lorsque les parties sollicitent et que le juge prononce des astreintes; prévoyant que la partie pourrait ne pas se soumettre à sa décision, il la rend d'avance passible de dommages-intérêts calculés par jour de retard ou autrement. On s'est demandé quelle est la valeur obligatoire de la chose ainsi jugée. Elle est dans le dispositif, et cependant semblable disposition n'a rien d'obligatoire.

Prise ad futurum, à raison d'un fait qui ne s'est pas encore produit, elle n'a que l'apparence de la chose jugée, et il est certain que ce qui a été ainsi jugé peut être discuté le lendemain et être remis en question.

Il me reste à développer mes deux autres propositions, mais je pourrai être ici plus bref.

(A midi la séance est suspendue jusqu'à 2½ heures.)

TREIZIÈME SÉANCE.

27 septembre 1902 (après-midi).

L'audience est ouverte à 2 h. 1/2, sous la présidence de M. Matzen.

M. LE PRÉSIDENT. La parole est au conseil des Etats-Unis Mexicains, M. Beernaert.

M. BEERNAERT. Messieurs, je crois avoir eu ce matin l'honneur de démontrer que la chose jugée ne porte que sur l'ordre de juge, ordre qui ne peut jamais excéder la demande, et qu'à ce seul point de vue elle ne peut nous être opposée. Je crois avoir démontré du même coup, et sans qu'il faille y insister davantage, que dans l'espèce l'une des autres conditions essentielles de la chose jugée vient à manquer aussi: c'est qu'entre les deux demandes il n'y a pas identité d'objet. La première portait sur 21 annuités bien déterminées, de 1848 à 1870, et il s'agit maintenant de 32 autres annuités, également déterminées, et qui portent sur les années 1870 à 1902. Entre les deux demandes, l'identité d'objet ne pourrait se concevoir que si l'on avait prétendu et si l'on prétendait encore à un droit perpétuel, puisqu'alors on pourrait dire

que toutes ces annuités ne constituent que des parties d'un même tout; mais, vous savez que ce n'est point ce qu'on a réclamé naguère, que ce n'est pas ce qu'on réclame aujourd'hui, et vous savez aussi pourquoi on ne pourrait pas le réclamer;—je n'ai donc plus à y insister.

Et j'aborde le troisième ordre d'idées qui doit, à mon avis, faire écarter la chose jugée.

Etant donné que d'après les demandeurs il s'agit d'actions multiples naissant d'année en anné, s'ouvrant par le non paiement, étant donné dis-je qu'il s'agit d'actions ainsi indépendantes les unes des autres, il ne peut pas y avoir entre ces demandes successives et multiples cette absolue identité de cause que la chose jugée comporte nécessairement; certaines annuités pourraient être refusées alors que d'autres auraient été adjugées, sans qu'il y eût entre le jugement qui admet et le jugement qui rejette aucune contrariété. Cette observation à elle seule me paraît décisive:

On a représenté à vingt reprises ce litige comme s'il s'agissait d'un capital dû et productif d'intérêts dont une partie à déterminer reviendrait aux évêques de la Haute Californie, ou si l'on aime mieux, d'une rente perpétuelle.

Et partant de ces prémisses on dit: comment serait-il possible qu'aprés avoir une première fois alloué des intérêts pour quelques années on n'en allouerait pas pour les années suivantes?

Mais c'est lá une confusion qu'il importe de dissiper. Il ne s'agit pas ici d'un capital. Mon collègue, M. Delacroix vous a, je pense, démontré que dans ce procès il n'est en aucune façon question d'un contrat civil, qu'à l'origine et à la base de la réclamation il n'y a ni dépôt, ni prêt, ni vente, ni rien de semblable; il s'agit d'un fonds constitué naguère dans un intérêt public et affecté à des intérêts publics; c'est à une part de ce fonds que l'on prétend droit.

Or, même en faisant abstraction de tout ce que j'ai plaidé ce matin, demandons-nous quelle est dès lors la situacion. Vous prétendez avoir droit à une proportion donnée, 85 pct. d'après vous, du revenu du capital formant aujourd'hui, dites-vous, le Fonds Pie de Californie. Eh bien, pour que vous puissiez être admis à réussir dans cette prétention-là, il y a trois conditions qu'il faut que vous remplissiez et que vous devez remplir successivement chaque année à propos de chaque demande: Vous avez d'abord à établir votre qualité, et votre qualité doit résulter et de l'existence d'une Eglise catholique en Californie et du maintien de la législation américaine actuelle qui donne à cette Eglise la personification civile. Je veux espérer que la législation américaine continuera, en matière religieuse à s'inspirer des considérations larges et généreuses qui ont détérminé ce grand pays à appliquer la même règle si éminemment libérale à toutes les confessions religieuses; mais c'est là une espérance et non une certitude, elle peut être contredite par les faits; en politique tout change et d' autres idées peuvent présider à la gestion des affaires publiques, comme cela s'est vu et se voit en Europe. Or, de la personification civile de l'Eglise dépend la qualité sans laquelle elle ne peut avoir aucun droit. Dès lors, rien qu'à ce point de vue, comment prétendre à une allocation perpétuelle?

Voyez, messieurs, ce qui s'est passé en France lors de la Révolution en ce qui concerne les droits féodaux. Il y avait là une série de choses jugées et de droits qui semblaient bien acquis. Mais avec la législa-

tion nouvelle toutes ces vérités juridiques, tous ces droites, toutes ces constitutions de rentes, de créances, que sais-je? sont venus à disparaître. Il en serait de même ici.

Il faut en second lieu, pour que vous puissiez avoir droit à une part du Fonds Pie, que l'Eglise catholique de la Haute Californie soit à même dans les circonstances du moment de réaliser les intentions des donateurs, puisque c'est là surtout ce dont elle se prévaut. Je laisse de côté, pour n'y pas revenir, ce que l'on vous a dit, et fort bien dit, du but patriotique, du but national autant que religieux qu'avaient ces donateurs; supposons, par une hypothèse bien gratuite, que leur pensée ait été exclusivement religieuse, qu'ils n'aient eu en vue que les Missions, que la conversion des Indiens; eh bien, pour que l'Eglise de la Haute Californie puisse réclamer une part du Fonds, il faut qu'elle soit à même de remplir ces intentions des donateurs. Le peut-elle? Y a-t-il encore des Indiens à convertir en Californie? On nous dit que oui, et on produit un document qui chiffre la population Indienne à la date, si je ne me trompe, du traité de Guadalupe Hidalgo. Quelle est la situation actuelle? En reste-t-il, et s'il en reste aujourd'hui, en restera-t-il demain? Chacun sait que la politique des Etats-Unis relativement aux Indiens diffère de ce qu'étaient les habitudes mexicaines, de ce qu'elles sont en général dans l'Amérique espanole, au Brésil et ailleurs. Dans ces vastes contrées il reste beaucoup d'Indiens, ils se civilisent dans une certaine mesure, il se produit même entre les blancs et eux quelques mariages. Mais aux Etats-Unis, qu'on le veuille ou non, que ce soit une politique suivie ou le résultat de la puissance d'absorption de la race, l'Indien disparaît. S'il en reste en Californie, je le demande encore, combien en restera-t-il demain?

Et puis, il ne suffirait pas qu'il y eût des Indiens, ni même des Indiens à convertir, on devrait encore établir que c'est à cet objet que peuvent et doivent servir les sommes que l'on réclame.

Il faudrait donc nous dire quelles sont les Missions qui restent, sous quelle forme elles existent, où elles sont établies, et puis aussi comment la législation des Etats-Unis en matière religieuse comporterait encore l'œuvre des Missions dans l'ordre d'idées où les donateurs l'avaient instituée.

Donc seconde condition à remplir. Et remplie aujourd'hui elle ne pourrait plus l'être demain: s'ily n'y a plus d'Indiens, s'ils sont tous convertis, ou si l'œuvre ne peut plus être accomplie, où serait votre titre? Les Jésuites seuls d'après les actes de donation auraient pu donner au Fonds une autre destination, c'est là un droit tout personnel, et vous seriez donc dans l'impossibilité de remplir la condition à laquelle votre droit serait subordonné; à ce second point de vue autant qu'au premier on ne comprendrait donc pas une condamnation ad futurum avec des effets perpétuels.

Mais ce n'est pas tout. Vous reconnaissez qu'à propos de ce Fonds Pie il y a un partage à faire: Il faudrait répartir les fonds entre la Basse et la Haute Californie, le Mexique d'un côté, les Etats-Unis de l'autre. Pour cette répartition il n'y a aucune base. C'est contrairement aux prétentions de NN. SS. les évêques que l'on a admis dans la première sentence un partage par moitié. Sir Thornton a trouvé semblable répartition équitable; il ne serait point juste, dit-il, de tenir compte de ce que la population de la Haute Californe est beaucoup plus considérable que celle de la Basse Californie, ce qu'il faut voir

surtout c'est l'œuvre religieuse à accomplir, et d'après lui on peut la considérer comme d'égale importance dans les deux parties de l'ancienne Californie.

Ce serait là en tout cas la vérité d'hier, résultant de considérations du moment; et les circonstances ici sont essentiellement variables et mobiles. Tenez, vous-mêmes, vous ne voulez plus de la solution de Sir Thornton, et vous prétentions sont beaucoup plus vastes: vous voudriez obtenir 85 pct. du total. Vous vous fondez sur une base qui est à notre avis absolument inadmissible, celle de la population. Mais supposons-la équitable, n'est-elle pas fort sujette à changement? Aujourd'hui, vous prétendez que la proportion de la population de la Haute Californie est à celle de la Basse comme 85 est à 15; mais demain la proportion pourrait être de 90 ou de 95.

Bien plus variable encore serait l'appréciation des conditions respectives des deux contrées, quant aux Indiens, à laquelle il faudrait, selon nous, se livrer.

Il ne peut donc y avoir de chose jugée, puisqu'elle serait invariable, à propos de choses qui doivent nécessairement changer.

Un autre fait, messieurs, marque quelle est l'importance de l'observation que je viens de présenter. On vous a montré hier combien est injustifiable la prétention de faire payer par le Mexique en or ce qu'il devrait. Lorsque cela a été ainsi admis par Sir Thornton, c'était sans discussion de la part du Mexique, et il n'y en a pas eu parce que à cette époque cela n'avait pas d'intérêt; l'ancienne proportion établie par l'union latine comme représentant la valeur relative des deux métaux était encore conforme à la vérité ou peu s'en fallait, et dès lors que pouvait-il importer au Mexique de payer dans l'une ou l'autre monnaie? Mais voici qu'aujourd'hui les circonstances ont changé à ce point que la dette du Mexique serait beaucoup plus que doublée si elle devait être payée en or, et que cette circonstance indifférente naguère deviendrait ainsi de la plus haute importance.

Et c'est dans ces conditions que l'on allègue la chose jugée; Sir Thornton aurait décidé d'avance qu'un demi-siècle plus tard on paierait en or, quoi qu'il arrivât. Il en serait ainsi même si la différence de valeur entre les deux métaux venait à s'accentuer encore.

Autre observation. Toutes les législations comportent certaines prescriptions en matière d'arrérages, de tout ce qui se paie d'année en année, et il semble évident que dans l'espèce ces prescriptions-là du moins sont encourues. Je vous rappelais ce matin ces vingt années passées sans que le prétendu créancier eût dit un mot à son prétendu débiteur! Mais je n'ai pas à y insister puisque cela vous a été dit. Mais comment pourrait-il y avoir ici aussi chose jugée, puisque pour chacune de ces annuités la question pouvait se présenter dans des conditions de fait différentes, et que les unes seraient prescrites alors que les autres ne le seraient point?

Combien tout cela démontre que c'est avec raison que les auteurs et la jurisprudence n'admettent pas que le juge statue pour l'avenir, mais seulement quant à des faits posés, ayant produit leurs effets juridiques et par conséquent pouvant être appréciés tout entiers?

Donc, messieurs, je crois avoir démontré qu'il n'y a pas chose jugée, et cela á de multiples points de vue—pas de dictum, pas d'identité de demande, pas d'identité d'objet, pas d'identité de cause.

Une autre considération encore me paraît confirmer ma thèse: Tout droit donne une action, tout jugement emporte avec lui un ordre d'exé-

cution; lorsque le jugement est rendu, on n'a plus rien à demander au juge; il a parlé, il a ordonné, la puissance publique doit assurer l'exécution de ce qu'l a décidé.

Eh bien, messieurs, supposons que dans l'occurence NN. SS. les évêques, au lieu d'avoir en face d'eux un Etat, se trouvent devant un particulier; comment auraient-ils pu s'y prendre pour faire valoir le droit dont ils se prétendent investis? Ils auraient remis leur titre, c'est-à-dire la sentence de Sir Thornton, à un huissier pour en exiger l'exécution. Mais l'huissier aurait dit: Je vois bien que 21 annuités doivent être payées, or elles le sont, je ne puis pas les réclamer á nouveau, et comment moi qui ne suis qu'un agent d'exécution trouverais-je dans ce titre un moyen de contrainte pour amener le débiteur à payer ce dont il n'est pas dit un mot?

C'est là, messieurs, une considération de plus. Elle confirme qu'il n'y a pas chose jugée, car la chose jugée comporte un mandement de justice, c'est-à-dire un ordre d'exécution, et ici il n'y a rien de pareil.

En réalité, messieurs, ce n'est pas vraiment la chose jugée que l'on invoque; c'est une sorte de préjugé, c'est-à-dire de chose jugée implicite, et l'on dit: C'est une action analogue, et les motifs qui l'ont fait admettre un première fois doivent la faire admettre encore.

Je reconnais volontiers que la sentence de Sir Thornton constitue aux mains de nos adversaires un argument qu'ils ont le droit d'invoquer; c'est une autorité dont je respecte la valeur, elle nous oblige à démontrer et à démontrer de très près que la sentence n'est pas juridique—nous nous sommes chargés de cette tâche et croyons l'avoir accomplie. Mais ce qu'il m'est impossible d'admettre, et ce que vous n'admettrez pas, je pense, c'est que cette sentence constitue par elle-mêne cette chose jugée qui n'admet plus ni examen ni discussion. Ce serait tout au plus un préjugé, et je crois avoir démontré que le préjugé, même dans le dispositif, ne lie pas le juge, même quand il émane de lui-même.

Chose jugée implicite, dit-on, et l'on invoque surtout le livre de M. de Savigny. Je vous ai montré déjà qu'à un double point de vue, l'autorité de Savigny peut au contraire être invoquée par nous — chose future et impossibilité pour le juge d'excéder la demande. Mais, même au fond et sur cette thèse de la chose jugée implicite, nous pouvons encore invoquer son sentiment, et voici ce qui me permet de l'affirmer.

Il est une question de droit spéciale souvent traitée et en droit romain et en droit moderne; cette question la voici. Après avoir demandé en justice un objet et avoir échoué dans cette prétention, peut-on introduire une nouvelle demande plus ample et qui comprend la prétention déjà repoussée? Savigny cite le cas que voici:

Un grand domaine comprend plusieurs terres, A. B. C.; je réclame, soit comme propriétaire et par revendication, soit comme héritier et d'après l'action héréditaire, la propriété de la terre A et j'échoue; on décide que ma revendication ou mon action héréditaire n'est point fondée; la demande est ainsi repoussée — c'est chose jugée. Mais quant à la terre B qui est à côté, je puis, dès le lendemain, reprendre exactement le même procès contre les mêmes adversaires, armé des mèmes pièces. La question est la même, parties et qualités sent les mêmes, titres et arguments sont les mêmes. Peu importe: l'action est recevable. Cela ne fait de doute pour personne. C'est ce que dit Savigny.

Mais il y a une autre question sur laquelle l'accord n'est plus complet,

et la controverse date des romanistes: Puis-je, après avoir revendiqué sans succès la terre A revendiquer le domaine tout entier, c'est-à-dire les terres A. B. C.? M. de Savigny estime que non parce que, dit-il, la demande ainsi présentée comprendrait celle déjà adjugée quant à A et que par conséquent il pourrait y avoir contradiction entre la décision qui m'accorderait le domaine entier et celle qui déjà m'aurait éconduit quant à la terre A.—Identité de demande, d'objet, de cause, de parties, de qualités.

Beaucoup d'auteurs, et parmi les plus illustres, ne partagent pas l'opinion de Savigny à cet égard, et prétendent qu'après avoir ainsi échoué dans la terre A, rien n'empêche de demander par voie d'action nouvelle la propriété de A. B. C.; et ils se fondent sur ce que, si la partie est comprise dans le tout, le tout n'est pas compris dans la partie, et qu'ainsi la seconde action est différente de la première, quoiqu'elle comprenne celle-ci. C'est l'enseignement de Larombiére, de Toulier, de Xachariae d'Arndz, de bien d'autres encore.

Dans cette controverse, qui n'est pas la nôtre, je ne veux pas examiner si c'est Savigny ou si ce sont ses contradicteurs qui ont raison; il me suffit que tout le monde soit unanime à reconnaître que l'on peut soulever une seconde fois un même débat, identiquement le même, s'il porte sur un objet matériellement différent. Et peu importe qu'il s'agisse du domaine B. après le domaine A, ou de certains intérêts, après d'autres intérêts, ou d'autres loyers. Le débat est toujours le même, mais il porte sur un objet matériellement différent.

Et il n'y aurait rien de plus extraordinaire à ce qu'en fait il y eût ainsi deux choses jugées contradictoires, que si Mgr de Grass Valley, qui n'est pas au débat—nous ne savons pas encore pourquoi—reprenant pour lui-même le procès actuel, cette nouvelle instance aboutissait à une solution opposée. Là, la question serait évidemment entière et il pourrait échouer là où Mgr. de San Francisco aurait réussi, ou réciproquement.

C'est la conséquence de cette nature spéciale de la vérité de la chose jugée et de la présomption qui en résulte, sur laquelle j'insistais au début de ma plaidoirie.

Ici encore, on a invoqué l'autorité de Griollet, et j'y reviens une dernière fois. Il serait véritablement surprenant que M. Griolet, qui combat si énergiquement la doctrine de Savigny quant à la confusion que celui-ci voudrait établir entre le dispositif d'une sentence judiciare et ses motifs objectifs, ne fût pas de notre avis. Ce matin, j'ai cité déjà certains passages de son livre en disant qu'il y en a d'autres. M. Descamps a demandé à cet égard des indications plus complètes; c'est une lacune que je répare. A la page 114 Griolet approuve la Cour de Cassation de France d'avoir décidé qu'une décision qui tranche un différend quant à la compétence en alléguant la qualité de commerçant, ne fait pas chose jugée quant à cette qualité.

Il y avait eu déclaration de faillite, et la faillite suppose nécessairement que l'on soit commerçant. Mais il n'y avait pas à cet égard chose jugée. On plaide qu'elle était implicite. Non, dit la Cour de Cassation, c'est un motif cella, rien de plus, donc pas de chose jugée.

Veuillez écouter, messieurs, ce que dit encore Griolet à la page 114 de son livre, en résumant ce qui précède:

> Le fait juridique qui a donné naissance au droit jugé ne peut être affirmé par le juge que comme cause de ce droit et comme motif de la décision: ainsi il n'y a pas de jugement sur la cause elle-même; la déclaration du jugement ne s'étendra donc pas aux

droits nés de cette cause qui n'auraient pas eux-mêmes été l'objet d'un jugement rendu.

C'est toute ma plaidoirie; elle est encore résumée dans quatre lignes que je trouve à la page 117:

Les jugements qui déclarent la faillite, qui prononcent l'interdiction, la séparation de corps, la séparation de biens, affirment ou nient les faits qui donnent naissance à la faillite, qui autorisent l'interdiction, la séparation de corps et la séparation de biens, mais il n'y a chose jugée sur aucun de ces faits.

Et page 123:

Il est bien certain que le juge a prononcé sur l'existence d'un droit lorsqu'il a sanctionné ou refusé de sanctionner ce droit; en connaîtra toujours et d'une manière sûr les déclarations rendues par le juge en interprétant la sanction ou le refus de sanction, la condamnation ou l'absolution, c'est-à-dire en recherchant les déclarations de droit qui dans chaque espèce sont appliquées par la décision du dispositif.

Je crois avoir ainsi donné satisfaction à mon honorable contradicteur, il voudra bien m'excuser de ne pas l'avoir fait dès ce matin.

Il est si vrai que d'après Griolet il ne peut y avoir chose jugée que sur ce qui a été demandé, par quelque conclusion formelle, qu'appuyé du reste de nombreuses autorités il enseigne qu'il n'est pas permis au juge de donner raison au demandeur qui fait défaut. Le juge peut trouver la preuve de son droit dans le dossier de la partie adverse, il peut y avoir quelque titre irrécusable et la conviction du juge est donc faite, il est en mesure de dire droit, eh bien, il ne le peut pas, et pourquoi? Parce que, comme le dit Griolet, il doit avoir été conclu et plaidé.

Le juge est saisi du droit que le demandeur met lui-même en cause (pages 127 et 136).

L'on voit que l'enseignement de Griolet ne diffère guère de celui de Laurent, dont l'autorité avait été plus spécialement invoquée par le Gouvernement mexicain dans la correspondance diplomatique et que nos honorables contradicteurs ont mal lu, qu'ils me permettent de le leur dire. Laurent est formel, et nous n'avons guère fait que répéter en d'autres termes son opinion. Il faut lire notamment son N° 32 tout entier:

Le dispositif d'un jugement a-t-il l'autorité de la chose jugée à l'égard de tout ce qui s'y trouve énoncé? Non; si le dispositif fait chose jugée c'est parce qu'il décide une contestation. Tel est le principe qui domine la matiére. Tout ce qui est étranger à la décision est aussi étranger à l'autorité que la loi attribue à la chose jugée. Ainsi, les simples énonciations n'ont jamais l'autorité de la chose jugée. Cela est fondé en raison; la loi attache une présomption de vérité aux décisions judiciaires parce qu'elle suppose que le juge les a mûrement délibérées et qu'il a pesé tous les termes de sa sentence. Cette raison ne s'applique pas aux simples énonciations; c'est une opinion que le juge émet sans en avoir fait l'objet d'une délibération. Un jugement accorde à une personne des aliments en qualité d'enfant; a-t-il l'autorité de la chose jugée sur la question de filiation? Si la question a été débattue entre les parties, l'affirmative n'est pas douteuse.

Et plus loin:

On objecte que le demandeur a réclamé les aliments en qualité d'enfant et qu'il ne pouvait les obtenir qu'à ce titre. Sans doute le juge n'a accordé les aliments qu'en supposant qu'il était enfant du défendeur, mais supposer n'est pas juger. La raison est d'accord avec la subtilité du droit; l'état d'enfant légitime est la base de l'ordre civil, etc.

En note, Laurent renvoie à l'autorité de Toullier et ajoute: "Toullier Tome 5, et tous les auteurs;" puis il passe à un second exemple:

Le créancier demande contre son débiteur les intérêts d'un capital . . .

J'ai montré que, dans notre cas, il ne s'agit pas d'un capital, mais supposons-le:

> Le créancier demande contre son débiteur les intérêts d'un capital; le juge condamne le débiteur à les payer; y a-t-il chose jugée quant au capital? On suppose que le dispositif énonce le montant du capital. Il a été jugé que la décision n'avait pas l'autorité de la chose jugée quant au capital. On peut objecter que le juge en allouant les intérêts décide implicitement que le capital est dû, puisqu'il ne peut y avoir d'intérêts sans capital. Sans doute, mais la question est de savoir s'il y a chose jugée, et le juge n'a rien décidé quant au capital.

Il passe encore à un autre cas, qui mérite également votre attention:

> Une instance s'engage sur une adjudication; l'adjudicataire allègue certains créanciers, le juge fixe le chiffre de ces créances et énonce le chiffre qui constitue le prix; postérieurement, l'adjudicataire soutient qu'une remise lui avait été consentie, on lui oppose la chose jugée. La Cour a décidé qu'il n'y avait pas de chose jugée quant au prix d'adjudication, car le prix n'avait été l'objet d'aucune conclusion devant le juge.

Voilà ce que dit Laurent, vous voyez qu'il est aussi net que possible.

Dans ce même ordre d'idées, messieurs, il me reste à vous citer deux autorités puissantes. C'est d'abord un arrêt de la Cour de Cassation de France du 6 février 1883, rapporté dans le Recueil Périodique de Dalloz, 1883-1-451. Il décide qu'après une demande en paiement de loyers, le litige peut se reproduire entre les mêmes parties quant à des loyers échus à d'autres dates, sans que la chose jugée puisse être opposée.

Voici la seconde espèce, et elle est toute récente: il s'agit d'un arrêt de la Cour de Cassation de Belgique en date du 5 avril 1900 (Pasicrisie Belge 1700-1-201). C'était un vieux débat remontant à l'ancien régime; des rentes étaient réclamées à charge de la commune de Jupille lez Liège par le bureau de bienfaisance de Liège; or, un premier arrêt avait condamné la commune de Jupille pour une moitié du capital, mais l'autre moitié n'avait pas été l'objet d'une décision formelle; il n'y avait que condamnation implicite. Cet arrêt rendu, le Bureau de bienfaisance de Liège décrouvrit de nouveaux documents qui modifiaient la situation et lui donnaient l'espoir de réussir là où il avait d'abord échoué. Le débat est repris et naturellement on oppose la chose jugée La Cour de Liège l'admet. Mais la Cour de Cassation l'a rappelée aux véritables règles du droit en cassant sa décision, et voici ce que je lis dans l'arrêt:

> Considérant qu'aux termes de l'article 1351 du Code Civil l'autorité de la chose jugée n'a lieu qu'à l'égard de ce qui a fait l'objet du jugement:
>
> Considérant que ce principe s'applique aussi bien quand la chose sur laquelle il a été statué est un objet déterminé dans son intégralité que quand elle n'en est qu'une partie indivise; qu'en constatant l'indivision de la dette, l'arrêt attaqué n'en constate nullement l'indivisibilité, et que les parties indivises d'un tout sont susceptibles d'affectations juridiques très diverses;
>
> Considérant qu'en décidant que ce qui avait été statué in terminis pour la moitié indivise de la dette l'avait été implicitement, mais nécessairement, pour l'autre moitié, l'arrêt attaqué a étendu l'autorité de la chose jugée à une partie de la dette qui n'avait pas fait l'objet de l'instance antérieure et a ainsi contrevenu au dit article 1351.

La Cour aurait pu en juger autrement s'il s'était agi d'une chose indivisible, mais pour une chose indivise pas de chose jugée.

Il y a, messieurs, d'autres autorités encore sur les quelles je voudrais appeler votre attention, et notamnent celles citées par M. Azpiroz et dans la correspondance par M. le Ministre des affaires étrangères du Mexique, Mariscal, avec les Etats-Unis. Mais il faut se borner et je prie la Cour de se reporter aux documents que je viens de citer.

Il y a par contre certaines autorités citées par la partie adverse que j'avoue ne pas connaître malgré une longue pratique du droit, par exemple: le Dictionnaire général de Bertheau. M. Descamps est peut-être plus heureux que moi.

Je viens de dire qu'il n'y a pas à tenir compte d'un simple préjugé. Cela est plus particulièrement vrai quand il s'agit de sentences arbitrales. Je ne veux pas méconnaître, messieurs, que les sentences arbitrales ont force de chose jugée; je sais que des auteurs recommandables ont soutenu le contraire, et M. Ralston a cité notamment l'autorité de M. Rivier qui était assurément un jurisconsulte important, et celle de M. Bonfils; mais tel n'est point mon avis; je crois que les sentences arbitrales ont la même autorité, la même, la même force de chose jugée que les décisions des juges ordinaires; et le Mexique a si peu songé à le contester qu'il a exécuté la sentence de Sir Thornton. Mais s'il est vrai, messieurs, qu'il y a ici chose jugée, nous disons, comme nous l'avons toujours dit, que la Commission mixte n'a pu juger que ce qu'on lui a demandé, et que s'agissant de quasi-arbitres l'autorité de la chose jugée doit être ici plus strictement comprise.

La juridiction arbitrale, messieurs, n'emane pas de la puissance publique, elle n'en est pas une délégation; l'arbitre n'est pas chargé comme le juge de dire le droit, ce n'est point sa fonction. Il est seulement chargé de dire droit dans un cas déterminé, et parce qu'il est appelé à cet honneur par le consentement privé et libre des parties qui l'en ont chargé; sa fonction procède donc non de la loi mais du consentement des parties, et du mandat privé qu'elles ont donné. Et c'est à raison de ce fait que les sentences arbitrales rendues en pays étranger ont au dehors la même autorité que dans le pays même. L'autorité du juge s'arrête à la frontière, parce que là s'arrête la puissance publique. Mais un collège arbitral a un autre caractère: Mandataire des parties, il agit et juge en vertu de leur consentement: ce consentement ne comporte pas de frontières, et par conséquent la chose jugée vaut au-delà ce qu'elle valait endeçà.

Larombière dit avec raison que l'arbitrage considéré comme convention appartient au droit des gens et établit entre les contractants un lien de droit. Donc ici, messieurs, c'est à la convention qu'il s'en faut rapporter, et vous savez si l'on peut voir dans les correspondances échangées naguère quelque plein pouvoir donné aux membres de la commission mixte et qui leur aurait permis d'excéder même les bornes de la demande; donc, messieurs, ici, impossibilité d'admettre un préjugé quelconque. Les pouvoirs des arbitres sont strictement et rigoureusement circonscrits dans les bornes de la demande; ils jugent ils ne peuvent préjuger.

Je conclus, messieurs. Aux divers points de vue que je viens successivement d'examiner, j'estime que le terrain juridique du débat actuel est absolument libre d'obstacles. Sans aucun doute il y a pour la partie adverse des arguments, et la sentence Thornton en est un, mais ce n'est pas une barrière, ce n'est pas la chose jugée, et c'est, messieurs, à la très haute juridiction devant laquelle je plaide en ce moment—ce que je tiens pour l'un des grands honneurs de ma vie judiciaire—c'est, dis-je, à la Cour, à la Cour seule à dire le droit.

M. LE PRÉSIDENT. La parole est à M. l'agent des Etats-Unis mexicains.

M. EMILIO PARDO. Messieurs, pour couper court à toute espèce de difficulté, je me décide à imposer au Tribunal la corvée d'entendre une

lecture qui doit être très pénible pour Messieurs les arbitres, et aussi pour moi. Nos contradicteurs ont eu l'avantage de parler leur langue, tandis que je suis obligé de parler une langue qui ne m'est pas du tout familière. Voilà pourquoi, pour fatiguer le moins possible l'attention de la Cour, je me décide à lire le plaidoyer que j'ai l'honneur de soumettre à sa considération; je suis du reste dans les prévisions du protocole du 22 mai dernier, puisqu'il autorise les plaidoyers oraux et les plaidoyers par écrit.

Mais, avant d'entrer en matière, je demande au Tribunal la permission de lui présenter quelques explications au sujet d'un reproche que j'ai entendu plusieurs fois dans la bouche de nos contradicteurs, et un peu aussi dans la bouche de nos avocats. C'est à cause de certaines données indiquées par les Etats-Unis et qui ont été démandées à mon pays. On a demandé des éclaircissements, des documents au sujet de tel ou tel incident du procès; mon pays n'a pas été en mesure de répondre à ces requêtes. On en a fait un reproche à mon Gouvernement, et même il y a eu un des avocats de la partie adverse qui a considéré ce défaut de présentation de certains documents comme la base d'une présomption contre le Mexique. Or, vous pouvez savoir, messieurs, par la lecture du dossier, que tous les documents que les Etats-Unis ont demandés à mon pays et qui ont été signalés d'une façon précise, ont été présentés. Le Gouvernement des Etats-Unis et leur agent ont eu toutes les facilités désirables pour se renseigner sur les actécédents de cette affaire, ils ont pu s'adresser à toutes les archives, ils ont même trouvé des avocats mexicains pour les aider dans leurs recherches. Ainsi donc, mon Gouvernement a fait tout son possible pour éclairer la religion de la Cour: il a fourni tous les moyens et tous les documents qui étaient à sa disposition.

Il est bien vrai que les archives ne sont pas tout à fait complètes, mais cela s'explique du reste parfaitement bien. Vous savez, parce que malheureusement le fait est très connu, que mon pays a traversé des époques très agitées, il a été la proie de révolutions qui heureusement paraissent définitivement finies; pendant ces révolutions, ces agitations, les archives ont été exposées à tous les accidents de la guerre civile. Le Mexique a eu à soutenir dernièrement deux guerres, non seulement civiles mais étrangères; le Gouvernement a été obligé, pour sauver ses archives, de les transporter avec lui pendant ses pérégrinations à travers le territoire; il n'y a donc rien de surprenent si ces archives laissent quelque chose à désirer, si tous les documents que le Gouvernement des Etats-Unis a voulu avoir n'ont pas pu être mis à sa disposition.

Une fois cette explication donnée, je commence ma lecture, demandant d'abord pardon à messieurs les arbitres de l'ennui et de la fatigue que je suis obligé de leur imposer.

Quelques remarques sur la réplique de l'Agent des Etats-Unis à la réponse de M. J. Mariscal à la réclamation présentée au nom de MM. les Evêques de la Haute Californie.

1. La réclamation présentée dans la demande des Etats-Unis se fonde sur le décret du Gouvernement du Mexique en date du 24 octobre 1842, qui incorpora au Trésor les biens du Fonds Pie, ordonna leur vente pour le capital représenté par leur intérêt annuel à 6 pct. et disposa que le Trésor affectât le revenu à 6 pct. du produit total des aliénations aux intentions des donateurs.

2. Que le décret du 24 octobre soit le titre invoqué par les récla-

mants à l'appui de l'action qu'ils exercent, ne peut être douteux, étant donné que la demande porte précisément sur le paiement de ces intérêts pendant un certain nombre d'années et non sur la valeur des biens, ni sur la remise de ceux qui n'auraient pas été aliénés.

3. Raisonnant sur ces bases, M. Mariscal dit que les réclamants invoquent en vain les dispositions de la loi du 19 septembre 1836, qui ordonna de mettre à la disposition de l'évêque de Californie les biens appartenant au Fonds Pie, afin qu'il les administrât et les appliquât à leurs buts ou à d'autres analogues, parce que ce décret fut modifié par celui du 8 février 1842, et que personne n'a mis jusqu'à présent en doute la faculté souveraine du Gouvernement mexicain de modifier ses propres disposition législatives.

4. Quant au décret du 3 avril 1845 ordonnant la dévolution à l'évêque de Californie de tous les biens du Fonds Pie qui n'étaient pas vendus à cette époque, il ne semble pas invoqué dans la demande comme titre de l'action qui y est exercée, et ne pourrait d'aucune manière servir aux intentions des réclamants attendu qu'ils ne réclament pas la dévolution des biens visés par la loi du 3 avril 1845, mais le paiement des intérêts à 6 pct. sur le montant qu'ils attribuent arbitrairement à tous les biens, valeurs et crédits qui, à leur fantaisie, formaient le capital du fonds susdit. Cette prétention est entièrement arbitraire, ou se fonde sur un titre. Il faut évidemment accepter le second terme du dilemme et l'admettant comme le seul possible, on est forcé d'admettre que ce titre est le décret si souvent invoqué du 24 octobre 1842. Les réclamants se sont lassés de répéter qu'ils ne demandent aucune remise des biens, qu'ils reconnaissent le droit souverain par lequel le Mexique conserve en son pouvoir ce qui pourrait actuellement revenir au Fonds Pie, et qu'ils réduisent leurs prétentions aux intérêts, à 6 pct. sur la valeur qu'il leur plaît d'attribuer au capital dudit Fonds.

5. M. Mariscal a donc pu dire, que la réclamation devant être jugée à la lumière de la législation mexicaine, les demandeurs n'ont aucun titre à réclamer quelque chose au Gouvernement Mexicain. Le raisonnement conduisant à cette conclusion est d'une extraordinaire simplicité. Le décret du 24 octobre 1842 ordonna la constitution d'un "censo consignativo" avec le produit de la vente des biens qui formaient le Fonds Pie, afin que les revenus à 6 pour cent de ce *censo* fussent appliqués aux buts de la fondation primitive. Je me demande alors: Cette loi concéda-t elle á l'évêque de Californie ou à ses successeurs, la faculté de recevoir ces intérêts et de les appliquer à leurs fins? Non, certainement. Le décret du 24 octobre 1842 ne créa aucun titre efficace en faveur de ce prélat et de ses successeurs. Le Gouvernement Mexicain chargé du maniement et de l'administration du Fonds—les réclamants n'osent pas le nier—demeura par lá même investi de la faculté de continuer á l'administrer, et d'employer, au moyen des fonctionnaires qu'il lui plaisait de nommer à cet effet, les produits que l'on en recueillait. Il est donc d'une vérité évidente que le décret du 24 octobre 1842 ne donne aucun titre aux évêques actuels de Californie.

6. Qu'opposent les réclamants à une argumentation si décisive? D'abord, que l'évêque de Californie, et pour tant ses successeurs, avaient des droits *légaux et d'équité* indépendamment de tout décret du Gouvernement Mexicain, à administrer ce fonds, et que même, une fois promulgué le décret du 24 octobre 1842, le Gouvernement ordonna qu'on leur fît plusieurs paiements à compte du Fonds Pie. Quant au premier point, on voit sans peine qu'il n'est qu'une affirmation gratuite,

parce que rien ne le prouve. Comment! Les réclamants admettent sans hésiter qu'ils ne peuvent attaquer la validité ni l'efficacité des lois mexicaines successivement édictées à propos du Fonds Pie, ils les invoquent à l'appui de leurs prétentions, proclamant sans réserve qu'ils ne peuvent méconnaître la faculté souveraine du Gouvernement qui les expédia, mais perdant de vue que toutes ces lois ètablissent, changent, modifient, altèrent l'administration du Fonds, la confient à différents fonctionnaires ou employés, la confient et la retirent à l'évêque de Californie, ils invoquent encore des droits *légaux* de celui-ci à avoir la charge de cette administration. Une si grande inconséquence est inexplicable.

7. Quant aux différents ordres de paiement édictés par le Gouvernement Mexican, après la promulgation du décret du 24 octobre 1842, que démontrent-ils? Simplement que le Gouvernement Mexicain, usant de son droit, jugea convenable de donner certaine affectation aux produits du Fonds. Et loin que l'on en puisse inférer qu'il reconnut le droit des évêques de Californie à l'administrer, ce qui résulte des faits allégués est, comme nous venons de le dire, que le Gouvernement du Mexique fit usage, chaque fois qu'il le jugea convenable, de sa faculté souveraine de gérer le Fonds et de disposer de l'emploi de ses produits.

8. M. Mariscal fait remarquer très justement que, quoiquele décret du 3 avril 1845 servît de prétexte au surarbitre de la Commission Mixte pour affirmer que l'obligation y était reconnue de remettre à l'évêque les produits du Fonds, les réclamants en cette occasion se sont abstenus de le produire à l'appui de leur demande actuelle, pour des raisons qu'il est bon d'examiner avec soin. Mais dès maintenant il sera impossible de méconnaître cette vérité: La loi du 24 octobre 1842 ne donne aucun titre efficace aux réclamants pour prétendre qu'ils aient droit à administrer et à recevoir les intérêts à 6 pct. de la valeur qu'il leur plaît d'attribuer aux biens du Fonds Pie. S'il pouvait y avoir quelque doute à cet égard, la réponse de l'agent des Etats-Unis et de leur éminent avocat à M. Mariscal, le dissiperait entièrement. Dans ce document on parle de droits légaux et d'équité dont la source n'est point précisée; on n'explique pas par qui ils furent conférés ni quel est leur titre, et de la loi du 3 avril 1845, que les réclamants se décident enfin à alléguer comme base de leur réclamation. Etudions-la donc.

9. La loi disposa que les crédits et les autres biens du Fonds Pie de Californie, *qui existaient invendus*, seraient immédiatement rendus à l'Evêque et à ses successeurs, aux fins dont parle l'art. 6 de la loi du 29 sept. 1836 et *sans préjudice de ce que déciderait le Congres touchant les biens aliénés.*

Que résulte-t-il irrésistiblement de cette disposition législative sur la validité de laquelle aucune contestation n'est soulevée? Que le Gouvernement Mexicain continua à faire usage de sa faculté souveraine de disposer de l'administration du Fonds et de l'emploi de ses produits — Cela est indiscutable. — En second lieu, que les biens qui n'étaient pas vendus devraient être remis à l'évêque de Californie et à ses successeurs, et troisièment que le Congrès se réservait de disposer quant aux biens alors aliénés.

10. Il faut donc étudier successivement chacun de ces trois points, les seuls du décret dont il s'agit. Mais il y a quelque chose à ajouter à ce qui est déjà exposé, par rapport au premier. Une fois de plus, le Gouvernement Mexicain dispose selon qu'il l'estime convenable, de l'administration du Fonds et de son emploi, et comme les réclamants

n'attaquent et ne peuvent attaquer la faculté souveraine exercée par la promulgation de la loi dont je m'occupe, parce qu'ils se mettraient alors en contradiction ouverte avec euxmêmes, il est évident que ce point ne peut donner matière à discussion.

11. La seconde disposition du décret ordonne que les biens qui, à cette époque, n'auraient pas été aliénés fussent immédiatement rendus à l'évêque de Californie et à ses successeurs pour les fins de l'art. 6 du décret du 29 sept. 1836. Cette disposition constituet-elle un titre en faveur des réclamants? La réponse s'impose. Non simplement, parce que si c'était un titre il pourrait servir à motiver la prétention que le Gouvernement Mexicain délivra aux évêques actuels de la Haute Californie une partie des biens *invendus*, et je dis une partie, parce qu'une part devrait revenir à l'évêque de la Basse Californie, puis que les réclamants mêmes ont la bonté d'admettre que le 15 pct. du total ravient à l'église catholique de la péninsule californienne. Les réclamants demandent-ils qu'on leur remette quelque bien, quelque valeur, quelque chose de ce qui a formé le Fonds? Non. Ils demandent qu'on leur paie les intérêts du capital qu'ils supposent, et seulement ces intérêts. Donc la réclamation ne porte pas sur *des biens existant invendus du Fonds Pie.*

En conséquence, sous ce point de vue, la loi du 3 avril 1845, n'est pas le *titre* de l'action déduite dans la demande. Les réclamants sont d'accord avec nous sur ce point et ils ont dit en maintes occasions qu'ils reconnaissent le droit du Gouvernement du Mexique à retenir indéfiniment la propriété du Fonds; donc leur réclamation ne porte que sur les intérêts à 6 pct. d'un capital dont ils supputent le montant du mieux qu'il leur semble.

12. Le décret vise enfin les biens déjà vendus, et s'abstenant d'en disposer, il réserve au Congrés la détermination ultérieure sur *les biens aliénés*. Est-il possible de tirer un titre légal quelconque d'un *ajournement* qui n'ordonne rien? Tout considéré, ce qui dérive naturellement de la dernière partie du décret que j'analyse, est une nouvelle confirmation de la faculté que le Gouvernement Mexicain avait et qu'il exerçait, de disposer comme il le jugeait convenable de l'administration et de l'emploi du Fonds Pie. Mais quoi qu'il en soit, il est certain que le Congrès Mexicain ne prit aucune mesure au sujet des biens déjà aliénés, jusqu'au moment de l'annexion de la Haute Californie aux Etats-Unis. Du néant rien ne peut résulter. La réserve faite par le décret du 3 avril 1845 au sujet des biens déjà aliénés, n'est pas et ne peut être un titre pour personne ni pour rien. Et l'abstention du Congrès Mexicain de déterminer sur l'emploi des biens déjà aliénés, ne constitue et ne peut constituer ce titre, en dépit de tous les efforts de ialectique et d'habileté de nos adversaires.

13. Je déduis des observations antérieures qu'aucum des décrets expédiés par le Gouvernement Mexicain au sujet des biens du Fonds Pie, ne peut servir de base à la réclamation présentée au nom des Evêques de l'Eglise Catholique de la Haute Californie. — Cependant, par l'intermédiaire de l'agent des Etats-Unis et d'un de leurs avocats les plus distingués, ils prétendent que, quoique le Congrès Mexicain n'ait rien déterminé sur l'emploi des biens déjà aliénés le 3 avril 1845, les demandeurs sont en possession d'une qualité pour réclamer ce qu'ils ont demandé, parce qu'une interprétation pratique embrassant les matières réservées par la loi citée avait été donnée à la loi d'octobre 1842, et que par là même, toute action ultérieure du

Congrès était inutile, aussi arriva-t-il à ne rien décréter. — J'avoue ingénument qui si la remarque n'est pas un concept purement verbal qui ne signifie rien, je ne puis me rendre compte de ce que l'on a voulu dire. Je suppose que l'idée de nos adversaires est celle-ci: La loi du 24 octobre 1842, qui ordonna la constitution d'un *censo consignativo* avec le produit de la vente des biens du Fonds Pie, et la reconnaissance d'un intérêt de 6 pct. annuel, étant promulguée, le Gouvernement ordonna à diverses reprises comme le supposent les réclamants — et c'est peut-être ici une bonne occasion de faire remarquer avec quelle fréquence ils se livrent à des suppositions sur lesquelles ils basent de longs raisonnements — que des paiements divers fussent faits à l'évêque de Calfornie au compte du Fonds Pie. Il est donc reconnu que l'évêque mentionné avait un droit à recevoir les revenus promis. Voilà le titre qu'invoquent ses successeurs, et il est inutile d'alléguer qu'aucune disposition ne s'édicta sur les biens invendus en 1845, parce que cette disposition était déjà prise: payer les revenus en vertu de la loi du 24 octobre 1842 à l'évêque de Californie et à ses successeurs. Comme on le voit, le raisonnement pour arriver à cette conclusion est véritablement laborieux. Un titre légal est bien obscur s'il ne resulte que d'une argumentation, si pénible et vicieuse d'ailleurs sous tous les points de vue.

15. Quel est le sens de ce concept de la loi du 3 avril 1845, "sans préjudice de ce que le Congrès décide au sujet des biens aliénés"? Il est évident qu'ayant été vendus et que se trouvant légitimement aux mains des acheteurs, le Congrès ne pouvait pas en disposer. Ils avaient été incorporés légitimement au domaine de la Nation et en vertu d'une loi régulièrement promulguée, ils avaient été achetés par des particuliers. Les réclamants n'attaquent pas la validité de ces aliénations, et loin de l'attaquer, la reconnaissent expressément en exigeant qu'on leur paie les intérêts produits par un capital qui n'est que le prix de ces biens. Il est donc certain que par rapport aux biens mêmes déjà vendus, aucune résolution ultérieure ne pouvait être prise par le Congrès Mexicain; et comme malgré tout, la loi du 3 avril 1845 lui réserva la faculté de *disposer* quant à ces biens, il est évident, aucune autre interprétation n'étant possible, qu'il visa les intérêts du capital du censo que la loi du 24 octobre 1842 fit constituer sur la Rente du tabac. Ces intérêts étaient tout ce qui restait de disponible, pour ainsi dire, et ils étaient la seule matière sur laquelle le Congrès pût prendre une résolution. Eh bien! Une loi antérieure avait disposé (24 octobre 1842) que les revenus du *censo consignativo* formé du capital produit de la vente des biens du Fonds Pie, fussent applicables à l'objet de la fondation primitive. La loi de 1845 ordonnant que le Congrés devait disposer à l'avenir quant au capital même du cens et quant à ses intérêts, il semble évident que le décret du 24 octobre 1842 demeura modifié en substance sur ce point, puisque la loi du 3 avril 1845 confia au Congrés le soin de prendre des measures sur ce qui devait être fait des biens déjà aliénés â l'époque. Si donc les réclamants et les défendeurs admettent qu'aucune autre loi ne fut adoptée après celle de 1845, nous pouvons affirmer en toute sécurité que, comme ni la loi du 24 octobre 1842, ni celle du 5 avril 1845 ne peuvent servir de titre à la réclamation dont il est question, il n'y a plus que "ces droits légaux et équitables" auxquels se réfère la réplique de l'agent des Etats-Unis . . . c'est-à-dire quelque chose de vague, d'indéterminé et d'équivoque. Un concept verbal, pas un titre.

II. 16. Les réclamants comprennent bien l'irrémédiable faiblesse de leur cause pour ce motif, et admettant, par voie de supposition, que l'église catholique de la Haute Californie pourrait manquer d'un droit à administrer le Fonds Pie de Californie ou à réclamer un intérêt perpétuel, ils soutiennent qu'un tribunal d'équité, appliquant au cas de larges principes de droit—broad principles of right—devrait reconnaître à la dite Eglise qualité suffisante pour recevoir les intérêts dudit Fonds. Discutons la thèse. On a dit, en effet, que ce tribunal est un tribunal d'équité, ou, ce qui revient au même, si je ne me trompe, que pour se prononcer sur la question qui lui a été soumise, il n'y a pas besoin de recourir à des dispositions légales, ni de tenir compte de ce que, par un euphémisme véritablement curieux, on a appelé *technicalities* et que sans s'en tenir aux rigueurs du droit, il doit juger *ex equo et bono*. Je résiste à cette prétention avec toute l'energie dont je suis capable. Elle est dépourvue de tout fondement. Si les parties en cause avaient voulu chercher une solution d'équité au différend survenu entre elles, elles l'auraient stipulé ainsi; et c'est en vain que l'on chercherait dans le protocole du 22 mai, un pacte qui permette de dire que l'intention des Hautes Parties contractantes fut de libérer les juges choisis pour régler le conflit, du devoir d'avoir recours au droit, aux lois applicables au cas, pour trouver le criterium de décision indispensable. Chaque fois qu'une question d'ordre juridique survient—et nul ne pourra nier que la question à l'ordre du jour n'appartienne à cette catégorie—et que les intéressés ont recours à des juges constitués ou nommés par eux pour la décider, il va de soi que c'est au droit qu'ils doivent recourir si l'on n'a pris soin de stipuler autrement. Le protocole du 22 mai créa-t-il une cour d'équité? Institua-t-il un tribunal n'ayant pas à appliquer des lois mais des considérations d'équité? Que signifie alors le fait d'avoir choisi pour juges des jurisconsultes d'une réputation mondiale? Que signifie alors cet imposant appareil d'avocats qui ont défilé devant la Cour, chacun plus éloquent que l'autre, discutant la question sous tous ses aspects de droit.

17. Mais il a été dit qu'en plus de la question sur l'efficacité de l'arrêt de la Commission Mixte de Washington, la Cour devra se prononcer, si elle nie l'existence de la res judicata, sur la justice ou l'injustice de la réclamation de l'Eglise Catholique de Californie, et que cette question ne doit pas être examinée au point de vue de la science du droit ni avec le criterium de quelques lois positives, mais par des considérations d'équité. Pour juger de la hardiesse de cette thèse il suffit de fixer l'attention sur ce que *juste* veut dire ce qui est conforme à la justice, *idem sonat jure et rite* (Vocabularium juris utriusque Scott et Heineccius, verb. justitia). Lorsque le Protocole confie à ce Tribunal la mission de décider si la réclamation qui lui est soumise est juste, il lui impose le devoir de se prononcer sur ce qui peut être conforme à la justice et la justice d'une réclamation au point de vue juridique ne peut être appréciée que juridiquement.

18. On doit donc fermer l'oreille aux appels de nos adversaires à l'équité, et il est nécessaire de leur rappeller que nous ne sommes pas aux Etats-Unis, afin qu'ils ne perdent pas leur temps à invoquer des précédents de la jurisprudence de ce pays sur les causes dont la connaissance incombe aux Cours d'équité ni sur le criterium que ces Cours doivent appliquer à la décision des questions qui leur sont soumises.

19. Sans envahir le terrain réservé aux distingués avocats du

Mexique devant ce tribunal, je me permettrai de faire constater que, comme la réclamation de l'Eglise Catholique de la Haute Californie aurait dû être soumise aux tribunaux mexicains, les seuls compétents pour décider sur des réclamations de citoyens étrangers contre le Gouvernement National, la bonne volonté de mon pays à se départir du droit indiscutable qu'il avait d'exiger cette soumission à ces juges d'une demande formulée contre la République, n'implique pas et ne peut impliquer la renonciation au droit d'exiger que la question soit jugée selon les lois mexicaines, les seules applicables au cas. Les lois mexicaines, comme le démontreront bientôt les avocats du Mexique, sont celles que cette Haute Cour devra consulter, et on ne peut admettre l'existence de quelque renonciation à ce sujet, s'il est vrai que les renonciations ne se présument pas mais doivent être expressément constatées.

20. Si j'ai justement compris les observations de la réplique de l'agent des Etat-Unis à la réponse de M. Mariscal, on lui fait un reproche plus ou moins voilé qu'en citant l'acte de donation considéré comme l'instrument constitutif du Fonds Pie, il n'a copié que les passages propres à son but. Le reproche est injuste. La Cour est en condition de connaître le document dont il s'agit, autrement que par les paragraphes reproduits par M. Mariscal, Le Ministre des Affaires Etrangères de mon pays savait bien que l'acte auquel je me réfère faisait partie du dossier soumis à la Commission Mixte, et par là même son texte intégral était à la disposition de nos juges. Recherchant la briéveté, il copia ce qu'il jugea le plus convenable au but poursuivi, c'est-à-dire pour démontrer que ce document ne pouvait pas être la base de la réclamation américaine. La teneur des extraits fidèlement copiés ne permet pas de douter que le fait même de la discussion de ce cas devant la Cour soit une infraction manifeste de la volonté des donateurs, parce qu'ils exprimaient explicitement leur volonté qu'en aucum temps le juge ecclésiastique ou séculier ne s'entremette — ce mot a en espagnol une signification d'une énergie peu commune — à savoir si s'exécute ou non la condition de cette donation, notre volonté est qu'elle ne donne lieu à aucune prétention, et que la Sacrée Compagnie l'accomplisse ou non en vue des missions " elle n'aura à en rendre compte qu'à Dieu notre Seigneur." Si cette volonté des premiers donateurs est une loi, nous pourrons dire qu'en ce moment même on l'enfreint, et que le Mexique seul prétend qu'elle soit respectée, tandis que les représentants de l'église Catholique de Californie essaient de la faire oublier.

21. L'affirmation est fondée; car les réclamants et nous, nous sommes d'accord pour admettre qu'aux jésuites—à qui personne n'aurait en le droit de demander compte de l'emploi du Fonds Pie—se substitua le Gouvernement espagnol et au Gouvernement espagnol se substitua celui du Mexique.

III. 22. Ce serait le moment de discuter le point de savoir si l'arrêt de la Commission Mixte a ou non force de chose jugée; mais comme cette question doit être amplement traitée par les avocats de mon pays, je m'abstiens de l'aborder, non sans faire constater que nos adversaires ont fait un effort considérable pour justifier une thèse que nul ne combat: toute sentence sans appel, prononcée par un juge compétent, a force de chose jugée et parmi les sentences ayant cette force se trouvent les jugements des tribunaux d'arbitrages, internationaux ou non. Nul n'a fait opposition au principe que je viens de formuler, qui est,

certainement, de jurisprudence universelle; mais dans l'espèce, la question est de fait plutôt que de droit. Les conditions indispensables pour qu'une sentence produise la chose jugée, furent-elles réalisées en cette occasion? Tel est le problème dont le développement est réservé aux avocats du Mexique. Je me contenterai de faire remarquer seulement qu'étant évident et indéniable que l'arrêt de la Commission Mixte ne contient aucune déclaration expresse dans sa partie résolutive ni sur le montant du capital ni beaucoup moins sur l'obligation future et perpétuelle de payer des intérêts pour ce capital, si ces déclarations ne sont pas exprimées on ne peut les supposer contenues qu'implicitement dans la décisions. Or la Commission Mixte n'ayant pas pu faire ces déclarations explicitement, elle ne pouvait non plus les faire implicitement.

23. L'art. II de la Convention du 4 juillet 1868, qui créa la Commission Mixte, exclut expressément des réclamations dont cette Commission pourrait connaître tout ce qui émanerait de faits antérieurs au 2 février 1848. "Il est convenue qu'aucune réclamation émanant de faits antérieurs au 2 février 1848 ne sera admise d'après cette convention." Eh bien, l'incorporation au Trésor National des biens du Fonds Pie, la constitution du censo consignativo du produit de cette vente, avec hypothèque de la Rente du tabac, la charge donnée à l'évêque de Californie de l'administration du Fonds, l'acte qui enlevait cette administration à ce prélat, la dévolution de l'administration des biens qui n'auraient pas été vendus, tout cela *émane* d'événements antérieurs au 2 février 1848; donc les exigences irrésistibles de la logique imposent la conclusion qu'aucune réclamation émanée de ces événements ne put être soumise à la Commission Mixte, et ne put être résolue par elle, implicitement. D'une façon expresse, aucune résolution sur les points indiqués n'est consignée dans la décision du tiers M. Thornton. Indirectement ou implicitement aucun d'eux ne put être l'objet de se décision. Comment donc peut-on invoquer la théorie de la chose jugée et nous parle-t-on de l'efficacité de décisions implicites?

24. En ce qui regarde des prestations futures, c'est-à-dire l'obligation que l'on suppose avoir été imposée implicitement au Gouvernement Mexicain de payer non seulement les sommes qui lui furent demandées devant la Commission Mixte, mais les intérêts successifs, perpétuellement et indéfiniment, elle ne fut certainement pas comprise dans la demande, ni ne fut la matièere de la défense, ni l'objet du contrat judiciare et ne fut pas expressément résolue par la Commission. Le seraitelle implicitement? Impossible, car le moins que l'on puisse dire à cet égard est que la sentence ne peut aller au-delà de ce qui est demandé, que les arrêts *ultra petita* sont nuls de plein droit.

25. Où est donc parmi les chapitres de la demande des évêques de la Haute Californie la pétition que le Mexique soit déclaré dans l'obligation de payer perpétuellement les intérêts dont on parle? Si une telle déclaration ne fut et ne put être la matière du litige, elle ne put être faite explicitement ni implicitement par la Commission Mixte.

26. Les pouvoirs mêmes des arbitres nommés en vertu de la Convention de 1868, c'est-à-dire, les termes mêmes du compromis, étaient un obstacle insurmontable à toute tentative de prétendre à des prestations futures. Le texte de l'art. I de la Convention susvisée dissiperait tous les doutes s'il pouvait y en avoir à cet égard. Toutes les réclamations faites par des corporations, compagnies ou particuliers, citoyens de la République Mexicaine, provenant de dommages *soufferts* dans leurs personnes ou dans leurs propriétés par des autorités des

Etats-Unis qui aient été présentées à l'un des deux Gouvernements en lui demandant son interposition près de l'autre postérieurement à la célébration du traité de Gaudalupe Hidalgo, seront référés à deux commissaires. Il est évident en conséquence que la Commission Mixte ne devait s'occuper que des réclamations pour dommages *soufferts*, ou ce qui est la même chose, qu'il n'était pas dans ses facultés de connaître sur d'autres demandes relatives à des prestations futures, quelles qu'elles fussent, ni à rien résoudre sur les obligations d'un accomplissement futur.

27. D'une part donc, les réclamants ne demandèrent pas qu'il fût déclaré que le Mexique fût obligé à payer des intérêts dans l'avenir, d'une autre, si même cette demande eût été présentée à la Commission Mixte, celle-ci aurait eu à s'abstenir de prononcer sur elle, faute de compétence; et enfin l'arrêt de cette Commission ne contient aucune déclaration sur ce point. Comment donc ose-t-on invoquer des résolutions implicites sur des obligations futures à la charge de la République mexicaine?

28. Grâce à un subterfuge ingénieux, les évêques de Californie obtinrent que la Commission Mixte accueillît une réclamation fixe, précise, ponctualisée, réduite à un chiffre. Le jugement de la Commission Mixte porta sur cette réclamation. Le Mexique fut injustement condamné à payer la somme établie par la sentence. Le Mexique paya; la sentence fut exécutée dans toutes ses parties et tant pour ces motifs que pour les stipulations de la convention de 1868, contenues aux art. II, paragraphe II et V, l'arrêt de la Commission doit être regardé comme l'arrangement complet, parfait et final de toute réclamation contre l'un des Gouvernements, procédant d'événements d'une date antérieure à l'échange des ratifications de la convention. Les Hautes parties contractantes s'engagent aussi à ce que *toute réclamation* présentée ou non à la Commission fût regardée et traitée, *finalement réglée, annulée et pour toujours inadmissible* une fois clos les travaux de la dite Commission.

29. Un mot encore avant de passer à une autre question. Bien que, entre la présentation de la réclamation des évêques de la Haute Californie, et l'arrêt du surarbitre de la Commission Mixte, il s'écoulât une période de cinq années durant lesquelles, si la thèse soutenue par les avocats de la partie adverse est vraie, les intérêts continuèrent à courir sur le capital constituant le Fonds Pie, le jugement du surarbitre, n'osant pas faire de déclarations pour l'avenir, s'abstint de faire payer d'autres intérêts que ceux qu'il regarda échus dans les vingt et un ans écoulés depuis le 2 février 1848, jusqu'à la date de la réclamation. Pourquoi l'arbitre s'abstint-il de faire quelque déclaration sur les intérêts échus durant les cinq ans employés à plaider l'affaire? Pourquoi ne fit-il aucune indication sur la liquidation à établir pour que les réclamants perçussent une somme qui se serait élevée à plus de deux cent mille piastres?

30. Assurément, parce qu'il considéra comme l'avait considéré le commissaire américain, que cette déclaration était hors de sa compétence, qui se bornait à connaître des dommages *soufferts* jusqu'au moment de l'échange des ratifications de la convention de 1868, et parce qu'en un mot, il lui était interdit de décréter *ultra petita.*

31. L'obligation de payer une rente perpétuelle et indéfinie à l'église Catholique de Californie ne fut, d'après ce qu'on a vu, ni demandée, ni débattue, ni déclarée expressément ni implicitement et par là même,

la chose jugée par l'arrêt de la Commission Mixte demeura épuisée, c'est le mot, lorsque la République Mexicaine eut payé la somme à laquelle elle avait été condamnée.

32. Il me semble que j'ai fait ressortir l'importance de se rapporter non seulement aux enseignements des auteurs sur l'extension de la *res judicata*, et aux principes de la théorie juridique sur cette matière, mais aussi, puisqu'il est question d'une sentence arbitrale, aux termes du compromis et à la volonté des octroyants sur les effets, et sur l'extension du jugement, parce que sur tous ces points la volonté des parties est *loi* et prévaut sur le droit positif, sur les théories scientifiques et sur les doctrines des jurisconsultes.

IV. 33. La réponse du Gouvernement Mexicain oppose à la demande l'exception péremptoire qui se déduit justement et naturellement des Art. XIV et XV du Traité de Guadalupe Hidalgo. Selon le premier de ces articles: "Les Etats-Unis exonèrent aussi la République Mexicaine de toutes les réclamations de citoyens des Etats-Unis non résolues encore contre le Gouvernement Mexicain et qui peuvent avoir une origine antérieure à la date du présent traité: cette exonération est définitive et perpétuelle, soit que lesdites réclamations soient admises, soit qu'elles soient rejetées par le tribunal de commissaires dont parle l'article suivant et quel que puisse être le montant de celles qui restent admises." L'art. V ajoute: "Les Etats-Unis exonérant le Mexique de toute responsabilité pour les réclamations de leurs citoyens, mentionnées à l'article précédent et les considérant complètement annulées pour toujours, quel qu'en soit le montant, prennent à leur charge de les satisfaire jusqu'à un chiffre n'excédant pas trois millions deux cent cinquante mille dollars." Comment l'exception alléguée par le Mexique résulte-t-elle de cet article? Si nous en jugeons par la réplique des réclamants à la réponse de M. Mariscal ils n'ont pas compris la portée de la défense dont je m'occupe. Le texte anglais de l'art. IV, qui est celui que l'on doit avoir présent à l'esprit parce qu'il est à supposer que la partie contractante, auteur de la renonciation contenue dans ledit article, mesura la signification exacte des concepts employés pour l'énoncer, dit que la libération octroyée au Mexique se réfère à toute espèce de réclamations ou crédits—claims—ayant une origine antérieure à la signature de Guadalupe. Est-il ou non certain, que la réclamation relative au Fonds Pie est d'une créance—claim—que l'on suppose existant avant cet événement? Il serait impossible de nier que tous les élements de ce crédit supposé consistent en faits, en actes ou en dispositions du Gouvernement Mexicain antérieurs à 1848, et s'il en est ainsi, à moins de fermer les yeux devant l'évidence, ou devra convenir que cette réclamation—claim—selon l'autorité linguistique la plus acceptée en anglais—eut son origine, naquit, surgit, avant la signature du traité de Guadalupe. Ce concept est compris dans la libération ample, absolue, illimitée, accordée au Mexique à l'art. IV dudit traité. Ainsi le comprirent les négociateurs mexicains du traité de Paix de 1848, et la meilleure preuve en est ce qu'ils consignèrent dans le rapport présenté à leur Gouvernement pour lui rendre compte de leur mission. Je copie les passages relatifs de ce rapport, qui fut présenté à la Cour comme une des annexes de la réponse de mon Gouvernement à la réclamation des Etats-Unis. Page 245. "Les quinze millions convenus à l'art. 12 et les stipulations des art. 13 et 14, sont l'indemnisation la plus claire que nous puissions obtenir comme compensation des dommages soufferts par la Répu-

blique. Celle-ci diminuée par l'accroissement de territoire acquis par sa voisine, les mêmes obligations qu'elle avait auparavant vont peser sur un pays moins grand, et sont par conséquent plus onéreuses. Ainsi notre dette intérieure et extérieure devra être satisfaite en entier par la partie du peuple mexicain qui conserve ce nom, tandis que sans la cession elle s'étendrait sur toute la République telle qu'elle était auparavant. Ce sont des dommages de cette nature qui dans la mesure du possible sont réparés par l'indemnisation." Page 247. "La véritable utilité des arrangements contenus dans les trois articles—13, 14 et 15—ne consiste pas précisément en ce que la République soit exonérée du paiement des sommes auxquelles ils se refèrent quelqu'en soit le montant, petit ou élevé, *mais dans le réglement de tous ses comptes avec la nation voisine, et à ce que rien ne reste pendant susceptible d'altérer la bonne intelligence entre les deux Gouvernements, et de donner lieu à des contestations embrouillées et dangereuses.* Cela est un bien d'une importance capitale."

34. C'est ainsi que les commissaires Mexicains comprirent la portée et la signification des art. 13, 14 et 15 du traité, et il est certain que la thèse du Gonvernement du Mexique que relativement aux réclamations ou crédits pour faits antérieurs au 3 février 1848, la République resta absolument libre et exonérée, n'est que le résultat de l'interprétation que dès alors on considéra qu'il convenait de donner aux articles cités.

35. Mais les réclamants prétendent se soustraire à la rigueur inflexible des déductions qui dérivent des textes invoqués et allèguent que le 2 février 1848, aucun citoyen américain ne pouvait formuler de réclamation au Gouvernement du Mexique pour des causes ou motifs plus ou moins relatifs au Fonds Pie. La libération consentie au Mexique ne pouvait donc comprendre la demande actuelle, comme elle ne put non plus être appliqée à la demande soumise à la Commission Mixte. Cet argument, malgré son énergie apparente est notoirement spécieux.

36. En effet, acceptant le point de vue de nos adversaires, nous pouvons dire avec eux qu'en 1848, aucun citoyen des Etats-Unis n'avait à proposer de réclamation sur les biens du Fonds Pie. Comment, dans la suite des temps, quelques citoyens des Etats-Unis purent-ils acquérir un intérêt dans ce Fonds Pie? C'est ce que jamais n'ont pu expliquer d'une façon satisfaisante les réclamants, qui ayant commencé par s'intituler les maîtres de tout ce qui devrait appartenir à ce Fonds, (Voir la lettre de l'Evêque Alemany au Dt. d'Etat des Etats-Unis en 1859) au moment de spécifier leur demande devant la Commission Mixte, abandonnent cette prétention et la réduisent aux intérêts qu'ils supposent produits par le capital que, selon leur caprice, ils calculent comme résultant du Fonds, postérieurement à la date du traité de paix.

37. Pour donner une apparence d'efficacité au subterfuge imaginé pour éluder les stipulations dudit traité; on dit que comme les intérêts demandés furent causés et non payés après février 1848, le dommage souffert pour cette raison, le préjudice dont ils demandent réparation, survinrent après cette date et à des citoyens Américains. Pour arriver à cette conclusion qui fait plus honneur à l'habileté de ceux qui la soutiennent qu'à leur justification, on tente de séparer la prestation demandée, c'est-à-dire une série d'annuités d'intérêts, de l'obligation générale de les payer, comme si c'était là deux choses différentes et

susceptibles d'exister l'une sans l'autre. Quiconque prendra la peine d'examiner froidement la situation aura cette persuasion: l'obligation de payer un intérêt périodique est une seule; c'est celle que contracte un débiteur en s'en inposant la charge; les échéances de cette obligation sont les différents et les successifs. On ne peut dire raisonnablement qu'il y ait autant d'obligations que d'échéances périodiques des intérêts. Le lien juridique est unique mais avec cette modalité, que les prestations auxquelles s'oblige le débiteur n'ont pas à être accomplies en une seule fois, mais à des époques consécutives. A chacune de ces échéances convenues, ou peut demander l'accomplissement de l'obligation primitive qui est la seule exigible.

38. Si ces observations sont vraies—et je doute beaucoup que l'on puisse les discuter de bonne foi—nous arrivons nécessairement à cette conclusion: l'obligation dont les réclamants exigèrent l'accomplissement devant la Commission Mixte, et celle dont on exige aujourd'hui l'accomplissement du Mexique, qui est la même, est celle que la République s'imposa, selon le criterium des représentants de l'Eglise Catholique de Californie, lorsqu'elle édicta le décret du 24 octobre 1842, ou quand le 3 avril 1845, elle ordonna la dévolution à l'Evêque de Californie des biens invendus du Fonds Pie. Or, cette obligation quelle qu'elle fût, resta absolument éteinte par les clauses XIV et XV du traité de Guadalupe. Elle n'a pu renaître seulement par le fait que l'Eglise Catholique de Californie eut acquis la qualité de corporation nord-américaine en 1854. Nous pouvons donc affirmer que les réclamants actuels ne peuvent soutenir leurs prétentions en présence d'un traité, qui, comme le dit M. Mariscal dans sa réponse, est le plus solemnel de tous ceux qui unissent le Mexique et les Etats-Unis, et grâce auquel, selon que l'entendirent les négociateurs mexicains, depuis 1848, tous nos comptes avec cette nation demeurent soldés et rien ne resta debout qui pût donner l'occasion dans l'avenir à des controverses compliquées et dangereuses.

39. Il a été dit que, grâce à la découverte d'un subterfuge plus ingénieux que juridique, les évêques de la Haute Californie parvinrent à faire encadrer leurs réclamations dans les prévisions de la Convention de 1868 et je crois qu'il faut bien revenir sur ce point. Le sophisme du raisonnement employé à l'effet repose sur une confusion délibérée entre ce qui constitue l'origine—techniquement la cause—d'une obligation avec les faits qui peuvent déterminer son échéance. Causa, dit la loi romaine (II D. de verb. sig), primum enim negotium significat, et quamlibet obligationum originem, Causa, pro titulo (leg II. parr. 4 D. de except. rei. jud. Scott et Heineccius Vocab, juris Utriusque Verb. Causa). L'échéance d'une obligation quand elle est à terme, ou consiste en des prestations périodiques, n'est pas l'origine, ni la cause, ni le principe de l'obligation mais seulement l'occasion de la rendre effective, *cum dies credit;* en d'autres termes, l'échéance n'est pas l'évènement d'où procède l'obligation, mais le fait qui détermine l'occasion d'en exiger l'accomplissement.

40. Insister sur ce point devant un tribunal composé de juristes éminents, serait abuser de son attention. En appliquant donc au cas concret les remarques antérieures, on sera forcé de reconnaître que les différents actes des Gouvernements espagnol et mexicain dont l'histoire a été amplement exposée dans ces audiences, tous antérieurs aux années 1848 et 1868, étant l'origine, la cause, le principe de l'obligation dont on exige l'accomplissement, et ces faits étant ceux dont *procède*

la réclamation, celle-ci est en tous points inadmissible parce qu'en face d'elle se dresse l'insurmontable obstacle de deux pactes internationaux, également respectables et obligatoires.

V. 41. Dans la prévision que, contrairement à ce que l'on doit espérer, la Cour décide que l'exception péremptoire déduite des stipulations du traité de Guadalupe n'est pas efficace, M. Mariscal propose une autre du même caractère, fondée sur diverses lois mexicaines dont les textes sont à la disposition du tribunal, ayant été déposées en même temps que la réponse de mon Gouvernement, et tout en réservant aux distingués avocats du Mexique le développement des questions juridiques posées en même temps que l'exception dont je m'occupe, je me permettrai quelques explications que je crois indispensables.

42. La somme réclamée est un revenu de 6 pct. garantie par l'hypothèque de la rente du tabac, et la garantie promise et constituée étant une *hypothèque* qui ne peut porter que sur des immeubles ou droits réels, il est manifeste que le droit constitué si il est un droit, ce qui est bien contestable, serait une valeur immobilière.

43. L'art. 684 du Code civil mexicain dit que "les biens immeubles sont fract. IX. Les autres droits réels sur des immeubles. L'art. 1823 du même Code est ainsi conçu: "L'hypothèque est un droit réel constitué sur des biens immeubles ou sur les droits réels pour garantir l'exécution d'une obligation ou sa préférence pour le paiement." En conséquence, tant à cause de la nature même de l'opération que à cause de sa garantie par une hypothèque, l'obligation attribuée au Gouvernement du Mexique, constitue juridiquement un bien immeuble car il est supposé avoir donné naissance à un droit réel, et les droits réels sont des immeubles selon la législation Mexicaine.

44. Quelle est la loi applicable à ce droit réel? Indiscutablement la loi Mexicaine, parce qu'à l'époque où ce droit commença d'exister, les personnes, les choses, le lieu du contrat supposé et celui où était situé l'objet de ce contrat, étaient mexicains.

45. Eh bien, selon les principes du droit international privé, le statut réel, c'est-à-dire l'ensemble des lois applicables *aux biens immeubles*, est le seul applicable dans les cas de différends, parce qu'il a été reconnu à l'unanimité que chaque Etat souverain a le droit de légiférer sur les immeubles situés dans son territoire. En vertu de ce principe élémentaire, l'art. 13 du Code civil du District Fédéral du Mexique dispose que: "Sur ce qui concerne les biens immeubles situés dans le District Fédéral ou à la basse Californie, les lois Mexicaines seront obligatoires quoi qu'ils soient possédés par des étrangers." Et malgré ma crainte des propositions absolues, j'oserai affirmer que ce principe appartient à la jurisprudence universelle.

46. Sans admettre bien entendu, que l'Eglise Catholique de Californie fût propriétaire du censo constitué par le Gouvernement Mexicain sur la rente du tabac et avec l'hypothèque de cette même rente, je prétends que les lois mexicaines sont les seules applicables. A leur défaut, quelles autres lois pourraient l'être?

47. Des dispositions du Congrès Mexicain obligent à considérer comme éteints par la prescription *négative* les droits que prétendent exercer les réclamants. A cette prescription ils opposent uniquement que jamais encore on n'a soutenu devant un tribunal international qu'une réclamation pût être rejetée pour cause de prescription.

48. Une affirmation aussi absolue est téméraire; parce qu'il faudrait pouvoir alléguer et prouver que des précédents de jurisprudence inter-

nationale ont établi pour règle que l'exception de prescription est inadmissible contre des réclamations soumises à des tribunaux internationaux; et c'est ce que nos adversaires ne pourraient démontrer. Quelle relation y a-t-il entre la nature ou l'espèce de juridiction à laquelle est soumise une action, et la valeur de tel ou tel système de défense? Cependant les réclamants posent en dogme que les lois relatives à la prescription négative, manquent d'autorité devant les tribunaux internationaux, mais jusqu'aujourd'hui on s'est borné à fournir sur ce point des affirmations. Nous devrions donc attendre les preuves. Mais il n'est pas inutile pour bien poser la question, de rappeler que le tribunal constitué par le protocole du 22 mai s'est substitué, du consentement des parties intéressées, au tribunal préétabli qui en l'absence de cette stipulation aurait dû connaître de la question. Nous affirmons que ce tribunal aurait dû être mexicain et invoquant l'art. 97 de la Constitution Féderale Mexicaine, présentée parmi les annexes de la réponse de la République, nous soutenons que c'est devant ce tribunal que les réclamants auraient dû demander l'accomplissement de l'obligation attribuée au Gouvernement du Mexique. Si la demande avait été présentée devant semblable tribunal, le défendeur n'aurait-il donc pu invoquer la prescription? Il serait impossible de le nier. Et pourquoi cette défense régulière devant un tribunal préétabli, ne serait-elle opposable devant un tribunal spécialement institué pour connaître de la question au moyen d'un compromis arbitral? Parce que, disent nos adversaires, en premier lieu, l'objet de la prescription n'est pas d'éteindre le droit mais d'empêcher l'action. Nous ignorons si aux Etats-Unis ce principe est juridique, mais suivant la tradition romaine et d'après les législations civiles du Code Napoléon, la prescription négative est précisément un moyen légal *d'extinction* d'obligations, ou ce qui revient au même, produit une exception péremptoire qui détruit l'action, et non une défense dilatoire qui en empêche l'exercice. En second lieu, ajoutent les réclamants, quiconque est sous l'obligation d'une prestation, peut à son choix recourir ou non à la prescription, mais du seul fait de son consentement à ce que la réclamation soit soumise à l'arbitrage il se désiste de la défense fondée sur la prescription. Pourquoi? Nous l'ignorons. Mais la théorie de nos adversaires, formulée *in terminis*, pourrait servir aussi bien à exclure tous moyens de défense. Par le fait d'avoir consenti à ce que la réclamation présentée fût soumise à l'arbitrage, le Mexique se serait déclaré vaincu d'avance, et aurait signé la sentence le condamnant à payer tout ce qu'on lui réclame? Non! Une prétention aussi absurde ne peut être nulle part accueillie car elle revient à dire que dans la célébration d'un compromis arbitral le défendeur, du seul fait d'y souscrire reconnaît ne pouvoir lui opposer aucune exception.

49. A ce sujet, nous retrouvons une allégation qui a déjà été étudiée. Elle consiste dans la supposition que d'après les stipulations du Protocole du 22 mai, la Cour à la juridiction de laquelle se soumettaient les Hautes parties contractantes, ayant la faculté pour décider sur la justice de la réclamation, au cas où elle ne serait pas régie par le principe de "*res judicata*" tout système de défense appuyé sur le temps écoulé, est inadmissible. L'injustice—dit-on—ne peut sous l'action du temps devenir la justice, sans une faute de la part du créancier ou par les actes du débiteur déclarant la réclamation prescrite.

50. Il serait oiseux de démontrer que dans la langue juridique *juste* signifie ce qui est conforme à la justice, et que dans une question de

l'ordre juridique comme celle-ci, *justice* signifie *Droit*. Or, la loi positive autorise la prescription, comme un moyen juridique légitime c'est-à-dire *juste*, d'éteindre les obligations, de sorte que si le débiteur veut l'invoquer et il en fait la preuve, le juge qui connaît du procès devra la déclarer et nul ne pourra qualifier d'injuste la sentence rejetant l'action intentée.

51. Le cours du temps peut avoir pour résultat que l'injustice se convertisse en justice; et le phénomène se réalise tous les jours du fait de la prescription positive et négative, sanctionnée par toutes les législations comme institution d'ordre public et nommée par les jurisconsultes romains, *la patronne du genre humain*.

52. La partie adverse insinue que le créancier n'a aucune faute à se reprocher, si le temps nécessaire à la prescription s'est écoulé. Mais on oublie, en formulant cette allégation, que la loi à cet égard ne reproche au créancier d'autre faute que d'avoir laissé son action tomber sous le coup de la prescription.

M. EMILIO PARDO. Je demande à la Cour la permission de continuer ma plaidoirie à l'audience prochaine, car je me sens très oppressé.

M. DESCAMPS. Est-ce qu'on ne pourrait pas autoriser Son Excellence à déposer son imprimé, et le considérer comme lu?

M. BEERNAERT. En effet, on pourrait considérer la lecture comme terminée.

M. DESCAMPS. De cette façon, les débats pourraient continuer sans interruption jusqu'à la fin.

M. LE PRÉSIDENT. Absolument. M. l'agent des Etats-Unis s'oppose-t-il à ce que le reste du mémoire ne soit pas lu, et à ce que celui-ci soit déposé?

M. RALSTON. I suppose M. Pardo finds himself fatigued and not entirely prepared to continue, but simply desires an adjournment until Monday. We are perfectly willing to agree to that.

M. ASSER. He perhaps does not understand that it is proposed to consider the oral argument as finished, and to file the printed argument Monday. Has the agent of the United States any objection?

M. RALSTON. No.

Sir EDWARD FRY. Then we gain so much time.

M. RALSTON. If I can have it in print Monday I shall not object.

M. DE MARTENS. We shall begin Monday.

M. RALSTON. With M. Penfield's remarks.

M. LE PRÉSIDENT. Maintenant, la première partie des débats est close, avec la réserve pour M. l'agent du Mexique de déposer lundi sa plaidoirie imprimée. Alors commencent les répliques. Pour les répliques, d'après les règles de procédure établies par le Tribunal, chacune des parties a le droit de faire parler un conseil.

M. DESCAMPS. Je demande la parole.

M. LE PRÉSIDENT. M. le Chevalier Descamps a la parole.

M. DESCAMPS. Je voudrais faire observer à la Cour que j'ai été victime d'un cas de force majeure qui m'a empêché de parler au jour qui m'était indiqué; je demande la permission de prendre maintenant la parole, car ensuite il me serait impossible de le faire, M. Penfield, juge aux Etats-Unis, ayant évidemment un droit de priorité sur moi; de sorte que la conséquence serait de me rendre victime d'un cas de force majeure absolue, puisque le jour où mon tour de parole est venu était précisément celui de l'inhumation de ma vénérée souveraine. J'espère que la Cour ne voudra pas me tenir rigueur et qu'elle

prendra en considération la situation spéciale dans laquelle je me trouve.

M. LE PRÉSIDENT. Le Tribunal, vu le cas invoqué à l'appui de votre demande, vous accorde celle-ci, sous la réserve du droit pour la partie adverse de faire aussi répliquer par deux conseils.

M. BEERNAERT. Je pense que nous rentrerions dans les vues de la Cour d'abréger autant que cela se peut les débats en faisant pour les répliques ce que nous venons de faire pour les plaidoiries, de maniére à éviter les répétitions. Il y a deux grandes questions: La réclamation est-elle juste? Y a-t-il chose jugée? Nous nous sommes distribué la tâche; peut-être nos honorables contradicteurs pourraient-ils faire de même, et nous reprendrions la même étude.

M. DESCAMPS. Oui, sauf le droit de faire valoir d'autres considérations, en ce qui me concerne je tâcherai de le faire; nous devons conserver une certaine liberté d'action.

M. BEERNAERT. Bien entendu.

M. RALSTON. Simply with the understanding that when the session opens Monday, M. Descamps will open and will be followed by Judge Penfield, who will close for the United States.

M. EMILIO PARDO. Il reste entendu que j'ai le droit de déposer lundi le mémoire qui contient mon plaidoyer?

M. LE PRÉSIDENT. Certainement.

M. DESCAMPS. Nous n'aurons pas le temps de le lire!

M. DE MARTENS. Il s'agit seulement de la fin, M. Pardo avait presque fini.

M. DESCAMPS. S'il y avait une chose que nous n'aurions pas pu connaître nous demandons à en avoir communication.

M. DE MARTENS. Il faut que M. Pardo communique directement la fin de son plaidoyer à la partie adverse.

(La séance est levée à $4\frac{1}{2}$ heures et le Tribunal s'ajourne à lundi le 29 septembre à 10 heures du matin.)

QUATORZIÈME SÉANCE.

29 septembre 1902 (matin).

Le Tribunal s'est réuni à 10 heures du matin; tous les Arbitres étant présents.

M. LE PRÉSIDENT. La parole est à M. l'agent des Etats-Unis du Mexique pour la continuation de son discours.

M. EMILIO PARDO (CONTINUANT SON DISCOURS).

53. Les évêques de Californie avaient à leur disposition les tribunaux mexicains auxquels ils pouvaient présenter leur demande contre le Gouvernement de la République. Répétons qu'une des dispositions de l'art. 97 de la Constitution du Mexique, a précisément pour but de déterminer la compétence du tribunal appelé à connaître des demandes d'étrangers ou de nationaux contre la Nation. Jamais les évêques de Californie ne formulèrent de demandes devant le juge compétent pour en connaître. Ils ne l'adressèrent jamais directement au Gouvernement du Mexique. Ills formulèrent leur première réclamation devant la Commission Mixte de Washington et se jugeant avec des droits à en élever d'autres, eurent recours à la voie diplomatique si peu justifiée en ce

cas, car nul ne pouvait se plaindre de déni de justice ni de retard injustifiable à l'administrer.

54. Les réclamants laissèrent donc volontairement s'écouler le temps nécessaire à la prescription négative et c'est en vain qu'aujourd'hui ils prétendent n'avoir aucune faute à se reprocher; car le seule qui suffise devant la loi à motiver la prescription: le non exercice de l'action leur est imputable. Si la République Mexicaine avait édicté une loi de prescription spéciale au sujet de la réclamation du Fonds Pie, la partie adverse pourrait dire qu'un acte du débiteur est insuffisant pour que son obligation soit éteinte, mais il faut faire remarquer qu'il s'agit de la loi applicable à toutes les réclamations juridiques qui doivent avoir leurs effets au Mexique.

55. Cette loi fait partie du Code civil du Mexique et elle établit la prescription négative à laquelle on a recours pour se soustraire à une réclamation dont l'injustice a été démontrée à d'autres égards. Cette loi est obligatoire pour pous Mexicains et étrangers touchant les relations juridiques formées au Mexique et que doivent y recevoir une réalisation pratique. Voilá pourquoi les évêques de Californie, qui ont laissé s'écouler un temps suffisant pour que leur action tombe sous le coup de la prescription, n'ont qu'à se soumettre aux conséquences de leur omission, parmi lesquelles est l'extinction des obligations qu'ils mettent à la charge du Mexique pour des responsabilités relatives au Fonds de Californie.

VI. 56. D'un seul coup de plume, les réclamants voudraient rayer de la défense Mexicaine toutes les exceptions subsidiaires et qui se fondent sur les dispositions des lois expédiées le 22 juin 1855 et le 6 septembre 1894. Grâce à ces lois la République Mexicaine a pu liquider sa dette intérieure, et extérieure, reconnaître ses obligations, les épurer, et en un mot rétablir son crédit et prendre une place honorable parmi les pays respectés pour leur exactitude et leur fidélité dans l'accomplissement de leurs engagements.

57. La première de ces lois invitait tous ceux qui, nationaux ou étrangers, se regardaient comme créanciers du Gouvernement Mexicain, à faire la preuve de leurs créances qui dès lors, seraient liquidées ou converties en titres réguliers donnant droit à toucher un interêt périodique. Ces dispositions n'avaient pas un caractère obligatoire, mais le créancier qui refusait de s'y soumettre ne pouvait prétendre être plus favorisé que ceux qui se rendirent à l'appel de la loi. Il devait donc se résigner à ce que le réglement de sa créance fût différé ou ajourné.

58. Le système de la loi de 1885 ne produisit pas un résultat aussi complet qu'on espérait. Un grand nombre de créanciers du Mexique, placés dans l'alternative de se soumettre à la loi ou de s'y soustraire, prirent ce dernier parti, et le résultat fatal fut que malgré les efforts du Gouvernement Mexicain pour régulariser la dette nationale, en établir le montant, et la payer, ces intentions furent irréalisables tant qu'on n'obligea pas les créanciers à présenter leurs créances.

59. Mais il ne suffisait pas de déclarer que tous les créanciers du Mexique étaient obligés de présenter leurs créances au bureau établi à cet effet, il fallait encore sanctionner efficacement l'accomplissement de ce devoir. Cette sanction fut créée par la loi du 6 septembre 1894. Elle disposait que les créanciers qui laisseraient passer les délais fixés pour présenter, liquider et convertir leurs créances sans remplir ces formalités, perdraient tout droit à présenter des réclamations ultérieures, lesquelles seraient prescrites pour toujours.

60. Cette loi produisit un résultat surprenant. La République se trouva en état de connaître ses responsabilités et le chiffre auquel elles s'élevaient; elle les reconnut, les liquida, délivra les titres respectifs à un intértêt assez rémunérateur, et qui sont acceptés sur presque tous les marchés importants de l'Europe et de l'Amérique.

61. *Tous* les créanciers du Mexique accoururent à son appel, et il faut remarquer que parmi ces créanciers étaient tous ceux dont les créances avaient été reconnues par des accords internationaux dans lesquels le Gouvernement du Mexique s'était engagé à payer sa dette sous une forme déterminée ou en donnant telle ou telle garantie. Au nombre de ces créanciers figuraient les porteurs d'obligations provenant de la convention célèbre du Père Moran et par laquelle le Mexique fit une transaction avec le Gouvernement Espagnol et s'engagea à payer une certaine somme pour désintéresser les missions des Philippines.

62. Messieurs les évêques de la Haute Californie ne se crurent pas obligés de se soumettre à la loi. Ils crurent avoir toujours à leur portée le moyen d'obtenir la préférence sur les Mexicains et sur les étrangers qui s'étaient rendus à l'appel honorable du Gouvernement Mexicain, et ils attendirent que l'intervention diplomatique leur assurât une situation unique et privilégiée, dans laquelle n'est placé *aucun créancier du Mexique.*

63. Comment expliquer cette attitude? Sur quoi se fonde cette prétention irritante de se soustraire à une loi obéie par tous? D'abord sur ce que la question discutée est simplement de savoir si la réclamation est juste ou non, et que pour cette appréciation il est inutile de tenir compte de la loi qui déclara prescrites et caduques les créances non présentées à la conversion dans les délais fixés à cette fin. Ensuite qu'un acte du débiteur ne peut seul produire l'extinction de la dette.

64. Quant au premier point, il me semble oiseux de répéter qu'un esprit clair et impartial ne pourra jamais admettre que le Gouvernement du Mexique en signant le protocole du 22 mai dernier renonça à opposer toutes les défenses qu'il avait à faire valoir contre la demande de l'Eglise Catholique de Californie.

65. Quant au second point, on voit aisément, qu'au moyen d'un procédé de généralisation assez facile, on veut appliquer à un Etat souverain un principe qui ne pourrait être invoqué que contre des particuliers. D'après les principes généraux du droit, des actes exclusifs du débiteur ne peuvent en rien modifier l'obligation à sa charge, mais lorsqu'il s'agit d'un *Etat*, dans l'exercise de sa souveraineté, ces principes perdent de leur inflexibilité, à cause des exigences d'un ordre supérieur. Parfois l'existence même de la nation, sa sécurité intérieure, la défense de ses institutions fondamentales imposent des dispositions, qui, de la part d'un individu seraient impossibles. Rien de plus facile que de citer des exemples à l'appui des observations précédentes; mais afin de ne pas donner à ce travail une extension immodérée, je me bornerai à faire remarquer que la faculté souveraine que le Gouvernement Mexicain exerça en donnant la loi du 6 septembre 1894 n'est pas soumise à l'appréciation du Tribunal, et j'ajouterai que lorsqu'un État indépendant contracte en sa qualité de personne juridique, une responsabilité capable de l'obliger, il ne perd pas pour cela sa condition de Souverain investi de la faculté de légiférer sur toutes les questions de droit intérieur.

66. Il est certain que la loi du 6 septembre 1894 est postérieure à la date à laquelle, pour la première fois après le verdict de la Commission

Mixte, Messieurs les Evêques de Californie intentèrent une nouvelle réclamation au sujet des intérêts du Fonds Pie, par la voie du Département d'Etat des États-Unis et de leur Ministre au Mexique. Mais tous les créanciers du Mexique, invités à faire valoir leurs droits, se trouvaient dans la même situation, c'est-à-dire que tous étaient en possession de droits acquis, ou supposés acquis, antérieurement au 6 septembre 1894. D'ailleurs, de sa nature même, cette loi ne pouvait se rapporter qu'aux créances en existence, et non à celles de l'avenir, les premières étant seules susceptibles de liquidation et de conversion.

67. En somme, c'est par suite d'un acte, ou pour mieux dire d'une omission que les réclamants se trouvent placés dans la situation d'où dérive l'exception qui a été opposée à leur demande. En obéissant à l'appel de la loi, en agissant comme agirent *tous* les autres créanciers du Mexique, ils auraient eu l'occasion de faire valoir leurs droits. Ils préférèrent volontairement s'en abstenir, aspirant à une situation exceptionnelle et privilégiée—prétention dont la raison et le fondement nous échappent—ils doivent subir aujourd'hui les conséquences. C'est donc un de leurs actes propres, un acte du prétendu créancier, qui a déterminé l'extinction définitive des droits qu'il croyait avoir.

VII. 68. Je ne saurais trouver une occasion plus opportune d'appeler l'attention sur les dispositions légales du Mexique établissant l'incapacité radicale de l'Eglise Catholique de la Haute Californie comme corporation religieuse, à exercer les droits qu'elle prétend faire valoir contre le Mexique et sur des biens situés au Mexique.

69. La personnalité civile que l'Eglise Catholique de la Haute Californie peut avoir dans cet Etat de l'Union Américaine, peut lui servir aux Etats-Unis et par rapport à des biens situés dans le territoire américain. Mais par rapport à des biens immobiliers—et le censo constitué par la loi mexicaine du 24 octobre 1842, avec l'hypothèque de la Rente du tabac, est un bien immobilier—cette capacité, dis-je, selon les règles du Droit international privé, est régie par les lois du Mexique. Or, ces lois ne reconnaissent pas a l'Eglise Catholique de la Haute Californie la personnalité nécessaire à posséder et à administrer des biens immobiliers au Mexique. La loi suprême du Mexique, sa constitution politique, art. 27, établit l'incapacité civile des associations religieuses à posséder et à administrer des biens immobiliers ou des capitaux qui y seraient placés.

70. Dans quelques Etats de l'Union américaine il est interdit par exemple, que les associations religieuses possèdent ou acquièrent dans le territoire de ces Etats, des propriétés pour une valeur supérieure à un chiffre donné et la législation de quelques autres Nations a cru devoir imposer des restrictions semblables pour empêcher l'accaparement de la propriété immobilière par la main morte. Ces restrictions font partie du droit public de ces Nations. Qui donc pourra raisonnablement prétendre que ce droit public perde sa valeur, lorsque c'est une corporation religieuse étrangère qui aspire à se créer une situation privilégiée et exceptionnelle? On ne pourrait le croire, car une telle prétention impliquerait la méconnaissance de la souveraineté. Le Mexique réclame maintenant l'application de ces principes, et invoque, outre sa Constitution politique, les dispositions de deux lois organiques, qui refusent à toute association religieuse, quelle que soit sa croyance et quelle que soit sa dénomination, la capacité civile pour posséder et pour administrer des biens immobiliers ou des droits réels au Mexique, et pour exiger exécution d'obligations d'accomplissement

futur. Je me réfère aux dispositions de la loi du 14 décembre 1874, dont le texte a été présenté au Tribunal, et en particulier aux articles 14, 15 et 16 dont nous avons présenté la traduction en français. En présence de ces textes il est impossible de reconnaître à l'Eglise Catholique de la Haute Californie une personnalité civile lui permettant de présenter la réclamation actuelle.

VIII. 71. Dans l'exercice de sa souveraineté, la République Mexicaine décréta le 12 juillet 1859 la loi de nationalisation des biens ecclésiastiques. Nous n'avons pas à considérer si cette loi fut juste ou non, au point de vue du droit abstrait ou du droit canon. C'est une loi édictée par un pouvoir souverain, et par là, c'est une loi obligatoire. Du reste, des lois semblables ont été promulguées dans presque toutes les nations des deux continents, pour obéir à des raisons d'ordre public, que ce n'est pas le moment d'examiner ici.

72. Par l'œuvre de cette loi de nationalisation, toutes les associations religieuses qui possédaient des biens immobiliers ou des droits réels—également biens immobiliers—en furent irrévocablement privées. Les effets de cette loi atteignirent-ils des associations religieuses étrangères? Nous le soutenons. Nos adversaires prétendent que non, et ils basent leur dénégation sur ce que lors de l'annexion de la Haute Californie aux Etats-Unis, le Mexique était lié par l'engagement de payer un certain intérêt, calculé sur le montant des biens du Fonds Pie, aux évêques du territoire annexé. Dans la suite du temps, l'Eglise Catholique de la Haute Californie obtint, dit-on, la qualité de corporation Américaine et elle fut par là soustraite à l'atteinte des lois que le Mexique édictait au sujet de l'Eglise Catholique mexicaine, car autrement ce serait donner un effet extraterritorial à ces lois. L'Eglise de Californie à l'époque de la cession de ce territoire, ajoute-t-on, avait une existence légale d'après le droit international. Elle conserva cette existence, et les lois mexicaines édictées plus tard, sont impuissantes à la lui enlever.

M. Emilio Pardo. Ce passage de ma plaidoirie se rapporte à la loi qui nationalisa les biens ecclésiastiques. Cette loi, d'accord avec la Constitution de 1857, ordonna que tous les biens possédés par les corporations religieuses seraient nationalisés, c'est-à-dire qu'on déclara l'incorporation définitive de tous les biens de mainmorte dans le Trésor national. Evidemment cette loi se constituait avec l'hypothèque de la rente du tabac, puisque cette hypothèque étant de droit réel était comprise notamment dans les dispositions de la loi qui a été déposée devant la Cour. Cette loi met le Gouvernement—même en admettant l'existence de la créance qui est réclamée par Messieurs les évêques de la Haute Californie—dans l'impossibilité absolue de se soumettre à cette réclamation. Aucune corporation religieuse d'aucune confession n'est capable, non seulement de comparaître avec la qualité civile nécessaire pour faire une réclamation, mais de réclamer des biens en meubles ou des droits réels. Toutes les corporations religieuses mexicaines et étrangères ont dû se soumettre à ces dispositions. On peut donc bien dire en ce qui concerne la réponse de l'agent des Etats-Unis à la réponse de M. Mariscal que le Mexique a bien le droit de légiférer sur les corporations religieuses établies dans son territoire, mais qu'une corporation religieuse comme l'Eglise Catholique de la Haute Californie ne peut pas être obligée de se soumettre à une loi qui a été édictée pour les corporations religieuses établies au Mexique.

C'est, messieurs, l'occasion de rappeler le principe d'après lequel le Mexique, comme tout pays souverain, a le droit exclusif de légiférer sur des biens meubles ou des biens réels sur son territoire. La question de savoir si le propriétaire réel ou supposé de ces propriétés, de ces biens meubles ou droits réels est national ou étranger n'a aucune importance, parce que à ce point de vue la personnalité qu'une loi étrangère peut accorder à une corporation religieuse établie sur son territoire peut être suffisante pour les relations entre cette corporation et son Gouvernement, mais est tout à fait insuffisante pour établir les rapports légaux entre cette corporation et un Gouvernement étranger.

La situation actuelle au Mexique est qu'aucune corporation, non seulement ecclésiastique mais civile, d'une durée indéfinie, n'a le droit de posséder ou d'administrer des biens meubles ou des droits réels. Comment peut-on permettre à l'Eglise catholique de la Haute Californie, par le fait qu'elle est une corporation étrangère, d'enfreindre une loi qui fait partie du droit public du Mexique? La loi qui nationalisa les biens ecclésiastiques au Mexique, qui mit un terme aux abus, est une de nos lois fondamentales; on ne peut pas prétendre qu'une corporation étrangère religieuse, si respectable qu'elle soit, puisse avoir le droit de se soustraire aux dispositions de cette loi.

Vous avez eu peu-être, Messieurs les arbitres, l'occasion de remarquer que, quoiqu'on ait fait certaines réserves sur le droit par lequel le Gouvernement Mexicain édicta la nationalisation des biens ecclésiastiques, des biens de mainmorte, il faut reconnaître que cette faculté de mon pays à décréter cette nationalisation n'est pas en cause; c'est-à-dire que le Tribunal n'a aucune compétence pour décider si cette loi est d'accord ou non avec les principes généraux. Le Mexique quand il décréta cette loi, a fait la même chose qu'ont faite presque tous les Gouvernements des pays civilisés; tous se sont crus obligés de mettre un terme aux abus de la mainmorte, au danger que présentait pour la richesse publique cet accaparement de la propriété, et on ne peut pas reprocher au Mexique un fait qui a été consommé, reproduit partout où la mainmorte a produit les effets fatals qu'elle produit nécessairement.

D'ailleurs, les corporations religieuses et le clergé au Mexique, pendant les révolutions qui ont agité mon pays fournissaient à la révolution, aux éléments perterbateurs des ressources et des armes pour combattre les autorités légitimes. Le Gouvernement de mon pays se trouva dans l'obligation de désarmer ses ennemis et de priver le clergé et les corporations ecclésiastiques des éléments qu'ils employoient à maintenir l'agitation dans le pays et à soutenir une guerre qui nous ravageait et qui faisait l'esclandre du monde entier.

Mais, messieurs, c'est une digression qui n'a vraiment aucune opportunité dans le débat. Je me borne à faire remarquer qu'on ne peut pas reprocher au Mexique d'avoir édicté une loi qui a été édictée partout ailleurs pour la même raison: pour empêcher l'accaparement de la richesse mobilière par les biens de mainmorte.

Si la réclamation des évêques de la Haute Californie avait gain de cause dans ce procès ils se trouveraient au Mexique dans une situation tout à fait privilégiée, exceptionelle. Je crois donc qu'on ne peut pas reprocher à mon Gouvernement d'avoir fait tous ses efforts pour éviter une situation qui serait la cause de je ne sais combien de perturbations et de difficultés.

On a dit aussi, messieurs, que prétendre appliquer aux biens du Fonds Pie de la Haute Californie la loi qui nationalisa les biens appartenant

aux fondations ecclésiastiques ou civiles d'une durée perpétuelle ou indéfinie, équivaudrait à donner un effet extra territorial à cette même loi. Du moment, messieurs, que le Mexique prétend appliquer cette loi à une réclamation qui est dirigée contre lui et qui porte sur des biens établis au Mexique et se référant à un contrat qui a été fait au Mexique, on ne peut pas admettre cette objection qu'en tâchant d'appliquer la loi du 12 juillet 1859 il veut attribuer à cette loi un effet extra territorial.

73. Le raisonnement qui précède, repose sur une confusion d'idées et sur un sophisme dont il est facile de découvrir le vice, parce que le précepte de l'art. 13 du code civil mexicain, d'après lequel les lois mexicaines seules sont applicables en tout ce qui concerne les biens immobiliers, fussent-ils possédés par des étrangers, n'est autre que l'application d'un principe de droit international privé, dont la démonstration déjà faite n'est pas à répétér devant ce Tribunal.

74. Les lois mexicaines de nationalisation des biens ecclésiastiques, applicables à tous les biens de cette espèce *existant au Mexique*, loin de prétendre à une action extraterritoriale, sont d'un caractère strictement et rigoureusement territorial, puisqu'elles ont pour objet des propriétés situées sur le territoire national. Et ainsi, de même qu'une association religieuse mexicaine s'opposerait, avec raison, à ce que le Gouvernement du Mexique prétendît appliquer la loi de nationalisation des biens de la mainmorte à des propriétés situées à l'étranger, de même ce Gouvernement a le droit parfait d'exiger qu'une corporation religieuse étrangère se soumette aux lois Mexicaines en ce qui concerne les propriétés immobilières, situées sur territoire mexicain.

75. Le principe scientifique dominant dans la question, est celui-ci: Toute nation a le droit de légiférer sur les biens fonds situés dans son territoire, que les possesseurs de ces biens soient nationaux ou étrangers, car si on n'admettait pas ce principe, il en résulterait forcément cette application extraterritoriale dénoncée par nos honorables adversaires. La loi américaine, par exemple, met une limite à la capacité des corporations religieuses à acquérir des biens immobiliers au-delà d'une valeur atteignant un certain *maximum*, parce qu'on a jugé aux Etats-Unis que ce système est le plus propre à éviter l'accaparement des biens fonds par la mainmorte. Que dirait le tribunal des Etats-Unis, devant lequel une congrégation religeuse étrangère viendrait maintenir la prétention que le statut limitant sa capacité à posséder des biens immobiliers, ne régit que les corporations américaines et non les étrangères? Il dirait avec raison que tâcher de rendre extensive la capacité illimitée d'une congrégation religeuse selon la loi de son pays, á des biens situés aux Etats-Unis, serait prétendre à l'application extra-territoriale de cette loi, et que quiconque possède des biens fonds sur le territoire américain, se soumet tacitement, mais nécessairement, en ce qui tient à ces biens, à la souveraineté américaine.

76. Sous ce point de vue donc, les réclamants aspirent à se placer dans une situation exceptionnelle et privilégiée. Aucune corporation religieuse, catholique, protestante ou de quelque autre dénomination, ne peut posséder au Mexique de biens immobiliers. Leur incapacité à cet égard est absolue, radicale, d'ordre public et cependant, l'Eglise Catholique de la Haute Californie, une corporation étrangère, pourrait se soustraire au Droit public en vigueur dans la République mexicaine? Enoncer seulement semblable prétention, c'est la condamner, comme un outrage à la souveraineté d'un Etat indépendant.

IX. 77. De notre côté, il a été allégué qu'il n'y a plus d'Indiens idolâtres à christianiser dans la Haute Californie et que, en supposant même inefficaces toutes les autres exceptions proposées, celle-ci suffirait au rejet de la réclamation, à quoi l'on répond que d'après la volonté des donateurs, même réalisée la prévision sur laquelle ce moyen de défense se fonde, les produits du Fonds devraient être employés pour les besoins des Indiens, et que cette supposition n'est pas exacte parce qu'il y a encore des Indiens non civilisés dans la Haute Californie.

78. Si on s'appuie sur la volonté des donateurs pour prétendre qu'il y a encore des Indiens à la subsistance desquels il faut pourvoir, on doit se conformer strictement à cette volonté telle qu'elle fut exprimée. L'acte de donation octroyé par le Marquis de Villapuente, stipule en termes exprès et catégoriques que les propriétés qui y sont mentionnées sont *données aux Missions de la Compagnie de Jésus des Californies* (p. 105 Vol. imprimé); idée qui semble corroborée plus loin (p. 106). En ce qui concerne la donation Arguëlles, d'après le décret royal du 25 juillet 1803 son application doit être, selon les termes mêmes de la cédule royale, rendue sous la forme de "distribution entre les religieux qui desservent les missions qui *étaient à la charge des Jésuites*, dans ces parages (pag. 319)."

79. On nous parle à tout moment du respect dû aux volontés des donateurs du Fonds Pie. On nous rappelle sans cesse que le Gouvernement Espagnol comme celui du Mexique, en s'occupant des biens des Jésuites et en disposant des biens qui formaient ce fonds, déclarèrent leur intention de se soumettre à ces volontés. Mais il semble que cette soumission ne soit obligatoire que pour le Mexique, et en ce qui peut lui porter préjudice, car lorsqu'il est question de ce qui le favorise, on passe sur les déclarations des bienfaiteurs et on affecte d'en oublier ou de n'en pas comprendre la véritable signification.

80. Laquelle des missions mentionnées dans le document distribué par l'Hon. M. Ralston fait partie de celles qui furent fondées par les Jésuites? N'est ce pas un fait patent qu'il n'y eut de missions fondées par eux que dans la Basse Californie? Ne l'est-il pas également que les donations eurent en vue les missions fondées ou à fonder par la Compagnie de Jésus?

X. 81. Si le Fonds pie de Californie avait pu survivre aux lois de nationalisation des biens de mainmorte légitimement décrétées par la République Mexicaine, la faculté d'employer les produits de ce fonds et les appliquer comme il lui semblerait le plus convenable aux intentions de l'institution, appartiendrait exclusivement à ce Gouvernment. De cette faculté indiscutable, que nos adversaires ont reconnue, puisqu'ils admettent comme dictés par une autorité souveraine et légitime les divers décrets expédiés jusqu'en 1845, résulté la liberté de disposition que j'invoque. Elle est la conséquence naturelle et inévitable d'un fait qui n'a pas été nié non plus; que par suite de la suppression de la Compagnie de Jésus et de la prise en possession de leurs temporalités, le Gouvernement Espagnol prit la place des Jésuites, auxquels à son tour succéda le Gouvernement du Mexique, lorsqu'il eut conquis son indépendance. Selon la volonté des fondateurs primitifs, les Jésuites, même en admettant qu'ils aient été investis de ce que l'on a bien voulu nommer un trust, étaient autorisés à disposer des produits du Fonds pie, comme ils l'aurient jugé convenable et dans l'intelligence qu'ils n'auraient à rendre compte de cette gestion à personne et qu'au-

cune autorité séculière ou ecclésiastique, ne pourrait intervenir dans cette gestion qui leur était confiée sans restriction ni contrôle.

82. Si les lois de la logique ont conservé leur force, et si on admet que le Gouvernement Espagnol et ensuite le Gouvernement Mexicain se subrogèrent aux premiers missionnaires pour leurs droits et leurs facultés, il faudra admettre qu'ils acquirent du même coup, et dans toute sa plénitude, toutes les facultés, toutes les attributions illimitées que la volonté des donateurs du Fonds Pie, avait concédées aux Jésuites. Le roi d'Espagne fit à ce sujet d'innombrables déclarations qui n'ont pas été lues dans les audiences du Tribunal, et le Gouvernement Mexicain légiféra et decréta constamment sur l'administration du Fonds, comme sur l'emploi de ses produits; et l'une des preuves en est que c'est dans une des lois expédiées par le Gouvernement du Mexique que les réclamants s'efforcent de trouver un titre.

83. Cependant les réclamants méconnaissent le droit du Gouvernement Mexicain et affirment que l'emploi et la disposition du Fonds Pie reviennent exclusivement aux évêques de la Haute Californie comme le démontre rien moins que le décret du 3 avril 1845 si souvent invoqué dans cette discussion.

84. Il me semble inutile de m'arrêter à repéter la réfutation de l'argument que l'on prétend tirer de cette loi, qui, ainsi que les avocats du Mexique l'ont démontré de façon concluante, n'implique nullement un contrat synallagmatique, source d'obligations exigibles devant tout tribunal. Ce décret dans lequel l'autorité souveraine du Mexique dicta une mesure, ne put créer un droit dans l'acception technique du mot, de même que les autres lois que la République dicta dans un but identique en disposant de l'administration du Fonds.

85. D'autre part, l'attitude de nos honorables adversaires est inconséquente au dernier point. En même temps qu'ils invoquent une loi mexicaine chargeant l'évêque de Californie et ses successeurs de l'administration et de l'employ du Fonds Pie, reconnaissent qu'ils acceptent le caractère d'agents ou de délégués du Gouvernement Mexicain, et prétendent tenir leur titre de ce même Gouvernement, ils proclament très haut qu'ils se jugent dispensés du devoir de rendre compte de leur gestion, et prétendent que nul n'a droit à leur demander des comptes. Est-il donc explicable qu'une corporation étrangère soustraite à la juridiction des autorités mexicaines, assume la qualité d'agent ou de délégué du Gouvernement de la République? L'évêque de Californie á qui la loi du 3 avril 1845 confia l'administration et l'emploi du Fonds Pie, était un fonctionnaire mexicain, mais en vertu de l'annexion de la Haute Californie aux Etats-Unis, les successeurs de cet évêque ont la nationalité américaine. Comment donc conserveraient-ils une charge qui, sans avoir compte de son caractère précaire, les placerait, eux citoyens étrangers, non résidant en territoire mexicain, dans la condition d'employés ou d'agents d'un Gouvernement qui n'est pas celui auquel ils doivent fidélité? L'acte d'incorporation d'où dérive la personnalité civile attribuée à l'Eglise Catholique de la Haute Californie n'implique-t-il pas nécessairement la soumission absolue aux lois et aux autorités des Etats-Unis et la rupture de tout lien de dépendance à l'égard du Gouvernement, auquel le territoire annexé était soumis avant l'annexion?

86. Les réclamants insistent cependant sur ce que le Gouvernement du Mexique comme *trustee*, a le devoir de payer une pension perpétuelle de 6 pct. annuel sur une somme déterminée et ils ajoutent que ce

même Gouvernement a reconnu cette obligation dont il revient à l'Evêque de Californie d'exiger l'accomplissement. Pour juger de l'efficacité de ces allégations, il suffit de supposer pendant un instant que la Compagnie de Jésus n'a pas été supprimée et que les biens administrés par elle—donc ceux des missions de Californie—ne sont pas passés en d'autres mains. En ce cas, qui aurait le droit de demander aux Jésuites, ces *trustees*, selon la qualification que nos adversaires leur ont donnée, d'employer les produits des biens à l'entretien des missions ou du culte catholique en Californie? Personne sans aucun doute, car la volonté des donateurs était qu'aucune autorité séculière ou ecclésiastique ne s'entremît et demandât compte aux Jésuites de l'accomplissement de la condition imposée à la donation. Eh bien, le Gouvernement Espagnol succéda à la Compagnie de Jésus dans toute la pléntitude des facultés qu'exprime l'acte de fondation du Fonds Pie; et au Gouvernement Espagnol succéda celui du Mexique, sans restriction d'aucun genre. Donc, le Gouvernement Mexicain qui assuma le trust à la charge d'abord des Jésuites, selon que l'entendent les réclamants le prit dans les mêmes conditions que ceux-ci, ou, ce qui revient au même, avec la faculté de disposer des produits du Fonds comme il lui semblerait le plus convenable. et de les employer comme il le jugerait le plus utile.

87. Pour soutenir le contraire, il serait nécessaire que l'on nous montrât l'acte juridique modificant le trust primitif confié aus Jésuites missionnaires, et cet acte juridique n'a pas été produit et ne peut l'être, parce que nous avons déjà vu que les lois Mexicaines expédiées à diverses époques et desquelles on veut conclure que le Gouvernement Mexicain s'imposa des obligations, n'ont pas et ne peuvent avoir le caractère de contrats, sources de droits dont l'exercice reviendrait aux évêques actuels de la Haute Californie. De plus, outre qu'il s'agit d'actes unilatéraux, excluant de façon absolue toute idée de lien juridique, ce furent des actes de souveraineté soumis de leur propre nature à la volonté du souverain dont ils émanèrent.

88. Il est dû, avant de poursuivre, d'examiner la question actuelle sous un point de vue assez intéressant et qui me semble nouveau. Quoique l'on puisse dire sur la faculté du Gouvernement Mexicain par rapport à l'administration et à l'emploi des produits du Fonds Pie, on ne dit pas cependant en quoi il les emploie ni ce qu'il en fait. Cette observation ne résiste pas à l'analyse, pour deux raisons également puissantes.

89. La première est qu'il a déjà été démontré que le Gouvernement Mexicain, même en le considérant comme un *trustee*, n'a à rendre compte à personne de l'accomplissement ou du non accomplissement de la condition imposée par les premiers donateurs, puisque, successeurs des *trustees* originaires, (les Jésuites), il jouit de la liberté illimitée qui leur était concédée.

90. La seconde est que la fondation ayant eu en vue un double but, l'un politique et l'autre religieux, le premier est impossible, puisque la Haute Californie n'est plus une dépendance mexicaine. Il ne serait donc plus possible de remplir en tous points les volontés des donateurs. D'autre part, l'Eglise Catholique de Californie est une corporation riche, établie dans une contrée renommée également pour sa richesse, et qui est soumise à l'autorité d'un Gouvernement, l'un des plus puissants de la terre, et les prévisions des donateurs du Fonds ne sont plus réalisables aujourd'hui. A cet exposé, il faut ajouter que les lois d'ordre public de la Nation Mexicaine, les principes de sa constitution

politique, lui défendent de considérer comme subsistant un fonds qui depuis 1859 et en vertu de la loi du 12 juillet de cette même année, fut définitivement et irrévocablement nationalisé et cessa complètement d'exister. Nulle corporation ecclésiastique, d'aucune dénomination, ne peut avoir au Mexique les droits que prétend exercer au moyen de ses évêques, ou de quelques-uns d'entre eux au moins, l'Eglise Catholique de Californie. Etrangère comme elle l'est; en ce qui regarde des propriétés situées en territoire mexicain, elle est soumise aux lois du pays, à l'obéissance desquelles elle ne peut se soustraire en alléguant qu'elle est une corporation de nationalité américaine.

91. Le Tribunal peut mesurer l'importance qu'aurait pour la République Mexicaine une décision qui sanctionnerait les prétentions de l'Eglise Catholique de la Haute Californie, car il ne saurait échapper à sa haute penétration qu'il y a au Mexique un grand nombre d'entreprises montées par des compagnies étrangères, et que chacune se jugerait autorisée à s'exonérer de l'obéissance aux lois du pays, en invoquant simplement sa nationalité. C'est ainsi que dans le territoire Mexicain même s'érigerait une foule d'Etats dans l'Etat, chacun ayant son régime propre, et exigeant chacun que les lois de son pays lui soient seules applicables, et non les lois Mexicaines. Une prétention aussi exhorbitante serait insoutenable, et c'est cependant ce que l'Eglise Catholique de Californie cherche à faire triompher devant ce Tribunal.

92. Et puisque je m'occupe des lois constitutionelles mexicaines, que l'on me permette d'expliquer maintenant l'opportunité des dispositions de la loi du 14 décembre, 1874, présentée au nombre des annexes de la réponse du Mexique à la demande des vénérables évêques de la Haute Californie.

93. Cette loi, entre autres choses, établi les seuls droits correspondants aux associations religieuses du Mexique, et comme parmi ces droits ne figure pas celui d'avoir une personnalité civile pour exiger l'exécution d'obligations d'un accomplissement futur, et que d'autre part, ces obligations sont déclarés nulles et d'aucune valeur, il est évident que l'Eglise Catholique de la Haute Californie manque de personnalitá aux yeux de la législation constitutionnelle Mexicaine, et elle ne peut rien réclamer à la République.

94. L'exception dérivée de la loi constitutionnelle à laquelle je me réfère ne put être ni alléguée ni décidée par la Commission Mixte, simplement parce que la loi du 14 décembre 1874 est postérieure à la réclamation dont connut cette Commission. C'est donc une défense subséquente qui ne pourrait pas être soumise à la *res judicata* alléguée avec tant dénergie par nos honorables adversaires.

95. Et c'est en vain que l'on dirait que cette loi, postérieure de plusieurs années à l'annexion de la Haute Californie aux Etats-Unis, est inapplicable à l'Eglise Catholique de cet Etat de l'Union Américaine parce que, bien qu'il s'agit d'une corporation étrangère, il est question des droits des associations religieuses au Mexique, et qu'il est évident que pour apprécier ces droits et la capacité des personnalités qui les exercent, il faut nécessairement recourir aux lois du Mexique. Autrement ce serait vouloir attribuer un effet extraterritorial aux lois nord-américaines sur des relations de droit, nées au Mexique, sur des choses existant au Mexique, et qui imposent des obligations à un Gouvernement établi au Mexique.

96. Il est facile de se faire une idée des abus auxquels prêterait la sanction des principes contraires à ceux que je défends, et pour n'en présenter qu'un exemple il me suffira de supposer que, afin d'éluder le

droit public de mon pays, les associations religieuses qui y sont établies, obtinssent leur incorporation d'après la loi de quelqu'un des Etats de l'Union Américaine. A l'ombre de cette incorporation qui leur donnerait une personnalité civile aux Etats-Unis, elles parviendraient sans difficulté à éluder l'application des lois mexicaines qui interdisent aux associations perpétuelles et indéfinies, l'acquisition de biens immobiliers et de droits réels, et la mainmorte régnerait de nouveau au Mexique avec tout son cortège d'inconvénients politiques et économiques, sans que le Gouvernement pût apporter un remède au mal, parce qu'en face de lui se dresserait l'infranchissable obstacle de la nationalité américaine de la corporation.

XI. 97. Abordant le détail de la réclamation, et en prévision, contrairement à tout ce que l'on doit attendre, on viendrait à déclarer que le Mexique est débiteur des sommes qui lui sont réclamées. Mr. Mariscal au nom de Gouvernement, se plaint des exagérations de la demande et au nombre d'entre elles spécifie l'exigence du paiement en or. Cette question a déjà été traitée par les distingués avocats du Mexique et je ne compte pas ajouter à leurs observations. Cependant il n'est pas inutile d'attirer l'attention sur les bases sur lesquelles repose une prétention si peu motivée. Elles se réduisent à ceci: Le Mexique est trustee du Fonds Pie, ou plutôt des intérêts à 6 pct. qui sont objet de la demande. En cette qualité, il devait les payer aux dates convenues. Il ne l'a pas fait, il doit en supporter les conséquences, et parmi elles, celle d'avoir à payer en or au moment où sa monnaie celle en laquelle il reçut le produit de la vente des biens formant ledit Fonds, et la même en laquelle, selon qu'on le prétend, il s'obligea à payer les intérêts réclamés, souffre une dépréciation considérable. Deux choses seraient nécessaires à l'efficacité, apparente au moins, de l'argument. D'abord que le non accomplissement supposé du paiement de certains revenus promis en argent, eût pu causer la novation de l'obligation primitive en transformant en un engagement de payer en or l'obligation de payer en argent. Ensuite, que la demande eût compris en plus de la prestation principale: le paiement des intérêts échus, l'indemnisation des dommages. Or, le non accomplissement d'une obligation n'en modifie point la modalité ni les conditions, et la réclamation, de son côté, n'embrasse pas la réparation des dommages. Donc, la prétention dont je parle est à tous points de vue dénuée de fondement.

98. D'autre part, en prétendant au paiement en or des sommes demandées, on perd de vue qu'il est dans les principes du droit civil que le débiteur doit payer avec l'espèce de monnaie dans laquelle il s'est engagé à le faire de telle sorte que si elle a souffert une dépréciation, le créancier doit la supporter, de même qu'il profiterait de l'augmentation de la valeur si le cas contraire se réalisait. Que l'on suppose que l'argent, comme il arriva en 1859, fit prime sur l'or, la prétention de Mexique à payer en or seraitelle fondée? Non, et pour la même raison on ne peut l'obliger à remplir l'engagement dont on le suppose responsable en payant en or, sous prétexte que sa monnaie a subi une dépréciation.

XII. 99. Je suis obligé de faire constater que les réclamants n'ont pas compris la portée de la défense subsidiairement alléguée par le Mexique, en invoquant la sentence rendue dans le proces Rada, dont le tribunal a déjà tant entendu parler. On a crue que cette exception se rattache à l'embargo de l'Hacienda Ciénega del Pastor, dont le surarbitre

de la Commission Mixte déduisit la valeur, à cause du séquestre dont elle fut l'objet en raison de l'exécution d'une sentence qui ne fut pas dictée par le Suprème Conseil des Indes royal, et dont l'exécutoire est le fondement de l'exception, mais par un tribunal de District du Mexique, plusieurs années aprés l'indépendance. Les réclamants disent qu'on allègue en vain la défense dont il est question, parce qu'il est constaté que malgré l'embargo de l'Hacienda Ciénega del Pastor, cette propriété fut vendue par le Gouvernement du Mexique qui en reçut le prix de sorte que sa dette ne peut en être diminuée. L'exception subsiste même en supposant fondée cette obligation parce qu'elle se fonde sur le fait parfaitement démontré par la sentence du Conseil des Indes, que l'adjudication faite à la Marquise de Rada, des biens provenant de la succession du marquis, fut déclarée nulle et sans valeur. C'est à ces biens que se réfère la donation qui a été considéré comme l'origine du Fonds Pie. Il est donc manifeste que si la marquise, en vertu de la sentence exécutoire dont nous parlons, n'acquit pas la propriété des biens qu'elle donna plus tard à la Campagnie de Jésus, elle ne put pas non plus en transmettre la propriété aux donataires; et par conséquent il y a à déduire du Fonds Pie tous les biens appartenant à la donation Rada.

100. Pour se soustraire à la conséquence que je viens de déduire de la sentence dictée par le Conseil des Indes, les réclamants disent que dans ce jugement le droit de la Marquise de las Torres de Rada et de ses héritiers aux propriétés dont elle fit don aux Jésuites, ne fut pas attaqué et que tout ce que décida le Suprême Conseil des Indes, se réduisit à certaines déclarations sur les charges de chancellerie, qui étaient attachées au titre du Marquis de las Torres de Rada, et sur les revenus de ces charges.

101. Il faut donc avoir recours a la sentence invoquée pour démontrer l'erreur dans laquelle, de bonne foi assurément, se trouvent nos honorables adversaires. "Nous décrétons—disent les magistrats du Conseil suprême des Indes—et nous déclarons nuls et de nulle valeur et nul effet, les inventaires et évaluations des biens qui restèrent à la mort du Marquis de las Torres de Rada; et *l'adjudication qui en a été faite à la marquise;* et nous réservons leurs droits aux héritiers de celle-ci et à Don Joseph de Rada et ses colitigeants, pour qu'ils en usent comme il leur convient, sur les droits respectifs déduits dans l'Audience où ils devront l'exécuter." Suivent lés déclarations relatives à la transmission de la propriété civile et naturelle du titre et de la dignité de Marquis et des charges de chancelier et contrôleur. Il est donc indubitable que l'adjudication faite en faveur de la marquise des biens de la succession du Marquis de Rada, fut annulée. Comme ces biens—je dois le répéter—étaient ceux qui furent donnés aux jésuites, il est clair que cette donation resta nécessairement annulée à l'instant même où le fut le titre de la donatrice, car nul ne peut transmettre plus de droit qu'il ne possède, et la Marquise de las Torres de Rada ne fut jamais propriétaire des biens en question. Ces explications permettront d'apprécier la valeur du système employé par les réclamants pour combattre l'exception dont je m'occupe. La question relative aux charges jointes au Marquisat de las Torres de Rada et à leurs émoluments, est indépendante de celle qui se rapporte à la nullité de l'adjudication faite en faveur de la Marquise, des biens de la succession de son second mari, quoique les deux points aient été décidés dans la même sentence.

102. Dans l'état actuel des choses, comme il n'apparaît nulle part que la susdite Marquise ait été remise en possession des biens dont le Conseil des Indes annula l'adjudication, la véritable chose jugée est que les biens donnés par cette dame aux jésuites, ne lui appartenaient pas et que, par là même, elle ne put transmettre une propriété qui n'était pas la sienne.

103. Il est bien sûr que cet état de choses n'a pas changé, puisque encore vers le milieu du dernier siècle, la sentence du Conseil des Indes était en voie d'exécution en ce qui touchait les émoluments des charges de Chancelier et de Contrôleur appartenant au Marquisat de las Torres de Rada. On ne connait pas avec certitude, malgré les efforts dont le dossier de la Commission Mixte fait foi, quel fut le dénouement du litige relativement à ces émoluments, bien que l'on sache de façon certaine que, quoique en conséquence de ce procés, l'hacienda de Ciénega del Pastor fut l'objet d'une saisie, le Gouvernement du Mexique aliéna cette propriété.

104. La justice exige que si, comme le prétendent les évêques de la Haute Californie, on doit ajouter le prix de l'hacienda Ciénega del Pastor à l'évaluation du Fonds Pie, en tout cas soit déduit de cette évaluation, le montant capitalisé des propriétés données par la Marquise de las Torres de Rada, qui n'avait pu les transmettre, étant donné qu'elles ne lui appartenaient pas. Le Gouvernement Mexicain es responsable de la valeur de ces propriétés vis-à-vis des héritiers du Marquis de las Torres. Si ces héritiers se présentaient pour les revendiquer, les possesseurs actuels des propriétés auraient à s'adresser au Gouvernement qui, en définitive est seul responsable, en sa qualité de successeur des Jésuites et le propriétaire des biens qui formèrent le Fonds Pie de Californie.

105. En raison de ces considérations, la soussigné a l'honneur de demander au Tribunal de déclarer justifiés les moyens de défense invoqués par le représentant du Gouvernement Mexicain, dans sa réponse à la demande présentée au nom de l'Eglise Catholique de la Haute Californie.

M. LE PRÉSIDENT. La réponse des Etats-Unis Mexicains est finie; nous passons donc aux répliques.

Mr. RALSTON. With the permission of M. Descamps, and with the permission of the court, I desire to present for a moment a printed copy of the deposition of Mr. John T. Doyle, together with the exhibits that accompany it, and further, with the permission of my friends upon the other side of the room, I should like to make one or two brief observations as to some points which have been cited by them, calling attention merely to one or two little errors of fact into which I think they have fallen and without desiring to present any argument.

M. BEERNAERT. Messieurs, on me communique à l'instant un nouveau document considérable dont nous ne savons pas le premier mot et qui paraît complété par de nouvelles annexes. Je ne veux pas faire de procédure, et si malgré la décision que la Cour a prise de ne plus admetre de nouvelles pièces à ce moment du débat, elle veut bien recevoir celle-là, je n'y fais pas d'objection. Seulement il est évident que nous devons avoir le droit et le temps d'examiner ce document et d'y répondre.

Mr. RALSTON. I think, Mr. President and honorable arbitrators, that M. Beernaert has fallen into a slight error. The document presented has been in the hands of the secretary-general for some time,

perhaps ten days, and we have only just had an opportunity to print it. So this is not a new document, but there is one new authority to which I shall desire to refer.

M. LE SECRÉTAIRE GÉNÉRAL. Ce document est déposé depuis dix jours.

M. BEERNAERT. On nous le remet à l'instant.

M. LE SECRÉTAIRE GÉNÉRAL. Vous auriez pu le consulter avant; il est au greffe depuis dix jours.

M. BEERNAERT. Nous en ignorions le dépôt.

M. LE SECRÉTAIRE GÉNÉRAL. Le dossier est à votre disposition depuis 15 jours, vous pouviez l'examiner.

M. BEERNAERT. Quand nous avons vu le dossier, ce document n'y était pas.

M. LE SECRÉTAIRE GÉNÉRAL. Il y était il y a dix jours.

M. BEERNAERT. C'est pour nous un document nouveau et je demande la permisson de le lire. Nous avons pris communication du dossier dès que la Cour nous y a autorisés, et certainement à ce moment ce document n'y était pas.

Mr. RALSTON. If Mr. Beernaert will allow me, the filing of the original deposition of Mr. Doyle was brought to the attention of the court in open session about ten days ago, but it probably slipped M. Beernaert's attention at the time.

SECRETARY-GENERAL. What day did you give it?

Mr. RALSTON. About ten days ago, I think.

M. ASSER. M. le Secrétaire Général a-t-il mentionné le dépôt de ce document?

M. LE SECRÉTAIRE GÉNÉRAL. Evidemment, il doit être mentionné.

M. ASSER. Est-ce que le procès-verbal le mentionne?

M. LE SECRÉTAIRE GÉNÉRAL. Nous allons examiner les procés-verbaux.

Mr. RALSTON. The *procès-verbaux* will not show the date, but our stenographer's report will show the exact date.

Sir EDWARD FRYE. Will you show us in the notes what the date is?

Mr. RALSTON. A little index was handed to the court the other day, and that will show the exact time.

(Mr. Ralston examines the stenographic report.)

M. BEERNAERT. Il est fâcheux qu'on ne nous l'ait pas distribué.

Mr. RALSTON. Mr. President and honorable arbitrators, it was deposited with this court, and the attention of the court was directed to it, on the 15th of September, as appears on page 6 of the printed report.

M. DELACROIX. C'est un document dont on nous a refusé l'ouverture. Certains documents étaient scellés, j'en ai demandé l'ouverture, on m'a répondu qu'on n'avait pas le droit de les ouvrir.

M. LE SECRÉTAIRE GÉNÉRAL. Le 15 septembre, ces deux documents étaient dans des enveloppes scellées. M. le Président, après la séance du 15, les a ouvertes et a pris connaissance des documents. J'ai alors adressé une lettre à l'agent des Etats-Unis mexicains lui disant que "tous les documents, sans réserve et sans exception" (souligné) étaient à sa disposition.

M. DESCAMPS. C'est clair!

M. DE MARTENS. C'est clair, n'est-ce pas: c'était à la disposition de la partie.

M. DELACROIX. On nous avait dit qu'ils étaient à la disposition, et je

crois me souvenir que nous avions reçu cette lettre avant que je sois venu, du moins si mes souvenirs me servent bien. Quand nous nous sommes présentés, nous avons reçu communication du dossier. On nous a montré certaines lettres qui étaient scellées, j'ai demandé qu'elles fussent ouvertes et M. le Secrétaire Général m'a répondu qu'il ne pouvait pas ouvrir ces documents. Nous en sommes restés là, supposant que ce document, qui était scellé et qui était indiqué comme étant le témoignage de M. Doyle était précisément celui qui se trouvait dans le livre rouge. Nous n'avions pas besoin dès lors de faire desceller cette enveloppe mystérieuse, puisque nous pensions que le document était dans le livre rouge. Aujourd'hui nous apprenons que c'était autre chose. Je n'y insiste pas autrement, seulement nous demandons le temps de le lire et d'y répondre.

M. LE SECRÉTAIRE GÉNÉRAL. Quand l'honorable conseil des Etats-Unis Mexicains s'est présenté, je n'avais pas encore adressé ma lettre à l'agent, lui disant que le Tribunal mettait le dossier sans exception aucune à sa disposition. C'est une heure après que M. le Président a ouvert ces enveloppes; ma lettre est partie quelques heures après pour M. l'agent du Mexique lui disant que tout le dossier était de 10 heures à midi et de 2 heures à 4 heures à sa disposition, sans exception aucune. Je ne sais pas jusqu'à quel point ces Messieurs n'ont pas jugé utile d'en user.

M. DELACROIX. Je viens d'en donner la raison.

M. DE MARTENS. Mais, la lettre existe?

M. LE SECRÉTAIRE GÉNÉRAL. La lettre existe.

M. DESCAMPS. C'est absolument clair et absolument correct, je tiens à le constater.

Mr. RALSTON. I regret very much the misunderstanding on the part of my friends on the other side.

M. LE PRÉSIDENT. Il n'y a pas de doute là-dessus. La lettre sera incorporée au dossier. M. l'agent des Etats-Unis d'Amérique du Nord a-t-il encore quelque chose a déposer?

Mr. RALSTON. No; I think not, except for the convenience of the court I would like to present one thing more. I should have brought it this morning, but it was overlooked. It is an official map of the United States, which shows upon it the various reservations apportioned to the different Indian tribes. It is not a matter of great importance, but I should like, with the permission of my friends, that the court should see it, to give the court a better idea of the situation.

M. DE MARTENS. I think you have already announced your intention to present it a week or ten days ago.

Mr. RALSTON. Yes; I have.

Sir EDWARD FRY. Before you go on I should like to ask you this question: Our attention has been drawn to the fact that in the previous proceedings there were three bishops named and it is said there are only two now. I desire to call your attention to it early, so that if there is any error it may be corrected.

Mr. RALSTON. I thank your honor. We are in a position to correct it. From our point of view there was none, but we have a complete power of attorney from the third bishop.

Sir EDWARD FRY. He undertakes to be bound by the proceedings?

Mr. RALSTON. Yes, sir; and he authorizes Archbishop Riordan to duly represent him. But I perhaps should add, my attention having

been called to it, that we are to-day copying it with a view to presenting it to the court, the court having indicated a disposition to receive it. There are one or two further points which I believe it would be in the interest of correctness and speed to speak of for about five minutes.

M. le Président. La parole est au conseil des Etats-Unis d'Amérique, M. Descamps.

M. Descamps. M. Ralston demande que je lui cède la parole pendant cinq minutes, si le Tribunal veut bien la lui accorder.

M. de Martens. Ce serait une réplique nouvelle. Le tribunal a décidé que vous prendriez la parole après M. Pardo.

Mr. Ralston. I will not insist upon it, but there are one or two points that I would like to explain to the court.

M. Descamps. Messieurs les Arbitres, appelé au grand honneur de défendre la cause des Etats-Unis d'Amérique devant une juridiction arbitrale internationale, et de plaider cette cause devant vous, qui constituez si dignement le premier tribunal d'arbitrage établi conformément à la Convention de La Haye, je viens vous demander en ordre principal de consacrer en notre faveur le respect de la chose jugée, et en ordre subsidiaire d'assurer le respect de ce que nous considérons comme des engagements inviolables. C'est sous l'égide de ces deux grandes maximes fondamentales du droit: *Res judicata, veritas inter partes—Pacta servanda*—que je place les considérations que je vais essayer de développer devant vous.

J'estime, Messieurs, que dans une affaire aussi compliquée et au point où en sont arrivés les débats, il est nécessaire d'eviter ce que l'on a appelé tout a l'heure "les digressions inopportunes." Il importe de s'attacher aux questions maîtresses. L'histoire des colonies en général et celle des réductions en particulier est intéresante sans doute, et peut-être n'aurais-je pas trop de peine d'en parler, cette histoire rentrant dans le cadre de mon enseignement universitaire. Les faits et gestes de la Révolution française sont un objet d'études curieuses et de controverses incessantes, mais je ne vois pas la nécessité de m'en occuper présentement, sauf pour faire mes réserves concernant certaines déductions et applications développées par mes honorés contradicteurs. Le récit des trois mariages de la Marquise de Villapuente peut présenter des aspects piquants, bien que le mobile qui a déterminé notre confrère à ornementer et à dramatiser ce récit ne me paraisse pas bien louable: il n'y a pas lieu, ce semble, de discréditer les fondations californiennes. Et moi aussi, si je recherchais l'anecdote, je pourrais rappeler certains incidents des correspondances diplomatiques entre les deux gouvernements en cause, où j'aurais beau jeu . . . et peut être les rieurs de mon côté. Mais à quoi bon tant cela? Attachons nous aux éléments pertinents de la cause et tâchons de circonscrire le débat au lieu de l'etendre et de l'égarer.

Avant d'entrer au cœur du débat, je dois faire une rectification concernant certaines allégations de M. Beernaert. Mon illustre adversaire a savouré longuement dans son discours le silence et comme l'insouciance des ayants droits à faire valoir leurs revendications. Il a tenu à rappeler ce passage de la décision du premier arbitre, où l'on suppose que les réclamations et les réponses à l'origine furent simplement verbales. Aucune trace de réclamation écrite, nous a-t-on dit. C'est une erreur complète et il existe au dossieur une pièce qui coupe court aujourd'hui àces hypothèses. Nous n'avons pas, il est vrai, la réclamation

de l'archevêque de San Francisco. Nous avons mieux: la réponse officielle du gouvernement mexicain constatant la demande écrite et s'excusant du retard apporté à y répondre à raison de la nécessité de consulter les rétroactes et des documents anciens. Cette pièce ayant échappé à notre honoré contradicteur, j'en tiens une copie à sa disposition. Elle date du 29 septembre 1852. Le Gouvernement mexicain refuse de faire droit à la demande, en alléguant que c'est lui est le successeur des missionnaires, ajoutant qu'il lui serait d'autre part bien difficile de venir en aide aux chefs de l'Eglise de la Haute-Californie, les missions de la Basse-Californie étant dans une profonde détresse et le trésor mexicain étant, de notoriété, mis à mal (*por la penuria conocida del Erario publico*).

M. DE MARTENS. Où est cette pièce?

M. DESCAMPS. Elle est au dossier de M. Doyle, et voici la traduction anglaise du passage que je viens de citer: "*On account of the well-known penury of the public treasury and on account of the state of poverty and backwardness in which the missions under its protection in the territory of the Republic are found.*"

Le refus opposé à la demande était, comme on le voit, catégorique et constatait même une impossibilité physique de témoigner quelque bon vouloir, vu l'état fâcheux de la caisse de la République.

En ce qui concerne un autre point sur lequel M. Beernaert a aussi insisté et qui concerne les réclamations postérieures au jugement arbitral de 1875, voici exactement ce qui s'est passé. Le premier payement du Mexique condamné à solder sa dette, fut fait le 31 janvier 1877, le second, le 31 janvier 1878. Il y a eu treize payements partiels, et le dernier porte la date du 21 janvier 1890. Aussitôt après cette apuration, dès le 1er mars 1890, nous constatons que M. le sénateur Stewart addressa une demande d'intervention au Gouvernement des États-Unis dans le but d'obtenir du Gouvernement mexicain le payement des intérêts échus depuis 1869. Et le 17 août 1891 M. Ryan, ministre des Etats-Unis à Mexico, formula une réclamation diplomatique en règle.

Cette réclamation portait:

Mon gouvernement est d'avis que la décision de l'arbitre à établi en force de chose jugée:

1°. La débition du Gouvernement mexicain envers l'Église catholique romain de Californie, de la part revenant à celle-ci dans la revenu annuel dudit fonds charitable;

2°. Le montant annuel de cette part;

3°. Que les archevêque et évêques de cette église sont les titulaires du droit de la réclamer et de la recevoir;

4°. Que la partie demanderesse est une corporation de citoyens américains (États-Unis);

5°. Que la cause comporte proprement *l'intervention diplomatique du gouvernement des Etats-Unis.*

Et voici la conclusion:

J'ai ordre d'exprimer respectueusement à Votre Excellence l'espoir de mon Gouvernement d'obtenir prompt et satisfaisant acquiescement à cette demande.

Un autre point sur lequel je dois revenir aussi, bien qu'à regret, ce sont les plaintes constantes des défendeurs concernant l'état de notre dossier documentaire. L'honorable M. Beernaert nous disait récemment encore: "Nous sommes à cet égard dans une situation lamentable!" Mais, Messieurs, à qui la faute? Et en toute justice est-ce que le Gouvernement des États-Unis n'a pas fait, au point de vue des communications, cent fois plus que le Gouvernement mexicain et son agent?

Un mot maintenant du mémoire que vient de lire S. Exc. M. Pardo. M. le ministre du Mexique, si je l'ai bien compris à première audition, se place sur un terrain assez singulier. Selon lui, le tribunal actuel ne serait un tribunal international que pour la forme. En réalité, il faut le considérer comme un tribunal mexicain chargé d'appliquer exclusivement les lois du Mexique, lesquelles devraient avoir en tout cas et sans conteste une valeur absolue. Ce point de vue ne me paraît pas exact.

Il y a d'abord au-dessus des lois mexicaines et du droit mexicain un droit international public en conformité duquel toutes les nations doivent se conduire et qui, notamment en matière d'obligations pécuniairies contractuellement assumées, ne permet pas à chaque Etat d'en agir toujours à sa guise, ces obligations fussent-elles contractées envers des particuliers étrangers. Tous les actes qu'il peut plaire à un Etat de faire à l'égard des ressortissants étrangers ne sont pas des actes licites selon le droit international public.

Il y a aussi un droit international privé qui suppose la coordination des lois des divers pays suivant une règle de justice, laquelle ne permet pas toujours à un Etat de n'avoir égard qu'à ses propres lois, par exemple en ce qui concerne l'état et la capacité des personnes, soit physiques, soit morales. On peut, ici encore, se trouver en présence de nombreuses et importantes questions qui ne relèvent pas exclusivement d'une seule souveraineté.

L'éminent organe du Gouvernement mexicain prétend encore que le Tribunal arbitral doit "fermer l'oreille à nos appels à l'équité."

Mais ceci ne pourrait être établi qu'après un examen particulièrement attentif des termes du compromis, qui sont loin d'enjoindre au présent tribunal de statuer exclusivement d'après les lois mexicaines. Je comprends cependant l'empressement du Mexique à demander au Tribunal arbitral de fermer l'oreille à l'équité, lorsqu'il soutient des thèses comme celles que nous avons entendu développer tout à l'heure et où j'ai cru relever cette conclusion: si la créance réclamée n'avait pas été garantie par moi sur le revenu des tabacs, je ne pourrais pas la confisquer; mais comme je l'ai garantie, elle devient pour moi matière à confiscation. Sans compter qu'il n'est pas commode en droit de soutenir que le principal suit la loi de l'accessoire et qu'une créance change de nature parce qu'une garantie—le revenu des tabacs érigé en immeuble—vient s'y annexer.

Le Mexique prétend que, dans le compromis, il n'a pas entendu renoncer à l'empire absolu de ses lois. Mais les Etats-Unis ne sont pas apparemment de cet avis, et c'est le tribunal arbitral qui, aux termes de l'article 48 de l'Acte de la conférence de La Haye, "est autorisé à déterminer sa compétence en interprétant le compromis, ainsi que les autres traités qui peuvent être invoqués en la matière et en appliquant les principes du droit international."

Tels sont les pouvoirs de la Cour et il est peut-être bon de le rappeler. Le Mexique a contesté fort tard la compétence de la jurisdiction arbitrale de 1868. Il peut soulever devant la juridiction de 1892 telle exception qui lui agrée, mais la règle concernant les exceptions d'incompétence visant le compromis est celle-là.

Après s'être placés sur un terrain peu solide, selon nous, et avoir réclamé l'application absolue et exclusive des lois mexicaines dans la présente cause, les défenseurs du Mexique nous font connaitre les lois dont ils entendent revendiquer l'application.

Ils nous signalent d'abord une série de dispositions constitutionnelles et législatives concernant les institutions religieuses et les biens ecclésiastiques. Mais il y a lieu d'observer d'abord que toutes ces dispositions, y compris la dernière loi citée, celle de 1874, sont antérieures à la première décision arbitrale. . . . .

M. EMILIO PARDO. Non.

M. DESCAMPS. Je parle des lois de proscription et non des lois de prescription; en leur qualité de simples moyens de preuve, fussent-ils nouveaux, les textes invoqués ne peuvent infirmer la chose jugée.

La question de la condition des personnes morales étrangères dans leurs rapports éventuels avec les divers pays est, au demeurant, une question fort délicate, dont la solution n'est pas aussi facile et ne peut être aussi unilatérale que semble le penser l'honorable organe du Mexique.

Si le Mexique entend que ses ressortissants à l'étranger bénéficient de leur loi nationale quant à leur état et à leur capacité, on conçoit que les autres Etats ne soient pas précisément dépourvus de titres à revendiquer vis-à-vis de l'Etat du Mexique l'application de leur loi à eux quant à l'état et à la capacité des personnes. Et il y a là plus qu'une simple question de réciprocité; il y a une question de coordination nécessaire suivant une loi générale de justice. Il est juste que les nations n'empiètent pas sur leur compétence respective en ce qui concerne la détermination des droit de leurs ressortissants, sous la réserve des exigences propres de l'ordre public chez elles. Or comment, en vérité, considérer comme contraire à un tel ordre le simple acquittement d'une dette en numéraire assumée par contract envers des ressortissant étrangers qui n'habitent pas le territoire et n'y exercent aucune action ou influence?

Et en ce qui concerne les fondations étrangères de nature diverse existant dans tant de pays, est-ce, donc, par des lois de confiscation pure et simple que les États se croient autorisés à procéder, et ne voyons-nous pas, au contraire, des interventions diplomatiques assurer des respects nécessaires ou aboutir à des réglementations équitables?

Dans le cas présent, qui peut soutenir un seul instant que le fait de payer la dette qu'on réclame ait un rapport quelconque avec le maintien de l'ordre public international ou national au Mexique? Le trésor seul peut en ressentir quelque atteinte, et combien légère en présence de l'état florissant actuel des finances mexicaines. Car il est bon de le constater, et je suis heureux de rendre ici cet hommage à l'Etat mexicain: ses finances sont aujourd'hui très prospères et le sacrifice d'argent qui lui est demandé n'a rien pour lui d'exorbitant ni d'inquiétant.

On le voit, la question de la confiscation des fondation étrangères dans un pays, celle de la situation des personnes morales étrangères en rapport de simple débition de sommes contractuellement promises et garanties, ne sont pas de celles qui se tranchent *ad libitum*, sans soulever des questions d'équité et de justice internationale et sans provoquer de légitimes interventions diplomatiques.

Mais voici une autre série de lois mises en avant par nos adversaires, ce sont des lois de déchéance radicale attachées au nonaccomplissement de telle ou telle formalité. Nos adversaires invoquent dans cet ordre deux lois: celle de 1885, qui n'est point pertinente puisqu'elle ne renferme qu'une invitation à un acte volontaire, et celle de 1894 stipulant

que la non production des créances à charge de l'Etat Mexicain, dans un délai de quelques mois, devant un bureau institué pour en juger la réalité, aura pour conséquence une déchéance définitive.

Mais il y a lieu d'observer que la rente due aux chefs de l'Eglise catholique en Californie avait été l'objet d'une réclamation diplomatique en règle en date du 17 août 1891 et que nous avons déjà fait connaître. Cette réclamation antérieure et officielle équivalait manifestement à la production demandée; et en tout cas, lorsque des créances ou des droits sont l'objet d'un recours diplomatique le droit international public autorise-t-il à décréter à leur égard des déchéances radicales du chef de simple inaccomplissement de telle ou telle formalité sans raison d'être dans l'espèce, et traitant la réclamation diplomatique comme si elle n'existait pas? Nous nous permettons de répondre négativement.

J'arrive à une troisième série de lois invoquées contre nous, les lois établissant une prescription et spécialement une courte prescription—cinq ans—en ce qui concerne les intérêts échus des rentes.

Je n'entends pas répéter ici ce qui a déjà été dit sur ce point par mes confrères américains, mais je voudrais demander une explication à S. Exc. M. le Ministre du Mexique. Les conclusions de MM. Beernaert et Delacroix parlent d'un Code civil fédéral. Or je n'ai pas connaissance d'un tel Code; et aux termes de l'article 72 X, de la Constitution mexicaine, modifié par la loi du 14 décembre 1883, le Congrès n'a compétence pour faire des codes obligatoires dans toute la république qu'en ce qui concerne les mines et le commerce, en y comprenant les institutions de banque. Je connais les codes particuliers de différents Etats de la Confédération mexicaine. Dans les documents fournis par nos adversaires je trouve le Code civil du district fédéral et du territoire de la Basse-Californie. Est-ce ce Code que l'on entend appliquer aux relations entre less ressortissants étrangers et le Gouvernement mexicain dans l'ordre des dettes contractées par ce dernier à l'égard des premiers?

M. Emilio Pardo. Il est bien vrai que les Etats-Unis mexicains reconnaissent à chaque Etat le droit de légiférer sur les matières civiles et pénales; mais il y a des lois qui sont obligatoires dans toute la Fédération, comme, par exemple, les lois relatives à la propriéte minière et au commerce. Il est bien entendu par la Cour mexicaine que dans les rapports du Gouvernement fédéral avec les particuliers, nationaux ou étrangers, les intéressés sont soumis au Code du district fédéral. Quoique ce soit le Code spécial du district fédéral, c'est la loi à laquelle la Fédération est assujettie dans les relations avec les particuliers.

M. Descamps. S. Exc. M. Pardo nous dit qu'il a été entendu que le Code spécial en question s'applique aux rapports du Gouvernement fédéral avec les particuliers nationaux ou étrangers. Je n'entends pas me prononcer à l'instant sur cette question. Je ne veux pas davantage revenir sur les observations développées par mes confrères américains touchant l'inapplicabilité au cas présent des dispositions que l'on invoque, spécialement en ce qui concerne la prescription des intérêts par cinq ans. Mais je tiens à faire observer combien il serait exorbitant et injustifié de tenter de transformer le temps laissé au Gouvernement mexicain pour solder un arrière d'intérêt qu'il a obtenu de ne payer que par acomptes, en moyen de prescription des intérêts en cours pendant cette période.

Ce serait faire tourner le service au détriment de celui qui l'a rendu

non pas certes en vue de ruiner le débiteur par une réclamation ultérieure d'intérêts accumulés, mais en vue de lui faciliter le moyen d'apurer un arrière de compte qui devait naturellement être liquidé avant le payement d'autres charges, et cela non seulement de l'accord tacite, mais en vertu d'un accord exprès des parties. Il ne faut pas oublier, en effet que dans la convention intervenue après la décision du surarbitre,—convention du 29 avril 1876 art. III,—le Mexique a itérativement sollicité et obtenu, vu l'état obéré de ses finances, de ne payer aucune annuité excédant 300,000 pesos en or ou en équivalent jusqu'à ce que le total des condamnations à liquider par lui fût couvert. Et il convient d'observer que ce bénéfice du terme a si bien été entendu ainsi, que moins de quarante jours après l'apurement de l'arriéré soldé en treize années, les ayants droit formulèrent leur demande. Tout cela est d'une correction manifeste et parfaite.

Au demeurant, il résulte à l'évidence de la correspondance diplomatique échangée entre les deux Gouvernements, les 21 novembre, 4 et 8 décembre 1876, qu'à la suite d'une tentative malheureuse faite par le Gouvernement mexicain pour obtenir une interprétation authentique, fort erronée selon nous, de la sentence arbitrale, et de la protestation des Etats-Unis, les deux parties sont convenues—tous droits réservés—de s'abstenir de soulever entre elles des difficultés ou compétitions nouvelles relativement à l'affaire sur laquelle avait prononcé l'arbitre avant la compléte exécution de la sentence arbitrale. C'est ce qui a été fait des deux parts, mais c'est ce qui s'oppose en même temps à ce que le silence des demandeurs puisse être invoqué comme servant de point de départ à une prescription quelconque.

Il ne me reste que quelques instants avant la suspension de la séance. Je demande à MM. les arbitres de vouloir bien m'autoriser à ne traiter qu'à la reprise de nos débats la question capitale de la chose jugée.

M. le Président. Vous continuerez votre discours à l'ouverture de l'audience. Avant d'ajourner le Tribunal je donne la parole à M. le Secrétaire Général pour la lecture de la lettre qu'il a adressée à M. Pardo pour lui dire que le dossier américain, sans aucune exception, était mis à sa disposition tous les jours de 2 heures à 5 heures de l'après-midi.

M. le Secrétaire Général. Voici la lettre que j'ai adressée à M. Pardo le 15 septembre 1902:

Monsieur: J'ai l'honneur de porter à votre connaissance que le dossier qui a été soumis par l'Agent des Etats-Unis d'Amérique au Tribunal d'Arbitrage institué en vertu du traité conclu à Washington le 22 mai 1902 entre les Etats-Unis d'Amérique et les Etats-Unis Mexicains, se trouve déposé au greffe dudit Tribunal, 71 Prinsegracht, où Votre Excellence ou bien telle autre personne qu'elle désignera à cet effet pourra en prendre connaissance.

J'ajouterai que tous les documents, sans aucune exception, sont compris dans le dossier et qu'ils peuvent être examinés demain 16 septembre et tous autres jours suivants de 2 heures à 5 heures.

M. le Président. Cet incident est clos.

(A midi la séance est suspendue jusqu'à 2½ heures.)

QUINZIÈME SÉANCE.

29 septembre 1902 (après-midi).

L'audience est ouverte à 2 h. ½, sous la présidence de M. Matzen.

M. le Président. La parole est continuée à M. le Conseil des Etats-Unis d'Amérique.

M. DESCAMPS. Messieurs les arbitres, une question domine ce débat et lui donne une physionomie particulière entre tous les arbitrage, c'est la question de la chose jugée.

Elle est capitale au point de que de la solution du présent litige.

Peut-être est-elle aussi capitale au point de vue de l'avenir des juridictions arbitrales. Je n'aurai pas trop de peine à démontrer, je pense, quel trouble ébranlement profond pourrait apporter dans le fonctionnement normal et pacificateus de ces juridictions le système qu'essayent de faire prévaloir,—mais vainement, j'en ai la confiance,—les défenseurs du Gouvernement mexicain.

Cette question, Messieurs, présente encore un autre caractère: elle doit être résolue absolument et en première ligne. Toutes les autres questions—combien multiples et compliquées—viennent en ordre éventuel et subsidiaire; elles ne doivent être résolues que s'il est décidé que la chose jugée n'a point ici de puissance régulatrice, "*if not*," suivant l'expression du compromis.

Le problème doit donc être abordé de front et mis, autant que possible, en toute lumière.

Cela est d'autant plus nécessaire qu'une confusion assez étrange a été faite, au moins au début, par nos adversaires. La trace de cette confusion se retrouve non seulement dans la correspondance diplomatique de S. Exc. M. Mariscal, ministre des affaires étrangères du Mexique, mais dans diverses notes publiées de puis par la défense et notamment dans la réponse du Gouvernement mexicain à l'Exposé de la revendication des Etats-Unis d'Amérique. Cette confusion nous parait tenir surtout à l'application indistincte et assez équivoque du terme "autoritè" à la chose jugée entre parties et aux précédents judiciaires en général. Il serait plus exact, ce semble, de parler de l'*autorité* de la chose jugée et de la *valeur* des précédents judiciaires. La puissance publique, par des raisons de haute sagesse attache aux jugements devenues définitifs entre les plaideurs une souveraine présomption de vérité, en vue de ne pas éterniser les procés et d'assurer aux décisions de justice une efficacité légitime. Cette vérité présumée est relative sans doute en ce sens qu'elle ne lie que les parties en cause ou leurs ayant droit, mais elle est intangible pour elles et se trouve, dans ce cercle, élevée à la hauteur d'une norme régulatrice de leur droit. C'est pourquoi l'on peut dire, en parlant d'elle, l'autorité de la chose jugée.

Les précédents judiciaires, au contraire, ont une valeur générale qui permet de les invoquer dans tous les cas semblables, sans distinction des parties qui furent en cause et des juges qui rendirent la sentence. Mais cette valeur—abstraction faite de la fonction coutumière de la jurisprudence comme instrument de cristallisation du droit—n'est qu'une valeur de raison toujours soumise ou contrôle d'une raison plus éclairée. Les décisions d'un magistrat, commes telles, ne lient pas les autres magistrats: elles ne lient même pas le magistrat qui les a rendues dans les causes ulterieures qui peuvent lui être soumises: car il peut reconnaitre qu'il s'est trompé et réformer sa première jurisprudence.

S'il ne s'agissait que de faire ressortir la valeur de la décision arbitrale de 1875 comme précédent judiciaire par rapport à la présente cause, à coup sûr on pourrait élever cette valeur à la plus haute puissance: car les cas ne sont pas seulement semblables, ils sont absolument, identiques, ce qui est rare en jurisprudence, étant donné l'infinie diversité des faits avec lesquel le juge se trouve journellement aux prises.

Mais ce n'est pas là le seul avantage que nous nous croyions autorisés à revendiquer. Nous estimons et nous croyons pouvoir démontrer à l'évidence que la décision rendue en 1875 constitue chose jugée dans des proportions qui rendent nécessairement triomphante pour nous la cause d'aujourd'hui.

Nos adversaires ne méconnaissent pas, à la vérité, le principe de la chose jugée, bien que l'on puisse constater dans le développement de leurs moyens certaine trace de distinctions regrettables, par exemple, entre les jugements ordinaires et les jugements arbitraux, certaines expressions inexactes, comme celle de "quasi-arbitrage," et même quelque tendance à parler ici de matière controversable—d'oú pourrait résulter une impression fâcheuse, n'étaient les déclarations catégoriques ultérieures. Messieurs, l'arbitre est juge et ses décisions sont inviolables. La justice internationale, par cela même que ses moyens d'exécution peuvent être dans certains cas plus précaires, a besoin, pour son fonctionnement normal, de l'armure juridique de l'inviolabilité. Plus que toute autre elle doit se mouvoir dans une sphère qui la mette à l'abri des retours offensifs de nature à compromettre son caractère intangible et sacré. Il importe de veiller avec un soin jaloux à ce que rien n'ébranle, rien ne défigure la chose jugée en droit international.

Nous sommes tous d'accord sur le principe. Nous admettons tous également que la chose jugée peut être invoquée par le demandeur comme elle peut l'être par le défendeur, par celui qui a gagné son procès et par celui qui l'a perdu, celui-ci pouvant y chercher un abri contre une condamnation plus onéreuse.

Il semble bien que nous devions également reconnaître tous que la chose jugée est appelée à remplir une double fonction: l'une négative, ou l'on invoque l'existence d'un jugement antérieur pour exclure le renouvellement du même procès; l'autre positive, où l'on fait valoir la teneur du jugement antérieur comme norme régulatrice permanente entre les parties dans leurs autres différends. Ne pas admettre cette seconde fonction serait, ou peu s'en faut, retourner au droit romain de la période primitive, où l'on admettait uniquement que l'action était consommée par le fait de l'intenter ou tout au moins par le jugement rendu sur elle. C'était le simple *non bis in idem;* ce n'était pas la *veritas inter partes.*

Les divergences de vues deviennent plus sérieuses lorsqu'il s'agit de déterminer ce qui, dans les jugements considérés au point de vue de la diversité des éléments qui peuvent y être renfermés ou rattachés, doit constituer la chose jugée.

Une réponse adéquate et lumineuse se présente pourtant à l'esprit: l'autorité de la chose jugée s'étend à ce qui a été réellement statué par le juge. Le statut réel du juge dans l'intégralité des éléments que le constituent organiquement et nécessairement: voilà bien, ce semble, le terrain d'application de la chose jugée. Que la chose soit explicitement ou implicitement, mais réellement décidée, cela tient à la forme externe du jugement et n'affecte pas son contenu véritable. Il en est ici du jugement comme de la loi: c'est la volonté vraie du pouvoir qui est régulatrice, peu importe que la manifestation de volonté revête une forme explicite ou implicite, du moment qu'elle est réelle et certaine.

La place matérielle qu'occupe le statut du juge dans *l'instrumentum judicii* n'est pas davantage absolument décisive en soi. Dans certains pays, on accentue la distinction formelle entre ce qu'on appelle le dispositif et les motifs. Dans d'autres, on suit moins rigoureusement ce

formalisme. Il est certain, en tout cas, qu'en droit des gens, les jugements ne sont pas soumis à des formes sacramentelles, qu'il faut partant s'attacher à la réalité des choses et se demander, en se plaçant à ce point de vue, quel est le véritable statut dy juge.

Si dans l'instrument qu'il rédige, le juge se bornait à formuler uniquement ce statut, la question se résoudrait toujours d'ellemême. Mais il se fait qu'ordinairement—et obligatoirement dans beaucoup de pays—le juge, en l'acquit de sa mission et pour dégager sa responsabilité, consigne dans *l'instrumentum judicii* des éléments expositoires indiquant comment il a été amemé à établir son statut quelles sont les considérations de fait ou de droit qui l'ont acheminé à sa sentence. Ni en eux-mêmes, ni dans sa pensée, ces éléments expositoires ne constituent son statut: ils énoncent de simples motifs de sa conviction. Et ici se pose la question: comment discerner, dans ce mélange éventuel d'éléments divers, ce qui constitue le véritable statut du juge et ce qui forme une simple exposition des motifs de ce statut? Comment le faire alors surtout que, comme en droit des gens, il n'y a pas de formalisme démarcateur.

Il semble, à première vue, que la solution du problème ne soit pas bien difficile dans les pays où la distinction formelle entre le dispositif et les motifs est méthodique. Ne suffit-il pas de considérer le dispositif comme contenant intégralement et exclusivement le statut du juge, et ce qu'on appelle les motifs ou considérants comme n'en faisant point partie? Il est certain, que lorsqu'on admet *par définition* que le dispositif est la partie du jugement qui, seule, contient le statut du juge, on peut conclure que le statut du juge est proprement contenu dans le dipositif. Mais il suffit de jeter un coup d'œil sur les grands recueils d'arrêts des pays dont nous parlons, pour saisir bientôt que tout est loin d'être résolu par cette tautologie ou par la distinction formelle invoquée. D'une part, on est obligé de reconnaître, comme l'a fait M. Beernaert, qu'il peut se glisser dans le dispositif des éléments manifestement expositoires et qui, ne participant pas du véritable statut du juge, garderont un caractère différent, malgré leur place. D'autre part, on est amené pratiment à reconnaître à certains éléments qui ne sont pas dans le dispositif, tantôt un pouvoir élucidateur nécessaire quant au sens du dispositif, tantôt un lien tellement intime avec celui-ci qu'ils apparaissent comme étant ses fondements essentiels, inséparables. C'est ainsi que, même dans les pays dont nous parlons, on en revient par un détour á rechercher quel est au fond et dans sa réalité le véritable statut du juge, en reconnissant que la distinction purement formelle ne fournit pas toujours les éléments d'une solution adéquate et suffisante.

En ce qui concerne le droit international, nous l'avons observé, la question se pose dans des conditions qui ne permettent pas de la trancher par une distinction purement formelle.

Suivant nos adversaires, il ne faudrait considérer comme chose jugée que le résultat immédiatement pratique de la sentence, par exemple, la condamnation du défendeur à payer telle somme au demandeur. C'est ce que l'on appelle l'ordre, le *mandatum* proprement dit, en rapport immédiat avec les mesures d'exécution.

Laissons de côté cette observation—elle a peut-être cependant son importance—qu'il y a des jugements dont l'essence n'est pas à proprement parler un commandement ou une défense, mais qui sont simplement déclaratifs. Prenons la thèse de nos adversaires comme si elle

était sans reproche à ce premier point de vue. Ce sera donc le résultat immédiatement pratique en connexion avec les mesures d'exécution, qui ne pourra plus être remis en question: le reste demeure motifs de décision et n'a rien à voir avec la chose jugée.

Cette thèse est inadmissible. Non seulement elle réduirait la chose jugée à des proportions dérisoires, mais elle la ramènerait souvent à des éléments complètement inintelligibles. Soutiendra-t-on, par exemple, dans le cas présent, que le défendeur a été simplement condamné à payer au demandeur telle somme numériquement spécifié, et que la chose jugée interdit seulement à celui-ci de réclamer encore une somme numériquement la même, bien qu'elle soit tout autre dans sa caractéristique individuelle ou par sa cause de débition. Ce serait absurde.

Entendre ainsi la chose jugée non seulement conduirait à l'absurde, mais aboutirait à méconnaître la nature du pouvoir judiciaire en tant en tant que pouvoir chargé de dire le droit, *jus dicere*. Placé en face du litige qu'il est appelé à résoudre dans l'accomplissement de sa mission, le juge ne le tranche pas, comme on semble le croire, par un ordre pure et simple. Il ne crée pas le droit; il déclare, dans un cas donné, le droit des parties en cause d'une manière obligatoire pour celles-ci. Sans doute, toutes raisons qu'il est amené à formuler dans *l'instrumentum judicii* en vue d'expliquer sa décision et de mettre sa responsabilité à couvert ne doivent pas être confondues avec le statut judiciaire proprement dit; mais ce statut ne doit pas, d'autre part, être mutilé, artificiellement tronqué, de manière à dénaturer l'œuvre de juge. Pour demeurer ce qu'elle doit être, cette œuvre doit consister essentiellement dans la déclaration du droit des parties, dans ses éléments caractéristiques et essentiels, avec les conséquences pratiques qui en découlent.

Admettre la théorie de nos adversaires, ce ne serait pas seulement, dénaturer la mission du pouvoir judiciare, ce serait aussi dénaturer l'intention réele, commune, constante des parties. Que demandent les parties, dans une instance judiciaire? Que le juge déclare qui a le droit pour lui et tire les conséquences pratiques obligatoires de cette constatation. Lorsque les parties se présentent devant le juge, elles ne le sollicitent pas de rendre un ordre exécutoire en blanc, sans plus. Elles lui demandendent de dire leurs droits respectifs d'une manière obligatoire et d'allouer, comme conséquence, les résultats pratiques qui en découlant.

Réduire le statut du juge à la détermination pure et simple de résultats, c'est prendre la partie pour le tout. C'est transformer l'élément consécutif de statut en élément exclusif. C'est donner le plus souvent au jugement une physionomie impénétrable, source d'inextricables embarras.

Il faut donc reconnaître que dans la décision du juge sainement entendue il y a plus que le résultat immédiatement pratique correspondant aux besoins de l'exécution: il y a la reconnaisance du fondement essentiel sur lequel le résultat repose et qui fait corps avec celui-ci dans le statut. La condamnation à payer tant d'années d'intésêts d'une rente déterminée implique l'existence de cette rente.

Examinons à la lumière de ces observations qui me paraissent claires, le cas qui se présente aujourd'hui devant nous.

Et d'abord dissipons une équivoque. Nous ne disons pas que nous réclamons aujourd'hui les intérêts que nous avons déjà réclamés autrefois. Nous ne disons pas que l'on ne puisse soutenir que les

intérêts que nous réclamons ne sont pas dus pour telle ou telle cause qui ne porte pas atteinte à la chose antérieurement jugée; par exemple, que l'on a remboursé la rente ou qu'on a payé intégralement les intérêts. Tout cela ne parte pas atteinte au premier jugement.

Mais ce que nous vous demandons, Messieurs, les arbitres, c'est de constater que le premier arbitre a déclaré que l'État du Mexique était redevable aux chefs de l'Eglise catholique en Californie d'une rente annuelle, caractérisée dans ses éléments essentiels, à concurrence des annuités échues et non payées. Nous vous demandons de reconnaître qu'il s'agit bien aujourd'hui de la même rente réclamée du même chef entre les mêmes parties. Et nous vous demandons tenir compte de la première décision, de nous allouer les intérêts maintenant échus et non payés, en respectant le statut antérieur dans ce qu'il a nécessairement et incontestablement résolu.

Nos adversaires, au contraire, veulent tout remettre en question, jusqu'à l'existence même de la rente dont ils ont été condamnés à payer vingt et une années d'intérêt.

Vainement leur disons-nous qu'en soutenant cette thèse ils se contredisent eux-mêmes: car enfin, d'une part, ils soutiennent que la cause du payement des intérêts ne peut rentrer dans les cléments constitutifs de la chose jugée et, d'autre part, ils indiquent comme élément essentiel des vérifications à établir pour constater la chose jugée, l'identité de cause.

Vainement encore leur faisons-nous remarquer que suivant leur système et dans l'hypothèse où leurs prétentions dans le litige: actuel seraient accueillies, il y aurait en réalité contradiction absolue, complète, saisissante, entre le jugement antérieur et le jugement d'aujourd'hui.

Nous avons beau leur faire observer que leur manière de voir non seulement aboutit à l'effacement de la chose jugée, mais ruine fondamentalement l'économie même de son institution et contrecarre les deux fins poursuivies dans cet ordre par la puissance publique: ne pas éterniser les procès et assurer entre parties aux décisions de justice une efficacité permanente. Car la sentence du premier juge dans sa teneur essentielle et inséparable du résultat pratique attaché à ella sera anéantie, et le procès pourra indéfinement recommencer. Il tombe sous le sens, en effet, que dans le cas présent, s'il n'y a pas chose jugée pour le Mexique, il n'y a pas chose jugée pour les États-Unis, et qu'à l'échéance de chaque année d'intérêts, le litige pourra recommencer sur nouveaux frais et sur toute la ligne. Ingénieux système sans doute pour assurer toujours de la besogne à la Cour permanente d'arbitrage, mais auquel il est permis, à coup sûr, de préférer d'autres moyens de réaliser le même but!

Pour toute réponse, nos adversaires nous disent: Vous ne réclamez pas le mêmes intérêts qu'autrefois: la demande est différente: vous n'êtes plus dans les conditions d'application de la chose jugée. Mais nul ne soutient que l'indentité de demande ou d'instance soit nécessaire. Les loi parlent de l'indentité de l'object, du point contesté: ce qui n'est pas précisément la même chose. La question n'est donc pas où on la place. Il s'agit simplement de savoir si le juge dans son premier statut n'a pas compris et dû comprendre les fondements essentiels de décision—qu'on les appelle motifs objectifs ou qu'on leur donne une autre dénomination, peu importe—et si l'on est autorisé à éliminer de la sentence des éléments dont la séparation ne se conçoit point,

pour faire échec à la volonté patente, consciente, indiscutable du premier juge.

Et c'est allors que nos adversaires en viennent à soutenir cette thèse invraisemblable qu'en matière d'existence d'une rente, on ne peut jamais arriver à la chose jugée, et cela parce que l'inexigibilité du capital briserait foncièrement l'unité de l'obligation et que—suivant une vieille théorie qui n'est plus, que nous sachions, défendue par personne aujourd'hui—nous serions en présence d'une succession d'obligations sans aucun lien entre elles! . . . . .

M. BEERNAERT. C'est l'opinion défendue par votre partie.

M. DESCAMPS. Elle est vôtre et son application vous revient. Ainsi ce n'est pas le 23 octobre 1842 qu'est née pour le Gouvernement mexicain l'obligation de servir une rente annuelle dont la présentation devient exigible à chaque échéance, mais c'est chaque année qu'il naît une obligation solitaire complètement indépendante des autres! Mais ici nos adversaires se divisent, et c'est M. le Ministre du Mexique qui va faciliter ma tache en donnant la réplique à M. Beernaert, avec une vigueur dont je lui laisse l'honneur et la responsibilité:

> On tente de séparer la prestation demandée, c'est-à dire une série d'annuités d'intérêts, de l'obligation générale de les payer, comme si c'était là deux choses différentes et susceptibles d'exister l'une sans l'autre. Quiconque prendra la peine d'examiner froidement la situation le verra: l'obligation de payer un intérêt périodique est une seule; c'est celle que contracte un débiteur en s'en imposant la charge; les échéances de cette obligation sont les différents et les successifs. On ne peut dire raisonnablement qu'il y ait autant d'obligations que d'échéances périodiques des intérêts. Le lien juridique est unique, mais avec cette modalité que les prestations auxquelles s'oblige le débiteur n'ont pas à être accomplies en une seule fois, mais à des époques consécutives. A chacune de ces échéances convenues, on peut exiger l'accomplissement de l'obligation primitive, et c'est la seule exigible.

Au demeurant, M. Beernaert abandonne parfois son opinion pour abonder dans les idées de M. Pardo. C'est ainsi qu'on peut lire à la page 6, ligne 11, des conclusions déposées par lui, à propos de la rente représentative du Fonds des Californies: "Le droit aux intérêts présuppose un droit de créance." C'est précisément ce que dit M. Pardo, interprétant le droit mexicain.

La distinction entre les éléments additionnels, ajoutés à l'*instrumentum judicii* comme simples moyens d'exposer ou d'expliquer la statut du juge, et les élements essentiels qui font inséparablement et organiquement partie intégrante de la sentence, et qui ne se réduisent pas aux résultats immédiatement pratiques de celle-ci, est nécessaire, juste, pratique. On peut la mal interpréter, on ne la supprimera pas.

Les plus illustres commentateurs du droit romain l'ont mise en lumière et elle est, peut-on-dire, de jurisprudence mondiale.

En ce qui concerne le droit romain, auquel les interprétes du droit des gens recourent volontiers à titre de *ratio scripta*, l'autorité de M. de Savigny a fortement embarrassé M. Beernaert. Après avoir rendu un sincère et éloquent hommage au grand romaniste que fut son ancien maître, M. Beernaert l'a néanmoins jeté par-dessus bord en déclarant que son opinion était "isolée." Que notre illustre contradicteur se détrompe. Dans un ouvrage classique sur le droit romain, le célèbre professeur de l'université de Berlin, Dernburg, n'hésite pas à qualifier l'opinion de Savigny d'opinion dominante: "Die herschende Ansichte." Et cela est important à signaler ici parce que, comme l'a fait observer M. Ralston, l'éminent agent des Etats-Unis, Savigny n'a pas seulement justifié sa doctrine par des raisons lumineuses; il l'a pré-

cisément appliquée au cas qui nous occupe dans les termes suivants: "Quand le défendeur a été condamné à payer les intérêts d'un créance ou les arrérages d'une rente, après avoir contesté le droit du demandeur au capital ou à la rente, ce droit se trouve investi de l'autorité de la chose jugée par la condamnation." Et cette solution est aussi justifiable en raison que fondée sur la réalité des choses. Il n'y a pas de génération spontanée d'intérêts. La débition d'arrérages éch u implique l'existence de la rente. Le juge est tenu, à raison même de la demande de paiement des arrérages, de s'occuper aussi de l'existence de la rente. Il doit examiner cette question complètement, la discuter et la décider. Ce n'est donc pas sans raison que la puissance publique attachera à son statut sur ce point l'autorité de la chose jugée pourra, comme *veritas inter partes* reconnue par le pouvoir, servir de fondement à des demandes ultérieures.

Pénétrons-nous bien de la réalité des choses et observons d'autre part le point de vue immédiat auquel se place le juge lorsqu'il rédige sa sentence. En rédigeant souvent dans une courte formule le résultat immédiatement pratique de son statut, le juge n'entend pas nécessairement pour cela, réduire ce statut à ce seul point; mais il porte à bon escient son attention spéciale sur les exigences d'exécution qui vont suivre sa sentence. C'est ainsi, qu'il d'éterminera en ce qui concerne une dette dont les intérêts sont réclamés, ce qui est liquide et immédiatement sujet à exécution. Est-ce à dire que l'existence de la dette soit étrangère à son statut? C'est la base substantielle et inséparable de sa décision, ou plutôt c'est la décision essentielle à laquelle s'attache le résultat immédiatement pratique comme corollaire de liquidation et d'exécution.

L'opinion que nous soutenons ici est en harmonie avec les grands courants de la jurisprudence dans les deux mondes. Mes confrères américains ont mis ce point en lumière non seulement pour la sphère anglo-américaine mais encore pour les autres parties du monde juridique.

Il faut bien reconnaître que sous cette dénomination: les motifs, on peut dans la réalité comprendre deux choses très distinctes: de simples éléments d'ordre explicatif et les bases substantielles de la décision. Celles-ci constituent avec les résultats immédiatement pratiques les éléments constutitifs essentiels et véritables du statut, et forment le terrain d'application de la chose jugée.

En tout cas il importe de se rappeler que la question ne se pose pas précisément en droit international comme dans le droit positif de tel ou tel Etat. Sur le terrain où nous discutons présentement, il n'y a pas de formes sacramentelles: la réalité, le bon sens, la bonne foi nous conduissent seuls à déterminer dans tel cas donné le véritable statut du juge, et à dire: à ce statut, l'on ne touchera point par des retours offensifs.

Après avoir essayé de mettre en lumière la consistance juridique de la chose jugée considérée dans éléments naturels, attachons-nous à serrer d'aussi près que possible les faits de la cause: nous y trouverons une éclatante confirmation de la thèse que nous défendons.

Et d'abord examinons la sentence même, rendue par Sir Edward Thornton en 1875.

On a été dur, Messieurs, pour le surarbitre: on a dit qu'il n'était pas jurisconsulte, que sa décision manquait de clarté, qu'elle avait été rendue "sans examen, ou du moins sans grand examen" . . .

M. Beernaert. Des chiffres!

M. DESCAMPS. Soit, ils ont ici leur importance. On a dit aussi que la question n'ayent pas été plaidée devant lui comme elle l'est devant la Cour actuelle, il était bon de n'accepter que sous caution cette première sentence. On a été plus loin encore dans la correspondance diplomatique.

Pour moi, je le dis en toute sincérité, j'ai été frappé de la manière dont le surarbitre, en si peu de mots, a si nettement élucidé tant de questions qui se rattachent au présent litige. La sentence du surarbitre occupe à peine quatre pages du *Mémorial* qui nous a été distribué par les soins des Etats-Unis d'Amérique. Combien lumineuse et substantielle à la fois nous apparaît la décision arbitrale! Et combien consciencieuse l'investigation de l'arbitre!

Il y a, Messieurs, encore aujourd'hui, dans la cité de Londres un homme qui a été investi par son Gouvernement des plus hautes fonctions publiques; il a été nommé ministre d'Angleterre à Washington. Cet homme a été élevé à une dignité plus haute encore à certains égards: celle d'arbitre international, comme le sont les juges que j'ai devant moi. Et cet homme, après avoir tout examiné, tout étudié, s'est recueilli dans sa conscience; puis, au moment de prononcer son statut, avec une modestie qui nous émeut, il s'est exprimé en ces termes:

Dans le cas de Thaddée Amat, évêque de Monterey, et de Joseph S. Alemany, archevêque de San Francisco, contre de Mexique, n°. 493, il ne sera pas possible au surarbitre de discuter ici la variété des arguments qui ont été produits des deux cotés. Il ne pourra qu'établir les conclusions (*to state the conclusions*) auxquelles il est arrivé après une soigneuse et longue étude de tous les documents qui lui ont été soumis.

Remarquez, Messieurs, les mots: *to state the conclusions.* En nous tenant strictement à la thèse du Gouvernement mexicain, suivant laquelle la "partie conclusive" de l'œuvre du juge aurait force de chose jugée, nous serions amenés à englober tout l'instrument de Sir Edward Thornton dans son statut proprement dit. Nous n'irons pas jusque-là, et en vérité, cela n'est pas nécessaire.

Le surarbitre continue en déclarant qu'il va "rendre sa décision avec un profond sentiment de l'importance de l'affaire, conformément à ce qu'il considère comme juste et équitable, dans la mesure où il peut faire fond sur son jugement et sur sa conscience."

Voilà, messieurs, en quels termes s'est exprimé en commençant le surarbitre dont on vous demande de reviser aujourd'hui radicalement la sentence, rendue, dit-on, "sans examen ou du moins sans grand examen." Sentence vraiment remarquable de précision et de raison, où sont tranchées comme par leur racine toutes les questions si longuement agitées devant lui, si longuement débattues encore devant vous.

Et voyez! Voici d'abord comment il fixe la nationalité des demandeurs et détermine le moment où l'Eglise catholique de la Haute-Californie est entrée dans l'allégiance des Etats-Unis.

La première question à considérer est la nationalité des demandeurs.

Sur ce point le surarbitre estime que l'Eglise catholique romaine de la Haute-Californie devint une corporation de citoyens des Etats-Unis, le 30 mai 1848, le jour où fut ratifié le traité de Guadalupe-Hidalgo.

Voici comment le surarbitre tranche la question de sa compétence au point de vue du compromis et du traité de Guadalupe-Hidalgo.

Pour toute réclamation dont le fait déterminateur serait antérieur à la date du traité de Guadalupe-Hidalgo, les demandeurs ne seraient pas autorisés à comparaître devant la commission mixte instituée par la Convention du 4 juillet 1868; mais une réclamation dont le fait déterminateur est postérieur à cette date rentre dans la compétence de la Commission.

La question de la nationalité des demandeurs et celle de la compétence de la Commission étant ainsi tranchées, le surarbitre arrive au cœur du litige: il s'agit de l'intérêt du fonds appelé "Fonds pie des Californie," de la débition de la rente, du droit des évêques de la Haute Californie comme successeurs de Diego. Et voici comme il établit dans le chef des ayants-droit actuels le titre à exiger le paiement de l'intérêt annuel autrefois payé à Diego:

S'il est vrai que cet intérêt eût été payé au Très Révérend François-Garcia Diego, évêque de Californie avant la séparation de la Californie de la République du Mexique, il appert au surarbitre qu'une bonne part doit en être payée maintenant et depuis le 30 mai 1848 aux demandeurs qui, selon lui, sont les successeurs directs de cet évêque, en tant qu'il s'agit de la Haute-Californie.

En d'autres termes, si l'obligation de payer la rente a existé envers Diego, elle doit persister envers ses successeurs dans la mesure où ils sont en effet ses successeurs.

On a discuté à perte de vue sur le caractère propre du Fonds des Californies, sur le but essentiel, soit religieux, soit national qu'il faut lui attribuer. Le surarbitre traite ce point en ces termes: "Le Fonds pie des Californies a été le résultat de donations faites par plusieurs personnes privées dans le but d'établir, d'aider et de maintenir les missions catholiques romaines en Californie et de convertir à cette religion catholique les païens de cette région." "L'objectif des donateurs, ajoute-t-il, était sans aucun doute principalement l'avancement de la religion catholique romaine." "L'on comprend aisément, dit-il encore que le Gouvernement espagnol fût heureux de profiter des sentiments religieux de ses sujets et vit avec grande satisfaction que leurs donations contribueraient beaucoup à la conquête politique des Californies, mais le but des donateurs était seulement la conquète religieuse, bien qu'eux aussi aient ressenti quelque fierté, sachant qu'ils contribueraient en même temps à l'extension des possessions de l'Espagne."

La parte à attribuer aux demandeurs dans la rente est ensuite fixée par le surarbitre à la "juste moitié": c'est la base généralement adoptée dans les partages à défaut d'autre critérium de répartition nettement admissible. Le montant annuel à échoir est alors déterminé en conséquence. Et la somme d'ensemble à payer pour vingt et un ans échus et non payés est additionné pour être adjugée, sans intérèt des intérêts toutefois.

Tel est le statut arbitral dans l'ensemble des éléments qui le composent et l'éclairent. Il fait lumineusement justice de tout ce qui, dans les prétentions des défendeurs, pourrait tendre à l'ébranler, à l'enever ou à le défigurer.

Non, ce n'est pas simplement une somme numérique que le surarbitre a déclare nous être due, c'est bien une rente annuelle, à concurrence de vingt et une années échues et impayées, une rente formant la juste moité des produits du Fonds Californies, capitalisé à 6 pour cent et dont l'arbitre a déterminé le montant suivant de probantes données et conformément à l'équitè. La défense a critiqué ces données avec une extrème vivacité et beaucoup de fantaisie. Car elle est arrivée à conclure que ce que M. Mariscal lui-même a appelé un "don magnifique" était un simple trompe-l'œil, quelque chose comme un bilan vèreux. C'est trop démontrer pour prouver quelque chose, et le procédé de demonstration était d'ailleurs trop élémentaire: biffer ce qui ne convient pas et rompre ainsi la balance de l'actif et du passif. Il y

a, Messieurs, une partie du jugement arbitral que je ne vous ai point lue et que ces attaques m'amènent à vous lire. Voici ce que dit l'arbitre en appréciant l'attitude prise par le Mexique concernant la teneur du Fonds des Californies:

Il n'y a pas de doute que le Gouvernement mexicain ne doive avoir en sa possession tous les comtes et documents relatifs à la vente des biens fonciers appartenant au Fond pie et aux produits; cependant, ils n'ont pas été fournis et la seule conclusion que l'on puisse tirer du silence sur ce point est que le montant des produits actuellement reçus par le Trésor n'était, tout au moins, pas inférieur à celui qu'allèguent les demandeurs.

Si le Gouvernement mexicain critique aujourd'hui—de bonne foi, je n'en doute pas, mais sans grand succès de lumière, puisqu'il allègue surtout la destruction accidentelle de documents—le montant du Fonds fixé par le premier arbitre, il faut reconnaître qu'il y a eu faute initiale de son côté et il semble juste dès lors de lui appliquer la maxime usuelle: "*Adscribat sibi!*"

J'ai tenu, Messieurs les Arbitres, à relever dans leur texte, en les accompagnant d'un bref commentaire, les points saillants du jugement arbitral de 1875. Les décisions du surarbitre concernant les demandes en revision de la sentence introduites par le Mexique et spécialement la dernière décision (24 octobre, 1876), rectifiant une erreur d'arithmétique et fixant à nouveau et le total du fonds (1,135,033 dollars), et la moitié de l'intérêt de cette somme à 6 p. c. (43,050.99) et, en conséquence, la somme des intérêts dus pour vingt et un ans (904,070.29), méritent également d'être signalés.

Je crois avoir démontré que le premier arbitre a statué en réalité, et n'aurait pas pu faire autrement que de statuer sur la débition de la rente annuelle, fondement juridique essentiel et inséparable de l'attribution de vingt et une années d'arrérages échus et non payés.

Mais voici l'objection de nos adversaires: dans ce cas, disent-ils, l'arbitre a statué *ultra petita*, car l'objet de la demande était seulement les arrérages de quelques années. Mais comment soutenir un seul instant, après lecture des mémoires des deux parties devant les commissaires, des opinions formulées par ceux-ci, notamment par le commissaire mexicain, des nouveaux mémoires présentés par les avocats du Mexique au surarbitre après le désaccord des commissaires, que l'existence de la rente n'a pas fait l'objet des débats et des conclusions des parties.

L'existence ou l'inexistence de l'obligation de payer une rente annuelle! Mais les parties n'ont ent quelque sorte, discuté que cela; car le fait du non-payement des arrérages à concurrence de vingt et une années n'était pas contesté.

Les conséquences du statut du juge sur ce point comme norme des décisions de l'avenir! Mais elles ont été nettement saisies et itérativement signalées par les organes autorisés de l'opinion du Gouvernement du Mexique et par le membre mexicain de la Commission mixte.

Ecoutez Avila, le plus advisé défenseur du Mexique:

Il serait curieux de nous voir payer un *tribut perpétuel* au profit des Etats-Unis et d'une secte religieuse. (*Mémorial*, p. 551.)

Ecoutez Zamacona, le commissaire mexicain:

Voici que les réclamants veulent changer la situation, et obliger le Mexique à payer le *tribut perpétuel d'une rente* à certaines corporations américaines. (*M.*, p. 543.)

Les défenseurs du Mexique avaient donc la parfaite clairvoyance des conséquences d'un jugement arbitral éventuellement défavorable à leur cause. Et eux-mêmes donnaient de la rente annuelle dont les

demandeurs sollicitaient la reconnaissance à leur profit cette définition: "C'est une rente perpétuelle." En cela ils ne se trompaient point et étaient d'avance d'accord avec les maîtres de la science du droit définissant précisément ainsi les rentes perpétuelles. "Les rentes perpétuelles sont celles dont le service n'est pas limité à une durée déterminée." Le service des arrérages, disent-ils encore, est l'exécution de l'obligation et non sa cause génératrice. Nous empruntons ces lignes à MM. Aubry et Rau sur Zacharie.

Je voudrais maintenant signaler un fait sur lequel j'ai le devoir d'appeler l'attention toute spéciale de la Cour parce que je le considère comme décisif contre toute tentative que pourrait faire présentement le Mexique de restreindre la portée de la décision arbitrale de 1875 à un simple statut sur des intérêts sans lien avec la reconnaissance de l'obligation même concernant la rente. Non seulement le Mexique a sollicité de l'arbitre une décision sur ce point, mais il a voulu obtenir à cet égard, en sa faveur, une interprétation authentique du statut arbitral dans des conditions vraiment singulières.

Voici quelques extraits de la correspondance diplomatique qui a eu lieu immédiatement après la decision arbitrale définitive.

Nous lisons dans la note adressée par Avila à M. Mariscal, en date du 21 novembre 1876:

> Dans la réunion que les agents et les secrétaires de la Commission ont tenue hier pour publier les dernières décisions de l'arbitre, j'ai présenté par écrit certains exposés dans le but d'obtenir leur insertion dans le registre des délibérations de ce jour, mais je n'obtins point cette insertion, parce que l'agent et le secrétaire des Etats-Unis estimèrent que cela ne devait pas être.

Et voici le point dont Avila demandait l'insertion:

> Que la réclamation concernant le Fonds pie fût considérée comme finalement réglée *in toto* et que toute autre nouvelle réclamation *quant au capital* du dit fonds ou *à ses intérêts accrus ou à accroitre* dût être considérée comme inadmissible pour toujours.

C'est-à-dire qu'Avila, conformément aux instructions du Gouvernement mexicain, demandait une interprétation officielle et authentique de la sentence rendue, constatant qu'elle impliquait décision concernant le sort de la rente elle-même et des intérêts à échoir comme des intérêts échus.

Et voici comment répondit M. Hamilton Fish à la communication que lui fit M. Mariscal de la note d'Avila:

> Vous apprécierez de suite mon extrême aversion, au moment où l'obligation de chaque Gouvernement de considérer le résultat dans chaque case comme absolument final et concluant devient parfaite, en voyant que le Gouvernement du Mexique a fait ou se propose de faire des démarches qui altéreraient cette obligation.

M. Mariscal se tira d'affaire comme il pouvait en répondant à la date du 3 décembre:

> Señor Avila a voulu seulement exprimer l'opinion de son Gouvernement quant à l'impossibilité de réclamer dans l'avenir le capital du Fond pieux dont l'intérêt accumulé sera maintenant payé conformément au jugement. Il s'efforce d'éviter si possible une réclamation future des parties interessées par l'intermédiaire des États-Unis, mais il ne prétend pas mettre en doute la présente decision.

Il est inutile d'insister sur la différence entre la première suggestion d'Avila et l'explication ultérieure de ses intentions après la réponse des Etats-Unis. Ce que nous avons tenu à mettre en relief, c'est l'instruction donnée par le Gouvernement mexicain à ses agents d'obtenir une interprétation de la sentence arbitrale impliquant statut sur

l'existence même de la rente: ce qui ne lui permet guère, se semble, de soutenir le contraire sans se mettre en fâcheuse posture. Ce qu'il est peut-être bon aussi de constater, c'est l'accord tacite des deux Gouvernements, à la suite de cet incident, pour ne plus soulever de complications entre eux concernant le Fonds Californien avant l'accomplissement complet des obligations contenues dans la sentence. Et ceci n'est pas sans importance: car, d'une part, il explique l'absence de réclamations avant cet accomplissement et, d'autre parte, il met en relief l'impossibilité de transformer ce silence en moyen de prescription pour le Gouvernement mexicain.

Ainsi, en résumé, non seulement le premier arbitre a statué manifestement sur l'existence de la rente annuelle, non seulement les demandeurs et les défendeurs ont débattu à fond ce point et adopté des conclusions opposées, mais le Gouvernement mexicain à sollicité une interprétation authentique du jugement impliquant statut sur le même point essentiel. Comment ce Gouvernement pourrait-il aujourd'hui avec quelque succès soutenir une thèse différente?

Je voudrais maintenant essayer de montrer à quel point le système défendu par nos adversaires est contraire non seulement à l'esprit, mais aux dispositions formelles d'un Acte que la première Cour d'arbitrage siégeant à La Haye ne reniera certainement pas: la Convention pour le règlement pacifique des conflits internationaux.

La Conférence de La Haye s'est occupée à trois reprises de la chose jugée et elle l'a fait dans des conditions que j'ai le devoir de rappeler brièvement ici.

A l'article 18 la Convention,—à laquelle ont souscrit les deux parties aujourd'hui en litige,—elle s'exprime comme suit:

> La convention d'arbitrage implique l'engagement de se soumettre de bonne foi à la sentence arbitrale.

Et le commentaire du rapporteur est significatif:

> Le trait caractéristique de l'arbitrage est précisément la soumission convenue des Etats à un juge de leur choix, avec l'engagement qui en découle naturellement de se conformer loyalement à la sentence.

Oui, se conformer, c'est-à-dire non seulement exécuter, mais tenir d'une manière permanente la sentence pour norme régulatrice des rapports juridiques, en un mot, la considérer comme *veritas inter partes*, et tout cela de bonne foi, sans subterfuge ni retour offensif. A coup sûr, toutes les intentions demeurent sauves, mais les faits doivent d'autre part être constatés dans leur teneur objective.

La conférence s'est occupée une seconde fois de la chose jugée à l'article 55, à propos de la question de savoir si et dans quelle mesure il fallait admettre une procédure spéciale en revision. Elle a déclaré que les parties pouvaient se réserver dans le compromis cette faculté et elle a organisé, en vue de cette hypothèse, le système d'une revision, strictement limitée quant à la juridiction appelée à en connaître, quant aux faits qui peuvent la motiver et quant au délai dans lequel elle serait recevable.

Voici le texte de l'article 55:

> Les parties peuvent se réserver dans le compromis de demander la revision de la sentence arbitrale.
>
> Dans ce cas et sauf convention contraire, la demande doit être adressée au tribunal qui a rendu la sentence. Elle ne peut être motivée que par la découverte d'un fait nouveau qui eût été de nature à exercer une influence décisive sur la sentence et qui, lors de la clôture des débats, était inconnu du tribunal lui-même et de la partie qui a demandé la revision.

La procédure de revision ne peut être ouverte que par une décision du tribunal constatent expressément l'existence du fait nouveau, lui reconnaissant les caractères prévus par le paragraphe précédent et déclarant à ce titre la demande recevable.

Le compromis détermine le délai dans lequel la demande de revision doit être formée.

On voit combien la Conférence a été pénétrée de la nécessité de terminer définitivement les litiges déférés à la justice arbitrale et de ne pas ébranler l'atorité des sentences rendues par les arbitres. Mais il y a dans la Convention de la Haye un article plus intéressant encore, et qui accuse clairement, avec la volonté de la Conférence de sauvegarder en tout cas l'autorité de la chose jugée, son dessein d'en étendre les effets régulateurs et pacificateurs non seulement à des points de fait, mais à des points de droit servant de bases aux jugements, non seulemente entre les parties immédiatement en cause, mais entre toutes les parties éventuellement intéressées. L'initiative de cette proposition ingénieuse revient à M. Asser. Voici son économie. La chose jugée n'est obligatoire qu'entre parties. Mais en droit international, spécialement dans les conventions appelées unions universelles, il y a de trés nombreuses parties, souvent intéressées également à la solution de tel litige. Par exemple tel Etat a parçu la taxe postale de telle façon; un autre lui conteste cette manière de procéder. Il faut recourir à un arbitre. Mais la décision, quelle qu'elle soit, ne constituera chose jugée qu'entre parties. Cela peut être regrettable. De là l'organisation d'un système de mise en cause de tous les Etats participants à une même convention en vue d'obtenir une décision judiciaire qui les liera tous.

Voici le texte de l'article 56.

La sentence arbitrale n'est obligatoire que pour les parties qui ont conclu le compromis.

Lorsqu'il s'agit de l'interprétation d'une convention à laquelle ont participè d'autres Puissances que les Parties en litige, celles-ci notifient aux premières le compromis qu'elles ont conclu. Chacune de ces Puissances a le droit d'intervenir au procès. Si une ou plusieurs d'entre elles ont profité de cette faculté, l'interprétation contenue dans la sentence est également obligatoire à leur égard.

Voilà comment la Conférence de La Haye a témoigné de sa volonté de consolider et d'étendre l'autorité de la chose jugée.

Au contraire—et c'est là, à mon sens, une remarque d'importance capitale,—la thèse soutenue par nos adversaires tend à rendre impossible, sauf dans des proportions dérisoires, l'existence même d'une chose jugée et le fonctionnement nécessaire de son autorité dans d'immenses domaines du monde juridique pratique. En effet, pour toutes les obligations dont l'exécution est successive, impossibilité radicale d'arriver à la chose jugée. Vous réclamez les éléments exigibles, les termes échus d'une créeance dont la capital ne peut, pour le moment, être réclamé? Impossibilité radicale d'arriver à la chose jugée en cette matière. Chaque année, bien qu'il ait été établi par le juge que la créance était due et qu'il n'ait fait que liquider les intérêts exigibles en conséquence, la controverse pourra reprendre à fond et donner lieu à des jugements successivement contradictoires.

Dans le cas présent, où l'on ne conteste nullement—le compromis en contient l'aveu formel—que les arrérages de la rente n'ont pas été payés depuis trente et un ans et où la contestation porte et a toujours porté en réalité sous l'existence ou la non-existence d'un droit à la rente annuelle, c'est précisément sur ce point que la chose jugée devrait être écartée. Si les Etats-Unis ont gain de cause dans

le présent litige, le Mexique pourra, dans un an, à la première échéance, recommencer le procès à fond et sur toute la ligne; et si le Mexique triomphe, les Etats-Unis pourront faire de même. Est-ce admissible?

Et en supposant même que cela fût possible dans le droit strict de tel ou tel pays, est-ce admissible en droit international où dominent ces deux grands principes:—le principe de bonne foi qui écarte les solutions de strict droit reposant soit sur un formalisme outre, soit de purs expédients de procédure,—le principe de la nécessité impérieuse de terminer les conflits au lieu perpétuer et de les multiplier.

Et ceci me conduit à présenter à la Cour une observation dont la portée ne lui échappera point. Cette observation n'est pas de moi; elle m'a été faite par un de mes éminents collégues de l'Institut de Droit international, dont je suis autorisé à citer le nom, mais qu'il me parait inutile de mèler à ce débat, la valeur objective de l'observation étant suffisante. Voici donc ce qu'il me disait: "Quelque controverse que l'on puisse soulever dans les diverse pays, quelque subtilité que l'on puisse invoquer, la présomption dans les arbitrages internationeaux doit toujours être que les Etats en cause ont engagé la question et que le juge l'a résolue dans des conditions qui permettent d'en finir. Toute autre supposition est inadmissible en mátière de procédure arbitrale internationale."

On peut ajouter qu'elle est le plus souvent et très expressément contre dite par le libellé même des compromis d'arbitrage, lesquels déclarent vouloir régler d'une manière concluante les différends en question, et non les éterniser et less envenimer par d'incessantes revisions à perspectives contradictoires.

Je viens de citer l'opinion d'un de mes collègues de l'Institut de droit international. Si je l'ai fait, c'est surtout pour montrer qu'il ne faut pas toujours conclure du national à l'international, et que certaines questions posées sur le terrain du droit des gens peuvent se colorer de teinte particulière, dont il est juste et nécessaire de tenir compte.

Mais, au fond, dans cette affaire, la question qui se débat est moins une question de haute science qu'une question générale de bon sens et de bonne foi. Que l'on enfasse l'expérience. Que l'on expose au premier venu qu'un différend s'est élevé entre les Etats-Unis et le Mexique concernant le paiement d'une rente de 43,000 dollars environ; que les deux Etats sont convenus en 1868 de recourir à une juridiction arbitrale, que l'arbitre a condamné le Mexique, à payer aux Etats-Unis vingt et une années d'arrérages—vingt et une fois 43,000 dollars,—pour les années échues et de la rente. Si l'on ajoute que le Mexique, depuis la sentence de l'arbitre, a refusé de payer annuellement les 43,000 dollars et allègue aujourd'hui que la rente n'existe pas et n'a jamais existé, l'interlocuteur répondra invariablement:

> C'est une chose jugée, cela: le premier juge a manifestement décidé le contraire. Aussi ce que le Mexique a de mieux à faire, ce semble, c'est de payer volontairement les arrérages actuels afin de ne pas être condamné judiciairement, comme précédemment, à payer les arrérages en souffrance.

C'est un peu ce qu'ont répondu les États-Unis au Mexique lorsque celui-ci, après avoir refusé de liquider l'arrière déclarait qu'il n'y avait qu'une seule voie pour terminer le différend: le recours aux tribunaux mexicains interprétant souverainement la sentence du premier arbitre international. Vous ne voyez qu'une voie, ont répondu les Etats-Unis et nous nous en voyons trois autres: payer, transiger, plaider

devant une juridiction arbitrale internationale. Celle-ci est l'organe naturellement appelé dans le cas présent à décider si et dans quelle mesure la première sentence arbitrale doit garder l'ineffaçable empreinte de la chose jugée et demeurer la norme régularisatrice de notre différend. C'est ainsi que nous avons été amenés aujourd'hui devant la Cour d'arbitrage de La Haye à discuter à fond la grande question qui donne à cette arbitrage une physionomie distinct entre tous les autres.

Permettez moi, Messieurs, en terminant l'examen de cette question, de rappeler un souvenir qui se rattache à l'époque où le Mexique conquit son indépendance. A cette époque troublée, alors que les passions s'agitaient encore—et la passion est parfois mauvaise conseillière non seulement pour les individus, mais pour les peuples—l'Etat mexicain n'hésita pas à prendre une résolution qui honore aujourd'hui encore son Gouvernement. Cette résolution est consignée dans le Décret du 28 juin 1824, lequel porte ce qui suit:

Le Congrès souverain des Etats-Unis mexicains, voulant donner un témoignage de son respect pour la foi publique et de son observation rigoureuse des principes de justice, ayant en vue l'établissement sur des bases solides du crédit national, décrète:
Sont reconnues les dettes contractées dans la nation mexicaine par le Gouvernement des Vice-Rois.

Parmi les charges du passé, il en est une qui a un caractère que j'appellerai intangible: c'est celle qui se rattache au Fonds des Californies et à sa contre-valeur représentée par la rente annuelle dont nous réclamons la prestation. Les sanctions géminées de la religion et de la législation ont mis cette charge à l'abri des mainmises contraires à sa destination.

De bonne foi, le Gouvernement mexicain a soutenu devant la première juridiction arbitrale qu'il n'était pas obligé à payer cette dette aux ayants droit. La décision arbitrale de 1875 lui a prouvé qu'il la devait.

De bonne foi, le Gouvernement mexicain, après la première sentence a demandé la revision de la décision arbitrale. Sauf rectification d'une erreur mathématique, cette revision ne lui a pas été accordée.

En toute bonne foi, le Gouvernement mexicain soutient actuellement et de nouveau la même thèse qu'autrefois. Je ne doute pas, quant à moi, que la juridiction arbitrale de 1892, en accord avec celle de 1875, ne prouve à l'État du Mexique qu'il eut bien fait de liquider les termes échus d'une obligation de rente dont l'existence a été constatée par le premier juge.

A quelque chose, toutefois, erreur peut être bonne. J'ai la confiance que des délibérations actuelles de la Cour sortira une sentence qui, loin d'ébranler ou de défigurer la chose jugée, la consacrera pour l'ordre international dans ses éléments essentiels, dans sa portée véritable, dans des conditions où elle puisse remplir efficacement sa haute mission: terminer les différends internationaux, assurer au contenu des statuts des arbitres une valeur permanente entre les parties et prévenir des retours offensifs qui compromettraient l'inviolabilité souveraine de la justice arbitrale.

Je prie le Tribunal de vouloir bien me permettre de continuer ma pladoirie demain matin, me sentant un peu fatigué.

M. le Président. Est-ce que l'autre conseil des Etats-Unis d'Amérique, M. Penfield, ne pourrait pas parler maintenant?

Mr. Ralston. Mr. Penfield is not here at the present time, because he had anticipated that M. Descamps would require the rest of the

afternoon, and he had some final work to do. I could communicate with him, perhaps, but I believe it would be a saving of time not to ask him to break in at this moment.

M. LE PRÉSIDENT. On pourrait lui téléphoner.

Mr. RALSTON. I can telephone for him immediately, but I think I could assure the members of the court, if it would affect their judgment, that Judge Penfield when he commences will not take more than two hours.

Sir EDWARD FRY. Then he would get through half the speech to-day.

M. ASSER. One hour to-day and one hour to-morrow.

Mr. RALSTON. That to a degree destroys the continuity of his speech. The judge has been very solicitous that he should have an opportunity of speaking straight ahead, and I feel therefore bound to make that statement to the court. He has mentioned the matter to me heretofore.

M. LE PRÉSIDENT. Il est désirable d'en finir; à la demande du conseil des Etats-Unis le Tribunal s'ajourne à demain matin 9 h. ¾.

(Le Tribunal s'ajourne à mardi le 30 septembre 9¾ heures du matin.)

SEIZIÈME SÉANCE.

30 septembre 1902 (matin).

Le Tribunal se réunit à 9¾ heures du matin, tous les Arbitres étant présents.

M. LE PRÉSIDENT. Je déclare que maintenant les séances continueront sans interruption, dans les heures fixées. De plus, le Tribunal sans vouloir en aucune manière enchaîner la liberté des orateurs et tout en respectant leur liberté, exprime le désir que les conseils veuillent bien dans leurs discours éviter autant que possible des répétitions inutiles.

La parole est au conseil des Etats-Unis d'Amérique M. Descamps.

M. DESCAMPS. Messieurs les arbitres, je ne prolongerai pas—autant que je le pourrais faire—le débat concernant l'autorité de la chose jugée en produisant de nombreuses citations et de longues analyses des jugements rendus dans les divers pays. Je me borne à renvoyer aux ouvrages qui ont été signalés par mes confrères américains, et dont les extraits principaux ont été reproduits spécialement par M. Ralston. J'y ajouterai, en ce qui concerne la France et la Belgique, deux grands recueils: les *Pandectes françaises* et les *Pandectes belges*, dans lesquels l'orientation est facile et qui donnent un aspect d'ensemble de la jurisprudence de ces pays.

Je me permets de relever dans les *Pandectes belges* v°, *Chose jugée* n° 169, le passage suivant, "La chose jugée peut donc résulter d'une décision simplement implicite, c'est-à-dire d'une conséquence nécessaire mais non formulée, d'une disposition expresse." De même en effect que la volonté du législateur peut être constatée réelle et certaine, sous une forme implicite comme sousune forme explicite; ainsi c'est à la volonté réelle et certaine du juge, et non exclusivement à la forme explicite ou implicite de sa manifestation, qu'il importe de s'attacher la thèse contraire aboutirait souvent à des conséquences aussi étranges qu'injustifiées. La volonté réelle du juge, comme la volonté réelle du législateur: voilà le point de mire des investigations de l'interprète.

Le § 425 des *Pandectes françaises* formule une règle semblable à celle du n° 169 *Pandectes belges* et le § 449 s'attache à nous donner un guide de nature à orienter le juge dans la solution de la question de savoir si telle prétention des parties tombe ou ne tombe pas sous le coup de la chose antérieurement jugée. Ce n'est au fond que l'application du critérium de contradiction.

M. DE MARTENS. Pouvons-nous profiter de ces deux volumes?

M. DESCAMPS. Evidemment. Il y a là, comme dans tous les recueils semblables des accumulations de documents qui ne sont pas toujours en parfaite concordance, mais les matériaux n'en demeurent pas moins précieux et signalent en tout cas tous les aspects de la question.

J'ai tâché de me rendre un compte pratique des contradictions éventuelles qui pourraient survenir entre l'ancienne décision arbitrale et la nouvelle, si les prétentions des défendeurs étaient admises: cette comparaison est très instructive.

J'ai aussi mis en regard des prétentions d'autrefois celles d'aujourd'hui, et sauf quelques moyens nouveaux qui, par cela même qu'ils ont la qualité de simples moyens, ne peuvent pas porter atteinte à la chose jugée, j'ai constaté que sur toute la ligne, on reproduisait les mêmes arguments, dont le juge d'autrefois a fait bonne et définitive justice.

Bonne et définite justice en effet: car après avoir montré qu'il y a en cette affaire chose jugée, je tiens à prouver brièvement qu'il y a aussi chose bien jugée, en tenant compte de tous les éléments dont le surarbitre a disposé lorsqu'il a rendu sa décision, et l'on ne peut demander rien autre chose à un juge.

J'ai déjà signalé dans une courte analyse les points lumineux de la première sentence arbitrale, ceux où l'arbitare tranche, par des raisons frappantes, avec un grand sens de justice et au point de vue de la bonne foi, les difficultés accumulées comme à plaisir dans cette affaire.

Sans relever ici toutes ces difficultés dont beaucoup ne sont point pertinentes en la cause, je voudrais signaler et faire en quelque sorte toucher du doigt les causes d'erreur qui vicient tout le système d'argumentation de nos adversaires, et qui doivent, selon moi, détourner la cour de tout ralliement à leurs conclusions.

I. Une première cause les erreurs où versent nos contradicteurs—je l'ai signalée dans une première plaidoirie, avant de traiter la question de la chose jugée—c'est l'idée qu'ils se font de la prépondérance nécessaire, absolue, exclusive des lois mexicaines en cette affaire. J'ai montré qu'il n'était pas possible de faire table rase à ce point et du droit international public et du droit international privé et de l'équité dont les arbitres sont aussi les ministres, selon les termes et l'esprit du compromis. Je ne reviens pas sur ce point.

II. Une seconde cause des erreurs que l'on peut constater dans nombre de raisonnements de nos adversaires, c'est la notion inexacte qu'ils se font du *trust*, qui est caractéristique des fondations californiennes en litige. Le droit français qui semble avoir servi de guide exclusif à nos adversaires ignore presque entièrement cette notion, ou plutôt il l'insinue dans le cadre des donations *sub modo*. De là les méprises que l'on peut constater au début des conclusions déposées en cours d'instance par MM. Beernaert et Delacroix.

Le *trust* anglais, la *stiftung* allemande, la fondation proprement dite attachent une libéralité, un patrimoine à un office. Il y a le *trustee* et *celui qui trust*. Faut-il proscrire cette forme de libéralité? Ne faut-il

pas plutôt la réglementer de manière à éviter les abus et à sauvegarder l'ordre public? Ce que l'on appelle le domaine éminent de l'Etat sur les *trust* va-t-il jusqu'à permettre à l'Etat de dire à chaque instant: "Le *trust*, c'est moi?" Ce serait, la négation même de la notion du *trust*.

Le dépôt et l'administration du fonds qui compose le *trust*, le pouvoir d'obtenir et de disposer des revenus qu'il produit ne doivent pas être confondus. Ces attributs peuvent se rencontrer dans la même main. Ils peuvent aussi être séparés et créer des droits respectifs fort distinct.

L'acte constitutif du *trust* peut reconnaître à telle personne ou à tel pouvoir le droit de pourvoir dans telle éventuallté à telle désignation, par exemple, à la désignation de l'ayant droit aux revenus, sans conférer pour cela à cette personne ou à ce pouvoir une faculté *ad nutum*, ou le droit de disposer souverainement du *trust* et de ses revenus selon le bon plaisir: ce qui serait encore une fois la négation du *trust* dans sa destination propre liée à son essence.

Il ne suffit pas d'ailleurs—et nous insisterons bientôt sur ce point—il ne suffit pas d'affirmer que le souverain, en vertu de son domaine éminent, aurait le droit de disposer, personnellement et à tous égards, du *trust* pour prouver qu'il a usé de ce droit et surtout qu'il en a usé au moment décisif en la cause, c'est-à-dire, dans le cas présent, au moment qui précède le démembrement des Californies.

La méconnaissance des divers points que nous venons de signaler se manifeste dans un grand nombre de déductions de nos adversaires.

III. Une troisième cause d'erreur chez eux est l'éloignement où ils se tiennent le plus souvent de ce que l'on peut appeler le cœur de la question, le propre siège de la matière. A nos yeux, ce qu'il importe de déterminer pour la solution du litige actuel, ce sont ces deux points fondamentaux:

1°. Constater aussi nettement que possible la situation juridique, et spécialement l'attitude du pouvoir souverain, au moment qui a précédé la séparation des deux Californies;

2°. Fixer aussi exactement que possible les conséquences juridiques du démembrement de territoire survenu, pour un *trust* dont le champ d'activité conforme à sa destination ce trouve manifestement coupé en deux tronçons, et dont l'organe agissant et ayant droit aux revenus se trouve lui aussi scindé en deux organismes. C'est sur ces deux points qu'il faut surtout faire la lumière.

La plupart des autres questions peuvent sans doute édifier plus ou moins le juge, mais ne fixeront point sa décision juridique. Les développements qu'on leur consacre sont en quelque sorte des préambules quand ils ne sont pas des hors d'œuvre.

IV. Une quatrième cause des erreurs où versent nos adversaires se trouve dans la méconnaissance pratique de ce fait, qu'une loi, un décret, n'est pas toujours exclusivement un acte de souveraineté imposant d'autorité des commandements ou des défenses; qu'ils peuvent au contraire renfermer des éléments obligationnels dont l'acceptation ou la ratification par les intéressés aboutit à l'existence d'un véritable contrat.

Et à ce point de vue il faut constater que l'interprétation donnée par nos contradicteurs au décret du 28 octobre 1842, qui est d'importance capitale dans la cause, est singulièrement erronée.

Ils y voient un acte de confiscation, alors que toute sa teneur nous démontre qu'il ne renferme qu'une transformation de valeurs, avan-

tageuse pour l'Etat sans doute, mais que ne diffère pas en soi des actes communément appelés remplois.

Et la combinaison recherchée—la *combinazione*, comme disent les Italiens—n'est pas difficile à saisir: un Etat en besoin de ressources immédiates nous apparaît comme transformant une valeur à réaliser immédiatement à son profit en une valeur soldable à des échéances futures bien échelonnées.

Grâce à cette combinaison, il devient propriétaire des immeubles et valeurs du Fonds des Californies et ils les vendra pour disposer du prix. Mais il n'entend aucunement s'approprier la contre-valeur qu'il substitue immédiatement a ces biens, c'est-à-dire la rente.

Ses déclarations à ce sujet sont formelles, absolues. Il déclare expressément "vouloir réaliser en toute exactitude les buts charitables et nationaux que le fondateur s'est proposé, *sans la moindre perte des biens destinés à cette institution.*"

Il caractérise non moins nettement le moyen qu'il entend employer à cet effet: "*capitaliser* les biens *qui appartiennent en propre au Fonds pie* en les *plaçant à intérêt*, en rentes, *sous de dues garanties.*"

Et c'est ce qu'il fait—car les actes sont parfaitement d'accord ici avec les déclarations—par une double opération qui le rend, d'une part, propriétaire à fin de vente, des propriétés rurales et urbaines et autres biens composant le Fond pie—qui le rend, d'autre part, débiteur d'une rente annuelle égale au revenu à 6 p. c. du capital représentatif des biens vendus; ce qui simplifie et même rend inutiles les fonctions d'administration.

Et l'Etat se constitue non seulement débiteur ordinaire, mais débiteur sous "due garantie," comme il l'a déclaré. A titre de garantie, il affecte spécialement le revenu des tabacs au paiement de la rente (*al pago de los reditos correspondentes al capital del referido fundo de Californias*).

Et il règle comme suit la délivrance des mandats de paiement. "La direction du Département des finances prestera (*entregara*, délivrera, remettra en main) les sommes nécessaires pour remplir les objets auxquels ce fonds est destiné, et cela "sans aucune déduction pour frais d'administration ou autres quelconques."

Il n'est pas nécessaire d'avoir des connaissances approfondies en langue espagnole pour savior que *al pago* signifie au payement et non à la donation, et que *entregar* correspond au latin *tradere*, délivrer, remettre dans la main, prester. En rapprochant ce dernier mot du terme *al pago*, aucun doute ne peut subsister quant au sens du décret de 1842.

Mais ce n'est pas assez: nous pouvons constater l'exécution du décret à l'égard des ayants droit par le Gouvernement d'une manière conforme à la signification que nous venons d'établir. Si en effet, nous lisons la page 149 du *Mémorial*, nous constaterons l'existence d'un ordre de payement sur la douane maritime de Guyamos, paru au *Diario de Mexico* sous la date du 23 avril 1844, et dont le titulaire est "Juan Rodriguez de San Miguel comme représentant du T. R. évêque des Californies."

Voilà pour la contre-valeur des biens vendues du "Fonds des Californies." Quant aux biens invendus au 3 avril 1845, le décret de cette date ordonne leur *restitution aux évêques de cette mitre* et *à ses succes seurs*. En présence de tels faits, soutenir que les décrets de 1842 et de 1845 ne renferment aucune obligation véritable envers les évêques de

Californie, c'est—pour emprunter à S. E. M. Pardo une de ses expressions—"fermer les yeux à la lumière de l'évidence."

Pour nous, nous avons la claire vue de cette vérité juridique: au moment où allait se fixer par voie de séparation les destinées politiques des deux Californies, l'Etat mexicain se considérait comme le débiteur de la contre-valeur des fondations californiennes, fondations alimentées par la charité privée, pour être appliquées à un but apostolique, dans un champ particulier de travail (les deux Californies) par une organisation religieuse particulière non moins nettement déterminée et représentée par l'évêque catholique des Californies.

On a soutenu qu'entre l'instant où l'Eglise catholique est devenue la ressortissante des Etats-Unis et le moment où elle a pu régulariser sa situation dans l'Etat de Californie, le Mexique a eu le pouvoir de faire main-basse sur ses droits. Mais traiter ainsi toutes les situations qui ont besoin d'un certain temps pour s'accommoder à un nouvel état de choses serait souverainement inéquitable et même nettement injuste. Ce n'est pas ainsi que le traité de Guadalupe-Hidalgo a réglé ce genre de situation transitoire et nous trouvons précisément dans ce traité un article ainsi conçu, concernant les Mexicains qui ne gardent pas le caractère de citoyens du Mexiqui et qui ne sont pas encore admis à la jouissance de tous les droits de citoyen des Etats-Unis.

> Entre temps, ils seront *maintenues* et protégés dans la jouissance de leur liberté et de leurs propriétés et garantis quant au libre exercice de leur religion, sans restriction aucune.

IV. Mais j'arrive à signaler une nouvelle et quatrième cause des erreurs qui sont à la base des thèses soutenues par nos adversaires: c'est la méconnaissance des conséquences naturelles et juridiques du démembrements des Etats.

Deux faits sont certains:

1°. Par la cession de la Haute Californie aux Etas-Unis, le champ effectif d'opération des fondations californiennes a été scindé en deux parties;

2°. Par cette même cession, l'organe appelé à fonctionner sur ce champ et ayant droit au payement de la rente représentative des revenus du trust s'est également trouvé partagé en deux parties.

On affirme que le traité de Guadalupe-Hidalgo a résolu ce cas, mais on est loin de le prouver, et le Mexique, dans nombre de conventions, a reconnu la contraire, car ses allégations d'incompétence ne datent pas du premier compromis d'arbitrage, et le cas des évêques de la Haute Californie était depuis longtemps soumis à l'arbitrage aux dates où le compromis initial fut à diverses reprises prorogé par le Gouvernement mexicain.

Il serait plus exact de dire que le traité de Guadalupe-Hildalgo a créé le cas sans le trancher. Et l'on sait de reste que dans les questions de toute espèce si compliquées auxquelles peuvent donner lieu les annexions, les instruments diplomatiques sont toujours imparfaits. Il faut régler selon la justice et l'équité les situations nouvelles.

Le droit pour l'Église catholique de la Haute-Californie de réclamer une part de la contre-valeur, représentative du Fonds des Californies semble difficilement discutable. La quotité de cette part est plus délicate à etablir. A défaut d'autre base de répartition pleinement satisfaisante, la règle ordinaire communément reçue et pratiquée est le partage par moitié. C'est une règle un peu grossière si l'on veut mais elle est dictée, en l'absence de norme meilleure, par le bon sens et l'équité. C'est elle qu'a l'appliquée l'arbitre.

V. Une cinquième source des erreurs que l'on peut relever dans les discours de nos adversaires réside dans une certaine tendance à ne pas tenir un compte suffisant des faits, et à leur opposer des droits théoriques qui, eussent-ils existé avec le caractère et l'éntendue qu'on leur attribue, n'ont pas été exercés dans dans cette mesure.

Il ne s'agit pas seulement de savoir ce que les Gouvernements successifs avaient, en principe, le droit de faire quant aux fondations californiennes. On peut soutenir, comme l'ont fait nos adversaires, qu'un souverain peut traiter selon son bon plaisir tous les *trust* de son empire.

Nous préférons admettre qu'il a le droit de les réglementer pour éviter les abus et dans les limites des exigences de l'ordre public. Mais là n'est pas la question. Il s'agit de savoir non ce qu'on a pu faire, mais ce que l'on a fait.

Il arrive dans la destinée de *trust* que des difficultés, des cas imprévus, se présentent, et alors on est amené à appliquer cette sage maxime: *potius interpretandus est actus ut valeat quam ut pereat.*

Il se présente des situations que l'on peut appeler intérimaires ou d'attente; on pratique fréquemment alors quant aux revenus ce que l'on appelle le procédé de la conservation.

Il peut se faire que dans l'acte de fondation on prévoie certaines éventualités extrêmes, par example l'extinction des successeurs réguliers des dispensateurs autorisés des revenus, et que l'on autorise à pourvoir à la continuité de la succession.

Nous trouvons quelque chose de semblable dans l'acte type des fondations californiennes Il est certain que le Gouvernement espagnol s'est considéré comme autorisé à désigner, à défaut de la lignée primitive de missionnaires, lignée éteinte par suppression, une autre lignée d'évangélisateurs.

Il est non moins avéré qu'à un moment donné le chef des missions californiennes, Diego, a été, à la demande du Gouvernement mexicain, créé évêque des Californies, et cela en connexion non douteuse avec la réalisation des intentions des fondateurs du "Fondo piedoso."

Il est établi que des obligations ont été ultérieurement assumées par l'Etat mexicain, car il n'est pas possible de soutenir qu'il se soit simplement engagé à faire des *payements* d'un genre inconnu en droit; des payements sans créancier ni débiteur. Il est de toute évidence que ces obligations ont été contractées, comme le rappelle le Décret de 1845, "envers les évêques de cette mitre et leurs successeurs."

On peut critiquer cela, quoique bien à tort, au point de vue du développement des missions, ou à tel au tel point de vue. Mais l'Etat, qui a sollicité l'établissement de cette situation et qui l'a consacré par ses actes, est mal venu, ce semble, à s'en plaindre. Et on peut en tout cas lui appliquer justement la maxime: *patere legem quam ipse fecisti!*

C'est peut-être ce que nos contradicteurs ont trop oublié.

VI. Je me permets de signaler enfin une dernière source des erreurs commises par eux. Elle tient à certains procédés de négation, qui dépassent à notre sens la mesure. En entendant nos contradicteurs nier jusqu'à la réalité du *Fondo piedoso*, nous nous sommes rappelés ce nihilisme transcendental dont l'expression a été consignée, dit-on, dans cette célèbre constitution imaginée en trois articles: Art. 1er. Il n'y a plus rien. Art. 2. C'est tout. Art. 3. Nul n'est chargé de l'exécution du présent décret.

Et voyez la série des négations dont on nous a gratifiés!

Il n'y a pas d'arbitrage international dans cette affaire.

Il n'y a pas de droit international public ou privé limitant les lois mexicaines.

Il n'y a pas d'équité à invoquer.

Il n'y a pas eu de Fonds des Californies sérieusement existant.

Il n'y a pas eu de rente.

Il n'y a plus d'indiens.

Il n'y a plus de missions.

Il n'y a plus d'obligation.

Il n'y a plus d'ayants droit.

Il n'y a pas de chose jugée.

Il n'y a pas eu compétence dans le chef de l'arbitre.

Enfin—comme conclusion dernière—nous ne devons rien.

C'est ce qui la cour aura à apprécier et à décider. Si elle aborde le fond, elle constatera, je n'en doute pas, qu'il y a des Indiens, des missions, une rente et des ayants-droit. Mais à mon sens elle constatera avant tout ceci, qui la dispense de revenir sur le fond: il y a chose jugée.

Un mot encore sur un point important: celui de la monnaie en laquelle les annuités échues et non payées devront être éventuellement soldées. L'or et l'argent se disputent ici la palme, mais avec des mérites inégaux.

Voici les raisons qui doivent, selon moi, faire pencher la balance de la justice du côté de l'or.

1. La sentence du 24 octobre 1876 nous adjuge définitivement le payement en or. La monnaie est une marchandise possédant un pouvoir d'acheter déterminé. Changer cette marchandise serait changer très gravement ce qui nous a été réellement adjugé, par le premier arbitre.

Nos adversaires sont en désaccord avec nous sur l'étendue de la chose jugée, mais ils admettent tout au moins que la chose jugée s'étend á ce qui'ls appellent "les résultats immédiatement pratiques de la sentence."

Or le payement en or rentre précisement dans cette partie incontestée du premier jugement arbitral.

2. Nos contradicteurs allèguent, il est vrai, qu'au moment où fut rendue la première sentence la question de la monnaie en laquelle la dette devait être soldée n'avait aucune importance, les deux métaux s'équilibrant comme valeur. Mais d'abord ils n'ont point fourni la preuve exacte de ce fait, et nous remarquons, en tout cas, dans les compromis la mention courante du payement "en or ou dans son equivalent:" ce qui ne laisse de place au payement en argent que sous réserve de conserver le rapport des deux métaux en prenant pour base le payement en or. D'autre part, s'il est vrai, comme ils l'affirment que les biens autrefois vendus leur ont été payés en argent il est non vrai que cet argent avait alors un autre rapport avec l'or qu'aujourd'hui et qu'ils sont mal venus à prétendre qu'aucun compte ne doive être tenu de cette différence.

3. La latitude du payement en argent laissée à nos adversaires serait contraire au principe juridique universellement admis: *Nemo ex suâ culpâ commodum acquirere debet.* En effet, le fait de n'avoir point payé les annuités au moment où ils auraient dû les payer deviendrait, un titre pour s'acquitter dans une monnaie dépréciée. Tout ce qu'ils pourraient prétendre à leur point de vue, ce serait de payer chaque

année suivant le rapport existant alors entre l'or et l'argent: ce rapport n'est pas difficile à constater.

4. Nous ne sommes pas ici sur le terrain des simples conventions de droit privé où l'on peut essayer de faire prévaloir une solution exclusivement favorable au débiteur: il s'agit d'une dette créée par la loi. Or le décret de 1842, soit que l'on considère son texte, soit que l'on consulte son esprit, n'est pas favorable à la prétention de nos adversaires.

Aux termes de ce décret, l'annuité doit nous être remise *dans la main*, c'est le sens du mot *entregar* de l'article 3 du décret. La dette est donc portable, et non quérable. Et après le démembrement, convenu par traité, des Californies, notre part de dette exigible est devenue régulièrement payable dans notre pays. L'importance de cette observation n'échappera point à ceux qui estiment que la loi du lieu où l'obligation doit être exécutée est régulatrice des modalités de l'exécution.

D'autre part, il suffit de lire le décret de 1842 pour saisir que l'intention formelle du législateur de cette époque a été de nous assurer une contre-valeur intégrale des biens vendus, il a voulu que nous ne subissions aucune perte, même du chef des frais d'administration et *à fortiori* du chef d'une monnaie dépréciée. Il a voulu nous assurer un situation *in integrum*.

Certes, nous ne pouvons être à l'abri de toutes les causes qui peuvent influer dans un pays sur la valeur relative des choses. Nous estimons simplement que nous n'avons pas à supporter celle qui se rattache à la dépréciation d'un des métaux, instrument des échanges. Une chose est certaine, c'est que si le Fonds pieux nous eût été laissé dans sa constitution propre, on eût, dans les baux par exemple, stipulé un chiffre supérieur pour le payement en monnaie dépréciée que pour le payement en monnaie non dépréciée.

5. L'or est l'instrument général des payments internationaux. . . .

M. Pardo. Ah!

M. Descamps. L'or lingot et l'or monnaie ne sont guère différents de valeur et ainsi on a toujours de la marchandise pour sa valeur réelle. Par suite du traité de démembrement, la dette ayant pris un caractère international implicitement consacré, il y a lieu de la payer en or

On est en effet généralement d'accord, tout au moins dans les liquidations de comptes d'ordre international, qu'un Etat ne peut se libérer par exemple, en papier-monnaie de son cru. Or lorsqu'il attribue à tel métal, chez lui, une valeur supérieure de près de moitié à sa valeur comme marchandise, ce métal est dans cette mesure un véritable papier-monnaie qu'il n'est ni équitable ni juste d'essayer d'imposer à sa valeur nominale comme libération de paiements internationaux.

6. Enfin, en équité, il ne serait pas juste ne nous faire subir ce double dommage:

1°. Celui du non-payment des intérêts des intérêts;

2°. Celui du payement dans une monnaie dépréciée.

Et cela d'autant plus qu'aucune des deux raisons pour lesquelles l'arbitre ne nous a pas accordé les intérêts des intérêts, ne demeure debout aujourd'hui.

Nous avons reconnu loyalement que cette circonstance, sur le terrain de la chose jugée, n'est par relevante pour nous. Mais si nous sommes condamnés à perdre sur ce terrain le bénéfice des pièces nouvelles produites par nous, c'est une raison pour que nous ne perdions pas d'autre

part le bénéfice d'une situation acquise consacrée par le *dictum* de l'arbitre.

Car il faut en revenir là. Il y a dans cette affaire une position que nous avons le droit de ne pas abandonner. Nous avons de 1868 à 1875 lutté sur la haute mer pour arriver enfin à ce port abrité contre le flot des arguments juridiques: la chose jugée. Il est peu d'arbitrages qui aient été plus longs, plus disputés, plus mouvementés: opinions des défenseurs des deux parts, opinions des commissaires, nouvelles instances des défenseurs, statut du surarbitre, pétition de revision avec amplification, double décision nouvelle de surarbitre: rien n'a manqué à cette procédure arbitrale espacée sur sept années.

Aujourd'hui nous n'avons pas, certes, refusé de nous livrer à un nouveau combat sur la haute mer et nous avons à bon escient augmenté nos engins de lutte; mais c'est en conservant toujours le droit de retour à notre port d'attache. Ici nous ne demandons que le respect de la chose jugée. Là-bas nous insistons pour que sanction soit donnée dans la plus large mesure à des engagements dont nous nous efforçons, à l'aide de moyens nouveaux, de marquer la portée et les conséquences.

La Cour appréciera l'un et l'autre de ces procédés, dont le premier garde un caractère principal et dont le second demeure subsidiaire.

Un dernier mot. On dit qu'un riche citoyen de la nation, pour laquelle j'ai l'honneur de parler en ce moment, s'apprête à doter la Cour arbitrale d'un magnifique Paleis. Si ce magnanime dessein se réalise, peut-êtra n'est-il point de plus belle devise à mettre au fronton de cet édifice que celle de la l'Institut de Droit international—*Justitiâ et Pace:* car ce sera bien là que la Justice et la Paix s'embrasseront d'une fraternelle étreinte. Et si le palais, comme je l'espère, s'agrandit dans l'avenir, si de nouvelles ailes s'y déploient, et que de nouveaux frontons réclament de nouvelles devises je ne vois point d'inscriptions plus lumineusement expressives des exigences fondamentales de l'ordre juridique international que ces deux maximes, où j'ai essayé de résumer ma pensée en commençant cette plaidoirie: *Pacta servanda! Res judicata veritas inter partes!*

M. LE PRÉSIDENT. La parole est au conseil des Etats-Unis d'Amérique M. Penfield.

Mr. PENFIELD. Mr. President and honorable arbitrators: In closing the argument on the part of the United States, it will not be expected that I should attempt to do more than briefly to restate and accentuate the principal contentions of associate counsel who have preceded me and to make suitable reply to the arguments of those speaking on behalf of the Republic of Mexico. In the course of my argument, therefore, I shall seek only to refer to established facts and to settled principles, simply in order to illustrate our theme and to reinforce the position of the United States—a position which has been frankly disclosed in the diplomatic correspondence without concealments, without evasion, and with that spirit of fairness and candor worthy of a great State.

The prime motive which inspired the formation of the Hague Convention was to secure the establishment of international justice. One of its chief objects was to afford sure redress for whatever injury may be arbitrarily inflicted by the government of one State upon the subjects of another. Unfortunately, the juridical fact has sometimes been momentarily overlooked or forgotten, that the supreme authority of the State which arbitrarily injures the property right of the subject of

another State incurs the just obligation of fulfilling the duties thereby entailed.

It is these arbitrary injuries to private right which constitute, unhappily, the long list of grievances which in the past have been preferred by governments on behalf of their subjects against offending States. These grievances have been summarily settled sometimes by the strong arm of the government acting on behalf of its injured subjects; and this has given rise to grave complaints by the distinguished publicist, Mr. Calvo, of the forcible collection of exorbitant indemnities.

The States of the Western Hemisphere recently held an international conference at the City of Mexico, with a view to find some just and satisfactory solution of this grave problem; and the result was that the project of a treaty was signed by the delegates of the States there assembled, under which such controversies between those States are to be tentatively referred, for a period of five years, to the permanent court provided by the Hague Convention.

Without exaggeration, therefore, I may say that the eyes of the western world are now turned toward this judicatory; for the sessions now held by this high court and its determinations, of vast moment as they are to the nations of the Old World, are even more so, if that were possible, to those of the Western Hemisphere. The decision, which will make for the reign of law and justice among nations, and for law and justice between the State and the humblest individual, will by its benign influence and beneficent example, tend to increase respect for private right and to put an end to the mutual grievances complained of in the past, of arbitrary acts of the State with respect to vested right on the one hand, and on the other, to the collection of indemnities by military execution—complaints which have in the past sorely perplexed the diplomacy and sometimes imperiled the relations of otherwise friendly States.

I hope I do not trespass too far upon your indulgent consideration if I say that upon this tribunal is therefore cast a most solemn responsibility—weighty as regards the litigant States who are parties to this controversy, and of incalculable importance by the lasting impression its determinations will produce upon the States of the Old World and upon the sense of law and justice among the peoples of the western world. The high precedent now set by your decision will live in its effects upon social order in the Western Hemisphere and will live in its influence upon the cause of international arbitration.

On this occasion of the sitting of the first court organized under The Hague Convention, we owe a passing tribute to His Imperial Majesty the Czar of Russia for the lofty conception and initiative which has finally led to the creation of the present tribunal, and to the additional security provided for the judicial protection of private right and for the preservation of the pacific relations of States.

Not less honor does the world owe to the memory of Her Majesty the late Queen and Empress for the generous response of the British Government to the magnanimous views of the Czar.

Equal honor is due to the sympathetic action of His Majesty the King of Denmark—the land whose folk and speech have left their beneficent and enduring impress upon the civilization of the United States; and honor too, in overflowing measure, to Her Majesty the most gracious Queen of the Fatherland, whose race has given two Presidents

to the United States, for the generous support of the project by her Government and for the hospitality we enjoy in a land distinguished by equal laws, whose prophetic spirit was expressed by the pen of Grotius in the Common Law of Nations.

Fortunate are the States who appear before a tribunal thus constituted and inspired with the spirit of these mighty traditions, which are summed up in the single idea of international justice, unfettered by the narrow technicalities of procedure, and by the *summum jus*, the *summa injuria* of literal constructions; an idea which was formulated in the immortal words of Justinian: "Justice is the constant and perpetual will to render to every one his due." That justice we here invoke.

It would be futile and, therefore, an unpardonable breach of the sorely taxed patience of this tribunal to dwell in detail upon all the particular statements and arguments of counsel for Mexico, or to review at length the history of the Pious Fund of the Californias. I shall only attempt to reply to Mexico's principal contentions which seem to merit some observation.

As the basis of the reply, I beg leave briefly to restate the foundation facts of our case.

The militant spirit of the Roman Catholic religion doubtless inspired the zeal of its votaries in their contribution of munificent donations, in their unselfish devotion and infinite labors to propagate the truths of the Evangel, under the auspices of the Pope. His power was then both spiritual and temporal, and the primary object of all the religious orders was to extend this spiritual dominion of the Vicar of Christ. And it is contrary to the expressed will of the donors of the benefactions; it is contrary to the evidence before the tribunal and contrary to historical truth to assume that the object of the donations was national or political, or to contend that the Catholic Church was not, in the understanding of all its members and orders, the church universal. The King of Spain was His Catholic Majesty. He did not hold the keys of St. Peter—he was a son of the church, and in respect of matters spiritual was loyal to the church. Whatever motives actuated him in the expulsion of the Jesuits and in the sequestration of their property, it would be inconsistent with the conspicuous loyalty of his religious character and with the tenor and spirit of his decree of expulsion to suppose that he did not, after having dispossessed the Jesuits and after the Pope, through his influence, had suppressed the order, which was thereby disabled to exercise the functions of the trust—it would be an unwarranted reproach upon his memory to assume that he did not propose and undertake to administer the trust in the spirit of its founders. These observations equally apply to the Government of Mexico down to 1845, except during the presidency of Santa Anna, whose hand of spoliation was restrained by the conscience of his people and was marked by what was, in effect, a solemn acknowledgment of the arbitrary character of his act by the engagement, binding upon the nation, that 6 per cent interest should be paid upon the capital of the fund and devoted to the pious uses to which the properties had been dedicated.

Among those who contributed to promote the work of evangelization, which was carried on in all parts of the world, and notably in the unexplored regions of the New World, were the donors of the estates which were especially devoted to the objects and uses generic-

ally described in the term "the Pious Fund of the Californias." The leading object of the benefactions was declared in the deed made by the Marquis de Villapuente and the Marquesa de las Torres de Rada, in 1735, of the vast estates which were expressly granted to the Society of Jesus "for the missions founded and hereafter founded in the Californias," so that all the rents and profits thereof should "be applied to the purposes and objects herein specified, namely, the propagation of our holy Catholic faith."

This was the cardinal object of the numerous donations made during the period of 1697 to 1768, and which, as shown by the evidence, aggregated a sum of over $1,700,000. And this sum is found not in fictitious, exaggerated, and unsupported statements of counsel, but from the historical evidences preserved in the archives of the Republic of Mexico.

It not infrequently happens that lapse of time and changed circumstances make it impossible to execute a trust, or some of its incidents, through the instrumentalities contemplated by its founder; but always, through whatever change of time and circumstance, it has been the just and wise policy of the State, in favor of charitable uses, to provide through some of its organs, administrative or judicial, for the faithful execution of the fundamental object of the trust. And it is to the honor of the Spanish and Mexican Governments that whatever national or political motive inspired the sequestration of the Pious Fund, they have always recognized in their decrees and laws the leading object of the benefactions.

Thus, during a period of one hundred and thirty-five years a practical and substantially uniform construction has been placed on the donations by the supreme authorities of Spain and of Mexico, and on the obligation devolved upon the Government, resulting from the siezure by the State of the property which had been irrevocably and inalienably dedicated by the founders to pious uses.

Thus, it is a conceded fact, which does not admit of discussion, that the Crown of Spain, from 1767 to the date of the independence of Mexico, recognized the sacred obligation which devolved upon the Government from the sequestration of the property.

It is also shown by its decrees and legislation that the Government of Mexico, after her independence was achieved, succeeded to the possession and administration of the trust, and solemnly enacted that its income, firstly, in the form of rents, and secondly, in the form of interest, should be devoted to the uses destined by the donors; declaring in the law of 1832 that the proceeds of the leased properties should be "solely and exclusively destined to the missions of the Californias;" declaring in the law of 1836 that "the property belonging to the Pious Fund of the Californias" shall be by the newly created bishop of the two Californias and his successors "managed and employed for its objects or other similar ones, *always respecting the wishes of the founders of the fund;*" providing by the law of April 1, 1837, for the negotiation of a loan by the Government from the Pious Fund, pledging the maritime customs to secure the payment thereof, and moreover mortgaging said fund, "coming upon this point to an agreement with the ecclesiastical authority;" thereby recognizing in 1837 the ownership of the fund by the ecclesiastical authorities; declaring by the decree of February 8, 1842, that the fund should be administered by the Government "for the purpose of carrying out

the intention of the donor in the civilization and conversion of the savages;" and reaffirming in the decrees of 1842, 1844, and 1845 the trust character in which the property or fund was held by the Government, in accordance with the object to which it had been devoted by the founders.

Finally, after the question has been under agitation during a period of forty years; after it has been the subject of one arbitration and is now the subject of another, the Mexican minister for foreign affairs, Mr. Mariscal, makes answer, in this case, solemnly admitting that the Jesuits were the original trustees of the Pious Fund; that after the expulsion of the Jesuits in 1767 the Spanish Crown took possession of and administered the properties which constituted the Pious Fund until the independence of Mexico was achieved; and that the Mexican Government succeeded the Spanish Government as trustee of the fund with all the rights granted to the missionaries by the founders.

Inasmuch as neither Spain nor Mexico ever asserted or exercised a discretionary right of disposition, and inasmuch as such right was personal to the Jesuits who had been incapacitated from exercising the right by the act of the Pope suppressing the order in 1773, rendering such personal disposition impossible, it follows that if Mexico took the properties charged with the subsisting rights of the Jesuits, it was charged with the duties which correspond to the rights of the beneficiaries of the trust.

In declaring the legal consequences attached to the action of the Spanish and Mexican Governments the question is not important whether that action was taken in the exercise of one or another prerogative of sovereignty—whether in the exercise of the despotic power of Nero, of life and death, and of uncompensated confiscation of the property of his subject, or the legitimate power of eminent domain—the regulated power of the sovereign to expropriate, upon reasonable compensation to be made therefor, the property of the subject to the uses of the States. But Mexico disavowed any purpose of confiscation, and it is not in this presence that the exercise of either power could be successfnlly vindicated as lawful and right. And our honorable opponents, in that spirit which has at all times done honor to the character of the jurisconsult—our opponents admit that the action of the Mexican Government in the sequestration of the properties of the Pious Fund was wrong; yet, if I understand their position, they ask this honorable tribunal to consecrate another wrong of the same character by an award legalizing the refusal of Mexico to mitigate the consequences of that wrong by the payment of interest on the capital of the fund. The initial wrong was consummated in 1842; the subsidiary wrong, of which we now complain, dates from 1870 and continues operative to this moment. But it is this latter wrong—that is to say, a wrong committed since the making of the treaty of Guadalupe-Hidalgo—that we have a legal right to complain of. In the international forum the Government of the United States has no *locus standi* to complain of legal wrongs committed by Mexico prior to the treaty of peace. It can not lawfully make reclamation for indemnity for the act of the state against its own subjects; and even if these subjects became, subsequent to the commission of the wrong, citizens of the United States the Government of the latter can not lawfully espouse their grievance committed by their Government before they were denationalized. The reasons on which this familiar distinction of international law and

practice are founded are so notorious that I beg the indulgence of the honorable tribunal for adverting to the subject. My apology is that it has been the repeated signal for the clashing of shields by our honorable opponents.

The distinguished counsel for Mexico, M. Beernaert, argued that the principle or legal conception embodied in the term "*chose jugée*," or *res judicata*, is a presumption, a fiction; but then he adds that it is a necessary fiction. A principle which is confessedly necessary is, humanly speaking, an inexorable rule of conduct, and is therefore to be judicially observed. The necessity of the rule is its own sufficient justification.

The principal argument of our honorable opponent is predicated on three propositions: First, that the particular instalments of interest demanded in this case have not been adjudicated; second, that the object of the demand to-day is materially different from the object of the former demand, and that between the two there is wanting identity of cause or object, because, it is argued, rights or claims of interest maturing each year are successively violated, and that these violations constitute injuries to different and successive rights.

Rights spring out of obligations. They are correlative terms. The right of the beneficiaries to claim the interest in this case is founded in the identical obligation which became *res judicata* by the award of the mixed commission in 1875. We assert the continued existence of the obligation of Mexico which was thus adjudicated, and the exact reciprocal of that obligation is the right of the beneficiaries, which is, therefore, included in *res judicata*. Hence the premises on which the argument of the learned counsel was based, being themselves fallacious, the conclusion deduced from them must fail. One can not deny the right of the United States to claim this interest without attacking and denying the obligation which was solemnly adjudged, and you can not attack and deny the obligation without impeaching, reopening, rehearing, overruling, and reversing the former judgment. If one sues to recover rents, there is the premise that the plaintiff owns the house which has been let to the defendant and on which rents accrue from month to month; if one sues to recover the annual interest falling due on a mortgage, the action is based on the premise that there is a capital or principal, the amount of which must be judicially ascertained by the judgment as one of its indispensable bases.

The learned counsel also contended that it is impossible to attribute to the award of 1875 the effects of *res judicata*, because the conditions are subject to necessary and inevitable fluctuations. The argument was that the beneficiaries of the Pious Fund may at some future period cease to exist, and that hence the doctrine of *res judicata* is necessarily inapplicable.

In this transitory sphere of existence the Government and the people of Mexico may cease to exist; the Government and the people of the United States may disappear from the face of the earth, and so may the beneficiaries of the Pious Fund cease to exist at some period in the far distant future. But the two Governments and peoples do now exist; the beneficiaries do now exist, even in larger numbers in the United States than in Mexico; and the decision of the honorable tribunal is to be rendered not on the supposed facts of an imaginary case, but on the concrete facts of the case now to be decided. But such are the inconsistencies of fundamental error of reasoning inevitably

involved in the position of the Mexican Government, that while the learned counsel is denying the force of *res judicata* in favor of the United States in this case, he reaffirms the position of Mr. Avila and invokes the doctrine of *res judicata* in favor of Mexico urged by the declaration in Mr. Avila's note to the Mexican minister, which was communicated by him to the Secretary of State, that the effect of the award of the mixed commission was to adjudge and settle forever all question of the obligation of Mexico to pay interests accrued and to accrue, and affirming that the debate was finally closed. Thus in the same breath in which our honorable opponents attack the doctrine of *res judicata* they uphold and advance the doctrine of *res judicata.*

I quite concur with Monsieur Beernaert that there is a considerable difference in the formal parts of judgments rendered by the courts which administer the civil law, and those which administer the law in Great Britain and the United States. But the difference is only formal and superficial. In England and the United States a judgment formally consists, first, of the findings of the facts in issue between the parties; second, of the statement of the court applying the law to the facts; and third, of the final sentence or dispository part of the judgment. In the civil law judgment, the statements of law and fact are combined in the considerations which are followed by the final sentence. It is therefore exact to say that between the judgments rendered by the civil and common law courts, there is only a formal difference, a formal division between the grounds or "objective motives" of the decision and the dispository part of the judgment. But it is not the forms but the essence of things which the court considers. In both systems the maxim, which expresses the vitalizing reason of the rule of *res judicata*, is the same—namely, that it is to the interest of the commonwealth that there should be an end of litigation.

I beg pardon of the learned arbitrators if I add that what are styled the "objective motives" or grounds of the judgment include the decisive facts in the given case, and the judicial application of the law to the facts; the two forming the premises of the syllogism, the conclusion deduced from which is stated in the dispository part of the final sentence. These "objective motives" form an integral part of the judgment and they are included in the *res judicata*, irrespective of whether the judge was right or wrong, in finding the facts and in applying the law.

But in the common law system, the judge in the course of his opinion sometimes turns aside from the direct consideration of the case in hand, and reviews cases and precedents more or less analogous, and utters opinions, more or less relevant; but inasmuch as those opinions are given for illustration merely and are not germane to the decision, they are styled mere *dicta* and are without binding force either as *res judicata* or as precedents. As I understand the text writers, these *dicta* correspond to the "subjective motives" of the civil law. Monsieur Beernaert traces one by one the successive steps of the court sitting in judgment and argues that it is only when the final stage is reached, in the rendition of the final sentence, that the judge has passed to the height of public power; but, as we understand it, the judge is clothed with public power to find the decisive facts and to apply the law; he is clothed with public power to pronounce the final sentence; and therefore, to quote the language of the learned counsel, Monsieur Beernaert, "When the judge has passed to this height of public power his judgment is absolutely obligatory."

If in attacking the juridical effects of *res judicata* a distinction is to be made between judgments rendered by courts of civil law and of common law, I beg leave to observe that the majority decision of the mixed commission was rendered first by the American commissioner, Mr. Wadsworth, and then by the umpire, Sir Edward Thornton, not merely in the approved form of the common-law judgment, but in the usual form of an international award, and that if the contention of our honorable opponent is sustained it would render the doctrine of *res judicata* absolutely inapplicable to international awards, which, in view of the susceptibilities of the contending parties, are frequently limited to the dispository part of the judgment.

In the course of his argument the learned counsel, referring to the former arbitration, said: "Show us the conclusions or memorial in which you have said, I demand not interest for twenty-one years, but forever! Show us how it could have been possible for the judge to decide upon this demand which you have never made."

The obligation of Mexico to pay interest is evidenced and declared by her own laws. It was so adjudged by the commission. Then, I answer, show us how and when that obligation to pay annual interest was ever extinguished. Will our honorable opponents plead and attempt to vindicate before this tribunal any subsequent act of confiscation?

I beg the indulgence of the court while I suggest "a subjective motive," an individual opinion of my own, a reason why that obligation to pay annual interest has not been extinguished. On February 17, 1834, a convention was celebrated between Spain and the United States whereby the United States agreed to cancel the claims of its citizens for injuries sustained from the captures and condemnations of their vessels and cargoes by the agents of the Spanish Government during the wars growing out of the insurrection of its American colonies. It was agreed that the claims amounted in value to $600,000, and it was further agreed that Spain, instead of paying the amount of the claims, should inscribe the same upon the great book of the consolidated debt of Spain and pay perpetual rents thereon at the rate of five per cent per annum, and that the Government of the United States should make distribution of the rents thus paid among its citizens equitably entitled thereto. Instead of making compensation in money for the confiscation of property, Spain undertook to pay perpetual rents thereon. If during the period of twenty-one years following the date of that treaty the Spanish Government had refused to pay those rents and the question of its obligation to do so had been submitted to an international tribunal which had awarded the payment of those rents during the twenty-one years, would it be argued that upon a subsequent default and submission of the case to international arbitration, the Government of the United States would be compelled to try anew the whole transaction? Or could it not properly invoke the application of the principle of *res judicata*, the obligation which had been adjudicated in the one case being precisely the same obligation which gave rise to the claim sued on in the second case? I suggest this case as an illustration, as a "subjective motive," and not as an "objective motive" for the decision of the case now before this tribunal.

Finally the learned counsel frankly admits that the motives or grounds of the decision do have a certain importance, and may be considered in order to determine the meaning of the dispository part of

the judgment and to give to it its veritable consequence. The language thus used appears vague. It is necessary to define. What is meant by "giving to the judgment its veritable consequence?" I regret that the learned counsel fails to illustrate with the light of his clear mind the scope or meaning of the phrase—the veritable effects of the judgment. The judgment and the meaning of the judgment are one and the same thing. What party should inquire as to the meaning of the judgment? Why ask the question? For what purpose? *Cui bono?* To ask the question is to answer it.

But in the armor of Achilles was found one vulnerable point; and the keen eye of the honorable counsel has detected one, just one point, which he finds vulnerable in the armor of *chose jugée.* The point is said to consist in the absence of identity of objects of the two suits; and this armor is said to be open because the first suit was for twenty-one annuities and the present suit is for thirty-three annuities; or in other words, because the former judgment failed to decree the perpetuity of the right, so as to include, as parts of one whole, the interest already accrued and the interest not yet accrued and not yet demandable.

Sir Edward Fry. Is it not 33 years, Mr. Solicitor?

Mr. McEnerny. Thirty-three years is right.

Mr. Penfield. I am quoting from Mr. Beernaert, if the honorable arbitrator please, and he said the first suit was for 21 annuities and the present suit is for 32 annuities. In fact it is for 33, but of course it is unimportant.

Sir Edward Fry. Yes, it is unimportant, but I thought it was 33.

Mr. Penfield. It is unimportant for the purposes of the argument.

With respect to this statement of the honorable counsel there appears to be a want of precision in point of fact and a misconception in point of law.

The memorial in the former case charged that "in pursuance of the decree for the sale and capitalization of the property made by the provisional president of said Republic, dated October 24, 1842, the said Republic of Mexico by the same decree undertook and promised to pay interest on said capital at the rate of six per cent per annum, *thenceforth;*" this is the language of the memorial; and the word "thenceforth" unqualified and unlimited, includes all time and asserts the perpetuity of the obligation. The umpire, in his decision (Transcript, pages 607, 608), decided that the Spanish Government became the trustee of the fund, avowedly with all the duties and obligations attached to it; that Mexico succeeded to the trust and declared that the assumption by the Government of the care and administration of the Pious Fund was for the express purpose of scrupulously carrying out the objects proposed by the founders, and those objects were eternal in their nature. In point of fact then this question was submitted and it was adjudged by the umpire that the obligation was perpetual in its nature. In this connection I would refer also to the brief of Mr. Doyle on p. 14 and to Mr. Avila's statement (Transcript, p. 640, section 156).

In point of law, a judgment for the recovery of installments of interest or of rents due has the effect of establishing the right of recovery of subsequent rents or interests falling due on the obligation, the existence, nature, and amount of the obligation having been judicially established. The actions may be successive and multiple in form, but they are not different in their essential juridical character, for each and every such right of action successively sued on is dependent on

the same obligation and there is therefore absolute identity of objects in the successive suits.

In this connection, I cite Chand on "Res Judicata," section 28, page 40, which says that "the identity of the matter at issue will apply even when the subject-matter, the object, the relief, and the cause of action are different." And he says, on page 46, that if the claimant is defeated by a judgment which negatives his title, he "can not reagitate the same question of title by suing to obtain relief for a subsequent item of the obligation." On pages 50 and 51, the text is to the effect that *res judicata* is not defeated by a change in the form of the action; and at the foot of page 55, he states that *res judicata* covers points which are *essential* to the former judgment.

Our opponents have exclaimed with some vehemence against what they denominate "perpetual rents, perpetual servitude of Mexico—the shirt of Nessus, which can not be divested." Thus their minds, like Mr. Avila's, confess the veritable effects of the judgment while their words combat their inmost thought. The diplomatic correspondence (appendix to transcript, p. 50) shows that the United States ambassador to Mexico was instructed July 18, 1901, by Secretary Hay, to suggest, or bring about, an offer to settle the matter by a compromise once for all of the entire claim. The door has been open for a final compromise and settlement of the annual interests or perpetual rents, as our honorable opponents style them, and Mexico has never responded in any sense to the offer. The Government of the United States has not only been just, but it has even been generous, to Mexico, as is demonstrated by its action in the Weil and La Abra cases. Is this the shirt of Nessus?

I lay down on this branch of the argument in reply the following propositions:

First: An international award has the force of *res judicata.*

Second: It includes all the objective motives or grounds on which the final sentence is predicated. Thus it includes as many distinct judgments as there are essential bases of law and fact which are implied in the final sentence, just as the conclusion of a syllogism impliedly and necessarily includes the major and minor premises. In reaching a judgment we must reason, and we can reason only according to the forms and laws of thought. We therefore proceed step by step, from premise to premise, of fact and law, to the conclusion, which is the formal statement of the ultimate truth deduced from the premises, both of which must be true. The judgment, therefore, includes the decisory part and all the organic parts, and constitutes in fact so many distinct judgments which are summed up and denominated judgment just as all races of men are summed up and denominated in a single word, "*man.*"

In support of these propositions I refer to the authorities cited in the memorandum filed on behalf of the United States, pages 49–54, and to the replication, page 4, and notes on page 7.

In the light of the foregoing propositions, what was adjudged, what was established by the award of the Mixed Commission?

First, that in point of fact the Mexican Government in 1842 had in its possession a certain sum of money, the amount of which was fixed by the award. Second, that, as a mixed question of law and fact, Mexico was under an obligation to pay annual interest *thenceforth* on said sum at the rate of six per cent. Third, that in point of fact, the instalments of interest accruing from 1848 to 1869 were due and

unpaid by the Government of Mexico. Fourth, that in point of fact, the Government of the United States had sued Mexico, demanding the payment of this interest which had accrued; and that as a mixed question of law and fact, the former Government had been injured by the nonpayment of that interest, and so was entitled to claim it for the use of its injured citizens, whose cause it had espoused and made its own.

All the constituent elements of the judgment, all the "identities" mentioned by Monsieur Beernaert, are here, namely, identity of parties and of capacities in which the parties sue and are sued, namely, the Government of the United States and the Government of Mexico; identity of the cause, that is to say, of the obligation of Mexico to give to the United States for its citizens the enjoyment of their withheld property rights; and identity of demand and decision, namely, for the amount due and unpaid, which results from a mere arithmetical computation, all the elements of which are included in the judgment. *Id certum est quod reddi certum potest.* Therefore the bases of the present claim were judicially considered and determined; not less so than if the mixed commission had formally so adjudged on each particular proposition. The mixed commission in 1875 could not have rendered the final award it did, unless the Government of the United States had sued the Government of Mexico, and unless the commission had adjudged that the United States had been injured by Mexico. The mixed commission could not have adjudged that injury and the extent of that injury without adjudging the perpetual obligation and the amount of interest falling due each year and the aggregate amount thereof accrued and unpaid from 1848 to 1869; and it could not have adjudged the amount of interest falling due each year without ascertaining and adjudging the amount of the capital and the rate of interest it bore.

As to the effects of each of these particular judgments we invoke the application of the principle of *res judicata.* As between the two Governments the question of the amount of the capital, the rate of interest it bears, the amount of the instalment falling due annually, and the obligation of the Mexican Government to pay, and the right of the United States Government to claim it, are judicially settled forever.

In the "Conclusions" filed on behalf of Mexico by MM. Beernaert and Delacroix it is alleged that the principle of *res judicata* can not be applied in this case, because the award in 1875 emanated from a mixed commission, clothed only with an arbitral authority, and that the power of the arbitrators, proceeding only from the consent of the parties, is limited by the private mandate from which it emanates, and therefore can not constitute a former adjudication.

The effect of this contention is, in short, to deny to the principle of *res judicata* any application whatever to international arbitration; and, as has been shown by Mr. Ralston, it is in conflict with the general consensus of opinion of publicists of recognized authority. The denial of the application of the doctrine to international awards would indeed deprive the law of nations of one of its most fruitful and beneficent principles and would be most detrimental to the development of that law, and to the fostering and preservation of the peaceful relations of States which that law is intended to promote.

What, then, is implied by the submission of a case to international arbitration? Are the parties at liberty to attack the award after they

have granted full jurisdiction to the tribunal to render it? Do they not consent in advance to accept the award, and not merely to accept it, but also to accept all the judicial consequences which attach to it? Those consequences are as much a part of the award as are the fundamental bases on which it is predicated. The award, then, is to have its complete juridical effects, and its payment is only one of these effects. If the contention now under consideration should unfortunately be upheld by this honorable tribunal, then it would logically follow that if the Mixed Commission had decided in the former case against the United States the latter would have been at once at liberty to bring fresh suit for the very same interest which formed the subject of the first litigation, and in the second litigation it could plead, if it had already been announced, the principle which you are now asked by Mexico to declare.

The application of the principle in this case is appropriate, and we invoke it because you are expressly authorized to apply it, and because it is just, and because the principle operates reciprocally, and is equally binding upon each party, whether winning or losing. I will not trespass upon the indulgence of the honorable tribunal by restating at length or reviewing the authorities already cited; but, in order to illustrate the theme, let us suppose that the award of the umpire had been in favor of Mexico and against the United States. The Government of the United States would not again have presented that claim, or the one now sued on, convinced that the question of liability was settled by that decision; but, if we may suppose a case so highly improbable as that the United States had again brought forward the former claim or the present claim, and if it were submitted under the present protocol, let us conceive what would be the position of the Mexican Government. Would it not have contended that the question of liability had been forever settled in favor of Mexico? Would it have contended that the matters then in issue and decided were open for rehearing? If the present Mexican contention is valid it destroys the vital principle of *res judicata*, or, rather, there is no such principle, which is then reduced to the bare statement of the simple fact that it was once adjudged that a certain sum of money was or was not owing between certain parties. If the contention is valid the statements and expositions of the principle contained in so many of the text-books and decisions are simply meaningless verbiage. The judgment of a court, like the conclusion of a syllogism, rests upon premises, without which there can be no conclusion, and consequently no judgment. The argument of our honorable opponents, therefore, proves too much, since if it proves anything it is that no judgment was ever rendered. The argument, however, when reduced to its last analysis, is simply in effect a direct attack upon the award for alleged error of the umpire in his appreciation of the law and the facts.

We invoke the application of the principle, therefore, even though, as shown by the evidence now before the court, the award would be for a less sum than we are justly entitled to recover. But it is vastly more important in its influence upon international law, and therefore upon the well-being of states, that upon this occasion, when this honorable tribunal will, for the first time in the history of nations, solemnly determine the judicial effects of an international award, that the far-reaching decision should be in accord with sound academic principles, illustrating not merely the maxim of the municipal courts

that it is to the interest of the state that there should be an end of litigation of the same questions, but that *interest gentibus omnibus ut inter civitates omnes sit finis litium*—it is to the interest of the peace and welfare of all races that between all nations there should be an end of controversy.

In the eloquent plea of the counsel who opened the case for Mexico, Monsieur Delacroix, it was said that "there are no missions, that there could not be any, on the free soil of America; no more in the United States of America, where liberty of conscience is to-day complete and entire, than in Mexico to-day would it be any longer possible to establish these works of reduction or of religious conquest than of political conquest."

While I concur in the statement of the learned counsel that in the United States of America liberty of conscience is complete, and that there is entire freedom of religious faith and worship, the conclusion deduced therefrom is in fact and in reason strangely at variance with the large truth contained in the general proposition. For there the Greek Catholic has consecrated his church; there the Mormon his temple; there the Anglican, the German Lutheran, the Dutch Reformed, the Mennonite, the Presbyterian, and a multitude of other sects and religions have consecrated places of worship of the Supreme Being; and there each sect, according to its means and resources, is engaged in the propagation of its faith; and there, in the complete separation of church and state, flourishing and advancing, building new churches and hospitals and schools, in which the teachings of the humanities are tempered with the teachings of piety, the Roman Catholic Church maintains its missions and founds new ones, not only in cities—in New York, in Chicago, in San Francisco—but in the villages and pueblos and among the aborigines in the wilderness.

We are not concerned here, as the honorable counsel has suggested, with the question of the revision of history, but with its illuminating instruction in the judicial interpretation of the decisive facts of this case; and happily for mankind it is no longer possible to fan into fresh flames the buried and extinct embers of the conflagration of the passions which from the 16th to the 19th centuries spread over Western Europe; and little could it enlighten the issues here to inquire whether the Jesuits ought to have been maintained or expelled.

Far be it from us to stain the memory of the King of Spain by ascribing to him greed for their riches as the motive for the expulsion of the Jesuits; least of all could such motive be justified in this presence, in an age of equal laws, when the present and future prosperity and happiness of all peoples depend on the protection of private right.

The expulsion of the Jesuits, as demonstrated by the decree of the King of Spain, originated not in rapacity nor in hostility to the Roman Catholic religion, nor to the will of the founders of the missions. Political, not mercenary, the motives undoubtedly were; but the final consequences of arbitrary injury inflicted upon private property right are to be judged by the accomplished fact; and we are to ascertain and interpret the juridical effects attached to the fact, and which were acknowledged both by the Crown of Spain and by the Government of Mexico.

It does not seem fitting before this tribunal to follow the eloquent counsel in the discussion of the events which led up to and which signalized and followed the French Revolution and the Franco-Prussian

war. Such discussion would be barren here; and it does not seem opportune to distract attention from the issues of the concrete case before this honorable tribunal.

Every case is to be decided on its own facts, not upon the assumed facts of an imaginary case called analogous. Does it accord with the scientific spirit of research after truth to speak of a supposed analogy as complete, without previous full investigation and an exact statement of all the facts of the supposed case? At the close of the Franco-Prussian war a fine was imposed upon the losing party to meet the costs of the victor. At the close of the Mexican war, not only was no fine imposed, on the contrary, the United States paid to Mexico the sum of $15,000,000 for the purchase of the ceded territory, and the two States stipulated, in the last clause of Article 8 of the treaty of peace, that "property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, (and) the heirs of these, shall enjoy with respect to it guaranties equally ample as if the same belonged to citizens of the United States."

These persons are, therefore, entitled to claim all the guaranties of the Federal Constitution.

In respect of their property rights, they were placed on a plane of equality in all respects with native-born citizens of the United States.

And the high contracting parties further stipulate in article 9 of the treaty that "the Mexicans who in the (ceded) territories aforesaid shall not preserve the character of citizens of the Mexican Republic" * * * "shall be incorporated into the Union of the United States and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States according to the principles of the Constitution; and in the meantime they shall be *maintained and protected in the free enjoyment of their property*." Our honorable opponents contend that that meant property only situated within the territorial jurisdiction of the two States. On the contrary, the duty was imposed upon the Government of the United States to protect all rights of property of every description which might accrue to these denationalized Mexican citizens, and the benefit of the covenant runs not only to those persons but to their heirs in the United States; if, therefore, any foreign government not a party to the treaty should thereafter injure any of the property rights of these citizens or of their successors in interest by denying to them the enjoyment of those rights by withholding payment of an established fiduciary or pecuniary obligation, the Government of the United States is bound by that treaty to protect and vindicate those rights. Is that engagement any less binding between the parties themselves? Does it stipulate that Mexico shall be at liberty to deny the enjoyment to those property rights by withholding the property itself? If an exception is not contained in the treaty, then, under the covenants of the treaty as well as upon the principles of international law, the Government of the United States owes, in return for the duty of allegiance of its citizens, the reciprocal duty of protection to the citizens and to their legitimate successors in interest in respect to the denial of any right of enjoyment of property that might thereafter be injuriously withheld from them. That it owed that duty to the then bishops was solemnly adjudged by the umpire. Does it not owe the same duty to their successors?

The honorable counsel for Mexico inquired: What is the law which

it is necessary to apply in this case? And the solution proposed for this question was in effect this:

First. That this is not an international but a private arbitration between citizens of the United States and the Government of Mexico, because the Government of the United States sues simply in behalf of the prelates of the church in California.

Second. That this honorable tribunal has been delegated, or substituted, to sit in the place and stead of the Mexican tribunals, adopting the same rules and principles which would have governed their decisions.

The character of this proposition, which I can not believe will find acceptance, challenges a moment's consideration. If this rule were adopted by international tribunals it would strike at the very root of international arbitration, and would defeat one of the prime objects of the Hague Convention. We complain here of a denial of justice. A state may deny justice in many different modes to the subjects of another state. It may do so by the arbitrary imprisonment of their persons or by the confiscation of their property. It may do so by the final decision of a court of last resort. In short, a denial of justice includes any arbitrary wrong or injury committed by the supreme authorities of one state upon the personal or property rights of the subject of another state. If the view put forward by M. Delacroix were adopted in respect of denials of justice, resulting in international intervention and arbitration, what would be the predicament of the offended government and of its injured citizens if an arbitral tribunal were simply substituted in place of the local tribunals which denied justice? Is this honorable court bound to sit in the place and stead of, and to adopt the same rules and principles as, the local tribunals by which justice had been finally denied? If so, why should a government intervene in any case? Why arbitrate what has already been conclusively determined? To state the question is to answer it.

The contention of the honorable counsel, moreover, does not appear to be in harmony with the well settled principles of international law.

Vattel and the European publicists in general lay down the doctrine that the State which intervenes in behalf of its injured subject makes the cause its own, and the controversy is thereafter waged between the offended and the offending States. This lawsuit is, therefore, one between the United States and Mexico. It is the sovereign who sues, and he represents collectively all his subjects. The United States Government has intervened and represents all its citizens who have been injured by the non-payment of the debt sued for. A government may intervene *sua sponte*, as governments have done in the past, under circumstances of flagrant injury to its subjects and of offense to the national honor. It may, without the petition or suggestion of any of its citizens, demand immediate apology, reparation and compensation in respect of those who have been injured.

The State, by its very act of intervention and submission of the cause to arbitration, cancels the particular claim of any and of all of its subjects against the offending State, for an injury committed; and when the indemnity is collected, the sovereign, or, in this case, the President, acting through the Secretary of State, will make the distribution in accordance with the principles of international law and with the exalted spirit of equity, to whoever of its citizens may be ultimately entitled. This was done with respect to the moneys paid on the former award, the evidence of which is before the court. The

question, therefore, who or what claimant appeared before the Department of State, or whether any claimant appeared at all or not, is not a question before this court. If we establish by proofs the injury to citizens of the United States and the Government of the United States takes up that case as its own, you can only determine whether the United States Government is entitled to a recovery in the suit.

This, then, is an international, not a private, arbitration. The whole people of the United States, on the one hand, and of Mexico on the other, represented by the agents of the sovereign authority, are before the court; and unless, as we contend, the principle of *res judicata* governs the decision, the court will have then to decide whether the claim is valid upon principles of international law and of justice.

The view on which the contention of the learned counsel for Mexico is based is announced in the work of a celebrated publicist, Mr. Charles Calvo, a writer for whose great erudition and for whose large and valuable compilation we are all greatly indebted, and of whom I could only speak with the most profound respect before any tribunal. Mr. Calvo, however, was born and reared in a State or continent whose controversies have been the subject of serious consideration by the publicists, and some of the principles declared by Mr. Calvo may properly be considered in the light of the surroundings and environments in which he was bred. He lays it down in substance as a principle that the state is absolutely sovereign with respect to its internal affairs, and that no other state has any right to intervene for any cause whatever. In its aspect as a political maxim, it is not proper in this case and place to consider it. But in its aspect as a declared principle of international law, applicable to intervention for the protection of the right of the injured subjects of a foreign state, most unfortunate would it be for the cause of justice in the western world if that should be incorporated as a principle into the law of nations. If that contention is consecrated as a principle, it ends, once for all, all right of a state to protect its subjects against denials of justice—of whatever kind—committed by one state upon the nationals of another state; and the abandonment of the duty of protection of its subjects by the state forfeits its right to their allegiance.

I have in mind, and with the indulgence of the court I will state, a concrete case which strikingly illustrates the workings of the principle underlying the contention of the honorable counsel, and which was announced by Mr. Calvo.

A revolution had broken out in an American state. A military chieftain, acting under the direction of the supreme authority of the state, seized and confiscated the movables of a United States citizen, not because the citizen had been guilty of lawless or unneutral conduct, but solely and simply for military uses. The citizen appealed to his government to secure an indemnity. A local law authorized the seizure of the property and provided that the military commanders seizing property for such uses must give a voucher showing the property taken, fixing its value, and that the claim for compensation therefor must be presented, within a short period, before the local tribunals, and that the local tribunals must take such voucher as conclusive proof of the value of the property taken; and the law further provided that the claimant who should refuse to accept the voucher tendered by the military officer or should refuse to present his claim within the limited time before the local tribunals should forfeit his claim. The officer

was thus clothed with power of confiscation, and in the case now under mention he tendered a voucher to the citizen showing only one-fourth of the fair market value of the property taken. The Secretary of State presented the claim diplomatically and requested the payment of a reasonable indemnity. The request was refused, and the ground put forward for the refusal was that the property had been taken under the direction of the head of the state, and pursuant to local law; that every state is absolutely sovereign with respect to its internal affairs, and that a local law prohibited any foreigner from applying to his government to intervene for his protection, and on these grounds it was argued that the United States could not properly intervene, and the claim was rejected.

If the contention made by the learned counsel for Mexico were to be adopted and to govern the relations of the State to its subjects sojourning in a foreign land, then, in the words of a distinguished statesman, the supreme authorities of one State may lawfully swing up by the heels the innocent subject of another State and bastinado him as he swings, and his Government is powerless to protect him. His only recourse is to the local tribunals, whose rule of decision in denial of justice has been prescribed in advance by the local laws.

In this connection another defence interposed by our honorable opponents is that the claim is barred by the statute of limitations.

In point of fact this contention is by the terms of the protocol excluded from your consideration. Our answer is that one State can not by its statutes bind another State in denial of justice. It is the State which sues here. If it had been contemplated to raise this defence, then, on the principles which govern the relations of friendly States, it should have been so expressed in the protocol.

Our position in respect to this contention is stated in Mr. McEnerney's brief, pages 56-58, to which I respectfully refer the honorable court.

I beg leave, however, to add that the bringing forward of the contention at the present stage of the case comes to us in the nature of a surprise. It was not disclosed or even remotely suggested in the course of the negotiations between the two Governments, as will appear from the diplomatic correspondence. The only objections made by Mr. Mariscal were that the case did not fall within the governing principle of *res judicata* and that the claim was not just. It was contemplated between the two States that in the submission of the cause to international arbitration, it should be lifted above all technicalities and decided solely upon the ground, not whether the statute of limitations can be pleaded against the juridical effects of a former judgment, but upon the broad ground whether the adjudication of the facts and liability in the former case was such as properly to control the determination of the facts and liability in this case, and if not, whether the claim be just.

Our honorable opponents lay stress on the decision made in the case of Nobile *vs.* Redman. In our view, that decision can not determine the present case, because.

First, the decision was rendered by an inferior court and the Supreme Court of the United States, in another case, has held otherwise.

Second, in the case now before this honorable tribunal, there is not nvolved any question of the capacity of the claimants to sue; for the

Government of the United States represents here all its citizens, in all of their legal capacities to sue; whether natural or juridical; whether corporations, public or private, lay or ecclesiastic.

I refer in this connection to Transcript, pages 589–593, 599 and 600.

The protocol submits to the determination of the honorable arbitrators the decision of the question of the amount of the award and the currency in which it should be payable. It is contended in the "conclusions" that the payment of the award in gold, formerly a matter of indifference, would be to-day ruinous for Mexico; that the Mexican standard is exclusively silver; that it was in this money that the State received the proceeds of the sale; and that it should remit only a part of what it has received and as it has received it.

If the whole case is not controlled by the force of the principles of *res judicata* this question will then be determined by the honorable tribunal in the light of those considerations which are just and equitable between the parties, and consonant with the reputation, credit, and dignity of the litigant States. In the absence of evidence showing in what currency the proceeds of the sales were paid to Mexico by the purchasers of the properties, we are not at liberty to assume whether the payments were made in gold or silver, or both, but the depreciation of silver in comparison with gold during the last thirty years is a matter of public notoriety, of which the court will take judicial notice.

It was indeed, as stated in the "conclusions," a matter of comparative indifference whether the award of 1875 was payable in gold or silver; but since that date the depreciation has been such that the commercial value of silver has decreased comparatively to less than one-half of its former value, and is now approximately only forty per cent of what it was in 1870. This depreciation can not be imputed as a fault to either Government, and is not, therefore, a consideration which should properly influence the judgment of the court, by making the nominal amount of the award worth 150 per cent more than its actual value in the money markets of the world. On the other hand, the purchasing value of either a dollar of gold or of silver has greatly depreciated during the last sixty years, and if measured by its purchasing value, the capital of the Pious Fund, as actually realized by Mexico, far exceeds its present nominal sum.

The generally accepted standard of exchange among the civilized nations is gold, and in an international tribunal would, in the absence of an expressed stipulation to the contrary, naturally be adopted as the medium in which the award should be payable. Among the equitable considerations which may justly influence the judgment of the court, it is not improper to refer to the precedent set by the action of the Government of the United States, as indicating at least its conception of what is due to the national honor. And in this connection I refer to the La Abra and Weil cases.

The Mixed Commission created under the convention of July 4, 1869, rendered awards in two cases known as the "Weil" and "La Abra Silver Mining" claims, which together amounted to the sum of $1,130,506.55. Mexico petitioned the Government of the United States to set aside those awards on the alleged ground that the Commission had been wickedly deceived by fabricated and perjured testimony adduced by the claimants. Upon strict principles of municipal law, Mexico was not justified in asking for a reopening of the awards; for she had not been free from laches in presenting to the tribunal even

the evidence which she already had in her possession showing the fraud, of which she had notice before the trials were closed; but immediately following the rendition of the awards the Mexican Government, while conceding their binding force, began a diplomatic attack on the justice of the awards, and thereafter submitted a large volume of evidence in support of her charges to the Secretary of State.

The President finally recommended to Congress the passage of a law conferring upon the Court of Claims of the United States, sitting in the District of Columbia, jurisdiction to hear and determine the charges. Actions were brought before the court, were prosecuted by official legal counsel employed by the Government of the United States and wholly at its expense. The result was a decree in each case, sustaining the charges which had been preferred by the Mexican Government, and the decisions rendered by the lower court were affirmed on appeal to the Supreme Court of the United States. Then, without any request or suggestion on the part of Mexico, the United States, *sua sponte*, refunded to the Mexican Government, in United States gold, the total amount of the two awards, although there had already been paid out and distributed by the United States Government among the individual claimants under these awards a sum exceeding a half a million dollars. Therefore the Government of the United States stands to lose more than half a million dollars, which, having been distributed twenty years ago among the claimants and their attorneys, are beyond recovery in the courts on account of the death of some of the claimants and the insolvency of their estates, and the legal difficulties of recovering from the attorneys moneys paid to them and honestly received by them through their faith in the integrity of their clients.

If the Government of the United States had seen fit to stand on narrow grounds, it might well have said, if it had adopted the view now put forward in the "conclusions" that inasmuch as when the awards were rendered it was a matter of comparative indifference to Mexico whether she paid them in gold or silver; and inasmuch as during the last thirty years there has been so great depreciation in silver, and inasmuch as the United States has been an innocent loser in so large a sum, and inasmuch as Mexico has adopted a silver standard, the United States may and will refund to Mexico in the standard of her own currency. If the contention made in the "conclusions" is to be sustained, then the United States Government, having refunded to Mexico in United States gold, has refunded a sum amounting to nearly $3,000,000, measured by the standard of the Mexican currency; and thus Mexico on the face of her own contention has accepted more than she would be thereon entitled to receive by nearly two millions of dollars, while on the other hand, she is asking this honorable tribunal to award to the United States less than one-half of what Mexico owes.

I now conclude my argument with the final proposition that the contention now brought forward by Mexico that the claim under consideration is barred by the statute of limitations; the contention that the claimants ought to have resorted to the local tribunals; the contention that the numbers of the beneficiaries of the Pious Fund are varying from year to year; the contention that the award of Sir Edward Thornton was erroneous; the contention that the doctrine of *res judicata* can not be invoked against a sovereign, all these and all similar contentions of Mexico have been excluded from your consideration by the terms

of the protocol, namely, is the case within the governing principle of *res judicata*; if not, is the claim just.

The justice of a decision is tried, not merely by the language and reasons of the opinion given, but by the effect of the decree. Does it do justice in the case between the parties; and does it also tend to exalt the general principle of justice?

Mexico, upon the facts taken from her own records, has appropriated a fund, the principal of which amounts to more than $1,700,000. It can not be shown, upon the careful reading and interpretation of any treaty stipulation, that Mexico has ever been discharged or released from the obligation to pay the interest which has accrued since 1869. National obligations, whether acknowledged by statute or presidential decree, or by a written promise to pay, are, in the last analysis, reduced to the same juristic term. It is a difference of formula not of things. And whether evidenced by its bonds, by its statutes or decrees, or under whatever other solemn form, the duty of the State to discharge its obligations, fiduciary and pecuniary, to the subjects of another State, is settled by the law and practice of nations. The fact that the obligation may have inured, in part, to beneficiaries in the Republic of Mexico, and in part to those in the United States, subsequent to the treaty of 1848 between the two States, could not affect the validity of the obligation, the payment of whch is asked by the United States, simply because it is just and because in this presence, where all nations stand equal, that nation alone is mighty which is superior by its moral right.

In closing, I beg to express our grateful appreciation for the most patient and indulgent attention which the representatives of the Government of the United States, the claimants, and their counsel have received from the honorable tribunal, as well as for the many valued services and courtesies rendered by the distinguished secretary-general, the first secretary, and the other officers of the court; and also to express our sense of the kindly consideration which we have all received at the hands of the distinguished representatives and counsel of the Republic of Mexico.

Although they are momentary adversaries before this tribunal, yet through the solution of the controversy afforded by the recourse to this high court, the friendly relations that unite the two litigant States remain undisturbed and have even been strengthened by the mutual forbearance, courtesy, and respect shown throughout all their negotiations; and it is the ardent hope and firm belief of the United States that the two nations will continue to be united by the close and enduring ties of common sympathies and reciprocal friendship.

M. Beernaert. Messieurs, M. Penfield vient de me faire l'honneur d'une réplique, qui, je n'en doute pas, est extrêmement sérieuse, mais qu'à raison de ma connaissance imparfaite de la langue anglaise je n'ai que très insuffisamment saisie. Il est de mon devoir d'y répondre. Je ne pourrai le faire qu'en me faisant rendre compte d'après la sténographie de ce que je n'ai pas saisi. Je prie donc la cour de bien vouloir remettre les répliques à demain; très probablement M. Descamps et moi pourrons nous contenter de deux à trois heures et par conséquent d'une seule audience.

Judge Penfield. At the request of Mr. Ralston I desire to reserve five minutes this afternoon.

Mr. Ralston. We will ourselves be ready to proceed by half-past two.

M. le Président. Le tribunal, après avoir délibéré, a décidé de continuer ses séances.

M. Beernaert. La cour me permettra de lui faire remarquer que dans ce cas une bonne partie de ce qu'a dit M. Penfield demeurera nécessairement sans réponse. Qu'elle me permette de lui faire remarquer qu'il y a là un précédent important au point de vue de cette juridiction internationale: du moment que l'on autorise l'emploi de différentes langues, il est indispensable que les avocats des deux parties puissent se comprendre. Je demande une remise à demain, qui ne prolongera assurément pas les débats puisque je viens de dire que nous serons assez brefs l'un et l'autre.

(Le tribunal se retire pour délibérer.)

M. le Président. Le tribunal, ensuite de la promesse formelle des conseils des Etats-Unis du Mexique de finir leurs dupliques demain mercredi, s'ajourne à demain 10 heures du matin. Le tribunal décide en outre que M. Penfield peut faire tout de suite les observations qu'il a à présenter au nom de M. Ralston.

Mr. Ralston. I do not think Mr. Penfield has understood what was said (in French).

M. de Martens. Mr. Penfield may make observations in the name of Mr. Ralston. He may make these observations now.

Mr. Penfield. In the course of his speech M. Delacroix said, referring to the opinion of the umpire, and to be found at page 606 of the transcript:

> This honorable umpire said in commencing, I can not examine all these arguments. Perhaps, adds Mr. Delacroix, he was not a jurisconsult. I am ignorant of the fact, but at all events he has not examined the arguments, but he goes on to tell us upon what he has founded his conviction.

M. Beernaert, in his turn, said, referring to the umpire, that his decision was scarcely juridical; that it was scarcely complete; that the sentence opens by this: He recognizes that he is not a jurisconsult. He declares himself powerless to discuss and to examine the considerations which have been submitted to him, and then he judges according to his personal appreciation of them and to his conscience.

Both of the gentlemen have fallen into a great error, caused by apparent misunderstanding of the true meaning of the language used by the umpire. The umpire simply stated that it was impossible for him to discuss the various arguments which had been put forward on each side, and in effect said that he could only give the conclusions at which he had arrived after a careful and lengthy study of the documents submitted to him. (In respect of arguments, I am afraid that this court will be in a worse predicament than the umpire. We have been talking away now for ten days.) These documents, of course, included the arguments. He did not for a moment say that he was not a jurisconsult. He was, as we understand it, a publicist. Such a statement would have been superfluous, and, as we all know, in addition, would have been erroneous, as he was a jurisconsult of acknowledged ability and celebrity. The simple fact was that there had been submitted to him in all for decision about one thousand cases, many of them involving intricate questions of law and fact, and from the very pressure of time he was unable to present the details of the reasons or "motifs" of his decisions, and only gave in his opinion in this case, as

well as in many others, what might fairly be regarded as the "dispositif;" that is to say, the conclusions at which he had arrived, based upon a lengthy consideration of the "motifs" or reasons adduced before him.

Moreover, the representatives of Mexico have fallen into a serious error in their understanding of the statement made by Messrs. Ralston and Siddons, and to be found at length on page 32 of the replication and page 52 of the Diplomatic Correspondence. This error was undoubtedly occasioned by the fact that Sr. Mariscal only quoted in the answer of Mexico disconnected sentences. Examination of the full citation will show that the contention of Messrs. Ralston and Siddons simply amounted to this: That the fund had always been in the hands of trustess, first, the Jesuits, next the Spanish Crown, then the Government of Mexico, then the bishop under the law of 1836, then again in the Mexican Republic; that the change of trusteeship was in every case accomplished by the act of the sovereign, and not that the sovereign had a right to, or had, in fact, confiscated for its own benefit the fund itself. It is a well-known principle in English and American law that the appointment and removal of trustees is within the power of the sovereign, this power ordinarily being exercised through the courts, but not necessarily so. There has, therefore, been no recognition of any sovereign right to confiscate the proceeds of the fund, but merely a recognition of the right of the sovereign to change the trustee, the trustee in the present case being changed by the sovereign itself assuming that position.

(Le tribunal s'ajourne à mercredi le 1 octobre à 10 heures.)

DIX-SEPTIÈME SÉANCE.

1 octobre 1902 (matin).

Le tribunal se réunit à 10 heures du matin, tous les arbitres étant présents.

M. LE PRÉSIDENT. La parole est à l'agent des Etats-Unis de l'Amérique du Nord.

Mr. RALSTON. Mr. President and gentlemen, there are some matters of no great moment, but which I desire to present to the court in order to entirely, as we say, round up the case—end the little details.

The first is the filing of powers of attorney from the bishops of Sacramento and Monterey to the archbishop of San Francisco, authorizing the full prosecution by him of the proceeding which is now pending before this honorable tribunal.

Then, the second is a copy of a call from Mexico upon the United States for discovery as to certain facts, and an additional affidavit of the Most Reverend Patrick W. Riordan as to the discovery called for, and call for discovery, copy of which has heretofore been filed. And I may explain briefly that Mexico has served two calls for discovery upon us; one relating to the number of Indians and their christianization, and the other relating to the disposition of the former award. I have wanted to make categorically the discoveries asked for by Mexico, and I think with the filing of these papers I have done so.

The third is a paper, which we expect from the printer immediately, a copy of the papal bull, authorizing the formation of the diocese of Monterey and of California, by virtue of which Diego was appointed.

The fourth is the affidavit of Archbishop Riordan, showing search in Rome for correspondence between the Mexican ambassador and the Holy See relative to erection of the bishopric of California, the same occurring in 1840, and copy of letter sent by the Mexican ambassador April 6, 1840, just received, with a translation of the same. We have been making a search for weeks in Rome for a copy of a letter which we believed must have existence, from Mexico to the Holy See, which promised, as we interpret it, to Mexico the full control of the Pious Fund. I should like to call that to the attention of the court and to the other side as quickly as I have my copies from the printer, which will be in the course of an hour.

Fifth. I have a telegram from the Secretary of State showing the date of the last payment to the bishops of California of the former award. I do not suppose that there will be any question between us about the correctness of the telegram, but I should be glad if Mr. Pardo would examine it and see if he is content with the statements made in it.

The sixth is a telegram from the Secretary of State, showing dates and amounts of payments under the Weil and La Abra claims. I should like also to show that to Mr. Pardo. I do not think there is any question of fact between us, and perhaps he will agree that the statements made are correct.

In addition I want to address in open court an inquiry to the agent of Mexico. On August 28th I addressed a letter to His Excellency Emilio Pardo, calling for certain discoveries from Mexico, to which no categorical reply has been received. The letter has been acknowledged, but beyond that I have had no reply. The points upon which evidence is desired are:

1. The amount of money paid to the Roman Catholic bishop of California out of or chargeable against the income of the Pious Fund from February 8, 1842, to February 2, 1848, and the amount of payments, if any, similarly made as against the principal thereof.

2. The amount of money paid out of or chargeable against the ncome of the Pious Fund to the Roman Catholic bishop or bishops or archbishops of either of the Californias from February 2, 1848, to the present time, or of any similar payments from or chargeable against the principal of said fund.

3. The amount of money paid from February 8, 1842, to February 2, 1848, chargeable, as above, against either the interest or principal of the Pious Fund to any religious orders of the Catholic Church engaged in work in either Upper or Lower California and for the purposes of such work.

4. The amount of money paid, chargeable as above, between February 2, 1848, and the present time to any of the religious orders of the Roman Catholic Church for the benefit of work in Upper California as ceded to the United States or in Lower California as remaining to Mexico.

5. The amount of money paid, chargeable as above, on any other account and disbursed or intended to be disbursed for religious purposes, in either of the Californias, in any manner other than as above indicated between either of the periods above named.

I added that it is desired that the foregoing information should be as specific as convenient with reference to payees, amounts, and dates of payment, and, if it may be, that if the information in detail is not

contained in documentary or other printed form, then that any printed official reports or other published papers showing the same in gross should be produced.

Mr. ASSER. Is this not before the court?

Mr. RALSTON. No; if the court will excuse me. This is a demand for discovery which we made on Mexico on August 28th, which is now nearly five weeks ago, and we have had no answer to it. I call the court's attention to the fact that no answer has been received, although we have desired to use the evidence, and I want to ask the agent for Mexico when such answer may be expected.

M. LE PRÉSIDENT. La parole est à l'agent des Etats-Unis mexicains.

M. DELACROIX. Nous répondrons cet après-midi à cette communication.

Sir EDWARD FRY. Quelle est la date sur laquelle on peut donner une réponse? C'est tout ce qu'on a demandé; il est très facile de répondre.

M. EMILIO PARDO. Il faut que je voie la correspondance de mon Gouvernement pour pouvoir donner une réponse précise.

M. DELACROIX. Ne vaut-il pas mieux que nous répondions au commencement de l'audience de l'après-midi?

M. DE MARTENS. Vous êtes tout à fait libre d'accepter ou non; sans votre consentement le Tribunal ne pourra recevoir aucun document, aux termes des articles 42 et suivants de la Conférence de La Haye.

M. LE PRESIDENT. Nous déciderons suivant votre réponse. La parole est au conseil des Etats-Unis mexicains.

M. DELACROIX. Messieurs, la bienveillante attention que le Tribunal a bien voulu nous accorder jusqu'ici ne nous permettra certes pas de faire la moindre redite, et en ce qui me concerne je ne reviendrai sur aucun des points que j'ai déjà traités; je me bornerai à répondre aux observations que ont été présentées par mes deux honorables contradicteurs, M. le Sénateur Descamps et l'honorable M. Penfield.

M. le Chevalier Descamps a commencé sa plaidoirie et l'a terminée en vous disant: Pacta servanda; j'étais heureux de cette indication, je me disais que les adversaires allaient enfin descendre sur le terrain où nous les avons conviés et qu'ils allaient nous dire quel est le pactum intervenu entre d'une part l'Eglise catholique, et d'autre part les Jésuites, le Roi d'Espagne, le gouvernement du Mexique, en un mot nous montrer le titre de leur créance. Mon honorable contradicteur M. Descamps, après avoir dit Pacta servanda, s'empressait d'ajouter que ce qu'il réclamait au gouvernement mexicain c'était le paiement d'une créance; il confirmait donc notre droit de réclamer l'exhibition du pactum.

C'est une imprudence, je pense, qui a été commise par mon honorable contradicteur, puisqu'après avoir proclamé le principe que nous-mêmes nous invoquons, il a négligé de s'y conformer.

S'il y avait un adage qui pouvait être invoqué de ce côté ci de la barre, c'était bien celui-là. En effet, vous vous souvenez du traité de Guadalupe Hidalgo intervenu entre le Mexique, d'une part, et les Etats-Unis d'autre part; aux termes de ce traité, les deux Etats, qui avaient à régler, comme le disait hier si justement M. Descamps, les conséquences du démembrement à donner la solution aux différents problèmes qui en étaient la conséquence; aux termes de ce traité il a été dit: Décharge réciproque est donnée, non seulement d'un Etat à l'autre, mais même des citoyens américains vis-à-vis du Gouvernement mexicain. Et l'honorable M. Penfield ajoutait que si des actes même

arbitraires avaient été commis par le Gouvernement mexicain comme tel vis-à-vis de ses sujets devenus depuis lors sujets américains, les Etats-Unis ne pouvaient pas en demander compte aujourd'hui au Gouvernement de Mexico. De telle façon, messieurs, que le traité de 1848 contenait une décharge absolue.

Le traité du 4 juillet, 1868, confirmait ce caractère du traité de 1848; il disait que si une commission était instituée, c'était uniquement pour régler les "injuries," les dommages qui auraient pris naissance postérieurement à ce traité de 1848.

Donc, messieurs, s'il y a une des parties qui ait le droit de dire "Pacta servanda," c'est assurément le Mexique, qui a traité, qui a réglé les conséquences du démembrement, qui a fait le pacte devant, dans la pensée des deux parties, être définitif, et sur lequel aujourd'hui cependant on veut revenir.

Il y a plus. Les demandeurs, après le traité de 1848 et après la convention de 1868, lorsqu'ils ont voulu présenter leur réclamation actuelle à la Commission, pour le rendre recevable, et pour ne pas se heurter au texte de ces deux traités, ont dû recourir à un expédient. Ils se trouvaient devant un traité qui disait: décharge, quittance absolue pour tous les faits antérieurs; aussi, alors qu'ils avaient présenté leur réclamation comme ayant pour objet un capital, c'est-à-dire le Fonds de Californie, ils ont recouru ensuite à un expédient et ils ont dit: nous ne demandons que des intérêts; des intérêts, c'est chose postérieure au traité puisqu'ils sont échus postérieurement à 1848.

Le Mexique a répondu que c'était là un expédient et que si on ne réclamait plus que les intérêts, c'était uniquement pour échapper aux conséquences du traité de 1848; des intérêts ne peuvent pas exister sans un droit préexistant, sans un droit perpétuel.

Cette réponse, messieurs, se trouve dans le mémoire de M. Aspiroz, présenté à la Commission mixte en 1869 et relaté dans le livre rouge.

Le surarbitre, l'honorable Sir Thornton, de même que tous les conseils des parties adverses en 1869, se sont abstenus de demander la consécration d'un droit préexistant et perpétuel, parce que c'était se heurter à cette fin de non recevoir résultant du traité de 1848 que j'indiquais tout à l'heure. Ils ont eu recours à cette habilité de formuler une demande d'intérêts en feignant de croire que cette demande ne créait pas un droit préexistant.

Aujourd'hui cependant vous savez ce qu'on plaide; M. le Chevalier Descamps vous a dit à la précédente audience: des intérêts supposent un droit préexistant, il n'y a pas de génération spontanée d'intérêts; et il en concluait que nécessairement Sir Thornton avait dû proclamer le droit préexistant auquel les adversaires se défendaient de prétendre en 1868.

Voilà l'expédient qui a réussi en 1868; mais aujourd'hui lorsque—si je puis me servir de cette expression—la mèche est éventée, lorsque nous voyons le moyen à l'aide duquel vous voulez échapper à la fin de non recevoir résultant du traité de 1848, alors que vous disiez: "il n'y a pas de droit préexistant" et qu'aujourd'hui vous venez dire reprenant notre objection d'alors: "s'il y a des intérêts il y a un droit préexistant et il y a chose jugée," n'avons-nous pas le droit de dire lorsque nous montrons votre attitude: Pacta servanda?

Si mon honorable contradicteur, M. Descamps, a cité cette parole, c'était pour en arriver à dire qu'il invoquait la bonne foi. Je m'étais proposé de relever cette parole dont peut-être la susceptibilité du

Gouvernement mexicain aurait pu se plaindre; mais le très honorable M. Penfield est venu à ce point de vue, par l'hommage qu'il a rendu au Gouvernement mexicain me dispenser de relever ce qui a été dit à ce sujet.

Messieurs, vous l'avez entendu, M. le Sénateur Descamps ne veut pas de l'Histoire. Il nous a dit cependant, et nous le savions, qu'il connaît très bien l'Histoire qui fait partie de son enseignement.

Or, nous démontrons que notre réclamation a pour elle le jugement des siècles et de l'Histoire. Je croyais que c'était un argument qui avait quelque valeur. J'ai cité ces faits précis, des dates, des événements politiques, et mon honorable contradicteur, qui connaît très bien tous ces faits, se borne à nous répondre: Ne parlons pas de l'Histoire ...... Je comprends.

M. Penfield, qui lui aussi connaît l'Histoire, avait été frappé d'une sorte de défi, que je lui avais porté au commencement de ces débats en disant: n'oubliez pas que si la Cour d'Arbitrage allait adopter votre théorie la situation serait la même en Prusse au sujet de l'Alsace-Lorraine; et j'avais indiqué qu'à mon sens cette comparaison mûrie devait avoir son importance et constituait un argument. M. Penfield nous dit: Ne mêlons pas des cas différents, ne faisons pas de comparaisons, chaque fait doit être examiné isolément. Et cependant, messieurs, par ce qu'il dit dans la suite on constate qu'il a bien voulu voir de près quelle était la valeur de cette comparaison; il nous dit: Les cas ne sont pas les mêmes, il y a deux différences. La première différence, dit-il, c'est que c'est la France, c'est-à-dire le pays à qui on a enlevé un territoire, qui a payé une indemnité de 5 milliards, tandis que dans notre cas c'est le pays à qui on a enlevé un territoire que reçoit une indemnité de 15 millions de dollars.

Qu'est-ce que cela fait? Il y a eu un règlement financier entre les deux Etats, ce règlement s'est terminé par un déficit ou par le paiement d'un excédent, qu'importe?

La seconde différence, dit-il, c'est que dans le traité de Guadalupe Hidalgo, dans le dernier article, il est dit que les deux nations respecteront les droits de propriété de leurs citoyens nouveaux, c'est-à-dire que les Etats-Unis respecteront les propriétés des anciens citoyens mexicains.

Eh bien, est-ce que par hasard l'Allemagne et la France avaient besoin d'inscrire dans le traité qu'elles respecteraient les droits de propriété des particuliers?

Ce sont là toutes les différences que vous avez citées. Est-ce que dans ces conditions je ne puis pas dire que la comparaison que j'avais produite a toute sa force et toute sa valeur, et qu'après ces débats il est impossible que vous ne disiez pas: il y a eu en Alsace-Lorraine des Jésuites, qui là n'avaient qu'une préoccupation religieuse, il y a eu confiscation de leurs biens par Louis XV en 1863, les souverains ont dit: nous confisquons, nous nous approprions, sous réserve des charges, ou de l'entretien du culte, ou des obligations.

Jamais, malgré cela l'Eglise n'a rien demandé; et aujourd'hui si les évêques obtenaient leur jugement dans le sens qu'ils sollicitent, on pourra dire: Mais l'Alsace-Lorraine a été conquise, le Gouvernement français s'est approprié autrefois les fonds des communautés religieuses, il y a là une situation identique, et cette comparaison avec des situations qui nous sont plus familières ne nous montre pas le caractère de la prétention.

Mais, messieurs, si M. Descamps ne veut pas du jugement de l'Histoire il ne veut pas davantage du droit. Le droit est une notion qui lui est cependant très familière comme elle l'est à M. Penfield; cependant l'un et l'autre de mes honorables contradicteurs vont vous dire: ne tenez pas compte du Dro.t.

M. Descamps vous dit: pas de droit, pas de loi positive, pas de loi mexicaine, parce qu'il y a le droit international public et le droit international privé.

Tout d'abord, quelles sont les dispositions de droit international public ou de droit international privé qu'il faut appliquer? Ce n'eût pas été indiscret d'espérer qu'il nous l'eussent dit, parce que ce n'est pas par des mots que l'on écarte des arguments, et surtout des arguments de cette valeur------

M. DESCAMPS. Le respect des contrats envers les étrangers.

M. DELACROIX. Je vais y venir.

M. Descamps nous dit qu'il nous oppose le droit international public et le droit international privé; permettez-moi de vous dire ceci: pas l'un et l'autre, n'est-ce pas? l'un des deux!

M. DESCAMPS. Si, si, les deux!

M. DELACROIX. Les deux?

M. DESCAMPS. Absolument!

M. DELACROIX. Alors, vous allez donc demander à la Cour de dire à la fois que les relations qui nous régissent sont des relations de droit public, des relations de nation à nation, des actes souverains que vous allez apprécier et viser, et en même temps que c'est une créance dont vous réclamez le paiement, droit positif, droit civil?

L'application du droit international public suppose un conflit entre deux États, et une discusion d'actes souverains. C'est ce principe qu'a développé M. Penfield, je vais y venir, je ne demande pas mieux que de vous suivre sur ce terrain et de demander à la Cour de régler notre cas suivant les dispositions du droit international public.

Mais mon honorable contradicteur a ajouté: droit international privé; et il devait le dire, puisqu'il demande le règlement d'une créance, d'un droit civil. Comment dès lors serait-il possible que vous fassiez application du droit international public?

Mon adversaire dit donc: droit international privé. Le droit international privé n'est pas un code universel, des règles uniformes pour tous les citoyens de tous les Etats. Le droit international privé est chargé de déterminer quelle es la loi positive de chaque pays qui sera appliquée à propos de chaque cas.

Ainsi, messieurs, s'il s'agit de la forme de l'acte, le droit international privé nous apprend que la loi appliquée est la loi "locus regit actum," la loi du lieu, c'est la loi nationale. S'il s'agit au contraire de la capacité, c'est le statut personnel, c'est la loi de la personne, avec certains tempéraments d'ordre public sur lesquels il y a de nombreuses controverses et de nombreuses discussions. S'il s'agit d'immeubles, de biens ou de droits immobiliers, c'est la loi du lieu où se trouve l'immeuble. Voilà ce que nous apprend le droit international privé.

Par conséquent, mon honoré contradicteur, il ne suffisait pas de nous jeter à la face les mots droit des gens, droit international public, droit international privé, il fallait préciser quelle était la disposition législative qui m'empêchait de produire tel ou tel argument.

En réalité, si l'on invoquait ces mots c'était pour vous dire qu'il n'y avait pas de droit à appliquer, et l'on vous demandait de proclamer

dans la première sentence rendue par une Cour d'arbitrage que la Cour d'arbitrage doit faire abstraction de l'existence d'une créance.

Ce que l'on vous demande, donc, c'est de vous lancer dans l'arbitraire auquel on donne le nom d'équité.

M. Penfield a cru devoir, lui aussi, aborder cette question dont l'importance n'a pas échappé à cet éminent jurisconsulte; il nous a dit: il peut y avoir un conflit entre un particulier et un Etat qui soit régi par les règles du droit international public, parce que ce particulier ayant subi un dommage de la part d'un Etat peut trouver bon de s'adresser à son Gouvernement et d'être représente par lui.

La thèse ainsi formulée est absolument juridique et nous n'y contredisons pas. L'exemple qu'a cité M. Penfield est parfaitement exact: Voici qu'un chef militaire qui a la juridiction dans une colonie, ordonne qu'il faut prendre ou décapiter un justiciable, alors que ces procédés sont trop sommaires et que cette justice est trop expéditive; cependant c'est la justice, c'est l'exercise du pouvoir souverain; le cas s'est présenté entre le Congo et l'Angleterre, à propos d'un officier congolais, M. Lothaire, qui aurait rendu une justice un peu sommaire vis-à-vis d'un suget anglais; le Gouvernement de l'Angleterre a dit: c'est peut-être un acte souverain, mais c'est un acte souverain á raison duquel je demande une réparation. Messieurs, la réclamation était: il y avait là un acte souverain, dit arbitraire, contre lequel on s'élevait.

Cela peut se produire aussi même à propos d'une loi. Je suppose que dans un pays on prenne une loi arbitraire en vue de frapper un étranger ou une catégorie d'étrangers; le gouvernement, qui est préposé à la défense de ses sujets, même résidant dans un autre territoire, pourra dire: c'est une loi arbitraire, et je soumets à un tribunal arbitral la question de savoir si cette loi n'est pas arbitraire; dans ce cas ce tribunal sera appelé à juger un acte souverain.

Tout ce qu'a dit à ce point de vue mon honorable contradicteur, M. Penfield, est parfaitement exact; seulement, comme il nous l'a si bien appris, il ne suffit pas d'une théorie, il faut faire l'application au fait. Qu'il nous dise donc quelle est la loi, quel est le droit, quel est le code mexicain qu'il taxerait d'arbitraire et dont il demanderait l'écart des documents de la cause, ou qu'il taxerait d'arbitraire! Assurément il ne le dit pas!

Au contraire, Messieurs, maintenant que ces débats touchent à leur fin, que vous connaissez l'affaire dans tous ses détails, que vous connaissez la demande, vous savez que ce que l'on demande c'est la reconnaissance de l'existence d'une créance, d'un droit privé, d'un droit civil. Comment dès lors peut-on invoquer un tel droit sans le faire régler par le droit privé.

Les demandeurs, ce sont les évêques; tous les mémoires, tous les documents que vous connaissez indiquent que les évêques sont les véritables réclamants, que le Gouvernement n'est là que pour les assister; et c'est par une erreur évidente que mon honorable contradicteur, M. Penfield, vous disait que ce sont les Etats-Unis qui plaident.

Non, les Etats-Unis assistent les évêques. Ce n'est pas un dommage causé à un citoyen, dont on demande réparation; ce ne sont pas des dommages-intérêts que l'on demande, ce sont les évêques, qui se croyant fondés à réclamer le remboursement d'une dépense, le demandent avec l'assistance et l'appui de leur Gouvernement. Le texte de la convention de 1868 est décisif sur ce point. On nous dit: chose jugée entre les mêmes parties; or, qui est-ce qui pouvait comparaître en

1869 devant la commission mixte? Sont-ce les deux Gouvernements? Nullement! Le texte de la convention précise dans l'article 1er que la commission mixte est instituée pour juger les differends existants entre de citoyens de l'un des Etats et le Gouvernement de l'autre Etat; ce sont des réclamations de citoyens qui sont soumises à la commission mixte; et s'il s'était agi d'un conflit entre le Mexique et les Etats-Unis la commission mixte de 1868 n'aurait pu en connaître.

Si l'on invoque la chose jugée, on doit prétendre que le débat se décide entre les mêmes parties. Ce sont les évêques—et d'ailleurs aucune démonstration n'est nécessaire sur ce point—qui sont les demandeurs, et s'ils agissent comme créanciers c'est le droit international privé qui doit les régir.

J'ai été assez surpris d'entendre mes honorables contradicteurs vous dire en bloc: pas de loi mexicaine à appliquer, pas de droit positif mexicain. Ils n'en veulent pas. D'autre part, lorsque nous leur demandons: quel est votre titre? Ils produisent des lois mexicaines, des décrets mexicains de 1836 et de 1842! Et je ne pouvais pas m'empêcher d'esquisser un sourire bien vite réprimé lorsque j'entendais mes honorables contradicteurs vous dire: d'une part pas de loi mexicaine, et d'autre...

M. Descamps. Pas d'empire absolu des lois mexicaines!

M. Delacroix. Pas de mots: des faits. Je vous réponds par un exemple: nous avons invoqué la loi de prescription quinquennale; c'est une disposition inscrite, je crois pouvoir l'affirmer, dans toutes les législations; lorsqu'il s'agit de prestations périodiques, de sommes dues par année, le créancier a le devoir de ne pas laisser s'écouler une période de plus de cinq années sans réclamer, sous peine de voir son droit compromis. Je suis convaincu, bien que je ne la connaisse pas, que cette disposition doit se trouver également dans la législation des Etats-Unis; elle se trouve dans le Code mexicain de 1870 comme dans le Code de 1895; c'est une disposition qui s'est trouvée dans le Code du Mexique dès qu'il en a eu un.

On nous a demandé quel était ce Code; nous avons répondu que c'était le Code du district fédéral de Mexico, parce que toutes les réclamations adressées à l'Etat sont jugées à Mexico et pas conséquent, suivant la loi de ce district fédéral; nous avons ajouté que la Basse Californie ne constituant pas un Etat distinct se trouve nécessairement régie aussi par cette loi du district fédéral. Mes honorables contradicteurs comprendront cela très bien puisqu'ils ont la même chose aux Etats-Unis: il y a des territoires qui ne constituent pas des Etats distincts. La situation est la même dans la Basse Californie, et c'est pourquoi les règles du district fédéral de Mexico lui sont applicables.

Je vous disais donc que c'est un principe inscrit dans toutes les législations. Il est juste d'ailleurs, et tous les auteurs, tous les commentateurs vous disent que ce serait réserver au créancier de ruiner son débiteur si le créancier pouvait laisser son débiteur dans l'insouciance, dans l'ignorance peut-être de son obligation, et si à un jour donné, après vingt ou trente ans il pouvait lui dire: vous me devez des sommes considérables par l'accumulation des intérêts arriérés.

Aussi, messieurs, toutes les législations disent que le créancier doit être suffisamment vigilant pour ne pas laisser accumuler plus de cinq ans d'intérêts. C'est juste, c'est légitime, et c'est parce que c'est juste et légitime que c'est inscrit dans le Code Mexicain.

Nous demandons l'application de cette notion élémentaire à la cause

actuelle, nous disons: tout au moins depuis 1870 jusqu'a 1891 vous n'avez rien réclamé, dès lors la prescription s'impose, elle s'impose qu'il y ait ou non chose jugée, puisque même l'existence d'un titre définitif n'empêche pas la prescription de s'opérer. C'est une notion élémentaire. Lorsque nous en demandons l'application, M. le chevalier Descamps nous répond: Pas de loi mexicaine, droit international.

Mais, ne sentez-vous pas que vous devriez, pour invoquer le droit international, établir que la loi dont je demande l'application est une loi arbitraire, que cette loi a été faite pour atteindre certains de vos citoyens et qu'elle se trouve en conflit avec votre législation? Mais, si elle est inscrite dans votre législation comme dans celle de toutes les nations, qu'est-ce qui vous autoriserait à dire qu'elle est arbitraire et à demander au nom du jus gentium, du droit international, qu'on écartât l'application.

L'objection, la seule qui était à faire, était celle-ci: la prescription a été interrompue et par conséquent il y a une période d'intérêts qui est due malgré la prescription, on nous aurait dit: Notre Ministre s'est adressé à votre Gouvernement par une lettre de 1891. Nous vous aurions repondu en vous disant: l'article 1232 du Code dit comment la prescription est interrompue: elle l'est par une demande judiciare ou par une citation en conciliation, cela n'existe pas dans l'espèce, et par conséquent à ce point de vue la prescription ne se trouve pas atteinte.

Il y a un autre exemple que je pourrais citer; je le puiserais dans ce qu'on a appelé la loi de prescription. Voici qu'en 1857 ou 1859 une loi est prise par le Gouvernement mexicain, une loi radicale, une loi qui interdit à toute autorité religieuse, soit séculière soit régulière, de posséder sur son territoire, qui lui enlève toute notion de personalité civile. Vous pourriez dire: c'est trop radical; vous pourriez essayer de démontrer que cette loi a été prise en vue de froisser les intérêts de vos citoyens et en rejeter l'application au point de vue du droit international public. Mais si je vous démontre qu'elle a été prise en vue de l'intérêt général, à raison des circonstances, de ce que l'on considérait, comme l'ordre public au Mexique, est-ce que vous direz encore que cette loi est arbitraire?

Mais, vous ne l'alléguez même pas, vous ne le prétendez pas. La loi a été votée à une époque où votre réclamation n'était pas encore formulée et où assurément le législateur n'avait pas pu s'en préoccuper. Donc, elle n'est pas arbitraire.

Vous dites: droit international privé. Ah! ici, vous auriez pu en demander l'application, vous auriez pu dire: Mais cette loi règle la capacité des personnes, et comme elle règle la capacité des personnes elle ne peut pas nous être appliquée à nous étrangers. Alors, nous aurions discerté au point de vue du droit international privé si on peut appliquer une loi de capacité aux étrangers lorsqu'elle affecte l'ordre public national; nous aurions examiné si par exemple lorsqu'en France on éloigne les congrégations religieuses il serait permis à une congregation étrangère de s'y introduire en disant: C'est mon statut personnel dont je demande l'application. Nous aurions vu que lorsqu'il s'agit d'une disposition d'ordre public elle est applicable sur tout le territoire aux étrangers comme aux nationaux. Mais on ne nous a rien précisé à cet égard.

D'ailleurs c'est à ce point de vue que nous avons indiqué que la prétendue dette qui est réclamée avait une origine immobilière, que c'était

la représentation d'immeubles, représentation ayant lieu dans la thèse des adversaires par une rente hypothécaire, garantie par le produit de l'impôt des tabacs.

Dès lors, d'après le droit international privé, cette loi devait être applicable, parce que ce que l'on demandait c'était un droit réel et un droit réel est nécessairement régi par le droit national.

Mais, messieurs, si mon honorable contradicteur M. Descamps, n'aime pas l'Histoire, s'il ne veut pas du droit il ne veut pas davantage de la jurisprudence. J'avais fait, et je m'en excuse, un peu de jurisprudence, j'avais cité un jugement espagnol relatif à la succession Arguelles; je vous avais montré que la question posée à la Cour par les demandeurs avait été résolue contre eux sans protestation de l'Eglise au siécle précédent. Lorsque les Jésuites avaient été expulsés, la question de leur hérédité s'était trouvée ouverte précisément à propos d'une succession non encore liquidée dont l'attribution leur appartenait; la question de savoir si c'était l'Eglise ou l'Etat qui devait hériter d'eux avait été soumise aux juridictions espagnoles d'alors et par une sentence solennelle du Conseil des Indes du 4 juin 1783 on avait décidé que le Roi y avait non seulement un droit trustee mais un pouvoir discrétionnaire. On décidait que ces biens seraient "à son souverain plaisir."

C'était une jurisprudence qui méritait un peu d'attention; on a passé, et conséquent, l'argument conserve toute sa force.

Mais mon honorable contradicteur, M. Penfield, a estimé qu'il était impossible qu'il ne vous dît pas un mot d'une autre jurisprudence que j'ai citée: il s'agit du cas Nobile contre Redman. M. Penfield a dit: Je fais une objection, vous invoquez une autorité américaine, une décision de la Cour Suprême de Californie, et vous venez dire que la question actuelle a été décidée par cette autorité respectable d'Amérique contre nous. Mon objection, dit-il, est celle-ci: c'est que dans une autre effaire le même cas a été soumis à la Cour Suprême des Etats-Unis et a été résolu dans mon sens; par conséquent il y a deux décisions américaines et la Cour arbitrale est libre de choisir entre elles.

J'avais indiqué l'objection, mais que fallait-il répondre? Je me trouvais devant deux décisions américaines d'une importance considérable, je trouvais dans le pays de mon honorable contradicteur la question résolue contre sa thése; et puis je trouvais une décision en sens contraire. J'ai fait alors ce que commandait la situation: j'ai analysé la procédure des deux cas et j'ai démandé à la Cour d'examiner les raisons qui ont déterminé l'un et l'autre juge; vous vous trouvez devant deux jugements américains; il faut dire quel est le bon.

M. Penfield nous dit: le meilleur, c'est celui de la Cour Suprême des Etats-Unis. Je pourrais lui répondre: le meilleur c'est celui de la Cour Suprême de Californie, qui mieux que toute autre connaît les situations de fait et peut les apprécier. Mais je ne demande pas à la Cour de peser ces deux autorités, je lui dêmande de scruter ces deux décisions, de les lire et de voir celle dont la dialectique lui apparaît décisive,

Je vous avais dans ce but analysé dans une précédente audience le mémoire—ce que j'appellerais les conclusions—de celui qui défendait alors la thése que j'ai l'honneur de défendre aujourd'hui devant vous; je vous ai montré par quel le série de documents, de décrets successifs, etablissait que non seulement l'Eglise n'ávait pas capacité de recevoir et n'avait pas de droit, mais que d'autre part le souverain seul s'était

toujours considére comme le maître de ces biens. La conclusion me paraissait décisive.

Aujourd'hui, je vous dis: faites le parallèle, voyez l'autre décision; elle se trouve reproduite dans le livre rouge à la page 586, elle se trouve citée dans le mémoire de M. Doyle, c'est l'affaire Terrett contre Taylor.

Je vous indique immédiatement que dans ces décisions la question qui a été examinée était celle-ci: L'on ne discute plus, ou on ne discute guère le point de savoir si l'Eglise a un droit, on le suppose, mais, dit-on, le problème à résoudre est celui de savoir si un démembrement, une révolution, une dissolution d'Etat peut enlever le droit du précédent propriétaire. Ainsi posée, messieurs, la question ne pouvait avoir qu'une solution. On suppose que l'Eglise a un droit, et on se dit: est-ce que le fait que la Californie, par conséquent l'Eglise Californienne, a été démembrée, divisée, cela lui enlève les droits qu'elle pouvait avoir jadis? Mais, il est évident que non. Je lis le finale de cette décision qui se trouve à la page que je viens d'indiquer:

> La dissolution de la forme du Gouvernement n'entraine pas la dissolution des droits civils ou une abolition de la common law qui régit la question des héritages dans chaque pays. L'Etat lui-même n'a fait que succéder aux droits de la couronne. On a affirmé comme principe de common law que le partage d'un empire n'entraîne pas la déchéance des droits de propriété précédemment acquis, et cette maxime est également concordante avec le bon sens de l'humanité et les maximes de la justice éternelle.

C'est évident, messieurs; mais nous ne discutons pas cette question ici; nous n'avons jamais prétendu que l'Eglise, représentée par mes honorables contradicteurs, aurait perdu ses droits par la conquête; l'autorité de la Cour Suprême est donc entière. Mais, ce qu'il aurait fallu démontrer, c'est que la Cour Suprême des Etats-Unis aurait rencontré les différents arguments qui ont été développés dans l'affaire Nobile contre Redman et aurait combattu la solution donnée par la Cour Suprême de Californie. Les questions résolues étaient différentes, et par conséquent notre argument capital consistant à dire que la thèse présentée par les Etats-Unis a été condamée, dans leur propre pays par des Américains, par la justice américaine, conserve toute sa valeur et n'échappera pas assurément à l'attention de la Cour.

Dans le commentaire de cette décision de l'honorable M. Doyle notamment aussi dans son mémoire (page 90 du livre rouge) nous trouvons cette idée: aucune conquête, aucune révolution, aucun acte souverain n'a pu enlever à l'Eglise ce qui était sa propriété. Il posait cette prémisse: l'Eglise était propriétaire. C'était sa première prémisse; je ne pense pas qu'il l'ait démontrée, et sur ce point je m'en référa à de précédentes explications.

Mais sa seconde prémisse était celle-ci: Si l'Eglise était propriétaire, ni une conquête, ni une révolution, ni un acte souverain n'a pu lui enlever cette propriété, donc elle 'la encore aujourd'hui.

Comme j'ai trouvé cette notion indiquée également dans la plaidoirie de l'honorable M. Descamps, je me permets d'y insister un moment.

Je raisonne d'abord en m'appuyant sur l'argumentation qui a été fournie par M. Penfield. M. Penfield sur ce point a victorieusement combàttu M. Descamps. D'après M. Penfield l'acte souverain accompli par l'Etat mexicain vis-à-vis d'un citoyen mexicain, fût-il arbitraire, devrait encore imposer le respect de mes honorables contradicteurs. Vous vous souvenez de cette parole de M. Penfield, elle est juste, elle est juridique, et elle est importante parce qu'elle condamne tous les

arguments qui ont été presentés de l'autre côté de la barre et notamment ceux de M. Doyle.

Je suppose que M. le Président Santa Anna, en 1842, à cette période de révolution mexicaine, eût accompli un acte arbitraire, un acte injuste, un acte de spoliation; je suppose qu'il ait enlevé à l'Eglise, par une haine cléricale ou par d'autres considérations, ce qui était son bien. M. Doyle dit: l'acte est nul, l'usurpation ne peut pas enlever un droit. Je réponds avec M. Penfield; si même cela était, comme ce serait un acte souverain du Gouvernement mexicain vis-à-vis de sujets mexicains, les évêques des Etats-Unis de 1848 ou de 1850 ne pourraient pas critiquer cet acte et en demander la réformation par un Tribunal international. Il s'agit d'un acte souverain, accompli par un Etat souverain, vis-à-vis de ses sujets, il n'y a pas à le discuter, il n'y a qu' à l'accepter.

Non seulement cette notion se trouvait dans la plaidoirie que vous avez entendue hier de M. Penfield, mais elle se trouve également dans une des brochures de M. Ralston, cette notion ne peut pas être contestée.

Je dois ajouter que je ne puis pas considérer comme un acte d'usurpation, de spoliation, l'acte qui aurait été accompli dans les circonstances que je viens d'indiquer.

M. Descamps vous a dit que la thèse que j'avais présentée aurait eu cette conséquence de permettre à l'Etat de s'approprier tous les biens des personnes civiles; il a dit que la thèse que j'avais développée enlevait toute sécurité aux personnes civiles. Vous me permettrez de rectifier: Lorsqu'il s'agit d'une association commerciale, d'un être juridique composé de personnes qui apportent leurs droits individuels pour les mettre en commun sous une fiction, sous une entité juridique distincte, lorsque cette entité juridique vient à disparaître, lorsque l'Etat qui lui a donné naissance vient à lui enlever l'existence, les biens qui appartenaient à cette entité et qui avient leur support primitif dans le chef d'individu doivent être partagés à la dissolution entre ceux qui composaient cette association, et par conséquent ces citoyens conservent leurs droits.

Mais, messieurs, tout autre est le caractere d'une communaute religieuse, d'une association de bienfaisance, ou d'un établissement qui a un but de service public ou d'utilité publique. Lorsqu'on donne pour une institution charitable, dans ce cas la disposition est faite à une collectivité, c'est-à-dire à une partie de la nation c'est donc toujours la nation elle-même que représente ce droit, qui en est le support primitif et dès lors lorsque ce corps spécial de la collectivité, cette émanation de la nation a cessé d'exister, c'est évidemment l'Etat souverain qui reprend ce qu'il avait concédé.

Donc, messieurs, ici pas de spoliation, pas d'usurpation; y eût-il eu même spoliation, comme je l'ai dit, que ce ne serait pas critiquable. Mais j'ai tenu à rectifier ce que m'avait imputé l'honorable M. Descamps.

Vous vous trouvez donc devant des actes souverains et des appréciations souveraines de tribunaux américains; mes honorables contradicteurs ne pourront jamais en vouloir aux honorables membres de la Cour d'arbitrage s'ils n'adoptent pas leur maniére de voir puisque c'était celle qui était partagée par leurs concitoyens et par ceux qui sont appelés chez eux à rendre la justice et à dire le droit.

On a parlé, messieurs, d'une notion dont on a abusé, et cependant je n'y insisterai pas; on a dit que nous n'avións pas compris la signifi-

cation qu'eux-mêmes donnaient au mot trust, que c'était une notion qui noús échappait.

Messieurs, lorsque j'ai eu l'honneur d'être chargé de prendre la parole devant votré Cour, sachant que je pouvais avoir à discuter des législations étrangères qui ne m'étaient pas familières, je m'étais promis de ne pas abuser des mots, de rechercher plutôt la notion juridique que les qualifications juridiques qui peuvent varier d'Etat à Etat.

Ici, je le demande à mes honorables contradicteurs qui ont parlé de trust: au profit de qui le trust aurait-il été constitué? Est-ce au profit de l'Eglise? Alors vous devez soutenir que l'Etat aurait été le trustee de l'Eglise, que l'Etat au lendemain de la suppression des Jésuites aurait occupé le bièn pour l'Eglise. C'est une démonstration qui vous reste à faire.

Mais, messieurs, en tout cas, est-ce que cela ne revient pas toujours au même? Les adversaires doivent établir quel est leur droit, fût-ce le droit de trustee; il faut toujours que ce contrat, que nos l'appelons mandat, trust ou propriété vous donne un titre, il faut toujours que vous établissiez votre titre, quel que soit le contrat que vous invoquiez.

J'ajoute, messieurs, que cette notion n'est pas exacte, parce que si nous remontons à l'origine nous voyons que les donateurs disposent d'une manière absolue au profit des Jésuites ils leur donnent des pouvois tels qu'ils n'auront à rendre compte qu'à Dieu. N'est-ce pas au point de vue civil l'abandon le plus absolu? Ne devoir rende compte qu'à Dieu c'est le droit absolu de disposer sur terre, c'est ce que nous appelons dans notre Code Civil le droit de propriété.

Nous aurions, nous Etat, succédé aux Jésuites, et vous l'admettez: nous aurions donc succédé dans ce que vous appelez un trust, élargissant singulièrement la signification du terme; alors je dois avoir le même pouvoir. Et comment, si dans l'intention des donateurs primitifs il n'y a pas à côté des Jésuites quelqu'un qui puisse revendiquer un droit civil à l'encontre du leur, comment existerait-il aujourd'hui quelqu'un qui puisse revendiquer un droit civil à l'encontre de l'Etat?

Donc, messieurs, cette notion n'a qu'une importance bien secondaire et c'est à tort que M. le Chevalier Descamps nous a reproché de ne l'avoir pas comprise.

Au point de vue de la jurisprudence, j'avais fait une troisième citation, et ici les reproches qui m'ont été adressés ont été durs. J'avais parlé du procès de la Marquise de la Torres del Rada; pourquoi en avais-je parlé?

Parce qu'il se fait que les demandeurs ne produisent qu'un seul document en vue d'etablir leur droit au Fonds Pie de Californie. Ce document est un acte de donation que aurait été fait par le Marquis de Villapuente en son nom et au nom de son épouse, la Marquise de la Torres del Rada, c'était donc le document capital. Et voici, messieurs, que dans le livre rouge nous trouvons qu'un premier jugement de 1749, un second jugement de 1823, ont annulé l'effet de cette donation dont ils se réclament, et que ces décisions se trouvent passées en force de chose jugée!

Dès lors, il était nécessaire que vous connussiez la procédure qui avait précédé ces jugements, ou que tout au moins vous eussiez une notion du procès qui était engagé. Ces décisions sapent par la basse la réclamation faite de l'autre côté de la barre.

Il y avait un Fonds Pie dont on demande aujourd'hui la restitution.

Je vous ai dit que ce Fonds Pie se composait de deux parties, d'une part, d'immeubles, de créances hypothécaires; d'autre part, de créances chirographaires; je vous ai montré que la première partie de ce Fonds Pie était productive d'intérêts et que la seconde ne l'était pas. J'ai sur ce point fourni des indications qui étaient appuyées sur l'inventaire fait par Don Raminez elles n'ont pas été rencontrées. Je m'attendais à ce que mes honorables contradicteurs mettraient en rapport ce que j'avais dit, les citations que j'avais prises dans l'inventaire Ramirez, avec leur prétendu titre, c'est-à-dire avec les décrets mexicains de 1836 à 1845. C'eût été un travail intéressant; mais puisqu'il n'a pas plu à mes honorés contradicteurs de le faire, comme je veux être complet, la Cour me permettra de lui demander dix minutes de son attention pour le faire.

Les demandeurs s'appuient principalement sur le décret du 24 octobre 1842 pour y puiser un titre; ils vous disent que par ce décret l'Etat mexicain aurait fait un abandon ou une reconnaissance à leur profit, c'est-à-dire au profit de l'Eglise. Nous avons examiné ce point, nous avons indiqué qu'il était inconcevable que ce fût précisément au moment de la Révolution mexicaine que je caractérisais tout à l'heure et qui avait été caractérisée par M. Penfield avant moi, pendant cette période de trouble où un vent anticlérical soufflait au Mexique, que l'Etat souverain se fût dépouillé au profit de l'Eglise, alors qu'il ne l'avait pas fait jusque-là.

Mais voyons ce décret, il dit (page 469 du livre rouge):

Article 1er: Les biens urbains et ruraux, les dettes et créances ainsi que toutes autres propriétés appartenant au Fonds Pie de Californie sont incorporés au Trésor public.

Déjà, il est assez bizarre de voir les demandeurs se fonder sur un titre qui a précisément cet effet radical d'incorporer au Trésor les biens urbains et ruraux, les dettes créances ainsi que toutes autres créances et propriétés.

Continuons:

Le Ministère de la Trésorerie procéderà la vente des biens urbains et ruraux et autres proprétés appartenant au Fonds Pie de Californie pour un capital représenté par un revenu annuel capitalisé à 6 pour cent l'an.

Dans ce second article on ne répète plus les mots "dettes et créances" qui se trouvaient dans le premier; dans ce second article, lorsqu'il s'agit de dire ce qui va être vendu on dit: les biens urbains et ruraux et autres propriétés.

Ce décret étant indiqué, nous reprenons la division que je signalais tout à l'heure. La première part, ce sont des immeubles, des créances hypothécaires, c'est un produit annuel. Le décret dit: il faut les vendre, le prix sera incorporé au Trésor et j'affecterai 6 pour cent à des buts que je caractériserai tout à l'heure.

Mais l'autre partie, les dettes d l'Etat' est-ce que le décret dit qu'il faut les vendre? Où le voyez-vous? Est-ce que vous concevez d'abord cette notion d'un Etat qui est lui-même débiteur et qui irait décider qu'il faut mettre en vente sa propre dette, qui irait dire qu'il ca payer 6 pour cent du produit de cette dette annuelle, c'est-à-dire que la vendant il s'engagerait à payer 6 pour cent?

C'est une notion inadmissible de concevoir que l'Etat aurait décrété qu'il fallait vendre sa propre créance; il était à la fois le créancier et le débiteur.

Lorsque je vais vous indiquer les chiffres cela va vous paraître encore plus évident.

Le Fonds Pie, d'après Don Ramirez, se composait d'abord d'un revenu de 32,255 piasters, ce qui à 6 pour cent fait 537,000 piasters, dont j'ai déduit les 145,000 piastres payées aux Philippines; il restait donc 392,000 piastres. Voilà ce qui était la part immobilière, la part productive.

Il y avait aussi la partie "créances," qui représente d'après M. Doyle (p. 493)—1,100,000 piastres, dont moitié—soit 550.000 piastres, est représentée par des intérêts arriérés. Eh bien, voyez-vous l'Etat, qui n'aurait pas payé ces intérêts arriérés décidant de mettre en vente cette dette consistant en des intérêts arriérés pour en payer 6 pour cent.

De telle façon, messieurs, qu'alors que Sir Thornton dit qu'on ne peut pas réclamer les intérêts des intérêts, l'Etat se serait engagé à payer dans l'avenir 6 pour cent d'intérêt sur les intérêts arriérés!...... Il faut avouer, messieurs, que c'eût été une interprétation assez extraordinaire du décret, surtout si l'on songe qu'il émane de quelqu'un qui n'avait pas de tendance à faire de tels cadeaux à l'Eglise.

Il y a plus. Il y avait de mauvaises dettes, vous en connaissez la nomenclature; elles n'avaient jamais rien produit. Et l'Etat cependant aurait décidé non seulement de vendre ces mauvaises créances, mais il les aurait rachetées au pair, et il se serait engagé lui Etat à payer perpétuellement 6 pour cent sur ces mauvaises dettes qui ne valaient rien, qui ne produisaient rien!

Messieurs, l'application même du titre qu'invoque mon honorable contradicteur, c'est-à-dire du décret du 24 octobre 1842 à ce Fonds Pie, démontre que son interprétation est absolument inadmisible.

L'Etat aurait pris l'engagement de payer perpétuellement 6 pour cent d'un capital qui ne produisait rien, à concurrence de 1,100,000 piastres. Non, messieurs; je touche à la démonstration par l'absurde, et j'aurais tort d'insister.

Il faut cependant que l'on nous dise de plus près comment les demandeurs comprennent le décret de 1842. Vainement jusqu'ici nous avons demandé à sos honorés contradicteurs de nous fournir une indication nette, elle ne se trouve dans aucun de leurs nombreux documents, je vais vous dire pourquoi, et j'en arrive ainsi à la lecture du décret du 3 avril 1845. Ce décret dit:

> Le Congrès a adopté et le pouvoir exécutif a ratifié ce qui suit:
>
> Toutes les sommes dues et les autres propriétés appartenant au Fonds Pieux de Californie qui pourraient être actuellement non vendues seront dorénavant restituées à l'évêque de ce siège et à ses successeurs, pour réaliser le but mentionné à l'article 6 du décret du 19 septembre 1836.

Si ce décret doit être interprété dans la vue d'une attribution des créances aux évêques, ce sont les créances non vendues, qui leur sont attribuées pour ce qu'elles valaient; et non pas un intérêt de 6 pour cent; ces créances en capital vous les avez demandées d'abord en 1859, puis en 1870, mais lorsque vous avez senti que vous vous heurtiez à une fin de non recevoir dérivant du traité de Guadalupe Hidalgo vous y avez renoncé, et aujourd'hui encore pour échapper à cette fin de non recevoir vous ne demandez que des intérêts.

En supposant que le décret de 1845 ait voulu dire "En ce qui concerne les biens vendus je vous donnerai 6 pour cent et en ce qui

concerne les biens non vendus je vous les donnerai," il n'a pu dire qu'une chose: Je vous les donnerai tels qu'ils sont, je vous les donnerai en capital.

Cela, vous n'osez pas le demander parce que vous vous heurtez au traité de Guadalupe Hidalgo dont le texte est formel. Vous voilà donc enserrés dans une argumentation dont je vous défie de sortir. Si votre interprétation est exacte, vous ne pouvez jamais demander autre chose que cette première partie du Fonds de Californie, la partie productive qui aurait été vendue pour être représentée par un capital à 6 pour cent; cette partie-là ce sont les 392,000 piastres que vous connaissez, dont il faut déduire le passif et spécialement les conséquences du procès de la Torres del Rada. Donc à ce point de voe il ne resterait rien.

Il ne resterait alors que cette partie que vous qualifiez d'importante du Fonds de Californie, composée de ces prétendues créances chirographaires; mais pour celles-lâ jamais l'Etat n'a dit: j'en paierai 6 pour cent. Il n'eût pas pu le dire, c'eût été absurde.

Donc, si vous avez un droit vous n'avez et ne pouvez avoir qu'un droit au capital, et ce droit au capital vous n'osez même pas le revendiquer parcequ'il se heurte à un prix de non recevoir absolu.

En ce qui concerne la composition du Fonds, on nous a dit aussi que l'on devait aujourd'hui prendre pour base les chiffres fournis par Sir Thornton, le sur-arbitre.

Je ne comprends pas le raisonnement: s'il n'y a pas chose jugée—et les adversaires ne peuvent discuter les chiffres que dans cett hypothèse—pourquoi prendre les chiffres de Sir Thornton? Il faut alors prendre les chiffres de votre mandataire, du mandataire de l'évêque, Don Ramirez, c'est ce qui doit servir de basc, ou il faut la division que j'indiquais tout à l'heure.

Vous dites: Nous allons prendre les chiffres de Sir Thornton et nous allons ajouter 200,000 piastres comme étant le produit de la vente de Cienega del Pastor. Pourquoi? je vous le demande. Dans les chiffres de Don Ramirez que je vous ai cités j'ai compris le revenu de la Cienega del Pastor et je l'ai capitalisé, cela se trouve dans mon chiffre de 392,000 piastres; pourquoi ajouter encore?

Votre point de départ est faux; vous auriez dû, et c'est de bon sens, si vous vouliez réclamer le Fonds de Californie, prendre pour base l'inventaire que j'ai analysé.

Messieurs, puisque j'ai parlé du décret du 24 octobre 1842 je vous signale combien la lecture des termes de ce décret est intéressante; l'exposé des motifs, ou plutôt le considérant qui fait partie de ce décret dit ce qui soit:

> Considérant que le décret du 8 février de la présente année, qui décide que l'administration et le soin du Fonds Pie de Californie seront rendus et continués au gouvernement comme cela était précédemment le cas, avait pour but de réaliser le plus fidèlement possible les objets de bienfaisance et nationaux désignés par les fondateurs, sans diminuer en quoi que ce soit les propriétés destinées à cette fin. . . .

Je demandais à mes honorables contradicteurs: à qui l'Etat a-t-il promis de payer 6 pour cent? L'on me répondait: à l'Eglise. Je disais: mais l'Eglise, il n'en est pas question dans ce décret. J'ajoute: le décret dit que ces 6 pour cent seront employés à des objets de bienfaisance et nationaux. Et se conçoit-il, messieurs qu'au jourd'hui une église étrangère puisse trouver dans ce décret son titre, alors qu'il y est dit que l'on emploiera ces 6 pour cent à des objets de bienfaisance et nationaux? Ce n'est pas à des objet religieux, c'est à des objets de

bienfaisance et nationaux, ce qui est le contraire d'une Eglise étrangère, et à ce point de vue encore le décret ne peut pas avoir la portée qu'on lui donna.

A une précédente audience, discutant la composition du Fonds Pie, je vous ai dit que lorsque le Roi d'Espagne s'était trouvé aux prises avec des difficultés financières résultant des velléités d'indépendance de la Nouvelle Espagne, lorsqu'il entrevoyait que ses territoires coloniaux et notamment la Californie allaient lui échapper, il avait pu recourir à un Fonds donné pour la conquête spirituelle et temporelle de la Californie.

Si plus tard le Gouvernement mexicain devenu indépendant redoutant l'influence étrangère, l'intervention du voisin, sentant que la Californie allait lui échapper, emploie le Fonds à la défense du territoire, pourra-t-on dire que le décret du 24 octobre 1842, qui destinait ces fonds à des objets de bienfaisance et nationaux interdisait au pouvoir souverain d'agir comme il l'a fait? Messieurs, est-ce possible?

Ce sont à certains moments des nécessités urgentes, des nécessités politiques qui ont pu déterminer un gouvernement à puiser, pour le bien de la nation, pour le bien de la Californie qui était alors la nation, dans ce Fonds Pie. Et qu'on nous montre donc le décret qui donne une arme à un étranger pour dire: vous allez me rendre l'argent que vous avez employé pour empêcher la conquête!

Quant au décret de 1836, qui confie à l'évêque de Californie l'administration du Fonds Pie, il n'est certes pas le titre des demandeurs? Il est rapporté par le décret du 8 février 1842, il n'existe plus.

J'entendais à l'audience de ce matin mon honorable contradicteur M. Ralston, nous dire qu'il fournissait certains documents relatifs à l'institution par la fondation d'un évêché au Mexique: mais ce document est sans importance s'il est antérieur à 1842, s'il a pour objet de régler une situation antérieure à 1842 en conformité du décret de 1836, parce que le décret du 8 février 1842 supprime et abolit l'effet du décret de 1836.

Le chevalier Descamps nous a dit: une loi n'a pas seulement un effet général, un effet politique, elle n'a pas pour objet de créer des obligations pour l'ensemble des citoyens, une loi peut créer une créance civile dans le chef d'un particulier.

Malgré l'autorité juridique de M. Descamps je dois avouer que cette déclaration est pour moi une révélation; je n'avais pas jusqu'ici conçu qu'une créance civile naquît d'une loi générale. Cela aurait peut-être justifié une démonstration, mais elle n'est pas venue. Le décret stipule au profit de l'évêque et de ses successeurs; quel est donc ce bénificiaire? C'est l'évêque mexicain. Est-ce que ceux qui ont voté cette loi ont pu avoir en vue, comme je disais à une précédente audience, d'alimenter perpétuellement le budget public, c'est-à-dire le budget des cultes d'un Etat étranger? Non, ils n'ont pu stipuler qu'en faveur de l'Evêque mexican et de ses successeurs mexicains. Quand le Gouvernement mexicain confie à tel évêque une administration, c'est à la condition qu'il soit son délégué.

Mais conçoit-on qu'une loi nationale puisse avoir cet effet de créer une dette à charge de l'Etat au profit d'un fonctionnaire étranger?

Dans le même décret l'Etat s'engage à payer à l'évêque un traitement annuel de 6,000 dollars. Diriez-vous aussi que c'est une créance civile!

En effet Messieurs c'est un engagement qui a été pris; et comment

allez-vous donner une application différente au point de vue juridique à l'engagement de payer 6,000 dollars et à l'engagement de confier l'administration du Fonds Pie?

Messieurs, j'abuse de vos instants parce que, je vous l'ai dit, ce décret est intervenu en 1836, et il est devenu sans valeur parce qu'un autre lui a été substitué, celui du 8 février 1842, qui l'a aboli.

Il est impossible que vous disiez qu'il a pu entrer dans l'esprit du législateur de 1842 ou même de celui de 1836 de confier l'administration d'un revenu à quelqu'un pui n'aurait plus été sous la surveillance; il est contraire à toute notion de droit politique, de droit public, de droit civil, d'admettre qu'un Etat gratuitement, pour un service public, pour un but déterminé, donne à une personne l'administration, l'emploi d'un revenu, sans stipuler une réserve; cela serait sans exemple, et ce caractère exceptionnel ne pourrait pas se trouver dans la législation révolutionnaire de 1842.

M. Doyle, à la page 90 de son mémoire, a donné une définition des biens ecclésiastiques; il y a, dit-il, les biens qui servent directement à l'exonération du culte, par exemple les lieutenants et les ornements nécessaires au service divin; ce sont des biens qui ne produisent pas de revenu et qui sont employés directement aux offices.

Il y a alors des biens qui produisent des revenus et qui servent à alimenter le primer service. Ce seront les terres, les vergers, qui seront loués pour alimenter les ministres du culte. Voilà ce qu'il dit.

Or, messieurs, est-ce que vous pourriez trouver dans un document de la cause un titre qui fasse rentrer les biens du Fonds de Californie dans cette seconde catégorie? Est-ce que jamais il est dit que ces biens seront employés à alimenter les ministres du culte? Où cela ce trouve-t-il?

Vous n'invoquez que le décret de 1842. Celui-là dit que le Gouvernement emploiera le revenu à des buts de bienfaisance et nationaux. Ce n'est pas l'entretien des ministres du culte, cela.

Donc, messieurs, si vous prenez même la définition de M. Doyle vous devez reconnaître que les biens en question ne peuvent pas rentrer dans la catégorie des biens ecclésiastiques.

M. McEnerney nous a dit que les biens avaient été donnés aux Jésuites et que par conséquent ils devaient avoir été donnés pour le but qui dominait les Jésuites. Mais c'est là résoudre la question par la question. Il s'agit toujours de savoir si ces Jésuites n'étaient pas plutôt les délégués du Roi que du Pape et si leur œuvre n'était pas plutôt patriotique et de conquête qu'exclusivement religieuse.

On nous a dit que le Fonde Pie avait toujours eu une existence distincte, c'est à dire que lorsque le Roi d'Espagne en 1767 s'était approprié ces biens il n'avait pas immédiatement, comme l'a fait plus tard le président Santa Anna, incorporé ces biens au Trésor, qu'il avait toujours admis que ces biens devaient avoir une affectation spéciale de bienfaisance et de piété.

Oui, nous pouvons l'admettre; mais il faut l'admettre en tenant compte des faits, en voyant le caractère que le Roi a donné à son acte. Je vous ai cité des documents établissant que le Roi en avait toujours disposé sans contrôle et sans réserve, que le Roi avait toujours estimé—comme après lui le Gouvernement mexicain—qu'en ce qui concernait ces biens il en faisait ce que lui dictait—suivant l'expression du Conseil des Indes son bon plaisir, son caprice. Il avait le droit d'en disposer, il n'avait de compte à rendre qu'à Dieu Seul!

Les Rois, de droit divin, estiment qu'ils sont—si vous permettez l'expression—trustees, du trésor national et qu'ils ne doivent compte qu'à Dieu de l'emploi qu'ils en font. Comme je vous l'ai déjà dit, au point de vue du droit civil c'est la propriété absolue. Par conséquent, quand on dit que le Fonds Pie avait une destination distincte, je réponds: oui, mais avec ce caractère que l'ensemble des décrets lui a donné, c'est-à-dire le droit absolu du souverain d'en disposer.

D'ailleurs, à côté de ce caractère, il y a toujours une autre notion qui échappe à mes honorables contradicteurs. Ils devraient établir quel est celui qui a un droit en concurrence, en contradiction avec le droit du souverain. C'est ici qu'ils devraient établir le droit de l'Eglise pendant cette longue période; ils devraient établir que déjà sous l'administration des Jésuites, surtout après leur expulsion, l'Eglise aurait acquis un droit privatif de celui du souverain. Eh bien, c'est ce droit de concurrence avec le droit du souverain qu'ils n'ont jamais établi, et qui est d'ailleurs condamné par l'aveu de l'Eglise et par le jugement de l'Histoire. Jamais l'Eglise n'a prétendu, non pas seulement à un droit exclusif ou privatif de celui du souverain, mais même à un droit indivis, à un droit de surveillance, à un droit de contrôle. L'Etat a confisqué, l'Etat a disposé des biens, jamais l'Eglise n'a protesté!

Donc, messieurs, j'ai le droit de dire à mes honorables contradicteurs: L'Eglise dit qu'elle est l'héritière des Jésuites, j'ai démontré qu'au moment où cette hérédité s'ouvrait elle devait en faire la pétition, et elle n'a rien dit pendant un siècle!

M. le chevalier Descamps a exposé que le démembrement de 1848 avait créé une question. Je lui ai répondu que le traité était chargé de résoudre les questions nées du démembrement et qu'il les avait résolues. Mais dans tous les cas, si même on pouvait prétendre que le traité de 1848 a laissé subsister un droit, il a dû laisser subsister un sujet de droit dont vous avez hérité. Ce sujet de droit quel est-il?

Sont-ce les Etats-Unis? Non, on ne le prétend pas. Les citoyens américains? Non, ils y renoncent, c'est dans le traité. Alors ce devrait être l'Eglise mexicaine subsistant sur le territoire étranger avec sa personnalité civile? Mais c'est impossible! Concevez-vous. L'Etat américain admettant sur son territoire une personne civile créée par un Etat étranger? Mais il n'en veut pas!

Précisément, messieurs, lorsque le Sénat de Washington a modifié le texte primitif de l'article 9 du traité, c'était pour qu'aucun doute ne subsistât à ce point de vue: il n'a pas voulu de droits à l'encontre des siens; ne veut d'autre personne civile sur le territoire américain que celles auxquelles le Gouvernement souverain américain aurait donné l'existence. Il n'y a donc plus d'Eglise, ayant la personnalité civile.

Mais je suppose qu'il y ait encore une collectivité de fidèles, une collectivité de chrétiens, une collectivité d'anciens mexicains qui vont devenir américains, qui ont des droits indéterminés, mais qui enfin ont encore des droits quelconques au Fonds de Californie. Vous dites que vous en êtes les successeurs? Je vous demande qui est-ce qui les représentait en 1848, car si vous avez une créance dont vous avez hérité il fallait un sujet de droit en 1848. Quel est-il? Si cette collectivité de chrétiens autrefois mexicaine aujourd'hui américaine existait, elle n'avait pas encore la personnalité civile; et qui la représentait? C'est la nation américaine, c'est le Gouvernement américain qui, comme je l'ai entendu maintes fois dire au cours de ces débats, représente toutes les collectivités.

A partir du traité, lorsque la nation américaine prend la Californie, les Californiens deviennent ses sujets; s'il y a une partie des sujets qui constituent une collectivité non encore dotée de la personnification civile mais enfin qui existe avec des droits embryonnaires, eh bien, c'est l'Etat qui les représente. Et l'Etat donne quittance! Comment des lors pouvez-vous vous dire les successeurs de ce personnage sujet de droit?

Monsieur, je me suis demandé: quelle aurait été la situation si les Jésuites n'avaient pas été expulsés? Deux hypothèses sont possibles: ils seraient restés dans la Basse Californie où ils étaient cantonnés, puisque toutes leurs Missions se trouvaient dans la Basse Californie. Intervient le démembrement: est-ce que par hasard il y aura quel qu'un pui pourra dire au nom du Gouvernement américain ou au nom des évêques de la Haute Californie: vous me devez une part du Fonds? Mais non, les Jésuites en disposent comme ils l'entendent, comme ils veulent, ils ne sont pas expulsés, ils continuent à vivre. Le Gouvernement mexicain a succédé au Roi d'Espagne, le démembrement se produit, les Jésuites sont restés dans la Basse Californie, qui est-ce qui demandera une part du Fonds Pie au nom de la Haute Californie?

Seconde hypothèse: Je suppose, et ici voyez dans quel domaine des hypothèses je vais suivre mes honorables contradicteurs, je suppose que les Jésuites aient avancé et aient établi certaines missions dans la Haute Californie; est-ce que quelqu'un, le démembrement s'étant produit en 1848, pourra réclamer et dire aux Jésuites: vous allez me donner une part?

Mais absolument pas! D'abord les Jésuites auraient pu répondre: Il ne nous plaît pas de rester dans la libre Amérique, nous préférons le pays des Rois espagnol ou le Mexique, nous nous retirons dans la Basse Californie. Qu'est-ce qui aurait eu qualité pour le leur défendre?

Notez que le successeur des Jésuites dans l'hypothèse même des adversaires, existe: Il y a un évêque dans la Basse Californie. Par conséquent ce qu'auraient pu faire les Jésuites, leurs successeurs peuvent le faire.

Quel est le droit civil que l'on aurait pu exercer contre les Jésuites—qui ne devraient compte qu' à Dieu—devant n' importe quelle juridiction internationale? Il n'y en à pas.

De façon, messieurs, que même en raisonnant dans l'hypothèse la plus favorable à mes honorables contradicteurs, en supposant que le Roi ne se soit pas approprié les biens des Jésuites, l'action manquerait de base.

L'honorable M. Penfield n'a pas, je pense, bien saisi l'argument que j'avais déduit de cette circonstance que les Missions, telles qu'elles ont été conçues dans la première moitié du 18e siècle, ne pourraient plus exister en Amérique. Il nous a dit: aux Etats-Unis la liberté de conscience est absolue, il y a même des presbytériens, des mahométans, qui peuvent se livrer à la propagation de leur foi.

Sans doute, mais sur ce territoire—et il ne me contredira pas—personne ne pourrait opérer une œuvre qui serait une œuvre de réduction comme l'étaient les Missions.

M. Descamps nous dit: C'est une question de forme . . . Pas tant que cela, mon honorable contradicteur; une question de forme quand il s'agit de la liberté de conscience? une question de forme quand il s'agit de convertir en subjuguant par les armes? Alors que les Missionnaires étaient assistés de troupes et qu'on ne concevait pas l'établissement

religieux sans la caserne, des Missions de ce genre que l'on appelait alors des réductions seraient-elles possibles?

Un dernier point. L'honorable M. Penfield vous a parlé du paiement en or. Déjà M. le chevalier Descamps nous avait dit: la créance est portable, vous vous êtes engagés à me payer aux Etats-Unis, et comme ma monnaie est l'or, il faut me payer en or.

Je réponds: Vous avez dit vous même que votre titre se trouvait dans le décret de 1842. Ainsi donc ce gouvernement révolutionnaire aurait pris non pas seulement l'engagement de payer 6 pour cent sur de mauvaises créances, sur des dettes dont l'Etat ne payait plus l'intérêt depuis longtemps, de payer 6 pour cent d'intérêt sur les intérêts, mais il aurait pris l'engagement de payer en or son tribut à l'étranger! . . . Non, messieurs, et je ne dois pas insister.

Mes honorables contradicteurs out ajouté: Il y a eu un retard dans le paiement et le retardataire ne peut bénéficier de ce retard; s'il avait payé à l'échéance il aurait payé sans que le change eût les conséquences qu'il a aujourd'hui.

Mais, permettez, si j'avais l'obligation de payer, vous aviez l'obligation de demander, et vous n'avez pas demandé.

M. Descamps. Nous avons demandé.

M. Delacroix. Vous n'avez pas demandé; vous n'avez pas demandé en 1875 lors du règlément; il y a une correspondance que vous avez mal interprétée, M. Beernaert en parlera tout à l'heure; vous n'avez demandé qu'en 1891, et par conséquent, si votre réponse consiste dans l'interruption que vous venez de me faire je vous réponds que pendant vingt ans vous n'avez pas réclamé.

Messieurs, un fait est certain. Nous avons reçu en argent le produit des réalisations. Un autre fait est certain: c'est que l'étalon au Mexique est l'étalon d'argent. Je vous ai cité la législation sur ce point: l'Etat a le droit de payer ses dettes en argent sauf stipulation contraire, par ce que tous les Etats ont le droit de se libérer dans leur monnaie nationale. Alors comment pourrait-on justifier qu'ayant reçu en argent nous dussions payer en or? Cela doit se trouver dans le titre; et ici encore je demande: est-ce que le décret de 1842, lorsqu'il a stipulé que l'Etat paierait un intérêt de 6 pour cent—et vous en étiez les bénéficiaires, dites-vous—a dit qu'il paierait cet intérêt en or? Et s'il ne l'a pas dit, est-ce que implicitement il ne promettait pas de payer dans sa monnaie nationale?

S'il y a une dépréciation, cette dépréciation aurait pu se produire sur les immeubles, elle est inhérente à toute existence d'un fonds; et vous voudriez nous la faire supporter exclusivement?

On nous a dit que l'or était la monnaie des arbitrages et que les condamnations prononcées par un tribunal international devraient être exécutées en or.

Lorsqu'il s'agit d'un dommage dont le tribunal fixe la réparation il peut stipuler le paiement en or. Ce qu'il veut, c'est la réparation d'un dommage, pour lui ce dommage représente une somme de X, il peut la chiffrer comme il le veut, dans la monnaie qu'il choisit; mais quand ils'agit non pas de dommages-intérêts, comme je l'ai déjà dit, mais d'une créance, le Tribunal qui reconnaîtrait l'existence de la créance devrait incontestablement trouver dans le titre la justification d'une condamnation ou décision, si c'est payement en or. Ici le titre est un décret national mexicain; comment peut-on y puiser la justification de la prétention au paiement en or?

Sir Thornton n'a pas discuté la question, d'abord parce qu'à ce moment elle n'avait pas d'intérêt, et ensuite parce qu'elle ne lui a pas été posée . . . il y a tant de questions qui ne lui ont pas été posées! . . . Vous n'avez même pas demandé le paiement en or, cela n'a pas fait l'objet d'une discussion quelconque; et vous nevez aujourd'hui dire que c'est jugé parce que Sir Thornton a dit que l'on paierait en or mexicain, comme il aurait dit en argent parce qu'à ce moment c'était la même chose.

M. Penfield vous a dit que lorsque le Mexique avait éte condamné par la Commission mixte à payer une certaine somme en or du chef de réparations qui étaient la conséquence de deux procés, le Sénat de Washington avait décidé que les sommes payées seraient restituées parce que le jugement était le résultat d'une erreur; on a trouvé des documents postérieurs établissant que la Commission mixte s'était trompée: le Sénat a reconnu que la somme devait être restituée et elle l'a été dans la monnaie où elle avait été payée, c'est-à-dire en or.

Comment aujourd'hui peut-on argumenter de ce fait alors que la solution doit se trouver dans le titre de la créance?

Messieurs, j'ai terminé. Je suis rassuré sur l'issue de ce procès; pour que le Mexique succombât il faudrait, comme l'a fait le surarbitre Sir Thornton, et comme vous a demandé de le faire M. le chevalier Descamps, faire abstraction de ce qu'il a appelé "cette montagne de questions" que j'aurais agitées devant vous: il faudrait que vous supposiez que tous les actes de donation, s'il y a eu, exprimaient les mêmes intentions que l'acte de Villapuente; ce serait déjà bâtir sur hypothèse; il faudrait ensuite dire que lorsque dans ces actes les donateurs excluaient expressément l'autorité ecclésiastique ils avaient en vue de donner à l'Eglise; ce serait une interprétation assez nouvelle, et c'est cependant ce qu'on vous demande!

Vous devriez dire ensuite que lorsque le Roi d'Espagne s'est approprié les biens des Jésuites, cet acte souverain qui a reçu la consécration des siècles et de l'Eglise, qui a été respecté par celle-ci, devrait être considéré par vous comme non avenu; et vous devriez dire que malgré cet acte de confiscation ou d'appropriation du pouvoir souverain, alors que ces biens ont été pendant un siècle entre les mains du Roi, ils sont restés biens ecclésiastiques malgré la confiscation antérieure. Est-ce possible?

Vous devriez alors, messieurs, oublier que les Jésuites ne pouvaient pas acquérir pour leurs fins spirituelles, et que s'ils ont pu avoir des biens c'était nécessairement comme délégués du Roi, en vue de l'œuvre qu'il désirait accomplir.

Vous devriez alors oublier cette série de décisions, de décrets, qui ont déterminé le jugement Nobile, ces décrets par lesquels le Roi affirme son pouvoir de disposer du Fonds Pie. Et surtout vous devriez oublier ce décret du Roi d'Espagne de 1820, que j'ai cité à une précédente audience et qui marquait l'incapacité de l'Eglise pour acquérir; ce qui montre que les décrets de 1836, 1842 en 1845 ne pouvaient pas avoir pour effet de conférer un droit à l'Eglise puisque la législation avait proclamé qu'elle était incapable de recevoir.

Vous devriez alors, messieurs, interpréter les décrets successifs que vous connaissez, comme, étant des contrats donnant naissance à des obligations civiles, alors que jamais personne sur le sol mexicain pas même l'Eglise mexicaine n'a formulé une telle prétention.

Vous devriez dire le décret du 24 octobre 1842 qui a pour objet

de nationaliser les biens, de les incorporer au Trésor, avait pour but de créer une créance civile au profit de l'Eglise; vous devriez supposer que le Gouvernement avait décidé de vendre toutes les créances, même celles qui existaient à charge de lui-mêmes et de payer non seulement sur le capital de ces créances mais sur les intérêts des intérêts un intérêt perpétuel de 6 pour cent.

Voilà tout ce que vous devriez dire. Et ce n'est pas encore tout: vous devriez encore dire que le Gouvernement aurait décidé de racheter les mauvaises créances au pair avec les intérêts arriérés, et qu'il se serait engagé à payer perpétuellement 6 pour cent sur ces mauvaises créances. Vous devriez dire que les lois mexicaines sont applicables quand elles sont invoquées par nos honorables contradicteurs et qu'elles ne le sont pas quand elles sont invoquées par nous-mêmes.

Vous devriez dire que la prescription qui existe dans toutes les nations est un principe à rejeter de vos décisions et du droit international. Vous devriez dire que cette loi de nationalization des biens ecclésiastiques, qui devient d'ailleurs commune à beaucoup de législations, ne devrait pas recevoir son application. Tout cela, messieurs, répugne à la conscience du jurisconsulte.

J'ai fini. Je vous remercie de la bienveillance avec laquelle vous m'avez écouté, comme je dis à mes honorables contradicteurs: merci pour les rapports cordiaux, corrects et courtois dont vous nous avez honorés.

J'ai dit.

(La séance est suspendue jusqu'à 2½ heures.)

DIX-HUITIÈME SÉANCE.

1 octobre 1902 (après-midi).

L'audience est ouverte à 2 h. ½ de l'après-midi, sous la présidence de M. Matzen.

M. LE PRÉSIDENT. La parole est à l'agent des Etats-Unis mexicains, pour répondre à la communication qui lui a été faite ce matin.

M. EMILIO PARDO. Messieurs, quand j'ai eu l'honneur de m'adresser pour la première fois au Tribunal, j'ai commencé par faire la remarque que mon gouvernement était tout à fait disposé à ce que tous les documents pouvant établir les faits et illustrer la religion du Tribunal puissent être admis par celui-ci. D'accord avec cette déclaration qui a été faite au commencement des débats, je dois dire que de la part du Gouvernement mexicain il n'y a pas de difficulté à ce que tous les documents que l'agent des Etats-Unis vient de déposer maintenant soient admis pour produire les effets qui leur appartiennent, c'est-à-dire que je ne m'oppose pas du tout à la production de ces documents au dossier; mais il est bien entendu que toutes réserves sont faites en ce qui concerne la validité et l'authenticité des documents qui n'ont pas une authenticité bien établie.

Quant aux interpellations qui m'ont été adressées par Monsieur l'agent des Etats-Unis, je dois dire qu'au sujet de certaines données qui ont été demandées à mon Gouvernement pour établir quels étaient les paiements faits par lui aux dates fixées dans le document lu par M. Ralston antérieurement, je me suis empressé de transmettre à mon Gouvernement cette requête, et j'ai fait connaître à M. Ralston la réponse que j'ai reçue. M. Mariscal m'a dit que comme les données

demandées par M. Ralston étaient assez compliquées et demandaient des recherches assez délicates, recherches qui devaient être faites par le Département des Finances, on avait donné tous les ordres nécessaires pour faire opérer ces recherches. Jusqu'au moment où j'ai l'honneur d'adresser la parole au Tribunal les données demandées par M. Ralston ne sont pas arrivées encore; peut-être arriveront-elles quand les audiences seront finies . . . Mais je dois faire constater que cette requête a été adressée par M. Ralston peu de jours, je crois, avant le commencement des audiences du Tribunal; il faut donc tenir compte du délai nécessaire pour que la réponse et les communications de mon Gouvernement arrivent ici.

M. Ralston a demandé si j'admettais comme authentiques et bien prouvé les faits qui sont établis par les documents dont le Tribunal a eu connaissance. Il s'agit d'abord de la date du dernier paiement fait au Gouvernement des États-Unis en conséquence de la décision rendue par la Commission mixte en 1875. Le seul fait que je puisse affirmer, c'est que mon Gouvernement a payé tout ce qui lui incombait d'après la décision de 1875; quant à la date du dernier paiement, je ne suis pas assez bien renseigné pour pouvoir la donner d'une façon certaine. Je crois aussi que le Gouvernement américain a payé ou restitué à mon Gouvernement les sommes qui avaient été perçues en conséquence des deux décisions sur les cas de la Abra et de Weil; je crois, sans pouvoir l'affirmer péremptoirement, qu'à ce sujet tous les comptes ont été réglés entre les deux Gouvernements, mais je ne suis pas en mesure de dire quelle est la date du dernier paiement.

J'ai ainsi répondu à toutes les questions qui m'ont été posées par M. Ralston, mais s'il désire une autre explication je suis tout à fait à sa disposition pour lui répondre immédiatement.

Mr. RALSTON. Mr. President, I think perhaps the agent of Mexico has fully responded to all of my suggestions of this morning, if I understand his answer to refer as well to the letter addressed by the ambassador of Mexico to the Holy See in April, 1840, as to the other matters of which he has spoken; that is to say, that he makes all reservations as to the authenticity of that document, reserving to himself the right to attack the authenticity hereafter, if it should appear that there is any reason to do so. Am I right?

M. PARDO. That is right.

Mr. RALSTON. Then I think we are sufficiently in accord. I should add that I have a telegram from the Secretary of State showing the date of the last payment to the bishops of California of the award. The honorable agent for Mexico has stated that he is without information as to the correctness of that date, but knows that his Government has made all the payments. I presume, however, there will be no dispute upon that point. The Department of State telegraphs me that the last payment was made January 20, 1890. The fact is not important, except from our point of view in its relation to some subsequent facts.

I neglected to say this morning that I also had ready to present to the court a map showing the Indian reservations, and I have it with me. I think, perhaps, I may have shown it already to the agent of Mexico; if not, I will do it forthwith. I think there will be no question as to its authenticity. It is certified to by the Government officials as being a correct map.

M. LE PRÉSIDENT. L'agent des Etats-Unis mexicains ne s'oppose pas au dépôt des documents qui sont présentés par l'agent des Etats-Unis d'Amérique du Nord?

M. EMILIO PARDO. Absolument pas.

M. LE PRÉSIDENT. Alors le Tribunal prend acte de la déclaration des deux agents.

M. DE MARTENS. Et avec les réserves qui ont été faites.

M. LE PRÉSIDENT. Absolument: avec les réserves. L'incident est clos; la parole est au conseil des Etats-Unis Mexicains M. Beernaert.

RÉPLIQUE DE M. BEERNAERT.

Messieurs, j'ai promis de ne pas retenir longtemps votre attention, et je tiendrai parole. Je puis le faire d'autant plus aisément que quant à la question de chose jugée, dont je me suis spécialement chargé, je crois avoir dit ce qu'il y avait à dire.

Deux mots d'abord du début du litige et de ce qu'a d'inexplicable le silence prolongé des évêques au sujet d'un droit qui d'après eux serait évident.

J'avais dit, avec la sentence de Sir Thornton, que depuis 1846 jusqu'en 1870, il n'y avait trace écrite d'aucune réclamation, tout en estimant avec lui qu'il fallait admettre l'affirmation de Sa Grandeur l'évêque de Monterey quant à une démarche faite par lui en 1852 auprès du Gouvernement mexicain, de 1852, en suite de cette démarche, et l'on voudrait en triompher un peu.

Nous estimons au contraire, que loin d'affaiblir notre thèse cette lettre la fortifie. Elle répond porte-t-elle, à une demande de secours aux Missions de l'évêché de Monterey sur le Fonds Pie de Californie. Nous n'avons pas la lettre de l'évêque, elle n'est ni dans les archives épiscopales ni dans les archives mexicaines; mais on peut juger de sa teneur par la réponse qu'elle a reçue. Or, l'on voit ainsi que l'évêque de Monterey n'a dû faire ancune allusion à un droit quelconque de propriété; il n'a revendiqué ni ce droit, ni quelque rente perpétuelle qui aurait remplacé le capital; il n'a pas demandé le partage d'un fonds indivis dans lequel il prétendait avoir une part; non, il a sollicité un secours, et à cette demande le Gouvernement répond par un refus poli, fondé sur la pénurie de ses ressources. Mais, comme s'il avait pressenti ce qui allait suivre, dans cette même lettre le Gouvernement dénie tout droit à l'Eglise de la Haute Californie "désormais séparée de la nation."

Ce fait ne caractérise-t-il pas et n'aggrave-t-il pas le silence gardé par les évêques pendant de longues années? Voici donc que, sans y être provoqué, le Gouvernement mexicain affirme qu'ils ne pourraient élever sur le Fonds Pie aucune prétention quelconque; n'était-ce pas pour les évêques une sorte de mise en demeure d'affirmer et de faire valoir le droit dont ils se seraient crus investis; ne devaient-ils pas tout au moins protester et faire des réserves? Eh bien, ils se taisent et cela jusqu'en 1870.

Et cependant, messieurs, voyez la conclusion que l'on tire de cette lettre de 1852; c'est le gouvernement mexicain qui se serait trouvé mis en demeure, et une demande de secours laissée sans aucune suite serait le point de départ des intérêts que l'on réclame à charge du Gouvernement du Mexique!

Une autre raison encore aurait enlevé à la lettre de 1852, si l'on pouvait y voir une réclamation qui n'y était pas, toute force juridique; je l'ai fait valoir déjà, mais il me semble que nos honorables contradicteurs aient perdu de vue ce que j'ai dit à cet égard. C'est qu'à cette époque, l'Eglise de la Haute Californie n'avait qu'une existence toute de fait; pour devenir "corporation," avec le droit de posséder, de recevoir, d'agir en justice, avec tous les effets que comporte la personnalité morale, il lui fallait remplir d'abord les formalités prescrites par la législation américaine, et je ne vois nulle part que cela aurait été fait avant 1854, lorsque l'autorité pontificale étant intervenue, la situation de l'Eglise de la Haute Californie se trouva régularisée par l'établissement de l'archevêché de San Francisco et de l'évêché de Monterey.

Comment en 1852 Mgr. Alemany aurait-il pu réclamer un droit à titre de son évêché qui n'avait pas encore d'existence juridique, qui n'était certainement pas alors personne morale, dont l'existence n'avait pas mêne été consacrée par l'autorité pontificale? Comment aurait-il pu agir au nom d'un être inexistant?

Je sais, messieurs, que d'après la sentence de Sir Thornton l'Eglise de la Haute Californie serait devenue corporation américaine par le fait même du traité de Guadalupe Hidalgo; Sir Thornton ne fait pas remonter sa personnification civile jusqu'à la date de la conquête, fixée comme vous le savez au 7 juillet 1846, mais d'aprés lui à la date même de la ratification du traité, c'est-à-dire le 30 mai 1848, ipso facto l'Eglise californienne serait devennue corporation de citoyens des Etats-Unis, par cela seul qu elle n'aurait pas opté pour la nationalité mexicaine.

Messieurs, la sentence de Sir Thornton constitue chose jugée: elle devait être obéie et elle l'a été pleinement. Mais aujourd'hui qu'on veut faire produire à cette sentence des effets nouveaux et considérables, nous avons pu je pense, sans manquer de convenance ou même de courtoise, faire remarquer que Sir Thornton n'était pas précisément un jurisconsulte.

Nos honorables contradicteurs affirment le contraire, en se fondant sur ce qu'il a fait partie de la Commission mixte, et qu'il a eu de ce chef beaucoup d'affaires à décider—c'est M. Ralston qui le dit dans une de ses dernièles notes.

L'argument me paraît insuffisant; et sans parler de ce que dit Sir Thornton au début de sa sentence, lorsqu'il déclare qu'il n'est pas en état d'examiner et de discuter les nombreuses questions de droit qui avaient été soulevées, il me semble que cette sentence même marque que ses connaissances juridiques étaient un peu superficielles.

Voici en effet une double erreur: D'après Sir Thornton, l'Eglise de la Haute Californie serait devenue personne morale le 30 mai 1848, sur le champ, par cela seul qu'elle n'aurait pas opté pour son ancienne nationalité. Cela semble à tous égards insoutenable. Dans les traités qui régularisent un démembrement territorial ou une conquête, il est de pratique pour ainsi dire constante que l'on réserve un droit d'option aux citoyens du pays annexé; on tient ainsi compte de leurs sentiments, de leurs habitudes, de leurs affections; malgré l'annexion de la contrée où ils habitent, il leur est permis de ne pas changer de nationalité. Mais où a-t-on vu accorder semblable droit non plus à des citoyens en chair et en os, mais à des personnes morales? Où, quand, dans quel traité cela se trouverait-il?

Les personnes morales, la Cour le sait mieux que moi, sont des créations de la loi, et elles ne pourraient exister en vertu d'une loi étrangère. Si le pays change de maître, elles doivent, si elles le peuvent, se soumettre à la loi nouvelle et en remplir les conditions. Qui eût admis qu'une commune, un bureau de bienfaisance, un séminaire, je ne sais quel autre collège, fût venu dire: mexicains hier, nous entendons rester mexicains aujourd'hui. Comment le Gouvernement des Etats-Unis aurait-il accueilli semblable prétention? Et quelle législation eût-il fallu appliquer à ces personnes morales établies en Amérique, mais demeurées mexicaines?

Dans l'espèce, semblable thèse aurait d'autant moins pu se soutenir que dans le traité de Guadalupe Hidalgo le Mexique avait demandé l'insertion d'une clause qui pouvait permettre jusqu'à un certain point de considérer les corporations religieuses comme conservées dans la limite où elles existaient auparavant. C'était un article 9 qui maintenait dans le pays annexé les institutions religieuses et les relations des catholiques avec leurs supérieurs ecclésiastiques. Eh bien, cette clause, si peu explicite, et qui assurément ne disait pas que de pareilles corporations pourraient être personnes morales en Amerique quoique restant mexicaines, cette clause si simple, si anodine, a été écartée par le Sénat des Etats-Unis; elle n'est pas au traité.

Et si l'on consulte le texte de ce document, texte imprimé par les soins de nos honorables contradicteurs, que l'on voie donc ce que porte l'article 8. Il donne le droit d'option aux citoyens Mexicains; et ce sont si bien des citoyens que l'on a en vue qu'ils pourront aller, venir, se déplacer changer de domicile, etc., toutes stipulations évidemment inapplicables à des personnes morales. C'est déjà ce que faisait remarquer dans son mémoire imprimé au livre rouge (p. 396) M. Azpiroz.

Il me paraît donc évident qu'à cet égard Sir Thornton a fait erreur; l'Eglise de Californie n'a pu devenir personne morale américaine dès le 30 mai 1848, par cela seul qu'elle n'aurait pas déclaré opter pour la nationalité mexicaine.

Voici, messieurs, une seconde erreur non moins évidente. Je veux supposer que l'Eglise établie en Californie eût eu ce droit étrange d'opter comme si elle avait été un citoyen ordinaire et de dire: J'entends rester mexicaine; et je suppose encore, non moins gratuitement, que comme telle, elle fût alors personne morale. Aurait-il vraiment appartenu à cette Eglise de devenir ipso facto, par le fait seul de sa volonté, personne morale américaine? Sir Thornton le dit, mais il ne nous montre aucun texte, soit de la législation américaine générale soit de la loi californienne qui justifie semblable dire.

Il n'y a pas un pays au monde où une corperation puisse assumer la personnalité morale sans avoir aucune formalité à remplir, et même sans devoir le dire.

Et vous avez dans le dossier la preuve que l'Amérique ne fait pas exception; le statut de Californie est publié dans le livre rouge (p. 52), à la suite et comme annexe, comme complément du mémoire présenté pour NN. SS. les évêques. Et l'on y voit que le statut de Californie, qui a permis à l'Eglise catholique et aux autres Eglises de s'ériger en personnes morales, n'a été rendu obligatoire que le 13 mai 1854, et qu'il prescrit une déclaration à faire devant l'autorité compétente par le chef du diocèse ou de l'église. C'est cette déclaration que nous voyons avoir été faite par Mgr. Alemany; elle se trouve dans le même document.

Donc, seconde erreur qui ne paraît pas moins indiscutable que la première: l'Eglise mexicaine n'est pas devenue personne morale américaine le 30 mai 1848; nous estimons qu'elle ne constituait pas auparavant une corporation légale, mais il est certain que dès le 30 mai 1848 il n'y a plus eu d'Église mexicaine; l'Eglise américaine de la Haute Californie qui a pris sa place n'était qu'un être de fait sans aucuns droits comme personne morale; ces droits elle ne les a acquis, elle n'a pu les acquérir que postérieurement à la loi du 13 mai 1854 et après l'accomplissement des formalités prescrites par la loi.

Et cependant à cette Eglise qui n'existait pas on a reconnu le droit de réclaimer et de recevoir depuis 1848 jusqu'en 1854. Mais, c'est la chose jugée: peu importe l'erreur du juge, il n'y a pas à revenir là-dessus, je le reconnais volontiers.

Je pense donc, messieurs, que mes observations antérieures restent debout et j'en viens à ce qui me reste à dire—c'est peu de chose—de la question de la chose jugée.

Mais d'abord, j'ai à exprimer le vif regret de n'avoir pu, faute d'une connaissance suffisante de la langue anglaise, goûter pleinement la plaidoirie si nerveuse, si élégante de forme, si parfaitement courtoise de M. Penfield; je le prie de croire que les sentiments qu'il a exprimés à notre égard sont aussi et de tout point les miens.

Comme l'a établi M. Delacroix, il ne pourrait en aucun cas y avoir ici chose jugée qu'au profit des évêques, mais certainement pas au profit des Etats-Unis, que l'on cherche à mettre en cause, et cela se comprend. En effet, la Commission mixte, de qui émane la première décision, n'avait incontestablement de compétence qu'à l'égard des réclamations que des citoyens des Etats-Unis pouvaient avoir envers le Mexique ou des citoyens mexicains envers le gouvernemeut des Etats-Unis. Le texte le dit, et il se comprend d'ailleurs que s'il y avait eu quelque différend entre les deux gouvernments, ce n'eût pas été à une commission mixte qu'on aurait pu s'en remettre pour le résoudre.

Elle n'a d'ailleurs point jugé quant aux Etats-Unis; le droit qu'elle a reconnu est celui des évêques de la Haute-Californie; c'est à leur profit qu'elle a condamné le gouvernement mexicain; elle n'alloue rien et ne pouvait rien allouer aux Etats-Unis; jusqu'à ces derniers temps ceux-ci avaient une attitude exclusivement diplomatique; ils prêtaient leurs bons offices à un de leurs citoyens, ils recommandaient ses prétentions et y appelaient l'attention du gouvernement voisin; c'était un rôle gouvernemental, rien de plus. Ecoutez plutôt M. Clayton écrivant à M. Mariscal, le 1er septembre 1897:

> J'ai des instructions de mon gouvernement pour appeler l'attention de Votre Excellence sur les réclamations de l'Eglise catholique romaine de Californie contre le Gouvernement mexicain, au sujet du Fonds Pie de Californie.

Tous les autres documents de l'affaire sont conçus dans le même esprit.

Donc, il ne pourrait y avoir chose jugée qu'au profit des évêques. Et même si les Etats-Unis étaient aujourd'hui au procès, ils ne pourraient s'en prévaloir, puisqu'ils n'étaient certainement pas en cause lors de la première procédure, et qu'il n'est ni contesté ni contestable qu'il n'y a chose jugée qu'entre parties.

C'est parce qu'il s'agit d'un conflit entre une personne morale, corporation de citoyens américains, et le Mexique, que nous estimons que, sous la forme d'un arbitrage international, il s'agit en réalité d'un conflit de droit privé, et pour une question de droit civil, c'est à la

législation mexicaine qu'il faut, selon nous, s'en rapporter; cette législation c'est le Code fédéral. Comme aux Etats-Unis d' Amérique, au Mexique chaque Etat a son droit propre, et il en est ainsi notamment du district fédéral de Mexico, comme pour Washington aux Etats-Unis. Il règle tous les litiges qui concernent l'Etat, parce qu'il ne peut être assigné qu'à Mexico, et comme vous le verrez par le Code Civil que vous avez sous les yeux, une disposition expresse le rend applicable au territoire de la Basse Californie, simple territoire encore et non un Etat.

En ce qui concerne la chose jugée, le droit mexicain est d'ailleurs conforme à l'ancien droit espagnol et à ce qu'on peut appeler le droit européen.

Parmi les points développés ce matin, il en est un sur lequel il faut que je revienne en quelques mots, parce qu'il est la base de notre argumentation; cependant il n'a pas été touché, même par un mot, dans la première sentence, et l'on ne s'en est guère expliqué devant vous au cours de ces longues plaidoiries: je veux parler de ce qui concerne le traité de Guadalupe-Hidalgo.

Les Etats-Unis voulaient que ce traité, qui leur abandonnait la moitié de la surface territoriale du Mexique, établît désormais entre les deux pays de bonnes relations: on voulait nettoyer le passé, il ne devait rester entre eux aucun différend, aucun sujet de conflit. Les Etats-Unis et le Mexique se donnent réciproquement décharge complète et absolue; c'est comme solde de compte toutes prétentions réciproquement réglées, que le Mexique reçoit des Etats-Unis une indemnité de 15 millions de dollars.

On écarte égalament toutes les prétentions, toutes les réclamations pendantes ou que pourraient avoir à soulever contre le Mexique des citoyens de l'autre pays, en tant qu'elles auraient pour base des faits antérieurs, à la ratification du traité. Mais, comme on ne pouvait ainsi disposer des droits d'autrui, ce sont les Etats-Unis qui s'en chargent, et ils reçoivent à cet effet une somme à forfait de 4,250,000 dollars. Si quelqu'un dans la grande République américaine prétend à un droit à faire valoir à charge du Mexique, c'est aux Etats-Unis désormais qu'il doit s'adresser; et l'on constitue une commission—commission exclusivement américaine—chargée d'examiner le fondement des réclamations de ce genre.

Ainsi, le traité de Guadalupe Hidalgo constitue une décharge absolue, une quittance de Gouvernement à Gouvernement, et c'est aussi une quittance donnée au nom des particuliers américains au Gouvernement mexicain. A partir de ce moment-là tout est réglé, tout est liquidé, les procès soumis aux tribunaux viennent à tomber, et on prohibe pour l'avenir toute réclamation nouvelle pouvant prendre son origine dans un fait de même nature.

Sans doute, à l'avenir, de nouveaux conflicts pourront surgir, de nouvelles prétentions pourront être élevées, soit entre les deux Etats, soit de la part de citoyens, mais ces litiges devront trouver leur origine et leur raison d'être dans des faits postérieurs à la ratification du traité.

Je ne sais si j'ai bien compris la plaidoirie de M. Penfield, mais il semble qu'il ait allégué à côté ou même au-dessus du droit des évêques, un droit pour la République elle-même. Ce serait de la part des Etats-Unis une nouvelle affirmation de ce domaine éminent, de ce droit souverain que la plupart des Etats se sont arrogé, sur les biens appartenant aux personnes morales, et peut-être cette prétention serait-alle peu

d'accord avec ce que l'on plaide ici. Je ne vois pas bien non plus ce que deviendraient à ce compte les Missions, les Indiens, les intentions du Marquis de Villapuente, celles des autres fondateurs.

Mais, au point de vue auquel je me place en ce moment, mon raisonnement n'en serait que plus fort, puisqu'il est indiscutable qu'en précense des termes formels du traité de Guadalupe Hidalgo toute réclamation des Etats-Unis à charge du Mexique, fondée sur des faits antérieurs à 1848, devrait être écartée sans examen.

Cela n'est d'ailleurs pas moins vrai pour les citoyens et pour les personnes morales de l'Amérique; je ne dois pas y insister davantage, puisque nous avons ici l'autorité de Sir Thornton qui devrait en tous points valoir chose jugée. Rappelez-vous ses paroles:

> Les réclamants ne peuvent avoir le droit de saisir la Commission établie par la convention du 4 juillet 1868 pour toutes les réclamations qui auraient pu être présentées avant cette date.

Et l'on se demande comment, le sens du traité de Guadalupe Hidalgo étant ainsi indiscutable et fixé par Sir Thornton lui-même comme écartant toute réclamation de principe, comment un capital dont il ne peut plus être question pourrait être considéré comme continuant à engendrer des intérêts?

Messieurs, j'éprouve quelque embarras à vous reparler de la chose jugée, car vraiment le sujet a été épuisé et je n'aime pas les redites. Cependant, malgré tout ce qui a été dit, ou peut-être parce que l'on en a trop parlé, il semble qu'il règne dans la cause une certaine obscurité, une certaine confusion, et je voudrais m'attacher une dernière fois à les faire disparaître.

Pour apporter ici un peu plus de lumière, je crois ne pouvoir mieux faire que d'analyser encore devant vous la marche de la procédure, car ainsi du même coup j'aurai l'avantage d'établir que la chose jugée ne peut pas être alléguée, et de démontrer que l'attitude du Gouvernement mexicain dans ce différend a été absolument correcte, conforme à ses devoirs internationaux, et fondée en droit. Cette justification sera à peu près toute ma plaidoirie.

En 1859, lorsque les évêques s'addressent pour la première fois aux Etats-Unis, c'est une réclamation en capital qu'ils annoncent, ils ont un droit à la propriété, ou du moins à une part de la propriété du fonds, ce sont des capitaux que leur doit le Mexique et même dans leur lettre de 1859 ils en fixent le chiffre, ils l'établissent à 2,800,000 piastres; et ce document se trouve accompagné d'une cédule qui donne le détail de cette somme. Il est essentiel de ne pas oublier ce point de départ.

La Cour sait que postérieurement à 1859, les évêques ont gardé le silence jusqu'a la constitution de la Commission mixte, qu'alors la campagne fut rouverte par la lettre du 13 mars 1870, et que là encore c'est la propriété, c'est un capital que l'on réclame. C'est cette réclamation du 13 mars 1870 qui fut transmise à la Commission mixte. Donc, la situation est claire, les évêques de la Haute Californie disent nettement et exactement ce qu'ils veulent: le Fonds Pie doit d'après eux être partagé entre les deux Californies, ils demandent leur part.

Quelle est alors l'attitude du Mexique? Va-t-il, comme on le lui reproche si injustement, contester en elle-même la compétence de cette Commission mixte qu'il a contribué à constituer? On l'a dit, mais il n'y a pas un mot de cela: jamais le Mexique n'a contesté cette compétence; mais devant la Commission mixte il a invoqué le traité de Guadalupe Hidalgo pour en déduire qu'il s'agissait d'une réclamation

éteinte. Quel est donc, disait-il, le droit que les évêques peuvent invoquer, et comment pourrait-il, ne pas être antérieur à la ratification du traité de Guadalupe Hidalgo? Il serait impossible d'en imaginer un autre. Si les évêques prétendent invoquer les titres originaires, l'acte de donation du Marquis de Villapuente ou ceux que l'on ne connaît pas il n'y a pas besoin d'établir qu'ils sont certainement antérieurs. Si sans aller jusque-là ils font dériver l'origine de leur droit de la suppression des Jésuites ou des dispositions prises alors par le Roi d'Espagne il en est de même; et de même encore si l'on arrive jusqu'aux actes de la République mexicaine, au décret de 1842 ou à celui de 1846; tous faits antérieurs et dés lors, il s'agirait en tout cas d'un droit éteint que l'on ne peut plus faire valoir et à propos duquel il n'y aurait plus qu'un seul débiteur possible: les Etats-Unis contractuellement substitués au Mexique moyennant une somme à forfait pour toutes les créances dont justifieraient des citoyens américains.

Voilà, messieurs, ce que disait le Gouvernement mexicain, et c'est assurément ce qu'il aurait dit avec plus de force encore aux Etats-Unis eux-mêmes si ceux-ci avaient cru pouvoir se mettre directement en cause.

Eh bien, ce système de défense n'était-il pas absolument correct et juridique? Prétendre que le droit réclamé était éteint, ce n'était certainement pas méconnaître la compétence du juge à qui l'on disait: la réclamation dont vous êtes saisi n'est pas fondée, voici ma quittance, c'est une quittance internationale qui date du 30 mai 1848, il n'y a plus de droits à ma charge.

Quoi de plus légitime que pareil argument? Et il faut supposer que les défenseurs des évêques ont trouvé l'objection du Mexique juste et même insurmontable, puisqu'on les vit alors changer complétement d'attitude, abandonner toute prétention à une part de propriété ou à un capital et ne plus réclamer que les intérêts échus depuis 1848, en se défendant même de toute prétention à un capital.

Telle aussi fut la thèse de M. Ralston: on ne pouvait, dit-il, réclamer le capital puisqu'il avait été confisqué, fait regrettable, injuste, mais procédant d'un acte souverain, et sur lequel il n'y avait pas à revenir. Et on concluait de là qu'il n'y avait eu avant 1848 aucune lésion de droits et qu'elle ne se serait produite qu'ensuite, d'année en année par le fait du non-paiement des intérêts.

A ce nouveau système, mis en avant au nom des évêques, que répondirent les avocats du Mexique? Ce que disent aujourd'hui les avocats américains, ce que plaidait l'autre jour M. Descamps, et à peu près dans les mêmes termes, ils disaient: vous réclamez des intérêts, mais des intérêts supposent nécessairement un titre, une créance . . . et je crois même que c'est à l'un d'eux que M. Descamps empruntait ce mot qui n'est pas mal: "Il n'y a pas de génération spontanée d'intérêts." La conséquence suppose un principe, et du moment où la créance est écartée par le traité, comment serait-on recevable à demander des intérêts?

Par une prévision assez naturelle de ce qui est arrivé, ils ajoutaient: ce que vous nous dites aujourd'hui de ces prétendues lésions de droits postérieures à 1848 vous pourriez le dire demain à propos de nouveaux intérêts, et continuant de la sorte vous arriveriez à ce résultat que, ne prétendant rien au capital et vous inclinant devant l'acte souverain qui l'a nationalisé, vous en tireriez seuls tous les avantages jusqu'à la consommation des siècles!

Telle est, messieurs, la confusion qui est au fond de ce procès et qui seule peut l'expliquer.

Vous pourrez lire la défense des avocats américains, notamment dans le mémoire de M. Azpiroz du 24 avril 1871, on se demande comment on pourrait la trouver irrégulière et contraire au compromis, ou même, comme on a paru le dire, contraire à la bonne foi qui doit régner dans les relations internationales plus encore que dans les relations entre particuliers.

Les objections du gouvernement mexicain demeurèrent sans réponse, ou du moins je n'en vois pas de trace dans le dossier.

Et c'est dans ces conditions qu'intervint la sentence de l'arbitre. Il reconnaît que d'après le traité de Guadalupe Hidalgo, les réclamations pour faits antérieurs à 1848 ne peuvent pas être rçues, puisqu'elles sont éteintes; mais il en est autrement, dit-il, des réclamations d'origine postérieure.

Il ne nous dit pas quelle est cette origine postérieure, ni ce qu'elle pourrait être, ni d'où le droit aux intérêts pourrait émaner, et après avoir constaté que les réclamations postérieures à 1848 sont recevables, il déclare la prétention des évêques fondée, en allouant des intérêts depuis le 30 mai "jusqu'à ce jour." Puis, par le dispositif de la sentence, il fixe la somme à payer en piastres et en centavos.

Ainsi, le tiers-arbitre ne peut juger le fond, et d'ailleurs on ne le lui demande pas, il le constate, mais il accorde en intérêts tout ce qu'on demande.

Le Gouvernement mexicain s'incline devant la sentence et s'exécute; mais alors se produit un dernier incident que je vous avais signalé et dont j'ai été surpris de voir nos honorables contradicteurs se prévaloir à leur tour. Le Mexique avait donc plaidé, et à mon avis justement plaidé, qu'à raison du traité de Guadalupe la demande n'était pas plus recevable quant aux interêts qu'elle ne l'aurait été en capital; que ces intérêts n'étaient que la conséquence d'une demande principale abandonnée, supprimée, et devaient dispáraître avec elle; que peut-être enfin après avoir demandé certains intérêts on en demanderait d'autres. On n'avait rien répondu. La sentence rendue, M. Avila conclut de ce silence qu'on a demandé tout ce qu'on croyait pouvoir obtenir, que la sentence est définitive, qu'on ne cherchera pas à baser une seconde action sur un principe aboli. Il y a, dit-il, décision "in toto." Il écrit cela à son gouvernement, et celui-ci communique immédiatement sa lettre aux Etats-Unis.

Vient alors la réponse des Etats-Unis, réponse que M. Descamps a inexactement analysée; le Gouvernement ne songe pas à se plaindre des observations du gouvernement mexicain, et il ne répond pas à l'interprétation ainsi donnée à la sentence par l'interprétation contraire; dans le système plaidé aujourd'hui, il aurait dû dire: comment! vous prétendez ne plus rien devoir, mais le contraire est jugé; la sentence est une sentence définitive qui produira périodiquement ses effets, indéfiniment, et dès à présent il y a de nouveau cinq années échues que je vous invite à payer.

Eh bien, messieurs, pas un mot de tout cela, pas même une réserve; on se borne à dire en termes peu clairs: la sentence est ce qu'elle est, ce n'est pas à nous en expliquer, on n'y peut toucher. Et l'on ajoute seulement.

Veuillez ne pas considérer cette lettre comme pouvant être interprétée comme un acquiescement à ce que vous dites.

Et voici que les choses se passent comme le Gouvernement mexicain l'avait appréhendé; voici qu'après un long et absolu silence il s'est trouvé saisi d'une demande de 32 années d'intérêts, bien au-delà du capital.

Sir Thornton a dit dans sa sentence qu'il allouait des intérêts déterminés, des intérêts "jusqu'à ce jour"; et on soutient qu'il faut lire qu'il a reconnu un droit perpétuel, une rente perpétuelle, dont les intérêts courront toujours.

Mais alors c'est donc bien un droit au capital qui aurait été réclamé et proclamé, et la base de ce droit serait nécessairement dans les faits antérieurs au traité de Guadalupe Hidalgo!

On doit se prévaloir d'un prétendue volonté de Sir Thornton, et il a exprimé la volonté contraire! Il n'aurait pu, dit-il, statuer sur un droit permanent, et sa sentence serait pour toujours res judicata!

Il y a ici un dilemme que j'ai déjà signalé et auquel on ne peut, semble-t-il, échapper: Ou bien Sir Thornton n'a alloué que ce qu'il a dit allouer, et alors il n'y a pas chose jugée, il a prononcé sur 21 années d'intérêts sans plus, ou bien, malgré les termes de sa sentence il a voulu le contraire, il a entendu reconnaître un droit perpétuel, et alors la sentence tomberait devant les raisons que lui-même a proclamées et qui devaient rendre la demande non recevable.

Je ne puis donc voir ici qu'une simple habilité d'attitude, qui ne peut réussir. J'affirme, comme le gouvernement mexicain l'a fait dès le premier jour, que des intérêts ne peuvent être dus là où il n'y a pas de créance. Et comment concevoir qu'un traité international eût écarté un droit en permettant de tourner semblable stipulation par une réclamation annuelle qui en serait exactement le contre-pied?

En 1870, on n'a point conclu à la reconnaissance d'un droit permanent, à des intérêts perpétuels, et c'est encore exactement ce que l'on fait aujourd'hui: on demande 32 années d'intérêts, sans plus; et M. Descamps s'en étonnant, comme si ce n'ètait pas le fait de sa partie, disait; l'année prochaine on pourra donc encore recommencer!—Oui, parce que vous le voulez bien, parce que vous n'osez pas invoquer un droit définitif. Le traité de Guadalupe n'est-il pas là?

Que s'ensuit-il? C'est que ce qui est l'âme, ce qui forme le nœud de la contestation, devrait rester en dehors de toute décision; il faudrait considérer le litige au fond comme n'existant pas; ou vous devriez partir de cette notion contraire aux faits que le droit au principal irait de soi, serait reconnu ou établi, et n'aurait pas même besoin d'être jugé. Alors que c'est là toute la contestation et que toute action sur le principal se trouverait irrésistiblement repoussée par le traité de Guadalupe Hidalgo!

C'est tout ce que je voulais dire à ce sujet, et déjá j'ai à m'excuser de m'être tant répété.

A la lumière de ces observations, il ne me reste plus qu'a vous rappeler rapidement les différents motifs juridiques que j'ai développés pour écarter la chose jugée.

Il y a d'abord ce motif capital que la demande d'aujourd'hui n'est pas la demande d'autrefois. Sir Thornton l'a dit, la réclamation se bornait à 21 années d'intérêts, et c'est pourquoi il l'a jugée recevable. Aujourd'hui on demande 32 autres années d'intérêts, et on ne peut dire que les deux demandes sont identiques qu'en soutenant que l'une et l'autre portent sur le fond . . . sans le dire, ce qui devrait les faire écarter.

Cette objection, messieurs, est à mon sens la plus grave de celles que je vous ai présentées. L'on n'y a pas répondu.

Différence complète donc entre la demande d'autrefois et la demande d'aujourd'hui, et l'on ne méconnaît pas que les juges ne peuvent jamais statuer au-delà de la demande; le sens d'un jugemente se trouve nécessairement fixé par les conclusions de la demande, c'est une zone que le juge ne peut dépasser.

De la non-identité des deux demandes, résulte nécessairement la non-identité de la chose jugée. Et il en ressort aussi la non-identité de l'objet: 21 années d'intérêts déterminés d'un côte, 32 années d'intérêts également déterminés de l'autre. Et ici comme toujours il n'est possible d'échapper à cette objection fondamentale qu'en prétendant voir derrière ces deux objets apparents un autre objet caché, gardé dans la coulisse, mais qui devrait aller sans le dire: c'est le droit au Fonds.

Mais si le juge devait ici suppléer au silence des parties, n'aurait-il à tenir compte ni des faits anciens, ni du traitè de Guadalupe Hidalgo, ni de la décharge donnée au Mexique et de l'obligation contracté par les Etats-Unis de se charger de toutes les prétentions fondées des citoyens de leur pays? . . .

Et même sans cela, pourrait-on dire qu'il y a identité d'objet? Rappelez-vous le cas traité par Savigny: les terres A et B d'un même domaine successivement réclamées dans les mêmes conditions pour la même cause, entre les mêmes parties, sans autre différence que la topographie de tel lopin de terre et de tel autre lopin voisin. Rappelez-vous encore la situation visée par nombre d'auteurs depuis le droit romain: après avoir réclamé en vain quelques annèes de loyer, on peut en réclamer d'autres; les questions de principe, la validité du bail par exémple, ont été jugées la première fois; peu importe, on peut recommencer le debat pour les années suivantes: l'objet de la demande n'est pas le même.

Je ne veux pas revenir sur d'autres exemples, parce que déjà j'excède les limites que je m'étais imposées.

Je disais donc: pas d'identité de demande, pas d'identité de chose jugée, pas d'identité d'objet.

Et puis aussi, pas d'identité de cause, dans le sens propre de ce terme, puisque la cause de chacune de vos demandes est dans le non-paiement successif d'annuités, causes successives et multiples. Comment serait-ce la même.

Et puis, à chaque annuité, les circonstances ne sont-elles pas différentes? Et n'y a-t-il pas chaque fois des justifications et d'autres justifications à donner, ce què exclut la possibilité d'une décision anticipée, qui devrait d'ailleurs s'appliquer à des choses futures?

L'honorable M. Penfield m'a répondu que sans doute les Etats-Unis pouvaient disparaître de la surface du globe, mais que cette éventualité était peu vraisemblable. . . Ce n'èst pas précisément celle que j'ai signalée. J'ai dit qu'il s'agissait ici non d'un droit civil intangible comme l'est le droit de son essence, mais d'une part que réclament les évêques, dans une masse affectée à un service public.

Or, chaque année, il y a à justifier de ce droit et de la quotité de ce droit. Il faut d'abord vérifier quelle est la loi de la Californie et à quelles conditions elle soumet l'exercice des droits qu'elle reconnaît. La législation des personnes morales, l'histoire le prouve, est sujette à changer, et la plaidoirie de M. Penfield pourrait faire croire qu'aux Etats-Unis il y aurait peut-être quelque arrière-pensée à ce sujet. Où

trouver là les éléments d'une décision anticipée? Il faudrait d'autre part justifier que l'on est en mesure d'affecter les fonds à la destination en vue de laquelle on les réclame.

Il y a, dites-vous, encore quelques Indiens en Californie. Mettons qu'il en soit ainsi, sera-ce vrai demain? On sait avet quelle rapidité la population aborigène disparaît aux Etats-Unis.

Et ces Indiens vivent-ils réunis? Sont-ils l'objet de Missions? Est-ce à ces Missions que les fonds seraient consacrés?

Puis, enfin, vous invoquez un droit relatif. Il s'agit d'une masse où vous auriez un droit indéterminé à régler d'aprés des circonstances absolument mobiles et changeantes.

Dans ces conditions, comment admettre qu'il y ait un droit perpétuel? Que Sir Thornton ait pu en 1875 juger d'avance et pour toujours que vous auriez droit, sans autre explication, sans autre justification, à la moitié du revenu supposé du capital que représente le Fonds Pie de Californie?

A cette observation, messieurs, vient s'en ajouter une autre que je me borne également à rappeler: C'est que Sir Thornton aurait statué sur choses futures, alors que la doctrine est unanime à enseigner que tout jugement suppose l'appréciation de faits accomplis; pas de chose jugée d'avance. Il n'y a alors qu'une apparence de jugement, toujours sujette à révision.

Nous avons enfin fait remarquer, messieurs, que ce qui prouve bien qu'il n'y a pas ici de chose jugée, c'est que les évêques n'auraient eu, même vis-à-vis de simples particuliers, aucune voie d'exécution; il leur aurait été impossible d'obtenir judiciairement l'exécution de la sentence Thornton telle qu'on veut l'interpréter.

En réalité excusez encore cette répétition—le système de nos adversaires se réduit à dire qu'il y aurait ici chose jugée implicite, parce que cela doit avoir été la pensée du juge.

Pour cela, il faudrait d'abord que l'on pût admettre que Sir Thornton a eu une volonté opposée à celle qu'il a exprimée; et puis qu'il pût avoir semblable volonté, c'est-à-dire qu'il eût été saisi de la demande sur laquelle il aurait ainsi statué; enfin il faudrait nous dire comment dans ces conditions Sir Thornton aurait écarté l'obstacle insurmontable, infranchissable, du traité de Guadalupe Hidalgo.

M. Penfield disait hier qu'un syllogisme ne se comprend pas sans prémisses et que dans un jugement il faut compléter le dispositif par les motifs, en l'absence desquels il ne se comprendrait pas. Messieurs, c'est supposer qu'un syllogisme est nécessairement parfait et qu'un jugement doit être irréprochable. Sans doute, d'après nous, Sir Thornton n'aurait pas dû accorder les intérêts réclamés, et il ne le pouvait pas parce qu'ils ne se comprenaient pas sans droit au principal; mais enfin, c'est ce qu'il a fait; et conclure de ce qu'il a accordé des intérêts à tort qu'il a dû vouloir en outre, implicitement, contrairement à ce qu'il disait, reconnaître un droit au pricipal, c'est greffer une erreur de principe sur l'erreur de la conséquence.

L'un de nos honorables contradicteurs, M. Descamps a invoqué deux recueils dont je veux dire quelques mots: ce sont les Pandectes Françaises et les Pandectes Belges. Ce sont avant tout des recueils analytiques de jurisprudence, et vous savez qu'il est difficile d'apprécier des analyses d'arrêts quand on ne connaît pas exactement les faits et l'objet du litige. Mais quoi qu'il en soit, il faut voir ce que disent ces livres de la question dans son ensemble.

J'avais déjà moi-même invoqué les Pandectes Belges; au No. 144 V° Chose jugée la Cour verra que quant à l'autorité des jugements il n'y a que le dispositif qui compte, les motifs n'ayant jamais la valeur de chose jugée.

Du No. 144 au No. 169 il y a une longue série de décisions judiciaires, toutes basées sur la règle que je viens de rappeler. Puis, vient le passage cité par M. Descamps et que je lis:

La forme du dispositif n'étant pas prescrite, celui-ci ne doit pas être exprès, et l'on peut donc l'interpréter pour dire ce qu'il y faut lire.

C'est ce que j'ai eu l'honneur de plaider; je vous ai dit que si les motifs ne constituaient pas chose jugée, il était de jurisprudence qu'il fallait en tenir compte lorsque le dispositif lui-même était sujet à interprétation, et qu'en cas d'obscurité, on pouvait l'éclairer en le mettant en rapport avec les motifs. Les Pandectes Belges ne disent pas autre chose.

Les Pandectes Françaises s'expriment à peu près de même; au mot "Chose jugée," No 320, vous verrez affirmer aussi que le dispositif seul constitue le jugement, l'autorité de la chose jugée ne s'étendant pas aux motifs. Et à la suite de cette déclaration vous verrez 60 ou 70 arrêts qui en ont ainsi jugé.

Au No. 321 les Pandectes Françaises confirment une autre proposition que j'ai développée devant vous: c'est que puisque les motifs ne constituent pas la chose jugée, il n'est pas permis de se pourvoir en Cassation contre les erreurs de droit qu'on y relève.

Au No. 322 se trouve la confirmation d'une autre proposition également plaidée par moi: c'est que la contradiction qu'il peut y avoir entre les motifs et le dispositif d'un jugement ne donne pas ouverture à cassation.

Sous le No. 360, on lit comme dans les Pandectes Belges que si le dispositif est obscur on peut recourir aux motifs pour l'interpréter.

Arrive enfin le No. 425 qui a été invoqué par M. Descamps et que je lis:

L'autorité de la chose jugée peut même s'attacher à une disposition implicite, au moins dans le dispositif, quand elle est la conséquence forcée d'une disposition explicitement formulée.

Et le No. 449 également cite qui reproduit quelques lignes de l'ouvrage de Griolet dont j'ai devant vous étudié la doctrine.

Et voilà tout. Quant à moi, messieurs, je n'ai garde de citer de nouvelles autorités; mais que la Cour me permette de lui dire qu'à mon avis ce qui a été écrit de plus substantiel, de mieux raisonné et de plus concis sur cette question, c'est encore le Traité des Obligations de Pothier, le véritable auteur du code civil en cette matiére.

J'ai dit déjà qu'ici la chose jugée implicite que l'on allégue ne serait en réalité qu'un préjugé, et que le préjugé ne lie pas même le juge dont il émane, fût-il absolument formel et explicite; c'est une opinion qu'l a exprimée, et bien qu'il l'ait insérée dans sa décision, rien ne l'empêche d'en changer.

Enfin, messieurs, je crois avoir démontré qu'il ne pouvait être question de préjugé dans l'espèce, par cela seul qu'il s'agit d'une sentence arbitrale. Vous connaissez mes vues en cette matière: contrairement à ce que quelques-uns enseignent, l'arbitre est selon moi un juge, sa sentence est bien un jugement, on doit lui attribuer l'autorité de la chose jugée; mais avec une restriction que je crois absolument juridique.

L'arbitre n'est qu'un juge conventionnel dont l'autorité résulte non de la loi, mais du consentement des parties; elle procède d'un contrat; il est juge dans les limites de ce contrat, il l'est complètement, absolument, mais au-dela il n'est plus rien, car il n'est pas autorité publique, il n'est pas chargé de dire le droit; il a à juger un cas déterminé en vertu d'une convention déterminée; dans ces conditions, comment à côté de ce qu'il juge, pourrait-il préjuger? Ce serait contraire à l'essence même de sa mission.

M. Descamps a fait remarquer que nous n'avions pas cité d'autorités américaines ou mexicaines, et il en voulait conclure que nous abandonnions, sans les faire nôtres, les considérations développées dans le mémoire de M. Mariscal, ministre des affaires étrangères du Mexique. Dois-je dire qu'il n'en est rien?

Dans une affaire aussi touffue, aussi longue, aussi fatigante pour la Cour—et je me permettrai d'ajouter un peu aussi pour les conseils—il fallait chercher à éviter des redites, et c'est ce qui fait que nous avons cru pouvir ne plus rien dire de ce qui se trouvait dans le mémoire de M. Mariscal. Et précisément à propos de l'arbitrage vous lirez ce qui suit à la page 5 de ce travail:[a]

L'inefficacité des décisions arbitrales du droit international, à servir pour la décision des cas futurs, quoiqu'ils puissent être analogues à ceux déjà jugés, a été expressément reconnue par le Gouvernement des Etats-Unis d'après ce que l'on voit dans l'ouvrage de "Moore:" "International Arbitrations," au sujet de la Commission mixte, qui siégea à Halifax en vertu du traité de Washington, et qui condamna les Etats-Unis à payer au Gouvernement Britannique cinq millions et demi de dollars à titre de dommages et intérêts pour le préjudice causé par des pêcheurs américains, et, dans l'espèce de réclamation présentée par le Ministre d'Espagne, Señor Muruaga, le motif en était la confiscation de coton considéré comme contrebande de guerre, dont les sujets espagnols Murra et Larrache avaient souffert. Le Secrétaire d'Etats-Unis, T. F. Bayard, a dit dans sa communication du 3 décembre 1886: "Les décisions des Commissions internationales . . . ne sont considérées comme ayant d'autorité que sur l'espèce particulière jugée . . . d'aucune façon, elles ne lient les Etats-Unis, sauf dans les cas où elles furent appliqués." (Papers relating to the For. Rel. of the U. S., year 1887, p. 1021.)

Le même honorable Secrétaire disait dans le document précité "Ces décisions s'accordent avec la nature et les termes du traité d'arbitrage," tenant compte sans doute que Omne tractatum ex compromisso: nec enim aliud illi (arbitro) licebit quam quod ibi ut afficere possit cautum est: non ergo quódlibet statuere arbiter poterit, nec in que re libe nisi de qua re compromissum est.

Un peu plus haut, le Ministre invoque encore la loi romaine:

De his rebus et rationibus et controversiis judicare arbiter potest, quae ab initie fuissent inter eos qui compromisserunt, non quae postea supervenerunt (L. 46 D. de recept. qui arb.) d'après laquelle l'effet attribué par le droit civil aux décisions arbitrales était si limité qu'il ne leur accordait pas de produire les effets de chose jugée. La loi I du code de recept dit: Ex sententia arbitri ex compromisso jure perfecto arbitri appellari non posse saepe receptum est; quia nec judicati actio inde praestari potest.

Messieurs, un dernier mot. On allègue la chose jugée, mais s'il vous fallait l'admettre votre conscience de juge serait-elle satisfaite?

De très nombreuses questions de fait et de droit ont été plaidées devant vous et l'avaient été déjà devant la Commission mixte. Ont-elles été résolues? Savons-nous exactement pourquoi nous avons été condamnés, quel est le titre qui devrait faire admettre le droit des Evêques et comment il aurait pu en aucun cas survivre au traité de 1848?

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[a] Page 47, this volume.

Il y a d'autre part d'importantes questions de chiffres. Sir Thornton les a implicitement écartées, mais comment? Peut-on dire que la consistance du Fonds Pie a été bien établie, que la donation del Rada en fait partie, qu'il faut débiter le gouvernement mexicain de toutes les créances irrécouvrables, des intérêts que le gouvernement espagnol n'avait pas payées depuis longtemps, mais qu'il se devait à lui-même et qui étaient ainsi éteints par confusion?

Tenez, messieurs, laissez-moi vous rappeler un seul point. Vous savez que les Missions des Philippines réclamaient une partie du Fonds et qu'elles l'ont reçue. A-t-on du moins déduit cette somme de la somme ainsi qu'il était élémentaire de le faire? Non, Sir Thornton paraît n'y avoir point songé. Semblable calcul demeurerait-il acquis, malgré l'erreur qui le vicie?

Et que dire de ces intérêts accumulés depuis des années qui accroissent le capital? Sir Thornton s'est refusé à allouer les intérêts des intérêts, mais il l'a fait! Le capital dont il alloue les intérêts est pour plus de la moitié une addition d'intérêts arriérés! Sur tout cela y aurait-il vraiment chose jugée; aucun examen ne serait-il plus admissible?

Autre point encore: la question de l'or. Jamais elle n'a été discutée. Si je ne me trompe, c'est dans le mémoire de M. Doyle que le paiement a été demandé sous cette forme, mais sans justification aucune. Cette demande n'a pas été contestée, et il n'y avait pas intérêt à le faire, car à cette époque il y avait parité de valeur entre les deux métaux, et payer en or ou en argent était chose indifférente. De son côté l'arbitre dit que le paiement sera fait en or, mais sans dire pourquoi.

Or, aujourd'hui il résulterait de là pour le Mexique une aggravation de charges de plus de moitié, et le rapport de l'or à l'argent dans l'avenir s'aggraverait encore, il se réduirait au quart au lieu d'être de moins de moitié, qu'il devrait en être ainsi indéfiniment; chose jugée. Eh bien, messieurs, je ne sais si je vois mal, mais voilà des choses qui me troublent, qui ne peuvent satisfaire ma conscience, et qui, me semble-t-il, ne peuvent pas non plus satisfaire la vôtre.

Quoi qu'il en soit, il y a tout au moins une question qui n'est pas jugée et qui ne pouvait l'être. On a fait l'addition des intérêts courus sans examiner s'ils étaient dus, ou si du moins ils n'étaient pas prescrits. Soit! cela est jugé, nous ne critiquons pas; mais à partir de la sentence rien ne peut l'être!

Rendue en 1875, elle alloue des intérêts jusqu'à 1870. Et puis vingt années se passent sans qu'on réclame rien, alors que la loi mexicaine comme toutes les lois du monde, punit semblable négligence de la prescription. On ne veut pas qu'un créancier puisse ruiner son débiteur par de telles accumulations d'intérêts, et presque toutes les législations établissent la prescription quinquennale. Or, sans qu'il y ait eu citation devant le juge, sans mise en demeure, sans même de réclamation officieuse, nous aurions à payer 32 années d'intérêts. Ici, messieurs, du moins la sentence de Sir Thornton est indifférente et certainement ces intérêts que nul n'a réclamés ne sont plus dus.

C'est par cette dernière observation que je termine. Je vous avais promis d'être bref, je me suis efforcé de l'être; je veux même vous épargner l'ennui d'une péroraison qui me paraît inutile; je puis du reste prendre à mon compte celle de M. Descamps. Il vous a proposé une fort belle devise pour le futur palais de la Cour d'arbitrage, je la

demande avec lui, et voilà au moins un point sur lequel nous aurons été d'accord.

M. LE PRÉSIDENT. Comme personne ne demande plus la parole, je prononce la clôture des débats. Maintenant, le Tribunal délibérera et votera; et quand la sentence sera rédigée et signée, elle sera publiée dans une séance du Tribunal à laquelle les agents et les conseils des parties seront dûment appelés.

(A 4 h. ½ la séance est levée et le Tribunal s'ajourne sine die.)

DIX-NEUVIÈME SÉANCE.

14 octobre 1902 (après-midi).

L'audience est ouverte à 5 heures de l'après-midi, sous la présidence de M. Matzen.

M. LE PRÉSIDENT. La parole est au Secrétaire-Général pour lire la sentence arbitrale de Tribunal.

M. LE SECRÉTAIRE-GÉNÉRAL. Voici cette sentence;

Cour Permanente d'Arbitrage de La Haye.

Le Tribunal d'arbitrage, constitué en vertu du traité conclu à Washington, le 22 mai 1902, entre les Etats-Unis d'Amérique et les Etats-Unis Mexicains;

Attendu que, par un compromis, rédigé sous forme de Protocole, entre les Etats-Unis d'Amérique et les Etats-Unis Mexicains, signé à Washington, le 22 mai 1902, il a été convenu et réglé que le différend, qui a surgi entre les Etats-Unis d'Amérique et les Etats-Unis Mexicains, au sujet du "Fonds Pieux des Californies," dont les annuités étaient réclamées par les Etats-Unis d'Amérique, au profit de l'Archevêque de San Francisco et de l'Evêque de Monterey, au Gouvernement de la République Mexicaine, serait soumis à un Tribunal d'arbitrage, constitué sur les bases de la *Convention pour le reglement pacifique des conflits internationaux*, signée à La Haye le 29 juillet 1899, qui serait composé de la manière suivante, savoir:

Le Président des Etats-Unis d'Amérique désignerait deux Arbitres non-nationaux et le Président des Etats-Unis Mexicains également deux Arbitres non-nationaux. Ces quatre Arbitres devraient se réunir le 1er septembre 1902 à La Haye, afin de nommer le Surarbitre qui, en même temps, serait de droit le Président du Tribunal d'Arbitrage.

Attendu que le Président des Etats-Unis d'Amérique a nommé comme arbitres:

Le très honorable Sir Edward Fry, Docteur en droit, autrefois siégeant à la Cour d'appel, Membre du Conseil Privé de Sa Majesté Britannique, Membre de la Cour Permanente d'Arbitrage, et

Son Excellence Monsieur de Martens, Docteur en droit, Conseiller Privé, Membre du Conseil du Ministère Impérial des affaires Etrangères de Russie, Membre de l'Institut de France, Membre de la Cour Permanente d'Arbitrage;

Attendu que le Président des Etats-Unis Mexicains a nommé comme Arbitres:

Monsieur T. M. C. Asser, Docteur en droit, Membre du Conseil d'Etat des Pays-Bas, ancien Professeur à l'Université d'Amsterdam, Membre de la Cour Permanente d'Arbitrage, et

Monsieur le Jonkheer A. F. de Savornin Lohman, Docteur en droit, ancien Ministre de l'Intérieur des Pays-bas, ancien Professeur à l'Université libre d'Amsterdam, Membre de la Seconde Chambre des Etats-Généraux, Membre de la Cour Permanente d'Arbitrage;

Lesquels Arbitres, dans leur réunion du 1er septembre 1902, ont élu, conformément aux articles 32–34 de la Convention de la Haye du 29 juillet 1899, comme Surarbitre et Président de droit du Tribunal d'Arbitrage:

Monsieur Henning Matzen, Docteur en droit, Professeur à l'Université de Copenhague, Conseiller extraordinaire à la Cour Suprême, Président du Landsthing, Membre de la Cour Permanente d'Arbitrage.

Et attendu qu'en vertu du Protocole de Washington du 22 mai 1902, les susnommés Arbitres, réunis en Tribunal d'Arbitrage, devraient décider:

1°. Si la dite réclamation des Etats-Unis d'Amérique au profit de l'Archevêque de San Francisco et de l'Evêque de Monterey est régie par le principe de la *res judicata*, en vertu de la sentence arbitrale du 11 novembre 1875, prononcée par Sir Edward Thornton, en qualité de Surarbitre;

2°. Si *non*, si la dite réclamation est juste, avec pouvoir de rendre tel jugement qui leur semblera juste et équitable;

Attendu que les susnommés Arbitres, ayant examiné avec impartialité et soin tous les documents et actes, présentés au Tribunal d'Arbitrage par les Agents des Etats-Unis d'Amérique et des Etats-Unis Mexicans, et ayant entendu avec la plus grande attention les plaidoiries orales, présentées devant le Tribunal par les Agents et les Conseils des duex Parties en litige;

Considérant que le litige, soumis à la décision du Tribunal d'Arbitrage, consiste dans un conflit entre les Etats-Unis d'Amérique et les Etats-Unis Mexicains qui ne saurait être règlé que sur la base des Traités internationaux et des principes du droit international;

Considérant que les Traités internationaux, conclus depuis l'année 1848 jusqu'au compromis du 22 mai 1902, entre les deux Puissances en litige, constatent le caractère éminemment international de ce conflit;

Considérant que toutes les parties d'un jugement ou d'un arrêt concernant les points débattus au litige s'éclairent et se complètent mutuellement et qu'elles servent toutes à préciser le sens et la portée du dispositif, à déterminer les points sur lesquels il y a chose jugée et qui partant ne peuvent être remis en question;

Considérant que cette règle ne s'applique pas seulement aux jugements des tribunaux institués par l'Etat, mais également aux sentences arbitrales, rendues dans les limites de la compétence, fixées par le compromis;

Considérant que ce même principe doit à plus forte raison, être appliqué aux arbitrages internationaux;

Considérant que la Convention du 4 juillet 1868, conclue entre les deux Etats en litige, avait accordé aux Commissions Mixtes, nommés par ces Etats, ainsi qu'au Surarbitre à désigner éventuellement, le droit de statuer sur leur propre compétence;

Considérant que dans le litige, soumis à la décision du Tribunal d'Arbitrage, en vertu du compromis du 22 mai 1902, il y a, non seulement identité des parties en litige, mais également identité de la matière, jugée par la sentence arbitrale de Sir Edward Thornton comme Surarbitre en 1875 et amendée par lui le 24 octobre 1876;

Considérant que le Gouvernement des Etats-Unis Mexicains a consciencieusement exécuté la sentence arbitrale de 1875 et 1876, en payant les annuités adjugées par le Surarbitre;

Considérant que, depuis 1869, trente-trois annuités n'ont pas été payées par le Gouvernement des Etats-Unis Mexicains au Gouvernement des Etats-Unis d'Amérique et que les règles de la prescription, étant exclusivement du domaine du droit civil, ne sauraient être appliquées au présent conflit entre les deux Etats en litige;

Considérant, en ce qui concerne la monnaie, dans laquelle le paiement de la rente annuelle doit avoir lieu, que le dollar d'argent, ayant cours légal au Mexique, le paiement en or ne peut être exigé qu'en vertu d'une stipulation expresse;

Que, dans l'espèce, telle stipulation n'existant pas, la Partie défenderesse a le droit de se libérer en argent;

Que, par rapport à ce point, la sentence Sir Edward Thornton n'a pas autrement force de chose jugée que pour les vingt et une annuités à l'égard desquelles le surarbitre a décidé que le paiement devait avoir lieu en dollars d'or Mexicains, puisque la question du mode de paiement ne concerne pas le fond du droit en litige mais seulement l'exécution de la sentence;

Considérant, que d'après l'article 10 du Protocole de Washington du 22 mai 1902, le présent Tribunal d'Arbitrage aura à statuer, en cas de condamnation de la République du Mexique, dans quelle monnaie le paiement devra avoir lieu;

Par ces motifs:

Le Tribunal d'Arbitrage décide et prononce à l'unanimité ce qui suit:

1°. Que la dite réclamation des Etats-Unis d'Amérique au profit de l'Archevêque de San Francisco et de l'Evêque de Monterey est régie par le principe de la *res judicata*, en vertu de la sentence arbitrale de Sir Edward Thornton du 11 novembre 1875 amendée par lui le 24 octobre 1876;

2°. Que, conformément à cette sentence arbitrale, le Gouvernement de la République des Etats-Unis Mexicains devra payer au Gouvernement des Etats-Unis d'Amérique la somme de *un million quatre cent vingt mille six cent quatre-vingt-deux dollars du Mexique et soixante-sept cents* (1,420,682.67/100 dollars du Mexique), en monnaie ayant cours légal au Mexique, dans le délai fixé par l'article 10 du protocole de Washington du 22 mai 1902.

Cette somme d'un million quatre cent vingt mille six cent quatre-vingt-deux dollars et soixante-sept cents (1,420,682.67/100 dollars) constituera le versement total des annuités échues et non payées par le Gouvernement de la République Mexicaine, savoir de la rente annuelle de *quarante trois mille cinquante dollars du Mexique et quatre-vingt-dix-neuf cents* (43,050.99/100 dollars du Mexique) depuis le 2 février 1869 jusqu'au 2 février 1902;

3°. Le Gouvernement de la République des Etats-Unis Mexicains paiera au Gouvernement des Etats-Unis d'Amérique le 2 février 1903, et chaque année suivante à cette même date du 2 février, à perpétuité, la rente annuelle de *quarante trois mille cinquante dollars du Mexique et quatre-vingt-dix-neuf cents* (43,050.99/100 dollars du Mexique) en monnaie ayant cours légal au Mexique.

Fait à La Haye, dans l'Hôtel de la Cour Permanente d'Arbitrage, en triple original, le 14 octobre 1902.

(*signé*): HENNING MATZEN.
EDW. FRY.
MARTENS.
T. M. C. ASSER.
A. F. DE SAVORNIN LOHMAN.

M. LE PRÉSIDENT. Messieurs, Le Tribunal d'Arbitrage a tenu sa première séance le 15 septembre, et la clôture des débats a été prononcée le 1er octobre; aujourd'hui, 14 octobre, nous avons rendu la sentence que M. le Secrétaire-Général vient de lire, et dont un exemplaire sera donné à chaque Agent des Puissances en litige, en exécution des dispositions du Traité, et dont le troisième est destiné à être déposé dans les Archives du Bureau International de la Cour permanente d'Arbitrage.

Le Tribunal d'arbitrage est donc arrivé à la fin de sa tâche, à moins que les Parties, usant de la faculté que leur donne l'article 13 du protocole de Washington, conformément à l'article 55 de la Convention de La Haye, demandent la révision de la sentence arbitrale. Cette révision ne peut être motivée que par la découverte d'un fait nouveau qui eût été de nature à exercer une influence décisive sur la sentence et qui lors de la clôture des débats était inconnu du Tribunal lui-même et de la Partie vui demande la révision. La procédure de révision ne peut être ouverte que par une décision du Tribunal constatant expressément l'existence du fait nouveau, lui reconnaissant le caractère prévu par le paragraphe précédent et déclarant à ce titre la demande recevable. Mais dès maintenant, et jusqu'à ce qu'une telle demande soit adressée au Tribunal et déclarée recevable, les Hautes Parties ont cessé d'être en litige et la mission qui lui a été confiée est regardée comme remplie.

Je tiens, Messieurs, à vous adresser encore quelques mots.

S'il n'est donné à aucun Tribunal humain de savoir ses sentences infaillibles, nous emporterons du moins d'ici la ferme conviction d'avoir recherché la vérité de toutes nos forces, consciencieusement et impartialement; et il me sera permis d'ajouter que l'unanimité avec laquelle tous les Membres du Tribunal appartenant à différents pays réunis ici à La Haye sont arrivés, chacun pour soi et tous ensemble, aux mêmes conclusions, me semble constituer une garantie de plus que dans notre recherché empressée de la vérité nous n'avons pas fait fausse route.

En repassant par mémoire le cours de nos travaux, c'est à Messieurs les Agents, les intermédiaires entre les Parties et le Tribunal, que celui-ci doit en premier lieu ses remerciements sincères. Messieurs, marquées au sceau de votre haute distinction, les relations avec le Tribunal, établies et maintenues par vous, ont été des plus excellentes et des plus cordiales du premier jusqu'au dernier jour.

Nous remercions aussi chaleureusement Messieurs les Conseils des deux Parties, qui nous ont secondés et qui ont revêtu les débats des formes les plus courtoises et d'une bonne grâce incessante.

Une parfaite urbanité dans les rapports mutuels a rendu la tâche du

Président aussi facile qu'agréable. Lors de notre première réunion j'ai dit que les Conseils établiraient des bases pour les délibérations du Tribunal; ils ont réalisé et bien au-delà cette prédiction, ils ont guidé le Tribunal en faisant jaillir sur tous les points en litige la lumière de leur haute érudition et du travail le plus approfondi.

Nous vous remercions, Monsieur le Secrétaire-Général, dont l'infatigable assistance nous a prêté un précieux appui, ainsi que Messieurs les Secrétaires pour le soin avec lequel ils se sont acquittés de leur tâche.

Le tribut de notre reconnaissance est dû aussi aux Membres du Conseil Administratif de la Cour Permanente, qui ont mis à notre disposition le confort et l'élégance des belles salles dans lesquelles nous avons tenu nos réunions.

Sous l'impression de l'accueil si hospitalier qui lui a été fait dans ce pays si riche en souvenirs de grands faits et de bienfaits dans l'histoire du Droit et de l'Humanité, le Tribunal, siégeant sous les auspices de Sa Majesté la Reine des Pays-bas, dépose aux pieds de la Gracieuse Souveraine l'hommage respectueux de sa profonde gratitude et ses meilleurs vœux pour son bonheur et pour la prospérité de son Peuple.

La parole est à l'agent des Etats-Unis d'Amérique.

Mr. RALSTON. Mr. President and honorable arbitrators:

Now that the hour of adjournment approaches, it seems fitting that some acknowledgment should be made on the part of the United States and their representatives for courtesies extended, as well as for those expressed in the speech just concluded.

We came strangers, and have met with only the most friendly treatment from all. To you, Mr. President, and to all other members of the court, we owe most hearty thanks for the kind and patient hearing constantly afforded us. You have recognized the fact that satisfaction to all litigants, whether successful or rejected, was only to be given when all could feel that their arguments, sound or otherwise, concise or repeated, had received all possible attention.

My duty at this point would be incomplete were I to overlook acknowledgment of the unfailing courtesy to the parties litigant displayed by the officers of the court. Without their constant assistance our proceedings must have been much less rapid and effective.

I desire to recognize the good faith and good temper at all times displayed by our friends upon the other side of this dispute. While they have ever loyally and ably maintained the cause of Mexico and energetically sought to further her interests, never have any difficulties of a personal character or controversies calculated to leave unpleasant memories arisen between us. I also join with you, M. President, in expressing the thanks of my country to the Permanent Administrative Council for providing us with such pleasant quarters in which to meet and adjust our difficulties.

We exchange the compliments appropriate to the time and circumstances, yet were there nothing more to be said our words might well be counted as "sounding brass and tinkling cymbal," and our meeting here as having only ephemeral value.

There has just been determined at The Hague a controversy over money—a thing which we are told has been "slave to thousands," and the love of which is described as "the root of all evil." If a judgment now meant nothing more than the transfer or non-transfer of

money from one party or the other, however interesting this might be to those concerned, the world at large could look on with indifference.

We believe, however, that a first step has been taken that will count largely for the good of future generations; that following this primal recognition of the existence of a court competent to settle disputes between nations, will come general reference to it, not alone of differences similar to the present, but of other controversies involving larger questions of individual rights and national privileges. We may hope that precisely as questions formerly believed to involve individual honor have in many countries entirely ceased and in others are ceasing to be settled by formal exercise of force, the same revolution may gradually be effected in the affairs of nations. The Permanent Court of Arbitration, assisting this end, must tend to bring about that "peace on earth, good will toward men" for which Christians hope.

Mr. President and honorable arbitrators, for good or for ill, our task is accomplished. While we may be pardoned for indulging in the expression of hope that, irrespective of the immediate effect of your decision, good is to be anticipated from the labors of all of us, yet whatever the future holds we must accept it. We have all done, according to our several lights and abilities, the best we knew, and quietly and philosophically, without exultation or depression, we accept the result.

I may therefore recall to you in closing the promise of the old "Niebelungen Lied:"

> Wilt thou do the deed and regret it?
>   Thou hadst better never been born.
> Wilt thou do the deed and proclaim it?
>   Then thy fame shall be outworn.
> Thou shalt do the deed and abide it,
>   And from thy throne on high,
> Look on to-day and to-morrow as those that never die.

M. LE PRÉSIDENT. La parole est à l'agent des Etats-Unis Mexicains.

M. EMILIO PARDO. Messieurs, Quand j'ai eu l'honneur d'adresser la parole pour la première fois à la Cour, le jour où elle s'est installée, j'ai commencé par exprimer au nom de mon Gouvernement sa détermination de se soumettre fidèlement et loyalement à la décision de cette Cour. Je suis absolument sûr que lorsque mon Gouvernement connaîtra le jugement que la Cour vient de rendre il l'acceptera comme l'expression du jugement et de la sagesse de cinq jurisconsultes distingués, de cinq honnêtes hommes. Mais naturellement je dois réserver à mon Gouvernement le droit de faire valoir tous les recours que le protocole du 22 mai dernier accorde aux Parties.

Je ne veux pas abuser de la patience ni de l'attention du Tribunal. Je réitère la manifestation de gratitude que j'ai faite le jour de l'installation de la Cour pour le bon vouloir avec lequel Messieurs les Arbitres ont eu la bonté d'assumer une tâche lourde et pénible qui a été remplie avec une si grande bonne volonté et avec un esprit d'impartialité que je me plais à reconnaître.

Je profite de cette occasion pour adhérer de tout mon coeur à la manifestation qui vient d'être faite par M. l'agent des Etats-Unis et aux remerciements qu'il a adressés aux Membres du Conseil administratif de la Cour Permanente d'Arbitrage pour leur bienveillante hospitalité. Il ne me reste plus qu'a vous dire encore une fois merci pour

votre travail, pour votre bon vouloir, pour votre sagesse et pour votre impartialité.

M. LE PRÉSIDENT. Au nom du Tribunal, je remercie les Agents des Hautes Parties pour les aimables et bienveillantes paroles qu'ils ont bien voulu lui adresser.

(La séance est levée à 5 heures et demie.)

PROTOCOLES DES SÉANCES DU TRIBUNAL D'ARBITRAGE CONSTITUÉ EN VERTU DU TRAITÉ DU 22 MAI 1902 SIGNÉ À WASHINGTON ENTRE LES GOUVERNEMENTS DES ETATS-UNIS D'AMÉRIQUE ET DES ETATS-UNIS MEXICAINS.

PROTOCOLE I.

Séance du lundi 15 septembre 1902.

Le Tribunal s'est réuni à 11½ heures du matin à l'hotel de la Cour Permanente d'Arbitrage, 71 Prinsegracht à La Haye.

Les Arbitres présent étaient:

M^r^. le Professeur H. Matzen, Docteur en droit, Professeur à l'Université de Copenhague, Conseiller Extraordinaire à la Cour Suprême, Président du Landsthing, Membre de la Cour Permanente d'Arbitrage, Surarbitre et Président du Tribunal;

Le Très Honorable Sir Edward Fry, Docteur en droit, autrefois siégeant à la Cour d'Appel, Membre du Conseil Privé de Sa Majesté Britannique, Membre de la Cour Permanente d'Arbitrage, un des Arbitres désignés par les Etats-Unis d'Amérique;

Son Excellence M^r^. de Martens, Conseiller Privé, Membre du Conseil du Ministère Impérial des Affaires Etrangères à St. Petersbourg, Membre de la Cour Permanente d'Arbitrage, un des Arbitres désignés par les Etats-Unis d'Amérique;

M^r^. T. M. C. Asser, Docteur en droit, Membre du Conseil d'Etat des Pays-Bas, ancien Professeur à l'Université d'Amsterdam, Membre de la Cour Permanente d'Arbitrage, un des Arbitres désignés par les Etats-Unis Mexicains;

M^r^. le Jonkheer A. F. de Savornin Lohman, Docteur en droit, ancien Ministre de l'Intérieur des Pays-Bas, ancien Professeur à l'Université libre d'Amsterdam, Membre de la Seconde Chambre des Etats-Généraux, Membre de la Cour Permanente d'Arbitrage, un des Arbitres désignés par les Etats-Unis Mexicains.

M^r^. Matzen prend place au fauteuil de la Présidence et prononce le discours suivant:

"Excellences! Messieurs! Comme Président du Tribunal d'Arbitrage, institué en vertu du traité conclu à Washington le 22 mai 1902 entre les Etats-Unis de l'Amérique et les Etats-Unis Mexicains, je déclare la première séance du Tribunal ouverte.

C'est la premiére fois, qu'a été constitué un Tribunal d'Arbitrage, siégeant sous le régime de la Convention de la Haye sur l'Arbitrage International et composé de membres de la Cour Permanente d'Arbitrage, créée par la Convention; et je remercie Vos Excellences ici présentes, Président et Membres du Conseil Administratif de la Cour Permanente, d'avoir bien voulu nous faire l'honneur d'assister à la première séance du premier Tribunal d'Arbitrage, émané de la Cour Permanente.

Ce premier Tribunal est constitué grâce à l'initiative de deux Grandes Puissances du Nouveau Monde, qui animées du même sincère désir de faire règler un différend survenu entre eux a l'amiable et d'une manière satisfaisante et juste, sont tombées d'accord de le soumettre à un Arbitrage conforme dans son essence aux règles de la Convention de la Haye.

Toutes les stipulations du traité susmentionné relatives à la constitution de ce Tribunal d'Arbitrage ont été dûment ecécutées.

Les Membres du Tribunal ici présents sont prêts à remplir consciencieusement la tâche importante et honorable, qui leur a été confiée.

Les Arbitres, choisis par les puissances, brillent au premier rang des jurisconsultes du monde et sont bien au-dessus de mes éloges.

Le fait d'avoir été appelé par leur vote, à présider leurs séances est considéré par moi comme un grand honneur illustrant toute mon existence, mais il serait de nature à m'effrayer, si je n'avais pas la ferme certitude de pouvoir compter sur leur constante et bienveillante collaboration.

Au nom du Tribunal je souhaite une respectueuse et cordiale bienvenue aux illustres personnages représentant les Puissances devant le Tribunal et aux Conseils éminents, qui les assistent de leurs lumières, dont les savants discours élucideront les faits et fixeront des bases pour nos délibérations.

Au moment de l'ouverture des séances du Tribunal j'émets le vœu, qu'il nous soit donné, grâce aussi au concours zèlé et à la collaboration des Hautes Parties d'inaugurer les travaux des tribunaux d'arbitrage de la Convention de la Haye d'une manière conforme à la pensée sublime qui l'a inspirée et au but glorieux, qu'elle est appelée à faciliter: le règlement pacifique des litiges entre les Etats sur la seulebase solide, la base du respect du droit.

Ensuite il donne successivement lecture des noms des Arbitres, mentionnés ci-dessus et ceux des Agents et Conseils des deux Parties, savoir:

M[r]. Jackson Harvey Ralston, Agent pour le Etats-Unis d'Amérique; Son Excellence M[r]. Emilio Pardo, Envoyé Extraordinaire et Ministre Plénipotentiaire du Mexique auprès de Sa Majesté la Reine des Pays-Bas, Agent pour les Etats-Unis Mexicains; MM. William Laurence Penfield, Juge; le Sénateur W. M. Stewart; le Chevalier Descamps, Sénateur du Royaume de Belgique, Secrétaire-Général de "l'Institut du Droit International," Membre de la Cour Permanente d'Arbitrage; Charles J. Kappler; W. T. S. Doyle; Garret W. McEnerney, Conseils pour les Etats-Unis d'Amérique, et Son Excellence M[r]. Beernaert, Ministre d'Etat, Membre de la Chambre des Représentants de Belgique, Membre de la Cour Permanente d'Arbitrage, et M[r]. Léon Delacroix, Avocat près de la Cour d'Appel à Bruxelles, Conseils pour les Etats-Unis Mexicains.

Il invite ensuite M[r]. L. H. Ruyssenaers, Envoyé Extraordinaire et Ministre Plénipotentiaire de Sa Majesté la Reine des Pays-Bas, Secrétaire-Général de la Cour Permanente d'Arbitrage à remplir les fonctions de Secrétaire-Général du Tribunal et nomme comme Secrétaires du Tribunal:

M[r]. Walter S. Penfield, M[r]. Luis Pardo, 1er Secrétaire de la Légation du Mexique à La Haye, et M[r]. le Jonkheer W. Röell, 1er Secrétaire du Bureau International de la Cour Permanente d'Arbitrage.

Quant à la question des langues le Président déclare que le Tribunal

a décidé que la langue française sera celle du Tribunal, sauf le droit des Parties de parler aussi en anglais.

Le Secrétariat est chargé de l'élaboration des procès-verbaux qui seront rédigés en français et sous une forme concise.

Les Parties, désirant faire sténographier les comptes-rendus, pourront prendre les mesures nécessaires à cet égard.

Le Président ajoute que le Tribunal, avec l'assentiment des Parties, a décidé que les débats seront publics, mais que, vû l'exiguité de l'espace qui pourrait être réservé au public, celui-ci ne sera admis que sur la présentation de cartes spéciales à délivrer par le Secrétaire-Général de la Cour Permanente d'Arbitrage.

M[r]. JACKSON HARVEY RALSTON, Agent des Etats-Unis d'Amérique, prononce le discours suivant:

On behalf of the United States, it is my honor and pleasure to offer a brief reply of thanks to the courteous sentiments of the distinguished President of this Court.

At this moment, permit me to express my appreciation of the action of the Netherland Government in extending many courtesies in connection with the establishment of the Court of Arbitration, as well as in facilitating the work of the first litigants, and furthermore to acknowledge most heartily the compliment shown by the attendance on this occasion of the members of the Administrative Council.

We who represent the United States esteem highly the opportunity of presenting before this learned body a controversy involving the two foremost nations of the North American continent. It is perhaps natural that we should felicitate ourselves upon the fact that the first nations to resort to this tribunal are of the Western hemisphere, and are nations which may take pride in the fact that they are legitimate offspring of the peoples of Europe, and as such, inheritors of centuries of a common civilization, the most advanced that the world has ever known.

We of the United States find satisfaction in the fact that the first suggestion of arbitration of the question now offered for your consideration was made by M[r]. Secretary Hay of the United States, whose fame as a diplomatist and as a statesman knows no national bounds. We congratulate our neighbours upon the other side that after this suggestion M[r]. Hay and the distinguished Secretary of Foreign Affairs of Mexico, M[r]. Mariscal, came to a speedy accord upon the proposition to refer the proposed arbitration for settlement under the provisions of the Hague Peace Convention.

On May 22, 1902, the protocol was signed at Washington, and without loss of any time the Mexican Senate, on May 30th, validated its requirements by ratifying the instrument.

That the two countries should have been willing to arbitrate their differences before five members of the Permanent Court of Arbitration, is, I venture to say, conclusive evidence of belief in the impartiality and ability which would be displayed by those whom the signatories of the Hague Convention had designated from among their most eminent jurists and publicists.

Inaugurating our proceedings under such circumstances, I may assure you, M[r]. President and Honorable Arbitrators, that the determinations of this Court, whatever they may be, will command and receive the respect and unquestioned acquiescence of the United States. After your award shall have been rendered, no matter what our previous

opinions may have been, we will remember the language of a distinguished English jurist, who, on the occasion of a famous international arbitration said:

I hope that the English people will obey the decisions of the Judges with the submission and respect due to the decision of a tribunal whose decree they have freely agreed to accept.

I do not wish to take my seat without expressing the hope of my country that the precedent of appealing to the judges forming the Permanent Court of Arbitration may be followed with increasing frequency as years go by. While the unique honor must remain to the United States of America, and the United Mexican States of being the first voluntarily to submit their differences to the jurisdiction of this Court, it will be a source of the greatest satisfaction to my Government if the action thus taken should pave the way to similar settlements in the future, whereby in later cases misunderstandings which might otherwise lead to conflicts between states may receive peaceable adjustment, believing as it does that the most happy rivalry that can possibly exist between nations is to be found in a common effort to excel in whatever tends to bring about the contentment and well-being of mankind. The good of humanity is an end to which the United States steadily and consciously struggles, and toward the same end, we believe, assuredly the formation and the extension of the employment of the Permanent Court of Arbitration must largely contribute.

In again thanking you, Mr. President, for your own expressions of courtesy and good will, let me once more express the hope that our labors may conduce towards the coming of the time, when, to paraphrase the language of England's great poet:

The war drum throbs no longer,
And the battle flags are furled
In the parliament of man,
The Federation of the world.

Son Excellence M. Emilio Pardo, Agent des Etats-Unis Mexicains, prononce le discours suivant:

Messieurs! Au nom du Gouvernement des Etats-Unis Mexicains, je profite de cette occasion solennelle pour exprimer ses remerciments très sincères et très cordiaux aux éminents publicistes qui forment la Cour Permanente d'Arbitrage, appelée à prononcer la dernière parole sur le différend suscité entre les représentants de l'Eglise Catholique de la Haute Californie et mon Pays, au sujet de la réclamation désormais célèbre, du Fond Pie de Californie.

Je me fais un devoir de remercier également le Gouvernement des Pays-Bas, pour l'hospitalité si franche et si généreuse qu'il a bien voulu nous accorder, et qui rentre si bien dans les traditions du peuple Néerlandais, et je me permets de présenter la reconnaissance de mon Pays et de son Gouvernement aux très distingués membres du Corps Diplomatique qui ont bien voulu honorer de leur présence, cette imposante cérémonie.

La grande institution créée par le Congrès de la Paix, est appelée pour la première fois à rendre ses importants services à la cause du Droit et de la Justice, et je m'empresse de faire profession publique de la foi du Gouvernement Mexicain en la sagesse, en la science et en l'impartialité de la Cour qui vient d'être installée.

Quoiqu'il en soit pour nous du jugement de la Cour, nous pouvons dire avec le plus légitime orgueil que, comme le prouve la correspondance diplomatique échangée entre les deux Gouvernements en cause, pour préparer la signature du Protocole du 22 mai dernier, le Mexique fut le premier à proposer l'application de l'arbitrage international établi par la Convention du 29 juillet 1899.

L'événement, dont nous sommes les témoins, marquera, j'en suis sûr, une date inoubliable dans les fastes de l'histoire de l'arbitage international, si modeste que soit le litige qui a motivé la convocation de la Cour, et nous devons espérer tous, les puissants et les faibles, tous égaux devant la Justice, que l'example donné par les deux Républiques de l'Amérique du Nord ne restera pas infécond et isolé.

La séance est suspendue à midi et reprise à 2¼ heurs.

M^r. Ruyssenaers, Secrétaire-Général du Tribunal, fait lecture des communications qui lui ont été adressées par les Agents d'Amérique et du Mexique aux fins d'être soumises au Tribunal d'Arbitrage.

Sur la demande du Président aux Parties si elles ont encore d'autres actes ou documents à communiquer au Tribunal, M^r. Delacroix déclare que l'Agent du Mexique a effectivement cette intention, mais ne pourra effectuer cette remise avant la prochaine séance.

M^r. l'Agent d'Amérique dépose quelques nouvelles publications se rapportant à la cause en litige.

Le Président déclare ensuite qu'il est bien entendu que le dossier déposé par l'Agent d'Amérique est, de son consentement, à la disposition de la Partie défenderesse.

Après un échange d'observations entre MM. les Agents d'Amérique et du Mexique au sujet de la procédure et notamment sur la question de savoir laquelle des deux Parties aura la parole en dernier lieu, le Président déclare que le Tribunal délibérera sur les règles de procédure qu'il y aurait lieu de fixer par rapport aux questions soulevées.

Ensuite M^r. Ralston déclare que l'annexe de la réponse du gouvernement Mexicain intitulée "*Pleito de Rada*" est acceptée par lui comme authentique.

La parole est ensuite donneé à M^r. le Sénateur Stewart, qui commence son discours.

A 4 heures la séance est levée et le Tribunal s'ajourne à mardi le 17 septembre à 9½ heures du matin.

Ainsi fait à la Haye, le 15 septembre 1902.

Le Président: H. MATZEN.
L'Agent des Etats-Unis d'Amérique: JACKSON H. RALSTON.
L'Agent des Etats-Unis Mexicains: E. PARDO.
Le Secrétaire-Général: L. H. RUYSSENAERS.

PROTOCOLE II.

Séance du mercredi 17 septembre 1902.

Le Tribunal s'est réuni à 10 heures, tous les Arbitres étant présents.

Sur l'invitation du Président, M. le Secrétaire-Général fait lecture de la décision suivante du Tribunal, qui a été notifiée le 15 septembre à MM. les Agents des deux Parties:

"Le Tribunal, attendu que l'Agent de la Partie défenderesse (Etats-Unis Mexicains) a consenti à ce que la réplique écrite de la Partie demanderesse (Etats-Unis d'Amérique) soit jointe au dossier, sous la condition que la Partie défenderesse ait le droit d'y répondre par écrit, à décidé que la dite réplique sera acceptée par le Tribunal et que la Partie défenderesse aura le droit d'y répondre par écrit, pourvu que cette réponse soit déposée au Greffe du Tribunal en manuscrit au plus tard le 25 de ce mois et qu'au plus tard le même jour une copie en sat remise à la Partie demanderesse."

Et ensuite des règles de procédure établies par le Tribunal d'Arbitrage:

"Le Tribunal, vu la nécessité de fixer l'ordre des plaidoyers et, se conformant au règlement de la procédure arbitrale, consigné dans la Convention pour le règlement pacifique det conflits internationaux conclue à la Haye le 29 juillet 1899 (art. 30 et suivants), a décidé ce qui suit:

"1°. attendu que ce sont les Représentants des Etats-Unis d'Amérique qui ont ouvert les débats en leur qualité de Partie demanderesse, la parole sera donnée aux Représentants des Etats-Unis Mexicains comme Partie défenderesse aussitôt que la Partie demanderesse aura terminé son plaidoyer. Ensuite les deux Parties, si elles le désirent, alterneront encore une fois dans le même ordre:

"2°. les Parties ont le droit de faire parler tous leurs Conseils tant pour le premier plaidoyer que pour la réponse. Pour la réplique et la duplique chaque Partie désignera un seul de ses Conseils pour prendre la parole, sauf le droit des autres Conseils d'intervenir pour répondre aux objections qui concerneraient spécialement le discours qu'ils ont prononcé."

M^r^. l'Agent d'Amérique remet à la Cour quelques documents.

M^r^. l'Agent du Mexique remet à la Cour la réponse de son Gouvernement avec les annexes.

M^r^ le Sénateur Stewart continue son discours, commencé dans la séance du 15 septembre, et le termine à 11¼ heures.

Le Président déclare que le Tribunal a l'intention d'ajourner ses séances jusqu'à Lundi prochain, le 22 septembre et de siéger ensuite tous les jours suivants.

M^r^. Beernaert, Conseil des Etats-Unis Mexicains, prie le Tribunal de bien vouloir siéger aussi cet après-midi si c'est possible.

Le Tribunal se retire pour délibérer. A la reprise de la séance le Président déclare que le Tribunal siégera jusqu'à midi et que la séance sera alors suspendue jusqu' à 2½ heures de l'après-midi.

Mr. Garret W. McEnerney, Conseil des Etats-Unis d'Amérique, adresse la parole au Tribunal.

La séance est suspendue à midi.

A la reprise de la séance à 2½ heures Mr. McEnerney continue son discours jusqu'à 4½ heures.

La séance est levée et le Tribunal s'ajourne à lundi le 22 septembre à 10 heures du matin.

Ainsi fait à la Haye, le 17 septembre 1902.

Le Président: H. MATZEN.
L'Agent des Etats-Unis d'Amérique: JACKSON H. RALSTON.
L'Agent des Etats-Unis Mexicains: E. PARDO.
Le Secrétaire-Général: L. H. RUYSSENAERS.

PROTOCOLE III.

Séance du lundi 22 septembre 1902.

Le Tribunal s'est réuni à 10 heures, tous les Arbitres étants présents.

Le Secrétaire-Général fait lecture des procés-verbaux des séances du 15 et 17 septembre.

M^r. Beernaert fait une remarque au sujet du dossier, déposé par l'Agent d'Amérique et exprime l'opinion que le dossier doit être considéré comme un dossier commun.

M^r. Garret W. McEnerney reprend son argumention du 17 septembre.

A midi la séance est suspendue jusqu'à 2 heures.

A la reprise de la séance MM. Ralston et Pardo échangent quelques observations se rapportant à la question soulevée dans la séance du matin par M^r. Beernaert.

M^r. l'Agent de l'Amérique dit que son Gouvernement se considérait tenu à déposer l'ancien dossier, mais que les *deux* Parties devaient présenter tous documents ou mémoires qu'ils jugeraient nécessaires et qui constitueraient le nouveau dossier. Le Gouvernement Américain a soumis l'ancien dossier, parcequ'il se trouvait de fait en possession.

Quant à la correspondance diplomatique, il estime que l'obligation de faire les communications nécessaires est absolument la même pour les deux Gouvernements. Il ajoute que tout ce qui a été soumis au Tribunal par la partie demanderesse est mis, sans aucume réserve, à la disposition de la partie adverse.

M^r. l'Agent du Mexique répond que ce débat n'a qu'une importance secondaire, attendu que tous les documents sont déjà entre les mains du Tribunal. Quant à la responsabilité qui incomberait à son Gouvernement, il fait observer que la réponse du Mexique, accompagnée de l'importante annexe intitulée "Pleito de Rada" a, conformément à l'article VII du Protocole du 22 mai 1902, été remise directement au Gouvernement des Etats-Unis d'Amérique et il s'étonne que cette annexe ait été jointe au dossier, tandis que la réponse du Mexique ne s'y trouvait point.

Le Président dit qu'il sera pris acte des déclarations des deux Parties et qu'elles seront mentionnés dans le procès-verbal.

M^r. Pardo fait encore observer qu'il existe un malentendu par rapport à sa situation personnelle. Il désire constater qu'il est ici uniquement en qualité d'Agent des Etats-Unis Mexicains et que ce n'est point comme représentant diplomatique du Mexique à la Haye qu'il désire être considéré.

M^r. Garret W. McEnerney continue son discours qu'il termine à $3\frac{3}{4}$ heures.

M^r. Ralston, Agent d'Amérique prend la parole.

La séance est levée à 5 heures et le Tribunal s'ajourne au lendemain à 10 heures.

Ainsi fait à la Haye le 22 septembre 1902.

Le Président: H. MATZEN.
L'Agent des Etats-Unis d'Amérique: JACKSON H. RALSTON.
L'Agent des Etats-Unis Mexicains: E. PARDO.
Le Secrétaire-Général: L. H. RUYSSENAERS.

PROTOCOLE IV.

Séance du mardi 23 septembre 1902.

La séance est ouverte à 10¼ heures du matin; tous les Arbitres étant présents.

M^r. Ruyssenaers, Secrétaire-Général du Tribunal fait lecture des deux décisions suivantes du Tribunal.

Afin de garantir la marche régulière et continue des débats, le Tribunal décide ce qui suit:

1°. Les séances du Tribunal auront lieu tous les jours de 10 heures à midi et de 2½ heures à 5 heures, jusqu'à la fin des débats;

2°. Toute proposition ou demande des Parties en litige concernant la marche de la procédure arbitrale ou l'interprétation des règles établies doit être formulée par écrit.

Ces décisions seront communiquées par écrit aux deux Parties.

M^r. Ralston dit qu'il vient de recevoir du Chevalier Descamps, Conseil des Etats-Unis d'Amérique, qui se trouve à Bruxelles un télégramme demandant l'autorisation de remettre son discours à lundi le 29 septembre, afin de lui permettre d'assister aux cérémonies des funérailles de Sa Majesté la Reine des Belges.

M^r. Beernaert fait une demande tendant à l'ajournement du Tribunal les 25 et 26 septembre se déclarant prêt à revenir en temps utile pour assister à la séance du 27 courant.

Le Président répond que le Tribunal a décidé de siéger tous les jours; M^r. Ralston est invité à en donner connaissance par télégramme au Chevalier Descamps.

M^r. Ralston continue son discours de la veille, qu'il termine à midi.

La séance est suspendue jusqu'à 2½ heures.

A la reprise de la séance M^r. Ralston remet au Tribunal d'Arbitrage une demande (*écrite*) tendant à permettre au Chevalier Descamps de prendre la parole lundi prochain le 29 septembre au lieu d'aujourd'hui.

Le Président répond que le Tribunal ne peut pas admettre cette demande.

M^r. Delacroix, Conseil des Etats-Unis Mexicains, prend la parole.

La séance est levée à 5 heures et le Tribunal s'ajourne au lendemain à 10 heures du matin.

Ainsi fait à la Haye, le 23 septembre 1902.

Le Président: H. MATZEN.
L'Agent des Etats-Unis d'Amérique: JACKSON H. RALSTON.
L'Agent des Etats-Unis Mexicains: E. PARDO.
Le Secrétaire-Général: L. H. RUYSSENAERS.

PROTOCOLE V.

Séance du mercredi 24 septembre 1902.

La séance est ouverte à 10 heures du matin, tous les Arbitres étant présents.

M^r. Delacroix reprend son argumentation de la veille.

A midi la séance est suspendue jusqu'à 2½ heures.

A la reprise de la séance Mr. Ralston, Agent des Etats-Unis d'Amérique donne, avec l'assentiment de la Partie défenderesse, quelques explications sur les anciennes frontières de la Californie et remet au Tribunal des copies certifiées conformes des cartes officielles, annexées au traité de Guadelupe-Hidalgo du 2 février 1848 où ces limites se trouvent fixées.

Mr. Beernaert dépose des conclusions imprimées pour la Partie défenderesse et demande au Tribunal s'il serait possible de ne pas siéger vendredi matin le 26 septembre à cause de la cérémonie des funérailles de Sa Majesté la Reine des Belges.

Le Président répond que le Tribunal défèrant à cette demande ne siégera pas dans la matinée de vendredi prochain.

Mr. Delacroix continue son discours jusqu'à 4½ heures et le Tribunal s'ajourne à vendredi à 2½ heures de relevée.

Ainsi fait à La Haye, le 24 septembre 1902.

Le Président: H. MATZEN.
L'Agent des Etats-Unis d'Ameérique: JACKSON H. RALSTON.
L'Agent des Etats-Unis Mexicains: E. PARDO.
Le Secrétaire-Général: L. H. RUYSSENAERS.

PROTOCOLE VI.

Séance du vendredi 26 septembre 1902.

Le Tribunal s'est réuni à 2½ heures de l'après-midi, tous les Arbitres etant présents.

A l'ouverture de la séance Mr. Ralston, Agent des Etats-Unis d'Amérique, remet au Tribunal, avec l'assentiment de la Partie défenderesse, un mémoire du Gouvernement Américain fournissant des données sur le nombre de catéchumènes indiens élevés dans les établissements catholiques de la Californie et sur le nombre d'Indiens se trouvant dans la Californie supérieure d'une part telle que cette contrée a été limitée par le Traité de Guadaloupe Hidalgo et d'autre part telle qu'elle était définie autrefois d'après les prétentions du Gouvernement Espagnol.

Le Président invite le Secrétaire-Général à transmettre à l'Agent des Etats-Unis Mexicains un exemplaire du mémoire imprimé susmentionné.

Mr. Delacroix reprend son argumentation du 24 septembre qu'il termine à 5 heures.

La séance est levée à 5 heures et le Tribunal s'ajourne au lendemain à 10 heures.

Ainsi fait à La Haye, le 26 septembre 1902.

Le Président: H. MATZEN.
L'Agent des Etats-Unis d'Amerique: JACKSON H. RALSTON.
L'Agent des Etats-Unis Mexicains: E. PARDO.
Le Secrétaire-Général: L. H. RUYSSENAERS.

PROTOCOL VII.

Séance du samedi 27 septembre 1902.

Le Tribunal se réunit à 10 heures, tous les Arbitres étants présents.

Mr. Beernaert, Conseil des Etats-Unis Mexicains, dit que Mr. Pardo

prendra la parole après lui et qu'il a fait imprimer d'avance sa plaidoirie, dont il se propose de remettre un exemplaire à chaque Membre du Tribunal d'Arbitrage ainsi qu'à M^r. l'Agent d'Amérique.

M^r. Ralston répond qu'il s'empressera d'en prendre connaissance.

Ensuite M^r. Beernaert commence son argumentation.

A midi la séance est suspendue jusqu'a $2\frac{1}{2}$ heures.

A la reprise de la séance M^r. Beernaert continue son discours, qu'il termine à $3\frac{1}{2}$ heures.

M^r. Pardo, Agent des Etats-Unis Mexicains, commence son argumentation après avoir expliqué au Tribunal qu'il désirait *lire* sa plaidoirie et qu'il l'avait dans ce but fait imprimer d'avance.

A $4\frac{1}{4}$ heures l'Agent des Etats-Unis Mexicains se sentant fatigué demande à se reposer.

Après un échange d'observations entre le Président et les Agents d'Amérique et de Mexique, il est décidé par le Tribunal, d'accord avec les deux Parties, qu'un exemplaire imprimé de la plaidoirie de M^r. Pardo sera remis au Tribunal at à la Partie demanderesse, avant que M^r. Descamps prenne la parole lundi prochain et que cette communication dispensera M^r. l'Agent du Mexique de terminer la lecture de cette partie de sa plaidoirie qu'il n'a pu finir dans la séance d'aujourd'hui.

M^r. le Chevalier Descamps, Conseil des Etats-Unis d'Amérique, qui, par suite de son absence à Bruxelles n'a pu assister à la séance du 23 septembre, où il aurait du prendre la parole après M^r. Ralston, demande au Tribunal l'autorisation d'être encore admis à le faire lundi prochain.

Le Président déclare que le premier plaidoyer et la réponse doivent être considérés comme terminés, mais—qu'avec l'assentiment de la Partie défenderesse—le Tribunal, défèrant à la demande du Chevalier Descamps, à décidé que pour la réplique et la duplique chaque Partie pourra désigner *deux* de ses Conseils pour prendre la parole au lieu d'un *seul*, ainsi qu'il avait été ordonné par le Tribunal et ainsi qu'il a été notifié au Parties le 15 septembre.

En conséquence, le Chevalier Descamps sera admis à prononcer son discours dans la prochaine réunion du Tribunal.

La séance est levée à $4\frac{1}{2}$ heures et le Tribunal s'ajourne à lundi le 29 septembre à 10 heures du matin.

Ainsi fait à La Haye, le 27 septembre 1902.

Le Président: H. Matzen.
L'Agents des Etats-Unis d'Amérique: Jackson H. Ralston.
L'Agent des Etats-Unis Mexicains: E. Pardo.
Le Secrétaire-Général: L. H. Ruyssenaers.

PROTOCOLE VIII.

Séance du lundi 29 septembre 1902.

Le Tribunal s'est réuni à 10 heures, tous les Arbitres étant présents.

L'Agent des Etats-Unis Mexicains, M^r. Pardo, continue la lecture de sa plaidoirie *écrite*, l'impression de ce document n'ayant pu être effectuée en temps utile pour être communiquée au Tribunal et à la Partie demanderesse, avant l'ouverture de la séance.

A 11½ heures, après que Mr. Pardo a terminé son plaidoyer Mr. Ralston offre au Tribunal ainsi qu'à la Partie défenderesse un exemplaire *imprimé* de la déposition faite sous serment le 26 août 1902 par Mr. John T. Doyle devant le notaire Jas. T. O'Keefe de San Francisco.

Mr. Beernaert demande s'il s'agit dans l'espèce d'un *nouveau* document. Dans ce cas il exprime le désir qu'il soit accordé à la Partie défenderesse le temps nécessaire pour examiner cette nouvelle pièce.

Le Secrétaire-Général fait observer qu'il ne s'agit nullement d'un nouveau document mais simplement d'une pièce figurant déjà au dossier et dont la Partie défenderesse a pu prendre connaissance puisqu'il a lui-même addressé le 15 septembre à Monsieur l'Agent des Etats-Unis Mexicains une lettre officielle lui faisant savoir que le dossier américain déposé au Greffe du Tribunal etait, *sans exception aucune*, mis à sa disposition.

Le Chevalier Descamps, Conseil des Etats-Unis d'Amérique, prend la parole.

A midi moins un quart, le Chevalier Descamps demande à suspendre la séance et à continuer son discours à la reprise de la séance. Avant la suspension de la séance le Secrétaire-Général donne lecture de la lettre officielle susmentionnée, qu'il a adressée le 15 septembre à Mr. l'Agent des Etats-Unis Mexicains et dont voici la teneur:

"Monsieur, J'ai l'honneur de vous faire savoir que le dossier qui a été soumis par l'Agent des Etats-Unis d'Amérique au Tribunal d'Arbitrage, constitué en vertu du traité conclu à Washington le 22 mai 1902 entre les Etats-Unis d'Amérique et les Etats-Unis Mexicains, se trouve déposé au Greffe du dit Tribunal 71 Prinsegracht, où Votre Excellence, ou bien telle autre personne qu'elle désignera à cet effet, pourra en prendre connaissance.

"J'ajouterai que tous les documents, sans exception aucune, sont compris dans ce dossier et qu'ils peuvent être examinés demain le 16 septembre ainsi que les jours suivants de 2 à 5 heures.

"Veuillez," etc., etc.

A midi la séance est suspendue jusqu'à 2½ heures.

A la reprise de la séance l'Agent des Etats-Unis Mexicains dépose sur la table du Tribunal un exemplaire du tome XI du Recueil des lois Mexicains intitulé: "Legislacion Mexicana ó Coleccion completa de las disposiciones legislativas expedidas desde la independencia de la Republica ordenada por los licenciados Manuel Dublan y Jose Maria Lozano, Edicion oficial — 1879. —

Ensuite le Chevalier Descamps continue son argumentation jusqu'à 4 heures.

A ce moment il se déclare trop fatigué pour continuer et demande à remettre la suite de sa plaidoirie à demain.

Le Tribunal s'ajourne à mardi le 30 septembre 9¾ heures du matin.

Ainsi fait à La Haye, le 29 septembre 1902.

Le Président: H. MATZEN.
L'Agent des Etats-Unis d'Amérique: JACKSON A. RALSTON.
L'Agent des Etats-Unis Mexicains: E. PARDO.
Le Secrétaire-Général: L. A. RUYSSENAERS.

PROTOCOLE IX.

Séance du mardi 30 septembre 1902.

Le Tribunal se réunit à 9¾ heures du matin, tous les Arbitres étant présents.

Le Président prononce quelques paroles pour recommander à MM. les Conseils de bien vouloir éviter, autant que possible, toute répétition qui ne serait pas absolument indispensable.

Ensuite le Chevalier Descamps, après avoir déposé sur la table du Tribunal un exemplaire d'un dictionnaire franco-espagnol intitulé: "Nuevo diccionario frances-español y español-frances con la pronunciacion figurada en ambas lenguas arreglado con presencia de los materiales reunidos para esta obra por D. Vicente Salva y constros sacados de los diccionarios antiguos y modernos mas acreditados compuesto con mejor método, mas exacto correcto y completo que todos los publicados hasta el dia por D. J. B. Guim, duodecima edicion, Paris 1889", continue son argumentation qu'il termine à 10½ heures.

Le juge Penfield, Conseil des Etats-Unis d'Amérique, prend la parole et prononce un discours qu'il termine à 12.35 heures.

Mr. Beernaert, Conseil des Etats-Unis Mexicains, adresse au Tribunal une demande tendant à le remise de la séance à demain, afin de permettre aux Conseils de la Partie défenderesse, qui n'ont pu suivre qu'imparfaitement l'argumentation *anglaise* de Mr. le juge Penfield, d'étudier à tête reposée le compte-rendu sténographique de ce discours.

Il ajoute que Mr. Delacroix et lui-même s'appliqueront à présenter leurs observations aussi brièvement que possible, afin de regagner ainsi le temps perdu par la suspension de la séance qu'ils sollicitent et il ne met pas en doute qu'il leur sera possible de finir leurs discours de duplique dans la séance de demain.

Après s'être retiré pour en délibérer, le Tribunal décide ce que suit:

En vue de la promesse formelle de la part des Conseils du Mexique de finir leur duplique demain mercredi le Tribunal s'ajourne à demain à 10 heures.

Ainsi fait à La Haye, le 30 septembre 1902.

Le Président: H. MATZEN.
L'Agent des Etats-Unis d'Amérique: JACKSON H. RALSTON.
L'Agent des Etats-Unis du Mexique: E. PARDO.
Le Secrétaire-Général: L. H. RUYSSENAERS.

PROTOCOLE X.

Séance du mercredi 1 octobre 1902.

Le Tribunal se réunit à 10 heures du matin, tous les Arbitres étant présents.

Mr. Ralston demande à Mr. Pardo s'il est en mesure de lui fournir les renseignements qu'il lui a demandés par une lettre du 28 août 1902, au sujet des versements effectués par le Gouvernement Mexicain au clergé de Californie de sommes d'argent provenant du Fonds Pieux.

L'Agent des Etats-Unis Mexicains se reserve d'y répondre cet après midi.

M^r. Delacroix, Conseil des Etats-Unis Mexicains, commence son argumentation à 10¼ heures et la termine à midi.

La séance est suspendue jusqu'à 2½ heures.

A la reprise de la séance M^r. Ralston donne lecture de deux télégrammes du Gouvernement Américain donnant les dates et les chiffres des paiements qui ont été faits dans l'affaire Weil et La Abra et des derniers versements effectués par le Gouvernement Mexicain au clergé de Californie en conséquence de la décision de la commission mixte, et il remet ensuite au Tribunal les documents suivants:

1°. Papal Bulls with relation to California bishoprics;
2°. Powers of attorney from the Bishops of Sacramento and Monterey to the Archbishop of San Francisco;
3°. Mexican call for discovery with supplemental affidavit of the Most Reverend Patrick William Riordan, Archbishop of San Francisco;
4°. Letter of the Mexican Legation at Rome to the Holy See, dated April 6, 1840, and affidavit of Most Reverend Patrick William Riordan, Archbishop of San Francisco;
5°. Map showing Indian reservations within the limits of the United States compiled under the direction of the Hon. W. A. Jones, Commissioner of Indian Affairs, 1901.

M^r. Pardo dit qu'il ne fait aucune objection contre le dépôt de ces pièces, qu'il suppose être destinées à éclairer le Tribunal, mais il n'en garantit nullement l'exactitude et il fait ses réserves à cet égard.

Il ajoute qu'il n'a pas encore reçu les informations demandées par Mr. Ralston dans sa lettre du 28 août dernier. Quant aux chiffres et dates donnés par Mr. Ralston il n'est pas à même de prononcer faute de données sur ce point.

M^r. Beernaert commence son discours à 3 heures et le termine à 4¼ heures.

Le président prononce la clôture des débats et déclare que le Tribunal délibérera sur l'affaire en litige. La sentence sera lue dans une séance publique, à laquelle les Agents et Conseils des deux Parties seront dûment appelés.

A 4½ heures la séance est levée et le Tribunal s'ajourne sine die.

Ainsi fait à La Haye, le 1 octobre 1902.

Le Président: H. MATZEN.
L'Agent des Etats-Unis d'Amérique: JACKSON H. RALSTON.
L'Agent des Etats-Unis Mexicains: E. PARDO.
Le Secrétaire-Général: L. H. RUYSSENAERS.

PROTOCOLE XI.

Séance du mardi 14 octobre 1902.

Le Tribunal s'est réuni à 4 heures de l'après-midi, à portes closes, tous les Arbitres étant présents.

Les cinq Arbitres ont signé la Sentence définitive du Tribunal en trois exemplaires, dont un sera remis à chacune des Parties, en exécution des dispositions du Traité, et dont le troisième est destiné à être

déposé dans les archives du Bureau International de la Cour permanente d'Arbitrage.

A 5 heures, la séance à portes closes a pris fin et a été immédiatement suivie d'une séance publique.

Tous les Arbitres étaient présents, ainsi que les Agents des Gouvernements des Etats-Unis d'Amérique et des Etats-Unis Mexicains.

Le Président donne la parole à M[r]. Ruyssenaers, Secrétaire-Général de la Cour Permanente d'Arbitrage pour lire la sentence arbitrale dont voici la teneur:

Le Tribunal d'Arbitrage, constitué en vertu du Traité conclu à Washington, le 22 mai 1902, entre les Etats-Unis d'Amérique et les Etats-Unis Mexicains;

Attendu que, par un compromis, rédigé sous forme de *Protocole*, entre les Etats-Unis d'Amérique et les Etats-Unis Mexicains, signé à Washington le 22 mai 1902, il a été convenu et réglé que le différend, qui a surgi entre les Etats-Unis d'Amérique et les Etats-Unis Mexicains au sujet du "*Fonds Pieux des Californies*" dont les annuités étaient réclamées par les Etats-Unis d'Amérique, au profit de l'Archevêque de San Francisco et de l'Evêque de Monterey, au Gouvernement de la République Mexicaine, serait soumis à un Tribunal d'Arbitrage, constitué sur les bases de la *Convention pour le règlement pacifique des conflits internationaux*, signée à La Haye le 29 juillet 1899, qui serait composé de la manière suivante, savoir:

Le Président des Etats-Unis d'Amérique désignerait deux Arbitres non-nationaux et le Président des Etats-Unis Mexicains également deux Arbitres non-nationaux Ce quatre Arbitres devraient se réunir le 1 septembre 1902 á La Haye afin de nommer le Surarbitre qui, en même temps, serait de droit le Président du Tribunal d'Arbitrage.

Attendu que le Président des Etats-Unis d'Amérique a nommé comme Arbitres:

Le très honorable Sir Edward Fry, Docteur en droit, autrefois siégeant à la Cour d'Appel, Membre du Conseil Privé de Sa Majesté Britannique, Membre de la Cour Permanente d'Arbitrage et

Son Excellence Monsieur de Martens, Docteur en Droit, Conseiller Privé, Membre du Conseil du Ministère Impérial des affaires Etrangères de Russie, Membre de l'Institut de France, Membre de la Cour Permanente d'Arbitrage;

Attendu que le Président des Etats-Unis Mexicains a nommé comme Arbitres:

Monsieur T. M. C. Asser, Docteur en Droit, Membre du Conseil d'Etat des Pays-Bas, ancien Professeur à l'Université d'Amsterdam, Membre de la Cour Permanente d'Arbitrage et

Monsieur le Jonkheer A. F. de Savornin Lohman, Docteur en Droit, ancien Ministre de l'Intérieur des Pays-Bas, ancien Professeur à l'Université libre d'Amsterdam, Membre de la Seconde Chambre des Etats-Généraux, Membre de la Cour Permanente d'Arbitrage;

Lesquels Arbitres, dans leur réunion du 1 septembre 1902, ont élu, conformément aux Articles XXXII—XXXIV de la Convention de La Haye du 29 Juillet 1899, comme Surarbitre, et Président de droit du Tribunal d'Arbitrage:

Monsieur Henning Matzen, Docteur en Droit, Professeur à l'Université de Copenhague, Conseiller extraordinaire à la Cour Suprême, Président du Landsthing, Membre de la Cour Permanente d'Arbitrage.

Et attendu, qu'en vertu du Protocole de Washington du 22 mai 1902, les susnommés Arbitres, réunis en Tribunal d'Arbitrage, devraient décider.

1°. Si la dite réclamation des Etats-Unis d'Amérique au profit de l'Archevêque de San Francisco et de l'Evêque de Monterey est régie par le principe de la *res judicata*, en vertu de la sentence arbitrale du 11 novembre 1875, prononcée par Sir Edward Thornton, en qualité de Surarbitre;

2°. Si *non*, si la dite réclamation est juste, avec pouvoir de rendre tel jugement qui leur semblera juste et équitable;

Attendu que les susnommés Arbitres, ayant examiné avec impartialité et soin tous les documents et actes, présentés au Tribunal d'Arbitrage par les Agents des Etats-Unis d'Amérique et des Etats Unis Mexicains, et ayant entendu avec la plus grande attentiou les plaidoiries orales, présentées devant le Tribunal par les Agents et les Conseils des deux Parties en litige;

Considérant que le litige, soumis à la décision du Tribunal d'Arbitrage, consiste dans un conflit entre les Etats-Unis d'Amérique et les Etats-Unis Mexicains qui ne saurait être règlé que sur la base des traités internationaux et des principes du droit international;

Considérant que les Traités internationaux, conclus depuis l'année 1848 jusqu'au compromis du 22 mai 1902, entre les deux Puissances en litige, constatent le caractère éminemment international de ce conflit;

Considérant que toutes les parties d'un jugement ou d'un arrêt concernant les points débattus au litige s'éclairent et ce complètent mutuellement et qu'elles servent toutes à préciser le sens et la portée du dispositif, à déterminer les points sur lesquels il y a chose jugée et qui partant ne peuvent être remis en question;

Considérant que cette règle ne s'applique pas seulement aux jugements des tribunaux institués par l'Etat, mais également aux sentences arbitrales, rendues dans les limites de la compétence fixées par le compromis;

Considérant que ce même principe doit à plus forte raison, être appliqué aux arbitrages internationaux;

Considérant que la Convention du 4 juillet 1868, conclue entre les deux Etats en litige, avait accordé aux Commissions Mixtes, nommées par ces Etats, ainsi qu'au Surarbitre à désigner éventuellement, le droit de statuer sur leur propre compétence;

Considérant que dans le litige, soumis à la décision du Tribunal d'Arbitrage, en vertu du compromis du 22 mai 1902, il y a, non seulement identité des parties en litige, mais également identité de la matière, jugée par la sentence arbitrale de Sir Edward Thornton comme Surarbitre en 1875 et amendée par lui le 24 octobre 1876;

Considérant que le Gouvernement des Etats-Unis Mexicains a consciencieusement exécuté la sentence arbitrale de 1875 et 1876, en payant les annuités adjugées par le Surarbitre;

Considérant que, depuis 1869, trente-trois annuités n'ont pas été payées par le Gouvernement des Etats-Unis Mexicains au Gouvernement des Etats-Unis d'Amérique et que les règles de la prescription, étant exclusivement du domaine du droit civil, ne sauraient être appliquées au présent conflit entre les deux Etats en litige;

Considérant, en ce qui concerne la monnaie, dans laquelle le paiement de la rente annuelle doit avoir lieu, que le dollar d'argent, ayant cours légal au Mexique, le paiement en or ne peut être exigé qu'en vertu d'une stipulation expresse;

Que, dans l'espèce, telle stipulation n'existant pas, la Partie défenderesse a le droit de se libérer en argent;

Que, par rapport à ce point, la sentence de Sir Edward Thornton n'a pas autrement force de chose jugée que pour les vingt et une annuités à l'égard desquelles le surarbitre a décidé que le paiement devait avoir lieu en dollars d'or Mexicains, puisque la question du mode de paiement ne concerne pas le fond du droit en litige mais seulement l'exécution de la sentence;

Considérant, que d'aprés l'Article X du Protocole de Washington du 22 mai 1902, le présent Tribunal d'Arbitrage aura à statuer, en cas de condamnation de la République du Mexique, dans quelle monnaie le paiement devra avoir lieu;

Par ces motifs le Tribunals d'Arbitrage décide et prononce à l'unanimité ce qui suit:

1°. Que la dite réclamation des Etats-Unis d'Amérique au profit de l'Archevêque de San Francisco et de l'Evêque de Monterey est régie par le principe de la *res judicata*, en vertu de la sentence arbitrale de Sir Edward Thornton du 11 novembre 1875 amendée par lui le 24 octobre 1876;

2°. Que, conformént à cette sentence arbitrale, le Gouvernement de la République des Etats-Unis Mexicains devra payer au Gouvernement des Etats-Unis d'Amérique la somme *d'un million quatre cent vingt mille six cent quatre-vingt-deux Dollars du Mexique et soixante-sept cents* (1,420,682$\frac{67}{100}$ *Dollars du Mexique*) en monnaie ayant cours légal au Mexique, dans le délai fixé par l'Article X du Protocole de Washington du 22 mai 1902.

Cette somme d'un million quatre cent vingt mille six cent quatre vingt deux Dollars et soixante sept cents (1,420,682$\frac{67}{100}$ Dollars) constituera le versement total des annuités échues et non payées par le Gouvernement de la République Mexicaine, savoir de la rente annuele de *quarante trois mille cinquante Dollars du Mexique et quatre-vingt-dix-neuf cents* (43,050$\frac{99}{100}$ Dollars du Mexique) depuis le 2 février 1869 jusqu'au 2 février 1902;

3°. Le Gouvernement de la République des Etats-Unis Mexicains paiera au Gouvernement des Etats-Unis d'Amérique le 2 février 1903, et chaque année suivante à cette même date du février, à perpétuité, la rente annuelle de *quarante trois mille cinquante Dollars du Mexique et quatre-vingt-dix-neuf cents* (43,050$\frac{99}{100}$ Dollars du Mexique) en monnaie ayant cours légal au Mexique.

Fait à La Haye, dans l'Hôtel de la Cour Permanente d'Arbitrage, en triple original, le 14 octobre 1902.

HENNING MATZEN.
EDW. FRY.
MARTENS.
T. M. C. ASSER.
A. F. DE SAVORNIN LOHMAN.

Le Président prononce ensuite l'allocution suivante:

Messieurs, le Tribunal d'Arbitrage a tenu sa première séance le 15 septembre, et la clôture des débats a été prononcée le 1er octobre; aujourd'hui, 14 octobre, nous avons rendu la sentence que M. le Secrétaire-Général vient de lire, et dont un exemplaire sera donné à chaque Agent des Puissances en litige, en exécution des dispositions du Traité, et dont le troisième est destiné à être déposé dans les archives du Bureau International de la Cour Permanente d'Arbitrage.

Le Tribunal d'Arbitrage est donc arrivé à la fin de sa tâche, à moins que les parties, usant de la faculté que leur donne l'article 13 du protocole de Washington, conformément à l'article 55 de la Convention de La Haye, demandent la revision de la sentence arbitral. Cette revision ne peut être motivée que par la découverte d'un fait nouveau qui eût été de nature à exercer une influence décisive sur la sentence et qui lors de la clôture des débats était inconnu du Tribunal lui-même et de la partie qui demande la révision. La procédure de révision ne peut être ouverte que par une décision du Tribunal constatant expressément l'existence du fait nouveau, lui reconnaissant le caractère prévu par le paragraphe précédent et déclarant à ce titre la demande recevable. Mais dès maintenant, et jusqu'à ce qu'une telle demande soit adressée au Tribunal et déclarée recevable, les Hautes Parties ont cessé d'être en litige et la mission qui lui a été confiée est regardée comme remplie.

Je tiens, Messieurs, à vous adresser encore quelques mots.

S'il n'est donné à aucun Tribunal humain de savoir ses sentences infaillibles, nous emporterons du moins d'ici la ferme conviction d'avoir recherché la vérité de toutes nos forces, consciencieusement et impartialement; et il me sera permis d'ajouter que l'unanimité avec laquelle tous les Membres du Tribunal appartenant à différents pays réunis ici à La Haye sont arrivés, chacun pour soi et tous ensemble, aux mêmes conclusions, me semble constituer une garantie de plus que dans notre recherché empressée de la vérité nous n'avons pas fait fausse route.

En repassant par mémoire le cours de nos travaux, c'est à Messieurs les Agents, les intermédiaires entre les Parties et le Tribunal, que celui-ci doit en premier lieu ses remerciements sincères. Messieurs, marquées au sceau de votre haute distinction, les relations avec le Tribunal, établies et maintenues par vous, ont été des plus excellentes et des plus cordiales du premier jusqu'au dernier jour.

Nous remercions aussi chaleureusement Messieurs les Conseils des deux Parties, qui nous ont secondés et que ont revêtu les débats des formes les plus courtoises et d'une bonne grâce incessante.

Une parfaite urbanité dans les rapports mutuels a rendu la tâche du Président aussi facile qu'agréable. Lors de notre première réunion j'ai dit que les Conseils établiraient des bases pour les délibérations du Tribunal; ils ont réalisé et bien au-delà cette prédiction, ils ont guidé le Tribunal en faisant jaillir sur tous les points en litige la lumière de leur haute érudition et du travail le plus approfondi.

Nous vous remercions, Monsieur le Secrétaire-Général, dont l'infatigable assistance nous a prêté un précieux appui, ainsi que Messieurs les Secrétaires pour le soin avec lequel ils se sont acquittés de leur tâche.

Le tribut de notre reconnaissance est dû aussi aux Membres du Conseil Administratif de la Cour Permanente, qui ont mis à notre disposition le confort et l'élégance des belles salles dans lesquelles nous avons tenu nos réunions.

Sous l'impression de l'accueil si hospitalier qui lui a été fait dans ce pays si riche en souvenirs de grands faits et de bienfaits dans l'histoire du Droit et de l'Humanité, le Tribunal, siégeant sous les auspices de Sa Majesté la Reine des Pays-Bas, dépose aux pieds de la Gracieuse Souveraine l'hommage respectueux de sa profonde gratitude, et ses meilleurs vœux pour son bonheur et pour la prospérité de son Peuple.

M^r. RALSTON, Agent des Etats-Unis d'Amérique demande la parole et s'exprime en ces termes:

M^r. President and honorable arbitrators: Now that the hour of adjournment approaches, it seems fitting that some acknowledgment should be made on the part of the United States and their representatives for courtesies extended, as well as for those expressed in the speech just concluded.

We came strangers, and have met with only the most friendly treatment from all. To you, Mr. President, and to all other members of the Court, we owe most hearty thanks for the kind and patient hearing constantly afforded us. You have recognized the fact that satisfaction to all litigants, whether successful or rejected, was only to be given when all could feel that their arguments, sound or otherwise, concise or repeated, had received all possible attention.

My duty at this point would be incomplete were I to overlook acknowledgment of the unfailing courtesy and friendliness to the parties litigant displayed by the officers of the Court. Without their constant assistance, our proceedings must have been much less rapid and effective.

I desire to recognize the good faith and good temper at all times displayed by our friends upon the other side of this dispute. While they have ever loyally and ably maintained the cause of Mexico and energetically sought to further her interests, never have any difficulties of a personal character or controversies calculated to leave unpleasant memories arisen between us. I also join with you, Mr. President, in expressing the thanks of my country to the Permanent Administrative Council for providing us with such pleasant quarters in which to meet and adjust our difficulties.

We exchange the compliments appropriate to the time and circumstances, yet were there nothing more to be said, our words might well be counted as "sounding brass and tinkling cymbal," and our meeting here as having only ephemeral value.

There has just been determined at The Hague a controversy over money,—a thing which we are told has been "slave to thousands," and the love of which is described as "the root of all evil." If a judgment now meant nothing more than the transfer or non-transfer of money from one party or the other, however interesting this might be to those concerned, the world at large could look on with indifference.

We believe, however, that a first step has been taken that will count largely for the good of future generations; that following this primal recognition of the existence of a Court competent to settle disputes between nations, will come general reference to it, not alone of differences similar to the present, but of other controversies involving larger questions of individual rights and national privileges. We may hope that precisely as questions formerly believed to involve individual honor have in many countries entirely ceased and in others are ceasing to be settled by formal exercise of force, the same revolution may gradually be effected in the affairs of nations. The Permanent Court of Arbitration, assisting this end, must tend to bring about that "peace on earth, good will toward men," for which Christians hope.

Mr. President and Honorable Arbitrators, for good or for ill our task is accomplished. While we may be pardoned for indulging in the expression of hope that, irrespective of the immediate effect of

your decision, good is to be anticipated from the labors of all of us, yet whatever the future holds, we must accept it. We have all done, according to our several lights and abilities, the best we knew, and quietly and philosophically, without exultation or depression, we accept the results.

I may therefore recall to you in closing the promise of the old "Niebelungen Lied":

> "Wilt thou do the deed and regret it?
> Thou hadst better never been born.
> Wilt thou do the deed and proclaim it?
> Then thy fame shall be outworn.
> Thou shalt do the deed and abide it,
> And from thy throne on high,
> Look on to-day and to-morrow as those that never die."

Mr. Pardo Agent des Etats-Unis Mexicains prononce ensuite les paroles suivantes:

Messieurs: Quand j'ai eu l'honneur d'adresser la parole pour la première fois à la Cour, le jour où elle s'est installée, j'ai commencé par exprimer au nom de mon Gouvernement sa détermination de se soumettre fidèlement et loyalement à la décision de cette Cour. Je suis absolument sûr que lorsque mon Gouvernement connaîtra le jugement que la Cour vient de rendre il l'acceptera comme l'expression du jugement et de la sagesse de cinq jurisconsultes distingués, de cinq honnêtes hommes. Mais naturellement je dois réserver à mon Gouvernement le droit de faire valoir tous les recours que le protocole du 22 mai dernier accorde au Parties.

Je ne veux pas abuser de la patience ni de l'attention du Tribunal. Je réitère la manifestation de gratitude que j'ai faite le jour de l'installation de la Cour pour le bon vouloir avec lequel Messieurs les Arbitres ont eu la bonté d'assumer une tâche lourde et pénible qui a été remplie avec une si grande bonne volonté et avec un esprit d'impartialité que je me plais à reconnaître.

Je profite de cette occasion pour adhérer de tout mon coeur à la manifestation qui vient d'être faite par M. l'Agent des Etats-Unis et aux remerciements qu'il a adressés aux Membres du Conseil administratif de la Cour Permanente d'Arbitrage pour leur bienveillante hospitalité. Il ne me reste plus qu'a vous dire encore une fois merci pour votre travail, pour votre bon vouloir, pour votre sagesse et pour votre impartialité.

Le Président remercie Messieurs les Agents de leurs paroles courtoises et annonce que le Tribunal a terminé ses traveaux.

La séance est levée à 5½ heures.

Fait à La Haye, le 14 octobre 1902.

Le Président: H. Matzen.
L'Agent des Etats-Unis d'Amérique: Jackson H. Ralston.
L'Agent des Etats-Unis Mexicains: E. Pardo.
Le Secrétaire-Général: L. H. Ruyssenaers.

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