HAS THE UNITED STATES REPUDIATED INTERNATIONAL ARBITRATION? A REPLY.

BY F. D. MCKENNEY.

UNDER the terms of a protocol agreed upon and signed early in 1903, between the United States of America and the Republic of Venezuela, the claim of the Orinoco Steamship Company, an American corporation wholly owned by American stockholders, for the reparation of damages suffered by it as the result of specified wrongful acts and defaults on the part of the Venezuelan Government, was submitted for adjudication to an international arbitration commission which met and sat in Caracas. That commission consisted of two members—one appointed by the President of the United States, the other by the President of Venezuela, and an umpire named by the Queen of the Netherlands.

The protocol declared that "all claims *owned* by citizens of the United States of America against the Republic of Venezuela" which should be presented to the commission by the Department of State of the United States should be examined and decided by it, and required the commissioners and the umpire "before assuming the functions of their office" to "take solemn oath carefully to examine and impartially decide, *according to justice and the provisions of this convention,* all claims submitted to them." The particular provisions of the protocol or "convention" pertinent to this discussion are as follows:

> "The commissioners, or in case of their disagreement, the umpire, shall decide all claims upon a basis of absolute equity, without regard to objections of a technical nature, or of the provisions of local legislation.
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> "The decisions of the commission, and, in the event of their disagreement, those of the umpire, shall be final and conclusive."

The claim of the Orinoco Steamship Company, as presented

to the commission by the Department of State, contained four items, of which the first, and perhaps the most important, was a claim for damages for the breach by the Venezuelan Government of a contract or concession in favor of the claimant's assignor for the exclusive right to navigate the Macareo and Pedernales channels of the Orinoco River with vessels engaged in foreign trade, plying between Trinidad and certain Venezuelan ports.

The second item was for the sum of 100,000 bolivars, about $20,000, admitted by an account stated and agreed upon between the authorized representatives of the Venezuelan Government and the claimant's assignor to be due from the former to the latter.

The third item covered various claims for damages inflicted upon and losses sustained by the claimant and its assignor by reason of the seizure, detention and use of certain vessels belonging to them, and for amounts due for services rendered by the claimant and its assignor to the Venezuelan Government on the latter's request, as evidenced by formal vouchers or receipts.

The fourth item consisted of a claim for counsel fees and expenses incurred by the steamship company in its various attempts to collect the amounts alleged to be due to it from Venezuela.

The whole of the first and second items, and the greater part of the third, arose prior to April 1st, 1902, during the corporate existence of claimant's assignor, the Orinoco Shipping and Trading Company, Limited, these items of demand having been assigned by that company on that date—together with its fleet of steamships and all its corporate franchises and assets, including lands, depots and stores both in Venezuela and elsewhere—to the Orinoco Steamship Company.

The Orinoco Shipping and Trading Company, Limited, which had been in existence for a number of years prior to 1902, was an English registered company; but ninety-nine per cent. of its capital shares were owned absolutely by the native-born American citizens who subsequently incorporated and organized, and still own, the entire capital stock of the Orinoco Steamship Company.

The interest of these American citizens in the Orinoco Shipping and Trading Company, Limited, and in the claims of that corporation against Venezuela had been made known officially to the Department of State of the United States early in the year 1899, and the incorporation of the Orinoco Steamship Company by such American citizens and the transfer to it of

all the assets of the English company, including said claims, were made known to said department as they occurred.

For some time prior to February 17th, 1903, the date of the protocol under consideration, these assigned claims had been the subject of diplomatic communication between the United States and the Government of Venezuela; and the existence of these assigned claims and the interest of the American company in them was well known to the representatives of both contracting Powers at the time of the execution and exchange of said protocol. It was for the accommodation and protection of these assigned claims and to secure an adjudication of them on their merits that the form of expression ordinarily used in such protocols in defining the matters to be arbitrated was abandoned, and the unusual phrase, "all claims *owned* by citizens of the United States of America against the Republic of Venezuela" was adopted in its stead.

That the Orinoco Steamship Company was a citizen of the United States within the intent of the protocol, and that it "owned," by virtue of a valid assignment, the claims against the Government of Venezuela now under consideration has never been denied nor disputed, and such was found to be the fact by the umpire, Dr. Harry Barge, who also solemnly found and declared that the commission over whose deliberations he was appointed to preside, and he as its umpire, had full jurisdiction under the express terms of said protocol to investigate and decide upon their respective merits each and every one of said claims. The commissioners of the contracting Powers disagreed with respect to the liability of Venezuela in the premises; and the decision of the claims was remitted to the umpire.

Notwithstanding all of the above, and notwithstanding the requirement of the solemn oath which he had taken, at the moment of qualifying as umpire, to examine and decide all claims submitted to him "according to justice and the provisions of this convention," Dr. Barge disallowed the first and second items *in toto* and the third in its greater part, because, primarily, as he states in his review of the case, the assignment by the Orinoco Shipping and Trading Company, Limited, of its valuable rights in the navigation of the Orinoco River and of its claims against Venezuela had been made without first notifying that country of its intention to make such transfer, and, secondarily, because

under a certain article of the concession of navigation the *concessionaire* had, in his view, pledged itself to submit all disputes and controversies which might arise out of it to the local tribunals of Venezuela for their decision.

Referring particularly to the cash item of 100,000 bolivars—which, by a written agreement made on May 10th, 1900, between Felix Quintero, Minister of the Interior, and R. Morgan Olcott, acting on behalf of the Orinoco Shipping and Trading Company, the Venezuelan Government bound itself to pay—the learned umpire declared that, under a certain provision of the code of law of Venezuela, the transfer of such a debt "gives no right against the debtor when it was not notified to or accepted by the debtor," and this provision he also held to be applicable to that portion of the third item, some $49,978.76 in amount, which was alleged to have accrued due prior to April 1st, 1902, the date of the assignment to the American company.

In this connection the judgment of the umpire reads as follows:

"Whereas . . . the transfer of the credits of the Orinoco Shipping and Trading Company, Limited, to claimant took place on the first of April of this same year [1902], it is clear from what heretofore was said about the transfer of these credits that all items of this claim based on obligations originated before said April 1st, 1902, and claimed by claimant as indebtedness to the company and transferred to claimant on said April 1st, have to be disallowed, as the transfer was never notified to or accepted by the Venezuelan Government."

The fourth item of the claim, being that for counsel fees, was disallowed because "the necessity to incur those fees and further expenses in consequence of an unlawful act or culpable negligence of the Venezuelan Government is not proved."

The sum of $28,224.93, which was a part of the third item and which was the sum awarded by the umpire to the claimant, was identical in character of origin and was supported by the same class of proof as was that portion of the same item which was rejected, but it was distinguished by the umpire from the latter because it had accrued due subsequent to the date of the assignment from the elder company to the claimant.

Does it not plainly appear that the respected umpire, in refusing to consider and decide the first three items upon their merits and on the evidence "furnished by or on behalf of" the United States, and in rejecting them all because the transfer from one company to the other, which transfer affected each one

of them, had not been previously "notified to or accepted by the Venezuelan Government" as required by the Venezuelan code of law, violated the express command of the protocol whose terms he was appointed to administer, and also violated the express requirement of his oath of office which obligated him to decide all matters in dispute in accord with the provisions of that "convention"? The failure or refusal of the umpire to determine the three items in accord with the express requirements of the protocol, "without regard to objections of a technical nature," and without reference to "the provisions of local legislation," has left them undetermined in fact, and has permitted them to remain and continue to be a source of international concern, as they were prior to the execution of the protocol under which it was the undoubted intention of both Governments that they should be examined and finally decided. Their merits not having been examined, and the items themselves having been rejected by the umpire solely upon technical grounds, or out of regard for the provisions of local legislation, how can it reasonably be said that the claim of the Orinoco Steamship Company has in fact been examined and decided by an international commission under an international agreement?

But it has been suggested that, by the terms of the protocol in question, it was agreed by the contracting Governments that the decisions of the commission, or of the umpire in case of their disagreement, should "be final and conclusive"; and it is further suggested that the insistence by the United States that the decision in the present case shall be revised and the case itself resubmitted to further examination amounts to a repudiation of established principles of international arbitration. This suggestion is without foundation in fact or support in law.

Theoretically, every decision of an arbitrator, whether he be an international umpire or a local arbitrator, is final and conclusive. The expression of such intent in the body of a protocol providing for international arbitration adds nothing to the commonly accepted logic of such a submission. Even though not so expressly declared, the decisions of an arbitrator, freely chosen by the contending parties to judge their differences, is commonly to be accepted as final and conclusive. But this theory of utter finality has, since the birth of the principle of arbitration itself, ever been subject to exceptions which, through the passing cen-

turies, have become definitely defined and precisely expressed in the decisions of tribunals of great weight and in the writings of publicists of undoubted authority. For instance, the writer of the very article which affords excuse for this reply* admits that, in cases involving fraud on the part of the arbitrators, the decision of an arbitral tribunal, even though international in character, may be disregarded; but he suggests that, "unless fraud is alleged, the United States should set the example of abiding by the decision of international arbitration as at present constituted, no matter how crude the system." What is meant or was intended to be meant by the expression, "International arbitration as at present constituted"? Did its author mean to suggest by its use that the United States, while maintaining its place in the very forefront of all the nations which proclaim the virtues and value of International Arbitration, should disregard the settled principles and well-defined limitations upon which the entire structure of such arbitrations is bottomed? It must be assumed that such was not his intention, for, in the absence of at least a few reasonably well-defined rules or principles commonly accepted, and by which all arbitrations, municipal as well as international, must be governed, arbitration itself as a principle of governmental action probably could not long exist.

It being conceded that fraud will vitiate the decision of an arbitral tribunal of international character, and it thus appearing that such decisions are not absolutely inviolable, may it not well be that other grounds exist upon which the refusal of a party or a nation to lend adherence to such decisions in particular cases may be reasonably defended?

As was the case in the present instance between the United States and Venezuela, it is customary for the parties to arbitral conventions to agree upon articles of submission, and to define the powers of the arbitrators and the limitations of their authority, and sometimes to prescribe rules of procedure. If an arbitrator sworn to uphold and administer such articles of submission should incontinently or otherwise disregard their terms or exceed the powers conferred upon him thereby, is it to be said that the parties to the submission are nevertheless to stand bound by his award?

* "Has the United States Repudiated International Arbitration?" By Philip Walter Henry. NORTH AMERICAN REVIEW, December, 1907.

As already said, it is a well-settled principle that the judgments of arbitral tribunals, speaking generally, are to be accepted as final and conclusive; that the vital principle of arbitration is wanting where the high contracting parties, or either of them, openly or covertly reserve to themselves the right to dissent from the final decree of the arbitrators. But it is equally well settled that such judgments may be disregarded, and that, too, with honor, (1) when the arbitrators have exceeded the powers conferred upon them by the articles of submission; (2) when the terms of the articles of submission have been disregarded or evaded; (3) when the award is equivocal or uncertain; (4) when the award was obtained by fraud or corruption; and (5) when the award is contrary to accepted principles of international law or amounts to a flagrant denial of justice.*

Volkerrecht does not hesitate to declare that

"If, however, the arbitrators, by pronouncing a sentence evidently unjust and unreasonable, should forfeit the character with which they are invested, their judgment would deserve no attention."

Calvo, the *vade mecum* of every Latin-American and Spanish-speaking Power, great or small, declares that international awards may ever be "disregarded" where the arbitrators have proceeded without authority, or when any member of the tribunal is legally or morally incapacitated, or where there has been bad faith or corruption on the part of such members, or *where the terms under which the question was submitted to the tribunal have been disregarded,* or where the decision is absolutely contrary to right and justice. Hall, an English-speaking writer of world-wide reputation, sums up the matter as follows:

"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."

It is also a well-recognized principle of national intercourse, repeatedly exemplified in the practice of the United States, and of which Venezuela herself has not been slow to claim the benefit, that no sovereign can in honor press or insist upon the recognition of an unjust or mistaken award, even though made by an inter-

* Vattel, Book II, ch. 18, par. 329; Heffter, par. 109; Phillimore 111, par. 3; Calvo, pars. 1512–1532; Hall, par. 119.

national tribunal invested with the power of swearing witnesses and of receiving or rejecting testimony.

The Republic of Venezuela has repeatedly exercised the right to protest against, and repudiate for cause, sentences of arbitral tribunals, and in the report of the Venezuelan Minister of Foreign Affairs to the National Congress of 1904 her attitude in such regard is stated as follows:

"The fact that Venezuela subscribed to the agreements to which I have referred [the protocols of 1903], and that by virtue of said agreements the Mixed Commissions entered upon an examination of the claims of foreign subjects, did not impose upon the Government the duty of indiscriminately accepting the sentences they might render. In such cases, the very faith that is to be placed in treaties, as well as the importan of arbitration in the solution of international litigations, make it incumbent upon the Governments availing themselves of it to become zealous guardians of the procedure of the persons to whom they confide such a high mission as that of settling their disagreements. The presumption that the arbiters must discharge their functions in a proper manner may at times be unfounded, and then the sentences ought not to deserve the respect nor do they have the authority which the protocol gives them. The character of a final decision cannot always be conceded to arbitral decisions merely because they proceed from the persons appointed to constitute an arbitration commission, for if the treaty attributes such a character to them beforehand, it is only in the belief that such decisions would not be vitiated in any manner that could render them ineffectual.

"The cause of arbitration would suffer severe injury if the principle should come to be accepted that all arbitral decisions must be carried out, whatever they may be. Publicists have already declared unanimously in favor of the right that Governments have to seek the invalidation of certain sentences, and well known are the causes that, in their opinion, may lead to that recourse."

President Castro himself, in his annual message to the same National Congress of 1904, as appears from the translation made thereof by Pedro Rafael Rincones, then consul-general of Venezuela at New York, which translation was largely circulated in this country, declared the view of his Government as well as of himself concerning national rights and duties in such circumstances in the following words:

"Of the awards made by the Mixed Commissions, it was necessary and obligatory for us to protest against the one relating to the claim made by the general company of the Caracas water-works. That award being in flagrant contradiction to the provisions of the protocol and the principles of equity, the Republic could not admit it, as its recognition

would have implied the abdication of its right and the discredit of the arbitration; since, if similar decisions were to be accepted, being in themelves null, the high ends which are sought by the institution of arbitration for the furtherance of harmony and justice would be turned to ridicule, as would also the trust and confidence which should be deserved by the judges. We had also to make a like protest against the sentence delivered by the respective umpires on appeal made from the Venezuelan-Mexican Commission. That sentence, which can only be qualified as absurd, occasioned surprise to everybody, and gave rise to an unpleasant situation for a diplomat who had until then been appreciated amongst us."

The fact that, upon reflection, President Castro and his advisers concluded that the protests so made by their Government were not well founded, and could not be sustained, and therefore caused them to be withdrawn, does not detract one whit from the principles of action which he and his Minister of Foreign Affairs so forcibly and with such good reason proclaimed.

If "international arbitration as at present constituted" is at all amenable to the rules and principles of international law above set forth—and who can reasonably doubt that it is?—what one, having regard for his own reputation, will venture to deny that upon all the facts and circumstances of the Orinoco Steamship Company's case the United States is not only acting in strict right, but also in full accord with equity and good conscience in disregarding the award of the umpire and in insisting that the claims of that company, which include among them at least one item of considerable amount which Venezuela herself had diplomatically admitted that she owed, shall be submitted to further arbitration before a competent and impartial tribunal?

It is true that our Government in this instance "has refused to abide by the decision of an international arbitrator, and has practically gone to the point of ultimatums to force a reopening," and it is asked, "Would such a course have been pursued against a stronger nation, and is our State Department justified in such action?"

It is our pleasure to be able to reply to this inquiry in the affirmative, and historical precedent in confirmation of such reply is easily at hand.

In 1827, when the general disparity in wealth and power between the United States and Great Britain was not totally dissimilar to that now existing between the United States and Vene-

zuela, it was agreed between the two first-mentioned Powers to submit to the determination of an arbitrator the pending question as to the true divisional line between the United States and the adjacent British possessions on the north, and a convention to that end was agreed upon and executed. The King of the Netherlands was chosen as arbitrator, and in his award, given at The Hague in 1831, he held that neither of the lines claimed by the contending Powers under the treaty of peace of 1782-83 sufficiently answered the calls of that treaty to require preference to be given to one Power over the other, and so, abandoning as impractical the attempt to draw the line described in the treaty, he recommended in his award a line of convenience. The agent of the United States protested the award on the ground that it was not in accord with the powers conferred upon the arbitrator by the contracting parties. The British Government signified its readiness to acquiesce in the recommendation of the arbitrator. President Jackson declined to do so, and subsequently submitted the question of acceptance or rejection to the Senate, which, by a vote of 35 to 8, resolved that the award was not obligatory, and "advised" the President to open a new negotiation with Great Britain for the exact ascertainment of the line. The matter was finally settled by the Webster-Ashburton treaty of 1842.

Other precedents to like effect are not lacking, but want of space forbids their citation.

The single instance referred to, however, would seem to be a sufficient refutation of the unpatriotic suggestion that in the case of Venezuela or any other minor power the United States has used or would be likely to use measures to which it would not resort in the case of a more powerful opponent.

As neither the United States nor Great Britain in that case found any insuperable difficulty or objection in the way of disregarding the arbitral decision of the King of the Netherlands, it would seem that in the case of the Orinoco Steamship Company the Government of Venezuela with even less difficulty and certainly with no greater loss of prestige might agree to disregard the palpably unjust decision of an umpire who is a mere subject of that country.

FREDERIC D. MCKENNEY.

THE DECLINE AND FALL OF WAGNER.

BY REGINALD DE KOVEN.

PROGRESS and development; these are the watchwords of Art!

Progress, in its resistless march along the road of the inexorable law of the survival of the fittest, looms up dominant and overpowering; a very iconoclast to overthrow movements, shatter ideals, destroy theories, overturn idols from their pedestals, to rob many a laureate of his wreath, and snatch the mantle of fame from many a hero. And all this the world must face and endure as best it may; for without progress and development Art would lose vitality, that power of expansion and recrudescence which is the cardinal essential of its being.

To avoid a misapprehension which might deem the statement made in the caption of this article subversive, incendiary and even impertinent, a very *lèse-majesté,* as it were, to a monarch of Art, its intent and purpose should be defined and made clear *ab initio.* To Wagner the tone poet, Wagner the maker of a new musical epoch, Wagner the emotional philosopher who, like a Napoleon, has changed the map of the musical world and impressed his commanding genius and individuality on his art in ineradicable fashion that will endure as long as the Art itself, I do not refer. It is with Wagner the stage craftsman, Wagner the dramatist, Wagner the high priest and prophet of a new order of things operatic, the inventor of a new Art form, and the certain decline and probable fall of his works in popular estimation from this standpoint, that this article has to do.

And, first, as to the fact; and the indications pointing to a probable, or even possible, decline and fall of the works of a Master who, for years and until recently, has absorbed and held the practically undivided attention of the musical world.

During the season now drawing to a close, a condition of affairs operatic wholly without precedent in musical annals has