

**ARGUMENT FOR CLAIMENTS IN
THE CASE OF THE U.S. AND
PARAGUAY NAVIGATION CO.
VS. THE REPUBLIC OF PARAGUAY**

Published @ 2017 Trieste Publishing Pty Ltd

ISBN 9780649309283

Argument for Claimants in the Case of the U.S. and Paraguay Navigation Co. vs. The Republic of Paraguay by John Appleton & C. S. Bradley

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Cover @ 2017

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* ARGUMENT FOR CLAIMANTS

1866

IN THE CASE OF THE

U. S. and Paraguay Navigation Co.

VS.

THE REPUBLIC OF PARAGUAY,

SUBMITTED TO

Commissioners Hon. Cave Johnston, for the U. S., and Senor Jose Berges, for Paraguay,

BY

JOHN APPLETON AND C. S. BRADLEY,
COUNSEL FOR CLAIMANTS.



WASHINGTON:
M'GILL & WITHEROW, PRINTERS
1860.

ARGUMENT.

This is a case of wrong and injury done by the government of Paraguay to citizens of the United States. It is only in cases of wrong that this government will interpose. In other cases its good offices are sometimes employed, but it never makes a demand, or employs force, unless a wrong has been done. This is its settled policy.

In this case, the wrong is beyond question. It appears from the memorials of the company, from the recorded judgments of the Department of State under two administrations, from the messages of the President, from the solemn action of both branches of Congress, and from the treaty itself, which assumes the wrong, and constitutes a commission to assess the damages.

It is a peculiarity of this commission that it is formed with reference to a single case and for a single purpose. Ordinarily, a claims commission is authorized to consider and determine all such claims of a certain character as may have been presented within a given time. In such cases, the treaty assumes only certain general facts, such as the previous existence of a war, the appropriation of a sum of money, or some general principle of liability. Neither of these assumptions would be inquired into by a commission. In this case, the whole subject matter of the negotiation which led to the treaty, having been a single claim, it was easy to make the convention definite, and to confine the duties of the commission to a single point. This has been done. The treaty assumes the wrong committed and the liability of Paraguay, and only authorizes the commissioners to assess the amount of damages. It is a simple question of, how much?

If there was any ambiguity in the convention on this point, it could not fail to be removed by a reference to the proceedings which led to the convention.

The first application of the company to their government was dated January 15, 1855, and requested that "such measures may be taken as to me [the President] may seem meet and proper,

to demand of the government of Paraguay and enforce the payment, as indemnity for our losses and the destruction of our business in that country, the sum of \$935,000."

The statement of Mr. Gallup (see his letter to Mr. Bradley, of July 8, 1855) shows that Mr. Marcy, the Secretary of State, "although at first somewhat prejudiced against it, [the claim,] at the last interview I had with him, expressed himself satisfied that a great outrage had been committed upon our citizens by the President of the Republic of Paraguay, and that he should make a demand upon his government for indemnity."

The records of the department show that this assurance was complied with. On the 18th of July, 1856, Mr. Marcy writes to Mr. Peden, American Minister at Buenos Ayres, as follows:

"A company of American citizens, called the 'United States and Paraguay Navigation Company,' was established in the manufacturing business within the territory of Paraguay, with the full consent of the government of that country. A misunderstanding unfortunately arose between that government and the U. S. consul, Mr. Hopkins, who was the agent of the company. The authorities of Paraguay not only broke up the company, but seized its property. The conduct of Paraguay appears to have been not only unjust and oppressive, but to have produced the loss of a large amount of property. Mr. Fitzpatrick will be instructed to present to the Paraguayan Government a claim for the damages sustained by its unjustifiable proceedings towards the company. Should there be, as there probably will, a difference of opinion as to the character and amount of indemnity to which the company is entitled, [not as to the liability, be it observed, but as to the indemnity.] Mr. Fitzpatrick will be instructed to investigate the transaction and report thereon to the government."

Accordingly, on the 5th of August, 1856, Mr. Marcy writes to Mr. Fitzpatrick as follows:

"No doubt is entertained that injustice was done to the company, and that under the condition of things in Paraguay, the government of that country is accountable therefor. You will accordingly, at a proper time, and in a proper manner, make known the views of this government on the subject. Before adverting to it, however, it is deemed advisable that you should propose an exchange of the ratifications of the treaty with Paraguay, which was concluded on the 4th of March, 1852."

Whatever prejudices Governor Marcy may have had in the beginning against Mr. Hopkins or the claim of the company, he had reached the conclusion, it will be seen, at this time, that, beyond any doubt, "injustice was done to the company, and that, under the condition of things in Paraguay, the government of that country is accountable therefor." This was the deliberate judgment of Governor Marcy, and was made the basis of his official action.

It was a judgment found, moreover, not upon *ex parte* statements of the company, but in full view of the statements, also, of Paraguay, and with the correspondence of Mr. Falcon on the files of the Department.

The mission of Mr. Fitzpatrick was a complete failure. He was so rudely treated on the subject of the treaty, and his request was so summarily refused, that he seems to have thought it useless to attempt any other business. The claim of the company was not mentioned, and when he was satisfied that President Lopez would not consent to exchange the ratifications of the treaty, he at once withdrew.

It now became necessary for the Government of the United States to resort to more decisive measures in respect to Paraguay. Without any good reason on earth, the business of the company had been broken up, its property seized, and its servants insulted; a peaceful surveying vessel had been fired upon, and an American citizen had been killed; a treaty solemnly made had been refused to be exchanged upon the most frivolous pretext, and our agents, who were sent out in a spirit of moderation to adjust the existing difficulties, had been received with rudeness, and refused any satisfaction whatever. It was quite time that President Lopez should be made to feel his true position.

Accordingly, after a careful examination of the subject, the President brought it to the attention of Congress. In his message of December 8th 1857, after referring to the treaty and to the Water Witch, he adds:

"Citizens of the United States, also, who were established in business in Paraguay, have had their property seized and taken from them, and have otherwise been treated by the authorities in an insulting and arbitrary manner, which requires redress."

This was the judgment of the President of the United States, as deliberately published to the world in his annual message. And so important did he deem the subject that he made the following recommendation:

"A demand for these purposes will be made in a firm but conciliatory spirit. This will the more probably be granted, if the Executive shall have authority to use other means in the event of a refusal. This is accordingly recommended."

The recommendation of the President was responded to by the Committees on Foreign Affairs, both in the Senate and House. The reports of both committees are before the commissioners, and set forth, in the most clear and emphatic manner, the wrong done by Paraguay to the company, and the justice of their claim to redress.

On the 2d of June, 1858, Congress adopted a resolution authorizing the President to adopt such measures and use such force to secure justice from Paraguay as he might think necessary.

A large expedition was at once formed by the Secretary of the Navy, and placed under the command of Commodore Shu-

brick. Willing, however, to avoid, if possible, the use of force, a commissioner was appointed, (Mr. Bowlin,) who accompanied the expedition, bearing definite proposals of adjustment to be laid before Paraguay. These proposals, of course, were the terms dictated by this Government, upon which alone hostilities could be avoided. They are contained in the instructions of General Cass to Mr. Bowlin, and speak for themselves. In reference to the claim of the company, they relate wholly to the question of amount. As to any question of wrong or injury, Mr. Bowlin was entrusted with no discretion whatever. That question was regarded as foreclosed. Concerning this part of the subject, his instructions left him no possible room for doubt. The injuries done to the company were detailed to him at length, and he was distinctly told that the loss of the company "was occasioned by the wanton violence of the Paraguayan Government," and that there was "no doubt that the Paraguayan Government ought to be held to make it good to the injured party." "If, therefore, (it was added,) the Government of Paraguay should consent to the payment of the sum of \$500,000, in full discharge of the entire claim of the company, you will not refuse to make the adjustment for that amount."

This was the first discretion entrusted to Mr. Bowlin in reference to the claim of the company. He might adjust it for \$500,000. This failing, he had one alternative. Such was the confidence of the company in their case, that they preferred to present it to a joint commission rather than adjust it for a less sum than \$500,000, which they regarded as a liberal compromise of their just claims.

"If you find it impossible," adds, therefore, General Cass, "to reach an agreement with the Paraguayan Government as to the amount of indemnity to be made to the company, [not as to the wrong and injury done—that was concluded,] you may propose to leave this to be determined by an impartial commission." "An indispensable preliminary, however," he was carefully admonished, "to this adjustment, will, of course, be an acknowledgment on the part of the Paraguayan Government, of its liability to the company."

This was his second mode of adjustment. If Paraguay would pay \$500,000 dollars, he might adjust the claim for that sum. If not, he might refer the question of amount to be settled by commissioners under specified treaty provisions, provided, however, that the Paraguayan Government must first acknowledge its liability to the company. Unless this was acknowledged, he had no authority to make the treaty, but must refer the subject to the commander of the American squadron, who could then have employed force.

It will not answer to say that the naval expedition had special reference to the Water-Witch and the treaty, for this idea is directly contradicted by the instructions. "You will state," writes General Cass, "that the President desires friendship with Paraguay, and trusts that this desire may be reciprocated. In the cases of the Water-Witch and Paraguay Navigation Company, however, he can accept no other proof of such a desire on the part of that Government than the acceptance by it of the basis of settlement of these cases which has been indicated."

Thus, in order to avoid the use of force against her, Paraguay was either to pay \$500,000 to the company, or else to acknowledge its liability, and consent to refer the question of amount to a joint commission. This was the whole of Mr. Bowlin's discretion in reference to the company.

To say that he made the treaty without this acknowledgment of liability, would be to charge him with a direct violation of his instructions, of which I am quite sure he could never be guilty.

To say also that the President of the United States thus limited Mr. Bowlin's discretion, in a case involving peace or war, without having fully satisfied himself that the wrong had been done and the liability incurred, would be to charge that distinguished functionary with a dereliction of duty which no man living is less likely to commit.

But, in point of fact, Mr. Bowlin is not chargeable with any such violation of his instructions. In his dispatch accompanying the treaty, he declares that he has literally obeyed them, except in reference to a suggestion which was made to him as to the place where the award should be paid. This he deemed unessential. His obedience is shown, moreover, by the treaty itself. We come, now, to the treaty.

The preamble recites "a pending question" to be settled. The only pending question was the question of amount. The liability had been conceded, but there was a failure to agree upon the amount. President Lopez was willing to pay \$250,000, but Mr. Bowlin was not authorized to receive less than twice that sum. There was "a pending question," therefore, of amount, and this was to be determined by commissioners.

The first article binds Paraguay, in substance, to pay the award of the commissioner.

The second article is specific as to the whole object of the constitution. "The two high contracting parties [it says] appreciating the difficulty of agreeing upon the amount of the reclamations," &c. The difficulty is not as to agreeing upon the question of wrong or injury or liability, but only upon the amount; and "to determine the amount of reclamations, [not the wrong,] it is therefore agreed," continues the article, "to constitute such a

commission." By the terms of the same article the two commissioners are to meet in Washington to "investigate, adjust, and determine the amount of the claims," &c., and in the fifth article the mode of payment of such "amount" is specifically indicated.

The letter of the treaty, therefore, is in strict conformity with the purpose of it, in strict conformity with the instructions under which it was made, in strict conformity with the views of Congress who authorized the expedition, in strict conformity with the views of the President, and in strict conformity with the whole history and justice of the case. Nothing was intended to be embraced in the treaty but the question of amount; and human testimony, it is respectfully submitted, cannot possibly make anything more clear than that no other question *was* embraced in the treaty.

Nor was there anything novel, under the practice of our Government, in thus requiring an admission of liability as an indispensable condition of delay. Such cases have been of frequent occurrence. In the recent instance of the "Aves claim," where Venezuela was charged with having evicted a party of American citizens from a guano island, our minister at Caraccas was finally instructed to demand his passports, unless Venezuela would admit its wrong and acknowledge its liability. In that event he was authorized to remain, and leave the computation of damages for subsequent arrangement. To avoid the acknowledgment, Venezuela sent a special minister to this country, with an earnest request that the negotiation should be transferred to Washington, where the damages, it was alleged, might be more equitably assessed, for several reasons, which were given, than could possibly be done in Caraccas. But our Government would only consent to the transfer upon the condition of an admission of liability, and the special minister returned home. The Government of Venezuela, having then exhausted all its efforts to avoid doing so, at last made the required admission, and our minister remained at his post. Some time afterwards the claim was adjusted to the satisfaction of the parties. This is only a recent case to illustrate a common practice. And the reason for the practice is quite obvious. Whenever a wrong has been done to a citizen, there is an injury done also to the national honor. The question of damages may require time, and can wait; but when the facts are once known, a nation jealous of its honor will demand the most prompt atonement. The acknowledgment of wrong and the promise of indemnity are, in the beginning, of course, a sufficient satisfaction. It will only remain then to compute the loss and see that the promise is complied with. In the present case, the commissioners are to ascertain the loss, and Paraguay has agreed to make it good.