

In the middle ages, the most powerful of emperors, barefoot and penitent, humbled himself before the Vicar of Christ; within the past generation, the man of "blood and iron" who had unified a Germany torn by a thousand years of dissension and armed conflict, went, as it were, to Canossa; in our own day, and in a higher sense, the world bows before the Pontiff true to his mission, armed only with the sword of the Spirit and the breast-plate of righteousness.

THE CHAMIZAL ARBITRATION AWARD.

The editorial comment of this JOURNAL for October, 1910,¹ noted the submission of the Chamizal boundary dispute between the United States and Mexico to arbitration. As stated in that editorial, the tract in dispute comprises an area of about six hundred acres between the channel of the Rio Grande as it ran in 1852, the date of the survey by Commissioners Emory and Salazar, and the present channel, which at this point runs considerably farther to the south. The tract is and during the process of its formation always has been physically and geographically a part of the city of El Paso, Texas, and about six thousand of the forty thousand inhabitants of the town now make their homes upon it. Mexico submitted a claim to the tract to the International Boundary Commission in 1894, but the Commissioners were unable to agree; the issue at that time being as to whether the change of channel was due to erosion or avulsion. By virtue of the treaty between the United States and Mexico of June 24, 1910,² the case was again sent before the International Boundary Commission, which was enlarged for the purpose of the consideration and decision of this case only by the addition of a third commissioner, a Canadian jurist, selected by the two governments acting in common accord. The Commission thus constituted consisted of the Honorable Eugene Lafleur, of Montreal, Canada, Presiding Commissioner; Brigadier-General Anson Mills, retired, American Commissioner, and Senor Don F. B. Puga, Mexican Commissioner. The treaty provided for the presentation of case, countercase and written and oral arguments, and for

¹ Vol. 4, pp. 925-930.

² Printed in SUPPLEMENT, April, 1911, p. 117.

representation of each government by an agent and counsel. The United States was represented by William C. Dennis, Esq., as agent; Walter B. Grant, Esq., of Boston, Massachusetts, counsel, and Richard F. Burgess, Esq., of El Paso, Texas, associate counsel. Mexico was represented by Senor Joaquin D. Casaus, former Mexican Ambassador at Washington, as agent; W. J. White, Esq., of Montreal, Canada, as counsel, and Seymour Thurmond, Esq., of El Paso, Texas, as assistant counsel.

The treaty of June 24, 1910, provided that the Commission should sit for the trial of the Chamizal Case at El Paso, Texas, or Ciudad Juarez, Mexico, as might be most convenient. By informal agreement, all sessions were held in the Federal Court-room at El Paso. The first session was held, as provided in the Supplementary Protocol,³ on May 15, 1911, and the decision, which appears in this number of the JOURNAL,⁴ was handed down on June 15, 1911.

For an intelligent understanding of the issues, it is necessary to bear in mind certain important provisions of the boundary treaties between the United States and Mexico. Article V of the Treaty of Guadalupe-Hidalgo provides that the boundary line between the two republics shall run "up the middle" of the Rio Grande "following the deepest channel." Article I of the Gadsden Treaty of 1853 reiterates the provision that the line shall run "up the middle" of the Rio Grande. The treaty of Guadalupe-Hidalgo also provides for commissioners "to run and mark the said boundary in its whole course to the mouth of the Rio Bravo del Norte" and provides that the commissioners shall keep journals and make plans and that "the result agreed upon by them shall be deemed a part of this treaty." The Gadsden Treaty contains similar provisions. Articles I and II of the Boundary Convention of 1884 play such an important part in the decision of the case that it seems advisable to quote them in full. They are as follows:

ARTICLE I.

The dividing line shall forever be that described in the aforesaid treaty and follow the center of the normal channel of the rivers named, notwithstanding any alteration in the banks or in the course of those rivers, provided that such alterations be effected by natural causes through the slow and gradual erosion and deposit of alluvium and not by the abandonment of an existing river bed and the opening of a new one.

³ Printed in SUPPLEMENT, April, 1911, p. 120.

⁴ See JUDICIAL DECISIONS, *infra*, p. 782.

ARTICLE II.

Any other change, wrought by the force of the current, whether by the cutting of a new bed, or when there is more than one channel by the deepening of another channel than that which marked the boundary at the time of the survey made under the aforesaid treaty, shall produce no change in the dividing line as fixed by the surveys of the International Boundary Commission in 1852; but the line then fixed shall continue to follow the middle of the original channel bed, even although this should become wholly dry or be obstructed by deposits.

The principal contentions submitted to the tribunal on behalf of Mexico were as follows: 1. That the treaties of 1848 and 1853 established a fixed and invariable line, unchanged by any mutation in the course of the Rio Grande; 2. That the treaty of 1884 was not retroactive and, therefore, had no application to the case inasmuch as the greater part of the Chamizal tract was admittedly formed prior to its signature; 3. That in any event the treaty of 1884 provided for only two alternates, *i. e.*, "slow and gradual erosion and deposit of alluvium" and "the cutting of a new bed," and that rapid, violent and intermittent change at El Chamizal did not fall into either of these categories. Therefore, the treaty of 1884 was not applicable to the change at El Chamizal, which necessitates an examination of the rules of international law; 4. That the ordinary rules of international law with respect to accretion and avulsion had no application to the change in question because the Rio Grande was not a river in the legal sense of the word, but a torrential stream; and, finally, Mexico denied any prescriptive title in the United States.

The United States maintained: 1. That the treaties of 1848 and 1853 established a fluvial boundary; 2. That the treaty of 1884 was retroactive; 3. That while it is true as claimed by Mexico that the treaty of 1884 provided for only two categories of changes, these two categories embraced all changes taking place on the river, all erosive changes, where there was no question of the cutting of a new bed being embraced within the first category, *i. e.*, "slow and gradual erosion and deposit of alluvium." The treaty of 1884 therefore applies to the change in question and the boundary line continues to follow the changing channel of the river; 4. That even assuming the correctness of the Mexican contention that the treaty of 1884 does not apply to the change in question, the result would be the same inasmuch as the ordinary rules of international law governing avulsion and erosion would apply since the Rio Grande is a river in every sense in which that term is used and

not a mere torrential stream; and, finally, the United States claimed title to the tract by prescription.

The opinion of the Presiding Commissioner holds: 1. That the Mexican claim to a fixed and invariable boundary line is inadmissible and the American contention that the treaties of 1848 and 1853 establish a fluvial boundary is sustained; 2. It sustains the contention of the United States that the treaty of 1884 is retroactive. Upon both these points the Mexican Commissioner filed a clear-cut dissenting opinion.⁵ 3. The opinion holds that the possession of the United States "was not of such a character as to found a prescriptive title." On this point alone all the Commissioners concur. 4. As regards the further construction of the treaty of 1884, the Presiding Commissioner apparently assumes that this convention is applicable to the change at El Chamizal. He holds that the changes in the river from 1852 to 1864 "were caused by slow and gradual erosion and deposit of alluvium within the meaning of Article I of the convention of 1884,"⁶ and therefore the boundary moved with the river; further, "that all the changes which have taken place in the Chamizal district from 1852 up to the present date have not resulted from any change of bed of the river."⁷ He holds, however, that the changes from 1864 to 1868, although resulting from "the degradation of the Mexican banks and the alluvial deposits formed on the American banks,"⁸ were of such a nature that they "can not by any stretch of the imagination or elasticity of language be characterized as slow and gradual erosion,"⁹ and, further, that inasmuch as the changes which occurred in that year (1864) did not constitute slow and gradual erosion within the meaning of the convention of 1884, the balance of the tract (*i. e.*, that portion which accreted after 1864) should be awarded to Mexico. The opinion holds that it is not within the province of the Commission to relocate the line of 1864, "inasmuch as the parties have offered no evidence to enable the Commissioners to do so."¹⁰ The Presiding Commissioner and the Mexican Commissioner join in the following award:

Wherefore the Presiding Commissioner and the Mexican Commissioner, constituting a majority of the said Commission, hereby award and declare that the

⁵ Judicial Decisions, p. 826.

⁶ *Id.*, p. 807.

⁷ *Id.*, p. 808.

⁸ *Id.*, p. 808.

⁹ *Id.*, p. 809.

¹⁰ *Id.*, p. 812.

international title to the portion of the Chamizal tract lying between the middle of the bed of the Rio Grande, as surveyed by Emory and Salazar in 1852, and the middle of the bed of the said river as it existed before the flood of 1864, is in the United States of America, and the international title to the balance of the said Chamizal tract is in the United States of Mexico.¹¹

The American Commissioner filed a vigorous dissenting opinion from so much of the opinion and award "as assumes to segregate the Chamizal tract and to divide the parts so segregated between the two nations and * * * which holds that a portion of the Chamizal tract was not formed through slow and gradual erosion and deposit of alluvium within the terms of the treaty of 1884."¹² The American Commissioner maintains in his dissenting opinion that the Commission was wholly without jurisdiction to divide the tract between the two parties inasmuch as a question as to the international title to the tract as a whole was submitted by the convention of June 24, 1910 (Articles I and III), and because both parties had stated the issue before the tribunal to be whether the line should be drawn through the channel of 1852 or the present channel, and neither party had suggested the possibility of a division of the tract. He observes:

Even in ordinary tribunals of general jurisdiction it is regarded as a dangerous practice for the court to award a decree not solicited or endorsed by counsel for either party. Is not this danger accentuated when an international tribunal which has no powers except those conferred upon it by the terms of the submission under which it sits assumes to raise and answer a question never suggested by the parties in the course of negotiations extending over fifty years, and not indorsed by either party in argument when suggested from the bench? Particularly is this true when it can be asserted without fear of contradiction that if there had been the slightest idea in the minds of the negotiators of the treaty of June 24, 1910, that it was susceptible of the construction which has been placed upon it by the majority of the Commission, the possibility of such an unfortunate result would have been eliminated in even more precise and affirmative language.¹³

The American Commissioner is furthermore of the opinion that the majority of the Commission in declining to accept the construction which both parties had placed upon the convention of 1884 that it embraced only two alternatives, namely, slow and gradual erosion and deposit of alluvium and the cutting of a new bed, and in importing within the

¹¹ *Id.*, p. 812.

¹² *Id.*, p. 813.

¹³ *Id.*, p. 814.

terms of the treaty a *tertium quid*, *i. e.*, rapid and violent erosion, something unknown both to the treaty and to the common law, had again departed from the terms of the submission. The American Commissioner draws attention to the fact that during the course of the argument the Presiding Commissioner intimated to counsel for the United States that it was scarcely desirable to pursue the argument upon this point further since both parties seemed agreed that the convention of 1884 embraced but two classes of changes. Finally, the American Commissioner was of the opinion that it would be totally impossible to locate the channel of 1864 and that the award was, therefore, "vague, indeterminate and uncertain in its terms and impossible of execution."

He concludes his opinion by saying:

The present decision terminates nothing, settles nothing. It is simply an invitation for international litigation. It breathes the spirit of unconscious but nevertheless unauthorized compromise rather than of judicial determination.¹⁴

The agent of the United States upon his own motion, subject to the consideration and action of his government, filed a protest¹⁵ against the decision and award on the ground that it amounted in various respects set forth by him to a "departure from the terms of submission;" because it was "impossible of application;" because it fails in certain respects to state the reasons upon which it is based as required by the terms of submission, and, finally, because of "essential error of law and fact."

DIAZ AND MEXICO.

The recent events in Mexico, culminating in a civil war and the overthrow of President Diaz and the massing of an American army corps on the confines of Mexico, are too important to be dismissed in an editorial comment. A leading article will be devoted to the subject in a future number; but it may not be inappropriate at this time, and in this way, to call attention to the fundamental mistake of the unfortunate ex-president, which resulted in the fall of his government and in his exile from the country for which he had labored so long and successfully and launched upon the path to greatness. The mistake in question was his continuance in power, to obtain which he consented to the amendment of the Constitution so as to enable him to retain the presidency.

¹⁴ *Id.*, p. 826.

¹⁵ *Id.*, p. 832.