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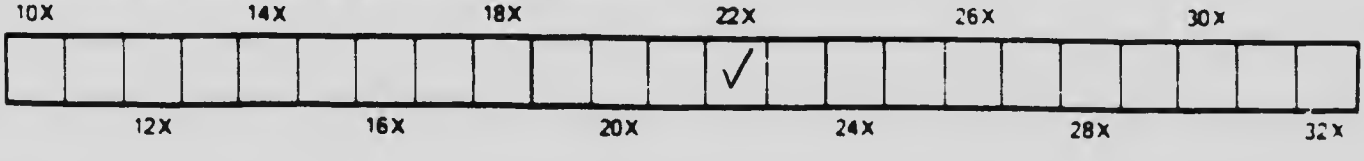

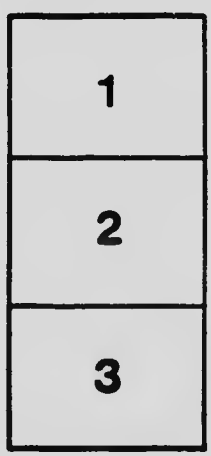

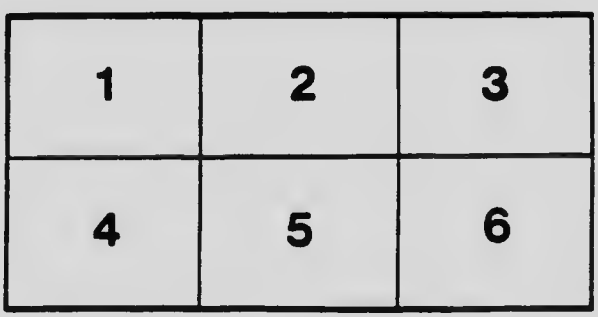

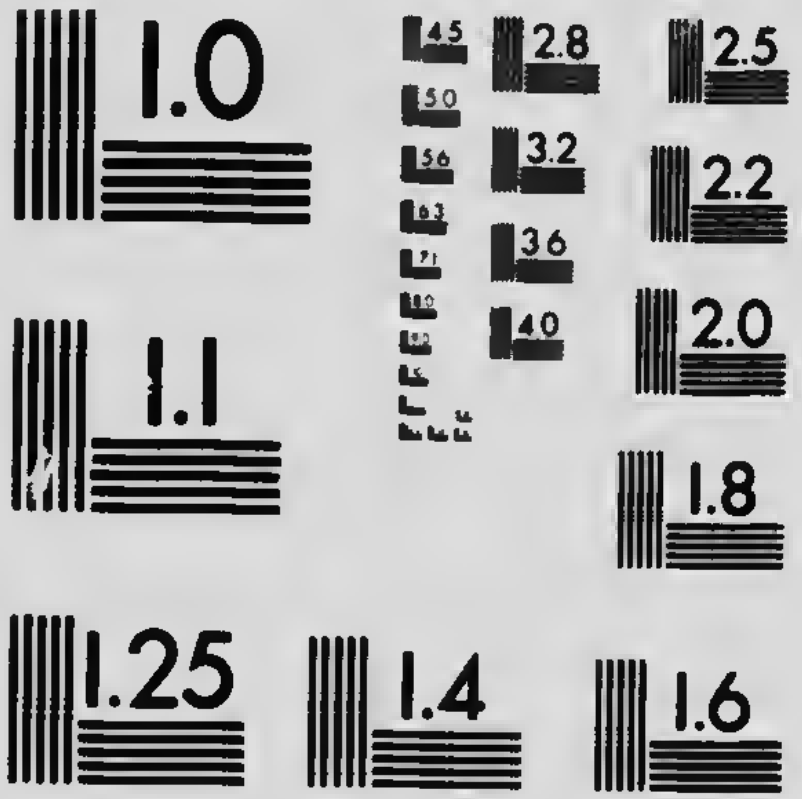

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Judicial Settlement of International Disputes

WILLIAM RENWICK RIDDELL

Reprinted from the PROCEEDINGS OF THE AMERICAN SOCIETY FOR JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES, 1913

I. SETTLEMENT OF INTERNATIONAL DISPUTES

WILLIAM RENWICK RIDDELL

In the consideration of the many matters of international dispute settled by means other than war and diplomacy, it is not without interest to note the personnel of the tribunals entrusted with the determination of such matters.

More than once has an account been given of the disputes between the United States on the one hand and Britain (including Canada) on the other settled by a reference to such tribunals. I propose in this paper to say a few words about the arbitrators, and I venture to think that it will be found in most instances that men were appointed the judicial cast of whose mind was known either from their being or having been judges or otherwise.

This indicates that the English-speaking peoples, at least in disputes among themselves, really desired a judicial settlement, an adjudication by judges on right and justice, and not a compromise worked out by partisans

desirous of obtaining as much as possible for their own side.

The very beginning of references to such tribunals in the English-speaking nations, and, indeed, in substance the beginning of modern international arbitation is seen in Jay's treaty.

Jay's treaty of 1794 left three matters to arbitration:

1. The first was, what was the "River St. Croix" mentioned as the international boundary in the treaty of peace in 1783?

David Howell who had been a judge of the supreme court of Rhode Island was appointed by the United States; Col. Thomas Barclay, a man of considerable legal erudition, who had studied law under John Jay and who was a practising lawyer, by Britain; and Egbert Benson, former judge of the supreme court of New York, and to be a United States circuit judge, was chosen by these two because he was "cool, sensible and dispassionate." The award of these was unanimous (1798).

2. A board of five was formed to determine the amount payable to British subjects being prevented from recovering debts due before the peace from American citizens. There was not a judge among them and the proceedings wholly failed, to a great extent it would seem from a lack of the judicial temperament in the arbitrators.

3. Claims against Britain for illegal and irregular seizures during the French wars. Governor Christopher Gore, the legal preceptor of Daniel Webster and of high standing at the bar of Massachusetts, and William Pinkney, to be attorney-general of Maryland and afterwards of the United States, were the American commissioners.

Dr. John Nichol, an eminent civil lawyer, shortly to become Sir John Nichol, judge of the Prerogative Court and the court of Admiralty, was first appointed with Dr. Anstey of the same profession but of less note. Nichol was succeeded by Dr. Swabey, of Doctors' Commons, Col. John Trumbull, the artist, was the fifth.

The labours of the commission were much complicated owing to the want of harmony of the commission (see 2 above) just mentioned; but when that was out of the way they soon made a satisfactory award (1804).

After the futile war of 1812 came the treaty of Ghent, which left three matters for decision (1814).

The islands etc. in Pasamaquoddy Bay. Colonel Barclay and John Holmes were made arbitrators. Holmes had been a member of the legislature of Massachusetts and was to be a member of Congress, first as member of the House and then as senator. The decision of this board was not judicial, but was a compromise. Neither party has, however, disputed or complained of it (1817).

5. The northeastern boundary of the United States. Barclay and Cornelius P. Van Ness of Vermont, shortly after to be chief justice of that state, tried the impossible and naturally could not agree. This boundary was properly a question for diplomacy, not for judicial decision.

6. The Lake boundaries were left to Anthony Barclay son of Colonel Barclay, and Peter Buel Porter of New York, who was a practising lawyer, had been a gallant soldier and a congressman, and was to be secretary of war in Adams' cabinet; and they finally agreed upon a line satisfactory to all parties (1822)

7. In 1818, an agreement was entered into for the deter-

mination of whether Britain must pay for slaves who had been received by her forces during the war and thus enabled to escape from their American masters. The Emperor of Russia (in 1822) decided in favor of the United States the question of Britain's liability for such escaped slaves.

8. The average value of the slaves was determined by Langdon Cheves, afterwards judge of the supreme court of South Carolina, Henry Seawell, formerly judge of the superior court of North Carolina, George (afterwards Sir George) Jackson, a diplomatist, and John McTavish. They gave a unanimous award upon the purely business question, involving only commercial value (1824).

9. The total amount to be paid involved much more than purely business matters, and the board failed to agree. The governments settled the amount by diplomatic means (1826).

10. Another attempt was made in 1827 to settle the Maine boundary; it was agreed to leave this to the arbitrament of some friendly sovereign or state, and the King of the Netherlands was agreed upon. King William of the Netherlands gave an award as to this boundary, satisfactory to neither party (1831).

11. Certain claims of American citizens against British subjects and vice-versa were by the convention of 1853 left to a board of three. Nathaniel G. Upham was the American commissioner. He was for some years a judge of the supreme court of New Hampshire. The British commissioner was Mr. (afterwards Sir) Edward Hornby, afterwards judge of the supreme court of China and

Japan. Joshua Bates, an American banker living in England, was selected as the third; and the results of their labors were wholly satisfactory.

12. In 1854 it was agreed that the territory reserved by the Convention of 1818 within which American fishermen had not the right to fish should be determined by a commission of three, one appointed by each government, and these to choose the third, if they could not agree, then by lot. A board was appointed, M. H. Perley (succeeded by Joseph Howe) being the British commissioner, G. G. Cushman, who was succeeded by ex-Gover[illegible] Dr. John Hubbard and he by E. L. Hamlin being appoi[illegible]d by the United States. John Hamilton Gray was selected by lot as umpire. This inquiry rather called for local knowledge than judicial decisio[illegible]nd it was reasonably successful.

13. The amount to be paid by the United States for property taken belonging to the Hudson Bay Company and other British subjects in Oregon, etc., was in 1865 left to Alexander S. Johnson of New York and John (afterwards Sir John) Rose, the Canadian financier. These two gentlemen had no difficulty in determining this purely commercial matter, and agreed upon an award (1869). They had wisely selected an umpire in case of difficulty, in the person of Benjamin R. Curtis, a distinguished jurist of Boston, who had been a judge of the supreme court of the United States and given the splendid dissenting judgment in the Dred-Scott case. He was to be of counsel for Andrew Johnson on his impeachment and so help settle forever the power of the President of the United States.

The treaty of Washington, 1871, left four matters to arbitration.

14. The *Alabama* claims. Sir Alexander J. E. Cockburn, lord chief justice of England, and Charles Francis Adams, who had studied law under Daniel Webster, represented the countries concerned. With them sat Count Frederick Sclopis, a distinguished Italian judge named by the King of Italy, M. Jacques Staempfli, named by the President of Switzerland, a Swiss advocate, and Baron d'Itajuba named by the Emperor of Brazil who had been a member of the law faculty of Olinda. While Cockburn would not sign the award it was promptly accepted by his country (1872).

15. Other claims against Britain, the St. Alban's raid, etc. For these there was a board of three: James Somerville Fraser, formerly a judge of the supreme court of Indiana, and Russell Gurney, Judge of the sheriff's court and recorder of London, were assisted by Count Louis Corti, who was Italian Minister at Washington. The awards were satisfactory (1873)

16. The amount to be paid by the United States for fishing privileges was decided in Halifax. Sir Alexander T. Galt, the Canadian financier, and John H. Clifton, formerly attorney general of Massachusetts (succeeded by Ensign H. Kellogg) were appointed. They were joined by the Belgian Minister at Washington, M. Maurice Delfosse. There is no need to say anything as to the discontent occasioned by their award; however the amount was promptly paid (1877).

17. The International Boundary at the Pacific Ocean was determined in favor of the United States by Emperor William of Germany (1872).

18. The right of Canadians to seal in the Behring Sea, was, by the Treaty of 1892, left to a board composed of Mr. Justice Harlan, of the United States Supreme Court, Senator John T. Morgan of Alabama, whose legal attainments and judicial mind were afterwards recognized by his appointment as commissioner to prepare a system of laws for the Hawaiian Islands, Lord Hannen, a lord of appeal in ordinary, Sir John S. D. Thompson who had been a judge in Nova Scotia, Baron De Courcel, named by the President of France, Marquis Emilio Visconti Venosta named by the King of Italy and M. Gregers Gram, named by the King of Sweden and Norway. A successful award followed as to the principle (1893).

19. The amount of damages to be paid was left to Judge William L. Putnam of the circuit court of appeals and Mr. Justice George Edwin King of the supreme court of Canada, who did not find it necessary to appoint an umpire (1896).

20. The Alaska boundary was agreed, in 1903, to be left to "six impartial jurists of repute." The British commissioners were Lord Alverstone, lord chief justice of England, Sir Louis Jettè, who had been chief justice of the Province of Quebec, and John Douglas Armour who had been chief justice of the Province of Ontario but who was then a judge of the supreme court of Canada. On the death of Mr. Justice Armour, he was succeeded by Mr. (afterwards Sir) Allen Aylesworth. The American "impartial jurists of repute" were senators Root, Lodge and Turner. The award was received in Canada with much dissatisfaction, chiefly because it was felt (rightly or wrongly) that some of the commissioners were not "im-

partial jurists." I am wholly of the belief that had all the American commissioners been judges there would have been little or no complaint (1903).

21. The Hague arbitration as to fishing privileges, drying and curing fish, etc. Judge George Grey of the circuit court of appeals and Sir Charles Fitzpatrick, chief justice of the supreme court of Canada, were joined by three impartial jurists of repute, Dr. Lammasch of Vienna an Aulic counsellor, Jonkheer Lohman of Holland and Dr. Drago of the Argentine Republic. Their award was, in all points but one. unanimous. In that one the splendid spectacle was presented of an American judge refusing to join in a decision in favor of his country because it was, in his opinion, not based upon law (1910).

I say nothing here as to the disputes between the states of the American Union which have been decided by the Supreme Court of the United States—a real judicial settlement of interstate disputes.

It may be worth while, however, to notice a dispute between two Canadian Provinces. When the Dominion in 1876 set off the territory of Keewatin, the eastern boundary of the new territory was fixed at the western boundary of the Province of Ontario. The Territory of Keewatin was put under the jurisdiction of the Province of Manitoba. This province claimed as part of the new territory a large area which Ontario had always considered her own. The dispute became acute; the Dominion supported the claim of Manitoba. It would, perhaps, be more accurate to say that the claim was made by the Dominion and Manitoba was a mere instrument. It was at length

agreed that it should be referred to arbitration to determine the true west and north boundary of Ontario. Robert A. Harrison, chief justice of Ontario (who took the place of William Buell Richards, the former chief justice of Ontario, who had been first appointed by the Province), Sir Francis Hincks, a Canadian financier and finance minister (named by the Dominion in the place of Lemuel Allen Wilmot, their first nominee), and Sir Edward Thornton, British minister at Washington (named by both Dominion and Province) acted as arbitrators. Their award, made in 1878, was unanimous in favor of the Province of Ontario. The Province of Ontario at once accepted the award and passed legislation to bring it into effect (1879) 42 Vic. (Ont) c.2., but the Dominion refused to give effect to the award by similar legislation. (The government of the Dominion and of the Province of Ontario were of different politics, and it was freely charged, perhaps with some truth, that this difference had no little to do with the refusal.) The governments concerned, ultimately to put an end to the controversy, agreed to have the question disposed of by the judicial committee of the privy council, the final court of appeal for the empire. The matter was laid before the judicial committee in the form of a special case signed by the attorneys-general of Ontario and Manitoba. The committee heard counsel for the dominion, Ontario and Manitoba and decided August 11, 1884, (1) that the award was not binding without Dominion legislation but (2) that the award was not substantially accurate; and advised further legislation. The Dominion thought it advisable that Im-

perial legislation should be had and the act (1889), 52 and 53 Vict. (Imp.) c. 28., was passed accordingly to carry into effect the finding of the committee (and arbitrators).

In arbitrations with non English-speaking nations it cannot be said that either the United States or Britain has made it a general practice to appoint judges as arbitrators. The reasons for this are obvious. The proceedings even if they are not conducted in a language other than English, generally involve the consideration of documents and often oral testimony in another language. It is very desirable indeed to have one skilled in the language likely to be used wholly or in part. It is the somewhat rare exception to find a judge who has had the opportunity and the inclination to acquire a working knowledge (say) of Spanish. There may be, too, prominent in both peoples a feeling of kindly commiseration, sometimes perilously near contempt, for those who do not speak English and for any other language than English; a feeling sometimes almost of exasperation at the folly of foreigners in persisting to chatter unintelligibly instead of talking so that one can understand them. An English lady in Paris had that feeling, for though she could speak French she never did, "it just encourages them." Moreover a knowledge of local conditions and local customs is often most desirable. As a rule therefore, someone is sought who is acquainted with the country and the language, sometimes the consul of the appointing country as for example Ephraim George Squire the well known archaeologist appointed in 1863 by the President to represent the United States in the Peruvian claims commission, Lewis Joel, who had been British consul at Valparaiso

appointed in 1893, and his successor Alfred St. John, consul at Callao, appointed 1894 to represent Britain on the commission on claims against Chile. Sometimes a foreign sovereign or potentate was appointed; as the President of Chile in the dispute Britain had with the Argentine in 1845; the King of the Belgians, 1861, Britain and Brazil; the King of Prussia, 1842, Britain and France; the Emperor of Austria, 1881, Britain and Nicaragua; the Senate of Hamburg, Britain and Peru and Britain and Portugal; the President of the United States in 1869, Britain and Portugal as to the Island of Balama. Occasionally the contending nations ask a supposedly impartial party to nominate an arbitrator. The United States was thus asked by Britain and Liberia in 1879; the Emperor of Russia in 1895, by Britain and the Netherlands.

Sometimes an agreement was made to leave the question in dispute to the arbitrament of one private person agreed upon, and this person was not always non-judicial. William Strong a former justice of the Supreme Court of the United States, was in 1884 appointed sole arbitrator in the Pelletier-Lazare claims by the United States against Hayti. And occasionally a judge is to be found appointed either alone or with others.

In 1871 Judge William T. Otto was appointed commissioner for the United States in the Spanish claims commission, and resigning, was succeeded by Kenneth Rayner who had been a judge of the first *Alabama* claims court.

The Mexican claims were referred, in 1840, to a commission in which sat William L. Marcy of New York who

had been recorder of Troy and a justice of the supreme court, and John Rowan who had been a member of the court of appeals of Kentucky.

Nathaniel G. Upham whom we have already met was umpire in the Panama Riot Claims in 1861.

Johnson Cave who had been a circuit judge in Tennessee represented the United States in 1860 as arbitrator in its claims against Paraguay.

Perhaps the most interesting of these appointments is nearly if not quite the first:

In 1654 during the time of the Commonwealth, a treaty of peace was entered into between England and the Netherlands in which it was provided that the Netherlands should pay to Cromwell for the persons injured damages for "ships and effects of the English that were seized and detained in the dominion of the King of Denmark ever since the 18th of May, 1652." The Englishmen named as arbitrators were Edward Winslow and James Russel. Winslow had been governor of Plymouth Colony and a vigorous champion of its rights and good name. He practised medicine without a license and preached without being in holy orders.

While the board does not seem to have had a judge upon it, the same cannot be said of another under the same treaty of 1654. Eight persons were named as arbitrators, four English and four Dutch, to determine the losses and damages sustained by the English East and West India Companies and the Dutch East and West India Companies respectively. The Englishmen were headed by John Exton, who was a lawyer of very high

standing, and who had five years before been appointed judge of the court of Admiralty. He performed his duties in this court in such a way as to merit his reappointment on the Restoration a few years later.

It may fairly be said that between themselves the inclination of the English-speaking peoples has been rather to appoint judges to decide the points in differences between them and so obtain a judicial determination than a compromise or an undue advantage. Instances are found too in which a foreign and supposedly impartial arbitrator is sought, and several instances occur of arbitrators appointed by a foreign state joining arbitrators appointed by the United States and Britain.

With non-English speaking nations these are the exception, and while the arbitrators may have acted most judicially, it is more than likely that judicious rather than judicial conduct was looked for.

A word as to the success of the arbitrations between the United States and Britain:

The references which I have numbered 1, 3, 4, 6, 7, 8, 11, 12, 13, 15, 17, 18, 19, and 21, were wholly successful in the sense of being accepted without demur or complaint. Of these fourteen, eight (1, 3, 8, 11, 15, 18, 19, and 21,) may fairly be said to have been decided by judges; of the others one (4) was a compromise, one (12) depended on local knowledge; (13) on a purely business matter; two (7 and 10) were decisions of foreign potentates, and only one (6) is a decision of non-judicial arbitrators, judicially on a point like that in 1. Of those decided by judges the award in 14 was received with considerable

grumbling by the country which had lost, but no more than often greets an adverse decision of a court in private litigation. Grumbling is one of the inalienable rights of a free man and a free nation and affords a safety valve for feelings which might if pent up do mischief. This was paralleled by the Halifax award (16) by a non-judicial board. The United States made considerable objection to the award, and repudiation was spoken of, but before long the storm died down and the money was paid. These awards were very soon submitted to and they have left behind them no trace of ill-will or enmity.

The Alaska award (20) is not quite in the same case. As I have said, many Canadians did not and do not believe that Canada was fairly treated in the composition of the court, and they did not and do not believe that the decision was a judicial decision. There are still traces of indignation over the matter in some quarters, and this will probably not wholly die out for a long time.

The judge-conducted references which failed are (5), a perfectly impossible task from the nature of things, a task in which the unprejudiced and impartial King of the Netherlands also failed (10) and the total price to be paid for slaves (9). The difficulties in this matter do not appear to us now as though they could not have been overcome; but the commissioners seem to have lost their temper. At all events they did not agree and the governments got tired of waiting and settled the dispute out of court. This is paralleled by (2) which does not seem to be such as to have called for an irreconcilable conflict of opinion; but there, it is certain, personal animosity was aroused which made an agreement impossible.

I venture to submit that the experience of these two nations has shown the possibility of the judicial settlement of international disputes.[1]