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THE PANAMA SITUATION IN THE LIGHT OF INTERNATIONAL LAW.

THE TREATY OF 1846 BETWEEN THE UNITED STATES AND NEW GRANADA.

In 1846 the United States negotiated a treaty of "peace, amity, navigation, and commerce" with New Granada. The thirty-fifth article of this treaty dealt with the rights and duties of the high contracting parties in regard to the transit route across the Isthmus of Panama. A revolution in 1863 changed the name of New Granada to the United States of Colombia, and another revolution in 1836 resulted in the promulgation of the present constitution of the centralized Republic of Colombia. The legal identity of these various governments is admitted and the names New Granada and Colombia will be used interchangeably in this article. The treaty of 1846 had never been denounced and was in full force between the United States and Colombia on the 3d of November, 1903, when the revolution resulting in the inde-

pendence of Panama took place. The legal questions growing out of the construction of the thirty-fifth article of the treaty of 1846 are interesting in themselves, and a proper understanding of them is highly important in forming any intelligent opinion in regard to the course of our government during the events which led up to the recognition of the independence of Panama.

It is my purpose to discuss from a purely legal stand-point the meaning of the leading provisions of the thirty-fifth article of the treaty of 1846, and to apply the law as we find it to the occurrences between the date of the revolution and the recognition by the United States of the independence of Panama. With the political and ethical questions involved we have nothing to do.[1]

It will be necessary to state the provisions of the treaty in some detail.

(The fourth, fifth, and sixth articles provide for the reciprocal abolition of all differential duties, discriminating against the vessels or merchandise of either country.)

Article 35 is as follows:

"The United States of America and the Republic of New Granada, desiring to make as durable as possible the relations which are to be established between the two parties by virtue of this treaty, have declared solemnly and do agree to the following points."

1st. (The first sentence states that the above abolition of differential duties shall apply to ports of the Isthmus of Panama and to the goods of citizens of the United States in transit across the Isthmus.) "The Government of New Granada guarantees to the Government of the United States that the right of way or transit across the Isthmus of Panama upon any modes of communication that now exist, or that may be hereafter constructed, shall be open and free to the Government and citizens of the United States, and for the transportation of any articles of produce, manufactures, or merchandise, of lawful commerce, belonging to citizens of

[1] To avoid possible misconstruction it may be well to say that in the opinion of the writer these extra legal considerations amply justify the course of the government.

the United States." (Here follow stipulations in regard to the tolls which may be charged for transit across the Isthmus.) "And in *order to secure to themselves the tranquil and constant enjoyment of these advantages,* and as an especial compensation for the said advantages and for the favors they have acquired by the fourth, fifth, and sixth articles of this treaty, the United States guarantee positively and efficaciously to New Granada, by the present stipulation, the perfect neutrality of the beforementioned Isthmus, *with the view that the free transit from the one to the other sea may not be interrupted or embarrassed in any future time while this treaty exists;* and in consequence, the United States also guarantee, in the same manner, the rights of sovereignty and property which New Granada has and possesses over the said territory."

2d. This article provides that the treaty shall remain in force for twenty years and abrogates the treaty with the United States of Colombia of 1824.)

3d. (If no notice is given twelve months before the twenty years expire the treaty shall remain in force until twelve months from the time such notice is given.)

4th. "If any one or more of the citizens of either party shall infringe any of the articles of this treaty, such citizens shall be held personally responsible for the same, and the harmony and good correspondence between the nations shall not be interrupted thereby, each party engaging in no way to protect the offender or sanction such violation."

5th. "If, unfortunately, any of the articles contained in this treaty should be violated or infringed in any way whatever, it is expressly stipulated that neither of the two contracting parties shall ordain or authorize any acts of reprisal, nor shall declare war against the other on complaints of injuries or damages, until the said party considering itself offended shall have laid before the other a statement of such injuries or damages, verified by competent proofs, demanding justice and satisfaction, and the same shall have been denied, in violation of the laws and of international right."

6th. "Any special or remarkable advantage that one or the

other power may enjoy, from the foregoing stipulations, are and ought to be always understood in virtue and as compensation of the obligations they have just contracted and which have been specified in the first number of this article."[2]

Three substantive propositions seem to be laid down in the thirty-fifth article, viz.:

1st. New Granada guarantees to the United States the free and open transit of the Isthmus by all present and future means of transportation.

2d. The United States guarantee to New Granada the neutrality of the Isthmus to the end that the free transit may not be interrupted.

3d. The United States guarantee the sovereignty and property which New Granada has over the Isthmus.

These propositions appear innocent enough at first sight, but when examined as they have been examined during the last two months in the light of the historical and physical facts of the last fifty years and in the light of all the decisions and dicta (if I may use the words) of American and Colombian diplomats, presidents, lawyers, naval commanders, and revolutionists, it speedily becomes apparent that they might well have emanated from the Delphic oracle.

The first question to dispose of, because if answered in the affirmative it would at once settle the law in favor of Colombia,[3] is the question as to the scope of the American guarantee of the sovereignty and property which Colombia has over the Isthmus. Do the United States bind themselves to maintain the sovereignty of Colombia against domestic insurrection?

The guarantee is general in its terms. Domestic dangers

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[2] Compilation of Treaties in Force, 1899, pp. 134–136.

[3] Senator Hoar, while maintaining that the treaty binds the United States to defend Colombian sovereignty against domestic insurrection, supports the recent action of the administration on the ground that this guarantee does not apply when the insurrection is brought on by the injustice of the legitimate government, and that we are the judge of the ethics of the situation. See *Congressional Record* for February 22d, p. 2278. This suggestion does not seem in accord with the rule that all wars are just in the contemplation of the law. See Hall's International Law, 4th edition, p. 351.

are not specifically mentioned. According to the rule of construction applicable to such cases laid down by Hall, admittedly the standard authority, this would not include a guarantee against domestic violence.

"When a guarantee is given by a single state . . . it must be acted upon at the demand of the country benefited . . . unless the circumstances giving rise to the call upon the guaranteeing power are of the nature of internal political changes; a guarantee given to a particular dynasty, for example, is good only against external foes and not against the effects of revolution at home, unless the latter object be specifically mentioned." [4]

The circumstances surrounding the negotiation of the treaty and the practical interpretation which has been placed upon it disclose no reasons why the general rule should not apply.

The provisions in regard to the American guarantee, as we shall see in more detail later, were suggested by the Granadian negotiator and were supported by a "secret and confidential" exposition of the "reasons that make the stipulations of the treaty proposed useful and acceptable to the United States of America." In this interesting and important document Mr. Mallarino, Granadian Secretary for Foreign Affairs, rests his entire argument upon the following propositions: that Great Britain is pursuing a policy of aggression in the New World and is attempting to carry out a "long meditated intention of grasping the most mercantile spots in America;" that if the "usurpation of the Isthmus in its channelizable portion should be added to these encroachments" the interests of the United States would suffer; by inserting the guarantee clause as an equivalent for the abolition of the differential duties, Great Britain and other powers would not only be compelled by fear of the United States, but persuaded by self-interest to join in the guarantee; that therefore the United States could perform the obligations imposed by the clause "without having to fear the eventuality of a war with any other power in order to main-

tain the sovereignty of New Granada over the Isthmus," and that the proposed plan is "entirely exempt from any cost or risk." [5] In all this there is not the slightest suggestion that the guarantee of sovereignty and property could relate to anything except the aggressions of foreign powers, particularly England. Considering the fact that Panama, then as now, was in a chronic state of revolution, the assurance that the guarantee was without "cost or risk" seems a little strong even for a South American diplomat if the United States were engaging to put down all these revolutions. But granting that the Granadian negotiator might make such a statement, the supposition that any sane American diplomat would accept it, or that any President or Senate would have ratified the treaty if they had understood that the guarantee applied to local revolutions, is improbable in the extreme.

But, fortunately, the point has been squarely raised and settled. In 1862 revolutionary disturbances of unusual virulence were afflicting Panama in common with the rest of Colombia. The revolution resulted in turning New Granada into the United States of Colombia. While the revolution was in progress the Colombian minister, who of course represented the legitimate government, appealed to Secretary Seward for aid according to the terms of the treaty. He argued that this was not a case of mere civil commotion, because the new faction, calling itself the United States of Colombia, was a new member of the family of nations, qualified by its constitution to take over more territory than was embraced within New Granada, thus impliedly admitting that the guarantee did not apply to domestic struggles as to which faction should rule over the identical territory of New Granada, and perhaps impliedly claiming that it would apply to any attempt to set up a new sovereignty, including the Isthmus, composed in part only of the territory of New Granada.[6] Seward was too busy with the Civil War to say anything very important as to

[5] Senate Document, 58th Congress, 1st Session, No. 17, 17–19.
[6] Senate Document, 58th Congress, 2d Session, No. 143, pp. 12–14.

the meaning of the treaty; the important point is that his inaction in the premises met the approval of the revolutionists, who soon came into power.[7] In 1865 Mosquera, the leader of the revolutionists, was President of the new federal republic with an extreme states-rights constitution which permitted nullification of national acts by the state governments. No sooner were national affairs settled than Panama proceeded to go through a very salutary local revolution, which resulted in the exchange of one Colancha for one Jil Colunje as local President.[8] Under a unique rule of constitutional construction Mosquera had held that the General Government had no authority to interfere in local revolutions, and he accordingly accepted the new authorities. When the exiled Colancha gathered together his defeated adherents in the neighboring state of Cauca and started for Panama with a counter revolution, Mosquera, forgetful of his own feelings in 1862, characterized him as a bandit and called upon the United States through Minister Burton to perform "what he considered their duty by preventing this or any other hostile party or individuals from landing within the limits of the state and employing the necessary force to expel such in case a landing should be effected."[9] Mr. Burton notified the American naval and consular officers on the Isthmus of the expected incursion and of the demands of the President, and added that he concurred in the latter's interpretation of the obligations of the treaty. Admiral Pearson and Commander Davenport, then acting consul, replied at once, taking issue vigorously with the President's view of the treaty. These officers contended that the liability of the United States in case of domestic insurrections was strictly limited to maintaining the freedom of transit. The whole matter went to Secretary Seward for his decision. He took the opinion of Attorney-General Speed, who advised, November 7th, 1865:

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[7] See Foreign Relations, 1866–67, p. 565.

[8] Foreign Relations, 1866–67, title "Colombia."

[9] Mr. Burton to Commander Preble, Aug. 31, 1865, Foreign Relations, 1866–67, p. 464, Senate Document, 56th Congress, 2d Session, No. 143, p. 31.

"From this treaty it cannot be supposed that New Granada invited the United States to become a party to the intestine troubles of that government, nor did the United States become bound to take sides in the domestic broils of New Granada. The United States did guarantee New Granada in the sovereignty and property over [10] the territory. This was as against foreign governments."

Accordingly Secretary Seward wrote to Minister Burton summarizing and adopting the conclusions of the Attorney-General. He said in part:

"The purpose of the stipulation was to guarantee the Isthmus against seizure or invasion by a foreign power only. It could not have been contemplated that we were to become a party to any civil war in that country by defending the Isthmus against another party." [11]

Minister Burton was naturally mortified at the failure of the Department to sustain his interpretation of the treaty and eager to retrieve his mistake. He did not have long to wait. September 3d, 1866, the Colombian Secretary of Foreign Affairs notified him "that private intelligence worthy of credit has just been received that preparations are being made in the State of Panama for an uprising, proclaiming its separation from the United States of Colombia." [12] The communication contained a request that Mr. Burton notify the Americans on the Isthmus, and particularly the agents

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[10] Vol. XI, Opinions of Attorneys-General, p. 393. The Attorney-General laid special stress on the fourth clause of the thirty-fifth article as given above. He argued that inasmuch as this clause was mutual and gave the United States no more rights over the citizens of New Granada than it did New Granada over United States citizens, it would be inconsistent with the guarantee clause if the latter authorized the United States to take part in the domestic troubles of New Granada. The force of this argument is not perceived.

Some language is used in the opinion which indicates that the Attorney-General possibly thought that the guarantee of the neutrality of the right of way was similarly limited—*i.e.*, to cases of disturbance caused by a foreign power. But Secretary Seward expressly points out in his letter to Mr. Burton adopting the opinion that this question had not arisen.

[11] Mr. Seward to Mr. Burton, Nov. 9th, 1865, Senate Document, 58th Cong., 2d Session, No. 143, p. 27.

[12] Mr. Garrido to Mr. Burton, Sept. 3d, 1866, Senate Document, 58th Cong., 2d Session, No. 143, p. 34.

of the Panama Railroad, to keep themselves free from complicity with the movement, and closed with a vague reference to the treaty. Mr. Burton saw his chance to raise the question of the scope of the guarantee clause and secure an admission that the interpretation of the Attorney-General was correct. He replied, denying that the Americans on the Isthmus were lending any encouragement to the alleged revolt, and suggesting that the Colombian note left him in some doubt as to the precise meaning attached to the treaty by the Colombian Government, and pointing out the necessity of coming to a clear understanding in regard to the obligations imposed upon the United States by the guarantee clause, at least so far as it applied to the circumstances in hand. He concluded his note with the following clear-cut inquiry:

"To enable the United States to act understandingly and effectively in the premises, it is believed important that they should know whether Colombia holds it their duty under the existing treaty stipulations between the two countries to aid, when called on by Colombia to do so, in suppressing such a movement as that contemplated in his Excellency's note, or any other disturbance confined to Colombian citizens, or whether the treaty guaranty is understood as limited in its application to attempts against the neutrality, sovereignty, and property of the Isthmus by powers foreign to Colombia." [13]

Mr. Burton followed up this note with a personal interview which was entirely satisfactory, and two days later received the following reply:

"As to the interposition due from the Government of the United States by the treaty existing between the two nations in the event that an insurrection by armed force should take place on the Isthmus for the purpose of segregating it from the Union, the Government of Colombia understands that if such a movement should be effected with the view of making that section of the Republic independent and attach-

[13] Mr. Burton to Mr. Garrido, Sept. 12th, 1866, Senate Document, 58th Cong., 2d Session, No. 143, p. 40.

ing it to any other foreign nation or power,—that is to say in order to transfer by any means whatever the sovereignty which Colombia justly possesses over that territory to any foreign nation or power whatever,—the case will then have arisen when the United States of America, in fulfilment of their obligation contracted by the thirty-fifth article of the treaty existing between the two Republics, should come to the assistance of Colombia to maintain its sovereignty over the Isthmus, but not when the disturbances are confined to Colombian citizens." [14]

The possible ambiguity involved in the phrase, "making that section of the Republic independent and attaching it to any foreign nation or power," is satisfactorily explained by the next clause—"that is to say, in order to transfer by any means whatever the sovereignty which Colombia justly possesses over that territory to any foreign nation or power whatever." The Colombian Secretary clearly says that if Panama revolts for the purpose of segregating itself from the Union in order to become independent, the United States are not bound to interfere, but if the object of the movement is annexation to some foreign power the guarantee of the treaty becomes effective. Mr. Burton, who had the advantage of a personal interview and who himself entertained a contrary view, so understood him. He reported the results of his correspondence as follows:

"The result has been that the Colombian Government declares that it does not feel itself authorized by the treaty to require the aid of the United States for the suppression of an insurrection, rebellion, or other disturbance on the Isthmus on the part of Colombian citizens, not even an invasion by another Colombian state, unless such movement be intended to detach the state of Panama from the Colombian Union and to annex it to a foreign power. This would seem to leave the Isthmus free to declare itself independent of the United States of Colombia, without fear of the forced intervention of the United States of America, pro-

[14] Senate Document, 58th Congress, 2d Session, No. 143, p. 41. Mr. Garrido to Mr. Burton, Sept. 14th, 1866.

vided such declaration be not accompanied by the end of annexation to a foreign power. If such purpose be not declared at the time and the Isthmus should secure its independence, which is admissible under the construction just adopted by this Government, it would appear too late to then invoke the help of the United States to subjugate it again to Colombian rule in case it should afterwards attempt to unite itself to another nation." [15]

And he adds an interesting prophecy:

"Should this view of the Colombian Government become known to the people of Panama, it is entirely safe to predict a revolutionary movement for independence at no very distant day, which, unless it shall be so indiscreetly conducted as to call for the interference of the United States, will very likely be made good."

Minister Burton was possibly a little provoked at the Colombian Government for failing to make at least some show of maintaining the interpretation he himself had at first adopted, a construction which he says had always been entertained by the Colombian Government, including President Mosquera, the real negotiator of the treaty on the part of (Colombia) until 1862, when as dictator he adopted an interpretation better suited to the circumstances then surrounding him." [16] He was at first inclined to believe that the Colombian note which raised the question was sent without the knowledge of the President as a feeler to ascertain what the attitude of the United States would be in case the exiles of the Colunje-Colancha revolution finally carried out their threatened counter-revolution. Color was lent to this idea by the fact that one of these exiles was now under-secretary for foreign affairs. Still later he reports that these exiles were partisans of the President; that it was generally supposed he would manage to have them restored to power in Panama; [17] that the President had reversed his ruling as to the constitutionality of intervention in local revolutions by

[15] Mr. Burton to Mr. Seward, Oct. 3d, 1866, Foreign Relations, 1866–67, p. 574, Senate Document, 58, 2d, No. 143, pp. 35–36.

[16] Senate Document, 58th Cong., 2d Session, No. 43, p. 35.

[17] Foreign Relations, 1866–67, p. 582.

the general government, and that he had ordered national troops to Panama "to preserve order there as he pretends, but really, as is generally supposed, to bring about an overthrow of the state government of Panama and to substitute the parties deposed in 1865." [18] From all this, if true, we may perhaps get the basis for an inference that the request for American interference was for "home consumption only," and that one reason why the President accepted Secretary Seward's view of the treaty was that he did not wish the United States to interfere with the particular revolution in question.

But, after all, the mental processes of the picturesque old reprobate who ruled Colombia at that time are "interesting rather than important." It may be that he was hampered by the attitude which he had taken in the days when, himself a revolutionist, the "legation which deemed itself authorized to represent the Granadian Confederation," as his Secretary of State euphemistically put it, sought to invoke the treaty against him and failed. It may be that the revolution had his secret good wishes. It may even be that a man who construed the constitution of his own country to permit local option in revolutions, and then reversed this ruling when his own friends seemed to be suffering from it, was not a high authority on the construction of treaties. But President Mosquera was the de jure President and de facto government of Colombia, and his admission clinches the American contention already favored by the general rules of construction by a priori considerations, and by the circumstances leading up to the negotiation of the treaty, that the guarantee of sovereignty and property contained in the first clause of Article 35 had no reference to domestic revolutions even though aimed at the independence of Panama.

In view of the fact that this interpretation, formally sanctioned by both parties, had stood unquestioned for nearly fifty years, it seems that Secretary Hay was clearly right

[18] Foreign Relations, 1866–67, p. 567.

when he closed his discussion of this point in his recent correspondence with General Reyes with the statement:

"The theory on which the statement of grievances proceeds, that the treaty obliged the Government of the United States to protect the Government of New Granada against domestic insurrection or its consequences, finds no support in the record and is in its nature inadmissible." [19]

We have noticed that the treaty contains three distinct guarantees, two on the part of the United States, one on the part of Granada. We have been discussing the second guarantee of the United States, the guarantee of sovereignty and property.

Let us now turn to the guarantee on the part of New Granada. New Granada guarantees to the United States the right of way over the Isthmus. This, of course, imposed upon New Granada the primary duty of maintaining the freedom of transit, and in case she fails to do so renders her liable in damages. On this point there is no room for argument. As early as 1857 Secretary Cass negotiated a claims convention with New Granada which provides for reference to a commission of

"All claims of citizens of the United States upon citizens

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[19] Mr. Hay to General Reyes, Jan. 5th, 1904, Senate Document, 58th Congress, 2d Session, No. 95, p. 92. See also the declaratory words in a project for a protocol submitted by the Colombian Minister to Secretary Evarts in 1881, Foreign Relations, 1881, p. 362.

"The guarantee of sovereignty consists in this, that the United States of America shall, by the necessary measures, including the use of force, prevent the territory in question from being the object of conquest or usurpation, or intrigues which shall tend to separate it from the Colombian Union, *employed by any foreign power.*"

Those who are interested in the arguments for the Colombian contention may be referred to Mr. Burton's despatch to Mr. Seward, Nov. 5th, 1865, Senate Document, 58th Cong., 2d Session, No. 143, p. 27, Foreign Relations, 1866, p. 461, to Senator Hoar's speech in the Senate, Feb. 22d, 1904, Congressional Record, Feb. 22d, p. 2276, and to an interesting and able article in the Advocate of Peace for Jan., 1904. These arguments so far as they rely on authority are based on general expressions where the precise point in question is not involved, and appear to confuse the guarantee of sovereignty and property with the guarantee of the neutrality of the transit which will be considered later. The most important documents were not available at the time the article in the Advocate of Peace was written.

of New Granada . . . and especially those for damages which were caused by the riot at Panama on the 15th of April, 1856, for which the said Government of New Granada acknowledges its liability arising out of *its privileges and obligation to preserve peace and order along the transit route.*" [20]

Our government has always held this view. Says Secretary Fish:

"But it is regarded as the undoubted duty of the Colombian Government to protect the road against attacks from local insurgents. The discharge of this duty will be insisted upon." [21]

When Secretary Hay authorized Vice-Consul-General Ehrman to recognize the de facto Republic of Panama he instructed him to look to it for all due action to protect the persons and property of citizens of the United States and to keep open the Isthmian transit in accordance with the obligations of existing treaties" (*i.e.*, the treaty of 1846, the obligations of which were assumed to have passed to Panama).[22] Mr. Ehrman gave the notification in Mr. Hay's language and the Panama authorities admitted the asserted liability.[23]

The guarantee of freedom of transit on the part of New Granada is placed between the clause expressly stipulating that the abolition of differential duties on American goods and vessels shall apply to the ports of the Isthmus of Panama, and the clause providing that the tolls charged American citizens for crossing the Isthmus shall be the same

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[20] Senate Miscellaneous Documents, 36th Congress, 2d Session, No. 13, p. 3 (*italics mine*). See also Moore's History and Digest of International Arbitrations of the United States, Vol. 2, pp. 1361–1420, especially 1369. It should be noted that as a matter of fact the Granadian police force actively participated in the riot of 1856 and shot down unoffending American citizens. It does not appear that New Granada or Colombia ever paid damages for mere failure to maintain peace and order along the transit route. See the case of the Montijo, Moore, Vol. 2, p. 1421.

[21] Mr. Fish to Mr. Scruggs, Oct. 29th, 1873, Foreign Relations, 1874–75, p. 363.

[22] Mr. Hay to Mr. Ehrman, Nov. 6th, 1903, Senate Document, 58th Cong., 2d Session, No. 51, p. 107.

[23] Senate Document, 58th Cong., 2d Session, No. 51, p. 128.

as those charged Granadians. There is nothing to indicate that a breach of the clause in regard to freedom of transit would justify self help on the part of the United States any more than a breach of the clause which immediately precedes or follows. Culpable failure on the part of New Granada to maintain freedom of transit would of course be a breach of the obligations imposed by the treaty, just as the imposition of differential duties would be a breach of the treaty. Such failure on the part of Granada would therefore form a proper basis for a "statement of damages" such as is provided for by the fifth section of the thirty-fifth article. If this appeal to diplomacy proved unavailing reprisals or war would follow at the option of the United States. But the Granadian guarantee of freedom of transit gives the United States no special treaty right to intervene. They have merely the general right, which every nation has, to punish violations of treaty rights, and this general right is in this instance specially qualified by a condition precedent—viz., the presentation of a statement of damages and failure of redress. If the United States have any right or duty to intervene to secure the freedom of transit, we must find it in some other part of the treaty.[24]

This brings us to the consideration of the most important provision of the treaty, the storm centre during the recent debates over the Panama treaty—the American guarantee of the neutrality of the Isthmus. It reads:

". . . The United States guarantee positively and efficaciously to New Granada by the present stipulations the perfect neutrality of the before-mentioned Isthmus with the view that the free transit from one to the other sea may not be interrupted or embarrassed at any future time while this treaty exists." . . .

Three questions arise in regard to this guarantee.

First: Is it effective against domestic insurrections which affect the freedom of transit, or is it, like the guarantee of sovereignty and property, confined to interference with the freedom of transit on the part of foreign powers?

[24] But see on this point Professor Morey's Article on "International Right of Way" in the American Lawyer for February, 1904.

Second: Does it become effective only upon the demand of New Granada or may the United States intervene upon their own motion?

Third: In case the United States do intervene (whether at the request of New Granada or upon their own motion) may they act solely with a view to maintaining the freedom of transit with the least possible risk and expense to themselves, or must they regard the primary rights of sovereignty and property of New Granada?

Let us take these questions up in their order. Does the guarantee of neutrality apply to local disturbances affecting transit or is it confined to cases of foreign intervention?

According to the general rule of construction cited above, if the guarantee is general and there is nothing to indicate a contrary intention, it should be construed as applying only to cases of foreign intervention. Here we do have a general guarantee of "the perfect neutrality of the before-mentioned Isthmus;" but this general expression is immediately explained by the following words, which show the purpose for which the guarantee was given: "With the view that the free transit from one to the other sea may not be interrupted or embarrassed in any future time while this treaty exists." Inasmuch as the purpose of the guarantee—the freedom of transit—would be as completely defeated by an interruption of the transit growing out of domestic insurrection as out of foreign war, it would seem that the general rule must yield to the declared intention of the parties.

But there is another even stronger reason for holding this view. We have already seen that by the next clause the United States guarantee the sovereignty and property of New Granada over the entire Isthmus. The guarantee of the neutrality of the transit route given in this clause, never having been concurred in by any other power except the United States, is, of course, not a neutralization of the Isthmus in the technical sense of the term. It is merely a pledge of protection on the part of the United States, *i.e.*, it is a guarantee of the sovereignty and property of New Granada over the transit route. That being so, if this guarantee of neutrality of the transit route extends only to cases

of foreign intervention, it is rendered entirely superfluous by the following clause, which extends the same guarantee over the entire Isthmus. On the other hand, if we construe the guarantee of neutrality to extend to all interruptions of the freedom of transit from whatever source, and the guarantee of sovereignty and property to extend to all intrusions upon the Isthmus on the part of foreign powers, whether the freedom of transit was endangered or not, every word in the sentence has its appropriate purpose. A construction which renders inoperative so considerable a part of the language of a treaty is not to be adopted if there is any reasonable construction which gives effect to the whole. Although it would have been very unreasonable to construe the guarantee of sovereignty and property over the entire Isthmus to extend to domestic insurrection, thus forcing the United States to become a party to every civil war upon the Isthmus, the result has shown that there was nothing particularly onerous in their undertaking to guarantee the freedom of transit from interruption from any and every source, subject, as we have seen, to the primary guarantee on the part of New Granada.

Since one construction disregards the express object of the guarantee and renders inoperative a considerable portion of the language of the sentence, while the other construction, not unreasonable in itself, insures the accomplishment of the declared object of the clause and gives effect to all parts of the sentence, we must conclude that so far as appears from the treaty itself the guarantee of neutrality with a view to free transit extends to all interruption of traffic whether caused by local insurrections or foreign wars.

Turning from the treaty to its diplomatic glosses, we find that while upon one occasion the general expressions of the foreign departments of both governments seemed to negative the construction contended for above, in practice it has always been acted upon and of late years has been formally adopted by both countries.

Previous to November, 1865, American marines were landed three times during domestic disturbances at the in-

stance of the local authorities to protect property and maintain order.

In November, 1865, Seward in declining, as we have seen, to intervene to suppress a domestic insurrection which was not alleged to have threatened the transit route, wrote to Minister Burton:

"As it may be presumed, however, that our object in entering into such a stipulation was to secure the freedom of transit across the Isthmus, if that freedom should be endangered or obstructed, the employment of force on our part to prevent this would be a question of grave expediency to be determined by circumstances. The Department is not aware that there is yet occasion for a decision on this point."[25]

During the second revolution of the year 1873, in which the local government troops stationed on the Isthmus joined the insurgents and serious interference with transit was only prevented by the interference of the American forces under Admiral Almy, the Secretary of the Panama Railroad asked Secretary Fish to remonstrate with the Colombian Government and if possible to secure adequate protection for the road. He referred at the same time to the American guarantee. Mr. Fish responded:

"This government, by the treaty with New Granada of 1846, has engaged in a guarantee of neutrality of the Isthmus of Panama. This engagement, however, has never been acknowledged to embrace the duty of protecting the road across it from the violence of local factions. Although such protection was of late efficiently given by the force under the command of Admiral Almy, it appears to have been granted with the consent and at the instance of the local authorities.[26] It is, however, regarded as the undoubted duty of the Colombian Government to protect the road against attacks from local insurgents. The discharge of this duty will be insisted upon."

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[25] Mr. Seward to Mr. Burton, Nov. 9th, 1865, Senate Document, 58th Cong., 2d Session, No. 143, p. 27.

[26] Wharton's Digest, Vol. 2, p. 105.

Mr. Fish instructed Mr. Scruggs, our Minister to Colombia, in the same sense, and directed him to demand the fulfilment of the Colombian guarantee of free transit. Mr. Scruggs accordingly addressed a letter to the Colombian Secretary, Jil Colunje (our old revolutionary friend, perhaps), in which he used the following language:

"By the treaty with New Granada of 1846, the obligations of which were assumed by its successor, the United States of Colombia, the government of the undersigned engaged to guarantee the neutrality of the Isthmus of Panama. But this engagement has never been acknowledged to embrace the duty of protecting the road across the Isthmus from the violence of local factions. It is therefore regarded as the undoubted duty of the Government of Colombia to protect that road against the attacks from local insurgents.

The undersigned is accordingly instructed by his government to bring the matter to the attention of your Excellency, and to ask that a sufficient force be kept on the Isthmus to deter attacks upon the road, its officers and employees." [27]

The Colombian Secretary responded as follows:

"As the honorable Minister in his note observes, the stipulations of the treaty of 1846, by which his government compromised itself to guarantee the neutrality of the Isthmus of Panama, did not include the obligation to protect the railroad against the class of violences referred to, the undersigned makes known from the present that the Colombian Government has considered, *and will always consider as its exclusive function and duty* to give that protection, a protection which this government has never refused, although it may have appeared inadequate during the late disturbances, on account of the magnitude of the acts committed at so great a distance from this capital. Furthermore, the undersigned communicates to his Excellency the Minister, that on the fifteenth of the present month a decree was made, to the end that hereafter no disturbance may be permitted on the line of the railway, a decree for the prompt enforcement of which there

[27] Mr. Scruggs to Mr. Colunje, Dec. 19th, 1873, Foreign Relations, 1874–75, p. 356.

will always be a sufficient national force in Panama at the disposal of the state government." [28]

On first reading these expressions seem decisive against the construction contended for. But it must be remembered that when Mr. Fish and Mr. Scruggs said that "the guarantee had never been acknowledged to embrace the duty of protecting the road across it (the Isthmus) from the violence of local factions," they were evidently referring to Mr. Seward's action in 1865, and that Mr. Seward had expressly limited himself to deciding the case before him—viz., a case where the freedom of transit was not even alleged to be in danger and where, therefore, it was entirely unnecessary to consider the effect of the guarantee we are now discussing, the guarantee of the neutrality of the Isthmus with the view that the freedom of transit should not be interrupted. It was only necessary for Mr. Seward to construe the guarantee of sovereignty and property. Again it is to be noted that in the actual circumstances which Mr. Fish and the Colombian Secretary had in mind, it was clearly the duty of Colombia to protect the road under her primary guarantee of the freedom of transit. She had been shamefully derelict in not maintaining sufficient troops on the Isthmus to fulfil her engagements; the few troops present had gone over to the insurgents, and it had become necessary for the United States to intervene to protect the freedom of transit against the national troops of Colombia. In asserting and admitting the primary duty and privilege on the part of Colombia under these circumstances both Mr. Fish and the Colombian Secretary seem to have lost sight of the fact that this did not by any means negative the existence of a secondary duty and privilege on the part of the United States. Mr. Fish in making an entirely proper demand seems to have relied on a mistaken reference to a former precedent; the Colombian Secretary in admitting a plain duty seems to have incautiously conceded more than was necessary.

But whatever importance might attach to this incident standing alone, the views then expressed have been long since

[28] Foreign Relations, 1874–75, p. 356.

repudiated by both governments. Mr. Scruggs stayed at his post long enough to see the Department at Washington abandon the ground he had apparently won. In 1885 the revolution which resulted in the establishment of the present Centralized Republic was in progress; the local government was powerless to protect the transit. The Colombian Government thereupon informed Mr. Scruggs:

"That the time has arrived for soliciting the intervention of the government which your Excellency so worthily represents in accordance with Article 35 of the treaty of Dec. 12th, 1846, to the end that pending the arrival there of the national troops said government will undertake to maintain harmless the rights and authority of the Colombian Government in the State of Panama." [29]

In response to this request American forces were landed to protect the transit. Secretary Bayard informed the Colombian Minister that this was done "*solely in order that the duty might be fulfilled which is rendered incumbent upon the nation by the treaty of 1846.*" [30] Or as President Cleveland put it in his Annual Message in 1885: "Emergencies growing out of the *civil war* in the United States of Colombia demanded . . . the employment of armed forces to *fulfil its guarantees under the thirty-fifth article of the treaty of 1846.*" President Cleveland and Secretary Bayard completely ignored the dictum of Secretary Fish in 1873 and asserted and acted upon the proposition that the American guarantee of the neutrality of the Isthmus with the view that transit might not be interrupted extended to domestic as well as foreign difficulties.

This ruling was followed by President Roosevelt when he directed the landing of American forces during the domestic disturbances of 1901 and 1902 avowedly to enforce the guarantees of the treaty. In the first of these instances the American marines were landed at the request of the local authorities, in the second without such request. But both

[29] Mr. Restrepo to Mr. Scruggs, April 14th, 1885, Foreign Relations, 1885, p. 210.

[30] Mr. Becerra to Mr. Bayard, April 4th, 1885. (memorandum of conversation), Senate Document, 58th Congress, 2d Session, No. 143, p. 63.

instances are equally good authority for the proposition in which we are at present interested.

Our survey of the precedents shows that American troops have been landed seven times during domestic insurrections; that the application of the guarantee of neutrality to domestic difficulties has never been denied except by way of dictum in 1873; that it has since that time been three times expressly asserted, twice with the hearty approval of both governments. Under these circumstances it would seem that we are justified in concluding that the precedents sustain our *a priori* conclusion that the American guarantee of the neutrality of the transit route applies to both domestic insurrections and foreign wars.

The second question which we have propounded in regard to the American guarantee of neutrality is: Does it become effective only upon the demand of New Granada or may the United States intervene upon their own motion? [31]

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[31] All discussion of the interesting questions which might arise as to the duties of the United States when requested to fulfil the guarantees by New Granada is omitted from the text as unnecessary for our present purpose. It will be noted that according to our interpretation of the treaty New Granada and the United States both guarantee the freedom of transit across the Isthmus. This would be inconsistent and meaningless unless we admit that there are some circumstances under which New Granada may rightfully shift her primary liability to the United States. What these circumstances are is not stated in the treaty; we are left to find them out as best we may. New Granada being in possession of the Isthmus, undoubtedly one prerequisite to any right on her part to expect the assistance of the United States in the maintenance of free transit is a request to that effect on the part of New Granada. But is the United States always bound to intervene upon request? Or is it necessary that traffic be actually interrupted? Or does New Granada owe a duty to exhaust all available means at her command before calling upon the United States? These questions have never been authoritatively answered. The interests of the United States in the freedom of transit have been so great that there has been little disposition to define or limit the occasions on which New Granada has a right to our assistance. Perhaps the most useful suggestions on the subject are those made by Captain Perry of the "Iowa" in 1901. He expressed the opinion that it was unquestionably the duty of Colombia to exhaust her own means of maintaining the freedom of transit before calling upon the United States, but added that as a practical matter he would act as soon as traffic was actually interrupted. But

The rule of construction governing this question is unquestioned. Hall states it as follows:

"Guarantees may either be mutual and consist in the assurance to one party of something for its benefit in consideration of the assurance by it to the other of something else to the advantage of the latter, as in the treaty of Tilsit, by which France and Russia guaranteed to each other the integrity of their respective possessions; or they may be undertaken by one or more powers for the benefit of a third, as in the treaty of the 15th of April, 1856, by which England, Austria, and France guaranteed 'jointly and severally the independence and the integrity of the Ottoman Empire, recorded in the treaty concluded at Paris on the 30th of March;' or, finally, they may be a form of assuring the observance of an arrangement entered into for the general benefit of the contracting parties, as in the treaties of 1831 and 1839, by which Belgium was constituted an independent and neutral state in the common interests of the contracting powers, and while placed under an obligation to maintain neutrality received a guarantee that it should be enabled to do so, or in the treaty of November, 1855, by which Sweden and Norway engaged not to cede or exchange with Russia, nor to permit the latter to occupy any part of the territory belonging to the crowns of Sweden and Norway, nor to concede any right of pasturage or fishery or other rights of any nature whatsoever, in consideration of a guarantee by England and France of the Swedish and Norwegian terri-

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he declined to interfere on the request of the local authorities when they merely feared that traffic might be interrupted in the future. The captain's exegesis did not meet the approval of the local authorities. He reports to the Secretary of the Navy:

"This seemed a disappointment to them, as they evidently wanted me to land at once, thinking by so doing it might prevent the liberals from coming in and capturing Panama. In other words, in their weakness and incapacity they want the United States to protect them from their enemies, while they sit hopelessly incompetent. The Alcalde, who was present, could not refrain from making some remarks which were offensive about a house burning and not coming to put it out, which necessitated my speaking to him in a sharp manner. They then withdrew." See Senate Document, 58th Cong., 2d Session, No. 143, pp. 201 and 209.

tory. In the two former cases a guarantor can only intervene on the demand of the party or, where more than one is concerned, of the parties interested, because the state in favor of which the guarantee has been given is the best judge of its own interests, and as the guarantee purports to have been given solely or at least primarily for its benefit, no advantage which may happen to accrue to the guaranteeing state from the arrangements to the preservation of which the guarantee is directed, can invest that latter power with a right to enforce them independently. In the last-mentioned case, on the other hand, any guarantor is at liberty to take the initiative, every guaranteeing state being at the same time a party primarily benefited." [32]

If, therefore, the American guarantee of the freedom of transit (and, of course, the same is true of the guarantee of sovereignty) was inserted for the benefit of New Granada alone, the United States has no right to enforce it except on the request of New Granada. If, on the other hand, the guarantee was inserted for the benefit of the United States alone or for the joint benefit of the United States and New Granada, the United States, being in either case a party primarily interested, may intervene whenever in their opinion a proper occasion has arisen. We must therefore decide whether the American guarantee confers a right or acknowledges a duty or whether it does both.

To decide this question we must examine the stipulations of the treaty in the light of the circumstances of its origin and the facts of its history. The treaty reads:

"And, *in order to secure to themselves the tranquil and constant enjoyment of these advantages,* and as an especial compensation for the said advantages and for the favors they have acquired by the fourth, fifth, and sixth articles of this treaty, the United States guarantee, etc."

It is submitted that on its face this sentence says that there are two reasons for giving the guarantee: first, it was given in order that the United States may secure—*i.e.,* maintain—a free and constant right of transit (the transit being the

[32] Hall, p. 356.

advantage referred to; see treaty as quoted *supra*); second, it was given as an especial compensation for this right of transit and for the abolition of the differential duties granted by the fourth, fifth, and sixth articles. The first reason is for the advantage of the United States; the second for the advantage of New Granada. The first reason indicates a benefit to the United States; the second a burden on the United States. The first makes the guarantee a right; the second a duty.

As far as phraseology goes, neither of these reasons is given precedence over the other. The words "As an especial compensation" do not mean especially as a compensation. They refer to the fact that the United States had already given a general compensation for the abolition of the differential duties by the Granadian government by agreeing to a reciprocal abolition on their own part. In so far as the language of the sentence assigns any priority to one reason over the other, it may fairly be claimed for the reason which is first stated. But this is not necessary; it is sufficient if we establish that two coördinate reasons are given.

It will be remembered that there are also two distinct guarantees given by the United States.

The United States guarantee the perfect neutrality of the Isthmus to the end that free transit may not be interrupted.

The United States guarantee the property and sovereignty of Colombia over the Isthmus as against any foreign power.

It is not claimed that any precise apportionment of benefit and burden between these two guarantees can be made, and it is admitted that it might at times (especially in view of our policy of late years) be thought an advantage to the United States to have the right to warn foreign powers off the Isthmus, even though not actually interrupting the traffic; and it is likewise admitted that the intervention of the United States to keep the transit open should operate for the benefit of New Granada. It is however suggested that while the guarantee of freedom of transit is, in the sense in which the word is used by Hall, a primary benefit to both parties, it is especially a benefit to the United States, while the guarantee of sovereignty and property is especially a

benefit to New Granada. These views find confirmation in the history of the negotiations leading up to the treaty.

Although as early as 1843 the Granadian Government had offered to conclude treaties with Great Britain, France, and the United States providing for a guarantee of the neutrality of the Isthmus, and although this offer had been brought to the attention of the State Department, Mr. Bidlack was sent to negotiate a general commercial treaty with New Granada and a treaty with reference to the right of transit over the Isthmus without instructions as to the policy of the United States in regard to the guarantee.[33] The treaty between the United States and Venezuela of 1836 was taken as the basis of negotiations. The Granadian negotiator, however, insisted that the provisions in regard to the transit of the Isthmus should be inserted in the general treaty, and that these provisions should include a guarantee of Granadian "territorial possession" of the Isthmus. The points involved are important and I shall quote liberally from the despatches.

Mr. Bidlack to Mr. Buchanan, Dec. 9th, 1846:

". . . I had intended to endeavor to agree upon the terms of a separate treaty in relation to the Isthmus of Panama; but in our conversation yesterday Mr. Mallarino intimated that it would be advisable to include both questions or subjects in the one treaty, stating among other reasons that he did not wish, as long as it could be avoided, to call the attention of the British legation or Government to the movement; and that if the Granadian Government abolished the differential duties, and ceded to the United States the right of way across the Isthmus, he presumed the *United States would guarantee to New Granada the Isthmus,*[34] or at least as much of it as was required for the construction of a canal or railroad upon the most favorable route; and, *moreover, that it was important that this guarantee should appear in the treaty as a condition for the right of way and the abolition of the discriminating or differential duties;*[35] otherwise

[33] Senate Document, 58th Cong., 1st Session, No. 17, pp. 14–24.
[34] Italics in original.
[35] Italics mine.

New Granada would be obliged to grant the same privileges unconditionally to England, with which government they had a treaty to that effect." [36]

In the "secret and confidential" report on reasons which should make the treaty agreeable to the United States, to which reference has already been made, the Granadian Secretary, while arguing that the guarantee will be advantageous for the United States, insists that it shall appear as a consideration for the abolition of the differential duties, that is, as a burden, for the reasons stated above by Mr. Bidlack and for the additional reason noted once before, that England and the other European powers would be tempted or forced to join in the guarantee in order to participate in the commercial advantages of the abolition.

Mr. Bidlack gives his impressions and conclusions based upon Mr. Mallarino's arguments and his own reflections in his report to Secretary Buchanan, Dec. 14. He writes:

" . . . With regard to the right of transit and free passage over the Isthmus which appeared to me to be becoming of *more and more importance every day*,[37] I have only to remark that I have procured the 'largest liberty' and *the very best terms that could be obtained.*

"I could not obtain these terms without consenting to guaranty the integrity and neutrality of the territory; and, in fact, it seemed to me, upon reflection, *that in order to preserve the rights and privileges thus ceded, it would be both the policy, the interest, and the duty of the United States to enter into an obligation to protect them.*" [38]

That is, Mr. Bidlack accepted the provisions in regard to the guarantee for two reasons: first, because they were demanded by the Granadian Secretary; second, because on reflection he had concluded that they were demanded by the best interests of the United States. The final stages of the negotiations are best told in the protocol of a conference held between Mr. Bidlack and Mr. Mallarino signed at the same time with the treaty.

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[36] Senate Doc., 58th Cong., 1st Session, No. 17, p. 22.

[37] Italics in original.

[38] Senate Document, 58th Cong., 1st Session, No. 17, p. 24.

"In reference to the first point, newly introduced by Mr. Mallarino in the thirty-fifth article (the guarantee clause), Mr. Bidlack stated that the obligation to guaranty the integral possession of those portions of territory between the continents that 'the universal mercantile interest require to be free and open to all nations' might *quoad hoc* be considered at least a quasi alliance; and to some extent contrary to the policy of the United States; for agreeing to which, the abolition of all differential duties might not be considered a sufficient equivalent."

Mr. Bidlack stated, moreover, that the abolition of the differential duties "was reciprocal, and therefore could not fairly give to either of the high contracting parties a claim for other equivalents; but he frankly admitted that the Government of the United States was desirous of the abolition of these differential duties, and might be willing to receive it as a partial consideration of the proposed guarantee. He, however, contended that this guarantee of territory, and the guarantee of "the right of way" over said territory, or what had been termed "the right of transit" over the interoceanic passage should also be reciprocal and included in the same treaty.

"All these propositions having been accepted after a slight discussion, *the first point of the thirty-fifth article was accordingly altered,* and it was further agreed that the treaty should be finally signed at the same time with this protocol, on Saturday, the 12th instant." [39]

Summarizing the negotiations which led up to the treaty, we have the following: The American guarantees were first proposed and always insisted upon by the Granadian Secretary. The great object in view on his part seems to have been to secure American support against European and especially English aggression. Nevertheless he stoutly maintained that it was necessary for the United States to give this support in their own interests and he argues to this effect at great length. He was, however, especially anxious that the guarantee should appear in the form of a burden as

[39] Senate Document, 58th Cong., 1st Session, No. 17, p. 16.

a consideration for the abolition of the differential duties, and this for two reasons: first, lest England claim the exemption from differential duties under the favored nation clause; second, because he wished to force England to join in the guarantee in order to secure the abolition of the duties.

Mr. Bidlack was at first reluctant to grant the guarantee, because it might constitute an entangling alliance. Later, however, he concluded that it would be for the advantage of the United States to make the guarantee. Nevertheless, he made as good a bargain as he could with Mr. Mallarino. He required, besides the abolition of the differential duties, a reciprocal guarantee of the right of way on the part of Granada; "and the first point of the thirty-fifth article was accordingly altered." When we look at the article as altered we see that all the changes suggested by Mr. Bidlack were included. We find a guarantee of the free transit on the part of Granada; this guarantee jointly with the abolition of the duties is made the consideration for the American guarantee. But we find something else. We find the provision, "And, in order to secure to themselves the tranquil and constant enjoyment of these advantages." This is a new idea. We know it did not originate with Mr. Mallarino. He was especially anxious that the American guarantee should appear as a burden, as a consideration for the abolition of the differentials. We also know that Mr. Bidlack had used an almost identical expression in his report to Mr. Buchanan when he said "That in order to preserve the rights and privileges thus ceded it would be both the policy, the interest, and the duty of the United States thus to enter into an obligation to protect them." The inference is irresistible that Mr. Bidlack, while willing to meet Mr. Mallarino's diplomatic necessities by making the American guarantees appear as a burden, had at the last moment secured the adoption into the treaty of his new-found faith that they were also a benefit. And so the two reasons were given and the guarantee was made both a right and a duty.

That President Polk agreed with Mr. Bidlack in regarding the guarantee as a benefit to the United States is apparent

from the often quoted phrase in the message transmitting the treaty to the Senate:

"The treaty does not propose to guaranty a territory to a foreign nation in which the United States will have no common interest with that nation. On the contrary, we are more deeply and directly interested in the subject of this guaranty than New Granada herself or any other power." [40]

The question as to whether it was necessary for the United States to wait for the permission of Colombia to enforce the guarantee of the treaty of 1846 arose in connection with an amusing incident in 1866.[41] Alexander McKee, United States consul at Panama, died Sept. 1st, 1866. While the President of the State of Panama, surrounded by his functionaries, was on his way to attend the funeral he perceived that a party of armed people belonging to the marine of the North American Union had disembarked, together with a band of music, and he was "under the painful necessity of declining and causing the other authorities to decline attending said obsequies, because permission to disembark said force had not been asked of him." The President therefore protested to the American admiral in charge against this conduct, and going beyond the matter in hand he announced that in case it should "be necessary to disembark forces in the future" it must not be done without his consent.[42] Ad-

[40] Message to Senate, Feb. 15th, 1847.

[41] This is not the first reference to the matter to be found in the despatches. Consul Rice in his report to the Department of the landing of American marines with the permission of the local authorities in March, 1856, takes occasion to say:

"But without such permission we should have deemed it proper to land the marines under the instructions to Consul McKee and myself from the Government at Washington . . . embodied in a despatch from the Secretary of the Navy, at the instance of the Secretary of State, to the commander of the ship-of-war on this station, dated June 21st, 1862, from which I quote: 'You will therefore put yourself in communication with the United States consuls on the Isthmus, and upon their requisition use the force at your command for the protection of Americans in their person and property, and for the security of the railroad company in all their rights.' It is believed that the United States has always maintained the view expressed in these instructions." See Mr. Rice to Mr. Seward, March 15th, 1865, Senate Document, 58th Congress, 2d Session, No. 143, p. 26.

[42] Foreign Relations, 1866, p. 459.

miral Pearson responded, explaining that the marines were without ball cartridges and that the band was unarmed, and apologizing for his failure to obtain permission before landing in the particular instance, but taking up the challenge contained in the obiter remarks of the President at the close of his letter he avowed his intention under the sanction of the treaty of landing to preserve order whenever it became necessary, with or without permission.[43] This apology seems to have been considered worse than the original offence. It was communicated by the President of Panama to the central government and called forth a formal note to Minister Burton. The Colombian Secretary says:

"Agreeably to the said thirty-fifth article, said guarantee is expressly declared to be an especial compensation for favors acquired by the United States of North America in that State. The guarantee is, therefore, not a right pertaining to them, but an obligation, a service, contracted by them, which redounds to their interest, but which cannot take the character of a power or jurisdiction. But by giving to said guarantee the interpretation implied in the pretensions of Rear-Admiral Pearson, it would be converted into an additional favor to the United States of North America, a favor which would require on the part of Colombia the abdication of her sovereignty." . . . "The way or transit across the Isthmus shall be open to the citizens and Government of the United States of North America, agreeably to said Article 35, but neither this nor any other article of the treaty implies the right of disembarking troops on that territory without previous notice, and then subject to the conditions of the treaty." . . .[44]

It would be easy to agree with these conclusions if the premise was sound, but, as we have seen, the guarantee was in form and in substance both a benefit and a burden.

Minister Burton referred this correspondence to Secretary Seward, who thus had an opportunity to pass upon the point in which we are interested. Unfortunately for us, Seward

[43] Foreign Relations, 1866, p. 460.
[44] Ibid., p. 458.

was conducting the State Department instead of writing a commentary on the treaty for the benefit of posterity. In an elaborate despatch five pages long he evades the point as follows:

"The entire controversy is uncalled for by any proceedings which have been taken by Admiral Pearson, or by any exigency that has arisen in our relations with the Government of Colombia. . . . We are not now under any necessity to confess the obligations or to claim the benefits which result from that most interesting relation. . . . A government cannot justly be expected to give explanations and guarantees in regard to the course it will adopt in hypothetical cases, where it has neither itself done, nor suffered its agents to do, any act which implies a want of fidelity to its treaties and other international obligations." [45]

Seward concludes his despatch with a few general observations upon the respective rights and duties arising under the treaty and the spirit in which they would be approached by the United States which will be quoted hereafter.

It is gratifying to know that Seward's purpose was accomplished. The President of Colombia read the despatch with "peculiar satisfaction" and the Secretary was of the opinion "that the correct estimate placed upon the facts which have led to this communication have fixed definitely the meaning of the treaty, and will serve as a point of departure for whatever political emergency may occur." [46] Secretary Seward evidently did not let the American naval officers find out that he had provided any point of "departure" from their customary conduct, for in August, 1867, we find the Colombian Government again complaining of the unauthorized landing of American marines, which, as Mr. Burton reported to Secretary Seward, he was "unofficially informed" originated in naval officers mistaking rockets sent up in the city by the populace on a holy day for the signs agreed upon by the United States consul, naval officers, and

[45] Foreign Relations, 1866–67, p. 526.
[46] Ibid., p. 565.

Panama Railroad for the landing of forces to protect American citizens and property." [47]

The question which Secretary Seward waived aside in 1866 has never been satisfactorily answered, owing to the fact that Colombia has been only too glad to secure the presence of American troops on the Isthmus. According to the report submitted to the Senate on behalf of the State Department in response to a resolution inquiring into the various occasions on which American forces have been landed on the Isthmus and the circumstances under which it has been done, it appears that American troops have been landed four times since 1866—viz., in 1873, 1885, 1901, and 1902. In all of these occasions except the last the Colombian Government suggested or assented to the landing.[48] In 1902 the landing was made "solely on the initiative of the United States, the local authorities being notified in advance." Although the Colombian Government and its local officials protested strongly against the methods employed to keep the transit free upon this occasion, the published correspondence does not show that any particular protest was made on the ground that the landing was made without permission.

The failure to exercise a right when there has been no occasion for it is no argument against its existence. The fact that the Colombian Government has been quick to request American aid, and that, therefore, it has in general not been necessary to volunteer assistance, does not indicate that it would not have been proper to do so. And in the only in-

[47] Foreign Relations, 1866, p. 568.

[48] Senate Document, 58th Congress, 2d Session, No. 143, p. 3.

In 1885, however, under President Cleveland, while it appears as a matter of fact that the American marines were not landed until requested by the local authorities, Secretary Bayard's whole attitude, as reflected in a conversation with the Colombian Minister on April 3d, 1885, and formally recorded in a note of the Colombian Minister to Mr. Bayard the following day, was to the effect that he did not consider the request of Colombia a necessary prerequisite to intervention on the part of the United States. Mr. Bayard formally declared "that the United States forces were to be sent to the Isthmus in pursuance of the spontaneous action of the United States Government." See Commander Clark to Mr. Chandler, Jan. 18th, 1885, Senate Document, 58th Cong., 2d Session, No. 143, p. 53; Mr. Becerra to Mr. Bayard, April 4th, 1885, Ibid., p. 61.

stance where the United States acted on its own motion the Colombian Government does not seem to have protested. There is certainly no practical construction to control the result which we have reached from the examination of the text of the treaty and the circumstances of its origin. We must conclude that the United States have the right under the treaty to land forces to protect the transit route whenever in their opinion the local authorities cannot protect it.[49]

[49] It has been frequently argued (see North American Review for February, 1904, article on "The Fifty Mile Order") that the fact that President Buchanan in three annual messages and one special message asked Congress to empower the President to intervene to protect the free transit from sea to sea via Nicaragua, Panama, and Tehuantepec, indicates that he did not believe that the United States had the right to enforce the guarantees of the treaty of 1846 on their own motion. Careful examination of the messages shows that President Buchanan's difficulties were with Constitutional rather than International Law. He notes the fact that the United States had a treaty in regard to Panama and refers to it as follows:

"In reference to the Panama route the United States by their existing treaty with New Granada expressly guarantee the neutrality of the Isthmus 'with the view that the free transit from one to the other sea may not be interrupted or embarrassed at any future time while this treaty exists.'" . . . "These treaty stipulations with New Granada and Mexico, in addition to the considerations applicable to the Nicaragua route, seem to require legislation for the purpose of carrying them into effect." (Richardson, Vol. 5, p. 517.)

Nevertheless he classes together, intervention to protect the Panama route according to the provisions of the treaty, intervention in Nicaragua without any treaty, and general intervention to protect the lives and property of American citizens in emergencies in all revolutionary ports, and asks Congress to give him power to act in all these cases. He says:

"He (the President) cannot without transcending his constitutional power direct a gun to be fired into a port or land a seaman or marine to protect the lives of our countrymen on shore or to obtain redress for a recent outrage on their property." (Richardson, Vol. 5, p. 539.)

President Buchanan needed no authority according to our municipal law to act under the treaty or in general emergencies. Congress could give him none under International Law to take charge of the transit route in Nicaragua without a treaty. If he had merely asked for power to intervene under the treaty his course would have been an authority for the construction of the treaty adopted in this article. As it is, his views cannot be regarded as an authority for anything unless it be the doctrines of International Law which he had formerly expressed in the Ostend Manifesto and the doctrines of Constitutional Law which he later expressed when he declined to coerce a sovereign state. See Richardson, Messages and Papers of the Presidents, Vol. 5, pp. 447, 515–17, 538, 569.

We have seen that the American guarantee of the neutrality of the Isthmus with the view that transit may not be interrupted extends to disturbances growing out of domestic insurrection as well as foreign wars. We have decided that this guarantee is both a privilege and a burden, and that the United States may therefore intervene upon their own motion to render it effective. We come now to the third question in construing this guarantee: Does this right to intervene to protect the transit route imply the right to exclude Colombia from her own territory as a means of securing tranquillity? In other words, may the United States forces engaged in fulfilling the guarantee by maintaining the freedom of transit, prohibit the transportation of Colombian national troops by the Panama Railroad in case such use would tend to turn the transit route into a theatre of hostilities? [50]

Let us for the sake of the argument make two violent assumptions: first, that the American guarantee is purely a benefit to the United States; second, that the question is in no way affected by the fact that Colombia also guarantees the freedom of transit. Even on these assumptions it is submitted that the treaty would not justify the exclusion of Colombia from her own territory. The rule of construction to be applied in such cases is elementary. Turning once more to Hall, we find it stated as follows:

"Whenever, or in so far as a state does not contract itself

[50] The position taken in the text in regard to the duty of the United States to permit Colombia to use the transit route in defence of her sovereignty renders it unnecessary to discuss the precise amount of territory which could properly be neutralized if a contrary view were taken. In any event, the question is purely academic, as it is admitted that whether the "fifty-mile order" and other similar orders were justifiable or not they were never acted on. The only interference on the part of the United States forces with the Colombian troops during the revolution was the prohibition of the use of the railroad by the Colombian troops on the mornings of Nov. 4th and 5th, 1903. If the United States had a right to neutralize any zone of any dimensions this action was clearly within the narrowest limits which could be suggested. Incidentally it may be added that there is good Colombian authority for the position of the administration that any disturbance on the Isthmus is likely to disturb transit. (Mr. Herran to Mr. Seward, June 26th, 1862; Mr. Burton to Commander Preble, Aug. 31st, 1865. See Senate Document, 58th Cong., 2d Session, No. 143, pp. 12 and 31.)

out of its fundamental legal rights by express language, a treaty must be so construed as to give effect to those rights. Thus, for example, no treaty can be taken to restrict, by implication, the rights of sovereignty or property or self-preservation. Any restriction of such rights must be effected in a clear and distinct manner.[51]

No nation will be presumed to have deeded away the right to fight for its own life on its own territory at all times unless the grant has been made in clear and unmistakable language. It is not pretended that the right to exclude Colombia from her own territory is expressly granted. The argument for the existence of such a grant by implication runs something like this: The United States have a right to protect the transit; the United States are not bound to aid Colombia in a civil war; to allow Colombia to use the railroad during a civil war would tend to provoke attacks on the road by the insurgents and might involve the United States in the civil war; therefore the United States have the right to exclude the Colombian troops from the transit route.

To assent to this proposition is in effect to say that the grant of a privilege by one nation to another carries with it to the grantee the right in case of civil war to destroy the grantor rather than run the risk of a temporary impairment of the privilege. It is like denying to the master of a house the right to resist robbers on the ground that it might disturb the business of a tenant. This will never do. The fact that New Granada and her successor, Colombia, have been weak, corrupt, inefficient nations; that revolutions have been the rule rather than the exception; that the United States is a great nation ready to act as the trustee for civilization—all these considerations affect the ethics of the situation but not the law. "Russia and Geneva are equal" in the eye of the law. And in order to find out what the law is we must assume for Colombia the strength of one and the beneficence of the other. Even on the inadmissible assumptions that the American guarantee is purely a benefit to the United States and that the Colombian guarantee does not affect the ques-

[51] Hall, International Law, 4th edition, pp. 354, 355.

tion, it is submitted that there is no such irresistible implication as is indispensably necessary if we are to construe the treaty to grant to the United States the right to exclude Colombia from her own territory.

But as a matter of fact we know that the American guarantee is not only a benefit but a burden. Whether exercised as a right or a duty its nature is unchanged. Whether the United States forces are landed with or without the permission of the Colombian authorities, their rights are the same, once they are landed. If the United States forces may exclude the Colombian forces from their own territory in one case, they may in the other. And it will hardly be contended that Colombia would stipulate with the United States for the right to call upon the United States to maintain free transit through Colombian territory at the price of excluding Colombia from sovereignty over her territory.

Again we have seen that as a matter of fact Colombia herself guarantees to the United States the free transit of the Isthmus and thereby becomes liable for failure to maintain the same. If we construe the American guarantee to authorize the United States to exclude the Colombian forces from the transit route, we have a treaty which in one clause imposes a duty upon Colombia and in the other gives the United States the right to prevent her from performing that duty.

We may admit that the precise adjustment of rights and duties between the two guaranteeing nations is left rather vague by the treaty, and that no construction is entirely free from difficulties, but taking the treaty as a whole, bearing in mind the fact that Colombia is a guarantor of the freedom of transit as well as the United States, that the American guarantee is a burden as well as a benefit, and especially remembering that a treaty is not to be construed to forfeit essential rights by doubtful implications, we must conclude that as far as we can judge from the words of the treaty the United States do not have the right to exclude the Colombian forces from the transit route.

When we turn from the words of the treaty to their practical administration we find no such established interpreta-

tion contrary to the conclusions which we have reached as would justify us in changing our view. There is very little authority which is in point. There is a general expression of Secretary Seward's in 1865 contained in the closing paragraph of his note in regard to the controversy over the landing of American marines without permission from the Colombian authorities [52] which is often quoted and which so far as it goes sustains the contention adopted. Mr. Seward wrote:

"The United States desires nothing else, nothing better, and nothing more in regard to the States of Colombia than the enjoyment on their part of complete and absolute sovereignty and independence. If those great interests shall ever be assailed by any power at home or abroad, the United States will be ready, co-operating with the government and their ally, to maintain and defend them. Such co-operation will be in accordance not merely with the terms of the treaty, but also in accordance with the respect which is due to the sovereignty of that ally, and to the courtesies which friendship inspires, and which are invariably practised between friendly and enlightened nations."

While the precise question as to whether the Colombian forces could be excluded from the transit route during the time the American forces were on guard does not seem to have been covered by any instructions issued to the expeditionary force in 1885, the general tenor of these instructions is very deferential to the Colombian Government, and the tone of the instructions was reflected in the conduct of the American troops. While the revolutionists were handled without gloves, the national forces were afforded every facility to reconquer the Isthmus.

The practical conduct of the expedition as well as the attitude of the United States Government is well set forth by the account given by President Cleveland in his Annual Message in 1885. He says: "Desirous of exercising only the powers expressly reserved to us by the treaty, and mindful of

[52] Mr. Seward to Mr. Burton, April 30th, 1866, Foreign Relations, 1866–67, p. 531.

the rights of Colombia, the forces sent to the Isthmus were instructed to confine their action to positively and efficaciously 'preserving the transit and its accessories from being interrupted or embarrassed.' The execution of this delicate and responsible task necessarily involved police control where the local authority was temporarily powerless, *but always in aid of the sovereignty of Colombia.*[53] The prompt and successful fulfilment of its duty by this government was highly appreciated by the Government of Colombia, and has been followed by expressions of satisfaction. High praise is due to the officers and men engaged in this service. The restoration of peace on the Isthmus by the re-establishment of the constituted government there being thus accomplished, the forces of the United States were withdrawn."

President Cleveland evidently took the view that the rights of the United States under the treaty were subject to the rights of sovereignty and self-preservation of Colombia.

On the other hand, in 1901 and 1902 the American commanders were instructed to prohibit the use of the railroad by Colombian forces in case it was likely to convert the line of transit into a theatre of hostilities. In accordance with these instructions the American officers on the Isthmus for a considerable time declined to permit the transportation of Colombian troops by the Panama Railroad. As late as Oct. 29th Rear-Admiral Casey gave strict orders to the officials of the Panama Railroad to decline to transport Colombian troops without special authority from the American Commander-in-Chief.[54] This action caused great dissatisfaction on the part of the Colombian authorities and was made the occasion of urgent diplomatic remonstrance. As a result, on Oct. 29th the Navy Department telegraphed Rear-Admiral Casey as follows:

"While approving your attitude the Department wishes to impress upon you that the relations of the United States with Colombia are much strained. You must adopt measures as conciliatory as is consistent with dignity United States,

[53] Italics mine.

[54] Senate Document, 58th Congress, Special Session, No. 10, p. 72.

overlooking matter of minor importance. Negotiations for ship canal are at present at standstill on account of feeling of irritation on part of Colombian representative." [55]

Two days later, when the Colombian commander asked Rear-Admiral Casey whether it would be "inconvenient" for his troops to be transported by the railroad the latter acted on the above hint from the Department, and replied that it would cause no "inconvenience for the government troops to be transported by train from Colon to San Pablo or from Colon or Panama to other places on the road." Admiral Casey added the hope that General Perdomo would "instruct his command to avoid as far as possible interrupting the transit of the train in any way or converting the line of the road into a theatre of hostilities.[56]

To offset the interpretation of the guarantee clause derived from the treaty itself, read in the light of the principles of construction applicable thereto and clearly adopted by President Cleveland in 1885, we have the contrary ruling of the United States Government in 1901 and 1902, which evoked bitter protests from Colombia and as a consequence was abandoned in practice even if maintained in theory. There is certainly no such a sustained course of practice sanctioned by both countries as would justify us in departing from the construction adopted above—viz., that the United States must exercise its rights under the guarantee clause of the treaty subject to the primary rights of sovereignty and self-preservation inhering in Colombia.

Summarizing the results of our investigations as to the proper construction of the thirty-fifth article of the treaty of 1846, it is submitted that they establish the following propositions:

1st. The guarantee of the sovereignty and property of New Granada over the Isthmus of Panama does not bind the United States to defend this sovereignty against domestic insurrection even if the revolution should result in the independence of Panama.

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[55] Senate Document, 58th Cong., Special Session, No. 10, p. 93.
[56] Ibid., p. 73.

2d. The United States do guarantee the sovereignty and property of New Granada over Panama as against foreign powers, European or American.

3d. New Granada guarantees to the United States and their citizens the right of free transit over the Isthmus. This imposes upon New Granada the primary duty to maintain this freedom of transit.

4th. The United States guarantee the neutrality of the Isthmus in order that free transit may not be interrupted. This guarantee is effective against any interruption of the transit whether proceeding from domestic difficulties or foreign wars.

5th. This guarantee is both a benefit and a burden to each of the contracting parties and may therefore be enforced on the initiative of either.

6th. Although the United States may enforce this guarantee unasked, they must do so subject to the paramount rights of sovereignty and self-defence which are reserved to the local sovereign since nowhere expressly granted away.

7th. The ordinary rights of every nation to safeguard its interests and to seek redress for the violation of treaty rights are limited by the provision that neither party shall resort to self-help on account of any supposed violation of the above treaty rights until a statement of damages and a claim for redress has been made to the opposite party without obtaining satisfaction.

Applying these conclusions of law to the well-known facts of the revolution in Panama, we see that the United States were not bound to put down that revolution at the request of Colombia; that the United States were acting within their treaty rights in landing men to preserve the freedom of transit whenever it seemed necessary, with or without the permission of Colombia, but that the treaty does not give the right to the United States to exclude the forces of their ally and co-guarantor from her own territory because the presence of these forces is likely to render the task of the United States more difficult; and that the United States were therefore technically not justified by any or all the provisions of the

proceeding to Panama on the morning after the revolution. This was an act of political intervention; its justification must be found in considerations of ethics and expediency. It cannot be found in law.[57]

William Cullen Dennis.

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[57] It is not seriously alleged that at the time of the American intervention Colombia had been guilty of any violation of the treaty of 1846 which would have justified the United States in taking action by way of reprisals or otherwise, according to the general rules of International Law.

It is rather suggested than asserted that the treaty of 1846 obligated New Granada and Colombia to permit the construction of a canal across the Isthmus and therefore to negotiate and ratify a treaty with the United States to that end. It is indeed obvious that the treaty of 1846 looked forward to a subsequent convention which should define the meaning and secure the objects of the original treaty according to the developing needs of Isthmian traffic. As Mr. Mallarino suggested in his secret memorandum (see *supra*), the treaty "could be completed and perfected by a subsequent and complementary convention, in which the transit of the interoceanic passage should be arranged, and its *permanent neutrality* strengthened" (italics in original). But it is equally obvious that even if there had been an express provision calling for a subsequent treaty the high contracting parties had an equal right to decide upon its terms and to ratify or reject it after negotiation according to International and Constitutional Law. As a matter of fact, the two countries had negotiated at least four separate times in regard to such a treaty; upon two of these occasions the negotiations resulted in full-fledged treaties, one of which failed of ratification through the action of the Colombian Congress, and the other because of the indifference of the United States Senate. (See as to legal duty to negotiate a treaty Mr. Hay to General Reyes, Jan. 5th, 1904, Senate Document, 58th Congress, 2d Session, No. 95, p. 22.) As to the moral obligation resting on Colombia to ratify a proper canal treaty, that is another matter. (See the President's Special Message, Jan. 4th, 1904, Senate Document, 58th Congress, 2d Session, No. 53, p. 23.)

The absurdity of the claim that the treaty of 1846 imposes a legal obligation on the contracting parties to unite in any supplementary convention becomes more manifest when we remember that the treaty of 1846 provides for its own termination at any time at the option of either party on twelve-months' notice.

Even if some violation of the treaty on the part of Colombia could be established, by the very terms of the treaty itself it would not justify self-help on the part of the United States until after a formal and unsuccessful appeal to Colombia for redress through diplomatic channels. No such appeal had been made.