THE RECOGNITION OF PANAMA AND ITS RESULTS[1]

(Theodore S. Woolsey, LL.D., in The Green Bag.)

There are two questions involved in our recent recognition of a new State of Panama, and in the negotiation of a canal treaty with that State. These are: First, whether the action of this Government was correct, was according to law and precedent and in conformity to treaty; second, whether the newly recognized State is in such possession of sovereignty as to make its title to property which it may agree to convey good for anything. As Congress is called upon to pay ten millions of dollars for the canal concession, together with sundry other considerations, Panama's right to convey is a vital point in the contract. And the reputation of our country for dignity, fairness, and obedience to law is something which no administration and no citizen would willingly see hazarded.

Up to the time of writing,[2] the essential history of this Panama outbreak is as follows:

Irritated by the failure of the republic of Colombia to ratify the Hay-Herran canal treaty, Panama, one of the States forming that union, seceded, and on the 3rd of November last, declared its independence. The night before the revolution, the United States ship Nashville had arrived at Colon, *i.e.*, Aspinwall. By the use of its force the railway property was protected, and the few Colombian troops present at Colon prevented from giving trouble. Two days after the outbreak, these troops sailed for home. Other United States vessels were at once ordered to both sides of the Isthmus, amongst them the Dixie, with 400 marines on board. She reached Colon Nov. 5. On the 6th the new State of Panama was recognized by the United States as a *de facto* government,—that is, as the only government in sight capable of exercising the powers of statehood. A week later a diplomatic agent from Panama was received at Washington. This act worked recognition of Panama as an independent State, and accordingly five days more saw a new canal treaty signed. Meanwhile, there were rumors of an attempt by Colombia to re-establish its authority, which called forth orders to our ships and the announcement to that government that its troops would not be permitted to land at any ports in Panama. To earnest-

[1] To avoid possible misconstruction, the author desires to state his belief, that in its preference for the Panama canal route over all others, our Government has made no mistake.

[2] December 19.

ly protest against all this, Colombia sent commissioners to Washington, but without avail. The treaty was sent to Colon, ratified by the revolutionary representatives at Panama, returned to this country, and placed before the United States Senate. December 12 a minister to the new State was named, and the calling of a convention at Panama announced which should frame a constitution. For it should be borne in mind that the canal treaty was made and ratified under the authority of a Junta merely. Now a Junta, in the Latin-American sense, is a political committee of management, usually, as in this case, self-constituted.

With these facts in mind, let us look at the law governing the recognition of independence.

Briefly, the new government must establish its ability to perform all the duties and maintain the rights of a State. Also, in case of violent separation from another State, it must appear that the parent is making no effort, and is unlikely to make an effort in the near future, to coerce the revolutionary body. Thus time is the essence of the question,—time for testing the new State's stability, its popular backing, its freedom from outside control, its independence as an assured fact.

For instance, when the South American colonies revolted from Spain early in the last century, the United States Government allowed twelve years to elapse before recognition of their independence.

In support of the rule for recognition given above it is hardly necessary to cite authorities. I mention one only, Snow's Manual of International Law (2d ed., pp. 10, 11), partly because his phrasing is very apropos, and partly because this manual was published by our Government for the use of the navy so lately as 1898. It is therefore the rule which our naval officers would have followed in the case of Panama, had no special instructions superseded it.

"When a rebellious community has practically attained its end, which is independence, and the mother country has ceased military operations against it, then, if the government and institutions of the new State appear regular and stable, it is recognized by third States as an independent State and a member of the family of nations. . . . "

"The usage of International Law in reference to the recognition of the independence of a State is that when the war for its subjugation has practically ceased and that it has a stable government

the proper time has arrived. The commencement of a State as a subject of interntional law dates from this recognition of independence by existing States. . . . "

"Cases have occurred where third States have recognized the independence of a rebellious community prematurely, but such recognition has been generally followed by a declaration of war by the parent State upon the ground that such action places the third State in the position of an ally to the rebellious community, and hence of an enemy to the parent State. The alliance of France and the United States in 1778 is a case in point. John Quincy Adams gives a safe rule when he says: 'The justice of a cause, however it may enlist individual feelings in its favor, is not sufficient to justify third parties in siding with it. The fact and the right combined can alone authorize a neutral to acknowledge a new and disputed sovereignty.' To have sufficient claim, then, for recognition as a separate nationality a community should have the attributes of a sovereign State. It should possess and control a fixed territory, within which there is a definitely organized government, ruling in a civilized manner, controlling the obedience of its citizens or subjects and duly authorized by them to carry on dealings with the existing sovereign States."

Judged by this standard, its own standard, our government, by recognizing the new State of Panama within ten days of its secession, as possessed of sovereignty although *sans* a constitution, *sans* a government, *sans* a definite status, *sans* everything, gave to Colombia cause for war. Its further act forbidding and preventing, by show of force, the parent State from trying to coerce its rebellious portion, was an act of war, so far as the general principles of international law are in question.

So clear is this conclusion, that it is hardly necessary to give further attention to it. It is but beating the air. For the administration does not try to justify its action under general law, but rather by an appeal to specific treaty provision. This is contained in the thirty-fifth article of the treaty of 1846 with New Granada, to whose rights and duties the United States of Colombia has succeeded.

By this treaty, certain privileges of import and navigation were granted, in Articles 4, 5 and 6. In addition, by Article 35 the citizens, vessels and merchandise of the United States were to enjoy in New Granadian ports, including those of Panama, "all the exemp-

tions, privileges and immunities, concerning commerce and navigation, which are now or may hereafter be enjoyed by Granadian citizens, their vessels and merchandise; and that this equality of favors shall be made to extend to the passengers, correspondence and merchandise of the United States in their transit across the said territory, from one sea to the other. 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." The article goes on to amplify this privilege by stating specifically that the citizens of the United States and their property should have in all respects the same transit rights as belonged to the citizens of New Granada. Thus whatever route of trade across the isthmus the future might develop, whether highway, railway or canal, though the latter was particularly in mind, its use was to be granted on equal terms to our people.

This was the grant of a privilege, not reciprocal but unilateral, and therefore requiring a consideration. This consideration this same article 35 goes on immediately to specify, in these terms:

"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 4th, 5th and 6th articles of this treaty, the United States guarantee positively and efficaciously to New Granada, by the present stipulation, the perfect neutrality of the before-mentioned 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 guarantees, in the same manner, the rights of sovereignty and property which New Granada has and possesses over the said territory."

Thus the United States pledged its own abstention, and also undertook the duty and burden of neutralizing the isthmus and maintaining any future transit way free from injury, the burden, that is, of protection. For neutralization undertaken by a single State obviously means protection, since real neutralization implies a self-denying agreement on the part of all related powers, each for itself.[1] This stipulation did not take away New Granada's duty of preserving order, but supplemented it. So Mr. Cass declared in

[1] See Wharton's *Digest of the International Law of the United States*, § 145.

1857, as quoted below. In the performance of this duty on a number of different occasions, to protect the peace and the property of the Panama railway, forces have been landed from United States ships. But see what this duty of protection is now construed to mean. The President's *apologia,* in his message to Congress of December 7, 1903, thus describes it:

"The treaty vested in the United States a substantial property right carved out of the rights of sovereignty and property which New Granada then had and possessed over the said territory."

By a complete confusion of ideas, a duty has changed into a property right, existing originally under New Granadian sovereignty, is now construed as existing in derogation of, to the exclusion of, that sovereignty.

It is a well-known rule in the construction of treaties, that a provision inserted for the benefit of one of its contracting parties must be strictly construed, on the ground that the party for whose benefit it is inserted must see that a provision in its favor is expressed in terms so clear and unmistakable that no doubt as to its meaning can exist.

Does the President's argument accord with this rule? The message announces that after the new republic was started "the United States gave notice that it would permit the landing of no expeditionary force, the arrival of which would mean chaos and destruction of the line of the railway and of the proposed canal, and an interruption of transit as an inevitable consequence." In effect, he says that as the United States is bound to protect the Panama railway and the zone it traverses from injury, and as the re-establishment of Colombian authority over the rebellious isthmus, including this zone, might jeopardize this railway, therefore Colombia shall be prevented from that primary exercise of a State's sovereignty, the right to put down insurrection.

Was the treaty provision inserted to limit Granadian sovereignty or to maintain that sovereignty? Was a property right clearly intended and stated to be granted in the treaty? Is the idea that an obligation to protect the property of a friendly State substitutes the rights of the protector for the rights of the sovereign, consonant with either law or common sense? Does any reasoning man believe that the President's construction of the treaty of 1846 can be written into it by any other hand than the mailed fist?

The message goes on to adduce authorities for its interpretation of the treaty. Let us examine them, remembering, however, that the opinions of Secretaries of State have no inherent judicial or legal value.

Secretary Cass in 1858 wrote of the narrow portion of Central America:

"While the rights of sovereignty of the States occupying this region should always be respected, we shall expect that these rights be exercised in a spirit befitting the occasion and wants and circumstances that have arisen. Sovereignty has its duties as well as its rights."

The quotation goes on at some length to declare that no local State would be permitted to bar intercourse or make it unduly burdensome. The letter (to Mr. Lamar) was aimed at exactions in the shape of port dues and tolls forbidden by treaty. Mr. Cass also deprecated European influences in that quarter, as well as local disturbance. The Panama railway was then part of our easiest route to California, and we were naturally sensitive as to its unobstructed use. The language of the letter is general and vague. It was far from having any such meaning as the President imagines. But it was explicitly insisted that the rights of sovereignty of the Central American States must be respected. It therefore condemns our recent action. Mr. Cass' deliberate opinion is expressed elsewhere. In 1857 he negotiated a claims convention with New Granada, providing (Art. 1) for the reference of claims "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 the privilege and obligation to preserve peace and good order along the transit route," a full acknowledgment of Granadian sovereignty and responsibility in the isthmus.

The President next quotes Secretary Seward, in 1865:

"The United States have taken and will take no interest in any question of internal revolution in the State of Panama, or any State of the United States of Colombia, but will maintain a perfect neutrality in connection with such domestic altercations."

Can the President say as much? It is a queer citation for his purpose. Mr. Seward goes on to declare our right of protection under the treaty, and gives his interpretation of the ambiguous last phrase of the 35th article, which has been cited but not commented on above: "The purpose of the stipulation was to guarantee the isthmus against seizure or invasion by a foreign power only."

But it is probable that the President, although citing this dubious support to his interpretation and action, does not after all base the justification of that action upon the 1846 treaty. He appeals rather to a variety of considerations which are of greater or less force, and which, taken together, are held to give the United States an equitable right to do what it will in the matter of Panama and a Panama canal, because what it wills is just. The argument in the President's message is substantially as follows:

A fair and even generous canal treaty was made last year with Colombia, a country oft disturbed by popular risings, and no better than it should be.

This treaty failed of the ratification by Colombia which it deserved, and would have had, had the government chosen.

In consequence, a revolution broke out at Panama, "and with astonishing unanimity the new republic was started."

To allow the landing of Colombian forces to quell this rebellion "would mean chaos and destruction along the line of the railway and of the proposed canal, and an interruption of transit as an inevitable consequence," hence it was forbidden.

Colombia being thus held incapable of recovering its power, the new State was recognized, and the parent advised in all friendliness to settle her differences with the triumphant rebel.

The "interests of civilization" demand that the isthmus traffic shall not be disturbed any longer by unnecessary and wasteful civil wars.

Colombia alone is incapable of maintaining order on the isthmus, and has constantly to fall back upon the aid of the United States.

When at last there was an opportunity to repay the United States for these many services, Colombia offensively refused.

Therefore it would be "folly and weakness" and "a crime against the nation" if we do not set up this puppet State, and thus carry out the great enterprise of building the inter-oceanic canal.

It is "a project colossal in its size, and of well-nigh incalculable possibilities for the good of this country and the nations of mankind."

This was the argument and the conclusion. Accordingly, without stopping to take breath, the administration made a canal treaty with Panama "better in its terms" than those with Nicaragua and Costa Rica or the one which Colombia rejected.

Translated into every-day speech—and every day one hears just such sentiments—we gave Colombia fair terms, she tried to "hold us up," we set up a State which we could manage, and now Colombia pays the penalty of overreaching herself.

This sort of argument will appeal to men differently. One or two facts are clear about it. One is, that it does not regard Colombia as a sovereign State under constitutional government. The charge that treaty ratification there is at the President's will; the idea that frequent revolutions in a State detract from its sovereignty; the denial to a State of the right to quell insurrection, are proofs of this.

Another fact is, that it is not a case where law enters, but only politics. The moving considerations are purely material. It is the interests of civilization that are appealed to, the world's need of a colossal public work, not the reign of law and the equality of States.

Old precedents have been disregarded and new ones made. These carry us far towards the theory that to the United States belongs such headship of the States on this continent as to make its own sense of justice, its own will, the only law. To claim such powers without being held to corresponding responsibilities for our weaker neighbors' actions is impossible.

There has been indecent and unnecessary haste, judged by our own or any other standards. The puppet State of Panama, with a population no larger than Milwaukee's, itself a hotbed of revolution, cannot stand alone. We must support it and be responsible for its conduct.

As already suggested, there are some who see nothing out of the way in such reasoning as this, and in the conclusions resulting.

There are others who have regard still for national honor, patience, obedience to law; who fear dangerous precedents; who would keep faith even with weak and treacherous neighbors.

But such men will be asked, would you permit any State on academic ground of equality and law to hinder this country from constructing a canal already too long delayed?

The answer is twofold. National reputation is more valuable than national progress. From a purely material standpoint, what our country may gain in ease of communication it may more than offset by awakening political mistrust.

And the second answer is, that no such choice as is contended was forced; that the President's way was bad diplomacy; that with

a little more patience and a little more management, all that the United States has at heart could probably have been won. Fifty-three political disturbances, great and small, in Colombia are enumerated in the message, and the railway protected throughout. Why not endure a fifty-fourth? Why not have put down the Panama revolution as threatening the railway—an undoubted treaty right—instead of aiding it, first getting Colombia's pledge to deal fairly with a new treaty? We might have lost a year, but we should have saved our character and had a real State to deal with.

This suggests the second of the inquiries proposed at the outset. If our recognition of Panama was warranted neither by law nor by treaty, is it any the less a sovereign State for all that? And if a sovereign State, but under a Junta, are its contracts valid?

To the first part of this question the reply must be, that premature or wrongful recognition may violate the rights of the parent State, but nevertheless accomplishes its object. For recognition simply means, that, so far as the recognizing State is concerned, the new body is to be allowed to exercise towards it the rights of statehood. If unwarranted, it may be a cause of war with the parent, but does not affect the third parties. They take their own line. They grant or withhold recognition at their own will. And so when A says that B's colony, C, is independent, A grants that colony external sovereignty as to A itself only, and takes the consequences.

But unfortunately, under our system of international law, a powerful wrongdoer cannot be brought to book by a feeble sufferer. Thus wrongful recognition may be a wrong without a penalty.

To give a single illustration: the recognition by the United States of the new government in Hawaii, which ousted the monarchy in 1894, was likewise premature. But the new State stayed independent and sovereign nevertheless; exchanged ministers with this country; after its government was established, made a treaty with this country; and other powers gradually followed suit. There the injury was to a ruling family and irremediable, not to a parent State retaining its right of coercion. The new State arose within the old limits, not by separation. But the principle involved in recognition is the same, that thereby a new sovereignty exists.

And now our final inquiry. Is our canal treaty, made with Panama under the Junta, valid, and title to property leased or ceded by it, good?

The rules which govern the validity of treaties relate to the State's capacity to contract, to the negotiating agents, to the object of the treaty, and its ratification.

A treaty is void if it contracts to do an unlawful act. It is a fair question, whether Panama's agreement to lease territory and cede property, which Colombia still claims, is not a contract to do an unlawful act. But the point is not pressed, as being precluded by our recognition subject to penalty.

The three other rules all depend upon the Constitution of each State. If semi-sovereign, it has not full capacity. Its agents who act in the name of the State must be empowered by its fundamental law; ratification must be done in accordance with the Constitution.

But suppose there is no Constitution. No popular vote has been taken; no head of the State chosen; no power of ratification lodged in anyone's hands. Does the treaty-making power exist in such shape as to entitle other States to credit the action of persons thus unrepresentative and unauthorized?

It is not often, I fancy, that such speedy treaty-making after revolution is attempted as to raise this point, and I do not find it directly settled by the publicists. If a State's independence is recognized by another, it has sovereignty enough to make treaties with that other. But to bind the new State, its agents of negotiation and ratification must be truly representative, in some way entitled to bind their country. Mere assumption of the right would seem a frail basis to build upon. Probably in the case in question the United States would always claim and always have the power to enforce the Hay-Varilla agreement, as against other powers. Yet who will guarantee that a future Panama, pressed perhaps by future creditors, will not want a larger rental, and deny the validity of this contract on the ground that it was made by those who were unauthorized? In other words, there is enough doubt about the competence of Panama's agents to cast discredit upon the agreement. It will be good if we can always make it good, but not otherwise.

If this is sound logic, it should follow that to pay Panama as much for a doubtful title under a questionable contract as was to have been paid to Colombia for a sound title, is very poor business. It is only done to save face. However, this defect in title under treaty can be and should be cured, by future reference to the proper body for ratification after a Constitution in Panama has been adopted.

Let us set together briefly the conclusions drawn from the considerations which have been presented.

(1) The hasty recognition of a new State in Panama was not in accordance with the law of nations.

(2) To justify it by the treaty of 1846 requires a new and forced construction of that instrument.

(3) To prevent Colombia's coercion of Panama is an act of war.

(4) The "man in the street's" verdict, that our smart politics served Colombia right, disregards law, sets a dangerous precedent, detracts from the national dignity, and may injure our influence and trade amongst the Latin-American States.

(5) Our duty was and is to let Colombia recover Panama if she can; our policy, to use her troubles to get favorable canal action from the rightful sovereign.

(6) Our recognition, if persisted in, makes of Panama a treaty-making agent, but for ourselves only.

(7) The canal treaty, negotiated and ratified by the Junta, with no constitutional authority or other authorization, is of doubtful validity and the defect will need to be subsequently cured.

LAWYERS

(Sigma, in Blackwood's.)

Continued from January Number.

How much Coleridge, when at the Bar, owed to the untiring ability and laboriousness of Charles Bowen, only those who were behind the scenes can properly estimate. Bowen certainly never recovered the strain of the Tichborne trial, in which he was throughout the animating spirit of the Attorney-General, who without him would on many occasions have perilously floundered. Bowen was one of the subtlest lawyers and most brilliant scholars that has ever adorned the English bench. Moreover, he was endowed with a peculiarly mordant wit, enunciating the most sardonic utterances in a voice of almost feminine softness. Of these, perhaps, the most prominent was his protest to the counsel who was impugning, wholesale, certain evidence which had been filed against his client. "Aren't you going a little too far, Mr. ——?" he murmurously in-