THE VENEZUELA-BRITISH GUIANA BOUNDARY ARBITRATION OF 1899

"An arbitrator, whether he be king or farmer, rarely decides on strict principle of law. He has always a bias to try, if possible, to split the difference." [1]

The late Severo Mallet-Prevost, distinguished international lawyer, who served as Secretary of the Commission appointed by President Cleveland to report on the boundary line between Venezuela and British Guiana, and later as Agent and of Counsel for Venezuela before the Paris Arbitration Tribunal in the Guiana Boundary Case, left for one of his law partners, Judge Otto Schoenrich, a member of our Society, an interesting and important memorandum dealing with the Venezuela-British Guiana Boundary Arbitration, which was only to be published after Mr. Mallet-Prevost's death and at the discretion of Judge Schoenrich.

Judge Schoenrich published this memorandum with some explanatory comment in a current note in the July, 1949, issue of the JOURNAL.[2] We are pleased to publish in this number of the JOURNAL [3] a comment by Mr. Clifton J. Child, formerly Commonwealth Fellow, University of Wisconsin, upon Judge Schoenrich's note and Mr. Mallet-Prevost's memorandum.

Mr. Mallet-Prevost's memorandum consists mainly of a statement of facts within his personal knowledge about certain dramatic incidents relating to the way in which the decision of the arbitrators in the British Guiana Boundary Arbitration was brought about by the President of the Tribunal. There are also certain subsidiary and minor statements of fact and opinion and inference. Finally, there is an important statement, not of fact, but of belief and opinion, as to the way in which Mr. Mallet-Prevost thought the attitude of the President of the Tribunal was influenced or controlled by the governments of Great Britain and Russia.

No one who knew Mr. Mallet-Prevost would doubt that the facts which he stated as within his personal knowledge were true to the best of his knowledge and belief. Obviously, his opinions might be mistaken, irrespective of the substantive truth or technical accuracy of his facts.

The essential facts stated by Mr. Mallet-Prevost as within his personal knowledge may be summarized as follows: After the conclusion of the arguments in the British Guiana Boundary Arbitration, and while the Tribunal was considering its judgment, Mr. Mallet-Prevost was sent for by the two American arbitrators, Chief Justice Fuller and Mr. Justice Brewer. When he appeared, Mr. Justice Brewer "excitedly" told him that

[1] Albert Gallatin, Agent of the United States in the Northeastern Boundary Arbitration between the United States and Great Britain, commenting on the award of the King of The Netherlands in that case, quoted by William C. Dennis, in "Compromise —The Great Defect of Arbitration," Columbia Law Review, June, 1911, p. 493, at p. 495.

[2] Vol. 43 (1949), p. 523.

[3] *Supra*, p. 682.

M. de Martens, the President of the Arbitral Tribunal, had informed the American arbitrators that the British arbitrators, Lord Chief Justice Russell and Mr. Justice Collins, were ready to decide in favor of the so-called Schomburgk Line (substantially the British contention), and that if the American arbitrators insisted on a line starting at the Moruca River (substantially the Venezuelan contention), he, de Martens, would join with the British arbitrators and make the British line the boundary by the judgment of the majority of the Tribunal; but, de Martens went on to say, he desired a unanimous decision and if the American arbitrators would join with him and accept a compromise line (which lay between the two national contentions), he would secure the agreement of the British arbitrators and a unanimous decision would be given for this compromise line. Mr. Brewer further stated that, under the circumstances, although he and Chief Justice Fuller were of the opinion that the boundary should start at the Moruca River, they were ready either to agree to de Martens' proposal and unite in a unanimous opinion in favor of the compromise line, or refuse and file dissenting opinions from a decision which would then adopt the British line. They left it to Mr. Mallet-Prevost to determine which course he wished them to follow.

Mr. Mallet-Prevost said that the decision was too important for him to make on his sole responsibility and asked permission to consult General Harrison, the Chief Counsel for Venezuela, which was given. General Harrison was very indignant, but finally said: "What Martens proposes is iniquitous, but I see nothing for Fuller and Brewer to do but agree."[4] So much for Mr. Mallet-Prevost's statement of the essential facts.

Mr. Mallet-Prevost also added a statement, which did not pretend to be a statement of fact but only of opinion and belief, that in view of certain facts, including the foregoing, he had become convinced and still believed "That during Martens' visit to England, a deal had been concluded between Russia and Great Britain to decide the case along the lines suggested by Martens and that pressure to that end had in some way been exerted on Collins (one of the British judges) to follow that course."[5]

Mr. Child devotes most of his comment to a carefully documented argument to show that there is no sufficient basis for Mr. Mallet-Prevost's belief that the decision was the result of a diplomatic "deal" between England and Russia. The present writer has no desire to take issue with Mr. Child on this point. Mr. Mallet-Prevost's belief imputes what would be dishonorable conduct to the Foreign Office of Great Britain, then in the hands of Lord Salisbury, and to the British judges as well as to the Government of Russia and the President of the Tribunal. *Omnia praesumuntur rite esse acta.* Mr. Mallet-Prevost's personal statement of fact, already summarized, does not, in the judgment of the writer, reflect on

[4] This JOURNAL, Vol. 43 (1949), p. 530.
[5] *Ibid.*

anybody but the President of the Tribunal.[6] It does not reflect on the British judges any more than on the American judges, and does not touch the governments of Great Britain and Russia at all. Mr. Child would seem to have effectively disposed of certain minor matters of fact, opinion and inference which might tend to support Mr. Mallet-Prevost's belief, and Mr. Mallet-Prevost's opinion on this point would seem to the writer open to a motion to "set it aside as not supported by the evidence."

But it is submitted that this does not in any wise tend to discredit Mr. Mallet-Prevost's statement of the important facts of which he had personal knowledge which show the unjudicial method by which the judgment of the arbitrators was brought about, and this is the important point in Mr. Mallet-Prevost's memorandum, not only as respects the British Guiana arbitration, but as tending to illuminate and illustrate the great defect of arbitration in general, *i.e.*, compromise.[7]

This brings us to the first point which appears to the writer to need clarification; namely, does or does not Mr. Child accept the truth and accuracy of the facts stated by Mr. Mallet-Prevost in his memorandum as a matter of personal knowledge?

Here Mr. Child seems to the writer to be ambiguous and therefore unsatisfactory. His principal concern is evidently to repel Mr. Mallet-Prevost's "belief" in a diplomatic "deal" between Great Britain and Russia. He nowhere directly challenges Mr. Mallet-Prevost's statement of facts within his personal knowledge. In fact, toward the close of his article, when he offers his own explanation of the decision of the court—pressure by the President of the Tribunal on both the British and American arbitrators[8]—he goes a long way toward accepting the facts stated in Mr. Mallet-Prevost's memorandum.

On the other hand, he apparently seeks to throw doubt upon Mr. Mallet-Prevost's statement of fact by pointing out that in the statement which Mr. Mallet-Prevost and General Harrison gave to the press immediately after the decision in 1899,

> the only suggestion of impropriety which they made in connection with the award was that it was essentially a compromise. . . . There was no complaint that this compromise resulted from undue pressure upon the judges by the Russian President of the Tribunal . . . Nor was there any appeal to the American judges, as there might reasonably have been, if Mr. Mallet-Prevost's present charge is true, to enter a protest against the false position in which they had supposedly been placed by the President of the Tribunal and to let it be known

[6] And even as to him, see *infra*, p. 726.

[7] See this writer's article in Columbia Law Review, June, 1911, p. 493, cited *supra*.

[8] "Indeed, was it not M. de Martens' desire for unanimity which caused him, in bringing both parties to accept a compromise, to put pressure upon the British judges, as well as upon their American colleagues?" *Supra*, p. 689.

that, if they had concurred in the unanimous award of the Tribunal, they had done so against their own better judgments.[9]

With submission, this is a surprising argument. Is Mr. Child trying to say that the fact that Mr. Mallet-Prevost and General Harrison did not break faith and violate the confidence of the two American judges in 1899 is a reason to believe that Mr. Mallet-Prevost was not telling the truth in 1944, when it could properly be told? Mr. Child goes so far as to say: "In fact, apart from the resentment which the Counsel for Venezuela apparently felt against the verdict, there were none of the elements of the story as Mr. Mallet-Prevost now tells it." [10]

Of course, Mr. Mallet-Prevost did not need to leave a posthumous memorandum with his law partner to repeat what he and General Harrison had so well said in 1899—that the decision was a compromise, not a judicial decision—something which Mr. Child does not deny, but on the contrary affirms along with others who have studied the case.[11] It is submitted that there is not one word in Mr. Mallet-Prevost's statement of 1944 which is inconsistent with what he and General Harrison said in 1899. He simply adds additional matter which he was not at liberty to make public in 1899. Then he said the decision was a compromise. Now he tells how that compromise was brought about.[12]

It is submitted, therefore, that Mr. Child's complaint of the omission in 1899 of those matters which it would not have been permissible or honorable then to disclose, as making it "tempting to assume that, in nursing his grievance against the Tribunal through the years, Mr. Mallet-Prevost allowed his imagination to supply a number of details which were missing from the statement which he and General Harrison made in 1899," is both unjust and unconvincing.[13] Mr. Child also questions the accuracy of certain minor statements in Mr. Mallet-Prevost's memorandum. For example, he points out that Mr. Mallet-Prevost apparently overlooked the fact that Lord Chief Justice Russell, at the time he dined with him in

[9] Mr. Child, *supra*, p. 683.

[10] *Ibid.*

[11] Mr. Child, *supra*, p. 689. *Cf.* Mr. Justice Brewer, quoted by Judge Schoenrich, *loc. cit.*, p. 526; the Honorable John W. Foster, Proceedings of the American Society of International Law, 1909, p. 28; article, "Compromise—The Great Defect of Arbitration," Columbia Law Review, June, 1911, pp. 495, 496, etc.

[12] In like manner, any charge in 1899 by Mr. Mallet-Prevost and General Harrison of a diplomatic "deal" under the circumstances then obtaining, and in view of the honorable obligations by which they were bound, would have been unthinkable.

[13] Child, *supra*, p. 683. *Cf.* Mr. Child's statement, "It was perhaps only to be expected that some day, after turning the matter over in his mind for so long, Mr. Mallet-Prevost would eventually produce a theory to justify the attack which he and General Harrison, the senior Counsel for Venezuela, launched upon the Tribunal immediately after the award was announced on October 3, 1899." *Supra*, p. 682.

January, was not yet a member of the Arbitral Tribunal. But after all, he subsequently became a member, and presumably Lord Chief Justice Russell as an arbitrator in October held the same views as to the functions of an arbitrator which he had expressed as a diner-out in January, which is Mr. Mallet-Prevost's point. Again, the relative "taciturnity" and "listlessness" of Lord Justice Collins, before and after taking his vacation, is a matter of opinion, rather than statistics, and, it is submitted, is irrelevant and immaterial even by way of impeachment as bearing upon the truthfulness and accuracy of Mr. Mallet-Prevost's essential facts.[14] And finally, it is suggested that no one who has seen much of the inside and outside of arbitral tribunals or other international gatherings would attach any great importance to the pious speeches of the arbitrators or equally unctuous statements of their governments in acclaiming the results reached [15] as showing that Mr. Mallet-Prevost was not wholly correct in his description of the methods by which these results were attained.[16]

In view of Mr. Child's suggestion that Mr. Mallet-Prevost's story may have grown with the years, the present writer ventures to adduce his own testimony that Mr. Mallet-Prevost told him this same inside story as to how the Guiana Arbitration Boundary Line was arrived at in all its essential details, thirty-four years before he told it to Judge Schoenrich and made it of record in his memorandum, after receiving the Order of the Liberator in 1944.

In stating the circumstances under which Mr. Mallet-Prevost came to tell me the story of the Guiana Boundary decision, it is more convenient to speak in the first person. From July 1, 1906, to July 1, 1910, I was Assistant Solicitor of the Department of State. Among the important legal matters pending before the Department was a claim against the Mexican Government in which Mr. Mallet-Prevost was counsel for the claimants. It happened that I was assigned to this case by the Department. This led to frequent conferences with Mr. Mallet-Prevost. I was, also, during that period, working on the *Orinoco Steamship* claim against Venezuela, a matter in which I was later appointed Agent of the United States in the arbitration which took place before The Hague Court in 1910. All this naturally led Mr. Mallet-Prevost to take a kindly interest in me as a young lawyer dealing with another Venezuela arbitration, and led him also to tell me the story of his unsatisfactory experience with the Arbitral Tribunal in the Guiana Arbitration. He told me the story very briefly at the close of an interview, but he told it just as he told it later to Judge Schoenrich and in his memorandum, even to his description of the pic-

[14] Child, *supra*, pp. 684, 685.

[15] Child, *supra*, pp. 691–693.

[16] Neither is it surprising that if there was a diplomatic "deal"—which the writer does not believe—the parties to this "deal" left no written record of their misconduct for the diligence of Mr. Child to discover.

turesque language which de Martens' proposition evoked from that devout Presbyterian, General Harrison. No essential fact was left to be supplied by Mr. Mallet-Prevost's "imagination" [17] in 1944. I hasten to add, however, that I do not recollect that Mr. Mallet-Prevost, in telling the story to me, mentioned his belief that the arbitral decision was the result of a British-Russian "deal," as he did in telling the story to Judge Schoenrich and in his memorandum of 1944. For this difference, there are several possible explanations. In the first place, it may be due to faulty recollection on my part; but I do not think so, because the story was of great interest to me, and the telling stands out in my recollection very distinctly to this day. His failure to mention this theory might have been easily due to the fact that he did not think it wise to speak of it to me at that time, but I think it more likely that it was due to the brevity of our conversation on this point which took place just as we parted. Of course, it is possible, as Mr. Child seems to suggest,[18] that Mr. Mallet-Prevost had not at that time come to the conclusion that what happened was the result of a diplomatic "deal"; but even if this last be the true explanation, it would in no wise affect the credibility of Mr. Mallet-Prevost's consistent statement of the facts within his personal knowledge.

It happens that I had another personal contact, or near contact, with this interesting international incident. My conversation with Mr. Mallet-Prevost took place in the State Department Building, and doubtless before July 1, 1910, when I left the Department. At any rate, it took place before I went to The Hague in the late summer and fall of 1910 as Agent of the United States in the *Orinoco Steamship Arbitration* with Venezuela. Shortly after my arrival at The Hague, in accordance with custom and the instructions of the American Legation, I left cards on various members of the diplomatic corps, among them Sir George Buchanan, the then British Minister at The Hague, who had been the British Agent in the British-Venezuelan arbitration over the Guiana Boundary in 1899. Sir George returned the call and I subsequently met him and we fell into conversation which naturally, under the circumstances, turned to the British Guiana-Venezuela Boundary Line Arbitration. I regret that I cannot recall my conversation with Sir George as clearly and definitely as I do the conversation with Mr. Mallet-Prevost. Aside from our mutual assumption that the Guiana Boundary Line decision was a compromise, the thing which stands out in my memory most clearly is his criticism of the detail into which both Sir Richard Webster, the British Attorney General, and Mr. Mallet-Prevost went in their arguments before the Arbitral Tribunal.[19] I do know, and I know that I thought at the time, that what Sir George said did not leave in my mind the slightest reason to doubt the inside story of the

[17] Child, *supra*, p. 683.
[18] *Supra*, pp. 682, 683.
[19] Child, *supra*, p. 686.

way in which the decision was reached as told me by Mr. Mallet-Prevost. On the contrary, the impression which I carried away was that which is suggested by Mr. Child himself, namely, that M. de Martens had "put pressure upon the British judges, as well as upon their American colleagues," [20] and my "belief" is that it was undoubtedly of the same nature, *i.e.*, that de Martens threatened the British judges that he would decide with the Americans unless they agreed to his compromise line, in the same way that he threatened the Americans that he would side with the British unless they made the compromise line unanimous.

Having said this, I hasten to add that such conduct on the part of the President of the Tribunal, however "iniquitous" it seems when tested by Anglo-American judicial standards, does not, in my judgment, imply conscious wrong-doing on the part of the President. As John W. Foster has pointed out, de Martens "was not a lawyer by profession, but had received his training in the Russian Foreign Office." [21] He was using diplomatic, not judicial, methods, and rather strenuous diplomatic methods; but, as Mr. Root has said;

> Arbitrators too often act diplomatically rather than judicially; they consider themselves belonging to diplomacy rather than to jurisprudence; they measure their responsibility and their duty by the traditions, the sentiments, and the honorable obligation which have grown up in centuries of diplomatic intercourse, rather than by the traditions, the sentiments, and the sense of honorable obligation which characterize the judicial departments of civilized nations.[22]

De Martens' background did not qualify him to respond to the appeal which General Harrison addressed to him in his closing argument of the Guiana Arbitration, when he said, referring to the proposals for a permanent international tribunal which had just been under consideration at the First Hague Conference of 1899 in which de Martens had sat as a Russian delegate:

> If conventions, if accommodations, and if the rule of give-and-take are to be used, then let the diplomatists settle the questions. But when these have failed in their work, it seems to me necessarily to imply the introduction of a judicial element into the Tribunal.[23]

We have made real advances in the past half-century toward a truly judicial tribunal. The decisions of the Hague Court marked an advance in this respect over the decisions of the *ad hoc* commissions and tribunals

[20] *Ibid.*, p. 689.

[21] Proceedings of the American Society of International Law, 1909, p. 28.

[22] Proceedings, National Arbitration and Peace Conference, April 15, 1907, p. 44; quoted article, "Compromise—The Great Defect of Arbitration," *loc. cit.*, p. 495, note.

[23] Quoted by John W. Foster, Proceedings of the American Society of International Law, 1909, p. 27.

which preceded it.[24] The decisions of the World Court show still further progress. We cannot claim even yet to have reached the stage where the element of compromise is eliminated as completely from international, as it has been from national, judicial proceedings (and it has not and probably never will be completely eliminated from any human procedure); but we can hope and even reasonably expect that there will never be occasion for anyone to write a memorandum about a decision of the World Court similar to that of Mr. Mallet-Prevost which is under discussion.

In conclusion, it is submitted: First, there is no doubt of the truthfulness and substantial accuracy of Mr. Mallet-Prevost's memorandum so far as it relates to matters of fact within his personal knowledge. Second, the Mallet-Prevost memorandum affords definite and conclusive evidence of what practically everyone who had studied the Guiana Boundary Case was already convinced and many had said, namely, that the decision was a diplomatic compromise and not a truly judicial decision. Third, while the methods of the President of the Tribunal in securing a unanimous compromise in this case are somewhat less—or should we say more—"diplomatic" than those ordinarily used, they are, in principle, typical of much of the international arbitral procedure of the past. Fourth, the principal purpose of this editorial is to make a contribution, however slight, to the process of making certain that they are not typical of the arbitral procedure of the future.

WILLIAM CULLEN DENNIS

[24] Columbia Law Review, 1911, p. 493, at pp. 496, 502.