# REPLY OF THE REPUBLIC OF NICARAGUA

TO THE CASE OF THE

# REPUBLIC OF COSTA RICA

AND REFUTATION THEREOF.



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The Republic of Nicaragua, in presenting to His Excellency the President of the United States her answer to the case of the Republic of Costa Rica, submitted under the treaty of Guatemala of the 24th of December, A. D 1886, insists that the greater part of the documents presented by Costa Rica and relied upon by her are foreign to the issue that, by the treaty, is before the arbitrator for his determination, and tend in a great degree to obscure rather than to elucidate the real and vital question in controversy.

The charge is made that the greater part of the documents appended to the argument of Costa Rica are foreign to the present controversy, and that those documents, according to the opinion of Nicaragua, rather than elucidating the question at issue, render it obscure.

It is to be regretted that the "Reply" answered to in the present remarks, has contented itself, as a general rule, with making mere affirmations, without taking the trouble of accompanying them with such a necessary thing as proof in their support.

What can be easier or more convenient for the defender of any cause whatever than to repudiate in this way, by a mere stroke of the pen, the whole or the greater part of the documentary evidence on which the argument of his opponent is based? Under such a system he might as well have

written another phrase and rejected at once the whole argument.

The simple reading of the headings or titles of the documents herein referred to is enough to show that each one of them is intimately connected with the question at issue, because they constitute conclusive evidence of the fact that the treaty of limits of April 15, 1858, was negotiated, concluded, ratified, exchanged, and carried into execution entirely in conformity with the public law in force in Nicaragua at the time of its celebration, that the said treaty was complied with in good faith by Nicaragua during a long period of time, and that it was only owing to circumstances that the said Republic decided in 1871 to retract her former action and suggest doubts in regard to the validity of the compact.

Nicaragua affects not to give any importance to the documents filed by Costa Rica, but the truth is that the testimony which they afford cannot be destroyed by her, because she cannot tear from her statute books and from her collections of diplomatic papers the numerous acts of recognition of the validity of the treaty of 1858 repeatedly made by her chambers, her cabinets, her diplomatic ministers, and all other officials.

The documents filed by Costa Rica do not render the question obscure; much to the contrary, the light that they throw upon it is so brilliant and penetrating that it compels Nicaragua to close her eyes against it.

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The treaty itself sharply and pointedly fixes the question in controversy, to wit, "whether the treaty signed by both on the 15th day of April, 1858, is or is not valid." (Case of Nicaragua, App. A., p. 31.)

This issue is, Nicaragua insists, a narrow one, and can only be solved by determining whether those forms which each of the contracting powers requires to be observed in order to give validity to a treaty shall have been followed.

The treaty of Guatemala plainly and positively fixed and determined the question at issue in the present arbitration.

Costa Rica has not discussed any other question than that, and, on the contrary, her desire that the debate should not go beyond the limits of its proper subject has been such and so great that in several portions of her "Argument" she has called attention to the manifest tendency of Nicaragua to confound the historical point, which is not submitted, with the legal point, which is the subject of the arbitration.

The issue is whether the treaty of 1858 is valid or invalid; and to show that it is valid Costa Rica has filed as evidence a considerable number of communications from the Department of State of Nicaragua to the Department of State of Costa Rica, and of legislative acts of the Nicaraguan Legislative Chambers, leaving beyond a doubt the validity of the treaty of limits; and with the said legislative acts and communications from the State Department of Nicaragua, and in corroboration thereof, several publications made by the official organ of the Nicaraguan Government have been accompanied.

Costa Rica, therefore, has kept herself within the bounds of the controversy; and if she entered into some slight explanation of the rights which she enjoyed prior to the treaty of 1858 in the territory, the limits of which were fixed by it, and exhibited some of the titles on which those rights were based, it was only for the purpose of proving that the treaty gave her nothing which originally did not belong to her, but that, on the contrary, it restricted her domain.

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Acts done seemingly in pursuance of the treaty, seeming acquiescence in its provisions, or the possession of territory claimed to be taken thereunder throw no light upon the naked legal question, "Is the treaty valid?"

All of these matters might be admissible in a controversy wherein a boundary line was to be fixed, but to adduce them to support the validity of a treaty is making the treaty prove itself. If the treaty is invalid all these acts are unlawful, and it is confidently urged that to do an invalid act under an invalid treaty does not prove or tend to prove the validity of the treaty.

The compliance with the treaty of limits on the part of the two contracting Republics was not seeming but real and

true; and the possession in which each one of them has been ever since the promulgation of the treaty, and still continues to be, of the portion of the territory which was respectively allotted to them, has not been precarious but final and perpetual.

The statement that the treaty of limits remained suspended in 1858, subject to the fulfillment of any formalities which it might need for its perfection, is absolutely incorrect, because ever since the date of the exchange and promulgation of the treaty it was considered, as well in Costa Rica as in Nicaragua, as perfect and terminated.

The acts witnessing the full compliance with the treaty, without any difficulty of any kind, during fourteen consecutive years, have not been mentioned by Costa Rica as constituting direct evidence of the validity of the treaty; that direct evidence is different and has been abundantly furnished in the argument of Costa Rica. Those acts have been referred to and proved, because they establish a point of transcendental importance in the present controversy, and this point is that the supreme powers of Nicaragua have recognized repeatedly the validity, now denied, of the compact, and at present it is unlawful for them to retract that recognition, which was unqualified.

The treaty of limits does not suffer from any irregularity of any kind; but, even granting that in the beginning some requisite of form might have been wanting in it, that defect was cured by the subsequent confirmation imparted to that instrument by the Nicaraguan Chambers. It is well known in law that nullity, if consented to, must be considered as if it never existed.

In the United States, more, perhaps, than in all the other countries of the world, except England, from where the doctrine was taken, the principle is universally held that whatever has been consented to by one of the parties can never again be disputed. The well-known plea which in the laws of England is called "estoppel" (from the English verb to stop) has the effect of precluding all contracts under seal

from being contradicted, and thus forbids the parties to deny what they had once agreed to. This remedy is of daily occurrence in this country, and requires no explanation.

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When the validity of the treaty is challenged, the question, and the only question, to be determined is, Have those forms, which both countries prescribe shall be followed to give it force and make it binding, been performed? Time cannot be substituted for legislative ratification, nor can executive acquiescence be so substituted; neither can forcible possession of territory by the adverse party supply the needed sanction. In fact, upon every principle of international law, naught save a full compliance with the Constitution of the country can make the treaty of valid and binding force.

It would be indubitably gratifying for Nicaragua that the present discussion should not go beyond the narrow abstract circle to which she wishes to confine it; but Costa Rica makes use of her right in showing, not only by direct means, but also indirectly, that the disputed treaty is valid.

It is not merely the lapse of time that has given legal force to the compact of 1858. That force emanates from the sovereign will of Nicaragua; but the execution in good faith of the said compact during a long period of years is a precedent of the greatest importance for the right construction of the Nicaraguan laws which serve as a basis for the treaty, since it is altogether inadmissible that during fourteen years the Nicaraguan legislatures and cabinets should have considered a few blank pages as national law.

The theory that two subsequent legislative ratifications were needed for the perfection of a treaty of limits is one of yesterday in Nicaragua and the effect of pure casuistry, resorted to only for the purpose of disguising the anxiety to obliterate the compact of 1858. Twenty years before that date, when another attempt was made to settle the same dispute about limits, that very Constituent Assembly which framed and promulgated the Constitution of 1838, now the bulwark of the defense of Nicaragua, declared, by a special

decree enacted on the 8th of December, 1838,* that the treaties to be concluded with Costa Rica should be ratified by it without being subject to a double legislative ratification.

On December 8, 1857, another treaty was made for the same purpose, and the Constituent Assembly, which happened then to be in session, also declared that the treaty should be ratified by it and that it was not subject to a double legislative ratification. (Decree of January 18, 1858.)

When the treaty of April 15, 1858, was concluded, the above-named Assembly gave to it its approval; and, instead of directing that it should be submitted to the Legislature of 1859, caused it to be passed to the Executive for its sanction and promulgation. (Decree of June 4, 1858.)

That decree was duly sanctioned and promulgated; and the Constituent Assembly, far from withdrawing it, or objecting to it, enacted new laws by which it was enforced and carried into effect. See, for instance, the law of June 11, 1858, in which the port of San Juan del Norte, situated on one side of the river, opposite the extremity of Punta de Castilla, which, according to the treaty of 1858, is Costa Rican territory, is called frontier of the State; or the other law of August 30 of the same year, providing for the territorial division of the Republic, which does not mention a single one of the towns, or any portion of the territory, of the province of Guanacaste, &c.

Señor Ayón was the inventor of the strange cause of nullity of which the Government of Nicaragua subsequently took such a strong hold to break the treaty of 1858.

Costa Rica possesses, not by force, but quietly and peacefully and by virtue of her right, the territory marked out to her by the treaty of 1858; and Nicaragua also and in the same way possesses the strip of land, which formerly belonged to Costa Rica, between the center of the Bay of Salinas and the La Flor river, and also the whole southern shore

*See page 366 of the *Recopilación de las Leyes, Decretos y Acuerdos ejecutivos de la República de Nicaragua*, por el Doctor La Rocha, Managua, 1867.

of the lake and a portion of the right bank of the San Juan river, without needing to have a soldier on the spot and by no other force than that of the treaty of limits.

The fact of the possession in which both parties have been, and still are, since the celebration of the treaty, of the territories, which, according to the provisions thereof, were adjudicated to them, proves conclusively that the compact was not left incomplete; but that, on the contrary, it was terminated and considered such by the two parties. Otherwise Costa Rica would have never consented to restrict her jurisdiction to the new line which the treaty marked out for her, and abridge her former rights, but certainly would have maintained herself in the possession of her old frontier of the La Flor river.

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Nowhere are these views of international law better understood nor more rigidly adhered to than in the United States. Its diplomatic correspondence bristles with pointed paragraphs insisting that its treaties are of no force until ratified in its constitutional manner, and that it cannot be considered by foreign nations as a matter either of complaint or animadversion, that a ratification by its Senate has been refused.

In the history of the United States instances have occurred wherein the Senate has refused to ratify a treaty made by the Executive, but it has never been seriously contended that such an unratified treaty has any validity.

The general doctrine that a public treaty to be valid needs to be ratified is taken for granted; but no one has maintained that the treaty of limits of 1858 is valid without ratification. It is held, on the contrary, that it was ratified in due form.

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Mr. Clay, Secretary of State of the United States, in his note to Mr. Addington of April 6, 1825 (Wharton's International Law Digest, vol. II, p. 11) states this proposition thus:

"To give validity to any treaty the consent of the parties is necessary. *As to the mode by which* that consent shall be expressed, it must necessarily depend with each *upon its own peculiar constitutional arrangement.* All that can be rightly demanded in treating is to know the contingencies, on the happening of which that consent is to be regarded as sufficiently testified."

" Nations treating with each other are bound to take notice of the constitutional provisions limiting the treaty-making power. It is akin to the knowledge that is imputed in individual matters to one dealing with the agent of another, restricted by written instructions of which the party dealing has notice.

Ratifications have ever been a necessary part of a treaty.

" It is said to be the general understanding and practice of nations, as a check on the mistakes and indiscretions of ministers or commissioners, not to consider any treaty negotiated and signed by such officers as final and conclusive until ratified by the sovereign or government from whom they derive their powers." (President Washington, special message, September 17, 1797.)

To this the remark immediately preceding is also applicable.

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How impotent and futile would such reservation be if the contending government could dictate what such ratifications should be. If it could overturn the Constitution of the country and insist that it could not only designate its own form of ratification, but prescribe what should bind the other contracting government, such a doctrine would eliminate from a treaty the element of consent, and would virtually annihilate one of the parties to the treaty.

The Government of Costa Rica was not the one which dictated the form of the ratification of the treaty of limits of 1858 in Nicaragua. That form was provided for and designated by the Nicaraguan National Representation which existed at that time, and consisted of the extraordinary body or assembly to which the Nicaraguan people had entrusted the political reconstruction of their country, and was a constituent body exercising fully and without limitation of any kind the whole sovereignty of the nation. Here are the decrees which the said Constituent Assembly enacted for the guidance of the Executive, fixing the basis upon which it should proceed to celebrate the treaty.

*Decree No.* 11 *of December* 2, 1857, *describing the powers of the Executive.*

The President of the Republic of Nicaragua to the inhabitants of the same:

Whereas the Constituent Assembly has decreed as follows:

The Constituent Assembly of the Republic, in use of its faculties, decrees:

Article 1. It is incumbent upon the Executive power, *first*, to conduct the foreign relations, to appoint diplomatic ministers, of whatever rank or category, and agents or consuls of the Republic near the foreign governments and courts, and receive those ministers and agents sent by them to this Republic with sufficient authorization; *second*, to conclude treaties with all other nations, and concordates with the Apostolic See, to enter into contracts of all kinds interesting to the Republic, either with companies or with private parties, and adjust treaties of peace, all of these acts being subject to ratification by the legislative power; *third*, to exercise patronage according to law.

Let it pass to the Executive.

Given at the Hall of Sessions, at Managua, on the 1st of December, 1857.

PEDRO ZELEDÓN, *President.*
J. MIGUEL CÁRDENAS, *Secretary.*
FRANCISCO JIMÉNEZ, *Secretary.*

Therefore let it be executed.
Managua, December 2, 1857.

AGUSTÍN AVILEZ.

To the Secretary of the Interior, Dr. Don Rosalío Cortez.

*Decree of January 18th, 1858, directing the Executive to appoint Commissioners to enter into negotiations with Costa Rica, because of the impossibility on the part of Nicaragua of ratifying the treaty concluded between Costa Rican Commissioners and the General Commander-in-Chief of the Nicaraguan Army.*

The President of the Republic of Nicaragua to the inhabitants of the same:

Whereas the Constituent Assembly of the Republic has decreed as follows:

The Constituent Assembly of the Republic of Nicaragua, in use of the legislative powers vested in it, decrees:

Sole article. Whereas the treaty of the 8th of December ultimo, concluded between Commissioners of the Costa Rican Government and the General Commander-in-Chief of the Army of Nicaragua, cannot be ratified by the latter Republic: Therefore, The Executive shall appoint Commissioners, who, under new instructions, shall enter into the negotiation and conclusion of treaties of peace, friendship, and alliance between the two countries, so as to establish their independence upon more substantial foundations, and reconcile their respective interests, said treaties to be subject to the ratification of the Assembly.

To the Executive power.

Given at the Hall of Sessions, at Managua, on the 15th of January, 1858.

TIMOTEO LACAYO, *President.*
ISIDORO LÓPEZ, *Secretary.*
PABLO CHAMORRO, *Secretary.*

Thereupon let it be executed.
Managua, January 18, 1858.

AGUSTÍN AVILEZ.

To Dr. D. Rosalío Cortez, Secretary of War and of the Interior.

*Decree authorizing the Executive to treat without ratification of the legislative power.*

The President of the Republic of Nicaragua to the inhabitants of the same:

Whereas the Constituent Assembly of the Republic has decreed as follows:

The Constituent Assembly of the Republic of Nicaragua, in use of the legislative faculties with which it is invested, decrees:

"Article 1. In order that the Executive may comply with the decree of January 18th instant the said Executive *is hereby amply authorized to act in the settlement of the difficulties with the Republic of Costa Rica in such manner as it may deem best for the interests of both countries and for the independence of Central America* WITHOUT THE NECESSITY OF RATIFICATION BY THE LEGISLATIVE POWER.

"Article 2. *Such treaties of limits as it may adjust* SHALL BE FINAL *if adjusted in accordance with the bases which separately will be given to it; but, if not, they shall be subject to the ratification of the Assembly.*

"To the Executive power.

"Given at the Hall of Sessions, in Managua, on the 5th of February, 1858.

"TIMOTEO LACAYO, *President.*
"ISIDORO LÓPEZ, *Secretary.*
"PABLO CHAMORRO, *Secretary.*"

Costa Rica had no right to meddle with the Constituent Assembly by suggesting to it to provide for any particular form of law to be observed in the celebration of the treaty of limits. She had to confine herself to respect whatever laws were passed upon that subject by the Nicaraguan sovereign; and to have acted otherwise would certainly have been to go beyond the limits of her powers. She contented herself, as she ought, with the construction which the Nicaraguan su-

preme authorities themselves placed upon their own laws, and which, on the other hand, was correct on the ground of principle. Even if that construction had been incorrect, it being authentic, as proceeding from the legislators themselves, and being, therefore, a law, could not be rejected or objected to by Costa Rica.

This being the case the Nicaraguan supreme authorities cannot now retract the said laws and construction to the detriment of Costa Rica, who had no voice, nor could she have any, in either their enactment or interpretation.

Should a different doctrine be admitted, no nation would ever become bound to another by any kind of engagement, because the law as now held by one might at her will disappear to-morrow through some casuistic effort, as the one now made by Nicaragua, and the treaties concluded in pursuance of that law would have to fall with it at the will of the party who wanted to break them.

It is, therefore, a mistake to say that the element of consent to the compact has been or attempted to be eliminated on the part of Costa Rica. That consent was given by Nicaragua in the form that she herself was pleased to enact, and nothing else can be desired.

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The argument of Costa Rica virtually concedes that a ratification in some form must be had, and seeks to show—

1. That the President of Nicaragua had the power of ratification and his ratification was sufficient. This is an argument advanced now for the first time by Costa Rica, and hence was not referred to in the presentation of the original case.

2. That the treaty of 1858 became a part of the Constitution of Nicaragua of 1858, and thus became ratified.

3. That the treaty was acquiesced in and thus became valid.

4. That the Constitution of 1838 was not in force when the treaty was made, and the approval by the Constitutional Assembly was sufficient.

5. That the Constitution of 1838 was not affected by the treaty of 1858, and hence did not require the approval of one Legislature and the sanction of the next to effect the ratification—*i. e.*, that the laws on the subject of boundaries were secondary and not fundamental laws.

In addition to these points it is also sought to be shown that—

Costa Rica lost territory by the treaty of 1858, and that the treaty was freely entered into without coercion or violence.

The fallacy of all these positions has been exposed in the former part of this reply, for each and all are obnoxious to the principles of international law, which we consider have already been demonstrated to be well settled and acquiesced in by all nations, but we shall take them up and discuss each separately in the order above named.

Each one of the points contained in the above paragraph will be specifically discussed at the places wherein they may be taken up; and then it will be shown where the fallacy lies and whether it is true, as alleged by Nicaragua, that her conclusions are sound and in accord with the principles of the law of nations.

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*First.—Ratification by the President.*

The powers of the President of Nicaragua were only such as the Constitution of 1838 conferred on the Executive of the Republic, and nowhere therein is he vested with the power to ratify a treaty, and particularly one that changed the text of the Constitution itself by changing the boundary of the Republic.

In order to affirm that the President of Nicaragua had no other faculties in regard to the treaty of limits than those which the Constitution of 1838 vested in him, it is necessary for any one to be beforehand decided to ignore the decrees of the Nicaraguan Constituent Assembly of December 2, 1857, and January 18 and February 5, 1858, above inserted. But whether desirable or not the said decrees stand and can be found in the statute books of Nicaragua. They have been exhibited by Costa Rica and have to serve as basis for the decision of the arbitrator.

The Constitution of 1838 certainly did not vest in the Chief Magistrate of the nation the power to celebrate international treaties; and, strange to say, it did not either vest it in the national representation. So it appears from the thirty-three sections of article 109, the seven sections of article 110, the four sections of article 111, the three sections of

article 112, and the twenty-six sections of article 135, providing, respectively, for the powers vested in the chambers, both jointly and separately, and the exclusive ones of the Chamber of Deputies, of the Senate, and of the Executive.

Does this mean that the Nicaraguan nation had no power or authority to treat with the other states? No such a thought can be entertained for a moment, much less when we remember that Nicaragua before the promulgation of her present Constitution concluded, as is well known, several international treaties.

It may have been very possible by reason of this remarkable omission in the Constitution of 1838 that the Constituent Assembly of 1858, called upon to give a new Constitution to the country, decided to promulgate in advance sections 14, 15, and 16 of article 55 of the new instrument, still incomplete, which referred to foreign relations and the conclusion of public treaties. (See decree of December 2, 1857.)

The Constitution of 1838 is not, therefore, the law to which we have to look for finding out who had the power to enter into treaties with other nations, or how that power ought to be exercised. That law is, on the one side, the decree above inserted of December 2, 1857, embodied in article 55 of the Constitution of 1858, enacted for the purpose of correcting at once in a general way the omission committed in the former Constitution of 1838; and, on the other hand, the subsequent decrees enacted and promulgated by the said Constituent Assembly for the specific purpose of adjusting the treaty of limits with Costa Rica.

Under these circumstances everything set forth in the Constitution of 1838 in regard to this matter must be peremptorily and at once set aside and discarded.

The Nicaraguan Executive acted in this case, not in pursuance of the Constitution of 1838, the provisions of which, as far as foreign relations and treaties and powers relating thereto, both of the Executive and the Legislative, are concerned, had disappeared, but in pursuance of the new con-

stitutional law made and promulgated by the Constituent Assembly of 1858; and in so doing it exactly complied with and enforced the fundamental laws of the State.

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That the Constitution of a country is paramount and binds not only the Executive but the Legislative is axiomatic; it is the very foundation on which a republic rests.

This principle is plain and really axiomatic.

But it has been already demonstrated that the Constitution of 1838 had nothing to do with the treaty of limits, and that the supreme fundamental law governing the subjects of ratification and exchange of the treaty consisted of the chapter of the new Constitution sanctioned in advance by a special decree of the Constituent Assembly, and the other two decrees, more especial in their character, enacted by the same body for the concrete case of this treaty.

Any action in opposition to the said decrees, whether on the part of the Constituent power, or on the part of the Executive, or of any other power or authority in the nation, would have been unlawful and punishable. Those decrees, as well as all other laws, whether fundamental or secondary, enacted by that memorable Assembly, received punctual execution precisely on the same principle which the defense of Nicaragua now invokes.

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Ratifications were exchanged upon this theory, and therein it was expressed that the ratification by the President was the only ratification the treaty had received. Costa Rica was then bound to take notice that the treaty had not received the constitutional ratification, and that it was without force or effect.

The ratifications of the treaty were exchanged in pursuance of the special laws enacted by the Constituent Assembly of Nicaragua for the celebration of the treaty of limits with Costa Rica; and the act of exchange sets forth the

authority upon which the Executive Power was acting. Costa Rica took note of the fact that each and all of the formalities prescribed by the Nicaraguan National Representation had been complied with by the Supreme Chief Magistrate of the Republic of Nicaragua, and rested satisfied of the perfection of the compact, which was immediately carried into effect. The same Constituent Assembly approved afterwards the same treaty, and for many years Nicaragua complied with it in good faith.

This being the case, Costa Rica could not, by any means, imagine that the treaty was, as Nicaragua now claims, void and of no effect.

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"The municipal constitution of every particular State determines in whom resides the authority to ratify treaties negotiated and concluded with foreign powers so as to render them obligatory upon the nation. In absolute monarchies it is the prerogative of the sovereign himself to confirm the act of his plenipotentiary by his final sanction. In certain limited or constitutional monarchies the consent of the legislative powers of the nation is in some cases required for that purpose. In some republics, as in that of the United States of America, the advice and consent of the Senate are essential to enable the Chief Executive Magistrate to pledge the national faith in this form. In all these cases it is consequently an implied condition, in negotiating with foreign powers, that the treaty concluded by the Executive Government shall be subject to ratification in the manner prescribed by the fundamental laws of the State." (Wheaton's International Law, part III, chap. II, p. 455.)

The doctrine of Wheaton herein referred to is perfectly sound; but it is certainly inapplicable to the present case, because Costa Rica does not maintain, nor has she ever done, or will do so, that the treaty of 1858 is valid without ratification.

The ratification was given. The Executive Power gave it by virtue of delegation made in its favor by the Constituent Assembly of Nicaragua and upon concrete bases and special instructions transmitted to it by the latter body. Subsequently the Assembly itself approved the treaty and cor-

roborated in this way the ratification which in its name and by delegation of its powers had been made by the National Executive.

The ratification was made in accord *ad pedem litteræ* with the provisions of the fundamental laws of the State; and, according to the doctrine of Wheaton, which is invoked, the treaty thus ratified cannot but be taken as valid and perfect.

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*Qui cum alio contrahit, vel est, vel debet esse, non ignarus conditionis ejus.*

This principle is correct in private law, but it is not so much so in public law, as taught by Pasquale Fiori in the following words:

"If the constitution of one or the other of the contracting parties imposes upon the Executive the obligation of communicating the treaty to the Chambers, such obligation is a matter which purely and exclusively belongs to the domestic or municipal law of the country where it exists, and it belongs to the Executive itself to determine how and when it ought to comply with that duty, in conformity with the Constitution of the State." *

But even granting that the principle could have rigorous application to this case, the fact is that Costa Rica complied with it exactly. She was aware of the transitory *régime* of political reorganization prevailing in Nicaragua at the time of the conclusion of the treaty of limits, and took pains to see that all the formalities prescribed for that case by the Nicaraguan public law then in force should be strictly observed. If the National Constituent Assembly of Nicaragua deemed it fit to prescribe these or the other formalities for the celebration and perfection of the treaty, it did not belong to Costa Rica to repudiate or object to, in any way whatever, the decisions of that sovereign body. She had to accept and

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* *Nouveau Droit International Public*, second edition, vol. III, p. 339. Paris: 1885.

respect them as the whole nation did ; and to act otherwise would have been for her to invade the rights as well as the liberty and independence of her neighbor.

The treaty was concluded, ratified, exchanged, and carried into execution, with the full knowledge of the condition of things in Nicaragua and of the sufficient power vested in the supreme authorities, both constituent and executive, of that Republic, to enter into it.

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As against the constitutional provisions of the State of Nicaragua, Costa Rica seeks to maintain that the ratification by the President of Nicaragua binds the nation, and recites a decree of the Constitutional Assembly, which it claims vests this power in the President.

It has been seen that the Nicaraguan Constitution of 1838 provided nothing in regard to the conclusion of international compacts, and that perhaps for this reason the Constituent Assembly of 1858 hastened the sanction and promulgation of the chapter of the new Constitution which referred to this matter. It is, therefore, incorrect to state that Costa Rica acts in opposition to the constitutional precepts of Nicaragua when she holds that the ratification given to the treaty of limits binds that Republic. That ratification, as has been formerly explained, adjusted itself exactly to the provisions of the public law of Nicaragua which was in force at that time.

The Nicaraguan Constituent Assembly delegated to the Executive the power to ratify the treaty, and this act of a body, which was the highest representative of the nation, cannot now be turned against Costa Rica, who took no part in it, and could not prevent it.

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This decree in its second article expressly declares that, so far as a treaty of limits is concerned, it needs legislative ratification if the instructions are exceeded.

That the treaty of 1858 was submitted for ratification was an admission that the treaty was beyond and in excess of the instructions, for in no other view from this stand-point would it have been required to be submitted to the Legislative.

Article 1 of the decree expressly declares that the treaty to be celebrated with Costa Rica should not require ratification by the Assembly, and article 2 of the same declares that the said ratification would be necessary only in case that the boundaries agreed upon were not in accord with the bases separately communicated by the Assembly to the Executive Power.

If those bases were respected, the ratification by the Assembly, according to the plain language of the decree, became unnecessary, the compact being beforehand really ratified.

The act of exchange and the decree of approval of the treaty by the Nicaraguan Executive declared expressly that the treaty had been made in strict accordance with the above-mentioned bases. The Constituent Assembly being in session, the approval and exchange of the treaty took place, and the instrument was published as law of the Republic in the official organ of the Supreme Powers, side by side with the acts, decrees, and resolutions of the Assembly. Not a voice was raised in this body intimating that the treaty had been made contrary to the bases which the Assembly had furnished. The Executive gave knowledge of the treaty to the Assembly; and the Assembly, while not ratifying it because it was already ratified, still approved it, and showed thereby that it was satisfied with the manner in which the Executive had exercised the power delegated to it for ratifying the compact.

Even granting that the Executive might have violated some one of the bases regulating its action, the subsequent approval given by the Assembly would have cured that defect; but the truth is that no such violation took place, as proved by the fact that the defense of Nicaragua shuns to exhibit the text of those instructions so often referred to, which

were given by the Assembly to the Executive Power and are on record in the archives of her Chambers and of her Department of Foreign Relations. Nicaragua prefers to speculate upon conjectures more or less unlikely, and insinuate in this way that the instructions were violated; but if such was the case, Costa Rica could not be blamed for it, because the said instructions, as far as she was concerned, were secret.

It is, nevertheless, idle to dwell upon this subject, because the subsequent approval given to the treaty by the Constituent Assembly was sufficient to cure any defect which possibly might have been committed in that respect.

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Even though this decree was of binding force notwithstanding the Constitution of 1838, still it vested in the President no more than is vested in a minister with full power. The effect of a treaty made by such a minister and the necessity for its final ratification, even when the right of ratification has not been reserved, have been the subjects of much difference of opinion among public jurists and writers on international law. The earlier writers, following the analogies of the Roman law respecting the contract of mandate or commission, insisted that a treaty so concluded bound the sovereign and required no ratification; but this position has been controverted by the more recent writers, the latter insisting that the analogies of the Roman law were not to be the guide, inasmuch as time has worked a change in the usage of nations, and Wiequefort admits the necessity of a ratification to validate the acts of a minister with full power.

From a very early time the acts of ministers under full power have been considered the subject of ratification; and as illustrative of this is cited the fact that the treaty of peace concluded in the year 561 between the Emperor Justinian and Cosroes I, King of Persia, was signed by plenipotentiaries and subsequently ratified and ratifications exchanged. (Barbeyrac, History of Ancient Treaties, part II, p. 295.)

"It has been very justly observed that this example of the exchange of formal ratifications at a period of the world like that of Justinian, which invented nothing and only collected and followed the precedents of the preceding age, is conclusive to show that this sanction was then deemed necessary by the general usage of nations to give validity to treaties concluded under full powers." (Wurm, die Ratification von Staats vertragen Deutsche viertal jahrs Schrift, No. 29.)

And the better and accepted opinion now is that treaties are relied on only when ratified, even though made under full power. The obligation to ratify rests with great force upon the nation, and especially so when instruc-

tions have not been exceeded; but yet a failure to ratify, supported by strong and solid reasons, is not considered bad faith and is justifiable.

The question here at issue is not whether Nicaragua ought to have ratified this treaty, but whether without this ratification the treaty could be valid; and hence it is out of place to mention the reasons moving to her in failing to ratify.

We contend, therefore, even if the pretensions of Costa Rica were well founded in this regard, still the law of nations would have required a ratification of this treaty in the form required by the fundamental law of the state.

The whole of the above dissertation on the ratification of public treaties must be entirely set aside in this case, owing to its absolute irrelevancy, because Costa Rica does not hold that the treaty is valid without ratification, but that it is valid because it was ratified in due form.

From where can it be concluded that the faculties given the Executive by the Constituent Assembly were no others than those ordinarily conferred upon a minister with full powers?

Such a conclusion would be to confound things that are entirely different.

It is plain that the plenipotentiary in general and according to the universal diplomatic practice has not the right to conclude, ratify, and exchange the treaties which he has negotiated, and that ordinarily the approval of the represented sovereign is first to be obtained. These were the powers which in the concrete case herein referred to were given General Don Máximo Jerez, Plenipotentiary of Nicaragua, to negotiate the treaty; but a very different thing was the special delegation of power made by the Constituent Assembly of Nicaragua to the Executive of that country. The faculties which were given to the President were not those of a plenipotentiary, but the same that the Assembly or national extraordinary representation itself had to ratify the treaty, which might be concluded by the plenipotentiary in pursuance of the instructions and rules communicated to him for that purpose by the same constituent body.

But even granting that the analogy claimed by the defense of Nicaragua does really exist, the fact is that when the plenipotentiary received a special authority to ratify in ac-

cordance with minute instructions transmitted to him a concluded treaty that ratification is valid as well as the treaty.

Numerous cases of this kind might be cited, and the following decree of Nicaragua eloquently shows that such a practice has been followed by her:

*Decree No. 43 of March 28, 1858, authorizing the Executive to finally ratify a treaty with the United States in case that such a treaty should be concluded.*

The President of the Republic of Nicaragua to the inhabitants of the same:

Whereas the Constituent Assembly of the Republic has decreed what follows:

The Constituent Assembly of the Republic of Nicaragua, in use of its legislative faculties, decrees:

Sole article. The Government is hereby authorized, in case that a treaty additional to the one of November 16, 1857, ratified on the 25th instant, should be concluded between Nicaragua and the United States, to ratify it either by itself or by giving authority to do so to the Minister Plenipotentiary in Washington.

To the Executive power.

Given at the Hall of Sessions, at Managua, on the 26th of March, 1858.

AGUSTÍN AVILEZ, *President.*
ANTONIO FALLA, *Secretary.*
PIO CASTELLÓN, *Secretary.*

Therefore let it be executed.
Managua, March 28, 1858.

TOMÁS MARTÍNEZ.

To Dr. Don Rosalío Cortez, Secretary of the Interior.

As shown by this decree not only the Executive Power, but a simple minister plenipotentiary has had authority in Nicaragua to ratify a public treaty, the delegation of such an

important faculty not being irregular according to the public law of that country.

The power of ratifying a treaty is not, in substance, different from the power of legislating, and the legislative power, according to the Nicaraguan Constitution, can be delegated, as shown by article 42 of the said Constitution, which reads as follows:

"Article 42. It belongs to Congress—

* * * * * *

"25. To DELEGATE to the Executive power the following faculties:

* * * * * *

"2. To LEGISLATE upon matters of Police, Treasury, War, and Navy."

If such a thing is lawful under full constitutional rule let it be seen whether it was not so during a period of political reconstruction and when the delegation was made, not by a simple, ordinary congress, but by a National Constituent Assembly.

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But another reason exists why the presidential ratification was insufficient to give validity to the treaty, to wit, the want of power even in the Constitutional Assembly to confer this power upon the President in violation of the Constitution of 1838.

Until the Constitution of 1838 was superseded by that of 1858 it was the paramount law of the Republic, and, as such, bound the Constitutional Assembly. The Assembly had the power to propose to the people a new constitution, and if ratified by a popular vote it would take the place of the old one, but until that time the 1838 Constitution was in full force and effect. Any decree made by the Assembly in violation of its terms and provisions was void and conferred no rights or powers. When, therefore, this decree was entered, which proposed to waive a ratification of a treaty, it conferred no right upon the President to act in violation of the then existing Constitution.

These statements of Nicaragua rest upon two notable errors. The first is to suppose that the provisions of the Constitution of 1838 were the rule which the treaty of limits ought to follow, an error which has been refuted before; and the second, which is still graver, is to maintain that the enact-

ments of the Constituent Assembly of 1858 required popular sanction in order to be efficient.

In the United States of America the partial reform of the Constitution of each State is commonly made in the following manner: the State Legislature passes a law exactly like any other, providing for the reform to be made. This law is approved by the Governor and then submitted to the people. Until this is done the amendment only amounts to a project, its constitutional character being derived exclusively from the popular sanction. This is in general the method resorted to for amending or supplementing the Constitution of most of the States of the American Union.

The same thing does not happen in Nicaragua nor in many other Spanish-American States. In Nicaragua the reform, when partial, is decreed by one Legislature and sanctioned by the following one, and when total the convocation of a Constituent Assembly is indispensable. The popular vote does not take any part in the formation of the amendment, whether total or partial.

Such are the provisions made upon this subject by the several Constitutions which Nicaragua has had. (See Constitution of 1826, chapter XIII; Constitution of 1838, chapter XIV; Constitution of 1858, chapter XXIV, &c.)

Therefore when the defense of Nicaragua explains in its "Reply" that the Assembly of 1858 was entrusted with framing the amendments to the Constitution, but that these amendments had no value until submitted to the people and approved by them, the idea naturally comes to the mind that such an explanation is not serious, because it is inconsistent with the well-known ability and learning of the representative of Nicaragua to be so oblivious of the laws of his own country.

And if the popular sanction of the Constitution of 1858 is seriously spoken of, the learned defender of Nicaragua must then be pleased to show where, when, and how the sanction of the Nicaraguan people was given to the present Constitution of that Republic, partially promulgated at first, and after-

wards totally, by the same Constituent Assembly which approved the treaty of limits concluded with Costa Rica.

No; the partial reforms decreed by that Constituent Assembly acquired force and began to be observed as fundamental laws of the nation immediately after they were enacted and sanctioned by the same constituent body.

One of those partial reforms was made by the decree of December 2, 1857, and related to the faculties of the Executive Power in the matter of international treaties. It has been inserted above. That decree was fundamental law or Constitution of Nicaragua from the date of its promulgation.

Many other special laws of the same fundamental character were passed by the same body and had their full effect as Constitution from the dates of their publication.

The whole body of the Constitution was given to the public on August 19, 1858, and, by order of the same Assembly, it went into effect on September 15 of the same year.

Elsewhere the proper explanation will be given of the value which the Constitution of 1838 had at that time and on what foundation. It is sufficient for the moment to say that during the period of political reorganization in which the Constituent Assembly of 1857 and 1858 held sway, the voice and action of that body were the supreme law of the nation, untrammeled for all purposes by the broken Constitutions of 1838 and 1854, as shown by many measures taken by that Assembly, which were then, as now, laws of Nicaragua, whether fundamental or secondary.

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The force of this position is appreciated by Costa Rica, and hence she endeavors to show that by some mysterious method the Constitution of 1838 had disappeared; that it no longer remained the supreme law of the country. The argument upon this subject will be examined under the fourth point. Suffice it now to say that Nicaragua repudiates such a doctrine and insists that her Constitution shall not be thus abrogated at the behest of a neighboring Republic.

The method by which the Constitution of 1838 did not become an obstacle in the way of compliance with the de-

cisions of the Constituent Assembly since the day of their sanction by it was not mysterious. When those provisions contradicted the Constitution, they became by themselves reforms thereof, without necessity of any other formality.

The laws above copied show as fully as can be desired the correctness of the position which Costa Rica has taken upon the subject—that is, that during the period of political reconstruction above referred to the decrees of the Constituent Assembly were the supreme law of the nation, or, in other words, that that great national convention held in its hands in an unrestricted manner all the powers of the nation. That Assembly was the one which delegated to the Executive Power the faculty of ratifying the treaty of limits with Costa Rica, and the one which, after the ratification thereof in the manner prescribed by it, and after its promulgation as law of the Republic, corroborated its efficiency by the special approval which it imparted to it by the decree copied elsewhere.

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The doctrine here maintained is a familiar one in the United States and the States forming the Federal Republic. The history of the country shows that the usual way when the separate States desire to change their Constitution is to call a constitutional convention, and the deliberations of this convention are submitted for ratification to a popular vote. No one ever had the hardihood to contend that the calling of such convention abrogated the then existing Constitution. Frequently it has happened that the deliberations of the convention have failed to be ratified by a popular vote. If such argument obtains several of the States of the United States would be without any fundamental law whatever—*i. e.*, if the old Constitution has been thus abolished and the new one not adopted.

It must be conceded that the Constitution of 1838 was in force, and that any act done by the Constitutional Assembly in violation of it was void.

It is a common thing to look for analogies between the staple institutions of the United States of America and the more or less changeable ones of that portion of America which was formerly Spanish; but frequently these parallels lack correctness.

It has been shown before that everything said and argued upon the idea that the sanction of the Constitutions and constitutional amendments of Nicaragua had to be given by popular vote constitutes an almost unpardonable error.

From the mistaken idea that the enactments of the Constituent Assembly of 1858, proving to be in opposition to the Constitution of 1838, were null and void, certain conclusions might be drawn which the defense of Nicaragua itself would have to repudiate, as, for instance, among many others, those which follow: 1st, that the Nicaraguan Constituent Assembly of 1858 had no legal mission, because it was convoked and organized in open violation of article 196 of the Constitution of 1838, by which it was provided that no general constitutional reform should be undertaken, except upon a law passed to that effect by the Legislative Power and upon compliance with certain forms of proceeding which were not followed; 2d, that the Constitution of 1858, framed and enacted by that Assembly and now in force, was null and void as proceeding from a body which, according to the Constitution of 1838, lacked legal constituent mission; 3d, that the administration of General Martinez, before the Constitution of 1858, for a period lasting longer than the one marked by the Constitution of 1838, was not legal; 4th, that all the subsequent Nicaraguan administrations, the present one included, elected by virtue of the provisions of the Constitution of 1858 have been unlawful and unconstitutional, &c.

These conclusions are rigorously logical; but they show by their own absurdity that the principle invoked by the defense of Nicaragua, from which they are drawn, is also absurd.

Nicaragua has not yet understood that by trying to destroy the treaty of limits concluded with Costa Rica she undermines her whole legislation and public life during a period of nearly thirty years.

*Second.—The Treaty of* 1858 *became part of the Constitution of* 1858.

If, as seems to be claimed, it was intended by Nicaragua to make the treaty of limits of 1858 a part of the Constitution of 1858 the Constitutional Assembly were certainly most unfortunate in the use of expressions which, it is now urged, tend to prove the above as facts. It can hardly be seriously contended that Nicaragua had the most remote idea that the treaty of 1858 was to be a part of the Constitution of 1858, and the only question left is, Has Nicaragua made use of such expressions that *nolens volens* they must give that effect to the treaty; or, in other words, must a legal effect be given to language different from its intent?

The treaty of limits of April 15, 1858, had the character of law of Nicaragua since it was ratified, exchanged, and promulgated. The Constituent Assembly approved it afterwards, and corroborated its legal force, making of it a confirmed law; at the same time the said body continued in its work of framing the Constitution which was at last promulgated on the 19th of August, 1858. It may be said that the treaty went out of the hands of the Assembly when the latter sanctioned the whole of the Constitution.

One of the articles of this instrument reads as follows:

"The laws on special limits form part of the Constitution."

This declaration had its historical antecedent in another provision of the Constitution of 1838, which reads in this way:

"The dividing lines with the bordering States shall be marked out by a law which shall be made a part of the Constitution."

The Constitution of 1838 speaks in the future tense; the Constitution of 1858 speaks in the present. Why? Because in 1858 the question of limits with Costa Rica was already settled, while in 1838 it was unsettled, or, at least, it had not been settled by a treaty. The Constitution of 1838 provided that the law on limits should be embodied in the Constitution of the State; the Constitution of 1858 provides that the law already enacted is made a part of the Constitution.

It is therefore upon good grounds that Costa Rica has held that the treaty of limits of April 15, 1858, was embodied, by the very same Constituent Assembly which approved it, in the text of the new fundamental law of that year.

There is no need to explore presumed intentions when the literal context of the Nicaraguan laws of that period is so perfectly clear; nor could it be admitted under any circumstances that the intention of the Assembly was different from the one which is revealed by its plain and explicit enactments.

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The clause in the Constitution of 1858 in relation to special limits declares that laws on that subject shall form part of the Constitution. How shall they form part? The only way would be by their incorporation into the Constitution by way of amendment, as had always been the rule. Why give a strained construction to this clause? If the laws are to be part of the Constitution they must be incorporated therein, as provided by the terms of the existing Constitution. This would be in harmony with the history of this Republic, in universally fixing her boundaries by an article in her Constitution.

The clause of the Constitution of 1858 which relates to this point provides, as explained in the foregoing remark, for the present and not for the future. "The laws on special limits," it reads, "form a part of the Constitution." If it does not refer to the future and only speaks of the present, how can its meaning be distorted so as to make it mean what it does not say? When the Constitution speaks of laws it certainly means secondary or general provisions and acts passed by the legislative power of the nation; but such acts and provisions of this kind which related to special limits had, by the very fact of their enactment and promulgation, to become incorporated into the fundamental law as an organic part of the same. This is the right construction to be placed upon the clause herein referred to.

To give to it the interpretation that Nicaragua pretends is to convert that provision of the Constitution of 1858 into

useless phraseology. No necessity whatever would have existed to specially declare one thing which was already set forth in the Constitution—that is, the general methods of amending it.

In other words, if the interpretation suggested by Nicaragua were the correct one, the provision might be eliminated or expunged from the text of the Constitution without leaving any void in the instrument. This is a patent proof that such interpretation is untenable.

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*Third.—Acquiescence in the treaty.*

It is asserted in chapter V of part I of the case of Costa Rica that the treaty of 1858 was acquiesced in and complied with for fourteen years—that is to say, until 1872, when Mr. Ayón, the Minister of Foreign Affairs, expressed doubts as to the validity of the treaty, while in chapter IX of part 2 it is admitted that in 1869, only eleven years after the date of the treaty, the Minister of Costa Rica introduced article 6 of the proposed treaty of that year, providing that Nicaragua should ratify the treaty of 1858. It would appear from a comparison of these two statements that Costa Rica first doubted the validity of that treaty, and that, too, some three years before she claims that any doubts had been expressed as to its validity by Nicaragua. This inconsistency cannot be reconciled and tends strongly to corroborate, what Nicaragua has always claimed, that at all times the validity of the treaty had been a matter of question and doubt.

In chapter IX, Part Second, of the argument of Costa Rica it was amply shown that Costa Rica never entertained, as she does not entertain now, any doubt about the validity of the treaty of 1858, and it was explained there, furthermore, what was the reason why article 6 of the Jimenez-Montealegre project of convention of July 21, 1869, was written. It is unnecessary, therefore, to repeat here the said demonstration; much more so when the defense of Nicaragua admits, as it could not help doing, the truth of the facts therein stated.

It was in 1869 when Nicaragua prepared herself to deny her pledged faith to the treaty of limits, and the reason which moved her to do so was the disappointment felt by her on

account of the Costa Rican decree of April 28, prohibiting the extraction from the forests of Costa Rica of their natural products, and in 1872 she decided to accomplish the total destruction of the treaty. Up to that time nothing is found in the official records of the National Congress or of the Executive Power or the Supreme Court of Nicaragua, or in the official press, organ of the supreme powers, or the private independent press, setting forth or even intimating the most insignificant hesitation as to the validity, perfection, and efficiency of the said treaty. The defense of Nicaragua has not produced, nor can it do so, the proof of its assertion that *the validity of the treaty of limits had been at all times at Nicaragua and at Costa Rica a matter of question and doubt*, because, as has been said, the so-called doubts were the invention of Señor Ayón in 1871, when he felt himself wounded to the core by the fall of the Ayón-Chevalier contract, and the result of the work of some other discontented mind in 1869, when the mouths of the San Carlos and Sarapiquí rivers were closed to the abusive trade of rubber taken from the forests of Costa Rica. If the defense of Nicaragua wishes to substantiate its statements it must produce the official documents anterior to 1869 and 1872 wherein such doubts might have been expressed.

Much to the contrary, in perusing the legislative records and the files of official writings from 1858 to 1871, the defense of Nicaragua will be forced to see, in spite of itself, repeated and constant evidence, conclusive in its character, against the position it has taken.

And an argument which is not only unsupported by proof, but contradicted by the Nicaraguan laws themselves, has necessarily to recoil against Nicaragua, and corroborate the statements made by her opponent.

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Costa Rica asserts that the introduction of Article 6 in the before-mentioned treaty was to obtain a public declaration by Nicaragua of the validity of the treaty and avoid doubts as to the future. If it had been the fact, as

is now sought to be proven, that no doubt had ever been expressed up to that date, and that the provisions of the treaty had been lived up to and her opinion taken as to canal concessions, the public declaration could not have strengthened the treaty, and if, as she claims, no doubts had been expressed it could not have removed them, but it could strengthen the treaty if matters were the reverse and doubts had been expressed.

Several acts are recited as having been done in pursuance of the stipulations of the treaty, and, while it is confidently maintained that they shed no light upon the question in controversy, they will be referred to.

The acts recited by Costa Rica to show that the treaty of limits of 1858 received punctual execution by both contracting parties since the date of the celebration cannot be spoken of simply as "several." They form an uninterrupted series and were performed both by the different Legislatures and by all the Nicaraguan administrations from 1858 to 1871.

It is argued that this uninterrupted series of acts performed in good faith by both parties does not throw any light on the present controversy, but elsewhere sufficient has been said on the subject, and it would be idle to repeat it here.

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These acts consist in consulting with Costa Rica as to certain canal and railway concessions that had been granted by Nicaragua, to wit, those to Belly, to Chevalier, and to Pim. All this could have been done without any such admission on the part of Nicaragua for either or both of the following reasons:

There is great error in attempting to reduce in this way to only three the acts performed by both parties during the long period of time above expressed, which are demonstrative of the punctual execution of the treaty of limits; and it is certainly queer that the method of refuting the argument of Costa Rica consists in making light of the difficulty encountered and closing the eyes against it. The facts against which no specific objection has been made by Nicaragua must be taken for admitted, and therefore they will not be mentioned here. Examination will be made only of the points which Nicaragua has been willing to consider.

First. The treaty had not been finally rejected and might have been subsequently ratified; and, as when ratified it would have related back to and taken effect from its date, it was encumbent upon Nicaragua to preserve the *status quo* of all matters pertaining thereto, or to change them only with the consent of Costa Rica. This doctrine has been maintained in the United States, wherein it is held that no grants of land in territory ceded by a treaty can be made pending ratification, and if so made, if the treaty is finally ratified, the grants become invalid. (United States *vs.* Arredondo, 6 Peters, 691.) It was no more than the exercise of good faith that prompted a compliance with the terms of a treaty then *in fieri*.

The acts performed by both Nicaragua and Costa Rica in execution of the treaty of 1858 were not so performed for this or the other reason of politics, neighborhood, or sympathy, but only and exclusively in pursuance of the provisions of the treaty. So it is expressly set forth in the greater part of the documents exhibited by Costa Rica, as can be seen, for instance, in documents Nos. 19, 22, 23, 25, 26, 28, 29, 30, 32, 41, and 45 of her "Argument."

Nor can it be thought that grants or concessions referring to territorial sovereignty and other subjects were made by either State, unless when compelled to do so by a public treaty. When Costa Rica protested against the occupation and closing of the mouth of the Colorado river by the American Transit Company, and Nicaragua accepted that protest as just, and directed the Company to refrain from touching the river belonging to Costa Rica, Nicaragua did not act in this way through pure sympathy, or friendly feelings, towards Costa Rica, but because she recoguized that the said river was Costa Rica's, and because she entertained the most intimate conviction that the treaty of 1858 was valid and perfect. Exactly the same thing can be said in regard to the other facts set forth by Costa Rica, which constitute a plain admission on the part of Nicaragua that the treaty was international law for both countries.

The first reason alleged by Nicaragua to explain the action of her Government from 1858 to 1872 is a bad one. To say that the treaty was religiously complied with by both nations as international law, because it had not been finally

rejected and might still be subsequently ratified, is a reason which can satisfy no one.

Public treaties are not complied with upon the mere possibility that in the future they may reach perfection. If they are complied with it is because they have already legal existence. It is not rare for a public treaty to go into effect before it is ratified and exchanged; but this never happens except by special agreement of the interested parties, whether set forth in a special clause of the same treaty or in an additional convention, either public or secret.

In all other cases the execution does not begin until the treaty becomes perfect, and to suppose otherwise would be to make the effect precede the cause and to subvert all the laws of logics.

The defense of Costa Rica agrees to the fact that it was the exercise of good faith that prompted Nicaragua to comply with the terms of the treaty; but it does not agree to the statement that the said treaty was one *in fieri*, as Nicaragua wishes now to maintain, forgetting that the character which the said treaty has and always had, according to her laws and her diplomatic records, is and was at all times that of a concluded matter.

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Such acts have been frequently done, and, as illustrative, attention is called to the treaty between the United States and San Domingo of 1869, which treaty was rejected by the Senate. Pending the action of the Senate the United States paid to San Domingo the first installment of a payment provided for only by that treaty, and when this act was sought to be made the basis of a claim against the United States for the balance of the fund, the State Department very promptly refused to recognize such a demand. "Mere signing by the Executive of a treaty containing a clause for its ratification in the usual form is no guarantee that the treaty should be ratified, nor does a payment of an installment of money by the Executive as a preliminary payment under such a treaty, which provides for a lease of foreign property, bind the Government to future payments." (Mr. Evarts, Secretary of State, to Mr. Delmonte, Feb. 19, 1880. Wharton International Law Digest, vol. II, p. 12.)

In 1884 a treaty was concluded between the United States and Nicaragua relating to canal concessions, which treaty was finally rejected by the United States Senate; but, pending the ratification and under its terms, the United States sent a surveying party to Nicaragua to fix the lines of the canal. It was never pretended that these acts validated the treaty or deprived the Senate of the United States of its constitutional right to reject the treaty. Both the acts here recited are much stronger as tending to prove acquiescence than those adduced by Costa Rica.

The example of the San Domingo treaty would be applicable to the case if the said treaty would have been constitutionally ratified and promulgated by the Government of the United States, as the treaty of limits of 1858 was by the Government of Nicaragua. In her examples Nicaragua always forgets the differential element, consisting of the fact that the treaty of limits was RATIFIED in the manner and form which the constitutional law then in force in the country required for its validity.

As to the other example, which admits of the remark above made, the circumstance must be borne in mind that the scientific studies to which it refers have nothing to do with the treaty. Before any one had thought of negotiating it some other surveys of the same kind had been already undertaken. Furthermore, it was not the Senate of the United States which ordered those surveys to be made, and it never said that they were undertaken in compliance with the treaty between the United States and Nicaragua.

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Second. The friendly relations with Costa Rica, her ally in war, might well move Nicaragua to confer with her when treating upon so momentous a question, and this is emphasized by the fact that a similar consultation was had with Guatemala on the subject of the Pim concession, clearly showing that a friendly feeling towards her neighboring republics was the cause of this consultation. There was no treaty with Guatemala requiring her consent; still her consent was asked in the same way as that of Costa Rica.

This second reason is no better or stronger than the first, especially if due consideration is given to the language of

the documents exhibited by Costa Rica, from which it appears that the intervention given her in the contracts of interoceanic canal was due to the provisions of the treaty of limits of 1858 and to no other cause.

As to the fact that Guatemala was consulted in regard to the Pim concession, document no. 41, appended to the argument of Costa Rica, conclusively shows that said consultation was made in pursuance of another public treaty made by Nicaragua, and not to simple feelings of friendship between her and that Republic.

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As an additional ground of alleged acquiescence Costa Rica affirms that the treaty of 1858 has been officially published in the Code of Laws of the Republic of Nicaragua.

True it is that the treaty has been published, but with the following note:

"Although there are no reasons to consider that the present treaty is not yet a law of the Republic, being wanting in some of the essential requirements to give it validity, it has been deemed convenient to insert it in this place, as being a document of importance for further arrangement with the Republic of Costa Rica."

This clearly demonstrates that such publication did not give acknowledgment, much less ratification, of this pretended treaty.

When it was stated in the "Argument" of Costa Rica that the treaty of 1858 was published officially in the collection of laws of the Republic of Nicaragua, reference was not made to the book wherein the foregoing note appears, recently published at Managua (1885) by order of the Department of Foreign Relations, subsequent to the initiation of the present controversy, and in which, as was to be expected, the Government of Nicaragua caused that note to be placed at the foot of the treaty.

The "Argument" of Costa Rica referred to official publications contemporary with the celebration of the treaty, and to the official newspaper which was the organ of the Supreme Nicaraguan Powers of 1858. No. 15 of the said Gazette, issued on the 8th of May, and No. 23 of the same, issued on

the 3d of July, 1858, published the treaty of limits, the act of exchange, and the decree of approval enacted by the Constituent National Assembly; and the publication was made, not as relating to a matter still in project, but to one terminated and settled in exactly the same manner as used for the promulgation of laws.

The "Argument" alluded also to the official collection of the laws issued by the Constituent Assembly of Nicaragua in the years 1857 and 1858, a book which was published in Managua in 1858, where, on page 46, the decree of approval appears.

Neither in the official newspaper nor in the said official collection of the laws of the Assembly, any note appears to have been appended to the treaty so as to diminish its strength.

The collection to which the defense of Nicaragua refers in the passage herein commented upon, is the book entitled "*Derecho de Gentes Positivo de la República de Nicaragua*," &c., printed, by order of the Ministry of Foreign Relations, at Managua in 1885. That book contains the treaty of 1858, together with the act of exchange, and the decree of approval of the Constituent Assembly, and also the treaties concluded by Nicaragua with Spain, France, Great Britain, the Holy See, Italy, Switzerland, the United States of America, Colombia, Honduras, Salvador, and Guatemala. The treaty with Costa Rica was inserted there, because the compiler of the book had not courage enough to strike it out; but the Ministry ordered that the note should be made to it, setting forth that "there are some reasons to consider that the treaty is not yet a law of the Republic, because it is thought that some requisites essential to its validity are wanting in it." This note, written in 1885, is in every respect consistent with the attitude taken by Nicaragua subsequent to 1872.

No confusion, therefore, should be made between this recent collection of 1885, which is the one referred to in the

"Reply" of Nicaragua and the original collections contemporary with the treaty and prior to the present question.

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But aside from this it must be remembered that these several acts were done by the Executive, and for the most part by the same one who exchanged the ratifications of the treaty, nor should it be overlooked that at that crisis in the history of the country the post of Minister of Foreign Affairs was filled by Mr. Zeledon, a native of Costa Rica.

It has been superabundantly demonstrated that the acts referred to were not acts of the Executive, but of the Constituent Assembly, and that the Executive did not perform them except by special delegation of the Assembly, and with its subsequent approval.

A hint is also made that the insertion of the Treaty of Limits in the collection of treaties was due to the personal action of Señor Zeledón, ex-Minister of Foreign Relations of Nicaragua; but if the fact is taken into consideration that Señor Zeledón died in 1870, fifteen years before the collection of laws referred to by the defense of Nicagagua was published, no doubt can be entertained that the said gentleman could have no part in the said publication; and if the defense of Nicaragua meant to refer to the original collection of laws of 1858, then the fact is also to be considered that the said publication of the treaty as law of Nicaragua was made in June of the said year, and that Señor Zeledón was not called to fill the position of Secretary of State until the month of August following, as shown by the decree of his appointment, issued by the President of Nicaragua on August 16, 1858, to be found on page 132 of the respective collection.

Independently of the above statements the fact is to be recorded here that Señor Zeledón, although born in Costa Rica, moved to Nicaragua when he was very young for the purpose of making there his studies of law; that he married in that country; that there he spent almost his whole life, and that there he died in advanced age, after having

given his services to the country as legislator, diplomatist, Secretary of State, &c. He had his property in Nicaragua, and in Nicaragua he left his children settled. His love for Nicaragua and his devotion to the service of the interest of that Republic made him deserve, at the time of his death, that Señor Juarez, ex-Secretary of State of Nicaragua and one of her most prominent public men, in delivering his funeral eulogy, should say that "Nicaragua had deserved from Señor Zeledón to be preferred to his own country, when subsequent to the independence the two States became separate and distinct nations." (Gaceta de Nicaragua, No. 25, of June 18, 1870.)

The name of crisis in the history of Nicaragua is given to the period of 1858, and the phrase does not lack exactness, because it was then, when after three years of civil strife, through which the national independence was almost lost, the country was reconstructed upon bases which have subsisted to this date. That was, indeed, a salutary crisis, and the men who placed themselves at the head of it are no doubt entitled to the name of patriots.

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*Fourth.—That the Constitution of* 1838 *was not in force at the time of the treaty of* 1858.

Foreseeing the difficulty that must arise in asserting the claims heretofore made by Costa Rica that government now boldly asserts the abolition of the Nicaraguan Constitution of 1838. How that instrument went out of existence we are left to conjecture, but it is seriously argued that if the Constitutional Assembly in its legislative character passed laws in conflict with the Constitution the effect of such laws was to destroy the Constitution.

It could not certainly be expected that historical facts established beyond doubt would be ignored or misconstrued, as is done in this place. The Constitution of 1838 went out of existence by virtue of the subsequent Constitution promulgated by the Constituent Assembly of 1854, on the 30th of April of the said year, under the administration of Don

Fruto Chamorro; and, as it is necessary for Costa Rica to accompany each one of her assertions with documents in support thereof, some phrases will be herein transcribed of the "Memoirs for the History of Nicaragua and of the National War against the Filibusters" of Don Gerónimo Perez (*Memorias para la Historia de Nicaragua y de la Guerra Nacional contra los Filibusteros, 1854 to 1857, par Gerónimo Perez, Masaya, Imprenta del Orden*, 1883), which give the history of that Assembly from its convocation to the sanction and promulgation of the new fundamental code. They read as follows:

"After the inauguration of the new administration and under the belief that peace was firmly established it was thought that the desired opportunity had arrived of convoking a constituent assembly or of carrying into effect the convocation made by the Legislatures of 1846 and 1847 in order that the Constitution of 1838, to the deficiencies of which the past troubles had been attributed, should be revised and substituted by another more in conformity with the height of civilization and the necessities of the time." (Page 10.)

"On the 22d of June of the same year the Government ordered that primary and district elections should, respectively, be held on the 31st of July and the 28th of August next, without, however, fixing the date of meeting of the Assembly, perhaps because it feared the result of the elections and desired to keep in reserve some means of providing for that emergency." (Page 11.)

"The Government of Nicaragua thought that the opportunity had arrived of appointing the day in which the Constituent Assembly should meet, and by the decree of December 11 appointed the 8th of January following, but the meeting took place on the 22d without the attendance of the expelled members." (Page 16.)

"As soon as the Assembly accomplished its organization it appointed a committee to make a draft of the new Constitution, and the said committee engaged itself at once, with admirable assiduity, in the framing of the instrument, the

completion of which was desired in as short a time as possible for fear that some new revolutionary movement, somewhat spoken of, might prevent it. This fear was also the cause of the promulgation in advance of certain sections of the Constitution, which was still incomplete and under discussion." (Page 17.)

"The Constituent Assembly continued in the meantime to hold its meetings, and by decree of April 7 assumed the legislative power for cases of urgency, as it itself had ordered by formal decree that no ordinary assembly should meet in 1854, both because of the expense to be incurred thereby and of the great inconveniences and almost impossibility of holding two assemblies at the same time." (Page 31.)

"The draft of the Constitution, having been submitted to the Assembly and discussed by it, was sanctioned on the 30th of April, 1854."

"The new Constitution, consisting of 104 articles, restricted the privileges of citizenship by requiring the possession of a capital of from two to four hundred dollars to be a citizen, while the former Constitution only required two hundred. The new one provided also for the creation of only one Chamber of Congress, consisting of the same number of Senators and Representatives sitting altogether in the same House; disqualified the clergy for the position of members of Congress, and extended to four years the presidential term of office, as well as the time of service of Senators and Representatives. Under the Constitution of 1838 this period was two years." (Page 32.)

"The sanction of the Constitution, its presentation to the Government, the oath administered to the President to comply with it, and the new presidential election, which, according to it, took place, succeeded each other amidst splendid festivities, the animation of which was increased by the good news received from Honduras, and transmitted on purpose, that the Government of that country had ordered the Nicaraguan refugees to go to the interior, although, in reality, at

that very moment they were leaving the State with the revolutionary torch in their hands." (Page 33.)

"The Constituent Assembly remained in session until the information of the Del Pozo defeat reached it, and then, by decree of May 14, decided to continue to hold its meetings at Granada. It must be remembered that this Assembly had assumed the legislative power, and that for this reason it was then in existence because its original mission of reforming the Constitution had been fulfilled." (Page 53.)

The Constitution of 1838 went, therefore, out of existence by the promulgation of the Constitution of 1854.

But the Democrats, who in the latter year rose up in arms against the established Government and who for the purpose of overthrowing it called the filibusters to their country, raised the abolished Constitution of 1838 as a flag for their rebellion.

The Constitution of 1854 was then rigorously upheld by the Government and the legitimist party; but when the compromise was made between both parties for the purpose of ejecting the invader, it was stipulated that as soon as the national war was terminated, the Assembly of 1854, or a new one of the same constituent character, should be convoked for the framing and promulgation of a new Constitution.

Walker was expelled from Nicaragua; the two rival leaders, Generals Jerez and Martinez, became reconciled, and the dictatorial duumvirate which was thereby brought into existence chose to convoke a new Constituent Assembly, which was the celebrated one of 1858, clothed with unrestricted powers to do everything necessary for the reorganization of the Republic, which approved the treaty of limits and framed and promulgated the Constitution which has been in force in Nicaragua ever since.

If the Constitution of 1838 did ever reappear as an organic general law until the new Constitution was promulgated it was only through a revolutionary act of the *de facto* government of Generals Martinez and Jerez, based upon another

revolutionary act, which was the agreement of September 12, 1856; but not for this the said Constitution of 1838 became superior to the condition of things which existed under the extraordinary rule of political reorganization exercised by the Constituent Assembly, but, on the contrary, it was subject to revision by the same Assembly.

In order that the whole extent of the powers vested in that body may be well understood some of the acts done by it should be cited.

Article 125 of the Constitution of 1838 provided as follows: "The executive power shall be vested in a supreme director elected by the people of the State." But in spite of this provision, and by virtue of the fact that that period was one of transition between the anarchy of the revolution and the constitutional regime, the Constituent Assembly decided by decree of November 8, 1857, that the dictators, Generals Don Tomas Martinez and Don Máximo Jerez, who, as stated above, by no other authority than their own had conferred the power upon themselves, should continue to exercise for a certain time the Executive power of the Republic.

Article 126 of the same Constitution of 1838 read that "in the absence of the Director the Chamber of Representatives shall select one member of the Senate to fill his place," &c. But in spite of this provision the Constituent Assembly decreed that in case of the absence of the dictators Martinez and Jerez, or of their being engaged in some other occupation incompatible with the functions of their position, the Executive power should be transferred to Lic. Don Gregorio Juarez and Dr. Don Rosalio Cortez, as substitutes, appointed by the dictators.

Subsequently to that the same Assembly decreed (November 20, 1857) that whenever, for any reason whatever, the Republic should find herself without a President, the Assembly, if then in session, should elect one of its own members to fill that position. If the Assembly was not in session the acephalous condition of the State was to be remedied by other means which the same decree provided for. In one of its

articles the following language occurs: "As long as the Constitution to be given to the Republic is not established, the present law shall have its effect as such; and whatever matter is not provided for in it shall be determined either by the Constituent Assembly or by the Executive if the Assembly is not in session. Observe that this was to be done not in accordance with the Constitution of 1838.

Section 2, chapter IX, of the Constitution of 1838 described the faculties of the Executive power. Nothing was said in it about the celebration of international treaties, but on the 2d of December, 1857, the Assembly enacted a law by which some functions of the Executive Power were described, and one of them was to celebrate treaties with all other nations, subject to the ratification of the legislative power. This law was given the character of fundamental by the Constituent Assembly.

The strained condition of the relations between Costa Rica and Nicaragua caused the Constituent Assembly to fear that the latter Republic might be invaded by the former; and, acting under that impression, by decree of December 21, 1857, it clothed the Executive Power with unlimited faculties. When the treaty of limits of 1858 was ratified, the Executive found itself in actual possession and exercise of the said faculties, by special decree of the Constituent Assembly, no. 22, of the 27th of January, 1858; and it made use of them, as explicitly declared in the decree of ratification which was issued on April 26, 1858. It must be noticed, furthermore, that the Constituent Assembly had then taken a recess, and that in suspending its sessions renewed the faculties given the Executive by decree of April 5, 1858. The Assembly did not meet again until fourteen days after the date of the exchange of the ratifications of the treaty. Therefore, when the treaty was exchanged and ratified the Executive had, under repeated decrees of the Constituent Assembly, a dictatorial character.

Article 133 of the Constitution of 1838 limited to two years the term of office of the Supreme Director of the State; but, in spite of this provision, the Constituent Assembly, by decree of March 20, 1858, decided that the duration of the said term of office should be such as fixed by the dictatorial duumvirate on the 26th of August, 1857, it resulting thereby that the said period was extended to four years. This law was also expressly enacted with the character of fundamental.

Article 137 of the Constitution of 1838 disqualified military officers in actual service from holding the position of Supreme Director of the Republic; but, in spite of this provision, the Constituent Assembly, by decree of March 20, 1858, placed the command-in-chief of the army in the hands of the Chief of the State. This law was also passed as being fundamental in its character.

Chapter III of the Constitution of 1838 declared that all the inhabitants of the State, domiciled in whatever portion of its territory, were Nicaraguan citizens, and that naturalization in the country could be acquired by any one born in another Republic of America by simply settling in the State and declaring before the local authority his intention to become Nicaraguan; but the Constituent Assembly, by decree of March 26, 1858, reformed this constitutional provision and considerably restricted both citizenship and naturalization.

The above statements are sufficient to show that the Constituent Assembly of 1858 was not, as it is claimed, an ordinary Legislature, subject to the provisions of the Constitution of 1838, but a National Convention most freely and unrestrictedly called to reconstruct from the very foundation the almost ruined social structure of Nicaragua.

The laws which the said Assembly passed are not void because unconstitutional, as argued by the defense of Nicaragua. They are, on the contrary, reforms of the Constitution; and a part of the public law now in force in that nation.

So it appears from her legislative collections.

How a secondary law can effect the annulment of the superior or fundamental law is difficult to understand. That an unconstitutional law is void has heretofore always been maintained, and it scarcely needs argument to show that such is, and of necessity must be, the effect. If it were otherwise of what use would constitutional limitations be? If a law can destroy the constitution that instrument does not deserve the name.

The point made by Costa Rica is not by any means that a secondary law in conflict with the Constitution destroys the latter, instead of falling to the ground through its unconstitutionality. The point is, on the contrary, that organic fundamental laws of the State, promulgated by an Assembly vested with all the necessary power, for the express purpose that they would be fully and immediately executed actually modified and amended from the very date of promulgation the public law of Nicaragua; that they were incorporated into the text of the new Constitution; and that they are still a part of the fundamental law of that State.

A secondary law in conflict with the organic one is worth nothing, and this is plain; but special fundamental laws frequently form what is called the Constitution of a country, and the laws referred to by Costa Rica belong precisely to that class.

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Recurring to the history of the United States, many decisions of the Supreme Court have declared certain laws unconstitutional. If such a law could effect a repeal of the Constitution instead of being itself a nullity, there would be now no constitutional Government in the United States. It is a misapplication of the result, and it needs only to be stated to demonstrate that it is utterly untenable.

To the reasoning of the preceding paragraph sufficient answer has been given in the foregoing commentary. The misapplication of the result is not in the reasoning of Costa Rica, but in the artifice by which Nicaragua wishes to impress the idea that the Constituent Assembly was nothing else than an ordinary constitutional congress, and that fundamental organic laws of the State were secondary laws.

But Costa Rica is at fault with her facts. The Constitutional Assembly acted and claimed to act under the Constitution of 1838, as is shown in numberless of its acts, among others the following:

"The Constitutional Assembly of the Republic of Nicaragua, in virtue of its faculties, decrees:

"1. The public Executive administrations that, without any constitutional election, have ruled in some portions of the Republic or in the whole of it from June, 1854, until the installation of the present Constitutional Assembly are not considered legal administrations of the Republic, as they were not elected according to article 7 and the whole of chapter VI of the Constitution."

Further on the same decree says:

"It is especially declared that all contracts, treaties, concessions of land, and papers of naturalization, Government bonds, or any other contracts engaging the credit or the public property of the nation made by the administration referred to without authorization or approval by the legislative power are against what is established in article 5 and in sections 4, 5, 9, 13, and 20 of article 109 of the Constitution, and hence are annulled," &c.

Decree of the Constitutional Assembly, in its legislative character, approving the treaty of June 4, 1858.

"The Constitutional Assembly of the Republic of Nicaragua, in exercise of the legislative faculties with which it is invested, decrees:

"Sole article. The treaty of limits celebrated in the city of San José on the 15th of April of the present year, between the Ministers Plenipotentiary General Don Máximo Jerez on the part of this Republic and General Don José Maria Cañas on the part of Costa Rica, with the intervention of the Minister Plenipotentiary of the Government of Salvador, Colonel Don Pedro R. Negrete, is approved."

The new Constitution itself begins with the following preamble, viz:

"In the presence of God, we, the representatives of the people, fully and legally authorized by our constituents to reform the Constitution of the 12th of November, 1838, decree and sanction the following political Constitution."

And its concluding chapter repeals the Constitution of 1838, viz:

Chapter XXIV.

"Article 105. * * * The Constitution of the 12th of November, 1838, is abolished and all laws not inconsistent with the present Constitution are to remain in force."

The decrees, instead of declaring void ALL acts from 1854 to 1857, as is asserted by Costa Rica, only annul such as conflicted with the Constitution of 1838, and for the reason that they did so conflict.

The mention of a single fact will be sufficient to show that the criterion of legality of the Constituent Assembly of 1858 was not the Constitution of 1838, and this fact is the following: That the nullification made by it of all the acts of the former Nicaraguan administrations did not include or refer, according to the decree cited by Nicaragua, to the administration of General Don Fruto Chamorro, which was based partially on the Constitution of April 30, 1854. If this Constitution had no value, it is plain that the Constituent Assembly would have not failed to nullify the acts of an administration which had acted under its rule and which was founded upon it.

Another fact is that upon the death of Señor Chamorro the Executive fell legitimately into the hands of Senator Don José Maria Estrada, who filled the position and ruled the country under the Constitution of 1854 until September 12, 1856, in which, by virtue of a treaty of the same date, known to history by the name of the Martinez-Guzman-Jerez-Orozco treaty, the Government presided over by him was dissolved. The acts of that administration, far from being nullified by the Constituent Assembly of 1858, were expressly declared valid by decree of June 25 of the said year; while, on the contrary, those of the administrations of Señor Castellon and of his successor, Señor Castillo, who ruled Nicaragua under the Constitution of 1838, from June, 1854, to September 12, 1856, when the dissolution thereof also took place, were declared void. This proves that in the conflict of Constitutions and Governments in Nicaragua, the idea of legality was rather on the side of the Constitution of 1854 than on that of the Constitution of 1838, because the latter was, more than anything else, the flag of a revolution. Both Walker and Rivas claimed that they ruled by virtue of the Constitution of 1838, and everything done by them was annulled.

The fact is that Nicaragua was a chaos from 1854 to 1857, and that the Constituent Assembly was dictatorially convoked to re-establish order, and that the powers vested in it by the people of the State were unrestricted.

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How, then, did the Constitution become lost? The revolution of 1854 had been successfully put down, the rightful authorities under the Constitution had maintained its integrity, and had driven out of the territory a foreign invader. Internal commotion and invasion had demonstrated that contingencies might arise, as they had already arisen, that made it desirable to amend, alter, and add to the National Constitution. Such has been the history of all constitutional Republics. The Constitution of the United States contains twice as many amendments as original articles. Nearly every State in the United States has had two or three new Constitutions, but in the United States, as in Nicaragua, the old remained in force until the new took effect. The people might have rejected the Constitution of 1858 when it was submitted for their suffrages. Had they done so would Nicaragua have been without constitutional Government? No thoughtful person would claim any such thing.

It is a fact of public notoriety that the revolution of 1854 had for its object to destroy, both the Constitution promulgated in that year, and the administration of Señor Chamorro which was based upon it, the banner of the revolution being, as has been stated, the Constitution of 1838. If, as claimed here by the defense of Nicaragua, the revolution of 1854 was successfully put down, the conclusion might be reached that the legality of 1838 succeeded thereby in securing its triumph; but this is not entirely true, and shows how inaccurately, under a historical point of view, the defense of Nicaragua has been written.

The error is here reiterated and insisted upon that the Constitution of 1858 might not have been ratified by the people, and as this error is the foundation of the argument it becomes necessary to denounce it again, and request the defense of Nicaragua to take the trouble, in order to dispel it from its mind, to read the decrees dated on the 21st and 23d of August, 1858, providing for the manner, time, and cere-

monies for the swearing to of the new constitution and making no mention at all of the ratification of the same by popular vote.

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This is a new argument advanced now for the first time by Costa Rica. In all the diplomatic correspondence heretofore had and all the doubt expressed on the validity of the treaty never has it been before claimed that the Nicaraguan Constitution of 1838 was not in force. The mere assertion of it is a proposition that ought not for a moment be admitted by Nicaragua; it is an intervention as to her internal affairs by a foreign government that ought not to be tolerated; but Nicaragua, anxious to maintain her friendly relations with her sister Republic and conscious of the strength and integrity of her case, has not sought to evade any issue made by Costa Rica, even though it be one that ought not to be admitted or considered. She has preferred to meet and overcome her arguments irrespective of their impropriety, and to lay bear before the arbitrator the very merits of the controversy.

What the defense of Costa Rica has held is that the regime under which the treaty of limits was ratified, exchanged, and executed was not a regime of full constitutional legality, but a transitory one of dictatorial character, in which the Executive Power and the Constituent Assembly exercised without limitation of any kind the sovereign power of the nation; and this fact is so superabundantly demonstrated that in reality it would be idle to insist any longer upon it.

And if Nicaragua feels sensitive, as it seems, because Costa Rica analyses the Nicaraguan institutions contemporary with the treaty, the fact is to be noticed that Costa Rica has only made use of her right, and that Nicaragua is the one to be blamed for it, owing to her attempt to break a sacred and inviolable engagement.

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In order to maintain this claim Costa Rica quotes largely from "Walker's War in Nicaragua," and seeks by expressions found therein to prove that the Republic was in a state of chaos. It is earnestly urged that the assertions of a filibuster who had sought by force to overturn the Government of the State, and who, having been driven out of its limits, was preparing for

another expedition against its peace and safety, are not to be treated as historical facts and ought not to be so cited. Walker, in his effort to draw to his support an invading expedition, wrote the work referred to as a justification of his unlawful purpose and to induce others to join him in his contemplated expedition. Undoubtedly he pictured Nicaragua in a state of chaos and hopeless anarchy and himself as rather of benevolent motive and purpose in seeking to establish a government there. He desired to convert his lawless acts into meritorious ones. His conduct was contrary to the law of civilized nations, and he paid with his life the penalty of his unlawful proceedings. His execution received the approval of the civilized world. He stands as a condemned criminal under international law, and his declarations in defense of his crime are not admissible, nor ought they to be considered in an international arbitration.

It seems to be the fate of the defense of Nicaragua to be at fault with its facts, and to place Costa Rica in the necessity of correcting its errors at every step. Here, for instance, the said defense seeks to impress the idea that the historical narration of the Nicaraguan revolution of 1854–1857 made in the argument of Costa Rica is based upon the work of Walker, "The War of Nicaragua," forgetting that the defense of Costa Rica by note made at the foot of the said narration in chapter II, part 2, of its argument expressed itself in this way:

"This statement is based upon the facts reported by the official press of Nicaragua, the 'Anuario de Ambos Mundos,' and 'The History of the Nicaraguan War,' by Walker."

Therefore, the bases of the narrative consists principally of authentic documents published officially by the press of Nicaragua, then of the statements published by one of the most serious diplomatic Reviews which existed at the time in which the events took place; and, finally, of quotations from the "War of Nicaragua," by Walker, which was cited in further corroboration of the truth.

All the statements in regard to which the contemporary official documents, the diplomatic Review, and the book of William Walker agree, have to be taken as indisputable in point of truth; and all that has been said by Costa Rica appears, furthermore, supported by the authority of the historical works of Gerónimo Perez, a Nicaraguan writer, ex-Sec-

retary of the Treasury of that Republic and ex-Secretary of the Legation of Nicaragua in Washington.*

Rather than occupying itself in making a picture of Walker the defense of Nicaragua ought to have shown the incorrectness of the facts set forth; but, as this was impossible for it, it chose what was more convenient, and undertook that picture. It may be taken for granted that everything said by Walker was untrue; but still the statements of the official press and of the diplomatic Review remain standing. If Walker had an interest in finding justification of his Vandalic enterprise, neither the official papers of Central America, nor the "Revue des deux Mondes," nor Gerónimo Perez were organs of the filibuster, and they all are in accord with the narrative made by Costa Rica.

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It is further urged that the use of the words, in the approval of the treaty of 1858, "In virtue of its legislative faculties" by the Constitutional Assembly were erroneous and have been productive of all the controversy. That they were not accidentally or erroneously used is proven by the fact that the Constitutional Assembly possessed the faculties of an ordinary legislature. It was in this latter capacity only that it possessed any right or power whatever to approve a treaty. In its capacity as a constitutional assembly its powers were restricted to proposing amendments to the old Constitution of 1838 to be submitted to the people for their ratification. This form of expression was then not only entirely and strictly correct, but its omission would have left the proposed approval of no force or effect whatever. These words make the claims of Nicaragua infinitely stronger.

The Assembly which approved the treaty of limits did not act as a Legislature or a Constitutional Assembly, but as a constituent body, and so it itself declared in the heading of the decree of approval, which begins with these words:

"The Constituent Assembly of the Republic, in use of the legislative powers vested in it, decrees," &c.

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* Memorias para la Historia de la Revolucion de Nicaragua en 1854; Memorias para la Historia de la Campaña Nacional contra el Filibusterismo, 1856 y 1857.

If the expression is found there that the Constituent Assembly acted in use of its legislative faculties, that only shows that, in its opinion, in approving the treaty it did not enact a fundamental organic law of the State, but an ordinary law; and this opinion of the Constituent Assembly is to be given all the force of an authentic interpretation, having, like all others made by the legislator himself, the character of law, and constituting, therefore, the most peremptory possible exception against the subsequent pretensions of Nicaragua.

What Costa Rica has said and still maintains is that if the phrase "legislative faculties" would not have been found in the decree of approval of the treaty issued by the Assembly, the present controversy would not have existed, because Nicaragua would not have had the opportunity of making this argument. It is, therefore, clear that the whole of the present question turns on the use of one word; and the construction to be placed on it in case of doubt could never be in the sense that the obligation contracted would produce no effect. That construction has, necessarily, to be, on the contrary, in accord with the principles, and in a sense much more in harmony with the clear intention plainly expressed by the parties.

The error that the Constituent Assembly of 1858 had only authority to frame a Constitution and submit it to the people has been sufficiently refuted.

Costa Rica has never said that the expression used by the Constituent Assembly in approving the treaty of 1858, "by virtue of its legislative faculties," was or was not erroneous. What Costa Rica has remarked is that the whole of the present contention rests under the reasoning of Nicaragua upon the use of one word, to such an extent that if the said word is set aside the whole question disappears at once. Strike out the word "legislative" from the decree approving the treaty, and the whole building raised by Nicaragua will fall to the ground.

Nicaragua argues that the said word is sacramental, and that if omitted would have left the approval without force or effect. This argument is unsound, and the proof thereof can be found in the several laws enacted by the same Constituent Assembly, in which the word in question was omitted, and which reads as follows: "The Constituent Assembly of the Republic of Nicaragua decrees," &c. (See pages 1 and 10 of the Collection of said laws.)

It seems to be tiresome to rectify again the repeated error of attributing to the Constituent Assembly of 1858 the exclusive character of a Constitutional Assembly, or ordinary Legislature, with faculties limited to submit to the people for ratification the amendments to the Constitution which might prove to be necessary. The constituent character of the Assembly appears from the decree of its convocation, from the one of its installation, and from each of the one hundred and five decrees contained in the collection of its acts, in none of which is the Assembly given any other name than that of Constituent Assembly of the Republic of Nicaragua.

If that Constituent Assembly of 1858 expressed that it had used its legislative faculties in approving the treaty, it was because, in its own opinion, it was not making by that act fundamental or organic legislation, and this is what Costa Rica has held at all times and is in harmony with the principles of the public law of Nicaragua.

But if it was required for the validity of the treaty that the approval thereof should have the character of fundamental law, that character was acquired by it through the fact that the approving body was a constituent one.

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*Fifth.—The Constitution of* 1838 *was not affected by the treaty of* 1858.

The argument adduced by Costa Rica in support of this position seems to rest upon the theory that the Constitution of 1838 did not define a boundary between Nicaragua and Costa Rica, but rather left the arrangement of boundaries to be subsequently made, and that the Constitution itself was

not complete until the treaty of 1858, which then of its own force became an amendment, or rather the completion, of the Constitution, and also claims that the boundaries of the State were to be secondary rather than fundamental laws. It is further urged that as the boundary was in dispute it could not be determined by a constitutional provision, but only by some act to which Costa Rica should be party or in which she should acquiesce.

The Constitution of April 8, 1826, eliminated from the territory of the State of Nicaragua, the district of Guanacaste, and with this the question, which for many years has engaged the attention of the Governments of Costa Rica and Nicaragua and of the nations friendly to both Republics, was, or at least ought to have been, closed.

In 1838, however, the idea sprung up in Nicaragua to reincorporate Nicoya into her territory, and as the Nicaraguan Constitution promulgated in that year could not, as it had been desired, settle that point finally, the following provision was written in it, to wit:

"The boundaries with the bordering States shall be marked out by a law, which shall be made a part of the Constitution."

All arrangements about limits were therefore postponed and left to be made by some future ordinary Legislature, by means of a law, which, although ordinary in its character, should, however, become at once a part of the Constitution. It is for this reason that Costa Rica has held that the settlement of limits herein referred to was not under the Constitution of 1838 a subject for fundamental but secondary law, and that the treaty by which the said settlement was accomplished, far from wounding the Constitution, filled a void which had been left in it.

The exactness of this remark is self-evident.

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The strength of this latter position is weakened, if not totally destroyed, by the assertion in the same chapter that Costa Rica in all her Constitutions has fixed her boundaries, thus claiming for Costa Rica the right to do by constitutional provision that which is denied to Nicaragua. The difference to be noted in this regard between the Constitutions of the two States is that while Nicaragua in all her Constitutions has fixed the same boundary

in each, to wit, the limit of the Spanish province of that name, Costa Rica has changed her designation; and while her Constitution of 1825 fixed the Rio Salto as the divisional line, which left the whole district of Nicoya, Lake Nicaragua, and the San Juan river within the limits of Nicaragua, and which Nicaragua insists is and was the true boundary, her later Constitutions have claimed the district of Nicoya and a part of the San Juan river. If Costa Rica abided by her boundaries defined in her Constitution of 1825 there would be no controversy, for that boundary coincides with the Constitution of Nicaragua.

Costa Rica promulgated her first Constitution on January 21, 1825. The district of Nicoya does not appear in it as a part of the territory of the State for the simple reason that the decree by which the said district was annexed to Costa Rica was not issued by the Federal Congress of Central America until the 9th of December of the same year—that is, three hundred and twenty-one days after the promulgation of that Constitution.

Four months, less one day, after the annexation of Nicoya to Costa Rica, Nicaragua, by order of the Federal power, enacted and promulgated her own Constitution of April 8, 1826, and by it the district of Nicoya was eliminated from her territory.

As to the San Juan river the Costa Rican Constitution of 1825 is clear: the mouth of that river marks the northern limit of the Republic on the Atlantic side. This declaration is not, by any means, contradicted by the Nicaraguan Constitution of April 8, 1826, which, on the contrary, sets forth that the free and constituted State of Costa Rica was the boundary of Nicaragua on the southeast.

Subsequent to the annexation of Nicoya the Costa Rican Constitutions marked as limits of the State on the side of Nicaragua the La Flor river, the southern shore of the Lake of Nicaragua, and the San Juan river.

And when the question about limits was ended by the conclusion of the treaty of April 15, 1858, the frontiers established by this treaty were the ones always set forth in all the Costa Rican Constitution, subsequently promulgated, of 1859, 1869, 1871 and 1882.

The Nicaraguan Constitution of 1838 left, as has been seen before, to an ordinary Legislature to be convened afterwards the determination of the frontier on the Costa Rican side; but the Nicaraguan Constitution of 1858, which was promulgated subsequently to the treaty of limits by the same Constituent Assembly, which gave its approval to the latter, expressed itself as follows:

"The laws on special limits form part of the Constitution."

The treaty of limits, which was a Nicaraguan law, became incorporated into the Constitution.

The above is the explanation of the changes which, in regard to the determination of limits, has been noticed in the Constitutions of Costa Rica and Nicaragua.

Costa Rica could not be asked, after the annexation of Guanacaste, to abridge her rights and restrict her territory to what she owned before it, much less when the said annexation was not her work, but the result of the free and spontaneous will of the people of that district, sanctioned by the Republic of Central America, consented to by the Constituent Nicaraguan Legislature of 1826, and affirmed by an international treaty.

Should Nicaragua willingly give her assent to the action taken by the Supreme Federal Power and by her own Constituent Legislature of 1826, all of it corroborated by the faith of a treaty, certainly there would be no dispute.

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Article 15 of the Constitution reads as follows:

"Article 15. The territory of the State extends at present from west to east from the River Del Salto, which divides it from that of Nicaragua, up to the River Chiriqui, the boundary of the Republic of Colombia, and north and south from one to the other sea, the limits being on the north the mouth of the San Juan river and the Escudo de Veragnas and on the south the mouth of the River Alvarado and that of the Chiriqui."

This can be answered by exactly the same remark as was made to the immediately preceding point.

The theory that the laws concerning special limits became of their own force incorporated into the Constitution of the State is untenable, for it is at war with the fundamental doctrines upon which constitutional provisions rest.

Costa Rica has not held for a single moment the general theory that the laws concerning special limits became of their own force incorporated into the Constitution of the State. Such a doctrine, whether tenable or untenable, has been neither invoked nor repudiated by Costa Rica. What she maintains is that article 102 of the Nicaraguan Constitution of November 12, 1838, provided that the boundaries with the bordering States should be marked out by a law, and that this law should be made a part of the Constitution. That this assertion is perfectly true and correct can be shown by only looking at the text of the Constitution itself.

The theory may be tenable or untenable as a matter of principle, but whether tenable or untenable it was the law, nay, the fundamental law, of Nicaragua.

It may be granted that secondary laws, enacted by ordinary legislative assemblies, cannot in general be raised to the category of fundamental or organic laws, but if they are enacted in pursuance of an order of the Constituent Legislature for the special purpose of filling a void which was left in the Constitution, with the understanding that as soon as they were enacted they would be considered as a part of the Constitution, there is no difficulty in principle to accept that this happened with them; and so, indeed, it happened with the treaty of limits, which, as soon as it acquired legal existence, was raised to the rank of fundamental law, a character which was subsequently given to it by virtue of the provision of the new Constitution of 1858, setting forth that the laws on special limits are made a part of the Constitution.

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Of what force would constitutional provisions as to the method of the amendment of the Constitution be if any legislature could amend it in so important a particular? And to carry this claim to its fullest extent, as

contended for by Costa Rica, the amendment of the National Constitution could be effected by the simple concurrence of the President of the Republic and a foreign power. Jurisdiction over the whole State could thus be ceded to a foreign power by the act of the Executive, and a power greater than that possessed by the sovereign in an unlimited monarchy would by this means be conferred upon the president of a constitutional republic. How could the Republic exist should such a power be recognized? The people of the State were so jealous of their rights that they placed safeguards around the amendment of their Constitution to guarantee that no amendment could be hastily or inconsiderately made. They required that a second Legislature should act upon the amendments before they became part of the Constitution, thus practically reserving to themselves, in the election of a second Legislature, the sanction of the change. It removed the right of a legislature to consummate an alteration of the fundamental chart, and after all these careful provisions it is now argued that they were all in vain; that all was nugatory, and the Constitution was so defective and so different from what it was intended to be that it contained within it the elements for its easy destruction; that the Executive power was so great that without consultation with or sanction of any one, the whole State could be handed over to a foreign power and disappear from the nations of the world. It needs but to state such results to refute the argument of Costa Rica on this point.

It has been already demonstrated that the treaty of limits was not intended to amend the text of the Constitution, but to complete it, in pursuance of the provision made by the final part of article 2 of the said instrument.

The treaty was not concluded between the President of the Republic of Nicaragua and a foreign power, but between the said foreign power and the Republic of Nicaragua herself, fully and sufficiently represented by her two Supreme Powers, namely, the Executive and the Constituent and Legislative.

There was no alienation of territory on the part of Nicaragua, who, on the contrary, acquired sovereignty on the isthmus between the La Flor river and the center of the Bay of Salinas, and also on the southern shore of the Lake and on a portion of the right bank of the San Juan river; but even granting that such alienation had taken place the public Powers of Nicaragua, Constituent and Executive, could have done it validly.

Everything else in the passage now commented upon consists of mere generalities, and needs not to be answered.

When the Constitution fixed the boundaries of the State and provided that laws about special limits should become part of the Constitution it emphasized the necessity of their being added by amendment in the constitutional way, and this latter clause, instead of weakening, adds strength and force to the position maintained by Nicaragua.

The Constitution of 1838 marked, as was natural, as limits of the State of Nicaragua those established by the Constitution of 1826, and if the phrase "the laws on special limits shall form part of the Constitution" was written in it, it was in the hope that the territory of Nicaragua might be enlarged in consequence of the arrangements undertaken with the State of Costa Rica, as it indeed happened by virtue of the treaty of limits of April 15, 1858.

To claim that the above-inserted phrase means that all future laws in regard to limits could not be incorporated into the Constitution until acquiring the character of constitutional amendments through the performance of the formalities and requisites established by the same Constitution for such amendments, is to claim precisely the contrary of what the phrase expresses.

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The boundaries of Nicaragua were fundamental, not secondary, laws. They were constitutional provisions. They, of all other provisions, were necessary for the preservation of the State; the most important to be sacredly guarded; for if one mile of her territory could be alienated the whole of the State could be, and the sovereign power, instead of being reserved to and vested in the people, would have passed from them.

This paragraph rests upon the error that the demarkation of the border line between Costa Rica and Nicaragua was and had to be the subject of a fundamental law; but this error cannot prevail against the language of that provision of the Constitution of 1838 which has been so often quoted, namely: "The boundaries with the bordering State shall be marked out by a law which shall be made a part of the Constitution."

Nor is the argument founded upon the arbitration under the treaty of 1860 with England sufficient to show that the laws of limits were secondary laws and not constitutional provisions. An arbitration is a vastly different matter from a treaty, but yet that arbitration did not change the boundaries, and although it limited to a certain extent the absolute sovereignty over the Mosquito country, it really extended the then existing sovereign power.

The preceding paragraph contains, as shown by its language, the admission that the arbitration therein referred to modified the sovereignty of Nicaragua over the Mosquito Territory, and this is enough to show that, according to the public law of Nicaragua, no constitutional amendment is required for the celebration of international compacts by which the sovereignty of the State over the territory might be modified.

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In further support of the treaty of 1858 Costa Rica argues, first, that it was freely entered into, and, second, that its effect was to deprive Costa Rica of territory that she had possessed up to that time, in effect claiming that the treaty was prejudicial rather than beneficial to Costa Rica.

Both facts are correct and have been fully proved in the "Argument" of Costa Rica.

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First, as to the absence of force or coercion in making the treaty. To support this theory certain dispatches are given for the purpose of showing that friendly negotiations were being conducted prior to the celebration of the treaty. It is conceded by Nicaragua that she was anxious to avoid hostilities with Costa Rica at that time. The assistance that Costa Rica had rendered in the war just then closed was appreciated, and the most kindly feelings were entertained towards her. In addition to this the war had strained the resources of Nicaragua to their utmost, and she was ill-equipped to engage in another struggle. It has always been the source of profound regret that such a time should have been chosen by her friend and ally to renew, under menace of war, the boundary discussion, and while not contending that this condition of affairs would avoid the treaty if constitutionally ratified, reference is made thereto to cancel the persuasive character of an argument as to the validity, based upon the allegation that full and free consent was given.

The Costa Rican "theory" is correct and has been proved.

The negotiations were begun after hostile armies had entered the territory of Nicaragua and war was imminent.

On the 19th of October, 1857, the following decree was made by the Government of Nicaragua:

"Whereas the concessions made by the Government of the Republic have not been sufficient to arrest Costa Rica in her designs and to prevent the hostile operations which she has carried into effect with the view of appropriating the River San Juan, the lake, and the isthmus between San Juan del Sur and La Virgen so that the whole line of transit might remain under her dominion, &c., * * * Nicaragua accepts the war made against her by the Government of Costa Rica," &c.

On the 22d of October the Governor of the Department of Rivas issued a proclamation of the following import:

"Whereas our gratuitous enemies of the neighboring Republic of Costa Rica have commenced hostilities against us with no other pretext or motive than the desire of taking possession of our most important military post and the principal commercial routes of the Republic, endeavoring to deprive us of these advantages, which we possess by indisputable right, to benefit themselves exclusively through the most scandalous usurpation, &c., considering that this department being near the frontier is likely to be invaded at any moment, &c., I declare traitors to the country whomsoever in any manner, directly or indirectly, lends any help to the Costa Rican forces," &c.

The Constitutional Assembly, in its legislative capacity, on the 26th of November, 1857, gave the following decree:

"Article I. The war which the Government of Costa Rica wages against Nicaragua by occupying and retaining by force an important portion of her territory and taking possession of her routes of commerce, threatening her military posts, and appropriating the lake is a most unjust one; in consequence Nicaragua makes use of her right to repel this aggression as far as the laws of war permit."

The treaty of 1858 itself confessed this state of affairs to exist in its very first article, wherein regret is expressed that they were about to fight on the subject of these boundaries.

Costa Rica had just rendered Nicaragua the eminent service of liberating her from foreign domination, but the civil war which had brought about the filibuster invasion was to commence again with all its horrors. Costa Rica had by her efforts snatched from the hands of Walker the line of transit which was under those circumstances the key of Central America. The danger of a fresh invasion was imminent, and to abandon at those moments the line of transit would have been the greatest imprudence. Nica-

ragua had not the means to defend it. The peace of Central America depended upon the proper custody of the San Juan river, and that river was at that time wholly, as it is now partly, common to Costa Rica and Nicaragua. Costa Rica, therefore, threatened by Walker, could not yield to the insinuations of Nicaragua and abandon the important military positions which she had conquered.

But that occupation had not for its object to injure in the least the rights of Nicaragua, and as far as Costa Rica was concerned it was, instead of beneficial, a very heavy burden, as shown by the fact that Costa Rica turned her eyes to the other Governments of Central America and asked for their assistance by means of men and money, or at least the latter, for the preservation of the positions which she at the expense of great sacrifices held in her possession to the common benefit of all the allied governments.

This was true to such an extent that Costa Rica set forth in her last circular that if no assistance was given her, as justice demanded, for the preservation of the military positions above named she would see herself in the necessity of abandoning them, because her treasury could not bear that burden alone, and that if that was the case she would burn or destroy the steamers with which she guarded the river to avoid their falling into the hands of the enemy.

This action of Costa Rica, perfectly justifiable under those circumstances of common danger, was taken by Nicaragua, almost blinded by the question of limits, as hostile to her rights, and by virtue thereof she declared war on Costa Rica.

Costa Rica, conscious of her justice and her strength, instead of answering her neighbor by waging war against her, addressed a circular to the other Governments of Central America, so as to obtain, in a kind of family meeting, the adjustment of the questions between two members of the family which at that moment might be productive of fatal results to the whole of Central America. The voice of Costa Rica was heard, and owing to the generous mediation of the

Salvadorian Cabinet all those questions were settled by the treaty of April 15, 1858.

But when the said treaty was initiated the relations between the two countries were already cordial, and Costa Rica found herself fully satisfied with the demonstrations of joy made in Nicaragua when the Public Powers of that nation and all her people became persuaded that Costa Rica did not aspire to impose upon them by force of arms a treaty of limits, but merely wanted to set at rest forever the old differences between the two countries by pacific means and in a Central American Diet.

The treaty was signed on the 15th of April, three months and one day after the proclamation by the Constituent Assembly of Nicaragua of decree no. 17, of January 14, 1858, directing that religious festivities should be celebrated in all the towns of the Republic in thanksgiving to the Almighty for the re-establishment of peace with Costa Rica.

And as this is a historical point, leave will be granted to mention here the manner of compliance which the Executive Power adopted by its decree no. 213, of the 16th of January, to carry the decree of the Assembly into effect. The following is the language of the Executive decree just mentioned:

*Decree no. 213, of January 16, 1858, appointing the 2d of February to celebrate religious festivities in thanksgiving for the re-establishment of peace between Nicaragua and Costa Rica.*

The President of the Republic of Nicaragua to the inhabitants of the same:

In use of the faculties vested in him by the legislative decree of the 14th instant, ordering religious festivities to be held thanking the Almighty for the re-establishment of peace, decrees:

Article 1. The 2d of February next is hereby appointed for the purposes of the decree of the 14th instant, above cited.

Article 2. The Vicar General and the acting Bishop of the diocese shall take such steps as proper in order to cause a solemn mass to be celebrated in the Holy Cathedral on the above said date in thanksgiving to the Almighty for the re-establishment of peace, the said mass to be attended by the ecclesiastic dignitaries and venerable clergy.

Article 3. The curates of the respective parishes shall cause a solemn mass to be celebrated on the same day in their respective churches.

Article 4. All the authorities and officials, whether civil, military, or of the treasury, shall attend this solemn mass at their respective residences.

Article 5. The prefects, under prefects, and alcaldes of the towns of the Republic and the military governors and commandants of places shall cause the most approved demonstrations of public rejoicing to be made in their respective jurisdictions on the day of the religious festivities, and in the places where more than one authority exists they shall proceed altogether by common agreement.

Article 6. The expenses incurred by this public rejoicing shall be defrayed in this capital by the treasury and in all other cities and towns by the municipal funds. The gunpowder to be used for salutes ordered by military authorities shall be supplied by the national magazines.

Article 7. The prefects in the chief towns of the departments, the under prefects in the places of their respective residences, and the alcaldes in their own towns are required under their most strict responsibility to see that the present decree is faithfully complied with.

Article 8. Let it be communicated to whomsoever it may be proper.

Given at Managua on the 16th of January, 1858.

AGUSTÍN AVILEZ.

To say after these antecedents that the treaty of limits was rather imposed upon Nicaragua by Costa Rica by force

of arms is the extreme of absurdity, and for this reason that point will not be touched any more in the remainder of the present paper.

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*Second.—That Costa Rica lost territory by the treaty.*

If the claim of Costa Rica in this regard was well founded—that is to say, if her boundaries were withdrawn towards the south by the operation and effect of the treaty of 1858—it would be an additional argument to strengthen the claim of Nicaragua that her constitutional requirements on the subject of boundaries must be observed.

It was as necessary to submit the treaty to the approval of one and the ratification of another legislature if the territory was increased as though it had been diminished, for in either event the text of the Constitution was changed, and the fact of adding territory might be even more objectionable than disposing of it. The test was, were the boundary lines changed; and if changed it mattered not whether a valuable or a valueless district was lost or a valuable or valueless one gained.

In the effort of the defense of Nicaragua to find out reasons with which to destroy the treaty of limits a new one is set forth in this place which had never been brought out before and which is futile enough as to tempt one to leave it unanswered.

That new reason is that if Costa Rica lost territory by the treaty of 1858 and Nicaragua gained it the acquisition of territory thereby made was illegal, as in opposition to the Constitution, the text of which could not be lawfully changed whether a loss or gain took place.

While most of the legislations prohibit those who have not the free administrations of their property from alienating it without certain requisite formalities, not one can be found which forbids them from acquiring the same by lawful means, because in law to alienate and to acquire are not the same thing.

And what happens under private law also happens under international law. There is no nation which is forbidden to acquire new dominions, and if the principles invoked by the defense of Nicaragua were true, the governments of the

great powers which have made acquisitions in Asia, Africa, Oceanica, &c., should be compelled to give them up, besides being subject to just blame and impeachment for violating the constitutions of their respective countries.

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If the claim of Costa Rica is candid she ought not to oppose the treaty being declared invalid, for Nicaragua does not wish to deprive her of any territory that belongs to her, and here now urges that the invalidity of the treaty be declared to give Costa Rica an opportunity to present her claim and have awarded to her any territory that she has been deprived of by the treaty of 1858. Nicaragua has no desire to retain any territory that is not rightfully hers, and if a treaty of such doubtful authority stands between Costa Rica and the reclamation of a portion of her rightful possessions it ought not to be permitted to remain. The means are provided by the treaty of 1886 to adjust the boundary line, and before an arbitrator jointly chosen by both countries Costa Rica need not fear but that every rightful claim will be awarded her.

That Costa Rica ceded a portion of the territory of Guanacaste, and also a portion of the Costa Rican territory which had never corresponded to that district, is a fact of public notoriety.

Nevertheless, the treaty of 1858 is upheld as being valid, because a vehement aspiration of Costa Rica has always been, as it is now, to maintain with the other States, and especially with her neighbors, the most perfect friendship. She owes the progress which she has reached to her interior and exterior peace. Her domestic troubles have lasted a day, and on the following morning public order has been invariably re-established. She has only had one exterior war, and that was the one which she declared against William Walker to save Nicaragua from foreign yoke.

Costa Rica wishes to concentrate her forces in developing her own resources by means of labor, and feels anxious to be disembarrassed from questions which, like that of limits, if reopened, would have to absorb the whole attention of her Government and deviate her from the road in which she is

now thoroughly engaged—that is, the development of the wealth of the country.

This is the reason why Costa Rica sincerely desires that the treaty of 1858 be held valid. An additional reason for Costa Rica to firmly maintain her rights is to cause Nicaragua to be true to her pledged faith.

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At this point Nicaragua might rest her case without attempting to demonstrate the error of this claim that Costa Rica's territory was reduced; but, as much effort has been made to sustain this pretension, a short review of the argument adduced might be proper. In the case of Nicaragua (page 10) are found quotations from the original titulo from King Philip II of Spain to licentiate Juan Cavallon, and the same titulo is cited in the case of Costa Rica (chapter II, part I) to sustain her pretensions to the ownership of the Desaguadero. An examination of the titulo, however, demonstrates that the quotation is not from the granting clause of the titulo, but from a recital in anticipation of the grant. The titulo recites the fact that Cavallon has made certain discoveries; and, further, that in a certain part of the territory he has been informed of the condition of the natives, and then avers that, in consequence of his zeal, etc., a certain grant of a territory described is made. The granting clause of the titulo is cited by Nicaragua, and the recital, which does not describe the territory granted, seems to be relied upon by Costa Rica to support her claim. That such is not the grant it is only necessary to read the whole of the titulo to determine.

The historical part of this question has been discussed to such an extent by Costa Rica that in reality there is no need to dwell again upon it, much more so when such a historical disquisition is not the object of this controversy.

In answer to all that Costa Rica has written in regard to this point, supported by innumerable documents on file in the archives of the mother country and by the writings of celebrated historians strengthening the conclusions which are derived from the said authentic documents, Nicaragua comes and makes the poor and subtle distinction between the granting clause of one of the documents exhibited by Costa Rica and the recital made in the same in anticipation of the grant, as if both things were not a part of the same document, or as if it were not necessary to consider the whole

of the said document to discover what was indeed the Royal will.

The distinction cannot be more subtle; but, even granting for one moment that it has some value, would it have any efficiency to destroy the other documents on which the defense of Costa Rica is founded?

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Again it is asserted that the Spanish Cortes annexed Nicoya to Costa Rica in 1812, but no proof is adduced to sustain such a claim, and it is refuted not only by the quotations cited by Nicaragua in her case, but also by the fact that Costa Rica introduces proof that the Federal Congress in 1825 directed that Nicoya be separated from Nicaragua and annexed to Costa Rica. Why separate it in 1825 if it was not then a part of Nicaragua?

Nicaragua denies the partial annexation of Nicoya to Costa Rica, which took place in 1812. As this is not the moment to discuss *in extenso* the question of limits between Costa Rica and Nicaragua prior to 1858, it will be easily understood that Costa Rica is not willing to exhibit prematurely all the documents which are in her possession; but in order to satisfy in part the desire of Nicaragua to become acquainted with those documents, Costa Rica appended to her "Reply" to the argument of Nicaragua under no. 2, a document which establishes in the most conclusive manner the fact of that annexation—a fact which, on the other hand, is of historical notoriety.

Nicoya and Costa Rica appear to have formed, as far back as in 1670, only one political community, and so it is proved by the following document:

*Extract from the Minutes of the Illustrious Corporation of the City of Cartago, in regard to taxes due by the District of Nicoya.*

"In the city of Cartago, on April 30th, 1670, the following-named gentlemen, members of the city corporation, having met as usual, namely, His Honor Don Juan López

de la Flor, Field Marshal and the Governor and Captain General of this Province; Captain Don Alonzo de Bonilla, sargeant major; Captain Don Juan de Echevarria Navarro, the provincial alcalde of the Holy Brotherhood; Captain Don Fernando de Salazar, treasurer of the city and senior alderman and second lieutenant; Tomas Calvo, general receiver of public moneys, and after having conferred as usual for the good of the public, and properly discussed what is to be done for the collection of taxes (alcabalas) still unpaid, both in this city and in the Province of Nicoya, in the territorial jurisdiction of Esparza, by unanimous vote agreed to the following:

"That whereas the amount of taxes to be paid during the last year of 1669 has not been either collected or assessed for the reason that no information was received of the portion which the Province of Nicoya, in the territorial jurisdiction of Esparza, should contribute: Therefore, in order that the said share be known and paid, it was—

"*Resolved*, That a competent person be sent to the said Province of Nicoya, in the territorial jurisdiction of Esparza, with power and authority to examine the statements which may have been made before His Honor the Mayor (Corregidor) of that province, and the deeds which may have been executed there; and that the said person, upon this evidence and the investigation which he may cause to be made among residents of the said province, shall assess and collect the said taxes (alcabalas), together with the arrears, and recover the sums of money proceeding from this source which are now in the possession of Nicolas Gutierrez Jaramillo, collector for this city. The above-named person shall appear before His Honor the Mayor (Corregidor) and file and exhibit his commission, whereupon he shall exercise authority as judge of tax matters (juez de alcabalas) and commissioner of this city; and this corporation, in the name of His Majesty, requires from His Honor the Mayor (Corregidor) to cause full compliance to be given to this resolution and to allow the said judge-commissioner to act freely in

the fulfillment of his duty, favoring him and giving him assistance in the collection of the taxes whenever needed; and, in its own name, requests the same thing, promising, in its turn, to reciprocate with the same attention the requests of his Honor whenever made.

"And, in order that the arrears may be liquidated and collected * * * (there is here something in the text which cannot be read).

"And whereas this power is sufficient for the purposes aforesaid, the above-named gentlemen appointed Captain Don Francisco de Miranda, a resident of this city, to be the said commissioner, authorizing him to exercise authority, in the name of the Royal Treasury, for the purposes herein mentioned. The proper commission shall be issued to him, and the present minutes shall be inserted in its text; and, although an authenticated copy of the commission to collect alcabalas is now in the possession of His Honor the Alcalde Mayor of the Province of Nicoya, still another copy of said commission must also be inserted in the one to be issued to the judge-commissioner above named, who will present himself to Captain Benito de Nava, Lieutenant-Governor and Captain-General of the city of Esparza, and require him to proceed to the assessment of the said alcabalas which have been farmed out to him; and so it was ordered, provided for, and signed by the members of this corporation.

"Don Juan Lopez de la Flor.
"Alonzo de Bonilla.
"Don Fernando de Salazar.
"Juan de Echevarria Navarro.
"Tomas Calvo."

Nicoya was alternatively aggregated to Costa Rica and to Nicaragua, but oftener to Costa Rica than to Nicaragua; and when the independence of the country was proclaimed Nicoya found herself in the abnormal condition of being aggregated for some purposes to Costa Rica, and for other

purposes to Nicaragua. Such a condition of things ceased to exist by the final annexation of Nicoya to Costa Rica, in 1825.

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It has heretofore been shown that this separation was provisional only, and the further fact is now adduced that Nicoya was represented in the formation of the Nicaraguan Constitution of 1826, and that her delegates took part and signed said Constitution. That Constitution bears the signature of two delegates from Nicoya.

The annexation of Nicoya to Costa Rica by the sovereign will of the people who inhabited her territory was final and perpetual and not provisional only, as is claimed here.

The Federal Central American Congress sanctioned the annexation temporarily, until, in compliance with the Federal Constitution, the limits of the States should be marked out; but the Federation was extinguished before the demarkation of limits was accomplished.

Then it was when the people of the District of Nicoya ratified the annexation of it to Costa Rica.

Such are the facts.

If Nicoya had been represented in the Nicaraguan Constituent Assembly of 1826, which eliminated it from the territory of the State, the said elimination would have still more force; but there is a mistake in saying that Nicoya took part in the framing of the first fundamental charter of Nicaragua. At that time Nicoya obeyed the laws of Costa Rica, was represented in the Costa Rican Congress, and had adopted the Costa Rican Constitution of January, 1825.

The Deputies who voted for, sanctioned, and subscribed their names to the Nicaraguan Constitution of 1826, were the following:

Don Manuel Mendoza, Deputy for Matagalpa, President.
Don Isidro Reyes, Deputy for Leon, Vice-President.
Don Pedro Muñoz, Deputy for Nicaragua (now Rivas).
Don Ramon Pacheco, Deputy for Subtiava.
Don Gregorio Porras, Deputy for El Realejo.

Don Silvestre Selva, Deputy for Granada.

Don Francisco Reñazco, Deputy for Masaya.

Don Juan J. Zavala, Deputy for Leon.

Don Juan Manuel Zamora, Deputy for Masaya.

Don Francisco Parrales, Deputy for Nicaragua (now Rivas), Secretary.

Don Sebastian Escobar, Deputy for Granada, Secretary.

These are the signatures authorizing the Nicaraguan Constitution of 1826, as can be seen on page 22, second column, of the book entitled "*Compilation of Laws of Nicaragua*" (*Recopilación de las Leyes, Decretos y Acuerdos Ejecutivos de la República de Nicaragua en Centro América*, Managua, Imprenta del Gobierno, 1867), made by Doctor and Master Licentiate Don Jesus de la Rocha by order of President Don Fernando Guzmán, and indorsed and approved by Doctor Don Rosalío Cortes, Secretary of the Interior.

Neither did Nicoya take any part whatever in the Nicaraguan Constitution of 1826, nor does the said Constitution bear, as is alleged, the signatures of two delegates from that district.

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At that time no one pretended Nicoya was not part of Nicaragua, and the historical quotations as well as the royal letters cited and referred to in Nicaragua's case demonstrate it beyond peradventure.

If by the words "at that time" is meant the date of the first Nicaraguan Constitution, when the annexation of Nicoya to Costa Rica was an accomplished fact and the Central American Congress had approved of it, and the Constitution of Nicaragua itself had recognized its consummation and eliminated Nicoya from her own territory, it is plain that Nicoya did not form part of Nicaragua.

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That the south bank of the San Juan river was within the province of Nicaragua under the Spanish rule no stronger evidence could be adduced than that silent witness, Castillo Viejo. It stands on the right bank of the river a grim witness, bearing testimony to the truth of Nicaragua's claim.

Don Silvestre Selva, Deputy for Granada.

Don Francisco Reñazco, Deputy for Masaya.

Don Juan J. Zavala, Deputy for Leon.

Don Juan Manuel Zamora, Deputy for Masaya.

Don Francisco Parrales, Deputy for Nicaragua (now Rivas), Secretary.

Don Sebastian Escobar, Deputy for Granada, Secretary.

These are the signatures authorizing the Nicaraguan Constitution of 1826, as can be seen on page 22, second column, of the book entitled "*Compilation of Laws of Nicaragua*" (*Recopilación de las Leyes, Decretos y Acuerdos Ejecutivos de la República de Nicaragua en Centro América*, Managua, Imprenta del Gobierno, 1867), made by Doctor and Master Licentiate Don Jesus de la Rocha by order of President Don Fernando Guzmán, and indorsed and approved by Doctor Don Rosalío Cortes, Secretary of the Interior.

Neither did Nicoya take any part whatever in the Nicaraguan Constitution of 1826, nor does the said Constitution bear, as is alleged, the signatures of two delegates from that district.

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At that time no one pretended Nicoya was not part of Nicaragua, and the historical quotations as well as the royal letters cited and referred to in Nicaragua's case demonstrate it beyond peradventure.

If by the words "at that time" is meant the date of the first Nicaraguan Constitution, when the annexation of Nicoya to Costa Rica was an accomplished fact and the Central American Congress had approved of it, and the Constitution of Nicaragua itself had recognized its consummation and eliminated Nicoya from her own territory, it is plain that Nicoya did not form part of Nicaragua.

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That the south bank of the San Juan river was within the province of Nicaragua under the Spanish rule no stronger evidence could be adduced than that silent witness, Castillo Viejo. It stands on the right bank of the river a grim witness, bearing testimony to the truth of Nicaragua's claim.

If Nicaragua did not possess that territory, why build fortresses to maintain it? If its jurisdiction did not extend to the south bank of the river, why was the fort built on that side? To shake the force of this conclusive evidence Costa Rica claims this fort to have been under the jurisdiction of the Captain General of Guatemala; but no authority for such claim is produced, while, on the contrary, it is shown on page 12 of the case of Nicaragua that not only this fort but that the entire defense of the Desaguadero was committed to the Governor of the Province of Nicaragua.

Castillo Viejo, invoked by Nicaragua as the strongest evidence to be adduced by her of her sovereignty over the southern bank of the San Juan river, and which has been called by her "silent and grim witness, bearing testimony to the truth of Nicaragua's claim," does not prove, however, the validity of that claim. Nicaragua was not the one who built and governed Castillo Viejo, nor was that fort a dependency of Nicaragua. It depended on the Captaincy General of Guatemala, which built it with funds common to the provinces which formed that Captaincy General, and it was intended to serve as a key for the protection not only of the territory of Costa Rica and Nicaragua, but of the other provinces of Central America. This is a fact of historical notoriety and has been proved by irrefutable documents, which Costa Rica has quoted in her argument.

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In Mr. Levy's work on Nicaragua an account of an expedition by the British, under Lord Nelson, in 1780, is given, and an account of the storming of the Castillo Viejo, showing that the defense was maintained by the Governor of Nicaragua. On page 48 is the following:

"Manuel de Quiroga had just succeeded Cabello (1780) when it became known that an English expedition was coming up the river San Juan. The whole country flew to arms. The fort of Castillo fell into the hands of the invaders, but disease had decimated the English forces and the further prosecution of the enterprise was abandoned. The English left the fort and returned to Jamaica in 1781."

While the defense of Nicaragua quotes from the work of Mr. Levy, the defense of Costa Rica relies upon the original document.

The expedition of British troops against Castillo Viejo in 1780 was not under the command of Lord Nelson, but under the command of Brigadier General del Remple and Colonels John Polson and Alexander Litt. The troops, consisting of 2,500 soldiers, left Jamaica on the 1st of January of the said year, equipped and provided for by His Excellency John Dalling, the Governor of the island. The British forces remained two months at Gracias á Dios for the purpose of adding to their number the forces of the ally, the King of Mosquitia, George King.

On April 9 the garrison of Castillo Viejo noticed the approaching of the enemy, and immediately a courier was dispatched to report the fact to the Most Illustrious President and Captain General of Guatemala, Don Matias de Gálvez. The commandant and governor of the castle was Don Juan de Ayssa. A few days after the formal siege was commenced the situation of the besieged became such that, according to the language of the original account thereof, they had *to bury* their dead by throwing them in the river, and afterwards not even this was possible, and it was necessary that the dead bodies be thrown over the walls.

Such was the destitution of the defenders of Castillo Viejo that they had to ration out a small amount of water, and on April 26 only half a glass of it was given each man and "none to the women, because there was not enough."

On the 27th several soldiers asked for permission "to go out to get water to drink, since they preferred death at the hands of the enemy than by thirst."

The chapel of the fortress was filled with the wounded, and there were no means to cure them.

At last, on the 28th, the garrison saw itself absolutely unable to continue the defense, because "every man laid prostrate on the floor." There was a meeting of the officers, and the white flag was hoisted.

On the 29th, at 4 p. m., no assistance of any kind having been received, the castle surrendered to the troops of His British Majesty; and, according to the capitulation, consist-

ing of nine articles, which was then signed, the garrison surrendered itself as a prisoner of war of His British Majesty, and Colonel Polson took possession of the castle as "commander-in-chief of the troops of His British Majesty before the fort of San Juan."

This is the true account of the events, such as appears from the diary kept by the Governor of the castle, Don Juan de Ayssa, published by the "Gaceta Oficial," of Guatemala, and republished by that of Costa Rica in nos. 273, 275, 277, and 278, of the 11th, 18th, 24th, and 28th of March, 1857.

It is, therefore, seen that neither did the Governor of the castle, Señor Ayssa, ask the Governor of Nicaragua assistance of any kind, nor did any one assist him, nor did anything happen that Mr. Levy said.

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"Nelson was one of the officers of this expedition—a fact which has been contradicted by persons who prefer to deny what they do not know. We will therefore state the proofs.

"It is proper to notice that this attack is not the same as that which was made on the same fort in 1769, and which was repulsed by Miss Herrera."

To this note the same remark above made is applicable.

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"The plan of the 1780 expedition had been formed in 1779 by General Sir John Dalling. Its object was to take possession of Nicaragua, and thereby to cut off the communications between the Spanish colonies. In the event of possession not being taken of the whole country the intention was at least to hold possession of the River San Juan and the Nicaraguan isthmus.

"The troops were under the command of Colonel Polson. One of the subordinate officers was called Nelson, who commanded a small vessel—the Honchinbrooke—and was destined to be one day the hero of Trafalgar.

"The garrison was composed of 208 men, commanded by Juan de Ayssa. The defense was so vigorous that when the English had taken the dominating positions around Castillo, and further resistance was useless, a capitulation was signed granting to Ayssa and to his garrison the honors of war.

"Nelson lost, by fighting and disease, 190 men out of 200 in his command, and he himself narrowly escaped falling a victim to dysentery."

The particulars herein given of the British expedition of 1780 show that they refer to the same military event recorded by the diary of Señor Ayssa. They show besides that that expedition was not intended exclusively against the province of Nicaragua, but against all the American dominions of the crown of Spain. The defense of those dominions was not entrusted to simple provincial Governors, but to Viceroys and Captains General. For that reason Señor Ayssa, from the very first moment, addressed himself to his immediate superior His Excellency Don Matias de Galvez, President and Captain General of Guatemala.

Let it be permitted to take notice here of the contradiction incurred in this passage by the argument of Nicaragua. In the beginning the following is said: "In Mr. Levy's work on Nicaragua an account of an expedition by the British under Lord Nelson, in 1780, is given." And in the next paragraph, it is stated that Nelson was a subaltern officer of the expedition, under the orders of Colonel Polson. This shows the inaccuracy with which the defense of Nicaragua has been written.

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In 1848, when the British again invaded the country and entered the San Juan river, Costa Rica did not claim that her territory had been interfered with and took no steps towards its defense. On the other hand, Nicaragua prepared to repel the aggression and hastily threw up fortifications on the south bank of the river, below the mouth of the Sarapiquí, and offered a vigorous defense of their territory in the action at that place on February 12, 1848. No Costa Rican was engaged in this affair, nor were any of Costa Rica's troops in the vicinity. In fact, instead of objecting to these aggressions, Costa Rica sympathized with the British, and so marked was this feeling of sympathy that it called forth a letter from Mr. E. G. Squier, United States Chargé d'Affaires in Central America, to the Government of Costa Rica, remonstrating with her for her attitude in the struggle and her sympathy with the British.

This new British enterprise directly referred to the Mosquito question in which Costa Rica had not the direct interest that Nicaragua had. The question having been car-

ried to the ground of actual recourse to arms Costa Rica had sense enough not to attempt to engage herself in hostilities with Her British Majesty; and while Nicaragua was building fortifications, Costa Rica negotiated in Washington and in London the recognition of her territorial rights as far as the San Juan river. This judicious action caused her to be considered by Nicaragua as partial against her, but as far back as 1850 the Costa Rican diplomatist, Licentiate Don Felipe Matina, answered the said charges in the following language: "The Nicaraguans have expected to justify their conduct by accusing the Costa Ricans of having favored the occupation of San Juan in the name of the Mosquito king; but this charge has no foundation, because it is proved that the said occupation was the result of a plan formed long ago by the British government and communicated to all the States of Central America and New Granada."

"The only thing in support of the charge which has been cited consists of certain newspaper articles. The editor of a paper which had no official character and was published at San José wrote in it that he considered that occupation favorable to the interests of Costa Rica; as if a Government could ever be held responsible for the personal individual opinions of private parties, or as if the feelings and ideas of a citizen could ever be deemed to be the feelings or ideas of the nation."

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But as further evidence that the river San Juan was solely within the limits of Nicaragua is the fact that no road connecting the river with any part of Costa Rica has ever been built. The river never has been used as a highway of that Republic, nor could it be without the building of connecting roads.

Even granting that no road connected the interior of Costa Rica with her frontier on the San Juan river, that fact would never prove that that territory belonged to Nicaragua, because the fact of not using what is our own property does not imply or suppose a lack of ownership. On the other

hand, it is perfectly well known that Nicaragua has no roads leading to those places.

But the defense of Nicaragua is sadly mistaken in stating that there were no roads between the San Juan river and the capital of Costa Rica, an error of which she can easily get rid by perusing documents nos. 23, 24, 26, 37, 40, 48, 50, and 52, appended to the "Reply" of Costa Rica to the argument of Nicaragua. The fact is that not only have such roads existed there, but that the commerce of the nation has been carried on through them at different periods and that custom-houses were established for the service thereof, as witnessed by several of the documents cited.

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Some argument is introduced to show that the San Juan river and the Desaguadero are the same. This is not a disputed fact and such arguments are entirely unnecessary. Nicaragua maintains that the San Juan, with its three mouths, is, and, as far as Nicaragua is concerned, always has been, known and considered one and the same. It is from the mouth of the Desaguardero that the boundary begins, and that mouth is the southern one, to wit, the Colorado river.

If the argument of Costa Rica has furnished the proof that the Desaguadero and the San Juan river are the same, it was only because Costa Rica thought that Nicaragua would be consistent with her former conclusions. Under the Secretaries of State, Señor Ayón and Señor Rivas, she had held and accepted, as limits between the two countries, the Desaguadero river; but she claimed that that river flowed in the valley of Matina, many leagues south of the San Juan river. Now Nicaragua places herself in another point of view, which she selected because of her impossibility to deny the identity between the Desaguadero and the San Juan rivers.

Costa Rica will not insist, therefore, in demonstrating what is an admitted truth.

As to the failure of San Salvador to ratify the treaty and thus give force and effect to her guarantees, Costa Rica maintains that this objection could, with equal propriety, be urged by her; that the guarantees which failed were of equal importance to her, and that hence the two countries are left in the same condition. This is undoubtedly true. Costa Rica might, with equal propriety, maintain this position, but it is not conceived how that fact could take away Nicaragua's right to rely upon it. It was an essential element of the Convention, and the failure of Nicaragua left the Convention imperfect.

In this paragraph the defense of Nicaragua attempts to destroy the doctrine established in chapters XII, XIII, and XIV, Second Part, of the "Argument" of Costa Rica, wherein it has been shown that the Government of Salvador was not an essential party to the treaty of limits, but primarily and principally a fraternal mediator, and that the guarantee offered by it could, owing to its character of accessory, disappear without in the least affecting the validity of the principal obligation, exactly in the same way as any security or bond, in private law, can disappear without destroying the strength of the obligation contracted between the principal parties to the compact.

The chapters of the "Argument" of Costa Rica above referred to have not been answered, and it will be a loss of time to dwell again *in extenso* upon a point which has not been nor could be refuted.

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It is also claimed that San Salvador was not party to the treaty, and hence the treaty needed no ratification from her. The rule upon this subject is well stated in Wheaton's International Law, part 3, p. 495, thus:

"If the mediation is spontaneously offered it may be refused by either party; but if it is the result of a previous agreement between the two parties it cannot be refused without a breach of good faith. When accepted by both parties it becomes the right and duty of the mediating power to interpose its advice with a view to the adjustment of their differences. It thus becomes a party to the negotiation, but has no authority to constrain either party to adopt its opinion; nor is it obliged to guarantee the performance of the treaty concluded under its mediation, though, in point of fact, it frequently does so."

This quotation from Wheaton cannot have even the remotest application to the case now under discussion.

The mediation of Salvador in the disputes about limits between Costa Rica and Nicaragua in 1858 ended with the signing of the treaty of April 15 of the said year. It can be read from the beginning to the end, and nowhere will it be found that Salvador is given in it the character of mediator for future occurrences.

The character, which under article X of the treaty Salvador had, was that of *guarantor or surety* for the compliance with the provision contained in clause IX of that compact, but not that of mediator, which is a thing completely different.

This character of surety or guarantor did not, nor could it, give the Government of Salvador the standing of principal party to the compact.

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But a further argument for the invalidity of the treaty is the disastrous results that would accrue to Nicaragua if the treaty was interpreted as Costa Rica contends for; that such is sufficient to avoid a treaty is stated by Vattel, p. 194:

"A treaty pernicious to the state is null and not at all obligatory, as no conductor of a nation has the power to enter into engagements to do such things as are capable of destroying the state for whose safety the government is entrusted to him. The nation itself, being necessarily obliged to perform everything required for its preservation and safety, cannot enter into engagements contrary to its indispensable obligations."

Chapter X of the "Reply" of Costa Rica victoriously refuted beforehand the allegations contained in this passage. It has been shown, furthermore, in that chapter that the quotation from Vattel is incomplete, and that, according to the doctrines set forth by that author, the treaty of limits herein referred to cannot be counted under any consideration whatever among those called pernicious to the state.

In conclusion, Nicaragua calls attention to document No. 60, submitted by Costa Rica, wherein she expresses her willingness to have the treaty of 1858 declared null, and also to the argument in her case, in which she insists that the treaty is prejudicial to her territorial rights. The Arbitrator must regard these as candid and expressive of the case of Costa Rica. If, then, it would be to the interests of Costa Rica, as well as of Nicaragua, to declare the treaty invalid, what reason can exist to affirm its validity?

The Government of Costa Rica represented, indeed, to the Government of Nicaragua, feeling tired of the present contention, that it was advisable that, instead of insisting upon the nullity of the treaty, negotiations should be initiated to rescind the same treaty by common agreement; that was in 1880; but the Nicaraguan Government did not accept the suggestion, because it was afraid of the re-establishment of the original frontiers of Costa Rica, which would be the inevitable consequence of the breaking of the compact.

At present no one thinks of the rescission of the treaty or of any negotiation to put an end to the differences of both countries by common consent. The question has been submitted to the final decision of the President of the United States of America, and that decision has to be given in justice and according to principles.

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For nearly thirty years has this contention been prevalent between the two countries.

From 1871 to the present date there are not thirty years. It was in 1871 when Secretary Ayón forced the present contention into existence. Up to that date the legality of the treaty had never been made the subject of discussion.

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The prosperity of both has been retarded by the doubts and contentions over this treaty.

And the blame therefor falls upon Nicaragua, who conceived the idea of reviving questions which, after having

been pending for thirty years, had been finally settled by the treaty of 1858.

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Nothing stands in the way of an honorable and just settlement of these boundary questions save and except the treaty of 1858.

As long as the treaty of 1858 remains in existence and does not disappear by virtue of the award to be made by the Arbitrator, there is no question of limits to be settled.

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Why should it longer be the stumbling-block in the way of a fair, equitable, and honorable adjustment?

For the simple reason that what has been agreed upon by the parties to a compact is law among them, and for the reason that there is no arrangement to be made, since it is already made by a distinct and inviolable international agreement.

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The method is already agreed upon by which the vexed question of boundary shall be determined. Before an impartial Arbitrator, in case the two countries cannot arrive at a conclusion, every opportunity will be presented for both countries to try the merits of their respective claims, and the award will be received with that satisfaction which will unite the two countries in closer bonds of friendship and bury in oblivion the memory of the long and bitter controversy that distracted them and strained the friendship between them.

When the question in regard to limits shall be legally opened, if such a thing ever happens, the second arbitration

herein referred to will, indeed, take place; and Costa Rica confidently expects that in that event, she will recover the possession of her original frontiers, from which she consented to withdraw by virtue of the treaty of 1858, only for the purpose of avoiding differences with her neighbor.

# POINTS OF DOUBTFUL INTERPRETATION.

# PREFACE.

The Republic of Nicaragua believes that she has so clearly demonstrated the invalidity of the treaty of 1858 that it will not become necessary for the Arbitrator to consider or decide any of the points of doubtful interpretation; yet, inasmuch as they have been furnished to the Republic of Costa Rica and have been discussed in her case, to keep within the strict text of the treaty of 1886, the following answer is now submitted:

In her first paper Nicaragua set forth that she reserved her argument upon the points which she calls doubtful of the treaty of limits of April 15, 1858, for some future time, after the Arbitrator should have decided the question of validity or nullity of the said treaty, or whenever he should declare his intention to decide that question in the sense that the treaty is valid.

Now, Nicaragua changes her mind and adduces the reasons upon which she claims that the so-called doubts must be decided in her favor or according to her views and convenience.

Costa Rica has already set forth in her "Reply" to the argument of Nicaragua, that the latter lost the right of alleging anything in regard to the doubtful points, as soon as she allowed to pass unavailed the only opportunity which she had to do so under the stipulations of the treaty of arbitration concluded at Guatemala on December 24, 1886.

The allegations herein refuted are therefore extemporaneous on the part of Nicaragua, and the omission committed by her cannot now be cured. The fact that argument upon the subject is now presented by Nicaragua only shows that she made a mistake in not offering it in due time.

# POINTS OF DOUBTFUL INTERPRETATION.

## FIRST.

The Punta de Castilla, understanding by this the terminal end of the right bank of the San Juan river, is declared in the treaty as the point from which the boundary line begins on the Atlantic side.

The point at which the boundary line between Costa Rica and Nicaragua begins, under article II of the treaty of limits, is not Punta de Castilla, but the extreme *end* of said point, and it is necessary to bear in mind this fact with great care. The article of the treaty referred to reads as follows:

"The dividing line between the two Republics, starting from the Northern Sea, shall begin at the end of Punta de Castilla, at the mouth of the San Juan de Nicaragua river, and shall run along the right bank of the said river," &c.

Therefore the starting point of the dividing line between the two Republics is not the whole delta formed between the Colorado river and the mouth of the San Juan—a delta which is called "Punta de Castilla"—but the *end* of the "Punta de Castilla," which lies on the right side of the mouth of the San Juan river.

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This point has to be located at the mouth of the river.

This point called by the treaty the *end* of Punta de Castilla must be located at the same place in which it was when the treaty was signed—that is to say, at the same degrees of longitude and latitude which it occupied—because that point is and has to be a fixed one, and not movable like the waters.

Now that this has been obliterated, where shall the starting point of the line be?

The starting point of the dividing line between the two Republics is, and has always been, where it was established in the beginning—that is, at the end of "Punta de Castilla." This point has not been obliterated, is perfectly distinguishable at present, and is on the right side of the mouth which the San Juan river had in 1858. This mouth has not been closed or obstructed, as intimated, although it may be true that the greatest part of the waters of the river discharge now into the Atlantic through the Colorado river, which rises, flows, and empties all within the territory of Costa Rica.

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The language of article II declares that the line shall start "at the extremity of Punta de Castilla, at the mouth of the river San Juan de Nicaragua."

It is true that the boundary starts from the *end* of Punta de Castilla, which, as has been said, is on the right side of the old mouth of the San Juan river.

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These latter words, Nicaragua insists, are the controlling ones, and, although the mouth of the river may have changed, still that will not throw both banks within the jurisdiction of Costa Rica.

In order to fully appreciate the difficulty arising out of this question it will be necessary to refer frequently to topographical details in the course of the discussion, and, as illustrative, three maps are appended, one showing the whole course of the river San Juan, the others the harbor of Greytown (San Juan de Nicaragua).

There are here neither controlling nor controlled words. The point called end of Punta de Castilla is the starting place of the boundary between the two States, whether or not the river forces itself into new channels to empty into the sea. It will continue to be so even in the case, which has not happened, that the bed of the old mouth of the San Juan river should have become dry.

Long antecedent to the treaty of 1858 the river San Juan had established itself in three streams through the delta to the sea, namely, the San Juan proper, which enters the bay or harbor of Greytown; the Taura, which branches off to the south, six miles above Greytown, entering the sea five miles from Greytown; and the Colorado, which also branches off to the south, eighteen miles above Greytown, and enters the sea about the same distance south of the port.

The rivers named San Juan, Taura, and Colorado have always been distinguished from each other ever since their discovery. One of the several ancient documents in which they are so distinguished, is the Report made by Don Pedro Agustin Morel de Santa Cruz, Bishop of Costa Rica and Nicaragua. The treaty of limits of April 15, 1858, also distinguishes them, as can be seen by articles II and V of that instrument. The project of the Castro-Navas Convention of January 19, 1884, also distinguished them; and, lastly, the treaty of Managua of July 26, 1886, did the same thing.

This proves that the three rivers are essentially different things which cannot be confounded with one another.

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The Taura is an unimportant stream, the mouth being invariably closed in the dry season. The Colorado, ever since 1860, has been the main stream. In that year the waters were diverted from the San Juan proper into the Colorado, and now by far the greatest part of the water of the parent stream finds its outlet through that river. In the height of the dry season at least twenty times as much water goes to the sea by way of the Colorado as by the San Juan proper.

Whether the mouth of the Taura river is or is not closed in the dry season is a fact which has no bearing whatever on the present question.

The Colorado river has acquired greater importance since 1860; but this fact has depended upon natural causes, in which the hand of man has had no intervention, and is subsequent in date to the treaty of limits.

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Not less serious changes have taken place in the harbor of Greytown since the date of the treaty. This harbor owes its origin, as well as its destruction,

to the gradual extension from point "A" on the sketch map herewith of a tongue or bar of sand. In the course of a century or more this mole has steadily grown outwards across the bight in which Greytown stands. At first the effect was to inclose a splendid sheet of sheltered water with an easy entrance, but as the extending tongue approached the main-land at "B" the entrance became difficult and finally closed.

This occurred about 1862, since which date none but small coasting vessels and small tugs have been able to enter that harbor. The great diversion of the waters of the San Juan into the Colorado referred to above no doubt accelerated the closing of the harbor entrance, but was not the primary cause of it.

In the dry season it is with difficulty that the water of the river can maintain an opening into the sea at Greytown, and the opening is subject to the most capricious changes. It often happens that a tug will go out to take cargo to a vessel outside and be unable to enter the harbor again for days and even for weeks. Sometimes the force of the sea will heap up the sand along the tongue or mole so that the waters of the river are entirely shut in, and a channel has to be cut across the bar of sand to allow the pent-up water to force an opening.

The changes that have taken place in the port of Greytown, whatever they may be, do not produce the effect of changing the location of the end of Punta de Castilla, which is the starting point of the boundary line between Costa Rica and Nicaragua.

Costa Rica, having, as she has, sovereignty in common with Nicaragua over the Bay of San Juan, has sustained as much injury as Nicaragua by the deterioration of the harbor, and she has as much interest as Nicaragua in restoring the things there to their original condition.

The deterioration of the Bay of San Juan has depended to a great extent upon the failure of the two interested nations to reach an understanding on the subject, and this has been due to the attitude taken by Nicaragua against the treaty of limits. Nicaragua has not only harmed herself with her contention, but has also done wrong to the interests and rights of her neighbor.

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The river will sometimes force its way to the sea at one place; sometimes at another. There is certainly not a spot along the whole of the 3½ miles,

from "A" to "B," where the river has not been at one time or another, and sometimes it will change repeatedly in the course of a single month.

The variability of the course of the waters of the San Juan river, if true, only proves still more the necessity that the end of Punta de Castilla, which is the starting point of the boundary line between the two States, be not ambulant, but fixed, always remaining at the same place where it was at the time of the conclusion of the treaty.

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This tongue or mole of sand is claimed by Costa Rica as the Punta de Castilla of the treaty of 1858.

Costa Rica holds that the starting point of the boundary is the end, the extremity, of Punta de Castilla and not the delta known by the same name, which is in every respect a very different thing.

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At that time there was still a good entrance to the harbor, and one side of this entrance was formed by the extremity of this Punta de Castilla.

That in 1858 there was a good entrance for vessels between Greytown and Punta de Castilla, and that such a condition of things changed afterwards, cannot destroy the positive and true fact that the *end* or extremity of Punta de Castilla is the starting point of the boundary between the two States.

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But in article 5 the whole of the peninsula north of the Colorado river was designated as Punta de Castilla, thus showing that the punta was a place of uncertain definition.

In the same way as article II of the treaty of limits clearly establishes what is the end of Punta de Castilla, article V of the same instrument explains also what is to be understood by Punta de Castilla. The latter is the whole delta formed

by the Colorado and San Juan rivers, and the starting point of the boundary line is the end or extremity of that delta watered by the San Juan.

In this there is nothing obscure or uncertain.

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The boundary was to follow the River San Juan till it reached the sea; consequently, at the time of the treaty the line would follow the southern shore of that part of the harbor known as Harbor Head to the point "A," and thence, according to the pretensions of Costa Rica, along this tongue of shifting sand, Punta de Castilla, to the extremity of the tongue.

The boundary drawn by the treaty of 1858 starts from the end of Punta de Castilla and follows along the right bank of the river-bed through which the San Juan flowed in 1858 and through which it still flows, although now carrying less water than at that time.

So it is set forth by article II of the treaty already quoted.

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It is not to be understood that even at the time of the signing of the treaty this tongue of land called Punta de Castilla was not occasionally broken through by the sea.

This is not a proper field for conjectures; the text of article II of the treaty of limits is plain.

And if the San Juan river at the time in which the treaty of limits was signed broke occasionally the tongue of land called Punta de Castilla to carry its waters to the sea, that fact, rather than weakening the stipulations of the treaty, gives them greater strength.

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But so long as there was an open entrance to the harbor it was through that channel that the waters of the river flowed into the sea.

It has been already said that, whatever the course of the river may have been, and even in case that the old river-bed should have become dry, the dividing line between the two States would not have been changed thereby.

But since the treaty that state of things has entirely changed. There is no such thing as a fixed harbor entrance and no such thing as a river mouth.

The harbor entrance and the river mouth are now the same as they were, with the difference that they have sustained considerable deterioration; but this has been the work of nature, without any intervention of the hand of man.

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Since the tongue or mole of sand effected a junction with the main-land at "B" the waters of the river have entered the sea at any and every place where they could most easily break through, along the whole length of this Punta de Castilla, from the main-land at "A" to the main-land at "B," and in the wet season there are frequently two or three places open at once.

Even granting that all of this is true, which is not admitted at all, it would not be sufficient to take the starting point of the boundary designated by the treaty of 1858 away from the place where it is.

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Where, then, is the river mouth? Where is the "extremity of Punta de Castilla?"

The end of Punta de Castilla is now where it was in 1858, and no human power would be sufficient to take it away from its place. The old mouth of the San Juan river is also now where it was in 1858, although it may be that the stream, or the greater part thereof, has forced its way through other channels to empty into the sea.

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There is a further difficulty. While Costa Rica has avoided all reference to these facts, she urges that while waters may move boundaries do not.

The principle that the boundaries of the States when marked by streams do not move, even in case that the

streams abandon partially or totally their former bed, and force themselves through new outlets to the sea, is a principle incontrovertible, held by as many writers as have occupied themselves with the subject, and supported by decisions of the Government of the United States.

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How could this be applied to the present case? In the first place, it is beyond the power of human skill to fix one single point of the boundary line along Punta de Castilla as it existed in 1858.

The difficulties encountered in the application of a principle, even if really existing, prove nothing against the principle.

Any map whatsoever, provided that it is contemporary with the treaty—and there are many excellent ones—would settle the difficulty.

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As a matter of fact, this tongue of sand is in a state of incessant change; and if it were possible by a miracle to mark where the boundary would be, if the condition of things could be reproduced as they were at the time of the treaty, this Punta de Castilla would be in many places, perhaps in all its length, either in the sea or in the harbor.

The mouth of the San Juan river is not the Desert of Sahara, where from morning to night inconceivable transformations take place, owing to the movement of the sand which covers it. What is said here by Nicaragua is merely hyperbolic, and calculated to represent a material operation within the easy reach of any topographic engineer as extremely difficult.

If the sea would have receded from the end of Punta de Castilla no one doubts that the extension of that point left dry would belong to Costa Rica by right of accession, exactly in the same way as the prolongation of the opposite end on the Nicaraguan side, owing to the same cause, would be Nicaraguan territory. Reciprocally, if the sea has in-

vaded part of what was in 1858 Punta de Castilla nothing else can be done than submitting to and accepting the action of nature. Nothing of this exhibits any difficulty.

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The rule of international law referred to by Costa Rica is based on the strong necessity for fixity of boundaries, and obtains when a river, by avulsion, should find a new channel.

The rule of international law on which Costa Rica bases her conclusions, the correctness of which Nicaragua admits, obtains, whether the finding of a new channel is due to avulsion or to any other process, however slow, and responds to the necessity that the boundaries between nations be permanent and not liable to change at the caprice of the stream. The principle is applicable to all cases.

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This rule has a practical base to rest upon, because the boundary can be traced without difficulty after the change; but it is another question when the land on which the boundary ran has been swept away and the re-establishment of the line is absolutely impossible.

Nicaragua, therefore, contends that under these circumstances the whole length of the mole or bar of sand from "A" to "B" must be accepted as the mouth of the river, since the river outlet may, and often does, range from one end to the other within a few months, as is well shown on the United States map herewith. A boundary must be one that has a reasonable prospect of fixity, and ought not to be of such doubtful location or instability as in the present case.

The picture here drawn by Nicaragua of the state of things at Punta de Castilla is not correct; but, even if it were not overdrawn, it would give rise only to a mere practical question and would not authorize under any circumstances the conclusion reached by that Republic. The fact that the material location of the boundary line proves to be more or less difficult cannot be a reason for carrying that line many miles towards the south to the prejudice of Costa Rica.

If the designation of a line should prove not to have been well made, for the reason that the location thereof proves to

be subject to this or the other practical difficulty, this would give occasion only to negotiations between the two interested parties for the designation of another line presenting fewer obstacles, but in no manner to the sacrifice of the rights of one of those parties to the profit of the other. By the same right that Nicaragua pretends to advance her frontier towards the south, Costa Rica might also pretend on her part to advance hers to the north.

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The conclusion is that the starting point for the boundary line on the Atlantic is the point of the main-land marked at "A" on the plan.

The conclusion is that the starting point of the boundary between the two States on the Atlantic side is the one fixed by the treaty of April 15, 1858, and no other, the said starting point being the end of Punta de Castilla, on the mouth of the San Juan river, opposite the port of Greytown and separated from it by the river. That is the starting point, whatever circumstances, changes, or transformations may happen there, provided that they are made by the act of nature.

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SECOND AND THIRD.

How is the central point of Salinas Bay, which is the terminal end of the line, to be fixed? If by the central point is meant the true center of a circle formed by the bay, it is indispensable to fix the limit of the harbor towards the sea. If so, what must that limit be?

The divisional line on the Pacific side was described as a straight astronomical line from a point on the river Sapoá two miles from the lake to the central point of Salinas Bay. As the starting point on the Sapoá river is north of the bay, this line will vary greatly, whether its terminus shall be on the bay shore or in the center of the bay.

It is submitted that the most reasonable construction of this article is to treat the bay as marked on either side by the Punta Mala and Punta Zacate, and, measuring along the shore line of the bay, fix the terminus at that point which would be equidistant from each of these starting-points.

Attached hereto is a United States map giving a clear delineation of the bay, upon which are located the points referred to.

This alleged doubt in regard to the meaning of the words "Center of the Bay of Salinas" has for its object the mani-

fest intention of carrying the Nicaraguan frontier some miles farther towards the south than the line established by the treaty of limits. The end or extremity on this side of the boundary line between the two countries is, as established by the treaty of 1858, the center of the Bay of Salinas, whose waters were declared to be common to the two Republics. By the word bay is not meant the bay shore, much less the capricious measure from Punta Mala to Punta Zacate herein suggested.

By casting a glance at the excellent map of the said bay, drawn in 1885 by officers of the United States Navy, every one will see at once that the Bay of Salinas is enclosed between Punta de Zacate and Punta Arranca Barba, and that the center of the said bay can never be located on its southeastern shore, as Nicaragua pretends without foundation. The center cannot be other than the center of the figure, and the figure is nothing else than the space or area enclosed within the lines which form the circuit, and not the lines themselves.

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## FOURTH, FIFTH, SIXTH, NINTH, AND ELEVENTH.

### FOURTH.

By article 4 Nicaragua consents that the harbor of San Juan (Greytown), which had belonged to her exclusively and upon which she had exercised exclusive dominion, should be common to the two Republics, and by article 6 Nicaragua consents that Costa Rica should have perpetual right of free navigation on the waters of the river from its mouth on the Atlantic up to a point three English miles below Castillo Viejo.

This being the case, is Costa Rica obliged to contribute with Nicaragua towards the necessary expenses in preventing the obstruction of the harbor of San Juan, in keeping the navigation of the river unobstructed and in improving it for their common benefit?

### FIFTH.

If Costa Rica is obliged to so contribute, in what proportion must she do so?

SIXTH.

If Costa Rica is not obliged to so contribute can she prevent Nicaragua from making improvements at her own expense, and will she have the right to demand indemnity for such points as it might be necessary to occupy on the right bank of the river or for the lands which belong to her, on the same bank, that might become inundated or in some other way affected by such works of improvement?

NINTH.

According to the text of the treaty the dominion and sovereignty (sumo imperio) over the waters of the San Juan river, from its origin in the lake down to its mouth on the Atlantic, belongs to Nicaragua. Can Costa Rica rationally dispute the right of deviating these waters?

ELEVENTH.

Does the treaty of April 15, 1858, give to Costa Rica any right to be a party in the concessions of interoceanic canal projects which Nicaragua may grant or give her the right to participate in the benefits that Nicaragua shall receive as sovereign of her territory and waters and in the compensation for the valuable concessions and privileges that she may so concede?

This is the way in which the Government of Nicaragua presents its so-called doubts in regard to the construction to be placed upon the treaty of 1858. Each one will be examined separately when taken up and explained.

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Costa Rica maintains that she not only is not obliged to contribute towards the expense of keeping the river and harbor unobstructed, but also that she has the right to prevent Nicaragua from undertaking any work of improvement without her consent, and, even when so undertaken, they must be at the sole expense of Nicaragua; that she may object to the deviating of the waters of the river, and is entitled to share in the benefit of interoceanic transit over the San Juan.

The points which are the subject of the preceding paragraph have been extensively and with the proper separation dwelt upon in Chapter III, Part Third, of the "Argument" of Costa Rica.

Due distinction was established therein between the right of co-ownership which Costa Rica has in the Bay of San Juan and the simple use and navigation to which she is also entitled under the stipulations of the treaty of limits in the river of the same name.

It was set forth in that part of the "Argument" and substantiated by the proper proof that the rights of Costa Rica in the bay and in the river being essentially different from each other, her position in regard to either of those waters had necessarily to be different.

It was said that as Costa Rica is not the owner of the river she cannot be considered to be bound to defray any expenses which might be necessary for its improvement; and the law of "Las Partidas" was cited, which uses this language:

"But the one who has only the right of use over a thing, as was stated in the preceding law, is not bound to do any of the aforesaid things in the property over which he has that use." Those things aforesaid are "to guard, preserve, repair, and improve" the property. It was said finally that to compel Costa Rica to share the expenses of the preservation of a river of which she is not the owner would be to confound the right of ownership, which represents fullness of power over a thing, with the right of use, which represents only one of the restrictions of the ownership or of its emanations.

To all these reasons, perfectly well supported by law, the defense of Nicaragua has given no answer.

In regard to the Bay of San Juan, over which Costa Rica has sovereign rights, it is plain that the limitation or abridgment of her sovereignty cannot take place except by an act of her own will and upon her consent.

Costa Rica has to reserve her freedom of action until she sees concretely what is intended to be done to improve the harbor and prevent it from being obstructed, and when the opportunity may present itself to consider this point Costa Rica and Nicaragua shall enter into agreements and by

means of a treaty they shall arrange the form, time, manner, and circumstances of the work to be undertaken. The mutual interests of both parties is sufficient to facilitate the result.

The scientific studies which are to be made for the determination of the advisability or necessity of the work have to be undertaken by common consent.

So it was done in 1868, when the two Governments of Costa Rica and Nicaragua undertook improvements in the localities herein referred to. The Government of Nicaragua appointed Engineer Sonnestern and the Government of Costa Rica Engineer Sangy to make the necessary studies and drawings, and submit a plan of the works which should be executed, accompanied by the proper estimates. The studies were made and the plans and estimates presented; and certainly at this moment the works would have been finished if the revolution in Nicaragua in 1869 had not prevented it.

Subsequent to that date the Nicaraguan Government has never intimated to Costa Rica any desire to improve at the common expense the harbor of San Juan, and this is explained by the position assumed by her about that time in opposition to the treaty of 1858. When this question is settled there will be no difficulty for Nicaragua to enter into arrangements with Costa Rica in regard to the point herein referred to, and also to many others which naturally arise out of the joint ownership and the contiguity of the two nations at several places.

Nicaragua can make in the San Juan river as many improvements as she may please, provided that by no means Costa Rica sustains detriment in her right of navigation on the river, or any other injury resulting from undertaking the work without considering the right of Costa Rica as *cestui que use* and riparian nation. Therefore, Nicaragua could not deviate the waters of the river so as to cause them to abandon the river-bed which marks the limits with Costa

Rica, because such deviation would destroy the riparian character which Costa Rica has at present.

Nor could Nicaragua build dams or stop the waters of the river in such a way that the Costa Rican rivers Sarapiquí, San Carlos, Pocosol, and other lesser ones would not have free exit.

Nicaragua cannot do any work which may cause the neighboring Costa Rican districts of San Carlos, Sarapiquí, &c., to be inundated.

In short, Nicaragua can do with the San Juan river all that she pleases, but without in the least affecting the rights of Costa Rica.

Does this mean that, through the necessity of respecting the rights of Costa Rica, Nicaragua has to give up her aspiration of changing the valley of the San Juan river into a navigable canal? Certainly not. It means, simply, that she has to act with the assent of the nation who has the right of use in the river and the right of ownership in the bay, besides all other riparian rights which the international law recognizes.

Costa Rica desires as much as Nicaragua that the canal should be opened. She is ready to favor that work by all means within her reach, and if any difficulty stands in the way it rests exclusively upon the strenuous efforts of Nicaragua to ignore the indisputable rights of Costa Rica.

If the latter Republic aspires to share in the benefits of the interoceanic transit it will always be in exchange for the concessions that she may make for a work of such vital importance to the world. Three-fourths of the right bank of the San Juan river belong to Costa Rica, and the other quarter also belongs to her, less a strip along the river two miles wide. She is the owner of the rivers Pocosol, Sarapiquí, San Carlos, and Colorado, whose waters are required for the execution of the work. She is co-owner of the Bay of San Juan. To her the valley of the San Carlos river belongs, and that valley, according to the project of the engineers of the canal, has to be inundated.

Let it be seen, therefore, whether Costa Rica must not be given intervention in the enterprise, and whether she is not right in aspiring to a reasonable compensation.

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The position thus assumed would practically make Nicaragua a dependency of Costa Rica.

The position assumed by Costa Rica is that which is assumed by every one who sees himself in the necessity of defending his indisputable rights when ignored or denied.

Nicaragua is not a dependency of Costa Rica, as Costa Rica is not a dependency of Nicaragua; both are sovereign nations, and in the same way as Nicaragua shows herself jealous of her liberty and independence, Costa Rica has also, by necessity, to vindicate her evident rights.

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It would entitle Costa Rica to share all the benefits of Nicaragua's work without contributing at all to the burdens.

If Costa Rica aspires to any benefit that benefit is nothing more than the equivalent of what she will give out of her own property for the common work.

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It would do more—it would put in the power of Costa Rica to destroy by her refusal the welfare of Nicaragua.

If the welfare of Nicaragua were founded upon absolutely ignoring the rights of her neighbor the foregoing phrase would be correct; but, as the welfare of Nicaragua depends upon the enjoyment of her own rights and the respect of the rights of others, the proposition lacks exactness.

The concessions made to Mr. Belly and Monsieur Chevalier show that Costa Rica has always been ready to har-

monize her rights with those of her sister; and if at the present moment such a condition of harmony does not exist it is due exclusively to the decision on the part of Nicaragua to exclude Costa Rica from the benefit of a work which cannot be accomplished without affecting both the territories and the rights of the two nations.

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By means of such an interpretation of the treaty she would have completely the power to bar the progress and the prosperity of Nicaragua.

To this the above answer is also to be given.

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It is not to be concealed that the completion of interoceanic transit is of vital importance to Nicaragua. Upon it rests the future of the country; without it its geographical position is valueless; and if such an interpretation was declared the treaty would not only be prejudicial but disastrous to Nicaragua.

The completion of interoceanic transit is a matter of common interest, and it would be necessary to be blind not to see it.

Upon it rests in great part the future of both countries, but there is no reason to maintain that the respect on the part of Nicaragua of the rights of Costa Rica is disastrous to her, as the recognition of the rights of Nicaragua is not disastrous to Costa Rica.

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The question of contribution towards expenses sinks into insignificance compared with the claim of Costa Rica to participate really in the right of domain and sovereignty over the waters of this river.

Costa Rica has not, under the treaty of limits, domain and sovereignty over the waters of the San Juan river. Her rights are those of use and navigation and the usual riparian rights under the law of nations.

To justify a refusal to assist in the preservation of the navigation of the river Costa Rica points to article 6, in which the exclusive domain and supreme sovereignty over the river is retained by Nicaragua, but at the same time asserts, notwithstanding this provision, the right to intervene to prevent any works of improvement, any diversion of the waters to effect any improvement of navigation, and to demand any share of any revenue arising from canal concessions or the completion of interoceanic transit. These positions, Nicaragua maintains, are entirely inconsistent with each other If the burdens incident to the first are not imposed on Costa Rica the benefits of the second do not accrue to her. She is not to be permitted under the terms of the treaty to possess the right to demand tribute from the lawful enterprise of her sister Republic of Nicaragua.

There is neither inconsistency nor contradiction in the action of Costa Rica. She recognizes the sovereignty of Nicaragua over the waters of the San Juan river, but she calls attention to the fact that that right of domain or ownership is limited by the easement of use and navigation which belongs to Costa Rica.

The difficulty, therefore, rests only upon the confusion made by Nicaragua of rights which are so different.

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True it undoubtedly is that the sovereignty of the river vesting in the Republic of Nicaragua that Republic has not the power to demand of Costa Rica the apportionment of the expense of maintaining its navigation.

This is precisely what Costa Rica holds.

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It would be an abdication on the part of Nicaragua of her supreme control of the river, the rights of Costa Rica being ancillary and dependent only upon the exercise by the Republic of Nicaragua of her sovereign power; but it is equally true that this sovereign power draws with it the absolute right to deal with the river as the sovereign deems right and fit. The rights of the sovereign are supreme; the right to use is secondary and incidental to the sovereign right. This former right must control; and although a capricious exercise of it would not be justifiable by the law of nations, the lesser must give way to the supreme right. Nicaragua does not contemplate injury to her neighbor in the building of a canal. She does not intend to destroy, but to improve, the navigation both of the San Juan and the Colo-

rado rivers. Dams of necessity must be built, but the most experienced engineers declare that the effect will be to so store the waters during the wet season that it will distribute them to the improvement of the navigation of the lower San Juan and Colorado during the dry season. The difficulty as to navigation now is that in one season there is an immense volume of water, while at another there is so small a quantity that navigation is practically closed; but even though these benefits are to result Costa Rica still declares that she is entitled to an indemnity even for doing her good. The canal itself will be of great benefit to Costa Rica, although it should not touch her territory, but by this claimed interpretation she would be entitled to absolutely prevent the consummation of an object so desirable unless her demands, be they ever so unreasonable, were complied with; but, even upon a compliance with the most severe terms that Costa Rica might impose, the mere concession of the right of Costa Rica to interfere is the death knell of the canal project. The pretensions of Costa Rica have already delayed the building of the canal, to the disadvantage of both Republics. Capitalists of the old and the new world will not embark in an enterprise where the consent of two countries has to be obtained and the canal be subject to two jurisdictions. The joint control of this river is the end of interoceanic communication.

There is no such abdication. Nicaragua retains the supreme control of the river, but side by side with that right and as a limitation thereof coexists the right of use and navigation which Costa Rica has according to the treaty.

This right is not ancillary and dependent, but as much principal or primary as that of Nicaragua. Nicaragua can dispose of the river as she may deem advisable, but without detriment to the rights of Costa Rica.

There is no such thing as superior and inferior, secondary or incidental, rights, nor can there be any possible conflict between rights. While they exist they must harmonize with each other, and not seek to destroy one so as to leave the other standing. The theory of superior and inferior rights, and that the latter must yield to the former, is a true novelty in science, or, better to say, a principle openly condemned by it, the true principle being, on the contrary, that "there is no right against a right." Costa Rica does not think that Nicaragua, in proposing to open a canal, has it precisely in view to cause her injury. No. But if Nicaragua ignores the rights of Costa Rica; if she nullifies them

by a stroke of the pen; if she forgets that Costa Rica is joint owner of the bay of San Juan and has the right of use and navigation of the river, and has a river front on it, and is absolute owner of the waters of the Colorado, Sarapiquí, and San Carlos rivers, which are concerned in the work of the canal; if she loses sight of the fact that the eminent domain, absolute and unrestricted, over the territory intended to be inundated belongs to Costa Rica; if, in one word, Nicaragua acts without paying any attention to the rights of Costa Rica in connection with the enterprise of the canal, the fact is that she will do harm to her neighbor, even if that is not her intention.

It is not precisely an indemnification what Costa Rica claims. What she demands is that nothing be done without her consent in matters in which she has an interest, and she makes this demand, founded on the right vested in all owners not to allow their property to be touched or disposed of without their consent.

The canal will be of great profit for Costa Rica, whether or not it touches her territory, and much more, of course, if it does. Costa Rica is not blindfolded and can see all of this very well. She has been at all times ready to give open protection to a work of such importance. It cannot be said, therefore, that she attempts to prevent it.

If any obstacles are encountered by the enterprise those obstacles are precisely the ones which Nicaragua herself has created with her unacceptable pretension of excluding Costa Rica from all intervention in that enterprise. Costa Rica, far from having been a party to any delay in the opening of the canal, offered, pending the question of the validity of the treaty, to guarantee a part of the interest on the capital to be raised for that work, this being a most eloquent fact to show how groundless is the charge herein formulated against Costa Rica. Costa Rica being, as she is, disposed to make liberal concessions to the enterprise—as liberal as those which Nicaragua may make—the difficulty herein suggested in regard to the canal concessions to be made by

the Governments of the two nations through the territory of which it passes proves to be purely imaginary.

It may be that to treat only with one Government would be more expeditious, but, as the interested nations are two, it is indisputable that both of them should be treated with.

On the other hand, even in the case, which is inadmissible, that Costa Rica could make the blunder of refusing to permit the canal to touch her territory and waters, this might give occasion to friendly advices by which she might be made to understand her own advantages, but never to demands, because every one can dispose of his own property as he pleases; and if Costa Rica aspires to derive some direct advantages from the enterprise, or if, as Nicaragua says, Costa Rica declares, even after seeing the benefits which the canal will produce to her, that she is entitled to indemnification, she would do by this nothing else than imitating Nicaragua, which does not grant gratuitously the concession of the territory and waters belonging to her which are necessary for the work, although, as she asserts, it has to be more profitable for her, and her whole future and prosperity depend upon the interoceanic communication.

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No wonder, then, that, with all the future prosperity of the nation at stake, Nicaragua urges that an interpretation so foreign to the intention of the parties—so disastrous to both countries—should not be permitted. If the rules of interpretation require that the intention of the parties shall prevail, who could for a moment contend that Nicaragua ever intended such a result? Then, as now, interoceanic transit was the one hope of future prosperity; then, as now, an undivided control of this transit was a *sine qua non* for the undertaking of the enterprise. Could it, then, have been possibly the intention of the treaty to wrest from Nicaragua her natural rights, her future hope, and leave her practically in the state of dependence upon the State of Costa Rica? Not only was it not the intention of Nicaragua to so bind herself hand and foot, but Costa Rica, as evidenced by article 8 of the treaty, never intended such a result.

After having seen Nicaragua deny the validity of the treaty of limits, we cannot be surprised by any other of her denials, no matter how strange they might appear.

Under cover of future prosperity of the nation an attempt is made to conceal what is simply a desire to ignore the rights of a neighbor. There is no possibility for interpretation of any kind in regard to this point, since the subject of the discussion is as clear as daylight and refers to things expressly declared by the will of the parties; and if it were lawful in the face of express texts, admitting of no tergiversation whatever, to explore the intention of the parties who signed their names to them, has Nicaragua forgotten that simultaneously with the treaty of limits she signed, together with Costa Rica, a concession of interoceanic canal which had been framed upon the bases of said treaty?

In that contract Nicaragua fully acknowledged the right of Costa Rica to intervene in the canal.

Nay, in 1869, many years after the foregoing grant, Nicaragua concluded with Costa Rica another convention upon the same subject, in which she recognized the rights of Costa Rica. How, then, can the learned defender of Nicaragua now say that that nation did not or could not think that in signing the treaty of 1858 she granted Costa Rica the right to intervene in the enterprise of an interoceanic canal?

To deny that right now is tantamount to breaking the treaty, because the sovereignty of Costa Rica over her territory would be null if Nicaragua could dispose of it without the consent of Costa Rica.

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In that article she agrees that if the canal contracts then in contest should for any reason fail, then Nicaragua should not enter into a new canal or transit contract without conferring with her in reference to their common safety and protection, so that the filibusters might not again gain access to or a foot-hold in the country.

Article VIII of the treaty reads as follows:

"If the contracts of canalization or transit entered into by the Government of Nicaragua previous to its being informed of the conclusion of this treaty should happen to be

invalidated for any reasons whatever, Nicaragua binds herself not to enter into any other arrangement for the aforesaid purposes without first having the opinion of the Government of Costa Rica as to the disadvantages which the transaction might occasion the two countries: *Provided*, That the said opinion is rendered within the period of thirty days after the receipt of the communication asking for it, if Nicaragua should have said that the decision was urgent; and if the transaction does not injure the natural rights of Costa Rica, the vote asked for shall be only advisory."

It is seen, therefore, that the reference herein made to the provisions of article VIII of the treaty is not accurate. No wonder, then, that the conclusions of Nicaragua lack correctness.

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Costa Rica could not have given up these important rights if they rested upon any solid foundation. At that time it was supposed the negotiation then in progress would result in the building and completion of the canal. This done there would be, of course, no occasion for future concessions, and the absolute relinquishment of all rights shows that they rested upon no substantial foundation. Why give up present rights and seek to retain shadowy ones in the possible future? No; the language of article 8 limits the consultation to a case where the natural rights of Costa Rica would be affected.

For the sake of the immediate opening of the canal Costa Rica accepted the contracts already entered into by Nicaragua in 1858; but it was stipulated that in case they should happen to be invalidated Nicaragua should not enter into any others without the intervention of Costa Rica.

The giving up or abandonment of rights about which so much is said by Nicaragua was in reality no more than nominal, because simultaneously with the treaty—that is, four days after it was signed—a canal contract, which had been under negotiation for many months before between the two Governments, was concluded, and in that contract, as it has been stated, Costa Rica had the intervention which belonged to her.

The language of article VIII does not limit the consultation to a case in which the natural rights of Costa Rica would be affected. Such an erroneous statement cannot be made when the express text of the article is before the eyes. Costa Rica has a vote when her natural rights are affected, and the right to pass an opinion in all other cases.

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If such rights were affected independent of the treaty, consultation would be demanded by the laws of nations, so that the treaty really leaves the matter where the law of nations left it—that is to say, that Nicaragua must so act as not to wantonly injure her neighbor, but that if the interests of both became so diametrically opposed that they could not exist together the superior right of sovereignty must prevail over a mere secondary right of use.

There are two grounds upon which Costa Rica bases her claim that her natural rights should be respected by Nicaragua in these canal matters: one is the common law of nations and the other the stipulations made in an international compact concluded by the two Republics. In spite of this Nicaragua finds no difficulty in maintaining that when the interests of both countries are in conflict hers must prevail over all others. It has already been said that there is no right against a right, and that whenever two rights find themselves in conflict, instead of sacrificing one to the advantage of the other, moral conscience and the principles of all known legislation ordain that they should harmonize. The doctrine which Nicaragua holds is deeply immoral, contrary to all justice, and Machiavel, Hobbes, and Holbach themselves would not have formulated it in such a crude manner.

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Nicaragua contends, therefore, that the supreme sovereignty of the river being vested in her she has the right to make improvements, divert the waters, grant canal concessions, and do every act that the supreme sovereign might do, taking care not to wantonly injure Costa Rica, and, possessing the

sovereign right, the secondary right of user might give way whenever they become so opposed to the beneficial use of the sovereign right that both cannot exist together.

The right of sovereignty of Nicaragua is limited by the right of use and navigation of Costa Rica, and still more by her rights as a riparian power and the owner of navigable rivers which flow to the sea through the bed of the San Juan river. It is plain, therefore, that Nicaragua can do in the San Juan river all that she pleases, provided that she does not thereby cause, directly or indirectly, willingly or unwillingly, any injury to the rights of others, for the determination of which, as is natural, no more than an ordinary intellect is required.

In regard to the strange doctrine about superior and inferior rights, and that the existence of the former demands the annihilation of the latter, enough has been said in the previous remarks.

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## SEVENTH.

In view of article 5 of the treaty, must the branch of the San Juan called the Colorado river be held as the limit between Nicaragua and Costa Rica?

Nicaragua has not as yet recovered her sovereign rights in the port of Greytown, but they are still curtailed by article 7 of the treaty of January 28, 1860, with Great Britain, which is as follows:

"The Republic of Nicaragua shall constitute and declare the port of Greytown or San Juan del Norte a free port, under the sovereign authority of the Republic; but the Republic, taking into consideration the immunities that up to now have been enjoyed by the inhabitants of Greytown, consents that trial by jury in all civil and criminal causes and perfect liberty of religious belief and of public and private worship, such as have been enjoyed up to this moment, will be guaranteed to them in the future."

"No duties or charges shall be levied on vessels arriving at the said free port of Greytown." &c.

When the treaty of limits was signed the commerce of Nicaragua had no exit to the Atlantic, because her part of San Juan del Norte was in the possession of a foreign power.

Article 5 of that treaty provided that as long as Nicaragua did not recover her sovereignty over that port the use

and possession (not sovereignty) over Punta de Castilla should be common and equal both for Costa Rica and Nicaragua, and that as long as this community existed the Colorado river should mark the limit.

The port of San Juan del Norte was then in the possession of the British, and as long as its occupation lasted, Punta de Castilla, Costa Rican territory according to the treaty, was used and possessed by both countries, and the Governments of Costa Rica and Nicaragua exercised their authority thereon through officers appointed and paid by them by common consent.

This precarious state of things only lasted twenty-one months, at the end of which Nicaragua and Great Britain concluded the treaty known by the name of the Zeledón-Whicke treaty, signed on the 28th of January, 1860. Article 1 of that treaty recognized that the whole territory formerly occupied by the Mosquito Indians, under the protection of Great Britain, is an integral part of the Republic of Nicaragua and subject to her sovereignty. The port of San Juan del Norte or Greytown was in consequence returned to Nicaragua, and from that moment the latter Republic ceased to use and possess in common, as she had thus far done, for the purpose of securing an exit to the Atlantic, the delta of the Colorado river or Punta de Castilla, and withdrew from the Costa Rican territory the authorities which she had kept there up to that time under the provisions of article V of the treaty of limits. The effects of that article then ceased at once.

Many years elapsed and Nicaragua was still in the full enjoyment of her sovereignty over the port of San Juan, but as she failed to comply with one of the stipulations of the Zeledón-Whicke treaty a contention arose between her and Great Britain, which resulted in the submission thereof to the arbitration of the Emperor of Austria and his award.

As Costa Rica was not a party to that arbitration the provisions of the award, whatever they may be, cannot affect her rights. If Nicaragua would have had any rights to re-

tain it is evident that she would have given notice of the question to Costa Rica, but she did not do it.

The limitations or restrictions to which this passage of the Reply of Nicaragua refers are only the trial by jury, the freedom of conscience, and the freedom of the port. The former two are general institutions of the Republic. The freedom of the port has always existed, and it has been stipulated for the future in the canal contract. All the other sovereign rights of Nicaragua are held in her hands, and therefore it can be unhesitatingly said that Nicaragua is in full possession of the same in the port of Greytown.

The proof that the community of use and possession of the delta of Punta de Castilla does not exist now, by right, is to be found in the fact that it has never existed *de facto* subsequent to 1860. Costa Rica has exercised and still exercises there, in an unlimited manner, her sovereign rights, and if Nicaragua now pretends to contradict them it is because she seems to be bent on not allowing any point of the treaty of limits to escape litigation.

The whole of the correspondence between the two Governments from 1860 to the date of the presentation of the "doubtful points" can be searched, and *not one line* will be found which will suggest any doubt of the unlimited sovereignty of Costa Rica over the delta of Punta de Castilla. A right, the existence of which has not been announced for twenty-seven years, notwithstanding that during the last fifteen years the discussion about the stipulations of the treaty of 1858 has been constant, is, indeed, a feeble one.

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Therefore, Nicaragua not being in full possession of all her rights in the port of Greytown, the condition of affairs provided for by this article of the treaty continues to exist, and the Punta de Castilla, as therein described, is common to both countries, the river Colorado being the limit of this community.

But this condition of things has become, to all intents and purposes, permanent. Nicaragua is, for example, forever precluded from levying taxes in Greytown for the general purposes of the State, this being the interpre-

tation given to the treaty of 1860 by the Emperor of Austria. Now, as this condition of things has thus become permanent, so should the boundary between the two countries become permanent and fixed, it being clearly opposed to the peace and prosperity of both countries to have a perfect community of interests in any territory. Hence it is submitted that the boundary line marking the exclusive jurisdiction and sovereignty of the two Republics should be the River Colorado.

The commerce of Nicaragua has its exit to the Atlantic through the port of San Juan del Norte, which is under the Nicaraguan sovereignty, and therefore the only reason which prompted article V of the treaty of limits ceased to exist. Twenty-seven years ago the common use and possession by the two Republics of the delta of Punta de Castilla also ceased. That precarious condition of things cannot and should not reappear, much less with the character of perpetuity which Nicaragua now wishes to give to it.

Supposing that the reasons alleged by Nicaragua in support of that pretension were admissible, which is denied, she might claim only the common use and possession of the delta, but not the transfer of her frontier to the Colorado river. Such a claim would be preposterous, and shows the amount of injustice with which Nicaragua always acted on this subject. She reasons in this way: Thou allowest me to enjoy thy property jointly with thee whilst I could recover mine; but as the enjoyment in common of a thing has some disadvantages, the declaration must be made that the whole thing belongs to me in absolute ownership!

The boundary between the two Republics is marked out by article II of the treaty, and is the right bank of the San Juan river.

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EIGHTH

The eighth point of doubtful interpretation submitted by Nicaragua to Costa Rica is the same that is described in the sixth paragraph of the treaty of 1886, to wit, whether Costa Rica has the right of navigation of the San Juan river with vessels of war or of the Revenue Service.

Article 6 of the treaty provides that Costa Rica shall have perpetual right of free navigation upon the San Juan river, from its mouth to three English miles below Costa Rica, *for the purposes of commerce*. Does this imply the right to navigate these waters with vessels of war or of the Revenue Service? Nicaragua maintains that it does not, while Costa Rica affirms that it does. Article 9 provides that no act of hostility shall be practiced on the waters of this river, even in the event of actual war.

The navigation of a river for commercial purposes does not draw with it the menace that the appearance on its waters of vessels of war must necessarily imply. What need has Costa Rica of war vessels, in the light of article 9 of the treaty? Even if war was flagrant her commerce on this river could not be interfered with.

Chapter II of Part Third of the Argument of Costa Rica victoriously refuted beforehand the reasons here adduced to deny Costa Rica the right of navigating with vessels of war or of the Revenue Service in the San Juan river. After the proper explanation of the principles of international law on the subject the following was said:

"All that I have said in this portion of my work in explanation of the facts and law which relate to the subject might be erroneous, badly brought, irrelevant, and absolutely inadmissible on general principles, and, nevertheless, it would be true that Costa Rica can navigate with men-of-war and other Government vessels on the waters of the San Juan river. It is Nicaragua herself who has solemnly granted that right by an article of that very same treaty which she alleges to be doubtful or capable of different interpretation."

"Costa Rica shall also be bound," says the second part of article IV of the treaty, "owing to the portion of the right bank of the San Juan river, which belongs to her, * * * to co-operate in its custody; and the two Republics shall equally concur in its defense in case of foreign aggressions; and this will be done by them with all the efficiency that may be within their reach."

"It can be seen by these phrases, as plainly and transparently as can be, that Costa Rica has not only the right, but the duty, or, to follow exactly the language of the treaty, the "obligation," not only of watching, guarding, and de-

fending its own river bank, but of contributing to the custody and defense of the other bank belonging to Nicaragua."

"If that duty should not be complied with, *with all the* efficiency within the reach of Costa Rica, the latter nation would violate an obligation contracted in a solemn treaty, and Nicaragua might prefer against Costa Rica a well-grounded charge; and, if this be the case, how can it be possible for Nicaragua to suppose that Costa Rica has no authority to navigate in the said river with Government vessels to be used in the police service of the locality, and in the custody of the two banks, and with regular men-of-war to be used in the defense, as efficient as possible, of the same banks in case of foreign aggressions?"

"No one can accomplish a purpose unless he has the means to do it; and it would be against logic and reason to impose upon either a man or a government the duty of *guarding* and defending a place, and at the same time deprive the one or the other of the right of arming or preparing themselves for resisting in the proper manner the aggression foreseen."

"The right to a thing," says Wheaton, "gives also the right to the means without which that thing cannot be used." (Part III, chapter IV, section 18.) "This is founded on natural reason, is accredited by the common opinion of mankind, and is declared by the writers."

"Let it not be said that the authority to navigate with men-of-war is only confined to the special case of foreign aggression. The treaty does not refer to this case exclusively, but speaks also of guard or custody, which means watching, vigilance, and other things of permanent character, and necessarily previous to actual defense. This, especially in a river, cannot be improvised at the very same instant that trouble arises, since, in order that it may be possible and efficient, a perfect knowledge of the locality, which cannot be acquired except by navigating the said river, is absolutely indispensable—much more so when it is well known that the navigation of the San Juan river en-

counters many obstacles, not only on account of shallowness at certain places, but also owing to its rapids and other dangers. The defense of a river of this kind without practical knowledge of all its peculiarities, rather than defense, would be a sure surrender to the enemy of the elements brought into action to oppose it."

"Let it not be claimed either that Costa Rica is relieved from the duty, assumed by her, of guarding and defending the river, nor that such duty has ceased or been abridged through the fact that Nicaragua denies to her the right to navigate said river with men-of-war, because the navigation of the San Juan river, which is the boundary between Costa Rica and Nicaragua, and is a boundary open and accessible to invasions by all kinds of enemies, was mentioned in the treaty, not simply for the benefit of Nicaragua and as an obligation on the part of Costa Rica, but because it involves also a sacred right of the most vital importance for its safety and preservation."

The defense of Nicaragua has not been pleased to answer any of these statements.

This article simply transformed to a perfect right what the law of nations denominates an imperfect right—a right of outlet to the sea and a right of trade, by means of this natural highway, with foreign nations. This imperfect right did not imply the right to navigate with vessels of war.

Certainly the treaty of limits did nothing else than transform to a perfect conventional and positive right the natural right, which all nations have, to pass out into the sea through her navigable rivers, especially when these rivers mark her frontiers.

This natural right is not confined to the simple carrying of merchandise and products, but evidently refers to all kinds of navigation, and so the writers say.

The sovereignty over the river is accorded to Nicaragua. Shall her territory be menaced by foreign ships of war? It is claimed such navigation is needed to protect commerce. Against whom is such protection needed? Certainly not against Nicaragua, for that cannot be interfered with, even in case of actual hostilities. No other power can interfere, because the sovereign right vests solely and exclusively in Nicaragua.

Two-thirds of the right bank of the San Juan river belonged to Costa Rica, and the protection of that extensive river front indispensably requires the presence in those waters of vessels of the Revenue Service; otherwise the commerce of Costa Rica would be at the mercy of smugglers.

The same reason exists for the placing thereon by Costa Rica, under certain circumstances, of vessels of war exactly in the same manner as in any other of her ports and coasts.

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The presence, then, of armed vessels would be a menace to the peace of Nicaragua, and cannot be admitted, either under the laws of nations or the provisions of this treaty.

Neither is the presence of Nicaraguan men-of-war on the the waters of the San Juan river a menace to Costa Rica, nor can the presence of Costa Rican vessels of the same kind on the same waters be a menace for Nicaragua, because the two Republics have stipulated that no act of hostility can be committed by either against the other upon the same river, even in case of war.

Only by forgetting that such a sacred engagement exists can the presence of the vessels herein referred to be considered to imply menace of any kind.

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Vessels of the revenue service are akin to vessels of war. While they have not all the means of aggression as the former, still they are armed vessels, capable of enforcing their demands by force, and must be classed in the category of vessels of war. Neither has the right under a commercial license to invade the territory, domain, or sovereignty of the Republic of Nicaragua.

There is no need of refuting the analogy herein claimed between a man-of-war and a vessel of the Revenue Service.

Nor does the treaty of 1868, by which Costa Rica becomes entitled to enjoy the rights of the "most favored nation" in Nicaragua, change the force or effect of the foregoing. By this term is meant those rights which may be accorded simply as matters of favor, as contradistinguished from those rights acquired from mutual concessions, reciprocity, or in consideration of some equivalent. The concessions to other nations referred to by Costa Rica are not matters of favor, but have been granted in consideration of advantages gained by Nicaragua, and hence do not extend to other nations.

Costa Rica finds herself, in regard to Nicaragua, in the enjoyment of all the advantages granted by her to the most favored nation.

It would be extremely diffuse to undertake to show that by virtue of that position Costa Rica can navigate the San Juan river with men-of-war, and the said demonstration is therefore dispensed with because in reality it would be tantamount to the anticipation of a question which cannot come up except in case that it is declared that under the treaty of 1858 she has no such right.

But it has to be noticed at once how strange it would be that, while foreign powers of this and the other hemisphere enjoy the right which is denied to Costa Rica, she, who is riparian owner and a neighbor, should not have it. Precisely for the reason that there are nations which, by treaties celebrated with Nicaragua, have the right to navigate with men-of-war the San Juan, the right of Costa Rica to do so is more and more self-evident; she needs to be prepared for the defense of her extensive river front. The nations to which Nicaragua has thus far granted the right of navigating with vessels of war the San Juan river are friends of Costa Rica, who has not the slightest fear that they will attempt to do her harm, but that right may be granted to-morrow to an unfriendly power; and then Costa Rica would be left to the mercy of her neighbor

TENTH.

As the reasons for making the stipulations of article 8 have disappeared, must Nicaragua be still obliged not to grant canal concessions through her territory without the advice of Costa Rica? What are the natural rights of Costa Rica and in what cases will these be considered as affected?

The universal doctrine is that when the reason for a rule ceases the rule itself ceases. *Cessante ratione cessat et ipsa lex* is a maxim that is as applicable to a treaty as to anything else. To fully appreciate this question reference must be had to the surroundings of the treaty of 1858. Then Walker had just been expelled from the country. He was defeated, but not disheartened; he was preparing for a new invasion, and rumors of his purposes and the success of his contemplated expedition were current in both Republics. The San Juan river had been the principal route of the filibuster. Costa Rica had helped in his expulsion. Under these circumstances all that Costa Rica then expected was that Nicaragua should not so hastily conclude a contract for a canal that under this guise these same filibusters, who had received valuable assistance and countenance from the old canal and transit company, might again gain access to and a foot-hold in the country. If the contract was concluded with parties against whom no suspicion of ulterior purposes could arise, the seventh and eighth articles sufficiently attest that Costa Rica had no interest and was unconcerned. If the rights now claimed existed before the treaty, Costa Rica would never have consented to abdicate or give them up. The whole purpose and intent of the treaty clearly leads to the conclusion that for the purposes only above named was any such article embodied in the treaty. The reason having failed, the obligation of consultation no longer remains of any force.

The reason of the stipulation of article VIII of the treaty of limits of 1858 is geographical and permanent, and not dependent upon circumstances, as herein indicated. Since the day in which Diego de Mercado, in 1620, conceived the idea of digging a canal of communication between the two oceans through the Isthmus of Nicaragua, until the day in which the last project of Engineer Menocal was presented, there has not been a single route, among the many suggested, which does not touch, more or less closely, the territory and the waters of Costa Rica.

For that reason it was stipulated in the treaty of 1858 that Nicaragua would not enter into any canal contract without first hearing Costa Rica, asking simply for her advice when her rights were not immediately and directly affected, and

asking for her decisive vote when the said rights might be compromised.

Article VIII of the treaty is couched in such terms as not to admit of tergiversation, and it suffices to read it to know that the vote of Costa Rica is indispensable in all canal contracts, and much more so when the rights of Costa Rica might be endangered. If the geographical situation of the two countries is the same as in 1858, and if their interests are united, as is the case, the reason of the article has not ceased and the article therefore remains in full force.

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What, then, are natural rights? All writers upon national and international law describe them as the right of existence and self-preservation and those that necessarily flow from them, such as the right of self-defense. Such is Nicaragua's interpretation, and she requests the Arbitrator to so decide, and under this rule to declare in what cases Costa Rica would be affected.

The natural rights of a nation are constituted by such conditions, depending upon the will of another, necessary for the accomplishment of the destinies of her moral entity.

This is the academical definition, and it is substantially in accord with the one given by the defense of Nicaragua; but it is to be supposed that an international arbitration must not have for its object to sanction general definitions of the Philosophy of Law.

In fact, the defense of Nicaragua asks for something positive and concrete. What is to be lamented is that she imposes upon the arbitrator the heavy burden of making a catalogue of the natural rights of Costa Rica in accord with the academical definition before expressed.

This proves once more the anxiety of the Government of Nicaragua to give rise to questions, doubts, and differences between it and the Government of Costa Rica, an anxiety which extends even to the natural rights of the latter nation, which it wishes to see described in a catalogue.