27th Congress, 2d Session. Rep. No. 919. Ho. of Reps.

CORNELIUS P. VAN NESS.

July 21, 1842.
Laid upon the table.

Mr. Cushing, from the Committee on Foreign Affairs, made the following

REPORT:

The Committee on Foreign Affairs, who were instructed by the House to inquire if Cornelius P. Van Ness, formerly Minister to Spain from the United States, has received a larger amount of money than he was entitled to receive by law, and if so what steps are necessary to recover back the money so received, report:

The committee have examined the accounts of Mr. Van Ness, and all such documents on the files of the Departments appertaining to the history of the mission of Mr. Van Ness as are material to the due understanding of the matter referred to the committee.

Mr. Van Ness was appointed minister to Spain, and commissioned as such on the 1st of June, 1829; and he continued in the actual exercise of the functions of minister until the 21st of December, 1836; and the committee find that he discharged the duties of the office with honorable fidelity and ability, and accomplished many objects of great importance to the interests of the United States.

By the act of Congress of May 1, 1810, it is provided that "the President of the United States shall not allow to any minister plenipotentiary a greater sum than at the rate of nine thousand dollars per annum, as a compensation for all his personal services and expenses;" and that he may allow an outfit "which shall in no case exceed one year's full salary of such minister."

In addition to the salary and outfit of public ministers, other expenditures do of necessity occur in the diplomatic intercourse of the United States with foreign nations, for which it has been usual to make provision annually in the appropriation bills, under the head of "contingent expenses;" and by the same act of 1810 the President is authorized to cause all such expenditures "to be duly settled annually with the accounting officers of the Treasury."

There is no definition in the law of what shall be deemed *personal* expenses of a foreign minister, and so embraced within the limitation of "salary;" nor of what shall be regarded as "contingent expenses," and be allowed in addition to the prescribed salary. Some of the expenditures of the class "contingent" are of course such as to be incapable of being foreseen and prescribed; and only a small part of them can be precisely

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fixed and limited in advance, so far as regards *amount*, though they be expenditures of known and certain recurrence. Among the allowances thus uniformly made are a quarter's salary to returning ministers and chargés d'affaires to defray their expenses home, postage, stationery, porterage, books, maps, presents, translations, and in some cases office rent, and extra expenses occasioned by the change of residence of the court to which the minister is accredited. Usage, equity, and the nature of the case, have in part served to guide the Executive in this respect; and, as the contingent expenses of diplomatic intercourse and foreign missions are annually submitted to Congress, the appropriations voted thereupon are in effect a legislative construction of the settlements made at the Treasury, and thus contribute to free the subject from much of its uncertainty. In addition to which, special acts for the relief of individual foreign ministers constitute precedents, in the nature of rules laid down by Congress.

Conformably herewith, and according to the established usage of the Government, Mr. Van Ness, on entering upon his mission, was authorized to draw on the bankers of the United States in London for the amount of his salary at the rate of nine thousand dollars per annum, and also for the contingent expenses of the legation.

In his instructions, Mr. Van Ness was required, in thus drawing, not to exceed in amount the sum to which he might be entitled in account with the United States at the date of his drafts, and to transmit his accounts to the United States quarterly for adjustment at the Treasury.

In the same instructions, certain contingencies, common to all the foreign missions of the United States, were enumerated, namely, the cost of gazettes and pamphlets transmitted to the State Department, of postage, stationery, and the necessary and customary presents to the menial attendants at court; it being prescribed that no other contingent expenses should be incurred without necessity, unless in compliance with the established usages, and no charge of any other description not warranted by the direction of the Department.

It appears that Mr. Van Ness, in pursuance of these instructions, rendered his accounts to the Department regularly at the end of each quarter, and drew for correspondent sums on the bankers of the United States at London.

After the return of Mr. Van Ness from his mission, there was, according to the custom in such cases, an examination of his accounts for adjustment and final settlement by the proper officers of the Government; and, on that examination, certain items of the account were disallowed or suspended by the Secretary of State.

These items in the account are—

1. The sum charged by Mr. Van Ness for salary, from the 1st October, 1835, to 21st December, 1836.

2. The sum charged for office rent.

3. The sum charged for the salary of a translator.

4. The sum charged for exequaturs of consuls.

5. The sum charged for expenses of following the court to the *sitios reales*.

6. The sum paid by Mr. Van Ness to G. W. Montgomery for performing the duties of secretary of legation.

7. The sum charged against Mr. Van Ness by the Auditor for exchange on his drafts.

1. *The salary after the 1st of October*, 1835.—On the 6th of March, 1835, a despatch was addressed to Mr. Van Ness by Mr. Forsyth, Secretary of State, in which it was stated that, anticipating his return to the United States under the permission granted to him, an appropriation for an outfit for his successor had been asked of, and made by Congress, as it was deemed important that a minister of the United States should be in Madrid as early as practicable after he (Mr. Van Ness) should leave it; and accordingly requesting that he would signify to the Department immediately at what time he would leave Spain, in order that a successor might be selected without delay. On the 15th of May, of the same year, Mr. Van Ness, in answer to that despatch, informed Mr. Forsyth that the latest period of his remaining at Madrid would be the 1st of October then next, though he should probably leave somewhat sooner. But he added that, *in case* of leaving before the arrival of his successor, which was, of course, probable, he would not do so at a moment when there might appear te be a pressing necessity for the presence of a minister of the United States.

Mr. Barry was appointed to succeed Mr. Van Ness, and set out on his mission, but died at Liverpool on his way, on the 30th of August, 1835. Mr. Van Ness received information at Madrid in the month of September of the death of Mr. Barry, and having had no communication from our Government on the subject of the mission, after the despatch of the 6th of March, he deemed it to be his duty to remain at his post. In November of the same year he addressed a despatch to Mr. Forsyth, in which he stated that, in consequence of the death of Mr. Barry, and of the desire indicated in the despatch from the Government, of the 6th of March, that there should be no delay in the arrival of a minister after his departure, he had concluded that it was proper for him to remain at his post until the President, on learning the death of Mr. Barry, should give some new directions, or make some new disposition of the legation.

After the receipt of this despatch at the Department of State, to wit: on the 20th of January, 1836, a communication was addressed by Mr. Forsyth to Mr. Van Ness, saying that his continuance in the charge of the legation beyond the time named by him for leaving it was a source of embarrassment to the Department, as it was doubtful whether, after the appointment of his successor, and the departure of the latter for Madrid, he could receive any salary for the time which had elapsed since the first of October previous. It does not appear that this communication ever reached Madrid; and Mr. Van Ness, for the reasons stated in his despatch of the 27th of November, 1835, and from the belief, arising out of the political circumstances and convulsions of Spain during that period, that it was important, if not necessary, for the United States to be represented by a minister at Madrid, continued in the performance of the duties of minister until the 21st of December, 1836, and regularly received his salary and contingent expenses from the bankers of the United States, in London, up to that time, precisely as he had done prior to the 1st of October, 1835.

Mr. Forsyth's letter, however, of the 20th of January, 1836, would seem not to be important to the decision of the question, whether Mr. Van Ness shall be allowed any salary after the 1st of October, 1835, which was several months prior to the date of that letter; and it appears, by the statement of the Fifth Auditor, that the charge for the salary in

question was directed by Mr. Forsyth to be suspended solely upon the ground of Mr. Van Ness's stating, in his despatch of the 15th of May, 1835, that he should leave Madrid by the 1st of October then next.

Without entering upon the inquiry whether, upon this statement of facts, the Government would be allowed in a court of law to recover back from Mr. Van Ness the amount of salary received by him, as already stated, after the 1st of October, 1835, the committee are of opinion that he is justly and equitably entitled to it, and ought to have credit for it accordingly in the settlement of his accounts at the Treasury.

It is worthy of notice, too, that the amount of salary in question is but a little more than would have been paid by the United States, had Mr. Van Ness left the mission on the 1st of October, 1835. By the practice repeatedly pursued in such cases the secretary of legation would have received the outfit and salary of chargé d'affaires for the same period, which would have amounted to a sum but little less than that suspended in the accounts of Mr. Van Ness, and this without the advantage of the United States being represented by a minister at Madrid for nearly fifteen months, at a period of great public interest and excitement.

It appears, further, that while the charge for the *salary* of Mr. Van Ness after the 1st of October, 1835, was suspended, his charges for contingent expenses were actually allowed to the 21st of December, 1836, the day to which he remained with the legation as above mentioned. So far as this may be considered an admission that such contingencies were regularly and legally disbursed by Mr. Van Ness, it is difficult to perceive why the same principle should not establish his right to the salary, it implying to a certain degree that Mr. Van Ness was, during that period, in the actual discharge of the functions of minister of the United States.

2. *Office rent.*—At London and Paris charges are allowed for office rent, fuel, and lights; but at Madrid they have not heretofore been allowed, though in one instance made. But the Secretary of State has recently directed this charge to be allowed to Mr. Eaton, the successor of Mr. Van Ness, under the restriction that it does not swell his account for contingencies over the sum of $800 a year.

It appears that, in the year 1833, the President directed a limitation to be put upon the contingent expenses of the several foreign missions, to take effect after the 30th of September of that year, there having previously been no limitation to an amount certain, the allowance being made according to the nature and propriety of the charges. The legation at Madrid was limited to $800 a year; and in the despatch from the Department communicating such limitation, it was stated that the "the allowance of any less sum (than the $800 a year) would depend upon the principles which had previously governed the Department in the settlement of such accounts."

Mr. Van Ness claims office rent upon the general ground that it is a proper contingency to be allowed, but especially alleges that the above decision entitles him to the allowance of his charges for office rent as well before as after the time of the limitation by that decision. It establishes, he contends, his right after the limitation, upon the ground that, with it, his accounts would not exceed $800 a year; and he insists that the effect of the decision is to establish the charge as a proper one upon principle, at the Madrid legation, and, of course, allowable when there was no limita-

tion as to the amount of the contingencies, if it can be allowed since, when it does not interfere with such limitation.

The committee are disposed not to interfere upon this point, but to leave the settlement of it with the Department of State.

3. *Translator.*—It appears that, when Mr. Van Ness arrived at Madrid, he found Mr. G. W. Montgomery attached to the legation as translator, under the appointment of his predecessor, Mr. Everett, and with a yearly allowance of $600; and that, deeming the service of Mr. Montgomery indispensable to the advantageous management of the concerns of the legation at that time, Mr. Van Ness continued Mr. Montgomery in the same employment, and charged the expenditure therefor in his quarterly accounts.

There is no doubt that a charge for *translations* is a proper and customary one where occasion requires translations to be made. This has been recognised in various cases, and is expressly stated by Mr. Forsyth in regard to the present charge, his objection being only to the allowance of the item in the form of *salary* to a translator: though a similar objection was made to the same charge in the accounts of Mr. Everett, it was, nevertheless, allowed to him under act of Congress.

It was alleged by Mr. Everett, as it is by Mr. Van Ness, that, for greater certainty, it is customary at Madrid to communicate a Spanish translation accompanying the notes addressed to the Spanish Government; that English translations of the notes of the Spanish Government are transmitted to our Government with the originals; and the duty of making these translations is a confidential one, and which cannot with propriety or safety be entrusted to the hands of any foreigner or other person picked up, casually, whenever necessity calls for a translator; and that, therefore, the public interest requires that there should be a translator attached to the legation.

In addition to the case of Mr. Everett, it appears, also, that a yearly allowance for translator was made to Mr. Brent while chargé d'affaires of the United States at Lisbon.

If, notwithstanding these precedents in favor of the allowance of this charge, it should, nevertheless, be rejected on account of the form in which it stands, still it would seem to be certain that Mr. Van Ness is entitled to an allowance of a charge in some form for translations and translator's services. The amount charged by Mr. Van Ness was undoubtedly paid out by him. It is not money which he retained for his own use or has in his hands, but which he has actually expended in the service of the Government. He alleges that, during the whole of his negotiations with the Spanish Government concerning claims, tonnage duties, and various other subjects, volumnious translations were made at the legation, as the archives of the Department of State will show.

In this view of the subject, the committee are of opinion that the charge is one which would require to be re-examined at the Department, before any definite conclusion could be formed as to the precise sum which ought to be allowed on this account; it being deemed by the committee objectionable in point of form, as a charge for salary, but that he should be allowed a reasonable sum for translation and translator's services.

In confirmation of which it is proper to state that, though the charge appeared in the quarterly accounts of Mr. Van Ness, and though, when

notified of the limitation of the amount of contingencies, he wrote to the Department, that he presumed the salary of translator was not intended to be affected by or embraced in that limitation, yet he received no direction to discontinue the employment of Mr. Montgomery.

4. *Exequaturs of consuls.*—As a general principle, the consuls appointed to go abroad carry their commissions, and obtain from the foreign Governments their own exequaturs. This is done through our diplomatic agents, when we have them in the countries to which the consuls are sent. But it is otherwise in the case of consuls sent to the European *colonies;* and when the Spanish Government consented to admit consuls from the United States at the ports of the islands of Cuba and Puerto Rico, a different practice was pursued by our Government, as these consuls never went to Spain. The course adopted was, for the Department of State to send the consul's commission directly to the legation at Madrid, with directions to obtain the exequatur, and then to forward it with the commission to the consul at the port for which he was appointed.

The first commission of this kind sent to Mr. Van Ness was that of Mr. Shaler, who was appointed consul at Havana: it was forwarded in a despatch of Mr. Van Buren, as Secretary of State, of the 21st of May, 1830, in which it was stated that the practice would be followed of sending the commissions of the consuls appointed for the ports of the islands of Cuba and Puerto Rico directly to the legation at Madrid; and Mr. Van Ness was directed to charge the fees and expenses incurred on account of the exequatur then sent to the Government, that they might be charged and settled in the accounts of Mr. Shaler. Eight commissions were subsequently, at different times, sent to Mr. Van Ness, with directions to obtain the exequaturs and send them to the consuls. They were obtained and forwarded as directed, and the fees in each case charged to the Government, upon the supposition that the direction so to charge them in the first case was, of course, intended to apply to all similar cases.

The committee are of opinion that Mr. Van Ness had good reason to believe himself thus authorized to make the charges in question; and, moreover, that, as such expenses were incurred by the orders of the Government, he is entitled to a credit for them in his accounts. In addition to this, it appears that similar charges have recently been allowed by direction of the State Department to Mr. Eaton.

But, while adopting the conclusion that Mr. Van Ness, having paid this sum under the order of the Government, is entitled to the allowance of it in account, the committee cannot forbear to express the opinion that such fees ought not to have been demanded by the Spanish Government, and that no such demand ought hereafter to be acceded to by the United States. According to the 19th article of the treaty of San Lorenzo, between Spain and the United States, "consuls shall be reciprocally established, with the privileges and powers which those of the most favored nations enjoy in the ports where their consuls reside, or are permitted to be." The committee conceive that the requisition of fees on the exequaturs of consuls infringes the above article of the treaty of San Lorenzo, and is contrary to the rights of the United States.

5. *Expenses at the Sitios.*—The expenses incurred in following the Spanish Government to the country residences have, it is believed, always been charged by, and allowed to, our ministers in that country. When General Jackson came into the Presidency, he submitted the charges

of this kind, together with other matters in Mr. Everett's account, to Congress, at the same time expressing his opinion in favor of the equity of their allowance; and, under the act passed for the settlement of Mr. Everett's accounts, the charges were all allowed. A charge, corresponding to this in principle, was allowed to the American minister in the Netherlands, previous to the separation of Belgium and Holland, in consequence of the court residing alternately at Brussels and the Hague.

It appears that such of the charges for these expenses in Mr. Van Ness's accounts as are suspended are not objected to upon principle, but on account of the want of what Mr. Forsyth considered to be regular vouchers to sustain him. The items suspended are certified by the secretary of the legation to be correct. Upon similar vouchers it was heretofore usual to allow them, and such was the case with regard to Mr. Everett, after the principle was settled that such expenses were proper to be allowed. Mr. Forsyth, however, directed the certificate of the secretary of legation to be rejected in Mr. Van Ness's case. But the charges now in question, it should be observed, are those which occurred previous to Mr. Van Ness receiving notice of such decision or change of practice in the Department.

In the instructions given to Mr. Van Ness is the following direction: "Exact vouchers in all cases of expenditures will be necessary for the settlement of your accounts, and as some of these incidental charges are of a nature scarcely admitting of any other sort of voucher for every item, a separate account of them should be kept and certified by the secretary of legation." It is evident that the greater part of the expenditures of this character can be sustained only by the certificate of the secretary of the legation, or by the vouchers of the domestics of the minister, and the former are calculated to be the most safe and proper in such cases, and to be moreover conformable to the instructions of the Government.

The only question then is, whether the certificate of the secretary of legation shall be considered a proper voucher for the charges suspended, as already stated. Considering the nature of the charges, as well as the previous instances of their allowance upon the same vouchers, the committee can see no reason why Mr. Van Ness should not have credit for them in his accounts.

6. *The sum paid for the temporary services of a person to act as secretary of legation.*—This item is very small in amount. Such an allowance has been made to ministers in various instances, during intervals of time in which their legation was without a regular secretary; and it seems unreasonable in such a case to compel a minister to pay out of his own salary for the necessary service of a person to perform the duties of secretary of legation.

7. *Exchange.*—From the letter of credit and instructions, cited in the early part of this report, it appears that Mr. Van Ness was expressly authorized by the Government to receive at *London* the full amount of his salary as fixed by law, and also the contingent expenses of his mission. He accordingly drew for such sums as he conceived from time to time to be his due; and the question to be determined is, whether he shall account for a larger amount than that drawn by him from the bankers, and charged by them to the United States: in other words, whether the United States have a right to demand of him moneys which he has never received from them,

or on their account, and which consequently they have neither paid, nor are liable to pay.

The accounts of the United States with their bankers in London are kept in pounds sterling, at the rate of $4 44 to the pound, or 4*s.* 6*d.* to the dollar, which rate is considered to have been established by the act of Congress of the 2d of March, 1799, and to remain unaltered, except for the single purpose of the estimation of duties at our custom-houses, as directed by the act of the 14th of July, 1832. The ministers of the United States abroad draw upon the bankers also in pounds sterling, and at the rate above mentioned. Mr. Van Ness drew for £2,025 during each year on account of salary, and upon these drafts the bankers at London paid precisely $9,000, and charged the same amount to the United States.

But it has been objected that the exchange between Madrid and London is in favor of the latter place, and that Mr. Van Ness sold his drafts in Madrid at an advance; and it is upon this ground that the Auditor has charged him with the difference or gain thus realized.

The selection of London as the place of paying our ministers, instead of the Treasury at Washington, is the act of the Government, and the ministers are authorized by their instructions, and their letters of credit, to receive their salaries at that place, instead of receiving them at the Treasury. Our minister in London receives his money there, and gains the difference of exchange between Washington and London without its being claimed from him; while the minister at Madrid, who, for aught the committee know, may gain less by the change of the place of payment than the other, is charged with such gain.

If Mr. Van Ness had received the money in person from the bankers, no demand would have been made against him for exchange. It does not seem that a claim against him can be sustained upon the ground that he transferred to another person his right to receive the money which had been thus deposited for him, and upon a debt confessedly his due.

There is no evidence that the course pursued by the Auditor, in this respect, has received the sanction of any head of the Department of State: on the other hand, in a communication from Mr. Forsyth, as Secretary of State, to the Secretary of the Treasury, in the year 1839, after stating the cost to the United States of making remittances to London, the committee find the following remarks:

"In addition to the loss of the United States by the present system, it appears, as adopted by the accounting officers of the Treasury, to be unequal in its operation, and frequently presents obstacles to the adjustment of the accounts of our diplomatic agents at other courts than London. For instance, the minister at the latter place draws for £2,025, as equivalent to his salary of $9,000, and his accounts are passed at that rate; but the minister to any other country, entitled to the same salary, and drawing for the same amount, is required to show what amount, in the currency of the country where he is resident, he receives for his bill on London, and that sum is reduced by the accounting officer into American currency at another assumed par of exchange; and if, at that rate, it exceed $9,000, he is debited with the excess; if it fall short of that sum, there is a further loss to the United States. To remedy this, it would only be requisite, when fixing a rate of exchange, as between the dollar and pound sterling, in reference to the salaries of our diplomatic agents, to direct that those payable in London should be drawn and accounted for at that rate."

Mr. Webster, the present Secretary of State, in a communication on this subject to the President, submitted to Congress on the 18th of February last, concludes the expression of his views as follows:

"On the 14th November, 1834, Mr. Rothschild, banker of the United States in London, wrote to Mr. Forsyth requesting that he would have the goodness to acquaint him if the fixed value of the American dollar of 4*s.* 6*d.*, at which ministers and consuls had hitherto drawn, was to be continued, and if it was his wish that their drafts should be paid at the same fixed value of 4*s.* 6*d.* per dollar; to which Mr. Forsyth replied, by letter of the 22d December, 1834, 'that, with respect to the value of the dollar, 4*s.* 6*d.* being the rate adopted by the Treasury Department in the settlement of the accounts of our ministers and agents abroad, that valuation will be adopted by you until otherwise specially directed.' Considering the construction usually given to the act of March, 1799, and the foregoing instructions to the United States banker, and considering the evident inequality which would result from the adoption and sanction of the rule which the Auditor has followed in regard to payments made to persons not in England, I am of opinion that those ministers, &c., who draw upon London are entitled to have the dollar estimated at 4*s.* 6*d.* sterling. But, as this apparently makes some increase to the rate of their salaries as fixed by law, I submit the propriety of laying the whole subject before Congress, in order that some uniform rule may be established by law. If such should be the judgment of Congress, an act might be passed declaring that in all cases hereafter the pound sterling of Great Britain shall be deemed and taken to be of the value of four dollars and eighty-four cents."

The committee also find, by a statement of the Fifth Auditor in regard to the disputed items in the accounts of Mr. Van Ness, that the accounts of Mr. Cambreleng, late minister to Russia, have, in consequence of directions from Mr. Webster, been settled upon the same principles, in reference to this point, as those contended for by Mr. Van Ness.

The committee feel bound to regard this question as one decided at the Department of State, and, in their opinion, properly decided; and therefore do not consider the charge in question, made by the Auditor against Mr. Van Ness, a tenable one.

One other question, not embraced in the suspended items of Mr. Van Ness's accounts, but material to be stated as possibly constituting an addition to his credit, has incidentally come under the view of the committee.

It appears by the instructions given to Mr. Van Ness, on the 2d of Ocber, 1829, just previous to his leaving the United States, that he was informed that his allowance, as *limited by law*, was $9,000 a year for all his personal and other expenses, with an outfit equal to one year's salary, and a quarter's salary for his return; that, by a general rule, the salary commenced from the time of the minister's leaving home to proceed upon his mission; and that, in his case, it would commence from the time when he thus left home, which was understood to have been on the 23d of September.

Mr. Van Ness states that, relying upon the correctness of his instructions, he made his accounts accordingly, in the first place, but that, after examining the subject, he became satisfied that, both by the law and the practice, he is legally and equitably entitled to charge the salary from the date of the commission, which was on the 1st of June, 1829; and he contends that even then he would not come up to an average with the min-

isters who had been sent abroad, as it regarded the time which had elapsed between the commencement of their salaries and their arrival at the places of their destination.

This question does not appear to have been decided or acted upon in this case by the Department of State, and the committee do not deem it necessary or expedient to undertake to determine it. If the laws then and now in existence actually secure to Mr. Van Ness the right he claims in regard to this point, no action of Congress can deprive him of such right. If, on the other hand, he is bound by what is contained in his instructions, then the question is equally at an end.

And, in the examination of the whole case, the committee have restricted themselves to the duty of stating the facts as they appear, and of expressing, for the most part, only a qualified opinion thereon, without undertaking to make a settlement of the accounts of Mr. Van Ness in detail, so as to strike a balance either way, for the reason that the order of the House seems to look chiefly to the general history and circumstances of the case, and that Mr. Van Ness is not a party to, nor in any respect bound by, the action of the House.

Hence, as to that part of the order which instructs the committee to report what steps are necessary to recover back a possible or supposed balance in the hands of Mr. Van Ness, the committee do not propose any thing to the House for its action. Mr. Van Ness holds nothing except what, as he claims in the documents before the committee, he received and continues to retain lawfully. There is no application to the House by Mr. Van Ness for relief; and the committee do not perceive how the House can assume to decide the legal questions pending between him and the Government. On a judicial investigation of the case, it might appear that Mr. Van Ness is indebted to the United States; and, on the other hand, it might appear that the United States are indebted to Mr. Van Ness. It is a subject which, in the present stage of it, seems properly to belong to the officers of the Treasury, who have full power, if cause exists, to institute a legal examination of the accounts of Mr. Van Ness.