

REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

**General Claims Commission (Convention of September 8, 1923) (United
Mexican States, United States of America)**

4 February 1926 - 23 July 1927

VOLUME IV pp. 1-769



NATIONS UNIES - UNITED NATIONS
Copyright (c) 2006

PART I

GENERAL CLAIMS COMMISSION

GENERAL CLAIMS COMMISSION

The convention of September 8, 1923, provided for the settlement of all claims of citizens of both Mexico and the United States which had arisen since July 4, 1868, the date of the last general claims settlement between the two States, and which might arise within three years from the date of the first meeting of the General Claims Commission to be established under the convention. The closing date for claims thus provided became August 30, 1927. There were excepted from the jurisdiction of this Commission, as above noted, the claims of American citizens against Mexico arising out of the revolutionary disturbances in that State during the period from 1910 to 1920. These claims were instead to be decided by the Special Claims Commission under the convention of September 10, 1923. It should be clearly understood that not *all* claims arising during the period from 1910 to 1920 were reserved for the Special Claims Commission, only *revolutionary* claims of the character described in the convention of September 10, 1923. The General Claims Commission still had jurisdiction of other than revolutionary claims arising during this period. The General Claims Commission was to decide the claims presented to it "in accordance with the principles of international law, justice and equity" (Article II).

A huge volume of claims had accumulated during the period of approximately fifty-five years which had elapsed since the last general claims arbitration with Mexico. A total of 3,617 claims was filed with the General Claims Commission, of which 2,781 claims were against Mexico and 836 against the United States. Yet the Commission was required to dispose of all these claims within a period of three years from the date of its first meeting. By way of contrast the British-Mexican Claims Commission found it possible to dispose of only 21 claims out of a total of 110 within the two-year term provided for in its *compromis*.

It accordingly became necessary to extend the life of the Commission by successive conventions of August 16, 1927, September 2, 1929, and June 18, 1932. However, ratifications of the convention of June 18, 1932, were not exchanged until February 1, 1935, at Washington. In the meantime, the protocol of April 24, 1934, had been signed and ratifications thereof were also exchanged at Washington on February 1, 1935. As a result of the arrangements provided for in the protocol of April 24, 1934, the Commission as originally constituted under the convention of September 8, 1923, was not reconvened, so that its work may be said to have ended on August 30, 1931, under the extension provided for in the convention of September 2, 1929.

Within the period ending August 30, 1931, the Commission disposed of 148 claims out of the total of 3,617 claims filed with it. Awards favourable to American claimants were granted in 89 cases, the sums allowed amounting to \$4,607,926.59. Awards favourable to Mexican claimants were granted in five cases, the sums allowed amounting to \$39,000.00.

The protocol of April 24, 1934, implicitly recognized that the pace of progress of the Commission under the procedures it had followed

presented an impossible situation; the work of the Commission would be almost interminable if the previous method of settlement were continued. On the other hand, the protocol expressly recognized that on the basis of then available information an *en bloc* settlement would be premature and impossible. Accordingly the protocol provided for two national Commissioners who would proceed to appraise the claims still pending. On the basis of their appraisals the two Governments would later either agree on an *en bloc* settlement or would arrive at "an agreement for the disposition of the claims upon their individual merits."

No publication of the appraisals of the national Commissioners appointed under the protocol of April 24, 1934, appears to have been made. A representative of the Department of State has made the public statement that the Commissioners had reached agreed appraisals in favour of claimants, both American and Mexican, in "around 110 claims", and had agreed to dismiss "possibly 1,000 claims". The American Commission reported to the Secretary of State that written opinions had been made "in all of the active cases, 1,386 in number".

Nevertheless, these appraisals appear to have aided in reaching an *en bloc* settlement of the so-called General Claims by a convention of November 19, 1941. By this convention Mexico agreed to pay in instalments a total of \$40,000,000.00 in settlement of the General Claims, the agrarian claims and certain international claims arising between August 30, 1927, the final date of the period subject to the jurisdiction of the former General Claims Commission, and October 7, 1940.

Under the Settlement of Mexican Claims Act approved December 18, 1942¹, a domestic American Mexican Claims Commission composed of three members was established to examine and render final decisions in eight categories of claims of American nationals against Mexico. Without entering into a detailed examination of the interrelationships of such categories, the Act permitted a final disposition to be made of the General Claims not previously adjudicated in some manner.

The American Mexican Claims Commission functioned for a period of four years, terminating its labours on April 4, 1947. It considered 1,397 cases and granted awards in the total sum of \$37,948,200.05. To this sum must be added the sum of \$2,800,627.18 awarded in claims wherein the American and Mexican members of previous Commissions had agreed as to amounts, making a total of \$40,748,827.23 payable to claimants under the Settlement of Mexican Claims Act of 1942. Thus a *pro rata* distribution of 99.47 per cent was made to claimants out of the \$40,000,000.00 fund available for distribution. No moneys were available for payment of any interest⁴.

¹ Claims of American Nationals Against Mexico. Hearings before a Subcommittee of the Committee on Foreign Relations, U.S. Senate, 77th Cong., 2nd Session S. 2528, June 30, July 1, 2, 6, 10, and 14, 1942, p. 27.

² *Ibid.*, p. 14.

³ U.S. Stat. L., Vol. 56, p. 1058.

⁴ American Mexican Claims Commission under the Act of Congress Approved December 18, 1942. Report to the Secretary of State with Decisions showing the Reasons for the Allowance or Disallowance of the Claims (Washington, 1948) pp. 4, 74.

BIBLIOGRAPHY

- Convention of September 8, 1923: U.S. Treaty Ser. No. 678; U.S. Stat. L., Vol. 43, p. 1730; Treaties, etc., 1923-1937, Vol. 4, p. 4441; State Papers, Vol. 118, 1923, p. 1103; de Martens, 3d ser., Vol. 17, p. 292; Am. J. Int. Law Supp., Vol. 18, 1924, p. 147; R.G.P.C., 1936, Pt. 2, p. 20; For. Rel. U.S. 1919, Vol. 2, p. 632; *ibid.*, 1920, Vol. 3, p. 236; *ibid.* 1921, Vol. 2, p. 504; *ibid.*, 1922, Vol. 2, p. 668; *ibid.*, 1923, Vol. 2, p. 564.
- Convention of August 16, 1927: U.S. Treaty Ser., No. 758; U.S. Stat. L., Vol. 45, p. 2453; Treaties, etc., 1923-1937, Vol. 4, p. 4453; State Papers, Vol. 127, 1927, Pt. 2, p. 865; de Martens, 3d ser., Vol. 20, p. 74; Am. J. Int. Law Supp., Vol. 22, 1928, p. 11; R.G.P.C., 1936, Pt. 2, p. 22.
- Convention of September 2, 1929: U.S. Treaty Ser., No. 801; U.S. Stat. L., Vol. 46, p. 2393; Treaties, etc., 1923-1937, Vol. 4, p. 4458; State Papers, Vol. 131, 1929, Pt. 2, p. 574; de Martens, 3d ser., Vol. 21, p. 359; R.G.P.C., 1936, Pt. 2, p. 23.
- Convention of June 18, 1932: U.S. Treaty Ser., No. 883; U.S. Stat. L., Vol. 49, p. 3128; Treaties, etc., 1923-1937, Vol. 4, p. 4460; L.N.T.S., Vol. 158, p. 67; de Martens, 3d ser., Vol. 30, p. 744; Am. J. Int. Law Supp., Vol. 30, 1936, p. 105; R.G.P.C., 1936, Pt. 2, p. 23.
- Protocol of April 24, 1934: Executive Agreement Series, No. 57 (not in U.S. Stat. L.); Treaties, etc., 1923-1937, Vol. 4, p. 4489; de Martens, 3d ser., Vol. 29, p. 713; R.G.P.C., 1936, Pt. 2, p. 24; A. H. Feller, p. 340.
- Convention of November 19, 1941: U.S. Treaty Ser., No. 980; U.S. Stat. L., Vol. 56, p. 1347.
- Other references: Memoria, 1925-1926, p. 22; Memoria, 1926-1927, p. 183; Memoria, 1927-1928, p. 479; Memoria, 1928-1929, Vol. 2, p. 1095; Memoria, 1929-1930, Vol. 1, p. 614; Memoria, 1931-1932, p. 266; Memoria, 1932-1933, p. 165; Informe, 1933-1934, p. 289.
- Beus, J. G. de, The Jurisprudence of the General Claims Commission, United States and Mexico, under the Convention of September 8, 1923. (The Hague, 1938).
- Borchard, Edwin M., "Decisions of the Claims Commissions, United States and Mexico," Am. J. Int. Law, Vol. 20, 1926, p. 536.
- "Important Decisions of the Mixed Claims Commission, United States and Mexico," Am. J. Int. Law, Vol. 21, 1927, p. 516.
- "Recent Opinions of the General Claims Commission, United States and Mexico," Am. J. Int. Law, Vol. 25, 1931, p. 735.
- Brierly, J. L., "The Theory of Implied State Complicity in International Claims," British Yearbook, Vol. 9, 1928, p. 42.
- Briggs, H. W., "The Settlement of Mexican Claims Act of 1942," Am. J. Int. Law, Vol. 37, 1943, p. 222.
- Eagleton, Clyde, "Measure of Damages in International Law," Yale L. Jour., Vol. 39, 1929-1930, p. 52.
- Editorial note, "Mexican Claims Commissions Organized," Am. J. Int. Law, Vol. 18, 1924, p. 795.

- Editorial note, "Mixed Claims Commissions, United States and Mexico," Am. J. Int. Law, Vol. 19, 1925, p. 364.
- "General Claims Commission, United States and Mexico," Am. J. Int. Law, Vol. 20, 1926, p. 356.
- "Claims Commissions between the United States and Mexico," Am. J. Int. Law, Vol. 22, 1928, p. 643.
- (Historical summary), R.G.P.C., 1936, Pt. 2, p. 1.
- Fehr, Joseph Conrad, "International Law as Applied by U.S.—Mexico Claims Commission," A.B.A. Jour., Vol. 14, 1928, p. 312.
- Feller, A. H., *The Mexican Claims Commissions, 1923-1934* (New York, 1935).
- "The Mexican Claims Commissions," Iowa L. Rev., Vol. 19, 1934, p. 225.
- Garner, James W., "Decisions of the American-Mexican Mixed Claims Commissions, 1926," British Yearbook, Vol. 8, 1927, p. 179.
- "Decisions of the American-Mexican Mixed Claims Commissions, 1927," British Yearbook, Vol. 9, 1928, p. 156.
- "Decisions of the American-Mexican Mixed Claims Commission, 1928-1929," British Yearbook, Vol. 11, 1930, p. 220.
- "Decisions of the United States-Mexican Mixed Claims Commission," British Yearbook, Vol. 12, 1931, p. 166.
- "The Status of the United States-Mexican Mixed Claims Commissions," British Yearbook, Vol. 16, 1935, p. 176.
- Hunt, Bert L., "Work of the General Claims Commission, United States and Mexico," Fed. B. A. Jour., Vol. 3, 1937, p. 83.
- Hyde, Charles Cheney, "Concerning Damages Arising from Neglect to Prosecute," Am. J. Int. Law, Vol. 22, 1928, p. 140.
- Lanier, A. S., "A Claim against Mexico," Va. L. Reg., n.s., Vol. 13, 1928, p. 670.
- McDonald, John J., and Barnett, Carlyle, "The American-Mexican Claims Arbitration," A.B.A. Jour., Vol. 18, 1932, p. 183.
- Nielsen, Fred Kenelm, *International Law Applied to Reclamations* (Washington, 1933).
- Scott, James Brown, "The Settlement of Outstanding Claims between Mexico and the United States," Am. J. Int. Law, Vol. 18, 1924, p. 315.
- U. S. Government, American Mexican Claims Commission under the Act approved December 18, 1942. Report to the Secretary of State with Decisions showing the Reasons for the Allowance or Disallowance of the Claims (Washington, 1948).
- van Vollenhoven, C., "*La Jurisprudence de la Commission Générale de Réclamations entre les Etats-Unis d'Amérique et le Mexique, en 1926*," *Bulletin de l'Institut Intermédiaire International*, Vol. 16, 1927, p. 237.
- "*La Jurisprudence de la Commission Générale de Réclamations entre les Etats-Unis d'Amérique et le Mexique, en Mars-Juillet 1927*," *Bulletin de l'Institut Intermédiaire International*, Vol. 17, 1927, p. 253.
- Woolsey, L. H., "Settlement of Claims between the United States and Mexico," Am. J. Int. Law, Vol. 30, 1936, p. 99.

SECTION I

SPECIAL AGREEMENT : September 8, 1923.

PARTIES : United Mexican States, United States of America.

ARBITRATORS : C. van Vollenhoven (Netherlands), Presiding Commissioner, G. Fernández Macgregor, Mexican Commissioner, Joseph R. Baker, American Commissioner until May 31, 1925, Nathan I. Miller, American Commissioner until January 5, 1926, Edwin B. Parker, American Commissioner until July 17, 1926, Fred K. Nielsen, American Commissioner from July 31, 1926.

REPORT : Opinions of Commissioners under the Convention concluded September 8, 1923 between the United States and Mexico. February 4, 1926, to July 23, 1927. (Government Printing Office, Washington, 1927.)

Convention

GENERAL CLAIMS CONVENTION¹ OF SEPTEMBER 8, 1923

Signed at Washington, September 8, 1923; ratification advised by the Senate of the United States, January 23, 1924; ratified by the President of the United States, February 4, 1924; ratified by Mexico, February 16, 1924; ratifications exchanged at Washington, March 1, 1924; proclaimed by the President of the United States, March 3, 1924

The United States of America and the United Mexican States, desiring to settle and adjust amicably claims by the citizens of each country against the other since the signing on July 4, 1868, of the Claims Convention entered into between the two countries (without including the claims for losses or damages growing out of the revolutionary disturbances in Mexico which form the basis of another and separate Convention), have decided to enter into a Convention with this object, and to this end have nominated as their Plenipotentiaries;

The President of the United States of America:

The Honorables Charles Evans Hughes, Secretary of State of the United States of America, Charles Beecher Warren and John Barton Payne, and

The President of the United Mexican States:

Señor Don Manuel C. Téllez, Chargé d'Affaires ad interim of the United Mexican States at Washington;

Who, after having communicated to each other their respective full powers found to be in due and proper form, have agreed upon the following Articles:

ARTICLE I. All claims (except those arising from acts incident to the recent revolutions) against Mexico of citizens of the United States, whether corporations, companies, associations, partnerships or individuals, for losses or damages suffered by persons or by their properties, and all claims against the United States of America by citizens of Mexico, whether corporations, companies, associations, partnerships or individuals, for losses or damages suffered by persons or by their properties; all claims for losses or damages suffered by citizens of either country by reason of losses or damages suffered by any corporation, company, association or partnership in which such citizens have or have had a substantial and bona fide interest, provided an allotment to the claimant by the corporation, company, association or partnership of his proportion of the loss or damage suffered is presented by the claimant to the Commission hereinafter referred to; and all claims for losses or damages originating from acts of officials or others acting for either Government and resulting in injustice, and which claims may have been presented to either Government for its interposition with the other since the signing of the Claims Convention concluded between the two countries July 4, 1868, and which have remained unsettled, as well as any other such claims which may

¹ Source : Treaties, etc., 1923-1937, Vol. 4, p. 4441.

be filed by either Government within the time hereinafter specified, shall be submitted to a Commission consisting of three members for decision in accordance with the principles of international law, justice, and equity.

Such Commission shall be constituted as follows: one member shall be appointed by the President of the United States; one by the President of the United Mexican States; and the third, who shall preside over the Commission, shall be selected by mutual agreement between the two Governments. If the two Governments shall not agree within two months from the exchange of ratifications of this Convention in naming such third member, then he shall be designated by the President of the Permanent Administrative Council of the Permanent Court of Arbitration at The Hague described in Article XLIX of the Convention for the pacific settlement of international disputes concluded at The Hague on October 18, 1907. In case of the death, absence or incapacity of any member of the Commission, or in the event of a member omitting or ceasing to act as such, the same procedure shall be followed for filling the vacancy as was followed in appointing him.

ARTICLE II. The Commissioners so named shall meet at Washington for organization within six months after the exchange of the ratifications of this Convention, and each member of the Commission, before entering upon his duties, shall make and subscribe a solemn declaration stating that he will carefully and impartially examine and decide, according to the best of his judgment and in accordance with the principles of international law, justice and equity, all claims presented for decision, and such declaration shall be entered upon the record of the proceedings of the Commission.

The Commission may fix the time and place of its subsequent meetings, either in the United States or in Mexico, as may be convenient, subject always to the special instructions of the two Governments.

ARTICLE III. In general, the Commission shall adopt as the standard for its proceedings the rules of procedure established by the Mixed Claims Commission created under the Claims Convention between the two Governments signed July 4, 1868, in so far as such rules are not in conflict with any provision of this Convention. The Commission, however, shall have authority by the decision of the majority of its members to establish such other rules for its proceedings as may be deemed expedient and necessary, not in conflict with any of the provisions of this Convention.

Each Government may nominate and appoint agents and counsel who will be authorized to present to the Commission, orally or in writing, all the arguments deemed expedient in favor of or against any claim. The agents or counsel of either Government may offer to the Commission any documents, affidavits, interrogatories or other evidence desired in favor of or against any claim and shall have the right to examine witnesses under oath or affirmation before the Commission, in accordance with such rules of procedure as the Commission shall adopt.

The decision of the majority of the members of the Commission shall be the decision of the Commission.

The language in which the proceedings shall be conducted and recorded shall be English or Spanish.

ARTICLE IV. The Commission shall keep an accurate record of the claims and cases submitted, and minutes of its proceedings with the dates

thereof. To this end, each Government may appoint a Secretary; these Secretaries shall act as joint Secretaries of the Commission and shall be subject to its instructions. Each Government may also appoint and employ any necessary assistant secretaries and such other assistance as deemed necessary. The Commission may also appoint and employ any persons necessary to assist in the performance of its duties.

ARTICLE V. The High Contracting Parties, being desirous of effecting an equitable settlement of the claims of their respective citizens thereby affording them just and adequate compensation for their losses or damages, agree that no claim shall be disallowed or rejected by the Commission by the application of the general principle of international law that the legal remedies must be exhausted as a condition precedent to the validity or allowance of any claim.

ARTICLE VI. Every such claim for loss or damage accruing prior to the signing of this Convention, shall be filed with the Commission within one year from the date of its first meeting, unless in any case reasons for the delay, satisfactory to the majority of the Commissioners, shall be established, and in any such case the period for filing the claim may be extended not to exceed six additional months.

The Commission shall be bound to hear, examine and decide, within three years from the date of its first meeting, all the claims filed, except as hereinafter provided in Article VII.

Four months after the date of the first meeting of the Commissioners, and every four months thereafter, the Commission shall submit to each Government a report setting forth in detail its work to date, including a statement of the claims filed, claims heard and claims decided. The Commission shall be bound to decide any claim heard and examined within six months after the conclusion of the hearing of such claim and to record its decision.

ARTICLE VII. The High Contracting Parties agree that any claim for loss or damage accruing after the signing of this Convention, may be filed by either Government with the Commission at any time during the period fixed in Article VI for the duration of the Commission; and it is agreed between the two Governments that should any such claim or claims be filed with the Commission prior to the termination of said Commission, and not be decided as specified in Article VI, the two Governments will by agreement extend the time within which the Commission may hear, examine and decide such claim or claims so filed for such a period as may be required for the Commission to hear, examine and decide such claim or claims.

ARTICLE VIII. The High Contracting Parties agree to consider the decision of the Commission as final and conclusive upon each claim decided, and to give full effect to such decisions. They further agree to consider the result of the proceedings of the Commission as a full, perfect and final settlement of every such claim upon either Government, for loss or damage sustained prior to the exchange of the ratifications of the present Convention (except as to claims arising from revolutionary disturbances and referred to in the preamble hereof). And they further agree that every such claim, whether or not filed and presented to the notice of, made, preferred or submitted to such Commission shall from and after the conclusion of the proceedings of the Commission be considered

and treated as fully settled, barred and thenceforth inadmissible, provided the claim filed has been heard and decided.

ARTICLE IX. The total amount awarded in all the cases decided in favor of the citizens of one country shall be deducted from the total amount awarded to the citizens of the other country and the balance shall be paid at Washington or at the City of Mexico, in gold coin or its equivalent to the Government of the country in favor of whose citizens the greater amount may have been awarded.

In any case the Commission may decide that international law, justice and equity require that a property or right be restored to the claimant in addition to the amount awarded in any such case for all loss or damage sustained prior to the restitution. In any case where the Commission so decides the restitution of the property or right shall be made by the Government affected after such decision has been made, as hereinbelow provided. The Commission, however, shall at the same time determine the value of the property or right decreed to be restored and the Government affected may elect to pay the amount so fixed after the decision is made rather than to restore the property or right to the claimant.

In the event the Government affected should elect to pay the amount fixed as the value of the property or right decreed to be restored, it is agreed that notice thereof will be filed with the Commission within thirty days after the decision and that the amount fixed as the value of the property or right shall be paid immediately. Upon failure so to pay the amount the property or right shall be restored immediately.

ARTICLE X. Each Government shall pay its own Commissioner and bear its own expenses. The expenses of the Commission including the salary of the third Commissioner shall be defrayed in equal proportions by the two Governments.

ARTICLE XI. The present Convention shall be ratified by the High Contracting Parties in accordance with their respective Constitutions. Ratifications of this Convention shall be exchanged in Washington as soon as practicable and the Convention shall take effect on the date of the exchange of ratifications.

In witness whereof, the respective Plenipotentiaries have signed and affixed their seals to this Convention.

Done in duplicate at Washington this eighth day of September, 1923.

(Signed) CHARLES EVANS HUGHES.
JOHN BARTON PAYNE.

CHARLES BEECHER WARREN.
MANUEL C. TÉLLEZ.

Decisions

THE GLOBE COTTON OIL MILLS (U.S.A.) v. UNITED MEXICAN STATES.

(*February 4, 1926. Pages 1-2*)¹.

PROCEDURE, MOTION TO REJECT MEMORIAL.—VARIANCE BETWEEN MEMORANDUM AND MEMORIAL OF CLAIM.—AMENDMENT OF MEMORIAL.
 Motion to reject memorial on ground of variance in amount from that set forth in memorandum *denied*.

(*Text of decision omitted.*)

THE GLOBE COTTON OIL MILLS (U.S.A.) v. UNITED MEXICAN STATES.

(*February 11, 1926. Page 2.*)

PROCEDURE, TIME FOR FILING OF ANSWER. Time for filing of answer *held* suspended to date of instant opinion.

(*Text of decision omitted.*)

FLORA LEE (U.S.A.) v. UNITED MEXICAN STATES.

(*February 15, 1926. Page 3.*)

PROCEDURE, MOTION FOR LEAVE TO FILE MEMORIAL.—AMENDMENT OF MEMORIAL. Motion for leave to file separate memorial for part of claim previously filed denied without prejudice to recourse to procedure of filing memorial on basis of memorandum followed by filing of motion to amend such memorial.

(*Text of decision omitted.*)

¹ References to page numbers herein are to the original report referred to on the title page of this section.

PINE KING LAND AND LUMBER CO. (U.S.A.) *v.* UNITED
MEXICAN STATES.

(March 2, 1926. Page 4.)

PROCEDURE, MOTION TO DISMISS.—JURISDICTION OVER CLAIM BASED ON TITLE TO REAL PROPERTY.—LITISPENDENCE. Motion to dismiss, on grounds that claims based on title to real property were outside jurisdiction of tribunal and that a similar claim was pending before a Mexican court, overruled.

(Text of decision omitted.)

CLARA W. RONEY AND GEORGE E. BOLES (U.S.A.) *v.* UNITED
MEXICAN STATES.

(March 2, 1926. Pages 5-6.)

CONFLICTING JURISDICTION OF SPECIAL CLAIMS COMMISSION. Motion to dismiss claims clearly within competence of Special Claims Commission established under Convention of September 10, 1932, granted. Any such claim held outside jurisdiction of tribunal.

These cases are before this Commission on the Mexican Agent's motion to dismiss.

1. The claimants are the widow and father of Frederick John Roney and Early Boles, respectively, who it is alleged were unlawfully killed by armed Mexicans on or about the 5th day of January, 1920.

2. The ground of the motion to dismiss is that it appears on the face of the record that these cases fall within the jurisdiction of the Special Claims Commission, constituted under the Special Claims Convention, and are not within the jurisdiction of this Commission.

3. This Commission is constituted under the terms of the General Claims Convention signed September 8, 1923. The preamble recites that the high contracting parties, "desiring to settle and amicably adjust claims by the citizens of each country against the other * * * (without including the claims for losses or damage growing out of the revolutionary disturbances in Mexico which form the basis of another and separate convention) have decided to enter into a convention with this object". Article I of the Convention, defining in broad and general terms the jurisdiction of this Commission, carves out of its general jurisdiction claims "arising from acts incident to the recent revolutions". The other and separate convention, referred to in the preamble of the General Claims Convention, is that designated "Special Claims Convention" signed September 10, 1923, Article III of which specifies five categories of claims which fall within the jurisdiction of the Special Claims Commission constituted thereunder.

4. The Memorandum, the Memorial and the documents and proofs in support thereof, filed by the American Agent, read together, bring these cases clearly within the jurisdiction of the Special Claims Commission. This being true, this Commission is without jurisdiction to hear and decide them and the motion of the Mexican Agent to dismiss must be sustained.

5. These claims are two out of several hundred, which have been filed by the American Agent with both this Commission and the Special Claims Commission. As the jurisdiction of this Commission is general and as many cases may arise in which, from the facts alleged, it is not clear within which jurisdiction they fall, it will prove helpful to this Commission to have before it, in considering such claims, the opinions of the Special Claims Commission in the series of test cases, already submitted to it, in which it is believed opinions will be rendered at an early date. Such opinions on legal points are entitled to and will have great consideration and will be given great weight by this Commission in construing the exceptions contained in Articles I and VIII and in the preamble of the General Claims Convention.

6. In the cases here presented, however, the allegations contained in the memorandum and supporting exhibits numbered 4, 9, 15, 22, 23, 25, and 29 filed by the American Agent, leave no room to doubt that they fall within the jurisdiction of the Special Claims Commission, and hence that this Commission is without jurisdiction to decide them.

7. It is hereby ordered that docket Nos. 195 and 284, the United States of America on behalf of Clara W. Roney and George E. Boles, respectively, *v.* United Mexican States, be, and they are, hereby dismissed without prejudice to the right of the United States of America to espouse and prosecute them elsewhere.

EL EMPORIO DEL CAFÉ, S.A. (UNITED MEXICAN STATES) *v.*
UNITED STATES OF AMERICA.

(*March 2, 1926. Pages 7-9.*)

PROCEDURE, MOTION TO DISMISS. Upon a motion to dismiss, allegations of memorial to which it is addressed must be taken as confessed.

UNLAWFUL COLLECTION OF CUSTOMS DUTIES BY OCCUPYING MILITARY AUTHORITIES. Claimant paid to occupying American military authorities at Vera Cruz export duties on shipment to Mexican destination *via* port of Vera Cruz. Under Mexican law claimant was entitled to refund of such shipment when it reached its final Mexican destination but respondent Government failed to make such refund after demand. Motion to dismiss for lack of jurisdiction *denied*.

Cross-reference: Annual Digest, 1925-1926, p. 234.

Comments: Edwin M. Borchard, "Decisions of the Claims Commissions, United States and Mexico," Am. J. Int. Law, Vol. 20, 1926, p. 536 at 542.

This case is before the Commission on the American Agent's motion to dismiss. For the purposes of this motion only, the truth of all the allegations in the Memorial filed by the Mexican Agent must be taken as confessed.

1. From the Memorial it appears that the Government of Mexico has espoused and filed this claim on behalf of *El Emporio Del Café, S. A.*, a Mexican corporation, to recover moneys held by the American Government which were paid to it as export duties on shipments of coffee at the customhouse at Veracruz, Mexico, in August, 1914, while it was in military occupation of that city. It is alleged that during such military occupation the Government of Mexico established a temporary customhouse at Orizaba for the collection of customs passing through the port of Veracruz and that the claimant was required to pay, and did pay, to the Mexican customs authorities at Orizaba the same amount paid by claimant to the American authorities at Veracruz; that the shipments of coffee on which these customs duties were paid had for their final destination Ciudad Juárez, Chihuahua, Mexico, and after passing through the ports of Veracruz and New Orleans were delivered to this final destination through this Northern Mexican gateway; that under the laws of Mexico then in effect the claimant became entitled to have refunded it all export duties paid on shipments passing out of Mexico in transit to final destination in Mexico; that the Mexican Government did refund claimant the said customs duties paid to it by claimant at Orizaba, but that a like sum paid by claimant to the American authorities at Veracruz is still withheld by the American Government.

2. The American military forces in occupying Veracruz and in establishing all proper rules and regulations for the government of the occupied territory saw fit to adopt and enforce the laws then prevailing in Mexico for levying and collecting customs duties. Had Mexico on behalf of the claimant merely alleged that the American authorities were not entitled to perform any act of administration at Veracruz, and stopped there, then the Commission would have dismissed this claim; not, to be sure, because of the political background of said occupation, for the Commission shall have to decide very likely several controversies with political backgrounds. Neither does the mere fact that the occupation had been directed by the President of the United States, whose action was approved by the Congress, affect the question presented, for in determining the jurisdiction of this Commission the rank, be it high or low, of the national authorities whose acts are made a basis for complaint is immaterial. While the individual claimant was twice compelled to pay customs duties on the basis of the Mexican tariff laws which, according to these very laws, were due only once; and while one of these payments must therefore have been unlawfully enforced, the Commission is not clothed, by the terms of the Convention under which it is constituted, with jurisdiction to inquire and decide which payment was legal and which illegal. A controversy of this character, constituting a controversy between the two Governments themselves, does not change its nature when presented by either Government in the shape of the claim of an individual, and such a controversy has not been submitted to this Commission by the provisions of the Convention under which it is acting.

3. But the administrative acts of the American representatives during such occupation can and must be examined to determine to what, if any, extent they invaded the rights of Mexican nationals to their damage. The Memorial alleges that while the Mexican tariff laws which the American authorities undertook to administer authorized the collection of export duties which were actually collected, they also required that the duties so paid should be refunded to the shipper when and if the shipments on which duties were paid were reshipped into Mexico. Assuming the truth of said

allegations, it follows that the claimant was entitled to such refund from the American authorities, which has not been made.

4. For the reasons stated, the motion to dismiss is denied, and the respective Agents are directed to prepare this case for final submission in accordance with this interlocutory decision. The running of time for filing the Answer has been suspended from September 18, 1925, to March 2, 1926.

DAVID GONZALEZ (UNITED MEXICAN STATES) *v.* UNITED STATES OF AMERICA.

(March 2, 1926. Pages 9-10.)

UNLAWFUL COLLECTION OF CUSTOMS DUTIES BY OCCUPYING MILITARY AUTHORITIES. Double payment of export duties to Mexican authorities and occupying American military authorities in and of itself does not give rise to a claim within the jurisdiction of the tribunal. Motion to dismiss *denied* without prejudice to amendment of memorial to set forth any other facts bringing claim within jurisdiction of tribunal.

(Text of decision omitted.)

THOMAS O. MUDD (U.S.A.) *v.* UNITED MEXICAN STATES.

(March 2, 1926. Pages 10-11.)

PROCEDURE, MOTION TO DISMISS.—JURISDICTION.—CONTRACT CLAIMS.—CALVO CLAUSE.—ACTS OF MUNICIPALITIES. Motion to dismiss, on ground that claims based on nonperformance of contractual obligations, claims involving Calvo clause, or claims arising from the acts of municipalities in their civil capacity, are outside jurisdiction of tribunal, *dismissed* without prejudice when it appeared on the face of the record that at least some phases of claim were of a character to be within jurisdiction of tribunal. No ruling was thereby made that claims of the character objected to were without the jurisdiction of the tribunal.

(Text of decision omitted.)

ARMANDO COBOS LOPEZ (UNITED MEXICAN STATES) *v.*
UNITED STATES OF AMERICA.

(March 2, 1926. Pages 12-13.)

RESPONSIBILITY FOR ACTS OF MILITARY OCCUPATION.—PROXIMATE CAUSE.

Claimant was a student in the Mexican Naval School in Veracruz closed by order of the President of Mexico upon the occupation of the city by American military forces. Claim for inability to resume education for lack of funds when school reopened *disallowed*.

This case is before this Commission on the American Agent's motion to dismiss.

1. The pertinent paragraphs of the Memorial, as amended by the motion of the Mexican Agent filed February 27, 1926, through which it is sought on behalf of the claimant to fix liability on the United States, read as follows:

"That in the year 1914, he was a student of the Naval School established in the city and port of Veracruz; that as a direct and proximate result of the armed invasion of the said city by forces of the American Government, Venustiano Carranza, President of the United Mexican States at that time, ordered the closing of the Naval School until further orders, i.e., until such time as the port of Veracruz should again come under the control of the National forces; that when the school was reopened, he was absolutely wanting in the means to acquire the necessary equipment, which brought about the impossibility of continuing his career. * * * That the injury suffered by him being the proximate consequence of the occupation of the Naval Academy as a part of the port of Veracruz by the American forces, and inasmuch as it was this act that brought about the closing of the Academy and the impossibility for the claimant to continue his career because of the difficult personal circumstances in which he was left, * * *."

2. The only act of the Government of the United States complained of is the military occupation of Veracruz. According to the allegation of the Memorial, the naval school, which claimant was attending, was closed by order of the President of Mexico. When it reopened, the claimant was unable to re-enter the school for lack of funds. There is no allegation of any wrong cognizable by this Commission committed by the American Government, or for which it is responsible, and resulting either directly or indirectly or remotely in injury to claimant; and it is apparent from the Memorial that no such allegation can be made. It would not be profitable to discuss the remoteness, both in time and in the natural and normal sequence, of the damage alleged, to the act complained of; although it is apparent that such act was not in legal contemplation the proximate cause of such damage. It therefore follows that the motion of the American Agent to dismiss this claim must be sustained.

3. The Commission decrees that the Government of the United States of America is not obligated to pay to the Government of the United Mexican States, any amount on account of the claim asserted herein on behalf of Armando Cobos Lopez.

JOSEPH E. DAVIES (U.S.A.) *v.* UNITED MEXICAN STATES.*(March 2, 1926. Pages 13-14.)*

JURISDICTION.—CONTRACT CLAIMS. Claim for non-performance of a contractual obligation. Motion to dismiss, for lack of jurisdiction, *overruled*.

This case is before this Commission on the Mexican Agent's motion to dismiss.

1. The motion rests on the assertion that claims based on an alleged nonperformance of contractual obligations are outside the jurisdiction of this Commission.

2. Although the allegation of nonperformance of contractual obligations is apparent on the face of the record, it does not necessarily follow as a legal conclusion that the claim does not fall within the General Claims Convention.

3. The Commission therefore overrules the motion without prejudice. The running of time for filing the Answer has been suspended from January 27, 1926, to March 2, 1926.

WILLIAM A. PARKER (U.S.A.) *v.* UNITED MEXICAN STATES.*(March 2, 1926. Page 14.)*

PROCEDURE, MOTION TO DISMISS.—NATIONALITY, PROOF OF. When on the face of the record it appeared that claimant was an American national, motion to dismiss *overruled*.

(Text of decision omitted.)

ILLINOIS CENTRAL RAILROAD COMPANY (U.S.A.) *v.* UNITED MEXICAN STATES.*(March 31, 1926. Pages 15-21.)*

JURISDICTION, *compromis* BASIS FOR. The *compromis* is the tribunal's charter and its terms determine the scope of the tribunal's jurisdiction.

CONTRACT CLAIMS. Contract claims *held* within the tribunal's jurisdiction by virtue of terms of *compromis*.

DENIAL OF JUSTICE.—EXHAUSTION OF LOCAL REMEDIES. Article V of *compromis* construed to require some resort to local remedies, though not necessarily an exhaustion of such remedies, in order that tribunal may have jurisdiction.

Cross-references: Am. J. Int. Law, Vol. 20, 1926, p. 794; Annual Digest, 1925-1926, pp. 4, 215, 235, 407.

Comments: Edwin M. Borchard, "Decisions of the Claims Commissions, United States and Mexico," Am. J. Int. Law, Vol. 20, 1926, p. 536.

This case is before this Commission on the Mexican Agent's motion to dismiss.

1. The claim is put forward by the United States of America on behalf of the Illinois Central Railroad Company (an American corporation) to recover the sum of \$1,807,531.36, with interest thereon from April 1, 1925, alleged to be the balance due on 91 locomotive engines sold and delivered by the claimant to the Government Railway Administration of the National Railways of Mexico. The grounds of the motion to dismiss are (first) that the claim is based on an alleged nonperformance of contractual obligations and therefore not within the jurisdiction of this Commission and (second) that, the obligation itself not being denied by Mexico, no controversy exists for the decision of this Commission.

Jurisdiction over contract claims

2. The challenge of this Commission's jurisdiction to hear and decide any case grounded on a breach of contract obligations requires an examination and construction of the terms of the Treaty to ascertain the scope of this Commission's jurisdiction, which must be determined by it.

3. This Commission is constituted in pursuance of the provisions of a Convention entered into between the United States of America and the United Mexican States, signed at Washington September 8, 1923, which became effective on March 1, 1924. Its terms clothe this Commission with the jurisdiction and power and made it its duty to hear, examine, and decide:

- (a) All claims against one Government by nationals of the other for losses or damages suffered by such nationals or by their properties; and
- (b) All claims for losses or damages originating from acts of officials or others acting for either Government and resulting in injustice; but
- (c) There is excepted from the foregoing categories claims "arising from acts incident to the recent revolutions".

The examination and application of clause (a) will suffice for the disposition of this case.

4. Before entering upon this examination the Commission feels bound to state that any representation of international jurisprudence, and especially of the jurisprudence of the Mexican Claims Commission of 1868, intended to proclaim in a general way that such jurisprudence was either in favor of jurisdiction over contract claims or disclaimed jurisdiction over contract claims, is contrary to the wording of the awards themselves. Whatever statements from authors in this respect it may be possible to quote, a perusal of the very awards clearly shows that not only either allowance or disallowance of contract claims is not their general and uniform feature but that it is even impracticable to deduce from them one consistent system. A rule that contract claims are cognizable only in case denial of justice or any other form of governmental responsibility is involved is not in them; nor can a general rule be discovered according to which mere nonperformance of contractual obligations by a government in its civil capacity withholds jurisdiction, whereas it grants jurisdiction when the nonperformance is accompanied by some feature of the public capacity of the Government as an authority. It seems especially hazardous to construe awards like the umpire's in the Pond case, the Treadwell case, the De Witt case, the Kearney case, etc. (Moore, 3466-3469), as if they decided in favor of jurisdiction over

contract claims but dismissed the claims on their merits. As, moreover, no claims convention or arbitration treaty known to the Commission used exactly the wording of the present Convention of September 8, 1923 (though the treaty of August 7, 1892, between the United States and Chile comes near to it; (Moore, 4691), the Commission has to seek its own way.

5. The Treaty is this Commission's charter. It must look primarily to the language of that Treaty, and particularly to Articles I and VIII and the preamble, to discover the scope and limits of its jurisdiction. The words "all claims for losses or damages suffered by persons or by their properties" (except one group of claims only which has been turned over to a Special Claims Commission) indicate in themselves a broad and liberal spirit underlying and permeating this Treaty; and it is well known to have been the purpose of the negotiators to have by this Convention removed a source of irritation between the two Nations and a constant menace to their friendly intercourse. The phrase "for losses or damages suffered by persons or by their properties" is broader than any provision in similar previous treaties with Mexico—apart from Article VI of the treaty of January 30, 1843, which says "all claims", and from the unratified treaty of November 20, 1843, which said the same (Moore, 1245, 1246; Malloy, 1120). This phrase in no wise limits the preceding phrase "all claims" save that it in effect restricts the Commission's jurisdiction to claims susceptible of measurement by pecuniary standards and excludes those of either a speculative or a punitive character. For all practical purposes the initial words "All claims" of Article I are as broad as the like phrase embodied in the unratified treaty of 1843. This is emphasized by the fact that the other clause in Article I contained in the foregoing paragraph 3 (*b*), providing for a special contingency repeats this same phrase, "all claims", and merely adds thereto "for losses, or damages * * * resulting in injustice".

6. Must these opening words of Article I be construed in the light of the closing words of paragraph (1) of the same article, reading that the claims should be decided "in accordance with the principles of international law", etc., to the effect that "all claims" must mean all claims for which either government is responsible according to international law? The conclusion suggested exceeds what is required by logic and in the Commission's view goes too far. If it be true that all the claims of Article I should be decided "in accordance with the principles of international law", etc., the only permissible inference is that they must be claims of an international character, not that they must be claims entailing international responsibility of governments. International claims, needing decisions in "accordance with the principles of international law", may belong to any of four types:

(*a*) Claims as between a national of one country and a national of another country. These claims are international, even in cases where international law declares one of the municipal laws involved to be exclusively applicable: but they do not fall within Article I.

(*b*) Claims as between two national governments in their own right. These claims also are international and also are outside the scope of Article I.

(*c*) Claims as between a citizen of one country and the government of another country acting in its public capacity. These claims are beyond doubt included in Article I.

(*d*) Claims as between a citizen of one country and the government of another country acting in its civil capacity. These claims too are international in their character, and they too must be decided "in accordance with the

principles of international law", even in cases where international law should merely declare the municipal law of one of the countries involved to be applicable.

It seems impossible to maintain that legal pretensions belonging to this fourth category are not "claims". It seems equally impossible to maintain that they are not "international claims". If it were advanced that a state turning over claims of this category to an international tribunal waives part of its sovereignty, this would be true; but so does every treaty containing provisions which depart from pure municipal law, as the majority of treaties do. It is entirely clear that on several occasions both the United States and Mexico expressly gave claims commissions jurisdiction over contract claims, showing thereby that in principle conferring on an international tribunal jurisdiction over contract claims is not contrary to their legal conceptions. The so-called Porter Convention of the Second Hague Peace Conference of 1907, to which both the United States and Mexico are parties, though having for its object the prevention of the use of force in collecting debts growing out of contract obligations until other methods, including arbitration, had been exhausted, nevertheless is a striking illustration of the recognition of contract claims as proper subjects for submission to an international tribunal. The Commission concludes that the final words of Article I, which provide that it shall decide cases submitted to it "in accordance with the principles of international law, justice and equity", prescribe the rules and principles which shall govern in the decision of claims falling within its jurisdiction but in no wise limit the preceding clauses, which do fix this Commission's jurisdiction.

7. The argument is advanced that as Article V waives the requirement that as a prerequisite to diplomatic intervention remedies before local courts must be exhausted and as under its laws the United States can be sued only on claims arising out of contract, therefore Article V must refer to contract claims, as these are the only claims which could be enforced by local American tribunals. This argument lacks force inasmuch as Article V applies as well to Mexico as to the United States and under Mexican law not only claims against the Mexican Government based on contract but on other property rights or on torts may be enforced through the courts.

8. This much for the text of the Treaty of 1923. There remains the question whether there has been a misunderstanding on the part of the Mexican negotiators of this Treaty with respect to the inclusion of contract claims within its terms. In the absence of all evidence in this respect, an assumption to this effect appears to the Commission unlikely. If the Mexican negotiators of May-August, 1923, had been in doubt as to the views of the American Government relative to contract claims and had been desirous to ascertain it, nothing would have been more obvious than to consult Charles Cheney Hyde's book of 1922, "International Law Chiefly as Interpreted and Applied by the United States"; the more so as since February, 1923, the author was solicitor in the State Department at Washington. Volume I, page 559, of this work sums up the attitude of the United States in the following words:

"That it is disposed both to seek and permit the adjustment by arbitration of contractual claims of American citizens against foreign governments, as well as those of citizens of foreign States against itself. Arbitrators have, moreover, not hesitated to interpret broadly the scope of jurisdiction conferred upon them."

It is irrelevant and immaterial to consider the correctness of this interpretation of Mr. Hyde; the quotation is conclusive to show that if the Mexican

negotiators had felt in want of acquainting themselves with current American views as to international jurisdiction over contract claims, they can not possibly have been victims of the impression that the United States was averse to including contract claims.

9. From the foregoing considerations no other deduction is possible than that claims arising from breach of contract obligations are included within the terms of Article I of the Treaty of 1923. This is in conformity with what is known about the broad and liberal intention of the negotiators of the Treaty as recalled in paragraph 5 above. The attention of the Commission has been directed to some of the secret records of the negotiations between the representatives of the two Nations preliminary to the conclusion of this Treaty. These records tend to confirm the soundness of the conclusion reached by the Commission independent of them.

10. That there may be no possible confusion of thought, the Commission expressly states that in what is above written it has not considered the problem whether in the absence of a claims convention a foreign office would be entitled to resort to diplomatic intervention on account of the nonperformance of contractual obligations owing to one of its nationals by the government of another country. Some high executive authorities have denied this right; others have held that it could not be doubted. It is not for this Commission to pronounce upon this problem; the Commission bases its opinion with respect to its jurisdiction on the terms of an express claims convention.

Exhaustion of legal remedies in local courts

11. The construction and application of Article V of the Treaty of 1923 has been called in question in connection with the problem of the Commission's jurisdiction over contract claims. The Commission has no hesitation in rejecting the contention that while under Article V the legal remedies need not be "exhausted" some resort must nevertheless be had to the local tribunals before the claim can be so impressed with an international character as to confer jurisdiction on this Commission.

Influence of nondenial of obligation on jurisdiction

12. Nonperformance of a contractual obligation may consist either in denial of the obligation itself and nonperformance as a consequence of such denial, or in acknowledgement of the obligation itself and nonperformance notwithstanding such acknowledgment. In both cases such nonperformance may be the basis of a claim cognizable by this Commission. The fact that the debtor is a sovereign nation does not change the rule. Neither is the rule changed by the fact that the default may arise not from choice but from necessity.

Decision

13. From the foregoing it follows that the motion to dismiss must be and is hereby denied. The running of time for filing the Answer has been suspended from November 19, 1925, to March 31, 1926.

NORTH AMERICAN DREDGING COMPANY OF TEXAS (U.S.A.)
v. UNITED MEXICAN STATES.

(March 31, 1926, concurring opinion by American Commissioner, undated.
Pages 21-34).

JURISDICTION.—CALVO CLAUSE. A Calvo clause *held* to bar claimant from presenting to his Government any claim connected with the contract in which it appeared and hence to place any such claim beyond the jurisdiction of the tribunal. The clause will not preclude his Government from espousing, or the tribunal from considering, other claims based on the violation of international law. Article V of the *compromis* *held* not to prevent the foregoing result.

CONTRACT CLAIMS. Motion to dismiss, for lack of jurisdiction, claim based on non-performance of a contract with Mexican Government *rejected*.

Cross-references: Am. J. Int. Law, Vol. 20, 1926, p. 800; Annual Digest, 1925-1926, pp. 4, 179, 191, 218, 244, 261, 292; British Yearbook, Vol. 8, 1927, p. 181.

Comments: Edwin M. Borchard, "Decisions of the Claims Commissions, United States and Mexico," Am. J. Int. Law, Vol. 20, 1926, p. 536 at 538; Sir John H. Percival, "International Arbitral Tribunals and the Mexican Claims Commissions," Jour. Compar. Legis. and Int. Law, 3d ser., Vol. 19, 1937, p. 98 at 102; G. Godfrey Phillips, "The Anglo-Mexican Special Claims Commission," Law Q. Rev., Vol. 49, 1933, p. 226 at 234; Lionel Summers, "*La clause Calvo: tendances nouvelles*," Rev. de Droit Int., Vol. 12, 1933, p. 229 at 232.

This case is before this Commission on a motion of the Mexican Agent to dismiss. It is put forward by the United States of America on behalf of North American Dredging Company of Texas, an American corporation, for the recovery of the sum of \$233,523.30 with interest thereon, the amount of losses and damages alleged to have been suffered by claimant for breaches of a contract for dredging at the port of Salina Cruz, which contract was entered into between the claimant and the Government of Mexico, November 23, 1912. The contract was signed at Mexico City. The Government of Mexico was a party to it. It had for its subject matter services to be rendered by the claimant in Mexico. Payment therefor was to be made in Mexico. Article 18, incorporated by Mexico as an indispensable provision, not separable from the other provisions of the contract, was subscribed to by the claimant for the purpose of securing the award of the contract. Its translation by the Mexican Agent reads as follows:

"The contractor and all persons who, as employees or in any other capacity, may be engaged in the execution of the work under this contract either directly or indirectly, shall be considered as Mexicans in all matters, within the Republic of Mexico, concerning the execution of such work and the fulfilment of this contract. They shall not claim, nor shall they have, with regard to the interests and the business connected with this contract, any other rights or means to enforce the same than those granted by the laws of the Republic to Mexicans,

nor shall they enjoy any other rights than those established in favor of Mexicans. They are consequently deprived of any rights as aliens, and under no conditions shall the intervention of foreign diplomatic agents be permitted, in any matter related to this contract."

1. The jurisdiction of the Commission is challenged in this case on the grounds (first) that claims based on an alleged nonperformance of contract obligations are outside the jurisdiction of this Commission and (second) that a contract containing the so-called Calvo clause deprives the party subscribing said clause of the right to submit any claims connected with his contract to an international commission.

2. The Commission, in its decision this day rendered on the Mexican motion to dismiss the Illinois Central Railroad Company case, Docket No. 432, has stated the reasons why it deems contractual claims to fall within its jurisdiction. It is superfluous to repeat them. The first ground of the motion is therefore rejected.

The Calvo clause

3. The Commission is fully sensible of the importance of any judicial decision either sustaining in whole or in part, or rejecting in whole or in part, or construing the so-called "Calvo clause" in contracts between nations and aliens. It appreciates the legitimate desire on the part of nations to deal with persons and property within their respective jurisdictions according to their own laws and to apply remedies provided by their own authorities and tribunals, which laws and remedies in no wise restrict or limit their international obligations, or restrict or limit or in any wise impinge upon the correlative rights of other nations protected under rules of international law. The problem presented in this case is whether such legitimate desire may be accomplished through appropriate and carefully phrased contracts; what form such a contract may take; what is its scope and its limitations; and does clause 18 of the contract involved in this case fall within the field where the parties are free to contract without violating any rule of international law?

4. The Commission does not feel impressed by arguments either in favor of or in opposition to the Calvo clause, in so far as these arguments go to extremes. The Calvo clause is neither upheld by all outstanding international authorities and by the soundest among international awards nor is it universally rejected. The Calvo clause in a specific contract is neither a clause which must be sustained to its full length because of its contractual nature nor can it be discretionarily separated from the rest of the contract as if it were just an accidental postscript. The problem is not solved by saying yes or no; the affirmative answer exposing the rights of foreigners to undeniable dangers, the negative answer leaving to the nations involved no alternative except that of exclusion of foreigners from business. The present stage of international law imposes upon every international tribunal the solemn duty of seeking for a proper and adequate balance between the sovereign right of national jurisdiction, on the one hand, and the sovereign right of national protection of citizens on the other. No international tribunal should or may evade the task of finding such limitations of both rights as will render them compatible within the general rules and principles of international law. By merely ignoring world-wide abuses either of the right of national protection or of the right of national jurisdiction no solution compatible with the requirements of modern international law can be reached.

5. At the very outset the Commission rejects as unsound a presentation of the problem according to which if article 18 of the present contract were upheld Mexico or any other nation might lawfully bind all foreigners by contract to relinquish all rights of protection by their governments. It is quite possible to recognize as valid some forms of waiving the right of foreign protection without thereby recognizing as valid and lawful every form of doing so.

6. The Commission also denies that the rules of international public law apply only to nations and that individuals can not under any circumstances have a personal standing under it. As illustrating the antiquated character of this thesis it may suffice to point out that in article 4 of the unratified International Prize Court Convention adopted at The Hague in 1907 and signed by both the United States and Mexico and by 29 other nations this conception, so far as ever held, was repudiated.

7. It is well known how largely the increase of civilization, intercourse, and interdependence as between nations has influenced and moderated the exaggerated conception of national sovereignty. As civilization has progressed individualism has increased; and so has the right of the individual citizen to decide upon the ties between himself and his native country. There was a time when governments and not individuals decided if a man was allowed to change his nationality or his residence, and when even if he had changed either of them his government sought to lay burdens on him for having done so. To acknowledge that under the existing laws of progressive, enlightened civilization a person may voluntarily expatriate himself but that short of expatriation he may not by contract, in what he conceives to be his own interest, to any extent loosen the ties which bind him to his country is neither consistent with the facts of modern international intercourse nor with corresponding developments in the field of international law and does not tend to promote good will among nations.

Lawfulness of the Calvo clause

8. The contested provision, in this case, is part of a contract and must be upheld unless it be repugnant to a recognized rule of international law. What must be established is not that the Calvo clause is universally accepted or universally recognized, but that there exists a generally accepted rule of international law condemning the Calvo clause and denying to an individual the right to relinquish to any extent, large or small, and under any circumstances or conditions, the protection of the government to which he owes allegiance. Only in case a provision of this or any similar tendency were established could a parallel be drawn between the illegality of the Calvo clause in the present contract and the illegality of a similar clause in the Arkansas contract declared void in 1922 by the Supreme Court of the United States (257 U.S. 529) because of its repugnance to American statute provisions. It is as little doubtful nowadays as it was in the day of the Geneva Arbitration that international law is paramount to decrees of nations and to municipal law; but the task before this Commission precisely is to ascertain whether international law really contains a rule prohibiting contract provisions attempting to accomplish the purpose of the Calvo clause.

9. The commission does not hesitate to declare that there exists no international rule prohibiting the sovereign right of a nation to protect its citizens

abroad from being subject to any limitation whatsoever under any circumstances. The right of protection has been limited by treaties between nations in provisions related to the Calvo clause. While it is true that Latin-American countries—which are important members of the family of nations and which have played for many years an important and honorable part in the development of international law—are parties to most of these treaties, still such countries as France, Germany, Great Britain, Sweden, Norway, and Belgium, and in one case at least even the United States of America (Treaty between the United States and Peru dated September 6, 1870, Volume 2, Malloy's United States Treaties, at page 1426; article 37) have been parties to treaties containing such provisions.

10. What Mexico has asked of the North American Dredging Company of Texas as a condition for awarding it the contract which it sought is, "If all of the means of enforcing your rights under this contract afforded by Mexican law, even against the Mexican Government itself, are wide open to you, as they are wide open to our own citizens, will you promise not to ignore them and not to call directly upon your own Government to intervene in your behalf in connexion with any controversy, small or large, but seek redress under the laws of Mexico through the authorities and tribunals furnished by Mexico for your protection?" and the claimant, by subscribing to this contract and seeking the benefits which were to accrue to him thereunder, has answered, "I promise".

11. Under the rules of international law may an alien lawfully make such a promise? The Commission holds that he may, but at the same time holds of that he can not deprive the government of his nation of its undoubted right of applying international remedies to violations of international law committed to his damage. Such government frequently has a larger interest in maintaining the principles of international law than in recovering damage for one of its citizens in a particular case, and manifestly such citizen can not by contract tie in this respect the hands of his Government. But while any attempt to so bind his Government is void, the Commission has not found any generally recognized rule of positive international law which would give to his Government the right to intervene to strike down a lawful contract, in the terms set forth in the preceding paragraph 10, entered into by its citizen. The obvious purpose of such a contract is to prevent abuses of the right to protection, not to destroy the right itself—abuses which are intolerable to any self-respecting nation and are prolific breeders of international friction. The purpose of such a contract is to draw a reasonable and practical line between Mexico's sovereign right of jurisdiction within its own territory, on the one hand, and the sovereign right of protection of the Government of an alien whose person or property is within such territory, on the other hand. Unless such line is drawn and if these two coexisting rights are permitted constantly to overlap, continual friction is inevitable.

12. It being impossible to prove the illegality of the said provision, under the limitations indicated, by adducing generally recognized rules of positive international law, it apparently can only be contested by invoking its incongruity to the law of nature (natural rights) and its inconsistency with inalienable, indestructible, unprescriptible, uncurtailable rights of nations. The law of nature may have been helpful, some three centuries ago, to build up a new law of nations, and the conception of inalienable rights of men and nations may have exercised a salutary influence, some one hundred and fifty years ago, on the development of modern democracy on both sides of the

ocean; but they have failed as a durable foundation of either municipal or international law and can not be used in the present day as substitutes for positive municipal law, on the one hand, and for positive international law, as recognized by nations and governments through their acts and statements, on the other hand. Inalienable rights have been the cornerstones of policies like those of the Holy Alliance and of Lord Palmerston; instead of bringing to the world the benefit of mutual understanding, they are to weak or less fortunate nations an unrestrained menace.

Interpretation of the Calvo clause in the present contract

13. What is the true meaning of article 18 of the present contract? It is essential to state that the closing words of the article should be combined so as to read: "being deprived, in consequence, of any rights as aliens *in any matter connected with this contract*, and without the intervention of foreign diplomatic agents being in any case permissible *in any matter connected with this contract*". Both the commas and the phrasing show that the words "in any matter connected with this contract" are a limitation on either of the two statements contained in the closing words of the article.

14. Reading this article as a whole, it is evident that its purpose was to bind the claimant to be governed by the laws of Mexico and to use the remedies existing under such laws. The closing words "in any matter connected with this contract" must be read in connection with the preceding phrase "in everything connected with the execution of such work and the fulfillment of this contract" and also in connection with the phrase "regarding the interests or business connected with this contract". In other words, in executing the contract, in fulfilling the contract, or in putting forth any claim "regarding the interests or business connected with this contract", the claimant should be governed by those laws and remedies which Mexico had provided for the protection of its own citizens. But this provision did not, and could not, deprive the claimant of his American citizenship and all that that implies. It did not take from him his undoubted right to apply to his own Government for protection if his resort to the Mexican tribunals or other authorities available to him resulted in a denial or delay of justice as that term is used in international law. In such a case the claimant's complaint would be not that his contract was violated but that he had been denied justice. The basis of his appeal would be not a construction of his contract, save perchance in an incidental way, but rather an internationally illegal act.

15. What, therefore, are the rights which claimant waived and those which he did not waive in subscribing to article 18 of the contract? (a) He waived his right to conduct himself as if no competent authorities existed in Mexico; as if he were engaged in fulfilling a contract in an inferior country subject to a system of capitulations; and as if the only real remedies available to him in the fulfillment, construction, and enforcement of this contract were international remedies. All these he waived and had a right to waive. (b) He did not waive any right which he possessed as an American citizen as to any matter not connected with the fulfillment, execution, or enforcement of this contract as such. (c) He did not waive his undoubted right as an American citizen to apply to his Government for protection against the violation of international law (internationally illegal acts) whether growing out of this

contract or out of other situations. (d) He did not and could not affect the right of his Government to extend to him its protection in general or to extend to him its protection against breaches of international law. But he did frankly and unreservedly agree that in consideration of the Government of Mexico awarding him this contract, he did not need and would not invoke or accept the assistance of his Government with respect to the fulfilment and interpretation of his contract and the execution of his work thereunder. The conception that a citizen in doing so impinges upon a sovereign, inalienable, unlimited right of his government belongs to those ages and countries which prohibited the giving up of his citizenship by a citizen or allowed him to relinquish it only with the special permission of his government.

16. It is quite true that this construction of article 18 of the contract does not effect complete equality between the foreigner subscribing the contract on the one hand and Mexicans on the other hand. Apart from the fact that equality of legal status between citizens and foreigners is by no means a requisite of international law—in some respects the citizen has greater rights and larger duties, in other respects the foreigner has—article 18 only purposes equality between the foreigner and Mexicans with respect to the execution, fulfilment, and interpretation of this contract and such limited equality is properly obtained.

17. The Commission ventures to suggest that it would strengthen and stimulate friendly relations between nations if in the future such important clauses in contracts as article 18 in the contract in question were couched in such clear, simple, and straightforward language, frankly expressing its purpose with all necessary limitations and restraints as would preclude the possibility of misinterpretation and render it insusceptible of such extreme construction as sought to be put upon article 18 in this instance, which if adopted would result in striking it down as illegal.

The Calvo clause and the claimant

18. If it were necessary to demonstrate how legitimate are the fears of certain nations with respect to abuses of the right of protection and how seriously the sovereignty of those nations within their own boundaries would be impaired if some extreme conceptions of this right were recognized and enforced, the present case would furnish an illuminating example. The claimant, after having solemnly promised in writing that it would not ignore the local laws, remedies, and authorities, behaved from the very beginning as if article 18 of its contract had no existence in fact. It used the article to procure the contract, but this was the extent of its use. It has never sought any redress by application to the local authorities and remedies which article 18 liberally granted it and which, according to Mexican law, are available to it, even against the Government, without restrictions, both in matter of civil and of public law. It has gone so far as to declare itself freed from its contract obligations by its *ipse dixit* instead of having resort to the local tribunals to construe its contract and its rights thereunder. And it has gone so far as to declare that it was not bound by article 7 of the contract and to forcibly remove a dredge to which, under that article, the Government of Mexico considered itself entitled as security for the proper fulfilment of its contract with claimant. While its behavior during the spring and summer of 1914, the latter part of the Huerta administration, may be in part explained by the unhappy conditions of friction then existing between the

two countries in connection with the military occupation of Veracruz by the United States, this explanation can not be extended from the year 1917 to the date of the filing of its claim before this Commission, during all of which time it has ignored the open doors of Mexican tribunals. The record before this Commission strongly suggests that the claimant used article 18 to procure the contract with no intention of ever observing its provisions.

The Calvo clause and the Claims Convention

19. Claims accruing prior to the signing of the Treaty must, in order to fall within the jurisdiction of this Commission under Article I of the Treaty, either have been "presented" before September 8, 1923, by a citizen of one of the Nations parties to the agreement "to [his] Government for its interposition *with the other*", or, after September 8, 1923, "such claims"—*i.e.*, claims presented for interposition—may be filed by either Government *with this Commission*. Two things are therefore essential, (1) the presentation by the citizen of a claim to his Government and (2) the espousal of such claim by that Government. But it is urged that when a Government espouses and presents a claim here, the private interest in the claim is merged in the Nation in the sense that the private interest is entirely eliminated and the claim is a national claim, and that therefore this Commission can not look behind the act of the Government espousing it to discover the private interest therein or to ascertain whether or not the private claimant has presented or may rightfully present the claim to his Government for interposition. This view is rejected by the Commission for the reasons set forth in the second paragraph of the opinion in the Parker claim (Docket No. 127), this day decided by this Commission, and need not be repeated here.

20. Under article 18 of the contract declared upon the present claimant is precluded from presenting to its Government any claim relative to the interpretation or fulfillment of this contract. If it had a claim for denial of justice, for delay of justice or gross injustice, or for any other violation of international law committed by Mexico to its damage, it might have presented such a claim to its Government, which in turn could have espoused it and presented it here. Although the claim as presented falls within the first clause of Article I of the Treaty, describing claims coming within this Commission's jurisdiction, it is not a claim that may be rightfully presented by the claimant to its Government for espousal and hence is not cognizable here, pursuant to the latter part of paragraph 1 of the same Article I.

21. It is urged that the claim may be presented by claimant to its Government for espousal in view of the provision of Article V of the Treaty, to the effect "that no claim shall be disallowed or rejected by the Commission by the application of the general principle of international law that the legal remedies must be exhausted as a condition precedent to the validity or allowance of any claim". This provision is limited to the application of a general principle of international law to claims that may be presented to the Commission falling within the terms of Article I of the Treaty, and if under the terms of Article I the private claimant can not rightfully present its claim to its Government and the claim therefore can not become cognizable here, Article V does not apply to it, nor can it render the claim cognizable, nor does it entitle either Government to set aside an express valid contract between one of its citizens and the other Government.

Extent of the present interpretation of the Calvo clause

22. Manifestly it is impossible for this Commission to announce an all-embracing formula to determine the validity or invalidity of all clauses partaking of the nature of the Calvo clause, which may be found in contracts, decrees, statutes, or constitutions, and under widely varying conditions. Whenever such a provision is so phrased as to seek to preclude a Government from intervening, diplomatically or otherwise, to protect its citizen whose rights of any nature have been invaded by another Government in violation of the rules and principles of international law, the Commission will have no hesitation in pronouncing the provision void. Nor does this decision in any way apply to claims not based on express contract provisions in writing and signed by the claimant or by one through whom the claimant has deraigned title to the particular claim. Nor will any provision in any constitution, statute, law, or decree, whatever its form, to which the claimant has not in some form expressly subscribed in writing, howsoever it may operate or affect his claim, preclude him from presenting his claim to his Government or the Government from espousing it and presenting it to this Commission for decision under the terms of the Treaty.

23. Even so, each case involving application of a valid clause partaking of the nature of the Calvo clause will be considered and decided on its merits. Where a claim is based on an alleged violation of any rule or principle of international law, the Commission will take jurisdiction notwithstanding the existence of such a clause in a contract subscribed by such claimant. But where a claimant has expressly agreed in writing, attested by his signature, that in all matters pertaining to the execution, fulfilment, and interpretation of the contract he will have resort to local tribunals, remedies, and authorities and then wilfully ignores them by applying in such matters to his Government, he will be held bound by his contract and the Commission will not take jurisdiction of such claim.

Summary of the considerations on the Calvo clause

24. (a) The Treaty between the two Governments under which this Commission is constituted requires that a claim accruing before September 8, 1923, to fall within its jurisdiction must be that of a citizen of one Government against the other Government and must not only be espoused by the first Government and put forward by it before this Commission but, as a condition precedent to such espousal, must have been presented to it for its interposition by the private claimant.

(b) The question then arises, Has the private claimant in this case put itself in a position where it has the right to present its claim to the Government of the United States for its interposition? The answer to this question depends upon the construction to be given to article 18 of the contract on which the claim rests.

(c) In article 18 of the contract the claimant expressly agreed that in all matters connected with the execution of the work covered by the contract and the fulfilment of its contract obligations and the enforcement of its contract rights it would be bound and governed by the laws of Mexico administered by the authorities and courts of Mexico and would not invoke or accept the assistance of his Government. Further than this it did not bind itself. Under the rules of international law the claimant (as well as the

Government of Mexico) was without power to agree, and did not in fact agree, that the claimant would not request the Government of the United States, of which it was a citizen, to intervene in its behalf in the event of internationally illegal acts done to the claimant by the Mexican authorities.

(d) The contract declared upon, which was sought by claimant, would not have been awarded it without incorporating the substance of article 18 therein. The claimant does not pretend that it has made any attempt to comply with the terms of that article, which as here construed is binding on it. Therefore the claimant has not put itself in a position where it may rightfully present this claim to the Government of the United States for its interposition.

(e) While it is true that under Article V of the Treaty the two Governments have agreed "that no claim shall be disallowed or rejected by the Commission by the application of the general principle of international law that the legal remedies must be exhausted as a condition precedent to the validity or allowance of any claim", this provision is limited to claims falling under Article I and therefore rightfully presented by the claimant.

(f) If it were necessary to so construe article 18 of the contract as to bind the claimant not to apply to its Government to intervene diplomatically or otherwise in the event of a denial of justice to the claimant growing out of the contract declared upon or out of any other situation, then this Commission would have no hesitation in holding such a clause void *ab initio* and not binding on the claimant.

(g) The foregoing pertains to the power of the claimant to bind itself by contract. It is clear that the claimant could not under any circumstances bind its Government with respect to remedies for violations of international law.

(h) As the claimant voluntarily entered into a legal contract binding itself not to call as to this contract upon its Government to intervene in its behalf, and as all of its claim relates to this contract, and as therefore it can not present its claim to its Government for interposition or espousal before this Commission, the second ground of the notion to dismiss is sustained.

Decision

25. The Commission decides that the case as presented is not within its jurisdiction and the motion of the Mexican Agent to dismiss it is sustained and the case is hereby dismissed without prejudice to the claimant to pursue his remedies elsewhere or to seek remedies before this Commission for claims arising after the signing of the Treaty of September 8, 1923.

Concurring opinion

My fellow Commissioners construe article 18 of the contract before the Commission in this case to mean that with respect to all matters involving the execution, fulfillment, and interpretation of that contract the claimant bound itself to exhaust all remedies afforded under Mexican law by resorting to Mexican tribunals or other duly constituted Mexican authorities before applying to its own Government for diplomatic or other protection, and that this article imposes no other limitation upon any right of claimant.

They further hold that said article 18 was not intended to and does not prevent claimant from requesting its Government to intervene in its behalf

diplomatically or otherwise to secure redress for any wrong which it may heretofore have suffered or may hereafter suffer at the hands of the Government of Mexico resulting from a denial of justice, or delay of justice, or any other violation by Mexico of any right which claimant is entitled to enjoy under the rules and principles of international law, whether such violation grows out of this contract or otherwise. I have no hesitation in concurring in their decision that any provision attempting to bind the claimant in the manner mentioned in this paragraph would have been void *ab initio* as repugnant to the rules and principles of international law.

Article 18, as thus construed, in effect does nothing more than bind the claimant by contract to observe the general principle of international law which the parties to this Treaty have expressly recognized in Article V thereof. Mexico's motive for expressly incorporating this rule as an indispensable provision of the contract, which could be ignored by the claimant only by subjecting itself to the penalties flowing from its breach of the contract seems both obvious and reasonable and in harmony with the spirit and not repugnant to the letter of the rules and principles of international law. The provision as thus construed should be treated both by claimant and its Government with the scrupulous and unfaltering respect due any legal contract.

Accepting as correct my fellow Commissioners' construction of article 18 of the contract, I concur in the disposition made of this case.

Edwin B. PARKER,
Commissioner.

WILLIAM A. PARKER (U.S.A.) *v.* UNITED MEXICAN STATES.

(*March 31, 1926. Pages 35-42.*)

NATIONALITY, PRESUMPTION OF—NATIONALITY, EFFECT OF ESPOUSAL OF CLAIM BY GOVERNMENT. Fact that a Government espouses a claim does not create a presumption that claimant is of nationality of espousing Government.

NATIONALITY, PROOF OF. Nationality is a fact, to be proven as any other fact, to the satisfaction of the tribunal. Evidence *held* sufficient to establish nationality.

EVIDENCE BEFORE INTERNATIONAL TRIBUNALS.—RULES OF EVIDENCE.—ADMISSIBILITY OF EVIDENCE. The tribunal is not bound by municipal rules of evidence and the greatest liberality will obtain in the admission of evidence.

EVIDENCE, DUTY OF BOTH PARTIES TO SUBMIT. It is the duty of the two Agents to co-operate in submitting to the tribunal all relevant facts. Each Agent should present all the facts that can be reasonably ascertained by him without regard to what their effect may be.

PRIMA FACIE CASE. After claimant has established a *prima facie* case and respondent Government has offered no evidence in rebuttal, latter may not insist that evidence be produced to establish allegations beyond a reasonable doubt.

BURDEN OF PROOF.—EFFECT OF FAILURE TO PRODUCE MATERIAL EVIDENCE. No international rules exist relative to a division of the burden of proof between the parties. Nevertheless, an unexplained failure to produce material evidence peculiarly within the knowledge of one of the parties may be taken into account by the tribunal in reaching a decision.

AFFIDAVITS AS EVIDENCE. In a claim for goods sold to the Mexican Government, affidavit of claimant *held* to establish fact of sale and delivery.

QUASI-CONTRACT OR UNJUST ENRICHMENT AS A BASIS OF CLAIM.—LACK OF AUTHORITY OF OFFICIAL AS A DEFENCE. Where respondent Government has received and retained for its benefit goods sold to various officials by claimant, it is responsible therefor without regard to question of authority of such officials.

OWNERSHIP OF CLAIM. Where record raises a doubt as to ownership of claim by claimant, final decision postponed in order that effort may be made to obtain further evidence on this issue.

Cross-references: Am. J. Int. Law, Vol. 21, 1927, p. 174; Annual Digest, 1925-1926, pp. 240, 243, 414; British Yearbook, Vol. 8, 1927, p. 183.

Comments: Sir John H. Percival, "International Arbitral Tribunals and the Mexican Claims Commissions," Jour. Compar. Legis. and Int. Law, 3d. ser., Vol. 19, 1937, p. 98 at 101; G. Godfrey Phillips, "The Anglo-Mexican Special Claims Commission," Law Q. Rev., Vol. 49, 1933, p. 226 at 238.

1. It is alleged in the memorial that William A. Parker, who was born and has ever remained an American national, was, on and prior to December 8, 1911, until March 27, 1918, engaged in the City of Mexico as a dealer in typewriters, typewriting and general office supplies and repair of typewriters; that on the last named date, he caused a corporation to be formed under the Mexican law, designating it *Compañía Parker S. A.*; that at sundry times between December 8, 1911, and March 27, 1918, claimant sold and delivered, or rendered services in the nature of repairs to typewriters to various departments of the Government of Mexico, at prices which were agreed upon at the time of delivery or at the time the services were rendered; and that, after giving to the Government of Mexico all proper credits, there is due claimant \$39,090.05 which remains unpaid. The claim of William A. Parker against the United Mexican States has, on his behalf, been espoused by the United States of America and submitted to this Commission for decision. A Mexican motion to dismiss the claim was overruled by this Commission on March 2, 1926.

Nationality of the claim

2. The nationality of the claim presented has been challenged on several grounds. In response to this challenge it is contended that when a Govern-

ment espouses a claim of one of its nationals against another Government the private nature of the claim and the private interest of the claimant therein ceases to exist and the claim becomes a public claim of the espousing Government. From this premise the proposition is deduced and pressed that the espousal of a claim by either Government before this Commission and the allegation in the memorial of facts as distinguished from conclusions from which it would follow that the claim possessed the nationality of said Government is *prima facie* evidence that it is impressed with such nationality, subject to rebuttal by affirmative evidence to the contrary which may be offered by the opposing Agent. This contention is rejected by the Commission. It is clear that the Treaty of 1923 does not deal with any government-owned claims but does deal throughout with private claims of citizens which have been espoused by their respective Governments. Provision is even made in certain cases for a restitution of a "property or right * * * to the claimant" (Article IX of the Treaty). However, the Commission does hold that the control of the Government, which has espoused and is asserting the claim before this Commission, is complete. In the exercise of its discretion it may espouse a claim or decline to do so. It may press a claim before this Commission or not as it sees fit. Ordinarily a nation will not espouse a claim on behalf of its national against another nation unless requested so to do by such national. When, on such request, a claim is espoused, the nation's absolute right to control it is necessarily exclusive. In exercising such control, it is governed not only by the interest of the particular claimant but by the larger interests of the whole people of the nation, and must exercise an untrammelled discretion in determining when and how the claim will be presented and pressed, or withdrawn or compromised, and the private owner will be bound by the action taken. But the private nature of the claim inheres in it and is not lost or destroyed so as to make it the property of the nation, although it becomes a national claim in the sense that it is subject to the absolute control of the nation espousing it.

3. The nationality of the claim is challenged on account of insufficiency of the proof offered in support of the American nationality of the claimant (a) because it is only supported by the affidavits of three witnesses, one of whom is the claimant, the second a brother of claimant and the third a friend of long standing who could not have positive information with respect to the fact of his birth; (b) because no birth certificate is presented, nor is its absence explained; and (c) because two of the affidavits were taken before an American vice consul in Mexico who is not authorized to administer oaths under the laws of Mexico where the affidavits were taken. Article III of the Treaty of 1923 provides that "either Government may offer to the Commission any documents, affidavits, interrogatories or other evidence desired in favor of or against any claim * * * in accordance with such rules of procedure as the Commission shall adopt". Section 1 of Rule VIII adopted by the Commission in 1924 provides that "The Commission will receive and consider all written statements, documents, affidavits, interrogatories, or other evidence which may be presented to it by the respective agents * * * in support of or against any claim, and will give such weight thereto as in its judgment such evidence is entitled in the circumstances of the particular case". Under these provisions of the Treaty and the rules of this Commission, the affidavits of the claimant himself, his brother, and his friend, are clearly admissible in evidence in this case. Their evidential value—the weight to be given them—is for this Commission to determine and in so determining their pecuniary interest and family ties will be taken

into account. But, the contention made that the Government is the sole claimant before this Commission, hence the personal, business, or other relations between the private owner of the claim and third persons whose testimony is here offered can be taken into account only by the claimant Government in determining whether it will or will not espouse the claim, but not by this Commission, illustrates the extreme lengths to which the theory of the national character of the claim may be carried and is rejected. An unsworn statement may be accepted in evidence, but the weight to be given it will be determined by the circumstances of the particular case. Under the statutes of the United States, an American vice consul in a foreign land to which he is accredited is authorized to take the affidavit of an American citizen, and the mere fact that no such authority is conferred upon him by the laws of Mexico does not affect either the admissibility or the weight of the affidavits filed herein. In those jurisdictions where the local laws require registration of births a duly certified copy of such registration is evidence of birth in establishing either American or Mexican nationality by birth; but such evidence is not exclusive, and while ordinarily it is desirable that certificates of registrations of birth, which are usually contemporaneous with the fact of birth, should be produced when practicable in support of a claim of nationality by birth, or the absence of such certificate explained, it by no means follows that proof of birth can not be made in any other way. While the nationality of an individual must be determined by rules prescribed by municipal law, still the facts to which such rules of municipal law must be applied in order to determine the fact of nationality must be proven as any other facts are proven. On the record as presented, the claimant himself, his brother, and a third witness all testified to facts from which no other conclusion can be drawn than that claimant was born, and has always remained, an American national. The Mexican Government offers no evidence in rebuttal, but relies on the insufficiency of this proof. On the record as presented, the Commission decides that the claimant was by birth, and has since remained, an American national.

4. The nationality of the claim was further challenged on behalf of Mexico on the ground that claimant on March 27, 1918, had conveyed all of his property, rights, and interests, including the claim here put forward, to the Compañía Parker S. A., a Mexican corporation and impressed with Mexican nationality; and therefore, in the absence of allegations and proof that this claimant had a substantial and *bona fide* interest in the said corporation and in the absence of presenting to this Commission an allotment to the claimant by said corporation of his proportion of the loss or damage suffered by him through the corporation, the claim on his behalf does not fall within the provisions of the Treaty. On the hearing of this case the Commission requested both Agencies to present further evidence fully disclosing the facts with respect to this contention, in response to which request each Agent has presented a telegram. That filed by the Mexican Agent states in effect that the claimant Parker had conveyed all of his properties including this claim to the corporation formed by him and bearing his name; while that filed by the American Agent is to the effect that this claim was never conveyed to the corporation. This unsatisfactory state of the record will be hereinafter referred to.

Rules of evidence

5. For the future guidance of the respective Agents, the Commission announces that, however appropriate may be the technical rules of evidence obtaining in the jurisdiction of either the United States or Mexico as applied to the conduct of trials in their municipal courts, they have no place in regulating the admissibility of and in the weighing of evidence before this international tribunal. There are many reasons why such technical rules have no application here, among them being that this Commission is without power to summon witnesses or issue processes for the taking of depositions with which municipal tribunals are usually clothed. The Commission expressly decides that municipal restrictive rules of adjective law or of evidence cannot be here introduced and given effect by clothing them in such phrases as "universal principles of law", or "the general theory of law", and the like. On the contrary, the greatest liberality will obtain in the admission of evidence before this Commission with the view of discovering the whole truth with respect to each claim submitted.

6. As an international tribunal, the Commission denies the existence in international procedure of rules governing the burden of proof borrowed from municipal procedure. On the contrary, it holds that it is the duty of the respective Agencies to cooperate in searching out and presenting to this tribunal all facts throwing any light on the merits of the claim presented. The Commission denies the "right" of the respondent merely to wait in silence in cases where it is reasonable that it should speak. To illustrate, in this case the Mexican Agency could much more readily than the American Agency ascertain who among the men ordering typewriting materials from Parker and signing the receipts of delivery held official positions at the time they so ordered and signed, and who did not. On the other hand, the Commission rejects the contention that evidence put forward by the claimant and not rebutted by the respondent must necessarily be considered as conclusive. But, when the claimant has established a *prima facie* case and the respondent has offered no evidence in rebuttal the latter may not insist that the former pile up evidence to establish its allegations beyond a reasonable doubt without pointing out some reason for doubting. While ordinarily it is incumbent upon the party who alleges a fact to introduce evidence to establish it, yet before this Commission this rule does not relieve the respondent from its obligation to lay before the Commission all evidence within its possession to establish the truth, whatever it may be.

7. For the future guidance of the Agents of both Governments, it is proper to here point out that the parties before this Commission are sovereign Nations who are in honor bound to make full disclosures of the facts in each case so far as such facts are within their knowledge, or can reasonably be ascertained by them. The Commission, therefore, will confidently rely upon each Agent to lay before it all of the facts that can reasonably be ascertained by him concerning each case no matter what their effect may be. In any case where evidence which would probably influence its decision is peculiarly within the knowledge of the claimant or of the respondent Government, the failure to produce it, unexplained, may be taken into account by the Commission in reaching a decision. The absence of international rules relative to a division of the burden of proof between the parties is especially obvious in international arbitrations between Governments in their own right, as in

those cases the distinction between a plaintiff and a respondent often is unknown, and both parties often have to file their pleadings at the same time. Neither the Hague convention of 1907 for the pacific settlement of international disputes, to which the United States and Mexico are both parties, nor the statute and rules of the Permanent Court of International Justice at The Hague contain any provision as to a burden of proof. On the contrary, article 75 of the said Hague convention of 1907 affirms the tenet adopted here by providing that "The parties undertake to supply the tribunal as fully as they consider possible, with all the information required for deciding the case".

8. In the present case, the sufficiency of the proof has been challenged (a) with respect to the sale and delivery by the claimant of typewriters and supplies to the Mexican Government, which involves (b) the power of the individual purporting to represent said Government to bind it.

9. The allegations of sales made and deliveries effected to a designated agent at a designated place on the dates and at the prices specified and the failure of the Mexican Government to make payment are supported by the affidavit of the claimant, and the Mexican Agent has offered no evidence in rebuttal. The facts alleged are peculiarly within the knowledge of the respondent Government, which should make a full disclosure thereof. It is suggested that due to disturbed conditions or otherwise many of the records of that Government have been destroyed or misplaced, but it should seem that the respondent could at least definitely state whether or not the individual to whom claimant alleges he made deliveries was in its employ at the time and place designated and the actual or apparent scope of his authority. But whether the individuals to whom deliveries were made had, or had not, authority to contract for Mexico, certain it is that if the respondent actually received and retained for its benefit the property which the claimant testifies he delivered to it, then it is liable to pay therefor under a tacit or implied contract even if the individual to whom delivery was made had neither express nor apparent authority to contract for it.

10. Especially on account of the difficulty of ascertaining whether a person acting for either Government was entitled to do so, there has been embodied in Article I of the Treaty of 1923 a provision conferring jurisdiction over claims originating from acts of officials "or others acting for either Government". Reading this provision in connection with that contained in the first clause of Article I, the Commission is of the opinion that this provision should be so construed as to include all claims against one Government by the nationals of the other for losses or damages suffered by such nationals or by their properties, even when there is no evidence that they originate from acts of competent authorities, whether officials or others with a limited jurisdiction, but where there is merely evidence that they originate from acts of others acting for either Government. Where the regularity of a government administration is doubtful, as the administration of Huerta 1913-1914, the quantum of proof required might be greater than in the case of an entirely regular and well-established Government (compare Moore's *Arbitrations*, 3561). But in this case, the Mexican Agency has contented itself with the mere denial of authority without offering any evidence in support of such denial or throwing any light on the actual facts.

11. As pointed out in the foregoing paragraph No. 4, the proof with respect to the ownership of this claim is meager and unsatisfactory. While the Mexican Agent has failed to prove to the satisfaction of the Commission that

claimant Parker has sold and conveyed this claim to a Mexican corporation and hence it might be justified in making an award in favor of the United States on behalf of the claimant, nevertheless the Commission is not satisfied with the evidence which has been presented to it on this issue, although the truth may be readily and definitely established.

Interlocutory decision

12. The Commission therefore decides the several questions presented in accordance with the foregoing opinion, but expressly reserves its decision with respect to the ownership of this claim and the amount thereof. The Agents are requested to cooperate in discovering the facts with respect to the ownership of this claim and the interest, if any, of the claimant Parker or the Compañía Parker S. A. or others therein and file evidence herein on or before July 1, 1926, fully disclosing such ownership. The Commission suggests that this evidence may take the form of a stipulation of facts signed by both Agents. Should it appear that this claim is the property of the Compañía Parker S. A. or other Mexican corporation in which the claimant Parker has a substantial and *bona fide* interest, an allotment by such corporation to the claimant Parker made in accordance with the Treaty provisions may be filed and will be considered by the Commission.

GEORGE W. HOPKINS (U.S.A.) *v.* UNITED MEXICAN STATES.

(*March 31, 1926. Pages 42-51.*)

RESPONSIBILITY FOR ACTS OF DE FACTO GOVERNMENT.—EFFECT OF DECREES OF NULLITY.—NON-PAYMENT OF MONEY ORDERS. Respondent Government *held* responsible for non-payment of money orders of Huerta Government on ground they involved acts of an unpersonal character. Responsibility for acts of Huerta Government of a personal character will depend on whether at the time in question it had control over a major portion of the territory and a majority of the people of Mexico. Decrees of nullity subsequently issued by Carranza Government *held* not binding on the tribunal.

NON-RECOGNITION BY CLAIMANT GOVERNMENT AS ESTOPPEL. Claimant Government *held* not estopped by its non-recognition of Huerta Government to present claim involving acts of such Government.

PRIVILEGED STATUS OF ALIENS UNDER INTERNATIONAL LAW. The fact that a decision of the tribunal may result in extending to an alien a privilege not accorded Mexican nationals under Mexican law will not prevent the tribunal from reaching such decision, if it be dictated by international law.

Cross-references: Am. J. Int. Law, Vol. 21, 1927, p. 161; Annual Digest, 1925-1926, pp. 229, 232, 417; British Yearbook, Vol. 8, 1927, p. 180.

Comments: Edwin M. Borchard, "Decisions of the Claims Commissions, United States and Mexico," Am. J. Int. Law, Vol. 20, 1926, p. 536 at 541; G. Godfrey Phillips, "The Anglo-Mexican Special Claims Commission," Law Q. Rev., Vol. 49, 1933, p. 226 at 229.

This case is before this Commission on the Mexica Agent's motion to dismiss.

1. It is put forward by the United States of America on behalf of George W. Hopkins, who was born and has ever remained an American national. The claim is based on six postal money orders aggregating 1,013.40 pesos alleged to have been purchased by the claimant from the Mexican Government at its postoffices of Mazatlán, Sinaloa, and Guaymas, Sonora, between April 27, 1914, and June 8, 1914, inclusive. It is alleged that all of these money orders were in due time presented to the Mexican authorities and payment was refused by them. The ground of the motion to dismiss is that these money orders were issued by the Huerta administration, which was illegal, that the acts of such administration did not bind Mexico, and that therefore these orders can not be made the basis of a claim before this Commission against the United Mexican States.

Status of Huerta administration

2. In considering the character and the status of the Huerta régime this international tribunal will look to the substance rather than its form, a substance which is not difficult to discover notwithstanding the flimsy garb of constitutional power under which it undertook to masquerade. There is no room to doubt but that the assumption of power by Huerta was pure usurpation. From being the military commander of the capital, charged with the protection of the administration of President Madero against the revolutionary activities of Generals Reyes and Díaz to overthrow it, Huerta went over to Madero's enemies (February 18, 1913); he declared himself provisional president while Madero lawfully was in power (February 18, 1913, at 2 p. m. and 9 p. m.); he imprisoned both President Madero and Vice-President Pino Suárez and compelled them to tender their resignations (February 19, 1913, about 8 a. m.); he forced the provisional acting president, Lascurain, to appoint him, Huerta, the ranking minister in office (February 19, 1913, at 10 a. m.), and immediately thereafter forced him to resign (February 19, 1913, at 11 a. m.); he had his arbitrary acts confirmed by a congress from which his antagonists had fled and which could not muster a quorum (February 19, 1913, at 11.20 a. m.); and he contrived to procure recognition in some quarters as the constitutional provisional president through the suppression of press news so that the manner of his forcibly seizing the reins of government should not be known. The supreme court felicitated Huerta on his assuming office prior to the assassination of Madero and his associates and before the court could have known of the methods used to seize the office. The governors of the States which recognized Huerta were, most of them, either the partisans of Reyes and Díaz with whom Huerta conspired or had been placed in power by Huerta directly after the state stroke. It is not for an international tribunal to assume that events so abhorrent as these are only to be viewed from their "legal" aspect and that uncovering the real facts means an intrusion of "moral" or "sentimental" considerations on the sacred ground of law. Nor is there reason for alleging that in so judging the Commission infringes upon Mexico's sovereignty over

its domestic affairs, for the Mexican Government itself, through its Agency, invites the Commission to do so.

3. Before considering the question of the validity or nullity of acts done by or contracts entered into with a government administration of this character it is necessary to state at once the impossibility of treating alike all acts done by such an administration or all transactions entered into by an individual with it. There seems to be a tendency both in jurisprudence and in literature to do so, to declare that all acts of a given administration, the legality of which is doubtful, must have been either valid or void. Facts and practice, however, point in a different direction.

4. The greater part of governmental machinery in every modern country is not affected by changes in the higher administrative officers. The sale of postage stamps, the registration of letters, the acceptance of money orders and telegrams (where post and telegraph are government services), the sale of railroad tickets (where railroads are operated by the Government), the registration of births, deaths, and marriages, even many rulings by the police and the collection of several types of taxes, go on, and must go on, without being affected by new elections, government crises, dissolutions of parliament and even state strokes. A resident in Mexico who cleans the government bureaus or pays his school fee to the administration does not and can not take into consideration the regularity or even legality of the present administration and the present congress; his business is not one with personal rulers, not one with a specific administration, but one with the Government itself in its unpersonal aspect.

5. The difficulty of distinguishing between the Government itself and the administration of that Government arises at the point where the voluntary dealings and relations between the individual and the government agencies assume a personal character in support of the particular agencies administering the government for the time being. To this class belong voluntary undertakings to provide a revolutionary administration with money or arms or munitions and the like. But the ordinary agencies, departments, and bureaus of the Government must continue to function notwithstanding its principal administrative offices may be in the hands of usurpers, and in such a case the sale and delivery to these necessary and legitimate agencies of supplies, merchandise, and the like, to enable the Government itself in its unpersonal aspect to function is a very different transaction from one having for its object the support of an individual or group of individuals seeking to maintain themselves in office. The character of each transaction must be judged and determined by the facts of the particular case.

6. A similar distinction arises in the field of international law. There are, on one side, agreements and understandings between one nation and another changing or even subverting its rulers, which are clothed with the character of a free choice, a preference, an approval, and which obviously undertake to bear the risks of such a choice. There are, on the other hand, many transactions to which this character is alien. Embassies, legations, and consulates of a nation in unrest will practically continue their work in behalf of the men who are in control of the capital, the treasury, and the foreign office—whatsoever the relation of these men to the country at large may be. Embassies, legations, and consulates of foreign nations in such capital will practically discharge their routine duties as theretofore, without implying thereby a preference in favor of any of the contesting groups or parties. International payments (for a postal union, etc.) will be received from such Government; delegates to an international conference will often be accepted

from such Government. Between the two extremes here also there is a large doubtful zone, in which each case must be judged on its merits.

7. Facts and practice, as related to the Huerta administration in Mexico, illustrate the necessity of a cleavage in determining the validity or nullity of its acts.

8. In the field of international relations the distinction is apparent. Where pre-existing relations with government agencies continued under such circumstances as not to imply either approval or disapproval of the new administration or recognition of its authority these transactions must be treated as government transactions and binding on it as such rather than transactions had with a particular administration. The routine diplomatic and consular business of the nation continued to be transacted with the agencies assuming to act for the Government and which were in control of the foreign office, the treasury, and the embassies, legations, and consulates abroad. Even the United States, though placing its stamp of disapproval in the most unmistakable manner on the act of Huerta in usurping authority, kept its embassy in Mexico City open for the transaction of routine business, entrusting it to a *chargé d'affaires*, and maintained its consulates throughout Mexico. Such relations, so maintained, were entirely unpersonal; they constituted relations with the United Mexican States, with its Government as such, without respect to the status of the individual assuming to act for the Government.

9. This distinction was recognized in the decisions made by the Carranza administration as to the legality of the acts of the Huerta administration. Such acts as the registration of births, deaths, and marriages were practically undisturbed, because they were performed in the orderly functioning of the Government quite independent of the recognition or nonrecognition of the individuals exercising authority. These were unpersonal acts of the Government itself as an abstract entity. It does not matter for the present argument, and it is not for the Commission to decide, whether the terms of the Carranza decree of July 11, 1916, are or not in all things to be commended; it is noticed here only to point out that it recognized the distinction between transactions with and by the Government itself and transactions with and by the Huerta administration.

10. The same cleavage was recognized in connection with the financial transactions of the Huerta administration by later administrations of the Government of Mexico. The series of Mexican bonds issued during the Huerta régime, the proceeds of which were applied to the payment of the interest on the pre-existing debt of Mexico, have been uniformly recognized as valid, while other series of the same issue, the proceeds of which are claimed to have been applied to the maintenance in power of the Huerta administration or to the purchase of arms, munitions, and the like, have been repudiated. The Commission here expresses no opinion with respect to the application made by Mexico of the principle invoked in recognizing as valid one series of bonds and repudiating another series of the same issue. The latter is referred to here only to point out that the principle which the Commission applies in this case has been recognized and invoked by the Government of Mexico under administrations of unquestioned regularity and validity.

11. It is clear that the sale by the Mexican Government to and the purchase by the claimant Hopkins of postal money orders falls within the category of purely government routine having no connection with or relation to the individuals administering the Government for the time being. The facts as developed in the Memorial and the briefs, which are not contested by the Mexican Agent, aptly illustrate the necessity of the distinction here

made between acts of the Huerta administration in its personal character and acts of the Government itself in its unpersonal character. From the facts so developed it appears that at the very time these postal money orders were issued the greater part of the States of Sonora and Sinaloa, from which they issued, was dominated by Carranza as First Chief of the Constitutional Army, while the City of Mexico, on which the orders were drawn, was dominated by Huerta. Yet the post offices in these two States under the domination of Carranza continued to issue money orders of the United Mexican States upon the postmaster in the Federal District of Mexico. In other cases that have been submitted to this Commission it is apparent that the government agencies functioning under the Huerta administration continued to carry out obligations under pre-existing contracts and otherwise functioned without reference to the change in the administration. It also appears that when Huerta seized the reins of government which in his capacity as provisional president he undertook to administer he did not change the government machinery as it had been set up under President Madero, which continued to operate in all its parts in the service of the people, and the great majority of the personnel of all of the bureaus and agencies of the Government remained unchanged and continued to discharge their duties to and in the name of Mexico. At no time did the government machinery cease to function, notwithstanding the change in the personnel of some members of its executive branch. To the extent that this machinery acted in the discharge of its usual and ordinary functions or to the extent that it received benefits from transactions of an unusual nature, Mexico is bound.

12. But it by no means follows that if the contracts of the claimant Hopkins, evidenced by postal money orders, should be treated as contracts with the Huerta administration in its personal aspects Mexico is not bound by such contracts. The question then arises. How far can an administration which seizes the reins of government by force and is illegal in its inception bind the nation? It will be borne in mind that an administration of illegal origin either operates directly on the central authority by seizing, as Huerta did, the reins of the Government, displacing the regularly constituted authorities from their seats of power, forcibly occupying such seats, and extending its influence from the center throughout the nation; or it comes into being through attacking the existing order from without and step by step working toward the center. The acts of an organization of the latter type become binding on the nation as of the date territory comes under its domination and control *conditioned* upon its ultimate success. The binding force of such acts of the Huerta administration as partook of the personal character as contradistinguished from the Government itself will depend upon its real control and paramountcy at the time of the act over a major portion of the territory and a majority of the people of Mexico. As long as the Huerta régime was in fact the master in the administration of the affairs of the Government of Mexico its illegal origin did not defeat the binding force of its executive acts (award of 1901 in the Dreyfus case between France and Chile, Deschamps et Renault, *Recueil international des traités du XX^e siècle*, an 1901, 394). Once it had lost this control, even though it had not been actually overthrown, it would not be more than one among two or more factions wrestling for power as between themselves. Even while still in possession of the capital and therefore dominating the foreign office, the treasury, and Mexico's representatives abroad, its acts of a personal nature could not ordinarily bind the nation from the moment it apparently was no longer the

real master of the nation. It is unnecessary in this case for the Commission to determine the exact time between February, 1913, and July, 1914, the turning point was reached in the ebbing power of Huerta. During the months of February (last half), March, and April, 1913, Huerta's power was paramount in the north, the center, and the south of Mexico notwithstanding uprisings in several States. The Huerta administration was not accorded recognition by any foreign Government after June 1, 1913. During the period from January to July, 1914, inclusive, Huerta's power rapidly diminished, and it is not improbable that the alleged insult offered the American Flag in March, 1914, resulting in America's military occupation of Veracruz was an unsuccessful endeavor on his part to turn the tide in his favor by appealing to the Mexican people to rally to his support against a foreign "enemy" (?) It therefore follows that in every case submitted to this Commission in which acts of the Huerta administration in its personal aspect are involved the Commission must consider the particular facts in that case and decide upon the actual binding force upon the Mexican Nation of such acts.

The Carranza decrees of nullity

13. As the Commission holds that the contracts between the Government of Mexico and Hopkins, evidenced by the postal money orders which it issued to him, are unaffected by the character of the Huerta administration and are binding upon the United Mexican States as such, the question presents itself whether this binding force has from an international viewpoint been subsequently destroyed by the decrees issued by Carranza on February 19, 1913, and July 11, 1916. The Commission has no hesitancy in answering both questions in the negative. The first decree, being that of one State of the Union, Coahuila, could have no possible effect on or modify either the rights or duties of the Union itself. The second decree, even when considered as subsequently invested with the character of a law by the Mexican Congress, could not possibly operate unilaterally to destroy an existing right vested in a foreign citizen or foreign State or a pre-existing duty owing by Mexico to a foreign citizen or foreign State. The fact that it follows that foreign citizens may enjoy both rights and remedies against Mexico which its municipal laws withhold from its own citizens is immaterial as will be hereinafter pointed out in paragraph 16.

14. From the foregoing the Commission concludes that Hopkins' contracts are unaffected by the legality or illegality of the Huerta administration as such, that they bind the Government of Mexico, that they have not been nullified by any decree issued by Carranza, and that they have not been and can not be nullified by any unilateral act of the Government of Mexico.

Nonrecognition as an estoppel

15. Has the American Government forfeited its right to espouse Hopkins' claim because in 1913 it warned its citizens against the "usurper" Huerta and never recognized his administration? The Commission holds that such warnings and such failure to recognize the Huerta administration cannot affect the vested rights of an American citizen or act as an estoppel of the right of the American Government to espouse the claim of such citizen before this Commission (see the award of Honorable William H. Taft, Sole Arbitrator between Great Britain and Costa Rica, October 18, 1923, reported in 18 (1924) American Journal of International Law, at pages 155-157).

The position assumed by the American Government under the administration of President Wilson was purely political and was binding, even on that administration, only so long as it was not modified. It was an executive policy, which, so long as it remained unmodified and unrevoked, would close to the American Government the avenue of diplomatic interposition and intervention with the Huerta administration. It temporarily, therefore, rendered this remedy—diplomatic interposition or intervention—unavailable to an American citizen but it did not affect a vested *right* of such citizen. But nonrecognition of the Huerta administration by the American Government under the Wilson administration was not dependent upon Huerta's paramountcy in Mexico. It meant that, even if it were paramount, it came into power through force by methods abhorrent to the standards of modern civilization, that it was not "elected by legal and constitutional means", and hence, while the *Government* of Mexico continued to exist and to function, its *administration* was not entitled to recognition.

Privileged status of foreigners

16. If it be urged that under the provisions of the Treaty of 1923 as construed by this Commission the claimant Hopkins enjoys both rights and remedies against Mexico which it withholds from its own citizens under its municipal laws, the answer is that it not infrequently happens that under the rules of international law applied to controversies of an international aspect a nation is required to accord to aliens broader and more liberal treatment than it accords to its own citizens under its municipal laws. The reports of decisions made by arbitral tribunals long prior to the Treaty of 1923 contain many such instances. There is no ground to object that this amounts to a discrimination by a nation against its own citizens in favor of aliens. It is not a question of discrimination, but a question of difference in their respective rights and remedies. The citizens of a nation may enjoy many rights which are withheld from aliens, and, conversely, under international law aliens may enjoy rights and remedies which the nation does not accord to its own citizens.

Decision

17. From the foregoing opinion it follows, and the Commission decides, that the allegations contained in the memorial filed herein bring this claim within the jurisdiction of this Commission. Assuming that such allegations are true, the Government of Mexico is bound to pay the claimant the postal money orders declared upon. The motion of the Mexican Agent to dismiss is therefore overruled. The running of time for filing the Answer has been suspended from December 16, 1925, to March 31, 1926.

THE HOME INSURANCE COMPANY (U.S.A.) *v.* UNITED MEXICAN STATES.*(March 31, 1926. Pages 51-59.)*

INSURER AS CLAIMANT. No issue as to jurisdiction raised by tribunal in claim by insurer.

RESPONSIBILITY FOR LOSSES INCURRED IN GOVERNMENT OCCUPATION OF RAILWAYS. Respondent Government *held* not responsible in its capacity as operator of railways for shipment lost due to acts of revolutionary forces; *held* obliged, nevertheless, to refund excess transportation charges.

RESPONSIBILITY FOR ACTS OF FORCES.—ACTS OF REVOLUTIONARY FORCES.—FAILURE TO PROTECT. No responsibility *held* to exist when reasonable measures were taken in suppression of revolution.

Cross-references: Am. J. Int. Law, Vol. 21, 1927, p. 157; Annual Digest, 1925-1926, p. 211.

1. This claim is asserted by the United States of America on behalf of the Home Insurance Company, an American corporation, against the United Mexican States to recover the sum of \$23,050.00 with interest thereon from May 28, 1924, on which date it is alleged the claimant paid under two policies of insurance the principal sum mentioned to Westfeldt Brothers, of New Orleans, Louisiana, an American mercantile partnership, composed wholly of American nationals, to indemnify them for losses in transit of two cars of coffee, one originating at Huixtla, Chiapas (Mexico), the other originating at Tapachula, Chiapas (Mexico), both destined to New Orleans via Puerto México, Veracruz (Mexico).

2. The record as submitted is in some respects meager and incomplete and in other respects contradictory and confusing, but, giving due weight to the facts proven and their necessary implications, the Commission finds the facts as follows:

3. On November 23, 1923, Westfeldt Brothers of New Orleans placed an order with El Emporio del Café, S. A., of Mexico City, Mexico, a Mexican corporation, for one car of coffee of the kind and grade and at the prices stipulated, to be paid for by the sight draft of El Emporio del Café, S. A., on Westfeldt Brothers at New Orleans, "insurance cared for by Westfeldt Brothers".

4. On November 27, 1923, Westfeldt Brothers placed another order with El Emporio del Café, S. A., for another car of coffee of different grades and prices, to be insured and paid for by the sight draft of El Emporio del Café, S. A. on Westfeldt Brothers at New Orleans, "insurance cared for by Westfeldt Brothers".

5. On November 30, 1923, in pursuance of the order of November 23, 1923, a car of coffee was shipped from the station of Huixtla, with ultimate destination New Orleans, covered by a through bill of lading issued by the National Railways of Mexico, consigned to shipper's order notify Westfeldt Brothers, New Orleans, and routed by the National Railways of Mexico via Puerto México and the Munson Steamship Line.

6. On December 4, 1923, in pursuance of the order of November 27, 1923, another car of coffee was shipped from the station of Tapachula, likewise

covered by a through bill of lading with ultimate destination New Orleans, consigned and routed in the same way as the shipment mentioned in the preceding paragraph.

7. Both of these cars arrived at Puerto México on December 5, 1923, and on the following day the coffee was removed from the cars and placed in the railroad warehouse to await the arrival of a steamer of the Munson Line for transshipment to New Orleans.

8. The rail lines over which these shipments moved and the warehouse into which the coffee was removed and stored at Puerto México were operated by the Government of Mexico, which at that time had taken over and was operating all or practically all of the rail lines in the Republic of Mexico, most of which were owned by private corporations.

9. At the request of Westfeldt Brothers the claimant herein as of December 1, 1923, issued at Mexico City, through its manager for Mexico, a policy of insurance covering the first shipment, and on December 5, 1923, issued a like policy of insurance covering the second shipment, both in the usual form for the indemnification of Westfeldt Brothers against loss in transit, with the usual limitations not necessary to notice here. Attached to each of said insurance policies in the form of a rider was a "War and Riot Clause" extending to Westfeldt Brothers, in consideration of an additional premium, indemnity against loss caused by "Rioters, Civil Commotion, Rebellion, Insurrection, Military Invaders, Military or Usurped Power or Martial Law, Intervention by Foreign Power or Powers, Robbery by Persons or Bands who take property by Force", but excluding from such coverage "any Acts or Proceedings of the Civil and/or Military Representatives of the Constituted Authorities for the time being".

10. Thereafter, on January 15, 1924, in consideration of an additional premium, the insurance under both of these policies was extended effective as and from January 12, 1924, to cover "loss of and/or damage to the property insured directly caused by Confiscation, Detention or Sequestration by the Constituted Authorities for the time being, whether local or Federal."

11. On or about December 5, 1923, a program was decided upon under the leadership of Adolfo de la Huerta having for its object the overthrow of the administration of President Obregón of Mexico. On December 6 de la Huerta publicly warned Obregón that he would meet the same fate as his predecessor (Carranza) if he continued in his present course, and soon thereafter it was reported that the military forces in several Mexican States, notably Chihuahua, Tamaulipas, Veracruz, Puebla, Jalisco, Michoacan, Guerrero, Oaxaca, Tabasco, Campeche, and Yucatan were in revolt against the Obregón administration and that the Federal officeholders in those States had been replaced by the adherents to the revolutionary movement. Adolfo de la Huerta was a man of influence and had a large following in Mexico. He had taken a prominent part with Carranza when the latter was First Chief of the Constitutionalist Army in launching and prosecuting an ultimately successful revolution against the Huerta administration in 1913 and 1914; later he, with General Calles and others, led a successful revolution resulting in the overthrow of the Carranza administration, after which de la Huerta became Provisional President; after the election of Obregón as President, de la Huerta became his Finance Minister in a cabinet in which General Plutarco Elias Calles held the portfolio of Minister of the Interior. In the fall of 1923 acute friction developed between de la Huerta and Calles, the latter an active and the former a passive candidate for the presidency. This developed into friction between de la Huerta and Obregón. On Sep-

tember 14, 1923, de la Huerta tendered his resignation as Finance Minister, which was immediately accepted. On October 18, 1923, he publicly announced his candidacy for the presidency, which was followed by charges by his political enemies of extravagance and misconduct in office as Finance Minister, which charges were publicly supported by President Obregón. The heat of political contest resulted in riots and bloodshed. A convention of the Cooperative Party was attended by more than 2,500 delegates from every State and territory except Lower California, including a majority of the Chamber of Deputies. On November 23, 1923, this convention repudiated Calles and Obregón, two of the founders of the party, by choosing de la Huerta as its candidate for the presidency. He also had the support of several other political parties. With this strong political following de la Huerta took the field to forcibly overthrow the Obregón administration, which he claimed had been and was disregarding the legislative and judicial departments of the government and had armed political agitators to do its bidding without respect for life, liberty, or property. General Calles withdrew as a candidate for the presidency and took the field against de la Huerta and his followers in defense of the Obregón administration. By the middle of December the opposing armies were reported to be lined up on a 65-mile front in the State of Puebla. On December 15, 1923, the city of Puebla, the third largest in Mexico in point of population, was evacuated by the government troops and entered the next day by the followers of de la Huerta. The cities of Mérida and Progreso, both in Yucatan, were also reported to have fallen into the hands of the revolutionists. By the end of December, 1923, the revolutionists had advanced practically two-thirds of the way from Veracruz to Mexico City. About this time General Obregón took supreme command of his army and prepared to advance to Veracruz. The Government of the United States placed an embargo on all arms, ammunitions, and supplies destined to the rebel forces. At that time de la Huerta had set up at Veracruz an organization which he proclaimed as the provisional government of Mexico. Apparently from this time on de la Huerta experienced difficulty in raising funds with which to prosecute his campaign, and his organization began to crumble. His forces were defeated at Esperanza in January and on February 11, 1924, the Federal forces recaptured Veracruz. So vigorously were the operations against the insurgents prosecuted that by April, 1924, the revolution was practically suppressed. It appeared from the final message of President Obregón, delivered September 1, 1924, that the armed rebels had numbered approximately 56,000 including 25,000 deserters from the army, and that the suppression of the revolution had cost the Federal Government more than 60,000,000 pesos.

12. Among those who had deserted the Federal forces in December, 1923, to become followers of de la Huerta was Brigadier General Benito Torruco, who from time to time, between February 1 and March 10, 1924, seized at Puerto México the two carloads of coffee above-mentioned which were stored in the railroad warehouse at that port. He gave receipts therefor to the Terminal and Customs Agent of the railway there signed by him as "The General of Division, Chief of the Military Operations on the Isthmus".

13. While it does not appear that the rebel forces at and contiguous to Puerto México were numerically strong, it does appear that they were sufficiently strong to cut off all communication from Puerto México from December 6, 1923, to April 2, 1924. It further appears that prior to these

seizures the Terminal and Customs Agent of the railroad at Puerto México made an unsuccessful effort to forward this coffee to New Orleans by the steamship *Sveland*, as no steamer from the Munson Line was available for its transportation.

14. Based on the foregoing findings of fact, the conclusions reached by the Commission follow:

15. The contention that this Commission is without jurisdiction to hear and decide this case because it is predicated on the nonperformance of a contract obligation, and that claims of this nature are not embraced within the Treaty in pursuance of which this Commission is constituted, is rejected for the reasons set forth in the Illinois Central Railroad Company case, docket No. 432, this day decided by this Commission.

16. It is for each nation to decide for itself whether or not it will engage in owning and/or operating railroads or other transportation facilities. In this case it appears that at the time of the losses here complained of the Government of Mexico had taken possession of and was operating the railroads located in the territory under its jurisdiction. As such it was performing a governmental function, but it by no means follows that its liability as a carrier of freight and passengers for hire was in any respect greater than or different from that of a private corporation operating the same railroads. In its capacity as carrier Mexico, as between it and the owner of the goods carried, was subject to the laws of the Republic applicable to other public carriers. Under those laws it received and promptly and safely transported to Puerto México the shipments of coffee the loss of which gave rise to this claim. It was prepared to deliver these shipments to the Munson Line in accordance with the terms of the through bill of lading, but the Munson Line had no ship available to receive them at that port. The railroad's agent made an unsuccessful attempt to forward the coffee by another ship. Because of the cutting off of Puerto México from all mail and transportation communication with the outside world from December 6, 1923, to April 2, 1924, it was not possible for the carrier to move the coffee to a place of greater safety or to communicate with either the shipper or the purchaser. That Westfeldt Brothers as well as the claimant herein knew of the actual or threatened disturbed conditions in the territory through which those shipments must move in transit is evidenced by the fact that Westfeldt Brothers paid an additional premium in the first instance for war-risk insurance excluding acts of the constituted authorities and some five weeks later, but prior to the seizure of the coffee, they paid an additional premium to the claimant for insurance against loss caused by "confiscation, detention, or sequestration by the constituted authorities for the time being, whether local or federal". The de la Huerta revolution had been launched. General Torruco was in command of its military forces at Puerto México and contiguous territory when Westfeldt Brothers procured this extension of insurance coverage from the claimant. Thereafter the coffee was seized and confiscated by General Torruco in his capacity as "Chief of the military operations on the Isthmus". Under the laws of Mexico a public carrier for hire is not liable for the loss or damage to shipments in its possession resulting from "*casos fortuitos*", which includes acts of revolutionary forces, without negligence on its part. In these circumstances the Commission decides that the Government of Mexico is not liable in its capacity as carrier for the loss of the shipments of coffee here involved.

17. But the Government of Mexico in its sovereign capacity owed the duty to protect the persons and property within its jurisdiction by such means as were reasonably necessary to accomplish that end. A failure to discharge that duty resulting in loss or damage to an American national would render it liable here, and the claim against it of such American national, if espoused and presented by the Government of the United States of America, would fall within the jurisdiction of this Commission. The question then arises in this case, Did the Government of Mexico fail in the discharge of its duty as sovereign to take all reasonable measures to protect the coffee in question. The Commission decides that the record as presented discloses no such failure. The de la Huerta revolt against the established administration of the Government of Mexico—call it conflict of personal politics or a rebellion or a revolution, what you will—assumed such proportions that at one time it seemed more than probable that it would succeed in its attempt to overthrow the Obregón administration. The sudden launching of this revolt against the constituted powers, the defection of a large proportion of the officers and men of the Federal Army, and the great personal and political following of the leader of the revolt, made of it a formidable uprising. President Obregón himself assumed supreme command. Through the vigorous and effective measures taken by the Obregón administration what threatened at one time to be a successful revolution was effectually suppressed within a period of five months from its initiation. General Torruco, who seized and personally receipted for the coffee in question was the military commander of the de la Huerta forces on the Isthmus, including Puerto México and the country contiguous thereto. He succeeded in holding this territory on behalf of the revolutionists under de la Huerta and against the established authorities of the Obregón administration. Communication between Puerto México and the outside world was cut off during a period of nearly five months. In these circumstances the Commission finds that on the record submitted the Government of Mexico, then under the administration of President Obregón, did not fail in the duty which in its sovereign capacity it owed to Westfeldt Brothers to protect their property.

18. From the record it appears that Westfeldt Brothers paid the Government of Mexico the through-freight charges on the shipments of coffee in question from the points of origin to New Orleans and that the claimant has reimbursed Westfeldt Brothers for such payment. The Government of Mexico in its capacity as carrier has performed the service which it contracted to perform up to Puerto México but not further. It is therefore obligated to pay to the claimant the division of the through-freight charges from Puerto México to New Orleans, for which payment has been made but no service rendered. Upon the Government of the United States filing with this Commission on or before May 1, 1926, evidence satisfactory to the Commission of the amount due claimant under this decision an award will be entered for such amount in favor of the United States of America on behalf of the claimant against Mexico. Further than this, the Commission finds, the Government of the United Mexican States is not obligated to pay any amount to the Government of the United States of America on account of the claim herein presented.

19. Had the loss herein complained of occurred within the period from November 20, 1910, to May 31, 1920, inclusive, it would seem that the claim would have fallen within the jurisdiction of the Special Claims.

Commission constituted in pursuance of the Special Claims Convention between the United States and Mexico signed September 10, 1923, and effective through exchange of ratifications February 19, 1924. Articles II and III of that convention have no counterpart in the convention under which this Commission is constituted. It is not for this Commission to express any opinion with respect to the liability of Mexico under the evidence as presented by this record if the terms of the Special Claims Convention were applied thereto. It is proper, however, to call attention to the radical difference in the terms of the two conventions and to expressly state, for the guidance of the respective Governments, that what is said in this decision and opinion can have no application to cases falling within the terms of the Special Claims Convention.

FABIAN RIOS (UNITED MEXICAN STATES) *v.* UNITED STATES
OF AMERICA.

(*March 31, 1926. Pages 59-61.*)

PROCEDURE, MOTION TO DISMISS.—RESPONSIBILITY FOR ACTS OF FORCES.—

MILITARY ACTS. While respondent Government would not be responsible for losses resulting from shell fire in taking possession of Veracruz, decision on motion to dismiss for lack of jurisdiction *suspended* in order that allegations of other circumstances of loss may be developed and supported.

Comments: Edwin M. Borchard, "Decisions of the Claims Commissions, United States and Mexico," *Am. J. Int. Law*, Vol. 20, 1926, p. 536 at 542.

This case is before this Commission on the American Agent's motion to dismiss.

1. The claim is put forward by the United Mexican States on behalf of Fabian Rios, who was born and has ever remained a Mexican national, to recover damages in the sum of 6,000 pesos. The pertinent allegation in the Memorial follows:

"That during the battles of the 21st and 22nd of the month and year above stated, fought with the invading forces of the American Government, he was compelled to abandon his residence, because several shells shot by the ships of war of the said Government, fell near his residence. That after having abandoned his home, three of those shells struck his very house, totally destroying his furniture and personal belongings, and what was left of his household and personal articles was stolen by the soldiers and by the populace."

2. The motion to dismiss challenges the jurisdiction of the Commission to hear and decide this case because the losses complained of resulted from the acts of the armed forces of the United States in taking military possession of Veracruz in April, 1914, and not from the administrative acts of the American authorities after the occupation had been accomplished. If it were clear that the Memorial did not allege any damage resulting from the administrative acts of the American authorities, then the motion would be sustained under the previous decisions of this Commission in *El Emporio del Café* case (Docket No. 281), the *Gonzales*

case (Docket No. 290), and the Lopez case (Docket No. 903), and for the reasons therein stated.

3. But while the allegations in the Memorial are inconsistent and confusing, they must be taken as confessed for the purposes of this motion, and the Commission can not say with certainty that there is no claim for loss or damage suffered by claimant after the military possession of Veracruz had been accomplished. While the Memorial does allege that the American shells which struck claimant's house when the Americans were in the act of taking possession of Veracruz totally destroyed "his furniture and personal belongings" and while it is difficult to understand how after such total destruction there was anything "left of his household and personal articles" to be "stolen by the soldiers and by the populace" due to the lax administration by the American authorities after possession had been accomplished, nevertheless, in view of these ambiguous allegations the Commission is not justified in sustaining the motion to dismiss.

4. The Mexican Agent is given leave to file an amended memorial, with full evidence in support thereof, within thirty days from this date, setting out the facts with greater particularity and reconciling these inconsistencies. A failure to take full advantage of this leave will result in the dismissal of the case.

JOHN B. OKIE (U.S.A.) *v.* UNITED MEXICAN STATES.

(*March 31, 1926. Pages 61-64.*)

IMPROPER COLLECTION OF GOVERNMENTAL CHARGES. Claim for collection of fees arising in connexion with imports, which authorities had agreed to waive, *allowed*.

1. This claim is put forward by the United States of America on behalf of John B. Okie, who was born and has ever remained an American national. From the record it appears that on January 17, 1920, Okie, who was engaged as a sheep breeder in Texas, applied to the Mexican Government through its Department of Finance and Public Credit, for authority to import Merino sheep into Mexico. Unfortunately neither this original letter nor a copy thereof has been produced. It was answered, however, on January 29, 1920, by the Department of Finance and Public Credit of the Mexican Government, a copy of which answer follows:

[Translation]

(To be sent under registered mail)

Federal Executive Power, Mexico, Dept. of Finance & Public Credit, Dept. of Customs Service, Sec. 1, Group 1, No.

Subject: Fixing conditions for temporary importation of ewes through Villa Acuña.

To J. B. OKIE,

670 So. Orange Grove Ave.,

Pasadena, Cal., U. S. A.

Your communication of the 17th inst. at hand, requesting authorization to import 24,000 Merino ewes, of high grade, coming from the State of Texas,

with the idea of having them permanently in Mexico and having the shearing done here, selling the wool in the country; and in reply would state that this Department grants your request under the following conditions:

First: The number of head to be 20,000 and up.

Second: The total importation of same should be made prior to the 30th day of June of this year, and without the collection of any charges.

Third: If for causes of force major you should have to export the stock in question prior to June 30, 1921, you are authorized to do so, the Government collecting the amount of 50 cents per head, as fee for pasturage.

Fourth: After the lapse of one year from July 1st next, the sheep will be considered as definitely nationalized and will be subject to the export duties involved, and you will be governed by the laws now in force on this subjects

The foregoing has been communicated to the Customs House at Villa Acuña for compliance in so far as it may apply.

Constitution and reforms,

Mexico, Jan. 29, 1920.

By order of the Secretary,

CHIEF CLERK.

2. On February 21, 1920, Okie made his first importation into Mexico of something over 13,000 head of sheep on which he was required to pay consular fees and inspection and sanitary fees which he paid under protest.

3. On March 15, 1920, Okie addressed both the Secretary of Finance and Public Credit and the Secretary of Foreign Relations calling their attention to the contract which he claimed to have with the Government of Mexico for the importation into Mexico of 20,000 and upward head of sheep without the imposition of any charges, advising the amount of consular fees and inspection and sanitary fees which were paid by him under protest and respectfully requesting a refund thereof. He added "as I am to make by the 20th of May another importation of 15,000 head of sheep through this same customs house, I would ask that you order that the charges made on this first lot be omitted on all others for which I would thank you in advance".

4. Okie received a reply to these communications from the Department of Foreign Relations of the Mexican Government dated March 30, 1920, reading:

[Translation]

Federal Executive Power, Mexico, Dept. of Accountancy and "Glosa"

Number 1267. Volume 63, Page 5

Matter: I acknowledge receipt of your letter of the 15th inst.
Department of Foreign Relations.

To Mr. V. G. Okie, Acuña, Coahuila.

I acknowledge receipt of your letter to the Secretary of the Treasury and Public Credit, and beg to inform you that as soon as the said Department issues the proper instruction this Department of Foreign Relations will give orders in connection with the case to our Consul at Del Rio with regard to the reimbursement of the duties to which you refer.

I assure you of my sincere consideration.

Constitution and reforms.

Mexico, March 30, 1920.

Alberto C. FRANCO,
Acting Chief Clerk.

5. When on March 29, 1920, Okie imported into Mexico the second herd, consisting of 11,500 sheep, like charges for consular fees and sanitary fees were imposed and paid by him under protest. The total fees paid by him on both herds aggregated 5,890.38 pesos.

6. The claimant asks an award for this amount with interest thereon. As far as the Commission can infer from the incomplete evidence submitted, Okie and the Mexican authorities placed a different interpretation on the contract evidenced by the correspondence above referred to. As Mexico had at that time imposed no import duties on sheep and as a permit to import sheep was not required by its laws, Okie seems to have interpreted the words found in the letter to him of the Mexican Department of Finance and Public Credit, dated January 29, 1920, "without the collection of any charges" as applying to all government taxes, fees, or charges of any nature. The Mexican Government on the other hand contends that under its constitution and laws its officers are without the power to remit any taxes or fees imposed by law and that the words quoted in effect was a mere statement that import duties did not exist.

7. In considering which party was responsible for this misunderstanding, the Commission finds that the entire fault lay with the Mexican officials. When the Mexican Treasury Department on January 29, 1920, with full knowledge of the nonexistence of import duties on sheep, wrote to Okie, the sheep breeder, granting authority to import sheep without paying any "derechos", they certainly did not convey to him the understanding that the Government meant "derechos de importación" only. Okie's letter of March 15, 1920, asked for refund under his contract of consular fees and inspection and sanitary fees and that the border customs-house authorities be instructed not to impose such fees on the second shipment which he intended to make in May. When, with this letter before it, the Mexican foreign office wrote Okie on March 30, 1920, that as soon as the Treasury Department "issues the proper instruction this Department of Foreign Relations will give orders * * * with regard to the reimbursement of the duties to which you refer", Okie could not possibly have understood from this letter that the particular fees mentioned in his letter could not under the law be refunded to him. He was justified in assuming that no such fees would be demanded on the second shipment which he notified the Mexican authorities he intended to make and which he notified the Mexican authorities he intended to make and which he actually made during the month of May. Therefore, the misunderstanding between the parties and the resultant damage sustained by Okie was due entirely to the fault of the government officials resulting in injustice to Okie. Under the express terms of the Treaty under which this Commission is constituted the Mexican Government must therefore indemnify him.

8. Okie, however, was not justified in understanding that the Mexican Government would do more than waive any charges collected by or for the account of the Government itself and which would ordinarily find their way into the Mexican treasury. From the 5,890.38 pesos paid by Okie should be deducted such fees as were paid to the veterinary expert who was not an official of the Mexican Government for his service in inspecting the sheep. An award will be made against Mexico for the balance with interest thereon. The Agencies are requested to submit to the Commission on or before July 1, 1926, a statement, if practicable, in the form of a stipulation of the facts signed by both Agents, disclosing the amount for which an award will be made under this decision.

9. As the claim was liquidated as to amount on May 29, 1920, the date of the last payment, the award will bear interest at the rate of 6% per annum from that date.

Interlocutory decision

10. For the reasons stated the Commission decrees that the Government of the United Mexican States is obligated to pay to the United States of America on behalf of John B. Okie an amount to be ascertained in accordance with the foregoing opinion with interest on such amount at the rate of 6% per annum from May 29, 1920. Upon the filing by the Agents of the report requested a final award will be entered.

NICK CIBICH (U.S.A.) *v.* UNITED MEXICAN STATES.

(March 31, 1926. Pages 65-67.)

RESPONSIBILITY FOR ACTS OF MINOR OFFICIALS.—DIRECT RESPONSIBILITY.

Claim for money of which police took possession when claimant was arrested but which was never returned, *disallowed* in absence of proof of lack of reasonable care on part of authorities.

Cross-reference: Annual Digest, 1925-1926, p. 220.

1. This claim is asserted by the United States of America on behalf of Nick Cibich, a young naturalized American citizen, who on the evening of May 23, 1923, being drunk in the streets of Pánuco, Veracruz (near the very center of the oil district of Tampico), was locked up in a cell by the police until the next morning, to sleep himself sober. His money, either to the amount of \$460 or \$475, was taken from him by the chief of police for safe-keeping; but was stolen during the night by a gang of liberated prisoners and faithless policemen, and therefore could not be returned to him the next morning. The United States claims an amount of \$475 (which seems to have been inferred from the amount of about 950 pesos, mentioned in the first Mexican police report, and was never mentioned by Cibich, himself, before his affidavit of October 17, 1924), with interest.

2. It is significant that the United States does not make and apparently could not make any claim for false imprisonment, but seeks only to recover the amount of money alleged to have been stolen with interest thereon. The references to the failure to try the claimant for any offense and the failure to impose on him any fine for drunkenness and the negligence of the local authorities in failing to apprehend and prosecute the offenders and the fact that among the gang of thieves were faithless policemen are all mentioned merely in an effort to impute to Mexico some sort of responsibility for the crime committed within its borders.

3. It is unnecessary here to inquire under what particular provisions of the Mexican law the Pánuco police authorities were entitled to take into custody a drunken man found upon its streets. Such authority by express statute or well-established custom exists in every civilized country of which the Commission has knowledge.

4. If Cibich had not been put in jail and his money had not been taken into custody by the police, would Mexico have been held responsible

if in his drunken condition he had been set upon and robbed by a gang of thieves? There seems no reason to believe it. Or, under the same conditions would Mexico have been held responsible because of the presence, among the thieves, of two defecting policemen? There seems no reason to believe it. If he had been imprisoned, and his money withdrawn from him and locked up in a safe place, even if this place had been invaded by the thieves after having overpowered the custodian, would Mexico have been held responsible? This too must be answered in the negative. Therefore, the claimant's case must rest on the fact that the police authorities, having taken Cibich's money in custody, did not put it in a safe and well-locked place, but placed it in the drawer of a table. This fact, it is true, appears in the first police report presented immediately after the occurrence (that of May 24, 1923), and it is repeated in the testimony of January 21, 1925 (or 1924); but a report of December 24, 1924, speaks of "deposited in the safe (*en la caja*) of the police station", and mentions the keys of this safe, and Cibich's own report of May 29, 1923, before the American Consul states upon his inquiries that it had been "deposited in the safe, and locked up," and that "the keys of the safe were delivered, in his presence, to a man in charge of guarding the jail". The allegation that the police failed to use reasonable care in safeguarding the money taken into custody by them is not confirmed by any further evidence than that above-mentioned, which does not support the claim that it was placed in an open drawer (the reports say just: "*en el cajón de la mesa*" and "*en el cajón de una mesa*"), and does not entitle the Commission to build upon it the far-reaching conclusion of official malfeasance. This is particularly true as the Memorial itself, which was never amended, alleges that the money was "placed in the safe of said jail and the keys of said safe given to one of the public guards or police in charge of said jail in the presence of the said (drunken) claimant".

5. As on the record submitted the claimant was legally taken into custody and as the money he had on his person was properly taken by the police for safe keeping, and as the weight of the evidence fails to disclose any want of reasonable care on the part of the Mexican authorities in connexion with the loss of such money, it is unnecessary for the Commission to inquire into the right to assert this claim before this Commission based on the acts or omissions of the municipal officers of Pánuco.

Decision

6. The Commission decrees that the Government of the United Mexican States is not obligated to pay to the Government of the United States of America any amount on behalf of Nick Cibich on account of the claim asserted herein.

THE HOME INSURANCE COMPANY (U.S.A.) *v.* UNITED MEXICAN STATES.

(October 7, 1926. Page 68.)

RESPONSIBILITY FOR LOSSES INCURRED IN GOVERNMENT OPERATION OF RAILWAYS. Claim for excess freight charges *allowed*.

1. The Commission, in its opinion rendered in this case on March 31, 1926, stated that the Government of Mexico was obliged to pay to the claimant the division of the through freight charges from Puerto México to New Orleans. The Commission added that, upon the Government of the United States filing on or before May 1, 1926, evidence satisfactory to the Commission of the amount due claimant under this decision, an award would be entered for such amount.

2. The American Agent, on April 30, 1926, filed testimony, satisfactory to the Commission, stating the division of the through freight charges from Puerto México to New Orleans to have been \$594.14 (five hundred and ninety-four dollars fourteen cents, United States currency).

3. Therefore, award is hereby given that, on account of the claim herein presented, the Government of the United Mexican States is obligated to pay \$594.14 to the Government of the United States of America.

DAVID GONZALEZ (UNITED MEXICAN STATES) *v.* UNITED STATES OF AMERICA.

(October 7, 1926. Page 69.)

UNLAWFUL COLLECTION OF CUSTOMS DUTIES BY OCCUPYING MILITARY FORCES. Claim for double payment of export duties to Mexican authorities and occupying American military authorities *dismissed* for lack of jurisdiction.

1. The Commission, by its decision in this case rendered March 2, 1926, gave the Mexican Agent leave to file an amended Memorial within thirty (30) days from that date, "setting out facts, if any exist, constituting a wrong by the American authorities in the administration of the customs by them", and bringing the case within the principles and rules announced in the interlocutory decision in the El Emporio del Café case on the same day. The Commission stated that, in the absence of such allegations, the case would be dismissed.

2. As the amendment to the Memorial, filed March 27, 1926, does not contain any such allegation with respect to wrongful action on the part of the American authorities in the administration of the customs by them, but raises a controversy which the Commission in its interlocutory decision in the El Emporio del Café case explicitly declared to be outside its jurisdiction, the case is hereby dismissed.

FABIAN RIOS (UNITED MEXICAN STATES) *v.* UNITED STATES OF AMERICA.

(October 7, 1926. Page 70.)

PROCEDURE, MOTION TO DISMISS. When decision on motion to dismiss was postponed in order to permit of the further investigation of facts

and introduction of further evidence but, after expiration of time allowed for this purpose, no further evidence was produced, claim *dismissed*.

(Text of decision omitted.)

WELLS FARGO BANK AND UNION TRUST COMPANY (U.S.A.)
v. UNITED MEXICAN STATES.

(October 7, 1926. Page 71.)

PROCEDURE, MOTION FOR LEAVE TO FILE MEMORIAL.—AMENDMENT OF MEMORIAL. Motion for leave to file a memorial under a different name from that in the memorandum *denied* without prejudice to procedure of filing memorial on basis of memorandum followed by filing of motion to amend such memorial.

(Text of decision omitted.)

L. F. H. NEER AND PAULINE NEER (U.S.A.) v. UNITED MEXICAN
STATES.

*(October 15, 1926, concurring opinion by American Commissioner, undated.
Pages 71-80.)*

DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH.—INTERNATIONAL STANDARD. In absence of evidence establishing that action of authorities in failing to apprehend or punish those guilty of murder of American citizen amounted to an outrage or such a failure to reach international standard that would be conceded by every reasonable man, claim *disallowed*.

Cross-references: Annual Digest, 1925-1926, p. 213; British Yearbook, Vol. 8, 1927, p. 183.

Comments: Edwin M. Borchard, "Important Decisions of the Mixed Claims Commission, United States and Mexico," Am. J. Int. Law, Vol. 21, 1927, p. 516 at 521; Joseph Conrad Fehr, "International Law as Applied by U.S.-Mexico Claims Commission," A.B.A. Jour., Vol. 14, 1928, p. 312.

1. This claim is presented by the United States against the United Mexican States in behalf of L. Fay H. Neer, widow, and Pauline E. Neer, daughter, of Paul Neer, who, at the time of his death, was employed as superintendent of a mine in the vicinity of Guanaceví, State of Durango, Mexico. On November 16, 1924, about eight o'clock in the evening, when he and his wife were proceeding on horseback from the village of Guanaceví to their home in the neighborhood, they were stopped by a

number of armed men who engaged Neer in a conversation, which Mrs. Neer did not understand, in the midst of which bullets seem to have been exchanged and Neer was killed. It is alleged that, on account of this killing, his wife and daughter, American citizens, sustained damages in the sum of \$100,000.00; that the Mexican authorities showed an unwarrantable lack of diligence or an unwarrantable lack of intelligent investigation in prosecuting the culprits; and that therefore the Mexican Government ought to pay to the claimants the said amount.

2. As to the nationality of the claim, which is challenged, the Commission refers to the principles expounded in paragraph 3 of its opinion and decision rendered in the case of William A. Parker on March 31, 1926. On the record as presented the Commission decides that the claimants were by birth, and have since remained, American nationals.

3. As to lack of diligence, or lack of intelligent investigation, on the part of the Mexican authorities, after the killing of Paul Neer had been brought to their notice, it would seem that in the early morning after the tragedy these authorities might have acted in a more vigorous and effective way than they did, and moreover, that both the special agent of the Attorney General of Durango (in his letter of November 24, 1924), and the Governor of that State, who proposed the removal of the Judge of Guanaceví, have shared this opinion. The Commission is mindful that the task of the local Mexican authorities was hampered by the fact that the only eyewitness of the murder was unable to furnish them any helpful information. There might have been reason for the higher authorities of the State to intervene in the matter, as they apparently did. But in the view of the Commission there is a long way between holding that a more active and more efficient course of procedure might have been pursued, on the one hand, and holding that this record presents such lack of diligence and of intelligent investigation as constitutes an international delinquency, on the other hand.

4. The Commission recognizes the difficulty of devising a general formula for determining the boundary between an international delinquency of this type and an unsatisfactory use of power included in national sovereignty. In 1910 John Bassett Moore observed that he did "not consider it to be practicable to lay down in advance precise and unyielding formulas by which the question of a denial of justice may in every instance be determined" (*American Journal of International Law*, 1910, p. 787), and in 1923 De Lapradelle and Politis stated that the evasive and complex character (*le caractère fuyant et complexe*) of a denial of justice seems to defy any definition (*Recueil des Arbitrages Internationaux*, II, 1923, p. 280). It is immaterial whether the expression "denial of justice" be taken in that broad sense in which it applies to acts of executive and legislative authorities as well as to acts of the courts, or whether it be used in a narrow sense which confines it to acts of judicial authorities only; for in the latter case a reasoning, identical to that which—under the name of "denial of justice"—applies to acts of the judiciary, will apply—be it under a different name—to unwarranted acts of executive and legislative authorities. Without attempting to announce a precise formula, it is in the opinion of the Commission possible to go a little further than the authors quoted, and to hold (first) that the propriety of governmental acts should be put to the test of international standards, and (second) that the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an

insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. Whether the insufficiency proceeds from deficient execution of an intelligent law or from the fact that the laws of the country do not empower the authorities to measure up to international standards is immaterial.

5 It is not for an international tribunal such as this Commission to decide, whether another course of procedure taken by the local authorities at Guanaceví might have been more effective. On the contrary, the grounds of liability limit its inquiry to whether there is convincing evidence either (1) that the authorities administering the Mexican law acted in an outrageous way, in bad faith, in wilful neglect of their duties, or in a pronounced degree of improper action, or (2) that Mexican law rendered it impossible for them properly to fulfil their task. No attempt is made to establish the second point. The first point is negated by the full record of police and judicial authorities produced by the Mexican Agent, though the Commission feels bound to state once more that in its opinion better methods might have been used. From this record it appears that the local authorities, on the very night of the tragedy, November 16, went to the spot where the killing took place and examined the corpse; that on November 17 the Judge proceeded to the examination of some witnesses, among them Mrs. Neer; that investigations were continued for several days; that arrests were made of persons suspected; and that they were subsequently released for want of evidence. The American Agency in rebuttal offers nothing but affidavits stating individual impressions or suppositions. In the light of the entire record in this case the Commission is not prepared to hold that the Mexican authorities have shown such lack of diligence or such lack of intelligent investigation in apprehending and punishing the culprits as would render Mexico liable before this Commission.

Decision

6. The Commission accordingly decides that the claim of the United States is disallowed.

Separate opinion

While concurring in the decision disallowing this claim, I find myself unable to concur fully in the statement of reasons upon which the other two members of the Commission think the award should be grounded. Because of that fact I deem it to be advisable, having in mind particularly the importance of the rules and principles of law involved in the case, to state my own views somewhat in detail.

This claim is presented by the United States against the United Mexican States in behalf of L. Fay H. Neer, widow, and Pauline E. Neer, daughter, of Paul Neer, a native American citizen, who was killed in the vicinity of the village of Guanaceví, State of Durango, Mexico, on November 16, 1924. The claim is grounded on an assertion of a denial of justice growing out of the failure of Mexican authorities to take adequate measures to apprehend and punish the persons who killed Neer. An indemnity in the sum of \$100,000.00 is asked in behalf of the claimants as heirs of the deceased.

There is no dispute regarding the material facts in relation to the killing of Neer in so far as they are disclosed by evidence. Neer, at the time of his death, was employed as superintendent of a mine at Guanaceví. At about eight o'clock in the evening of the day on which he was killed, he and his wife were proceeding on horseback from Guanaceví to their home about three miles distant from the village. When they had gone approximately a third of the distance they were stopped by a number of men who engaged Neer in conversation, which Mrs. Neer did not understand. In the midst of this conversation Neer was shot and killed. An examination of the corpse revealed that three bullets had penetrated his body. Mrs. Neer was able to furnish but very little information of value in identifying the men by whom her husband was accosted.

Some question is raised in the Answer of the United Mexican States with respect to the right of the United States to maintain the claim in behalf of the claimants. However, it is merely stated in the Answer that "the American nationality of the claimants and of the deceased Paul Neer is not duly proved in the Memorial", and in the light of what I consider to be entirely convincing evidence produced on this point I have no doubt as to the right of the United States to prefer this claim in behalf of the claimants as American heirs of a deceased American citizen.

Among the annexes accompanying the Memorial of the United States are certain affidavits. Mrs. Neer, in an affidavit made by her, states that "the Mexican Government did not make an adequate or thorough investigation of the facts connected with the murder of said Paul Neer and failed and neglected to take any adequate measures to apprehend and punish the murderers of said Paul Neer" (pp. 23-24). Herman Dauth, a resident of Guanaceví at the time of Neer's death, states in an affidavit that "to his personal knowledge no effort was made by the local authorities to apprehend the murderers and assailants, either the day following the murder or the day thereafter, but that on the third day Indian trailers were sent to the scene of the murder and discovered the exploded shells behind the stone walls". The affiant further expresses the belief that had prompt and proper methods been employed by the local authorities, the identity of the murderers of the said Paul Neer could have been ascertained (p. 27). Another affiant, John N. Brooks, Jr., an employee in general charge of the Guanaceví Unit of the *Cia. Minera de Penoles, S.A.*, situated near Guanaceví, swears that "some inquiry and search was made by the authorities of the State of Durango to ascertain who were the murderers of said Paul Neer, but to his knowledge no reward was ever offered for their apprehension and no special pains or care were taken by the authorities to apprehend and punish the murderers" (p. 29).

To refute the charge that Mexican authorities failed to take proper measures to apprehend and bring to justice the persons who killed Neer, the Mexican Government filed with its Answer a record of proceedings instituted and carried on before the Judge of First Instance of the Judicial District of Guanaceví. From this record it appears that the Judge, on November 17, the day following the killing of Neer, ordered an investigation; that on the same day members of the Court went to the place where the killing took place; that they examined the corpse which had been removed to a near-by residence, and that they then proceeded to the examination of witnesses, including Mrs. Neer. It further appears that the examination of witnesses was continued for several days; that arrests were made of certain persons suspected of the killing of Neer;

and that they were subsequently released for want of evidence implicating them in the deed.

The Agent of Mexico, in his argument before the Commission, emphasized that the Mexican authorities had complied with the forms of Mexican law in the investigation of the killing of Neer, and he asserted that the efficacy of the law had been proved in the light of experience.

The sovereign rights of a nation with regard to the enactment and execution of laws of this character within its jurisdiction is of course well understood. Vattel, in asserting a general principle in relation to these rights, adds some observations as to the respect that should be accorded to the measures employed by nations in the exercise of such rights. He says:

"The sovereignty united to the domain establishes the jurisdiction of the nation in her territories, or the country that belongs to her. It is her province, or that of her sovereign, to exercise justice in all the places under her jurisdiction, to take cognizance of the crimes committed, and the differences that arise in the country.

"Other nations ought to respect this right. And, as the administration of justice necessarily requires that every definitive sentence, regularly pronounced, be esteemed just, and executed as such—when once a cause in which foreigners are interested has been decided in form, the sovereign of the defendants can not hear their complaints. To undertake to examine the justice of a definitive sentence is an attack on the jurisdiction of him who has passed it. The prince, therefore, ought not to interfere in the causes of his subjects in foreign countries, and grant them his protection, excepting in cases where justice is refused, or palpable and evident injustice done, or rules and forms openly violated, or, finally, an odious distinction made, to the prejudice of his subjects, or of foreigners in general." *Law of Nations*. (Chitty's edit. 1869, Book II, pp. 165-166.)

Although there is this clear recognition in international law of the scope of sovereign rights relating to matters that are subject of domestic regulation, it is also clear that the domestic law and the measures employed to execute it must conform to the requirements of the supreme law of members of the family of nations which is international law, and that any failure to meet those requirements is a failure to perform a legal duty, and as such an international delinquency. Hence a strict conformity by authorities of a government with its domestic law is not necessarily conclusive evidence of the observance of legal duties imposed by international law, although it may be important evidence on that point.

The functions exercised by the Judge at Guanaceví in investigating the death of the American citizen, Neer, and in taking steps to apprehend the persons who shot him were evidently not judicial acts in the sense in which the term judicial is generally used. The duties the Judge discharged may be said to be in a measure those of a police magistrate. However, the precise character of acts of the Judge is not a material point. The claim preferred by the United States is predicated on a denial of justice. I think it is useful and proper to apply the term denial of justice in a broader sense than that of a designation solely of a wrongful act on the part of the judicial branch of the government. I consider that a denial of justice may, broadly speaking, be properly regarded as the general ground of diplomatic intervention. This view, which has often been expressed, was well stated in the opinion rendered by Sir Henry Strong and Mr. Don M. Dickinson in the so-called "El Triunfo" case in which it was said:

"It is not the denial of justice by the courts alone which may form the basis for reclamation against a nation, according to the rules of international law.

" 'There can be no doubt'—says Halleck— 'that a State is responsible for the acts of its rulers, whether they belong to the legislative, executive, or judicial department of the Government, so far as the acts are done in their official capacity.' " Ralston, *International Arbitral Law and Procedure*, p. 51; *Foreign Relations of the United States*, 1902, p. 870.

The controversial questions that arise between nations from time to time with respect to complaints of denial of justice are numerous and varied. But it is probably not so very difficult to formulate a practicable and sound standard by which to test the propriety of intervention or the right of a nation to claim pecuniary reparation in any given case.

It may perhaps be said with a reasonable degree of precision that the propriety of governmental acts should be determined according to ordinary standards of civilization, even though standards differ considerably among members of the family of nations, equal under the law. And it seems to be possible to indicate with still further precision the broad, general ground upon which a demand for redress based on a denial of justice may be made by one nation upon another. It has been said that such a demand is justified when the treatment of an alien reveals an obvious error in the administration of justice, or fraud, or a clear outrage. The thought is expressed to some extent in an opinion given by Commissioner Bertinatti in the Medina case under the Convention of July 2, 1860, between Costa Rica and the United States in which it was said:

"It being against the independence as well as the dignity of a nation that a foreign government may interfere either with its legislation or the appointment of magistrates for the administration of justice, the consequence is that in the protection of its subjects residing abroad a government, *in all matters depending upon the judiciary power*, must confine itself to secure for them free access to the local tribunals, besides an *equality of treatment with the natives* according to the conventional law established by treaties.

"Only a formal denial of justice, the dishonesty or *prevarication* of a judge legally proved, 'the case of torture, the denial of the means of defense at the trial, or gross injustice, *in re minime dubia*', (see opinion of Phillimore in the controversy between the governments of Great Britain and Paraguay) may justify a government in extending further its protection." Moore, *International Arbitrations*, Vol. 3, p. 2317.

There may of course be honest differences of opinion with respect to the character of governmental acts, but it seems to be clear that an international tribunal is guided by a reasonably certain and useful standard if it adheres to the position that in any given case involving an allegation of a denial of justice it can award damages only on the basis of convincing evidence of a pronounced degree of improper governmental administration.

In the case before the Commission no charge is made of a failure of any duty by Mexican authorities to prevent the commission of an offense. Indemnity is claimed because of the alleged neglect of the authorities to take proper measures to apprehend and punish the persons who killed Neer. It has been repeatedly asserted by international tribunals that a failure of authorities to take adequate measures of this kind renders a nation liable to respond in damages. Thus, Mr. Findlay, in the opinion written by him in the case of Amelia de Brissot, under the Convention of December 5, 1885, between the United States and Venezuela, said:

"It would be wholly unwarranted, therefore, to hold Venezuela responsible for not anticipating and preventing an outbreak, of which the persons most interested in knowing and the very actors on the spot had no knowledge. A state, however, is liable for wrongs inflicted upon the citizens of another state in any case where the offender is permitted to go at large without being called to account or punished for his offense, or some honest endeavor made for his arrest and punishment." Moore, *International Arbitrations*, Vol. 3, p. 2969.

To the same effect Commissioner Little in the opinion written by him in that case said:

"Venezuela's responsibility and liability in the matter are to be determined and measured by her conduct in ascertaining and bringing to justice the guilty parties. If she did all that could reasonably be required in that behalf, she is to be held blameless; otherwise not. Without entering upon a discussion of the investigation instituted and conducted by her, it seems there was fault in not causing the leaders, at least, of this lawless band to be arrested. It was notorious who they were. It does not seem that any attempt was made before any local authority to bring them or any of the band to justice. Had there been a well-directed effort of that kind, or had the government's investigation disclosed their innocence, and failed to discover those actually guilty, its responsibility would perhaps have ended, assuming the investigation, as I do, was a fair and just one." *Op. cit.*, p. 2968.

See also the Poggioli Case before the Italian-Venezuelan Commission of 1903, Ralston, *Report*, p. 847, 869; Bovallins and Hedlund Cases, *Ibid.*, p. 952; case of Ruden & Company under the Convention of July 12, 1863, between the United States and Peru, Moore, *International Arbitrations*, Vol. 2, p. 1653.

It was argued in behalf of the United States that there was an unwarranted delay in steps taken to apprehend the persons who killed Neer; that the proceedings of investigation were of such a public character as to put persons implicated in the crime on guard and to enable them to escape; that detectives might have been employed to apprehend the offenders. I am of the opinion that better methods might have been used by the Mexican authorities, and that the action taken by them may well be adversely criticized.

But in the light of the entire record in the case before us I am not prepared to decide that a charge of a denial of justice can be maintained against the Government of Mexico conformably to the principles which according to my views as above expressed should govern the action of the Commission.

I accordingly concur in the decision that the claim of the United States is disallowed.

Fred K. NIELSEN,
Commissioner.

JOHN B. OKIE (U.S.A.) *v.* UNITED MEXICAN STATES.

(October 26, 1926. Pages 80-82.)

DAMAGES, PROOF OF. Evidence considered as to amount of damages allowable under decision previously rendered by tribunal and damages finally fixed and *allowed*.

(Text of decision omitted.)

WILLIAM A. PARKER (U.S.A.) *v.* UNITED MEXICAN STATES.

(October 26, 1926. Pages 82-86.)

OWNERSHIP OF CLAIM. Evidence as to ownership of claim *held* satisfactory. Claim *allowed*.

(Text of decision omitted.)

WALTER H. FAULKNER (U.S.A.) *v.* UNITED MEXICAN STATES.

(November 2, 1926, *separate opinion by American Commissioner, November 2, 1926. Pages 86-96.*)

DENIAL OF JUSTICE.—ILLEGAL IMPRISONMENT. An allegation that claimant was arrested without sufficient grounds, while it may involve an international delinquency, *held* to require more evidence than claimant's statement to establish it.

LACK OF NOTICE OF GROUNDS FOR ARREST. An allegation that claimant was imprisoned for four days without knowledge of the charge against him will, if proven, be given great weight by the tribunal. Such allegation *held* not established by the evidence.

LACK OF OPPORTUNITY TO COMMUNICATE WITH CONSUL. An allegation that claimant was imprisoned and denied right to communicate with his consul for several days will, if proven, be given great weight by the tribunal. Such allegation *held* not established by evidence.

CRUEL AND INHUMANE IMPRISONMENT.—INTERNATIONAL STANDARD. Evidence *held* to establish that claimant was imprisoned under sub-standard conditions.

MISTREATMENT DURING IMPRISONMENT. An allegation that claimant was transferred from one prison to another in a manner repugnant to his self-respect and was searched *held* not a basis of claim.

MEASURE OF DAMAGES, ILLEGAL IMPRISONMENT. Measure of damages in a claim involving illegal imprisonment set at \$150.00 per day.

Cross-references: Am. J. Int. Law, Vol. 21, 1927, p. 349; Annual Digest, 1925-1926, p. 294.

Comments: Edwin M. Borchard, "Important Decisions of the Mixed Claims Commission, United States and Mexico," Am. J. Int. Law, Vol. 21, 1927, p. 516 at 521.

1. It is alleged in the Memorial and other parts of the record presented by the American Government that Walter H. Faulkner, who was born and has ever remained an American national, lived in 1915 at San Antonio, Texas, U. S. A., his profession being an interpreter's; that in the fall of said year he visited Tampico, Tamaulipas, Mexico, and from there proceeded on a business trip to Veracruz, Veracruz, Mexico, where he arrived on September 25, 1915; that at the end of said month he was waiting there for the arrival of a steamer due on or about October 2, to take him back to Tampico; that in the afternoon of September 30, 1915, he was induced to visit a police office, was submitted there to a search of his pockets and clothes without being told the charge or suspicion against him; that he thereupon was confined until October 7 in a house of detention in the center of the town where conditions were extremely bad; that he did not discover until on or after October 4 the charge or suspicion against him to be that of having circulated counterfeit Carranza money; that from October 7 till October 11 he was confined in the Allende prison in the same city, where conditions were tolerable; and that on October 11 he was released, the Judge declaring that no sufficient evidence for the charge or suspicion against him was available. For the damages sustained in his honor, time lost, and well-being he claims \$50,000.

2. The claimant complains of seven acts on the part of Mexican authorities:

- a. He was arrested without any sufficient ground;
- b. He was not told the grounds of the charge or suspicion existing against him; a fact which prevented him from proving his innocence;
- c. He was placed in a house of detention where he suffered maltreatment;
- d. He was denied for several days communication either with the American consul or with friends;
- e. He was not heard or examined until after some one hundred and two hours;
- f. He was transferred from one prison to another in a way repugnant to his self-respect;
- g. While he was in detention his hotel valise was opened and searched.

3. The Commission holds that on the face of the record the allegations under f and g cannot in themselves furnish a separate basis for complaints. They are incidental to the treatment of detention and suspicion, and if consistent with Mexican law do not in themselves contain anything contrary to international rules or duties. It is neither sustained nor proven that the authorities in applying these measures to the claimant violated the Mexican law of procedure or any other Mexican statute.

4. The allegation of the claimant that he has been placed and kept from September 30 to October 7, 1915, in a house of intolerably bad conditions (allegation c) has been challenged by stating that it is supported only by affidavits of the claimant himself; that it is impossible for the Mexican Government to rebut it because of the destruction of the records in the de la Huerta insurrection of 1923-1924; and that therefore, in

accordance with decisions of former international tribunals, the Commission should not accept as sufficient evidence these statements of the claimant alone, made as late as 1925 or 1926. The Commission, however, sees that the claimant's recent affidavits are supported by the fact that on October 4 and 6, 1915 (prior, therefore, to October 7, 1915) he wrote letters of complaint to the American consul at Veracruz, and that nothing has been adduced to militate against the contention that the jail conditions he describes really existed in the down-town house of detention at Veracruz. The Commission holds the record convincingly establishes that the claimant has been in the said house of detention from a date some days prior to the date of his first letter to the American consul (October 4) up to October 7, the date on which he entered the Allende prison.

5. The allegation made by the claimant that he was arrested without any sufficient ground (allegation a) is most difficult to decide on the face of the record. The claimant states so, allowing for no other possible reasons of charge or suspicion against him than the fact that he came from Tampico where counterfeit Carranza money was being made and issued, and that an unnamed person might have declared that he had been seen circulating counterfeit money at El Paso, Texas. The Commission does not need any theory about presumption of lawfulness of governmental acts to hold, that in the matter of justification of an arrest the mere statement of the person who suffered the arrest can not be deemed sufficient. Furthermore, the explanation given for the circumstance that the Mexican Government can not submit to this Commission extracts from its police and judicial records in the case is a reasonable one (to wit, because of their destruction in 1923-1924). The record seems to indicate that, apart from one exception (the day of first examination), the Mexican rules of procedure have been followed; it at least does not show the contrary. The same Judge, who was so careful as to tell the claimant on Saturday, October 9, 1915, that on Tuesday, October 22, the legal period for his detention would elapse and who set him free on the preceding day about noon, mentions in his decree "the proceedings had up to this time"; it is difficult to assume this Judge to have been careful about periods and forms and careless as to the main point, the existence of any ground for the investigations. The fact that the period of detention elapsed on October 12 can not be interpreted as meaning that the period of three days, provided by article 132 of the Federal Code, had been calculated from either October 7 or 8, for then it would have ceased on October 10 or 11; but it might well mean that two procedures took place, one in a local court, and the other in a military court. The claimant himself states that on or about October 5 he was heard twice, even at so late an hour as eleven p. m., which would seem to show activity on the part of the local judicial authorities, and re-examined on or about October 6, and that in the Allende prison he was examined again on October 9. Where, in case the formalities of procedure had been evidently neglected, a presumption of lack of material grounds for the detention might have had probability, it would seem reasonable—once the record gives the impression that in the main the formalities of Mexican procedure have been complied with—to suppose their having been applied to some material basis for charge or suspicion, and not to proceedings without any foundation whatsoever as required both by the Code and by the Constitution. At any rate the record can not be said to contain convincing evidence as to absence of sufficient grounds for judicial

proceedings, as would be necessary for assuming an international delinquency. The fact that nothing appears about personal steps taken in Faulkner's interest by either the American consul or the acting special representative of the State Department at Veracruz, once they had been informed, can only strengthen the impression that there might have been some ground for charge or suspicion on the part of the Mexican authorities.

6. The allegation that the claimant was not allowed for four days to know the charge or suspicion sustained against him (allegation b) must, if proven, have great weight with this Commission. It is suggested by the two letters the claimant wrote from prison to the American consul, that he was given a first hearing and information only between October 4 and October 6; a fact which would have been illegal in the light of article 98, paragraph 2, of the said Federal Code in connection with article 20 of the Mexican Constitution of 1857. It is, however, of more importance to know, whether Faulkner at the time of his arrest understood or was told what was the charge or suspicion against him, such being a matter of prime importance for any person deprived of his liberty (allegation c). If the legal period for having a regular hearing of the person under detention had been transgressed, as seems to have been the case, such transgression in itself might have found some excuse in the turbulent and unsettled character of those times and in the press of work on the authorities, and can not be deemed to amount to an international delinquency; whereas there would be scarcely an excuse if, with respect to the fact of informing the claimant about the character of his case, he had been treated with undue and unnecessary harshness. Here again, however, it is doubtful whether this serious lack of duty on the part of the authorities may be inferred from the sole statement in the claimant's letter of October 4, 1915, and whether therefore there exists convincing evidence as to this point as well.

7. The allegation of the claimant (allegation d) that he was not allowed for several days to communicate with his consul would, if proven, also have weight with the Commission. The Commission holds that a foreigner, not familiar with the laws of the country where he temporarily resides, should be given this opportunity. It is not clear, however, from the record when and how the liberty to communicate was given the claimant; his letter of October 4, 1915, to the consul appearing, from its wording, not to have been the first communication tendered.

8. The allegation of the claimant (paragraph 4, *supra*) that he was placed for several days in a house of detention where conditions were extremely bad (repulsive filth, human excrement, no provision for sanitation, insects, rats) might have been easily negated by showing that such conditions do not exist at Veracruz or did not exist there in the fall of 1915. Making allowance for some apparent exaggerations in the claimant's presentation of facts, there is for the Commission every reason to hold that the claimant has been in this house of detention for some five days under conditions that were, for an educated man, intolerable. Maltreatment, apart from the conditions of the house, not only is not proven, but the record seems to show the contrary.

9. The Commission, eliminating from the claimant's complaints everything which might be due to misinterpretation or misrepresentation on his part, and for which the declaration of the claimant alone can hardly be considered sufficient evidence, views the fact that, as the records stands, he must be taken to have been detained for several days in a house of

detention under intolerable circumstances of indignity and inconvenience, and that possibly the harshness of this situation has been increased by the silence of the authorities for some days on the motives for his detention. Even if all other complaints were unfounded or unproven or improbable, these complaints remain, corroborated as they are by letters written from the house of detention at a time where misrepresentation might have withheld from the claimant the American Consul's assistance, and written to an American consul by a man who himself had been an American Consul. These statements of 1915 can not be rebutted by presenting them either as mere suppositions on his part or as afterthought of some ten years later. It therefore has to be examined whether either this first fact alone or these two facts combined constitute an international delinquency on the part of Mexico.

10. As the Commission expounded in its opinion in the case of L. F. H. Neer, it holds that the test lies in the application of international standards. That Mexico, just as all other civilized nations, is aware of these standards is apparent from what the claimant states about the Allende prison; the reliability of his complaints about the down-town building is even rendered more probable by the quite different manner in which he expresses himself not only on the Allende prison, but even on the "better and more healthful compartment" he occupied in the down-town building during October 6 and 7 (or 5 and 6). The Commission holds that, even in case there might have been sufficient ground for the arrest, here at any rate was a treatment of apparent international insufficiency for which the record furnishes convincing evidence and for which Mexico is liable. Whether there was sufficient ground for the arrest remains entirely doubtful; but as there certainly is not convincing evidence to the contrary, Mexico can not be held liable for an international delinquency in that respect.

11. The determination of damages to be allowed in cases of this type is necessarily uncertain. In the *Topaze* case, the umpire held after due investigation (Ralston, *Venezuela Arbitrations of 1903*, p. 331) that a sum of \$100 per day (or: not exceeding \$100 a day) "seems to be the one most usually acceptable" and "is apparently the favored allowance by arbitrators". The Commission is willing to follow these precedents, but realizing how much the value of money has changed feels bound to increase them fifty per centum. Cases of allowing damages for illegal imprisonment are most similar to the present one, and in such cases tribunals often allowed a gross sum without interest. The Commission is prepared to follow this precedent too. Calculating the amount in the manner most favorable to the claimant who alleges to have been kept for seven days in the first house of detention, the Commission holds that, on the face of the record, full satisfaction is given him by allowing \$1,050 without interest.

Decision

12. On the above grounds, the Commission decides that the Government of the United Mexican States is obligated to pay to the Government of the United States of America on behalf of Walter H. Faulkner \$1,050 (one thousand and fifty dollars), without interest.

Separate opinion

I concur in the award of an indemnity of \$1,050.00. However, I desire briefly to indicate my views with respect to legal contentions advanced by

each Agency in this case, and to point out that my acquiescence in an award providing indemnity merely for mistreatment in one of the jails in which Faulkner was imprisoned is due to uncertainties in the record which unfortunately have not been explained. I think the case presents a grievous injury to a respectable American citizen. The facts in the case are indicated and analyzed in the opinion signed by my associates.

The claim is based on charges of false arrest and detention and mistreatment of Faulkner, who was arrested and discharged without being brought to trial. Foreigners of course are in no manner exempt from the operation of criminal laws of the country of their sojourn. The acquittal of an alien after trial does not of itself justify a demand for indemnity. And the same is true respecting the release of an alien without subjecting him to trial. But international law requires that, in connection with the execution of penal laws, an alien shall be accorded certain rights such as are guaranteed under the laws of Mexico and under the laws of civilized countries generally both to aliens and nationals. There must be some ground for an arrest, or as said in terms of domestic law, there must be probable cause; a person is entitled to be informed of the charge against him; and he must be given opportunity to defend himself. Apart from questions respecting the observance of such rights, indemnities have frequently been awarded by international tribunals in cases in which aliens have been grossly mistreated during imprisonment. It is alleged in the Memorial of the United States that none of these rights was accorded to Faulkner, and that he was illtreated while under confinement.

These charges are denied in the Answer and in the Brief filed by the Mexican Government. In the oral and in the written argument it was contended that the claimant was guilty of laches in not bringing his complaint to the attention of the Mexican Government, and contentions were advanced with respect to the burden of proof resting on the claimant to establish his case, and the insufficiency of the evidence produced to substantiate the charges made against Mexican authorities.

While the arguments with respect to the insufficiency of proof to establish charges underlying the claim were very forcefully presented, it seems to me that in a number of respects the manner in which the claim was defended revealed the weakness of the defense. The proposition advanced in the Mexican Government's Brief that "Ordinarily it is incumbent upon the party alleging a fact to introduce evidence to establish it" may readily be conceded. And it is undoubtedly true that, whenever it is sought to ground important conclusions on an affidavit filed by a person in whose behalf claim is made, it is desirable that his testimony be confirmed by the testimony of others. But it seems to me that the contentions advanced by the Mexican Government go too far in an attempt to discredit the effect of Faulkner's affidavit, and in the argument with respect to burden of proof, and also in the reliance which is placed upon a rule of municipal law and of international law relative to a presumption of the propriety of the acts of officials.

While Faulkner's affidavit was generally rejected as proof of things of which Faulkner complains, it was repeatedly cited as proof of things which it was deemed to be proper to advance in defense of the claim. It was said that the claimant has done nothing to establish that he was imprisoned in what is called in the record the "downtown jail", and such imprisonment is specifically denied, although there are several communications accompanying the Memorial which show that as early as October 4, 1915, Faulkner had been in communication with the American Consul at Veracruz com-

plaining bitterly against his imprisonment. Moreover, with a dispatch of October 7, 1915, to the Department of State, the American Consul at Veracruz transmitted copies of communications dated October 5 and 7, 1915, respectively, to the American representative at Mexico City by which it is shown that he requested that representations regarding Faulkner's imprisonment be made to the Mexican authorities. The supposition can not be indulged in that Faulkner, prior to the date on which he was placed in the Allende jail, evidently October 7, was complaining about being in what he calls a "hell hole", or that the American Consul was addressing the American representative in Mexico City with respect to the imprisonment of Faulkner when there had been no imprisonment.

With regard to the value of Faulkner's testimony I may observe that it seems to me that his affidavit shows an intent to furnish a fair and accurate statement of facts. For example, while considering himself arbitrarily imprisoned without the slightest cause, throughout the period of his detention in two different jails, he gives details indicating that his condition was somewhat alleviated when he was placed in the Allende jail.

Counsel for Mexico, while asserting the insufficiency of evidence to meet the burden of proof which he insisted rested upon the claimant, referred to the principle stated by the Commission in its opinion in the claim of William A. Parker (Docket No. 127), in which the Commission asserted it to be the duty of the two Agencies to search out and to present to the Commission all facts throwing any light on the merits of a claim.

But little adjective law has been developed in international practice. The principle just mentioned is found in the Hague Convention of 1907 for the pacific settlement of international disputes to which a large number of nations including Mexico and the United States are parties. Article LXXV of that Convention reads as follows:

"The parties undertake to supply the tribunal as fully as they consider possible, with all the information required for deciding the case."

To be sure, no provisions of the Hague Convention of 1907 are incorporated directly or by reference into the Claims Convention of September 8, 1923. But this Commission has given effect to the principle underlying Article LXXV and both Agencies have expressed their intention to observe it. In the light of that principle it seems to me that clearly the charge of mistreatment of Faulkner in the so-called "downtown jail" can not be said to have failed because of lack of substantiation in that it is supported merely by Faulkner's affidavit. Had it been desired to discredit the affidavit on this point it would doubtless have been possible to produce for that purpose evidence describing the condition of the jail.

With respect to the charge of absence of probable cause for the arrest of Faulkner, it was contended in behalf of the Mexican Government that there was no supporting evidence other than that of Faulkner's affidavit. It was said that records were destroyed, so that the Mexican Government could not furnish evidence with regard to the reasons for Faulkner's arrest. Even though written records have been destroyed, there may be persons connected with the arrest who might testify with regard to orders given or orders received with reference to Faulkner's arrest and the reasons given at the time of the arrest for that action. The steps taken by the Mexican authorities to obtain information from persons having knowledge of the arrest are discussed in some detail in the Brief filed by the United States. However, since I concur in an award of indemnity for mistreatment only, I will not discuss this point.

I desire briefly to comment upon the argument made in the Mexican Government's Brief and in the argument of counsel with respect to laches with which it was contended Faulkner was chargeable in not bringing his complaint to the attention of the Mexican Government. I am of the opinion that it is a general practice among nations to receive complaints or claims, involving what is described in terms of domestic law as tortious acts on the part of authorities, through diplomatic channels, and not directly from aliens who may consider themselves aggrieved by such acts. However, touching the contention that Faulkner was guilty of laches, so that the Mexican Government was not put on notice with regard to his complaint, it may be observed that he complained very promptly and emphatically to an American Consular officer, who in turn communicated with an American representative in Mexico City, who undoubtedly brought the matter to the attention of Mexican authorities there. Furthermore, I am of the opinion that in an international arbitration the principle of laches can be invoked for whatever its legal effect may be only with respect to the rights of nations parties to the arbitration. International tribunals have in some instances declared that one government should not call upon another government to respond in damages when such action, after a long lapse of time, clearly puts the respondent government in an unfair position in making its defense, particularly in the matter of collecting evidence, and raises a presumption of the nonexistence of a just claim which would have been presented had it ever existed. The instant claim is not a proceeding instituted by Faulkner against the Mexican Government, and the merits of the case must be determined not in accordance with some law defining Faulkner's rights against the Government of Mexico, but conformably to the relative rights of the two nations under international law. In a case coming before a commission charged with the judicial determination of cases arising since the year 1868, for which no provision has been made by the two Governments since that date, a case in which the underlying grievances were, I feel certain, brought to the attention of Mexican authorities in 1915, the right of the United States to maintain the claim can not, in my opinion, be defeated or in any way affected by a plea of laches.

Fred K. NIELSEN,
Commissioner.

LEONARD E. ADLER (U.S.A.) *v.* UNITED MEXICAN STATES.

(*November 2, 1926, separate opinion by American Commissioner, November 2, 1926. Pages 97-100.*)

ILLEGAL IMPRISONMENT.—MISTREATMENT DURING IMPRISONMENT.—INABILITY TO OBTAIN PROPER MEDICAL CARE. Claimant alleged that ship on which he was wireless operator was unlawfully detained in Mexican port and claimant required to stay on board vessel. Claimant was permitted to leave vessel but was arrested and held during day. Claimant alleged that during period of such imprisonment he was prevented from getting proper medical care. *Held*, evidence does not establish claim for illegal arrest, detention and maltreatment.

Cross-references: Am. J. Int. Law, Vol. 21, 1927, p. 354; Annual Digest, 1925-1926, p. 296.

1. Claim is made by the United States of America in this case for indemnity in the sum of \$15,000.00 in favor of Leonard E. Adler, an American citizen, who, it is alleged, was wrongfully and arbitrarily arrested by Mexican authorities, held under imprisonment, and during the period of detention prevented from obtaining much needed medical assistance. The occurrences of which account must be taken in passing upon the merits of this claim are not all clearly explained either by the evidence filed with the Memorial or by that accompanying the Answer. The most important allegations in the Memorial are grounded almost solely on an affidavit made by Adler (Annex 4), the substance of which is as follows:

2. In 1917 Adler was in the employ of the Marconi Wireless Telegraph Company of America as a radio operator and was assigned for service on the Mexican steamship *Mexico*, owned by a Mexican company, which had a contract with the Marconi Company for the rental of radio apparatus installed on the vessel. When the ship arrived at Progreso, Yucatan, in the early part of December, 1917, it was boarded and taken possession of by Mexican soldiers under the command of a Mexican officer, who informed the Captain of the *Mexico* that no one would be permitted to leave the vessel. The officer stated that the vessel had been commandeered by the Mexican Government. By order of the officer guards were placed at the ship's gangway.

3. On December 30, 1917, the commander of the Mexican soldiers entered the radio cabin of the vessel and directed the transmission of a message. Adler informed the officer that the message could not be sent except upon the payment of the cost of transmission the amount of which he made known to the officer. The officer thereupon refused to pay the regular rates and ordered Adler and another operator on the vessel, Lloyd Brasher, to their cabin and placed a guard outside of the door. About January 5, 1918, the captain of the vessel received orders to proceed to Veracruz, Veracruz, Mexico, with the vessel, which arrived at that place about January 7, 1918. Some time after arriving at Veracruz Adler and Brasher were permitted to go ashore. They visited the American Consul with a view to obtaining information with respect to the detention of the ship. About half an hour after leaving the Consul's office they were arrested and brought to a police station near the wharf. They were questioned and searched, and after several hours of waiting in the station personal possessions which had been taken from them were returned, and the men were taken aboard the *Mexico*.

4. On or about January 20, 1918, Adler became afflicted with a high fever. Several abscesses appeared on his body and his right limb became swollen and gave him much pain. With Brasher he again went ashore with the intention of seeing the American Consul. On the way to the Consulate the two were arrested and once more brought to the police station, where they were questioned and searched. A Mexican soldier told them that they were suspected of being spies. They were kept at the station throughout the day without food and water. A police attaché inquired of Adler what was the matter with him, and Adler spoke of the fever and the abscesses from which he was suffering. The police attaché rendered no assistance. In the evening of January 20, possessions of the two detained men which had been taken from them were returned to them, and they were again brought aboard the vessel.

5. In March, 1918, the guard on the vessel was reduced, and the ship was ordered to proceed to Progreso. On arrival at that place Adler consulted Dr. H. E. Gimler, Public Health surgeon in the service of the United States. Dr. Gimler examined Adler and stated that he was suffering from blood poisoning and advised him to return to a hospital in New Orleans, as there were no facilities for treatment in Progreso.

6. On March 25, 1918, the vessel was released by the Mexican Government and sailed for New Orleans, where it arrived on March 28, 1918. There Adler was placed in a hospital and remained a patient for the greater part of seven months.

7. The detention of the vessel under guard of Mexican soldiers for the period stated in Adler's affidavit is corroborated by affidavits made by Brasher. (Annexes 5 and 6 to the Memorial.)

8. The record is not clear with respect to the precise character of the detention of the steamship *Mexico*. The Commission of course can not question the sovereign control of the Mexican Government over a Mexican vessel in Mexican ports. The evidence before us does not warrant a conclusion that the detention of the vessel was the result of unauthorized acts of Mexican military authorities for whose arbitrary conduct, resulting in inconvenience and severe physical injuries to Adler, the Mexican Government under international law is responsible. The question for determination therefore is, whether, following the detention of the ship, Mexican authorities forcibly compelled Adler to remain upon it and prevented him from obtaining medical treatment. With respect to this particular point the only evidence before the Commission is the affidavit of Adler. That evidence is not discredited by the conclusion we feel constrained to reach that Adler's affidavit does not furnish evidence to support a charge of false imprisonment and an aggravated degree of ill treatment.

9. It is stated in the affidavit that, on the arrival of the *Mexico* at Progreso on December 29, 1917, Mexican soldiers boarded the vessel and guarded the gangway, and that the captain of the vessel was told that no one would be permitted to leave it. A temporary measure of this kind could not in itself be the basis of a charge of wrongful imprisonment. The affidavit also contains allegations with respect to the detention of Adler and Brasher by police both at Progreso and at Veracruz and the return of the two men to the ship under escort of the police. It also appears from Adler's affidavit and from the affidavit of Brasher that the vessel proceeded to Veracruz under guard. Whatever action the guards may have taken to detain persons on board, it seems to be certain that the main purpose of the guard was to control the movements of the vessel. In the absence of positive evidence to the effect that, during the course of the detention of the ship, Adler made known to the Mexican authorities a desire to leave the vessel and to seek proper medical treatment where it might be obtained, and that he was refused permission to do so, we do not feel justified in declaring that he was clearly the victim of unwarranted arrest and detention and maltreatment for which under international law damages should be assessed against Mexico. With respect to this uncertainty in the record and with respect to whatever annoyance and inconvenience Adler may have been subjected to by being detained on shore, it may be observed that the Commission has heretofore broadly indicated a standard by which it considers it must be guided in making judicial pronouncements with respect to alleged wrongful acts of authorities directed against private persons. The Commission has expressed the view

that it can not render an award for pecuniary indemnity in any given case in the absence of convincing evidence of a pronounced degree of improper governmental administration.

Decision

10. In the absence of evidence of this kind in the instant case, the Commission decides that the claim must be dismissed.

HARRY ROBERTS (U.S.A.) *v.* UNITED MEXICAN STATES.

(November 2, 1926. Pages 100-106.)

ILLEGAL ARREST. Evidence *held* not to establish that claimant was arrested without probable grounds.

DILATORY PROSECUTION. When claimant was imprisoned for several months without trial in contravention of Mexican law, *held*, an indemnity is due.

CRUEL AND INHUMANE IMPRISONMENT. Evidence *held* to establish that claimant was imprisoned under sub-standard conditions.

INTERNATIONAL STANDARD.—EQUALITY OF TREATMENT OF ALIENS AND NATIONALS. Equality of treatment of aliens and nationals is not the test of international responsibility when aliens are not treated in accordance with the ordinary standards of civilization.

Cross-references: Am. J. Int. Law, Vol. 21, 1927, p. 357; Annual Digest, 1925-1926, p. 227; British Yearbook, Vol. 8, 1927, p. 184.

Comments: Edwin M. Borchard, "Important Decisions of the Mixed Claims Commission, United States and Mexico," Am. J. Int. Law, Vol. 21, 1927, p. 516 at 521.

1. This claim is presented by the United States of America in behalf of Harry Roberts, an American citizen who, it is alleged in the Memorial, was arbitrarily and illegally arrested by Mexican authorities, who held him prisoner for a long time in contravention of Mexican law and subjected him to cruel and inhumane treatment throughout the entire period of confinement.

2. From the Memorial filed by the Government of the United States and accompanying documents, the allegations upon which the claim is based are briefly stated as follows: Harry Roberts, together with a number of other persons, was arrested by Mexican Federal troops on May 12, 1922, in the vicinity of Ocampo, Tamaulipas, Mexico, charged with having taken part in an assault on the house of E. F. Watts, near Ebano, San Luis Potosi, Mexico, on the night of May 5, 1922. The claimant was taken prisoner and brought to Tampico, whence he was taken to Ciudad Valles, San Luis Potosi, where he was held under detention until he was placed at liberty on December 16, 1923, a period of nearly nineteen months. It is alleged that there were undue delays in the prosecution of the trial of the accused which was not instituted within one year from the time of his arrest, as required by

the Constitution of Mexico. These delays were brought to the notice of the Government of Mexico, but no corrective measures were taken. During the entire period of imprisonment he was subjected to rude and cruel treatment from which he suffered great physical pain and mental anguish.

3. The United States asks that an indemnity be paid by the Government of Mexico in the sum of \$10,000.00 for the wrongful treatment of the accused. It is stated in the Memorial that Roberts earned prior to the time of his arrest \$350.00 a month; that he would have earned \$6,650.00 during the nineteen months that he was under arrest; and that he spent \$1,000.00 in fees paid to a lawyer resident in the United States to assist in obtaining his release. A total indemnity is asked in the sum of \$17,650.00 together with a proper allowance of interest.

4. The evidence presented by the Agency of the United States consists of affidavits made by Roberts and by other persons; correspondence which Roberts and fellow prisoners exchanged with the American Consul at Tampico, and correspondence exchanged by the Consul with Mexican authorities and with the Department of State. The Mexican Government on its part presented records of judicial proceedings, including proceedings instituted against Roberts and others.

5. It does not appear from this evidence that the Mexican authorities had not serious grounds for apprehending Roberts and his companions. The record of the proceedings instituted by the Mexican authorities shows that at about twelve o'clock on the night of May 5, 1922, the Chief of the Detachment in the Ebano Station, San Luis Potosí, received a telephone message from Mr. Eduardo F. Watts to the effect that, at that moment, there had appeared in front of his house, which is situated on the limits of a small village, a band of outlaws consisting of several men, mounted and armed; that the officer immediately left with the men under his orders to render assistance; that, upon arriving at the house he discovered several persons in hiding; that, having seen flashes of light and heard discharges from firearms, he ordered his men to return fire, whereupon the persons lying in ambush fled and succeeded in escaping due to their being mounted; that he picked up a dead man named Monte Michaels, who was suspected of being implicated in the blowing up of a train belonging to a petroleum company; that the officer also picked up a rifle having a burnt cartridge and an unused one in the breech, a saddled mule, and other things; and that Watts furnished the information that the fugitives were three Americans. It further appears that an examination of Watts' house disclosed the impacts of several shots fired at the premises; that on May 12th, Harry Roberts and two of his companions were apprehended in the neighborhood of Chamal, where they had fled and where forces had been sent to capture them; that upon their being arrested, their preliminary statements were taken, in which they did not deny that they were the persons who were surprised by the detachment from Ebano on the night of May 5th in front of Watts' house, although they asserted that they had not gone there with criminal purposes. It is further shown by the official Mexican records that on May 15th, the prisoners were placed at the disposition of the Agent of the Federal District Attorney, who immediately ordered a preliminary investigation; that from this time until the date when Roberts was placed at liberty judicial proceedings continued, first before the First District Court of Tampico, Tamaulipas, and afterwards before the Judge of First Instance of the District of Valles, San Luis Potosí; and that in the record of the proceedings instituted before those officials there are found statements of the accused and testimony of other persons

indicating that there were grounds for suspecting that Harry Roberts and his companions had committed a crime—grounds sufficient to warrant the authorities to proceed with the arrest and trial of the accused.

6. The Commission is not called upon to reach a conclusion whether Roberts committed the crime with which he was charged. The determination of that question rested with the Mexican judiciary, and it is distinct from the question whether the Mexican authorities had just cause to arrest Roberts and to bring him to trial. Aliens of course are obliged to submit to proceedings properly instituted against them in conformity with local laws. In the light of the evidence presented in the case the Commission is of the opinion that the Mexican authorities had ample grounds to suspect that Harry Roberts had committed a crime and to proceed against him as they did. The Commission therefore holds that the claim is not substantiated with respect to the charge of illegal arrest.

7. In order to pass upon the complaint with reference to an excessive period of imprisonment, it is necessary to consider whether the proceedings instituted against Roberts while he was incarcerated exceeded reasonable limits within which an alien charged with crime may be held in custody pending the investigation of the charge against him. Clearly there is no definite standard prescribed by international law by which such limits may be fixed. Doubtless an examination of local laws fixing a maximum length of time within which a person charged with crime may be held without being brought to trial may be useful in determining whether detention has been unreasonable in a given case. The Mexican Constitution of 1917, provides by its Article 20, section 8, that a person accused of crime "must be judged within four months if he is accused of a crime the maximum penalty for which may not exceed two years' imprisonment, and within one year if the maximum penalty is greater." From the judicial records presented by the Mexican Agent it clearly appears that there was a failure of compliance with this constitutional provision, since the proceedings were instituted on May 17, 1922, and that Roberts had not been brought to trial on December 16, 1923, the date when he was released. It was contended by the Mexican Agency that the delay was due to the fact that the accused repeatedly refused to name counsel to defend him, and that as a result of such refusal on his part proceedings were to his advantage suspended in order that he might obtain satisfactory counsel to defend him. We do not consider that this contention is sound. There is evidence in the record that Roberts constantly requested the American Consul at Tampico to take steps to expedite the trial. Several communications were addressed by American diplomatic and consular officers in Mexico to Mexican authorities with a view to hastening the trial. It was the duty of the Mexican Judge under Article 20, section 9, of the Mexican Constitution to appoint counsel to act for Roberts from the time of the institution of the proceedings against him. The Commission is of the opinion that preliminary proceedings could have been completed before the lapse of a year after the arrest of Roberts. Even though it may have been necessary to make use of rogatory letters to obtain the testimony of witnesses in different localities, it would seem that that could have been accomplished at least within six or seven months from the time of the arrest. In any event, it is evident in the light of provisions of Mexican law that Roberts was unlawfully held a prisoner without trial for at least seven months. With respect to this point of unreasonably long detention without trial, the Mexican Agency contended that Roberts was undoubtedly

guilty of the crime for which he was arrested; that therefore had he been tried he would have been sentenced to serve a term of imprisonment of more than nineteen months; and that, since, under Mexican law, the period of nineteen months would have been taken into account in fixing his sentence of imprisonment, it can not properly be considered that he was illegally detained for an unreasonable period of time. The Commission must reject this contention, since the Commission is not called upon to pass upon the guilt or innocence of Roberts but to determine whether the detention of the accused was of such an unreasonable duration as to warrant an award of indemnity under the principles of international law. Having in mind particularly that Roberts was held for several months without trial in contravention of Mexican law, the Commission holds that an indemnity is due on the ground of unreasonably long detention.

8. With respect to the charge of ill-treatment of Roberts, it appears from evidence submitted by the American Agency that the jail in which he was kept was a room thirty-five feet long and twenty feet wide with stone walls, earthen floor, straw roof, a single window, a single door and no sanitary accommodations, all the prisoners depositing their excrement in a barrel kept in a corner of the room; that thirty or forty men were at times thrown together in this single room; that the prisoners were given no facilities to clean themselves; that the room contained no furniture except that which the prisoners were able to obtain by their own means; that they were afforded no opportunity to take physical exercise; and that the food given them was scarce, unclean, and of the coarsest kind. The Mexican Agency did not present evidence disproving that such conditions existed in the jail. It was stated by the Agency that Roberts was accorded the same treatment as that given to all other persons, and with respect to the food Roberts received, it was observed in the Answer that he was given "the food that was believed necessary, and within the means of the municipality." All of the details given by Roberts in testimony which accompanies the Memorial with respect to the conditions of the jail are corroborated by a statement of the American Consul at Tampico who visited the jail. Facts with respect to equality of treatment of aliens and nationals may be important in determining the merits of a complaint of mistreatment of an alien. But such equality is not the ultimate test of the propriety of the acts of authorities in the light of international law. That test is, broadly speaking, whether aliens are treated in accordance with ordinary standards of civilization. We do not hesitate to say that the treatment of Roberts was such as to warrant an indemnity on the ground of cruel and inhumane imprisonment.

9. The respondent Government has not denied that, under the Convention of September 8, 1923, acts of authorities of San Luis Potosí may give rise to claims against the Government of Mexico. The Commission is of the opinion that claims can be predicated on such acts.

10. As has been stated, the Commission holds that damages may be assessed on two of the grounds asserted in the American Memorial, namely, (1) excessively long imprisonment—with which the Mexican Government is clearly chargeable for a period of seven months, and (2) cruel and inhumane treatment suffered by Roberts in jail during nineteen months. After careful consideration of the facts of the case and of similar cases decided by international tribunals, the Commission is of the opinion that a total sum of \$8,000.00 is a proper indemnity to be paid in satisfaction of this claim.

Decision

11. For the reasons stated above the Commission decides that the Government of the United Mexican States must pay to the Government of the United States of America on behalf of Harry Roberts \$8,000.00 (eight thousand dollars) without interest.

J. AND O. L. B. NASON AND AUBREY WILLIAMS (U.S.A.) *v.*
UNITED MEXICAN STATES.

(November 2, 1926. Pages 106-108.)

WRONGFUL DEATH.—RESPONSIBILITY FOR ACTS OF MINOR OFFICIALS.—

DIRECT RESPONSIBILITY. Evidence *held* not to establish that decedent was wrongfully killed by Mexican customs guards or that the respondent Government condoned wrongful acts on the part of such guards.

1. The same occurrences are the basis of these two claims, and the two Agencies expressed their intention to rely in their arguments on substantially the same evidence which was not filed with both records. The Commission therefore ordered the consolidation of the claims on October 29, 1926.

2. One of these claims is presented by the United States against the United Mexican States in behalf of James Nason and Ophelia Le Barre Nason, father and mother of Hilton Nason, who was killed on December 13, 1922, on the Mexican side of the Rio Grande near Boquillas, Coahuila. The other claim is made in behalf of Aubrey Williams, who was wounded at the same time and place. It is alleged in the Memorials that the two men went on a hunting expedition on the Mexican side of the river; that they obtained some kind of permit to carry arms, written with pencil by an armed Mexican river guard (or customs guard) who signed himself Antonio Flores; that about sunset they were halted by Flores and two or more other armed men and were ordered to throw up their hands; and that thereupon Nason was shot and Williams wounded. Claim is made in the Nason case for indemnity in the sum of \$25,000 and in the Williams case in the sum of \$15,000.

3. With respect to questions of nationality raised by the Mexican Government in each of these cases, the Commission calls attention to the principles asserted in paragraph 3 of its opinion rendered in the case of William A. Parker on March 31, 1926. On the record as presented the Commission holds that it is established that the claimants were by birth, and have since remained, American nationals.

4. From evidence in the somewhat meager records in these cases it appears that the two Americans crossed over to the Mexican side of the river to hunt; that they had no legal permit to do so; that they met some Mexicans, two of them being river guards; and that there was a quarrel and a fight in which Flores and Nason were killed and Williams slightly wounded.

5. From the Memorial filed in the Nason case it would appear that the claim is based on the theory that the Mexican Government is responsible for the acts of some official or officials who wrongfully killed Hilton Nason. But there is no evidence other than the affidavit of Williams that he and his

companion obtained some kind of an informal permit; there is no other evidence that Nason was wrongfully killed; and some evidence produced by the American Agent tended strongly to show that Nason was not wrongfully and unlawfully killed. The Commission therefore must hold that the claim has not been substantiated.

6. In the Memorial filed in the Williams case it is alleged that Williams was killed by "an armed Mexican customs guard in the service of the Government of Mexico" and that "the said Government of Mexico did not punish him for the wrongful acts committed by him as set forth herein, but instead absolved him from all responsibility and condoned the wrongful acts committed by him." The record before the Commission with respect to allegations of wrongful shooting of Williams is the same as that with respect to the unsubstantiated allegations of wrongful killing of Nason. And no evidence was presented by the United States to support a charge that the Mexican Government condoned wrongful acts on the part of the customs guards. The Commission must therefore also hold that no valid claim has been established in this case.

Decision

7. The Commission accordingly decides that these consolidated claims must be disallowed.

LAURA M. B. JANES *et al.* (U.S.A.) *v.* UNITED MEXICAN STATES.

*(November 16, 1925, separate statement regarding damages by
American Commissioner, November 16, 1926. Pages 108-131.)*

FAILURE TO APPREHEND OR PUNISH. Evidence *held* to establish lack of diligence of Mexican authorities in apprehending killer of American citizen. Claim *allowed*.

DIRECT AND INDIRECT RESPONSIBILITY.—DENIAL OF JUSTICE.—MEASURE OF DAMAGES. Measure of damages in cases of denial of justice based on condonation theory rejected and damages instead allowed limited to such as follow from respondent Government's failure to apprehend and punish, including damages for material losses and for personal indignity and grief.

Cross-references: Am. J. Int. Law, Vol. 21, 1927, p. 362; Annual Digest, 1925-1926, pp. 218, 256; British Yearbook, Vol. 8, 1927, p. 184.

Comments: Edwin M. Borchard, "Important Decisions of the Mixed Claims Commission, United States and Mexico," Am. J. Int. Law, Vol. 21, 1927, p. 516; J. L. Brierly, "The Theory of Implied State Complicity in International Claims," British Yearbook, Vol. 9, 1928, p. 42; Clyde Eagleton, "Measure of Damages in International Law," Yale L. Jour., Vol. 39, 1929-1930, p. 52 at 55 *et seq.*; Joseph Conrad Fehr, "International Law as applied by U.S.—Mexico Claims Commission," A.B.A. Jour., Vol. 14, 1928, p. 312 at 313; Charles Cheney Hyde, "Concerning Damages Arising from Neglect to Prosecute," Am. J. Int. Law, Vol. 22, 1928, p. 140; G. Godfrey Phillips, "The Anglo-Mexican Special Claims Commission," Law Q. Rev., Vol. 49, 1933, p. 226 at 230.

1. Claim is made by the United States of America in this case for losses and damages amounting to \$25,000.00, which it is alleged in the Memorial were "suffered on account of the murder, on or about July 10, 1918, at a mine near El Tigre, Sonora, Mexico, of Byron Everett Janes," an American citizen. The claim is presented, as stated in the Memorial, "on behalf of Laura May Buffington Janes, individually, and as guardian of her two minor children, Byron Everett Janes, Jr.; and Addison M. Janes; and Elizabeth Janes and Catherine Janes."

2. Briefly summarized, the allegations in the Memorial upon which the claim is based are as follows:

3. Byron Everett Janes, for some time prior to and until the time of his death on July 10, 1918, was Superintendent of Mines for the El Tigre Mining Company at El Tigre. On or about July 10, 1918, he was deliberately shot and killed at this place by Pedro Carbajal, a former employee of the Mining Company who had been discharged. The killing took place in the view of many persons resident in the vicinity of the company's office. The local police *Comisario* was informed of Janes' death within five minutes of the commission of the crime and arrived soon thereafter at the place where the shooting occurred. He delayed for half an hour in assembling his policemen and insisted that they should be mounted. The El Tigre Mining Company furnished the necessary animals and the posse, after the lapse of more than an hour from the time of the shooting, started in pursuit of Carbajal who had departed on foot. The posse failed to apprehend the fugitive. Carbajal remained at a ranch six miles south of El Tigre for a week following the shooting, and it was rumored at El Tigre that he came to that place on two occasions during his stay at the ranch. Subsequently information was received that Carbajal was at a mescal plant near Carrizal, about seventy-five miles south of El Tigre. This information was communicated to Mexican civil and military authorities, who failed to take any steps to apprehend Carbajal, until the El Tigre Mining Company offered a reward, whereupon a local military commander was induced to send a small detachment to Carrizal, which, upon its return, reported that Carbajal had been in this locality but had left before the arrival of the detachment, and that it was therefore impossible to apprehend him.

4. It is alleged in the Memorial that the Mexican authorities took no proper steps to apprehend and punish Carbajal; that such efforts as were made were lax and inadequate; that if prompt and immediate action had been taken on one occasion there is reason to believe that the authorities would have been successful; that it was only after a money reward for the capture of Carbajal had been offered that some dilatory steps were taken to apprehend him in a nearby town where he was staying.

5. The Memorial contains allegations with respect to the earning capacity of Janes, the loss suffered by his wife and children because of his death, and their want of means of support.

6. To substantiate the allegations of fact in the Memorial of the United States and the charge that Mexican authorities failed to take effective steps to apprehend the man who shot Janes, there were filed with the Memorial certain affidavits, statements, and copies of reports of the American Consul at Tampico to the Department of State from which it appears that the consul addressed the Governor of Sonora, pointing out that the killing of other Americans in mining camps in Sonora in the past had gone unpunished and urging that the Mexican authorities take steps to apprehend Carbajal.

7. In the Answer filed by the Mexican Government it is denied, that the Mexican authorities failed to take appropriate steps to arrest and punish Carbajal. Accompanying the Answer is a certified copy of judicial proceedings showing the action taken to investigate the killing of Janes and the orders given with respect to his apprehension. Attention is also called to the use of an armed force to capture the fugitive concerning which information is given in evidence accompanying the Memorial of the United States.

8. An affidavit made by the widow of the deceased under date of February 1, 1926 (Annex 11 to the Memorial), contains information regarding the circumstances attending the killing of her husband. The details furnished are doubtless substantially correct, but like other matters contained in the affidavit are naturally based on information which she had received from others.

9. An affidavit (Annex 12 to the Memorial) was furnished by L. R. Budrow, the General Manager of the Lucky Tiger Combination Gold Mining Company, an American corporation, owners of the stock of the Tigre Mining Company. In this affidavit Mr. Budrow states that on a visit he made to El Tigre shortly after Janes' death, he obtained the impression that very limited efforts had been made by the authorities at the time to capture Carbajal and that there was a general rumor in El Tigre that Carbajal was seen at that place a few nights after the murder. The affiant attached to his affidavit a report made by R. T. Mishler, Manager of the El Tigre Mining Company on April 11, 1925, with respect to the killing of Janes. The following extract from that report doubtless states in a substantially accurate way the facts with respect to the killing of Janes and the steps taken shortly thereafter by Mexican authorities to apprehend Carbajal:

"Mr. Janes had been Mine Superintendent of the Tigre Mine for six months preceding the tragedy.

"He had had trouble with a trammer named Pedro Carbajal and had given orders for his discharge.

"Mr. Janes and his Assistant, Mr. W. H. Williams, were accustomed to hire new men at the mine office, near the entrance to No. 4 Level which is situated about a hundred yards from the American quarters in the town of El Tigre. Carbajal had requested that he be reinstated in his work on two or three evenings before the tragedy and had been refused.

"On the evening of July 10 (1918) at about 3 : 30 P. M. he again requested work and was again refused.

"After Mr. Janes and Mr. Williams had left the office and were about half way up the path leading to their quarters, Carbajal started running after them brandishing a revolver. The Americans heard him when he had almost reached them. Mr. Janes dodged by him and started to run back toward the office. Mr. Williams stood still and said 'don't shoot'. Carbajal snapped his pistol, point blank at Mr. Williams, but it failed to go off. He then turned and fired at Mr. Janes as he was running down the path. The bullet entered the back near the spine causing Mr. Janes to fall. Carbajal ran up, placed his pistol at Mr. Janes' head and fired a second shot through the brain.

"Carbajal then went down the path, threatening with his pistol, a half dozen Mexicans gathered around the office, and disappeared up the canyon.

"The Comisario was advised within five minutes after the murder and was on the spot five minutes later. He lost a half hour in getting his policemen together and insisted that they should be mounted. The Company furnished the animals and the posse left Camp about 4 : 30 P. M. They returned about 7 : 00 P.M. and reported that they had not seen Carbajal. They were also out the following day, but without results.

"It is current talk that Carbajal stayed at a ranch 6 miles south of Tigre, for a week following the murder, and that he came into Tigre on two nights during the week, but it is most difficult to prove this story.

"Later word was received that Carbajal was at a mescal (native liquor) plant near Carrizal, 75 miles south of Tigre. Both the civil and military authorities were advised of this report. Finally the Major in charge of the District was persuaded to send a small detachment to Carrizal to investigate, with the promise by the Company of a substantial reward should Carbajal be captured. On their return the detachment reported that the man had left before they arrived."

10. Doubtless the evidence accompanying the Memorial of the United States furnishes accurate information with regard to the killing of Janes, and with regard to the preliminary steps taken looking to the apprehension of Carbajal. The evidence on this firstmentioned point is substantially the same as that given by witnesses whose statements are recorded in the record of judicial proceedings accompanying the Answer. With respect to these preliminary steps, we feel justified in reaching the conclusion that they were inefficient and dilatory. From an examination of the evidence on this point accompanying the Memorial, and more particularly from an examination of the records produced by the Mexican Government, we are constrained to reach the conclusion that there was clearly such a failure on the part of the Mexican authorities to take prompt and efficient action to apprehend the slayer as to warrant an award of indemnity. The grounds for such a conclusion can be shown by a brief statement of what those records reveal as to the action taken by the authorities.

11. It is shown that in the afternoon of July 10, 1918, the killing of Janes was brought to the notice of the local Judge, at El Tigre, and he appointed two men as experts to examine the body of the deceased. On the following day the Judge took the testimony of two persons employed by the El Tigre Mining Company. These men, who were not eyewitnesses of the murder, identified the corpse but gave no testimony concerning the facts of the killing. On July 12, the Judge took the statement of Guillermo A. Williams, an eyewitness of the killing. On July 13, the Judge took the statement of another eyewitness. On July 14, the statement of another eyewitness was taken.

12. On July 15, five days after the killing of Janes, when statements had been obtained from five men, the Judge, reciting that there had resulted from the proceedings up to that time sufficient merit for the prosecution of the person who killed Janes, issued an order to the *Comisario* to proceed to the capture of Carbajal.

13. On July 16, the Judge took the statement of another eyewitness to the murder. The *Comisario*, in reply to the order directing him to proceed to capture Carbajal, stated that, following immediate steps looking to the capture of Carbajal, which were unsuccessful, orders were given by means of warrants to different authorities where it was thought the accused might take refuge. On July 17, all papers in the case were forwarded by the local Judge to the Judge of First Instance of the District. The papers were received by the latter on July 22.

14. On July 30, the Judge of First Instance directed the arrest of Carbajal and on August 5, a communication in the nature of a circular was sent to the Judges of First Instance in the State of Sonora with the apparent purpose of enlisting their cooperation in the apprehension of the fugitive. This communication recited the facts with regard to the killing of Janes and the

preliminary investigations which had been conducted, and requested that the communication be returned to the Judge who transmitted it.

15. The circular was received by the Judge of First Instance at Arizpe on August 13, and by him brought to the notice of the Municipal President on August 14. On August 16, the Municipal President felt himself to be in a position to report that Carbajal was not found "in this section." The circular was evidently not received by the next Judge of First Instance on the route of transmission (the Judge at Sahuaripa) until October 14, about two months after it had reached the Judge of First Instance to whom it was originally transmitted. On October 15, it was sent to the Municipal President. On November 15, the communication was received by the Judge at Cananea and transmitted to the Municipal President on November 16. On December 3, the communication was forwarded to the Judge of First Instance at Nogales, Sonora. It thus is shown that from August 5, the date when the circular was first dispatched, until December 3, a period of about four months, the circular had reached but three judges.

16. In this manner, as shown by the record, the circular proceeded to Judges at Magdalena, Altar, Hermosillo, Ures, Guaymas, and Alamos, being received on February 12, 1919, seven months after the killing of Janes, by the Judge of First Instance at this last mentioned place. Thereupon it was returned to the Judge of First Instance at Moctezuma who had initiated its dispatch.

17. Carbajal, the person who killed Janes, was well known in the community where the killing took place. Numerous persons witnessed the deed. The slayer, after killing his victim, left on foot. There is evidence that a Mexican police magistrate was informed of the shooting within five minutes after it took place. The official records with regard to the action taken to apprehend and punish the slayer speak for themselves. Eight years have elapsed since the murder, and it does not appear from the records that Carbajal has been apprehended at this time. Our conclusions to the effect that the Mexican authorities did not take proper steps to apprehend and punish the slayer of Janes is based on the record before us consisting of evidence produced by both Governments.

18. The respondent Government has not denied that, under the Convention of September 8, 1923, acts of authorities of Sonora may give rise to claims against the Government of Mexico. The Commission is of the opinion that claims may be predicated on such acts.

Measure of damages for failure of apprehension and punishment

19. The liability of the Mexican Government being stated there remains to be determined for what they are liable and to what amount. At times international awards have held that, if a State shows serious lack of diligence in apprehending and/or punishing culprits, its liability is a derivative liability, assuming the character of some kind of complicity with the perpetrator himself and rendering the State responsible for the very consequences of the individual's misdemeanor. Opinions to this effect are to be found in the international awards in the Ruden & Company case (Moore 1655; under the Convention of December 4, 1868), in the Cotesworth & Powell case (Moore, 2053, 2082, 2085; under the Convention of December 14, 1872) and in the Bovallins and Hedlund cases (Ralston, Venezuelan Arbitrations of 1903, p. 953), separate opinions of seemingly the same tendency being expressed in the cases of De Brissot *et al.* (Moore, 2986, 2969; under the

Convention of December 5, 1885). The reasons upon which such finding of complicity is usually based in cases in which a Government could not possibly have prevented the crime, is that the nonpunishment must be deemed to disclose some kind of approval of what has occurred, especially so if the Government has permitted the guilty parties to escape or has remitted the punishment by granting either pardon or amnesty.

20. A reasoning based on presumed complicity may have some sound foundation in cases of nonprevention where a Government knows of an *intended* injurious crime, might have averted it, but for some reason constituting its liability did not do so. The present case is different; it is one of nonrepression. Nobody contends either that the Mexican Government might have prevented the murder of Janes, or that it acted in any other form of connivance with the murderer. The international delinquency in this case is one of its own specific type, separate from the private delinquency of the culprit. The culprit is liable for having killed or murdered an American national; the Government is liable for not having measured up to its duty of diligently prosecuting and properly punishing the offender. The culprit has transgressed the penal code of his country; the State, so far from having transgressed its own penal code (which perhaps not even is applicable to it), has transgressed a provision of international law as to State duties. The culprit can not be sentenced in criminal or civil procedure unless his guilt or intention in causing the victim's death is proven; the Government can be sentenced once the nonperformance of its judicial duty is proven to amount to an international delinquency, the theories on guilt or intention in criminal and civil law not being applicable here. The damage caused by the culprit is the damage caused to Janes' relatives by Janes' death; the damage caused by the Government's negligence is the damage resulting from the non-punishment of the murderer. If the murderer had not committed his delinquency—if he had not slain Janes—Janes (but for other occurrences) would still be alive and earning the livelihood for his family; if the Government had not committed its delinquency—if it had apprehended and punished Carbajal—Janes' family would have been spared indignant neglect and would have had an opportunity of subjecting the murderer to a civil suit. Even if the non-punishment were conceived as some kind of approval—which in the Commission's view is doubtful—still approving of a crime has never been deemed identical with being an accomplice to that crime; and even if nonpunishment of a murderer really amounted to complicity in the murder, still it is not permissible to treat this derivative and remote liability not as an attenuate form of responsibility, but as just as serious as if the Government had perpetrated the killing with its own hands. The results of the old conception are unsatisfactory in two directions. If the murdered man had been poor, or if, in a material sense, his death had meant little to his relatives, the satisfaction given these relatives should be confined to a small sum, though the grief and the indignity suffered may have been great. On the other hand; if the old theory is sustained and adhered to, it would, in cases like the present one, be to the pecuniary benefit of a widow and her children if a Government did *not* measure up to its international duty of providing justice, because in such a case the Government would repair the pecuniary damage caused by the killing, whereas she practically never would have obtained such reparation if the State had succeeded in apprehending and punishing the culprit.

21. It can not surprise, therefore, that both international tribunals and Governments more than once took a different view, or at least abstained from

sustaining the first view. The Commission is not aware of an international award in which the distinction has been set forth with clearness. But the Commission is aware of more than one award and governmental interposition which, in allowing or claiming damages in connection with nonpunishment of a wrongdoer, abstained from linking up the amount of these damages with the loss caused by the act of the individual. In the Glenn case (Moore 3138; under the Convention of July 4, 1868) the amount of damages was not connected with any assumption of complicity. In the Lenz case the Government of the United States, on account of nonpunishment of the culprits, only claimed "a reasonable indemnity" (March 25, 1899; Moore, Digest VI 794). In the Renton case the same Government for the same reason at the same date pleaded "gross negligence, if not complicity"—therefore leaving the assumption of complicity doubtful—and claimed a lump sum "for the murder of Renton and the failure promptly to apprehend and adequately punish the offenders," a position indicating that the Government did not consider the nonpunishment to be identical with the murder (Moore, Digest VI 794). Mr. Hyde, interpreting the policy in this respect of the Government of the United States, says: "The amount of the indemnity requested and obtained appears, at times, to have been out of proportion to the pecuniary loss sustained by the victims or their dependents *in consequence of the laches of the territorial sovereign*" (Hyde I, p. 515). And how dangerous inferences from awards which are silent on presumed complicity are is shown by the fact that, whereas the American Agency quoted the correspondence in the case of the Mexican shepherds as testimony in favor of the older doctrine, a German author quotes it as a striking example of the new one. (Schoen, *Die völkerrechtliche Haftung der Staaten aus unerlaubten Handlungen*, 1917, p. 38)

22. The answer to the question, which of the two views should be accepted as consistent with international law in its present status, would seem to be suggested by the fact that here we have before us a case of denial of justice, which, but for some convincingly logical reason, should be judged in the same manner as any other case of the same category. Denial of justice, in its broader sense, may cover even acts of the executive and the legislative; in cases of improper governmental action of this type, a nation is never held to be liable for anything else than the damage caused by what the executive or the legislative committed or omitted itself. In cases of denial of justice in its narrower sense, Governments again are held responsible exclusively for what they commit or omit themselves. Only in the event of one type of denial of justice, the present one, a State would be liable not for what it committed or omitted itself, but for what an individual did. Such an exception to the general rule is not admissible but for convincing reasons. These reasons, as far as the Commission knows, never were given. One reason doubtless lies in the well-known tendency of Governments (Hyde, I, p. 515; Ralston, 1926, p. 267) to claim exaggerated reparations for nonpunishment of wrongdoers, a tendency which found its most promising help in a theory advocating that the negligent State had to make good all of the damage caused by the crime itself. But since international delinquencies have been recognized next to individual delinquencies, since damages for denial of justice have been assessed by international tribunals in many other forms, and since exaggerated claims from one Government as against another have been repeatedly softened down as a consequence of arbitral methods, it would seem time to throw off the doctrine dating from the end of the eighteenth century, and return to reality.

23. Once this old theory, however, is thrown off, we should take care not to go to the opposite extreme. It would seem a fallacy to sustain that, if in case of nonpunishment by the Government it is not liable for the crime itself, then it can only be responsible, in a punitive way, to a sister Government, not to a claimant. There again, the solution in other cases of improper governmental action shows the way out. It shows that, apart from reparation or compensation for material losses, claimants always have been given substantial satisfaction for serious dereliction of duty on the part of a Government; and this world-wide international practice was before the Governments of the United States and Mexico when they framed the Convention concluded September 8, 1923. In the Davy case—a case, not of unpunished crime, but of inhuman treatment of a foreigner under the color of administration of justice—the award rightly stated (Ralston, *Venezuelan Arbitrations of 1903*, p. 412) that “there is left to the respondent Government only one way to signify * * * its desire to remove the stain which rests upon its department of criminal jurisprudence.” In the Maal case—a case of attack on a foreigner’s personal dignity by officials—the award rightly stated (Ralston, *Venezuelan Arbitrations of 1903*, p. 916): “The only way in which there can be an expression of regret on the part of the Government and a discharge of its duty toward the subject of a sovereign and a friendly State is by making an indemnity therefore in the way if money compensation.” The indignity done the relatives of Janes by nonpunishment in the present case is, as that in other cases of improper governmental action, a damage directly caused to an individual by a Government. If this damage is different from the damage caused by the killing, it is quite as different from the wounding of the national honor and national feeling of the State of which the victim was a national.

24. The Commission holds that the wording of Article I of the Convention concluded September 8, 1923, mentioning claims for losses or damages suffered *by persons or* by their properties, is sufficiently broad to cover not only reparation (compensation) for material losses in the narrow sense, but also satisfaction for damages of the stamp of indignity, grief, and other similar wrongs. The Davy and Maal cases quoted are just two among numerous international cases in which arbitrators held this view. The Commission does not think lightly of the additional suffering caused by the fact that a Government apparently neglects its duty in cases of so outstanding an importance for the near relatives of a victim.

25. As to the measure of such a damage caused by the delinquency of a Government, the nonpunishment, it may be readily granted that its computation is more difficult and uncertain than that of the damage caused by the killing itself. The two delinquencies being different in their origin, character, and effect, the measure of damages for which the Government should be liable can not be computed by merely stating the damages caused by the private delinquency of Carbajal. But a computation of this character is not more difficult than computations in other cases of denial of justice such as illegal encroachment on one’s liberty, harsh treatment in jail, insults and menaces of prisoners, or even nonpunishment of the perpetrator of a crime which is not an attack on one’s property or one’s earning capacity, for instance a dangerous assault or an attack on one’s reputation and honor. Not only the individual grief of the claimants should be taken into account, but a reasonable and substantial redress should be made for the mistrust and lack of safety, resulting from the Government’s attitude. If the nonprosecution and nonpunishment of crimes (or of specific crimes) in a certain period and place

occurs with regularity such nonrepression may even assume the character of a nonprevention and be treated as such. One among the advantages of severing the Government's dereliction of duty from the individual's crime is in that it grants an opportunity to take into account several shades of denial of justice, more serious ones and lighter ones (no prosecution at all; prosecution and release; prosecution and light punishment; prosecution, punishment and pardon), whereas the old system operates automatically and allows for the numerous forms of such a denial one amount only, that of full and total reparation.

26. Giving careful consideration to all elements involved, the Commission holds that an amount of \$12,000, without interest, is not excessive as satisfaction for the personal damage caused the claimants by the nonapprehension and nonpunishment of the murderer of Janes.

Decision

27. On the above grounds, the Commission decides that the Government of the United Mexican States is obligated to pay to the Government of the United States of America \$12,000.00 (twelve thousand dollars), without interest, on behalf of Laura May Buffington Janes, widow of Byron Everett Janes, and Elizabeth Janes, Catherine Janes, Byron E. Janes, Jr., and Addison M. Janes, their children.

Separate statement regarding damages

All members of the Commission are in entire accord with respect to the analysis of the facts of the case from which we have drawn the conclusion, as has been stated, that there was clearly such a failure on the part of the Mexican authorities to take prompt and efficient action to apprehend the slayer of Janes as to warrant an award of indemnity. However, I think it is advisable to indicate in a separate statement my views relative to the contentions advanced before the Commission as to the principles that should govern us in determining the amount of a pecuniary award.

The subject of the measure of damages in a claim like the instant case, involving a charge of neglect in the apprehending and punishing an offender, was discussed in briefs filed by the two Agents and in oral arguments.

The position of the Agency of the United States with reference to this question is that in such a case a State is responsible in damages sufficient to compensate the claimant for the injuries flowing from the wrongful act of the individual, and that this responsibility rests upon the offending State because by its failure to act it condones and ratifies the wrongful act, thereby making the act its own. (American Brief, p. 3.)

The position of the Mexican Agency with regard to the question at issue may be indicated by the following extract from its Brief (p. 12):

"III. In that case responsibility can only be demanded by a foreign State when negligence is so serious and so frequent as to endanger the safety of foreigners and the guaranties to which they are entitled.

"IV. This responsibility can not be heard by the Commission because it has no jurisdiction.

"V. The same act may motivate a responsibility towards the victim of the crime or its next of kin, but only in so far as it can be shown that this negligence and not the crime itself has directly caused the damage which can be ascertained in money.

"VI. The measure of damages whenever this responsibility is involved, must be exclusively ascertained with reference to the law of the place where the act took place. The Mexican laws do not recognize moral damage and therefore, even though it had been shown that the claimants in the instant claim had justified a moral damage, this can not be a matter which can be ascertained in a pecuniary way.

"VII. These moral damages in no wise can be assessed, since they are in essence exclusively punitive."

International law imposes on a nation the obligation to take appropriate steps to prevent the infliction of wrongs upon aliens and to employ prompt and effective measures to apprehend and punish persons who have committed such wrongs. There is no dispute between the two Agencies with regard to these requirements of the law. In the instant case indemnity is asked for on the ground of the neglect of authorities to take proper measures to arrest and bring to justice the person who killed Janes. The contention of the Mexican Agency advanced in this particular case, to the effect that the Commission is without power to redress by a pecuniary award an international delinquency growing out of a failure of a Government to live up to solemn obligations of this kind, I consider to be a remarkable contention, supported by no authority. It is interesting to note that it appears that this contention has been advanced in no other case among the large number of similar cases filed by both Agencies. And it is a particularly pertinent fact that numerous cases have been brought to the attention of the Commission in which the Mexican Government has alleged liability on the part of the United States in substantial amounts for the failure to apprehend and punish persons who have committed wrongful acts against Mexicans in the United States. For example, in the Diaz claim (Docket No. 293) it is stated on pages 1 and 2 of the Memorial:

"The lenity of the American authorities in regard to the institution of due legal process, to the discovery of the guilty party and to his punishment, constitutes a true denial of justice, which is a justification of the right of Cataline Balderas de Diaz, the mother of the man slain, and injured by the loss of her son, to demand compensation, and she was dependent on him for a living and such injury has not been made good to her. She grounds her petition on Article I of the Convention concluded between Mexico and the United States on September 8 1923.

"Taking into account the probable life expectancy of Mauricio Diaz, the claimant estimates the damage suffered by her at \$50,000.00 Mexican Gold, or the equivalent thereof in dollars."

The subject of damages is always a difficult one in international arbitrations. It seems to be clear that international tribunals can not apply rules by which to assess damages as definite as the rules by which domestic tribunals are governed in civil cases. A contention that an international tribunal such as that created by the Convention of September 8, 1923, has no power to award damages in cases like the present one prompts a consideration of the functions of international tribunals and of international practice, particularly as it is revealed by the decisions of arbitral tribunals in the disposition of claims similar to the instant case.

International controversies which diplomacy fails to solve may be settled by resort to force or by judicial methods. This Commission is charged with the judicial determination of all claims of the nationals of each Government against the other arising since July 4, 1868, excepting certain claims incident to recent revolutions in Mexico. It is the function of the Commission to pass

upon these cases in accordance with rules and principles of international law imposing like obligations on the two countries and securing rights that inure to the benefit of their respective nationals. I do not consider that this Commission is impotent to afford redress of a substantial character in cases like the present one in which there has been a failure to carry out a solemn obligation imposed by international law. This view is convincingly supported by the declarations of foreign offices in diplomatic exchanges, the writings of authorities on international law, and the rules and principles repeatedly stated and applied by international tribunals. In dealing with the question raised by the Mexican Agency in the pending case, I consider the decisions of arbitral tribunals to be of especial importance. The action taken by such tribunals reveals what I regard as sound reasoning upon which from time to time appropriate disposition of international controversies has been grounded. I deem it to be proper that weight should be attached to rules and principles that have often been formulated and applied in the light of experience, and not to reject them, unless, of course, we are convinced that they are unsound or that they have been given a wrongful application.

Rules and principles of law are not formulated in terms of pure logic. All rules are in a measure arbitrary, and the criterion of the value of any rule is the extent to which its advantages outweigh its disadvantages. Assuredly the theory repeatedly advanced that a nation must be held liable for failure to take appropriate steps to punish persons who inflict wrongs upon aliens, because by such failure the nation condones the wrong and becomes responsible for it, is not illogical or arbitrary. Certainly there is no violence to logic and no distortion of the proper meaning of the word "condone" in saying that a nation condones a wrong committed by individuals when it fails to take action to punish the wrongdoing. It seems to be equally clear that, irrespective of what may be the particular facts of any given case, a nation may logically be charged with responsibility for crime when it is shown that proper punitive measures have been neglected. The degree of fault attributable to a nation will, of course, depend upon the facts of each given case. A community protects itself against crime by police measures to prevent offenses against the law and by appropriate measures to punish wrongdoing. The prevalence of crime has often been ascribed to lax police measures and to a dilatory and ineffective administration of criminal jurisprudence resulting in the failure to apprehend criminals, in inadequate punishment, or in no punishment at all. Correspondence which has been exchanged between the Government of Mexico and the Government of the United States with respect to controversies pending for arbitration, and which is included among the records of the Commission, shows that each Government has from time to time pointed out the danger to the safety of its nationals of a lax administration of justice. It is clear that arbitral tribunals in assessing damages for the failure of authorities to punish wrongdoers have taken account of the damage caused by the wrongful acts of the culprits for which Governments have been held responsible. The opinions of some tribunals reveal that they have also taken account of other elements of damages, and I am of the opinion that that may properly be done. There are further considerations pertinent to the question of the responsibility to which a nation may be held for failure to punish crime. International law recognizes the right of a nation to intervene to protect the interests of its nationals in foreign countries, through diplomatic representations, and through instrumentalities such as those afforded by international tribunals. It seems to be clear that the recognition of this right is fundamentally

grounded on the often asserted theory that an injury to a national is an injury to the State to which the national belongs. If this theory were not sound it is difficult to perceive why the existence of this right of intervention should be recognized with regard to a limited number of persons within the territorial jurisdiction of a sovereign nation which is broadly described by Mr. Chief Justice Marshall in the opinion written by him in the case of *The Exchange* (7 Cranch, 116, 136) in which he said:

"The jurisdiction of the Nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it deriving validity from an external source would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction."

A nation has a right to insist upon the observance of obligations of international law which in a certain sense, undoubtedly qualify so far as aliens are concerned, those plenary sovereign rights which, as described by Chief Justice Marshall, a nation may exercise with regard to the persons and property of its own nationals. An alien has a right to rely upon an observance of rights which are secured to nations by international law and which inure to his benefit. Persons dependent upon him have that right, and international tribunals have the power to award redress for the disregard of such rights. These elementary principles are referred to in the extracts from Dr. Anzilloti's discussion of the responsibility of the State under international law quoted in the Mexican Agency's Brief. These extracts do not appear to support the contention of nonresponsibility advanced in the Brief. Dr. Anzilloti distinguishes between the obligations of a State to private individuals under domestic law and the responsibility of a State to another State under international law. He points out that individuals can not commit acts in contravention of international law. He argues that therefore the commission of such acts can not in itself be a violation of that law. But, of course, he does not deny, but expressly emphasizes, the duty of the State to vindicate rights that are secured by international law and that inure to the benefit of private individuals.

When questions are raised with respect to the failure to observe obligations of international law relative to punishment of wrongdoers, and when redress is sought for the delinquency growing out of such failure, the use of the term "punitive" with respect to the nature of the redress that may be afforded seems to be somewhat inapt. If the view is taken that a wrong to a national is a wrong to the State, it may perhaps be said that measures of redress for such wrongs are always in a sense punitive. But international tribunals in making pecuniary awards in cases like the present one do not appear to have considered that they were distinctly concerned in such cases as distinguished from other cases with the infliction of a penalty of what has sometimes been called "smart money". They have obviously considered that they were affording proper compensatory redress in satisfaction of wrongs.

Without any detailed discussion of the particular facts of numerous international precedents, international practice with regard to the rules and principles which have governed international tribunals in assessing damages in cases like the present one may be briefly indicated.

A single passage from the writings of a distinguished French author may be cited as illustrative of the views expressed by numerous well-known writers on international law with respect to the obligations of the law involved in a case of this character and the responsibility of a nation for their observance. Pradiér-Fodéré, in discussing this subject, says:

"En somme, les actes privés des nationaux n'engagent pas en principe la responsabilité de l'État auquel ces nationaux appartiennent, mais l'État dont le gouvernement approuve et ratifie les actes de ses ressortissants, ou qui refuse de réparer le dommage causé par un de ses sujets, de châtier lui-même le coupable, de le livrer pour être puni, devient en quelque sorte l'auteur de l'injure commise, se rend comme complice de l'offense, et autorise pleinement la partie offensée à faire remonter la responsabilité des actes offensants ou dommageables à celui qui se les est volontairement et sciemment comme appropriés." (Traité de Droit International Public, 1885, Vol. I, p. 336.)

* * * * *

"Mais, d'un autre côté, la nation ou le souverain ne doit point souffrir, que les citoyens fassent injure aux sujets d'un autre État, moins encore qu'ils offensent cet État lui-même * * * parce que les nations doivent se respecter mutuellement, s'abstenir de toute offense, de toute lésion, de toute injure, en un mot de tout ce qui peut faire tort aux autres. Si un souverain, qui pourrait retenir ses sujets dans les règles de la justice et de la paix, souffre qu'ils maltraitent une nation étrangère dans son corps ou dans ses membres, il ne fait pas moins de tort à toute la nation que s'il la maltraitait lui-même * * * Cependant, comme il est impossible à l'État le mieux réglé, au souverain le plus vigilant et le plus absolu, de modérer à sa volonté toutes les actions de ses sujets, de les contenir en toute occasion dans la plus exacte obéissance, il serait injuste d'imputer à la nation ou au souverain toutes les fautes des citoyens * * * Mais si la nation ou son conducteur approuve et ratifie le fait du citoyen, elle en fait sa propre affaire; l'offensé doit alors regarder la nation comme le véritable auteur de l'injure, dont peut-être le citoyen n'a été que l'instrument. Si l'État offensé tient en sa main le coupable, il peut sans difficulté en faire justice et le punir. Si le coupable est échappé et retourné dans sa patrie, on doit demander justice à son souverain. Et puisque celui-ci ne doit point souffrir que ses sujets molestent les sujets d'autrui, ou leur fassent injure, beaucoup moins qu'ils offensent audacieusement les Puissances étrangères, il doit obliger le coupable à réparer le dommage ou l'injure, si cela se peut, ou le punir exemplairement, ou enfin, selon les circonstances, le livrer à l'État offensé pour en faire justice * * * Le Souverain qui refuse de faire réparer le dommage causé par son sujet ou de punir le coupable, ou enfin de le livrer, se rend en quelque façon complice de l'injure et en devient responsable." (Ibid. pp. 615-616 ¹)

¹ Translation: In short, the private acts of citizens do not in principle bind the responsibility of the State to which these citizens belong, but the State whose government approves and ratifies the acts of its nationals, or that refuses to repair the damage caused by one of its subjects, or itself to punish the guilty person or to deliver him up for punishment, becomes in a certain measure the author of the injury committed, renders itself an accomplice to the crime, and fully justifies the offended party in placing the responsibility for the offensive or injurious acts upon the party which has, as it were, voluntarily and consciously assumed responsibility therefor.

* * * * *

"But on the other hand the nation or sovereign must not allow their citizens to do injury to the subjects of another state, much less to offend that state itself * * * because nations must respect one another, refrain from doing anything that may offend, hurt, or injure, in a word anything that may wrong others. If a sovereign who should be able to hold his subjects on the paths of justice and peace should allow them to ill treat a foreign nation as a body, or in the person of its members, the injury he does to that nation is no less than if the illtreatment was at his own hands * * *. Yet, since the state, even though the best regulated, the sovereign, even though the most vigilant and absolute, can not restrain at will all the acts of a subject, or to hold him on every occasion to the most exact obedience, it would be unfair to charge the nation or the sovereign with all the misdoings of the citizen * * * But if the nation or its head

See to the same effect Vattel, *Law of Nations* (1758) Book II, pp. 161-162; Twiss, *The Law of Nations*, 2d ed. (1875), Part 2, Par. II, p. 20; Martens, *Traité de Droit International* (1883), Vol. I, p. 563.

The position heretofore taken by the two Governments, parties to the arbitration under the Convention of September 8, 1923, with respect to the issue now raised may be shown, apart from what is revealed through Memorials that have been filed with this Commission by each, by a brief reference to diplomatic correspondence of a kind that might be quoted at length with respect to varying situations. The correspondence reveals that both have in the past entertained views in harmony with those expressed by the authors above cited.

Thus, Secretary of State Fish, in an instruction of August 15, 1873, to the American Minister to Mexico, said:

"The rule of the law of nations is that the Government which refuses to repair the damage committed by its citizens or subjects, to punish the guilty parties or to give them up for that purpose, may be regarded as virtually a sharer in the injury and as responsible therefor." (Moore, *International Law Digest*, Vol. VI, p. 655.)

From the correspondence between Secretary of State Fish and Mr. Mariscal, Mexican Minister to the United States, concerning the murder of seven Mexican shepherds in Texas in 1873, it seems to be clear that the Mexican Government predicated its demand for substantial damages on the ground of a denial of justice growing out of the failure of American authorities to apprehend and punish the wrongdoers. In a note addressed to Mr. Fish under date of January 30, 1875, Mr. Mariscal said:

"In my opinion, it is also proved that there has been such denial of justice not only because during the two years that have elapsed the criminals have not been punished, nor have any decided measures been taken for their detection, but because the prevalence of lawlessness and the inertness or powerlessness of the authorities near the scene of the crime are plainly shown by a multitude of facts and have been recognized by the executive of the State."

* * * * *

"As to the indemnity for the families of the shepherds which is likewise solicited by Lozano, he being duly authorized to do so, I think it should be fixed at twenty thousand dollars for each one; and for this there would be no lack of precedents, to which I think it now unnecessary to refer." (Foreign Relations of the United States, (1875), Part II, p. 957.)

In the *Poggioli* case before the Italian-Venezuelan Commission of 1903, the Commission considered a number of complaints on the part of the

approves and ratifies the act of the citizen, it makes it its own act; the offended party must then regard the nation as the true principal of the injury of which the citizen perhaps was but the tool. If the offended state has in hand the offender there is no difficulty about his doing justice and punishing him. If the offender has escaped and returned to his mother country, the sovereign must be asked to do justice, and since that sovereign must not allow his subjects to molest or wrong the subjects of another sovereign and, much less, boldly offend the foreign powers, he must compel the offender to make amends for the damage or insult, if it can be done, or subject him to exemplary punishment, or, according to circumstances deliver him up to the offended state for the proper administration of justice * * *. The sovereign who should refuse to cause the damage done by his subject to be repaired or to punish the offender or surrender him is in a manner making himself an accessory to the injury and becomes responsible therefor."

claimant against the Venezuelan Government, one of them relating to the failure of Venezuelan authorities to apprehend and punish four persons who had made an attempt upon the life of the claimant in 1891. In discussing this matter, Umpire Ralston said in part:

"Reviewing the authorities. it seems to the umpire that this case differs from those cited from Moore's *Arbitrations*, in that it is sustained by the clearest proof following distinct allegations and that there has been in fact a denial of justice by the administrative authorities of the State; that the considerations herein narrated come within the language of Calvo, who finds responsibility 'in case of complicity or of manifest denial of justice.' for there certainly was complicity on the part of the officials and denial of justice as set out; that the criterion suggested by Bonfils was exactly met by the administrative refusal to grant relief when the local government failed to take ordinary and necessary precautions and allowed the offenses complained of to go unpunished after becoming known; that the State of Los Andes. during the years in question in the language of Creasy, was 'habitually and grossly careless and disorderly in the management of its own affairs'; that by its failure to make reparation or punish the guilty, Venezuela has, through the fault of Los Andes. rendered itself 'in some measure an accomplice in the injury' and has become 'responsible for it,' and that according to Hall, the acts complained of being 'undisguisedly open and of common notoriety' and being of importance, the State 'is obviously responsible for not using proper means to repress them,' and has not inflicted 'punishment to the extent of its legal powers.' " (Ralston, *Report*, p. 869.)

In the case of *Cotesworth and Powell* under the Convention concluded between Great Britain and Colombia on December 14, 1872, there is an extended discussion in the elaborate opinion written by the Commissioners of illegal official acts resulting in damages to the claimants. But it is clear from the opinion that the responsibility of Colombia and the award of damages in this case for property losses resulting from illegal acts, in the amount of \$50,000.00, were predicated, not upon the abuses of judicial authorities, but upon an amnesty by which the offending officials were relieved of liability for their wrongful acts. This is shown by the following excerpts from the opinion;

"One nation is not responsible to another for the acts of its individual citizens, except when it approves or ratifies them. It then becomes a public concern, and the injured party may consider the nation itself the real author of the injury. And this approval, it is apprehended, need not be in express terms; but may fairly be inferred from a refusal to provide means of reparation when such means are possible; or from its pardon of the offender, when such pardon necessarily deprives the injured party of all redress. * * *

"He (the Commissioner) places this responsibility of Colombia solely upon the consequences of the amnesty, thus adhering, as he conceives, to the well-established principle in international polity, that, by pardoning a criminal, a nation assumes the responsibility for his past acts." (Moore, *International Arbitrations*, Vol. II, pp. 2082, 2085.)

Volume III of Moore's *International Arbitrations* contains the following account of the *Glenn* case under the Convention of July 4, 1868, between the United States and Mexico, decided by Sir Edward Thornton, the Umpire:

"Margaret Glenn made a claim for herself and her minor children for the murder of her husband and son, and the robbery of their bodies. This incident took place on November 1, 1858, about 2 o'clock, p. m., within two leagues of the city of Saltillo, on the road to Monterey. The murder and robbery were committed by a squad of soldiers under a sergeant and corporal. It was alleged that these persons were under the orders of a person who was a lawyer in Saltillo

and a deputy in the National Congress, but the participation of this person the umpire did not consider sufficiently proved. But the umpire found that there was a denial of justice in the failure to bring to trial those who committed the act of violence, by which means their guilt or innocence might have been established. On the ground of this lack of action on the part of the judicial authorities, the umpire made an award in favor of the claimants for \$20,000 in Mexican gold" (p. 3138).

The *Piedras Negras* claims under the same Convention furnish an interesting illustration of a case in which an arbitral commission, in assessing damages because of the failure of the United States to punish a band of persons who invaded Mexico from Texas, predicated its award on the damages caused by the wrongful acts of the culprits. The Commission pointed out that authorities of the United States had made no effort to arrest the offenders, which it was stated could easily have been done, and explained that the Commission arrived at its award of \$50,000.00 as stated by Dr. Moore, "by making what seemed to be just and equitable allowances to such claimants as appeared to have suffered by the burning and pillaging of the town."

In the *Davy* case before the British-Venezuela Commission of 1903, in which it seems clear that liability on the part of Venezuela was predicated on the failure to prosecute persons who had injured the claimant, the Umpire, in making an award mentioned several elements of damage of which he considered that account might properly be taken. He said in part:

"It was also the opinion of the honorable Commissioner for Venezuela that the crime was fully atoned when the guilty parties had been prosecuted and punished—a fact which he confidently believed had occurred and of which he felt sure he could give satisfactory evidence before the tribunal. It appeared that preliminary steps had been taken looking to that end, and the evidence adduced at each preliminary inquiry is a part of the testimony used in this case. These preliminary steps had given the President of Venezuela knowledge of the wrong committed, the necessity of punishment commensurate to the offense, and the names of the offenders. The Umpire has no question that the honorable Commissioner for Venezuela has been diligent in his efforts to obtain record evidence that there had been both prosecution and punishment of the guilty ones, but it has been without avail, and there is left to the respondent Government only one way to signify its regard for individual freedom, its abhorrence of such proceedings as are detailed in this case, and its desire to remove the stain which rests upon its department of criminal jurisprudence through the untoward and wicked practices of those who engaged in this conspiracy against the person and liberty of the claimant and the honor of their country. Too great regard can not be paid to the inviolability of the one and the sacred qualities of the other. The measure of damages placed upon such a crime must not be small. It must be of a degree adequate to the injury inflicted upon the claimant and the reproach thus unkindly brought upon the respondent Government. These invaded rights were in truth priceless, and no pecuniary compensation can atone for the indignities practiced upon the claimant; but a rightful award received in ready acquiescence is all that can be done to compensate the injuries, atone for the wrong, and remove the national stain." (Ralston, *Report*, p. 412).

(See also with respect to this subject of elements of damage the opinion of Ralston, Umpire, in the *Di Caro* Case, Ralston, *Report*, pp. 769-770.)

The international precedents to which reference has been made above are typical of the very considerable number cited in the American Brief. By decisions of international tribunals substantial damages have repeatedly been awarded because of the neglect of authorities to employ prompt and efficient measures to apprehend and punish offenders. No case was cited in the Mexican Government's Brief in which an award of a different kind had

been made. As has been observed above, demands for indemnities in substantial sums have been made in cases of this kind filed by both parties to this pending arbitration. I do not consider that the Commission is powerless to award damages of a substantial nature in cases of this character which often involve odious features of discrimination prompted by prejudice against aliens.

It is asserted in the Mexican Government's Brief that the measure of damages in such cases must be exclusively ascertained with reference to the law of the place where the acts underlying a claim in a given case were committed; that Mexican laws do not recognize "moral" damage and that even though it had been shown that the claimants in the instant case had justified a "moral" damage, this is a matter which can not be settled in a pecuniary way. International law is a law for the conduct of nations grounded on the general assent of the nations of the world. The law is therefore, of course, the same for all members of the family of nations. Obviously it can only be modified by the same processes by which it is formulated, namely, by general assent of the nations. It does not seem possible to conceive of a situation in which a single nation could by a municipal enactment denying a right of redress, relieve itself from making compensation for failure to observe a rule of international law.

In the light of the reasons stated above, I concur in the award requiring that the United Mexican States pay to the United States of America the sum of \$12,000 (twelve thousand dollars) without interest.

Fred K. NIELSEN,
Commissioner.

J. W. AND N. L. SWINNEY (U.S.A.) *v.* UNITED MEXICAN STATES.

(November 16, 1926, separate opinion by American Commissioner, undated.
Pages 101-136.)

DENIAL OF JUSTICE.—WRONGFUL DEATH.—DIRECT RESPONSIBILITY.—RESPONSIBILITY FOR ACTS OF MINOR OFFICIALS.—DILATORY PROSECUTION.—FAILURE TO APPREHEND OR PUNISH.—INTERNATIONAL STANDARD OF JUSTICE. Evidence *held* to establish that decedent was needlessly killed by customs guards and that there was undue delay in prosecution of, and failure to punish, such guards.

Cross-references: Am. J. Int. Law, Vol. 21, 1927, p. 562; Annual Digest, 1925-1926, p. 214.

1. This claim is presented by the United States against the United Mexican States in behalf of J. W. Swinney and N. L. Swinney, parents of Walter G. Swinney, a young American citizen, who in the afternoon of Sunday, February 5, 1922, while engaged in a trapping expedition on the Río Bravo or Río Grande del Norte, at a point not remote from Nuevo Laredo, Tamaulipas, Mexico, was shot from the Mexican bank by two armed Mexicans, and who died the next morning in the hospital at Laredo, Texas, U.S.A. One of these two Mexicans, Urbano Solís—a rural judge in the service

of the municipality of Nuevo Laredo—was arrested on or about February 5, 1922; the other one, José Maria Cruz—a rural police of the same municipality—was arrested on or about February 7, 1922, released before the end of February, but rearrested on March 8, 1922, at the instance of the American consul; both of them were finally discharged and released on November 15, 1922, without any trial being held. It is alleged that the death of said Walter Swinney caused to his parents (the claimants), American nationals, damages in the sum of \$25,000; that the Mexican authorities showed an unwarrantable neglect and indifference in investigating the case and prosecuting the culprits; and that on account of this unlawful killing and denial of justice Mexico ought to pay to the claimants the said amount with interest thereon.

2. A challenge of the nationality of the claim has been withdrawn during the oral hearing of the case.

3. The occurrence was as follows: Solís had supervision over the river in regard to smuggling endeavors, and on the very day of the occurrence the attention of him and his colleagues had by their superiors been drawn to the fact that rumors were being heard about probable attempts of revolutionaries to cross near the places under Solís' supervision. His part of the river was one of those where crossing the river with goods and using either the Mexican or the American bank as an entry port was forbidden. In the afternoon of that Sunday, Solís accidentally saw the boats of Swinney and his older companion McCampbell on the river, and wondering whether their business was lawful, went to take his helper Cruz from his house and go to the spot. When about 4 p.m. they discovered Swinney peaceably floating down the river, in a boat which in reality contained nothing besides himself and his firearms, they contend that they took him for a man who was there in contravention of the laws which it was especially their duty to enforce; their suspicion was strengthened by the fact that Solís, on his previous accidental discovery of the two boats, had thought the other boat loaded. This first contention is not disproven by the evidence; neither is the contention that Swinney refused to obey Solís' summons to come nearer in order to give the necessary explanations, and instead of doing so rowed to the opposite bank. Theoretically it might be doubted whether Swinney recognized the two Mexicans as river guards (customs guards) or similar officials; but anyone in these parts may be supposed to know that the river is being carefully watched by armed officials and that the presence on the river bank of officials seeking information of occurrences on and near the river is on both sides extremely likely. The second allegation of the two officials, however, is that, after Swinney disobeyed the summons, Solís shot in the water to frighten him, whereupon Swinney shot at them three times and a second shooting on their part followed which was in self-defense and mortally wounded him. By that time Swinney was near the American bank and was taken out of the water by his companion; the rural judge Solís went at once to the competent authority at Nuevo Laredo, to give a full account of what happened and place himself at the hands of justice.

4. The Commission, though mindful of the special task of Solís and of the special instructions given him quite recently, is far from satisfied that the shooting which ended in this tragedy was not reckless. There is every reason to doubt whether Swinney in his boat shot at the Mexican officials. The record mentions the inspection of Swinney's pistol, first by the witness Rodríguez and afterwards by the American consul, vice-consul and undertaker, disclosing that it could not have been used. A statement purporting

to have been made by McCampbell to the effect that Swinney fired from the American bank, after he had been wounded but not before that time, occurs in the consul's report of February 9, 1922, but does not appear in McCampbell's own affidavit of September 28, 1923. It is not clear from the record why Swinney looked like a smuggler or a revolutionary at that time and place, and how the Mexican officials could explain and account for their act of shooting under these circumstances, even when they considered him committing an unlawful act in crossing from one bank to another (a fact they did not see). Human life in these parts, on both sides, seems not to be appraised so highly as international standards prescribe. In the light (among other things) of the correspondence between the Governments of Great Britain and the United States relative to the reckless killing in 1914 on the Canadian border of the United States of one Walter Smith, who, while engaged in unlawfully shooting ducks, did not obey a summons of soldiers of the Canadian militia but rowed away (*Foreign Relations*, 1915, pp. 414-423), the Commission holds that this killing of Swinney has been an unlawful act of Mexican officials.

5. As to investigation of the case reported to them by Solís himself, there is from the record no reasonable doubt that the Mexican judicial authorities acted with a laches which must strike painfully not only those interested in the deceased men, but anyone who learns what happened. If the American consul had not been active for several months and if, as a consequence thereof, the Mexican authorities had not at last gathered some evidence on both sides, it is difficult to see how they would have obtained other information than the statements made by their own men. It is alleged and not negated, that the Mexican authorities during the first weeks only heard the two Mexican officials involved in the tragedy, Solís and Cruz; that they made no endeavor to hear the two American eye-witnesses—Swinney's companion, Philip McCampbell, who had been present at the event, and one Ignacio Rodríguez, who had seen the dying man (whom he did not know before), had talked with him, and had helped to have him taken to the hospital; that these authorities only examined the eye-witnesses on the strong and repeated insistence both of the American consul at Nuevo Laredo and the American embassy at Mexico City, and only as late as March 17, 1922 (McCampbell), and May 15, 1922 (Rodríguez); that they re-arrested Cruz on the same insistence; that the public prosecutor at Nuevo Laredo did not act (and then negatively) until July 5, 1922, nor the Attorney General at Ciudad Victoria, Tamaulipas, until November 14, 1922. A request from the American embassy to the Mexican Government to have the case brought to trial (May 16, 1923) had no effect. In a case so tragic as the killing of an innocent young foreigner, granted even that the officials who killed him may have considered their act justified, these facts should have been either negated or explained.

6. As to the discharge and release of the guilty parties, distinction ought to be made between the action taken by the public prosecutor at Nuevo Laredo and that of the Attorney General of the State. Once evidence gathered on the indefatigable insistence of the American consul, the prosecutor at Nuevo Laredo stated that there was reason to assume that the officials acted in what they believed to be the discharge of their official duty, whereas with respect to their claim of self-defense no positive conclusion could be reached. Instead of leaving the difficult decision on these points to an impartial tribunal, the prosecutor at least did not use the unproven self-defense as an argument, but based his decree of discharge and release exclusively on article 34, clauses XIV and XV, of the Penal Code (relating

to acts of officials in the exercise of their official capacity), thereby showing that he did not feel sufficiently convinced of their having acted in self-defense. The Attorney General, on the contrary, in confirming the first decree, discharged Solís on account of clause VIII of said article, which exclusively relates to self-defense. If the Mexicans in mortally wounding Swinney acted in self-defense, the case would have been different from their shooting a man who only did not approach, but rowed away; in his decision the Attorney General merely discarded the statements opposing those of his national officials, who at the same time were the accused. The Commission has great difficulty to understand why the royal road of an open trial has been avoided.

7. The respondent Government has not denied that, under the Convention of September 8, 1923, acts of authorities of Tamaulipas may give rise to claims against the Government of Mexico. The Commission is of the opinion that claims may be predicated on such acts.

8. The Commission considering among other things the financial support the deceased man gave the claimants, their prospects of life, and the character of the delinquency involved holds that the claimants have suffered damages to the extent of \$7,000 because of the killing of their son by Mexican authorities. For allowing interest on this amount the Commission finds no ground.

Decision

9. The Commission accordingly decides that the Government of the United Mexican States is obligated to pay to the Government of the United States of America \$7,000 (seven thousand dollars), without interest, in behalf of Jesse Walter Swinney and Nancy Louisa Swinney.

Separate opinion

I concur in the award of \$7,000.00 without concurring entirely in the grounds for the award stated in the opinion signed by the other two Commissioners.

Fred. K. NIELSEN,
Commissioner.

FRANCISCO QUINTANILLA (UNITED MEXICAN STATES) *v.*
UNITED STATES OF AMERICA.

(*November 16, 1926, separate opinion by American Commissioner, undated.*
Pages 136-140.)

DENIAL OF JUSTICE.—ACTS OF MINOR OFFICIALS.—DIRECT RESPONSIBILITY.
—DEATH DURING CUSTODY.—FAILURE TO APPREHEND OR PUNISH. Where evidence established that deputy sheriff and three other men took decedent into custody, that decedent was later found dead by side of road, and that no one was prosecuted for such death, claim *allowed*.

MEASURE OF DAMAGES, WRONGFUL DEATH. Measure of damages in case involving wrongful death *held* to include satisfaction due parents for loss suffered by international delinquency committed by respondent

Government. No allowance made for loss of support when evidence was lacking on this point.

Cross-references: Am. J. Int. Law, Vol. 21, 1927, p. 568; Annual Digest, 1925-1926, p. 224; British Yearbook, Vol. 8, 1927, p. 185.

1. This claim is presented by the United Mexican States against the United States in behalf of F. Quintanilla and M. I. Perez de Quintanilla, Mexican nationals, father and mother of Alejo Quintanilla, a young man, who was killed on or about July 16, 1922, not far from Edinburg, Hidalgo County, Texas, U.S.A. On July 15, 1922, about 5 p. m., said Alejo Quintanilla in a lonely spot had lassoed a girl of fourteen years, Agnes Casey, who was on horseback, and thrown her from the horse; she screamed, and the young Mexican fled. She told the occurrence to her father, Tom Casey, with whom Quintanilla had been employed some time before; the father the next morning went to lodge his complaint with the authorities, first to Edinburg (the County seat), where he did not find the sheriff, and then to Donna, where he found the deputy sheriff, one Sam A. Bernard. According to the record, this deputy sheriff with three other men, whose names are not mentioned, went to Quintanilla's house, took him from it, and the deputy sheriff with one Walter Weaver placed him in a motor car and drove with him, first to Casey's house, where they put on a new tire, and then in the direction of Edinburg to take him to the county jail. On July 18, 1922, about noon, Quintanilla's corpse was found near the side of this road, some three miles from Edinburg, traces showing that he had been taken there in a motor car. Bernard and Weaver were accused by the Mexican Consul at Hidalgo, Texas, and were accordingly arrested, but released on bail; Bernard's appointment as a deputy sheriff was cancelled by his sheriff on July 22, 1922. The public prosecutor made investigations and submitted the case to the Grand Jury, but the Grand Jury deferred it from 1922 to 1923, from 1923 to 1924, and never took action upon it. The Memorial alleges that the killing has caused to Quintanilla's parents losses and damages to the amount of 49,932.00 Mexican gold pesos, and that as these damages originated in acts of an official of the State of Texas, combined with a denial of justice, the United States is liable for them.

2. It appears from the record that Quintanilla was taken into custody on July 16, 1922, by a deputy sheriff of the State of Texas, to put him at the disposal of the judicial officers; it is left uncertain whether this official was provided with any authorization to take Quintanilla from his house and arrest him. The United States Government never reported what this deputy sheriff did with Quintanilla after he had taken him under custody. The young man apparently never reached the county jail. The deputy sheriff may have changed his mind and set him at liberty, and after that Quintanilla may have been murdered by an unknown person. An enemy of Quintanilla may have come up and taken him from the car. The companion of the deputy sheriff, who was not an official, may have killed Quintanilla; or the two custodians may have acted in self-defense. The United States Government has been silent on all of this. The only thing the record clearly shows is that Quintanilla was taken into custody by a State official, and that he never was delivered to any jail. The first question before this Commission, therefore, is whether under international law these circumstances present a case for which a Government must be held liable.

3. The Commission does not hesitate to answer in the affirmative. The most notable parallel in international law relates to war prisoners, hostages,

and interned members of a belligerent army and navy. It would be going too far to pretend that a Government taking into its custody either war prisoners or hostages or interned soldiers is responsible for everything which may happen to them; but there can be no reasonable doubt that it may be called to account for them, that it is obligated to account for them, and that under international law it can not exculpate itself by merely stating that it took these men into custody and that thereafter they have disappeared without leaving any trace. The Hague Conventions of 1907 are silent as to hostages; but as to war prisoners and persons assimilated to them (detained newspaper correspondents, etc.) they contain explicit provisions for the application of this principle (articles 13, 14 and 16 of the fourth Hague Convention of 1907) and the provisions of the fifth and thirteenth Conventions of 1907 concerning the treatment of interned army and navy men would be meaningless if the respective Governments were not obligated to account for the men they took into their custody. The case before this Commission is analogous. A foreigner is taken into custody by a State official. It would go too far to hold that the Government is liable for everything which may befall him. But it has to account for him. The Government can be held liable if it is proven that it has treated him cruelly, harshly, unlawfully; so much the more it is liable if it can say only that it took him into custody—either in jail or in some other place and form—and that it ignores what happened to him.

4. The question then arises whether this duty to account for a man in Governmental custody is modified by the fact that the custodian himself is accused of having killed his prisoner and, as an accused, can not be made to testify against himself. The two things clearly are separate. If the Government is obligated to state what happened to the man in its custody, its officials are bound to inform their Governments. It might be that the custodians themselves perish in a calamity together with the men in their custody, and therefore can not furnish any information. But if they are alive, and are silent, the Government has to bear the consequences. The Commission holds, therefore, that under international law and under Article I of the Convention of September 8, 1923, the respondent Government is liable for the damages originating in this act of a State official and resulting in injustice.

5. It is useless to inquire whether, apart from this liability, the United States might have been held responsible for a denial of justice in this case. The Commission confines itself to stating that nothing in the record shows that the prosecuting officer has ascertained who were the four men that took Quintanilla from his house, what were their motives for so doing, and what was to be learned from an inspection of the car in which Quintanilla was transported. If the prosecuting officer had information as to these points, the secrecy of the investigations before the Grand Jury can not explain the silence of the American Agency on all of these points.

6. The respondent Government has not denied that, under the Convention of September 8, 1923, acts of authorities of Texas may give rise to claims against the Government of the United States. The Commission is of the opinion that claims can be predicated on such acts.

7. Considering that satisfaction is due to the parents of Quintanilla for the loss suffered by the international delinquency committed, and taking into account that the record does not show how much of his earnings went to his parents, the Commission, on the data presented in the Memorial, considers these damages not to exceed an amount of \$2,000, without interest.

Decision

8. The Commission accordingly decides that the Government of the United States of America is obligated to pay to the Government of the United Mexican States \$2,000 (two thousand dollars) in behalf of Francisco Quintanilla and Maria Ines Perez de Quintanilla, without interest.

Separate opinion

I concur in the award of \$2,000.00 without concurring in the grounds for the award stated in the opinion signed by the other two Commissioners.

Fred K. NIELSEN,
Commissioner.

D. GUERRERO VDA. DE FALCÓN (UNITED MEXICAN STATES)
v. UNITED STATES OF AMERICA.

(November 16, 1926. Pages 140-143.)

RESPONSIBILITY FOR ACTS OF SOLDIERS.—DIRECT RESPONSIBILITY.—FAILURE TO APPREHEND OR PUNISH. Respondent Government *held* responsible for killing of Mexican subject by soldiers guarding the border.

Cross-references: Am. J. Int. Law, Vol. 21, 1927, p. 566; Annual Digest, 1925-1926, p. 220.

1. This claim was filed by the United Mexican States against the United States of America in behalf of Dolores Guerrero, widow of Gregorio Falcón, and of Bartolo, Apolonio, Domingo, and Mónica Falcón, children of the deceased Falcón, a Mexican citizen, who, on May 5, 1919, at about 10.30 A. M., was wounded by bullets fired by two American soldiers from the American side of the Rio Grande at a point near the ranch called Las Barreras while he was, it is alleged in the Memorial, bathing together with another Mexican named Félix Villarreal. Falcón died in the afternoon of the same day. American military and civil authorities made an investigation of the occurrences connected with the killing of Falcón. The soldiers were not brought to trial, but they were admonished for having fired on unarmed persons, although it was believed that they did so without intention to hit. It is alleged that the death of Gregorio Falcón caused his widow and his children, Mexican citizens, damages in the amount of 18,518.40 pesos, Mexican currency; that the American authorities improperly failed to bring the guilty persons to trial, and that on account of this wrongful death and a denial of justice the United States should pay an indemnity in the aforementioned sum, together with interest from May 5, 1919, to the time of payment. The record discloses the following facts: Sergeants John Smith and John Floyd, of the Fourth Cavalry of the United States Army, had been directed, on May 5, 1919, to patrol the river in the locality where the shooting occurred with the object of preventing smuggling and other transgressions of the law. Sergeant Smith, during the course of the investigation conducted

by the military authorities, testified that while the two soldiers were making an inspection on the banks of the river they saw through long-distance field glasses a naked man who was swimming towards the Mexican side and also several mounted men on the Mexican shore. Evidence on this point is not entirely clear. Sergeant Floyd stated that "About a half mile this side of that place (Barreras) we noticed a bunch of men trying to cross the river." Both soldiers also mentioned three men who were in the river naked, while evidence produced by the Mexican Government refers to but two men. It appears that the soldiers, believing that the men in the river were engaged in smuggling, approached them and directed them to halt. Falcón and Villarreal did not obey the order, whereupon Sergeant Smith fired a shot in the air to cause them to stop. The soldiers testify that they were thereupon immediately fired on from the Mexican side by mounted men; that they (the soldiers) retreated, dismounted, and returned to answer the fire in self-defense, and also directed some shots at the men who were in the water. It further appears that about fifty shots were exchanged in this manner while Falcón and Villarreal were approaching the Mexican shore, and that Falcón had to be assisted out of the water by Villarreal, he having been wounded by one of the bullets fired from the American side. While the two soldiers asserted that the men in the river were towing some floating cases, Falcón and Villarreal deny this, and there is no other evidence bearing on the point. It also appears uncertain whether the two Mexicans had been in the American side of the river. The only evidence upon this point is the statement of Juan Muñiz, a man who was on the American side at the time the occurrences in question took place, and who stated that "he had heard that two men had passed his ranch, coming from the vicinity of Mission, and that they had crossed the river." This same Muñiz testified that he had heard shots, "but that he did not know who shot first," a statement which might be interpreted in the sense that there were shots fired from both sides of the river, or that there were shots only from the American side and that Muñiz did not notice which of the two American soldiers had fired first.

2. Mexican authorities also investigated the occurrences in question and brought the results of their investigation to the notice of the Mexican Consul at Rio Grande, who, on May 12, 1919, communicated them to the Ambassador of Mexico in the United States, who brought them to the notice of the Department of State. The American military authorities, without bringing Smith and Floyd to trial, declared them innocent of crime on the ground that they had acted in the discharge of their duty in attempting to prevent smuggling, and that even if they had made an error in firing the first shot in the air, it was natural that they should return the fire of the Mexicans in order to protect themselves from shots being fired from the Mexican side.

3. Even though it be assumed that Falcón and Villarreal were engaged in smuggling, and that American soldiers were fired upon from the Mexican side, the Commission must consider the death of Falcón to be wrongful. It appears from the record that American military regulations forbade the firing on unarmed persons suspected of smuggling or crossing the river in places where passage was not authorized. (Bulletin No. 4 of February, 11 1919.) The soldiers may have believed themselves justified in using firearms to prevent smuggling or in returning a fire from the Mexican side. However, it appears they disregarded American military regulations which were evidently intended to prevent such unhappy occurrences as those underlying this claim. And according to the testimony of Sergeant Smith, they directed

fire against naked and defenseless Mexicans who were in the river thereby causing the death of Falcón.

4. In view of the results of the investigation made by American civilian authorities it seems to the Commission to be somewhat odd that the soldiers should not have been brought to trial. Apart from this point, however, the Commission is of the opinion that the killing of Falcón was a wrongful act for which damages may be assessed in the amount of \$7,000.00 without interest.

Decision

5. The Commission therefore decides that the Government of the United States of America must pay to the Government of the United Mexican States the sum of \$7,000.00 (seven thousand dollars) without interest, on behalf of Dolores Guerrero, widow of Gregorio Falcón and Bartolo, Apolonio, Domingo and Mónica Falcón, children of the deceased Falcón.

LINA BALDERAS DE DÍAZ (UNITED MEXICAN STATES) *v.*
UNITED STATES OF AMERICA.

(*November 16, 1926. Pages 143-146.*)

DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH. When the evidence failed to show that the American authorities were guilty of gross negligence in failing to apprehend those guilty of murder of a Mexican subject, claim *disallowed*.

1. Claim is made by the United Mexican States in this case for damages in the sum of 50,000 Mexican gold pesos or the equivalent thereof in currency of the United States, suffered by Catalina Balderas de Díaz, mother of Mauricio Díaz, a Mexican citizen, who was killed on February 8, 1920, in the city of San Antonio, Texas. It is alleged in the Memorial that the "lenity of the American authorities in regard to the institution of due legal process, to the discovery of the guilty party and to his punishment, constitutes a true denial of justice, which is a justification of the right of Catalina Balderas de Díaz, the mother of the man slain, and injured by the loss of her son, to demand compensation, as she was dependent on him for a living and such injury has not been made good to her." The sum claimed is estimated as having been suffered by the mother of the deceased taking into account his probable life expectancy.

2. The evidence accompanying the Memorial, in addition to that bearing on questions of nationality, consists of:

(1) The record of the inquest conducted with respect to the killing of Díaz which recites that the deceased came to his death on the eighth day of February, 1920, from a wound caused by a bullet from the firearm in the hands of some person whose name is unknown: and

(2) Copies of certain correspondence consisting of a communication sent by the Mexican Consul at San Antonio to the Mexican Ambassador at Washington, in which the Ambassador was informed that Díaz had been killed and that the Consul had written concerning the matter to the Sheriff

of Bexar County, Texas: the communication addressed by the Consul to the Sheriff requesting such information as the latter might have regarding the case; and the reply of the Sheriff to the Consul in which the latter was informed that Díaz was murdered by parties unknown to the police; that several persons suspected of the crime had been arrested; that the guilty persons had not been apprehended; and that the investigation would be continued.

3. The allegation in the Memorial with respect to a denial of justice resulting from a failure of American authorities to take proper steps looking to the apprehension and punishment of the person who killed Díaz raises for determination the question whether there is before the Commission convincing evidence of clearly wrongful conduct on the part of the authorities in neglecting their duty to bring to justice the person who killed the Mexican citizen Díaz. Since the Memorial is accompanied by no evidence whatever of such wrongful action on the part of the authorities, the Commission must look to the evidence filed by the United States to ascertain if the charge of a denial of justice is substantiated in the light of that evidence.

4. Accompanying the Answer of the United States is an affidavit made by F. N. Flores, Deputy Sheriff of Bexar County, who states that an investigation of the killing of Díaz showed that the deceased, who was a chauffeur, was engaged by two soldiers to drive them in an automobile; that two or three days after Díaz had been so employed two soldiers were arrested and brought to the police station at San Antonio; that two or three chauffeurs who operated cars from the same location as that from which Díaz operated were brought to the station to identify the soldiers; that no one was able to identify the two soldiers, who were later released; that every effort was made to find the guilty persons, but such efforts were not successful; and that no complaint was filed and no indictment returned in connection with the murder, as the guilty persons could never be located. The Answer is further accompanied by an affidavit made by O. W. Kilday, a detective in the employ of the City of San Antonio, Texas. Kilday states in this affidavit that he knows that the city and county officers made prompt efforts to apprehend the guilty persons, and that all of the city detectives were called to work on the case. He describes the difficulty in making investigations of the crime, due to the fact that the persons who hired Díaz had not been identified and that there were no clues which could be followed. He states that, two soldiers having been suspected, an investigation was also made by military authorities who worked in conjunction with civil authorities at San Antonio; that many soldiers were arrested and brought to the police station, and efforts were made to identify them as men who had hired the car driven by Díaz. It is pointed out in the affidavit that at the time of the commission of the crime there were probably forty thousand American soldiers stationed at the military posts in and around San Antonio.

5. Subsequent to the filing of the Answer, the American Agent filed some newspaper accounts with respect to the killing of Díaz; another affidavit of O. W. Kilday describing the activities of the police to apprehend the slayer of Díaz; an affidavit of similar purport made by Sam Street, a detective in the employ of the San Antonio police department; and an affidavit made by S. J. Maloukis, an investigator in the service of the military authorities.

6. The evidence presented by the United States does not show that there was gross negligence on the part of the American authorities in the matter of apprehending the person who killed Díaz, but does show the contrary. Even if all of the testimony furnished by the American Agency should be

regarded as unreliable—and it may be observed that no attempt was made to discredit it as such—there would still be no evidence showing negligence on the part of the authorities.

Decision

7. The charge of a denial of justice made in the Memorial is therefore not sustained, and the Commission accordingly decides that the claim must be disallowed.

MACEDONIO J. GARCÍA (U.S.A.) *v.* UNITED MEXICAN STATES.

(*November 23, 1926. Pages 146-149.*)

JURISDICTION. Claim for loan to Adolfo de la Huerta, Governor of Sonora, for assisting in revolutionary movement, *held not per se* outside jurisdiction of tribunal. Loan being payable after period covered by *compromis held* outside jurisdiction of tribunal.

LOAN TO OFFICIAL. Evidence *held* insufficient to establish responsibility of respondent Government for loan to official.

1. This claim is made by the United States of America against the United Mexican States in behalf of Macedonio J. García, an American citizen, to obtain the payment of \$161,000.00 with interest from May 31, 1920, in settlement of loans said to have been made by the claimant, the amount of \$150,000.00 being delivered on or about March 30, 1920, to Adolfo de la Huerta, Governor of Sonora, and the sum of \$11,000.00 being delivered in two parts, one of \$5,000.00 and the other \$6,000.00 United States currency during the month of May, 1920, to certain military officers. It is stated in the Memorial that García took a receipt for the amount of \$150,000.00 from de la Huerta "in the name of and for the United Mexican States"; that the latter agreed to repay this sum "on behalf of the United Mexican States"; that for the delivery of the other sums García also received a receipt signed by de la Huerta "acting for and on behalf of the Mexican Government"; and that de la Huerta likewise agreed to repay these sums. It is further alleged that on or about May 31, 1920, the three receipts were delivered to de la Huerta, who "for and on behalf of the Mexican Government" gave to García in exchange for the three receipts one receipt for the total sum of \$161,000.00 in which de la Huerta "on behalf of the Mexican Government promised and agreed to repay to claimant the said sum of \$161,000.00". It was argued in behalf of the claimant Government that the Government of Mexico is liable under the principles of international law to pay the sum of \$161,000.00 loaned to de la Huerta, who, in accordance with the so-called "Plan of Agua Prieta," was the "Supreme Chief of the Sonora Revolution," which occurred in Mexico in the spring of 1920; that the revolution was successful and resulted in the election of de la Huerta as Provisional President of Mexico and in the subsequent election of General Obregón as President, the latter assuming office on December 1, 1920; and that the receipt given by de la Huerta to García after his election as Provisional President is conclusive proof that the loans were made, and that the Government of

Mexico is bound under principles of international law to pay the obligations of successful revolutionists.

2. In behalf of the Mexican Government it is contended that the Commission has not jurisdiction over the claim because (a) whatever may be the status of García under the law of the United States, he is under Mexican law a Mexican citizen by virtue of Mexican parentage, and (b) that the claim is excluded from the jurisdiction of the Commission as falling within the category mentioned in Article I of the Convention of September 8, 1923, of claims "arising from acts incident to the recent revolutions."

3. The American citizenship of García is proved by a record of his birth on March 2, 1879, in Cameron County, State of Texas. There was laid before the Commission a naturalization certificate showing that Macedonio García was naturalized as an American citizen on November 26, 1869, by the order of the County Court in the same county. We have no doubt that this order is a record of the naturalization of the claimant's father. Macedonio García having been naturalized as an American citizen on November 26, 1869, the Mexican Government was obligated at that time, pursuant to Article I of the Convention concluded July 10, 1868, between the United States and Mexico, to recognize his American citizenship acquired about ten years prior to the birth of his son, the claimant in this case. Even if there were a doubt in our minds with respect to the status of Macedonio García, we are of the opinion that the right of the United States to intervene in behalf of the son could not be challenged solely on the basis of the telegram of October 13, 1923, before the Commission, which was transmitted by the Mexican Consul at Brownsville to the Mexican Agent in which telegram it is stated that Macedonio García was born in 1847, in Matamoros, Tamaulipas.

4. The receipt bearing date of May 31, 1920, for \$161,000.00, which is signed "The Supreme Chief of the Revolution, Adolfo de la Huerta," translated, reads as follows:

"I hereby declare that Macedonio J. Garcia, has furnished the amount of \$161,000.00 in the way of a loan for assisting the revolutionary movement which I have the honor to be the head of, and which should be paid when the federal public Hacienda is found to be in a favorable situation for making this reimbursement."

5. It is argued in behalf of the United States that it is unmistakably shown by this receipt that payment of the obligation to which it refers was not due until subsequent to May 31, 1920; that it follows that the claim based on the nonpayment of the obligation did not arise between November 20, 1910, and May 31, 1920, the period which, according to the Claims Convention of September 10, 1923, embraces claims arising during recent revolutions and disturbed conditions. in Mexico. We take that view, and therefore do not sustain the contention raised by the Mexican Agency that the claim comes within the category of claims "arising from acts incident to the recent revolutions."

6. In behalf of the respondent Government it has been argued that, it being assumed that money was loaned by García as described in the Memorial, that act was a participation by him in Mexican politics as a result of which, under international law he lost the right to invoke the protection of the United States, and the latter has no right to intervene in the case. Arbitral decisions were cited to support this contention. The Commission is of the opinion that no question of jurisdiction can properly be raised by the contentions made in behalf of the Mexican Government on this point which

is one the pertinency of which could only be considered in connection with the question of the validity of the claim under international law.

7. We deem it to be unnecessary to consider this matter, for the reason that, apart from other questions raised in the case, we are of the opinion that the evidence before the Commission in relation to the interesting transactions in question does not justify an award such as that asked for by the United States. The only evidence produced by the claimant Government other than that relating to the nationality of the claimant, is an affidavit made by the claimant and the receipt of May 31, 1920, signed, "Adolfo de la Huerta." There is no definite evidence throwing light on the contents of the receipts said to have been given by de la Huerta for the sums of \$150,000.00, \$6,000.00, and \$5,000.00, respectively; there is no definite evidence whether such sums were actually delivered and to whom; and apart from García's affidavit there is no evidence whether all of these three sums were originally loans or contributions. Excepting the claimant's affidavit there is no evidence to authenticate the receipt of May 31, 1920, signed "Adolfo de la Huerta." Finally, it is important to note that, while in the Memorial there is an allegation of liability for an overdue obligation evidenced by the receipt of May 31, 1920, the receipt recites that the sum of \$161,000.00 should be paid when the Federal Public Treasury is found to be in a favorable situation for making reimbursement. It has not been shown to the Commission that, it being assumed that the receipt evidences an obligation binding on the Mexican Government, it rests with the claimant to fix the time of payment according to his views of the conditions of the Public Treasury. And we do not consider that it would be within the province of the Commission to make any determination with reference to that point.

Decision

8. For the reasons stated above, the claim is disallowed.

THOMAS H. YOUMANS (U.S.A.) *v.* UNITED MEXICAN STATES.

(November 23, 1926. Pages 150-159.)

RESPONSIBILITY FOR ACTS OF FORCES.—DIRECT RESPONSIBILITY.—MOB VIOLENCE.—DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH.—FAILURE TO PROTECT. Mexican military forces, under command of officer, instead of protecting American citizens attacked by mob, opened fire on Americans, as a result of which all were killed either by armed forces or by mob. No one appeared to have been punished for the crime, though some prosecutions were begun. Claim *allowed*.

Cross-references: Am. J. Int. Law, Vol. 21, 1927, p. 571; Annual Digest, 1925-1926, p. 223; British Yearbook, Vol. 8, 1927, p. 184.

Comments: Edwin M. Borchard, "Important Decisions of the Mixed Claims Commission, United States and Mexico," Am. J. Int. Law, Vol. 21, 1927, p. 516 at 521.

1. Claim for damages in the amount of \$50,000.00 is made in this case by the United States of America against the United Mexican States in behalf of Thomas H. Youmans, the son of Henry Youmans, an American citizen, who, together with two other Americans, John A. Connelly and George Arnold, was killed at the hands of a mob on March 14, 1880, at Angangueo, State of Michoacán, Mexico. The occurrences giving rise to the claim as stated in the Memorial are substantially as follows:

2. At the time when the killing took place Connelly and Youmans were employed by Justin Arnold and Clinton Stephens, American citizens, who were engaged under a contract with a British corporation in driving a tunnel, known as the San Hilario Tunnel, in the town of Angangueo, a place having a population of approximately 7,000 people. The work was being done by Mexican laborers resident in the town under the supervision of the Americans. On the day when these men were killed Connelly, who was Managing Engineer in the construction of the tunnel at Angangueo, had a controversy with a laborer, Cayentano Medina by name, over a trifling sum of about twelve cents which the laborer insisted was due to him as wages. Connelly considering the conduct of the laborer to be offensive, ejected the latter from the house in which Connelly lived and to which Medina had come to discuss the matter. Subsequently Medina, who was joined by several companions, began to throw stones at Connelly while the latter was sitting in front of his house and approached the American with a drawn machete. Connelly, with a view to frightening his assailant, fired shots into the air from a revolver. The American having withdrawn into the house, Medina attempted to enter, and his companions followed. Connelly thereupon fired at Medina with a shotgun and wounded him in the legs. Soon the house was surrounded by a threatening mob, which increased until it numbered about a thousand people. Connelly, Youmans, and Arnold, realizing the seriousness of their situation, prepared to defend themselves against the mob. Connelly's employer, Clinton Stephens, on hearing shots, went to the house and learned from Connelly what had happened. Upon Stephen's advice Connelly undertook to surrender himself to the local authorities, but was driven back into the house by the mob. The attack against Connelly when he endeavored to surrender to police authorities was led by Pedro Mondragón, a person styled the "Jefe de Manzana," with whom Connelly had been on friendly terms. Stephens, followed by a part of the mob, proceeded to the *Casa Municipal* and requested the Mayor, Don Justo Lopez, to endeavor to protect the Americans in the house. The Mayor promptly went to the house, but was unable to quiet the mob. He then returned to his office and ordered José Maria Mora, *Jefe de la Tropa de la Seguridad Pública*, who held the rank of Lieutenant in the forces of the State of Michoacán, to proceed with troops to quell the riot and put an end to the attack upon the Americans. The troops, on arriving at the scene of the riot, instead of dispersing the mob, opened fire on the house, as a consequence of which Arnold was killed. The mob renewed the attack, and while the Americans defended themselves as best they could, several members of the mob approached the house from the rear, where there were no windows and set fire to the roof. Connelly and Youmans were forced to leave, and as they did so they were killed by the troops and members of the mob. Their bodies were dragged through the streets and left under a pile of stones by the side of the road so mutilated as scarcely to be recognizable. At night they were buried by employees of the Mining Company in its cemetery at Trojes.

3. On the morning following the murder of the Americans, Federal Troops arrived and established order. On March 17, the Government of the State was directed by the President of Mexico to take all possible measures to discover those who were responsible for the murders. Of the thousand or more who made up the mob, court action was instituted against about twenty-nine. Only eighteen of this number were arrested, but the record discloses that several were released on nominal bail, and were not apprehended after their release. Five were condemned to capital punishment, but their sentences were modified. This action of the court was to no avail; when it was taken one had died, and the remaining four left town before they could be arrested. Seven were acquitted. The cases of six others were discontinued, and the charges against the remaining eleven were left open in the year 1887 for prosecution when they might be apprehended.

4. There appears to be no reason to doubt the substantial accuracy of the allegations in the Memorial upon which the claim is predicated. Some contention is made in the brief filed by the respondent Government to the effect that it is not proved by evidence in the record that the Mexican authorities were chargeable with negligence in the matter of protecting the men who were killed; or that soldiers participated in the assault on the men; or that proper efforts were not made to apprehend and punish the persons participating in the attack. We do not agree with that contention. In reaching conclusions respecting material facts we are confronted by no serious difficulties resulting from absence of or uncertainties in evidence. The riot took place in the day time. About one thousand persons participated. The incidents of the riot were therefore, of course, well known throughout the town. Pertinent facts are fully revealed by information collected and gathered immediately after the riot, by reports from American diplomatic and consular officers in Mexico, and by communications exchanged between the American Legation at Mexico City and the Mexican Foreign Office. Copies of official Mexican judicial records and other records accompany the Mexican Answer and throw considerable light on the character of the various steps taken to bring to justice the guilty persons. It is pertinent to note that counsel for Mexico in oral argument did not challenge the substantial accuracy of the evidence upon which the allegations in the Memorial with respect to the occurrences out of which the claim arises are based. However, mention may be made of some of the principal parts of that evidence.

5. Accompanying a despatch of April 2, 1880, from the American Legation at Mexico City to the Secretary of State at Washington (Annex 34), is a lengthy communication sent to the Legation by Arthur B. Kitchener, Director of the Trojes Mining Company. That communication furnishes detailed information with respect to the incidents of the riot as they are described in the Memorial, and it contains the statement that the writer and Mr. Stephens had "several witnesses who saw the soldiers later on fire on the Americans." With a despatch of May 18, 1880, from the American Minister at Mexico City to the Department of State (Annex 36), was enclosed another lengthy communication addressed by Mr. Kitchener to the Minister in reply to a request made by the latter for information regarding the steps taken by Mexican authorities to bring to justice the persons implicated in the murder. Mr. Kitchener furnishes details with regard to the arrest of a number of persons and the release on what he calls "nominal bail" of some of those who had been taken into custody. He mentions two cases in which the bondsmen of men so released were common workmen of no property or position; another case in which the bondsman was a shopkeeper.

He expresses great dissatisfaction with the manner in which the investigation of the crime was conducted. Evidence which undoubtedly is of much value in furnishing reliable information concerning the facts relative to the riot is found in a report (Annex 39) transmitted to the Secretary of State at Washington under date of May 16, 1881, by Mr. David H. Strother, American Consul General at Mexico City, who visited Angangueo for the purpose of making an investigation of the murder. Although his investigation was made a year after the riot, it seems reasonable to believe that the facts in relation to the tragedy were so vividly in the minds of persons with whom the Consul General came into contact that he was able to obtain accurate and comprehensive information. From the Consul General's report it appears to be clear that he performed his work faithfully and with the sole purpose of ascertaining the truth. The manner in which he proceeded and the sources of his information may be shown to some extent by the following extract from his report:

"In conducting any investigation of the subject in hand I thought it advisable to conceal my official character and the motive of my visit, believing that I could thus obtain a more full and impartial statement of the facts. In this way I gathered evidence from Mexicans, English and Americans, all agreeing in the main facts and confirming generally the statements we have had heretofore. Some of the persons with whom I conversed were well acquainted with all the principal parties concerned and eye witnesses of some of the facts which they narrated. All told their stories clearly and dispassionately and seemed fairly to express the settled convictions of thinking men on events, which occurring more than a year before had been carefully sifted and conclusively established."

6. With respect to the participation of the soldiers in the attack on the Americans the Consul General said:

"It is believed by those who seem well acquainted with all the circumstances, that the appearance of the troops on the ground in behalf of public order, would of itself alone have been sufficient to have quelled the riot and put an end to all further turbulent and unlawful proceedings, but to the astonishment of all, they at once took position and opened fire on the Americans in the house. This act encouraged the mob to reopen their attack with redoubled fury. The soldiers continued their fire until they had expended their ammunition killing George Arnold by a shot through the head."

7. In submitting certain conclusions at the end of the report Mr. Strother stated:

"That there would in all probability have been no fatal results from the riot had it not been for the unaccountable and scandalous conduct of the State troops."

8. The American Minister at Mexico City in his despatch of April 2, 1880, reported to his Government that upon receiving telegraphic information regarding the murder of the Americans at Angangueo, he brought the matter to the attention of the Mexican Foreign Office in a communication of March 16, 1880, in which he expressed the feeling of assurance that such prompt and energetic measures would be taken by the Mexican Government as the circumstances of the case might require. In an instruction of April 20, 1880 (Annex 35), Secretary of State Everetts directed the Minister to express to the Mexican Government, without any reference to the question of private indemnity in advance of more complete information, the confident expectations on the part of the Government of the United States that nothing would be omitted in the matter of bringing the offenders to the strictest justice

according to law. Following the receipt of Consul General Strother's despatch of May 16, 1881, the Department of State, in an instruction dated November 4, 1881 (Annex 40), directed the American Minister at Mexico City to bring to the attention of the Mexican Government claims which had been presented to the Department by relatives of the three murdered men. The Department in this communication emphasized the participation of the troops in the riot and with respect to this point said:

"These troops, at a moment when they had the mob under control, and when the complete quelling of the riot seemed an immediate possibility, in utter disregard of the obligations of their office as preservers of the peace and with wanton and deliberate violation of law, opened fire on the three Americans, instantly killing one and joining with the infuriated mob in the inhuman slaughter of the other two who were fleeing for their lives from their burning cabin, which had been deliberately set fire to over their heads.

"It seems almost needless to remark that such conduct on the part of soldiers or police, under orders to preserve the peace and protect the lives and property of peaceable inhabitants, on the plainest principles of international law and independent of the treaty stipulations between the two nations, which are contravened by such proceedings, renders the Government in whose service they are employed, justly liable to the Government of the men, whose lives were thus wantonly and needlessly sacrificed."

9. Under date of May 15, 1882, the Mexican Foreign Office addressed a communication to the American Legation denying all liability with respect to these claims (Annex 41). The Minister for Foreign Affairs, Señor Mariscal, challenged the right of the United States to intervene in the cases on the ground that the murdered men had not been matriculated under Mexican law. He asserted that there had been no negligence in the matter of giving protection to the men and denied that evidence had been furnished to prove that soldiers participated in the attack on the Americans. A reply to the Mexican Government's note was made at considerable length by the American Minister in a note of May 27, 1882, (Annex 41). In this communication the Minister referred to the participation in the riot by the Mexican officer and the men under his command as follows:

"The above-mentioned officer and soldiers under his charge confessed to having done this, alleging in excuse that they feared the vengeance of the mob had they acted otherwise. A number of the towns people were eyewitnesses of this fact. Amongst others, I may mention the following: Don Guillermo Zercero 2; Diputado de Minería, an owner of mines and smelting works in the town; Don Justo Lopez, president of the Ayuntamiento of Anganguco; Don Ruperto Menchaca, butcher, well known to the Company and Antonio Alamio, store-keeper, besides many miners and work people of the District. For above a week after the disturbance the above-mentioned Mora and soldiers were still at liberty, but were then taken into custody on evidence against them by Don Justo Lopez."

10. In an instruction of September 4, 1882, the American Minister was informed that the Government of the United States did not deem it to be advisable to press the cases further at that time.

11. The claim made by the United States is predicated on the failure of the Mexican Government to exercise due diligence to protect the father of the claimant from the fury of the mob at whose hands he was killed, and the failure to take proper steps looking to the apprehension and punishment of the persons implicated in the crime. In connection with the contention with respect to the failure of the authorities to protect Youmans from the acts of the mob, particular emphasis is laid on the participation of soldiers which is

asserted to be in itself a ground of liability. In behalf of the respondent Government it is contended that the Mexican Government and the Government of the State of Michoacán acted with due diligence in arresting and bringing to justice all persons against whom a reasonable suspicion of guilt existed; that the charge that some State troops participated in the riot is not proved by the evidence; and that, even if it were assumed that the soldiers were guilty of such participation, the Mexican Government should not be held responsible for the wrongful acts of ten soldiers and one officer of the State of Michoacán, who, after having been ordered by the highest official in the locality to protect American citizens, instead of carrying out orders given them acted in violation of them in consequence of which the Americans were killed.

12. We are of the opinion that the contentions advanced by the United States as to liability on the part of the Mexican Government are sustained by the evidence in the record. Without discussing the evidence at length, it may be stated that the Commission is of the opinion that the record shows a lack of diligence in the punishment of the persons implicated in the crime. Annex 3 accompanying the Mexican Answer reveals some interesting information with respect to the prosecution of persons who were arrested. There is not sufficient information before the Commission to warrant us in undertaking to draw any definite conclusions with respect to certain cases in which prisoners were released and other cases in which severe sentences imposed by the court of first instance were mitigated by a higher court. It may be mentioned, however, that this judicial record shows that seventeen prisoners escaped, some of them while they were at liberty on bail. Citations have been made to evidence with respect to participation of soldiers in the killing of the three Americans. We consider that evidence to be ample proof of such conduct on the part of the soldiers, and touching this point it is pertinent to note that evidence has not been adduced to disprove their guilt. It is also pertinent to note touching this point that some soldiers were arrested but were not sentenced. Evidence before the Commission does not disclose whose weapons killed the Americans, but the participation of the soldiers with members of the mob is established. It can not properly be said that adequate protection is afforded to foreigners in a case in which the proper agencies of the law to afford protection participate in murder. The claim of *Alfred Jeannotat*, under the Convention of July 4, 1868, between the United States and Mexico, was a case very similar to the present one. Speaking of the participation of soldiers in riotous acts, Umpire Thornton said:

"It has been alleged that in the above-mentioned instance the sacking was done by the released prisoners, and by a mob belonging to the population of the town; but, if it were so, it was the military force commanded by officers who put it in the power of the convicts and incited the mob to assist them in their acts of violence and plunder. It does not appear that without the arrival of the military force, which ought to have protected the peaceable inhabitants of the town, there would have been any inclination to commit such acts of violence. The umpire is therefore of opinion that compensation is due to the claimant from the Mexican Government." (Moore, *International Arbitrations*, Vol. IV 3673, 3674.)

13. With respect to the question of responsibility for the acts of soldiers there are citations in the Mexican Government's brief of extracts from a discussion of a subcommittee of the League of Nations Committee of Experts for the Progressive Codification of International Law. The passage quoted, which deals with the responsibility of a State for illegal acts of officials

resulting in damages to foreigners, begins with a statement relative to the acts of an official accomplished "outside the scope of his competency, that is to say, if he has exceeded his powers." An illegal act of this kind, it is stated in the quotation, is one that can not be imputed to the State. Apart from the question whether the acts of officials referred to in this discussion have any relation to the rule of international law with regard to responsibility for acts of soldiers, it seems clear that the passage to which particular attention is called in the Mexican Government's brief is concerned solely with the question of the authority of an officer as defined by domestic law to act for his Government with reference to some particular subject. Clearly it is not intended by the rule asserted to say that no wrongful act of an official acting in the discharge of duties entrusted to him can impose responsibility on a Government under international law because any such wrongful act must be considered to be "outside the scope of his competency." If this were the meaning intended by the rule it would follow that no wrongful acts committed by an official could be considered as acts for which his Government could be held liable. We do not consider that any of these passages from the discussion of the subcommittee quoted in the Mexican brief are at variance with the view which we take that the action of the troops in participating in the murder at Angangueo imposed a direct responsibility on the Government of Mexico.

14. Citation is also made in the Mexican brief to an opinion rendered by Umpire Lieber in which effect is evidently given to the well-recognized rule of international law that a Government is not responsible for malicious acts of soldiers committed in their private capacity. Awards have repeatedly been rendered for wrongful acts of soldiers acting under the command of an officer. (See for example the claim of *Frederick A. Newton v. Mexico*, for the theft of property by Republican troops under Colonel Rijos, and the claim of *A. F. Lanfranco v. Mexico*, for the looting of a store at Tehuantepec by armed men under the command of the *Jefe Político* of that place—Moore, *International Arbitrations*, Vol. 3, p. 2997; also the interesting case of the German sentry who at the frontier near Vexaincourt shot from the German side and killed a person on French territory, mentioned by Oppenheim, *International Law*, 3d edit, Vol. 1, pp. 218-219; and the opinion of the Commission in the *Falcón* claim, Docket No. 278). Certain cases coming before the international tribunals may have revealed some uncertainty whether the acts of soldiers should properly be regarded as private acts for which there was no liability on the State, or acts for which the State should be held responsible. But we do not consider that the participation of the soldiers in the murder at Angangueo can be regarded as acts of soldiers committed in their private capacity when it is clear that at the time of the commission of these acts the men were on duty under the immediate supervision and in the presence of a commanding officer. Soldiers inflicting personal injuries or committing wanton destruction or looting always act in disobedience of some rules laid down by superior authority. There could be no liability whatever for such misdeeds if the view were taken that any acts committed by soldiers in contravention of instructions must always be considered as personal acts.

15. The respondent Government has not denied that, under the Convention of September 8, 1923, acts of authorities of Michoacán may give rise to claims against the Government of Mexico. The Commission is of the opinion that claims may be predicated on such acts.

16. Claim is made in this case for damages in the amount of \$50,000.00. The Commission is of the opinion that an award may properly be made in the sum of \$20,000.00.

Decision

17. The Commission therefore decides that the Government of the United Mexican States must pay to the Government of the United States of America the sum of \$20,000.00 (twenty thousand dollars) without interest on behalf of Thomas H. Youmans.

AGNES CONNELLY *et al.* (U.S.A.) *v.* UNITED MEXICAN STATES.

(*November 23, 1926. Pages 159-162.*)

COLLATERAL RELATIVES AS PARTIES CLAIMANT. Collateral relatives, namely, brothers and sisters, as well as parents, *held* entitled to claim for damages sustained as a result of death of American subject.

RESPONSIBILITY FOR ACTS OF FORCES.—DIRECT RESPONSIBILITY.—MOB VIOLENCE.—DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH.—FAILURE TO PROTECT. Claim arising under same circumstances as those set forth in *Thomas H. Youmans* claim *supra* allowed.

MEASURE OF DAMAGES, WRONGFUL DEATH. Loss of support made measure of damages in case arising out of death of American subject.

Cross-references: Am. J. Int. Law, Vol. 21, 1927, p. 579; Annual Digest, 1925-1926, p. 247.

1. Claim for damages in the amount of \$50,000.00 is made in this case by the United States of America against the United Mexican States in behalf of Agnes, Alice, Thomas, Mary A., and William Connelly and Ellen Edith Murphy, whose brother, John A. Connelly, together with two other Americans, Henry Youmans and George Arnold, was killed at the hands of a mob on March 14, 1880, at Anganguco, Michoacán, Mexico. The occurrences giving rise to this claim are the same as those underlying the claim of Thomas H. Youmans (Docket No. 271)¹. The conclusions of the Commission with respect to the responsibility of Mexico in the claim of Thomas H. Youmans which are stated in the Commission's opinion in that case are applicable to the instant case, and in disposing of it it is necessary merely to refer to certain questions raised by the Mexican Government with respect to the status of the claimants and the right of the United States to intervene in their behalf.

2. It is alleged by the respondent Government (a) that the United States has no standing in this case, since proof of the American citizenship of John A. Connelly, the murdered man, has not been presented, and (b) that, the right of the United States to intervene in this case being assumed, damages can not be recovered in behalf of the brothers and sisters of John A. Connelly in their own right, since they are collateral relatives who were not dependent on the deceased for support.

¹ See page 110.

3. From evidence in the record, we are satisfied that the American citizenship of the deceased John A. Connelly has been convincingly established. It appears that his parents lived at Lockport, in the State of New York; that an elder brother and two elder sisters were baptized at that place in the years 1852, 1853, and 1855, respectively; that John A. Connelly was born on September 26, 1856, at a place not mentioned and was baptized at Lockport on October 18, 1856. There is no reasonable doubt that he was a native citizen of the United States. It may further be mentioned however that there was introduced in evidence the record of the naturalization of Matthew Connelly, father of John A. Connelly, showing that the former was naturalized as an American citizen on June 16, 1855, that is, about a year prior to the birth of the son John.

4. The Commission is of the opinion that by the killing of John A. Connelly not only his father, but other members of his family, brothers and sisters, sustained a pecuniary loss. In taking account, as we deem it proper to do, of the indignity and grief occasioned by the tragic killing of Connelly, in which Mexican troops participated, we are mindful that brothers and sisters, and not the father alone were afflicted. The Commission is aware that it has been held in an international award that collateral relatives of a deceased claimant not dependent on him for support are not to be admitted as claimants in his place (McHugh case; Hale's Report 61-62, 240-241; Moore 3278-3279); but this situation is not present in this case. And as to the right of collateral relatives of a killed man not dependent on him for support to claim for damages sustained by his death awards differ. Bearing in mind the elements of damages of which international tribunals have taken account in similar cases (see for example, the discussion of the point in the *Di Caro* case, Ralston, *Venezuelan Arbitrations of 1903*, p. 769) we consider it proper to take cognizance of information contained in the record with respect to material support contributed by Connelly to members of his family. There is evidence to the effect that at the time of his death, four sisters, Mary A., Ellen, Agnes and Alice, aged respectively, 28, 24, 17 and 14 years, and one of his brothers, aged 11 years, were living with their father at his home, and that the deceased sent to his father to be used for the support of his brothers and sisters on an average of \$125.00 each month, and that on one occasion he had sent an additional sum of \$500.00. However, in fixing the amount of damages it cannot be assumed that had Connelly lived he would have continued throughout his lifetime to send money to his relatives though he did so when the father was alive and several children lived with him.

5. Claim is made in this case for damages in the amount of \$50,000.00. The Commission, however, is of the opinion that an award may properly be made in the sum of \$18,000.00.

Decision

6. The Commission therefore decides that the Government of the United Mexican States must pay to the Government of the United States of America the sum of \$18,000.00 (eighteen thousand dollars) without interest, on behalf of the claimants.

J. PARKER KIRLIN *et al.* (U.S.A.) *v.* UNITED MEXICAN STATES.

(November 23, 1926. Pages 162-163.)

CONTRACT CLAIMS. Claim for non-payment of fee for legal services rendered Mexican Government *allowed*. Only issue before tribunal was as to amount payable, since liability was conceded.

(Text of decision omitted.)

TEODORO GARCÍA AND M. A. GARZA (UNITED MEXICAN STATES) *v.* UNITED STATES OF AMERICA.

(December 3, 1926, dissenting opinion by American Commissioner, undated.
Pages 163-185.)

RESPONSIBILITY FOR ACTS OF FORCES.—ACTS OF SOLDIERS.—DIRECT RESPONSIBILITY.—WRONGFUL DEATH.—INTERNATIONAL STANDARD. Killing of Mexican subject by border patrol, under command of officer, *held* in the circumstances an act falling below the international standard.

DENIAL OF JUSTICE.—FAILURE TO PUNISH. Disapproval of sentence of court-martial by President of United States, whereby the commanding officer was restored to duty instead of dismissed from service, *held* not a denial of justice below international standard.

Cross-references: Am. J. Int. Law, Vol. 21, 1927, p. 581; Annual Digest, 1925-1926, p. 215; British Yearbook, Vol. 8, 1927, p. 185.

Comments: Edwin M. Borchard, "Important Decisions of the Mixed Claims Commission, United States and Mexico," Am. J. Int. Law, Vol. 21, 1927, p. 516 at 518; Joseph Conrad Fehr, "International Law as Applied by U.S.-Mexico Claims Commission," A.B.A. Jour., Vol. 14, 1928, p. 312 at 314.

1. This claim is presented by the United Mexican States against the United States in behalf of Teodoro García and María Apolinar Garza, Mexican nationals, father and mother of Concepción García, a girl of Mexican nationality, who on April 8, 1919, between 9 and 10 a.m., was killed by a shot from the American side of the Río Bravo del Norte or Río Grande, while crossing from the American to the Mexican side on a raft propelled by two men in the water, in the company of her mother and her aunt, not far from Havana, Texas, the father, a laborer, looking on from the Mexican bank. An American officer, Second Lieutenant Robert L. Guley, 4th United States Cavalry, was that morning on duty on the border with an armed patrol of four men, had discovered the raft in contravention of the laws, had fired in order to make them halt, and unfortunately had mortally wounded the young girl, who died immediately thereafter. Having been tried before a court-martial, he had been sentenced on April 28, 1919, to be dismissed from the military service, but the commanding officer at San

Antonio, Texas, in reviewing and approving the sentence, had used his right to reserve the case for the decision of the President of the United States, and the President, acting on the advice of the Board of Review, the Judge Advocate General, and the Secretary of War, had reversed the findings of the court-martial, released the lieutenant from arrest, and restored him to duty (September, 1919). It is alleged that the United States is liable both for a wrongful killing by one of its officials and for denial of justice; that the claimants sustained damages in the sum of 50,000 Mexican pesos; and that the United States ought to pay them the said amount, with interest thereon.

2. Nearly all of the facts in this case are undisputed. The raft left the Mexican side in the morning of the said day to take from the opposite side García's daughter who had been for about three years in the United States, but had fallen ill and was to be taken home, and García's wife with her sister, both of whom had been on the other side for a couple of days. All members of the party were unarmed. They crossed the river on a place where such crossing was strictly forbidden by the laws of both countries. It is not doubtful from the record that at least Teodoro García, the girl's father, knew perfectly well that this crossing was a delinquency and a risky act. Nor is it doubtful that the American officer had been especially instructed to enforce on the river border different sets of acts and/or regulations which forbade crossing, smuggling, and similar offenses. Less than two months before, however, on February 11, 1919, a military regulation had been promulgated, reading in its paragraph 7: "but firing on unarmed persons supposed to be engaged in smuggling or crossing the river at unauthorized places, is not authorized." Less than three weeks before, troop commanders had been told they would be held responsible that the provisions of said Bulletin be "carefully explained to all men." The court-martial decided that this Bulletin had been violated by the officer. The President of the United States gave a contrary decision after submission of reports which held, among other things, that the Bulletin had not been violated. The only point of some importance on which the evidence differs relates to the question, whether the raft at the time of the shooting was in the Mexican or in the American part of the stream; but for the decision to be given by the Commission this question is not material.

3. The killing and its circumstances being established, the Commission has to decide, whether the firing as a consequence of which the girl was mortally wounded constituted a wrongful act under international law. It is not for this Commission to decide whether the author could or should be punished under American laws; therefore, it is not for the Commission to enter upon the field where the American court-martial, the reviewing general at San Antonio, Texas, and the President of the United States found themselves. The only problem before this Commission is whether, under international law, the American officer was entitled to shoot in the direction of the raft in the way he did.

4. The Commission makes its conception of international law in this respect dependent upon the answer to the question, whether there exists among civilized nations any international standard concerning the taking of human life. The Commission not only holds that there exists one, but also that it is necessary to state and acknowledge its existence because of the fact that there are parts of the world and specific circumstances in which human practice apparently is inclined to fall below this standard. The Commission, in its opinion on the Swinney case (Docket No. 130), speaking of the Rio Grande, stated already: "Human life in these parts, on both sides, seems not

to be appraised so highly as international standards prescribe." Nobody, moreover, will deny that in time of active war the value of human life even outside of battlefields is underrated. Authoritative writers in the field of domestic penal law in different countries and authoritative awards have emphasized that human life may not be taken either for prevention or for repression, unless in cases of extreme necessity. To give just two quotations on the subject: the famous Italian jurist Carrara does not hesitate to qualify as an abuse of power excessive harshness employed by agents of the public force to realize an arrest, and adds that it is to such abuse that the sheriffs of Toscana owe their sad reputation (*Programma del corso di diritto criminale*, 8th edition, Vol. V, 1911, pp. 114-115; compare for an historic development Vol. I, 1906, pp. 56-60); and in *State v. Cunningham* 51 L. R. A. (N.S.) 1179, an American court said: "The highest degree of care is exacted of a person handling firearms. They are extraordinarily dangerous, and in using them extraordinary care should be exercised to prevent injury to others. * * *. We unqualifiedly condemn this practice of the reckless use of firearms. Officers should make all reasonable efforts to apprehend criminals; but this duty does not justify the use of firearms, except in the cases authorized by law. Officers, as well as other persons, should have a true appreciation of the value of a human life."

5. If this international standard of appraising human life exists, it is the duty not only of municipal authorities but of international tribunals as well to obviate any reckless use of firearms. On the part of American authorities this duty for the American-Mexican border was recognized in Bulletin No. 12, May 30, 1917 ("Particularly will be punished such offenses as unnecessary shooting across the border without authority"), by paragraph 7 of our Bulletin No. 4, February 11, 1919 ("but firing on unarmed persons supposed to be engaged in smuggling or crossing the river at unauthorized places, is not authorized"), and by paragraph 20 of General Order No. 3, March 21, 1919 ("Troop Commanders will be held responsible that the provisions of Bulletin No. 4 * * *, February 11, 1919, is carefully explained to all men"). In the field of international law the said principle has been recognized in the fourth Hague Convention of 1907, where article 46 of the "Regulations respecting the laws and customs of war on land" provides that in occupied territory "the lives of persons * * * must be respected," article 3 of the treaty itself adding that the belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation and shall be responsible for all acts committed by persons forming part of its armed forces. In order to consider shooting on the border by armed officials of either Government (soldiers, river guards, custom guards) justified, a combination of four requirements would seem to be necessary: (a) the act of firing, always dangerous in itself, should not be indulged in unless the delinquency is sufficiently well stated; (b) it should not be indulged in unless the importance of preventing or repressing the delinquency by firing is in reasonable proportion to the danger arising from it to the lives of the culprits and other persons in their neighbourhood; (c) it should not be indulged in whenever other practicable ways of preventing or repressing the delinquency might be available; (d) it should be done with sufficient precaution not to create unnecessary danger, unless it be the official's intention to hit, wound, or kill. In no manner the Commission can endorse the conception that a use of firearms with distressing results is sufficiently excused by the fact that there exist prohibitive laws, that enforce-

ment of these laws is necessary, and that the men who are instructed to enforce them are furnished with firearms.

6. Bringing the facts of the present case to the test of these principles, the Commission holds that, in the first place, the delinquency of crossing the river (not that of anything else or more) was sufficiently established. In the second place, the record only shows that the officer expected the delinquents to be engaged in importing barrels of the native liquor called "mezcal," all other suppositions as to atrocious acts they might have been perpetrating being mere inferences; a proportion between the supposed delinquency and the endangering of lives is therefore not established by the record. Remarks in the record relative to the "secrecy and speed with which the crime was committed," to the fact of its occurrence "at a hidden point on the border" ("a secluded and secret place") and to the status of war still existing at the time between the United States and Germany (April, 1919) can not either supply new facts, or outweigh the fact that the crossing occurred in broad daylight, between 9 and 10 a.m.; it is, moreover, stated in the record by a Mexican district judge that "the inhabitants or residents of both sides of the river * * * cross every day or very frequently to the other side" without looking "for the authorized shallow parts or passages, some of which are situated thirty or forty kilometers from their place of residence." In the third place, it appears from the record that the lieutenant did what he could to reach the place where the raft would probably land on the American bank of the river, so as to be able to arrest them without having resort to firing, but that the conditions of the bank did not allow him to be there in time and that hailing was impossible; the Commission has a full comprehension of the difficulties presenting themselves to an officer who in a case like this one has instantaneously to decide what to do. In the fourth place, however, the statement that the firing merely intended to give notice to the culprits of the officer's intention to investigate their business or to arrest them does not explain why the firing took place in so dangerous a way; the record showing that while persons were "swimming in the water and clinging thereto" (to the raft), he shot in the water quite near the raft, and that the child was wounded by "one of the first shots," the lieutenant himself recognizing that he "would not have fired in that direction if he had known women and children were on the raft." The allegation made by Lieutenant Gulley that "he knew nothing about Bulletin No. 4" can have no weight with the Commission, unless in so far as it might show that he considered himself as not having measured up to the requirements of said Bulletin.

7. The Judge Advocate's report of September 18, 1919, which apparently was the basis of the President's decision of said month would seem to interpret Bulletin No. 4, February 11, 1919, so as to read that firing on delinquents is not authorized in case the official knows or reasonably should assume that the delinquents are unarmed, but that such firing is authorized in case the official sees or is justified in assuming that they are armed, the presumption being in favor of their carrying firearms. In case this interpretation had been incorporated in the judicial decision emanating from the President of the United States, or if that interpretation were indispensable to explain the President's decision, the Commission would feel bound by this interpretation of a municipal enactment by the highest municipal decision of a judicial nature in this field. But assuming it to be a right interpretation as it stands, although not specifically endorsed by the President, it could not change in any way the facts in the present case, for in applying its principles to this

claim the Commission left aside the question whether the claimants were armed or not.

8. The allegation of a denial of justice committed by the United States has no foundation in the record. In order to assume such a denial there should be convincing evidence that, put to the test of international standards, the disapproval of the sentence of the court-martial by the President acting in his judicial capacity amounted to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognise its insufficiency. None of these deficiencies appears from the record.

9. The record leaves no doubt but that the claimants, at least Teodoro García, realized their acting in contravention of laws and regulations which had been effective since about two years. Though this knowledge on their part can not influence the answer to the question, whether the shooting was justified or not, it ought to influence the amount of damage to which they are entitled. In fixing this amount the Commission does not consider reparation of pecuniary loss only, but also satisfaction for indignity suffered. An amount of \$2,000, without interest, would seem to express best the personal damage caused the claimants by the killing of their daughter by an American officer.

Decision

10. The Commission accordingly decides that the Government of the United States of America is obligated to pay to the Government of the United Mexican States \$2,000 (two thousand dollars), without interest, in behalf of Teodoro García and María Apolinar Garza.

Dissenting opinion

I regret that I feel constrained to dissent from the views of the other two Commissioners with respect to this claim. A very small award was rendered in the case. There are instances in which an arbitral tribunal, after reaching the conclusion that there was no liability in a given case, has recommended that compensation be made by the respondent government as an act of grace. In the present case, in which I believe there is no legal liability on the part of the respondent government, I should have been glad to join in a recommendation to the Government of the United States to make compensation to the claimants in an amount larger than that of the pecuniary award. I am stating my views with regard to the law applicable to the case, first because I deem it to be desirable to analyze the charges made with respect to the proceedings conducted in connection with the trial of the army officer who shot the girl whose death gave rise to this claim, and, second, because my views apparently differ from those of the other Commissioners not only with respect to the law applicable to this case, but also with respect to the functions of the Commission in acting on a case of this character.

The claim made by the Mexican Government is based on two grounds: (1) That there was a denial of justice, as that term is understood in international law, in the action of the President of the United States in improperly setting aside the sentence of the court-martial which found an officer of the American army guilty of charges preferred against him, and (2) that the United States is liable for a wrongful act committed by that officer.

In the Mexican Memorial it is stated that "from a constitutional standpoint the power which the Hon. President of the United States has to reverse the verdict of the Court-martial, by declaring Lieut. Gulley not responsible for the crime of homicide, contrary to all the evidence on record in the proceedings, is not open to discussion; but it is beyond doubt that this decision is not conformable to the universal principles of justice, but only to those questions of expediency of a political nature, which while they assuredly comply with constitutional requirements, yet none the less transgress the Law of Nations." And in the Mexican reply it is stated that "the decision given by the President of the United States of America to the effect that Lieutenant Gulley was not responsible for the death of the little girl named Concepción García, however it may be in accordance with the Constitutional and Military laws of the latter country, violates the principles of Universal Justice accepted by all Nations and which therefore are a part of International Law." These are very serious charges, and I am of the opinion that they are the result, in part at least, of a misconception of the military law governing the proceedings in the case of Lieutenant Gulley. In the oral argument of counsel for Mexico a somewhat different aspect was given to the President's action, which was spoken of as a pardon granted to the accused.

From the American Answer with its accompanying exhibits the facts in relation to the shooting of Concepción García and the trial of Lieutenant Gulley may be briefly summarized as follows:

On the morning of April 8, 1919, Lieutenant Gulley was in charge of an armed patrol consisting of himself and four men. He was under instructions to prevent smuggling and crossing of the Rio Grande at unauthorized points, to investigate all suspicious persons and vehicles, to allow no one with firearms south of a certain military road and to report any unusual happenings. While on duty he thought he saw a raft put out from the Mexican side of the river coming towards the American side at a distance of from 2,500 to 2,800 yards from where he was. As the undergrowth was thick at the point where the raft appeared to be and prevented a good view, Gulley proceeded with his patrol about 400 yards down the river from whence he saw the raft about four or five yards from the American side moving towards the Mexican side. The river at this point is about 75 to 100 yards in width. The distance was too great to permit Gulley to see persons on board. The distance between Gulley and the raft, estimated at from 1,500 to 2,400 yards being too great to enable him to hail persons upon it, he fired about twelve shots in the direction of the raft, stating at the time he did so, that he did not desire to hit any one but merely to frighten persons on the raft, so as to cause them to return to the American side in order that he might arrest them. The sights of the rifle were set first at 1,000 yards, one-half the estimated distance to the raft, then at 1,150 yards, and finally at 1,450 yards, about three-fourths of the estimated distance, and the shots were seen to strike the water between Gulley and the raft and around the raft.

At the time of the shooting there were on the raft the wife of Teodoro García, her sister and two children of García, and in the water propelling the raft or swimming with it were two men and two women, all Mexicans, returning from the United States. The business in the United States of the four women and the children or the reason for crossing the river was not disclosed by the evidence. The two men had been engaged by García in the morning to propel the raft from the Mexican to the American side and

return. One of the children, Concepción García, had been on the American side for three years and was ill when she was returning home. Those in control of the raft, although they heard the shots and saw the bullets striking, pursued their way towards the Mexican side. One of the bullets, either ricocheting from the water or coming directly from the gun fired by Gulley, struck the child, Concepción García, in the head inflicting a mortal wound from which she died in Mexico. The accused did not know any of the persons on the raft, and neither he nor any of his men suspected at the time of the shooting that some one on the raft had been killed.

Lieutenant Gulley was brought to trial before a general court-martial which convened at McAllen, Texas, April 28, 1919. Two charges were preferred against him: (1) that he "with malice afore-thought, wilfully, deliberately, feloniously, unlawfully, and with premeditation" killed Concepción García, and (2) that he violated standing army orders by firing on unarmed persons crossing the Rio Grande at an unauthorized place. Under the first charge he was found guilty of manslaughter within the meaning of the 93rd Article of War, and he was also found guilty of the second charge, and he was sentenced to be dismissed from the Army. The reviewing authority (the Commanding General) approved the sentence, but conformably to an existing Army regulation and the 51st Article of War, he transmitted the record of the trial to the so-called "Board of Review" which rendered an opinion to the effect that Lieutenant Gulley was not under the law guilty of the charges preferred against him. This opinion, in which it is shown several high officers participated, was signed by the Judge Advocate General of the Army and approved by the Secretary of War, and was, together with the record of the trial before the court-martial, transmitted to the President of the United States pursuant to the provisions of the 51st Article of War. The President disapproved of findings of guilty and the sentence imposed on Lieutenant Gulley and ordered his release from arrest and his restoration to duty. Upon this action of the President the Mexican Agency bases the charge of a denial of justice.

By the 48th Article of War (39 Stat. L. 658) a sentence extending to the dismissal of an officer requires, in time of peace, confirmation by the President. In time of war such a sentence may, conformably to Article 51 of the Articles of War, be suspended by the competent authority pending action in the case by the President to whom, when this procedure is followed a copy of the record of the trial must be sent. If it can be imagined that in any civilized country a law could exist authorizing the setting aside of a sentence of dismissal or a sentence of death by the Chief Magistrate of the nation irrespective of the guilt of the accused person under the law, the records accompanying the Answer in the present case obviously show that no such action was taken by the President. While in time of war a commanding general may order the execution of a sentence of dismissal, he is authorized to suspend the sentence pending action by the President, and when such a course is adopted, it is clear that the President, under the system of military justice of the United States, acts in a judicial capacity, as a court of last resort, just as he so acts in time of peace, when sentences of this kind must be submitted to him before they are carried into execution. See on this point *Runkle v. United States*, 122 U. S., 543, 558. In the present case there were laid before the President as a court of last resort not only the record of the court-martial proceedings, but an opinion of the Board of Review signed by the Judge Advocate General of the army and approved by the Secretary of War. To my mind it must of course be

taken for granted that the President concurred in that opinion, in which the conclusions are submitted that Lieutenant Gulley did not commit manslaughter as defined by American law and did not violate an army regulation forbidding the firing on unarmed persons.

I am of the opinion that the Commission is bound by the President's interpretation of American law with respect to these two points. I take it that international law recognizes the right of the authorities of a sovereign nation, particularly a court of last resort, to put the final interpretation upon the nation's laws. Possibly there may be an exception to this general rule in a case where it can be shown that a decision of a court results in a denial of justice; that is, when a decision reveals an obviously fraudulent or erroneous interpretation or application of the local law. Domestic laws may contravene the law of nations, and judicial decisions may result in a denial of justice, but assuredly it is a well-recognized general principle that the construction of national laws rests with the nation's judiciary. In the opinion of the two other Commissioners some question seems to be raised whether it was necessary for the President, in order to reach the decision which he gave, to put an interpretation on Bulletin No. 4 of February 11, 1919, with respect to firing on unarmed persons. The opinion of the Board of Review deals in detail with the interpretation of this army regulation and reaches the conclusion by what appears to me to be sound reasoning that it was not violated by Lieutenant Gulley. Since, if in the opinion of the President the regulation had been violated the sentence of the court-martial could not have been disapproved, which it was, obviously the President put upon this regulation the construction that it was not violated by Lieutenant Gulley, however meagre may be the record of his specific action. The grave charge made in the oral and written arguments advanced in behalf of the Mexican Government that the action of the President was a denial of justice, in that a proper sentence of a lower court was deliberately set aside as a matter of expediency and contrary to all the evidence in the records of the proceedings, probably requires no more discussion than that given to it in the opinion of the two other Commissioners. I have, however, very briefly indicated the character of the careful proceedings that were taken in this case. A denial of justice can be predicated upon the decisions of judicial tribunals, even courts of last resort. But attempts to establish a charge that a court of last resort has acted fraudulently or in an obviously arbitrary or erroneous manner are very infrequently made. This Commission has in the past broadly indicated its views as to what is required to establish such a charge. It is probably unnecessary, in view of what has already been said with regard to the proceedings in this case to say anything more for the purpose of showing that the decision of the court-martial imposing a sentence of dismissal on Lieutenant Gulley was not set aside merely as a matter of expediency, or that the construction and application of the law by the court of last resort was neither fraudulent, nor arbitrary, nor obviously erroneous, nor an act of expediency.

The second point raised in the case before the Commission is more difficult. The charge of a denial of justice being disposed of, there remains for consideration the issue whether the deed committed by Lieutenant Gulley for which he was tried is one for which his Government is, under international law, liable to respond in damages. There is no question with regard to the rule of international law that a nation is responsible for acts of soldiers which are not acts of malice committed in their private capacity.

See the opinion of the Commission in the claim of Thomas H. Youmans, Docket No. 271, and the cases therein cited. The Commission must therefore consider the question as to what are the kinds of acts of soldiers for which a nation is responsible. International law specifically defines certain acts of representatives or agencies for which a government must answer, such as looting or wanton or unnecessary destruction of property by soldiers, and malicious or wanton taking of human life. Acts of this kind are generally also condemned and punishable under domestic law. Well defined responsibility may also be illustrated by the liability for damages caused by public vessels. In cases of collisions between public and private vessels awards have been rendered against a nation because public vessels have been found guilty of faulty navigation under the applicable rules of admiralty law. In cases of collision in territorial waters it has been asserted that the law applicable to the determination of the question of fault was the *lex loci delicti commissi*. See *The Canadienne* claim and *The Sidra* claim, American and British Claims Arbitration under the Special Agreement of August 18, 1910, Agent's *Report*, pp. 427, 452. The precise question before the Commission is whether the act of Lieutenant Gulley, held by the court of last resort not to be in violation of the law of his country, is one for which his Government is liable under international law. Whether the United States is so liable must, in my opinion, be ascertained by a determination of the question whether American law sanctions an act that outrages ordinary standards of civilization. It is conceivable that domestic laws, just as they may contravene international law in their operation on property rights of aliens may, by their sanction of personal injuries under certain circumstances, offend broad standards of governmental action the failure of observance of which imposes on a nation, as arbitral tribunals have frequently held, the liability to respond in damages under international law. A fairly close analogy to the question presented for determination in this case may be found, I think, in cases that have frequently come before international tribunals involving gross mistreatment of aliens during imprisonment. The Commission has in other cases indicated a standard by which it considers it must be guided in making judicial pronouncements with respect to alleged wrongful acts of authorities against private persons. It has expressed the view that it can not render an award for pecuniary indemnity in any case in the absence of evidence of a pronounced degree of improper governmental administration. It has made awards dismissing cases in the absence of such evidence and has rendered pecuniary awards in cases in which it considered that such evidence was found in the record.

In the present case the opinion of the majority seems to me to be grounded on a different theory as to liability. It is said in the opinion that the "only problem before this Commission is whether, under international law, the American officer was entitled to shoot in the direction of the raft in the way he did;" and that the Commission "makes its conception of international law in this respect dependent upon the answer to the question, whether there exists among civilized nations any international standard concerning the taking of human life." It is stated that, in order to consider shooting on the border by armed officials of either Government justified, "a combination of four requirements would seem to be necessary: (a) the act of firing, always dangerous in itself, should not be indulged in unless the delinquency is sufficiently well stated; (b) it should not be indulged in unless the importance of preventing or repressing the delinquency by firing is in reasonable proportion to the danger arising from it to the lives

of the culprits and other persons in their neighbourhood; (c) it should not be indulged in whenever other practicable ways of preventing or repressing the delinquency might be available; (d) it should be done with sufficient precaution not to create unnecessary danger, unless it be the official's intention to hit, wound or kill." It is further stated that "If this international standard of appraising human life exists, it is the duty not only of municipal authorities but of international tribunals as well to obviate any reckless use of fire-arms." To my mind it is not the duty of an international tribunal either to attempt in effect to formulate certain rules of criminal jurisprudence or to undertake to "obviate" acts which a tribunal may regard to be objectionable. In my opinion, it is the duty of an international-tribunal to determine whether a nation must respond in damages for acts alleged to be wrongful, and in discharging this duty a tribunal must take cognizance of and give effect to rules of law, and in cases in which unfortunately concrete rules are wanting, give proper application to principles. It must apply law to facts and pass upon acts of omission or commission in the light of rules or principles. And as I have heretofore observed, since the Commission cannot properly challenge the construction put upon penal laws of the United States by the Court of last resort in connection with the case of Gulley, it must determine whether laws under which his action was not punishable obviously fall below the standard of similar laws of members of the family of nations.

A very apposite case with respect to this point is the *Cadenhead* case decided May 1, 1914, by the Tribunal created by the Special Agreement concluded August 18, 1910, between the United States and Great Britain (Agent's Report, p. 506). I do not agree with the statement in the opinion rendered by the two other Commissioners as to the decision of the Tribunal. It is said that the claim was dismissed "because no personal pecuniary loss or damage resulting to relatives or representatives had been proven." That point is mentioned in the Tribunal's opinion. But the fundamental point in the case is concerned with the military law as construed by a military court under which a sentinel who accidentally shot a British subject while aiming at an escaping military prisoner was held not liable to punishment. Counsel for Great Britain severely criticized the army regulations under which shooting at an escaping prisoner in the manner disclosed by the record was permitted. With respect to what seems to me to have been the controlling point in the case, the Tribunal said (pp. 506-507):

"His Britannic Majesty's Government contend that this soldier was not justified in firing upon an unarmed man on a public highway, that he acted unnecessarily recklessly, and with gross negligence, and that compensation should be paid by the Government of the United States on the ground that under the circumstances it was responsible for the act of this soldier.

"The question whether or not a private soldier belonging to the United States Army and being on duty acted in violation of or in conformity with his military duty is a question of municipal law of the United States, and it has been established by the competent military court of the United States that he acted in entire conformity with the military orders and regulations, namely, section 365 of the Manual of Guard Duty, United States Army, approved June 14, 1902.

"The only question for this Tribunal to decide is whether or not, under these circumstances, the United States should be held liable to pay compensation for this act of its agent.

"It is established by the evidence that the aforesaid orders under which this soldier who fired at the escaping prisoner acted were issued pursuant to the

national law of the United States for the enforcement of military discipline and were within the competency and jurisdiction of that Government.

"It has not been shown that there was a denial of justice, or that there were any special circumstances or grounds of exception to the generally recognized rule of international law that a foreigner within the United States is subject to its public law, and has no greater rights than nationals of that country." (*Italics mine.*)

The last clause of the last paragraph above quoted may not be very happily worded, but I do not think that the learned Tribunal meant to give expression to the view that domestic laws can not contravene international law.

Domestic laws may by their operation on property rights of aliens contravene international law. And in any case in which an international reclamation is predicated upon such an infringement of the law of nations it is of course not a defense to say that a court of last resort has properly construed a law to authorize action against which complaint is made. But in reaching a conclusion whether an international delinquency has been committed in any such case, in which the decision of the court as to the meaning of the law is accepted as final, it is proper to determine whether the law has authorized or sanctioned a wrongful act. As I have observed, it is conceivable that domestic law by its sanction of personal injury may, under given circumstances, offend broad standards of governmental action which civilized nations may be expected to observe. And in a case involving an alleged personal injury permitted by domestic law of a nation, it is a proper test of the nature of the alleged wrongful act to compare the law of that nation with similar laws of other nations.

No attempt was made by counsel for the Mexican Government to make a comparison of the laws of the United States with the laws of other countries, not even with the laws of Mexico. Certain precedents were cited by counsel which it was argued furnish authority for a pecuniary award in the present case, among them the tribunal's decisions in the claims of Jesse Walter Swinney and Nancy Louisa Swinney, Docket No. 130, and Dolores Guerrero Vda. de Falcón, Docket No. 278, and the shooting in 1915 of two young Americans by Canadian soldiers in Canadian waters at Fort Erie. In my opinion none of these cases has any value in showing liability on the United States in the instant case.

In the Swinney case, a young man in a rowboat, not engaged in committing any offense, was shot by Mexican officials from the Mexican shore of the Rio Grande because, as was alleged, he did not respond to an order to come over to the Mexican side. On being hailed he explained that he was engaged in no wrongdoing. In the Falcón case the record disclosed that a soldier testified that he and a companion deliberately shot at unarmed naked persons swimming in the Rio Grande, one of whom was killed. The shooting which took place in Canadian waters was directed at two young men who were thought to be engaged in hunting ducks out of season. It seems reasonably clear that the men could have been apprehended without the use of firearms, and that, if they failed to respond to an order to come to the shore, they took but a few strokes in their boat before they were shot, one being killed and one seriously injured. In a note addressed by Secretary of State Bryan to the British Ambassador at Washington it was stated that the offense for which the arrest of the two men was sought was a minor one; that no resistance was offered or violence threatened by the injured men; that the killing and wounding were inflicted intentionally, or, if not,

through the gross and culpable negligence of the officers and soldiers in the most reckless manner in which they used their arms; and that the actions of the soldiers were without justification or excuse. It may be pertinent to note that even in these circumstances the British Government did not admit liability, but stated that "as an act of grace suitable compensation should be made to relatives of the deceased and to the injured man." And although the United States requested compensation, the British Government, instead of making such compensation to the United States, effected a private settlement with the injured persons. (*Foreign Relations of the United States*, 1915, pp. 415-423.)

In my opinion the very deplorable act committed by Lieutenant Gulley for which the United States is held responsible, has not been accurately described in the written or oral argument advanced by the Mexican Agency nor in the opinion of the two other Commissioners.

In discussing the available evidence with regard to the shooting of the little girl by Lieutenant Gulley, it is pertinent to bear in mind that we have evidence of two kinds: First, that accompanying the Answer consisting in the main of the lengthy opinion of the Board of Review analyzing the law applicable to the case, and the proceedings before the court-martial, including the evidence produced before the court, and second, the record of proceedings before Mexican judges in the State of Tamaulipas, which accompanies the Mexican Memorial.

In the opinion of the two other Commissioners brief quotations are made from the Mexican records to the effect that inhabitants on both sides of the river frequently crossed without looking for authorized shallow parts or passages. On this point, however, it seems to me that it is also pertinent to note that a judge states that "it is well known * * * that on account of the war between the United States of America and Germany there were taken by the former nation drastic measures in its frontiers to avoid the entrance of spies, among which measures was that of having patrols of American soldiers survey the length of the Bravo" and "*that in spite of such orders*" (italics mine) residents of Mexico "have defied the perils and dared to cross to the American side without a permit or passport." A Mexican judge before whom a number of Mexicans appeared conducted an investigation as a result of which it may be said that he in a sense found Lieutenant Gulley to be guilty of what he called the "crime of homicide", also describing the shooting as "wickedness or as an atrocity". Before the court-martial there appeared the defendant, of course, and also both American and Mexican witnesses.

It is stated in the Mexican Brief (p. 2) that Mexican witnesses all agreed that the soldiers on the American side "fired for no reason whatsoever and thus killed the child." And in the Mexican Reply it is stated that, although technically a state of war between Germany and the United States existed at the time of the shooting, it is evident that the persons who accompanied the little girl who was killed "could not have had the intention of crossing the Rio Bravo for the purpose of causing harm or injury to the United States, for, as it is proved by the testimony of the witnesses before the American authorities, found in Annex 1 of the Memorial, the sole purpose of the family of Concepción García was to return from the American side, where they were, to the Mexican side of the river, and it was only with this purpose that the temporary raft which served to take them across was made." Leaving aside discussion of the instructions which Lieutenant Gulley had with respect to the enforcement of laws and regulations incident

to a state of war, it is very pertinent to remark with regard to this statement in the Reply that of course the officer had no knowledge as to who were on the raft or what their purposes were. He was about a mile away when he first saw the raft. He rode hurriedly towards it. He was unable to challenge the persons on board by calling to them. While he clearly had no knowledge as to the mission of the persons propelling the raft, it is proper to bear in mind that he undoubtedly had information with regard to conditions on the border such as may be briefly indicated by quoting from a report of the Commissioner General of Immigration of the United States. In one portion of this report which was made at a time when vigilance on the border was not considered to be as imperative as it was when the shooting occurred, the Commissioner quotes the following from the report of an inspector on the border:

"There is little difficulty in smuggling an alien from Mexico across the line into this country, or in the alien entering unassisted, for that matter. The river is not wide at certain seasons of the year and in some places it becomes a mere trickle. This office estimates that there are at least 100 persons living on the Mexican side opposite points in this jurisdiction who earn their living chiefly by operating illegal ferries and bringing aliens to the United States. The work of the officers here in the past two years in apprehending and destroying boats used as ferries has largely forced them to abandon their large boats made of lumber and of galvanized sheet iron and to resort to 'patos', as they are known among the smuggling fraternity, made of a willow framework tied with willow withes and covered with a cheap canvas or wagon sheet. This canvas can be tied on or taken off the frame in a moment, and then carried under a man's arm. The frame can easily be hidden in the brush, and if it should be found and destroyed, 15 minutes' work with a machete (and no one ever saw a Mexican of this class without a machete) will construct another.

"These illegal ferrymen oftener than not own a small farm on the river. When an alien, Mexican or European, gentleman, criminal, or bolshevik—it makes no difference—wants to cross, this ferryman merely removes his boat cover from his wagon or haystack where it serves him between times, proceeds to the river and pulls his frame from the brush where it has been hidden, ties on the cover, places it in the water, and is ready to, and actually does take his passengers, and often a few cases of contraband liquor also, to this country. Before placing his boat in the water he carefully spies out this side, and probably calls to some 'paisano' on this side if one is in sight, and ascertains that no 'gringo' officers are in that vicinity. Any Mexican resident on this side will cheerfully abandon his work and spend a day if necessary watching for officers, to aid this boatman, with whom he is always in sympathy, and also for the reason that this kind of work does not call for much effort. In spite of the inhibitions of section 8, or of any other section, which the ferryman is probably ignorant of and which, in any event, he would cheerfully ignore, he more often than not successfully lands his passengers and returns to the other side and safety, and his passengers go their way." (*Annual Report*, 1924, pp. 16-17.)

In another portion of the report the Commissioner says:

"This work of the mounted or patrol inspectors is attended by considerable hardship and much danger, as it is often necessary for them to remain on duty long hours without opportunity for rest or sleep, in inclement weather, and the smugglers, who very frequently transport intoxicating liquor or narcotic drugs with the aliens are desperate characters. They go armed and shoot at the command to halt in the name of the law, preferring to commit murder rather than be apprehended and face the probability of serving a prison sentence. Previous annual reports have related the details of the killing and wounding of immigration officers by smugglers." (*Ibid.*, p. 19.)

In discussing acts of soldiers for which a government may be held liable, the Mexican Brief cites an extract from a note addressed by Secretary of State Frelinghuysen to the American Minister in Peru under date of December 5, 1884, with regard to the shooting of an American citizen in Peru by a Peruvian soldier. It is pertinent to note with regard to the character of acts of this kind for which a nation may be held responsible that Mr. Frelinghuysen describes the shooting as "as act of outrageous violation, by an agent of the Government while in the line of his duty, of a right which it was his business to protect." In my opinion, Lieutenant Gulley's act, however deplorable it is—and there may be reason to consider it indiscreet—does not come within the category of acts such as that described by Secretary of State Frelinghuysen. It is stated in the Brief (p. 15) that "even granting for purposes of argument that the soldier would not be guilty of the crime, and that really the orders prohibiting him from firing on unarmed persons would be unknown to him, still it could be held that the responsibility of the United States can be clearly established in international law." In support of this contention citation is made to an account in Moore's *Digest of International Law* of the killing by Chinese soldiers of Lewis L. Etzel, an American war correspondent, and the offer of the Chinese Government to pay an indemnity of \$25,000 Mexican currency. The account of this case is very briefly given, and it is pertinent to note that the killing is described as an act of "criminal carelessness." Citation is further made in the Brief of a request made by the United States of the Honduran Government for the payment of an indemnity of \$10,000 to the relatives of Frank Pears, an American citizen, who was shot in Honduras in 1899 by a sentinel. It is proper to note with respect to this case that the United States after investigation declared that the killing of Mr. Pears "could be regarded as nothing but the cruel murder of a defenseless man, innocently passing from his office to his house." Certainly the act committed by Lieutenant Gulley cannot be regarded as "cruel murder," and after a study of the elaborate opinion of the Board of Review in which evidence and law are considered to my mind with great care and accuracy, I do not believe that the shooting can properly be described as "criminal carelessness," although I am inclined to conclude from such evidence as is available that the officer might have acted with greater discretion and prudence.

It seems to me that the statement in the opinion of the two other Commissioners to the effect that "the record only shows that the officer expected the delinquents to be engaged in importing barrels of the native liquor called 'mescal', all other suppositions as to atrocious acts they might have been perpetrating being mere inferences," fails to take account of important matters in the record to which the Board of Review attached considerable weight in arriving at its conclusions. It may be that smuggling was the principal thing which Lieutenant Gulley had in mind in endeavoring to arrest persons on the raft. It is proper, however, to bear in mind that the Board of Review calls attention to at least three kinds of laws, the enforcement of which was enjoined on patrols, namely:

1. Legislation enacted in 1918 (40 Stat. L. 559) with respect to restrictions on the entry into or departure from the United States by aliens. It could not of course be expected that legislation of this kind would be repealed many months before the Treaty of Versailles had been signed. A portion of it relating to the entry of aliens into the United States is still in effect.

(41 Stat. L. 1217) and I assume that similar legislation is generally in force throughout the world to-day.

2. Legislation with respect to prohibition on the importation of arms and ammunition into Mexico (37 Stat. L. 630).

3. Legislation regarding matters relating to immigration and smuggling.

In discussing the position in which Lieutenant Gulley was placed, the Board of Review deemed it to be proper also to take cognizance of information which is stated in the Board's opinion as follows:

"It was a matter of common knowledge that propaganda in aid of war against the United States by the German Government, as well as organized efforts to procure information of military and other value, had been actively carried on by persons who, having their seat of operations in Mexico, had been crossing and re-crossing the border for this purpose. The safety of the whole people was involved in seeing that all such acts were suppressed and the offenders brought to justice."

To be sure hostilities between the United States and Germany were suspended in April, 1919, but the conclusion of peace was far distant, and it seems to me that the Board of Review acted properly in giving at least some consideration to the duties devolving upon a soldier during the existence of a state of war.

It was enjoined upon troops engaged in patrol duty to consider themselves always on duty; that patrolling was very important and must be performed in the most painstaking manner, and that perfunctory patrols are useless.

Lieutenant Gulley saw persons violating the law of the United States—and it is not disputed that this was knowingly done. He was not in a position to apprehend them; he could not hail them by calling to them; and they did not stop, although he repeatedly fired. Unless his testimony and that of soldiers with him are considered to be false, he did not aim at the raft. It may be pitiable that he shot at all, but it should be borne in mind, as I have endeavored to point out, that the question which must be considered in the instant case is whether the laws of the United States, under which shooting in those circumstances is not unlawful, are so at variance with the laws of other members of the family of nations as to fall below ordinary standards of civilization.

In my opinion the burden must devolve on anyone making such a charge to show convincingly by comparison with the laws of other countries the iniquitous character of the laws of the country against which complaint is made. To my mind that can not be shown by brief citations from domestic law such as are given in the opinion of the two other Commissioners. Nor do I perceive the relevancy of the citation of Article 46 of the regulations respecting the laws and customs of war on land in the Fourth Hague Convention. An injunction against murder in territory under military occupation stated in five words can have no bearing, to my mind, on the propriety of domestic law dealing with the difficult subject of the use of force in connection with the repression of crime. This is particularly true in a situation such as that under consideration in which patrol officers were called upon under unusual circumstances to execute both military and civil laws. The sacredness of human life and the principle that it shall not be unnecessarily taken or endangered are recognized in the jurisprudence of the United States and are emphasized in the opinion of the Board of Review whose conclusions with respect to Gulley's action, to my mind, are not at variance with that principle. I have already indicated the view,

in which I understand the other two Commissioners concurred, that obviously no denial of justice can be predicated upon the action of the President of the United States in disapproving of the sentence of the court-martial.

Fred K. NIELSEN,
Commissioner.

JOHN B. OKIE (U.S.A.) *v.* UNITED MEXICAN STATES.

(December 3, 1926. Pages 185-186.)

PROCEDURE, RECTIFICATION OF AWARD. Rectification of amount of award, as stated in Spanish text, to conform to the amount stated in English text, *ordered.*

(Text of decision omitted.)

WILLIAM A. PARKER (U.S.A.) *v.* UNITED MEXICAN STATES.

(December 3, 1926. Page 186.)

PROCEDURE, RECTIFICATION OF AWARD. Rectification of amount of award, as stated in Spanish text, to conform to the amount stated in English text, *ordered.*

(Text of decision omitted.)

ILLINOIS CENTRAL RAILROAD CO. (U.S.A.) *v.* UNITED
MEXICAN STATES.

(December 6, 1926. Pages 187-190.)

CONTRACT CLAIMS. Claim for non-payment for railroad locomotives sold and delivered to respondent Government *allowed.*

INTEREST ON AWARDS. Interest on award, from date when obligation of respondent Government first arose up to date of last award to be rendered by tribunal, *allowed.*

Cross-reference: Annual Digest, 1925-1926, pp. 257, 258.

1. This case is before the Commission for a final decision after counsel have been heard in oral arguments on the merits. Claim was originally made by the United States of America on behalf of the Illinois Central Railroad Company in the amount of \$1,807,531.36 with interest thereon from April

1, 1925, alleged to be due in payment of the purchase price of ninety-one locomotive engines sold by the Company to the Government Railway Administration of the National Railways of Mexico under a written contract. On October 15, 1925, the Mexican Agent filed a motion to dismiss the claim, alleging, first, that the claim being based on the alleged non-performance of contractual obligations, was not within the jurisdiction of the Commission, and, second, that the obligation to pay the amount claimed not being denied by Mexico, no controversy existed for the decision of the Commission. This motion was overruled by the Commission on March 31, 1926. Subsequently certain questions were raised with respect to the right of the Mexican Agency, under the rules of the arbitration, to file an Answer on April 1, 1926, the date on which the Answer was presented for filing. It became unnecessary for the Commission to consider that matter in view of the waiver filed by the American Agent on November 18, 1926, of his right to a hearing on a motion which he filed on September 8, 1926, to reject the Answer filed by the Mexican Agent.

2. The indebtedness of the respondent Government under the contract made between the Illinois Central Railroad Company and the National Railways of Mexico under Government Administration is admitted in the aforesaid motion of the Mexican Government to dismiss the claim and in the Mexican Answer. On page 3 of that Answer it is stated that "the Mexican Agent leaves the case in the hands of the Honorable Commissioners for their decision, and only takes the liberty to request them to take into consideration the equitable reasons which the parties directly interested took into account in arriving at the private settlement referred to above." From copies of correspondence which accompany the Answer it appears that, subsequent to the filing of the claim with the Commission, steps were taken looking to a private adjustment of the Railroad Company's claim against the Government of Mexico. Whatever may be the facts with regard to this proposed arrangement between the parties to the aforesaid contract which arrangement was not consummated, it can have no bearing on the liability of Mexico in the case before the Commission to make compensation in satisfaction of obligations under the terms of the aforesaid contract. The indebtedness of the Mexican Government is admitted, and it is the duty of the Commission to render an award for the amount which has been withheld from the claimant company.

3. During the course of oral argument the Mexican Agent called attention to the provision of Article 4 of the aforesaid contract that the sale of the locomotives "is made upon condition; that it to say, that the title to said locomotives and each of the same shall remain in and shall not pass from the vendor and shall not vest in the purchaser until such time as the purchaser shall have paid all sums due by it hereunder, and shall have fulfilled completely all the terms, covenants, provisions, and conditions, herein set forth and contained, and be performed and kept by the purchaser." With respect to this point the Agent of the United States, on behalf of the American Agency and the claimant company, announced a disclaimer of title in the company to the locomotives, the subject matter of the contract.

4. By virtue of the aforesaid contract there was due the railroad company on April 1, 1925, the principal sum of \$1,472,200 and interest on deferred payments amounting to \$335,331.36, the total sum due on that date being \$1,807,531.36. The Memorial asks for the payment of this amount "with a proper allowance of interest thereon from April 1, 1925."

5. Unfortunately the Convention of September 8, 1923, contains no specific stipulation with respect to the inclusion of interest in pecuniary awards. Allowances of interest have been made from time to time by international tribunals acting under arbitral agreements which, like the Agreement of September 8, 1923, have made no mention of this subject. See for examples: Treaty of October 27, 1795, between the United States and Spain, *Malloy*, vol. 2, p. 1640; Convention of February 8, 1853, between the United States and Great Britain, *ibid*, vol. 1, p. 664; Convention of November 25, 1862, between the United States and Ecuador, *ibid*, p. 432; Convention of July 4, 1868, between the United States and Mexico, *ibid*, p. 1128. Other agreements have contained stipulations authorizing awards of interest under specified conditions and for more or less definitely prescribed periods. See for examples: Treaty of November 19, 1794, between the United States and Great Britain, *Malloy*, vol. 1, p. 590; Convention of September 10, 1857, between the United States and the Republic of New Granada, *ibid*, p. 319; Convention of December 5, 1885, between the United States and Venezuela, *ibid*, vol. 2, p. 1858; Convention of August 7, 1892, between the United States and Chile, *ibid*, vol. 1, p. 185; Special Agreement of August 18, 1910, between the United States and Great Britain, *Redmond*, vol. 3, p. 2619. None of the opinions rendered by tribunals created under those agreements with respect to a variety of cases appears to be at variance with the principle to which we deem it proper to give effect that interest must be regarded as a proper element of compensation. It is the purpose of the Convention of September 8, 1923, to afford the respective nationals of the High Contracting Parties, in the language of the convention "just and adequate compensation for their losses or damages." In our opinion just compensatory damages in this case would include not only the sum due, as stated in the Memorial, under the aforesaid contract, but compensation for the loss of the use of that sum during a period within which the payment thereof continues to be withheld. However, the Commission will not award interest beyond the date of the termination of the labors of the Commission in the absence of specific stipulations in the Agreement of September 8, 1923, authorizing such action. With respect to the Commission's conclusion touching this point, it may be noted that some conventions have contained provisions requiring the payment of awards within a year from the date of the rendition of the final award, without interest during that period. See for example: Article 15 of the Treaty of May 8, 1871, between the United States and Great Britain, *Malloy*, vol. 1, p. 707. But although it has been stipulated that interest should not be paid after the date of the last award, allowances of interest on awards up to that date have been made even in the absence of any provision authorizing them. In Hale's Report, page 21, it is stated that the Commission created by Article 12 of the Treaty of May 8, 1871, between the United States and Great Britain "ordinarily allowed interest at the rate of 6 per centum per annum from the date of the injury to the anticipated date of the final award".

6. The amount claimed in the Memorial, \$1,807,531.36, consists of the unpaid principal sum of \$1,472,200 and interest on deferred payments under the contract up to April 1, 1925, amounting to the sum of \$335,331.36. The Commission is of the opinion that the award should consist of \$1,807,531.36, the specific amount claimed, plus interest at the rate of six per centum per annum on the sum of \$1,472,200.00 computed from April 1, 1925, to the date on which the last award is rendered by the Commission.

Decision

7. For the reasons stated above the Commission decides that the Government of Mexico shall pay to the Government of the United States of America the sum of \$1,807,531.36 (one million eight hundred and seven thousand five hundred and thirty-one dollars and thirty-six cents) plus interest at the rate of six per centum per annum on the sum of \$1,472,200.00 from April 1, 1925, to the date on which the last award is rendered by the Commission.

WILLIAM A. PARKER (U.S.A.) *v.* UNITED MEXICAN STATES.

(December 6, 1926. Page 191.)

INTEREST ON AWARDS. Interest on award *allowed* up to date of last award.

(Text of decision omitted.)

JOHN B. OKIE (U.S.A.) *v.* UNITED MEXICAN STATES.

(December 6, 1926. Pages 191-192.)

INTEREST ON AWARDS. Interest on award *allowed* up to date of last award.

(Text of decision omitted.)

J. PARKER KIRLIN *et al.* (U.S.A.) *v.* UNITED MEXICAN STATES.

(December 6, 1926. Page 192.)

INTEREST ON AWARDS. Interest on award *allowed* up to date of last award.

(Text of decision omitted.)

WALTER H. FAULKNER (U.S.A.) *v.* UNITED MEXICAN STATES.

(March 14, 1927. Page 193.)

PROCEDURE, RECTIFICATION OF AWARD. Rectification of language of Spanish text of award, to make it conform to English text, *ordered*.

(Text of decision omitted.)

J. W. SWINNEY AND N. L. SWINNEY (U.S.A.) *v.* UNITED MEXICAN STATES.

(March 14, 1927. Page 194.)

PROCEDURE, RECTIFICATION OF AWARD. Rectification of language of Spanish text of award, to make it conform to English text, *ordered*.

(Text of decision omitted.)

L. F. H. NEER AND PAULINE E. NEER (U.S.A.) *v.* UNITED MEXICAN STATES.

(March 14, 1927. Pages 194-195.)

PROCEDURE, RECTIFICATION OF AWARD. Rectification of language of Spanish text of award, to make it conform to English text, *ordered*.

(Text of decision omitted.)

LAURA M. B. JANES *et al.* (U.S.A.) *v.* UNITED MEXICAN STATES.

(March 14, 1927. Pages 195-196.)

PROCEDURE, RECTIFICATION OF AWARD. Rectification of Spanish text of award, to make it conform to English text, *ordered*.

(Text of decision omitted.)

THOMAS H. YOUMANS (U.S.A.) *v.* UNITED MEXICAN STATES.

(March 14, 1927. Page 196.)

PROCEDURE, RECTIFICATION OF AWARD. Rectification of Spanish text of award, to make it conform to English text, *ordered*.

(Text of decision omitted.)

FRANCISCO QUINTANILLA *et al.* (UNITED MEXICAN STATES)
v. UNITED STATES OF AMERICA.

(March 14, 1927. Page 197.)

PROCEDURE, RECTIFICATION OF AWARD. Rectification of Spanish text of award, to make it conform to English text, *ordered*.

(Text of decision omitted.)

JOSEPH E. DAVIES (U.S.A.) *v.* UNITED MEXICAN STATES.

(March 23, 1927. Pages 197-205.)

CONTRACT CLAIMS.—CLAIM *quantum meruit*.—NULLITY DECREES. Claim for payment for legal services rendered under contract made by claimant with agent of *de facto* Mexican Government *allowed*. Nullification laws of Mexico *held* to be without effect on rights of claimant. Where contract contained express limitation of authority of agent acting for Mexico, *held* claimant bound by such notice. Claim for services on a *quantum meruit* basis not made by claimant or allowed by tribunal.

Cross-references: Am. J. Int. Law. Vol. 21, 1927, p. 777; Annual Digest, 1927-1928, p. 207.

1. Claim is made in this case by the United States of America in behalf of Joseph E. Davies to obtain the payment of \$170,000 alleged to be due for legal services rendered by Davies under a contract concluded on or about October 11, 1920, between him and the Government of Mexico, acting through Roberto V. Pesqueira, Financial Agent of the Mexican Government in the United States. In the Mexican Government's Brief Mr. Pesqueira is also described as "confidential and financial Agent of the United Mexican States." A motion to dismiss this case on the ground that the claim, being based on an alleged non-performance of contractual

obligations, was not within the jurisdiction of the Commission, was filed by the Mexican Agent on January 27, 1926, and was overruled by the Commission on March 2, 1926. The case is now before the Commission for a final decision on the merits.

2. In the Answer filed by the Mexican Agent it is denied that Davies entered into any contract with the Mexican Government, represented by Roberto V. Pesqueira, for the performance of services as counsel by Davies for a period of years, and it is asserted that the Government of Mexico never entrusted any legal matters to the claimant.

3. There is no doubt, in the opinion of the Commission, that a contract was entered into between Davies and Pesqueira, acting in behalf of the Mexican Government. That contract is described by the claimant Government as an oral agreement the terms of which were subsequent to the making of the agreement embodied in writing. Among the evidence, which includes certain affidavits and copies of correspondence, produced by the claimant Government to establish the existence of this contract, the following communication accompanies the Memorial (Exhibit 4):

"Embajada de Mexico en los Estados Unidos de America, Washington, D. C.

CITY OF MEXICO, *October 11, 1920.*

Hon. Joseph E. DAVIES,

Southern Building, Washington, D. C.

DEAR MR. DAVIES: As suggested by you, I am putting our agreement into writing so that there may be no misunderstanding.

We have the conviction that my government will soon be recognized by the United States. With this recognition will come a very large amount of legal work and many serious legal problems. President de la Huerta and his associates in the Provisional Government are of the opinion, therefore, that Mexico should be represented by an efficient legal organization in the United States.

As the duly authorized representative of the Provisional Government of Mexico, I have retained you as its general counsel in the United States, the period of employment to be four years from October 1, 1920, and the rate of compensation to be \$50,000 a year, the first year payable in advance.

It is understood that you are to give all necessary time to the discharge of the business of the Government of Mexico, and that at your own expense you will make such additions to your legal organization as may be required, also that all necessary associate counsel will be employed at your expense, such amount, however, being limited to \$20,000 in any one year.

As I have explained to you, this contract is limited by one reservation. My authorization proceeds from President de la Huerta and I have no present power to bind the incoming administration of President Obregón. In event that President Obregón continues my authority, this contract will stand as drawn. If, however, President Obregón does not see fit to continue my authorities in these matters, it is understood that this agreement will be ended, at my written request, at the close of the first year; that is, on October 1, 1921.

Believe me deeply appreciative of your generous attitude in this whole matter, and accept the assurances of my high regard.

(Signed) R. V. PESQUEIRA,

*Financial Agent of the Government of Mexico
in the United States.*

Accepted: Joseph E. DAVIES."

4. It appears from the Memorial that, on or about October 20, 1920, the Government of Mexico paid to the claimant the sum of \$10,000, currency of the United States, and on or about December 7, 1920, the sum of \$15,000. It further appears that no additional payments were made until on or about June 19, 1922, when the claimant received \$5,000. The amount for which claim is now made is \$170,000, the difference between \$30,000 which the claimant received and \$200,000, the sum which it is alleged the claimant was entitled to receive under the contract said to have been made by him with the Mexican Government.

5. We do not consider to be tenable the contention made by the respondent Government that the contract concluded between Davies and Pesqueira is a nullity, it being governed by Mexican law, under which such an agreement is void. In behalf of the United States it is contended that the contract was made in the United States and must be governed by the law of that country. We are of the opinion that there can be no question that the sum of \$20,000 is due to the claimant under the agreement, whether American law or Mexican law is applied to it. In considering the arguments advanced to support the contention that the contract is void under Mexican law the Commission can not ignore the fact that the Mexican Government paid Davies \$30,000 in three payments made at different times. No showing has been made to the Commission which would warrant it in pronouncing a nullity a contract which the Mexican Government on several occasions clearly recognized as valid.

6. The Commission does not attach importance to the contention made in behalf of the respondent Government that Davies was a public servant of Mexico subject to removal. This being our view, it is unnecessary to consider the question whether, even if Davies should be regarded as a public servant of the Government of Mexico, a claim might be maintained in his behalf as an American citizen for any money that might be due to him from the Government of Mexico.

7. Accompanying the reply brief of the Mexican Government is a statement made by Pesqueira with regard to the transaction entered into by him with Davies. In the course of this statement Pesqueira declares that the professional services of Mr. Davies came to an end on October 1, 1921, and "declarant so notified Mr. Davies verbally in view of the fact that President Obregón did not sanction the said contract for the remaining three years." It is clear from the record that no written notice of the termination of his services was given to Mr. Davies. However, we do not consider this point to be of material importance in disposing of the case. Our conclusions with respect to the award which should be rendered by the Commission are fundamentally grounded on the construction which we give to the next to the last paragraph of the letter of October 11, 1920, addressed by Pesqueira to Davies. This paragraph contains an explicit statement with regard to the limitations on Pesqueira's authority in dealing with Davies. This point does not appear to be of any particular importance with respect to the question whether a valid agreement of some kind was made by Davies with the Government of Mexico, because the latter has not denied the authority of Pesqueira to contract for the services of Davies. But the extent of Pesqueira's authority is of importance as bearing on the nature of the agreement that was made, or in other words, the precise extent to which Pesqueira bound his Government.

8. It is probably a general rule of domestic law in many countries that a state is responsible for and is bound by acts of its agents within the limits of their functions or powers as defined by the national law, but when acts are done in excess of powers or functions so defined, the State is not bound or responsible. In the brief of the United States citation is made to two opinions of international tribunals which seem to be grounded on a somewhat different theory—the claim of H. J. Randolph Hemming under the Special Agreement of August 18, 1910, between Great Britain and the United States (*Report of the American Agent*, p. 617); and the claim of Ricardo L. Trumbull under the Convention of August 7, 1892, between Chile and the United States (Moore, *International Arbitrations*, Vol. 4, p. 3569). In the Hemming case the United States was held liable to make compensation for legal services rendered by the claimant at the request of the American Consul at Bombay in December, 1894, and in February, 1895, in connection with the prosecution of persons accused of circulating counterfeit American gold coins in India. The defense of the United States rested on the proposition that the Government should not be held liable to compensate the claimant for services rendered by him which the Consul had obtained without authority from his Government. The Tribunal, in its opinion, observed that, irrespective of what was the Consul's authority to employ an attorney at the expense of the United States, the record showed that the Government became aware of Hemming's employment, did not object to it, and approved the action taken by the Consul. This finding seems to have been the basis of the Tribunal's decision. In the Trumbull case contentions advanced by the United States with respect to nonliability for unauthorized acts of an American Minister to Chile in employing a Chilean citizen in 1889 in connection with an extradition case, were overruled by the Commission. The Commission held that the United States was liable to make compensation for the services obtained by the American Minister in consideration of, as was said in the opinion, "a promise in the name of his government, which, according to the rules of the responsibility of governments for acts performed by their agents in foreign countries, can not be repudiated". It therefore appears that in neither of these two cases did the tribunal attach importance to the authority conferred upon the national representative by domestic law or regulation.

"As I have explained to you, this contract is limited by one reservation. My authorization proceeds from President de la Huerta and I have no present power to bind the incoming administration of President Obregón."

9. The cases therefore differ from the instant case in which the record reveals a very explicit notice to the claimant Davies with regard to the limitations on the authority of the Mexican representative with whom the claimant contracted. In the communication of October 11, 1920, addressed by Pesqueira to Davies it is said:

10. The decisions in the Hemming and Trumbull cases appear to emphasize the idea of protection to persons contracting with public officers who, such persons may have good reason to believe, act within the scope of their authority. The rule of domestic law with regard to nonliability for unauthorized acts of public servants is apparently grounded on the idea that the nation's interests should be protected against indiscreet, mistaken or other improper acts of its agents. It is shown by the letter of October 11,

1920, which Pesqueira addressed to Davies that Pesqueira, by giving explicit notice of the limitations of his authority, took precaution to protect the interests of his Government and to define his position clearly to Davies. The paragraph in that letter to which attention has been specifically called might have been more concisely worded. Perhaps it might be plausibly construed to mean that Pesqueira, while calling attention to his limited authority, undertook to make an agreement which should be binding upon the Mexican Government for four years, but which might be terminated at the close of the first year, and if it should be so terminated, such action should be taken by written notification to Davies. However, we must give to the language of that paragraph what we consider to be the most reasonable interpretation of which it is susceptible. That interpretation we consider is that, in all matters pertaining to the contract, Pesqueira was without authority to bind President Obregón; that he therefore bound solely the administration of Provisional President de la Huerta; and that therefore whatever Pesqueira undertook to do after the termination of the latter's administration must be considered as merely a personal undertaking on the part of Pesqueira. In other words, Pesqueira did not bind the administration of President Obregón to give notice of termination of the contract, or, failing the giving of such notice, to be bound by the contract for the full period recited by it. Pesqueira states in the letter that "*this contract is limited by one reservation*"; that his authority proceeded from President de la Huerta; and that he has "*no present power to bind the incoming administration of President Obregón*". (Italics ours.) We do not believe that these explicit statements with regard to the limited authority of Pesqueira can be considered to be modified or nullified in any way by the subsequent somewhat vague statements regarding a possible continuation of the contract, or a possible termination on notice given by Pesqueira, who at the time he wrote could not be certain that he would be in office on October 1, 1921, which in fact he was not. A few historical facts which are of record before the Commission may be briefly mentioned to throw light on the transaction under consideration. In the spring of the year 1920, Adolfo de la Huerta, a former Governor of the State of Sonora, was elected Provisional President of Mexico following the successful so-called Agua Prieta revolution, and entered upon office on June 1, 1920. Subsequently General Obregón was elected President and assumed office on December 1, 1920. From December 1, 1920, until September 14, 1923, de la Huerta was Minister of Finance. Pesqueira's services terminated in November, 1920, shortly before General Obregón assumed the Presidency.

11. There is some evidence in the record indicating that the Mexican Treasury Department was cognizant during the administration of President Obregón of the contract made between Pesqueira and Davies. However, there is not convincing evidence that that administration recognized a contract of four years' duration and availed itself in behalf of Mexico of the claimant's services. The statement in the Memorial of the United States to the effect that in June, 1922, the Mexican Secretary of the Treasury, Adolfo de la Huerta, and the claimant Davies reached an agreement during a conference that in the future payments should be made at the rate of \$5,000 each and every month until the "full amount" of \$200,000 should be paid does not appear to be convincingly supported by the evidence cited on that point.

12. Since we have reached the conclusion that by the terms of the contract made with Davies the Mexican Government's representative did not bind his Government beyond the period of the administration of Provisional President de la Huerta, it is unnecessary to consider the effect of the failure of Davies to receive the written notice which it is stated in the communication addressed to him by Pesqueira should be served on the former in case President Obregón should not approve the contract. It might have been desirable for authorities of the Mexican Government having cognizance of this contract to communicate specifically with Davies concerning it with the idea of clarifying his position and of avoiding future misunderstanding. However, in the view we take of the case, this point involves only considerations of courtesy or expediency.

13. If the Mexican Government availed itself of the services of Davies after the termination of the administration of Provisional President de la Huerta, it might be considered that Davies is entitled to some compensation on a *quantum meruit* for such services. But even if this situation were clearly shown to exist, there is not in our opinion definite evidence of services rendered upon which to base an estimate of an award on a *quantum meruit* for such services. Unfortunately there is considerable uncertainty in the evidence in the record of this case, both as to the affidavits and as to correspondence, which in some respects is both vague and meagre. We do not discredit the evidence, but in passing on the relative legal rights and obligations of parties with respect to important contractual or quasi-contractual matters, certainty and sufficiency of evidence are of course of the utmost importance. The character of services rendered by Davies was discussed to some extent in the pleadings and briefs, and in oral arguments of counsel of each Government. On the part of Mexico this point was dealt with on the theory that no valid contract was made by a Mexican representative with Davies, and that if Davies should be considered to be entitled to any compensation it could only be on a *quantum meruit*. We hold that, since a binding contract was made obligating Mexico to pay a stated sum of \$50,000 at once following the consummation of the contract, the unpaid balance of \$20,000 should be paid, and that since we are called upon solely to give effect to strict legal rights of the parties to the contract, an award can be made only for that sum with interest.

Decision

14. For the reasons stated above the Commission decides that the Government of Mexico shall pay to the Government of the United States the sum of \$20,000 (twenty thousand dollars) plus interest on that sum at the rate of six per centum per annum from October 20, 1920, the date on which the first partial payment was made on the stipulated advance payment of \$50,000, to the date on which the last award is rendered by the Commission, and additional interest at the same rate on \$5,000 (five thousand dollars) from October 20, 1920, to June 19, 1922.

MARGARET ROPER (U.S.A.) *v.* UNITED MEXICAN STATES*(April 4, 1927. Pages 205-211.)*

RESPONSIBILITY FOR ACTS OF MINOR OFFICIALS.—ACTS OF POLICE.—DIRECT RESPONSIBILITY.—DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH.—FINALITY OF ACTS OF INVESTIGATING MAGISTRATE. Respondent Government *held* responsible for shooting of American subject by Mexican police resulting in his death. Acts of Mexican judge in investigating the occurrence *held* not entitled to same presumption of validity as final judgment of highest court.

MEASURE OF DAMAGES, WRONGFUL DEATH. Earning capacity of decedent and financial support given claimant taken into consideration in determining amount of award for wrongful death.

Cross-references: Am. J. Int. Law, Vol. 21, 1927, p. 776; Annual Digest, 1927-1928, p. 223; British Yearbook, Vol. 9, 1928, p. 161.

1. Claim for damages in the amount of \$17,000 is made in this case by the United States of America against the United Mexican States on behalf of Margaret Roper on account of the death of her son, William Roper, who was drowned in the Pánuco river, at Tampico, Tamaulipas, Mexico, on March 10, 1921, as a result—it is alleged in the American Memorial—of an assault upon him and three fellow seamen, S. Weston Brown, Ernest Small, and O. Griffin, committed by Mexican policemen and Mexican private citizens. It is stated in the Memorial that the seamen, when assaulted, jumped into the water to escape by swimming to their ship, the American merchant vessel *Saxon*, and that Roper was wounded by a pistol shot and sank immediately after having been heard to utter cries of distress. In behalf of the United States it is contended that Mexico is responsible for the unlawful acts of Mexican policemen for the failure of Mexican authorities to afford proper protection to the unfortunate Americans and for a denial of justice growing out of the failure of Mexican authorities to prosecute the persons implicated in the crime committed against the seamen.

2. It is difficult to reach a definite conclusion with regard to the precise character of all the occurrences connected with the death of the seamen, but certain things appear to be clearly shown by the record: Roper, Brown, and Small, American citizens, and Griffin, whose nationality does not clearly appear from the record, all members of the crew of the *Saxon*, obtained shore leave on the evening of March 10th, when the vessel was lying at anchor in the river about a mile distant from the water front at Tampico. When about 10 o'clock p. m. the men reached a boat in which they intended to proceed to the steamer, a Mexican, Florencio González, who either for some time had been following them or suddenly came upon them, tried to prevent them from leaving. After three of the seamen, Roper, Brown, and Griffin, had entered the boat other persons arrived. During a confusion of some kind the four seamen leaped into the water. Pistol shots were fired, and Roper appears to have been wounded. Griffin, instead of endeavoring to swim to the *Saxon*, hid behind a lighter and escaped death. The Captain of the *Saxon* shortly after 10 o'clock p.m. heard shots and cries and saw

swimming toward the vessel two men, one of whom cried out twice: "It is Willie Roper, I am wounded, save me"—or words to that effect. Both men sank before assistance could be given to them. Three days after the occurrences in question the bodies of Brown and Small were found, but Roper's body appears not to have been located. Brown's corpse was in a complete state of decomposition. Medical certificates produced before the Judge at Tampico would seem to indicate that Brown and Small were not wounded. As heretofore observed, it is difficult to reach a definite conclusion with regard to the precise character of all the occurrences connected with the death of the seamen. Parts of the evidence in the record before the Commission are conflicting. From some of the evidence which is available to the Commission, mainly that furnished by the seamen Griffin, it appears that González, desiring to prevent the seamen from leaving for their vessel, blew a whistle, which brought four or five companions who were near by in the dark; that one of these men assaulted the seamen Small and felled him on the shore; and that pistol shots were directed against the seamen, who leaped into the water to save themselves, whereupon the policemen without endeavoring to ascertain what became of the seamen departed with the other Mexicans.

3. The District Judge at Tampico instituted an investigation in the early part of March, 1921, and according to evidence given before the Judge by the Mexican policeman and other Mexican citizens, the occurrences in question were substantially as follows: On the evening of March 10th a half naked American citizen accosted these Mexicans and stated that he had been robbed and deprived of his clothing by some negroes. One of the Mexican citizens (González) proceeded to the river bank and found four negroes about to embark in a boat, whereupon he undertook to detain them. Two of the men went to bring two policemen, one of whom, when he arrived, fired shots into the air to intimidate the four negroes, who jumped into the water in order to escape arrest. On the basis of the evidence produced before him, the District Judge at Tampico, in an opinion which he rendered on September 9, 1922, about 18 months after the investigation was instituted, reached the conclusion that it did not appear that there was any crime to prosecute in connection with the death of the American seamen. In this opinion the Judge also declared that there was no crime to prosecute in connection with a supposed assault committed by the seamen against the person described as a half naked American who declared that he had been robbed. This latter conclusion we think was undoubtedly sound, and we are of the opinion that if there had been reason to suspect the seamen of wrongdoing they might have been arrested without any firing of pistols or indeed without any forcible measures. It would appear that the best service the policemen might have rendered would have been to deal in a proper way with the difficulties between the seamen and the private Mexican citizens who interfered with the departure of the seamen for their vessel. The evidence appears to be conclusive that shots were fired, and there is uncontradicted testimony that at least one policeman, Cristóbal Pérez, made use of his weapon. It is also clear that pistol fire was largely, if not entirely, responsible for the action of the men in leaping into the river, where they met their death. The evidence of the Captain of the *Saxon* makes it reasonably certain that Roper was shot, or in any event, that he was fired upon by the police. In view of the things of this kind concerning which the record before us leaves no doubt in our minds, we are constrained to reach the conclusion that had it not been for the unlaw-

ful acts of the police the seamen would not have met their death. Even though the police had fired, as was testified before the Judge at Tampico, simply to "intimidate" the seamen, such action must be regarded by the Commission as improper in the light of the principles underlying the Commission's decisions in the Swinney case, Docket No. 130,¹ the Falcón case, Docket No. 278,² and the Teodoro García case, Docket No. 292.³ In the opinions rendered in those cases the Commission discussed the reckless and unnecessary use of firearms by persons engaged in the enforcement of law.

4. It was argued in behalf of Mexico in the instant case that the Mexican Government is not responsible under international law for the acts of such minor officials as policemen. This question received consideration in the Quintanilla case, Docket No. 532, in which the Mexican Government contended that the Government of the United States was responsible for the acts of a deputy sheriff in Texas, and in which an award was rendered by the Commission in favor of the claimant. Considering the acts of the policemen in the present case in relation to the seamen, and in relation to the Mexican citizens who undertook to prevent the seamen from joining their vessel, we are of the opinion that the Mexican Government must be held responsible for the acts of the policemen. And with respect to this point we deem it particularly important to consider the comprehensive scope of Article I of the Convention of September 8, 1923, which is concerned with the jurisdiction of the Commission. In addition to a description of claims, in language similar to that frequently employed in claims conventions, there is found this additional description: "and all claims for losses or damages originating from acts of officials or others acting for either Government and resulting in injustice".

5. In support of the contentions made in behalf of the United States with respect to a denial of justice, it was alleged that there should have been a prosecution of Mexicans who appeared to be implicated in the deaths of the seamen, and that the investigation before the Judge at Tampico was of such a character as to reveal a purpose to exculpate those persons. This official may have complied with all the forms of Mexican law in conducting the investigation, as it was argued in behalf of Mexico he did. But we do not consider that occurrences pointing clearly to the commission of crime were adequately met by this investigation.

6. Three American citizens lost their lives under most unusual circumstances. There is evidence that some Mexican private citizens and some Mexican policemen undertook to prevent the American seamen from joining their vessel after the latter had been on shore leave. There is evidence given by one of the seamen who managed to preserve his life that one of his companions was felled by a blow on the head; that shots were fired at others who had entered a boat in which they intended to depart for their vessel; and that they leaped into the water to escape. During the course of an investigation of the death of the seamen before the Judge at Tampico, three private Mexican citizens testified to the effect that they were approached by a half naked American citizen and were informed by him that he had been assaulted and robbed by negroes who were at

¹ See page 98.

² See page 104.

³ See page 119.

the time near the river. These men further testified that one of them proceeded to the river bank and found four negroes about to embark in a boat whereupon he undertook to detain them; that two of the men went to bring two policemen, one of whom, when he arrived, fired shots into the air to intimidate the seamen, who jumped into the water.

7. From testimony given by Mexicans it appears that the half-naked American who had so persistently sought to obtain the arrest of negroes who had assaulted him, suddenly disappeared at the time when his presence would have been most important for the consummation of his purpose of obtaining redress. It is strange that such an important witness should not have been located by Mexican authorities. There would seem to be good reason to suppose that he could easily have been found if he were a reality. He was strikingly identified by several persons who gave testimony before the Mexican Judge, and it was testified that he could speak some Spanish.

8. The Commission believes that it has mentioned enough things shown by the record upon which to ground the conclusion that the occurrences in relation to the death of these American seamen were of such a character that the persons directly concerned with them should have been prosecuted and brought to trial to determine their innocence or guilt with respect to the death of the Americans. The conclusions of the Judge at Tampico with respect to the investigation conducted by him were treated in oral and in written arguments advanced in behalf of the Mexican Government as the judgment of a judicial tribunal. And the well-known declarations of international tribunals and of authorities on international law with regard to the respect that is due to a nation's judiciary were invoked to support the argument that the Commission could not, in the light of the record in the case, question the propriety of the Judge's finding. In considering that contention we believe that we should look to matters of substance rather than form. We do not consider the functions exercised by a Judge in making an investigation whether there should be a prosecution as judicial functions in the sense in which the term judicial is generally used in opinions of tribunals or in writings dealing with denial of justice growing out of judicial proceedings. It may readily be conceded that actions of the Judge should not be characterized by this Commission as improper in the absence of clear evidence of their impropriety. Obviously, however, the application of rules or principles asserted by this Commission in the past with respect to denials of justice will involve widely varying problems. To undertake to pick flaws in the solemn judgments of a nation's highest tribunal is something very different from passing upon the merits of an investigation conducted by an official—whether he be a judge or a police magistrate—having for its purpose the apprehension or possible prosecution of persons who may appear to be guilty of crime.

9. The Commission, considering among other things the earning capacity of the deceased and the financial support he gave the claimant, is of the opinion that an award of \$6,000 may properly be made in this case.

10. The Commission therefore decides that the Government of the United Mexican States must pay to the Government of the United States of America on behalf of the claimant the sum of \$6,000 (six thousand dollars) without interest.

MAMIE BROWN (U.S.A.) *v.* UNITED MEXICAN STATES.

(April 4, 1927. Pages 211-212.)

RESPONSIBILITY FOR ACTS OF MINOR OFFICIALS.—ACTS OF POLICE.—DIRECT RESPONSIBILITY.—DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH.—MEASURE OF DAMAGES, WRONGFUL DEATH.—FINALITY OF ACTS OF INVESTIGATING MAGISTRATE. Claim based upon same circumstances as those of *Margaret Roper* claim *supra* allowed.

(Text of decision omitted.)

DAISY SANDERS AND ROSETTA SMALL (U.S.A.) *v.* UNITED MEXICAN STATES.

(April 4, 1927. Pages 212-213.)

RESPONSIBILITY FOR ACTS OF MINOR OFFICIALS.—ACTS OF POLICE.—DIRECT RESPONSIBILITY.—DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH.—MEASURE OF DAMAGES, WRONGFUL DEATH.—FINALITY OF ACTS OF INVESTIGATING MAGISTRATE. Claim based upon same circumstances as those of *Margaret Roper* claim *supra* allowed.

(Text of decision omitted.)

JENNIE L. CORRIE (U.S.A.) *v.* UNITED MEXICAN STATES.

(April 4, 1927, concurring opinion by American Commissioner, undated, concurring opinion by Mexican Commissioner, undated. Pages 213-218.)

PROCEDURE, AMENDMENT OF MEMORIAL.—WRONGFUL DEATH, PARTIES CLAIMANT. A claim was duly filed with the tribunal by mother of deceased American subject based on his death. Mother thereafter died. Motion to amend memorial by substituting father of decedent as party claimant *allowed* notwithstanding expiration of time allowed for filing claims generally.

Cross-references: Am. J. Int. Law, Vol. 21, 1927, p. 782; British Yearbook, Vol. 9, 1928, p. 156.

(Text of decision omitted.)

JOSÉ ACEVEDO AND ENRIQUE JIMENEZ GONZALEZ (UNITED
MEXICAN STATES) *v.* UNITED STATES OF AMERICA.

(April 8, 1927. Pages 218-219.)

- - - - -

PROCEDURE, CONSENT OF AGENTS TO DISPOSITION OF MOTIONS. Motions to dismiss *overruled*, with consent of two Agents, subject to right to amend pleadings.

(Text of decision omitted.)

- - - - -

VIRGINIA ESTRADA VDA. DE RIVERA, *et al.*, AND OTHER
CLAIMS (UNITED MEXICAN STATES) *v.* UNITED STATES
OF AMERICA.

(April 8, 1927. Pages 219-220.)

- - - - -

PROCEDURE, CONSENT OF AGENTS TO DISPOSITION OF MOTIONS. Motions to dismiss *overruled*, with consent of two Agents, subject to right to amend pleadings.

(Text of decision omitted.)

- - - - -

WILLIAM R. TAYLOR AND OTHER CLAIMS (U.S.A.) *v.* UNITED
MEXICAN STATES.

(April 8, 1927. Pages 220-221.)

-

PROCEDURE, CONSENT OF AGENTS TO DISPOSITION OF MOTIONS. Motions to dismiss *overruled*, with consent of two Agents, subject to right to amend pleadings.

(Text of decision omitted.)

- - - - -

HENRY RUSSELL AND OTHER CLAIMS (U.S.A.) *v.* UNITED MEXICAN STATES.

(April 8, 1927. Pages 221-222.)

PROCEDURE, CONSENT OF AGENTS TO DISPOSITION OF MOTIONS. Motions to dismiss *overruled*, with consent of two Agents, subject to right to amend pleadings.

(Text of decision omitted.)

IDA ROBINSON SMITH PUTNAM (U.S.A.) *v.* UNITED MEXICAN STATES.

(April 15, 1927, concurring opinions by Presiding Commissioner and American Commissioner, April 15, 1927. Pages 222-228.)

RESPONSIBILITY FOR ACTS OF MINOR OFFICIALS.—ACTS OF POLICE.—

DIRECT RESPONSIBILITY.—DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH.—ESCAPE DURING IMPRISONMENT. Killing of American subject by Mexican policeman when off duty, followed by arrest of guilty and sentence of death, which was commuted by higher court to eight years, imprisonment, *held* not a denial of justice. Subsequent escape of prisoner during revolutionary disturbances, after thirty months' imprisonment, with no explanation being proffered by respondent Government for disappearance and failure to serve sentence, *held* a denial of justice for which respondent Government was responsible.

Cross-references: Am. J. Int. Law, Vol. 21, 1927, p. 798; Annual Digest, 1927-1928, p. 208.

Comments: Edwin M. Borchard, "Important Decisions of the Mixed Claims Commission, United States and Mexico," Am. J. Int. Law, Vol. 21, 1927, p. 516 at 521.

Fernández MacGregor, Commissioner:

1. This claim is presented by the United States of America against the United Mexican States demanding from the latter, in behalf of Ida Robinson Smith Putnam, an American citizen, the payment of \$53,106.50 on account of the murder perpetrated by a Mexican policeman, Eleno Uriarte, on the person of the claimant's son, George B. Putnam, an American citizen, a mining engineer, on or about July 5, 1909, in Pílares de Nacozari, Moctezuma, Sonora, Mexico. It is alleged that Mexico is responsible for a denial of justice which consisted in that an entirely unjustified penalty was imposed on Uriarte and, furthermore, in that the latter was not even made to serve such sentence. The Mexican Agency presented a motion to dismiss this claim, but withdrew it on February 11, 1926.

2. The American citizenship of the claimant was challenged by the Mexican Agency in its Answer, but this defense was not again used there-

after. I am of the opinion that the documents presented by the United States prove that this claim is impressed with American nationality.

3. The evidence contained in the record of this case is very meagre and it leaves in the dark what I consider to be the most important fact, and that is the escape of the convict, Uriarte. Nevertheless, the occurrences may be established as follows: On the date of the events, George B. Putnam attended a moving picture entertainment. At the close of the performance, Putnam went out in the street alone. It was then dark and it was raining. A few minutes after his leaving, several persons heard two shots and then a scream or moan, for which reason one of said persons went to the Chief of Police and informed him that a man had just been killed. Said Chief of Police, together with another policeman and the informant, went to the place where the shots had been heard and found the lifeless body of Putnam; there was found near it a yellow raincoat. A woman testified that after the shots, looking out through a window of her house, she saw, at a distance of about three meters, a man running with a pistol in his hand, who appeared to her as policeman Eleno Uriarte. It appears that the Chief of Police later reviewed the men under his command, all of them having answered the roll call except the aforementioned Uriarte. One of the policeman declared that he recognized as his own the yellow raincoat found near Putnam's corpse and that it was the same one which the deponent had loaned to Uriarte on the previous night. In view of the foregoing circumstances, prosecution was started, a warrant was issued for Uriarte's arrest, and upon his having been arrested three weeks later, on July 29th, 1909, he was examined by the Judge of First Instance of the District of Moctezuma, before whom the prisoner confessed his guilt, declaring that he had killed Putnam through jealousy. That when Putnam left the motion picture theatre, at about ten o'clock at night, said Uriarte told him that he wanted to have a talk regarding the affair which was still open between them. That they walked together some distance; that Putnam became incensed and attempted to throw himself on the deponent; that they both wrestled and fell; that they stood up at once, and that, then, Uriarte withdrew and, thinking that Putnam was carrying an arm, fired his gun on him twice and afterwards fled. The Commission does not have before it the complete criminal proceedings that were thereupon instituted against Uriarte, but in the record of this claim appear the decisions rendered in the first instance by the Judge of First Instance of the District of Moctezuma, on October 18, 1909, and on appeal by the Highest Court of Justice of the State of Sonora, on June 22, 1910. The lower court did not consider as proven the plea of self-defense made by Uriarte and found him guilty of homicide perpetrated without provocation and with treachery, for which it sentenced him to death. The higher court modified the decree of the court below, as it considered that the homicide had been committed during an encounter and that the treachery had not been proven, and on this ground it reduced the death sentence to eight years' imprisonment and hard labor.

4. The Memorial of the claim mentions only the trial in the first instance, and alleges that instead of shooting Uriarte at once, his execution was postponed until the first day of April, 1911, when he was liberated from prison to defend the town of Moctezuma for the Federal forces against the Revolutionists. It is further, alleged that Uriarte at once joined the latter and that he was not again apprehended by the Mexican authorities, thus escaping punishment for his crime. The evidence submitted by Mexico

in the Answer shows, as has already been stated, that Uriarte was still in prison in April, 1911, because the court of appeal had commuted the death penalty to eight years' imprisonment. A document presented by the Mexican Agency during the hearing of the case, shows that Uriarte, who had been taken out of the jail of Moctezuma, escaped on May 4, 1911, and that, upon having been re-arrested in Dolores, Chihuahua, he was sent to Sahuaripa, Sonora, and from the latter place to the penitentiary of Hermosillo, Sonora, having remained in this prison from June 3, 1912, until March 29, 1913, when he was liberated therefrom by Colonel Joaquin B. Sosa, then Military Commander of the said city of Hermosillo, and his whereabouts since that date are unknown. In view of the vagueness of the evidence with respect to the facts in connection with the escape of Uriarte, the Commission asked both Agencies to present additional evidence thereon, but the Mexican Agency was not able to add anything and the American Agency only presented two letters, which reveal the lack of success in its efforts to find new facts, and a memorandum regarding the military authorities who occupied Hermosillo, Sonora, in 1913, which makes reference, at the end, to a Colonel Ramon B. Sosa who was commanding the forces of Batamotal, to the north of Guaymas, in May, 1913.

5. The above-mentioned facts, although meagre, as heretofore noted, establish, nevertheless, the lack of responsibility of Mexico in the present case, as regards the charge imputed to her by the United States, of having violated its international duty by imposing on the slayer of Putnam a penalty out of proportion to his crime. The Commission, following well-established international precedents, has already asserted the respect that is due to the decisions of the highest courts of a civilized country. (Case of Margaret Roper, Docket No. 183, paragraph 8.) A question which has been passed on in courts of different jurisdiction by the local judges, subject to protective proceedings, must be presumed to have been fairly determined. Only a clear and notorious injustice, visible, to put it thus, at a mere glance, could furnish ground for an international arbitral tribunal of the character of the present, to put aside a national decision presented before it and to scrutinize its grounds of fact and law. We have now before us an appellate decision, rendered by the highest court of the State of Sonora. Nothing appears to show that the proceedings which that decision ended may have been dilatory or inadequate. The charges presented against it are based, not on facts, but on conjectures, such as inferring premeditation from Uriarte's confession that he was jealous of Putnam, and imagining that there was no self-defense due to the fact that the criminal fled after his crime. It is also charged that the Supreme Court of Sonora reduced the sentence without receiving new evidence. The courts of appeal in Mexico usually do not receive new evidence, but they study the case to see if the facts have been weighed correctly by the lower court and to see, especially, if the latter has applied to the case the corresponding legal precepts. This is what the Highest Court of Justice of Sonora did and had the right to do. Neither is the commutation itself of the death penalty to eight years, imprisonment sufficient to establish a denial of justice. The penalty is notoriously unjust only when there is imposed for a crime a penalty which does not correspond to the classification of said crime or when an unusual penalty is imposed for it. But to impose, for example, on a voluntary homicide one of the various penalties that are imposed for its different grades, aside from the death penalty, where there are doubtful circumstances concerning its perpetration, can never mean *prima facie* a wide deviation from

justice, and in no manner, on the other hand, does it involve pardon or amnesty as the American brief seems to indicate. The sentence of the Highest Court of Justice of Sonora is subject to no further examination, and the Mexican Government is not responsible on account of it.

6. The claimant Government alleges that the Mexican Government entirely failed in its obligation to punish the murderer of Putnam, as Uriarte escaped from the jail where he was imprisoned, and that he was never again apprehended. The evidence presented shows two escapes—one about 1911, after Uriarte, as alleged, had been taken out of the jail of Moctezuma to defend the town against the rebels, but he was then reapprehended; and the other about 1913, after the prisoner was taken out of the jail of Hermosillo by a Colonel Joaquin B. Sosa, no information appearing about this reapprehension. The first escape surely does not give ground for imputing responsibility to Mexico, since she apparently did everything possible to find the prisoner and to inflict on him the remaining punishment imposed. Nothing further is known concerning the second escape except the facts given above; it is not known who Colonel Joaquin B. Sosa was, to what forces he belonged (although it can be supposed that he belonged to the forces of the Constitutionalist Army, which at that time controlled the northern part of the Mexican Republic). (See George W. Hopkins case, Docket No. 39, paragraphs 11 and 12.) In the light of these vague facts it is impossible to fix precisely the degree of international delinquency of the respondent Government; but there remain at least the facts that Uriarte escaped and that Mexico had the obligation to answer for Uriarte until the termination of his sentence, and she is now unable to explain his disappearance. In such circumstances it can not be said that Mexico entirely fulfilled her international obligation to punish the murderer of Putnam, as Uriarte remained imprisoned only thirty months, more or less, and therefore Mexico is responsible for the denial of justice resulting from such conduct.

7. On the above grounds, due to the circumstances of the case, and in view of the standards set forth in paragraph 25 of the opinion rendered in the Janes case, Docket No. 168, I believe the claimant can properly be awarded the sum of \$6,000.00 (six thousand dollars), without interest.

Van Vollenhoven, Presiding Commissioner:

I concur in Commissioner Fernández MacGregor's opinion.

Nielsen, Commissioner:

I agree with the conclusions reached by Commissioner MacGregor with respect to the liability of the respondent Government. The claim preferred by the United States is grounded on an assertion of a denial of justice. The charge of a denial of justice is predicated, first, on the action of the appellate court in setting aside the death penalty imposed on Eleno Uriarte and substituting a term of eight years, imprisonment, and, second, on the failure of Mexican authorities to carry out the sentence imposed by the appellate court.

Appellate courts in some countries do not have the power to reduce the sentence of an accused person, but I do not understand that the United States finds fault with the Mexican law under which this power is vested in Mexican higher courts. Without entering into any discussion of the considerations which may have prompted the appellate court to reduce the sentence of the accused, I am of the opinion that no showing has been

made which could warrant the Commission in reaching the conclusion that the reduction of the sentence resulted in a denial of justice as that term is understood in international law.

The other point in the case, the fact that the accused did not serve the entire sentence of eight years imposed upon him raises more difficult questions. These difficulties confronting the Commission result from the scarcity and vagueness of the evidence in the record. There is evidence of fault, but nothing more. Therefore, it is, as stated in the opinion of Commissioner MacGregor, impossible to fix precisely the degree of delinquency on the part of the respondent Government. The instant case, therefore, differs materially from other cases passed upon by the Commission in which there has been considerable evidence of negligence and in which the Commission has rendered larger awards.

Decision

The Commission decides that the United Mexican States are obligated to pay to the United States of America on behalf of Ida Robinson Smith Putnam \$6,000 (six thousand dollars), without interest.

GERTRUDE PARKER MASSEY (U.S.A.) *v.* UNITED MEXICAN STATES.

(April 15, 1927, concurring opinions by Presiding Commissioner and Mexican Commissioner, April 16, 1927. Pages 228-241.)

PROCEDURE, ADMISSIBILITY OF DEFENCE RAISED IN BRIEF NOT THERETOFORE RAISED IN PLEADINGS. It is questionable whether a defence raised for the first time in the brief, and as to which relevant facts have not been produced, may be considered by tribunal. Defence in question *held* not well founded in law in any event and hence unnecessary to be considered further.

RESPONSIBILITY FOR ACTS OF MINOR OFFICIALS.—DIRECT RESPONSIBILITY.—DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH.—MISCONDUCT AS A BAR TO CLAIM. An American subject was killed by a Mexican, who was thereafter arrested and imprisoned. The assistant jail-keeper unlawfully permitted the accused to escape. Evidence was not shown that the appropriate authorities took effective action to apprehend the accused. *Held*, the fact that the jail-keeper allowed the escape of the accused entrained responsibility on the part of respondent Government without regard to whether the jail-keeper was subsequently punished. When misconduct of any official, whatever his status or rank, results in failure of a State to perform its international obligations, it is responsible. The circumstance that deceased American subject may have been guilty of misconduct *held* no bar to claim.

Cross-references: Am. J. Int. Law. Vol. 21, 1927, p. 783; Annual Digest, 1927-1928, p. 250; British Yearbook, Vol. 9, 1928, p. 162.

Nielsen, Commissioner:

1. Claim is made in this case by the United States of America against the United Mexican States on behalf of Gertrude Parker Massey, individually and as guardian of William Patrick and John Kilbane Massey, minor children of herself and William B. Massey, an American citizen, who was killed by a Mexican citizen at Palo Blanco, Vera Cruz, Mexico. The claim is grounded on an assertion of denial of justice growing out of the failure of Mexican authorities to take adequate measures to punish the slayer of Massey.

2. On or about the fourth day of October, 1924, Massey, who was the terminal superintendent of the *Cia Metropolitana de Oleoductos, S. A.*, was killed in a building which is described in the record as a "bodega" (apparently some kind of a store) belonging to the petroleum company, by a Mexican citizen, named Joaquín R. Saenz, who was also employed by the company under the direction of Massey. It appears that the slayer fired six shots into Massey's body any one of which was probably sufficient to cause death. After the killing Saenz fled. He was captured and placed in jail at Tamiahua, Vera Cruz. Subsequently he was confined in prison at Tuxpan, Vera Cruz, from which he escaped on December 26, 1924, and he was not apprehended. The record contains copies of correspondence from which it appears that the American Consul at Tampico and the American Ambassador at Mexico City have from time to time urged that steps be taken to apprehend and punish the slayer.

3. It is stated in the Mexican Answer that Massey attempted to commit the crime of rape on the wife of Saenz, and that this offense on the part of Massey prompted Saenz to take the life of Massey. The record contains a mass of grave accusations against the character of the deceased. I am not convinced of the truth of these charges against Massey which I consider are not supported by reliable evidence. Whatever may be the facts in relation to this point, I consider them to be entirely irrelevant with respect to the pertinent legal issues in the case. In connection with the charge of immoral and illegal conduct made against Massey, the contention is made in the Mexican brief that "International law, justice, and equity preclude a claim from being set up, on the general maxim *ex dolo malo non oritur actio*, when the alien from whose death the claim arises by his own immoral, negligent, or unlawful conduct caused or contributed to cause his own death." I am not entirely clear with regard to the argument that was made that in a case of this kind law, justice, and equity "preclude" a claim from being set up. Under Article I of the Convention of September 8, 1923, the United States has the right to present this claim to the Commission. The United States invoked the rule of international law which requires a government to take proper measures to apprehend and punish nationals who have committed wrongs against aliens. The legal issue presented to the Commission is whether or not the obligations of that rule were properly discharged with respect to the apprehension and punishment of the person who killed Massey. Neither the character nor the conduct of Massey can affect the rights of the United States to invoke that rule nor can they have any bearing on the obligations of Mexico to meet the requirements of the rule or on the question whether proper steps were taken to that end. In other words, the character and conduct of Massey have no relevancy to the merits of the instant claim under international law.

4. In the Mexican brief the contention is advanced that a State is not responsible for a denial of justice, when a private individual who is under

indictment or prosecution for the killing of an alien is allowed to escape by a minor municipal officer in violation of law and of his own duty; if the State immediately disapproves of the act by arresting and punishing the officer, and reasonable measures are taken for the apprehension of the fugitive. It is asserted that an assistant jail-keeper unlawfully permitted Saenz to walk out of jail; that this minor official was arrested and strong action was taken against him; and that therefore no responsibility attaches to the Mexican Government for his misconduct.

5. No such defense with regard to the non-responsibility for the acts of the jail-keeper, and no facts regarding his conduct or steps taken to punish him for his wrongdoing are stated in the Mexican Answer. It is therefore very questionable whether the defense could properly be advanced as it was in the Mexican brief and in oral argument in which contentions were forcefully pressed by counsel for Mexico with respect to the non-responsibility of Mexico for the acts of a minor official of this kind, and whether it is proper for the Commission to consider it. However that may be, I am of the opinion that the argument made with respect to this question of responsibility for the jail-keeper is not well taken.

6. An examination of the opinions of international tribunals dealing with the question of a nation's responsibility for minor officials reveals conflicting views and considerable uncertainty with regard to rules and principles to which application has been given in cases in which the question has arisen. To attempt by some broad classification to make a distinction between some "minor" or "petty" officials and other kinds of officials must obviously at times involve practical difficulties. Irrespective of the propriety of attempting to make any such distinction at all, it would seem that in reaching conclusions in any given case with respect to responsibility for acts of public servants, the most important considerations of which account must be taken are the character of the acts alleged to have resulted in injury to persons or to property, or the nature of functions performed whenever a question is raised as to their proper discharge. As the Commission has heretofore pointed out, it appears to be a proper construction of provisions in Article I of the Convention of September 8, 1923, that uncertainty with respect to a point of responsibility was largely eliminated by the two Governments when they stipulated that the Commission should pass upon "all claims for losses or damages originating from acts of officials or others acting for either Government and resulting in injustice."

7. The question which has been raised in the instant case, and not infrequently in cases coming before international tribunals, is not one that can be properly determined in the light of generalities such as are frequently found in the opinions of tribunals. That this is true may be shown by a brief reference to citations of cases appearing in the Mexican brief.

8. With respect to the broad statement in an opinion rendered by Attorney General Cushing to Secretary of State Marcy under date of May 27, 1855 (7 Ops. Atty. Gen'l 229), it is pertinent to note the precise character of the Peruvian Government's claim with respect to which Mr. Cushing advised Mr. Marcy. A Peruvian vessel was stranded as a result of the unskillfulness or carelessness of a pilot in the Bay of San Francisco. While this pilot was under a measure of supervision of state authorities and was licensed by them, he was employed by the master of the Peruvian vessel, who was at liberty to pilot his own vessel or to employ an unlicensed pilot. Mr. Cushing was of the opinion that neither the state of California nor the

United States was the "guarantor, security, or assurer" of the professional acts of the pilot. It may be still more pertinent to note that the claim evidently directly grew out of a complaint against a marshal for alleged improper conduct in not recovering a judgment which had been obtained against an associated body of pilots to which the incompetent pilot belonged, and that Mr. Cushing stated that the Peruvian claimants had an adequate legal remedy in the courts. The importance which Mr. Cushing attached to the failure to exhaust local remedies (a subject with which we are not concerned in this arbitration in view of the stipulations of Article V of the Convention of September 8, 1923) is clear.

9. In the Bensley case, Moore, *International Arbitrations*, Vol. 3, p. 3016. the Commissioners stated that there was no allegation that the acts complained of were perpetrated by any person or officer "in the employment or under the control of the Mexican Government, or for whose proceedings that government was or ought to be responsible," and that "the injury sustained by the memorialist, as set forth by him, was inflicted by a municipal officer (a village alcalde) of the village of Dolores, against whom redress might have been had before the judicial tribunals of the country."

10. In the Blumhardt case, *ibid.*, p. 3146, the failure of the claimant to resort to local legal remedies against a Mexican inferior judge is clearly emphasized. The Mexican Government could not be held responsible. said Umpire Thornton, for losses when the complainant had "taken no steps by judicial means to have punishment inflicted upon the offender and to obtain damages from him," and when it was "against him that proceedings should have been taken."

11. Sir Edward Thornton, Umpire in the arbitration under the Convention of July 4, 1868, between the United States and Mexico, often rejected claims because of the failure of claimants to exhaust legal remedies. See *ibid.*, pp. 3126-3160.

12. In the Slocum case, *ibid.*, p. 3140, Umpire Thornton stated that the Mexican Government could not be held responsible for the action of a Mexican prefect in ordering the imprisonment of the claimant, who had refused to pay taxes. The Umpire declared that the claimant was not justified in refusing to pay the taxes; that payment should have been made: and that an appeal could have been made to the proper authorities for a refund of improperly levied taxes.

13. In the Leichardt case, *ibid.*, p. 3133, damages were claimed because the claimant had been arrested and mistreated at the direction of a secretary to a governor of a Mexican state. No proceedings were instituted by the claimant against this minor employee who was guilty of such peculiar action in bringing about the mistreatment of the claimant. In dismissing the case. Umpire Thornton said:

"* * * it must be understood by foreigners in every country that wherever there is a fair prospect of obtaining justice by due course of law for wrongs and injuries inflicted by private persons or by 'paltry petty officers, drest in a little brief authority', like the governor's secretary, for instance, they must resort to the courts of the country, and in such cases only appeal to their own sovereign when the courts of the country refuse to do their duty, or misconceive it, or pervert justice *in re minime dubia*."

14. The Kellet case, *ibid.*, Vol. 2, p. 1862, grew out of difficulties which an American vice consul general had in Siam with Siamese soldiers. A disposition of the affair which resulted in a disciplining of the soldiers, was effected by the American Minister to Siam and an assistant legal adviser

to the Siamese Government. From the available record it does not appear that any claim for pecuniary indemnity was made by the United States in this case.

15. It is stated in the Mexican brief that in the Maal case, Ralston's *Report*, p. 914, the decision holding Venezuela responsible, was based on the fact that certain officers against whose acts complaint was made were never reprimanded or punished, and quotation is made of a statement to the effect that there had been no reprimand, punishment, or dismissal of these officers. It is pertinent to note, however, that the first reason for responsibility given by Umpire Plumley is stated in a sentence immediately preceding the statement quoted. The sentence reads as follows:

"The umpire acquits the high authorities of the Government from any other purpose or thought than the mere exclusion of one regarded dangerous to the welfare of the Government, but the acts of their subordinates in the line of their authority, however odious their acts may be, the Government must stand sponsor for."

16. The report in Moore's *Arbitrations* of the case of Pierce is very meagre. It is merely to the effect that the claimant was arbitrarily arrested by an officer of local police in Mexico; that the authorities proceeded against this official, fined, reprimanded and dismissed him from office; and that the claimant was not "under the circumstances, entitled to an award." In the light of the particular facts in this case it seems reasonable to suppose that little if any fault could be found with this decision.

17. In considering the question of a nation's responsibility for acts of persons in its service, whether they be acts of commission or of omission, I think it is pertinent to bear in mind a distinction between wrongful conduct resulting in a direct injury to an alien—to his person or his property—and conduct resulting in the failure of a government to live up to its obligations under international law. The cases which have been cited are concerned with the former; the instant case with the latter.

18. I believe that it is undoubtedly a sound general principle that, whenever misconduct on the part of any such persons, whatever may be their particular status or rank under domestic law, results in the failure of a nation to perform its obligations under international law, the nation must bear the responsibility for the wrongful acts of its servants.

19. In an instruction addressed by Secretary of State Hay to the American Minister to Honduras under date of February 25, 1904, directing the presentation of a claim against the Honduran Government on account of the injuries inflicted on Charles W. Renton, an American citizen, and his family, is a passage that seems to be very apposite to the instant case. In that instruction Secretary Hay said:

"The liability of the Government of Honduras is believed to be fully established, however, on grounds apart from the fact that a minor official of that Government was directly concerned in the crime. While a State is not ordinarily responsible for injuries done by private individuals to other private individuals in its territory, it is the duty of the State to diligently prosecute and properly punish such offenders, and for its refusal to do so it may be held answerable in pecuniary damages. There was an inexcusable delay in initiating a judicial investigation. The first proceedings were partial and onesided. The subsequent judicial proceedings, which were the direct result of the naval investigation by the U. S. S. *Montgomery*, terminated in condemning for minor offenses persons who, the evidence before the Department shows, were guilty of a deliberate and brutal murder. And, finally, soon after the decision of the supreme court all of the murderers, with single exception of Dawe, were permitted to escape." (*Foreign Relations of the United States*, 1904, p. 363.)

20. The statement of facts in the above-quoted passage reveals clearly a failure on the part of Honduran authorities to employ adequate measures to punish wrongdoers. Compensation was made by Honduras in satisfaction of the claim.

21. Citation is made in the Mexican brief to the Neer case, Docket No. 136,¹ decided by the Commission. In that case it was contended in behalf of the United States that proper steps had not been taken to apprehend persons who had killed an American citizen. The Commission, while being of the opinion that more effective measures might have been employed, held that the record did not disclose evidence of such a gross degree of negligence as would warrant the Commission in finding that the Mexican Government was chargeable with a denial of justice.

22. Citation is also made in the Mexican brief to the case of Catalina Balderas de Díaz, Docket No. 293, decided by this commission on November 16, 1926.² In that case the Commission refused to sustain the charge of a denial of justice made by the Mexican Government against the Government of the United States because of the failure of authorities to apprehend the murderers of a Mexican citizen. The Commission held that not only was there no evidence in the record of "gross negligence on the part of the American authorities," but no evidence whatever of negligence.

23. I am of the opinion that the record in the instant case clearly reveals gross negligence on the part of the Mexican authorities resulting in a denial of justice. This conclusion I ground on an examination of records throwing light on the actions of authorities which the United States has alleged were improper.

24. Saenz having been arrested, certain proceedings were carried on before a Judge at Palo Blanco, a Municipal Court of Tamiahua, and the Court of First Instance at Tuxpan. The record before the Commission reveals that during the course of these proceedings statements were made by some persons who had some direct information regarding the killing of Massey. Other persons appeared and related stories that they had heard regarding incidents in the life of Massey entirely unrelated to the slaying of the deceased. For example, a Mexican officer, Lieutenant Gabriel Martínez, testified that he had had an altercation with Massey because Massey had discharged a watchman, and that he (Lieutenant Martínez) had had complaints from several persons, whose names he did not remember, that Massey was attempting to make love to their wives. The Lieutenant also mentioned, as several persons appearing as witnesses did, that it was "rumored" that Massey had had intimate relations with a certain woman whose name frequently appears in the record. The record contains statements of several persons to the effect that Massey was a man of despotic character; that he treated employees under his direction harshly; that he had had disgraceful incidents with several women; that it was rumored that he had illicit relations with a certain Mexican woman; that he was disliked by the majority of the men under him. Turning from these proceedings, we find that they were suspended because of the escape of the accused from jail.

25. There is no proper arrest and there can be no prosecution in the case of a man who is permitted by police authorities to leave prison. It is argued in behalf of the Mexican Government that the Mexican Government is relieved from responsibility for the failure to bring Saenz to justice

¹ See page 60.

² See page 106.

because it arrested and punished José Refugio Vargas, the minor official responsible for the escape of Saenz, and took reasonable measures to apprehend the latter after his escape. Whatever bearing, if any, the arrest of the assistant jail-keeper, Vargas, might be considered to have on the question of Mexico's responsibility in this case, it is not a point of any material importance. With respect to this matter it may be observed, in the first place, that the record does not show that Vargas was prosecuted and punished, although there is evidence that he was arrested and spent some time in jail, and in the second place, that the conditions surrounding the imprisonment of Saenz reveal a situation of something more serious than an unexpected breach of trust on the part of a single minor official. Whether or not the keepers of jails may properly be designated as minor officials, they are assuredly entrusted with highly important duties. The point is more important than the amount or character of their official emoluments or the particular definition or designation of their position under the domestic law of their country. We find Vargas testifying during the course of the proceedings instituted against him that Saenz and three other persons charged with homicide, on one occasion requested Vargas for permission to leave the jail and that, after a conference with the Commandant of the Guard, the jail-keeper permitted the prisoner to depart. Vargas explained that he took such action because he had heretofore seen the warden of the jail do the same thing. The following extract from the testimony of Vargas, irrespective of the question of accuracy in detail, undoubtedly throws some light on conditions in the jail:

"It was about 8 o'clock on the night of the 26th of the current month when the warden of the jail left, whose name is Antonio R. Marquez, leaving the care of the jail to the speaker, and from between 10 and 11 of the same night while he was lying down the commandant of the guard, Amador, whose other name he does not know, came to him and stated that at the window which opens on court No. 2 there were parties talking, and he arose and saw that it was Joaquin R. Saenz, who stated to him that they had permission to go out to the street, Joaquin R. Saenz, Teofilo Florencia, Isaac Ovando and Felix Gamundi, the latter returning about one in the morning; that when they asked the speaker for permission to go outside he consulted the commandant of the guard and on agreement with the latter the above mentioned parties left, that the declarant allowed this to be done because prior thereto he had seen the warden do the same thing, and that by verbal order given him by the same warden for allowing to go out the said Joaquin R. Saenz, Teofilo Florencia and Gamundi, and that on the same day the warden had allowed Corporal Francisco Valenzuela to enter in order to converse with Saenz and Gamundi, the corporal inviting them to take beer, which Saenz and Gamundi accepted and took in the presence of the said warden; that upon the termination of the conversation the speaker shut Saenz and Gamundi up in the presence of the warden."

26. The record shows that Saenz, before the time when he took his final departure from jail by permission, had been allowed to leave the jail on at least one other occasion.

27. With regard to the argument made with respect to the bearing on the question of Mexico's responsibility of the steps taken to apprehend Saenz, it may be concluded that there is no evidence in the record showing that any effective action has been taken by the appropriate authorities to apprehend the accused. On this point counsel for Mexico called attention to a letter written by the Mexican Secretary of the Interior to the Governor of the State of Vera Cruz, requesting that all necessary measures be taken to apprehend Saenz and other fugitives. Citation was also made to a

communication written by the Governor of the State of Vera Cruz to the American Consul at Tampico from which it appears that certain prosecuting authorities had requested a Mexican Judge having knowledge of the case to issue the necessary orders and circular asking for the apprehension of Saenz. But there is no specific evidence that police authorities took any steps to apprehend him and no evidence of any difficulties experienced by such authorities to locate this well-known fugitive. In connection with the citation in the Mexican brief of the claim of Catalina Balderas de Díaz, it is pertinent to note that in that case the record contained evidence that there was no clue whatever to the identity of the guilty person; that military authorities and civilian police authorities had made diligent efforts to locate the guilty person; and that many persons had been arrested on suspicion.

28. In the light of the reasons which I have stated, I consider that the contentions of the United States that there was a denial of justice in this case growing out of the failure of Mexican authorities to take proper measures to punish the slayer of Massey have been established. I am of the opinion that an award of \$15,000.00 (fifteen thousand dollars) may properly be made on behalf of the claimant.

Van Vollenhoven, Presiding Commissioner:

I concur in paragraphs 1 to 6, inclusive, 18, 23, and 25 to 28, inclusive, of Commissioner Nielsen's opinion.

Fernández MacGregor, Commissioner:

I concur with the opinion rendered by Commissioner Nielsen. However, I believe proper to state that I differ with him in the estimate he makes of some of the cases cited by the Mexican Agency to support its theory of non-responsibility of States for acts of minor officials. It is not necessary to explain here my view-point regarding such cases.

I also wish to state, with respect to a denial of justice due to lack of adequate prosecution and punishment of a person guilty of murder, committed on the person of an unfortunate American citizen—denial of justice which is the international delinquency claimed in this case—that I differ somewhat with Commissioner Nielsen in a certain estimate which he seems to make of its extent. In fact, Mr. Nielsen seems to want it noted that the inadequate and improper action of the Mexican authorities is noticeable from the time that the Judges of Tamiahua and Tuxpan initiated the prosecution of the case, and even before the escape of Saenz occurs. This view is principally contained in paragraph 24 of his Opinion, as he makes a salient relation of the testimony rendered by various witnesses against the character or morality of the deceased Massey. The paragraph cited apparently contains a criticism of the procedure followed by the judge upon receiving the testimony of witnesses in the instruction of the cause, and perhaps implies that such procedure may be considered improper, applying thereto the criterion of international law.

In my opinion such criticism would be unfounded. The judicial investigation made for determining the circumstances in which the murder of Massey was committed, was in no way a deviation from Mexican law, and the system of this law is not contrary to any principle of international law. In the *Neer* case (Docket No. 136), the Commission, expressing its idea of denial of justice, said:

"It is not for an international tribunal such as this Commission to decide, whether another course of procedure taken by the local authorities at Guana-

cevi might have been more effective. On the contrary, the grounds of liability limit its inquiry as to whether there is convincing evidence either (1) that the authorities administering the Mexican law acted in an outrageous way, in bad faith, in wilful neglect of their duties, or in a pronounced degree of improper action, or (2) that Mexican law rendered it impossible for them properly to fulfil their task."

It may seem strange to one who is familiar with the opposite Anglo-Saxon practice, that in a judicial investigation, witnesses be permitted to render all the testimony they wish, without any impediment. There are, however, systems like that of Mexican law, that of French law, that of Italian law, and others of countries of Latin origin, in which the witness has that privilege and the judge the duty to respect it. The accused may present as many defense witnesses as he desires, and their testimony has only the limitation placed on its veracity by the prosecution witnesses presented by the Prosecuting Attorney, the representative of the victim, or by penal law itself when the witness is convicted of perjury. This system serves to let the judge form his conviction regarding the guilt of the accused; its object is to prepare the criminal prosecution, and its liberality is such that in some countries no penalty is imposed on a witness for false statements made during the period of instruction:

"L'information, qui se retrouve dans notre droit criminel, va servir d'élément à la conviction des juridictions d'instruction, mais non à celle des juridictions de jugement. Aussi la jurisprudence a-t-elle décidé, en se fondant sur le caractère *provisoire* de la déposition, qu'une déclaration mensongère, devant le juge d'instruction, ne saurait constituer le crime de faux témoignage." (*Précis de Droit Criminel*, R. Garraud, p. 572.)¹

Mexican law does punish a witness guilty of perjury (art. 733 of the Penal Code of the Federal District similar to that of Vera Cruz). But, on the other hand, it imposes on the judge the duty to examine witnesses "whose statement may be requested by the interested parties * * *" (art. 152 of the Code of Criminal Procedure of the Federal District, similar to that of Vera Cruz). It also imposes on him the duty to examine all the circumstances of the crime (art. 151); the duty to ask the witnesses if they have any cause for hatred or animosity towards the accused or the victim (art. 169).

The provisions last cited evidently serve to weigh the testimony of a given person. Hence, as much in the instruction as in the trial properly called, a witness may speak freely and he can be questioned not only by the judge, the Prosecuting Attorney, and the counsel of the defendant, but also by the jurors (articles 295, section V, and 297). Mexican law, like other systems of law already cited, leaves to the honor and conscience of the judge the use of the means which may serve to help in making the truth evident (art. 295, final paragraph).

In view of the above, and taking into account that the Commission has under its consideration only a judicial record which was not completed, I do not believe that the procedure, as followed by the Mexican judge up to the time of the escape of Saenz may be a deviation from his municipal

¹ "The information found in our criminal law serves as an element to conviction as to the jurisdiction of instruction, but not to that as to jurisdiction of judgment. Thus, jurisprudence, basing itself on the *provisional* character of a deposition, has decided that a false statement made before a 'juge d'instruction' could not constitute the crime of perjury. * * *"

law. The system of that law is not contrary to any rule of international law; therefore, in the present case, the facts emphasized in paragraph 23¹ of Commissioner Nielsen's Opinion could not form the basis of a judgment of improper or strange judicial action, which action, on the other hand, unfortunately, is in my opinion clear, in view of the other facts which left the crime in question unpunished.

Decision

For the reasons stated above the Commission decides that the Government of the United Mexican States must pay to the Government of the United States of America on behalf of Gertrude Parker Massey the sum of \$15,000 (fifteen thousand dollars), without interest.

GEORGE W. JOHNSON, ARTHUR P. WHITE, EXECUTOR, AND
MARTHA J. McFADDEN, ADMINISTRATRIX (U.S.A.) *v.* UNITED
MEXICAN STATES. ("DAYLIGHT" CASE.)

(*April 15, 1927, concurring opinion by American Commissioner, April 15, 1927.*
Pages 241-254.)

DIRECT RESPONSIBILITY.—ACTS OF PUBLIC VESSELS.—COLLISION IN TERRITORIAL WATERS.—PRESUMPTIONS UNDER MARITIME LAW. A Mexican public vessel collided with American sailing ship in Mexican territorial waters during a storm. Evidence being somewhat conflicting and fault not established, *held* no responsibility on part of respondent Government. Since collision occurred in territorial waters, Mexican law *held* applicable. Presumptions existing in maritime law not found in Mexican law accordingly not applied.

LACHES. Defence of laches *held* not sustained.

Cross-references: Am. J. Int. Law, Vol. 27, 1927, p. 791; British Yearbook, Vol. 9, 1928, p. 163.

Van Vollenhoven, Presiding Commissioner:

1. This claim is asserted by the United States of America on behalf of the part owners (or their successors in interest) in the American schooner *Daylight*, which on the night of March 21, 1882, while at anchor outside the bar at Tampico, Tamaulipas, Mexico, was in collision with a Mexican gunboat under way, the *Independencia*. The schooner, with its cargo and the personal effects of its crew, was wrecked and lost. The United States alleges that the collision was due to culpable negligence or faulty seamanship on the part of the *Independencia* and that the Government of Mexico is responsible for damages caused by its public vessels; and therefore claims damages in the amount of \$5,948.62, with interest.

2. The main facts of the case are as follows. In the late afternoon of March 21, 1882, there were at anchor within Mexican territorial waters

¹ Presumably paragraph 24 is meant.

just outside the Tampico bar an American sailing vessel, the schooner *Daylight*, and about a mile to the north of this schooner the Mexican gunboat *Independencia*. The captain of the *Daylight* had gone ashore about 3 p. m. to make entry of his ship, and had not returned. The weather had been fair and had continued so until about 7 : 30 p. m., when suddenly a strong wind from the north, shifting to the northwest, commenced to blow, which about 8 p. m. developed into a violent storm with lightning, rain, darkness and a very rough sea. The commander of the *Independencia*, which was anchored with her starboard anchor secured by two chains, deemed it advisable for the safety of his vessel to put out to sea or, at any rate, to seek a better location. Therefore the *Independencia*, with her lights burning, began to weigh her anchor and to go ahead slowly in a southern direction; but, from about 7 : 50 p. m. on, made her engines work full speed, while dragging her starboard anchor. The *Daylight*, also with burning light, and two other ships which were anchored not far off, could see the steamer approach from at least that time on; as soon as the *Daylight* noticed her, or perhaps before that time, she either filed all available chain, or made everything ready to do so. The first shock of the collision occurred some twenty-five minutes later, about 8 : 15 p. m.; all this time, or at least the latter part of it, the gunboat had been seen tacking, and one sailor from the crew of the *Daylight* (the Swedish seamen Peter Johnson) testified before the port authorities on March 25, 1882, that the gunboat at the time of the collision was "doubtless driven by the wind." It is worthy of remark that, according to the evidence, it took the *Independencia* more than half an hour to reach the *Daylight* which was anchored only one mile to the south. When the steamer had reached a distance of about ten fathoms from the *Daylight*, the officer on guard called out in English to the crew of the *Daylight*, expecting that the gunboat working under full steam might pass by the schooner without colliding if the schooner filed away more chain. The mate of the *Daylight* who replaced his captain testified on March 25, 1882, that he "supposed that the steamer was working to drive ahead." Instead, however, of advancing the *Independencia* drifted down backward and fell sternwise upon the schooner. Succeeding this first shock the commander of the gunboat ordered its engines reversed to disengage his ship, but driving back under full steam the entire length of the schooner it struck her again several times so as to tear out her bowsprit, to have her foremast entangled in the yards of the gunboat, and to split her foredeck. The clash threw back the steamer's smokestack. Some ten minutes after the first shock occurred the vessels were disengaged; the *Independencia* proceeded, was soon stopped, and dropped both her anchors some one hundred yards astern of the ill-fated *Daylight*, which has been filling rapidly with water and gradually sank. Neither in the latter part of the night nor on the next morning did the *Independencia* take pains to rescue the crew of the *Daylight*; they were not saved until about 7 : 30 a. m. on March 22, 1882, by a British schooner, the *Busiris*.

3. The great difficulty in this case, as in numerous collision cases, is one of conflicting and insufficient evidence. The only investigation of the facts that has been made was the one by the Mexican port authorities at Tampico who examined the masters and crews of both vessels (the Americans first) within the three weeks following the tragedy. The commander of the *Independencia* stated twice—once in his report of March 23, 1882, and once in the investigation on April 5, 1882—that the danger of the sudden rain storm moved him to seek a safer location. He stated that he

did so carefully, at first maintaining his starboard anchor and going slowly, but that after that he had to proceed under full steam; however, though the engines before and at the time of the collision were working at full speed, the vessel, since it was dragging one of its anchors, was not proceeding full speed. Mexico moreover contends that, if the American vessel had paid out more chain as soon as it was warned, the collision might have been prevented. The United States, on the contrary, contends that the gunboat knew that there was a schooner anchored only a mile off to the south; that under those conditions and with a strong "Norther" blowing the gunboat should not by leaving its perfectly safe position have disregarded the safety of other vessels; that when the steamer's smokestack fell there was a confusion or worse among the crew on board the *Independencia*. Besides, the United States assert—apparently basing its assertion on statements made by the mate and the sailor Oakland on March 25, 1881—that the *Daylight*, after the storm began and before the accident, had paid out all available chain, some thirty fathoms more than she had so far filed; but in the protest before the American consul on March 27, 1882, the captain and crew of the *Daylight* established that the crew "made everything ready to slip said Schooner's chain," but "had no occasion to slip Schooner's chain". The lack of conclusiveness in the evidence as presented on both sides before this Commission, which is the same evidence as was produced in the very next years following the occurrence (1883-1886), would seem to appear from the fact that the American Secretary of State on July 2, 1886, informed the American representative at Mexico City of the claimant's being invited "to produce whatever countervailing proof may be in his power," and that such further evidence never was obtained.

4. Among the Mexican evidence there is an inexplicable statement of the commander of the gunboat to the effect that, because of the extreme darkness, the light of the *Daylight* could not be seen until a short time before the collision; though there is evidence that the *Daylight* saw the gunboat from the beginning and that two other ships saw the lights of both vessels. Nor is it sufficiently explained why the *Independencia* after having been overwhelmed by the storm for half an hour could easily come to anchor, with both starboard and port anchors out, instantly after the collision. Among the American contentions, on the other hand, there is the unbelievable assumption that the Mexican commander had left without any reasonable ground a safe and effective anchorage in a dark, stormy, and dangerous night in waters with which he must have been quite familiar, and the dangers of which are well known to every Mexican seaman; in this connection it is worthy of note that one of the sailors of the *Daylight* (Abraham Oakland) testified on March 25, 1882, that after the storm began, but before the crew had noticed any movement of the gunboat, he had been "engaged in trimming the jib sails, so the schooner could put out to sea." The cook of the *Daylight* testified on March 25, 1882, that the mate (who replaced the captain, and who according to other evidence had been on deck when the tempest began) did not return on deck until the gunboat was within ten fathoms to the north of the schooner and the collision was imminent. The statement submitted by the United States that the *Independencia* if left to the current and wind could not possibly have collided with the *Daylight* would seem to indicate that the mere fact of the commander's leaving his original anchorage did not in itself constitute a dangerous act for this neighbouring ship.

5. The evidence as to fault on either side being greatly at variance, such as to leave the cause of the collision unascertainable, it is essential to determine whether some special rule as to burden of proof, or some presumption, can be invoked.

6. In the *Queen* case between Brazil and Norway, which was a case of a collision (1870) in Paraguayan waters between an anchored Norwegian sailing vessel and an aviso of the Brazilian navy under way at full speed, the arbitrator used as a basic rule the general principle that the burden of proof is incumbent upon the claimant government (Norway), and rendered an award in favor of Brazil (Lapradelle et Politis, *Recueil*, II, 708). In paragraphs 6 and 7 of its decision rendered March 31, 1926, in the case of William A. Parker (Docket No. 127), the Commission set out the grounds why this rule as to burden of proof is inapplicable to its proceedings. As to whether in case of collision between a ship at anchor and a ship under way the burden of proof by way of exception falls on the latter one, it may be stated that such a rule of evidence, where it exists, is usually considered and construed rather as a presumption of fault on the part of the ship under way than as a rule concerning evidence.

7. The United States contends that such a presumption in favor of ships at anchor, and another presumption in favor of sailing ships when colliding with steamers, are recognized by universal maritime law, and should be applied by this Commission which is bound to decide in accordance with the principles of international law, justice, and equity. Mexico, on the other hand, asserts that, as the collision occurred in Mexican waters, Mexican law is applicable, and that the Mexican law on collision in force in 1882—the *Ordenanzas de Bilbao* of 1737, confirmed in 1814—did not contain these presumptions. There would seem to be no doubt but that with reference to the present collision the law of Mexico is applicable. In the *Sidra* case the British-American arbitral tribunal held that “according to the well-settled rule of international law, the collision having occurred in the territorial waters of the United States, the law applicable to the liability is the law of the United States” (Nielsen’s *Report*, 457; see the *Canadienne* case, Nielsen’s *Report*, 430). In 1888, as its session of Lausanne, the *Institut de droit international* considering the problem of collisions both from the viewpoint of existing law and from that of a future uniform law, resolved in its drafts covering both viewpoints (under the guidance of such experts as Messrs. Lyon-Caen and Renault from Paris) that the law applicable is the law of the land where the collision took place a solution qualified by Mr. Fenault as required even by “ordre public”—and the Institute identified collisions within territorial waters with collisions in the interior of a country. If Mexican law in this matter were in open conflict with a universally recognized provision of international law the Commission should take such conflict into account; but even those international awards and authors who contend that in collision cases the Anglo-Saxon presumption in favor of the ship at anchor “is a universally admitted rule of maritime law” or is “*reconnu par tous les pays maritimes*” (Nielsen’s *Report*, 485; Lapradelle et Politis, II, 708) do not go so far as to establish that a disregard of this presumption constitutes a conflict with binding provisions of international maritime law. There certainly is a quite reasonable element in these presumptions for collisions under normal weather conditions; but under conditions so abnormal as this Tampico storm any generalization would seem objectionable. One of the first codes embodying the presumption in favor of ships at anchor, the maritime code promulgated by the Emperor Charles V

for the Low Countries in 1551, contains an express reservation relative to "a great tempest" and similar causes (Article 48 of said Code). In 1888 at Lausanne the presumptions were not included in either draft of the *Institut de droit international*; in 1898 at the Maritime Law Conference in Antwerp the question of the desirability of a specific provision for collision between a ship at anchor and a ship under way was unanimously answered in the negative by all of the affiliated national associations; and in the Brussels Convention of 1910 on collision law (Article 2, paragraph 2; and 6, paragraph 2) all presumptions, and especially that regarding ships at anchor, were abandoned.

8. It is to be considered, then, what the Mexican law in force in 1882 provided with reference to a collision of the present type. The existing federal Code of Commerce which contains a division (book the third) embodying maritime law was not in force at the time; it was not enacted until September 15, 1889. In 1882, the year of the occurrences discussed here, the Mexican Constitution of 1857 was already effective and it provided that all controversies relating to maritime law should be under the cognizance of the federal courts (Article 97, paragraph II). Said courts, in those days, applied as positive law the *Ordenanzas de Bilbao*, which had been the first mercantile law of the Mexican Republic in the period which elapsed between the date of the country's independence and May 16, 1854, the date of the promulgation of the first Mexican Code of Commerce, styled the *Lares Code*, after the Minister who sponsored its passage. The *Lares Code* was set aside by Article I of President Álvarez' decree of November 23, 1855, providing that the administration of justice should conform itself to the laws in force on December 31, 1852, and that the state courts with general jurisdiction should take cognizance of commercial law suits conformably to the ordinances and laws peculiar to each branch. At that time, in 1852, the law in force was the decree of November 15, 1841, which in Article 70 provided that, pending the enactment of a federal Code of Commerce, the law suits of this branch should be decided in accordance with the *Ordenanzas de Bilbao*, in so far as these ordinances had not been set aside. Therefore these ordinances had to be applied by the federal courts of Mexico, to which the Constitution of 1857, as stated heretofore, had transferred the jurisdiction in cases of maritime law. In the Bilbao ordinances the subject of collision is found under Chapter XX (*De las averías ordinarias, gruesas, y simples; y sus deferencias*; 36 articles), in Article 34, of which the general rule of responsibility for fault is reproduced without the introduction of any presumption. It can not be maintained that this silence on legal presumptions renders the Mexican law of the time incomplete and requires that it be supplemented by provisions drawn from the maritime law of a group of other countries.

9. In collision cases the first question to be answered is not which vessel is at fault, but whether either of the colliding vessels is at fault. Fault should be proven; absence of culpable fault must be surmised in cases where the cause of the collision can not be ascertained. There being no sufficient evidence before the Commission enabling it to hold that either commander or captain was guilty of culpable negligence or unskillful navigation, and there being no presumption, or specific rule for the burden of proof, in the Mexican law as it stood in 1882, culpable fault on the part of the *Independencia* can not be assumed.

10. There appears, however, in the record a circumstance which might raise serious doubts as to the respect felt for human lives on the part of

the *Independencia*. The commander of the gunboat knew that his ship had seriously damaged another vessel, and he might have suspected the danger arising out of the collision to the crew of the *Daylight*. Nevertheless there is no evidence as to any effort made by him either in the latter part of the night or even the next morning to render aid to the crew or the ship itself. It was left for a British schooner to save them, a long time after sunrise. Though this situation leaves a most unfavorable impression, the United States did not press it, and no opportunity was given the *Independencia* to explain her aloofness. Even if no good motive for this inhuman behaviour could be given, it would not furnish a legal ground for assuming culpable negligence with respect to the collision. At the Brussels Maritime Conference of 1905 it was expressly stated that, in cases of collision, failure on the part of one vessel to render assistance to the other vessel in distress does not in itself create a legal presumption of culpability for the collision (*Procès-verbaux du 17 octobre 1905*, pp. 7-10; Brussels Convention on collision law, 1910, Article 8, paragraph 3).

11. Mexico contends that there was laches on the part of the United States either in making the claimant present his claim in due form according to Mexican law, or in supplying further evidence. The first contention would seem untenable because of the fact that the reasons why the United States Government, rightly or wrongly, did not wish redress to be sought before Mexican administrative and judicial authorities were fully explained in the diplomatic correspondence of the years 1883-1886. Neither can laches be maintained with regard to the supplying of evidence, as the United States submitted all the evidence it could obtain. Once the diplomatic correspondence having come to a deadlock (1886), the United States, if unwilling to resort to force, could only wait.

12. For the reasons stated the claim should be disallowed.

Nielsen, Commissioner:

I concur in the Presiding Commissioner's conclusion that the case should be dismissed, although the record discloses evidence indicating that the Mexican war vessel may have been guilty of very faulty navigation.

There is no question as to the responsibility of a government under international law for damages caused by a public vessel, the improper management of which may be the cause of the injury to a merchant vessel belonging to another government.

In Bequet's *Repertoire du Droit Administratif*, the following principle is stated (23 p. 175):

"It is not only the army which by its acts can occasion accidents to individuals. The navy causes even more formidable ones and collisions between vessels of commerce and ships of war have sometimes extremely serious results. It is admitted without dispute that if there has been fault on the part of the officers of the fleet, faulty manoeuvring negligence, or imprudence on their part, the government is responsible."

International tribunals have frequently decided that compensation should be made for damages resulting from collisions between merchant vessels and public vessels. (See, for example, the case of the *Madeira*, Moore, *International Arbitrations*, vol. 4, p. 4395; the case of the *Confidence*, *ibid.*, vol. 3, p. 3063; the case of the *Sidra*, *American Agent's Report*, American and British Arbitration under the Agreement of August 18, 1910, p. 453; and the case of the *Lindisfarne*, *ibid.*, p. 483.)

Whether international practice justified the Mexican Government in taking the position when the United States presented a claim for the destruction of the *Daylight* that there should be a resort to local remedies is a question with which the Commission is not concerned. And the failure of the owners of the vessel to seek redress from Mexican administrative or judicial authorities is a matter which cannot be raised in defense to the claim at this time in view of the provisions of Article V of the Convention of September 8, 1923.

It is contended in behalf of Mexico that the only law applicable to the collision was the law of Mexico and not the law of the United States. The rule appears to have been laid down in two cases decided by the tribunal under the Special Agreement concluded between the United States and Great Britain August 18, 1910, that the law applicable to the determination of questions of fault with respect to collisions occurring in territorial waters is the *lex loci delicti commisi*. See the case of the *Canadienne*, *Agent's Report*, p. 427, and the case of the *Sidra*, *ibid.*, p. 453. This rule would appear to be sound as a general principle. But the recognition of the proper application of the rule in any given case would, I think, not necessitate the conclusion that an international tribunal would be impotent to determine liability based on the *general rule of international law* and the facts in a case in which it may appear that there is no applicable local admiralty law or is a law the effect of which may be to deny responsibility for a clearly wrongful act. In situations of that kind an international tribunal should, I think, determine the question of responsibility in the light of facts and general, applicable principles of law, as responsibility is determined, for example, in the case of wanton, negligent, or unnecessary destruction of property by some other agency for which the government is responsible.

It is maintained in the brief of the United States that maritime law is a part of the general law of nations, and it is argued that an examination of maritime codes reveals that at the time of the collision between the *Daylight* and the *Independencia* there was incorporated into the law of Mexico the principle of the often-stated rule which creates a presumption of fault against a ship in motion which comes into collision with a ship at anchor. In behalf of Mexico it is contended that no such rule was recognized in Mexican law in 1882. The statement has at times been made that admiralty law is international law. Admiralty law, although largely the product of principles and practices developed by maritime nations over a long period, can probably not be regarded as international law from the standpoint of the fundamental characteristics of the law of nations, namely, that it is a uniform law governing the conduct of nations which cannot be altered by a single nation. It can perhaps be said that certain principles of admiralty law have been so generally assented to that they are international law to which members of the family of nations should give effect. There may be some conventional international law. What is spoken of as general maritime law is the groundwork of all maritime codes, but nations generally do not consider themselves precluded from making modifications or additions. International law recognizes the right of a nation to subject foreign vessels within its jurisdiction to its authority, and to apply to them its maritime code. Aside from this particular point I think that clearly there are principles of law to which the Commission can give application in the instant case. And it should be noted that counsel for the United States apparently does not rely entirely on a rule with respect to presumption of fault, but argues

that evidence furnished by the Mexican Government reveals faulty navigation in several respects on the part of the war vessel.

In the opinion in the *Sidra case*, *supra*, signed by Monsieur Henri Fromageot, a distinguished authority, deeply versed in the law of nations, in the civil law, and in admiralty law, we have the following statement with regard to the requirements imposed on a moving vessel coming into collision with a vessel at anchor:

According to the well-settled Admiralty rule, recognized both in the United States and Great Britain, in case of a collision between two ships, one of them being moving and the other at anchor, the liability is for the vessel underway, unless she proves that the collision is due to the fault of the other vessel.

The rule so stated does not—at least not in terms—establish a presumption. But in taking account of the relative situations of two colliding vessels, it is probably in principle the same as the broad rule often stated by writers on admiralty law to the effect that there is a *prima facie* presumption against a moving vessel which collides with one at rest. The rule is obviously grounded on a sound principle. Whether the rule is so stated that it may be regarded as a rule of evidence or differently framed so that it may be considered, as I think it logically should, a substantive rule of admiralty law, it is probably formulated too broadly, unless it takes account of the situation of the vessel at rest. From an examination of decisions of courts of the United States in which effect has been given to the principle underlying the rule it would appear that the rule is best framed, substantially, in the language employed by Mr. Parsons, as follows:

“If a ship at anchor and one in motion come into collision, the presumption is that it is the fault of the ship in motion unless the anchored vessel was where she should not have been. The rule of law is the same when a vessel otherwise at rest is run into.”

See on this point the *Clara Clarita*, 23 Wall. 1, and the *Oregon*, 158 U.S. 186.

It does not appear from the record that the *Daylight* was improperly anchored, or that it failed to comply with any requirement of local law with respect to lights, or that any fault for the collision can be attributed to it.

Whether the rule as stated by Monsieur Fromageot or the general rule asserted by American courts is incorporated generally into maritime codes of nations at the present time, is not, it seems to me, a material point. The collision took place in 1882, and it is, of course, pertinent to have in mind the obvious principle that the effect of an act is to be determined by the law of the time when the act was committed. But the precise terms of any pertinent rule existing in that year appears to me not to be of controlling importance. The condition of the weather at the time of the collision in any given case can not affect the question of the proper application of the rule invoked by the United States or a similar rule, although, of course, it may be a very material point in determining whether a moving vessel was actually at fault. Evidence that unusual weather conditions rendered a ship unmanageable may be conclusive proof of lack of fault. Whatever may be the precise terms of any proper, applicable rule, it seems to me that it can scarcely fail to take account, in determining the question of fault, of the fact that one vessel is properly anchored and another is in motion, whenever collision results under such conditions.

The effective analysis of evidence in the record by counsel for the United States to my mind strongly suggests several reasons pointing to fault on

the part of the *Independencia*. It may be difficult in the light of the record to question the wisdom of the youthful commander of the war vessel—he was 23 years of age—in leaving the position where his ship was anchored. Undoubtedly the storm which he noted was equally violent at the place of anchorage of each of the vessels that came into collision. And if the merchant vessel by its anchor maintained its position with apparently but slight motion, it would seem strange that the war vessel should have been unable to keep its place of anchorage by the use both of its anchors and its engines, or should have been forced into the collision. It is strange, too, that the war vessel should be unable to check itself from coming into collision with the merchant vessel, when the former, after having been injured by the collision, and after its crew was apparently, as the evidence shows, to some extent demoralized, could drop anchor and come to a stop following the collision approximately one hundred yards distant from the merchant vessel. It seems strange also that it could promptly reverse its engines and pull away from the merchant vessel after the collision but could not reverse the engines in time to avoid an impending collision of which it had warning. Other facts mentioned in the brief of the United States tend strongly to indicate faulty handling of the war vessel.

Another point which is mentioned in the Presiding Commissioner's opinion, seems to me to be a pertinent one and one of which it is proper to take account, namely, the failure of the crew of the war vessel to observe what has been called "the first law of the sea"—to give assistance to seamen in distress and danger. By a statutory enactment of the United States the duty is imposed on the master of each vessel in case of collision to render all practicable assistance to the other, and if he fails to do so the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act, negligence or default. (26 Stat. L. 425.) A similar provision is found in the British Merchant Shipping Act of 1894 (Sec. 420). Doubtless provisions of this nature are found in the laws of other countries.

It is solely in the absence of more conclusive evidence to rebut the testimony which the members of the crew of the *Independencia* all gave to the effect that the unusual condition of the weather was an unavoidable cause of the accident that I concur in the decision that the claim be dismissed.

I agree with the views of the Presiding Commissioner that the principle of laches can be given no application in the present case. A fundamental point in any proper application of that principle must be delay in the time or presentation of a case by a claimant government. A claim was presented by the United States as soon as a proper investigation had been made of the facts leading to the collision and was vigorously pressed thereafter for a considerable period of time.

Fernández MacGregor, Commissioner:

I concur with the statements of fact and law made by the Presiding Commissioner and with his conclusion that the claim must be disallowed.

Decision

The Commission decides that the claim of George W. Johnson, Arthur P. White, Executor, and Martha J. McFadden, Administratrix, must be disallowed.

FRANCISCO MALLÉN (UNITED MEXICAN STATES) *v.* UNITED STATES OF AMERICA.

(April 27, 1927, concurring opinion by American Commissioner, April 27, 1927, dissenting opinion (dissenting in part) by Mexican Commissioner, undated.
Pages 254-280.)

EVIDENCE BEFORE INTERNATIONAL TRIBUNALS.—EFFECT OF MISREPRESENTATIONS AND OF DESTRUCTION OF PART OF MATERIAL EVIDENCE BY CLAIMANT. Facts that claimant made misrepresentations, conflicting statements and destroyed part of material evidence *held* not in and of themselves to bar his claim.

DUTY TO PROTECT CONSULS. Government of consul's residence should exercise greater vigilance, in respect to his safety and security, than is extended common citizens.

LACK OF PROTECTION. Appointment as deputy sheriff of a police officer, made after such officer had attacked a Mexican consul and had threatened such consul with death, *held* to be a basis for award when such officer subsequent to such appointment violently attacked such consul for second time.

RESPONSIBILITY FOR ACTS OF MINOR OFFICIALS.—DIRECT RESPONSIBILITY.—DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH. Mexican consul was violently attacked and beaten by American police officer during course of arrest for carrying a pistol, which consul was lawfully entitled to carry. Such police officer apparently never paid the fine subsequently imposed upon him for such attack. Responsibility on part of respondent Government *held* established.

MEASURE OF DAMAGES, ATTACK UPON CONSUL.—PUNITIVE DAMAGES.—INJURIES DEVELOPING AFTER ATTACK. When injuries complained of were not apparent at time of attack or shortly thereafter but developed after lapse of considerable period, proof of causal connexion must be established. Punitive damages should not be awarded on ground claimant was a consul. Damages should take into consideration indignity suffered, lack of protection and denial of justice.

Cross-references: Am. J. Int. Law, Vol. 21, 1927, p. 803; Annual Digest, 1927-1928, pp. 213, 267, 374; British Yearbook, Vol. 9, 1928, p. 160.

Comments: Edwin M. Borchard, "Important Decisions of the Mixed Claims Commission, United States and Mexico," Am. J. Int. Law, Vol. 21, 1927, p. 516 at 521.

Van Vollenhoven, Presiding Commissioner:

1. This claim is put forward by the United Mexican States on behalf of Francisco Mallén, a Mexican national. The claim is based on two assaults made on Mallén at El Paso, Texas, U.S.A., where he had been consul of Mexico since 1895, by one Juan Franco, an American deputy constable of Mexican origin; the first assault occurring on August 25, 1907, the second on October 13, 1907. Mexico alleges that the United States is responsible for illegal acts of an American official including an unwarranted arrest, for lack of protection, and for denial of justice in both trials relating to the

assaults, and claims on behalf of the claimant damages for compensation and satisfaction in the amount of \$200,000 with interest.

2. According to the respondent Government, the present claim shows a peculiar and delicate feature in that the claimant has intentionally misinformed on several occasions his own Government, the American Government and this Commission; especially in that he has submitted as evidence a garbled transcript of the proceedings in the second trial (November 7-9, 1907), allowing the text of the cross-examinations and other parts of the transcript to be destroyed though he knew the County Court at El Paso was not a court of record; in that he related the facts of the first assault in an exaggerated manner to his Government; in that he made conflicting statements about the second assault; and in that he misrepresented the purport of Dr. Bush's visits to him after October 13, 1907. The question has been raised as to whether a claimant behaving as is alleged deserves to see his claim espoused by his Government or, once it has been so, to see it maintained by said Government; or even, whether such a circumstance might induce the Commission to reject it.

3. The fact that Mallén's telegram of August 25, 1907, directed to the Mexican Foreign Office on the very evening of the first assault, was clothed in exaggerated words and that part of its contents is not supported by the evidence to which Mallén himself referred, can not be denied. Nor can it be denied that Mallén by submitting only a part of the transcript which he ordered made of the proceedings before the El Paso court on November 7-9, 1907, had removed from this Commission the best and most complete evidence it might have had regarding the second assault. Mallén, being at the time a man of fifty-three years, who had been a consul for twelve years, who was familiar with handling private affairs and who must have been somewhat familiar with criminal court practice in the United States, should not have acted in so uncautious a manner; he should have explained or at least established the several discrepancies between some of his earlier and later sworn and unsworn statements. But the mere fact that those parts of the transcript, which have been submitted to the Mexican Agency and by it have been rendered available for the respondent agency and the Commission, contain references to the omitted cross examinations, would seem to indicate that Mallén could not have intended to destroy all traces of that part of the proceedings. As to the visits of the physician Bush, between Mallén's statements on the one hand and Bush's statement in court on November 7, 1907, on the other hand, there is contradiction in words, not in essence; a divergence does not occur until Bush's affidavits of December 22, 1910, and January 26, 1927. The conclusion from all of this should be to the effect that Mallén, strange though it may seem, has not sufficiently realized that in a claim of this type and in the statement corroborating it the utmost accuracy is required and that there is no place for exaggerated, incomplete, or conflicting contentions. In paragraphs 8 and 9 of its opinion in the *Faulkner* case (Docket No. 47), rendered November 2, 1926, the Commission, however indicated that exaggeration and even misrepresentation of facts on the part of claimants are not so uncommon as to destroy the value of their contentions.

4. The evidence as to the first assault on Consul Mallén by Deputy Constable Franco, though unsatisfactory as to its details, clearly indicates a malevolent and unlawful act of a private individual who happened to be an official; not the act of an official. On Sunday night August 25, 1907, in a street of El Paso, the deputy constable saw Consul Mallén, for whom

evidently he had a profound aversion; pronounced to bystanders in uncouth language his intention to "get" and to "kill" that fellow; walked up to Mallén some five minutes later, and either slapped him in the face or knocked his hat off, possibly after having said some words in Spanish. Another policeman or a private citizen, Powers, was either called by telephone or happened to notice the event, and took Franco away. From Ciudad Juárez, Mallén wired to Mexico City that he had been the victim of an attempt to shoot him with a pistol; but the evidence does not support that contention. Franco was prosecuted before the County Court at El Paso and fined the next day \$5 on account of disturbing the peace; the fine apparently had been paid. Mallén had intentionally abstained from submitting any complaint and from being present at the arraignment.

5. Direct responsibility of the United States for this first assault has not been alleged. Denial of justice is alleged, on the ground that the court treated an attempt to kill Mallén as a mere disturbance of the peace. Since the occurrence was submitted to the police court without any testimony on the part of Mallén himself, it is difficult to see how the court could have deemed it a dangerous attack of importance. Mallén at this time had no reason to suspect Franco of lying in wait for him in order to revenge the fact (of which Mallén was innocent) of the nonextradition by Mexico of a man who had been suspected of being the murderer of Franco's brother-in-law. Lack of protection *during* this occurrence cannot be maintained; the second policemen, or the private citizen, did all that was necessary, and the incident was closed. On the other hand, it would seem quite unsatisfactory that a deputy constable, after disturbing the peace he was appointed to protect, was—as far as the record shows—neither punished in any disciplinary way, nor warned that he would be discharged as soon as a thing of this type happened again. The circumstance that within two months Franco, using the very same uncouth words to show his aversion for Mallén, availed himself of another opportunity to "get" Mallén, this second time misusing his official capacity, shows how imprudently and improperly the authorities acted in maintaining such a man, without any preventive measure, in a position in which he might easily cause great harm to peaceful residents. Mallén not long after August 25, 1907, applied to the county attorney at El Paso in order to inquire whether he was authorized to carry a pistol. The authorities of Texas therefore should have realized the risks they incurred by maintaining Franco in office and by not protecting Mallén from violence at the hands of Franco, and they must bear the full responsibility for their action.

6. The question has been raised whether consuls are entitled to a "special protection" for their persons. The answer depends upon the meaning given these two words. If they should indicate that, apart from prerogatives extended to consuls either by treaty or by unwritten law, the Government of their temporary residence is bound to grant them other prerogatives not enjoyed by common residents (be it citizens or aliens), the answer is in the negative. But if "special protection" means that in executing the laws of the country, especially those concerning police and penal law, the Government should realize that foreign Governments are sensitive regarding the treatment accorded their representatives, and that therefore the Government of the consul's residence should exercise greater vigilance in respect to their security and safety, the answer as evidently shall be in the affirmative. Many penal codes contain special provisions regarding special felonies committed as against foreign diplomats; nobody will contend that

such provisions exhaust the care which the Government of their residence is bound to observe regarding their security and welfare. In this sense one might even say that in countries where the treatment accorded citizens by their own authorities is somewhat lax, a "special protection" should be extended to foreigners on the ground that their Governments will not be satisfied with the excuse that they have been treated as nationals would have been (see paragraph 8 of the Commission's opinion in the *Roberts* case, Docket No. 185, rendered November 2, 1926, and paragraphs 13 and 16 of its opinion in the *Hopkins* case, Docket No. 39, rendered March 31, 1926). In this second sense President Fillmore of the United States, in his annual message of December 2, 1851, rightly said: "Ministers and consuls of foreign nations are the means and agents of communication between us and those nations, and it is of the utmost importance that while residing in the country they should feel a perfect security so long as they faithfully discharge their respective duties and are guilty of no violation of our laws. * * * Ambassadors, public ministers, and consuls, charged with friendly national intercourse, are objects of especial respect and protection, each according to the rights belonging to his rank and station." (VI Moore, *Digest* 813.) In this second sense it was rightly stated by the Committee of Jurists appointed by the League of Nations on the Corfu difficulties, in a report adopted on March 13, 1924: "The recognized public character of a foreigner and the circumstances in which he is present in its territory, entail upon the State a corresponding duty of special vigilance on his behalf." (*American Journal of International Law* 18, 1924, p. 543.) In this second sense again it was rightly contended in 1925 by an American author that "if a consul is not a diplomatic agent, he is nevertheless entitled to a certain degree of protection because of his public character," similarly as commissioners employed for special international objects, such as the settlement of frontiers, supervision of the execution of a treaty, etc., "receive a special protection, even though it does not amount to diplomatic privilege." (Eagleton in *American Journal of International Law* 19, 1925, pp. 303, 308.)

7. The second assault, October 13, 1907, happened on a Sunday afternoon in a street car moving from Ciudad Juárez, Chihuahua, Mexico, across the river to the adjoining city of El Paso, Texas, U.S.A. Franco starting from a house at the Mexican side saw Mallén on the car, boarded the back platform, and told the conductor that as soon as they would be on the Texas side he would "get" this man. Once the car was in the United States, Franco walked up from behind Mallén who was seated in the front of the car, violently struck him with his fist on the right side of the head so that the left side was bumped against the door or the window (which rendered Mallén unconscious for a moment), went on striking him several more hard blows even while he was on the floor, drew his pistol, drove Mallén at the point of it to the rear of the car, made the car stop a little later, and then took Mallén, his face all covered with blood, to the El Paso county jail. It has been proven beyond doubt that during the following trial even the co-counsel for the prosecution had no knowledge of a blow on the right temple struck with Franco's revolver; he alleged only a heavy blow with the fist and a pointing at Mallén with the pistol; and a similar statement was made by Mallén himself the day following the occurrence to an El Paso paper. There is no evidence to support the allegation of a blow with a revolver, except Mallén's sworn statement dated October 13, 1907 (the night of the event), according to which Franco had struck him

"with his fists and by means and instrument to the affiant unknown." It is essential to state that the whole act was of a most savage, brutal and humiliating character. It is also essential to note that both Governments consider Franco's acts as the acts of an official on duty (though he came from the Mexican side), and that the evidence establishes his showing his badge to assert his official capacity. Franco could not have taken Mallén to jail if he had not been acting as a police officer. Though his act would seem to have been a private act of revenge which was disguised, once the first thirst of revenge had been satisfied, as an official act of arrest, the act as a whole can only be considered as the act of an official.

8. Franco contended that he arrested Mallén because of his illegally carrying a gun. This contention has no merit. Not only does the record sufficiently show that the law of Texas prohibiting the carrying of firearms was being executed so as to allow the officials of both Governments, who often had to pass the border, to carry them by way of mutual concession; but the county attorney at El Paso, not long after August 25, 1907, had explicitly told Mallén that he might do so without fearing any consequences—a fact, established not only by Mallén's statement, but also by co-counsel Beall's letter of November 13, 1907, to the American Embassy at Mexico City—and the authorities after the second trial did not give any attention to Mallén's alleged contravention of the Texas law. If Franco, being aware of the Mexican consul's unlawfully carrying a pistol, had merely wished to prevent such action, he would, instead of submitting Mallén to the humiliation of an arrest in a street car, have applied to his superiors requesting them to inform Mallén he was not authorized to carry arms, particularly since the district attorney (Estes) had advised him to apply to the county attorney or even to the grand jury. The arrest made by Franco in this manner and at a time when Mallén's pistol was not displayed was a mere pretext for taking private vengeance. Neither Government denies that, even supposing Franco's intention to have been to execute the Texas law, he went incredibly much farther than might have been necessary to perform any official duty.

9. There can be no doubt as to liability on the part of American authorities for this second assault on Mallén by an American official. The American Agency, in the conclusion of its reply brief, states: "The Agent of the United States does not contend that this Government is without responsibility in this matter. An 'official or other' acting in a broad sense for the United States was by an American jury, in the language of the treaty, found to have perpetrated an 'injustice' upon Mr. Mallén. This circumstance is properly resented by Mexico." A memorandum emanating from the American State Department, dated February 26, 1913, and filed among the evidence, concludes by stating that, if Mallén's allegations are not refuted, "it would be incumbent either upon the State of Texas or on the National Government to accord him reparation for his injuries". Franco was acting for the State of Texas as assistant of a *State* official, and whereas the State Department at Washington was active in respect to this claim it was the government of the State of Texas which was negligent and careless. However, as this Commission has had occasion to point out more than once, acts of authorities of Texas may, under the Convention of September 8, 1923, give rise to claims against the United States and claims may be predicated on such acts.

10. The second assault was tried before the County Court at El Paso on November 7-9, 1907, and Franco was fined \$100 for aggravated assault

and battery resulting in wounds which were not serious. The injuries sustained by Mallén were demonstrated before the court as not being at the time of a serious nature, though they might have been dangerous, and the court in its instruction to the jury included a statement that "the evidence of bodily injury, inflicted upon Francisco Mallén by the defendant Juan Franco, does not show the injury to be of that serious character to warrant a conviction of aggravated assault" on *that* ground. Under these circumstances a fine of \$100, being within the limits of the penal law, can not be said to represent a denial of justice merely because of its moderate amount.

11. Has that second fine plus the cost of the prosecution (\$51.75) been paid? Mexico denies it, and there is no evidence to the contrary, except Franco's own affidavit of December 22, 1910, that he paid \$95, which would mean a part only of the fine and costs. The county auditor at El Paso established on January 8, 1926, that Franco had given a bond for the sum of \$151.75, but that "no record appears of any payments ever having been made on said Convict Bond". It therefore should be assumed that the second fine has not been paid. The sentence moreover read that, if the sum was not fully paid, Franco should be committed to the county jail. It was for the United States to show that he has been committed to jail. Punishment without execution of the penalty constitutes a basis for assuming a denial of justice.

12. Lack of protection on the part of the Texas authorities lies in the fact that so dangerous an official as Franco, after having had his appointment as deputy constable cancelled on October 14, 1907, was reappointed shortly afterwards, at any rate before March 4, 1908, this time as deputy sheriff. This reappointment means lack of protection in so serious a form that it amounts to a challenge; it is exactly the reverse from that protection due to all peaceful residents, whether aliens or nationals. Instead of providing the Mexican consul with that security for his person which, according to the quotation from President Fillmore given in paragraph 6 of this opinion, is indispensable to permit a consul to perform his task, it would have exposed him to daily danger if he had stayed at El Paso.

13. There being established that the United States is liable (a) for illegal acts of the deputy constable Franco on October 13, 1907, (b) for denial of justice on the ground of nonexecution of the penalty imposed on November 9, 1907, and (c) for lack of protection, there remains to be established what material losses and damages resulted from Franco's second assault. The difficulty before the Commission lies in the problem, whether there is a link between, on the one hand, Mallén's ailments of 1908 and subsequent years up to the present time, together with their financial consequences, and, on the other hand, the events of October, 1907. It has been conclusively shown that in November, 1907, at the time of the second trial, both Mallén and co-counsel Beall only complained about a serious injury sustained by Mallén on the left side of his face as a result of contusion with the car, and that at that time the court did not esteem his injuries serious. It would seem from a receipt, produced among the evidence and relating to professional services by Dr. Anderson at El Paso "from October 13th to November 12, 1907. Surgery for wounded head and face \$35.00", that this first treatment ended before the middle of November, 1907. It is established, on the other hand, that on February 2, 1908, Mallén entered a hospital and on February 4, 1908, was operated upon in the right mastoid region by a Mexican physician at Mexico City for ailments which have since

disabled him. The only links between these two facts consist in (a) a certificate delivered on July 3, 1908, by Drs. Urrutia and Cañas, the physicians who operated upon Mallén and continued treating him from 1908 to 1912, relating that "the lesion originated in a wound over the temporal region, which, according to the physicians who attended the patient in El Paso, Texas, during the month of October of last year, was a contused wound with a purulent discharge from the ear and probable fracture of the bone, which was the direct and sole cause of the disorder referred to", and (b) a statement of March 9, 1927, by the same Dr. Urrutia and one of November 16, 1926, by Mallén, according to which the Chief Surgeon of the Mexican Army, General Caraza at Mexico City, treated Mallén for about a month, after he left El Paso and before he entered the sanitarium on February 2, 1908, for what Caraza, according to Urrutia, called a cerebral abscess of traumatic origin. It is true that there is no trace in the record of any new accident to Mallén between November 12, 1907, and February 2, 1908, which might have caused these subsequent troubles of traumatic origin, and that the physicians in Mexico City appear to have considered the connection between the injuries of October, 1907, and their operation on the right mastoid region a natural one. On the other hand, even when not applying to medical certificates the usual requirements of affidavits or legal statements, the present certificate, issued "on petition of the interested party", would seem too vague and incomprehensible to allow the Commission so far-reaching a conclusion as the claimant suggests. The certificate of July 3, 1908, mentions a medical treatment in October, 1907, not a later one; it does not even state who "the physicians" quoted are; Drs. Bush and Vilas seem to be out of the question, and there is no indication whatsoever either of any treatment by Dr. Anderson after November 12, 1907, or of any treatment by a fourth physician at El Paso. If Dr. Anderson had found after November 12, 1907, that the wounds of the left side had developed into a really dangerous ailment on the right side of the head, either the claimant or Dr. Urrutia would not have omitted to produce this surprising discovery of Dr. Anderson's in some way or other, and Dr. Anderson's careful and time-consuming examination of the patient leading to this discovery doubtless would have made its appearance in one of the numerous doctor's bills produced among the evidence. Nor is there any indication relating to General Caraza's views concerning the connection between the injuries of October 13, 1907, the abscess he treated, and the ear troubles and presumable bone fractures for which Mallén went to the hospital; the contention that Caraza treated Mallén for "an infection which resulted from the said wounds" appears in Mallén's affidavit only, not in the physician's statement. The claimant should have furnished some conclusive and pertinent medical testimony about the development of his illness between November 12, 1907, and February 2, 1908; or at least might have produced an expert statement by some high medical authority of the present day establishing the value of the two statements (a) and (b) referred to in the middle of this paragraph. The Commission under the Convention would seem not to be warranted in considering as sufficient proofs for a conclusion of this importance statements of so loose and inexplicable a character.

14. When accepting as the basis for an award, in so far as compensatory damages are concerned, the physical injuries inflicted upon Mallén on October 13, 1907, only those damages can be considered as losses or damages caused by Franco which are direct results of the occurrence. While recogniz-

ing that an amount should be added as satisfaction for indignity suffered, for lack of protection, and for denial of justice, as established heretofore, account should be taken of the fact that very high sums claimed or paid in order to uphold the consular dignity related either to circumstances in which the nation's honor was involved, or to consuls in backward countries where their position approaches that of the diplomat. The Permanent Court of Arbitration at The Hague in its award of May 22, 1909, in the case of the deserters at Casablanca twice mentioned "the prestige of the consular authority" or "the consular prestige", but especially with reference to conditions in Morocco as they were before France established its protectorate.

15. Taking all these considerations into account, it would seem that an award may properly be made in the amount of \$18,000 without interest.

Nielsen, Commissioner:

I agree with the conclusions of the Presiding Commissioner with respect to the legal responsibility of the United States in this claim, and I will merely indicate briefly my views touching certain aspects of the case.

A consular officer occupies a position of dignity and honor, and there are several recorded precedents revealing emphatic action taken by Governments to obtain redress for indignities or physical injuries inflicted upon consular officers in the countries of their residence. Diplomatic officers are accorded under international law certain privileges and immunities which do not extend to consular officers, and we find incorporated into domestic legislation provisions designed to carry out the obligations of international law with respect to matters of this kind. (See, for example, sections 4062 and 4064 of the Revised Statutes of the United States.) I think that international law undoubtedly secures to a consular officer the right to perform his functions without improper interference. And it would seem that, in a case in which his personal safety is threatened, authorities of the country of his residence may well be expected to take especial precaution to afford him protection. It is of course their duty to take proper steps for the protection of all aliens. But when indemnity is claimed before an international tribunal solely as personal compensation to a consular officer who has been injured, I do not believe that a sum so large that it must properly be regarded as punitive damages or as redress for indignity to a nation can properly be awarded on the ground that the injured person is such an official. Considerations that have prompted large demands of indemnity through diplomatic channels in connection with the adjustment of unfortunate incidents involving injuries to consular officers may clearly be of such a character that account may not be taken of them in connection with the determination of a claim such as that pending before the Commission. However, I do not intend to express the view that the fact that Mr. Mallén was a consul may not be taken into consideration in determining the amount of indemnity to which he is entitled for the injury inflicted on him.

Mr. Mallén might, of course, very properly bring to the attention of the Mexican Embassy the incident which occurred on August 25, 1907, and which is discussed in the Presiding Commissioner's opinion. But assuredly his status as a consular officer in no wise made it improper or inadvisable for him, in case he considered that a situation had arisen in which he was entitled to especial protection from local authorities in Texas, to bring that fact to the notice of those authorities. And if that situation was as serious as he has represented it to be, there would seem to be good

reason to suppose that direct communication with the authorities would have been useful in prompting them to take precautionary measures looking to his protection in the future which he states they failed to do.

I am of the opinion that no denial of justice can be predicated upon the proceedings in connection with the trial of Franco before the County Court at El Paso in November, 1907. When the law of Texas permitted the imposition of a fine in the amount fixed by the jury or a less amount, the members of the jury who tried Franco can not properly be charged with dishonorable conduct. Therefore, if the imposition of this fine was a penalty so inadequate that a violation of international law resulted therefrom, this wrong must be predicated on the character of the penal statute in which such a fine was authorized. I do not believe that the law was of such a nature as to do violence to ordinary standards of civilization.

But if the penalty imposed was not actually carried out, then a mockery was made of the trial—at least to some extent. Under the final order made by the court Franco could expiate his offense by the payment of \$100 and the costs of the prosecution, or by a term of imprisonment. I think it is certain that Franco was not compelled to serve a jail sentence, and though he may have paid part of the fine imposed upon him, he did not pay it all. The United States must, therefore, clearly be held liable for the acts of any official responsible for this remarkable state of affairs.

Franco was appointed a deputy sheriff after he committed the assault on the consul. It is not entirely clear when this appointment was made, but it was apparently within a few months after Franco's conviction. The appointment was doubtless made by the sheriff of the County of El Paso and in all probability without the knowledge of any of the higher officials of the State of Texas. Although this appointment did not contribute to the injuries which Mr. Mallén received on October 13, 1907, and although he had ceased to be consul at El Paso when it was made, it is clearly something of which the Commission may properly take cognizance in fixing the responsibility of the United States. It suggests a condonement of Franco's offense. (See on this point the opinion of the Umpire in the *Bovallins and Hedlund cases*, *Ralston's Report*, p. 952.) The United States appears to have admitted in its brief responsibility for the acts of Franco, and whatever might be said with regard to the liability of a nation for the acts of an official such as a deputy constable, I am of the opinion that there can be no question as to responsibility in this case, in view of the fact that either an inadequate penalty or no penalty at all was imposed on Franco.

The award of the Commission must be based on the character of the injuries inflicted upon the consul as a result of force and violence not necessary to effect his arrest.

I am unable to believe that the county attorney at El Paso in any way authorized Mr. Mallén to carry a pistol regardless of the law. In any event, there is a clear judicial pronouncement with respect to the illegality of Mr. Mallén's conduct in doing so. I consider untenable the argument of the Mexican Government to the effect that Mr. Mallén did not come within the operation of the law because he was traveling when carrying a pistol. Mr. Mallén according to his own testimony, took a street car from El Paso to Ciudad Juárez to visit a friend in the latter city, but changed his mind and did not leave the car but returned on it to El Paso. And on this point it may be noted that the theory advanced by counsel for Mexico is inconsistent with Mr. Mallén's explanation that he could properly carry a pistol

at any time in view of the construction put upon the law by the county attorney.

The judge at El Paso charged the jury that, if they believed that Franco knew the consul was carrying a pistol, then Franco had a right to arrest the consul, and it was Franco's duty to make the arrest. That charge was certainly not too favorable to the defendant, and, indeed, it seems to me that undoubtedly the judge might more accurately have stated the law to the effect that, if Franco had probable cause to suppose that the consul was carrying a pistol, the arrest could properly be made. I do not mean to suggest that other means might not have been employed in dealing with the offense for which the consul was arrested or that Franco was not merely seeking a pretext to arrest the consul, but it appears to be certain that the consul violated the law when he persisted in carrying a pistol. It seems to be equally certain that Franco knew that the consul had a pistol. That the consul violated the law of Texas was not a consideration which should have prevented the Mexican Government from putting before the Commission the claim which they have presented, but I am of the opinion that no charge of false arrest can be maintained. I am further of the opinion that there is no evidence of violent resistance to arrest on the part of the consul which could justify the treatment accorded him by Franco.

It is not necessary to be a medical expert to reach the conclusion that the best time to obtain the most satisfactory information with respect to the extent of the consul's injuries was immediately after those injuries were inflicted. Of course, there might be future developments. If there were, those are matters in relation to which the Commission should have competent proof, if it is to take account of them in formulating its decision.

The consul had full opportunity at Franco's trial to present evidence of his injuries through medical experts and by his own testimony. Special counsel was employed to assist the prosecution. Testimony was given at the trial to the effect that the injuries inflicted on the consul were not serious. In the light of all the testimony, including that given by Mr. Mallén, the trial judge directed the jury that the evidence of bodily injury inflicted on Mr. Mallén did not show the injury to be of such a serious character as to warrant a conviction for aggravated assault. In the absence of a clear showing of the impropriety of this finding and instruction, the Commission can not properly ignore it or regard it as improper.

The full record of the trial is not before the Commission. It is undoubtedly proper to assume that, if any testimony had been offered at the trial more favorable to the claim than that which Mr. Mallén laid before his government, he would have produced it. It is reasonable to suppose that the entire record would have been useful to the Commission.

With reference to the character of the injuries suffered by Mr. Mallén there remains to be considered the evidence by which it is attempted to link with the injuries inflicted upon the consul in 1907 the various ailments for which he alleges he has been treated over a long period of years. The Commission can not apply strict rules of evidence such as are prescribed by domestic law, but it can and must give application to well-recognized principles underlying rules of evidence and of course it must employ common-sense reasoning in considering the evidential value of the things which have been submitted to it as evidence. I think it can be briefly shown that to attempt, on the basis of certain statements in the record with regard to ailments suffered by the consul over a period of years, to ascribe such ailments to the action of Franco in 1907 would more nearly approach a

process of fatuous guesswork than an application of principles of law or any proper common-sense reasoning. It is not shown by evidence that Mr. Mallén was not suffering from such ailments prior to his difficulties with Franco. Ailments in the mastoid region which are frequently mentioned could, of course, have resulted from various causes.

In a certificate made on July 3, 1908, approximately nine months after the date on which Mallén received his injuries, Doctors Urrutia and Cañas made a statement in which they mention troubles in the mastoid region and assert that "the lesion originated in a wound over the temporal region, which, according to the physicians who attended the patient in El Paso, Texas, during the month of October of last year, was a contused wound with a purulent discharge from the ear and probable fracture of the bone, which was the direct and sole cause of the disorder referred to". The physicians mentioned as having attended Mr. Mallén are probably those who testified at the trial of Franco, and they said nothing about a purulent discharge from the ear or a probable fracture. If they said things at some other time upon which Doctors Urrutia and Cañas based their conclusion, it does not appear what was said. Clearly, no weight whatever can properly be given to a statement of this kind in formulating a conclusion with respect to the effect of the assault on Mr. Mallén.

It does not appear to be necessary to comment on a statement such as that given by Doctor Auerbach, who on December 28, 1908, more than a year after the date on which Mr. Mallén's injury was inflicted, declares, without personal knowledge of the injury, that he "can positively certify that Mr. Francisco Mallén's present condition is directly due to the original injury received over the temporal region on the right side".

In November, 1909, two years after the assault on Mr. Mallén, Doctor Andres Catalanotti, with no personal knowledge of the injury resulting from the assault, declared, without giving any information as to the basis of his conclusion, that deafness from which Mr. Mallén suffered in one ear was due "solely and exclusively to the injury aforementioned in the temporal region, of which he was the victim on the 13th of October, 1907." And he asserted that this injury produced a fracture of the mastoid process. Doctor Catalanotti does not explain how the injury, of which he knew nothing except what someone may have told him, could result in such a fracture. The doctor also furnishes other information about Mr. Mallén's afflictions, but no explanation is given how they might be considered to be related to the assault perpetrated upon Mr. Mallén.

On July 7, 1910, nearly three years after the assault, Doctors Sánchez and de la Vega made a statement containing some general information regarding Mr. Mallén's physical condition. There is nothing in this statement to indicate that the condition described had any relation whatever to the assault committed on Mr. Mallén. Without undertaking in any way to apply a technical rule of evidence with respect to the relevancy of testimony, the Commission must clearly regard a statement of this kind as entirely irrelevant to any issue in the instant case.

Under date of November 26, 1910, Doctor de la Vega made a brief statement with regard to an injury to Mr. Mallén's leg and an injury to his left wrist and declared that the injuries were caused by falls owing to Mr. Mallén's propensity to vertigo from which he had been suffering. Nothing is said concerning the assault on Mr. Mallén in 1907.

In 1910, about three years after the assault on Mallén, Doctor Urrutia issued a statement in Panama City describing the results of an examination

he made on Mr. Mallén. The doctor declares that he found a scar in the right temporal region which he says "indicates to have been the result of a serious injury". He does not undertake to say that this injury was inflicted by Franco in 1907. The doctor speaks of another scar in the mastoid region, which he says no doubt resulted "from some surgical intervention directed at reaching the mastoid cells". This is not relevant testimony with regard to the effects of the assault committed by Franco.

In 1912, about five years after the assault, Doctor Sánchez made a statement concerning his treatment of Mr. Mallén's right ear. In this statement it is said that the ailment "is a direct result from Mr. Mallén's delicate condition brought about by the bodily injuries testified to by Doctors W. H. Vilas, W. H. Anderson, and I. J. Bush in the County Court at El Paso, Texas, in November, 1907". This conclusion appears the more remarkable in the light of the fact that at least one of the doctors who testified in El Paso (Doctor Vilas) clearly expressed the view that Mallén's injuries were not serious or of such a nature that they would produce serious results.

In a statement made in 1912 Doctor Urrutia declares that he performed an operation in the right mastoid region on Mr. Mallén. Doctor Urrutia expresses the opinion that in the future Mr. Mallén may suffer from certain physical infirmities. There is nothing to show that such possible afflictions may in any way be linked with the assault committed on Mr. Mallén in 1907.

In the year 1923 Doctor Zelaya made some general statements about the physical ailments from which Mr. Mallén had suffered in the past and mentioned bodily injuries which rendered Mr. Mallén subject to a mastoid operation. This statement has no relevancy to the injury inflicted on Mallén in 1907.

On March 9, 1927, Doctor Urrutia made a brief statement, in which it is said that Doctor Rafael Caraza while Chief of the Medical Corps of the Army saw Mr. Mallén and attended him for one month and upon examining him as an ear and throat specialist indicated to him (Urrutia) the opinion that an ample trepanizing of the lateral cavity was indispensable. This statement contains no reference whatever to the injuries inflicted upon Mr. Mallén in 1907.

The physicians who furnish statements of this character had no personal information regarding the injuries inflicted on Mr. Mallén in 1907, and therefore evidently knew only what they were told by Mr. Mallén himself. It is natural, therefore, that these statements reveal on their face, as I am of the opinion they do, that they have no relevancy to the question of damages.

Statements made by physicians with regard to fees charged Mr. Mallén for medical treatment which do not show that the treatments were for the injuries which Mallén suffered at the hands of Franco in 1907, and statements of this character which are devoid of any trace of relevancy to issues in the instant case are not evidence of which account can properly be taken in fixing an indemnity. A considerable number of such statements accompany the Memorial.

In the view I take of the attempt to link with the assault committed by Franco in 1907 ailments for which Mr. Mallén has been treated over a long period of years and his nonemployment in an official capacity during a considerable portion of that period, it is unnecessary to discuss the application of legal principles to a claim for salary for \$80,000 from 1907 to 1926, a claim for a loss of \$20,000 from the failure to receive possible promo-

tions, and a claim for unproved losses in private affairs amounting to \$20,000 because of retirement from other activities.

Mention may be made of a few of the seemingly odd assertions advanced by Mr. Mallén upon which he predicates in part his claim for the large sum of money demanded as indemnity. He swears in an affidavit under date of November 16, 1926, that he can not produce certain evidence as proof of damages because he was told by the Mexican Foreign Office that it was the privilege of the Mexican Government to demand any sum that it desires as indemnity. I am of the opinion that he was badly mistaken as to the advice he received. He swears to the Memorial in which it is stated that he was struck by Franco with a pistol. It seems obvious from the record of the proceedings before the court at El Paso in 1907 that no blows were inflicted on Mr. Mallén with a pistol at the time of the assault in that year. He advances as an item of damage that he lost some jewelry because he failed to pay interest on a loan. It is attempted to fasten liability on the United States because foreign newspapers are said to have published libelous statements regarding Mr. Mallén.

In 1909 there was presented to the Government of the United States a claim which Mr. Mallén had submitted to his own Government for presentation through diplomatic channels. The amount of this claim was \$200,000. It is difficult to reconcile this estimate of damages with the amount now claimed in the Memorial which is also \$200,000, although this sum includes estimates for salaries totalling \$80,000 which Mr. Mallén states he might have earned up to 1926 ; also estimates with respect to possible promotions to the amount of \$20,000 ; also estimates of losses to the amount of \$50,000 because of retirement from all activities ; also doctor's bills in considerable numbers ranging from \$5 up to \$10,000.

The Agent for the United States argued that the unreliable character of testimony furnished by Mr. Mallén should be taken account of in connection with the assessment of damages. The argument is undoubtedly sound. Obviously account must be taken of unreliable testimony with regard to the extent and character of injuries suffered by the claimant. But the Agent advanced the further contention that evidence of such a character had been presented by Mallén to his Government that the claim should be dismissed because the claimant had attempted to mislead his own Government and the Government of the United States. In my opinion the claim can not be dismissed on that ground.

Neither the fact that Mr. Mallén violated the law of Texas nor the fact that he has furnished inaccurate or exaggerated statements can in any way affect the right of the Mexican Government to present against the United States a claim grounded on an assertion of responsibility under rules of international law, although obviously these matters are pertinent with respect to a determination of the merits of the claim, because account must properly be taken of them in reaching a conclusion regarding the nature and extent of the wrongs inflicted on Mr. Mallén. If he violated the law of Texas a charge of false arrest and imprisonment can not be maintained. And clearly the extent of his injuries and losses has been exaggerated by the testimony which he has furnished.

The *Weil* claim cited by the American Agent is not apposite to the pending case. The United States, after having received an award honorably paid by the Government of Mexico in that case could return the award, either because it was considered that the Government of the United States should not pay over an award to a claimant who had practiced fraud, or

because it considered that the award could not have been rendered unless fraud had been practiced.

In the so-called *Rio Grande* claim presented against the United States under the Special Agreement concluded between the Government of Great Britain and the Government of the United States August 18, 1910, a motion was filed by the United States to dismiss the claim, in which motion it was alleged *inter alia*:

"That important official dispatches and court decisions, which purport to be quoted in the Memorial, are set forth in a grossly inaccurate and garbled form; for example sentences and parts of sentences are taken from different parts of a document and combined without asterisks; extracts from different documents, written by various persons to various persons at various times during a period of years are thrown together and attributed to one person in one document; sentences and parts of sentences, taken from judicial decisions and their headnotes, are jumbled and combined without regard to their order, context, or meaning. In one case a newspaper article, used to attack the character and conduct of an officer of the United States, has been materially misquoted. In another alleged 'propositions of compromise' * * * 'offered on behalf of the Government of the United States', are produced in quotation marks. The references in support of this quotation give no clue to its real origin, which appears to be another newspaper clipping which can not be identified either as to the paper or date of publication. The quotations and citations of the Memorial generally are so consistently and well-nigh universally inaccurate and misleading as to render the document improper for presentation to any judicial tribunal. (American Agent's Report, p. 335.)

The importance attached by the tribunal to the facts above stated is not entirely clear in view of the fact that the arbitral tribunal found other grounds on which to dismiss the claim.

In the same arbitration objection was made in behalf of the United States in another case against the presentation of certain documents placed before the tribunal about 13 years after the filing of the final pleading. Among the things filed were numerous unpublished papers and parts of such papers. None of the things so filed was authenticated in the manner prescribed by the rules of the arbitration, which required the filing of originals or certified copies. *Cayuga Indians* claim, *Ibid.*, p. 300. All of these things were, however, received by the tribunal. In the same case objection was made in behalf of the United States to a discussion of certain cases in which the records revealing the true character of such cases were not produced, and an unsuccessful attempt was made to lay such records before the tribunal. *Ibid.*, pp. 303-304.

Clearly the question of the validity under international law of contentions such as are advanced by Mexico with respect to want of protection for Mr. Mallén, failure of the authorities of Texas to punish the person who assaulted him, and the appointment to office of the person who committed the assault, can in no way be affected by the use of unreliable testimony by the claimant.

The Commission has not been misled by any inaccurate evidence. Mr. Mallén suffered a grave injury. This occurred in a community in which he had served for a long period of time as a consul. There is considerable evidence in the record indicating that as a cultured and capable official he served with credit to his country and to himself. The record reveals not only an absence of prompt and effective processes of law to bring about the punishment of a wrongdoer but also evidence of a condonement by officers of the law of the injury inflicted upon Mr. Mallén.

Decision

The Commission decides that the Government of the United States of America is obligated to pay to the Government of the United Mexican States on behalf of Francisco Mallén \$18,000 (eighteen thousand dollars), without interest.

Dissenting opinion

1. I concur with the opinion of the Presiding Commissioner, which finds after a careful analysis of this case that the United States is responsible on three grounds: (a) for the wrongful acts which Deputy Constable Franco committed against claimant, Mallén, on October 13, 1907; (b) for denial of justice resulting from the non-fulfilment of the sentence imposed on aforesaid Franco on November 9, 1907; and (c) for failure to give protection to Mallén.

2. However, I entertain serious doubts about the point of view stated by the Presiding Commissioner in paragraph 13 of his opinion in endeavoring to establish and determine the material losses and damages which were caused to Mallén by the second assault committed against him by Franco. In fact, it seems to me that, considering the evidence presented, a link can reasonably be established between the serious blows received by Mallén at the hands of Franco and the subsequent illness which the victim suffered in the ear since almost immediately after the assault.

3. Of course, it is proven that said assault was brutal and dangerous. The physicians who testified in the proceedings which were instituted against Franco, agreed that the blows which Mallén received were very severe and struck at a highly delicate part of the head. Dr. Vilas testified that, when he saw Mallén, "he had the appearance of having recently passed through a threshing machine or something of that kind", that he had "several bruises and contusions, one particularly bad on one side of the temple, in front and above the ear * * *"; and referring to the latter, he stated that it was "quite a serious wound", adding "I consider that a little bit more there would have been very dangerous to life. It is in a very dangerous locality; that portion of the skull is very thin and that wound was in a very dangerous place". Dr. Anderson testified that Mallén had "a long cut on the side of his head—on his temple, * * *" and when he was asked if, in his opinion, a blow on that part of the head could produce serious injury, he answered "yes" without hesitation. Dr. Bush testified that the cut over the right ear was "evidently the result of a blow", and when he was asked if a blow over the ear, in that part of the head, could result in serious bodily injury, he answered that "it might", adding that the wound "might become infected and produce blood poisoning or a blow there might have fractured the skull". It is true that the aforementioned physicians testified that they did not believe the wounds could be serious; but this was at the time of rendering their testimony; that is, on the day when the trial of Franco was held, and, at any rate, it appears from the statements of the physicians and from those of the eyewitnesses of the assault which Mallén suffered, that the blows struck by Franco were of a brutal character. It is highly regrettable that the authorities of Texas should not have waited for a sufficient time, as is done in other countries, when it is a question of determining the importance of injuries caused a person, but that they should have satisfied themselves with the statements,

in the nature of ordinary testimony rather than expert testimony, of the three aforesaid physicians, which were rendered during the proceedings instituted against Franco on November 7-9, 1907, that is to say, twenty-six days, at most, after the date when Mallén had received the blows. At any rate, it is evident, by the statements of said physicians, that the lesions were grave and in a part of the head where they could cause not only serious but fatal consequences. It seems that the physicians satisfied themselves with simply giving their opinion on the external aspects of the injuries, and that they never considered the possible internal consequences thereof.

4. It seems that Dr. Anderson continued to treat Mallén until November 12, 1907, on which date he issued him a receipt covering fees for professional services. It is not known whether these services of Dr. Anderson terminated on that date or whether they continued to be rendered. The only thing which appears in connection with the illness which claimant considers a consequence of the blows, is his entrance in the hospital of Dr. Urrutia on February 2, 1908, and his operation—February 4th of the same year—on the right mastoid region, as evidenced by a certificate of Doctors Urrutia and Cañas issued on July 3, 1908. This certificate is very important, and to weigh it, is it necessary to analyze the different facts it certifies. Of course it is reasonable, and in accord with the rules of evidence accepted among civilized countries, that such certificate must constitute full evidence as regards everything which the certifier had before his eyes and examined, and that it has no evidential weight with respect to the other circumstances to which he refers. In said document, Doctor Cañas and Urrutia certify the following facts: (a) that Mallén entered the sanatorium managed by Cañas, on February 2, 1908; (b) that he entered to cure himself from a suppuration of the right ear; (c) that it was necessary to operate on him immediately on account of the appearance of symptoms of meningitis which placed his life in serious danger; (d) that the operation was carried out on the 4th of the same month and that the operating surgeons found a purulent focus in the mastoid region and in the temporal channel which communicated with the skull, rendering necessary the trepanization and complete drainage of the channel; (e) that the focus was under treatment two months; (f) that on July 3, 1908 (the certificate says "at present"), the patient suffered from slight perturbations in the ear and pains which radiated from the skull, for which reason he was recommended to follow a very moderate and methodical life for some time and to abstain from all hard work; (g) that the lesion originated in a wound over the temporal region; and (h) that according to the physicians who attended the patient in El Paso, Texas, during the month of October of last year, the direct and sole cause of the disorder referred to was a contused wound with a purulent discharge from the ear and probable fracture of the bone. The aforesaid certificate contains nothing further, and if given slight consideration, it is readily seen that all the facts specified under headings a, b, c, d, e, f and g, are facts which the two surgeons, who operated on the claimant, had before their eyes and in their hands, for which reason they have to be given full faith and credit as regards such facts. On the other hand, the certification under letter "h" is only an explanation of the manner in which the lesion with a traumatic origin was caused on the temporal region; this explanation is given by them, attributing it to the physicians who attended the patient in El Paso, and they probably received it from the lips of the claimant himself, who transcribed, in part at least, the opinion of said physicians of El Paso. Perhaps nothing further is necessary to connect with a relation of cause

to effect, the lesions which Mallén received in October and the ills which had developed in him during the first months of 1908. In fact, the testimony of the physicians of El Paso shows that the blows, as already stated, were very severe and in a dangerous region. Doctors Urrutia and Cañas certify that Mallén entered their sanatorium to be operated at once for a suppuration of the ear, and they also certify (letter "g") that the lesion originated in a wound over the temporal region. It is not venturesome to infer that blows of the kind received by Mallén, could produce, within the period of less than three months, an abscess in the contused region, which might place the patient's life in danger due to its communication with the skull. Cañas and Urrutia had Mallén under observation at a time when it was surely easy to discover the scars of the blows and, taking into consideration their medico-legal experience, they had all reason to attribute the abscess to the blows which caused the exterior wound that was visible to them. During the oral arguments, there were read opinions of distinguished medico-legal experts who affirm that strong blows inflicted on the head can produce abscesses, either on the side struck or on the opposite side; and it must be remembered that Mallén received blows on both sides of the head; on one by Franco's fist and, on the other, by rebound against the walls of the street car.

5. But there is still more evidence. The same Dr. Urrutia, in a letter of March 9, 1927, states that he received Mallén from the hands of Dr. Rafael Caraza and that the latter indicated to him that, in his opinion, "an ample trepanization on the lateral cavity was indispensable, because, in his opinion, the patient, Mr. Mallén, had a cerebral abscess of traumatic origin and flebitis of the lateral cavity, which endangered his life"; and Urrutia adds that, in passing the surgical case, Dr. Caraza "did so in request of urgent professional services which, if not rendered, would cause, to use his own phrase, the death of the patient". Here again we find the indication, that the illness was of a traumatic origin, expressed by a physician (Caraza) who treated Mallén, according to this second statement of Urrutia, a month more or less before his entering the hospital, which fixes this time within the month of January. In this way the two certificates of Urrutia complement each other, and as there is no evidence, as the Presiding Commissioner reasonably avers, that Mallén would have received another blow between October and February, it is logical to suppose, it is insisted, that the blows struck by Franco were the ones that produced the abscess which Caraza found and Urrutia had in sight when he operated on him. There is nothing in the record, furthermore, which may prove that claimant suffered ear trouble before the events of October, 1907, and even supposing that such illness existed, there would remain the possibility that it might have been aggravated by the brutal contusions suffered by Mallén.

6. There remains to be explained why Urrutia did not refer at all to Dr. Caraza in his observations, in the first certificate. It may be conjectured that Urrutia did not believe necessary to make reference to what he states in his second certificate, because it was sufficient to certify his own discoveries logically attributable to the traumatic origin revealed by a recent scar on the temple (either of the temples): perhaps he only referred to the physicians of El Paso in order to establish merely the form of the traumatism, and he did not take care to check up what Mallén probably attributed to them. Anderson or the other physicians certainly did not say that there was otorrhoea, although they did indicate that a blow of the kind received by Mallén could cause fracture of the bone. Dr. Anderson, who continued

to treat Mallén after Franco's trial, said nothing with respect to the abscess found by Caraza and Urrutia, but his silence can be explained by the fact that this class of diseases do not develop rapidly and do not have marked external symptoms at the beginning. Anderson, and even Mallén, thought, perhaps, that the effect of the blows had disappeared, but shortly after, at most one month, Mallén began to suffer again and he consulted Dr. Caraza, who made the first discovery of the traumatic abscess.

7. The physicians who subsequently treated Mallén certify to the delicate condition of his health as a result of his illness in the temporal region, and they equally certify that as consequence of such illness, the sense of hearing in the right ear has been almost completely lost. The other details of those certificates can be placed in doubt, but they are not essential.

8. For the above reasons, I believe that the United States must indemnify Mallén, in addition to the grounds set forth by my colleagues, for the material damage suffered by him in the loss of hearing in the right ear.

AMERICAN SHORT HORN BREEDERS' ASSOCIATION (U.S.A.)
v. UNITED MEXICAN STATES.

(April 27, 1927, concurring opinions by American Commissioner and Mexican Commissioner, April 27, 1927, Pages 280-285.)

CONTRACT CLAIMS.—AUTHORITY OF AGENT.—CLAIM IN RESTITUTION. Claimant shipped cattle to fair sponsored by Mexican Government or agency thereof under a guarantee against loss made by a purported agent of Mexico. Cattle were never redelivered to claimant or payment made therefor. *Held*, insufficient evidence furnished as to exact terms of guarantee, the making of such guarantee, and authority of agents purporting to act on behalf of Mexican Government.

Cross-reference: Am. J. Int. Law, Vol. 21, 1927, p. 802.

Van Vollenhoven, Presiding Commissioner:

1. This claim is asserted by the United States of America on behalf of the American Short Horn Breeders' Association, an American corporation, against the United Mexican States to recover the sums of \$1,220 and \$1,645, with interest thereon. The claim is predicated on two different counts.

2. In the first place, it is alleged that the Industrial Agent of the Mexican National Railroads, by name J. B. Rowland, induced the claimant in December, 1922, and subsequent months, to participate in a cattle exhibition at Mexico City in the Spring of 1923; that he guaranteed the association the price of the cattle left unsold or unpaid for at the close of the exhibition; and that, instead of fulfilling this guarantee, cattle of the value of \$1,220 were neither paid for nor redelivered. The Industrial Agent, it is alleged, is a Mexican official, or at any rate one "acting for" the Mexican Government; the exhibition, it is alleged, was a Government affair; Mexico, therefore, should be held responsible.

3. The record as submitted is incomplete and meager. It is worthy of note that the Memorial combines the facts of this first count of the present claim with the facts of its second count and of two other claims (Docket Nos. 2403 and 3217) which are essentially different and should be carefully separated.

4. About December 1, 1922, Rowland came to Chicago, Illinois, U.S.A., to take up with the claimant its willingness to ship cattle to the Mexico fair. Claimant establishes that it only knew him in his capacity of Industrial Agent of the Government-owned Mexican National Railroads. The exposition would be held from March 29 to April 5, 1923. The Government patronized and subsidized it in several ways. The claimant apparently was unwilling to participate unless he were given a guarantee; the only contract alleged by the claimant is to the effect that Rowland, on behalf of Mexico, undertook to give such guarantee. A telegram sent to the claimant on January 25, 1923, by one Treviño, quoting another telegram by Rowland himself states, "Stock guaranteed from exposition to date" —a sentence which would seem garbled. On February 11, 1923, Rowland's associate Abbott wrote: "Mr. Rowland is now in Mexico City, where he will take up with the Department of Agriculture, as well as the Director General of Railways, the matter of some form of guarantee that should satisfy all of the Associations"; on February 18, 1923, Rowland wired from Mexico City; "Arrived here today find letter asking guarantee am arranging agricultural department take any surplus stock Abbott sending detailed letter on orders everything very satisfactory"; and on February 21, 1923, there followed a telegram from Mexico City by the same Rowland reading: "Will guarantee carload" (follows description of carload desired). The link between the two last telegrams is such as to render acceptable an interpretation by the claimant to the effect that it was the Department of Agriculture at Mexico City which guaranteed that, in case not all of the cattle shipped were sold or paid for, this Department would take the surplus stock and pay its market value.

5. Acceptable though such an interpretation may have been, it is doubtful whether the Commission is warranted in fixing a liability on Mexico exclusively on an assumption of this kind. Neither Rowland nor his associate Abbott, a private man as far as the record shows, ever mentioned in their dealings the Government or the Mexican Railroads as the party concerned; goods were shipped to Rowland, checks accepted from Rowland, complaint of nonfulfillment of promises lodged with Rowland, as is shown by Rowland's letter of May 21, 1923. The claimant was right and was acting in a business manner by requesting a guarantee before taking the risks of shipping cattle to Mexico; but he did not ascertain who it was that gave the guarantee mentioned in the telegram of February 21, 1923, nor what was guaranteed. From Abbott's letter of February 11, 1923, stating that Rowland would "take up with the Department of Agriculture" the matter of "some form of guarantee" it should have been sufficiently clear that, without special authorization, Rowland could not give a guarantee binding on the Mexican Government. The record does not show that the claimant made any inquiry as to the author and the contents of the guarantee referred to in Rowland's telegram of February 21, 1923. It would seem, therefore, that the Commission can not, on the evidence presented, consider Mexico as having given through Rowland the guarantee the claimant desired; and if this causes the Association a disappointment, it suffers from its own lack of sufficient care.

6. The second count of the claim is based on the fact that in the fall of 1923 there was to be another cattle exhibition at Mexico City, and that once more Rowland came to Chicago (September, 1923) to invite the claimant to participate. The Association shipped cattle in the value of \$1,645 (costs and charges included), and did not receive any money nor were the cattle redelivered. The claimant had already experienced that the outcome of a cattle exhibition in Mexico might not measure up to Rowland's expectations; its participation in the fair of March-April, 1923, had ended in an unpaid check "a few months after the exposition". With respect to the second count of the present claim there is not even a suggestion of the existence of some guarantee or similar contract—the record merely states that "an order for (this) livestock * * * was placed"—nor is there evidence that the Mexican Government actually received and retained for its benefit the claimant's animals.

7. On the grounds stated the claim should be disallowed.

Nielsen, Commissioner:

I am of the opinion that the claim must be disallowed. Unfortunately, the evidence in this case is of such an uncertain character that it is not possible to reach a positive conclusion with respect to the nature of the transaction entered into by J. B. Rowland and the claimant. The contentions with respect to the validity of the claim appear to rest on two propositions, namely, (1) Rowland acted as a representative of the Government of Mexico which is responsible for the nonfulfillment of the undertakings which he entered into with the claimant; and (2) Rowland entered into a contract with the claimant to sell cattle which the association exhibited, to remit the proceeds of sales to the association, and to pay the association for cattle not disposed of to private purchasers.

The precise relation of the Mexican Government to the exposition to which the cattle were sent and Rowland's status as a representative of that Government are controverted questions, which, in the view I take of the case, need not be considered in reaching a decision, because in my opinion there is not in the record evidence which could justify the Commission in reaching the conclusion that Rowland undertook to make sales of all cattle shipped, and to pay the claimant an agreed value of all cattle not sold to private purchasers.

To be sure there is evidence indicating that such an agreement may have been made, or that the claimant's representative may have thought that the interviews and correspondence with Rowland resulted in such an agreement. But in my opinion there is not evidence to justify the Commission in holding that such an agreement was actually consummated. There is evidence of an understanding that Rowland should undertake to obtain orders from Mexicans desiring to purchase stock placed upon exhibition, and that stock should only be sent when purchasers were found. In a communication addressed under date of February 11, 1923, to F. W. Harding, an official of the American Short Horn Breeders' Association, it was stated that Rowland would take up with the Department of Agriculture and with the Director General of the Railways the matter of "some form of guarantee that should satisfy" the associations interested in the exposition. In a telegram sent by Rowland to Harding under date of February 21, 1923, it is stated that the former will guarantee a certain number of cattle. But it is not possible on the strength of evidence of this character to reach the conclusion that the legal effect of the guarantee

mentioned, whatever may have been its precise character, was a contractual obligation in the nature of that upon which the claim apparently is grounded. Evidence with respect to the final disposition of the stock shipped for which the claimants were not paid might throw light on this point, and also on the broader question of the responsibility of the Mexican Government in connection with the transactions underlying the claim. But no such evidence is found in the record. I am of the opinion that the record is wanting in certainty and sufficiency of evidence upon which to predicate the consummation of a contract.

While my conclusions with respect to a proper decision in the case are based solely on this point, I may observe that it seems to be doubtful that there is evidence upon which a conclusion could properly be grounded to the effect that Rowland so represented himself to the claimants that they were justified in believing that he, as a representative of the Mexican Government, acting within the scope of his authority, undertook to bind the Government of Mexico to see to it that the claimants were paid for the cattle shipped to Mexico. The decision in the *Trumbull* case cited by the United States. Moore, *International Arbitrations*, vol. 4, p. 3569, was apparently grounded on the theory that the United States was liable to make compensation for services obtained by an American Minister in connection with an extradition case because he had made a promise in the name of his Government which, according to rules of responsibility of governments for acts performed by their agents in foreign countries, could not be repudiated.

Rowland evidently informed the claimant of certain privileges granted to exhibitors with respect to customs duties and railway rates. But the fact that he was in a position to do this is no clear indication of his representative character. I presume that remission of customs duties which was promised to the claimants is something that governments usually grant to foreign exhibitors in connection with expositions over which they have no direct control. In the instant case it may readily be perceived that the Mexican Government, being in charge of railway operations in Mexico, could see fit, in view of its desire to encourage and assist the exposition, to grant reductions in railway rates.

Fernández MacGregor, Commissioner:

I concur with the statements of fact and law made by the Presiding Commissioner and with his conclusion that the claim must be disallowed.

Decision

The Commission decides that the claim of American Short Horn Breeders' Association must be disallowed.

WAUKESHA COUNTY HOLSTEIN-FRIESIAN BREEDERS'
ASSOCIATION (U.S.A.) *v.* UNITED MEXICAN STATES.

(April 27, 1927, concurring opinions by American Commissioner and Mexican Commissioner, April 27, 1927. Pages 285-287.)

CONTRACT CLAIMS.—AUTHORITY OF AGENT.—CLAIM IN RESTITUTION.
Claim arose under similar circumstances to those of *American Short Horn Breeders' Association* claim *supra*. Disallowed for lack of evidence.

Cross-reference: Am. J. Int. Law, Vol. 21, 1929, p. 802.

(Text of decision omitted.)

AMERICAN SHORT HORN BREEDERS' ASSOCIATION (U.S.A.)
v. UNITED MEXICAN STATES.

(April 27, 1927, concurring opinions by American Commissioner and Mexican Commissioner, April 27, 1927. Pages 287-289.)

CONTRACT CLAIMS.—AUTHORITY OF AGENT.—CLAIM IN RESTITUTION.
Claim arose under similar circumstances to those of *American Short Horn Breeders' Association* claim *supra*. Disallowed for lack of evidence.

Cross-reference: Am. J. Int. Law, Vol. 21, 1927, p. 802.

(Text of decision omitted.)

GEORGE ADAMS KENNEDY (U.S.A.) *v.* UNITED MEXICAN
STATES.

(May 6, 1927, concurring opinion by American Commissioner, May 6, 1927. Pages 289-301.)

DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH.—INADEQUATE PUNISHMENT. An American subject was fired upon by a Mexican, as a result of which he was hospitalized for several months and permanently crippled. The guilty person was sentenced by a Mexican judge to two months' imprisonment, in a sentence which was not pursuant to Mexican law. *Held*, denial of justice established in inadequacy of punishment imposed.

FAILURE TO PROTECT. Evidence *held* not to establish a failure to extend protection.

MEASURE OF DAMAGES. Damages measured in part pursuant to rule of *Janes* claim *supra*.

Cross-references: Am. J. Int. Law, Vol. 22, 1928, p. 174; British Year-book, Vol. 9, 1928, p. 158.

Fernández MacGregor, Commissioner:

1. This claim is presented by the United States of America in behalf of George Adams Kennedy, an American citizen, against the United Mexican States, demanding the amount of \$50,000.00, with proper allowance of interest thereon, on account of damages suffered by the claimant, who received a wound in the right leg at the hands of Manuel Robles, a Mexican, on November 5, 1919, in San Javier, Sonora, Mexico. The claim is based (1) on a denial of justice resulting from the failure of the Mexican authorities to take adequate measures for the apprehension and punishment of the persons who, together with Robles, assaulted him, and resulting from the fact that although said Robles was arrested and judged, the proceedings were irregular, with the consequent result that a punishment was imposed on him out of proportion to his crime; and (2) on failure of the aforesaid Mexican authorities to give protection.

2. Briefly summarized, the facts on which this claim is based are as follows: claimant, George Adams Kennedy, was employed as assistant manager and engineer of the W. C. Laughlin Company, which company operated the Animas Mine in San Javier, Sonora, Mexico. It seems that at the time of the events, trouble had arisen between the company and the Mexican employees due to certain exactions on the part of both sides, and that three of the employees, including Manuel Robles, were the chiefs and representatives of said employees; that the company discharged, first, one of the three aforesaid men (November 3, 1919), and that in the morning of the next day (November 4th) placards were found attached to the mine office door and at the shaft of the mine inciting the employees to go on strike; that said placards were sent to the Municipal President of the town of San Javier, to place the matter before him and ask for the necessary protection—which was done orally and confirmed through a letter; that on the same date (November 4th) the other two chiefs or representatives of the workmen were discharged from the company for the best interest of the service; and then, as alleged, made threats against the officials of the company; that later on it was learned, through a shift boss, that the three discharged men were in the plaza of the town of San Javier inciting their companions to strike, for which reason said shift boss was sent to see the Municipal President of the town to inform him of the situation and demand of him that the police be present at the mine at 6.30 o'clock on the following morning, although there is no positive evidence that the Municipal President actually received this second demand for special protection.

3. At 6.30 o'clock in the morning, on November 5th, when the employees came in, Robles and one of the other discharged men appeared and advised their companions not to go to work. Robles demanded from Kennedy and the timekeeper of the mine, a notice which had been posted and which required the employees to come thirty minutes earlier than the usual hour, and upon such demand being refused, he started to argue with Kennedy. The latter alleges that Robles thereupon threatened him with his gun; that he, Kennedy, grasped it and attempted to take it away. A moment

of confusion and struggle followed. Kennedy says that some of the workers, whose names he does not know, dealt him some blows which knocked him down causing him to loose his hold on the gun of Robles; that the latter stepped back; that Kennedy caught a piece of pipe and threw it at Robles, who was able to dodge it, and, then, said Robles fired upon and wounded Kennedy in the right thigh. Robles and the eye-witnesses agree that the former did not fire until Kennedy threw the pipe at him, but they leave in doubt as to whether Robles had previously drawn his gun. Kennedy was subsequently taken up and his wound treated. The local magistrate immediately took notice of the matter and arrested Robles, placing the latter at the disposal of the local judge of San Javier, who proceeded to initiate the prosecution, appointing at once experts to examine the victim of the attack and taking the statements of all the persons who took part in the events or were witnesses thereof. The first proceedings having been concluded, the cause was remitted to the Judge of First Instance of Hermosillo to continue the prosecution. Kennedy left the next day (November 6th) for Nogales, Arizona, U.S.A., where he arrived, after a painful trip, in the night of the same day and was taken to St. Joseph's Hospital. He was operated upon on November 11th and remained in the hospital for four months, after which he went to Denver, Colorado, United States of America, where he arrived on April 1, 1920. On April 3rd, he underwent another operation in the right leg, which left it in a bad condition, for which reason he had to undergo other operations, also unsuccessful, that have left him permanently crippled. In the meantime, the prosecution of Robles before the Judge of First Instance of Hermosillo was continued, said Judge having rendered, on March 2, 1920, a decision sentencing Robles to two months' imprisonment, but he immediately released him, as he had already been kept in jail five months. The sentence became final, because neither of the parties appealed from it.

4. In view of the foregoing facts, it is alleged, chiefly, that the procedure followed by the Mexican Judge and his findings resulted in a denial of justice: (a) because the persons who took part in the attack provoked against Kennedy, were not punished: and (b) because a punishment was imposed on Robles notoriously out of proportion to the criminal act he committed. There is not sufficient evidence in the record to show that Kennedy may have been assaulted by other persons, outside of Robles; for, although it is true that Kennedy alleges that a young man who was standing near Robles at the time of the scuffle, struck him on the head with the lamp, and that some others did the same thing, also seizing his hands to break his grip on the gun; on the other hand, Robles, as well as seven eyewitnesses ignore such allegations. In the confusion that followed the act of the fight between Kennedy and Robles, nobody probably realized exactly what was happening, and Kennedy himself affirms that he thought at first that the men who intervened "were trying to intervene so that Robles would not shoot him". In view of these circumstances and the evidence which he had before him, the judge in the case could not, surely, consider guilty any other person than Robles, who had confessed his crime. It can not, then, be said that there may be a denial of justice on this ground.

5. The second ground on which a denial of justice is based, is, that the sentence of two months' imprisonment imposed on Robles is out of proportion to the seriousness of his crime. This assertion seems justified. In fact, I think that the international duty which a state has duly to punish those who, within its territory, commit a crime against aliens, implies the obliga-

tion to impose on the criminal a penalty proportionate to his crime. To punish by imposing a penalty that does not correspond to the nature of the crime is half punishment or no punishment at all. In order to reach the conclusion that the shooting was a very malicious act, it is sufficient to note that it was Robles who provoked the quarrel; that Kennedy was unarmed at the moment when he was fired upon; that the Mexican Prosecuting Attorney and judge discard the theory of self-defense; that the nature of the wound inflicted was serious. The Commission has repeatedly expressed the repugnance it feels for the frequent and reckless use of firearms, and in the instant case one can do no less than think that it is a question of a serious aggression. The mere description of Kennedy's wounds shows their seriousness; the first medical report that was given, immediately after the events (November 5th), says that the principal wound "is in the front part of the right thigh and near the groin * * * that the bullet penetrated, crossing the muscles and breaking the femur bone in the third superior section, and remained imbedded in the exterior part below the right hip, from where the bullet was extracted, which was found about to come out". Said report adds that "that wound, although serious, does not, *for the moment*, endanger the life of the wounded person, but it can later place it in danger if complications result". A sentence of two months' imprisonment for such a wound is a disproportionate penalty, and it can almost be said that it is an inducement for the commission of crimes of that kind. A municipal law which would oblige the judge to impose penalties of this nature could be considered, perhaps, as outside of the standards used by civilized countries. But no such charge can be made against Mexican law. As a matter of fact, the Penal Code of Sonora, Mexico, on the question of injuries, adjusts the penalty to their importance and their results, and for that purpose requires that no case involving personal injuries may be decided before the expiration of sixty days from the date on which the crime is committed, in order that the judge may know the probable result of such injuries, before imposing the sentence (Article 434). Furthermore, it provides that upon the expiration of the sixty days, two medical experts shall state the certain, or at least the probable, result of the injuries, and that having in mind such statement, final decision may be pronounced (Article 435). In the present case, the judge, for some inexplicable reason, did not comply with the requisites of his domestic law. It has been alleged that the record contains the medical certificate which described the wounds and to which reference is made above; that later, on December 27, 1919, the same physician who rendered the first certificate, together with a practical expert, certified that the wound received by Kennedy was not of the kind which necessarily endangers life and that it would take six weeks to two months to heal, without its resulting in the permanent incapacitation of the injured member, and that said expert opinion is sufficient, according to a provision of the Code of Criminal Procedure of Sonora (Article 111); that the diligence of the Mexican authorities in this respect, is shown by the fact that, in addition, the Prosecuting Attorney filed a motion on January 13, 1920, asking for a report on the condition of the patient from the physicians who were attending him at the St. Joseph's Hospital, in Nogales, Arizona, which motion was allowed by the judge, who, on his part, appointed two other physicians, Mexicans, who were to examine Kennedy, in pursuance of which letters rogatory were issued to the Judge of First Instance of Nogales, Mexico; it being further alleged that Mexican authorities are not responsible because of the failure to render

such report, and that the judge could not wait indefinitely, in view of the fact that the Mexican Constitution prescribes a maximum period within which the delinquent must be tried. We can not take into account such allegations, because the first medical certificate referred only to the wound at the time it was received; because the second certificate could in no manner help the judge to know the condition of the wounded man at the time of the trial, inasmuch as the physician and the practical expert, who issued such certificate and who were in San Javier, admit that they did not have before them the wounded man, as he was already in United States territory; and because the judge could have made urgent representations to the end that the physicians of the two towns of Nogales, who had later been appointed, would issue their certificate in time, as it must be taken into consideration that such certificate was requested on January 13, 1920, and sentence was not pronounced until March 2 of said year. It is true that the fact that the wounded man was absent made the completion of the proceedings more difficult; it is true that Kennedy's attorneys failed to take the necessary steps in order that the report would be rendered; however, the judge, on finding himself obliged to render judgment bound by the aforesaid provision of the Mexican Constitution, could have based himself, in imposing the sentence, on the nature itself of the wound, at least as described by the first medical certificate, which has all the aspects of being conscientiously made. The result of all was, that the judge ignored the seriousness of the injury suffered by Kennedy and that, exclusively basing his decision on the milder and conjectural certificate of December 27th, he imposed a penalty which was not the proper one for the crime of Robles, and even intentionally imposed the minimum of the inadequate penalty, basing his decision on the extenuating circumstance of confession on the part of Robles, when he had latitude to impose, at least, a longer term of imprisonment between two months and one year. In view of all the foregoing, it seems that there was negligence in a serious degree, and that such negligence constitutes a denial of justice.

6. Much stress has been laid upon the fact that the Mexican judge states in his sentence that the facts relating to the circumstances of the offence committed by Robles are supported by a document addressed by 54 laborers of the mine to one Leopoldo Ulloa, which document is contained in the record of the proceedings. That fact, it is deemed, can prove that the judge allowed himself to be unduly influenced. It is evident that such document could not be taken into consideration by the judge, because it lacked the requisites of evidence legally rendered, and that, therefore, the judge should not have even mentioned it in his sentence. But inasmuch as the judge did not avail himself of it, except to corroborate the circumstances of the offense that were already proven by statements of witnesses rendered according to law, the aforesaid fact does not reveal a serious transgression.

7. With regard to the allegation of failure to give protection, the following may be said: it seems that, notwithstanding the serious disturbances which occurred in that region—one of them being the insurrection of the Yaqui Indians—American lives and property in the mining district of Las Animas had been given adequate protection by the Mexican authorities; there is evidence that escorts had been furnished for the transportation of the company's minerals. On the other hand, there is no evidence that there may have been failure to maintain the usual order which it is the duty of every state to maintain within its territory. The question lies in knowing whether the special demand for protection made by the American employees

of the mine, due to the labor problems which had arisen between the management and the workmen, was such as to require the Mexican authorities to take extraordinary measures. The first alleged demand for protection was that made orally and later confirmed by letter to the Municipal President of San Javier on November 4th; it referred to threats of a strike and other vague threats made by the discharged workmen, the letter sent to the Municipal President mentions "difficulties between the company and its workmen in the mine", the interference by a worker called Rendón, who had repeatedly made threats against his chiefs, which threats are not specified, and it ended saying: "this company respectfully brings this matter to your attention requesting you to take the matter in hand and prevent the said Mr. Rendón from continuing in the interference of the operation and business of this mine". It seems that the Municipal President promised to attend to the matter. Taking into account the circumstances set forth by the company, I do not see that it might be a question of imminent danger which would require urgent measures either that very day or at the beginning of the next day. The second more definite demand for protection was made, according to Kennedy and an American companion of his, after Robles and another fellow worker were discharged, on November 4th, after 9.30 at night, through one Dominguez. The Municipal President was asked to send a *police officer* at six-thirty the following day, November 5th, to "arrest" the "agitators" and, if necessary, "to prevent their interfering with the shift going to work". There is not sufficient evidence that this second demand reached the Municipal President; Mexico might perhaps have cleared up this doubtful point. However, considering the evidence in the record, it seems to me that it is not possible to establish any responsibility on the part of Mexico for failure to give protection.

8. In view of the foregoing, I believe that this claim can be properly grounded only on a denial of justice resulting from the failure to have imposed on Kennedy's aggressor a punishment commensurate with his offense; but, taking into account that the irregularity imputed on the procedure of the Mexican judge was to a certain extent due to the lack of diligence on the part of claimant's attorneys and physicians, taking into account, further, that it is a question of indirect responsibility, and the principles mentioned in paragraph 25 of the opinion rendered in the *Janes* case, Docket No. 168, I believe that the sum of \$6,000.00 (six thousand dollars) is an adequate award.

Van Vollenhoven, Presiding Commissioner:

I concur in Commissioner Fernández MacGregor's opinion.

Nielsen, Commissioner:

On November 5, 1919, George Adams Kennedy, an American citizen, was shot at San Javier, Sonora, Mexico, by a Mexican citizen, Manuel Robles, seriously wounded, and evidently permanently crippled. The United States contends that the Mexican authorities at San Javier had been warned that Robles and others were dangerous agitators who were inciting the workmen in a mine at that place to interfere with the operations of the mine, and that the authorities failed to afford protection against the activities of these agitators. It is further contended that no proper steps were taken to prosecute persons who assaulted Kennedy, and in particular that there was a miscarriage of justice in connection with the trial of Robles.

Numerous citations were made in the brief of the United States from the works of writers on international law with regard to the duty of a state to take appropriate action to prevent injuries to aliens. The general rule on this subject is, of course, well established. But cases involving complaints of lack of protection often present difficulties, in that evidence is vague and scanty on the important point whether authorities have been put on notice with respect to apprehended illegal acts.

An indemnity in the sum of \$40,000 was paid by the United States to the Government of Greece on account of destruction of property belonging to Greek subjects and personal injury inflicted on them in the City of South Omaha in the year 1909. Public, No. 207, 65th Congress. An interesting point in connection with this case was the question whether a mass meeting held by citizens of the city shortly before the riot began was a warning to the local authorities of a possible riot. The meeting was prompted by a feeling of hostility which existed among the people of the city against the Greeks, who were said to be guilty of offensive conduct and unlawful acts. One of them on the day previous to the meeting had killed a policeman. The Government of the United States did not admit legal liability in the case, but did, however, pay an indemnity as an act of grace without reference to the question of liability. *House Reports*, vol. 1, 64th Cong., 2nd Sess., 1916-1917.

In the *Home Missionary Society* case, under the Special Agreement of August 18, 1910, between the United States and Great Britain, claim was made by the United States on account of losses sustained during an insurrection in the British Protectorate of Sierra Leone in Africa in 1898. It was argued in behalf of the United States that representatives of the British Government in the Protectorate had notice that the natives regarded a so-called "hut tax" imposed on them as unjust, and that forcible resistance, dangerous to the lives and property of foreigners, would be made to the collection of the tax. *American Agent's Report*, p. 421. The tribunal held that the imposition of the tax was a legitimate exercise of sovereignty, and, further, that, although it might be true that some difficulty might have been foreseen, there was nothing to suggest that it would be more serious than is usual and inevitable in a semibarbarous protectorate and certainly nothing to lead to widespread revolt.

The difficulties with respect to evidence inherent in cases of this nature exist in the present case. The Mexican *Presidente Municipal* at San Javier was informed during the course of an interview which he had with Kennedy that certain employees in the mine were instigating discord between workmen and the so-called shift bosses. Placards inciting the men to strike were brought to the notice of the *Presidente*, and he was requested to prevent the agitators from interfering with the operation of the mine. A communication dated November 4, 1919, was delivered to the *Presidente*, calling attention to the activities of Victoriano Rendón, a discharged employee, stating that Rendón was inciting the employees of the mine to insubordination and disturbances and was threatening his chief, and requesting that steps be taken to prevent Rendón from continuing in the interference with the operation and business of the mine. In the Memorial is printed a sworn statement made by Kennedy to the effect that he sent an employee of the mine, Trinidad Dominguez, to the *Presidente* with instructions to inform the latter that Robles and two other discharged employees had been in the so-called Plaza inciting the men to strike and threatening violence to any who might go to work on the following day, and that a demand

was made of the *Presidente* to send a police officer to the mine at 6.30 o'clock in the morning on the following day to arrest the agitators if necessary and to prevent interference with the miners in going to their work. There is no testimony that Dominguez delivered the message other than the sworn statement of Kennedy that he had the assurance of Dominguez that the latter delivered the message immediately on leaving the office of the mine. It would seem, however, that if it were not delivered, testimony to that effect might have been furnished by the Mexican Government. The mine which employed several hundred men was an important industrial plant and presumably one from which the local community derived much benefit. Undoubtedly there was abundant reason why the local authorities should be solicitous to afford protection to persons and property at the mine in case they had warning of threatened violence to life or property.

The record leaves some doubt as to the specific nature of the warning given to the Mexican authorities. The *Presidente* at San Javier was evidently informed that the operators of the mine had had difficulties with some workmen. It is not entirely clear to me that the duty to give protection was suitably performed, but in the light of the general principles which the Commission has announced in the past with respect to the necessity for grounding pecuniary awards on convincing evidence of improper governmental administration, I am not prepared to say that the charge of lack of protection can be maintained.

In considering the contentions advanced by the United States with regard to the impropriety of the proceedings instituted against the person who shot Kennedy, the Commission of course must have in mind the general principles asserted in behalf of Mexico with regard to the respect that is due to a nation's judiciary and the reserve with which an international tribunal must approach the examination of proceedings of domestic tribunals against which a complaint is made. As said by counsel for Mexico, such a tribunal of course does not act as an appellate court, but it is not precluded from making a most searching examination of judicial proceedings, and it is the duty of a tribunal to make such an examination to determine whether the proceedings in a given case have resulted in a denial of justice as that term is understood in international law. The principles which must guide the Commission in a case of this character were stated to some extent in the separate opinions written in the *Neer* case, Docket No. 136. There are numerous cases in which international tribunals have been called upon to examine the propriety of proceedings of domestic tribunals. See for examples, decisions in prize cases and other cases, cited in Dr. Borchard's *Diplomatic Protection of Citizens Abroad*, p. 342. See also the case of *Cotesworth and Powell*, Moore, *International Arbitrations*, vol. 2, p. 2050; the *Rio Grande* case under the Special Agreement of August 18, 1910, between the United States and Great Britain, *American Agent's Report*, p. 332; the *Brown* case, *ibid.*, p. 162; and the *Webster* case which was concerned with the action of quasi-judicial tribunals, *ibid.*, p. 537.

I agree with the conclusions stated in Commissioner MacGregor's opinion to the effect that the imposition of a sentence of two months' imprisonment on Robles was clearly an inadequate penalty for the grave crime which he committed. If Mexican law had required this penalty, the wrong resulting from the inadequate sentence should be predicated on the character of the law itself. But I think it is clear that the law authorized and required the infliction of a more serious penalty for the offense committed, and that therefore the Mexican Judge at Hermosillo who sentenced Robles did not

properly apply Mexican law. Such conduct on his part is assuredly some evidence bearing on the question of a denial of justice, but there is further evidence of the impropriety of the proceedings in connection with the trial of Robles. A medical certificate, which was obtained by order of a Judge at San Javier, and which evidently under Mexican law was evidence with regard to the injuries of Kennedy, reads in part as follows:

"In the front part of the right thigh and close to the groin there is located the principal wound caused by firearms, the bullet having passed into and through the thigh, breaking the femur bone in the upper third section, passing through the outer part of the hip bone on the left, from which place the bullet was extracted at the point where it had almost passed out of the body. The scalp showed a superficial wound an inch long, and there was a scratch on the right cheek near the eye. In addition on both hands and almost in the same place there were found scratches between the thumb and the index finger. The wound of the muscle, although serious, does not put in peril for the moment, the life of the wounded man, but it may later endanger it if complications result."

The certificate clearly shows the serious nature of the injuries inflicted on Kennedy. From the decision of the Judge at Hermosillo it appears that the Judge, in imposing a sentence of but two months' imprisonment, relied upon a second certificate signed by the physician who executed the first certificate and one other person, evidently not a physician. This certificate was executed nearly two months after the date of the first certificate, without any reexamination of Kennedy. The second certificate declares that the injury "is of a character that does not necessarily endanger life and will require from six weeks to two months to heal, without for that reason resulting in a permanent disability of the wounded member". The failure to obtain a further certificate for which steps apparently were taken can presumably be excused, at least to some extent, by the fact that Kennedy at the time when these steps were taken was no longer within Mexican jurisdiction.

Another feature of the proceedings before the Judge at Hermosillo which to my mind reveals their impropriety is the appearance in the record of a communication signed by 54 workmen in the mine at San Javier which was addressed to one Leopoldo Ulloa. In this communication the workmen requested Ulloa to endeavor to obtain the release of Robles and recited a series of complaints against the mining company with regard to the improper treatment said to have been accorded to the workmen in the mine. The extent to which the Judge was influenced by this communication is a point concerning which perhaps no positive conclusions may be drawn, but the communication is clearly made a part of the record of the proceedings and is cited by the Judge. It would seem that more appropriate action with respect to a matter of this kind would have been to take effective steps to discipline the person who ventured to put it before the Judge evidently for the purpose of influencing his action in a case in connection with which the consideration of such a communication was, to say the least, highly improper.

Several other matters were mentioned by counsel for the United States in analysing the proceedings before the Judge at Hermosillo with a view to showing their impropriety. Whatever might be said of their controlling importance, if any, I think that enough has been said to justify the conclusion which the three Commissioners have reached to the effect that the instant case reveals a denial of justice within the meaning of international law.

Decision

The Commission decides that the Government of the United Mexican States is obligated to pay to the Government of the United States of America on behalf of George Adams Kennedy the sum of \$6,000.00 (six thousand dollars) without interest.

HENRY RUSSELL *et al.* (U.S.A.) *v.* UNITED MEXICAN STATES.

(May 9, 1927. Page 302.)

PROCEDURE, MOTION TO AMEND. Motions to amend answers *granted* in absence of opposition of adverse Agent.

(Text of decision omitted.)

THE PEERLESS MOTOR CAR COMPANY (U.S.A.) *v.* UNITED MEXICAN STATES.

(May 13, 1927, *concurring opinions by Presiding Commissioner and Mexican Commissioner, May 13, 1927. Pages 303-305.*)

CONTRACT CLAIMS.—RESPONSIBILITY FOR ACTS OF DE FACTO GOVERNMENT.

—CLAIM IN RESTITUTION. Claim for unpaid purchase price of two automobile ambulances sold and delivered to Mexican Government under contract made during Huerta regime *allowed*.

Cross-references: Am. J. Int. Law. Vol. 22, 1928, p. 180; Annual Digest, 1927-1928, p. 246.

Nielsen, Commissioner :

1. Claim is made in this case by the United States of America in behalf of the Peerless Motor Car Company, an American Corporation, to obtain payment of 23,000 Mexican pesos, which it is alleged is due as the purchase price of two automobile ambulances, under a contract entered into July 25, 1913, between the Mexican Government and the claimant. Interest on this sum is claimed from October 15, 1913.

2. The contract, a copy of which accompanies the Memorial (Annex 2), recites that it is executed in fulfillment of an order "of the Department of War and Navy, between the Chief of the Military Sanitary Section, Colonel Agustín Nieto y Mena, M. D., and Mr. Joseph M. Wheeler, merchant of this city [Mexico City] and representative of 'The Peerless Motor Car Company'". By the third paragraph of the contract it is stipulated that payment for the ambulances shall be made "as soon as the said ambulances are duly received". Under date of October 15, 1913, a receipt for the ambulances bearing the signature of A. Nieto y Mena was delivered to Joseph

M. Wheeler, the claimant's representative in Mexico City. In this receipt it is recited that the ambulances received are complete and satisfactory, and that payment will be made to Wheeler immediately (Annex 6 to the Memorial.)

3. In the arguments advanced before the Commission both Governments rely upon the decision rendered by the Commission in the *Hopkins* case, Docket No. 39. In behalf of the Government of Mexico it is not disputed that the automobiles were manufactured and delivered conformably to the terms of the contract, and that the purchase price has not been paid. But it is contended that there is no international responsibility on the Mexican Government for, as stated in the Answer, "the nonpayment of certain war material admitted by the claimant corporation to have been ordered by, and sold and delivered to an illegitimate administration", that is, the administration of General Victoriano Huerta. It is further alleged in the Answer that "even assuming that the legitimate government of the United Mexican States had subsequently to the sale and delivery of the war material aforesaid to the local de facto administration become possessed of the said war material, no liability could be predicated upon the said respondent government neither in international law, nor equity, nor justice, since the said possession was due to the recognized right that all legitimate governments possess to capture the war material of the enemy".

4. In the view I take of this case it is unnecessary to consider the point as to the responsibility of Mexico grounded on the contention of the United States that it may be assumed from the record that Mexican authorities in power following the administration of General Huerta made use of the cars delivered by the Company. Nor is it necessary to consider the Mexican Government's contention as to the character of the ambulances as war material. The United States contends, among other things, that the purchase of these motor ambulances was an unpersonal act, and that therefore, under the principles laid down in the *Hopkins* case, Docket No. 39, the Government of Mexico is liable for the purchase price of the ambulances. I am of the opinion that the contention is sound, and that an award should therefore be rendered in favor of the United States in the sum of 23,000 pesos with interest from October 15, 1913, the date on which the receipt for the ambulances was delivered to the claimant's representative at Mexico City.

Van Vollenhoven, Presiding Commissioner :

I concur in Commissioner Nielsen's conclusion with respect to the liability of Mexico. The purchase of ambulances, however, in my opinion is not a part of the ordinary routine of government business. It comes within the doubtful zone mentioned in paragraphs 5 and 6 of the opinion in the *Hopkins* case. As such, it is much more akin to a transaction of government routine (the one extreme) than to any kind of voluntary undertaking "having for its object the support of an individual or group of individuals seeking to maintain themselves in office" (the other extreme), and therefore should, under the principles laid down in the said opinion, be assimilated to the first group, to wit, the routine acts.

Fernández MacGregor, Commissioner :

I concur in the opinions expressed by Commissioners Van Vollenhoven and Nielsen.

Decision

The Commission decides that the Government of the United Mexican States shall pay to the Government of the United States of America in behalf of the Peerless Motor Car Company the sum of \$11,465.50 (eleven thousand four hundred and sixty-five dollars and fifty cents) together with interest on that sum at the rate of six per centum per annum from October 15, 1913, to the date on which the last award is rendered by the Commission. The said amount of \$11,465.50 is the equivalent of 23,000.00 pesos for which claim is made. The Commission renders the award in the currency of the United States conformably to its practice in other cases of making all awards in a single currency, having in mind the purpose of avoiding future uncertainties with respect to rates of exchange which it appears the two Governments also had in mind in framing the first paragraph of Article IX of the Convention of September 8, 1923, with respect to the payment of the balance therein mentioned "in gold coin or its equivalent".

TOBERMAN, MACKEY & COMPANY (U.S.A.) *v.* UNITED
MEXICAN STATES.

(May 20, 1927, *concurring opinion by American Commissioner, May 20, 1927.*
Pages 306-311.)

STANDARD OF CARE OF PROPERTY HELD IN CUSTODY. Respondent Government *held* not subject to obligation to take special care, of a standard commensurate with that of a private concern, of goods coming into the custody of its customs service and left with it beyond required period for withdrawal of goods.

Cross-references: Am. J. Int. Law, Vol. 22, 1928, p. 182; Annual Digest, 1927-1928, p. 228; British Yearbook, Vol. 9, 1929, p. 157.

Fernández MacGregor, Commissioner:

1. This claim is presented by the United States of America in behalf of Toberman, Mackey & Company, an American corporation, demanding from the United Mexican States the sum of \$1,845.57, with interest, the value of 376 bales of hay, property of claimants, which was damaged in the Mexican Custom House of Progreso, Yucatán, Mexico, between the beginning of June, 1919, and July 23, 1920. It is alleged that the hay in question became completely deteriorated by exposure to the weather, on account of the negligence or lack of care of the authorities of the Mexican Custom House.

2. The evidence presented in this case shows that Toberman, Mackey & Company, an American firm dealing in grains, seeds, fodder and other products, having previously received an order from the firm of Crespo and Suárez, of Progreso, shipped in New Orleans, Louisiana, U.S.A., on a Norwegian vessel, June 3, 1919, 376 bales of compressed hay, under a bill of lading issued by the Gulf Navigation Company, Inc. The shipment was consigned to shippers order, Crespo and Suárez to be notified upon

its arrival, who, although they apparently had dissolved partnership on January 31, 1919, continued to do business jointly or separately. The shipment of hay was delivered by the steamer to the Custom House at Progreso sometime during the early part of June, and it was placed in an open space on the wharf, covered only with a canvas. Crespo and Suárez did not accept the hay, due, apparently, to some questions as to the manner of making payment for it, the result of which was, that they neither took steps to withdraw the hay from the Custom House nor to pay the import duties. The Gulf Navigation Company, Inc., on August 7, 1919, received from one Mariano de las Cuevas, who seems to have been the shipping company's agent, notice that Crespo and Suárez had not withdrawn the hay, in spite of his having urged them to do so, and that the hay had deteriorated somewhat on account of rains which had fallen. The Gulf Navigation Company, Inc., on December 12, 1919, notified claimants that Crespo and Suárez had definitely refused to accept the shipment of hay; that the latter was already in a rather bad state, after a long period of storage in the Custom House; and that the shipment was to be auctioned in conformity with customs regulations. Finally, the Custom House, in compliance with said regulations, and as the hay was then useless, burned it on July 23, 1920.

3. The claimant Government alleges that the Custom House of Progreso was negligent on account of not having taken due care of the fodder in question, as shown by the fact that it left said fodder in the open, exposed to the elements, for more than one year; that such negligence of Mexican officials, which was the cause of the complete loss of the goods, makes the Mexican Government responsible according to general principles of law, as well as under special provisions of the General Customs Regulations of the United Mexican States (Articles 120, 153, and others). The Mexican Government, on its part, alleges in defense, that the loss of the hay was due to the negligence of the consignees, of the shipping company or of the claimants, who did not comply with said Customs Regulations, citing also the provisions thereof to support their contention.

4. This case involves, therefore, an alleged act of a Mexican authority, which act, in the terms of the Convention of September 8, 1923, has resulted in injustice to American citizens. Said act is the omission of a Custom House to take due care of merchandise deposited therein. I do not believe that there is any clear principle of international law which obliges a government to take special care, as if it were a private storage concern, of merchandise which comes in through its Custom Houses, for the mere purpose of exercising the sovereign right of collecting import and export duties. It is conceivable that, under certain circumstances, the State may assume certain obligations in the exercise of sovereign acts of this nature; but, if such obligation is not established very clearly, it cannot, in my opinion, be imposed on the State. The question lies in determining whether the law of such State (in this case, Mexican law) imposes on custom houses the obligation of guarding, at all times and without limit like a good *pater familias*, all goods and merchandise which pass through its ports of entry. Mexican law in this respect is sufficiently clear, according to my opinion. In fact, the General Customs Regulations of Mexico require that application be filed for the dispatch of imported goods, within eight days following the date of unloading, and that the merchandise be withdrawn, at the latest, thirty days after unloading has been finished (Article 152). The party obliged to comply with these obligations, is the consignee (Article

109). When the parties concerned do not file their applications within said periods, the merchandise may remain in the storehouses or yards of the Custom House, incurring a custody charge (*derecho de guarda*), the custody being limited to preventing the loss of the merchandise by theft or otherwise (Articles 153 and 698), but the law further provides, that complaints filed against the Custom House attributing to it delay in the timely withdrawal of the merchandise within the periods provided by the Regulations, will not be taken into consideration (Article 152). The same law presumes that the merchandise may be placed, in the absence of a special petition, on the yards or in the storehouses, without determining in which cases one or the other must be done. From the foregoing citations it is inferred that, although the merchandise may remain in the custom house after the expiration of the term allowed for its withdrawal, said custom houses refuse to accept any responsibility for its deterioration once that term has expired. It remains doubtful whether such responsibility is assumed for the month in question, although it may be presumed that it could be legally so. But in the present case, claimants have not proven that the complete deterioration and loss of the hay may have commenced during the first month that such hay was on the yards of the Custom House. On the other hand, although it is true that the consignees were the claimants, they stipulated that Crespo and Suárez should be notified, who, it appears, were the purchasers of the merchandise. Either of these parties should have paid the duties, applied for the dispatch of the shipment, and withdrawn the hay. Crespo and Suárez should have been given timely notice of the arrival of the hay, by the claimants themselves, as may be implied from the letter of February 27, 1920, signed by one W. M. James, and they doubtless received later on notice from said Mariano de las Cuevas. However, they did not file their application within the eight days, nor did they withdraw the merchandise within thirty days after unloading; neither did they specifically refuse, before the Custom House, acceptance of the shipment (Article 113). The shippers, Toberman, Mackey & Company, also should have been given timely notice by said Crespo and Suárez that the latter were having difficulties in obtaining the merchandise, and, at least, they were so notified on December 12, 1919, by the Gulf Navigation Company, Inc., in a letter which causes the presumption that they had already been given notice of this fact previously. Both parties incurred the delay on account of this failure to comply with the clear provisions of Mexican law, and it was their negligence that unduly threw on the Mexican Custom House authorities the care of the merchandise, which care they had in no way contracted for. There can not be, therefore, imputed to the Custom House a responsibility which it did not have, nor assumed clearly, and which, on the other hand, was thrown on it by the negligence of the consignees and claimants in this case, who, it appears, had a clear knowledge of the circumstances in which the merchandise was shortly after its arrival at Progreso, and, surely, two months after such arrival. Under such circumstances, taking into account that in this case no discrimination or other unjust act on the part of Mexican customs authorities have been proven, and that the negligence of the owners and consignees of the bales of hay in question appears evident, I believe that this claim should be disallowed.

Van Vollenhoven, Presiding Commissioner:

I concur in Commissioner Fernández MacGregor's opinion.

Nielsen, Commissioner:

I concur in Commissioner Fernández MacGregor's opinion that the claim should be disallowed. I attach less importance to the provisions of Mexican legislation with respect to the interpretation of which conflicting contentions are advanced by counsel for each Government than to the uncertainty of the record in relation to facts concerning which it is important that the Commission should have definite information. The claim of the United States is predicated upon a complaint of negligence on the part of Mexican customs authorities in dealing with an importation of baled hay into Mexico.

International law of course recognizes the plenary sovereign right of a nation in all matters relating to imports and exports. The Mexican Government is free to establish at a port of entry elaborate facilities for storing imports or no facilities at all, and an importer can ship his goods to such a port or refrain from doing so just as he chooses.

Irrespective of what may be the precise formalities prescribed by Mexican law with regard to the treatment of imports, it seems to me that provisions of that law are probably substantially the same as those that doubtless exist generally in other countries. After a specified period storage charges are collected on imports, and after a further period goods may be sold or destroyed if not claimed. Presumably it is contemplated by Mexican law that some kind of care shall be taken of goods for a part if not all of such periods, and that commodities shall not be entirely unprotected, even though they are left without attention for long periods by importers, as was the claimant's shipment. However, I am of the opinion that, in considering the contention that Mexico is responsible for negligence on the part of the customs authorities we cannot properly fail to take some account of the conditions under which the hay was shipped to Progreso and left there until it was destroyed.

I am not prepared to say that under the terms of the Convention of September 8, 1923, liability might not be fastened upon a government for the acts of its customs authorities in a case revealing negligence with respect to protection of imported commodities, particularly in a case that might reveal a purpose of making discrimination against an importer whose goods were damaged or destroyed. It would be necessary in such a case that there should be convincing evidence of negligence on the part of those officials. The contention of the United States apparently is that negligence can properly be inferred from the fact that proper adequate care was not taken of the hay. It seems to me that there may have been negligence. However, while the Memorial contains an allegation of negligence, there is neither allegation nor evidence as to the nature of the facilities at Progreso for storage nor as to the particular reason why the hay was not cared for other than by the use of a canvas. Having in mind a proper limitation on inferences that may be drawn from evidence, I do not believe that on the record before the Commission an award could properly be rendered holding Mexico liable under international law for the destruction of the hay.

Decision

The Commission decides that the claim of Toberman, Mackey & Company must be disallowed.

GEORGE W. COOK (U.S.A.) *v.* UNITED MEXICAN STATES.

(*June 1, 1927, concurring opinion by Presiding Commissioner, June 1, 1927, dissenting opinion by Mexican Commissioner, undated. Pages 311-318.*)

NULLIFICATION OF POSTAGE STAMPS.—FAILURE OF AUTHORITIES TO COMPLY WITH APPLICABLE LAW. Claim for value of postage stamps which were retired by Mexican authorities without the notice required by law allowed.

Cross-reference: Am. J. Int. Law, Vol. 22, 1928, p. 185.

Nielsen, Commissioner:

1. Claim is made in this case by the United States of America in behalf of George W. Cook to recover the sum of \$153.52, stated to be the equivalent of 307.04 pesos, the value of two quantities of postage stamps, which were purchased by the claimant from Mexican postal authorities and which subsequent to the purchase were declared void. The stamps were submitted to the Commission for examination. Interest is claimed from November 15, 1914, on the sum of \$131.95 and from September 15, 1915, on the sum of \$21.57. The facts on which the claim is based as they appear from the record may be briefly stated as follows:

2. Under date of October 7, 1914, a circular communication was issued at Mexico City by the Mexican Postmaster General prohibiting the use after November 15, 1914, of a certain issue of stamps of which the claimant possessed a considerable quantity. It appears that Articles 194 and 195 of the Postal Code of Mexico make provision for the retirement of stamps upon a three months' notice, and that holders of stamps may, within the prescribed period of three months, effect an exchange of stamps which they possess for a new issue. It is provided that those who have not effected an exchange within this period shall lose not only the right to exchange the old stamps for new ones but also the value of the retired stamps which they may possess.

3. In communications dated January 14, 1915, and June 5, 1915, the claimant requested the Mexican authorities to effect an exchange or payment of stamps which he held of the value of 262.94 pesos, but no reply was made to his letters. In communicating with Mexican authorities, the claimant mentioned stamps to the value of 262.94 pesos; from the Memorial it appears that he held invalidated stamps to the value of 263.89 pesos at the time he wrote these letters. It is clear that no notice of three months was given by the postal authorities with regard to the retirement of the stamps in question. Furthermore, there is no proof that notice was given by postmasters as required by law of the retirement of the nullified stamps, within even a period of thirty-nine days, that is, from October 7, to November 15, 1914, the latter date being that on which the invalidation of the stamps took effect. While the point is immaterial in view of the fact that the legal notification prescribed by the Postal Code was not given, it may be noted that, had there been any public notice given of the retirement of the stamps on a shorter notice, evidence of such public notice could apparently easily have been produced. Notifications issued by postmasters to the public are, of course, something very different from instructions

sent to the postmasters through the mail by the Postmaster General. Obviously the claimant was deprived improperly of the value of the stamps nullified by the order of October 7, 1914. In transmitting mail the claimant would, of course, not make use of stamps which had been declared void or stamps concerning the validity of which there might be some question.

4. The claimant's rights with respect to another quantity of stamps to the value of 43.15 pesos is equally clear, or perhaps it might better be said, still more clear. These stamps bore the printed inscriptions "Gobierno Constitucionalista" and the letters "GCM". Under date of July 6, 1915, an order was issued that these postage stamps should be invalid from September 16, 1915, and that no new issue should be placed in circulation. It will be seen from this order that there was no compliance with the Mexican Code either with respect to a three months' notice of the nullification of stamps or with respect to the substitution of stamps in place of those nullified. Obviously, therefore, the claimant was deprived of his property.

5. The Mexican Agency has put in evidence a communication under date of September 8, 1926, addressed by the Mexican Postmaster General to the Department of Foreign Relations in which reference is made to a letter of February 9, 1926, addressed to W. Hansberg, an employee of Mr. Cook's firm. Nothing is said with regard to the contents of this communication, except that Mr. Hansberg "was not advised that the stamps to which he referred, were valid up to the year 1925, inasmuch as this office, on July 31, 1921, through its official organ, Bulletin of the Postal Service, advised all post offices of the Republic to notify the public that, beginning with September 1st of that year, postage stamps of the "Centenary Issue" would again be effective". Even if Mr. Hansberg had been informed in 1926, as it is stated he was not, that the stamps would again be effective up to the year 1925, such information would, of course, have been of no value to Mr. Cook in 1926. It is not perceived how the notification to the post offices to which reference is made in the above quoted extract could have any bearing on any issue in the instant case. In any event no copy of the notification to the post offices is produced, so that the Commission is not in a position to make any determination with respect to its legal effect. And no evidence is furnished that the post offices made any notification to the public to the effect that the so-called "Centenary Issue" would again be effective. If such evidence existed it evidently could easily have been produced, so that its contents and its bearing, if any, on the present case could be determined. It is nowhere even stated that a notification was given to the public. It is merely stated in the communication of September 8, 1926, that the post offices were advised to notify the public. Some of the stamps held by the claimant for which he seeks compensation evidently belonged to this "Centenary Issue".

6. In the Mexican Brief, it is stated that Mr. Cook must have seen more than once that stamps like his own were being used on the letters confided to the Mexican postal services; that he must have received correspondence addressed to him bearing those stamps; and that it did not occur to him to use them or transfer them. In my opinion it is highly improbable that even if some of these stamps were used on letters addressed to Mr. Cook—a thing concerning which, of course, we know nothing—they should ever have attracted the eyes of a business man of large affairs. Assuredly a business man to whose establishment comes a large quantity of mail which is generally opened by clerks does not make a personal examination of every stamp that comes to his place of business. Moreover, it is highly

improbable that stamps belonging to the limited issues which were nullified by the postal authorities ever came to Mr. Cook's office. And it is possible, and perhaps it may be said very probable, that none was ever used by anybody in Mexico. Whatever action may have been taken to give the public notice of a revalidation of the nullified stamps—and the record is too uncertain to reach any conclusion on that point—nothing was done until six years after the stamps had been nullified. Even though the observations made in the Mexican Brief concerning stamps that may have been seen by Cook had any bearing on the issues in the instant case, which I believe they have not, the Commission can not ground a decision on inferences of that kind, even if there were some foundation for them which I think there is not.

7. There are certain very simple facts and principles of law which I think are clearly decisive in this case. It would seem that there can be no more elementary principle of law than that the propriety of an act must be judged by the law existing at the time of the commission of the act. It is indisputable that Mr. Cook paid for the stamps that were nullified. Indeed as a matter of accommodation he took a large quantity of stamps in payment of money orders. It is also indisputable that he could not use nullified stamps, nor obtain other stamps in substitution conformably to law, nor obtain the value of the stamps nullified. It is obvious that he is entitled to pecuniary compensation to the amount he paid for the stamps which amount the Mexican authorities received.

8. I am of the opinion that an award should be rendered in this case in favor of the claimant in the amount of \$153.06 with interest at the rate of six per centum per annum, on the sum of \$131.55 from November 15, 1914, and on the sum of \$21.51 from September 15, 1915, such interest being computed on both sums from each of the two specified dates to the date on which the last award is rendered by the Commission.

Van Vollenhoven, Presiding Commissioner:

I concur in paragraphs 1 to 4, inclusive, of Commissioner Nielsen's opinion. I fully concur in paragraph 3 of Commissioner Fernández MacGregor's dissenting opinion. Since, however, in the present case Mexico has neither submitted the text of the revalidation circular of July 31, 1921, nor established how far said circular covered the stamps canceled in 1914 and 1915, nor established until what date (either January 1, 1925, or September 1, 1925) this revalidation had effect—such date being essential for the sake of knowing whether Cook could have legally used or sold his stamps at the time he presented his claim to the American Agency—and since Mexico was in honor bound to make full disclosure of these facts (paragraph 7 of the opinion in the *William A. Parker* case, Docket No. 127, rendered March 31, 1926, and Ralston, *Report of French-Venezuelan Mixed Claims Commission of 1902*, p. 25), I concur in paragraph 8 of Commissioner Nielsen's opinion.

Decision

The Commission decides that the Government of the United Mexican States shall pay to the Government of the United States of America in behalf of George W. Cook the sum of \$153.06 (one hundred and fifty-three dollars and six cents) with interest at the rate of six per centum per annum, on the sum of \$131.55 from November 15, 1914, and on the sum of \$21.51

from September 15, 1915, such interest being computed on both sums from each of the two specified dates to the date on which the last award is rendered by the Commission. Conformably to the practice of the Commission of making awards in a single currency, the award is expressed in the currency of the United States, the Mexican peso being converted at its par value of \$0.4985.

Dissenting opinion

1. I concur with the statement of facts contained in paragraphs 1 and 2 of Commissioner Nielsen's opinion. It appears clearly that the Mexican authorities violated their own law by not giving the three months' notice provided by articles 194 and 195 of the Postal Code; and although I believe that it is most probable that the circular of October 7, 1915, should have been published in the usual manner, posting it on the bulletin boards of the post offices for the information of the public, I agree that there is no evidence of its having been done.

2. All the postage stamps involved in this case, with the exception of a few in the amount of 1.12 pesos, are of the so-called "Centenary Issue." Some in the amount of 43.15 pesos, bear a renewal stamp which says; "Gobierno Constitucionalista", and the letters "GCM", and the balance, in the sum of 262.77 pesos, are not restamped. According to a letter from the Postmaster General to the Secretary of Foreign Relations, dated September 8, 1926, the postage stamps of the "Centenary Issue" were again in force from September 1, 1921, until the year 1925; such order, according to said letter, was published in the "Indicador del Servicio Postal", official organ of the Post Office Department of Mexico. Although I agree that the Government of Mexico could have produced the text of the order I have just referred to and failed to do so, I believe, nevertheless, that the letter of September 8, 1926, proves clearly that such order was made known to the public, inasmuch as it was published July 31, 1921, in the organ which the Post Office uses officially to give information about everything concerning the postal service. Claimant was, then, in my opinion, legally notified that the stamps which were in his possession as null, had been revalidated, and, therefore, could be used again or sold. If he failed to make use of them, it was due to his not wishing to do so or to negligence.

3. I believe that it is an established principle that claims must be considered as they are when presented before an international tribunal, even though it be true, further, that the propriety or impropriety of the act out of which they arise must be judged according to the law existing at the time of the commission of the act. In order that an international claim of the nature of those over which this Commission has jurisdiction, may arise properly, it is necessary (1) that there may be a transgression, on the part of a State, of some principle of international law, and (2) that there may be at the time of filing the claim evident damage to a citizen of the claimant State, directly caused by such transgression. In the present case the Mexican Government undoubtedly committed a transgression in declaring null the claimant's stamps, in violation of Articles 194 and 195 of the Postal Code; but it subsequently repaired the damage caused the claimant by restoring to the stamps he had all their value, during the long period included between September 1, 1921, and the year 1925. There was reparation of the damage caused, although such reparation may not have been complete, as Mexico limited herself to restoring the value of

certain stamps without restoring the value of all or the interest on the money which they represented. I believe it to be a sound and helpful practice recognized by authors and international decisions for the Government of the injured person to give the offending Government the opportunity to render justice to the offended party through its own regular and voluntary ways, thus avoiding occasion for international discussion and friction.

4. In view of the foregoing, I am of the opinion that the Mexican Government repaired in part the damage inflicted on the claimant, when it restored the value of certain of his stamps, and that this claim is now proper only for what has not been restored and for the unpaid interest, at the rate of six per cent per annum. The Mexican Government owes the interest on the sum of 262.77 pesos, from November 15, 1914, to September 1, 1921, and on the sum of 43.15 pesos, from September 15, 1915, to September 1, 1921; plus the sum of 1.12 pesos, value of the stamps which did not belong to the "Centenary Issue", which value was never returned, plus the corresponding interest thereon, from November 15, 1914, to the date on which the last award is rendered by the Commission.

G. Fernández MACGREGOR,
Commissioner.

GEORGE W. COOK (U.S.A.) *v.* UNITED MEXICAN STATES.

(*June 3, 1927, concurring opinions by Presiding Commissioner and Mexican Commissioner, June 3, 1927. Pages 318-324.*)

APPLICATION OF DOMESTIC STATUTE OF LIMITATIONS. A domestic statute of limitations is not binding on an international tribunal, particularly when claimant demanded payment of respondent Government within prescribed period.

CONTRACT CLAIMS.—NON-PAYMENT OF MONEY ORDERS.—EFFECT OF DEPRECIATION OF CURRENCY.—COMPUTATION OF AWARD.—RATES OF EXCHANGE.—EFFECT OF DOMESTIC LAW GOVERNING PAYMENTS. Claim for non-payment of money orders issued during Huerta regime *allowed*. A domestic law governing payments of obligations contracted in paper currency *held not applicable*. Award granted on basis of value of Mexican currency as of time of original transaction, when claimant had delivered value for money orders in question.

Cross-references: Am. J. Int. Law, Vol. 22, 1928, p. 189; Annual Digest, 1927-1928, pp. 205, 264.

Comments: Joseph Conrad Fehr, "International Law as applied by U.S.-Mexico Claims Commission," A.B.A. Jour., Vol. 14, 1928, p. 312 at 313.

Nielsen, Commissioner:

1. Claim is made in this case by the United States of America in behalf of George W. Cook to recover the sum of \$4,526.58, United States currency, stated to be the equivalent of 9,053.16 Mexican pesos, the aggregate amount

of numerous postal money orders, which are owned by the claimant, and which it is alleged were not paid upon presentation to Mexican postal authorities. The orders were issued in the years 1913 and 1914. A proper allowance of interest is claimed on the said sum of \$4,526.58.

2. The Answer of the Mexican Government contains an allegation to the effect that the money orders in question were issued by an illegitimate authority (the administration of General Huerta) which could not bind the United Mexican States. However, no contentions on this point were pressed in view of the decision rendered by the Commission in the *Hopkins* case, Docket No. 39, on March 31, 1926.

3. In the Brief filed by the Mexican Government in the case of the *Parsons Trading Company*, Docket No. 2651, of which use was made in the argument in the instant case, it is alleged that the right to collect a postal money order is subject to a statute of limitations of two years after the date of issue, and that a recovery on the orders in question is now barred by that statute. Finally, it is argued that, if a pecuniary award should be rendered by the Commission the amounts stated in the money orders should be calculated on the basis of the so-called Mexican Law of Payments of April 13, 1918. It is explained that this law had for its object the partial lifting of a general moratorium created by earlier legislation, and that the law established certain specified equivalents in gold currency of obligations contracted in paper currency. It is asserted that money orders are contractual obligations, and that the law of April 13, 1918, as a part of the *lex loci contractus*, is applicable to the payment of such orders.

4. It has sometimes been said that statutes of limitation are not a bar to international reclamations. General statements of this kind have perhaps at times led to some confusion of domestic law with a well-recognized principle of international practice. There is, of course, no rule of international law putting a limitation of time on diplomatic action or upon the presentation of an international claim to an international tribunal. Domestic statutes of limitation take away at the end of prescribed periods the remedy which a litigant has to enforce rights before domestic courts. It is satisfactorily established by evidence that the claimant in the instant case presented his money orders and requested payment within the period during which payment could be made under Mexican law, and that payment was refused by Mexican postal authorities. The United States is not now debarred by any Mexican statute of limitations from recovering money wrongfully withheld from the claimant. The Mexican Government could not by withholding payment for a period prescribed by a domestic statute of limitation relieve itself from an obligation under international law to make restitution of the value of the orders. From a conclusion to this effect it does not follow that international tribunals must always disregard all statutes of limitation prescribing reasonable periods within which remedies may be enforced before domestic tribunals. And it may be further observed that in view of the stipulations of Article V of the Convention of September 8, 1923, no question can arise in this case with respect to the exhaustion of local remedies.

5. The issue determinative of responsibility in this case is a simple one, and when its real character is perceived it is clear that the arguments advanced before the Commission covered a wide range of subjects not relevant to a proper disposition of the case. It is not necessary to take account of the considerations explained by Mexico with respect to economic conditions

in Mexico which prompted the enactment of the law of April 13, 1918. Nor is it necessary to determine whether Mexican money orders must be regarded as contracts, governed in all respects by the *lex loci contractus*, including the law of April 13, 1918, or whether it may more properly be considered that money orders are not commercial transactions, as was said by an American judge with respect to American money orders, but rather the means employed in exercising a governmental power for the public benefit. *Bolognesi et al. v. United States*, 189 Fed. Rep. 335. In a sense it may doubtless be said that a money order of the usual type evidences on the one hand some obligation of the Government that issues it to pay the value of the order, and on the other hand the right of the holder to receive payment. Furthermore, it is not necessary to give application in the present case to the principles asserted by the Commission in the *Hopkins* case, to which counsel for the United States called attention as to the standing of domestic statutes which by their operation on rights of aliens may contravene international law.

6. Obviously, rights and obligations in relation to money orders, the creatures of Mexican law, are governed by that law. But the Commission is not called upon to consider whether, if the Mexican Government had forced the claimant to accept payment according to the table of payments prescribed by the Mexican law of April 13, 1918, such action would have resulted in a violation of international law. The Mexican authorities have refused to make any payment. The questions before the Commission are, first, whether the failure of the Mexican Government to pay to the claimant the value of the money orders upon presentation renders the Government of Mexico liable under the terms of submission in the Convention of September 8, 1923, requiring the Commission to determine claims in accordance with principles of international law, and, second, if such liability exists what sum shall be awarded for wrongful withholding of the purchase prices or the orders. That responsibility in a case of this character exists was stated by the Commission in the decision rendered in the *Hopkins* case on March 31, 1926.

7. When questions are raised before an international tribunal, as they have been in the present case, with respect to the application of the proper law in the determination of rights grounded on contractual obligations, it is necessary to have clearly in mind the particular law applicable to the different aspects of the case. The nature of such contractual rights or rights with respect to tangible property, real or personal, which a claimant asserts have been invaded in a given case is determined by the local law that governs the legal effects of the contract or other form of instrument creating such rights. But the responsibility of a respondent Government is determined solely by international law. When it is alleged before an international tribunal that some property rights under a contract have been impaired or destroyed, the tribunal does not sit as a domestic court entertaining a common law action of assumpsit or debt, or some corresponding form of action in the civil law. And in a case involving damages to or confiscation of tangible property, real or personal, inflicted by agencies for which a government is responsible, or by private individuals under conditions rendering a government liable for wrongs inflicted, an international tribunal is not concerned with an action in tort, the merits of which must be determined according to domestic law. The ultimate issue upon which the question of responsibility must be determined in either of these kinds of cases is whether or not there is proof of conduct which is wrongful under

international law and which therefore entails responsibility upon a respondent government.

8. By the failure of the Mexican authorities to pay the money orders in question in conformity with the existing Mexican law when payment was due, the claimant, Cook, was wrongfully deprived at that time of property in the amount of 9,053.16 pesos. Payment of the orders should have been made when they were presented. The claimant is entitled to recover the loss which he sustained on account of the nonpayment at that time. An award should therefore be rendered by the Commission in favor of the claimant for the amount of the orders, namely, 9,053.16 pesos with interest. The total sum represents the legal measure of the loss suffered by the claimant when payment of the orders was refused. Since it is desirable to render the award in the currency of the United States conformably to the practice which the Commission has followed in the past, having in mind the desirability of avoiding uncertainties with respect to rates of exchange, and further having in mind the provisions of the first paragraph of Article IX of the Convention of September 8, 1923, account must be taken of the proper rate of exchange.

9. Domestic courts have frequently had occasion, especially in recent years, to deal with the translation into the currency of their own country monetary judgments in satisfaction of obligations fixed in the terms of the currency of some other country. In the absence of evidence with regard to the value of a foreign coin it has been held that the par value should be taken. *Birge-Forbes Company v. Heye*. 251 U. S. 317. The courts are required to convert currency in these cases in view of the fact that they can render judgments only in coin of the government by which they were created. However, the principles which these courts have considered in arriving at their decisions may have some pertinency to a case such as that before the Commission, since the translation of currency either by an international tribunal or by a domestic court must be based on some principle that is sound from the standpoint of the interests of the parties to the litigation. Some courts have held that in the case of a breach of contractual obligations the rates of exchange should be determined as of the date of the breach. Others have held that the rate should be fixed as of the date of judgment. In a recent case the Supreme Court of the United States held that the debt of a German bank to an American citizen arising from the refusal to pay a deposit on demand should be determined as of the value of the mark at the time the suit was brought. *Die Deutsche Bank Filiale Nurnberg v. Humphrey*, 272 U. S. 517. In a Brief filed by counsel in the case of *Hicks v. Guinness et al.*, 269 U. S. 71, are cited numerous decisions of each kind. I am of the opinion that in the instant case the par value of the Mexican peso, namely \$0.4985, may properly be taken in determining the amount to be awarded in the currency of the United States. There are several considerations which I think justify this conclusion. Mexico withheld payment of the money orders, and the claimant should be reimbursed in the full value of the orders. That payments were not made is satisfactorily shown by evidence, but the date upon which payment of each order was refused is uncertain, and it is natural that the claimant should not be able to furnish precise information in each case. There is not, in my opinion, before the Commission the proper kind of evidence on which the Commission could properly determine the rate of exchange on each of those dates or an average rate of exchange during the period within which the orders were dishonored,

even if such computations might be deemed to be proper. And what is probably more to the point, Mexico has not contended that the prevailing exchange rates at the time the orders were dishonored should be applied, but has insisted that an award should be rendered in terms of the law of payments of April 13, 1918.

10. Having in mind the uncertainty in the record as to the specific dates on which payment of each of the several money orders was refused, I am of the opinion that interest may properly be allowed on the sum of \$4,513.00 from the date of the last order, namely, September 21, 1914.

Van Vollenhoven, Presiding Commissioner:

I concur in paragraphs 1 to 4, inclusive, 8 and 10 of Commissioner Nielsen's opinion. Amounts which fell due to claimants in Mexico in the years 1913 to 1915 when a depreciated paper currency was in circulation throughout the country should be awarded by this Commission in strict compliance with the monetary enactments of Mexico effective in those years, unless in any specific case there might be conclusively proven that by so doing the Commission would cause the claimants an unjust enrichment. In the present case not only such evidence fails, but it would seem from the record that Cook, in having the full value of his money orders reimbursed to him, would only receive the value of what he sold, delivered, and was compensated for by way of these money orders. I therefore am of the opinion that an award should be rendered in the sum of \$4,513.00, with interest thereon.

Fernández MacGregor, Commissioner:

I concur in the opinion of the Presiding Commissioner.

Decision

The Commission decides that the Government of the United Mexican States shall pay to the Government of the United States of America in behalf of George W. Cook the sum of \$4,513.00 (four thousand five hundred and thirteen dollars) with interest at the rate of six per centum per annum from September 21, 1914, to the date on which the last award is rendered by the Commission.

PARSONS TRADING COMPANY (U.S.A.) *v.* UNITED MEXICAN STATES.

(June 3, 1927. Pages 324-325.)

CONTRACT CLAIMS.—NON-PAYMENT OF MONEY ORDERS.—EFFECT OF DEPRECIATION OF CURRENCY.—COMPUTATION OF AWARD.—RATES OF EXCHANGE.—EFFECT OF DOMESTIC LAW GOVERNING PAYMENTS. Decision in *George W. Cook* claim *supra* followed.

Cross-reference: Am. J. Int. Law, Vol. 22, 1928, p. 194.

(Text of decision omitted.)

JOHN A. McPHERSON (U.S.A.) *v.* UNITED MEXICAN STATES.

(June 3, 1927. Pages 325-329.)

OWNERSHIP OF CLAIM. Where evidence throws doubt upon claimant's ownership of claim, which doubt claimant was apparently in a position to dispel and failed to do so, claim *disallowed*.

Cross-references: Am. J. Int. Law, Vol. 22, 1928, p. 194; Annual Digest, 1927-1928, p. 253.

(Text of decision omitted.)

GEORGE W. HOPKINS (U.S.A.) *v.* UNITED MEXICAN STATES.

(June 3, 1927. Pages 329-331.)

NON-PAYMENT OF MONEY ORDERS. Claim for non-payment of money orders *allowed*, pursuant to rulings in *George W. Cook* claim and *John A. McPherson* claim.

OWNERSHIP OF CLAIM. Any doubt as to his ownership of the claim should be dispelled by claimant.

Cross-reference: Am. J. Int. Law, Vol. 22, 1928, p. 194.

Nielsen, Commissioner:

1. Claim is made in this case by the United States of America in behalf of George W. Hopkins to recover the sum of 1,013.40 Mexican pesos or its equivalent, the aggregate amount of six postal money orders which are alleged to be the property of the claimant, and which were not paid upon presentation to Mexican postal authorities. The orders were issued in the year 1914. A proper allowance of interest is claimed on the said sum of 1,013.40 pesos. A motion to dismiss this claim was filed by Mexico on December 16, 1925, and was overruled by the Commission on March 31, 1926. The case is before the Commission for final decision.

2. One of the money orders, in amount 23.40 pesos, is payable to Hopkins Studio. Two others, each in the amount of 200 pesos, were issued in the name of George W. Hopkins, and were indorsed to the *Banco Germánico de la América del Sur* of Mexico City. It is clear from the record that the indorsements were made for purposes of collection. I think that, conformably to the principles underlying the decision of the Commission in the case of *George W. Cook*, Docket No. 663,¹ and the decision in the case of *John A. McPherson*, Docket No. 126, an award should be rendered in favor of the claimant for the value of these three orders, namely, 423.40 pesos, or \$211.06, currency of the United States, with interest at the rate of six per centum per annum from June 6, 1914, the date of the last order, to the date on which the last award is rendered by the Commission.

¹ See page 209.

3. The other three orders were made payable to the *Banco Germánico de la América del Sur*, and were indorsed to The Davidson Co., S. A. In view of the uncertainty in the record with respect to the circumstances surrounding the purchase of these orders, I am of the opinion that no award should be made in favor of the claimant for the value which they represent. They are mentioned in a long list of orders contained in a letter sent by the *Banco Germánico de la América del Sur* to Davidson in which the latter is notified that the orders listed could not be collected. The necessity for certainty in the evidence in a case of this character was discussed in connection with the decision of the Commission in the case of *John A. McPherson*, Docket No. 126.¹ It would seem that it should have been possible for the claimant to produce evidence of his relations with Davidson and with the *Banco Germánico de la América del Sur* such as copies of communications establishing the relationship of agency, copies of instructions by the principal to the parties acting for him, and certified copies of entries in the books of any or all of the parties to the transactions in question which might have served to clarify the important point which is presented to the Commission.

Van Vollenhoven, Presiding Commissioner :

I concur in Commissioner Nielsen's opinion.

Fernández MacGregor, Commissioner :

I concur in Commissioner Nielsen's opinion.

Decision

The Commission decides (1) that the claim must be disallowed with respect to the three money orders issued in the name of the *Banco Germánico de la América del Sur* of Mexico City, totaling the amount of 590 pesos; and (2) that with respect to the three other money orders the Government of the United Mexican States shall pay to the Government of the United States of America on behalf of George W. Hopkins the total amount of the orders, namely, \$211.06 (two hundred and eleven dollars and six cents) with interest at the rate of six per centum per annum from June 6, 1914, to the date on which the last award is rendered by the Commission.

H. G. VENABLE (U.S.A.) *v.* UNITED MEXICAN STATES.

(July 8, 1927, concurring opinion of American Commissioner computing damages in a different amount, July 8, 1927, concurring opinion of Mexican Commissioner, July 8, 1927. Pages 331-392.)

INTERFERENCE WITH CONTRACTUAL RELATIONS.—WRONGFUL DETENTION OF PROPERTY.—RESPONSIBILITY FOR ACTS OF RAILWAY SUPERINTENDENT.—PROXIMATE CAUSE. The National Railways of Mexico, under government control, granted the use of its tracks to four locomotives owned by Illinois Central Railroad Company and leased to two American companies, of one of which claimant was president. Superintendent of said National Railways of Mexico by wire ordered that such locomotives

¹ See page 218.

be not permitted to leave Mexico, thereby preventing their return to owner in accordance with provisions of lease. Such locomotives thereafter remained in Mexico and became substantially valueless, despite efforts of claimant to procure their return. *Held*, respondent Government was responsible for such losses and damages as were an immediate and direct result of superintendent's order.

DETENTION OF PROPERTY NOT A PART OF BANKRUPTCY ESTATE.—INTERNATIONAL STANDARD. Facts *held* not sufficient to establish a failure to meet international standards when locomotive engines not belonging to debtor were attached for debts.

RESPONSIBILITY FOR CARE OF PROPERTY IN CUSTODY OF BANKRUPTCY COURT OR OFFICIALS.—OBLIGATION TO RELEASE PROPERTY NOT PART OF BANKRUPTCY ESTATE. When it was apparent to bankruptcy court and officials that property in their custody was rapidly deteriorating through theft, complete inaction on the part of the court will entrain the responsibility of respondent Government.

MEASURE OF DAMAGES, INDIRECT RESPONSIBILITY. Where Mexican court and railway officials stood passively by while railway locomotives leased by claimant's company were being dismantled by thieves, resulting in their destruction, respondent Government will not be held accountable for full value of each engine thus destroyed, since engines were not in its personal custody, but only for a lesser sum, since respondent Government was only indirectly responsible.

RAILWAY COLLISION.—RESPONSIBILITY FOR LOSSES SUFFERED DURING OPERATION OF TRAINS BY NATIONAL RAILWAYS OF MEXICO. Evidence *held* insufficient to establish fault on part of crews of National Railways of Mexico in connexion with a wreck of a railway locomotive in a collision.

CLAIM FOR EXPENSES. Claim for attorneys' fees and travel expenses, incurred after deterioration of locomotives, in custody of bankruptcy court, was discovered, *allowed*.

Cross-references: Am. J. Int. Law, Vol. 22, 1928, p. 432; Annual Digest, 1927-1928, pp. 229, 279.

Comments: Joseph Conrad Fehr, "International Law as Applied by the U.S.-Mexico Claims Commission," A.B.A. Jour., Vol. 14, 1928, p. 312 at 315.

Van Vollenhoven, Presiding Commissioner:

1. This claim is asserted by the United States of America on behalf of H. G. Venable, an American national. On April 18, 1921, a company of which Venable was president had, together with a company of which one E. S. Burrowes was president, entered into a contract with the Illinois Central Railroad Company at Chicago, Illinois, U.S.A., for the rental of some locomotives to them for use in Mexico, and a few days before, on April 13, 1921, Burrowes in his personal capacity had entered into another contract with the Mexican National Railways allowing him to use the Mexican tracks with these locomotives. About April 20, 1921, four locomotives were delivered, and in May they entered Mexico. On July 22, 1921, however, the Central Company under the contract requested the return of these four engines; in case of failure to do so either Burrowes' company

or Venable's company—the choice between them to be made by the Central Company in its discretion—would be subject to a high penalty. When, for this reason, Venable tried to have the engines leave Mexico, a Mexican railway superintendent by name of C. C. Rochin intervened, at Burrowes' request, by a telegram of September 3, 1921, which forbade his railway personnel to allow these engines and ten other ones to leave Mexican territory and from September 3 to 7, inclusive, 1921, the four locomotives were several times attached by the Court at Monterrey, Nuevo León, Mexico, for liquidated debts of Burrowes' company. On September 17, 1921, Burrowes' company, at Venable's request, was declared a bankrupt, the attachments then being consolidated for the benefit of the bankruptcy proceedings. Repeated demands made by Venable failed to effect the release of the engines; on the contrary, they were retained in the railway yard at Monterrey, where, after a few months, three of them appeared to have been deprived of so many essential parts as to have become practically useless. Even before these occurrences, on August 21, 1921, one of the four engines had been wrecked in a railway collision for which, it is alleged, Mexico is liable. Since finally Venable had to indemnify in the sum of \$154,340.10 the National Surety Company, which had secured the Central Company against its losses; and since he had incurred other expenses in connection with the facts which constitute the basis of this claim, the United States alleges that Mexico is liable to him in the amount of \$184,334.84, with interest thereon, on account of direct responsibility for Rochin's injustice, direct or indirect responsibility for the Court's action, direct responsibility for three engines having been destroyed in the railway yards, and direct responsibility for one engine having been destroyed in a collision.

2. As to the nationality of the claim, which is challenged, reference may be made to the principles asserted in paragraph 3 of the Commission's opinion in the case of William A. Parker (Docket No. 127), rendered March 31, 1926. On the record as presented, the Commission should hold that the claimant was by birth, and has since remained, an American national.

3. In order successfully to analyze the facts in this case, it is indispensable to establish first the contents of three contracts. The first one, a railway traffic contract of April 13, 1921, between, on the one part, the National Railways of Mexico (under government control) and, on the other part, Burrowes, was the contract under which the railway company was to use its tracks for the transportation of merchandise of Burrowes and to this end to use the locomotives imported or otherwise controlled by Burrowes. By the second contract, that of April 18, 1921, the Illinois Central Railroad Company agreed to lease, for use in the handling of freight traffic on certain lines of the National Railways of Mexico, six locomotives, to a combination of two companies, (*a*) the Burrowes Rapid Transit Company (Burrowes, president) and (*b*) the Merchants Transfer and Storage Company (Venable, president). In fact, as stated before, only four engines were delivered. The third contract is that of the same date of April 18, 1921, between the Illinois Central Railroad Company on the one part and, on the other part, Burrowes' company, Venable's company, and the National Surety Company, in which the three companies severally obligated themselves to a penalty of \$150,000.00 in case of nonfulfillment or improper fulfillment of the return of the engines under the contract.

4. About April 20, 1921, four locomotives were delivered by the Central Company to Burrowes' company and Venable's company at New Orleans, Louisiana, U.S.A.; and from the middle of May, 1921, to July 22, 1921, they apparently operated in Mexico without any occurrence or accident.

Burrowes and Venable

5. Before examining the details of this complicated case it may be prudent to make a preliminary remark. The record before the Commission doubtless reveals a series of acts on the part of Burrowes which attempted to injure Venable's business interests; acts in which Burrowes saw fit to involve Mexican authorities, either with or without fault on their part. The record, however, does not disclose Burrowes' motives and views. Apparently between May, 1921, and August, 1921, a serious friction had developed between the two men. Was Burrowes the first of them to attempt measures against the other? There is something quite enigmatic in the position taken by the Illinois Central Railroad Company. On July 22, 1921, it forwarded to Burrowes' company a *telegram* demanding the return of the four locomotives *within fifteen days*, i.e., on or before August 7; but in the fall of 1921, when it was advised that it could receive these engines from Monterrey if only it applied to the Court, it declared that it had no interest in doing so; and even as late as the first part of November, 1921, it did not show anxiety to have them. It would, therefore, seem to be not altogether improbable that the Central Company had not in July, 1921, requested the engines on its own initiative and from its own desire, but on the instigation of some one else. The locomotives were indispensable for the private freight transportation business Burrowes was conducting in Mexico; in a telegram of August 29, 1921, Burrowes contended: "Rapid Transit blown up action Venable and Waldrop" (Waldrop was the vice president both of Burrowes' company and of Venable's company); and it is clear from the record that late in August Venable was trying to have the engines returned to the United States without consulting Burrowes or informing him. In the same way Burrowes' instigating executory processes and attachments *in Mexico* against his own corporation may have been a counter act against Venable's request of a receivership before the *Texas* court. This means that it is not for this Commission—and that, on the record as it stands, it could not even do so with knowledge of facts—to consider whether Venable is justified to complain of Burrowes' attitude, or whether Burrowes might have been justified to complain of Venable. The Commission should eliminate all considerations of moral approbation or disapprobation of what either American citizen planned and did, and merely inquire whether Burrowes, in the course of execution of his scheme, induced Mexican authorities or others acting for Mexico to perform on their part acts resulting in injustice toward an American citizen, or even whether these authorities did so spontaneously.

Rochín's telegram

6. The first question before the Commission is that concerning Rochín's telegram of September 3, 1921; whether he was obliged or entitled to send it. It was argued by Mexico before the Commission, on the one hand, that Rochín in forwarding this telegram had in view the safeguarding of interests and rights of the National Railways of Mexico; that he did so under the

provisions of the railway traffic contract of April 13, 1921; and that in doing so he executed a *right*, not a duty. On the other hand, however, it was alleged by Mexico that Rochín merely acted under instructions from the owner of the locomotives or the man whom he might consider to be so (Burrowes), that he only meant to safeguard interests and rights of this private American citizen, and that it was his *duty* to do so, since a refusal on his part to act would have amounted to an interference in Burrowes' private affairs quite as much as his action did. There has not been alleged that Rochín acted under the emergency provision of Article XXI of the railway traffic contract, nor that he acted in connection with temporary exportation permits granted Burrowes' company by Mexico.

7. It would seem untenable to maintain that Rochín in sending his telegram acted under Article VI and VII of the contract providing that no Burrowes cars should be removed or rebilled until such unpaid freight charges as were due to the National Railways of Mexico should have been liquidated. If this had been the motive for his action, the evidence doubtless would have shown (*a*) that he had personal knowledge of the existence of unpaid charges in a sum of some importance, (*b*) that the order purported to prevent the "removing or re-billing" of the cars, (*c*) that the order would be canceled after payment of said charges, and (*d*) that, when the Burrowes Rapid Transit Company was declared a bankrupt, he (Rochín) joined the other creditors and presented his claim. For none of these contingencies is there proof or even probability. As to non-payment of due charges, there is nothing in the record except one Toussaint's statement of September 2, 1921, to Rochín's assistant Carpio that Burrowes' company was on the verge of bankruptcy, that he advised him to protect the interests of the National Railways with respect to unpaid freights, and that he did not know the amount due. A statement made by Venable to the District Court at Laredo, Texas, U.S.A., on September 1, 1921, that Burrowes had collected freights in advance on property being transported by Burrowes' company "and not paid same to cooperating railway lines, as he should have done", can not possibly have been known to Rochín on September 3, 1921, and neither contains the necessary elements for any governmental action. In the second place: Rochín's order did *not* prevent "removing or re-billing" of the cars, but exclusively their leaving Mexican territory. In the third place: the telegram did *not* establish that it would lose its effect once the charges would be paid, but it merely referred to an ulterior authorization by Ocaranza Llano, who was director general of the National Railways of Mexico and Rochín's chief in the railway management. In the last place: no claim in the bankruptcy proceedings against Burrowes' company was filed by the National Railways until some time between 1922 and March, 1926, and then for an amount of 12,957.63 Mexican pesos, for the payment of which sum it would not have been necessary to retain fourteen locomotives. From all of this there can only be one conclusion, to wit, that Rochín's telegram did not purport to protect any claim of the National Railways as against Burrowes' company.

8. There remains the other possibility: that Rochín acted under instructions from the man who apparently controlled the locomotives and whom he may have considered to be the owner, and that he even was obliged to obey these instructions. The evidence before the Commission would seem to render this second explanation improbable. If Rochín had acted

with this purpose, it would have been but natural for him to wire "do not permit the engines to cross the border unless Mr. Burrowes authorizes it", but he did so only on or about September 23, 1921, even then not saying "Burrowes" but "the owner". Instead of that, he ordered on September 3. not to release them "unless Mr. Ocaranza authorizes it". If Rochín had wired on behalf of the owner, there might have been expected some explanation by Burrowes regarding the reason why he could not act himself, and what was the name of the Mexican railway official who disobeyed his legitimate orders, and on what ground he disobeyed. Instead of that, Toussaint's letter of September 2, 1921, only establishes that the Mexico office of Burrowes's company had been the victim of some undisclosed frauds on the part of their managers at the boundary. If Rochín had wired on behalf of the owner, there might have been expected the production of some evidence which locomotives were either owned by Burrowes or under his control; instead of that, there is nothing except a unilateral statement in Toussaint's letter of September 2, 1921, designating the four locomotives rented from the Central Company and ten other engines. If Rochín had wired under instructions of the owner, he could only have ordered a measure the owner was entitled to order; and there can be no doubt but that a prohibition to let movable property leave the country except by authorization of a high Government official (Ocaranza Llano) was a remedy which could not have been applied by Burrowes himself. Rochín certainly was under no duty to comply with Burrowes' demand. There is no provision whatsoever in the contract either obliging the National Railways to act for the interests of Burrowes' company (apart from allowing them to use their tracks), or authorizing the National Railways to apply in behalf of Burrowes any remedy which Burrowes could not apply himself. Rochín being an official in an important and responsible position should have understood, supposing even that he was entirely unaware of Burrowes' intentions, that it might be dangerous for him to act as he did without having acquired sufficient information as to the reasons for Burrowes' request, at first sight inexplicable; the more so as he was advised that Burrowes was on the verge of being declared a bankrupt (as a matter of fact not bankruptcy, but receivership had been ordered on September 1. 1921), and as he should have realized the uncertainty as to Burrowes' rights to dispose of his effects at the time he applied to Rochín. If Burrowes some day had cabled to Rochín "see to it that fourteen locomotives in which my company is interested immediately leave Mexico", is it thinkable that Rochín would have used his official power to obey this command, or would he not have left this affair entirely to the activity and responsibility of Burrowes himself?

9. It is true that Rochín under the contract was not obliged to consider other American contract rights than those of Burrowes' private freight transportation business. But acting outside of the contract, he should take care not to violate other contract rights vested in any national or foreigner. If, acting without right or authorization, he damaged any such contract right—in the present case: Venable's—his being unaware of its existence would not exclude or diminish Mexico's liability for what this official of the National Railways (under government control) illegally did. Direct responsibility for acts of executive officials does not depend upon the existence on their part of aggravating circumstances such as an outrage, wilful neglect of duty, etc.

10. What was the damage caused by Rochín's telegram? Linked up with subsequent occurrences, his telegram may have been the cause of all the mishap of the claimant relative to the three engines which on September 3, 1921, were in good condition, and of part of the mishap with the fourth engine which had been wrecked in August; though it is uncertain where the three engines were on September 3, and whether they might not at the time of the attachment by the Court have been on Mexican territory even without Rochín's telegram. It is clear, however, that only those damages can be considered as losses or damages caused by Rochín which are immediate and direct results of his telegram; see the award in the *Lacaze* case between Argentine and France under the decree of December 17, 1860 (*De Lapradelle et Politis*, II, 298), and paragraphs 13 and 14 of the first opinion in the *Francisco Mallén* case (Docket No. 2935). Every day of delay in returning the four engines to the Illinois Central Railroad Company might have caused the claimant's company a loss of \$140.00 and, apart from that, obstacles against his returning them after August 7, 1921, might have resulted in imposing on the said company an obligation to pay the \$150,000.00 due under the contract in case of nonfulfillment or improper fulfillment of the duty to return the engines in good condition and in time. An element of uncertainty, however, proceeds from the fact that the Illinois Central Railroad Company never claimed any amount of \$140.00 per day for the period elapsed after August 7, 1921; and that it was not until November 15, 1921, after all of the important events subsequent to Rochín's telegram had occurred, that the Central Company really claimed the contractual penalty for the four engines. It is difficult, therefore, to make the money value of the damage caused by Rochín's act the object of a precise calculation.

The bankruptcy proceedings

11. The second problem before the Commission is that concerning the attitude of the State Court at Monterrey, Nuevo León, in its bankruptcy proceedings against Burrowes' company.

12. On July 22, 1921, the Central Company had requested the return of the four engines, a request which if complied with (as was Burrowes' duty) apparently would have destroyed an important part of Burrowes' transportation business. On August 1, 1921, Burrowes' company had taken over the similar business of the Brennan, Leonard and Whittington Transportation Company, including the use of ten more engines. On September 1, 1921, Venable, before the 49th Judicial District Court of Texas at Laredo, Texas, had requested the appointment of a receiver for Burrowes' company, and this request had been granted the same day. On September 1 and 2, 1921, one R. L. Bateman, a creditor of Burrowes' company, requested the said Court at Monterrey to attach the property of Burrowes' company for a liquidated and unpaid debt. Bateman's request appears to have suited Burrowes' plans; instead of opposing it, he recognized at his earliest opportunity—on September 3, 1921, late in the afternoon—that indeed he had discontinued paying his debts. The relation between the requests made at Laredo and at Monterrey has been touched upon in paragraph 5. On September 15, 1921, Venable demanded the Court at Monterrey to adjudicate the bankruptcy of Burrowes' company; the Court granted this request on September 17, 1921, appointing a lawyer, Leal Isla by name,

provisional *síndico* (trustee) and one Morales Gómez *interventor* (controller or supervisor). Leal was the Monterrey lawyer of the National Railways of Mexico.

13. The legal difficulties had begun when on September 3 to 7, inclusive, 1921, goods belonging to the debtor company had been attached by the clerk of the Court. Under Mexican law creditors are entitled to point out which effects they desire to see attached, and the debtor has the right to present objections. In the present case Burrowes as president of the debtor company designated for attachment "the entire business represented by him" (*toda la negociación por él representada*); whereupon Bateman and, after him, some other creditors demanded that, apart from a few goods of minor importance, out of the fourteen locomotives controlled by Burrowes' company—see paragraph 7—either the four engines leased by the Central Company or the three undamaged ones should be attached. The clerk of the Court did not inquire whether they were part of "the entire business" of the debtor company, but merely established that Burrowes had three days to object to said execution. Burrowes never objected, but, on the contrary, requested that "the properties designated by the parties and which are enumerated in the foregoing writ of attachment" be declared "to be formally attached". So the Court did on September 3, 1921, and following days. On September 17, 1921, these several attachments were consolidated into one attachment for bankruptcy.

14. In attaching the four engines for the debts of a company which did not own them the clerk of the Court may have made the slight oversight indicated in paragraph 13; but the mistake is entirely due to an unreliable statement of Burrowes. No fault can be imputed to the Court, and certainly not a defective administration of justice amounting to an outrage, bad faith, wilful neglect of duty, or apparently insufficient governmental action (see paragraph 4 of the Commission's opinion in the *Neer* case, Docket No. 136, rendered October 15, 1926).

15. The present claimant, Venable, then began his determined efforts to get these four engines free from the attachment. In order to be represented among the creditors and to be entitled to request bankruptcy proceedings, he bought, on the advice of his Mexican lawyer, the claim of one of the company's creditors, the firm of A. Zambrano e Hijos. It has been argued by Mexico that, acting on the advice of his Mexican lawyer, he failed to take the steps required by Mexican law in the forms required by Mexican law, and took other steps which according to the laws of procedure and bankruptcy never could make him attain his end. It is most unsatisfactory to state that he was the victim of either lack of knowledge or of application on the part of his lawyer; but Mexico can not be held liable on that ground. He moreover was the victim of the fact that the Illinois Central Railroad Company, which successfully could have required the release of the engines in the Monterrey Court, was unwilling to act (see paragraph 5).

16. Of these court proceedings four parts would seem open to criticism. When Venable instituted a suit against the *síndico*, the Court, instead of clinging to the periods of the law, accepted an answer filed by this *síndico* fifteen days late. In the second place: the Judge in the court room had private conversations on the case with Venable, his lawyer, and the *síndico*, in which he indulged in making a kind of informal ruling as to the party authorized to claim release of the engines (the Central Company only),

but in which he never told the claimant that he did not live up to the forms of Mexican law and that there lay his trouble. It would seem more appropriate for a Judge not to allow such interviews; but once he does, he should not be silent on a vital point which he might have indicated without committing himself. In the third place: a request of the Court itself addressed to the Mexican Land Registration Office on October 28, 1921, was allowed to remain unanswered, though a reply was indispensable for the continuation of the suit filed by Venable against the *sindico*. In the fourth place: the Court did nothing to bring the bankruptcy proceedings to an end, allowed them to remain at a standstill, did not direct the *sindico* to account for his acts nor for the custody of the goods trusted to his care. The first of these four objectionable acts can not be said to amount to so serious a deviation as to constitute a mal-administration of justice as mentioned at the end of paragraph 14. Nor can the second and third acts. The fourth act will be considered under paragraph 23. As to the details of the court proceedings, I refer to paragraphs 4 to 13, inclusive, of Commissioner Fernández MacGregor's opinion, in which I concur.

17. Supposing the choice of Leal as *sindico* was not a happy one, the Court can certainly not, on the record, be blamed because of the mere fact that a lawyer of the most important railway corporation was chosen as trustee in the bankruptcy proceedings against a company doing business relative to railways. Leal's proposal of October 4, 1921, temporarily to lease the engines to one of two applicants both alien to the National Railways can not be represented as meaning a prejudiced act intending to promote, not the interests of the estate, but of his railway corporation.

18. Since for those parts of Mexican law which are involved in the present case much depends upon the knowledge and trustworthiness of lawyers, satisfactory results of the administration of justice are not to be expected if, indeed, as it would appear from the record, even in important centres of Mexican life lawyers of good standing are not or were not up to the usual standards. Statutes following the type of French law, as it was adopted in Napoleon's day, can not work well unless the lawyers in the country where such statutes are in force correspond to what lawyers were and are in France and similar countries; and if a nation can not feel sure of that, it should in its legislation grant a larger power to its Judges, even in civil suits, as has been done in the legislations of parts of Asia, where the same difficulty existed.

19. The conclusion should be that the court proceedings at Monterrey, though presenting an unattractive picture of how legal provisions were allowed to be misused in support of bad intentions, do not show a defective administration of justice such as might give ground for their being stigmatized by an international tribunal.

The destruction of the three engines

20. On September 3, 1921, the four locomotives, three of which had continued to be in good operating condition, were attached for debts of Burrowes' company; on September 17, the attachments were consolidated and the engines were given in custody to a *sindico* or bankruptcy trustee. From September 3, 1921, until further provision to the contrary, the owners and other private persons interested in the engines lost their power over them. It is established by the record that the engines at all times were left

in an unprotected position, exposed to the weather; that up to October, 1921, they had been well preserved; but that before June, 1922, and particularly before June, 1925, so many parts of prime importance had been removed or injured that the engines had been reduced to a practically worthless condition. The question before the Commission is whether under international law these circumstances present a case for which a government must be held liable.

21. There could have been no hesitation to answer in the affirmative if the goods had been taken into custody by Mexican officials or other persons "acting for" Mexico. Then a direct responsibility of the government would have been involved. In paragraph 4 of its opinion in the *Nick Cibich* case (Docket No. 14)¹ the Commission held that Mexican police officers having taken a man's money into custody must account for it and would, apart from further complications, render Mexico liable if they did not. In paragraph 3 of its opinion in the *Quintanilla* case (Docket No. 582)² the Commission held that, once a government has taken into its custody war prisoners, hostages, interned soldiers, or ordinary delinquents, it is obliged to account for them. The opinion in the *Toberman, Mackey & Company* case (Docket No. 17) has no bearing on the present problem, since a real custody of imported goods in the hands of customhouse officials was held not to have existed in that case. In the *Lord Nelson* case before the British-American arbitral tribunal the United States was held responsible for the embezzlement of funds in custody of the clerk of a federal court (Nielsen, *Report*, 433-434).

22. The present situation, however, is different. When a court places a bankrupt estate in the custody of some kind of trustee (in Mexico; a *sindico* and an *interventor*), it does the same thing for an estate that it does for specific goods of a debtor when allowing a plaintiff to attach them in order to preserve for his benefit property on which eventually to execute a future award rendered in his favor. Such goods are not taken into custody by the courts themselves; a private citizen is appointed trustee, acting for the benefit of the plaintiff, or the plaintiff himself is appointed for this purpose. Likewise, in many countries a bankruptcy trustee, such as the Mexican *sindico*, can not be considered as an official, or as one "acting for" the government; he acts "as representative of the creditors" (Ralston, *Venezuelan Arbitrations of 1903*, 172). The *Institut de droit international*, in the rules on bankruptcy law it adopted in 1902 in its session of Brussels, styled persons like this Mexican *sindico* "the representatives of the estate" (*les représentants de la masse*; Articles 4 and 5). The draft convention on bankruptcy law inserted in the final protocol of The Hague conference on private international law of October-November, 1925, attended by delegations from twenty-two states (including Great Britain), established in its Article 4 that the syndic can take all conservatory measures or administrative measures and execute all actions "as representative of the bankrupt or of the estate" (*comme représentant du failli ou de la masse*). It is true that the British delegation left this conference before its close, but not because of any difference of views as to the position of the trustee; and, moreover, in the present case the position of the bankruptcy trustee should be considered in the light of Mexican, not of Anglo-Saxon, law. In countries with bankruptcy legisla-

¹ See page 57.

² See page 101.

tions such as the Mexican code contains, direct responsibility for what happens to the bankrupt estate lies not with the government. In the present case it rested either with Familiar, a railway superintendent at Monterrey, under whose care the engines had been placed at the time of their attachments and under whose care they had been left on October 4, 1921, by the *sindico* Leal; or the responsibility rested with this *sindico*, appointed by the Court on September 17, 1921, or with the combination of *sindico* and *interventor*. Laws like that of Mexico intentionally refrain from laying the heavy burden of these responsibilities on personnel of the courts. I concur with respect to the problem of the position of the Mexican *sindico* in paragraph 16 of Commissioner Fernández MacGregor's opinion.

23. Though the direct responsibility for what befalls such attached goods does not rest with the courts and the government they represent, because these are not the custodians, a heavy burden of indirect responsibility lies upon them. The Government obligates owners and other persons interested in certain goods to leave the care of these goods entirely to others; it temporarily excludes these owners or other persons interested from interference with their goods; it constrains them to allow custodians to handle them as these custodians think legal and fit. Here, conformably to what was held in the *Quintanilla* case, a Government can not exculpate itself by merely stating that it placed the goods in someone's custody and ignores what happened to them. The Court at Monterrey had "to provide for the preservation of the bankrupt estate", and the appointment of a provisional *sindico* and of an *interventor* had this special purpose (Article 1416, Mexican Code of Commerce of 1889). Through the *interventor* the Court could execute its control on the acts of the *sindico*. Through the prosecuting attorney the Court had to be vigilant against crimes. It had to see to it that the bankruptcy proceedings went on regularly and were brought to a close within a reasonable space of time. The Court at Monterrey seems not to have realized any of these duties. At a time when everybody could see and know that the three engines were rapidly deteriorating because of theft in a most wanton form, the less excusable since it could not have been accomplished unless by using railroad machinery specially adapted for such purposes as the dismantling of locomotives, no investigations were made by any prosecuting attorney, no prosecutions were started, no account was required from the custodian appointed by the *sindico*, nor from the *sindico* himself, and nothing was done to have the bankruptcy proceedings wound up. Even if, here was not wilful neglect of duty, there doubtless was an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. Whether this insufficiency proceeded from the law or from deficient execution of the law is immaterial. The Court at Monterrey can not plead innocence; having constrained private individuals to leave their property in the hands of others, having allowed unknown men to spoil and destroy this property, and not having taken any action whatsoever to punish the culprits, to obtain indemnification, to have the custodians removed and replaced, or to bring the bankruptcy to an end, it rendered Mexico indirectly liable for what occurred. Nor can the Court exculpate itself by alleging that no American citizen has applied to it in order to have these wanton acts investigated and to have the necessary action both against the perpetrators of crimes and the unreliable custodians started; to do such things is an essential part of proper governmental action and can not be made dependent upon private initiative.

24. The three engines according to the contract of April 18, 1921. between the Central Company, Burrowes' company, and Venable's company were valued at \$37,500.00 each. In October, 1921, an American expert calculated their value somewhat higher, to wit, at \$40,000.00 each. A proposal of the *síndico* to have the engines rented out (paragraph 17) was opposed by Venable and was never allowed by the Court; being kept unused in the railway yards, even when well protected, their value must have somewhat decreased, the custodians not being obligated to spend money in order to keep them in a first-class condition. It would seem proper, therefore, to consider the loss sustained because of the destruction of the three engines as amounting to the original valuation of \$37,500.00 each, or a total of \$112,500.00. In case of direct responsibility for engines under its own custody, Mexico should have had to indemnify in this sum, unless the occurrences could be ascribed to an irresistible calamity. Here indirect responsibility only can be fastened upon Mexico. The engines, however, were destroyed not by an act of God, but by criminal acts of men. The results of the acts were not secret or hidden; they were under the eyes of all the railway officials at Monterrey, who at the time were government officials. The crimes must have been committed not by private means, but by using railway machinery, which at the time was government machinery. It is not for the Commission to investigate who had the benefit of these removals; but there is high probability that the valuable parts of the engines were added to other engines proceeding from the same plants, as where the ninety-one locomotive engines sold by the Central Company to Mexico on April 23, 1921, and gradually delivered at New Orleans from shortly thereafter to June 28, 1921 (record of Docket No. 432). Considering all these points, the amount due because of this indirect government responsibility may be fixed at \$100,000.00 without fear of being unjust or unequitable.

25. The respondent Government has not denied that, under the Convention of September 8, 1923, acts of courts of Nuevo León may give rise to claims against the Government of Mexico. The Commission has repeatedly held that claims may be predicated on acts of state authorities.

The wrecking of the fourth engine

26. On August 21, 1921, one of the four engines had been wrecked in a collision on the railway track between Saltillo, Coahuila, and Monterrey, Nuevo León. Both colliding trains were operated by crews of the National Railways of Mexico (under government control); it is, therefore, irrelevant which crew was at fault. But were the National Railways liable for the accident? Article XXIII of the railway traffic contract of April 13, 1921, establishes that "the Railways will not be responsible for the damage suffered by locomotives, the cars or their contents by reason of accidents, fire—or for any other cause of superior force, the Second Party Contractor waiving for this effect the Articles Nos. 1440, 1442, and 2512 of the Civil Code of the Federal District". It is difficult to consider as convincing evidence of fault a mere statement proceeding from one of the mechanics that the other train was running without, or contrary to, orders. I therefore concur on this point, in paragraphs 19 to 21, inclusive, of Commissioner Fernández MacGregor's opinion.

27. The impossibility to return this engine in good condition to the owner (the Central Company) made the lessees liable, under their contracts of April 18, 1921, to an indemnification of \$37,500.00, which was actually paid. An expert estimate made on September 15, 1921, on behalf of the National Railways of Mexico stated that to put the engine in good condition would need repairs in the approximate cost of 21,000.00 Mexican pesos. It therefore would seem proper to consider the value of the engine after the collision as having amounted to \$37,500.00 minus the approximate equivalent of 21,000.00 pesos (viz, \$10,500.00), resulting in \$27,000.00. There is no evidence that, while in the Monterrey yard, this wrecked engine had some of its parts removed. Instead of ordering, under Article IX of the Convention of September 8, 1923, that this fourth engine be restored to Venable, it would seem in keeping with the interests of both parties to award on its account an amount in money representing its value (\$27,000.00) increased with a sum representing interests from the uncertain date on which, if the bankruptcy proceedings had been terminated in due time (see paragraph 23), the status of this engine would have been decided.

Venable's present rights in the four engines

28. Since there is no controversy between the two Governments that rights in the engines are vested exclusively in Venable at the present time and that they were so at the time he filed his claim, it is only necessary to indicate how he acquired them. The ownership of the engines was from the beginning in the Illinois Central Railroad Company. On August 15, 1922, it passed to Venable because of their transfer to him by the National Surety Company, which had paid \$154,340.10 to the Central Company under the bond proceeding from the third contract mentioned in paragraph 3 above. Venable, however, did not pay in 1922 to the National Surety Company more than \$50,780.65. was sentenced on March 6, 1923, to pay to this corporation an additional sum of \$111,743.83, and satisfied this judgment on December 7, 1926. Potential rights of three insurance companies in the engines were surrendered to Venable in contracts of July 7, 10, and 11, 1922, between them and the claimant.

Other items claimed

29. Venable, moreover, claims an amount of \$1,250.00, representing the sum paid by him for the claim of one of the creditors of Burrowes' company (A. Zambrano e Hijos), bought in order to enable him to request bankruptcy proceedings. Mexico can in no manner be held liable for this expense.

30. Venable claims fees of attorneys whose services he engaged either in Mexico or in the United States, in the total sum of \$20,294.74. In as far as these expenses are merely consequences of the attachments directed against Burrowes' company, they can not be linked with any illegal act of Mexico; but he should be compensated for them in as far as they relate to action taken after the deterioration of the three engines in the Monterrey railway yard had been discovered. The amounts claimed for such action of attorneys correspond with items 11 and 12 of Venable's list concluding

the Memorial, and with part of the amount under 10, in the sums of \$648.52, \$797.79, and \$2,000.00 (four monthly payments), in total, \$3,446.31.

31. Venable claims expenses for several trips, made by himself and others, in the amount of \$8,450.00. The trips made since the deterioration of the three engines was discovered caused the expenses under items 6 and 7, in the sums of \$2,200.00 and \$2,200.00, in total, \$4,400.00. The trips made in September-October, 1921, by Mims, in June, 1922, by Greenstreet, and in June, 1925, by Greenstreet and Mims, in order to establish the deterioration of the four engines, have also a bearing on facts for which Mexico should be held liable; but no indemnification is claimed on these counts.

Interest

32. The amount of \$100,000.00 for which Mexico is responsible on account of the destruction of the three engines (paragraph 24) is a lump sum for injustice inflicted and should bear no interest. Nor should any of the other amounts, apart from what has been suggested at the end of paragraph 27.

Conclusion

33. In conclusion, taking account of what has been said in the foregoing paragraphs, it would seem proper to award the claimant the sum of \$140,000.00, without interest.

Nielsen, Commissioner:

Claim is made in this case by the United States of America in behalf of H. G. Venable, in the sum of \$184,334.84. The claim is predicated, as stated on page 1 of the American brief, "on the wrongful detention and destruction of four (4) railway locomotives by the employees, agents, representatives, and officials of the 'National Railways of Mexico and Connecting Lines under Government Control', in conjunction with the Civil Court of First Instance at Monterrey, Mexico, and the Receiver and Superintendent in Bankruptcy of the Burrowes Rapid Transit Company [an American corporation, doing business in Mexico], who were serving under appointment by that Court".

The record in the case is a long one, embracing numerous copies of contractual arrangements and judicial proceedings. However, the most salient matters underlying the claim preferred by the United States can be somewhat briefly summarized from the allegations contained in the Memorial and the brief.

In 1921 E. S. Burrowes, an American citizen, entered into a contract with F. Perez, General Director of the National Railways of Mexico, under which the former obtained certain rights to use the tracks of the Railways in connection with the business of the Burrowes Rapid Transit Company, an American corporation, engaged in the transportation of freight. In carrying on this enterprise Burrowes obtained the cooperation and assistance of the claimant, Venable, who was the owner of the property of a Mexican corporation called the Merchants Transfer and Storage Company. This Company and the Burrowes Rapid Transit Company jointly leased

four locomotives from the Illinois Central Railroad Company, an American corporation. The lessees agreed to pay the Illinois Central Railroad Company \$35.00 in American currency per engine for each day while the lease was in force, and further agreed that in case the engines or any one of them should not be returned conformably to the terms of the lease, or if all or any of them should be injured so as to become unserviceable, the sum of \$37,500.00 should be paid to the lessor for each engine. The lease was subject to termination on fifteen days' notice on the part of the lessor. The two lessees, in conjunction with the National Surety Company, another American corporation, executed a bond to guarantee the proper performance of the terms of the lease, and by another undertaking the lessees pledged themselves to the National Surety Company to indemnify that company for any loss it might sustain in consequence of having executed the bond by which all the three companies pledged themselves to the Illinois Central Railroad Company.

On or about July 22, 1921, the Illinois Central Railroad Company gave notice of the termination of the lease. Difficulties evidently arose between Burrowes and Venable during the course of their business relationship. On or about August 25, 1921, Venable, having been informed of the notice of termination of the lease, took steps to return the locomotives. He was in New York City during the months of July, August, and September, 1921. Pursuant to his directions, A. G. Wittington, General Traffic Manager of the Burrowes Rapid Transit Company, sent a telegram on August 25, 1921, to P. E. Martinez, who was in charge of the office of that company at Monterrey. In this message the latter was directed to return the engines to Brownsville as quickly as possible. Martinez received the telegram and took steps to carry out the instructions therein contained, but was prevented from making delivery of the engines at Brownsville because of an order given by C. C. Rochín, Superintendent of Transportation of the National Railways of Mexico. On August 29, 1921, C. M. Hammeken, who was in charge of the Burrowes Company's offices in Mexico City, received at that place the following telegram from Burrowes:

"Rapid Transit blown up action Venable and Waldrop stop Quick have proper authorities prohibit engines leaving Republic until all freights which have been collected are paid protecting my name and yours stop Protect yourself by attaching anything on sight stop Don't draw Zambrano no funds available at all. My license still good and if freights are taken care of we can still make some money for you and I. I can get some power myself advise Ancira Hotel personal."

Hammeken explains in an affidavit accompanying the Memorial that on receipt of this telegram he went to Monterrey to confer with Burrowes, who urged Hammeken to persuade the Railway authorities to issue orders which would prevent the locomotives from leaving Mexico, so as to give time and opportunity to embargo them for debts of the Burrowes Rapid Transit Company; that to aid him (Hammeken) to have such orders issued he was given a letter addressed to an official of the Mexican National Railways; that this letter was presented to Rochín with whom Hammeken states he "had good relations"; and that thereupon Rochín sent his telegram directing the stopping of the locomotives.

Under date of September 3, 1921, Rochín sent to P. S. Alvares, Superintendent of the Northern Division of the National Railways of Mexico at Monterrey, the following telegram:

"11.05 A. M. As per instructions from General Superintendent you will not permit the following engines to cross border: Burrowes 2280, 2281, 2282, 2283, M.K.T. 502, 506, 598, 411, 413, ING 205, 229, 221 SA & AP 170 and 247 unless Mr. Ocaranza authorizes it. Please acknowledge receipt if understood."

The locomotives having been detained by the order of Rochín, the Judge of the First Court of Civil Letters at Monterrey, on September 3, issued an order of embargo on all four locomotives in connection with a proceeding instituted by R. L. Bateman, an employee of the Burrowes Rapid Transit Company, to recover a debt in the amount of 1,950 pesos alleged to be due to him from the Company.

It is alleged by counsel for the United States that Burrowes fraudulently took advantage of Hammeken's close relationship with Rochín to undertake to persuade the Mexican National Railways that the stopping of the engines would be a protection to the interests of the railways. And with reference to Rochín's order it is contended that his act in stopping the engines was illegal, extrajudicial, and improper; that Rochín clearly had notice with respect to the right of control over the locomotives and with respect to fraudulent purposes of Burrowes to prevent his co-lessee from returning the locomotives in accordance with the terms of the lease under which they had been obtained from the Illinois Central Railroad Company; and that Rochín's action resulted in a breach of the lease contract, entailing great financial loss on Venable for the consequences of which the Mexican Government is responsible in damages.

Counsel for Mexico in argument expressed the opinion that Burrowes used the court for the purpose of ruining Venable. It is undoubtedly clear from the evidence that the attachment of the locomotives was instigated by Burrowes. But counsel for Mexico differs from counsel for the United States with regard to the propriety of the action of the court in directing the seizure of the property. The latter contends that to direct execution on approximately \$200,000 worth of property for a debt of 1,950 pesos was manifestly improper; that it is clearly the purpose of provisions of the Mexican Commercial Code that property shall be seized only in sufficient quantity to satisfy a debt; and that the Code carefully guards against unnecessary seizure.

Following the seizure of the locomotives by order of the court, it appears that it was made known to the judge by Lic. Salome Botello, Mexican counsel for Venable, in a manner which is described in the Memorial and accompanying Annexes as "unofficial", that the locomotives were not the property of the Burrowes Rapid Transit Company, and that their return had been demanded by the Illinois Central Railroad Company pursuant to the terms of the lease of the locomotives. It further appears that the liability of the claimant as a joint lessee was explained to the judge, but that the judge refused to release the embargo and to permit the reexportation of the locomotives to the United States, and entered several additional orders of embargo.

Botello thereupon advised Venable that, as an expedient to meet the attitude taken by the judge that the locomotives could be released only on the demand of the Illinois Central Railroad Company, application could be made to the judge for a declaration of bankruptcy against the Burrowes Rapid Transit Company. For this purpose Venable, on the advice of counsel, purchased a draft, which had been drawn by the Burrowes Rapid Transit

Company at Monterrey on that company at Laredo, Texas, and discounted by a bank at Monterrey and had not been taken up and paid at Laredo. Application was made to the judge of the First Court of Civil Letters at Monterrey for a declaration of bankruptcy, and this application was granted by the court.

Carlos Leal Isla was appointed provisional *sindico* and Antonio Morales Gómez interventor, and the former apparently left the property in the direct charge of Francisco G. Familiar. No bond was required from any of these men to protect persons interested in the property seized.

The idea underlying the legal strategy advised by Botello in obtaining a declaration of bankruptcy against the Burrowes Company evidently was that it would be the duty of the judge under Mexican law promptly to release seized property which did not belong to the estate of the bankrupt; and furthermore, that a proper conservation of the estate of the bankrupt would make such release imperative, in view of the fact that, under the lease from the Illinois Central Railroad Company to which the Burrowes company was a joint party with the Venable Company, the Burrowes company was jointly liable with the Venable company for the entire value of all the locomotives, if delivery was not made conformably to the notice of the termination of the lease.

Venable called a meeting of creditors with the idea of effecting an arrangement for the release of the locomotives. He pointed out to the creditors that the further retention of the locomotives could be of no advantage to them, since they were not assets of the bankrupt; that, on the other hand, such retention was contrary to the interests of the Burrowes Company which was legally bound to return the locomotives. All efforts made by Venable to induce the creditors to act were fruitless. From a petition filed by Venable with the court at Monterrey it appears that the indifference of the creditors was explained as due to a feeling on their part that they could lose nothing by what might happen to an estate such as that actually possessed by Burrowes. In that petition it is further alleged that the creditors, knowing the liability of Venable towards the Illinois Central Railroad Company, hoped that he would settle their claims against the Burrowes Company in order to bring about the release of the locomotives. Venable in his petition stated that rather than submit to tactics of that kind he appealed to the court for the release of the locomotives as property which was no part of the estate of the bankrupt Burrowes company.

On September 22, 1921, the Merchants Transfer and Storage Company filed suit against the *sindico*, the court's appointee, to obtain the release of the locomotives. This suit was instituted by a pleading fully describing the ownership of the locomotives, the conditions under which they had been leased to the Venable company and the Burrowes company, the obligation of the lessees to return the locomotives to the owners, and the losses which would be sustained if delivery to the owners was not made. Copies of documents showing all these things which have been heretofore described were made part of this pleading. The court entered an order to give the *sindico* five days in which to make a reply. The *sindico* answered by filing a pleading of a technical character praying that Venable should be obliged to furnish a bond or surety, proof of the character in which he claimed the return of the property, proof of his legal representation of the Merchants Transfer and Storage Company, and an exact statement of what he prayed for. The pleading contained a long explanation of the legal basis of the so-called

dilatory exceptions interposed by the *sindico*. Counsel for Venable in turn made answer to these exceptions. These dilatory pleas were criticized by counsel for the United States as attempts to bring about delay and to harass Venable. In this connection it is pointed out that, although under the rules governing procedure before the court the *sindico* had five days from September 22nd in which to make reply, he did not file such reply until October 9th. The court thereupon allowed a period of ten days for receiving evidence. The *sindico* answered that there was no evidence to produce, and he requested the court to ask the register of the Land Office whether Venable or the Merchants Transfer and Storage Company possessed any real estate. On October 28th the court entered an order directing that inquiry be made of the Land Office regarding real estate. The record does not disclose that a report respecting that inquiry has been received up to the present time.

In September, 1921, Venable applied to a court in Texas for a receiver to take charge of the assets of the Burrowes Rapid Transit Company, which also did business in Texas with its principal office and place of business in Laredo and working offices in other places in the state. The petition filed by Venable recited the difficulties between himself and Burrowes with regard to the return of the locomotives obtained under the lease from the Illinois Central Railroad Company and contained allegations with respect to debts owing by the defendant company to the Merchants Transfer and Storage Company, liabilities which Burrowes had created against Venable and acts of the former in a reckless disregard of the interests of the latter. A copy of the lease was presented to the court. The court granted Venable's petition and appointed W. C. Greenstreet receiver. Subsequently the court issued an order reciting that the engines embargoed at Monterrey were the property of the Illinois Central Railroad Company.

Greenstreet, following his appointment as receiver, made application to the court reciting that since his appointment he had diligently endeavored to collect and preserve the records of the Burrowes Rapid Transit Company, and to obtain possession of the locomotives, but had been unable to do so because, as he believed, they were being held first, by an order of one of the officials of the National Railway Lines of Mexico, and second, by embargo proceedings in the court at Monterrey. The receiver prayed that he be authorized by the judge to make proper representations to the court and authorities in Monterrey or elsewhere in Mexico for the purpose of having the locomotives delivered conformably to the terms of the lease under which the use of the locomotives had been obtained from the Illinois Central Railroad Company. Such authority was granted by the court to the receiver. The receiver thereupon proceeded to Monterrey with Venable and Mexican and American counsel and attended a hearing at that place before the judge of the First Civil Court and the *sindico*, Isla, and presented to the court orders of the Texas court establishing that the engines were owned by the Illinois Central Railroad Company. Information was also given to the court respecting the authority conferred by the Texas court on Greenstreet to request the Monterrey court to release the locomotives, the demand of the Illinois Central Railroad Company for the delivery of the locomotives, and the relations between the Merchants Transfer and Storage Company and the Burrowes Company.

In an affidavit which is found in the record, Greenstreet stated that he heard the judge of the First Civil Court at Monterrey state that he was convinced that the locomotives belonged to the Illinois Central Railroad

Company and were not liable for the debts of the Burrowes Company; that he recognized that the detention of the locomotives in Monterrey was a great injustice to Venable and the Merchants Transfer and Storage Company, which would result in serious loss; but that he could not enter an order for the release of the locomotives, but indicated he would do so on a request from Isla. In the same affidavit it is stated that Isla declared that he also was convinced of these same facts with regard to the ownership of the locomotives, and the responsibility on the part of Venable for their return; that should the judge of the First Civil Court at Monterrey direct the release of the engines, he, Isla, would carry out the order; but that he would not ask for it.

On December 26, 1921, Botello filed another petition calling attention to the status of the locomotives and to the expiration on December 31st of that year of a permit for the reexportation of the locomotives without the payment of duties, so that this information might be brought to the attention of the *sindico* and the supervisor, with a view to the release of the locomotives. It does not appear that any action was taken with respect to this petition.

The locomotives having been received by Isla, who was appointed *sindico*, and who was a legal representative of the Mexican National Railways at Monterrey, they were in turn by him placed in the hands of Francisco G. Familiar, a superintendent of the Mexican National Railways. It is shown by evidence in the record that the locomotives, while so held, were dismantled. The record contains an affidavit made by Greenstreet giving details of his examination of the engines, and incorporating statements of approximately 15 pages of itemized articles that had been stolen. The record contains other sworn testimony of a similar nature. Greenstreet in his affidavit states that during the occasions of his inspection of the locomotives he heard conversations among the employees of the National Railways of Mexico, and was told by them that the parts of the locomotives which were missing had been removed by them and other employees of the National Railways of Mexico and used by the Railways. It is represented by counsel for the United States that such was obviously the fact; that the parts removed were of such a character that they could only have been taken by persons in control of apparatus for handling locomotives such as mechanism that could lift a locomotive; that obviously the parts removed were taken to be used in repairing other similar locomotives owned by the Mexican National Railways, and that, the Railways being under Government control, the Mexican Government profited greatly by the dismantling of the locomotives. It is not denied in behalf of Mexico that the locomotives were dismantled, but it is stated that there is no evidence proving that the Railways were responsible for the damages inflicted. It seems to be impossible to escape the conclusion that the parts removed were used in repairing other locomotives. Moreover, it would of course have been a very simple matter to obtain evidence on this point from persons connected with these serious matters, and assuredly that would have been a logical and very important thing to do. The locomotives were in such a condition that American insurance companies which had insured them against theft, destruction, and detention adjusted their risks without any contest with respect to liability.

The contentions advanced by the United States appear to involve three fundamental points: (1) The propriety of Rochín's order in stopping the

movement of the locomotives, (2) the propriety of the judicial proceedings before the court at Monterrey, (3) the theft and destruction of the locomotives. Wrongful action on the part of Mexican authorities resulted, it is alleged, in an interference with contractual rights of the claimant and consequent great financial loss.

I am of the opinion that the action of Rochín must be regarded as illegal and improper, irrespective of what may be the information or motive that prompted it. Mistaken action can not properly be asserted as a legal defense against liability predicated upon what Rochín did. See the case of the *Costa Rica Packet*, Martens, N.R.G., 2d Ser. XXIII (1898), pp. 48, 715, and 808; case of the *Union Bridge Company* under the Special Agreement of August 18, 1910, between the United States and Great Britain, *American Agent's Report*, p. 376; cases of the *Jessie*, *Thomas F. Bayard*, and *Pescawha*, *ibid.*, p. 479. Rochín's action was an interference with the rights of Venable and the rights of the Illinois Central Railroad Company. In matters pertaining to the contract made by Burrowes with the Mexican National Railways, officials of the latter would naturally deal with Burrowes or his agents. However, when Rochín was requested to prevent the engines from leaving Mexico, it does not seem to be conceivable that he should not have appreciated that he was dealing with a most unusual situation which required caution and full information as to the facts in relation thereto. That he had such information is to my mind made clear by the evidence. Testimony of Rochín on this point was not produced by Mexico. C. M. Hammeken, in an affidavit, swears that he explained to Rochín that it was desired to have the engines held on the latter's order, so that they might be attached by the court. There appears to be no provision in the Burrowes-Perez contract under which Rochín had either the right or the duty to stop the locomotives. It is not shown by any record in the case that the court at Monterrey gave effect to any rights asserted by the Railways under the contract. And, in any event, the seizure of the locomotives by administrative officials does not appear to be a proper assertion of such rights. It may be observed, although the point is not a material one, that it would seem that Rochín must have known that Burrowes was merely a lessee. It would be a most unusual state of affairs if Burrowes or his company had been a private owner and manufacturer of locomotives in Mexico. It would likewise seem that Rochín was informed concerning the rights of both Venable and the Illinois Central Railroad Company.

From the hands of the administrative officials of the Railways under Mexican control the locomotives passed under the control of Mexican judicial authorities. Whatever may be said of the standing of the attachment proceedings in international law, they seem clearly to have been of an unusual character. Bateman brought proceedings to collect approximately \$900.00 from the Burrowes company, who admitted the debt. Burrowes designated for attachment "the entire business represented by him". The court thereupon authorized the seizure of approximately \$200,000 worth of property, not belonging to that company, to secure a debt of \$900.00. Article 1395 of the Mexican Commercial Code which designates the kinds of property and the order in which such property may be taken to satisfy debts seems clearly to contemplate that property shall be seized only in sufficient quantity to satisfy the debt claimed. No examination appears to have been made with regard to the ownership of the property seized. No reasons such as prior liens or attachments were given for the seizure of this large amount of property. No bonds were given to

indemnify anyone for losses that might be sustained as a result of the attachment.

The bankruptcy proceedings which followed the attachment proceedings are to my mind likewise of a most unusual character. It happens occasionally that possession is taken of property which is not part of the assets of a bankrupt. This occurs when among property in the custody of a bankrupt are found things which may not have passed to the actual legal ownership of a bankrupt, or things concerning which the legal title may not be clear. It seems to be obvious that, from the time that the bankruptcy was declared, the judge at Monterrey and those acting under his direction and all creditors were aware of the fact that the locomotives did not belong to Burrowes or to his company. They were not part of the assets of the bankrupt. They were property which, conformably to the provisions of Articles 998 and 999 of the Mexican Commercial Code should be returned to the owner. These Articles provide in part that certain described property, including property which a bankrupt may have leased, shall be considered as belonging to others and shall be placed at the disposition of their legitimate owners.

The judge, in granting the petition for a declaration of bankruptcy, refers to a letter which he states creates a very strong presumption that the railroad equipment of the Burrowes Rapid Transit Company is not the property of the company and gives this as a reason for his decree of bankruptcy. It may probably be inferred from this that under Mexican law a business concern could not be forced into bankruptcy because of the nonpayment of a relatively small amount of debts when a creditor had a great many times more property than was necessary to satisfy such debts, and that in a case of that kind a creditor would be remitted to a suit, a monetary judgment in which could be satisfied out of a small proportion of the assets of the debtor. All the records of the Burrowes Rapid Transit Company were taken into custody when bankruptcy was declared, and they of course revealed clearly that the Burrowes Company was not the owner of the locomotives, and also that Venable was a joint lessee; and that the Illinois Central Railroad Company was the owner. The representations made to the judge by Botello and by Greenstreet, the receiver appointed by the court in Texas also made known to the judge and to the *sindico* the status of these engines.

That the locomotives were not part of the assets of the bankrupt, and therefore could not properly and legally be treated as such, was evidently clear to all persons who had any connection with the bankruptcy proceedings. It appears that the sole reason assigned for the failure to release the locomotives was that they would be released only to the owner directly, and not to a lessee having rights of possession. Counsel for Mexico declared in argument that this attitude on the part of the court and of the *sindico* was consistent with Mexican law, and that if the owner should not apply the property would be auctioned and sold. It seems to me to be inconceivable that it is a correct interpretation of the law of Mexico that in connection with drastic proceedings such as bankruptcy proceedings are, in which an individual or a business concern is wiped out and the owner's property is applied to the satisfaction of the claims of creditors, the law provides that property belonging to third parties—property the title to which is clear—may be seized, held, and sold at auction to satisfy the debts of a creditor to whom such seized property does not belong, simply because the party asking for the release of the property is one having a possessory right, or, as in the instant case, the owner of property represented by a lease.

Article 1416 of the Commercial Code of Mexico provides that "the judge who has cognizance of the bankruptcy shall provide for the conservation of the property of the estate and appoint for the purpose a provisional syndic and an interventor".

Article 998 of the Code contains the following provision with regard to the release of property which may have been seized and which does not belong to a bankrupt:

"The merchandise, effects, and every other species of property which exist in the estate of the bankrupt whose ownership has not been transferred to the bankrupt by a legal and irrevocable title shall be considered belonging to others, and shall be placed at the disposition of their legitimate owners, their rights being acknowledged by a meeting of creditors or by a final judgment, the estate retaining the rights in said properties which belonged to the bankrupt, in whose place such estate shall always be substituted, provided it fulfill the obligations annexed to the said rights."

Under Article 999 of that Code property which the bankrupt may have leased is included "within the principle" of the foregoing Article.

It is contended in behalf of the United States that the locomotives, being clearly property of the Illinois Central Railroad Company, the possessory right of which was in lessees at the time of the seizure, should have been released by an order of the court made on its own initiative, when the court was undoubtedly aware of the fact that the property did not belong to the bankrupt, or in any event, should have been promptly released when suit to recover it was instituted against the *sindico*, or following the hearing attended by Greenstreet. Counsel for Mexico contends on the other hand that under the law the property may be released only to the owner directly and that, failing an application from the owner the property must be sold to satisfy claims against the bankrupt. When the Mexican Code of Civil Procedure provides that property not belonging to a bankrupt shall be released to the owners, it seems to me that it is a common-sense interpretation that property under a lease shall be released to the owner of the lease, or in other words, to the owner of the property represented by that lease.

The Civil Code of the Mexican Federal District and Territories contains several chapters devoted to leases, which are defined as contracts by which one cedes to another the use or enjoyment of a thing for a certain time and in virtue of a certain price. When property under lease is seized under governmental authority the owner of a lease is, of course, deprived of the use of his property. This simple point is aptly illustrated by the case of the *Modern Transport Company, Ltd., v. Buneric Steamship Company*, Law Reports, King's Bench Division, vol. 1, 1916, p. 726, in which it was held in a case concerned with the requisition of a ship by the British Admiralty that the interest which was affected by the requisition was that of the *charterer* and not that of the owner. From the standpoint of international practice it is interesting to note the following definition of owner in the British Prize Court Rules and Orders:

"'Owner' shall include any person to whom by operation of law the property in a ship seized or taken as prize shall, in whole or part, have passed, and shall also include any person intervening in a cause on behalf of an owner, or intervening and claiming or alleging an interest in such ship." *Tiverton's Prize Law*, "Rules and Orders", p. 1.

A rule which would deprive a lessee from any standing in court to recover the use of his property and which would recognize only an owner not in possession would appear to be an arbitrary rule, the effect of which would be to destroy the contractual relations between the lessee and lessor, since property would be taken from him who has the right of possession and delivered to one who for a valuable consideration had sold that right to another. No citation of legal authority was made by Mexican counsel to support such an interpretation of the Mexican Commercial Code.

It was argued, with considerable reason, it seems to me, by counsel for the United States that the denial by the judge at Monterrey and by the *sindico*, Isla, of any standing on the part of Venable as a lessee to apply for the release of the locomotives was a denial of justice under well-known principles of international law securing to an alien the right to be heard in the courts. A denial of justice, as that term is understood in international law, of course can not be predicated upon the refusal of a court to hear a cause because a court has no jurisdiction, as when a nation does not allow itself to be sued in tort, or when the courts have not jurisdiction to pass upon questions of a political nature. But it seems clearly to be an established principle of international law that a foreign litigant should have the same opportunity to establish his case as a citizen has. On this point see Ralston, *International Arbitral Law and Procedure*, p. 47; *Revue Générale de Droit International Public*, Volume XIII, pp. 22-23; case of *Duthil and Faisans*, under the Convention of January 15, 1880, between the United States and France, Boutwell's Report, p. 91. It seems to be clear that both the judge and the *sindico* took the position that the one obstacle to the release of the engines was that the owner should apply and did not apply. This position, counsel for Mexico contended, was properly grounded on Mexican law. If that be a correct construction of Mexican law, then of course the court would not by a refusal to deliver to a lessee be denying Venable remedies granted by Mexican law to Mexican nationals, and if he suffered a denial of justice, that was inherent in the law.

Counsel for the United States discussed very fully the point that evidently both the judge at Monterrey and the *sindico*, Isla, knew that property not part of the assets of the Burrowes Company had been seized. The fact that documentary evidence so obviously established the ownership of the locomotives, the rights of the lessees, and the consequent nonliability of the locomotives to seizure as part of the assets of the Burrowes Company, furnish, I think, a satisfactory explanation of the character of the proceedings which took place when the receiver, Greenstreet, accompanied by Mexican counsel, undertook to obtain the release of the locomotives from the judge at Monterrey and the *sindico*, Isla. Counsel for Mexico discussed different kinds of proceedings which he stated could properly have been employed. To my mind there is nothing in the Mexican Commercial Code indicating that procedure with regard to the release of property which for some reason has been taken possession of, although not a part of the assets of a bankrupt, is not similar to procedure under the bankruptcy law of the United States and doubtless the laws of other countries. Such property naturally is generally promptly released by proceedings of an informal character. Obviously no other form of proceedings would be proper, except in a case in which contentious questions are raised with regard to ownership, in which case, of course, formal litigation becomes necessary. No proper law could permit an unnecessary despoiling of an owner of property against which there is no claim. And undoubtedly it is incumbent on officials to

take precaution against the seizure of such property. In the United States officials acting under the direction of the court may release property; under the Mexican Commercial Code it would appear that property must be released on an order of the judge, unless creditors effect an agreement. There appears to be nothing in the Code from which it may be inferred that property clearly not part of the assets of the bankrupt could not be released by the judge acting even on his own initiative. As bearing on Mexican law and procedure it is interesting to note from the record that two tank cars under lease to the Mexican National Railways were seized in connection with the proceedings against the Burrowes Company. A communication was addressed to the *síndico*, Isla, setting forth the fact with regard to the ownership and the lease, and asking for the release of the cars, whereupon Isla promptly recorded an expression of opinion to the effect that the cars were not subject to detention by the judge in bankruptcy.

Counsel for Mexico criticized Botello for the advice which he gave to Venable, and criticized the court for conducting proceedings that are called "informal". I am unable to perceive that the criticism is deserved in either case. Botello was selected as counsel, it is explained in the Memorial, because of his distinction as a lawyer. It seems incomprehensible to me that a lawyer of standing in Monterrey should not be familiar with such a simple question of proper practice as the application to the appropriate authorities in a bankruptcy proceeding for the release of property clearly no part of the assets of a bankrupt. Furthermore, the hearing which the judge at Monterrey conducted when Greenstreet, the receiver appointed by the Texas court, appeared with counsel before the judge seems to me to be a kind of simple proceeding one should expect in a matter of that kind. At that hearing there was, very appropriately, it seems to me, laid before the judge an abundance of documents revealing the ownership of the engines and the situation of the lessees. It was not a proceeding to give effect to a foreign judgment. It is pertinent to bear in mind that the judge found no fault with this procedure, which I think therefore we must assume is a perfectly regular one in Mexico. In reaching these conclusions I naturally have in mind the particular functions of the judge in dealing with the release of property clearly no part of a bankrupt's assets. Of course, generally speaking, proceedings before judicial tribunals are of a formal character.

The principles with respect to the reserve with which an international tribunal should deal with the examination of proceedings of domestic courts against which complaint is made have repeatedly been discussed before the Commission. To my mind it would be a strange process of reasoning by which the Commission would undertake, on the one hand, to regard as improper action of the judge in giving a hearing of this kind, having the purpose of affording to an alien the opportunity to present by ample proof matters such as were laid before the court, and, on the other hand, to regard as proper a ruling on the part of the judge that a lessee had no standing in court and that the locomotives could only be returned to an owner in a foreign land, a company which for obvious reasons made known to the court, such as the complete protection which it had in a bond and other practical reasons, would not appear and ask for the release of the locomotives.

At the point where Venable found himself baffled in all efforts to avoid being subjected to a loss of \$150,000, and being prevented from carrying out his contractual obligations toward the Illinois Central Railroad Com-

pany, the situation which he had to face may be briefly indicated. At the instigation of Burrowes the locomotives were seized on the order of Rochín. Within a short time, apparently about six hours after the seizure became effective, the property was attached to satisfy a debt of about \$900.00, and efforts to obtain the release of the property not belonging to the debtor resulted in failure. Bankruptcy was declared, and all efforts to obtain the release of property, clearly no part of the bankrupt's assets, likewise resulted in failure. The judge would render no judgment for release on his own initiative or in response to the representations made to him "informally" by Botello or those made to him by Greenstreet, the receiver appointed by the Texas court, although it was obviously clear to the judge that property not part of the bankrupt's assets was being held to the great loss of an interested person. The *síndico* would not release the property, although he likewise knew that he was holding property not the assets of the bankrupt, and he met a proceeding to obtain a release by a series of dilatory pleas. Evidently no rights of anybody were adjudicated by the court. See American Memorial, p. 18; Mexican Brief, p. 99.

An action of involuntary bankruptcy is a very serious and drastic proceeding. A bankrupt is deprived of his business assets and they are applied to debts of creditors. The general purpose of proceedings of this kind are probably very similar under domestic laws throughout the world. In the United States a bankruptcy proceeding is regarded as similar in principle to a proceeding in equity. In all countries unquestionably it is the duty of officials acting in a bankruptcy case to conduct proceedings with the utmost expedition consistent with a proper course of procedure and with the greatest possible care to safeguard the rights of the bankrupt and the rights of the creditors. The court once having declared bankruptcy and initiated the proceedings, it was obviously the duty of all functionaries connected with these proceedings to carry them through in this manner and to dispose of the relative rights of all parties. Apparently the rights of nobody have been settled. The proceedings seem to be at present in the situation they occupied when they were instituted, and property worth approximately \$200,000 which was seized and held, although not the property of the bankrupt, has been stolen or destroyed. The action of administrative and judicial authorities responsible for this situation constitutes, the United States contends, a denial of justice.

All questions discussed in connection with this claim with respect to Mexican law and procedure in relation to the disposition of the assets of a bankrupt in satisfaction of claims of creditors are entirely irrelevant to a proper disposition of the case. The Commission is not called upon to reach conclusions with regard to such matters. There is not before the Commission any question with regard to the duties of a judge or a *síndico* or an interventor in dealing with the assets of a bankrupt. The fundamental point in the case before the Commission obviously is whether there is responsibility on the Mexican Government because of the treatment of property which was not part of a bankrupt's estate and which was taken possession of by Mexican authorities and stolen after it was seized. It can obviously not be denied that the intermeddling of Rochín effectively deprived Venable from control over his property. Likewise Venable was of course absolutely deprived of control over the property when the court decreed attachment and later decreed bankruptcy. It seems to me that it can not be plausibly urged that when authorities of a government, judicial,

administrative or military, take possession of the property of an alien, and no safeguards are provided against loss through destruction or theft, it can properly be alleged in defense of allegations of responsibility for such action that the property, after having been taken, was turned over to persons for whom the government assumes no responsibility, and that therefore there can be no liability for destruction or theft of such property.

It would seem to me strange if counsel for Mexico is correct in his contention that the *sindico* can not be regarded under Mexican law as an official of the court, and that he is merely a representative of the estate of the bankrupt, a "private person", as he was called, for whom there is no responsibility on the part of Mexico. The *sindico* under Mexican law besides being a custodian of property subject to direction of the judge having jurisdiction in the bankruptcy proceedings seems also to perform in a measure duties such as are performed by the referee under the bankruptcy law of the United States, who in a sense might be called a sub-judge. On this point see Articles 1442, 1489, and 1490 of the Commercial Code of Mexico. The determinations of such a sub-judge with regard to the nature of claims presented by creditors against a bankrupt, the property that is subject to the payment of debts, the debts that are due, preferences of claims, are all questions of a judicial character which may ultimately come before the court for final action. But if it is a fact that such judicial questions are not dealt with in any way by the *sindico*, they, of course, are handled by the judge. Surely it can not be said that under Mexican law property may be seized by order of a court and that thereupon all the important proceedings with regard to the disposition of property not belonging to a bankrupt and with regard to the proof of debts and the distribution of property to satisfy those debts are entirely left by the judge to creditors to be adjusted as private, nonjudicial matters, the creditors being turned loose to help themselves to the estate of the bankrupt. Nor can it be plausibly maintained that in a case in which the property of an alien is involved there is no responsibility on the part of Mexico for anyone whatever may happen to the property.

It is shown by the Mexican Commercial Code that the judge has jurisdiction in the matter of release of property not part of the assets of a bankrupt and it is shown by the record in the case that the *sindico* took some action in matters of this kind subject to the control of the judge. It seems to me that the language of the Code does not lend itself to an interpretation sustaining such a view of the private character of the duties of a *sindico* and the nonresponsibility of a judge who has jurisdiction in a case of bankruptcy. But even if this were the situation with respect to Mexican law, I am of the opinion that the existence of Mexican law of this nature would not relieve the Mexican Government from responsibility for the deprivation of property during the course of bankruptcy proceedings, and more particularly with regard to property, *such as is involved in the instant claim which was not part of the assets of a bankrupt.*

Under the law of the United States the receiver and trustee and other persons connected with bankruptcy proceedings are officers of the court. Under international law a nation has responsibility for the conduct of judicial officers. It was suggested by counsel for the United States that, if in connection with a bankruptcy proceeding, or as distinguished from the disposition of assets of a bankruptcy, a proceeding to obtain the release of property not part of the assets of a bankrupt, such officials of a court.

were guilty of gross misconduct, the United States could not deny responsibility for their acts in the light of Article I of the Convention of September 8, 1923, under which the contracting parties are responsible for the acts of officials or others acting for either Government. And I am of the opinion that the Government of Mexico can not be without responsibility for persons performing the same kind of duties in Mexico merely by the fact, if it be a fact, that such persons are not designated or considered as officers under Mexican law. Mexican law requires them to conserve property seized in bankruptcy proceedings. It is the character of functions which persons perform and the manner in which those functions are discharged that determine the question of responsibility.

In connection with the decision in the claim of *Massey*, Docket No. 352,¹ the Commissioners expressed the view that it is a sound principle that whenever misconduct on the part of persons engaged in governmental functions, whatever may be their particular status under domestic law, results in the failure of a nation to perform its obligations under international law, the nation must bear the responsibility for the wrongful acts of such persons. In my opinion the same general principle of responsibility is applicable to conduct resulting in a direct injury to an alien—to his person or his property. Counsel for Mexico asserted that legal action might be taken against the persons responsible for the theft and destruction of the locomotives. Undoubtedly that is a proper provision of Mexican law. But under Article V of the Convention of September 8, 1923, it can not be pleaded in defense of a claim that the claimant has failed to resort to local remedies. The two Governments deemed it to be desirable to eliminate any such defense. I understand that the Mexican Government allows itself to be sued in tort; the United States does not. But even in the United States there would perhaps be at least what might be called a theoretical remedy in all cases in which claims are made against the Government of the United States, because actions could be maintained against the persons directly responsible for alleged wrongful acts upon which claims are predicated.

I do not mean to imply that a government must be regarded for every purpose as an insurer of property in custody of its representatives, as to be responsible, for example, for property taken by professional highwaymen against whose acts reasonable police measures could not have been effective. Such a situation is not presented by the record in this case, which shows that the property was directly in charge of a lawyer for the Mexican National Railways under governmental control, and of Familiar, one of the superintendents of the Railways, and further shows the manner in which the locomotives were dismantled to which reference has heretofore been made. In the instant case responsibility for the theft and destruction of the property seems to me to be obviously clear, unless we take the view, to my mind clearly unsound, that Mexico is responsible for neither the judge nor the *sindico*.

There is another aspect of the case which to my mind clearly reveals the responsibility of the Government of Mexico. It appears to be a well-established principle of international law that a denial of justice may be predicated on the failure of the authorities of a government to give effect

¹ See page 155.

to the decisions of its courts. See the *Putnam* case, Docket No. 354;¹ the *Youmans* case, Docket No. 271;² and the *Mallén* case, Docket No. 2935.³ decided by this Commission; also the *Montano* case, Moore, *International Arbitrations*, vol. 2, p. 1630; the *Fabiani* case, *ibid.*, vol. 5, p. 4878; and the case of *W. R. Grace & Co. against Peru*, *Foreign Relations of the United States*, 1904, p. 678. The *Lord Nelson* case, decided under the Special Agreement of August 18, 1910, between the United States and Great Britain, interestingly illustrates the point. American Agent's *Report*, p. 432. Claim was made in this case by the British Government on account of the seizure of the British schooner *Lord Nelson* shortly before the declaration of war between the United States and Great Britain in 1812. An American court pronounced the seizure of the vessel to be illegal, directed the vessel to be sold and the proceeds of the sale to be paid to the owner. The court's direction with regard to the payment to the owners was not complied with, because the funds were embezzled by the clerk of the court. In the proceedings before the Arbitral Tribunal the American Agent admitted liability in the claim for \$5,000.00, the principal amount claimed, and left to the consideration of the Tribunal the question whether interest should be included in the award. The Tribunal rendered an award in the case which included the principal sum of \$5,000.00 and interest amounting to \$18,644.38.

Venable originally had a possessory right with respect to the seized locomotives. Later he obtained a complete title to them. No matter how long or before what courts, or by what methods, Venable had prosecuted litigation for the recovery of the locomotives, he could never have obtained justice through the return of the locomotives, because they were stolen and destroyed while in custody of persons who obtained control over them by legal processes—whatever may be their nature. Neither the Mexican court at Monterrey nor any other court could ever have given effect to a decision restoring the engines to Venable or to anybody else. The record discloses that the remnants of the engines are now junk. They were not auctioned to satisfy debts of creditors.

Questions were raised in the Answer with regard to the standing of Venable as claimant. There is no doubt with regard to the American citizenship of Venable. If it should be considered that, in spite of his ownership of all interest in the claim there was any necessity for the allotment from the Merchants Transfer and Storage Company, a Mexican company, which accompanies the Memorial, there can be no doubt as to the satisfactory character of an allotment executed by the Board of Directors of the company in favor of the owner of all the property of the company.

Irrespective of what may be said with regard to all other points in the case, I am of the opinion that it is clear that Mexico must be held liable on two points, both directly concerned with the destruction and theft of the locomotives. Is Mexico responsible for the seizure of property by administrative and judicial action, the continued detention of the property, and the destruction and theft of property following such seizure? It is clear that, on one hand, no court could ever render a judgment restoring the locomotives which are ruined and worthless, and certainly that fact is as

¹ See page 151.

² " " 110.

³ " " 173.

determinative of responsibility as the failure of Mexican authorities to give effect to a judgment for restoration would have been if such a judgment had been rendered and the property had been destroyed and stolen after rendition of the judgment so as to render impossible the execution of the judgment. Certified copies of the court records in the proceedings before the judge at Monterrey were filed by the Government of Mexico, and copies of some of these records accompany the American Memorial. No record is revealed of any decision of the court finally adjudging the property rights of anybody in any of these proceedings. The situation about six years after proceedings were begun is assuredly significant of their character. It is equally clear, on the other hand, that compensation must be made for property of which possession was taken by Mexican judicial authority after seizure by administrative action and which was destroyed and stolen with the acquiescence or cooperation of someone appointed by the court to cooperate with the court, in accordance with the requirements of Mexican law, to safeguard it.

In 1922 a judgment was rendered against the National Surety Company in favor of the Illinois Central Railroad Company for the value of the four locomotives, namely, \$150,000, together with interest and costs, amounting in all to \$153,725.00. Venable, being liable to the Surety Company in that amount, a judgment was rendered against him therefor with interest, in all \$154,340.10. This entire sum he paid to the Surety Company. See Memorial, pp. 365, 356, 360 and evidence filed by the United States March 8, 1927. The Railroad Company assigned all its interest in the locomotives to the Surety Company which in turn assigned its interests to Venable. By the terms of the arrangement which Venable made with the insurance companies which had insured the engines, all their rights to the property were assigned to Venable. By an order of the Texas court which decreed a receivership for the Burrowes company, Greenstreet, the receiver in that proceeding, was directed to execute and deliver to Venable an assignment and transfer of all the interests of the Burrowes Rapid Transit Company in the locomotives and any and all claims which the company might have or assert against any person, firm, partnership, corporation, or government arising from injury to or detention of the locomotives. The items of damages stated in the Memorial are as follows:

- | | |
|---|--------------|
| (1) To amount of the principal of this claimant's confession of judgment to the National Surety Company | \$154,340.10 |
| (2) To amount of personal expenses of H. G. Venable in Monterrey, Mexico, in September, 1921, for himself, C. L. Eddy, Duke Oatman, and Mrs. Kathleen Hull Harvey | 4,050.00 |
| (3) To amount paid A. Zambrano e Hijos, September 15th, 1921, for draft | 1,250.00 |
| (4) To amount paid Lic. Salome Botello prior to January 1st, 1923 | 750.00 |
| (5) To amount paid Lic. Salome Botello between January 1st, 1923, and August 1st, 1925 | 500.00 |
| (6) To amount of personal expense of H. G. Venable in seeking collection of claim in November and December, 1922 . . | 2,200.00 |
| (7) To personal expenses of H. G. Venable in seeking collection of claim in January, February, and March, 1923. . . | 2,200.00 |

(8) To total amount paid to and through Hicks, Hicks, Dickson & Bobbitt to August 1st, 1925	4,227.14
(9) To expense obligation to Winston, Strawn & Shaw	3,654.63
(10) To expense to and through O. M. Fitzhugh prior to October 1st, 1922	9,166.66
(11) To expenditure to O. M. Fitzhugh in February, 1923	648.52
(12) To expense to O. M. Fitzhugh in March, April, July, and August, 1924, in seeking payment of claim from Mexican officials	797.79
(13) To expense of O. M. Fitzhugh in preparing proof of claim from January 1st, 1925, to August 1st, 1925	550.00
Total on August 1, 1925	184,334.84

I am of the opinion that the award in favor of the claimant should include the value of the four locomotives fixed in the aforesaid lease, namely, \$150,000, less 21,000 Mexican pesos or \$10,468.50, the amount which the Mexican Government has stated it would take to repair one of the engines which was wrecked while in charge of employees of the Mexican National Railways. For those damages it would seem Mexico became liable to the Burrowes Company or to Burrowes under the terms of the Burrowes-Perez contract. However, the damages were not adjusted or liquidated at the time when all rights of Burrowes with respect to the locomotives became vested in Venable. I think the Government of Mexico may properly be given the benefit of the doubt with regard to any rights the Burrowes company may have had against the Mexican Government for damages for the destruction of this locomotive. The sixth, seventh, and twelfth items of the claim for expenses in seeking a collection from the Mexican authorities totalling \$5,197.79 may properly be included in an award, the total sum of which should be \$144,729.29. I am of the opinion that interest should clearly be included in the award. Venable has been deprived of property and subjected to large financial loss, and the amount of damages is a sum of money fixed with absolute precision. The following extract from the opinion of the Tribunal in the *Lord Nelson* case in the arbitration under the Special Agreement of August 18, 1910, between the United States and Great Britain, *supra*, is pertinent to the instant case:

"In international law, and according to a generally recognized principle, in case of wrongful possession and use, the amount of indemnity awarded must represent both the value of the property taken and the value of its use (Rutherford's Institutes, Bk. 1, ch. XVII, sec. V; VI Moore's International Law Digest, p. 1029; Indian Choctaw's Case, Law of Claims against Governments, Report 134, 43 Cong., 2nd sess., House of Representatives, Washington, 1875, p. 220, *et seq.*).” American Agent's *Report*, p. 434.

The practice of international tribunals with respect to the inclusion of interest in pecuniary awards is discussed at some length in the decision rendered by the Commission on December 6, 1926, in the *Illinois Central Railroad Company* case, Docket No. 432.¹

¹ See page 134.

Fernández MacGregor, Commissioner:

1. I concur with the statements of the Presiding Commissioner in paragraphs 1 to 5, 24 and 28 to 32 of his opinion, and I dissent with him in regard to his views on the question of the responsibility of Mexico for Rochín's telegram. I set forth below some private views regarding the questions in which I concur, as, agreeing on the grounds of international law on which they are predicated, I believe that they explain themselves by means of a more minute, although unnecessary, consideration of Mexican law. I also give the reasons for my dissent in the points to which I refer above.

Telegram of Rochín

2. The first act of the Mexican Government which, according to the Government of the United States, implies the responsibility of Mexico is that committed by C. C. Rochín in his capacity of Superintendent of Transportation of the National Railways of Mexico and Connecting Lines Under Government Control, when he sent telegraphic instructions to prevent the Burrowes locomotives Nos. 2280, 2281, 2282, and 2283 from leaving Mexican territory. It is affirmed that such an act is illegal, because it put an obstacle to the legitimate right which Venable had, as joint lessee of the Illinois Central with Burrowes, to comply with the contract for the lease of the locomotives, which required the lessees to return same fifteen days after the lessor gave written notice for that purpose. To judge this responsibility attributed to the Mexican Government it is necessary to establish the juridical condition of the locomotives in question, Burrowes and Venable, respectively, in relation to the officials of the National Railways of Mexico. Burrowes was the only person that the National Railways of Mexico recognized and the only one with whom they had contracted, as proven by the contract of April 13, 1921. According to this contract Burrowes obtained the privilege of using the tracks of the National Railways of Mexico to carry freight with the rolling stock furnished by himself. The National Railways of Mexico obtained on their part, in addition to the stipulated profit for the use of their tracks, the possibility of filling, by using the rolling stock of Burrowes, the scarcity of such material from which the Railways were suffering. Venable entered into the contract made by him and Burrowes with the Illinois Central on a date subsequent to the signing of Burrowes' contract with the Railways. It is logical to suppose that he knew of this contract, and, therefore, that he agreed even to the possibility of not being able to perform his contract with the Illinois Central, inasmuch as, surely, by this contract the locomotives had to be returned fifteen days after the Illinois Central asked for them; and, on the other hand, the contract of Burrowes with the Railways gave the latter (Clauses VI and VII) the right to retain the locomotives if there were any unpaid freight. Moreover—and this has to be taken into account very much—Venable gave material possession of the locomotives to Burrowes, who always appeared juridically before the National Railways as the legal possessor of the rolling stock through some title or other. But he did not make known before any authority of Mexico his interest in the locomotives or in the contract of Burrowes with the Railways, before difficulties arose, and he did so, when they arose, only in an indirect way. For this reason, when Burrowes, through his agents Hammeken and Toussaint, went to Rochín explaining that he was having trouble with the agents in charge of the offices of the Burrowes Rapid

Transit Co. in the frontier; that the locomotives were going to leave the tracks of the National Railways and Mexican territory by order of Wittington (who was not subordinated, surely in this case to Burrowes, but to Venable); Rochín, Superintendent of Traffic, as already stated, could legally render aid to Burrowes, helping him to maintain a possession from which some persons who, like Venable, had in no way made known their interest in the locomotives, were endeavoring to remove him *without bringing any judicial action in Mexico*. It is not necessary to admit that Rochín as alleged by the Mexican Agency, may have only wished to safeguard the interests of the Railways, making use of the power given him by articles VI and VII of the contract of April 13, 1921; it suffices that Rochín may have considered that Burrowes, who was the party asking for the detention of the locomotives, *was, in Mexico and to the National Railways, the legal possessor of said locomotives*; and, further, that said Railways were connected by contract with Burrowes for the use of all the latter's rolling stock. If in the absence of a contract between Burrowes and the Railways Rochín had interfered for the purpose of detaining the locomotives in his mere capacity of a Mexican authority, then, perhaps, he could have been considered responsible, on account of intermeddling administratively in a matter which might be litigious. But, as already said, Rochín was not acting for the Railways as an authority, but in so far as they were moral persons who had contracted with Burrowes, and on this ground Rochín's action does not appear improper from an international point of view. The National Railways furnished the personnel that handled all the rolling stock of Burrowes; this personnel was at the orders of Rochín in his capacity of Traffic Superintendent; Rochín, then, could, by merely withdrawing such personnel, stop the locomotives, which would have meant, perhaps, a failure to perform their contract with Burrowes, for which failure only the latter could have sued the said Railways, to the exclusion of Venable, who never dealt with them.

3. There is another aspect of this fact, which it is very important to take into account. It is alleged that, without Rochín's telegram, the locomotives would not have been attached; that it would not have been necessary to ask for an adjudication of the bankruptcy of the Burrowes Rapid Transit Company; and, finally, that the locomotives in question would not have been lost. It must be noted in this respect, that Bateman had commenced an executory process against Burrowes since September 1st, and that such executory process was at the stage of an attachment since September 2nd, attachment which could be executed at any moment, even without Rochín's intervention. The evidence in the record says only that, on September 3rd, the locomotives in question were running towards the frontier between Mexico and the United States, but nothing is said as to where they were before eleven o'clock in the morning of that day, at which time Rochín sent his disputed telegram. In any manner, it appears that this telegram could detain the locomotives in Monterrey, which is situated at least eight hours by train from the frontier, and this supposing that the locomotives were to have free use of the tracks and did not have to await the movements of the other trains which ran in that section. In those eight hours available, during which the locomotives were in Mexican territory, Bateman could well have secured the attachment in any place other than Monterrey, by the use of telegraphic warrants, and, therefore, it appears that it is not established that Rochín's act may have been the cause and origin of the total loss of the locomotives or of any other loss or damage which may be attributed to the Mexican Government.

Judicial Procedure

4. The American Agency has alleged that the Mexican Courts which had cognizance of this case in different ways, carried out the proceedings improperly, giving cause for the imputation of a mis-administration of justice on the part of Mexico. The proceedings which were instituted in the courts of Mexico can be divided into two parts: (a) Those instituted in the First Civil Court of Letters of the city of Monterrey, Mexico, on the motion of R. L. Bateman, to obtain the attachment of three of the locomotives, Nos. 2280, 2281, and 2282, and other property alleged to belong to the Burrowes Rapid Transit Co., and (b) those instituted subsequently by H. G. Venable before the same Judge, to obtain an adjudication of the bankruptcy of said company, and the return of said locomotives to their owner.

5. The record of this claim shows that R. L. Bateman had been an employee of the Burrowes Rapid Transit Company, and that the latter owed him the amount of 1,950 pesos, covering salaries due. On September 1, 1921, Bateman appeared in Court with the document in which Burrowes as representative of said Company, acknowledged the indebtedness, and he asked that said Burrowes be summoned in Court to ratify his signature, so as to prepare the executory process. On September 2nd, the Judge ordered that Burrowes be summoned in Court in order to ratify his signature, within three work days after said Burrowes had been served with the summons. On that same date, at 4 p.m., Burrowes appeared in Court and ratified as his signature, that which was on the bottom of the document in question. The American Agency holds that the fact that Burrowes hastened to ratify his signature before the term fixed by the Judge for his doing so, reveals bad faith on the part of Burrowes and improper action on the part of the Court that consented to such a thing, for it can be inferred that the Court was in connivance with the parties in the action, to precipitate the events. The so-called annotated irregularity does not involve a violation of either the domestic law or international law. The term fixed by the Judge for the ratification of signature by Burrowes was a period of time allowed in his favor, and it is a principle recognized by all systems of law, that a party may waive the rights and terms which the law grants him if no third party suffers. Even on the supposition that the term were obligatory also for the Judge, it could not be shown that his failure to avail himself of such term constitutes the violation of a principle of international law, as it has been repeatedly held that judicial proceedings cannot be passed on by arbitral tribunals except when they may reveal a notorious injustice or wide deviation from standards generally accepted by nations.

6. The moment Burrowes ratified his signature, his indebtedness to Bateman filled the necessary requisites to institute an executory process with prompt results. (Articles 1391 and 1392 of the Code of Commerce of Mexico.) The Judge, therefore, ordered that such proceeding be held on September 3, 1921, at the petition of Bateman filed on the 2nd. The Executor of the Court, in compliance of this order, asked Burrowes to pay the debt to Bateman, and as he could not do so, it was proceeded with an attachment at 5 p.m., a regular hour according to Mexican law. (Articles 1064, 1392, 1393, 1394, 1395, and 1396 of the Code of Commerce.) The American Government alleges, that property was attached in an amount many times greater than that sufficient to cover the indebtedness to Bateman,

contrary to provisions of Art. 1392 of the Code of Commerce, which provides "that property be attached in amount sufficient to cover the debt and costs", and that this also constitutes a misadministration of justice. Mexican law (Art. 1392 cited) does not say clearly that only the property strictly necessary to cover the amount claimed must be attached; and it must be repeated here that, as in this case the protection which could arise from the limitation on the attachment is also given in favor of the debtor, the latter could waive it, as he did when he consented to the attachment of everything which was pointed by Bateman, who, on the other hand, did nothing more than specify the general designation made first by Burrowes of the entire business. Moreover, Mexican law grants to any interested person the right to oppose an attachment, alleging in Court the pertinent reasons therefor. (Articles 1394 and 1395 of the Code of Commerce and Title XII of the Code of Civil Procedure of the Federal District, supplementary to the Code of Commerce.)

7. With respect to the attachment proceeding, it is also alleged that it was carried out at an unusual hour in the afternoon of September 3rd. Mexican law is the only law that could determine in this case the working days and hours for the carrying out of such a proceeding, and, as a matter of fact, Articles 1064 and 1065 of the Mexican Code of Commerce solve this question and even authorize the Judge to avail himself of other than working days and hours when, in his judgment, there is necessity for it. An international tribunal, even in case that there should be a violation of provisions of this nature, could not, perhaps, hold that there is a misadministration of justice, except in very special cases.

8. The most serious charge made against this attachment is that it was decreed by the Judge on things which were not the property of Burrowes, since the locomotives belonged to the Illinois Central Railroad Company. There is no evidence that during the attachment proceedings instituted by Bateman the Judge may have had official knowledge of the fact that the locomotives were property of a third party and not of Burrowes. The Executor of the Court who carried out the attachment did not have the duty to know or attend to this question, for an attachment is always placed on property that is in the possession of the debtor, without prejudice to the right of the true owner to appear in Court and establish his ownership, exercising the legal acts which correspond to him. (Articles 1394 and 1395 of the Code of Commerce and Title XII of the Code of Civil Procedure of the Federal District cited.) It has not been proved that such provisions of Mexican law are a deviation from those which are contained, with respect to the same matter, in the codes of other nations, and they do not violate any principle of international law, in view of the fact that they do not ignore the rights of the true owner but merely set down the manner in which said owner must exercise them, which is well within the sovereign rights of a State. The Illinois Central Railroad Company, or any representative of its right, had always available the means of taking action against such attachment; and if they did not take such action in the manner prescribed by Mexican laws, their fault, ignorance, or negligence can not be laid on the authorities or on the Government of Mexico.

9. It is established in the record, that several other persons who had claims against the Burrowes Rapid Transit Company, followed the same procedure as that of Bateman, instituting executory proceedings and obtaining the attachment of the same locomotives and of some other things belonging to the insolvent company. Seeing the lack of success of his

extrajudicial representations and upon advice of Salomé Botello, a Mexican lawyer, Venable thought that the best method of obtaining the return of the locomotives in question was to appear as a direct creditor of the Burrowes Rapid Transit Company, endeavoring to have the bankruptcy of said company declared. He, therefore, purchased the credit of Messrs. Zambrano e Hijos, who had already obtained an attachment in their favor, in one of the executory proceedings instituted, as stated above, and as assignee of such credit, he asked, on September 15th, and obtained, on September 17th, from the First Judge of Civil Letters of the City of Monterrey, an adjudication of bankruptcy of the Burrowes Rapid Transit Company.

10. It has been alleged that the Mexican judge who appointed Isla as Trustee of the bankruptcy of the Burrowes Rapid Transit Company, committed a serious violation of international law by not requiring from said Trustee any kind of bond or security before receiving the property of the bankrupt. It has also been alleged that if Mexican law does not contain provisions to such effect, it reveals an insufficiency which may involve a misadministration of justice. Mexican law does not require that the appointed Trustee furnish security. (Article 1417 of the Mexican Code of Commerce.) Several systems of municipal law of other countries are in the same condition, although practice and publicists may show the inconvenience of the Assignee not giving security for the fulfillment of his commission. (See *Cyclopedia of Law and Procedure*, Vol. 34, pp. 150 and 250; Percerou, *op. cit.*, pp. 228, *et seq.*) There is no violation, on this ground, of municipal law or international law.

11. At the beginning Venable and Lic. Botello attempted to obtain the return of the locomotives by making unofficial representations before the Judge of the bankruptcy, to whom they explained the way in which they looked at the matter, alleging that said locomotives did not belong to Burrowes Rapid Transit Company, but to the Illinois Central Railroad Company. Both the Assignee of the bankruptcy and the Judge paid no attention to the verbal requests made by claimant, and this is the basis of another allegation of misadministration of justice made by the American Agency. Steps of similar character were taken by Mr. W. C. Greenstreet, Receiver in another bankruptcy of the same Burrowes Rapid Transit Company, adjudicated by the 49th Judicial District Court of Texas on September 1st, as a result of action taken by Venable before this Court since the latter part of August, 1921. The question then arises as to whether a judge has the obligation of considering petitions or motions made before him in a manner different from that prescribed by his law of procedure. The answer is simple, for international theory and practice are in accord, that every State has the right to set down the rules according to which actions may be brought in its courts. Mexican law establishes that all mercantile suits shall be prosecuted in writing. (Article 1055 of the Code of Commerce.) The Judge could not therefore enter a petition made in an appearance—that is, made verbally in any manner—conformably with article 126 of the Code of Civil Procedure of the Federal District, supplementary to the Code of Commerce. For such reason the Mexican judge could consider the unofficial petitions of Venable and of Greenstreet as nonexistent, without this involving the laying aside of any right existing under his domestic law or under international law.

12. Venable saw, then, that his unofficial representations did not produce, as they could not produce, any effect, and he then addressed himself to

the Judge in writing, asking from the Assignee the return of the locomotives in question, basing his petition on the provisions of Articles 998 and 999 of the Code of Commerce. The Judge submitted this petition to the Trustee, so that the latter would answer it as he thought advisable, which he did, filing, for the time being, so-called dilatory pleas, which pleaded chiefly lack of juridical capacity of Venable to demand the locomotives and vagueness of the petition he had presented. The American Agency contends that, in view of the terms of Art. 998 of the Mexican Code of Commerce, which provides that property which may exist in the estate of bankrupt, ownership of which has not been transferred to the bankrupt, by a legal and irrevocable title, shall be considered as of outside ownership and shall be placed at the disposition of its legitimate owners, the locomotives should have been placed immediately at Venable's disposition. It overlooks the fact that the same article cited provides that this return can be made only *(a) upon previous confirmation of the right of the owner in a meeting of creditors, or (b) through a final decree.* In the present case, Venable himself chose the second method, and in order to have a final decree in his favor, it was necessary that there should be a suit with all necessary proceedings. The action brought by Venable was an ordinary mercantile suit which had to be prosecuted in accordance with the provisions of Articles 1377 to 1390 of the Code of Commerce. In such a suit, dilatory pleas may be filed according to Art. 1379. Upon the filing of such pleas, the Judge could open, according to the same article, a period of ten days for the presentation of evidence, as he did. Mexican laws of procedure were, therefore, not violated, as alleged by the American Agency, and it is evident that if this suit was not decided by a final decree—which might have placed the locomotives in Venable's possession, if he had succeeded in proving his capacity—it was due to the fact that he abandoned the proceedings prematurely and without any reason, which makes him unentitled to complain before this Commission on account of the results of his own negligence. It has also been alleged with regard to this point, that the Judge allowed Leal Isla to answer the suit of Venable beyond the term set down for it. According to Mexican law, Venable should have charged the other party with contempt of court (Art. 1078 of the Code of Commerce), and then the proceedings would have continued on, Leal Isla losing the right to answer. Venable can not now complain of his own negligence.

13. Severe criticism has been made of the attitude of the Mexican Judge and Trustee in refusing to return the locomotives (a refusal which, on the other hand, was only extrajudicial and in answer to unofficial representations made by claimant, as proven) to any person other than their legitimate owner—the Illinois Central Railroad Company. It is contended that Art. 998 of the Code of Commerce provides that, in case of a bankruptcy, all the property, ownership of which has not been transferred to the bankrupt by legal and irrevocable title, must be returned to its owner; it is further alleged that Art. 999 of the Code of Commerce, Section IV, provides that property and merchandise which the bankrupt may have on lease, be considered as included in this provision, which was the case with the locomotives in question, as acknowledged by the Judge and the Trustee in their conversations with Botello and with Greenstreet. A long commentary on the two cited articles has been presented in an effort to show that the word "owner" must be interpreted in a broad sense, that it must include any person who may have any right on the property in question other than the right of ownership, provided there is no possibility

of the bankrupt himself having the right of ownership over the thing claimed. All the reasons adduced in support of this argument may be acceptable in Anglo-Saxon law, but, in the first place, there exists a principle that something which is clear according to the law does not have to be interpreted, and in the instant case Mexican law provides that the things covered by Art. 998 of the Code of Commerce be returned to their legitimate owners. In the second place, the theory which is the basis, in cases of bankruptcy, for the need of returning *only to its legitimate owners* the property found in the bankrupt's possession, over which he may not have an ownership title, has for its object avoiding difficulties in the bankruptcy, which might arise if property were returned to other persons, as errors might be committed, for which the owner would later have the right to complain against the bankrupt estate. By returning the things to the owner, all complications are avoided; once he is in possession of the property, the legitimate owner can return it to a third party interested therein, where there is some contract between the owner and such third party. Such, it appears, is the theory followed by Mexican law¹, by French law, and by other systems of law. (Percerou, *Faillites et Banqueroutes*, Ed. 1913, Vol. II, pp. 146, *et seq.*; Lyon Caen et Renault, *Manuel de Droit Commercial*, Ed. 1924, pp. 1075, *et seq.*) These authors take up and comment on this power which an owner has, to withdraw from the bankrupt mass the property title to which has not passed irrevocably to the bankrupt, calling such power and giving it the effects of a "right of revindication".

Now, then, according to Roman law, which is the basis of practically all the systems of law of Latin countries, the action of "revindication" can be brought only by the owner or his representative. (See Maynz, *Droit Romain*, ed. 1891, Vol. I, p. 773.) All the cited laws further impose on the owner who claims any property that may be in the bankrupt's possession the indispensable annoyance of instituted proceedings which may establish the right of ownership before the Trustee and the Judge of the bankruptcy. It is not here attempted to determine in what way provisions of the nature of those here considered may violate international law.

Destruction of the locomotives

14. The principal point in this claim is to determine the participation and responsibility of the Mexican authorities in the deterioration and almost total loss of the locomotives while the latter were in the possession of the Assignee of the bankruptcy, Leal Isla, who, in turn, had delivered them to Familiar, Terminal Superintendent of the National Railways in Monterrey. It is evident, of course, that the latter was charged with the care and material conservation of the locomotives. The evidence presented by the Mexican Agency proves that Leal delivered them to Familiar "in his capacity of Superintendent". The question arises, therefore, as to whether Familiar could perform that act in representation of the National Railways. A Superintendent is an agent; hence, he cannot bind his principal (in this case the National Railways, and through them the Mexican Government) except within the scope of his agency. It has not been proven that a Superintendent of the Railways can receive as a deposit rolling stock belonging

¹ (Vide *Diario de Jurisprudencia*, Vol. IX, No. 46. Decision of the 2nd Sala del Tribunal Superior. *Korff Honsberg y Cia. vs. Ingenio Constanca*.)

to private persons, under the responsibility of the Railways. A Superintendent has generally only administrative duties relative to the traffic of the trains. No one can believe that a Superintendent may have universal powers, specially outside of matters which concern the movement of trains. The resulting conclusion is that Familiar received the deposit of the locomotives in his private capacity and not in his official character, not being able, therefore, to bind Mexico with his private acts or omissions.

15. Leal Isla was also an official of the Railways (Consulting Attorney), and the same problem arises in regard to him. The Mexican Government alleges that a Consulting Attorney has no other duties than solving the legal questions presented to him; that, for the rest, he can exercise his profession freely just like any other lawyer. It seems, then, that Leal participated in the bankruptcy proceedings as a mere private person, and not as an official, for which reason his acts in this respect do not imply the responsibility of Mexico.

16. It has been insistently alleged, that the Assignee of a bankruptcy is an official of the government, basing such allegation on various provisions of Mexican law (Articles 1416 and 1417 of the Code of Commerce). Without going into a discussion of the laws of all countries, it may be affirmed that in many of them assignees do not have an official character. Thus, for instance, in French law: "Les syndics ne sont ni des fonctionnaires publics, ni des officiers ministériels". (Lyon-Caen et Renault, *Manuel de Droit Commercial*, ed. 1924, p. 1010.) This is the case in Mexican law (Art. 972 of the Code of Commerce), as it has been alleged by the Mexican Agent. Therefore, the acts or omissions of assignees can not be directly imputed on the court that appoints them, nor on the government of which it is a dependency.

17. It has also been alleged that, according to Mexican law (Art. 1416 of the Code of Commerce), the judge having cognizance of the bankruptcy "shall provide for the conservation of the estate, appointing to such effect a provisional assignee and a supervisor". From this provision it is endeavored to deduce that the judge is directly in charge of the conservation and care of said estate, being responsible for any deterioration or loss thereof. Such is not the case, in the first place, on account of a merely grammatical interpretation of the cited article. It is stated therein that the judge *shall provide for* the conservation of the estate; not that he *shall have* the conservation of it. To provide means to facilitate what is necessary or convenient for an end. The judge then has to issue dispositions or make necessary preparations for the conservation of the estate, but not conserve it directly. The same article says what is convenient or necessary for the end of conserving the estate—to wit, the appointment of a provisional assignee and a supervisor, to that effect. Articles 1418, 1419, 1420, 1422, and others of the Code of Commerce of Mexico corroborate this grammatical interpretation in providing that the management, administration, and care of the estate belong to the provisional assignee. This theory is further supported by the general theory of the duties of a government. Such an entity is instituted to watch over the general interest of the community, and not to care for the private interests of individuals. Bankruptcy proceedings, it is true, are of general order, but the estate of a bankrupt is conserved for the benefit of a certain group of private persons, comprised of the creditors. No governmental dependency is empowered or organized to manage an estate as if it were a private person. In a bankruptcy, as already stated, the bankrupt

loses the possession and administration of his estate, which goes over to the mass of creditors, represented by the assignee who exercises both functions. But while the court having cognizance of a bankruptcy does not have itself the possession and administration of the estate, but delivers it to the assignee, it does have the important and very serious duty to see that the assignee is a fit person and performs his duties faithfully and honestly. A court failing to do this would incur international responsibility if property of foreigners were involved, because it is the duty of the judicial power of a nation to prevent and punish attacks on private property. Mexican law establishes peremptory terms within which the assignee must perform his duties, and the judge must order the different proceedings of the bankruptcy. Some of these terms are obligatory for the judge without the necessity of a petition from one of the parties, as, for instance, the term fixed by Art. 1437 of the Code of Commerce, which provides that upon the conclusion of the inventory, without the need of a petition by the assignee, the judge shall issue a decree ordering that the vouchers of the credits be presented to him within specific terms. Art. 1442 of the same Code contains a similar provision, and there are other articles of Mexican law (1486, 1487, etc.) which, correctly interpreted, provide that the bankruptcy proceedings must be terminated within a definite period of time. Moreover, the supervisor appointed must watch that the assignee never allows the lapse of the terms which may be established by law for any of his duties (Art. 1422). There is another provision which obliges the assignee to present a project of privileged creditors, at the latest six months after the first meeting of creditors is held (Art. 1489). The State Attorney, on the other hand, must represent the absent creditors and exercise their rights (Art. 1439 of the Code of Commerce). All this shows that Mexican law was careful to watch that an abnormal condition, which involves the dispossession of the bankrupt's property and the administration thereof and the nonliquidation and nonpayment of the creditors, may be as brief as circumstances may permit, with the object that none of the parties interested in the bankruptcy may suffer. In the instant case it is in no way established that the assignee and the supervisor may have fulfilled their duties, neither is it established that the judge or State Attorney may have shown surprise or taken steps to put an end to this irregularity which, on account of its prolongation, gave rise to the almost total deterioration of the locomotives in the possession of the assignee. This responsibility weighs on the Mexican court that did not apply its law, to the detriment of the interests of foreigners.

18. However, while the negligence of the judge is obvious, one must not fail to take into account that there was also inexplicable negligence on the part of the interested parties. The judge extended himself to the point of unofficially explaining to Venable and to Greenstreet (appointed by the courts of Texas) that, according to Mexican law, the locomotives in question could be delivered only to the Illinois Central, their legitimate owner. The latter company knew very well this decision unofficially, as proven in the documents filed as evidence; (it seems, moreover, that it was officially notified, at the petition of the Mexican State Attorney, that it ought to press such rights formally), and due to an entirely selfish motive, it refused to press its rights, conformably with Mexican law, before the Mexican court. The Illinois Central, to a certain extent, abandoned its property in the possession of the assignee. Were the Illinois Central to appear directly before this Commission as a claimant, doubtless the Commission would have to take into account the negligence of said Company,

as it has already been established by arbitral practice among nations. Hence, Venable, who is the cessionary of the negligent owner, must suffer the consequences of the negligence. Furthermore, Venable himself, personally, showed inexplicable negligence in the case; knowing that the locomotives could not be returned without bringing formal action in the court with jurisdiction over the bankruptcy, he instituted such action and abandoned it immediately after the assignee filed certain dilatory pleas and the judge opened a term for the filing of evidence to clear that point. Both the assignee and the judge had the right to act in such a manner, according to Mexican law, as already stated. Had Venable continued the proceedings which he chose himself (he could have formally asked for the locomotives from the assignee without suing him, Art. 998 of the Code of Commerce) and proven his capacity before the Court, he would have obtained the return of the locomotives, as it is proven that Gimble did, representing companies which were in the same circumstances as the Illinois Central. Venable also showed negligence in another respect; the assignee attempted to enter into a contract with him which would place the locomotives in his hands, as the assignee contended that no one would have taken better care of them than the person who claimed to be entitled to them. But, unfortunately, Venable was not able to furnish the security required from him, and the transaction was not carried out. Finally, the assignee attempted to lease the locomotives in question to Daniel Flores or to F. Z. Westrup—and not to the Railways, as alleged (page 65 of the Brief of the United States)—upon payment of a rental which, although admittedly low, at least secured the care of the locomotives and guaranteed their return in good condition. Venable opposed himself to this transaction and the locomotives remained in the hands of the assignee of a bankrupt estate which did not have the funds to cover the necessary expenses for watching and preserving the said locomotives. All these facts which reveal negligence on the part of the Illinois Central and Venable, while they do not entirely prevent these parties from claiming damages before this international tribunal, can, at least, induce the Commission to take them into account when determining the amount of damages.

Collision of Locomotive No. 2283

19. This claim includes the value of a locomotive, which, together with others, was leased by the Illinois Central to the Burrowes Rapid Transit Company and to the Merchants Transfer & Storage Company, and which became practically useless as a result of a collision that occurred on August 21, 1921, while running from Saltillo to Monterrey, operated by employees of the National Railways. The train with which this locomotive collided was equally operated by employees of said Railways. International tribunals do not award damages except in cases where the facts appear clear and proven. But in this case there is, further, a perfectly legal and unequivocal agreement which throws the burden of proof of the negligence on the party that suffered the damage. Clause XXIII of the Burrowes contract stipulates that the Railways shall not be responsible for the damage suffered by the locomotives by reason of accidents, and to such effect Burrowes waives Articles 1442 and 2512 of the Mexican Civil Code, which establish the presumption of guilt of the debtor or the bearer in case of loss of the thing involved. Clause XXIV of the same Burrowes contract provides that the

Railways shall consider claims for damages to the locomotives, etc., when it is shown in an evident manner that they are liable through imprudence or neglect of its employees. In view of the foregoing, claimant or its assignee ought to have explained all the circumstances regarding the collision, which has not been done. In fact, the evidence relative to this point is indeed insufficient; there is an affidavit of the engineer who was driving the locomotive in question and who deposes, briefly, that locomotive No. 2283 was running from Saltillo to Monterrey, pulling train No. 23; that this train was due to meet train No. 24 at Kilometer No. 950; that said train No. 24 failed to make the meeting and lost its rights, giving to No. 23 the right of way; that upon reaching Kilometer 952, train No. 23 met train No. 24 on a sharp curve which made it impossible for him to see this train, for which reason the collision became inevitable. There are two other documents which contain the damages suffered by locomotive No. 2283 and an estimate of the cost of repairs which had to be done to it, said estimate amounting to a total of 21,000 pesos. The American Agency alleges that it is wholly unnecessary to determine which of the crews of the two trains was responsible for the accident, inasmuch as both trains were operated by crews furnished by the National Railways of Mexico, which fact makes the latter, in any event, responsible for the collision. The Mexican Agency alleges that it belonged to claimant to prove in an evident manner the liability of the Railways, conformably with clause XXIII of the contract, already quoted, adding that the accident could have well been caused through no fault of any of the two crews of the trains, thus bringing to light a third proposition in the dilemma set forth by the American Agency. As a matter of fact, it is possible that the accident may have occurred through no fault or negligence of either crew. It seems established that engineer Lozano, who was driving the Burrowes locomotive, acted in accordance with his instructions and with due precaution; that is to say, with no fault; but this does not necessarily prove that the engineer of the other locomotive was at fault. Many facts are lacking, to judge the acts of this engineer; the direction in which the two locomotives in question were going is not known; whether there was a station or employee of the Railways at Kilometer 950 to give an order to the trains is not known; the cause of the failure of train No. 24 to make due connections at Kilometer 950 is not known; it is not known whether the fact of not making that connection gave to train No. 23 the right to continue on a clear track; the traffic rules applicable to the case are not known. Under such circumstances, I believe that no liability can be imputed on the National Railways for the collision.

20. But while it is true that in view of the vagueness of the facts this Commission can not consider Mexico responsible for the collision that destroyed locomotive No. 2283, it is also true that the National Railways should have returned to Burrowes or his assignees the remains of the locomotive which suffered the damage. The value of the locomotives leased by the Illinois Central to Burrowes was stipulated in the corresponding contract at the sum of \$37,500; the estimate made of the approximate cost of the repairs to locomotive No. 2283 is, as already stated, 21,000 pesos. The difference between these two amounts is, in my opinion, the value of the remains of the locomotive in question, which Mexico would be obliged to return; for this reason I believe that Mexico must pay, on this ground, the sum of \$27,000.00.

21. The Government of Mexico, on its part, alleges, in regard to the point under consideration, that from the sum which may be paid to claimant as damages, there must be deducted the sum of 11,117.63 pesos and \$920, which the Railways have a right to collect from Burrowes and from his firm for freight and other expenses due. I believe that such a contention must be rejected, because the Burrowes Rapid Transit Co. had become bankrupt; the credit which the Railways had against it had to be included among the claims of the other creditors, and in no manner would it have been guaranteed by the four locomotives, which belonged to the Illinois Central and which, according to Article 998 of the Code of Commerce, could have been recovered by the latter company.

Collusion of Officials

22. After examining each of the acts of the Mexican officials who took part in this case, to determine the responsibility that the Government of Mexico may have, it remains established that there is no conspiracy as alleged by the American Agency in such categorical terms. In more than one place in its pleadings and its briefs, the theory is advanced that, beginning with Rochin's telegram, followed by the last term allowed by the Department of Hacienda for the re-exportation of the locomotives, the attachment executed by the First Court of Letters of Monterrey, the refusal of this Court to deliver the locomotives to Venable, insisting that only the Illinois Central, which was their owner, could receive them, and coming finally to the unfortunate destruction of such locomotives in the possession of Assignee Leal Isla, one can perceive the desire of the Mexican Government and of all its authorities to appropriate illegally the locomotives, instead of obtaining them through lawful means (Pages 138, 139, 140, 158, and 159 of the Brief of the United States). Such a serious imputation is not supported by evidence and is merely based on the frail inference that, as the Mexican Government forms one whole, it is to be supposed that what one department of the Government does is immediately known by all the other departments. This method of reasoning seems absolutely venturesome and opposed by the reality of things. A government is a complicated mechanism of agencies which operate in the most widely separated portions of a given territory; it is illogical to suppose that an act of one of these agencies, performed in the farthest corner of the state may be immediately known and taken into account by the other agencies or departments of the government. A single matter always has various aspects, and each of them is known and handled by a separate department, without having any connection with the other departments, as only this makes possible the division of labor. In the instant case, the Department of Hacienda, which had cognizance of the exportation of the locomotives in question, had in mind only that aspect of the matter and decided it conformably with its own laws. The National Railways, on their part, only had to know those circumstances which referred to the contract entered into with Burrowes. The Court of Monterrey, in effecting the attachment petitioned by Bateman, could not take cognizance—nor did it have the duty to do so *ex officio*—of all the other circumstances of Burrowes or his locomotives, for, as already stated, Mexican courts only take into consideration the facts and petitions which are officially presented to them, and, moreover, it has not been proven that the First Court of Letters of Monterrey knew at the beginning, even unofficially, that the

locomotives belonged to the Illinois Central or to Venable. The same Court, although it later knew unofficially the juridical position of the locomotives in Mexican territory in compliance of its own law, could not return them except to their owner, the Illinois Central. Finally, the deterioration of the locomotives is directly imputable on the Assignee of the bankruptcy of the Burrowes Rapid Transit Company, who is a private party personally responsible for his acts or omissions. The Mexican Judge, it has already been proven, was responsible for the noncompliance of his law which obliged him to terminate the bankruptcy proceedings within a certain period, a fact which implied that he ought to have ordered the Assignee, also within a certain period, to render a report on his work as Assignee. The charge made to the effect that the locomotives in question were used by the National Railways, has not been proven; this charge is made in two affidavits (those of W. C. Greenstreet and Ed Mims), in which the affiants do not refer to facts in which they took part, but to facts which they allege to know by hearsay, and, there is to be noted, further, the identity of the terms in which they make such affirmations. Aside from this, it is established in the record that the National Railways were suffering from a scarcity of rolling stock; that various companies, in addition to the Burrowes Rapid Transit Company, were running their trains on the tracks of the Railways of Mexico, so that, even admitting that the missing parts of the locomotives were removed using the apparatus and tools of said Railways, this would only reveal lack of watchfulness, but not that the removal was made in order that the Railways would use such parts, for they could well have been used by the other companies that were doing the same business as the Burrowes Rapid Transit Co. I do not believe, therefore, that there has been proven the collusion alleged to have existed among all the authorities of Mexico for the detestable purpose of larceny.

23. In view of all the above stated circumstances, I consider that the sum of \$140,000.00, at which the Presiding Commissioner estimates the damages suffered by the claimant, is the proper amount that the Mexican Government must pay.

Decision

All of the Commissioners are of the opinion that a pecuniary award should be rendered in favor of the claimant. Two of the Commissioners compute the damages to the claimant in the amount of \$140,000.00. The other Commissioner computes the damages in the amount of \$144,729.29. The sum of \$140,000.00 must therefore be the award of the Commission. Two of the Commissioners are of the opinion that interest should not be included in the award, and interest must therefore be disallowed. The Commission accordingly decides that the Government of the United Mexican States must pay to the Government of the United States of America on behalf of H. G. Venable, the sum of \$140,000.00 (one hundred and forty thousand dollars) without interest.

RUSSELL STROTHER (U.S.A.) *v.* UNITED MEXICAN STATES.*(July 8, 1927. Pages 392-393.)*

CRUEL AND INHUMANE IMPRISONMENT.—EFFECT UPON CLAIM OF ESCAPE OF CLAIMANT FROM PRISON. Claim based upon cruel and inhumane imprisonment and other grounds *allowed*, notwithstanding that for part of period claimant had escaped from jail.

Fernández MacGregor, Commissioner :

1. This claim is presented by the United States of America in behalf of Russell Strother, an American Citizen who, as alleged in the Memorial, was arbitrarily and illegally detained by the Mexican authorities who held him prisoner for a long period in violation of Mexican laws and subjected him to cruel and inhuman treatment during the entire period of such detention.

2. According to the record, Strother was one of the men who, together with Harry Roberts and others, were charged with having taken part in an assault on the home of one Eduardo F. Watts, on May 5, 1922, in the vicinity of Ebano station, State of San Luis Potosí, Mexico. All the facts in connection with this claim are the same as those stated in the relative paragraphs of the decision rendered by this Commission, November 2, 1926, in the claim presented by the United States of America in behalf of *Harry Roberts*, Docket No. 185,¹ with the only difference that Strother, together with other convicts, escaped from the prison where he was confined with his companions, on May 16, 1923, and he is charged with being the intellectual and material author of the offense of escaping from prison with the aggravating circumstances of assault on the guard and warden of the jail of Ciudad Valles, State of San Luis Potosí, Mexico. He was reapprehended two days after his escape; that is, Friday, May 18, 1923.

3. Mexico has alleged, on her part, that the circumstance that Strother escaped from the jail where he was confined, as stated, if it does not preclude the claimant from appearing before this Commission to demand an indemnification for damages suffered, should, at least, be taken into account when awarding his damages. The United States, on the other hand, contends that when Strother was reapprehended he suffered on this account cruel treatment which Roberts did not suffer and that he is entitled to greater damages.

4. I consider that the facts set forth in the preceding paragraph should not have any effect on the solution of this case, which is in all its other aspects similar to that of *Harry Roberts*, the considerations of fact and law stated in the Commission's decision referred to above, being applicable to it. Therefore, I am of the opinion that the claimant should be given an award of \$8,000.00.

Van Vollenhoven, Presiding Commissioner :

I concur in Commissioner Fernández MacGregor's opinion.

Nielsen, Commissioner :

I concur in Commissioner Fernández MacGregor's opinion.

¹ See page 77.

Decision

On the above grounds the Commission decides that the Government of the United Mexican States must pay to the Government of the United States of America, on behalf of Russell Strother, the sum of \$8,000.00 (eight thousand dollars), without interest.

UNITED DREDGING COMPANY (U.S.A.) *v.* UNITED MEXICAN STATES.

(July 15, 1927. Pages 394-396.)

CONTRACT CLAIMS.—CLAIM *quantum meruit*. Claimant performed dredging services for Carranza Government without written contract. Claim for services rendered measured on basis of compensation claimant had previously been receiving in vicinity *allowed*.

Cross-reference: Am. J. Int. Law, Vol. 22, 1928, p. 452.

Nielsen, Commissioner:

1. Claim is made in this case by the United States of America in behalf of the United Dredging Company, an American corporation, to recover compensation in the sum of \$33,625.76, currency of the United States, for services performed in an attempt to salvage the Mexican gunboat *Veracruz*, in the Pánuco River near Tampico, Tamaulipas, Mexico, where the vessel was sunk in 1914. Interest is claimed on the amount of \$33,625.76 from July 6, 1914, until the date of payment of any pecuniary award rendered by the Commission. The facts underlying the claim may be briefly summarized as follows:

2. On or about June 18, 1914, Sr. M. Urquidi, at that time Captain of the port of Tampico, which was then under the control of forces of General Carranza, came to the office of the claimant in the city of Tampico, together with Sr. José Certucha, who had formerly been Captain of the port, and as the representative of the Chief of the Constitutionalist Army Sr. Urquidi requested the Vice President of the claimant company to undertake the work of pumping out the sunken gunboat with a view to salvaging it. It is alleged that it was stipulated that the work should be done under the orders and directions of engineers who in turn were acting under orders of General Carranza; and further alleged that the claimant undertook the work and proceeded to perform it under specific orders and directions of the engineers, and that the claimant company itself advanced funds necessary to meet daily expenses. It appears that the claimant operated a dredge called the *Galveston* for a period of sixteen days from about the twentieth of June, 1914, to about the sixth of July, 1914, and that the claimant company was thereupon informed by General Carranza that because of a lack of funds, the work of salvage must be suspended. No written contract with respect to the work in question was made, but the allegations of the Memorial are supported by affidavits of Benjamin T. Davis, Vice President of the claimant company; Benjamin Anderson, employed by the company as a superintendent; Oscar Sternberg, Captain

of the *Galveston*, the claimant company's dredge; and W. A. H. Connor, employed as auditor and accountant for the company. The Reply is accompanied by other affidavits and daily reports of the work performed with the dredge for the period during which the salvage operations were carried on.

3. The amount of the claim is computed on the basis of a charge for the services performed at the rate of \$2,101.61 a day, that being the sum which the dredge *Galveston* and its crew were earning in and about the port of Tampico shortly before the services for which compensation is sought were undertaken.

4. It is contended in behalf of the United States that Mexico is responsible for obligations of the so-called "Constitutionalists" headed by General Carranza who as successful revolutionists established themselves in power in Mexico.

5. It is admitted in the Mexican brief that the dredge *Galveston* rendered to the Carranza Government the services described in the Memorial, and it is stated that there is no doubt that the *Galveston* was the property of the United Dredging Company. However, a question is raised whether the services were rendered by the claimant company or by Edwin R. Davis, with whom the claimant had certain contractual relations. In the Mexican Answer there is a discussion of provisions of a written contract made on May 30, 1913, under which E. R. Davis undertook to perform extensive dredging and construction work in the port of Tampico. It is clear, however, that the work of salvaging the gunboat *Veracruz* at the request of General Carranza's representative was a matter entirely distinct from the contract of May 30, 1913, which therefore is of no concern in relation to the instant case. There is nothing in the record to indicate that E. R. Davis had any connection with the arrangement made between the claimant company and General Carranza. No question being raised as to responsibility for obligations incurred by General Carranza, or as to the performance of the services for which compensation is sought, or as to the propriety of the amount claimed for those services, an award should be rendered in favor of the claimant in that amount.

6. Questions in relation to the nationality of the claimant raised in the Mexican Answer have been clarified in the American Reply, and there is no doubt as to the right of the United States to maintain the claim in behalf of the claimant company.

7. Interest should be allowed on the sum due for services rendered by the plaintiff. Perhaps it might be considered that this sum became due when the work was interrupted, and that therefore interest should be computed from that time, but the evidence with regard to the arrangement under which the services were rendered is too vague to reach a positive conclusion on that point. I am of the opinion that interest may properly be computed from the date on which a memorandum of this claim was filed, namely, August 13, 1925.

Van Vollenhoven, Presiding Commissioner :

I concur in Commissioner Nielsen's opinion.

Fernández MacGregor, Commissioner :

I concur in Commissioner Nielsen's opinion.

Decision

The Commission decides that the Government of the United Mexican States shall pay to the Government of the United States of America on behalf of the United Dredging Company, the sum of \$33,625.76 (thirty three thousand six hundred and twenty-five dollars and seventy six cents) with interest at the rate of six per centum per annum from August 13, 1925, to the date on which the last award is rendered by the Commission.

CHARLES S. STEPHENS AND BOWMAN STEPHENS (U.S.A.) *v.*
UNITED MEXICAN STATES.

(*July 15, 1927, concurring opinion by American Commissioner, July 15, 1927.*
Pages 397-401.)

RESPONSIBILITY FOR ACTS OF AUXILIARY MILITARY FORCES.—RECKLESS USE OF ARMS.—DIRECT RESPONSIBILITY. American subject was killed by shot recklessly fired by member of auxiliary military forces in executing order of sergeant to stop car in which decedent was travelling. *Held*, direct responsibility established.

DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH. Killer of American subject was allowed to escape from military arrest, was never apprehended, and officer responsible for his escape was never punished therefor. *Held*, indirect responsibility established.

NECESSITY OF PECUNIARY LOSS AS BASIS FOR CLAIM.—COLLATERAL RELATIVES AS PARTIES CLAIMANT. Brothers of deceased American subject held entitled to claim for indignity and grief suffered in his death, even though no pecuniary damage could be shown.

EVIDENCE BEFORE INTERNATIONAL TRIBUNALS.—ADMISSIBILITY OF PROOF OF FACTS OCCURRING AFTER FILING OF MEMORIAL. Tribunal considered, but did not finally rule on, admissibility of evidence of pertinent facts occurring after filing of memorial.

Cross-references: Am. J. Int. Law. Vol. 22, 1928, p. 448; Annual Digest, 1927-1928, pp. 233, 266; British Yearbook, Vol. 9, 1928, p. 159.

Van Vollenhoven, Presiding Commissioner :

1. This claim is put forward by the United States of America on behalf of Charles S. Stephens and Bowman Stephens, American nationals. Their brother, the American national Edward C. Stephens, a bachelor, was killed about 10 p. m., on March 9, 1924, by a shot fired by a member of some Mexican guards or auxiliary forces between Parral (Hidalgo del Parral), Chihuahua, and his residence, Veta Grande. Stephens was making the return trip from Parral, where he had passed the afternoon, travelling in a motor car in the company of two friends, a gentleman and a lady. At a point quite near the township of Villa Escobedo a shot was fired at the car, which killed Stephens instantly. The very young and very ignorant guard or soldier who caused his death, one Lorenzo Valenzuela, was

arrested by the civil authorities, but handed over on March 11 or 12, 1924, to the military authorities at their request. On April 30, 1924, however, Colonel Hermógenes Ortega, when ordered to discharge the auxiliary forces (or guards) under his command, discharged also this military prisoner. Valenzuela after his escape never was apprehended. Ortega, who was responsible for the escape, was prosecuted, and was sentenced by the Judge of First Instance at Parral on January 12, 1926, to three years' imprisonment; but apparently was acquitted on appeal by the Supreme Court of Justice of the State of Chihuahua about February 9, 1926. The United States alleges that Mexico is liable for the unlawful killing by Valenzuela, and moreover for not protecting Stephens, not prosecuting Valenzuela, and not punishing Ortega, and claims an indemnity of \$50,000.00 in favor of the deceased's two brothers, with interest thereon.

2. As to the nationality of the claim, which has been challenged, the Commission might refer to paragraph 3 of its opinion rendered in the case of *William A. Parker* (Docket No. 127)¹ on March 31, 1926. The nationality of the claim would seem convincingly established.

3. As to interests in the claim, the eldest brother of the deceased Stephens suffered a remote pecuniary loss by his death, in that the deceased together with this brother supported an aged aunt living in a sanitarium, by contributing at first the sum of \$75.00 a month, and later the sum of \$65.00 a month, an amount which the eldest claimant alone paid after his brother's death. The youngest brother, who since 1924 appears to be suffering from melancholy or some mental disorder, would seem from the record not to have sustained any financial damage. When international tribunals thus far allowed *satisfaction* for indignity suffered, grief sustained and other similar wrongs, it usually was done *in addition to* reparation (compensation) for material losses. Several times awards have been granted for indignity and grief not combined with direct material losses; but then in cases in which the indignity or grief was suffered by the claimant himself, as in the *Davy* and *Maal* cases (*Ralston, Venezuelan Arbitrations of 1903*, 412, 916). The decision by the American German Mixed Claims Commission in the *Vance* case (*Consolidated edition, 1925*, 528) seems not to take account of damages of this type sustained by a brother whose *material* losses were "too remote in legal contemplation to form the basis of an award" (the claim in the *Candlish* case was disallowed on entirely different grounds; *Consolidated edition, 1925*, 544). The same Commission, however, in the *Vergne* case, awarded damages to a mother of a bachelor son (not to his half-brother and half-sister), though "the evidence of pecuniary losses suffered by this claimant cognizable under the law is somewhat meager and unsatisfactory" (*Consolidated edition, 1926*, at 653). It would seem, therefore, that, if in the present case injustice for which Mexico is liable is proven, the claimants shall be entitled to an award in the character of satisfaction, even when the direct pecuniary damages suffered by them are not proven or are too remote to form a basis for allowing damages in the character of reparation (compensation).

4. The State of Chihuahua, during the period within which the tragic event occurred, was one among the scenes of the revolution of Adolfo de la Huerta which lasted from November, 1923, to April, 1924 (see paragraph 11 of the Commission's opinion in the *Home Insurance Company* case, Docket

¹ See page 35.

No. 73).¹ Since nearly all of the federal troops had been withdrawn from this State and were used farther south to quell this insurrection, a sort of informal municipal guards organization—at first called “defensas sociales”—had sprung up, partly to defend peaceful citizens, partly to take the field against the rebellion if necessary. It is difficult to determine with precision the status of these guards as an irregular auxiliary of the army, the more so as they lacked both uniforms and insignia; but at any rate they were “acting for” Mexico or for its political subdivisions.

5. Valenzuela, that night, was on duty with two other men, under a sergeant. They were acting apparently under the “General ordinance for the army” of June 15, 1897, which was binding also on civilians living in Mexico, and Article 176 of which obligates all individuals who are halted by sentries to answer and stop. When the four men saw Stephens’ car come near, the sergeant ordered two of them to halt it, not adding that they should fire. Nevertheless Valenzuela fired, with fatal result. It is uncertain from the record, whether the soldiers first had called out to the occupants of the car, as under the ordinance of 1897 they should have done.

6. There should be no difficulty for the Commission to hold that Valenzuela when trying to halt the car acted in the line of duty. But holding that these guards were entitled to stop passengers on this road and, if necessary, to use their guns pursuant to Article 176 just mentioned, does not imply that Valenzuela *executed* this authorization of the law in the right way. On the contrary, the use he made of his firearm would seem to have been utterly reckless. The guards should have realized that, even for foreigners aware of the conditions of the State of Chihuahua at that period, their wearing no uniforms rendered it difficult to recognize them as persons entitled to halt them, and that before indulging in stronger measures great care was indispensable because of their having the appearances of peasants, or even bandits. Being under the orders of a sergeant, the guards should have halted the car in accordance with his instructions, and Mexico contends that they were merely ordered to stop the automobile, without being ordered to fire at it. The excuse proffered by the killer that he merely intended to “intimidate” Stephens would seem too trite to deserve the Commission’s attention; see paragraph 3 of the opinion in the *Swinney* case (Docket No. 130),² paragraph 3 of the opinion in the *Roper* case (Docket 183),³ paragraph 1 of the opinion in the *Falcón* case (Docket No. 278),⁴ and paragraph 6 of the opinion in the *Teodoro García* case (Docket No. 292).⁵ Bringing the facts to the tests expounded in paragraph 5 of the last cited opinion, there can be no doubt about the reckless character of the act. To hold this means a different thing from establishing that Valenzuela’s act under Mexican law was punishable, a question which it is not for this Commission to decide; see paragraph 3 of the Commission’s opinion in the *Teodoro García* case (Docket No. 292).

7. Responsibility of a country for acts of soldiers in cases like the present one, in the presence and under the order of a superior, is not doubtful. Taking account of the conditions existing in Chihuahua then and there, Valenzuela must be considered as, or assimilated to, a soldier.

¹ See page 48.

² See page 98.

³ See page 145.

⁴ See page 104.

⁵ See page 119.

8. Apart from Mexico's direct liability for the reckless killing of an American by an armed man acting for Mexico, the United States alleges indirect responsibility of Mexico on the ground of denial of justice, since Valenzuela was allowed to escape and since the man who released him, Ortega, never was punished. Both facts are proven by the record, and reveal clearly a failure on the part of Mexico to employ adequate measures to punish wrongdoers; compare paragraphs 18 and 25 of Commissioner Nielsen's opinion in the *Massey* case (Docket No. 352).¹

9. Mexico has contended that this Commission, in any case submitted to it, can only take cognizance of facts which occurred before the filing of the Memorial, and therefore should ignore the *second* court sentence, that of February, 1926, acquitting Ortega. Since, however, in the present claim the date of the Memorial was December 17, 1925, and that of the *first* court sentence, which convicted Ortega, was January 12, 1926, it is immaterial whether Mexico's contention is right or wrong. If it is right, Ortega has been at liberty since the day on which he released Valenzuela (April 30, 1924) and never was convicted; if it is wrong, Ortega has been at liberty all that time and finally was acquitted.

10. Taking account of both Mexico's direct responsibility and its denial of justice, and of the loss sustained by the claimants as it was discussed in paragraph 3, an amount of \$7,000.00, without interest, would seem to express best the personal damage caused the two claimants by delinquencies for which Mexico is liable.

Nielsen, Commissioner :

I am of the opinion that there is legal liability on the part of Mexico in this case, and that a pecuniary award may properly be rendered in conformity with principles of law underlying awards made by the Commission in other cases. Peaceful American citizens were proceeding in an automobile in a locality where travel was neither forbidden nor restricted. I think that the record clearly shows that the killing of one of them, Edward C. Stephens, by a Mexican soldier, in the presence and under the command of an officer, was inexcusable; that the person who did the shooting was allowed to escape; and that the person who permitted the escape was not punished, although he was charged with the offense of permitting the escape of a prisoner.

Fernández MacGregor, Commissioner :

I concur in the opinion of the Presiding Commissioner.

Decision

The Commission decides that the Government of the United Mexican States is obligated to pay to the Government of the United States of America, on behalf of Charles S. Stephens and Bowman Stephens, the sum of \$7,000.00 (seven thousand dollars), without interest.

¹ See page 155.

CHARLES E. TOLERTON (U.S.A.) *v.* UNITED MEXICAN STATES.*(July 15, 1927, concurring opinion by American Commissioner, July 15, 1927.**Pages 402-403.)*

FAILURE TO PROTECT.—FAILURE TO APPREHEND OR PUNISH. Evidence held insufficient to establish a failure to protect or a failure to apprehend and punish attackers of American subjects.

Cross-reference: Am. J. Int. Law, Vol. 22, 1928, p. 452.

Van Vollenhoven, Presiding Commissioner :

1. Claim is made by the United States of America in behalf of Charles E. Tolerton, an American national, who, as a member of a party of six Americans, was attacked in the afternoon of January 19, 1905, between the ranch Tasajera, Sonora, Mexico, and Covache, Sonora, Mexico, by a group of Yaqui Indians; who succeeded in saving his life; but who suffered from the occurrence a mental shock and material damages for which, it is alleged, Mexico is liable on the grounds of lack of protection of the claimant and lack of prosecution and punishment of his assailants. The United States claims reparation and satisfaction in the sum of \$50,000.00.

2. From the record, lack of protection is not convincingly proven. The claimant testifies that when their party (then seven gentlemen and a lady) was about to leave La Colorada, Sonora, for their trip to a mining camp some one hundred miles off, they had a written order from the civil and military authorities at Hermosillo, the capital of Sonora, for an escort of soldiers; but that they were refused such escort by the local military authorities at La Colorada on the ground that their party was too large to need one. The American Consul at Nogales, Sonora, relates a statement by Tolerton and another member of his party, who had the good fortune to escape, Miller, according to which they were refused an escort at La Colorado on the pretext of the horses being tired. The Governor of Sonora, however, states that the party was given the opportunity of an escort pursuant to the orders from Hermosillo, but that, on the instigation of the said Miller, they were unwilling to wait for it. Evidence submitted by Mexico with reference to the Mexican policy as to granting escorts in Sonora at that period renders the uncorroborated statements of the claimant and his associate (who has filed a separate claim) improbable.

3. As to lack of prosecution and punishment, two different contentions are submitted. One is Tolerton's statement to the effect that when, after having reached Covache on January 19 and visited the Tasajera ranch, he returned to Covache on January 20 about 7 p. m., he found there some forty or fifty Mexican soldiers under an officer who had been expressly sent from La Colorada to persecute the assailants, but were intoxicated and unwilling to take the field. This statement is unsupported. The other contention alleges that the assailants never were prosecuted or punished. It seems impossible to consider this contention disproven by so loose and strange a statement as that made on March 4, 1905, by the Governor of Sonora and reading that "several of the murderers were captured by myself and made them pay with their lives for the crime committed and

we are in active pursuit of the balance"; but there is not sufficient evidence that in this region and this period the Mexican Government could successfully have taken other measures than those of the character of military expeditions against Yaqui Indians as it repeatedly dispatched. Therefore, there would not seem to be sufficient proof warranting a pronouncement of improper lack of prosecution.

4. On the above grounds, the claim should be disallowed.

Nielsen, Commissioner :

I am of the opinion that the claim must be disallowed on the sole ground that there is not sufficient evidence convincingly to prove either the lack of proper protection or the absence of appropriate steps to apprehend and punish the persons who attacked the party of which Tolerton was a member.

Fernández MacGregor, Commissioner :

I concur in the disallowance of the claim for the reasons expounded by my two colleagues.

Decision

On the above grounds the Commission decides that the claim presented by the Government of the United States of America on behalf of Charles E. Tolerton must be disallowed.

F. R. WEST (U.S.A.) *v.* UNITED MEXICAN STATES.

(*July 21, 1927, concurring opinion by American Commissioner, July 21, 1927. Pages 404-407.*)

FAILURE TO APPREHEND OR PUNISH.—EFFECT OF ACT OF AMNESTY. American subject was killed during course of pay roll robbery by bandits, to whom amnesty was thereafter granted as rebels by the President of Mexico. Claim *allowed*.

Cross-references: Am. J. Int. Law, Vol. 22, 1928, p. 452; Annual Digest, 1927-1928, p. 212; British Yearbook, Vol. 9, 1928, p. 163.

Van Vollenhoven, Presiding Commissioner :

1. Claim for damages in the amount of \$25,000.00 is made in this case by the United States of America on behalf of F. R. West, an American national, on account of the murder of his son Edgar G. West, an American oil well driller, near Nanchital, Veracruz, Mexico, on December 2, 1922, by Mexican bandits who thereafter were granted amnesty by Mexico. The murder was an ordinary case of wanton killing and robbery void of any political background, West being a member of a party of some nine Americans, two Mexicans and one Chinese, who took the pay roll of their oil company (El Aguila, S. A.) from Puerto México, Veracruz, to Ixhuatlán, travelling first by boat and thereafter by gasoline motor train. About 8.30 a. m. this train was fired upon from ambush by some fifteen bandits, who

killed West, another American (a tool dresser by the name of Snapp), and the Mexican motorman, took the pay roll and the watch of one of the party, and disappeared. About 10.30 a. m. a Mexican officer with some one hundred soldiers arrived on the spot, but did not apprehend the culprits. On December 30, 1922, the Mexican Government issued an amnesty act, which—it is alleged—was interpreted by the Mexican President on August 21, 1923, so as to cover the murder of West and Snapp. The perpetrators, as far as the record shows, never were either prosecuted or punished.

2. The nationality of the claim, which was challenged, would seem to have been sufficiently proven under the principles asserted in paragraph 3 of the opinion in the *William A. Parker* case (Docket No. 127),¹ rendered March 31, 1926.

3. There would seem no doubt but that granting amnesty for a crime has the same effect, under international law, as not punishing such a crime, not executing the penalty, or pardoning the offense. If proven, it fastens upon Mexico an indirect liability. Article 1 of the decree of December 30, 1922, which is the pertinent provision here, reads (translated): "Amnesty is hereby granted to those guilty of rebellion and sedition and any act committed in connection therewith up to the date of the publication of the present act and beginning with the year 1920". On August 21, 1923, the undersecretary of the Mexican Home Office wrote to the El Aguila Company the following letter (translated) :

FEDERAL EXECUTIVE POWER,
DEPARTMENT OF INTERIOR.

Despatch No. 3346. Number 7870.

Subject : That it is not possible to accede to the petition as stated in the enclosure herewith attached.

COMPañÍA DE PETRÓLEO "EL AGUILA." S. A.,
Avenida Juárez 92, 94, City.

In reply to your courteous memorial of the 4th instant, in which the aid of the President of the Republic is requested in order to prosecute the rebel leader Protasio Rosales and his followers, who were recently granted amnesty, for having been the authors of the attack committed December 2 of last year, upon the group of oil well drillers returning to their camps at Ixhuatlán, in which attack two Americans and one Mexican were killed, by advice of the First Magistrate, I have to state that the rebel Protacio Rosales and his followers having been granted amnesty by the War Department in accordance with what is ordered in the decree of December 30, last, for the crimes of rebellion and sedition and related crimes, and one of these latter being dealt with in the concrete case now denounced, it is not possible to accede to your request.

Universal suffrage. No reelection.

THE UNDERSECRETARY:
(S.) VENEZUELA.

MEXICO, D. F., AUGUST 21, 1923.

When, on October 4, 1923, the oil company inquired of the Mexican Home Office, whether there had not been a misunderstanding in applying the amnesty act to the perpetrators of the crime of December 2, 1922, the

¹ See page 35.

chief clerk of the Division of Justice replied under date of October 11, 1923, that the company "should make application to the proper authorities as this Department has no power to institute any investigation concerning the aforementioned case".

4. It is not for this Commission to interpret the amnesty act; the only point of importance is how Mexico construed it. In this respect the letter of August 21, 1923, leaves no doubt. It states that it is written on behalf of the President himself; it establishes that it relates to the perpetrators, known or unknown, of the "concrete" crimes of December 2, 1922; and it contends that these crimes cannot be prosecuted because of the fact that they are within the scope of the amnesty act. The subsequent letter of October 11, 1923, fails to contain any statement to the contrary made on behalf of the President of the United Mexican States.

5. Mexico alleged that the letter of August 21, 1923, could not purport to interpret or construe the amnesty act, since the President and the Home Office were not authorized to construe it, but the judiciary only. It would seem that the first part of this contention is disproven by the text of the letter.

6. Mexico alleged that after receiving the second letter dated October 11, 1923, it would have been the duty of the oil company to have proceedings initiated in order to give the judiciary an opportunity to decide whether the amnesty act was applicable to West's murder. There is nothing in the amnesty act which suggests the existence of such a duty.

7. Since Mexico has issued an amnesty act and since the President of Mexico has held that it covered the murder of West, Mexico has granted amnesty to West's murderers, and has voluntarily deprived itself of the possibility of prosecuting and punishing them. The indirect liability which it thereby incurred would seem to be expressed best by awarding the claimant a sum of \$10,000.00, without interest.

Nielsen, Commissioner :

I concur in the conclusion of the Presiding Commissioner with regard to responsibility on the part of Mexico in this case. It is clear that proper steps were not taken to apprehend the murderers of West. Whatever may be the proper construction and application of the amnesty mentioned in the Presiding Commissioner's opinion, the reference to it in the record serves to furnish conclusive evidence with respect to the failure on the part of the Mexican authorities to take steps looking to the apprehension and punishment of those who attacked the party of which West was a member.

Fernández MacGregor, Commissioner :

I concur in the Presiding Commissioner's opinion.

Decision

The Commission decides that the Government of the United Mexican States is obligated to pay to the Government of the United States of America, on behalf of F. R. West, \$10,000.00 (ten thousand dollars), without interest.

T. J. SNAPP (U.S.A.) *v.* UNITED MEXICAN STATES.*(July 21, 1927. Pages 407-408.)*

FAILURE TO APPREHEND OR PUNISH.—EFFECT OF ACT OF AMNESTY. Claim arising under same circumstances as those of *F. R. West* claim *supra* allowed.

Cross-references: Am. J. Int. Law, Vol. 22, 1928, p. 455; British Yearbook, Vol. 9, 1928, p. 163.

(Text of decision omitted.)

SALOME LERMA VDA. DE GALVAN (UNITED MEXICAN STATES)
v. UNITED STATES OF AMERICA.*(July 21, 1927. Pages 408-411.)*

FAILURE TO APPREHEND OR PUNISH. Claim for death of Mexican subject, whose murderer was indicted by grand jury but never brought to trial or punished, *allowed*.

Cross-references: Am. J. Int. Law, Vol. 22, 1928, p. 455; Annual Digest, 1927-1928, p. 218; British Yearbook, Vol. 9, 1928, p. 159.

Nielsen, Commissioner :

1. Claim is made in this case in the amount of 50,000 pesos, by the United Mexican States, in behalf of Salomé Lerma de Galván, mother of Adolfo Pedro Galván, a Mexican citizen, who was killed in August, 1921, at Driscoll, Texas, by an American citizen named Hugh K. Kondall. The facts in the case as disclosed by the record may be briefly summarized.

2. Kondall and Galván were employed as foreman and laborer, respectively, in the construction of a bridge at a point about a half mile north of the depot at Driscoll. On the morning of August 25, 1921, Galván had a slight altercation with the son of Kondall who supplied drinking water to the workmen. It appears that Kondall was angered when he learned of the episode and proceeded to his house where he probably procured a pistol. He thereupon returned to the place where Galván was working. There is evidence that the latter, when he knew that Kondall was armed with a pistol, proceeded with a raised hammer in his hand toward the spot where Kondall and another man were standing, and that Kondall thereupon twice shot Galván who died shortly thereafter.

3. Kondall was immediately taken into custody by the local authorities and charged with murder. On August 29, 1921, he was given a preliminary hearing before a justice of the peace at which several eye witnesses of the shooting were examined. The accused was required to give a bond in the amount of \$25,000 for his appearance before the Criminal District Court

of Nueces County, at its October, 1921, term. No indictment was returned against Kondall at that term of the court, but in the following March an indictment was found against him, charging him with the murder of Galván, and trial was set for April 20, 1922. Subsequently the accused was admitted to bail in the sum of \$5,000.

4. Accompanying the American Answer is a copy of the criminal court docket in this case from which the following is an extract:

April 7, 1922. Case set for Thursday April 13, 1922, 10 A. M. Venire of fifty ordered for that date and hour. Writ returnable Tuesday.

April 17, 1922. Case continued by agreement.

December 14, 1922. Continued by operation of law.

4/30/23. Set for May 14. Special venire of 60 ordered.

5/14/23. Set for May 21.

5/22/23. Continued by agreement.

11/12/23. Set for 11/21.

6/5/24. Continued by operation of law.

5/8/25. Set for May 20. Venire of 50 men.

5/20/25. Continued illness of parties.

5. From additional evidence filed by the United States it is shown that the trial of Kondall was further continued at the instance of the State "because of a defaulting witness" and set for hearing at the term of court beginning on October 25, 1926, and still further continued at that term of court until April, 1927, on account of absence of material witnesses for the State.

6. The record contains an affidavit executed on November 24, 1925, by George C. Westervelt, District Attorney for the Counties of Nueces, Kleberg, Kenedy, Willacy and Cameron, Texas. It is stated in this affidavit that several subpoenas were issued for the appearance at the several terms of court of Louis F. Johnston, an eye witness to the shooting of Galván, and that the State could not safely and successfully go to trial without the production of this witness.

7. It is alleged in behalf of Mexico that there was an unnecessary delay in the prosecution of a person charged with a capital crime, and that under international law the United States should make compensation in satisfaction of a denial of justice. This case presents no difficulties. The question at issue is whether it reveals a failure of compliance with the general principle of international law requiring authorities to take proper measures to apprehend and punish a person who appears to be guilty of a crime against an alien. The Commission is bound to conclude that there was a clear failure on the part of the authorities of the state of Texas to act in conformity with this principle. There was no difficulty in the apprehension of Kondall, and a preliminary trial was promptly held. At this trial testimony was given from which it seems to be obvious that a grand jury could not properly fail to return an indictment for murder against Kondall. An indictment was found by a grand jury in March, 1922. After that it is plain that the authorities failed to take the proper steps to try the accused. There is no satisfactory explanation of continuances of the proceedings from time to time. Justification for the failure to bring the accused to justice cannot be found on the ground stated in the affidavit made by the District Attorney as late as November 24, 1925, that a certain eye witness had not been located. There is no reason to suppose that the legal machinery of the state of Texas is so defective that in a case in which a preliminary trial

reveals that there were at least five eye witnesses to the shooting of Galván the authorities during a period of six years after the shooting found themselves unable to conduct a proper prosecution. If any such defect had existed it would not be an adequate defence to the claim presented by Mexico. If witnesses actually disappeared during the course of the long delay in the trial, then as argued by counsel for Mexico, that would be evidence of the evils incident to such delay. It may be observed that the argument in behalf of the United States appeared to be directed more to the question of the measure of damages than to a justification of the delay in the proceedings against the accused.

8. I am of the opinion that in the light of the principles underlying decisions rendered by the Commission in the past an award may properly be made in this case in the sum of \$10,000.

Van Vollenhoven, Presiding Commissioner :

I concur in Commissioner Nielsen's opinion.

Fernández MacGregor, Commissioner :

I concur in Commissioner Nielsen's opinion.

Decision

The Commission decides that the Government of the United States of America shall pay to the Government of the United Mexican States in behalf of Salomé Lerma de Galván the sum of \$10,000 (ten thousand dollars) without interest.

GEORGE DAVID RICHARDS (U.S.A.) *v.* UNITED MEXICAN STATES.

(July 23, 1927, concurring opinion of American Commissioner, July 23, 1927. Pages 412-416.)

FAILURE TO PROTECT. Where foreigners had been killed in region over two years previously but Mexico had furnished an armed guard of a number larger than that decedent was willing to have accompany him, and which he had accordingly reduced in size, subsequent killing of American citizen *held* not due to lack of protection.

DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH.—DILATORY PROSECUTION. Where trial of those accused of murder of American subject had continued for over six years without final disposition, claim *allowed*.

Cross-references: Am. J. Int. Law, Vol. 22, 1928, p. 660; Annual Digest, 1927-1928, p. 225; British Yearbook, Vol. 9, 1928, p. 159.

Fernández MacGregor, Commissioner :

1. This claim is presented by the United States of America against the United Mexican States demanding from the latter, in behalf of George

David Richards, an American citizen, an indemnization for damages suffered on account of the death of his father, David Emile Richards, also an American citizen, who was engaged in superintending the construction of a road in the vicinity of Merba Santa, near Chivela, State of Oaxaca, Mexico, and who was killed on August 26, 1921, under the circumstances hereinafter related: It seems that there had been difficulties between certain occupants of the land of the Chivela Estate and its owners, on account of certain taxes that the latter were endeavoring to collect from the former; the Mexican Government, upon request, had granted an escort of three soldiers for the protection of Richards, two of whom were accompanying him on horse-back at the time of the events, and upon reaching a point located several kilometers from the Yerba Santa. he was ambushed by several men who fired on him two shots, which wounded him in the upper right arm and in the right thigh; it seems that the soldiers, believing that Richards was dead, left him and went to notify their superior, who was the 2nd Lieutenant of a detachment of soldiers garrisoned in the ranch-house; the Lieutenant proceeded to the place where the attempt had been committed, and found only the body of Richards with the wounds mentioned without the appearance of having been robbed. The claimant Government alleges that the Mexican Government is responsible for the failure to afford adequate protection to Richards notwithstanding it knew the conditions of insecurity which prevailed in that region, shown by the fact that some other American and another foreigner had been killed two years before in that region, and for the failure to apprehend and punish adequately the guilty parties, although their names were known through a letter which the deceased had written during his life to a friend called Hart, an American citizen, owner of the estate, expressing to him the fear of being murdered by order of certain individuals whose names he gave.

2. With respect to the alleged lack of protection, it is proven, of course; that the Mexican Government had endeavored to safeguard the life of Richards, even placing at his disposal a special guard, which Richards himself reduced, making his trip with only two soldiers; it does not seem that anything else could be done, in view of the circumstances; it is further proven that the military authorities had detachments in that region with the object of keeping order. Attacks on the lives and property of individuals cannot be prevented many times, unfortunately, even by using the most efficacious preventive measures, and it seems that the fact, that other foreigners should have been killed there two years before, does not sufficiently prove a state of disorder which would require special measures. It is also proven that, at the request of Hart, Richards' friend, the former was furnished a detachment the services of which were satisfactory. Therefore, the allegation of lack of protection cannot be made a ground for the present claim.

3. With regard to the failure to apprehend and punish the guilty parties, the following is established in the record: due to the request of either the American Consul or Richards' friends, or due to the report rendered by the Lieutenant who proceeded at once to the scene of the events, an investigation was initiated in the Mixed Court of First Instance of the District of Juchitán, Oaxaca. It appears that the decree docketing the case was issued on August 28th, that is, two days after the murder was committed; on September 3rd, orders were issued for the apprehension of Alejandro Jiménez, Dionisio Carrasco, Mariano Mendoza and Mariano López,

presumably guilty of the crime committed, according to the letter which Richards wrote to Hart; on September 4th a decree was issued for the formal imprisonment of said men, who had already been arrested, the corpus delicti having also been proven with the autopsy made on the corpse of the deceased and with the testimony of several witnesses, including Hart; the same decree contained orders for the apprehension of Apolinar Carrasco and Otón Velázquez, who were considered also involved in the crime, but it seems that neither of these two men was found or arrested. It is presumable that the proceedings may have continued until March 17, 1922, on which date the Judge issued an order releasing the men detained, basing his action in that they had proven an alibi by showing that they were not and could not be in the place of crime, since they were in different and very distant places; on March 22, 1922, the Prosecuting Attorney filed an appeal against such decree, but the Judge did not admit said appeal until March 2, 1925; the same Prosecuting Attorney, on March 4, 1925, requested the apprehension of the accused, Velázquez and Carrasco, who had not been arrested up to that date; the case on appeal went to the Court of Appeals on March 19, 1925; the latter dictated its decision on appeal on August 1, 1925, revoking the decree which was issued by the lower court and which released the accused, and ordering them again confined in jail, the prosecution to be continued, basing itself on the fact that the testimony of the witnesses who helped to prove the alibi looked false and, specially, on the fact that the four accused could have been the intellectual authors of the crime and not its material authors only. There is no evidence showing that this apprehension may have been effected or that the prosecution may have been continued in any manner, it appearing only that a District Judge, probably in an "amparo" filed by the accused before him, granted a temporary injunction against the act complained of (probably that of re-apprehension), under date of August 15, 1925.

4. According to the foregoing facts, no irregularities appear in the procedure, which may amount to a deficiency and, therefore, carry international responsibility, until the time when the Prosecuting Attorney appealed from the decree which released the accused (March 20, 1922). From then on, there occur unexplainable delays, the first being that of the appeal having been admitted only almost three years afterwards (March 2, 1925); the Court of Appeals revoked the decree of liberty and ordered the re-apprehension of the accused on August 1, 1925, but Mexico has not presented any evidence of the continuation of the prosecution, or of their having been finally judged. More than six years, then, have elapsed without the judgment of the parties presumably responsible for Richards' death, and it appears that the delays have no excuse, for which reason Mexico is clearly liable on this ground.

5. The Government of Mexico alleged that at the time when the United States presented the claim, that is, on December 17, 1924, no claim had accrued, because the proceedings had been regular up to then, and there was, for that reason, no damage for which claim could be made, in view of the fact that the deficiencies, if there be such, did not become apparent until April 13, 1925. I believe that this argument should not be taken into consideration, because the appeal of the Prosecuting Attorney filed on March 22, 1922, should have been decided shortly thereafter and it was not, the supposed delinquents having remained free since then, and because there is the fact that two of them, Velázquez and Carrasco, were never

apprehended. The subsequent delays are incorporated into those which existed at the time of filing this claim.

6. The Government of Mexico also alleged that the present claim did not accrue prior to September 8, 1923, the date on which the two Contracting Parties in this arbitration concluded their general claims convention, and that therefore it was erroneously filed under Article VI, instead of under Article VII, of said treaty. For the reasons stated under paragraph 5, there would seem no doubt but that the present claim accrued prior to the signing of the general claims convention.

7. In view of the above considerations, I believe that the Government of the United Mexican States must pay to the Government of the United States of America, on behalf of George David Richards, the sum of \$9,000 without interest.

Van Vollenhoven, Presiding Commissioner :

I concur in Commissioner Fernández MacGregor's opinion.

Nielsen, Commissioner :

I concur with Commissioner MacGregor's conclusion as to liability on the part of Mexico in this case. In my opinion it is clear that proper steps were not taken to apprehend and punish persons guilty of the murder of David Emile Richards.

Decision

The Commission decides that the Government of the United Mexican States is obligated to pay to the Government of the United States of America, on behalf of George David Richards, \$9,000.00 (nine thousand dollars) without interest.

MARY ANN TURNER (U.S.A.) *v.* UNITED MEXICAN STATES.

(*July 23, 1927, concurring opinion by Mexican Commissioner, July 23, 1927. Pages 416-421.*)

ILLEGAL ARREST. Evidence *held* not to establish unjustified arrest.

DENIAL OF JUSTICE.—ILLEGAL IMPRISONMENT.—DETENTION BEYOND LEGAL PERIOD.—CRUEL AND INHUMANE IMPRISONMENT. American subject was held in jail beyond legal period for investigation of crime of which he was accused. He became ill and died during his imprisonment, though ill-treatment while he was in jail was not proved. *Held*, respondent government was responsible for risks incident to illegal custody.

MEASURE OF DAMAGES. When American subject died during illegal imprisonment, though not as a result of ill-treatment, *held* damages will not be allowed for his death but instead for the bad effect upon his health of his illegal custody and for pecuniary damage, grief and indignity suffered by his widow, claimant herein.

Cross-references: Am. J. Int. Law, Vol. 22, 1928, p. 663; Annual Digest, 1927-1928, pp. 226, 483; British Yearbook, Vol. 9, 1928, p. 160.

Van Vollenhoven, Presiding Commissioner :

1. This claim is presented by the United States of America in behalf of Mary Ann Turner, an American national through the naturalization of her husband, against the United Mexican States, on account of damages suffered from the death of her said husband, Edward Turner, a naturalized American national. Turner, who in the Spring of 1899 was a locomotive engineer in Mexico, had the misfortune to be involved in a train collision on March 20, 1899, at Encinar, Veracruz, which caused the death of the fireman serving on the other colliding engine. Turner was arrested about April 1, 1899, and sent first to the prison hospital at Orizaba, Veracruz, and afterwards to the prison in that place. He was free on bail until an uncertain date after June 14, 1899; was in jail again (first in Orizaba, the last few weeks in Veracruz) until January 28, 1900; and on the last date he died, without having had a trial. The United States alleges direct responsibility of Mexico for an illegal arrest, undue and illegal delay of proceedings, and inhuman treatment in prison, all of which contributed to causing Turner's death, and claims on behalf of his widow damages in the sum of \$50,000.00, with interest thereon.

2. The nationality of the claim has been challenged by Mexico in its answer, but after the filing of additional evidence by the United States this challenge was abandoned.

3. An unjustified arrest of Turner has not been proven. Under Mexican law, negligence in causing a railway accident resulting in one's death is punishable, and both Turner and the engineer of the other colliding train, one Clark, were arrested. The fact that Clark was convicted on March 17, 1900 (two months after Turner's death), for having caused this collision certainly can not prove that in March or April, 1899, there did not exist sufficient ground for an arrest and formal imprisonment of the deceased.

4. As to undue and illegal delay of court proceedings in the District Court at Veracruz in Turner's case, Mexico has pleaded that it is impossible to produce evidence because of the court records having been destroyed by American naval forces in April, 1914. The statement, made not only in the reply brief, but repeated during the oral hearings, is palpably erroneous. Annex I of the Answer established that the records of the Veracruz jail (*el archivo de la Cárcel de Veracruz*, as the Answer says), had been destroyed in 1914, among them the record of 1900 (*los expedientes de 1900*) and that therefore the respondent Government could furnish no information about what happened to Turner *in that jail* in the last month of his life. This information obtained from the jail warden at Veracruz was transmitted by the governor of the State of Veracruz, who resides at Jalapa, Veracruz. These statements which in no wise are related either to court records, to Jalapa, or to the year 1899, are reproduced in the Mexican reply brief (filed May 24, 1927) by contending "that as stated in Annex I of the Answer, the court records of Jalapa, Veracruz, from at least 1899 to 1914, were destroyed by the Army of the United States of America at the time that these American troops landed at and were in possession and control of the port of Veracruz. Among the said court records thus destroyed the documentation of the Mexican Judiciary concerning the said Turner was to be found". Additional evidence, filed by Mexico itself on May 11, 1927, to-wit, only thirteen days before the reply brief, shows that the court records in question, if not in Veracruz, might be either in the archives of the former

or present circuit courts at Puebla, Mexico City or Querétaro, that they apparently have been mislaid or destroyed by Mexican officials, and that even at this time Mexico feels uncertain where they ought to be. This means that Mexico can not possibly, as it endeavored to do, invoke in its favor or as an excuse, this lack of counterproof proceeding from the court record, and that its absence in this case is entirely different from the situation existing in the *Faulkner* case (Docket No. 47),¹ according to paragraph 5 of the Commission's opinion in that case.

5. From the record as it stands, and especially from a letter of the American Ambassador of September 4, 1899, and one of the Mexican Foreign Minister of December 26, 1899, it would seem probable that, if some investigations were made, they must have been slow and unsatisfactory, and that the accused was not allowed to play a part of any importance in them. It need not be established that gathering evidence in the case of a railway collision of this type and in this part of the country is a simpler task than gathering evidence of a backwoods murder by unknown individuals.

6. The record contains various statements about the time during which Turner was deprived of his liberty. Mexico contends that he was arrested on or about March 20, but released on bail on March 30, 1899; the American Ambassador, on the other hand, contends that both Turner and Clark were imprisoned on April 1, 1899. Mexico alleges that Turner's bail was cancelled and he himself placed at the disposal of the Judge on or about June 14, 1899, but that while the application of the guarantor was being dispatched, Turner succeeded in escaping, and that he was apprehended in Mexico City. The date on which Turner returned to jail is uncertain. When, however, the Mexican Foreign Minister, according to his letter of September 5, 1899, to the American Ambassador, applied to the Judge at Veracruz for information about the prisoner Turner, he was never informed by that Judge (as far as the record shows) that his supposition about Turner's being in jail was erroneous; nor did this Judge, when asked for an explanation about the apparent slowness of the investigations, ever allege (as far as the record shows) that they had been seriously interrupted because of any escape of Turner. On the record as it stands, it may be safely assumed that Turner was in jail at least from about September 1, 1899, on; the more so as—according to a statement furnished by the Supreme Court of the Nation—Turner on November 27, 1899, presented a petition requesting that the indictment in his case be quashed, and he probably did not do so until after he had waited in jail a considerable length of time for a trial. Under the conditions of the record there is no reason to give Mexico the benefit of the doubt against statements made by the American Embassy, when these in themselves are probable and not contradicted by any evidence.

7. According to the Mexican federal code of criminal procedure, which was applicable, the first state of the proceedings, that of the preliminary investigations, should have ended within five months after the date on which the accused came at the disposal of the judge (some date between March 20 and April 1, 1899, both dates inclusive). If he was apprehended shortly after June 14, 1899, and therefore had been at the disposal of the Judge from about April 1, 1899, on, then he was illegally in jail from about September 1, 1899. But even if it is considered uncertain whether he was

¹ See page 67.

at the Court's disposal between June 14, and September 1, 1899, then at any rate he was illegally in jail from about November 15, 1899, on; and since the illness from which he died must have begun or at any rate increased during the two months between the middle of November, 1899, and January 28, 1900, Mexico must be liable for what befell Turner during this period of illegal custody. Though there is no convincing proof that his death was caused by his treatment in prison, there can be no doubt but that, if at liberty, he would have been able to take better measures for restoring his health than he could do either in prison, or in a prison hospital. If having a man in custody obligates a government to account for him, having a man in *illegal* custody doubtless renders a government liable for dangers and disasters which would not have been his share, or in a less degree, if he had been at liberty.

8. Ill-treatment of Turner in jail is not proven in itself. No letters written either by him or to him while he was in prison connect up his death with inhuman treatment. The evidence exclusively consists of later statements by his widow, and of manifestly exaggerated letters from his lawyer, not corroborated by any contemporary testimony from some impartial authority having firsthand knowledge. But it is proven, on the one hand, that a man reported to be of broken health, who died on January 28th, was reprimanded by a jail warden on or about January 20th because of "bad conduct" (*mala conducta*); and on the other hand, that the Judge at Vera Cruz, being requested by the Federal District Attorney for information "whether it is true that he (Turner) is almost in a dying condition", telegraphed on January 26, 1900 (only two days before Turner's death), that Turner was in "the best condition possible consistent with his position as an accused" (*se halla en las mejores condiciones posibles atenta su calidad de procesado*). Instead of observing that this statement overlooked the fact that Turner, not having been tried, should have been considered and treated as an innocent man, Mexico attempts to amplify the Judge's statement by contending that this statement shows that while in prison, Turner "constantly was of bad behavior".

9. This is a case of alleged direct responsibility for acts of authorities. Mexico, on the record, cannot be held responsible for Turner's death; but it should be held responsible for the bad effect of its illegal and careless custody on Turner's health. An amount of damages of \$4,000.00, (four thousand dollars) without interest, would seem to express best the direct pecuniary damage, grief and indignity sustained by the claimant.

Nielsen, Commissioner :

I am of the opinion that Turner was clearly the victim of mistreatment. He evidently was not in jail for the entire period of ten months between the date of his arrest on March 20, 1899, as stated in the Memorial, or some days later, and the date of his death on January 28, 1900. But though he was free on bail a part of that time, he was continuously under accusation. There is no satisfactory explanation in the record why he was not tried. Evidence in the record indicates to my mind that he was innocent of the charge preferred against him, even though his arrest may have been justified. It seems to me to be clear that the accusation against him was of such a nature that its merits could speedily have been determined by a court.

Fernández MacGregor, Commissioner :

I concur with paragraphs 1 to 6 of the Presiding Commissioner's Opinion. It appears clear to me, notwithstanding the vagueness of the evidence presented by both sides in this case, that Turner was held prisoner without being brought to trial for a period which could be from three to five months more than he should have been, according to Mexican law, and that this fact, which means a violation of human liberty, renders Mexico liable conformably with principles of international law. Therefore, I believe that the claimant must be awarded the sum proposed by the Presiding Commissioner.

Decision

The Commission decides that the Government of the United Mexican States is obligated to pay to the Government of the United States of America, on behalf of Mary Ann Turner, \$4,000.00 (four thousand dollars), without interest.

B. E. CHATTIN (U.S.A.) *v.* UNITED MEXICAN STATES.

(July 23, 1927, concurring opinion by American Commissioner, July 23, 1927, dissenting opinion by Mexican Commissioner, undated. Pages 422-465.)

EFFECT UPON CLAIM OF ESCAPE OF CLAIMANT FROM PRISON. The fact that claimant escaped from jail and was a fugitive from justice *held* not to bar his Government's right to espouse his claim.

DENIAL OF JUSTICE.—ILLEGAL ARREST. Evidence to support the validity of an arrest need not be of same weight as that to support a conviction.

DIRECT AND INDIRECT RESPONSIBILITY.—MEASURE OF DAMAGES. Direct and indirect responsibility defined and distinguished. Measure of damages in each category considered.

IRREGULARITIES IN JUDICIAL PROCEEDINGS.—UNDUE DELAY IN JUDICIAL PROCEEDINGS.—CONSOLIDATION OF CRIMINAL CASES WITHOUT REASON.—FAILURE TO INFORM ACCUSED OF CHARGE AGAINST HIM.—INSUFFICIENT HEARING OR TRIAL.—FAILURE TO MEET ORDINARY JUDICIAL STANDARDS. Evidence *held* sufficient to establish various irregularities and undue delay in judicial proceedings as well as failure to meet ordinary judicial standards.

INFLUENCING OF TRIAL BY GOVERNOR OF STATE.—EXORBITANT BAIL.—FAILURE TO PROVIDE COUNSEL OR INTERPRETER TO ACCUSED.—FAILURE TO CONFRONT ACCUSED WITH WITNESSES. Evidence *held* not to establish certain irregularities in judicial proceedings.

FAILURE TO SWEAR WITNESSES.—INTERNATIONAL STANDARD. A failure to swear witnesses, when not required by Mexican law, *held* not to involve a failure to meet international standards.

CONVICTION ON INSUFFICIENT EVIDENCE. Claim that claimant was convicted on insufficient evidence *held* not established.

UNDUE SEVERITY OF PENALTY IMPOSED. A court in its discretion may impose a severe penalty for the embezzlement of four pesos, so long as such penalty is permissible under the law.

CRUEL AND INHUMANE IMPRISONMENT.—MISTREATMENT DURING IMPRISONMENT. Claim for mistreatment in prison *held* not established. Corroboration of allegations of claimant is required.

MEASURE OF DAMAGES. Measure of damages, in light of evidence, in case involving direct responsibility, considered. Fact that claimant had escaped from prison and was not in jail for entire period involved *held* to lessen damages.

Cross-references: Am. J. Int. Law, Vol. 22, 1928, p. 667; Annual Digest, 1927-1928, p. 248; British Yearbook, Vol. 9, 1928, p. 157.

Van Vollenhoven, Presiding Commissioner :

1. This claim is made by the United States of America against the United Mexican States on behalf of B. E. Chattin, an American national. Chattin, who since 1908 was an employee (at first freight conductor, thereafter passenger conductor) of the Ferrocarril Sud-Pacífico de México (Southern Pacific Railroad Company of Mexico) and who in the Summer of 1910 performed his duties in the State of Sinaloa, was on July 9, 1910, arrested at Mazatlán, Sinaloa, on a charge of embezzlement; was tried there in January, 1911, convicted on February 6, 1911, and sentenced to two years' imprisonment; but was released from the jail at Mazatlán in May or June, 1911, as a consequence of disturbances caused by the Madero revolution. He then returned to the United States. It is alleged that the arrest, the trial and the sentence were illegal, that the treatment in jail was inhuman, and that Chattin was damaged to the extent of \$50,000.00, which amount Mexico should pay.

2. Mexico has challenged the claimant's citizenship on account of its being established by testimonial evidence only. Under the principles expounded in paragraph 3 of the Commission's opinion in the case of *William A. Parker* (Docket No. 127)¹ rendered March 31, 1926, the American nationality of Chattin would seem to be proven.

3. The circumstances of Chattin's arrest, trial and sentence were as follows. In the year 1910 there had arisen a serious apprehension on the part of several railroad companies operating in Mexico as to whether the full proceeds of passenger fares were accounted for to these companies. The Southern Pacific Railroad Company of Mexico applied on June 15, 1910, to the Governor of the State of Sinaloa, in his capacity as chief of police of the State, co-operating with the federal police, in order to have investigations made of the existence and extent of said defrauding of their lines within the territory of his State. On or about July 8, 1910, one Cenobio Ramírez, a Mexican employee (brakeman) of the said railroad, was arrested at Mazatlán on a charge of fraudulent sale of railroad tickets of the said company, and in his appearance before the District Court in that town he accused the conductor Chattin—who since May 9, 1910, had charge of trains operating between Mazatlán and Acaponeta, Nayarit—as the principal in the crime with which he, Ramírez, was charged; whereupon Chattin also was arrested by the Mazatlán police, on July 9 (not 10),

¹ See page 35.

1910. On August 3 (not 13), 1910, his case was consolidated not only with that of Ramírez, but also with that of three more American railway conductors (Haley, Englehart and Parrish) and of four more Mexicans. After many months of preparation and a trial at Mazatlán, during both of which Chattin, it is alleged, lacked proper information, legal assistance, assistance of an interpreter and confrontation with the witnesses, he was convicted on February 6, 1911, by the said District Court of Mazatlán as stated above. The case was carried on appeal to the Third Circuit Court at Mexico City, which court on July 3, 1911, affirmed the sentence. In the meantime (May or June, 1911) Chattin had been released by the population of Mazatlán which threw open the doors of the jail in the time elapsing between the departure of the representatives of the Diaz regime and the arrival of the Madero forces.

Forfeiture of the right to national protection

4. Mexico contends that not only has Chattin, as a fugitive from justice, lost his right to invoke as against Mexico protection by the United States, but that even the latter is bound by such forfeiture of protection and may not interpose in his behalf. If this contention be sound, the American Government would have lost the right to espouse Chattin's claim, and the claim lacking an essential element required by Article 1 of the Convention signed September 8, 1923, would not be within the cognizance of this Commission. The motive for the alleged limitation placed on the sovereignty of the claimant's Government would seem to be that a government by espousing such claim makes itself a party to the improper act of its national. International awards, however, establishing either the duty or the right of international tribunals to reject claims of fugitives from justice have not been found; on the contrary, the award in the *Pelletier* case (under the Convention of May 28, 1884, between the United States and Hayti) did not attach any importance to the fact that Pelletier had escaped from an Haytian jail, nor did Secretary Bayard do so in expounding the reasons why the United States Government did not see fit to press the award rendered in its favor (Moore, at 1779, 1794, 1800). In the *Roberts*¹ and *Strother*² cases (Docket Nos. 185 and 3088) this Commission virtually held that protection of a fugitive from justice should be left to the discretion of the claimant government, and it did so more explicitly in the *Massey* case (Docket No. 352; paragraph 3 of Commissioner Nielsen's opinion).³ A similar attitude was taken in cases in which forfeiture of the right to protection was alleged on other grounds. In paragraph 6 of its opinion in the *Macedonio J. Garcia* case (Docket No. 607),⁴ the Commission held that the American claimant's participation in Mexican politics was not a point on which the question of the right of the United States to intervene in his behalf, and therefore the question of the Commission's jurisdiction, could properly be raised, but that the pertinency of this point could only be considered in connection with the question of the validity of the claim under international law. In the *Francisco Mallén* case (Docket No. 2935)⁵ none of the Commissioners held that misstatements or even misrepresentations by the individual

¹ See page 77.

² See page 262.

³ See page 155.

⁴ See page 108.

⁵ See page 173.

claimant could furnish a ground for the Commission to reject the claim as an unallowable one. It is true that more than once in international cases statements have been made to the effect that a fugitive from justice loses *his* right to invoke and to expect protection—either by the justice from which he fled, or by his own government—but this would seem not to imply that his government as well loses *its* right to espouse its subject's claim in its discretion. The present claim, therefore, apart from the question whether a man who leaves a jail which is thrown open may be called a fugitive from justice, should be accepted and examined.

Illegal arrest

5. It has been alleged, in the first place, that Chattin, contrary to the Mexican Constitution of 1857, was arrested merely on an oral order. The Court's decision rendered February 6, 1911, stated that the court record contained "the order dated July 9, which is the written order based on the reasons for the detention of Chattin"; and among the court proceedings there are to be found (a) a decree ordering Chattin's arrest, dated July 9, 1910, and (b) a decree for Chattin's "formal imprisonment", dated July 9, 1910, as well. Even if the first decree had been issued some hours after Chattin's arrest, for which there is no proof except the statement by the police prefect that Chattin was placed in a certain jail on the Judge's "oral order", the irregularity would have been inconsequential to Chattin. The Third Circuit Court at Mexico City, when called upon to examine the second decree given on July 9, 1910, held on October 27, 1910, that it had been regular but for the omission of the crime imputed (which was known to Chattin from the examination to which he was previously submitted on July 9, 1910), and therefore the Court affirmed it after having amended it by inserting the name of Chattin's alleged crime. The United States has alleged that, since the sentence rendered on February 6, 1911, held that "the confession of the latter" (Ramírez) "does not constitute in itself a proof against the other" (Chattin), the Court confessed that Chattin's arrest had been illegal. No such inference can be made from the words cited, though the thought might have been expressed more clearly; a statement, insufficient as evidence for a conviction, can under Mexican law (as under the laws of many other countries) furnish a wholly sufficient basis for an arrest and formal imprisonment.

Defective administration of justice

6. Before taking up the allegations relative to irregular court proceedings against Chattin and to his having been convicted on insufficient evidence, it seems proper to establish that the present case is of a type different from most other cases so far examined by this Commission in which defective administration of justice was alleged.

7. In the *Kennedy* case (Docket No. 7)¹ and nineteen more cases before this Commission it was contended that, a citizen of either country having been wrongfully damaged either by a private individual or by an executive official, the judicial authorities had failed to take proper steps against the person or persons who caused the loss or damage. A governmental liability proceeding from such a source is usually called "indirect liability", though,

¹ See page 194.

considered in connection with the alleged delinquency of the government itself, it is quite as direct as its liability for any other act of its officials. The liability of the government may be called remote or secondary only when compared with the liability of the person who committed the wrongful act (for instance, the murder) for that very act. Such cases of *indirect governmental liability* because of lack of proper action by the judiciary are analogous to cases in which a government might be held responsible for denial of justice in connection with nonexecution of private contracts, or in which it might become liable to victims of private or other delinquencies because of lack of protection by its executive or legislative authorities.

8. Distinct from this so-called indirect government liability is the *direct responsibility* incurred on account of acts of the government itself, or its officials, unconnected with any previous wrongful act of a citizen. If such governmental acts are acts of *executive* authorities, either in the form of breach of government contracts made with private foreigners, or in the form of other delinquencies of public authorities, they are at once recognized as acts involving direct liability; for instance, collisions caused by public vessels, reckless shooting by officials, unwarranted arrest by officials, mis-treatment in jail by officials, deficient custody by officials, etc. As soon, however, as mistreatment of foreigners *by the courts* is alleged to the effect that damage sustained is caused by the *judiciary* itself, a confusion arises from the fact that authors often lend the term "denial of justice" as well to these cases of the second category, which are different in character from a "denial of justice" of the first category. So also did the tribunal in the *Yuille, Shortridge & Company* case (under the British memorandum of March 8, 1861, accepted by Portugal; De Lapradelle et Politis, II, at 103), so Umpire Thornton sometimes did in the 1868 Commission (Moore, 3140, 3141, 3143; *Burn, Pratt* and *Ada* cases). It would seem preferable not to use the expression in this manner. The very name "denial of justice" (*dénégation de justice, déni de justice*) would seem inappropriate here, since the basis of claims in these cases does not lie in the fact that the courts refuse or deny redress for an injustice sustained by a foreigner because of an act of someone else, but lies in the fact that the courts themselves did injustice. In the British and American claims arbitration Arbitrator Pound one day put it tersely in saying that there must be "an injustice antecedent to the denial, and then the denial after it" (Nielsen's *Report*, 258, 261).

9. How confusing it must be to use the term "denial of justice" for both categories of governmental acts, is shown by a simple deduction. If "denial of justice" covers not only governmental acts implying so-called indirect liability, but also acts of direct liability, and if, on the other hand, "denial of justice" is applied to acts of executive and legislative authorities as well as to acts of judicial authorities—as is often being done—there would exist no international wrong which would not be covered by the phrase "denial of justice", and the expression would lose its value as a technical distinction.

10. The practical importance of a consistent cleavage between these two categories of governmental acts lies in the following. In cases of direct responsibility, insufficiency of governmental action entailing liability is not limited to flagrant cases such as cases of bad faith or wilful neglect of duty. So, at least, it is for the non-judicial branches of government. Acts of the *judiciary*, either entailing direct responsibility or indirect liability (the latter called denial of justice, proper), are not considered insufficient

unless the wrong committed amounts to an outrage, bad faith, wilful neglect of duty, or insufficiency of action apparent to any unbiased man. Acts of the executive and legislative branches, on the contrary, share this lot only then, when they engender a so-called *indirect* liability in connection with acts of others; and the very reason why this type of acts often is covered by the same term "denial of justice" in its broader sense may be partly in this, that to such acts or inactivities of the executive and legislative branches engendering *indirect* liability, the rule applies that a government cannot be held responsible for them unless the wrong done amounts to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. With reference to *direct* liability for acts of the executive it is different. In the *Mermaid* case (under the Convention of March 4, 1868, between Great Britain and Spain) the Commissioners held that even an act of mere clumsiness on the part of a gunboat—a cannon shot fired at a ship in an awkward way—when resulting in injustice renders the government to whom that public vessel belongs liable (De Lapradelle et Politis, II, 496; compare Moore, 5016). In the *Union Bridge Company* case the British American arbitral tribunal decided that an act of an executive officer may constitute an international tort for which his country is liable, even though he acts under an erroneous impression and without wrongful intentions (Nielsen's *Report*, at 380). This Commission, in paragraph 12 of its opinion in the *Illinois Central Railroad Company* case (Docket No. 432)¹ rendered March 31, 1926, held that liability can be predicated on nonperformance of government contracts even where none of these aggravating circumstances is involved; and a similar view regarding responsibility for other acts of executive officers was held in paragraph 7 of its opinion in the *Okie* case (Docket No. 275),² rendered March 31, 1926, and in paragraph 9 of the first opinion in the *Venable* case (Docket No. 603).³ Typical instances of direct damage caused by the judiciary—"denial of justice" improperly so called—are the *Rozas* and *Driggs* cases (Moore, 3124-3126; not the *Driggs* case in Moore, 3160); before this Commission the *Faulkner*, *Roberts*, *Turner* and *Strother* cases (Docket Nos. 47, 185, 1327 and 3088) presented instances of this type, in so far as the allegation of illegal *judicial* proceedings was involved therein. Neither in the *Rozas* and *Driggs* cases, nor in the *Selkirk* case (Moore, 3130), the *Reed and Fry* case (Moore, 3132), the *Jennings* case (Moore, 3135), the *Pradel* case (Moore, 3141), the *Smith* case (Moore, 3146), the *Baldwin* case (Moore, 3235), the *Jonan* case (Moore, 3251), the *Trumbull* case (Moore, 3255), nor the *Croft* case (under the British memorandum of May 14, 1855, accepted by Portugal; De Lapradelle et Politis, II, at 22; compare Moore, 4979) and the *Costa Rica Packet* case (under the Convention of May 16, 1895, between Great Britain and the Netherlands; La Fontaine, 509, Moore, 4948) was the improper term "denial of justice" used by the tribunal itself. The award in the *Cotesworth & Powell* case made a clear and logical distinction between the two categories mentioned in paragraphs 7 and 8, above; "denials of justice" on the one hand (when tribunals refuse redress), and "acts of notorious injustice" committed by the judiciary on the other hand (Moore, at 2057, 2083).

¹ See page 134.

² See page 54.

³ See page 219.

11. When, therefore, the American Agency in its brief mentions with great emphasis the existence of a "denial of justice" in the *Chattin* case, it should be realized that the term is used in its improper sense which sometimes is confusing. It is true that *both* categories of government responsibility—the direct one and the so-called indirect one—should be brought to the test of international standards in order to determine whether an international wrong exists, and that for *both* categories convincing evidence is necessary to fasten liability. It is moreover true that, as far as acts of the *judiciary* are involved, the view applies to *both* categories that "it is a matter of the greatest political and international delicacy for one country to disacknowledge the judicial decision of a court of another country" (*Garrison's* case; Moore, 3129), and to *both* categories the rule applies that state responsibility is limited to judicial acts showing outrage, bad faith, wilful neglect of duty, or manifestly insufficient governmental action. But the distinction becomes of importance whenever acts of the *other* branches of government are concerned; then the limitation of liability (as it exists for *all* judicial acts) does not apply to the category of direct responsibility, but only to the category of so-called indirect or derivative responsibility for acts of the executive and legislative branches, for instance on the ground of lack of protection against acts of individuals.

Irregularity of court proceedings

12. The next allegation on the American side is that *Chattin's* trial was held in an illegal manner. The contentions are: (a) that the Governor of the State, for political reasons, used his influence to have this accused and three of his fellow conductors convicted; (b) that the proceedings against the four conductors were consolidated without reason; (c) that the proceedings were unduly delayed; (d) that an exorbitant amount of bail was required; (e) that the accused was not duly informed of the accusations; (f) that the accused lacked the aid of counsel; (g) that the accused lacked the aid of an interpreter; (h) that there were no oaths required of the witnesses; (i) that there was no such a thing as a confrontation between the witnesses and the accused: and (j) that the hearings in open court which led to sentences of from two years' to two years and eight months' imprisonment lasted only some five minutes. It was also contended that the claimant had been forced to march under guard through the streets of Mazatlán; but the Commission in paragraph 3 of its opinion in the *Faulkner* case (Docket No. 47)¹ rendered November 2, 1926, has already held that such treatment is incidental to the treatment of detention and suspicion, and cannot in itself furnish a separate basis for a complaint.

13. As to illegal efforts made by the Governor of Sinaloa to influence the trial and the sentence (allegation a), the only evidence consists in hearsay or suppositions about such things as what the Governor had in mind, or what the Judge has said in private conversation; hearsay and suppositions which often come from persons connected with those colleagues of *Chattin's* who shared his fate. To uncorroborated talk of this kind the Commission should not pay any attention. The record contains several allegations about lawyers being unwilling to give or to continue their services because of fear of the Governor of Sinaloa; but the only statement of this kind proceeding from a lawyer himself relates to an undisclosed behavior on

¹ See page 67.

his part which displeased quite as much the college where he was teaching as a professor, as it displeased the Governor of the State. Among these lawyers who presented bills for large fees, but, according to the record, did not take any interest at all in their clients, and did not avail themselves of the rights accorded by Mexican law in favor of accused persons, there was one who seems to have been willing, only if he were appointed official consulting attorney for the American consulate, not merely to become quite active but also to drop at once his fear of the Governor. It took another lawyer thirty eight days to decline a request to act as counsel on appeal. If really these lawyers have behaved as it would seem from the record, their boastful pretenses and feeble activities were not a credit to the Mexican nation. The Government of Mexico evidently cannot be held liable for that; but if conditions sometimes are in parts of Mexico as they were then in Sinaloa, it might be well to explicitly obligate the Judge by law to inform the accused ones of their several rights, both during the investigations and the trial.

14. For the advisability or necessity of consolidating the proceedings in the four cases (allegations b), here is only slight evidence. Yet there is; and it would seem remarkable that, if the court record can be relied upon in this respect, this point was not given any attention during the investigations and the trial. Among the scanty pieces of evidence against Chattin there exists on the one hand a stub (No. 21), on which Chattin, by a statement made on October 28, 1910, admitted having written on April 24, 1910 (that is, before he came in charge of the track Mazatlán—Acaponeta, and was still on the track Culiacán-Mazatlán) the words "This man is O. K.—Chattin" (there is no addressee's name on the original), and of which he could give no other explanation than that it was issued to "recommend a friend who travelled on the line"; and on the other hand there was produced a stub (No. 23) reading "5/24/10.—Chattin—The two parties are O. K.—Haley", regarding which Haley stated on October 29, 1910, "that he wrote it on May 24th last for the purpose of recommending some intimate friends". These recommendations of travelling friends not only might raise suspicions in connection with the allegation ascribed to Camou and made in court by Batriz (both of them accused Mexican brakemen) that there was one general system of understandings between the several railway conductors, but it also shows that there might have been good reasons to connect the cases of at least Chattin and Haley; and as the cases of Haley and Englehart had been already naturally connected from the beginning, it would seem reasonable that at least the cases of these three men had been linked up. However, the Court which had taken these stubs from secret documents presented to it on August 3, 1910, by the railroad company, instead of making them an object of a most careful inquiry, neither informed Chattin and his colleagues about their origin, nor examined Haley and Chattin as to the relation existing between them. More than two months after the consolidation, to-wit on October 12, 1910, testimony was given that Ramírez, in the south of Sinaloa, had delivered passes to Guaymas, Sonora; but neither is there any trace of an investigation as to this connecting link between the acts of several conductors. Since no grounds were given for the consolidation of the cases, and not a single effort was made to throw any more light on the occurrences from this consolidation, all disadvantages resulting therefrom for those whose cases might have been heard at much earlier dates (Haley, Englehart and Parrish) must be imputed to the Judge. The present claimant, however, Chattin,

is the one who has not suffered from the consolidation, since his case was slowest in maturing for trial and since the others were waiting for him.

15. For undue delay of the proceedings (allegation c), there is convincing evidence in more than one respect. The formal proceedings began on July 9, 1910. Chattin was not heard in court until more than one hundred days thereafter. The stubs and perhaps other pieces of evidence against Chattin were presented to the Court on August 3, 1910; Chattin, however, was not allowed to testify regarding them until October 28, 1910. Between the end of July, and October 8, 1910, the Judge merely waited. The date of an alleged railroad ticket delinquency of Chattin's (June 29, 1910) was given by a witness on October 21, 1910; but investigation of Chattin's collection report of that day was not ordered until November 11, 1910, and he was not heard regarding it until November 16, nor confronted with the only two witnesses (Delgado and Sarabia) until November 17, 1910. The witnesses named by Ramírez in July were not summoned until after November 22, 1910, at the request of the Prosecuting Attorney, with the result that, on the one hand, several of them—including the important witness Manuel Virgen—had gone, and that, on the other hand, the proceedings had to be extended from November 18, to December 13. On September 3, 1910, trial had been denied Parrish, and on November 5, it was denied Chattin, Haley and Englehart; though no testimony against them was ever taken after October 21 (Chattin), and though the absence of the evidence ordered on November 11 and after November 22 was due exclusively to the Judge's laches. Unreliability of Ramírez's confession had been suggested by Chattin's lawyer on August 16, 1910; but it apparently was only after a similar suggestion of Camou on October 6, 1910, that the Judge discovered that the confession of Ramírez did not "constitute in itself a proof against" Chattin. New evidence against Chattin was sought for. It is worthy of note that one of the two new witnesses, Estebán Delgado, who was summoned on October 12, 1910, had already been before the police prefect on July 8, 1910, in connection with Ramírez's alleged crime. If the necessity of new evidence was not seriously felt before October, 1910, this means that the Judge either has not in time considered the sufficiency of Ramírez's confession as proof against Chattin, or has allowed himself an unreasonable length of time to gather new evidence. The explanation cannot be found in the consolidation of Chattin's case with those of his three fellow conductors, as there is no trace of any judicial effort to gather new testimony against these men after July, 1910. Another remarkable proof of the measure of speed which the Judge deemed due to a man deprived of his liberty, is in that, whereas Chattin appealed from the decree of his formal imprisonment on July 11, 1910—an appeal which would seem to be of rather an urgent character—"the corresponding copy for the appeal" was not remitted to the appellate Court until September 12, 1910; this Court did not render judgment until October 27, 1910; and though its decision was forwarded to Mazatlán on October 31, 1910, its receipt was not established until November 12, 1910.

16. The allegation (d) that on July 25, 1910, an exorbitant amount of bail, to-wit a cash bond in the sum of 15,000.00 pesos, was required for the accused is true; but it is difficult to see how in the present case this can be held an illegal act on the part of the Judge.

17. The allegation (e) that the accused has not been duly informed regarding the charge brought against him is proven by the record, and to

a painful extent. The real complainant in this case was the railroad company, acting through its general manager; this manager, an American, not only was allowed to make full statements to the Court on August 2, 3, and 26, 1910, without ever being confronted with the accused and his colleagues, but he was even allowed to submit to the Court a series of anonymous written accusations, the anonymity of which reports could not be removed (for reasons which he explained); these documents created the real atmosphere of the trial. Were they made known to the conductors? Were the accused given an opportunity to controvert them? There is no trace of it in the record, nor was it ever alleged by Mexico. It is true that, on August 3, 1910, they were ordered added to the court record; but that same day they were delivered to a translator, and they did not reappear on the court record until *after* January 16, 1911, when the investigations were over and Chattin's lawyer had filed his briefs. The court record only shows that on January 13, and 16, 1911, the conductors and one of their lawyers were aware of the existence, not that they knew the contents, of these documents. Therefore, and because of the complete silence of both the conductors and their lawyers on the contents of these railroad reports, it must be assumed that on September 3, 1910, when Chattin's lawyer was given permission to obtain a certified copy of the proceedings, the reports were not included. Nor is there evidence that, when two annexes of the reports (the stubs mentioned in paragraph 14 above) were presented to the conductors as pieces of evidence, their origin was disclosed. It is not shown that the confrontation between Chattin and his accusers amounted to anything like an effort on the Judge's part to find out the truth. Only after November 22, 1910, and only at the request of the Prosecuting Attorney, was Chattin confronted with some of the persons who, between July 13 and 21, inclusive, had testified of his being well acquainted with Ramírez. It is regrettable, on the other hand, that the accused misrepresents the wrong done him in this respect. He had not been left altogether in the dark. According to a letter signed by himself and two other conductors dated August 31, 1910, he was perfectly aware even of the details of the investigations made against him; so was the American vice-consul on July 26, 1910, and so was one H. M. Boyd, a dismissed employee of the same railroad company and friend of the conductors, as appears from his letter of October 4, 1910. Owing to the strict seclusion to which the conductors contend to have been submitted, it is impossible they could be so well-informed if the charges and the investigations were kept hidden from them.

18. The allegations (f) and (g) that the accused lacked counsel and interpreter are disproven by the record of the court proceedings. The telegraphic statement made on behalf of the conductors on September 2, 1910, to the American Embassy to the effect that they "have no money for lawyers" deserves no confidence; on the one hand, two of them were able to pay very considerable sums to lawyers, and on the other hand, two of the Mexicans, who really had no money, were immediately after their request provided with legal assistance.

19. The allegation (h) that the witnesses were not sworn is irrelevant, as Mexican law does not require an "oath" (it is satisfied with a solemn promise, *protesta*, to tell the truth), nor do international standards of civilization.

20. The allegation (i) that the accused has not been confronted with the witnesses—Delgado and Sarabia—is disproven both by the record of

the court proceedings and by the decision of the appellate tribunal. However, as stated in paragraph 17 above, this confrontation did not in any way have the appearance of an effort to discover what really had occurred. The Judge considered Ramírez's accusation of Chattin corroborated by the fact that the porter of the hotel annex where Chattin lived (Rojas) and an unmarried woman who sometimes worked there (Viera) testified about regular visits of Ramírez to Chattin's room; but there never was any confrontation between these four persons.

21. The allegation (j) that the hearings in open court lasted only some five minutes is proven by the record. This trial in open court was held on January 27, 1911. It was a pure formality, in which only confirmations were made of written documents, and in which not even the lawyer of the accused conductors took the trouble to say more than a word or two.

22. The whole of the proceedings discloses a most astonishing lack of seriousness on the part of the Court. There is no trace of an effort to have the two foremost pieces of evidence explained (paragraphs 14 and 17 above). There is no trace of an effort to find one Manuel Virgen, who, according to the investigations of July 21, 1910, might have been mixed in Chattin's dealings, nor to examine one Carl or Carrol Collins, a dismissed clerk of the railroad company concerned, who was repeatedly mentioned as forging tickets and passes and as having been discharged for that very reason. One of the Mexican brakemen, Batriz, stated on August 8, 1910, in court that "it is true that the American conductors have among themselves schemes to defraud in that manner the company, the deponent not knowing it for sure"; but again no steps were taken to have this statement verified or this brakeman confronted with the accused Americans. No disclosures were made as to one pass, one "half-pass" and eight perforated tickets shown to Chattin on October 28, 1910, as pieces of evidence; the record states that they were the same documents as presented to Ramírez on July 9, 1910, but does not attempt to explain why their number in July was eight (seven tickets and one pass) and in October was ten. No investigation was made as to why Delgado and Sarabia felt quite certain that June 29 was the date of their trip, a date upon the correctness of which the weight of their testimony wholly depended. No search of the houses of these conductors is mentioned. Nothing is revealed as to a search of their persons on the days of their arrest; when the lawyer of the other conductors, Haley and Englehart, insisted upon such an inquiry, a letter was sent to the Judge at Culiacán, but was allowed to remain unanswered. Neither during the investigations nor during the hearings in open court was any such thing as an oral examination or cross-examination of any importance attempted. It seems highly improbable that the accused have been given a real opportunity during the hearings in open court, freely to speak for themselves. It is not for the Commission to endeavor to reach from the record any conviction as to the innocence or guilt of Chattin and his colleagues; but even in case they were guilty, the Commission would render a bad service to the Government of Mexico if it failed to place the stamp of its disapproval and even indignation on a criminal procedure so far below international standards of civilization as the present one. If the wholesome rule of international law as to respect for the judiciary of another country—referred to in paragraph 11 above—shall stand, it would seem of the utmost necessity that appellate tribunals when, in exceptional cases, discover-

ing proceedings of this type should take against them the strongest measures possible under constitution and laws, in order to safeguard their country's reputation.

23. The record seems to disclose that an action in *amparo* has been filed by Chattin and his colleagues against the District Judge at Mazatlán and the Magistrate of the Third Circuit Court at Mexico City, but was disallowed by the Supreme Court of the Nation on December 2, 1912.

Conviction on insufficient evidence

24. In Mexican law, as in that of other countries, an accused can not be convicted unless the Judge is convinced of his guilt and has acquired this view from legal evidence. An international tribunal never can replace the important first element, that of the Judge's being convinced of the accused's guilt; it can only in extreme cases, and then with great reserve, look into the second element, the legality and sufficiency of the evidence.

25. It has been alleged that among the grounds for Chattin's punishment was the fact that he had had conversations with Ramírez who had confessed his own guilt. This allegation is erroneous; the conversations between the two men only were cited to deny Chattin's contention made on July 13, 1910, that he had only seen Ramírez around the city at some time, without knowing where or when, and his contention made on July 9, 1910, to the effect that he did not remember Ramírez's name. It has been alleged that the testimony of Delgado and Sarabia merely applied to the anonymous passenger conductor on a certain train; but the record clearly states that the description given by these witnesses of the conductor's features coincided with Chattin's appearance, and that both formally recognized Chattin at their confrontation on November 17, 1910. Mention has been made, on the other hand, of a docket of evidence gathered by the railway company itself against some of its conductors; though it is not certain that the Court has been influenced by this evidence in considering the felony proven, it can scarcely have failed to work its influence on the penalty imposed.

26. From the record there is not convincing evidence that the proof against Chattin, scanty and weak though it may have been, was not such as to warrant a conviction. Under the article deemed applicable the medium penalty fixed by law was imposed, and deduction made of the seven months Chattin had passed in detention from July, 1910, till February, 1911. It is difficult to understand the sentence unless it be assumed that the Court, for some reason or other, wished to punish him severely. The most acceptable explanation of this supposed desire would seem to be the urgent appeals made by the American chief manager of the railroad company concerned, the views expressed by him and contained in the record, and the dangerous collection of anonymous accusations which were not only inserted in the court record at the very last moment, but which were even quoted in the decision of February 6, 1911, as evidence to prove "illegal acts of the nature which forms the basis of this investigation". The allegation that the Court in this matter was biased against American citizens would seem to be contradicted by the fact that, together with the four Americans, five Mexicans were indicted as well, four of whom had been caught and have subsequently been convicted—that one of these Mexicans was punished as severely as the Americans were—and that the lower penalties imposed on the three others are explained by motives which, even if not shared,

would seem reasonable. The fact that the Prosecuting Attorney who did not share the Judge's views applied merely for "insignificant penalties"—as the first decision establishes—shows, on the one hand, that he disagreed with the Court's wish to punish severely and with its interpretation of the Penal Code, but shows on the other hand that he also considered the evidence against Chattin a sufficient basis for his conviction. If Chattin's guilt was sufficiently proven, the small amount of the embezzlement (four pesos) need not in itself have prevented the Court from imposing a severe penalty.

27. It has been suggested as most probable that after Chattin's escape and return to the United States no demand for his extradition has been made by the Mexican Government, and that this might imply a recognition on the side of Mexico that the sentence had been unjust. Both the disturbed conditions in Mexico since 1911, and the little chance of finding the United States disposed to extradite one of its citizens by way of exception, might easily explain the absence of such a demand, without raising so extravagant a supposition as Mexico's own recognition of the injustice of Chattin's conviction.

Mistreatment in prison

28. The allegation of the claimant regarding mistreatment in the jail at Mazatlán refers to filthy and unsanitary conditions, bad food, and frequent compulsion to witness the shooting of prisoners. It is well known, and has been expressly stated in the *White* case (under the verbal note of July, 1863, between Great Britain and Peru; De Lapradelle et Politis, II, at 322; Moore, at 4971), how dangerous it would be to place too great a confidence in uncorroborated statements of claimants regarding their previous treatment in jail. Differently from what happened in the *Faulkner* case (Docket No. 47),¹ there is no evidence of any complaint of this kind made either by Chattin and his fellow conductors, or by the American vice-consul, while the four men were in prison; and different from what was before this Commission in the *Roberts* case (Docket No. 185),² there has not been presented by either Government a contemporary statement by a reliable authority who visited the jail at that time. The only contemporary complaint in the record is the complaint made by one H. M. Boyd, an ex-employee of the railroad company and friend of the conductors, and by the American vice-consul (both on September 3, 1910), that these prisoners were "held to a strict compliance with the rules of the jail while others are allowed liberties and privileges", apparently meaning the liberty of walking in the patio. The vice-consul in his said letter of September 3, 1910, moreover mentioned that one of the conductors regarding whom his colleagues wired "one prisoner sick, his life depends on his release", when allowed by the Judge to go to the local hospital, did not wish to do this; and in summing up he confined himself to merely saying "that there is some cause for complaint against the treatment they are receiving". All of this sounds somewhat different from the violent complaints raised in the affidavits. The hot climate of Mazatlán would explain in a natural way many of the discomforts experienced by the prisoners; the fact that Chattin's three colleagues were taken to a hospital or allowed to go there

¹ See page 67.

² See page 77.

when they were ill and that one of them had the services of an American physician in jail might prove that consideration was shown for the prisoner's conditions. Nevertheless, if a small town as Mazatlán could not afford—as Mexico seems to contend—a jail satisfactory to lodge prisoners for some considerable length of time, this could never apply to the food furnished, and it would only mean that it is Mexico's duty to see to it that prisoners who have to stay in such a jail for longer than a few weeks or months be transported to a neighboring jail of better conditions. The statement made in the Mexican reply brief that "a jail is a place of punishment, and not a place of pleasure" can have no bearing on the cases of Chattin and his colleagues, who were not convicts in prison, but persons in detention and presumed to be innocent until the Court held the contrary. On the record as it stands, however, inhuman treatment in jail is not proven.

Conclusion

29. Bringing the proceedings of Mexican authorities against Chattin to the test of international standards (paragraph 11), there can be no doubt of their being highly insufficient. Inquiring whether there is convincing evidence of these unjust proceedings (paragraph 11), the answer must be in the affirmative. Since this is a case of alleged responsibility of Mexico for injustice committed by its judiciary, it is necessary to inquire whether the treatment of Chattin amounts even to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action recognizable by every unbiased man (paragraph 11); and the answer here again can only be in the affirmative.

30. An illegal arrest of Chattin is not proven. Irregularity of court proceedings is proven with reference to absence of proper investigations, insufficiency of confrontations, withholding from the accused the opportunity to know all of the charges brought against him, undue delay of the proceedings, making the hearings in open court a mere formality, and a continued absence of seriousness on the part of the Court. Insufficiency of the evidence against Chattin is not convincingly proven; intentional severity of the punishment is proven, without its being shown that the explanation is to be found in unfairmindedness of the Judge. Mistreatment in prison is not proven. Taking into consideration, on the one hand, that this is a case of direct governmental responsibility, and, on the other hand, that Chattin, because of his escape, has stayed in jail for eleven months instead of for two years, it would seem proper to allow in behalf of this claimant damages in the sum of \$5,000.00, without interest.

Nielsen, Commissioner:

I agree with the conclusions of the Presiding Commissioner that there is legal liability on the part of Mexico in this case. While not concurring entirely in the reasoning of certain portions of the Presiding Commissioner's opinion, including those found in paragraphs 6 to 11 inclusive, I am in substantial agreement with his conclusions on important points in the record of the proceedings instituted against Chattin and the other Americans with whose cases his case was consolidated. Irrespective of the question of the innocence or guilt of the claimant of the charge against him—whatever its precise nature was—I think it is clear that he was the victim of mistreatment.

Contention is made in behalf of the United States that the Governor of the state of Sinaloa, prompted by strong influence brought to bear upon him by the Southern Pacific Railroad Company, improperly undertook to influence the judge of the District Court at Mazatlán to convict the claimant and the other accused men in order that an example might be made of them. I do not think that this charge is substantiated by evidence in the record. A lawyer retained to act in this case withdrew and explained that by the action taken by him in the case he incurred the ill will of the Governor. The offenses for which the claimant and the other defendants in the case were charged was a crime under the federal law, but we find that the Governor appointed a commission to gather evidence against the accused. However it is explained that such action could properly under Mexican law be taken by him with regard to a federal offense, and it seems to me that this explanation cannot in the light of the information before the Commission be rejected. Other charges made by the United States with respect to the proceedings against the prisoners are enumerated in the Presiding Commissioner's opinion, and in a mass of vague evidence, and of technical questions of law concerning which there is considerable uncertainty, there are two outstanding points with respect to which the Commission may in my opinion reach a definite conclusion, namely, first, the delay in the proceedings that took place during the so-called period of investigation (*sumario*); and second, the character of the hearing that took place when the so-called period of proof (*plenario*) was reached. After a very careful consideration of the pleadings, the evidence and the oral and the written arguments, I think it is impossible not to say that the record reveals in some respects obviously improper action resulting in grave injury to the claimant and his fellow prisoners. Counsel for Mexico himself admitted and pointed out irregularities in the proceedings, while contending that they were not of a character upon which an international tribunal could predicate a pecuniary award.

So far as concerns methods of procedure prescribed by Mexican law, conclusions with respect to their propriety or impropriety may be reached in the light of comparisons with legal systems of other countries. And comparisons pertinent and useful in the instant case must be made with the systems obtaining in countries which like Mexico are governed by the principles of the civil law, since the administration of criminal jurisprudence in those countries differs so very radically from the procedure in criminal cases in countries in which the principles of Anglo-Saxon law obtain. This point is important in considering the arguments of counsel for the United States regarding irrelevant evidence and hearsay evidence appearing in the record of proceedings against the accused. From the standpoint of the rules governing Mexican criminal procedure conclusions respecting objections relative to these matters must be grounded not on the fact that a judge received evidence of this kind but on the use he made of it.

Counsel for Mexico discussed in some detail two periods of the proceedings under Mexican law in a criminal case. The procedure under the Mexican code of criminal procedure apparently is somewhat similar to that employed in the early stages of the Roman law and similar in some respects to the procedure generally obtaining in European countries at the present time. Counsel for Mexico pointed out that during the period of investigation a Mexican judge is at liberty to receive and take cognizance of anything placed before him, even matters that have no relation to the offense with which the accused is tried. The nature of some of the things

incorporated into the record, including anonymous accusations against the character of the accused, is shown in the Presiding Commissioner's opinion. Undoubtedly in European countries a similar measure of latitude is permitted to a judge, but there seems to be an essential difference between procedure in those countries and that obtaining in the Mexican courts, in that after a preliminary examination before a judge of investigation, a case passes on to a judge who conducts a trial. The French system, which was described by counsel for Mexico as being more severe toward the accused than is Mexican procedure, may be mentioned for purposes of comparison. Apparently under French law the preliminary examination does not serve as a foundation for the verdict of the judge who decides as to the guilt of the accused. The examination allows the examining judge to determine whether there is ground for formal charge, and in case there is, to decide upon the jurisdiction. The accused is not immediately brought before the court which is to pass upon his guilt or innocence. His appearance in court is deferred until the accusation rests upon substantial grounds. His trial is before a judge whose functions are of a more judicial character than those of a judge of investigation employing inquisitorial methods in the nature of those used by a prosecutor. When the period of investigation was completed in the cases of Chattin and the others with whom his case was consolidated, the entire proceedings so far as the Government was concerned were substantially finished, and after a hearing lasting perhaps five minutes, the same judge who collected evidence against the accused sentenced them.

Articles 86 and 87 of the Mexican federal code of criminal procedure read as follows:

"Art. 86. El procedimiento del orden penal tiene dos periodos; el de instrucción que comprende la serie de diligencias que se practican con el fin de averiguar la existencia del delito, y determinar las personas que en cualquier grado aparezcan responsables; y el del juicio propiamente tal, que tiene por objeto definir la responsabilidad del inculcado o inculpados, y aplicar la pena correspondiente.

"ART. 87. La instrucción deberá terminarse en el menor tiempo posible, que no podrá exceder de ocho meses cuando el término medio de la pena señalada al delito no baje de cinco años, y de cinco meses en todos los demás casos.

"Cuando por motivos excepcionales el juez necesitare mayor término, lo pedirá al superior inmediato indicando la prórroga que necesite. La falta de esta petición no anula las diligencias que se practiquen; pero amerita una corrección disciplinaria y el pago de daños y perjuicios a los interesados."¹

¹ *Translation.*—86. The criminal process has two periods; that of investigation (instrucción) which embraces the series of steps taken to the end of ascertaining the existence of the crime and determining the persons who in any degree whatsoever may appear responsible; and the trial proper which shall have as its object the defining of responsibility of the accused and the application of the corresponding penalty.

87. The investigation should be terminated in the shortest possible time, not to exceed eight months when the average penalty assigned for the crime is not less than five years and should not exceed five months in all other cases.

When, on account of exceptional reasons the judge may need a greater length of time, he shall ask his immediate superior, indicating the extension which is needed. The failure to so ask shall not annul the steps which already have been taken; but it shall place the judge liable to disciplinary corrective measures and the payment of damages to the parties interested.

In the proceedings in the trial of Chattin the period of investigation lasted approximately five months, and it may be that, considering the nature of the offense with which he was charged the maximum period prescribed by the code was not exceeded. But I think it is proper to note that although maximum periods are prescribed the code also properly requires that the period of investigation shall terminate in the least time possible. Moreover, the hearing after the period of investigation consumed practically no time, and without a determination of the question of guilt the accused Chattin was held for about seven months.

Although delays in criminal proceedings undoubtedly frequently occur throughout the world, I am of the opinion that it can properly be said that in the light of the record revealing the nature of the proceedings in Chattin's case, it was obviously improper to keep him in jail for either five or seven months during which he appealed without success to the judge for a proper disposition of his case. With respect to this period of imprisonment it should be noted that the amount of bail fixed by the judge, the sum of 15,000 pesos—a very large amount considering the nature of the offense charged—was for practical purposes the equivalent of imprisonment without bail.

The purpose of the investigation during which Chattin was held was to ascertain as prescribed in Article 86 of the criminal code, whether an offense had been committed and, to determine upon the persons who appeared to be guilty of such offense. The period of investigation in Mexican law may perhaps in a sense be regarded as a stage of a trial. And it may also be considered that in a measure the Mexican judge during the period of investigation performs functions similar to those carried on by police or prosecuting authorities in other countries, or similar to those of a common law grand jury. The distinguished Mexican diplomat and scholar, Matias Romero, makes the following comparison:

“So far, therefore, as a proceeding under one system may be said to correspond to a proceeding under the other, it may be said that the *sumario*, in countries where the Roman law prevails, corresponds practically to a grand jury indictment in Anglo-Saxon nations.” *Mexico and the United States*, Vol. I, p. 413.

The character of the proceedings in Chattin's case are described in some detail in the Presiding Commissioner's opinion. Chattin was arrested because a brakeman named Ramírez stated before the judge that these two men had been engaged in defrauding the railroad. It appears that after this statement, denied by Chattin, had been made the judge determined that it was not sufficient proof upon which to continue to detain him. He was finally convicted on the statement of two persons who stated that they paid to a person on the train whom the judge evidently considered to be identified as Chattin, 4 pesos on the 29th of June. The judge evidently was satisfied from the testimony of these two persons, and from records produced by the manager of the Southern Pacific Railroad that these witnesses rode on the train on the 29th of June, and that Chattin did not deliver the pesos to the railroad company on that same day. These things may be true, but considering the vague charge on which Chattin was originally held and the long period during which he was detained in prison, it seems to me that such a period of detention could not be justified, unless time and effort had been used to obtain more conclusive proof of guilt. In view of the fact that Chattin's case was consolidated with those of the three other conductors, it is proper in considering the propriety of the delays in Chattin's case to

take account of the character of proceedings in the other cases. All cases were terminated by the same decree of the court. The cases of the accused were consolidated. One of the men was brought from the state of Sonora to the state of Sinaloa after a series of loose proceedings. From the arguments advanced by counsel I am unable to perceive the propriety of this action in view of the general principle incorporated into Mexican law that crimes must be tried within the jurisdiction where they are committed. It seems to me to be clear that the case of each defendant was delayed by this process of consolidation, each case being affected by delays incident to other cases. However, while no court seems to have made any pronouncement with regard to a specific issue as to the propriety of such consolidation, inasmuch as a Mexican court was responsible for it, I do not feel that the Commission, in the light of the record before it can properly pronounce the action wrongful. The conductors accused together with Chattin so far as is revealed by the judicial decision rendered in their cases, were convicted on the testimony of certain persons that they had bought from brakeman tickets which were different from those in use on the day they were purchased from the brakeman and had been permitted by the conductors to use such tickets. If conductors knowingly received spurious tickets and profited from the sale of such tickets, they were evidently guilty of defrauding the railroad. However, it is not disclosed by the record of proceedings before the Commission that throughout the long period of retention any time was consumed in ascertaining whether or how the witnesses who testified against the accused knew that the tickets they bought were not of the kind in use on the day of purchase. There is no record that it was attempted to prove that the tickets bought from the brakeman could not be legally accepted by the conductors. There is no definite proof that the brakeman sold spurious tickets or that the conductors knowingly accepted spurious tickets. The brakeman might have fraudulently obtained possession of good tickets. Time was not consumed obtaining possibly important witnesses such as those mentioned in the Presiding Commissioner's opinion. Time was not taken to confront the accused with some important witnesses. Chattin, by taking an appeal against the decree of formal imprisonment did not delay the proceedings, since the investigation was carried on while the appeal was pending. Moreover, it appears that there was a delay of two months in remitting the appeal to a higher court, which required something more than another month to pass upon it, and its decision apparently was not received by the lower court until two weeks later.

When the preliminary investigation was ended the proceedings, so far as the Government was concerned, were virtually terminated. The law apparently permitted either the Government or the defendants to produce further evidence. The defendants submitted nothing, but their counsel rested the cases by presenting written statements in which the position was taken that no case had been made out against the accused in the light of the evidence before the court. I sympathize with that view, but do not consider that it is necessary nor proper for the Commission for the purpose of a determination of this case to reach a conclusion on that point. However, it seems to me that the record upon which the innocence or guilt of the accused was to be determined was of such a character that it was highly essential that the Government, in order to make a case against the accused, should have produced further evidence. And the fact that this was not done furnishes an additional, strong reason why the long period of deten-

tion of seven months cannot be justified by any necessity for such time in making the record upon which the accused men were convicted.

There are many things in the record apart from the records of judicial proceedings to which I think the Commission can give little or no weight. However, as bearing on the question of delay, I think it is proper to take note of a despatch dated July 29, 1910, addressed by Mr. Charles B. Parker, American consular representative at Mazatlán, to the Secretary of State at Washington. In that communication Mr. Parker reported that on July 25th the judge decided to grant bail to Chattin in the amount of 15,000 pesos. Mr. Parker further reports that he was informed by the district judge that there was "a clear case against two of the defendants, Haley and Englehart". It therefore appears that approximately four months before the termination of the period of investigation, and more than six months prior to the date of sentence, the judge expressed himself convinced of the guilt of two of the four accused men whose cases it seems to me were certainly not more susceptible of proof than those of the other defendants. Under date of September 3, 1910, Mr. Parker reported that he had been advised by the American Ambassador at Mexico City to insist on bail for one of the conductors who was sick, and that the judge had stated that the accused men could not be admitted to bail yet "because the case had not progressed far enough".

International law requires that in the administration of penal laws an alien must be accorded certain rights. There must be some grounds for his arrest; he is entitled to be informed of the charge against him; and he must be given opportunity to defend himself.

It appears to me from an examination of the record that the defendant Chattin first learned of the charge against him when he was called into court. It is not disclosed that a specific charge was made against him, but it is recorded that he stated "with regard to the facts under investigation" that he knew nothing about certain things which had been testified against him. In the decision rendered by a higher court on October 27th, sustaining the decree of formal imprisonment, it is said that it was not material that the crime charged was not specifically stated, and the crime is described "as it appears so far, embezzlement". The record does not show that any notice of the charge so stated was served on the defendant, although his lawyer probably could take notice from the record.

On December 17, 1910, a higher court sustained the decree of formal imprisonment against two of the conductors, and directed that the decree of imprisonment for the crime of embezzlement should be amended and that imprisonment should be decreed "for the crime of fraud with breach of trust". In a brief dated December 26, 1910, which was filed by the prosecuting attorney, the conclusion is expressed that offenses charged against the four conductors did not constitute the crime of embezzlement. It seems to me that there is an unfortunate degree of uncertainty on the point whether the defendants were ever properly notified of the offenses with which they were charged. However, I do not think that the Commission is in a position, in the light of the record, to formulate a conclusion that there was impropriety on this point. The subject is one with respect to which an international tribunal should attach more importance to matters of substance than to forms.

Much was said during the course of argument with regard to improper evidence in the record, particularly the anonymous accusations filed with

the judge by Brown, the superintendent of the Southern Pacific Railroad Company. The report seems to have been prepared by persons evidently resident in the state of California who were employed by Brown to make an investigation of rumors that conductors were defrauding the railroad company. In view of the nature of this report, it seems to be clear that the authors might well deem it proper and advisable not to sign it. Brown appeared in court on August 2nd and made sweeping charges against the four conductors. He stated that he had commissioned private detectives to make an investigation and as a result they succeeded in *proving* in the month of June, 1910, that the conductors and others, whom he did not remember, were appropriating money due the company, and that they had a well-organized "stealing scheme". This he could prove, he said, by delivering to the court notes which the detectives had made. He expressed a supposition that irregularities such as had caused the court's investigation had been occurring since the guilty employees entered the service of the company, and he stated that sometime ago many employees were discharged for irregularities. While Brown was submitting to the judge his conclusions, suppositions and offers of anonymous reports, the defendants were in jail. It seems to me that if Brown deemed it proper to exert himself as he did to bring about the conviction of the accused, he could have employed less crude and more efficient methods. I have already indicated the view that, having in mind the system of criminal jurisprudence in Mexico, any conclusions concerning objections to evidence of this character must be grounded not on the fact that the judge received it, but upon the nature of the use which he made of it. I do not question his motives nor competency, nor undertake to reach conclusions regarding his mental operations. But it is pertinent to note that the record of evidence collected during the period of investigation was the record on which the defendants were convicted. In view of the use made of the anonymous reports, as shown by the sentence given by the judge at Mazatlán on February 6, 1911, I cannot but conclude that these reports in some measure influenced the sentence.

The Commission has repeatedly expressed its views with regard to the reserve with which it should approach the consideration of judicial proceedings. Generally speaking, we must, of course, look to matters of substance rather than of form. Positive conclusions as to the existence of some irregularities in a trial of a case obviously do not necessarily justify a pronouncement of a denial of justice. I do not find myself able fully to concur in the general trend of the argument of counsel for the United States that the record of the trial abounds in irregularities which reveal a purpose on the part of the judge at Mazatlán to convict the accused even in the absence of convincing proof of guilt. A considerable quantity of correspondence and affidavits included in the record give color to a complaint of that nature against the judge. Whatever may be the basis for the charges found in evidence of this kind, I am of the opinion that the conclusions of the Commission must be grounded upon the record of the proceedings instituted against the accused. Having in mind the principles asserted by the Commission from time to time as to the necessity for basing pecuniary awards on convincing evidence of a pronounced degree of improper governmental administration, and having further in mind the peculiarly delicate character of an examination of judicial proceedings by an international tribunal, as well as the practical difficulties inherent in such examination, I limit myself to a rigid application of those principles in the instant case by concluding that the Commission should render an award, small in

comparison to that claimed, which should be grounded on the mistreatment of the claimant during the period of investigation of his case. While deeply impressed with the importance of a strict application of the principles applicable to a case of this character, such application does not, in my opinion, preclude a full appreciation of human rights which it was contended in argument were grossly violated, and which it is clearly shown were in a measure disregarded with resultant injury to a man who languished in prison for seven months and was severely sentenced on scanty evidence for the alleged embezzlement of four pesos. I do not think it can properly be said that he made an *escape* from jail at the end of eleven months of his sentence, when in a document produced by Mexico it is stated that the accused "were freed at the time the Madero forces entered" the place where they were imprisoned.

Decision

The Commission decides that the Government of the United Mexican States is obligated to pay to the Government of the United States of America, on behalf of B. E. Chattin, \$5,000.00 (five thousand dollars), without interest.

Dissenting opinion

Fernández MacGregor, Commissioner :

1. This is a case in which the United States of America charges a court of the United Mexican States with maladministration of justice to the prejudice of four citizens of the United States who were prosecuted before said court for the crime of embezzlement. Two decisions appear in the record: One in first instance, dictated by the District Judge of Mazatlán, and another on appeal, dictated by the Justice of the Third Circuit Court of the Federation.

2. This Commission has expressed, in general, its idea of what constitutes a denial of justice, where this expression is confined to acts of judicial authorities only. In the decision rendered in the case of *L. F. H. Neer and Pauline E. Neer*, Docket No. 136,¹ is held that, without attempting to announce a precise formula, its opinion was:

"(1) That the propriety of governmental acts should be put to the test of international standards, and (2) that the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."

In the case of *Ida Robinson Smith Putnam*, Docket No. 354,² I held, with the assent of the Presiding Commissioner, in referring to the respect that is due to the decisions rendered by high courts of a state:

"The Commission, following well-established international precedents, has already asserted the respect that is due to the decisions of the highest courts of a civilized country (case of *Margaret Roper*, Docket No. 183, paragraph 8)³. A question which has been passed on in courts of different jurisdiction by the

¹ See page 60.

² See page 151.

³ See page 145.

local judges, subject to protective proceedings, must be presumed to have been fairly determined. Only a clear and notorious injustice, visible, to put it thus, at a mere glance, could furnish ground for an international arbitral tribunal of the character of the present, to put aside a national decision presented before it and to scrutinize its grounds of fact and law."

The charges made against the procedure followed by the District Judge of Mazatlán must be judged in the light of these standards, which I believe justified and prudent. Such charges are, in short, the following: (1) That there was unlawful arrest or detention; (2) influence exercised by the Governor of the State of Sinaloa to have the accused convicted; (3) improper consolidation of the proceedings against the four conductors; (4) undue delay in the proceedings; (5) requirement of exorbitant bail for the provisional release of the accused; (6) lack of knowledge on the part of the accused as to the charges filed against them; (7) lack of counsel and interpreter on the part of the accused; (8) lack of oath by the witnesses who testified; (9) lack of confrontations between the witnesses and the accused; (10) lack of insufficiency of hearings in open court; (11) imposition of penalties out of proportion to the offenses committed; (12) lack of evidence of guilt of the accused and (13) bad treatment of the accused during their confinement in jail.

3. The unlawful arrest of the accused is not proven; neither is the undue influence of the Governor of the State of Sinaloa; nor the lack of counsel or interpreters; nor that the bail required may have been exorbitant; nor the absolute lack of evidence against the accused, nor that there may have been intentional severity in the sentence imposed; nor is it proven, finally, that the accused may have suffered bad treatment in prison. (See the opinion of the Presiding Commissioner.) On the other hand, the following charges are proven: (*a*) Lack of adequate investigation; (*b*) insufficiency of confrontation; (*c*) that the accused was not given the opportunity to know all the charges made against him; (*d*) delay in the proceedings; (*e*) lack of hearings in open court; and (*f*) continued absence of seriousness on the part of the Court.

4. The study which I have made confirms the Presiding Commissioner's conclusions with respect to the charges which he finds unfounded, so that it is necessary for me to examine only the remaining charges to compare them, if I find them sustained, with the standards of international law.

5. It has been alleged that the proceedings instituted against the four conductors should not have been consolidated, because there was no evidence to justify this step. The records show that the consolidation was decreed by the Judge on August 3, 1910; previous to this date the investigation made regarding Chaitin had already advanced; on July 19th the Judge received the police reports from Barraza and his associates, which the latter ratified in his presence, and it was only then that sufficient grounds were judged to exist to decree the consolidation. The latter is decreed when there are plausible reasons; complete evidence is not necessarily required. The consolidation means only a saving of time in the proceedings and unity in the judicial action; hence the consolidation always appears as necessary or proper at the beginning of the action, when all the evidence establishing a case has not yet been gathered. It is, therefore, sufficient that there may be a strong presumption, to order this purely economical proceeding, and in the instant case the mere statements of the first witnesses indicated that there might be some probable connection between the delinquent acts

that were imputed to the four conductors. In fact, Ramírez had testified that he sold tickets illegally in combination with Chattin, who was, in turn, in connivance with the other conductors; Barraza and his police associates testified that they had traveled on the railroad lines using false tickets which were always accepted by the corresponding conductors, asserting, further, that those who sold the tickets to them had claimed to be in connivance with the conductors, which could be corroborated to a certain extent by the fact that the unlawful ticket-sellers on one line of the railroad recommended Barraza and his associates to the unlawful sellers in another line of the railroad. The possible connection becomes the more probable when there are taken into account not only the cases of the conductors but those of the Mexican brakemen and other employees of the railroad who were involved in the affair. The Judge gave the reasons for his decree of consolidation, referring only to the applicable articles of the Federal Code of Criminal Procedure, and it suffices to see that Article 329 of said Code provides for this consolidation of actions brought for connected crimes; that Article 330 defines as connected crimes those committed by several persons, even if at diverse times and places, but through agreement among them; and, finally, that consolidation should be decreed *ex officio*; that is, by a voluntary act of the Judge (Art. 333) to justify such step. Moreover, the accused protested against the consolidation and the Judge limited himself to answering them; that if they filed their complaint in due form he would consider it. A consolidation can not, in general, cause irreparable damage to the defendants; although the most advanced action has to wait for the more backward actions to mature, nevertheless the legal provisions which oblige the Judge to terminate the preliminary investigation (*instrucción*) of the cases within a definite period of time (five months in this case) remain in force; so that it is not evident that the consolidation could have prejudiced (in the international sense of this term) any of the defendants in this case. The Presiding Commissioner is of the opinion that Chattin was, in this case, the one who could suffer the least by the consolidation. I consider that legally Chattin was the one who could suffer the most by the consolidation, for the reason that the proceedings against him were the most advanced and had to wait for the proceedings against the other conductors, or other persons involved in this case, to mature. But aside from all this reasoning which only serves to explain a question of domestic law, I am of the opinion that a judicial decision of a sovereign state can not be attacked by another state before an arbitral tribunal, because domestic precepts regarding consolidation may have been violated, as such internal violations can not constitute a violation of international law or result in damage clearly shown to have been suffered by citizens of the claimant government.

6. With regard to the undue delay in the proceedings, the record shows at once that certain proceedings could have been carried out with more diligence. The tickets and other documents contained in the record could have been exhibited to Chattin before it was actually done; the Judge did nothing in the case, between the end of July and the beginning of October, 1910; the witnesses who claimed to have handed four pesos to Chattin, testified on October 21st, and the report from the conductor on the money delivered to the company was not asked until November 11th; certain witnesses to whom Ramírez alluded in July were not summoned until November 22nd, which made it impossible for some of them, as Virgen, to be found, etc. But it must be noted that all these delays do not violate,

of course, any local law, since they refer only to the instruction period of the prosecution, which the Judge was carrying out, and the law allows him, at this stage, to use his discretion without any limits except that of terminating the preliminary investigation within a certain period, which was five months in the present case. (Art. 87 of the Federal Code of Criminal Procedure.) Now, Chattin's case was started on July 9, 1910, and on November 18th the Judge considered the investigation as completed, which means that he did it within the term of five months, to which I have referred above. In the *Roberts* case, Docket No. 185,¹ the Commission, referring to the time that an alien charged with crime may be held in custody pending the investigation of the charges against him, stated:

"Clearly there is no definite standard prescribed by international law by which such limits may be fixed. Doubtless an examination of local laws fixing a maximum length of time within which a person charged with crime may be held without being brought to trial may be useful in determining whether detention has been unreasonable in a given case."

The present case had been brought to trial on January 27, 1911, and it was decided in first instance on February 6th of the same year; that is to say, before the lapse of seven months after the initiation of the first proceeding instituted against Chattin. I believe that, from an international point of view, all incidental delays in general procedure disappear before an international tribunal, which can not call the Judge to account for each one of his acts, as if it were his hierarchical superior. This same criterion necessarily has to be applied to other defects which may be certainly found in the Judge's acts.

7. I do not believe that the accused was ignorant of a single one of the charges made against him, for the simple reason that the records formed in a criminal process are not secret, according to Mexican law, and are, from the time of their commencement, at the disposal of the defendants or their counsel, who have the right to attend all the proceedings for filing of evidence and other proceedings held in Court (Art. 20, section IV, of the Federal Constitution of 1857 and Art. 39 of the Federal Code of Criminal Procedure). There is no trace in the record in question of the fact that the accused, Chattin, was at any time deprived of these rights, and, on the contrary, it is established that on many occasions notice was served on him and his counsel of the different steps that were being taken in the process. It has been said in this connection that the accused had no knowledge of a document which contains a record of the investigations made by certain detectives from the United States at the request of the Southern Pacific Railroad of Mexico to ascertain whether the conductors of the trains of such railroad were defrauding the company by accepting tickets issued illegally. The record shows, under date of August 2nd, less than a month after the proceedings had been initiated, the statement of Elbert N. Brown, superintendent of the railroad in question, who referred to the private investigation made by the detectives from Los Angeles, California, U.S.A.; said superintendent made a further statement on August 3rd, and at the latter proceeding he exhibited a set of papers of 35 sheets containing the information that has been called secret. By decree of August 3rd, the judge ordered that the exhibited documents be annexed to the record and their corresponding translations be made, in view of the fact that they were in

¹ See page 77.

English, one Arturo E. Félix having been appointed translator for such purpose, and the latter accepted the commission and asked for the documents in question, which were delivered to him immediately. Later, on December 18th, the entire record was ordered to be placed in the hands of the defendant for three days so that he might take notes. Since the aforementioned documents were annexed to the record, and since the record could be consulted by the defendant and by his counsel, according to the legal provisions above cited, theoretically and legally Chattin could take notice of the charges placed against him as a result of the private investigation made by the detectives from Los Angeles, and, if neither he nor his counsel made use of their rights, such a circumstance can not furnish grounds for the responsibility of the District Judge of Mazatlán. It can not be argued that this disputed document was in the possession of the translator, for, even in such case, it was legally within the reach of the defendant and his counsel. It is an established fact that the counsel had knowledge of this information. Counsel Adolfo Arias, in the motion dated January 31, 1911, signed by Parrish, Englehart, and Haley, makes reference to the proceeding in which Brown delivered said documents (folio 192 of the record); counsel Fortino Gómez makes reference to the same secret testimony of the same detectives from Los Angeles, in his motion dated January 16, 1911, folio 209; and it is to be taken into account that all the counsel of the defendants in this case were wholly in agreement and communicated with one another in regard to the circumstances of the proceedings, as established in the record of this claim. It must be noted, also, that if the information adduced by Brown created an unfavorable impression which, it is said, was had by the Court towards the accused, the latter and his counsel could have eliminated such impression by presenting proper evidence which the Judge could not legally ignore. There is no proof of the defendant's having made use of this right, either. Finally, it must be also remembered that the Judge did not base himself in his decision on the results of this so-called secret information, for he limited himself to considering the real evidence of guilt which existed against the accused. In view of the above consideration, I believe that the charge under discussion can not be maintained.

8. It has been alleged that the trial proper (meaning by trial that part of the proceedings in which the defendants and witnesses as well as the Prosecuting Attorney and counsel appear personally before the Judge for the purpose of discussing the circumstances of the case) lasted five minutes at the most, for which reason it was a mere formality, implying thereby that there was really no trial and that Chattin was convicted without being heard. I believe that this is an erroneous criticism which arises from the difference between Angle-Saxon procedure and that of other countries. Counsel for Mexico explained during the hearing of this case that Mexican criminal procedure is composed of two parts: Preliminary proceedings (*sumario*) and plenary proceedings (*plenario*). In the former all the information and evidence on the case are adduced; the *corpus delicti* is established; visits are made to the residences of persons concerned; commissions are performed by experts appointed by the Court; testimony is received and the Judge can cross-examine the culprits, counsel for the defense having also the right of cross-examination; public or private documents are received, etc. When the Judge considers that he has sufficient facts on which to establish a case, he declares the instruction closed and places the record in the hands of the parties (the defendant and his counsel on the one side and the Prose-

cuting Attorney on the other), in order that they may state whether they desire any new evidence filed, and only when such evidence has been received are the parties in the cause requested to file their respective final pleas. This being done, the public hearing is held, in which the parties very often do not have anything further to allege, because everything concerning their interests has already been done and stated. In such a case, the hearing is limited to the Prosecuting Attorney's ratification of his accusation, previously filed, and the defendants and their counsel also rely on the allegations previously made by them, these two facts being entered in the record, whereupon the Judge declares the case closed and it becomes ready to be decided. This is what happened in the criminal proceedings which have given rise to this claim, and they show, further, that the defendants, including Chattin, refused to speak at the hearing in question or to adduce any kind of argument or evidence. In view of the foregoing explanation, I believe that it becomes evident that the charge, that there was no trial proper, can not subsist, for, in Mexican procedure, it is not a question of a trial in the sense of Anglo-Saxon law, which requires that the case be always heard in plenary proceedings, before a jury, adducing all the circumstances and evidence of the cause, examining and cross-examining all the witnesses, and allowing the prosecuting attorney and counsel for the defense to make their respective allegations. International law insures that a defendant be judged openly and that he be permitted to defend himself, but in no manner does it oblige these things to be done in any fixed way, as they are matters of internal regulation and belong to the sovereignty of States.

9. I have already expressed my opinion with regard to the general imputation that the accused were not informed of the charges that had been filed against them. But particular reference has been made, for instance, to the fact that the general manager of the railroad company was never confronted with the accused; that the confrontations between the accused and the witnesses who testified against them do not reveal effort on the part of the judge to find the truth; that no efforts were made to find witness Manuel Virgen, nor one Collins; that it was not attempted to establish whether it was eight or seven passes or tickets which were shown to Chattin on October 28, 1910, nor to ascertain the reason why the two witnesses on whose testimony the Judge based himself in convicting Chattin, said that the trip to which they were referring had been made on July 29th, and other charges of this nature. The Agent of Mexico averred that the general manager of the railroad was not the complainant, and that therefore it was not necessary to confront him with the prisoners. He argued that Brown had only advised the authorities that he suspected that the employees of the railroad were defrauding the company, but he made no specific charges against any individual employee. Under such circumstances he was neither a complainant nor a witness for the prosecution, because he did not refer to specific and certain facts imputable on any conductor. He added that, according to Mexican law in 1910, it was not constitutionally obligatory even to confront the accused with his accuser, specially in view of the fact that the real accuser in criminal causes is the State. Article 20 of the Constitution of 1857, in force in 1910, provides that it is the right of the accused to be informed as to the name of the accuser, if there be such, but not to be confronted with such accuser on motion of the Judge. The accused has, of course, the right to demand such confrontation and the Judge can not refuse to grant it.

10. I admit that the other deficiencies pointed out in the preceding paragraph exist and that they show that the Judge could have carried out the investigation in a more efficient manner, but the fact that it was not done does not mean any violation of international law. The Commission stated in its decision in the case of *L. F. H. Neer and Pauline E. Neer*, Docket No. 136:¹

"It is not for an international tribunal such as this Commission to decide whether another course of procedure taken by the local authorities at Guana-cavi could be more effective. On the contrary, the grounds of liability limit its inquiry to whether there is convincing evidence either (1) that the authorities administering the Mexican law acted in an outrageous way, in bad faith, in willful neglect of their duties, or in a pronounced degree to improper action, or (2) that Mexican law rendered it impossible for them properly to fulfill their task."

I believe that this rule is perfectly applicable to this case; an ideal Judge or a more experienced Judge would have carried out the proceedings in a better way, but the Commission is not competent to judge such a question.

11. The negligence of the Judge in holding certain proceedings is alleged specially with respect to the evidence against the accused. The essential point is that the Judge may have had sufficient evidence to convict them and not that he may not have accumulated more evidence when he was able to do so. The first statement against Chattin was rendered by Cenobio Ramírez; the latter stated that various persons had seen him deal with Chattin; such persons having been summoned, Ramírez's allegations could not be corroborated in an evident manner and, perhaps, for this reason the Judge abandoned this clue by not summoning all the persons named by Ramírez, etc. But it is doubtless that two witnesses free from all impediment testified that Chattin had collected in the train four pesos for a passage without giving a receipt, which fact was thereafter verified by the report rendered by Chattin that day to the company, that the four pesos had not been accounted for by him. The Federal Code of Criminal Procedure provides, in its Article 264, that testimony rendered in the manner in which it was rendered against Chattin, constitutes full evidence. The crime of embezzlement is defined by Article 407 of the Penal Code, as follows:

"He who, fraudulently and to the prejudice of another, disposes wholly or in part of an amount of money in coin, in bank bills, or in paper currency; of a document entailing an obligation, release, or transfer of rights, or of any personal property belonging to another, which he may have received in virtue of any of the contracts of pledge, agency, deposit, lease, *commodatum*, or any other contract which does not transfer title, will suffer the same penalty that, taking into account the circumstances of the case and the delinquent, would be imposed on him, had he committed larceny of such things."

Taking advantage of his position Chattin had appropriated to himself the four pesos that had been delivered to him, which is sufficient to justify the penalty of two years that was imposed on him, conformably with Article 384 of the Criminal Code. Such penalty does not reveal severity on the part of the Judge, for it is the pure and simple application of Mexican law. The latter provides that the medium penalty be imposed whenever there are no extenuating or aggravating circumstances, and such penalty is, in this case, two years.

¹ See page 60.

12. In the procedure under examination, the requisites established by international law in matters of this kind were observed in the principal features; the accused were arrested for probable cause; they had the opportunity to know all the charges pressed against them; they were permitted to defend themselves, there being no indication of the defense having been hampered; all the defenses which they pleaded were considered; they were confronted with the witnesses who testified against them; they were given the opportunity to be heard in open trial; they were convicted on evidence which, although not abundant, nevertheless met the requisites of Mexican law necessary to convict them; finally, the penalty fixed also by Mexican law was imposed on them. Hence, if the essential rights granted by the law of nations were respected, it matters not that certain precepts of the domestic adjective law may have been violated or that the Judge may have shown a certain degree of negligence and carelessness. This opinion is supported by the decision rendered in the *Cotesworth and Powell* case, which is celebrated in this matter and which summarizes what is established in international law on the question of denial of justice and on maladministration of justice. I quote the following passages:

"The judiciary of a nation should be respected as well by other nations as by foreigners resident or doing business in the country. Therefore, every definite sentence of a tribunal, regularly pronounced, should be esteemed just and executed as such. As a rule, when a cause in which foreigners are interested has been decided in due form, the nation of the defendants can not hear their complaints. It is only in cases where justice is refused, or palpable or evident injustice is committed, or when rules and forms have been openly violated, or when odious distinctions have been made against its subjects that the government of the foreigner can interfere * * *."

"No demand can be founded, as a rule, upon more objectionable *forms* of procedure or the *mode* of administering justice in the courts of a country; because strangers are presumed to consider these before entering into transactions therein. Still, a plain violation of the substance of natural justice, as, for example, refusing to hear the party interested, or to allow him opportunity to produce proofs, amounts to the same thing as an absolute denial of justice * * *."

"Nations are responsible to those of strangers, under the conditions above enumerated, *first*, for denials of justice, and, *second*, for acts of notorious injustice. The first occurs when the tribunals refuse to hear the complaint, or to decide upon petitions of the complainant, made according to the established forms of procedure, or when undue and inexcusable delays occur in rendering judgment. The second takes place when sentences are pronounced and executed in open violation of law, or which are manifestly iniquitous." (*Cotesworth & Powell*; Moore's *International Arbitrations*, pages 2050, *et seq.*)

13. To appraise the defective administration of justice which the United States alleges in this case (the American Agent calls it denial of justice in his Memorial and Brief), the Presiding Commissioner has entered into a study of the differences which exist between wrongful acts when the latter are caused by the judicial department of a nation, on one hand, and the same acts when caused by either the executive or the legislative department. I believe that the grouping of things in categories is very beneficial, provided these arise from or show essential differences. Establishing purely formal categories, if useful for certain determined purposes of economy of thought, carry the danger of inducing one to commit transcendental errors. There is no doubt but that there is a slight difference between a judicial act which involves refusal to repair a previous wrongful act and a judicial act which, without a previous injury, causes the damage of itself.

But this is not important in fixing the liability of the State. The latter exists only when the judicial act causes damage in violation of a principle of international law, and as much in the case of a previous wrongful act as in the case where the latter is lacking the State is only liable for its own act; in the first case, for the damage which is caused by its failure to repair a previous injury, and in the second, for the damage caused by its act violating the substantive or adjective law. In both cases the liability is direct, in international questions, as recognized by the Presiding Commissioner himself, when he says, in referring to so-called indirect liability: "*Though, considered in connection with the alleged delinquency of the government itself, it is quite as direct as its liability for any other act of its officials. The liability of the government may be called remote or secondary only when compared with the liability of the person who committed the wrongful act (for instance, the murder) * * *.*" And I believe that the liability of this person, if a private person, is not an international question.

14. If this is so, if the liability arising out of judicial acts of any kind is direct, then it is the same as the liability arising out of wrongful acts of the executive and legislative departments, it resulting therefrom that the three classes must be governed by identical principles, inasmuch as they do not differ essentially. The liability for executive or legislative acts of a government is not, then, stricter or greater than the liability arising out of judicial acts. It does not matter that some decisions may have established that acts of the executive or legislative departments give rise to liability even when they may not contain the element of bad intention. The intention has nothing to do in international law. What is to be determined, as already stated (and this agrees with the definitions which have been given as to what is an international claim), *is whether there exists an injury*, and whether the act which causes it violates *any rule of international law*, regardless of whether the act is intentional or not.

15. However, it seems that Anglo-Saxon practice has tried to establish this difference between judicial and executive acts; with regard to the latter, it has been said that once there exist the two elements, damage to a citizen of another country and violation of international law, the indemnization accrues at once, without any further steps, whereas such is not the case when dealing with judicial acts, for it is then necessary that the remedies furnished by the local law be exhausted, and, further, that the act involved bad faith, willful neglect of duty, or very defective administration of justice.

16. In my opinion, different things are confused and tests are applied which should serve for widely different classes of ideas. With respect to exhausting local remedies, I maintain, together with many publicists, that it should always be required with regard to any class of acts. An international claim should not accrue except as a last resort and not immediately as desired by the practice of Anglo-Saxon countries, which establish such principle because in them the State can not be sued. I consider that it is more dangerous to admit the right to an immediate claim when referring to wrongful acts of the executive or legislative, as a nation will resent more this procedure if it is a question of acts of the organs in which apparently sovereignty rests conspicuously, than if it is a question of violations made by its tribunals. The most important thing in the world is the preservation of peace among nations, and this is attained only through the most constant respect for sovereignty. If a nation inflicts damage on a citizen of another,

the one who causes the injury should be given the opportunity to repair it *through her own means*, and these are generally represented by judicial remedies. In this sense, it can be said that all claims accrue from a denial of justice. Hence, in this respect there is no difference between claims arising out of acts of the different agencies of a State.

17. With respect to the test that is applied to judicial acts, to wit, that in order to give rise to an international claim they must show bad faith, willful neglect of duty, or such a deviation from the practices of civilized nations as to be recognized at first sight by any honest man, it only serves to determine when judicial acts violate a principle of international law, it being unnecessary to apply this test to executive and judicial acts, as they, due to being more direct and simple, are more easily discerned when they deviate from a certain international rule. The important thing, it is insisted, is that the act which gives rise to the claim *causes damage in violation of a rule of international law*, and this is very difficult to determine when it is a question of judicial acts. There are many acts of this nature which, although involving a violation of domestic law, either do not cause measurable damages or do not violate any specific international principle, and, in both cases, lacking one of the elements of the claim, the latter does not accrue. I believe, in view of the foregoing, that to admit the classification of liability arising out of judicial acts into direct and indirect results in the confusion of the first class with the liability arising out of acts of the executive and the legislative; and as it is attempted to apply to the latter a stricter test (the Presiding Commissioner holds that the liability for these acts is unlimited and immediate), this test would seem applicable also, by analogy, to the so-called direct liability for judicial acts, to the detriment of the respectability of decisions, so much proclaimed by publicists and by arbitral tribunals.

18. Returning to the particular case on which I am commenting, I must say that, although the Presiding Commissioner makes clear the exception that, when dealing with decisions of courts, in regard to direct as well as indirect liability, the principle of respect for the judiciary prevails, nevertheless it appears to me that his clear and righteous spirit could not remove itself from the influence of the idea that, as the acts of the District Judge of Mazatlán do not amount to a denial of justice, but to a defective administration of it, or in other words, inasmuch as they involve *direct liability*, such acts must be judged with a severity which, although it does honor to his sense of abstract justice, is not based on international law.

19. I consider that this is one of the most delicate cases that has come before the Commission and that its nature is such that it puts to a test the application of principles of international law. It is hardly of any use to proclaim in theory respect for the judiciary of a nation, if, in practice, it is attempted to call the judiciary to account for its minor acts. It is true that sometimes it is difficult to determine when a judicial act is internationally improper and when it is so from a domestic standpoint only. In my opinion the test which consists in ascertaining if the act implies damage, wilful neglect, or palpable deviation from the established customs becomes clearer by having in mind the damage which the claimant could have suffered. There are certain defects in procedure that can never cause damage which may be estimated separately, and that are blotted out or disappear, to put it thus, if the final decision is just. There are other defects which make it impossible for such decision to be just. The former, as a rule, do not

engender international liability; the latter do so, since such liability arises from the decision which is iniquitous because of such defects. To prevent an accused from defending himself, either by refusing to inform him as to the facts imputed to him or by denying him a hearing and the use of remedies; to sentence him without evidence, or to impose on him disproportionate or unusual penalties, to treat him with cruelty and discrimination; are all acts which *per se* cause damage due to their rendering a just decision impossible. But to delay the proceedings somewhat, to lay aside some evidence, there existing other clear proofs, to fail to comply with the adjective law in its secondary provisions and other deficiencies of this kind, do not cause damage nor violate international law. Counsel for Mexico justly stated that to submit the decisions of a nation to revision in this respect was tantamount to submitting her to a régime of capitulations. All the criticism which has been made of these proceedings, I regret to say, appears to arise from lack of knowledge of the judicial system and practice of Mexico, and, what is more dangerous, from the application thereto of tests belonging to foreign systems of law. For example, in some of the latter the investigation of a crime is made only by the police magistrates and the trial proper is conducted by the Judge. Hence the reluctance in accepting that one same judge may have the two functions and that, therefore, he may have to receive in the preliminary investigation (*instrucción*) of the case all kinds of data, with the obligation, of course, of not taking them into account at the time of judgment, if they have no probative weight. It is certain that the secret report, so much discussed in this case, would have been received by the police of the countries which place the investigation exclusively in the hands of such branch. This same police would have been free to follow all the clues or to abandon them at its discretion; but the Judge is criticized here because he did not follow up completely the clue given by Ramírez with respect to Chatten. The same domestic test—to call it such—is used to understand what is a trial or open trial imagining at the same time that it must have the sacred forms of common-law and without remembering that the same goal is reached by many roads. And the same can be said when speaking of the manner of taking testimony of witnesses, of cross-examination, of holding confrontations, etc.

20. In view of the above considerations, I am of the opinion that this claim should be disallowed.

JOHN W. HALEY (U.S.A.) *v.* UNITED MEXICAN STATES.

(July 23, 1927, concurring opinion by American Commissioner, July 23, 1927, dissenting opinion by Mexican Commissioner, undated. Pages 465-471.)

EFFECT OF ESCAPE OF CLAIMANT FROM PRISON UPON CLAIM.—ILLEGAL ARREST.—INFLUENCING OF TRIAL BY GOVERNOR OF STATE.—CONSOLIDATION OF CRIMINAL CASES WITHOUT REASON.—UNDUE DELAY IN JUDICIAL PROCEEDINGS.—FAILURE TO INFORM ACCUSED OF CHARGES AGAINST HIM.—EXORBITANT BAIL.—FAILURE TO PROVIDE COUNSEL OR INTERPRETER TO ACCUSED.—FAILURE TO SWEAR WITNESSES.—FAILURE TO CONFRONT ACCUSED WITH WITNESSES.—INSUFFICIENT HEARING OR TRIAL.—FAILURE TO MEET ORDINARY JUDICIAL STANDARDS.—CONVICTION ON INSUFFICIENT EVIDENCE.—UNDUE SEVERITY OF PENALTY IMPOSED.—CRUEL AND INHUMANE IMPRISONMENT.—MISTREATMENT DURING IMPRISONMENT. Rulings in *B. E. Chattin* claim *supra* followed.

Cross-reference: British Yearbook, Vol. 9, 1928, p. 158.

(Text of decision omitted.)

G. A. ENGLEHART (U.S.A.) *v.* UNITED MEXICAN STATES.

(July 23, 1927, concurring opinion by American Commissioner, July 23, 1927, dissenting opinion by Mexican Commissioner, undated. Pages 471-473.)

EFFECT OF ESCAPE OF CLAIMANT FROM PRISON UPON CLAIM.—ILLEGAL ARREST.—INFLUENCING OF TRIAL BY GOVERNOR OF STATE.—CONSOLIDATION OF CRIMINAL CASES WITHOUT REASON.—UNDUE DELAY IN JUDICIAL PROCEEDINGS.—FAILURE TO INFORM ACCUSED OF CHARGES AGAINST HIM.—EXORBITANT BAIL.—FAILURE TO PROVIDE COUNSEL OR INTERPRETER TO ACCUSED.—FAILURE TO SWEAR WITNESSES.—FAILURE TO CONFRONT ACCUSED WITH WITNESSES.—INSUFFICIENT HEARING OR TRIAL.—FAILURE TO MEET ORDINARY JUDICIAL STANDARDS.—CONVICTION ON INSUFFICIENT EVIDENCE.—UNDUE SEVERITY OF PENALTY IMPOSED.—CRUEL AND INHUMANE IMPRISONMENT.—MISTREATMENT DURING IMPRISONMENT. Rulings in *B. E. Chattin* claim *supra* followed.

(Text of decision omitted.)

C. W. PARRISH (U.S.A.) *v.* UNITED MEXICAN STATES.

(*July 23, 1927, concurring opinion by American Commissioner, July 23, 1927, dissenting opinion by Mexican Commissioner, undated. Pages 473-482.*)

EFFECT OF ESCAPE OF CLAIMANT FROM PRISON UPON CLAIM.—ILLEGAL ARREST.—INFLUENCING OF TRIAL BY GOVERNOR OF STATE.—CONSOLIDATION OF CRIMINAL CASES WITHOUT REASON.—UNDUE DELAY IN JUDICIAL PROCEEDINGS.—FAILURE TO INFORM ACCUSED OF CHARGES AGAINST HIM.—EXORBITANT BAIL.—FAILURE TO PROVIDE COUNSEL OR INTERPRETER TO ACCUSED.—FAILURE TO SWEAR WITNESSES.—FAILURE TO CONFRONT ACCUSED WITH WITNESSES.—INSUFFICIENT HEARING OR TRIAL.—FAILURE TO MEET ORDINARY JUDICIAL STANDARDS.—CONVICTION ON INSUFFICIENT EVIDENCE.—UNDUE SEVERITY OF PENALTY IMPOSED.—CRUEL AND INHUMANE IMPRISONMENT.—MISTREATMENT DURING IMPRISONMENT. Ruling in the *B. E. Chattin* claim *supra* followed, tribunal noting that in the instant claim there was no reason whatever shown for consolidating the criminal case against claimant with others and that during the greater part of the proceedings he was without counsel.

Van Vollenhoven, Presiding Commissioner :

1. This claim is made by the United States of America against the United Mexican States on behalf of C. W. Parrish, an American national. Parrish, who was an employee (passenger conductor) of the Ferrocarril Sud-Pacífico de México (Southern Pacific Railroad of Mexico) and who in the Summer of 1910 performed his duties in the State of Sonora, was on July 24, 1910, arrested at Guaymas, Sonora, on a charge of swindling and embezzlement, and sent to Mazatlán, Sinaloa; was tried there in January, 1911, convicted on February 6, 1911, and sentenced to an imprisonment of two years and eight months; but was released from the jail at Mazatlán in May or June, 1911, as a consequence of disturbances caused by the Madero revolution. He then returned to the United States. It is alleged that the arrest, the trial and the sentence were illegal, that the treatment in jail was inhuman, and that Parrish was damaged to the extent of \$50,000.00, which amount Mexico should pay.

2. To the challenge of the claimant's citizenship and to his forfeiture of the right to protection applies what is said in paragraphs 2 and 4 of the opinion in the *Chattin* case (Docket No. 41).¹

3. The circumstances of Parrish's arrest, trial and sentence were as follows. In the year 1910 there had arisen a serious apprehension on the part of several railroad companies operating in Mexico as to whether the full proceeds of passenger fares were accounted for to these companies. The Southern Pacific Railroad of Mexico applied on June 15, 1910, to the Governor of the State of Sinaloa, in his capacity as chief of police of the State, co-operating with the federal police, in order to have investigations made of the existence and extent of said defrauding of their lines within the territory of his State. The Governor on June 17, 1910, delegated a police inspector, a police officer, and two persons they selected (a young

¹ See page 282.

laborer and a very young woman) to secure evidence to establish crimes of this type; the four persons, however, did not confine their investigations to the State of Sinaloa, but went as far as Guaymas, Sonora. Parrish was serving at the time on the track between Navojoa, Sonora, and Guaymas, Sonora. The group of four succeeded in provoking delinquencies of the brakeman Domingo Juárez, who served on the same line and the same trains where Parrish acted as passenger conductor. They reported to the Governor on July 9, 1910; the Governor, after consulting the Attorney General of his State, had the report forwarded to the Judge at Mazatlán, on July 18, 1910. The Judge, by telegram of July 22, and rogatory letters of July 23, 1910, requested his colleague at Nogales, Sonora, to have Parrish arrested, which he was on July 24, 1910, at Guaymas. On July 25, 1910, the Judge at Nogales notified his colleague by telegram that Parrish was held at his disposal, whereupon the Judge at Mazatlán requested the Court at Nogales by telegram and letter of July 25 and again on July 27 to issue a decree of formal imprisonment against Parrish. From July 25 on the Judge at Nogales (two successive judges) did all he could to avoid illegalities and delays in Parrish's case; he three times explained to his colleague at Mazatlán why his request did not fulfil the legal requisites necessary for a decree of formal imprisonment and therefore could not be complied with, particularly as the Nogales Court was not even entitled to submit Parrish to the hearing which must precede any formal imprisonment. Moreover he notified him on July 27, that the seventy-two hours allowed for solitary detention were about to expire. Probably because of this last message, the Judge at Mazatlán on July 28 requested by telegram the Federal Government to order Parrish transferred from Guaymas to Mazatlán; a telegram which, according to the Secretary of Justice, did not reach him until August 1. The Federal Government's measures for Parrish's transfer were not completed until August 10, 1910, whereupon Parrish was conveyed to Mazatlán. He arrived there on August 12, 1910, was given a hearing on August 13, and was declared formally imprisoned on the same day. From July 24 to August 13, 1910, he had been in jail without any information as to the grounds for his detention and without any hearing. In the meantime, on August 3, 1910, his case had been consolidated by the Court at Mazatlán with those of Chattin, Haley, Englehart and five Mexicans. On August 15 and 16, 1910, Parrish was confronted with the two police officers and their assistants who had been delegated by the Governor of Sinaloa. No subsequent investigations of any kind to obtain proof of Parrish's guilt appear to have ever been made. Parrish was kept under arrest until the end of January, 1911, at which time the case against another conductor, Chattin (Docket No. 41), was mature for trial. After all these months of preparation and a trial at Mazatlán, during both of which Parrish, it is alleged, lacked proper information, legal assistance, assistance of an interpreter and confrontation with the witnesses, he was convicted on February 6, 1911, by the said District Court of Mazatlán as stated above. The amount involved in Parrish's case was eighteen Mexican pesos. The case was carried on appeal to the Third Circuit Court at Mexico City, which court on July 3, 1911, affirmed the sentence. In the meantime (May or June, 1911) Parrish had been released by the population of Mazatlán which threw open the doors of the jail in the time elapsing between the departure of the representatives of the Díaz regime and the arrival of the Madero forces.

4. It has been alleged, in the first place, that Parrish was illegally deprived of his liberty. The irregularity established consists in this, that the Judge at

Mazatlán requested his transfer ordered on July 28 (or August 1) instead of on July 25. The deplorable circumstance of Parrish's detention during twenty days without any information or hearing would seem due to the fact that it took the Federal Government ten days of circuitous action before so simple a thing as the transfer of an arrested man from one State to another could be decreed. Against the decree of Parrish's formal imprisonment no appeal was instituted. Only in case the Judge at Mazatlán illegally took cognizance of Parrish's alleged felony and illegally requested his arrest, and in doing so was guilty of an outrage, bad faith, wilful neglect of duty, or apparent insufficiency of action. Mexico could be held liable on account of Parrish's arrest.

5. It has been alleged that Parrish was illegally turned over to the Judge of a neighboring state. Sinaloa, where the alleged felony had not been committed and where therefore the Court had no authority to try the case. On September 3, 1910, Parrish's lawyer protested against what he alleged to be wrongfully assumed jurisdiction; but he apparently did not do so in the forms required by Mexican law, and the question had to be considered as not having been raised before the Court. The sentence rendered February 6, 1911, though liberal in quoting articles of statutes applied by the Court, is silent on this matter of jurisdiction, and so is the decision on appeal of July 3, 1911. Quotations from Mexican law have been submitted by the Mexican Agency, establishing that the District Court at Mazatlán could legally take cognizance of Parrish's alleged felony committed in Sonora, quotations controverted by the United States. Nothing in the record of the court proceedings shows that the Judge paid any attention to this point of law. Neither did the appellate tribunal in its decision say one word to dispel the doubt, though both from the Mazatlán court record and from its own knowledge it must have seen the problem. However unsatisfactory this appears, it is not for this Commission to assume that a technical point of Mexican law has been misinterpreted by two courts. There would seem to be convincing evidence, however, that, if the transfer was illegal, this illegality has caused Parrish an essential damage; for during the correspondence mentioned in paragraph 3 above, relative to Parrish's formal imprisonment, the Judge at Nogales was just as prudent, conscientious and active as the Judge at Mazatlán was careless, unconscientious and indifferent regarding a man's freedom.

6. Irregularity in the court proceedings in the case of Parrish is alleged on the ten grounds mentioned in paragraph 12 of the opinion in the *Chattin* case. Here applies all of what has been said in paragraph 6, 7, 8 and 10 of the opinion in the *Halcy* case (Docket No. 42),¹ except (a) that in Parrish's case there does not appear one reason for linking up his case with those of his colleagues, nor for postponing his trial until the day of *Chattin's*, and (b) that during the greater part of the court proceedings he had no counsel. It should be pointed out emphatically that in Parrish's case as well there not only was insufficiency of preparatory investigations by the Judge, but that after the undecisive and unsatisfactory confrontations held on August 15 and 16, 1910, there is no trace of any further investigation whatsoever, scanty and deficient though the evidence before the Judge was; nor is there a trace of any effort whatsoever to shed light on Parrish's case from the evidence in the cases of the other conductors, or on their cases from

¹ See page 313.

Parrish's. The only light the Judge received was from dangerous hearsay reported by the general manager of the railroad company, who never was confronted with Parrish, and from the very dangerous documents submitted by the same manager to the Judge and never disclosed to the accused. Undue delay of court proceedings from August 16, 1910, to January 27, 1911, is apparent.

7. It is alleged that Parrish has been convicted on insufficient evidence. Here applies what is said in paragraph 24 of the opinion in the *Chattin* case (Docket No. 41) ¹ and in paragraph 11 of that in the *Haley* case (Docket No. 42). ²

8. Mistreatment of Parrish in jail is not proven. Here applies paragraph 28 of the opinion in the *Chattin* case. Even Mrs. Parrish did not complain of inhuman treatment of her husband, so far as the record shows. Parrish had been ill while in jail and went to the hospital for some time.

9. An illegal arrest of Parrish is not proven. Incompetency of the Judge who tried the case is not proven. Irregularity of court proceedings is proven with reference to absence of proper investigations, insufficiency of confrontations, withholding from the accused the opportunity to know all of the charges brought against him, undue delay of the proceedings, making the hearings in open court a mere formality, and a continued absence of seriousness on the part of the Court. Insufficiency of the evidence against Parrish is not convincingly proven; intentional severity of the punishment is proven, without its being shown that the explanation is to be found in unfair-mindedness of the Judge. Mistreatment in prison is not proven. Taking into consideration, on the one hand, that this is a case of direct governmental responsibility, and, on the other hand, that Parrish, because of his escape, has stayed in jail for eleven months instead of for two years and eight months, it would seem proper to allow in behalf of this claimant damages in the sum of \$5,000.00, without interest.

Nielsen, Commissioner:

I concur in the Presiding Commissioner's conclusion with respect to liability in this claim. My views regarding the case are stated to some extent in the opinion which I wrote in the claim of *B. F. Chattin*, Docket No. 41.

Decision

The Commission decides that the Government of the United Mexican States is obligated to pay to the Government of the United States of America, on behalf of C. W. Parrish, \$5,000.00 (five thousand dollars), without interest.

Dissenting opinion

Fernández MacGregor, Commissioner :

1. I differ with the opinion rendered by my two colleagues in the case of conductor Claude W. Parrish, who was tried before a Mexican court for the crime of fraud and breach of trust. The general reasons for my dissent

¹ See page 282.

² See page 313.

are those set forth in my separate opinion in the case of *Chattin*, Docket No. 41, and I shall only treat here the points on which the two cases differ.

2. The Presiding Commissioner concludes in paragraph 9 of his opinion in this case, that it is not proven in the Parrish case that there has been illegal arrest or incompetency of the Judge who tried the case; but he points out that the vacillations of the Judge of Mazatlán in obtaining the apprehension of Parrish by the Judge of Sonora and then in having the prisoner placed at his disposition caused a delay which was prejudicial to the claimant. This delay lasted twenty days, from July 24th to August 13, 1910. It is doubtless that the Judge of Mazatlán did not comply exactly with the requisites of Mexican law with respect to letters rogatory, but it is to be noted that whatever may have been the difficulties of the requesting Judge and the Judge who received the request the latter placed the prisoner at the disposition of the former on July 27th, that is, three days after the accused had been arrested, for which reason, on July 28th, the Judge of Mazatlán asked the Federal Government of Mexico to provide for the transfer of Parrish from Nogales to Mazatlán. The Federal Government issued the corresponding orders some time between the 1st and 12th of August, on which date Parrish was already in Mazatlán. Perhaps the prisoner's transfer might have been made more rapidly, but I do not believe, as already stated with regard to the *Chattin* case, that an arbitral commission may examine the governmental action of any State in its slightest details, as it may be supposed in the present case that the administrative machinery required certain steps which consumed the time above stated. With regard to this delay, what was said in paragraph 6 of my opinion in the *Chattin* case applies; in general, Parrish's trial was carried out within the periods fixed by Mexican law, and, therefore, the minor delays which may be pointed to between different steps in the proceedings disappear when the final result is considered, which was that the proceedings were terminated in due time.

3. The above-mentioned delay gives rise to another charge that the accused did not know the cause of his prosecution, during the twenty days that he was outside of the jurisdiction of the Judge in Mazatlán. I believe that this charge is refuted by merely reading Article 20 of the Mexican Constitution of 1857, which says: "*In all criminal causes*, the accused shall have the right to be informed of the reason for the prosecution". This means that this right, as well as the others stipulated by Article 20, accrue at the time when the accused is at the disposition of the competent Judge—the one who will conduct the proceedings—and not, for instance at the time when he is summoned to court by another Judge. This jurisprudence has been established by the Supreme Court of Mexico in the following decisions: May 30, 1881, amparo Ciriaco Vazquez, before the District Judge of Sonora; November 3, 1881, amparo Pedro García Salgado, before the First District Judge of the State of Mexico. (See the opinion of Lic. Ignacio Vallarta in this last case.)

4. Although I believe that the question of jurisdiction between the courts of a State is purely domestic (the international decisions cited by the Government of the United States all refer to international jurisdiction), I believe it pertinent to explain that, in my opinion, the District Judge of Mazatlán was competent to try Parrish. According to the information that this Judge had before him, there was probable cause to suppose that the four conductors and other employees of the railroad were defrauding the company; that

is, were committing the same crime or connected crimes. Article 330 of the Federal Code of Criminal Procedure provides that connected crimes are those committed by different persons, even if at diverse times and places, but through agreement between them; so that the Judge could order the consolidation and, therefore, consider himself competent to pass on Parrish's case, even though the latter had committed his crimes in the State of Sonora. Chapter III of the Code cited provides for the possibility of carrying out the consolidation of causes when they are in different courts and not only when they are in the same court. It must be taken into consideration, moreover, that probable cause is sufficient for the consolidation of proceedings just as for the arrest of an accused, for, as the procedure of consolidation is an economical measure to carry out certain proceedings more rapidly and to determine more easily all their circumstances, such measure is taken at the beginning of the prosecution, when there is yet no conclusive evidence of any kind, as it would be illogical to wait until the end of a prosecution before decreeing said measure of consolidation which, at this stage, would prove utterly useless. At any rate, as stated above, the question of jurisdiction can not cause damage to an accused except in very special and definite cases, as, for example, when the accused is tried by a military tribunal instead of a civil tribunal; consequently, a violation in this matter can not carry international liability.

5. With regard to the evidence which the Judge took into consideration in convicting Parrish, it must be repeated that he in no manner considered the secret documents of the Los Angeles detectives (paragraph 7 of my opinion in the Chattin case). The Judge received the testimony of four witnesses, two of them police officers, who affirmed unanimously the fact that Parrish had accepted tickets purchased illegally from a brakeman; that such tickets were different from those used on the day when the two officers and their companions made the trip; the value of the tickets was 18 pesos; conductor Parrish admitted that he worked on the railroad the day of the trip of Barraza and his associates; it is doubtless that the brakeman could not have committed any fraud against the railroad company without the knowledge of the respective conductor, who was precisely placed by the company in order to prevent fraud; consequently, the requisites fixed by the Mexican Criminal Code for the crime of fraud, defined in Article 414 of the Criminal Code of the Federal District, were fulfilled. Article 415 provides that the defrauder shall suffer the same penalty that would be imposed on him had he committed larceny; larceny by an employee, according to Article 384 of the same Code should be punished with two years' imprisonment; according to Article 406, breach of trust constitutes an aggravating circumstance, and when there are aggravating circumstances the maximum penalty may be imposed; now, then, according to Article 69, the maximum of a penalty is calculated by adding to the medium a third part of its duration, which results in a penalty of two years, eight months, fixed by the Judge of Mazatlán and affirmed by the Third Circuit Court.

6. In the opinion of the Presiding Commissioner in this case it is charged that there was no cause for the consolidation of the Parrish case with those of his three associates. It must be noted that Parrish's crime was the same as that of brakeman Domingo Juárez and that according to the investigation made by the Mexican police, Camou (another brakeman) was the one who directed them, together with said Juárez, to obtain illegal passage

from him. Camou's criminal act was connected with that of Conductor Haley and the latter with that of Chattin (according to the opinion of the Presiding Commissioner himself), so it is clear that the Judge of Mazatlán could legally decree the consolidation of all those cases.

7. It is said that the accused Parrish did not have counsel. On the reverse of folio 99 of the original record it is stated that when he gave his preliminary statement on August 13, 1910, he appointed Lic. Rosendo L. Rodriguez as his counsel. On the reverse of folio 100 it is noted that at the time that the latter was to be notified of his appointment he was temporarily absent from the city. On August 20th Counsel Rodriguez appeared before the Court to accept his appointment (reverse of folio 103). It is true that Counsel Rodriguez resigned September 6, 1910 (folio 110), and that his resignation was immediately communicated to the accused. It does not appear that the accused, who was informed of the resignation of his counsel, appointed another attorney immediately; but it does appear that the accused Parrish continued to be defended by his counsels Fortino Gómez (folio 143 and 156) and Adolfo Arias (folio 163). Besides, I do not find that the fact that an accused does not appoint counsel, being able to do so or to request it, constitutes any international violation; there would be a violation of this kind if the accused had not been permitted to have counsel.

8. The claim should be disallowed.

SECTION II

SPECIAL AGREEMENT: September 8, 1923, as extended by the Convention signed August 16, 1927.

PARTIES: United Mexican States, United States of America.

ARBITRATORS: Kristian Sindballe (Denmark), President Commissioner, from June 16, 1928, G. Fernández MacGregor, Mexican Commissioner, Fred K. Nielsen, American Commissioner.

REPORT: Opinions of Commissioners under the Convention concluded September 8, 1923, as extended by the Convention signed August 16, 1927, between the United States and Mexico, September 26, 1928, to May 17, 1929. (Government Printing Office, Washington, 1929.)

Convention

CONVENTION EXTENDING DURATION OF THE GENERAL CLAIMS COMMISSION PROVIDED FOR IN THE CONVENTION OF SEPTEMBER 8, 1923¹

Signed at Washington, August 16, 1927; ratified by the President, October 8, 1927, in pursuance of Senate resolution of February 17, 1927; ratified by Mexico, September 30, 1927; ratifications exchanged at Washington, October 12, 1927; proclaimed, October 13, 1927

Whereas a convention was signed on September 8, 1923, between the United States of America and the United Mexican States for the settlement and amicable adjustment of certain claims therein defined; and

Whereas under Article VI of said convention the Commission constituted pursuant thereto is bound to hear, examine and decide within three years from the date of its first meeting all the claims filed with it, except as provided in Article VII; and

Whereas it now appears that the said Commission cannot hear, examine and decide such claims within the time limit thus fixed;

The President of the United States of America and the President of the United Mexican States are desirous that the time originally fixed for the duration of the said Commission should be extended, and to this end have named as their respective plenipotentiaries, that is to say:

The President of the United States of America, Honorable Frank B. Kellogg, Secretary of State of the United States; and

The President of the United Mexican States, His Excellency Señor Don Manuel C. Téllez, Ambassador Extraordinary and Plenipotentiary of the United Mexican States at Washington;

Who, after having communicated to each other their respective full powers found in good and due form, have agreed upon the following articles:

ARTICLE I. The High Contracting Parties agree that the term assigned by Article VI of the Convention of September 8, 1923, for the hearing, examination and decision of claims for loss or damage accruing prior to September 8, 1923, shall be and the same hereby is extended for a time not exceeding two years from August 30, 1927, the day when, pursuant to the provisions of the said Article VI, the functions of the said Commission would terminate in respect of such claims; and that during such extended term the Commission shall also be bound to hear, examine and decide all claims for loss or damage accruing between September 8, 1923, and August 30, 1927, inclusive, and filed with the Commission not later than August 30, 1927.

¹ Source : Treaties, etc., 1923-1937, Vol. 4, p. 4453.

It is agreed that nothing contained in this Article shall in any wise alter or extend the time originally fixed in the said Convention of September 8, 1923, for the presentation of claims to the Commission, or confer upon the Commission any jurisdiction over any claim for loss or damage accruing subsequent to August 30, 1927.

ARTICLE II. The present Convention shall be ratified and the ratifications shall be exchanged at Washington as soon as possible.

IN WITNESS WHEREOF the above-mentioned Plenipotentiaries have signed the same and affixed their respective seals.

Done in duplicate at the City of Washington, in the English and Spanish languages, this sixteenth day of August in the year one thousand nine hundred and twenty-seven.

(Signed) Frank B. KELLOGG. Manuel C. TÉLLEZ.

Decisions

LEE A. CRAW (U.S.A.) *v.* UNITED MEXICAN STATES

(*September 26, 1928. Pages 1-2*¹).

CONTRACT CLAIMS.—EFFECT OF DOMESTIC LAW GOVERNING PAYMENTS. Claim for goods sold and services rendered the Mexican Government during Huerta regime *allowed*. Mexican law of payments of April 13, 1918, not given effect.

INTEREST. Where evidence is not clear as to time obligation to pay arose, *held* interest may be allowed from date marking termination of transactions in question.

(*Text of decision omitted.*)

NATIONAL PAPER AND TYPE COMPANY (U.S.A.) *v.* UNITED MEXICAN STATES

(*September 26, 1928. Pages 3-5.*)

MEMORIAL OF CLAIM AS EVIDENCE. Fact that under rules of tribunal claimant signed and swore to memorial of his claim does not thereby constitute it evidence in support of claim. Claim *disallowed*.

CONTRACT CLAIMS.—NON-PAYMENT OF MONEY ORDERS. Claim for goods sold and delivered, part of which was sold during de la Huerta administration, *allowed*. Claim for non-payment of money orders *allowed*.

RATES OF EXCHANGE.—INTEREST. Ruling on rate of exchange in *George W. Cook* claim *supra* followed. Interest *allowed* from date of termination of transactions in question.

The Presiding Commissioner, Dr. Sindballe, for the Commission :

In this case claim against the United Mexican States is made by the United States of America on behalf of the National Paper and Type Company, an American corporation, for a sum made up of two items.

1. The first item claimed is for the nonpayment of the agreed purchase price, partly fixed in dollars, partly in pesos, of printing machinery, paper envelopes and other goods alleged to have been sold and delivered by the claimants to various departments of the Mexican government between November 12, 1912, and October 16, 1914.

¹ References to page numbers herein are to the original report referred to on the title page of this section.

The claimants admit that goods sold and delivered to the Printing Office of the National Museum, to the amount of \$1,366.57, have already been paid, and they allow a sum of \$195.84 for goods returned. The amount claimed by them is \$26,639.43, U.S. currency.

The respondent government admits the sale and delivery of goods for \$11,401.48 and 23,996.65 Pesos, Mexican currency, but contests the sufficiency of the evidence produced for the rest of the goods, and submits that due to the political disorders in Mexico the Archives of the various Departments do not contain information concerning the goods in question.

No proof of the delivery of the item of goods said to have been sold for \$26.08 accompanies the Memorial. It was argued by counsel for the United States that, since the President of the company had sworn to the Memorial which includes a list giving the number, date and amount of the invoices of these goods, there was in fact before the Commission an affidavit in support of the allegations respecting this item. Under the rules the Memorial must be accompanied by the evidence on which the claimant relies in support of the allegations contained in the Memorial. The fact that under the rules of the Commission as they existed when the Memorial was framed it was required that the Memorial be verified by the claimant would not justify the Commission in sustaining the views of counsel in such a manner that its action would in effect constitute a precedent in the light of which a pleading might be regarded at once as a pleading and as evidence. This item must therefore be disallowed.

The remainder of the goods in question is alleged to have been sold to the House of Correction for Boys and the Correctional School connected therewith, Tlalpam, D. F., Mexico. Invoices and receipts covering all those goods have been submitted. In some cases the receipts have been signed by persons who, in the lack of evidence to the contrary, must be assumed to have been representatives of the institution just mentioned. In many cases, however, the receipts are signed by Guerra Hermanos, a grocery firm in Mexico City. With regard to this point the claimants have submitted the affidavit of an accountant employed by them stating that he, from his handling of the funds and documents of the claimant company, knows that the goods sold to the said institution in many cases, according to orders given by the institution, were delivered to Guerra Hermanos who undertook to bring the goods by their team to the Correction House at Tlalpam. In view of the fact that no declaration from Guerra Hermanos has been produced by the respondent government, the Commission holds that there is sufficient proof of the delivery of the goods in question.

A part of the goods delivered were sold and delivered during the period of the de la Huerta administration, but for the reasons set forth by the Commission in the *George W. Hopkins* case, Docket No. 39,¹ this circumstance does not affect the liability of the United Mexican States.

The amount in Mexican currency should be transferred into U. S. currency according to the rules applied by the Commission in the *George W. Cook* case, Docket No. 663.²

¹ See page 41.

² See page 209.

Interest should be allowed at the rate of six per centum per annum from October 16, 1914, the date of the termination of the transactions in question.

2. The second item claimed is for the nonpayment of sixteen postal money orders for an aggregate sum of 386.65 Pesos, Mexican currency, purchased by the claimant at the post office of the Mexican government at Cordoba, Vera Cruz, on August 19, 1914, and payable at sight to the claimant at Mexico City. The said postal money orders were presented for payment at various times during the period between August 19, 1914, and November 10, 1914, but were not paid.

With regard to this item, the only question raised is with respect to the rate of exchange to which the amount claimed should be transferred into U. S. currency. The Commission applies the principles laid down in the case of *George W. Cook*, Docket No. 663.

Interest should be allowed at the rate of six per centum per annum from November 10, 1914.

Decision

The United Mexican States shall pay to the United States of America on behalf of the National Paper and Type Company \$26,613.35 (twenty-six thousand six hundred and thirteen dollars and thirty-five cents) with interest thereon at the rate of six per centum per annum from October 16, 1914, to the date when the last award is rendered by the Commission, and \$192.74 (one hundred ninety-two dollars and seventy-four cents) with interest thereon at the same rate from November 10, 1914, to the date when the last award is rendered by the Commission.

EDGAR A. HATTON (U.S.A.) *v.* UNITED MEXICAN STATES

(September 26, 1928. Pages 6-10.)

NATIONALITY, PROOF OF. Evidence of nationality of a somewhat inconclusive character *held* sufficient when respondent Government had produced nothing to throw doubt upon claimant's nationality.

EVIDENCE BEFORE INTERNATIONAL TRIBUNALS.—PRESUMPTIONS AND BURDEN OF PROOF.—EFFECT OF ADMISSION IN ANSWER OF JURISDICTIONAL FACT. An admission of nationality made in answer of respondent Government cannot take the place of adequate proof of nationality, which is a jurisdictional fact. Circumstance that respondent Government admitted nationality does not relieve claimant Government of proving such fact.

ADEQUACY OF RECEIPT AS EVIDENCE.—AUTHENTICATION OF EVIDENCE. Authentication according to Mexican law of receipt given by commander of armed forces for animals taken *held* not necessary. Signature of officer proved genuine. Fact that claimant's name not shown on receipt *held* not fatal to his claim.

MILITARY REQUISITION. Claim for military requisition *allowed*.

Cross-reference: Annual Digest, 1927-1928, p. 485.

Commissioner Nielsen, for the Commission:

Claim is made in this case by the United States of America in behalf of Edgar A. Hatton in the sum of \$575.00, said to be the value of two mules and five saddle horses alleged to have been requisitioned by General Horacio Lucero, commander of Mexican Federal troops, in the month of March, 1924, at a ranch called San Gregorio, located at Villa Acauñã, Coahuila, Mexico. Interest is claimed from March 2, 1924, until the date of payment of any award rendered.

The case involves a small amount, but during the course of written and oral arguments there was raised a number of somewhat vexatious and important questions of evidence which require careful consideration.

In oral argument counsel for Mexico contended that the American citizenship of the claimant was not adequately proved. The proof of nationality accompanying the Memorial of the United States consists of, first, an affidavit by two persons in which they state that "they have known Edgar A. Hatton all of his life, and know him to be an American citizen"; and, second, an affidavit by the claimant in which he asserts that he is a citizen of the United States by birth.

Although the contention respecting nationality was raised in oral argument, the American citizenship of the claimant was expressly admitted in the Answer of the Mexican Government. And in the Mexican brief reference is made to this admission, and it is stated that "in view of the fact of the leniency with which the Honorable Claims Commission has solved the question of adequate proof of the nationality of the claimant, the Mexican Agent does not think himself justified to deny that the American citizenship of the claimant has been proved". After some argument to the effect that proof of nationality is very meagre, it is further stated in the brief that the Mexican Agent "can only call the attention of the Honorable Commission to this fact inasmuch as his absolute right of denial cannot be adduced in this occasion for the considerations aforesaid".

It is not altogether clear what is meant by the statement in the Mexican brief that the Commission has solved questions of adequate proof of nationality with "leniency". Nations of course do not make a practice of pressing diplomatic reclamations of persons other than their own nationals. The Commission has in the past accepted evidence of facts from which it could, in its judgment, draw sound conclusions with respect to the applicable law. But in any case in which there is an absence of such evidence or any evidence throwing doubts upon the nationality of the claimant, it need scarcely be said that the importance of the question of citizenship has not, and will not be, overlooked. The Commission does not minimize the importance of this subject. It realizes, of course, that the nationality of claimants is the justification in international law for the intervention of a government of one country to protect persons and property in another country, and, further, that by the jurisdictional articles of the Convention of September 8, 1923, namely, Articles I and VII, each Government is restricted to the presentation of claims in behalf of its own nationals.

The proof of nationality submitted with the American Memorial is assuredly very meagre, and adverse criticism of it made by counsel for Mexico appears to be well founded. As has been observed, there appears besides the claimant's own statement, only an affidavit sworn to by two persons in which they state that they know the claimant "to be an American citizen". That is a conclusion of law. The affidavit would have been of a different character had it furnished information with regard to the birth or the naturalization of the claimant. From proven facts of that kind the Commission could reach a positive conclusion with regard to claimant's nationality under the Constitution or under statutory provisions of the United States.

It was stated in oral argument by counsel for the United States that, had the nationality of the claimant been challenged in the Mexican Answer instead of being admitted, the claimant Government would have been put on guard and could have amplified its proof. Doubtless that is true. However, it is proper to observe with reference to this point that, as has already been pointed out, convincing proof of nationality is requisite not only from the standpoint of international law, but as a jurisdictional requirement. And the Commission, in refusing, as it does, to sustain the contention made in oral argument that the claim should be rejected, should not be understood to concede that admissions of the respondent Government of the nationality of claimants could in all cases take the place of adequate proof of nationality. Such admissions do not appear to be analogous to a waiver before a domestic court of a question of personal jurisdiction. The jurisdictional provisions of the Convention of September 8, 1923, are concerned with certain specified claims. Having in mind that the admission in the Mexican Answer relates to the nationality of a person resident in Mexico and owning property in that country; that under the arbitral agreement the Commission must take cognizance of all documents placed before it; and that nothing has been adduced to throw any doubt on the assertions of the claimant who swears that he was born in the United States, or on the sworn statement of persons who, in addition to their statement respecting the claimant's citizenship, state that they have known the claimant all their lives, it is believed that the claim should not be rejected on the ground of unsatisfactory proof of nationality.

The United States presented as evidence a copy of a receipt said to have been given to the claimant by General Lucero which reads as follows:

"Vale a la Hda de San Gregorio por 7 siete caballos para la tropa que es a mi mando.

San Gregorio 2 de Marzo—924 El Gral de B.

H. LUCERO."

The Government of Mexico presented a statement from Francisco Ibarra, who it is said acted as guide for General Lucero. This man asserts that a horse and a mule were taken from the San Gregorio Ranch, but that the horse was returned. As against such testimony it is proper to take account of the fact that the claimant has been allowed to remain in possession of a receipt, evidencing that a larger number of animals was taken and that none was returned. The Commission cannot properly disregard the evidential value of that receipt. And it may be particularly pertinent to note with respect to this point that receipts for military

requisitions have been given important standing and recognition in international law and practice. The convention of The Hague of 1907 respecting the law and customs of war on land contains provisions with regard to receipts for military requisitions and contributions.

It was stated in behalf of Mexico that the receipt had not been "authenticated" as required by Mexican law. And furthermore it was urged that the receipt may either have been altered or indeed may have been a fraud, since on the one hand, it refers to "siete caballos" whereas the claimant asked compensation for two mules and five saddle horses, and on the other hand, the body of the receipt was written in pencil and the signature in ink.

It is unnecessary to cite legal authority in support of the statement that an alien in the situation of the claimant is entitled under international law to compensation for requisitioned property. No formalities required by domestic law as to the form of authentication of a receipt for requisitioned property, or the failure of a military commander to comply with those formalities could render such a receipt nugatory as a record of evidential value before this Commission. The important point with respect to the authenticity of the receipt is that the signature thereto by General Lucero is admitted by the Mexican Government. The claimant having received a receipt which recites the taking of seven horses might have presented his claim in the terms of the receipt. However, he accepted, as doubtless he was obliged to do, the form of receipt given to him, and he explains the precise nature of the property taken. The Commission can properly accept his explanation rather than assume that for some reason the claimant chose to alter the receipt. No evidence has been adduced to prompt a supposition that such a fraud was committed, and there is good reason to suppose that it was not. As to the suggestion or contention of counsel that the receipt may be a fraud in view of the fact that the body of the document produced in evidence was in pencil and the signature in ink, it may be observed that such a fraudulent manufacture of the body of the receipt apparently could only have been committed in case the claimant had obtained possession of a piece of paper bearing General Lucero's signature, and some one had, for purposes of fraud, inserted the body of the receipt above the signature. In the absence of any proof suggesting such a crude fraud, the suggestion must be rejected.

There remains to be considered one further point. The receipt accompanying the Memorial does not mention the claimant as the person from whom the animals were requisitioned. It is true that the claimant is in possession of that receipt, but it would be possible for him to be so even if he were not the owner of the ranch and animals found there. It would have been desirable that the United States furnish evidence on this point. To be sure, if Hatton was not the owner of the ranch, Mexico could undoubtedly have been able to show that fact. There should be little difficulty in obtaining information respecting this question of title. And while it is not the function of the respondent government to make a case for a claimant government, it is believed that, in view of the fact that the claimant is in possession of the receipt, and in view of the further fact that Mexico has adduced nothing to show that the claimant was not the owner of the ranch at the time of the requisition, the Commission should accept without question the claimant's allegation that the property requisitioned from the ranch belonged to him. The justification for drawing

inferences from the nonproduction of available evidence has often been discussed by domestic courts. See for examples, *Kirby v. Tallmadge*, 160 U. S. 379; *Bilokumski v. Tod*, 263 U. S. 149.

The proof of the value of the animals taken is meagre, but since it has not been contested, the claimant should have an award for the amount asked with interest from March 2, 1924.

Decision.

The United Mexican States shall pay to the United States of America in behalf of Edgar A. Hatton, the sum of \$575.00 (five hundred and seventy-five dollars) with interest at the rate of six per centum per annum from March 2, 1924, to the date on which the last award is rendered by the Commission.

WILLIAM HOLLIS (U.S.A.) *v.* UNITED MEXICAN STATES

(*September 26, 1928. Pages 11-14.*)

CRUEL AND INHUMANE IMPRISONMENT.—MISTREATMENT DURING IMPRISONMENT. Evidence *held* insufficient to establish claim for cruel and inhumane conditions of imprisonment and mistreatment by authorities during imprisonment.

The Presiding Commissioner, Dr. Sindballe, for the Commission:

Claim is made in this case against The United Mexican States by The United States of America on behalf of William Hollis, an American citizen, for indemnity in the sum of \$15,000 for inhuman treatment alleged to have been accorded him in connection with his detention under arrest at Valles, San Luis Potosí, Mexico, during the days from Friday, September 22, to Sunday, September 24, 1911.

In 1911 the claimant was residing in Mexico, employed by the Mexican Petroleum Company at Ebano, San Luis Potosí. On Friday, September 22, he was arrested at his home at Ebano upon a charge of fraud preferred by Señor Rafael Rodríguez of San Luis Potosí. It appears from the record that he had passed a worthless check for 500 pesos which Señor Rodríguez had cashed, and that he had obtained other smaller amounts from other persons. The order of arrest was issued by the Political Chief at Valles according to letters requisitorial from the Criminal Court of San Luis Potosí, and the order was executed by Camerino Enríques, the Chief of the Police at Valles. The claimant was told that he would have to walk to Valles. He protested, saying that he was suffering from acute rheumatism in his right leg and from a severe rupture (*hernia*). Thereupon he was allowed to go by train on his payment of the travelling expenses for himself and the guard. He arrived at Valles in the evening of the same day, and was detained there until Sunday evening, when he was sent by train to San Luis Potosí, accompanied by Camerino Enríques.

With regard to the way in which he was treated by the authorities at Valles during his detention there, the claimant alleges the following:

Immediately upon his arrival he was confined in the jail, a room fourteen feet by twenty feet in size, occupied by thirty-four prisoners, reeking with filth, with no windows and no ventilation except through a grated door, and with no sewerage or conveniences of any kind. On the following morning he was removed from this room, and for the rest of the time of his detention at Valles he was allowed to stay at the headquarters of the police. Saturday night the jailkeeper, Regino Dominguez, became drunk at a local celebration, and on his return he asked the claimant for some beer. The claimant paid for four bottles. In the course of Sunday Regino Dominguez took the claimant to several saloons, calling for drinks and demanding the claimant to pay, as well as to give him money. When the claimant showed some hesitancy in complying with the demands of the jailkeeper, the latter drew his revolver and flourished it in the face of the claimant and around his own head, saying, "Look out when I am angered, the earth trembles". The claimant was forced to spend more than eighty pesos on that Sunday. His hair, which was dark brown before this experience, became covered with white.

On Saturday the claimant was informed that he would have to walk to San Luis Potosí, about 300 kilometers unless he paid the travelling expenses. He protested and sent telegrams of protest to the American Consul at San Luis Potosí and to the Governor of the State. He further sent a telegram to Señor Rafael Rodriguez, to whom he had passed the worthless check, asking him to pay the travelling expenses—although, according to his own statement as above mentioned, he was in possession of an amount of money sufficient to cover the said expenses. He alleges that he obtained a promise from Rodriguez to the effect that the latter would refund him the expenses. Subsequently he agreed to pay and was accordingly, as already mentioned, sent by train to San Luis Potosí, where he arrived Monday morning, September 25.

On September 28 the claimant was released, the American Consul at San Luis Potosí having obtained a guarantee from the employers of the claimant for the sum due to Rodriguez, and the latter having withdrawn his charge.

A short time after his release the claimant asked the American authorities to claim an amount of \$15,000 from the United Mexican States.

The claim as set forth in this case is predicated upon allegations concerning the following matters: (1) The demand that the claimant would have to walk from Eban to Valles and from Valles to San Luis Potosí unless he paid the travelling expenses of himself and the guard; (2) The treatment the claimant received from Regino Dominguez on Sunday, September 24; and (3) the confinement of the claimant in the jail described above during the night between Friday, September 22, and Saturday, September 23.

The facts regarding the allegations with respect to the claimant's complaint that he was obliged to walk or to pay his own travelling expenses are too indefinitely shown to make it possible to arrive at any positive conclusion with regard to misconduct on the part of the authorities. It would seem that the claimant chose to pay his travelling expenses or that some one paid them for him, and in any event, he was not forced to the detriment of his health to walk a long distance.

As regards the treatment which it is alleged the claimant received from Regino Dominguez, the question which the Commission has to decide is principally a question of evidence. The respondent government has undertaken an investigation according to which it is true that the claimant and the jailkeeper visited saloons together on the said Sunday, that the claimant paid for the drinks ordered, and that the jailkeeper was drunk, and boisterous, on one occasion throwing the claimant's money on the floor. The respondent government denies, however, that the claimant accompanied the jailkeeper otherwise than from his own free will. Now, besides the claimant's own statement, made for the first time to the American Consul at San Luis Potosí during the claimant's detention there, there is produced an affidavit by one Blodgett to the effect that he saw and heard that money was demanded from the claimant, and a letter from the American Consul at San Luis Potosí stating that the guard who brought the claimant to this city orally confirmed "the intoxication of Dominguez, the threats and demands for money". But these declarations give very few particulars. And the claimant's own declarations suffer from certain exaggerations. Further, the claimant would not seem to be in the charge of or dependent upon the jailkeeper from the time of his alleged removal from the jail, and it appears from the record that he was allowed to send messages and telegrams to several persons and to go to a hotel to take his meals, accompanied by a guard only. In view of those circumstances the Commission holds that the evidence produced does not convincingly prove that the claimant was forced to spend his money in the company of the jailkeeper on the Sunday in question.

With regard to the alleged confinement of the claimant in the jail during the first night of his detention at Valles the only evidence submitted is the statement of the claimant himself made to the American Consul at San Luis Potosí during the claimant's detention there. As the Commission entertains some doubt as to the perfect reliability of the statements of the claimant, it is found that an award cannot be based with sufficient certainty solely on the particular statement in question. Furthermore, this statement has been denied by the guard who brought him to Valles, although first in the course of a governmental investigation which—owing to revolutionary disturbances in the State of San Luis Potosí, it is alleged—did not take place until about a year after the detention of the claimant at Valles.

Decision

The claim made by the United States of America on behalf of William Hollis is disallowed.

IRMA EITELMAN MILLER, LILLIAN EITELMAN, AND
B. B. EITELMAN (U.S.A.) *v.* UNITED MEXICAN STATES

(September 26, 1928. Pages 15-17.)

DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH. Evidence *held* not to show a failure by competent authorities to use due diligence in apprehending persons guilty of murder of American subjects.

Cross-reference: Annual Digest, 1927-1928, p. 218.

Commissioner Fernández MacGregor, for the Commission:

1. This claim is presented by the United States of America against the United Mexican States in behalf of Irma Eitelman Miller, Lillian Eitelman and B. B. Eitelman, children of George Eitelman, who at the time of his death was employed by the Cusi Mining Company as blacksmith at their mines situated in the vicinity of Cusihiuriachic, State of Chihuahua, Republic of Mexico. On the morning of September 16, 1916, the body of George Eitelman was found by the roadside bearing wounds which indicated that he had been murdered. His skull was fractured; the bones of the face and some of the bones of the back and chest were also broken. There were some indications pointing to robbery as the motive for the crime. It is alleged that on account of this killing, the children of the deceased, who are American citizens, sustained damages in the sum of \$50,000.00 United States currency, and that the Mexican Government should make compensation in that amount, as the Mexican authorities showed a lack of diligence and intelligent investigation in prosecuting the culprits, to such a pronounced degree as to constitute a denial of justice.

2. The nationality of the claimant was not challenged by the respondent Government except in the course of oral argument. The Commission considers that there is convincing evidence that the deceased, as well as the claimants, are American citizens.

3. The contention of lack of diligence or lack of intelligent investigation on the part of the Mexican authorities after the murder of George Eitelman is made in a general way; the American Consul at Chihuahua, on September 17, 1916, brought the case to the attention of the Governor of that State; on October 1 following, Dr. I. S. Gellert, a reputable resident of Cusihiuriachic, informed the aforesaid Consul that the authorities had done practically nothing, in the two weeks that had passed since the murder; then the Consul again called the attention of the Governor to the inactivity of the authorities at Cusihiuriachic, but his communication, so it is alleged, was ignored by the Mexican officials.

4. From the record it appears that the local authorities, early in the morning of September 16, 1916, proceeded to the spot at which the killing had taken place, and made an investigation, having instituted the necessary legal procedure by appointing experts to make the post-mortem examination. On September 17th following the self-same authorities proceeded to the mine at which the deceased had been working, to obtain

information about him; it was disclosed that the man had only been a fortnight on the mine, and that no one knew him well. On September 19th two men who had been arrested on suspicion were questioned, but as no evidence was found warranting their detention they were released on September 22nd. On September 20th and 21st other persons were summoned and examined, one of whom was probably the last to see Eitelman on the night of September 15th, talking to an unknown man whose general description he gave. On October 3, another man, a prospector, was arrested on suspicion, but was released on the following day for want of evidence against him. On the same day the postmortem certificate was filed by the experts. On October 9, the Supreme Tribunal of Chihuahua transmitted to the Judge at Cusihuiriachic a letter from the American Consul to the Governor of Chihuahua, requesting greater activity in the apprehension of the culprits; the said Tribunal directed the judge to proceed with more speed and to report immediately, which he did. From that date on nothing is recorded, but the Mexican Agent filed evidence to the effect that the local police made efforts to get clues and to apprehend the culprits.

5. This Commission has in other cases expressed its views regarding criminal procedure, and in the light of the record of this case, and of the principles underlying the decision in the case of *L. F. Neer and Pauline E. Neer*, Docket No. 136,¹ before this Commission, it is not prepared to hold that Mexico is responsible.

Decision

The claim of the United States of America on behalf of Irma Eitelman Miller, Lillian Eitelman, and B. B. Eitelman is disallowed.

JOHN D. CHASE (U.S.A.) *v.* UNITED MEXICAN STATES

(September 26, 1928. Pages 17-20.)

DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH.—UNDUE DELAY IN JUDICIAL PROCEEDINGS. Claimant was shot during course of altercation with a Mexican subject. Both were arrested and later released on bond, case was prosecuted with due diligence at outset, but guilt of parties was not determined after lapse of fourteen years. Claim *allowed*.

Cross-references: Annual Digest, 1927-1928, p. 217; British Yearbook, Vol. 11, 1930, p. 224.

Commissioner Fernández MacGregor, for the Commission:

1. In this claim presented by the United States of America versus the United Mexican States, \$15,000.00, currency of the United States or its equivalent, with interest on that sum at the rate of 6% per annum until the date upon which payment shall be made, is demanded on behalf

¹ See page 60.

of John D. Chase, a citizen of the United States of America, who was seriously wounded by a Mexican, Jacinto Flores, Chase being disabled, as a result, to perform physical labor of any kind. The American Agent alleged in the Memorial that, although Jacinto Flores was arrested by the authorities, tried, convicted and confined in prison for a short while, the sentence given him entailed an entirely inadequate penalty for the premeditated crime which he had committed; but in the American brief Mexico's responsibility is alleged to consist in not having taken reasonable and adequate measures to apprehend and punish the assailant after he had fled while under release on bond which had been granted him.

2. At the time the events transpired, the claimant was employed as Route Agent by the Wells Fargo Express Company, a concern for which the Mexican, Jacinto Flores, worked in the same capacity as Chase, he being, in addition, Station Agent at Puerto Mexico, Tehuantepec. On September 13, 1913, a shortage was discovered in a remittance of cash consigned to the Cashier of the Tehuantepec National Railway at Rincón Antonio; and as the high officials of the Express Company appointed Chase to investigate the theft, Chase suspected that Flores was responsible and as a result a feeling of enmity arose between Flores and Chase. It appears that each threatened the other and that thereafter there was an exchange of revolver shots between the two participants, without it being possible to affirm, in view of the circumstances involving this claim, who was the first to make threats or who was the aggressor, inasmuch as the statements made by Chase and Flores and the witnesses who were examined were confused and contradictory. Chase received a bullet wound on the second rib of the right side, the projectile going through the thorax and embedding itself under the skin on the back between the ninth and tenth ribs, near the spine. In the course of the firing a Mexican woman who happened to be there was also wounded, her body being pierced by a bullet which entered the level of the sacrum and which passed completely through her. From the evidence filed by the Mexican Agent, it would appear that it was Chase who wounded this woman.

3. All the details of the facts which are succinctly set forth above were thoroughly discussed by both Agencies, which expressed contrary views regarding the classification of the crime committed, the American Agency for its part endeavored to show that the claimant was the victim of a premeditated and treacherous assault committed by Flores; the Mexican Agency on the other hand attempted to excuse Flores, making Chase appear as the aggressor and alleging, therefore, that even if Flores did fire on Chase, he did so in the exercise of the right of self-defense. It is not necessary for the Commission to weigh all the evidence presented by Mexico, as it is not within its province to decide the degree of guilt attaching to Flores or to Chase. The only matter within its jurisdiction is to ascertain whether the Mexican authorities who took cognizance of the criminal acts which have been referred to administered justice pursuant to the principles of international law.

4. The Mexican Agency offered as evidence the record of the trial conducted by the Judge of First Instance of Juchitán, State of Oaxaca. The deliberations in this process cover a period which runs from the date upon which the claimant was wounded until the first of January, 1914, that is, a little more than three months, and during that entire

time it is seen that the Mexican authorities exercised diligence, taking all necessary steps to elucidate the facts, arresting Flores at the beginning and then decreeing his formal commitment, examining all eye-witnesses, confronting them with each other, having experts examine the wounds, etc., etc., all in accordance with Mexican law, regarding which it has not been alleged that there was a variance from the practices of civilized nations. Chase was also committed for trial to answer for his affair with Flores and for the wound he had involuntarily inflicted on the Mexican woman to whom reference has been made. The Commission does not find that any of the procedure considered warrants the opinion that there has been a denial of justice.

5. But from the evidence presented by the Mexican Government it would appear that Jacinto Flores was released on bond of a thousand pesos on the first of January, 1914, just as the claimant, Chase, had previously been released on a bond of three hundred pesos, on October 16, 1913; and it is seen from the record that after the two defendants were released, the Court which was handling the case did nothing further. Fourteen years have since passed. International justice is not satisfied if a Government limits itself to instituting and prosecuting a trial without reaching the point of defining the defendant's guilt and assessing the proper penalty. It is possible that in certain cases the police or judicial authorities might declare the innocence of a defendant without bringing him to trial in the fullest sense of the word. But if the data which exist in a case indicate the possible guilt of a defendant, even in the slightest degree, it cannot be understood why he is not tried to the extent of determining his responsibility. The instant case falls within that category. But in view of its attendant circumstances it does not appear that this denial of justice is an extreme case.

Therefore, taking into account the circumstances above set forth, I believe that an award should be made against the Government of Mexico.

Decision

The United Mexican States shall pay to The United States of America in behalf of John D. Chase the sum of \$5,000.00 (five thousand dollars), without interest.

NORTHERN STEAMSHIP COMPANY, INC. (U.S.A.) *v.* UNITED MEXICAN STATES

(October 3, 1928, dissenting opinion by American Commissioner, undated. Pages 20-22.)

BLOCKADE OF PORT IN CONTROL OF INSURGENTS. Ruling in *The Oriental Navigation Company* claim *infra* followed. Claim *disallowed*.

The Presiding Commissioner, Dr. Sindballe, for the Commission:

On April 12, 1924, the steamship *Stal*, time-chartered by the Northern Steamship Company, Inc., an American Corporation, and sub-chartered by that company to the Tampa Box Company, arrived at the port of

Frontera, Tabasco, Mexico, then in the hands of insurgent forces, for the purpose of loading a cargo of cedar logs and forwarding that cargo to Tampa, Florida. The loading was begun on April 14. On April 22, when only part of the cargo had been loaded, the vessel was ordered to put to sea by the gunboat *Agua Prieta*, flying the flag of the Mexican Federal Government. It obeyed the order and proceeded to Tampa with its partial cargo.

On behalf of the Northern Steamship Company, Inc., the United States of America are now claiming that the United Mexican States should pay the company damages in the amount of \$7,439.43 with due allowance of interest on account of the loss suffered by the company from the action of the *Agua Prieta*. On the grounds set forth in the case of *The Oriental Navigation Company*, Docket No. 411,¹ the Commission, however, holds that the action of the *Agua Prieta* did not constitute a breach of international law.

Having unloaded its partial cargo in Tampa, the *Stal* returned to Frontera, loaded a cargo of cedar logs during the time from May 8 to May 18, and brought this cargo to Tampa. This time the vessel met with no hindrances.

On May 30, the *Stal*, still time-chartered by the Northern Steamship Company, Inc., but now sub-chartered to the Astoria Mahogany Company of Long Island City, New York, arrived anew at Frontera for the purpose of taking a cargo of mahogany logs to be shipped by Romano and Company, Frontera, from Frontera to Astoria, Long Island. This time the Federal Mexican Government was again controlling the port. No cargo was delivered to the vessel by Romano and Company, and after having waited several days the vessel left Frontera.

Alleging that the reason why the vessel did not receive any cargo was that a loading permit which had been issued by the Mexican Government was afterwards cancelled as a penalty upon the vessel for her having traded to the port of Frontera while in the hands of insurgents, the United States of America are now claiming that the United Mexican States should pay the Northern Steamship Company, Inc., damages in the amount of \$12,277.79 with the allowance of interest thereon.

From the record it does not appear with any degree of certainty that a loading permit ever was issued. In a telegram dated May 28, the claimant company asked I. H. Drake, Vera Cruz, to secure the necessary loading permit, and by a telegram, dated June 9, Drake informed the claimants that the permit was suspended because of the ship's having operated at Frontera during the occupation of the port by the rebels. On the other hand, it appears that Romano and Company have not been able to deliver the cargo. They apologize—in letters dated June 6 and June 7—that the authorities had promised to place a suitable tug at their disposal, but had failed to fulfill that promise. In a letter to the captain of the vessel, dated June 9, they declare, that it will not be possible to deliver the cargo “inasmuch as the vessel under your command has no permit to load wood”. But on June 5 it appears that Romano and Company asked the Maritime Customs House to certify that as communication with Mexico City was interrupted and as no loading permit was received in the Customs

¹ See page 341.

House, delivery of the cargo in question could only take place on the exportation duties being calculated on the basis of the gross tonnage of the vessel instead of on the basis of measurements of the logs to be exported.

Decision

The claim of the United States of America on behalf of Northern Steamship Company, Inc., is disallowed.

Commissioner Nielsen, dissenting.

The principal reasons why I dissent from the opinion of my associates in this case are stated in the dissenting opinion which I wrote in the case of the *Oriental Navigation Company*, Docket No. 411, and I consider it to be unnecessary to make any further statement.

THE ORIENTAL NAVIGATION COMPANY (U.S.A.) *v.* UNITED MEXICAN STATES

(October 3, 1928, dissenting opinion by American Commissioner, undated. Pages 23-47.)

BLOCKADE OF PORT IN CONTROL OF INSURGENTS. Although a Government does not have the power to interfere with neutral trade on the high seas destined for ports in the control of insurgents, when one of its public vessels finds a neutral vessel in such a port without proper clearance documents, *held* it may order such vessel to discontinue loading and leave the port. Claim for loss of cargo *disallowed*.

Cross-references: Am. J. Int. Law, Vol. 23, 1929, p. 434; Annual Digest, 1927-1928, p. 531; British Yearbook, Vol. 11, 1930, p. 220.

The Presiding Commissioner, Dr. Sindballe, for the Commission :

On April 15, 1924, the steamship *Gaston*, owned by the Southgate Marine Corporation, and, according to a time charter dated February 28, 1924, operated by The Oriental Navigation Company, an American Corporation, cleared the port of New Orleans with a cargo of general merchandise consigned to Frontera, Tabasco, Mexico. When this cargo was unloaded, the vessel was to load a cargo of bananas, consisting of fifteen or sixteen thousand bunches, which had been purchased by agents of The Oriental Navigation Company and was to be transported from Frontera to New Orleans for the purpose of sale at the latter place for the Company's account.

At that time the port of Frontera and some other Mexican ports were in the hands of insurgents. The Government of the United Mexican States had decreed that those ports should be closed to international trade, and had officially informed the Government of the United States of America about the closure. In reply the Government of the United States of America had declared that it felt obliged to respect the requirements of international law according to which a port in the hands of insurgents can be closed by an effective blockade only, and, further, that

it felt obliged to advise American citizens engaged in commerce with Mexico that they might deal with persons in authority in such ports with respect to all matters affecting commerce therewith.

The *Gaston* arrived at Frontera on April 20, and anchored in the roadstead. The following day the unloading of her cargo was begun. In the afternoon the Mexican gunboat *Agua Prieta* was noticed cruising in the offing and ordering the *Gaston* to put to sea. On April 22 this order, accompanied by some random shots, was repeated, and subsequently the *Gaston*, having communicated with the *U. S. S. Cleveland* and the *U. S. S. Tulsa*, put to sea, having unloaded only part of her cargo, and without having loaded any part of the cargo of bananas. The vessel went back to New Orleans, where the rest of her cargo was unloaded. The cargo of bananas became a total loss.

On behalf of The Oriental Navigation Company the United States of America are now claiming that the United Mexican States should indemnify the Company for the loss suffered by it from the action of the gunboat *Agua Prieta*. The loss is alleged to amount to \$15,400.91, which sum is claimed with the allowance of interest thereon.

The respondent government refers to the fact that the belligerency of the insurgents in question had been recognized by no foreign power. It follows therefrom, the respondent government contends, that the Federal Government of Mexico, notwithstanding the revolution, was vested with full and undivided sovereignty over all her territory, so that it was a question solely dependent upon domestic Mexican law whether or not the Federal Government was entitled to close a Mexican port. But according to the General Customs Regulations of Mexico, whenever a port is occupied by rebels, it will be deemed closed to legal traffic, no Federal Consul or other official will authorize shipment of merchandise to it, and persons violating this law will be liable to the punishment prescribed for smugglers.

In the opinion of the Commission it cannot be said to depend solely on domestic Mexican law whether or not the Government of the United Mexican States was entitled to close the port of Frontera. In time of peace, it no doubt would be a question of domestic law only. But in time of civil war, when the control of a port has passed into the hands of insurgents, it is held, nearly unanimously, by a long series of authorities, that international law will apply, and that neutral trade is protected by rules similar to those obtaining in case of war. It is clear also, that if this principle be not adopted, the conditions of neutral commerce will be worse in case of civil war than in case of war.

Now, it has been submitted by the respondent government that the law protecting neutral commerce is not the same after the world war 1914-19 as it was before. The old rules of blockade were not followed during the war, and they cannot, it is submitted, be considered as still obtaining. Indeed, this seems to be the view of most post-war authors. They point to the fact that the use of submarines makes it almost impossible to have blockading forces stationed or cruising within a restricted area that is well known to the enemy. On the other hand, they argue, it cannot be assumed that there will be no economic warfare in future wars. Is it not a fact that Article 16 of the Covenant of the League of Nations even makes it a duty for the Members of the League, under certain circumstances, to carry on economic war against an enemy of

the League? But the economic warfare of the future, it must be assumed, will apply means that are entirely different from the classical blockade, and the old rule of the Paris declaration of 1856 will have to yield to the needs of a belligerent state subjected to modern conditions of naval war.

If the view above set forth were accepted, there would seem to be little doubt that the rather moderate action of the *Agua Prieta*, consisting in simply forcing off the port a neutral vessel without doing any harm to the vessel or her crew, must be considered to be lawful. The Commission, however, deems it unnecessary to pass an opinion as to the correctness of that view, which, at any rate, for obvious reasons could not be adopted without hesitation. The Commission is of the opinion that the action of the *Agua Prieta* can hardly be considered as a violation of the law obtaining before the world war. It is true that, according to that law, the trading of the *Gaston* to the port of Frontera was perfectly lawful. The Federal Mexican authorities would not be justified in capturing or confiscating the vessel, or in inflicting any other penalty upon it. Neither would a Mexican warship have a right to interfere, if, for example on the high seas, it met with a neutral vessel bound for a port in the hands of insurgents. But, on the other hand, the authorities do not show, and the Commission is of the opinion that it cannot be assumed that the Federal Mexican authorities should be obliged to permit the unloading and the subsequent loading of a neutral vessel trading to an insurgent port without such clearance documents as are prescribed by Mexican law, even in case control of the port should have been obtained again by those authorities before the arrival of the vessel to the port or be reobtained during her stay there. Now, in the present case, it cannot fairly be said that the port of Frontera was in the hands of insurgents at the time when the events in question took place. It was in fact partly commanded by the *Agua Prieta*. That being the case, and none of the authorities invoked by the claimants bearing upon a situation of this nature, the Commission holds that the lawfulness of the action taken by the *Agua Prieta* in forcing off the *Gaston*, which had not applied to the Mexican Consul at New Orleans for clearance. can hardly be challenged.

Decision

The claim of the United States of America on behalf of the Oriental Navigation Company is disallowed.

Commissioner Nielsen, dissenting.

This case raises an issue whether under international law authorities of a Government may properly by some domestic enactment in the form of an executive decree or legislation close a port in the possession of revolutionists, without preventing ingress or egress by means of an effective blockade, as that term is understood in international law and practice. The issue in the instant case may be more specifically stated to be whether, in the absence of a legal blockade, the interference by the Mexican war vessel, *Agua Prieta*, with the steamship *Gaston*, resulting in loss to those operating the latter, entails responsibility under international law on the respondent Government.

In behalf of the United States it is contended that responsibility exists. and contentions to this effect are grounded on assertions found in opinions of international tribunals and in diplomatic exchanges and in connection

with precedents in other forms. As illustrative of the general tenor of these the following passage may be quoted from a statement made in the House of Commons on June 27, 1861, by Lord John Russell, Secretary of State for Foreign Affairs of Great Britain, in regard to an announcement made in that year by the Government of New Granada concerning the closure of certain ports in possession of persons engaged in a civil war:

"The Government of New Granada has announced, not a blockade, but that certain ports of New Granada are to be closed. The opinion of Her Majesty's Government, after taking legal advice, is that it is perfectly competent to the government of a country in a state of tranquillity to say which ports shall be open to trade and which shall be closed; but in the event of insurrection or civil war in that country, it is not competent for its government to close the ports that are *de facto* in the hands of the insurgents, as that would be a violation of international law with regard to blockades." (Moore, *Digest of International Law*, Vol. VII, p. 809. For other precedents see *op. cit.*, pp. 803-820; Borchard, *Diplomatic Protection*, p. 181; Ralston, *The Law and Procedure of International Tribunals*, pp. 406-408.)

The burden of the argument made in behalf of the Government of Mexico is a forceful presentation in the brief and in oral argument of the view that the closure of a port under the conditions revealed by the record in the present case, without the institution of a blockade, could properly take place through the legal exercise of sovereign rights recognized by international law, since a distinction must be made between the closure of a port occupied by insurgents possessing a status of belligerency and the closure of a port occupied by revolutionists who have not the status of belligerents. It was pointed out that neither the Mexican Government nor any other government had recognized the belligerency of the de la Huerta forces. Some contention seems also to have been made in the Mexican brief and in the course of oral argument to the effect that the measures taken to close the port of Frontera satisfied the requirements of international law with respect to the exercise of the right of blockade.

Without discussion at this point of the soundness of that contention, it may be pointed out that the argument seems inconsistent with the principal contention upon which the defense is grounded. To be sure it is permissible to plead consistent defenses. However, in the Mexican brief, as well as in the oral argument, it was clearly contended that there was no blockade at Frontera, and that the legal situation of that port was such that the law of blockade could not apply to it. The measures employed to interrupt intercourse with the port of Frontera could not be both a blockade and not a blockade. And it therefore seems to me that unwarranted emphasis is placed in the opinion of my associates on what I may call the secondary ground of defense presented by the Mexican Government, namely, that the action of the Mexican authorities might be regarded as proper in the light of rules of international law with respect to blockade. I shall discuss first and mainly the principal contention upon which, it seems to be clear, the Mexican Government rests its case, namely, that a distinction must be made between the closure of a port in the control of insurgents to whom a status of belligerency has been accorded and the closure of a port occupied by revolutionists not having that status.

On the point whether this distinction exists in the law, information with regard to the precedents cited in the American brief and in the

Mexican reply-brief is incomplete. That information does not reveal the nature of the revolutionary movements to which the precedents cited relate, except as regards the American Civil War, the legal status of which is of course well known. In the early stages of that struggle a state of belligerency was recognized by several Governments, and at least impliedly by the parent Government. Nor was any such information furnished by the United States in a counter-brief after the development of the issue in the Mexican counter-brief.

To my mind no definite conclusion can be drawn from the citations in the brief of each Government as to the existence or nonexistence of a rule of international law *specifically applicable to the case of a closure of a port occupied by insurgents who do not possess the status of belligerents*. It would seem that some Governments have not acquiesced in the principle underlying declarations similar to those made by Lord John Russell. It is therefore important to consider whether it is possible to invoke rules or principles of law which are applicable to the issue raised in the instant case and which can be shown by the evidence of international law to have received the general assent which is the foundation of that law.

I am of the opinion that there are two aspects of this case in the light of which responsibility on the part of the respondent Government should be fixed, even though it may logically be said that responsibility may be determined solely in the light of the principles stated by Lord John Russell. Established principles of international law with regard to blockade were not observed, and a ship engaged in trading in a manner which it is stated in the opinion of my associates "was perfectly lawful" was the victim of an interference which to my mind was an invasion, or it might be said, a confiscation, of property rights.

In my opinion this case does not reveal any arbitrary act on the part of the Mexican Government in the sense that Mexican authorities deliberately ignored international law in declaring the port of Frontera closed. On the other hand, I do not consider that the charterers of the *Gaston* had any intention of flouting a proper Mexican law. They unquestionably suffered loss as a result of the action of Mexican naval authorities, and if that action, which it is explained was taken pursuant to Mexican legislation, did not square with international law, the claimants should receive compensation. If the action was justifiable under international law, the claimants of course must bear the loss they sustained.

I am of the opinion that judicial and administrative officials who have frequently asserted the broad principle embraced by the statement of Lord John Russell, that it is not competent for a Government to close ports in the hands of insurgents except by effective blockade measures, have made no distinction between the closure of ports occupied by revolutionists to whom the status of belligerents has been accorded by some affirmative act, and ports occupied by forces not so recognized as having that status. In my judgment they have logically refrained from making such a distinction, because such a recognition of belligerency is not a sound and practical standard by which to determine the propriety or impropriety of the closing of a port. The consideration of this specific point seems to require an examination into the nature of belligerency and the evidence by which a judicial tribunal might be guided in reaching a conclusion with respect to the existence or non-existence of that status.

Evidence of this nature would not in all cases be such as could warrant sound conclusions of law.

The recognition of a new state, that is, the acceptance by members of the family of nations of a new member, an international person, is regarded by Governments as a political question, although the act of recognition should of course be grounded on a sound legal basis. The same is true—it may perhaps be said more particularly true—with regard to what is sometimes spoken of as a recognition of a change in the headship of a state, or in the form of government of a state; an act that may perhaps be more properly described as a determination on the part of an established Government to have diplomatic relations with a new set of authorities who come into control of a State following an insurrection. This of course is not a case of the recognition of an international person. So it seems to me that the recognition of a state of belligerency, so-called, on the part of governments involves very largely political considerations.

Judge John Bassett Moore has said that the “only kind of war that justifies the recognition of insurgents as belligerents is what is called ‘public war’; and before civil war can be said to possess that character the insurgents must present the aspect of a political community or *de facto* power, having a certain coherence, and a certain independence of position, in respect of territorial limits, of population, of interest, and of destiny.” And he has added as an additional element essential to a proper recognition of a state of war “the existence of an emergency, actual or imminent, such as makes it incumbent upon neutral powers to define their relations to the conflict.” In other words, interests of neutral powers must be affected before they are justified in acting. *Forum*, Vol. 21, p. 291.

Dr. Oppenheim says that “in every case of civil war a foreign State can recognize the insurgents as a belligerent Power if they succeed in keeping a part of the country in their hands, set up a government of their own, and conduct their military operations according to the laws of war.” *International Law*, 3rd ed., Vol. I, p. 137. Such a situation existed following the outbreak of the American Civil War in 1861, which has been referred to in the briefs of both Governments. After President Lincoln had issued a proclamation of blockade by the Federal Government, other Governments were doubtless justified, from a legal standpoint, in taking affirmative action to give recognition to the existence of a state of belligerency between the northern states and the southern states, and some Governments did this by issuing declarations of neutrality. See Moore, *International Law Digest*, Vol. I, p. 185. But in a case in which no such action is taken by a parent Government the situation may be much less simple. Governments are guided by different considerations of policy or expediency as to the conditions and times of recognition either of new states or of a status of belligerency. And it seems to be doubtful that it can be accurately said that such a status in law is necessarily dependent upon some such affirmative acts. A parent Government may not choose to take such action and other Governments may likewise refrain from doing so. Yet the situation described by Dr. Oppenheim may nevertheless exist. The same writer, while asserting, in disagreement with some other writers, that a state becomes an international person through recognition only, observes that international law does not say that a State is not in existence as long as it is not recognized. A new régime or Government may gain control of a country and be the *de facto*, and from the standpoint

of international law therefore the *de jure* Government, even though other Governments may not choose to "recognize" it, as is often said, or as might probably better be said, to enter into diplomatic relations with it. And it seems to me that the same political situation may exist with respect to a state of belligerency, when the term is used to connote simply the fact of the existence of war. Of course I do not mean to suggest that the recognition of belligerency by a parent Government or by other Governments does not entail important consequences. The rights and obligations of revolutionists that are derived from the state of belligerency under international law are well defined. See on this point and on the nature of the conditions warranting recognition of belligerency, Moore, *International Law Digest*, Vol. I, pp. 164-205.

It is interesting to consider in connexion with this question the citation made by counsel for the United States of the opinion of this Commission in the case of the *Home Insurance Company*, Docket No. 73, *Opinions of the Commissioners*, 1927. U. S. Government Printing Office, Washington, p. 51. He quoted from the conclusions of the Commission with regard to the nature of the revolutionary movement in Mexico in 1923 and 1924, as follows:

"The de la Huerta revolt against the established administration of the Government of Mexico—call it conflict of personal politics or a rebellion or a revolution, what you will—assumed such proportions that at one time it seemed more than probable that it would succeed in its attempt to overthrow the Obregón administration. The sudden launching of this revolt against the constituted powers, the defection of a large proportion of the officers and men of the Federal Army, and the great personal and political following of the leader of the revolt, made of it a formidable uprising. President Obregón himself assumed supreme command. Through the vigorous and effective measures taken by the Obregón administration what threatened at one time to be a successful revolution was effectually suppressed within a period of five months from its initiation."

I accept the conclusions of the Commission in regard to the facts stated in this opinion in which I did not participate. Counsel argued that, Mexico not having been held responsible for the acts of insurrectionists in this case, because control over those acts was beyond the power of the Mexican authorities, the Mexican Government should be held responsible in the instant case under international law for improper interference with a ship trading with a port in control of the same forces for whose acts Mexico was held not to be liable in the *Home Insurance Company* case.

If the observations which I have made with regard to considerations that may prompt recognition or non-recognition of belligerency by governments are correct, it would not seem to be logical to attempt to make any distinction between the closure of a port held by insurrectionists who by some affirmative acts have been recognized as belligerents, and a port in the hands of revolutionists to whom such a status has not in this manner been accorded. And since it would appear to be impracticable in all cases to make that distinction, there would seem to be a good reason why it has not been made, as it apparently has not. It is not my purpose to attempt to state any principles as to what constitutes a state of belligerency or justification for recognition of belligerency, nor principles as to the effect of affirmative acts of recognition or of the absence of such acts, but merely to indicate that in my opinion the distinction contended

for by the Mexican Government has not been made by governments or by international tribunals that have dealt with this question of the closure of ports without the enforcement of the closure by blockade measures, and that the distinction is not a logical one.

If this view be correct, it disposes of the Mexican Government's defense, unless account be taken of what I have spoken of as a secondary defense in support of which it was contended that the port of Frontera was blockaded, although it was also contended that the port was not blockaded, and that the legal situation of the port was such that there could be no blockade. If the distinction made by the Government of Mexico has no basis in law, then there is not before the Commission any special situation, but a case governed by applicable, reasonably well established principles of international law with respect to the exercise of the right of blockade. We have not a case governed solely by domestic law, or a case involving a consideration of rules or principles of law which are distinct from those relating to blockade by virtue of some theory that the latter are applicable only in times of international war, or in the case of a civil war when a state of belligerency on the part of insurgents has been recognized by the parent Government or by some other Government. Mexico has adhered to the Declaration of Paris of 1856 which asserts the rule that a blockade to be binding must be effective. It seems to me scarcely to be necessary to say anything to show that no blockade was established and maintained at Frontera in accordance with international law.

I do not consider it to be necessary, although I deem it to be proper, to ground my views with regard to the responsibility of Mexico in the instant case solely on principles of law with respect to the exercise of belligerent rights in relation to blockade. In the Mexican brief and in oral argument it was contended that Article VI of the Mexican customs laws is not repugnant to international law. This Commission on several occasions has had under consideration acts of authorities of a government violative of personal rights, also the standing in international law of domestic laws destructive of property rights. It seems to me that this Article of the customs laws, if given the interpretation put upon it by counsel for Mexico in the Mexican brief and in oral argument, according to which interference with the claimant's vessel is justified, must be regarded as legislation of that kind. The Article reads as follows:

"When the place in which a maritime or border custom house is located secedes from the obedience of the Federal Government, or is occupied by forces in revolt, legal traffic therewith shall be held immediately as closed and, from that time, no Federal office shall authorize the despatch of merchandise for the point which has withdrawn from Federal authority, nor shall it receive merchandise coming from such place until it shall return to obedience of the Federal power. Goods en route to the closed custom house may be imported through another custom house as provided by this law. The violators of this provision shall be punished as stipulated by this ordinance for smugglers, without prejudice to applying other penalties corresponding to the case." (Translation.)

In sweeping terms the law purports to close all insurgent ports without reference to any specific port. Let it be assumed for the purpose of discussion—at variance with the contention made in behalf of the United States—that a Government may properly under international law by some form of legal enactment close a given port without effectively by proper blockade impeding ingress and egress. Such action would assuredly

be entirely different from action taken pursuant to a law which closes ports without specifically mentioning the ports closed. The operators of a vessel accustomed to enter a given port might discover as it entered that the place had been occupied by revolutionists on the very day of entry and might find themselves in the position of law-breakers. Doubtless it may be properly stated as a general principle that penal legislation involving punishment by confiscation of property must be framed so as to give some notice of proscribed acts. This principle is obviously entirely distinct from the general principle that ignorance of law is no excuse for violation of the law. A different kind of a law would be one providing for the closing of ports in the hands of insurrectionists following some public pronouncement in a given case with respect to a designated port coming under the control of revolutionists. Such a pronouncement could have the effect of law. The notice sent to the Government of the United States by the Mexican Ambassador under date of December 18, 1923, with regard to the closing of the port of Frontera was not in my opinion any such law. A similar notice might be very important in the case of a proclamation of blockade, that is, of course, if it had the effect of announcing a blockade. But the notice given can not be considered as a law of which the owner of a vessel should take cognizance. And one Government can not expect that its domestic legislation or decrees or orders shall be carried out by another Government through some form of restraint imposed on the vessels belonging to the latter.

I have indicated the view that the interference with the operations of the steamship *Gaston*, which it is said took place pursuant to Article VI of the Mexican customs laws, was destructive of property rights. In the opinion of my associates it is said that "the trading of the *Gaston* to the port of Frontera was perfectly lawful". I agree with that view. If the *Gaston* was engaged in lawful operations when it was prevented from taking on its cargo, which became a total loss as a result of the action taken by the *Agua Prieta*, I am unable to perceive that this action can be regarded as a proper one, entailing no responsibility on the part of the Mexican Government. It does not seem to me that the majority opinion of the Commission justifies the interference by the war vessel with the pursuit of a lawful avocation by the merchant vessel.

It is interesting to consider by the way of analogy in connection with this point an opinion rendered by Mr. Justice Hughes of the Supreme Court of the United States in the case of *Truax v. Raich*, 239 U. S. 33. In that case the contention was made that a law of the State of Arizona, restricting the employment of aliens by employers in that State, was violative of the Fourteenth Amendment to the Federal Constitution, in that it involved a denial of the equal protection of the laws. The contention was sustained. The "right to earn a livelihood" said Mr. Justice Hughes "and to continue in employment unmolested by efforts to enforce void enactments" is one which a court of equity should protect. And he declared that it required no argument to show that "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure."

With respect to the argument made in behalf of the Government of Mexico that Article VI of the customs laws is not in derogation of international law, it seems to be pertinent to take account of another aspect

of that enactment, in the light, of course, of the construction put upon it by counsel. Under that construction the closure of any place which has seceded or which may be occupied by forces in revolt is authorized. No distinction is made in the terms of the law between a port in the hands of revolutionists whose belligerent status has been recognized by some affirmative act, and a port controlled by forces not so recognized. In the Mexican brief the argument seems to be made that, only in the case of international war must the closure of ports be effected by measures of blockade, yet, in oral argument counsel for Mexico evidently took the correct position that, in the case of civil war when a status of belligerency is accorded to insurrectionists, international law requires that the closure of ports in the hands of insurrectionists must be enforced by blockade.

In giving application to law, a judicial tribunal is not concerned with questions with respect to the propriety or the advantages or disadvantages of a rule of law that neutrals have a right to carry on trade with insurgent ports, unless they are prevented from doing so by methods prescribed by international law. The principle underlying the rule may perhaps be said to have something in common with that which has frequently been asserted, to the effect that the right of aliens to deal with insurgents in control of a given territory must be recognized, and that if the aliens are required to pay duties or taxes to insurgents, a Government which regains control of the territory should not exact double payments. See Moore, *International Law Digest*, Vol. VI, pp. 995-996.

By an Act of Congress of the United States of July 13, 1861, the President was authorized to proclaim the closure of ports of the southern Confederacy. However, this enactment seems to have been construed by the Government of the United States as a measure conferring on the Executive authority, if that should be deemed to be necessary, to close these ports. And they were closed by a formal proclamation and the maintenance of a blockade. Moore, *International Law Digest*, Vol. VII, pp. 806-812; Oppenheim, *International Law*, 3rd ed., Vol. 2, p. 515.

I am not certain that I understand the precise ground on which Mexico is absolved from responsibility in the opinion of the majority of the Commissioners. It is said that in "the opinion of the Commission it cannot be said to depend solely on domestic Mexican law whether or not the Government of the United Mexican States was entitled to close the port of Frontera". And the view is indicated that "in time of civil war, when the control of a port has passed into the hands of insurgents", application must be given to international law. It would appear therefore that the majority opinion rejects the Mexican Government's contention that the closing of the port of Frontera, conformably to Article VI of the customs laws, was consistent with international law. The view seems further to be made clear by the statement, to which reference has already been made, that "the trading of the Gaston to the port of Frontera was perfectly lawful", although it was contended in behalf of Mexico that the action of the vessel was a violation of Article VI of the customs laws. If this statement is correct—and I am of the opinion that it is, in the light of international law—it would appear that in the opinion of all three Commissioners Article VI of the customs laws, as construed by counsel for Mexico, is at variance with international law. The further conclusion must therefore follow that in accordance with international law the closure of the port could properly be effected only by a blockade.

The majority opinion proceeds to a discussion of some predictions made in the Mexican brief with regard to the future of international law relative to the exercise of belligerent rights. It is said in the brief that the "modern blockade can no longer be attempted to be subjected to the condition of effectiveness"; that "a blockade will not be established merely by vessels stationed or by cruisers operating in the vicinity of the enemy's coast"; that it will be established "by stationing war vessels in all seas, at every point in the globe, on commercial routes, which will stop all vessels whose destination to the territory declared to be blockaded may be proven or presumed, or by constituting zones of war more or less extensive in the jurisdiction of that territory, in which zones mines will be placed or submarines will cruise". The argument appears further to be made in the brief that the action taken with respect to the closing of the port of Frontera, including the action of the *Agua Prieta*, may be justified in the light of "the new international theories which arose by reason of the War of 1914-1919".

I am unable, as I have already indicated, to reconcile contentions of this kind with statements in the brief (probably not altogether adhered to in oral argument) to the effect that no question of blockade could arise in connexion with the closing of the port pursuant to sovereign rights exercised in accordance with Article VI of the customs laws. As illustrative of statements of this character, attention may be called to the following:

"The first thing to observe in this connection is that the belligerency of the revolutionary movement in question was never recognized by any foreign country and much less by the United States of America. We are, then, before a case where there are no belligerents, where there are no neutral powers and where, therefore, the simple basic elements of the right of blockade are lacking. This shows that the revolution with which we are dealing, cannot be governed by those rules of international law which apply to blockades. But said revolution must be governed by some laws and if the latter are not those of international sanction relative to blockades, they necessarily have to be the laws of Mexico, inasmuch as the unity of this nation and the sovereignty of her only recognized Government were not interrupted for a single moment."

.....

"Summarizing: in case of civil war, while the belligerency of the faction opposed to the Government has not been recognized, the municipal laws of the country continue to be applicable and international law is not applicable."

The views expressed in the Mexican brief with respect to the change and the future of international law appear to find some support in the following passage found in the opinion of my associates:

"The old rules of blockade were not followed during the war, and they cannot, it is submitted, be considered as still obtaining. Indeed, this seems to be the view of most post-war authors. They point to the fact that the use of submarines makes it almost impossible to have blockading forces stationed or cruising within a restricted area that is well known to the enemy. On the other hand, they argue, it cannot be assumed that there will be no economic warfare in future wars. Is it not a fact that Article 16 of the Covenant of the League of Nations even makes it a duty for the Members of the League, under certain circumstances, to carry on economic war against an enemy of the League? But the economic warfare of the future, it must be assumed, will apply means that are entirely different from the classical blockade, and the

old rules of the Paris declaration of 1856 will have to yield to the needs of a belligerent state subjected to modern conditions of naval war.

"If the view above set forth were accepted, there would seem to be little doubt that the rather moderate action of the *Agua Prieta*, consisting in simply forcing off the port a neutral vessel without doing any harm to the vessel or her crew, must be considered to be lawful. The Commission, however, deems it unnecessary to pass an opinion as to the correctness of that view, which, at any rate, for obvious reasons could not be adopted without hesitation."

Of course custom, practice, and changed conditions have their effect on international law as well as on domestic law. However, it need not be observed that a violation of law is not equivalent to a modification or abolition of law. The fact that new instrumentalities of warfare make it inconvenient for a belligerent in control of the sea in a given locality to act in conformity with established rules of law does not *ipso facto* result in a change of the law or justify disregard of the law. And if we indulge in speculation, it would not be a rash conjecture, in the light of experience, that the same belligerent, should his position be changed by a loss of control of the sea, would insist strongly on the observance of established rules and principles. It seems to be probable that among those who have given serious thought to the breakdown of the system of international law with regard to the exercise of belligerent rights on the seas and to the possibility of formulating rules that will be respected, there may be some who would not complacently vision a system of promiscuous seizure of and interference with neutral merchant vessels, or the promulgation of edicts with regard to forbidden mine-planted zones in the high seas in which the nations have a common right. Indeed it may be suggested that some might find it a more proper solution of the problem that the high seas should be maintained as the common highways in time of war, as in times of peace, and that to that end, interference with neutrals might be restricted to belligerent waters only.

A rule of law is put to a test whether it means something when honorable respect for it involves inconvenience or material sacrifice, or whether it is to become farcical by being flouted under some theory of plasticity or changed conditions, theories similar to the somewhat dangerous doctrine of *rebus sic stantibus* with respect to treaties. It is an elementary principle that the propriety of an act is governed by the law in force at the time the act is committed. International law is a law for the conduct of nations grounded on the general assent of the nations. It can be modified only by the same processes by which it is formulated. A belligerent can not make law to suit his convenience. An international tribunal can not undertake to formulate rules with respect to the exercise of belligerent rights, or to decide a case in the light of speculations with regard to future developments of the law, thought to be foreshadowed by derogations of international law which unhappily occur in times of war. Members of the League of Nations doubtless have entered into certain obligations under Article 16 of the Covenant of the League, but it must not necessarily be presumed that they must carry out their contractual obligations in violation of international law. It should rather be assumed that any action taken in fulfillment of such obligations will be executed in a manner consistent with that law. In the agony of great international conflict, resort may be had to expedients to circumvent law, but the law remains. As was said by Acting Chief Justice Sir Henry Berkeley in the case of the *Prometheus*:

"A law may be established and become international, that is to say binding upon all nations, by the agreement of such nations to be bound thereby, although it may be impossible to enforce obedience thereto by any given nation party to the agreement. The resistance of a nation to a law to which it has agreed does not derogate from the authority of the law because that resistance cannot, perhaps, be overcome. Such resistance merely makes the resisting nation a breaker of the law to which it has given its adherence, but it leaves the law, to the establishment of which the resisting nation was a party, still subsisting. Could it be successfully contended that because any given person or body of persons possessed for the time being power to resist an established municipal law such law had no existence? The answer to such a contention would be that the law still existed, though it might not for the time being be possible to enforce obedience to it." (Supreme Court of Hong-kong, 2 Hongkong Law Reports, 207, 225.)

The majority opinion, after discussing views with regard to the possible law of the future, states that it is unnecessary to pass an opinion with regard to those views, and that the Commission "is of the opinion that the action of the *Agua Prieta* can hardly be considered as a violation of the law obtaining before the world war." The reasoning of the opinion up to this point evidently is that the port of Frontera could not be closed by some order or decree pursuant to a domestic law, and that international law was applicable in considering the measures that might properly be employed. Those measures it is concluded were in harmony with international law existing prior to the World War with regard to the exercise of the right of blockade. I disagree with that view. A belligerent is accorded the right to obstruct trade with a port both, as regards ingress and egress, by virtue of the physical power to effect the obstruction and of the exercise of that power. I think that it is unnecessary to enter into any detailed discussion of the meaning of an effective blockade in order to show that none existed at Frontera—even if considerable allowance be made for speculation concerning recent changes in established principles of law.

It appears from the record that the steamship *Stal*, with respect to which a claim was argued in connection with the instant case, had been in port for ten days when the *Agua Prieta* arrived in the locality of Frontera, and that the *Gaston* arrived one day previous to that time. From evidence presented by Mexico it appears that Mexican authorities had undertaken to close several ports on the Pacific, the Gulf and the Atlantic coasts, including the port of Frontera. The coast line along which the Gulf ports and the Caribbean ports were closed, is approximately 900 miles in length. From evidence filed by the Mexican Government it appears that one gunboat, the *Agua Prieta*, and two revenue cutters were engaged in carrying out what is called a blockade in a communication sent by a Mexican naval commander to his Government under date of April 25, 1924. It appears from the record that one of the purposes of the *Agua Prieta* was to conduct an inspection of lighthouses. From a report made by the Commander of the *Agua Prieta* it appears that, due to trouble with the engine, his vessel was able to travel only at approximately two miles an hour. The brief visit of the *Agua Prieta* to the waters outside of Frontera was not an effective blockading of ingress and egress. The communication sent to the Government of the United States with respect to the closing of the port of Frontera which made no mention of blockade was neither notice nor proclamation of blockade. In the written and in the oral argument in behalf of Mexico it was suggested, presumably on the theory that notice was required, that that communication might be considered

as notice of blockade. The firing of some shots in the direction of the *Gaston* lying in the harbor and the signals sent to it ordering it to depart were not a proper substitute for capture or prize court proceedings or warning.

By way of comparison, mention was made in the record of the blockade measures employed during the American Civil War. The coast of the Confederate States to the extent of 2,500 nautical miles was blockaded by about 400 Federal cruisers. Oppenheim, *International Law*, Vol. II, 3rd ed., p. 525. At the single port of Charleston there were stationed in July of the year 1863 twenty-three vessels. *Proceedings of the United States Naval Institute*, Marine International Law, Commander Henry Glass, U. S. N., Vol. XI, p. 442. Possibly a single vessel might have satisfied the requirement of the situation at Frontera, but the visit of the *Agua Prieta* in my opinion did not.

Towards the close of the majority opinion are some observations which would seem to be at variance with the view expressed in a preceding portion to the effect that, in spite of the provisions of Article VI of the Mexican customs laws, and the closure of that port pursuant to that Article, the trading of the *Gaston* with the port of Frontera was perfectly lawful; that domestic law alone was not determinative of the right of the Mexican Government to close the port; and that Federal authorities "would not be justified in capturing or confiscating the vessel, or in inflicting any other penalty upon it." These views it seems to me must be grounded on the theory that the port was out of the control of the Mexican authorities; that therefore international law and not domestic law governed the right of a ship to enter and to leave the port; and that according to international law capture, confiscation or the infliction of any other penalty on the *Gaston* would have been improper. However, it is said in the majority opinion that "it cannot fairly be said that the port of Frontera was in the hands of insurgents at the time when the events in question took place"; that that port was "in fact partly commanded by the *Agua Prieta*; and that this being the case, "and none of the authorities invoked by the claimants bearing upon a situation of this nature, the Commission holds that the lawfulness of the action taken by the *Agua Prieta* in forcing off the *Gaston*, which had not applied to the Mexican Consul at New Orleans for clearance, can hardly be challenged." As I have just observed, this view seems to me to be at variance with the reasoning of other portions of the opinion, and it appears to be equally at variance with the contentions of the Mexican Government, and with the facts disclosed by the record.

In the notice of December 18, 1923, sent by the Ambassador of Mexico to the Department of State at Washington it is stated that the port of Frontera had been removed "from the action of the constituted legitimate authorities." In the Mexican Answer in the case relating to the *Stal*, it was stated that the order of closure was a proper one to prevent that any local or international trade be carried on with the port which because of sedition "has been temporarily wrested from the control of the legitimate authorities as has been in fact the situation with the port of Frontera at the time when the said vessel (the *Stal*) arrived". In a notice sent by the Mexican Legation in Havana to the Secretary of State of Cuba, under date of May 31, 1924, it was stated that the port of Frontera had again "come under the control of the constitutional authorities". In a com-

munication among the records of the de la Huerta insurrection found in the archives of the Department of Foreign Relations of Mexico, it is stated that the ports of the Gulf of Mexico and the Caribbean Sea with the exception of Tampico "are out of the control of the Government". In a message sent by Rear Admiral H. Rodríguez Malpica to the Secretary of Foreign Relations of Mexico, it is stated that the former "effected blockade" in the port of Frontera and other ports "held by rebels".

It is possible to conceive of an interesting situation in which land forces of insurgents might be in control of a seaport town and yet not in complete control of the port, because entry might be commanded by regular forces on an island or promontory from which the mouth of the harbor could be commanded. But in my opinion the casual visit of the *Agua Prieta* for a day in the vicinity of the port of Frontera in the manner disclosed by the record does not justify the conclusion that the port was in fact partly commanded by the *Agua Prieta*. The visit occurred, as has been pointed out, ten days after the *Stal* entered the port and one day subsequent to the entry of the *Gaston*. I do not believe that a single, brief visit of a war vessel in the vicinity of a port occupied by insurgents is tantamount to a control or command of the port that would relieve a government of the obligation to maintain a blockade as required by international law for the purpose of effecting a closure of the port.

As I have indicated, I am of the opinion that international law with regard to the exercise of the right of blockade is applicable to the situation existing at the port of Frontera when the *Gaston* was subjected to interference and consequent loss. I do not think there is any distinction in international law and practice, or in logic, between a port held by insurgents whose belligerency has been recognized by some affirmative act and a port occupied by insurgents to whom that status has not been accorded in that manner. I therefore disagree with the contention upon which the Mexican Government's defense is based with respect to this distinction. And I accordingly must therefore also disagree with a somewhat similar distinction which seems to be made in the American brief in which it is said that "the laws of war, and therefore the laws of blockade, had and could have no application to the situation under discussion, for it does not appear that either the Government of Mexico or the Government of the United States had recognized a status of actual belligerency as existing in Mexico at this time." In the course of oral argument counsel for the United States seemed to depart from that view.

The American brief seems to treat the closing of a port held by insurgents whose belligerency had not been recognized by some government as a kind of special case to which the law of blockade is not applicable. If this view be correct, and if international law with regard to blockade is not applicable in such a case, then a parent government would seem to be impotent, if it can not close a port by domestic enactment, to close the port at all, in the absence of some action by the parent government distinct from a blockade or following some form of recognition by other governments each of which might in behalf of its own vessels solely, or in behalf of the vessels of another country, legalize a blockade. I do not agree with such a view.

President Lincoln did not defer issuing a proclamation of blockade of the ports of the Confederate States until he had by some other affirmative act "recognized a state of actual belligerency" of the seceding states.

The establishment of the blockade has generally been considered to be the recognition of a state of war and has been so regarded by American courts. Prize Cases, 2 Black 635. Nor did President Lincoln before establishing a blockade await some affirmative acts of recognition of belligerency by other governments. Their acts followed the establishment of the American blockade and generally took the form of declarations of "neutrality". Moore, *International Law Digest*, Vol. 1, pp. 184-185.

Insurgent ports can be closed by effective blockade measures. The pronouncements of Governments, the opinions of international tribunals and the writings of authorities, in my opinion, all support the views that effective blockade is necessary to close an insurgent port, and that no distinction such as that for which the Mexican Government contends exists. This view is not at variance with the contention advanced in behalf of Mexico that Mexican sovereignty continued to exist in the territory occupied by insurgents. The Mexican Government was not able to exercise governmental functions in that territory, but I take it that *from the standpoint of international law and relations* the sovereignty of a nation over territory occupied by insurgents is not destroyed until insurrectionists have established their independence.

Some precedents cited by counsel might seem to be at variance with the principles asserted by Lord John Russell to which reference has been made, but on examination I think it will be found that they are not.

With regard to the dispute between Spain on the one hand and Germany and Great Britain on the other hand concerning the closing of ports in the Sulu Archipelago, it should be observed that an examination of the diplomatic correspondence with respect to this controversy shows that both Germany and Great Britain took the position that Spain did not possess sovereignty in the Sulu Archipelago and of course therefore not control. *British and Foreign State Papers*, Vol. 73, pp. 932-996.

In the case of the brig *Toucan*, it appears that Brazilian authorities detained this vessel at São Joze do Norte, where it stopped to discharge a portion of its cargo, and that they refused to let it proceed to Porto Alegre. (Moore, *International Arbitrations*, Vol. V, p. 4615.)

Commissioner Fisher, appointed under an Act of Congress of the United States to distribute the indemnity under the Convention of January 27, 1849, between the United States and Brazil, said that the "preventing of the *Toucan* and other vessels by the Brazilian authorities from going up to an interior port which had been closed on account of a civil insurrection existing there at the time, was but the exercise of a right incident to a sovereign state." If the decision of Commissioner Fisher rejecting a claim made in behalf of the *Toucan* should be considered to be in conflict with opinions of international tribunals to the effect that ports in the hands of insurgents can properly be closed only by a blockade, there would seem to be no reason to attribute to that particular opinion greater weight than to the others. On the other hand, Commissioner Fisher's opinion should probably not be construed to be at variance with the views expressed by the Government of the United States and the Government of Great Britain and by international tribunals and writers on international law, that international law does not sanction the closing of such ports merely by a decree or a domestic legislative enactment. Commissioner Fisher seems to have grounded his opinion mainly if not entirely on treaty provisions between the United States and Brazil. Further-

more, it would seem that much can be said in favor of the view that a Government might, in the proper exercise of sovereignty, refuse to clear a ship from within its jurisdiction, at one of its own ports, for an inland port within its dominions, temporarily occupied by insurgents.

In a somewhat similar situation it may be doubted that it would be in derogation of international law for authorities of a government to refuse to clear foreign vessels from one of its seaports to another seaport within its territory. However, a different view seems to have been expressed by Commissioners under the Convention of September 26, 1893, between Great Britain and Chile in the case of the bark *Chépica*. In 1891 authorities of the port of Valparaíso refused to permit this vessel to sail for Tocopilla, because the latter port was occupied by revolutionary forces. In an opinion rendered on December 12, 1895, this action seems to have been condemned by the British Commissioner and the Belgian Commissioner as violative of international law, although the claim made in behalf of the vessel was dismissed on a jurisdictional point. Moore, *International Arbitrations*, Vol. V, p. 4933. For a discussion of the refusal of Chilean authorities to grant clearance under such conditions, see Moore, *International Law Digest*, Vol. VII, pp. 815-817.

In oral argument counsel for Mexico cited an author, Dr. N. Politis, who appears to sustain the distinction which counsel for Mexico undertook to make. After referring to blockade in an international war and blockade in a civil war, Dr. Politis says:

"So long as the insurrection has not assumed through the recognition of the insurgents in the capacity of belligerents an international character, and remains a purely domestic conflict, the legally constituted government may close all or part of the ports of the country in the exercise of authority, by police measure, without establishing, properly speaking, a blockade."¹ (*Recueil Des Cours*, 1925, Vol. 1, pp. 94-95.)

However, the author cites no legal authority for this view and gives no reasons for the distinction he makes. In my opinion a correct statement of the law is found in the following passages from an article by Professor George Grafton Wilson found in Volume 1 of the *American Journal of International Law*, 1907, pp. 55, 58:

"The legitimate government cannot in any way throw the burden of executing its decrees upon a foreign state. Even its decrees of closure in time of insurrection must be supported by sufficient force to render them effective....

"Attempts have also been made by the parent State to obtain advantages of a blockade without the obligations of war through a proclamation declaring ports held by insurgents closed. Foreign States have, however, usually taken the position that such decrees are of no effect and the ports in the hands of the insurgents are closed only to the extent to which an effective force may physically prevent entrance....

"If ports in the possession of the insurgents could be closed by decree, there would be a close analogy to the old idea of a paper blockade. The principle has come to be generally recognized that in time of insurrection closure to be respected must be by effective force."

¹ "Tant que l'insurrection n'a pas pris par la reconnaissance des insurgés en qualité de belligérants, un caractère international et reste une lutte purement interne, le gouvernement légal peut fermer tout ou partie des ports du pays par voie d'autorité, par mesure de police, sans y établir, à proprement parler, un blocus."

The above quoted statements appear to be of particular interest in connection with the question under consideration, since the author's article is largely concerned with the distinction between war in connection with which there has been a "recognition of belligerency by a state" and war which exists without such recognition. The latter the author for the purposes of his discussion apparently designates as "insurrection".

Of similar particular interest are some references in the message of December 8, 1885, sent by President Cleveland to the Congress of the United States. He referred to "a question of much importance" presented by decrees of the Colombian Government, proclaiming the closure of certain ports then in the hands of insurgents, and declaring vessels held by the revolutionists to be piratical and liable to capture by any power. The President explained that the United States could assent to "neither of these propositions"; that "effective closure of ports not in the possession of the government, but held by hostile partisans, could not be recognized"; and that the "denial by this Government of the Colombian propositions did not, however, imply the admission of a belligerent status on the part of the insurgents." *Foreign Relations of the United States*, 1885, p. v.

G. L. SOLIS (U.S.A.) *v.* UNITED MEXICAN STATES

(October 3, 1928. Pages 48-56).

EVIDENCE BEFORE INTERNATIONAL TRIBUNALS.—AFFIDAVITS AS EVIDENCE. Affidavits *held* admissible as evidence.

NATIONALITY, PROOF OF. Although nationality of a claimant must be determined in the light of the law of the claimant Government, local law as to evidence sufficient to establish nationality *held* not binding on an international tribunal. Nevertheless, such local law will not be ignored.

BAPTISMAL CERTIFICATE AS PROOF OF NATIONALITY. Baptismal certificate dated May 1, 1883, of child born September 13, 1882, together with two supporting affidavits of third parties, *held* sufficient proof of nationality.

DUAL NATIONALITY. Claim will not be rejected on ground claimant possessed dual nationality solely by virtue of fact claimant's name appeared to be of Spanish origin.

FAILURE TO PROTECT. Evidence of failure to protect against acts of revolutionary forces *held* insufficient.

RESPONSIBILITY FOR ACTS OF SOLDIERS.—DIRECT RESPONSIBILITY. Claim for taking of property by soldiers, presumed to be under command of officers, *allowed*.

Cross-references: Am. J. Int. Law, Vol. 23, 1929, p. 454; Annual Digest, 1927-1928, pp. 242, 483; British Yearbook, Vol. 11, 1930, p. 220.

Commissioner Nielsen, for the Commission:

Claim is made in this case by the United States of America in behalf of G. L. Solis to obtain compensation for cattle said to have been taken

by Mexican soldiers from the claimant's ranch, called Morales, in the state of Tamaulipas, Mexico, in 1924. The claim consists of two items, one of \$535.00 for cattle alleged to have been taken by "de la Huerta revolutionary forces", and one of \$120.00 for cattle alleged to have been taken by Mexican federal forces. A "proper amount of interest" is asked for in the Memorial.

In the Answer of the Mexican Government it is alleged that "The American nationality of the claimant does not appear duly proven". Some point is made of a discrepancy in the record with respect to the given name of the claimant, and with respect to an explanatory affidavit accompanying the Memorial, it is stated that it "is wanting in any probatory force, inasmuch as it is *ex parte*." These contentions were forcefully and in much detail elaborated by counsel for Mexico in oral argument and in the Mexican brief.

Affidavits have been used by both parties in the pending arbitration. Use has been made of them extensively in arbitrations in different parts of the world for a century. And in Article III of the Convention of September 8, 1923, Mexico and the United States stipulate that they may be used before this Commission. It is unnecessary to observe, therefore, that the Commission can not regard them as being without any probatory force.

The divergence of views between counsel for the respective parties in the arbitration probably results to some extent from differences in local customs and practices in the two countries. However, this Commission is an international tribunal, and it is its duty to receive, and to appraise in its best judgment, evidence presented to it in accordance with arbitral agreement and international practice.

The records before the Commission contain correspondence between the two Governments, communications of various kinds contemporaneous with the occurrences pertaining to claims, and documents evidencing transactions entering into these claims. It is of course necessary in cases tried either before international courts or domestic courts to obtain evidence with regard to occurrences out of which claims arise. Testimony of witnesses may be offered, subject to cross-examination, but obviously in international arbitrations this procedure is seldom practicable. No oral testimony has heretofore been offered to the Commission. Sworn statements and unsworn statements have been laid before the Commission. Unquestionably it is true, as has been argued before the Commission, that affidavits used before domestic courts have contained false statements, but it does not follow that, because false testimony may be revealed in a given case that there is a presumption that all testimony is false, and that a form of evidence sanctioned by the arbitral agreement and by international practice can not be used profitably. When sworn statements instead of unsworn statements are employed in an international arbitration it is undoubtedly because the use of an affidavit in an arbitration is to some extent an approach to testimony given before domestic tribunals with the prescribed sanctions of judicial procedure. When sworn testimony is submitted by either party the other party is of course privileged to undertake to impeach it, and, further, to analyse its value, as the Commission must do.

Due no doubt to a measure to local custom and practice but slight use of affidavits have been made by the Mexican Government in the

pending arbitration. As has been pointed out to the Commission, and as it is doubtless well known, affidavits are used extensively in the United States by administrative and by judicial officials. Citizenship is a domestic matter in no way governed by international law, although multiplications of nationality frequently result in international difficulties. It has sometimes been said that, since obviously nationality of a claimant must be determined in the light of the law of the claimant government, proof adequate to establish citizenship under that law must be considered sufficient for an international tribunal. Even if this view be not accepted without qualification, it is certain that an international tribunal should not ignore local law and practices with regard to proof of nationality. The liberal practice in the United States in the matter of proving nationality in the absence of written, official records is shown by numerous judicial decisions. See for example, *Boyd v. Thayer*, 143 U. S. 135. It requires only a moderate measure of familiarity with international arbitral decisions, many of which are conflicting, to know that no concrete rule of international law has been formulated on this subject of proof of nationality.

A certificate of baptism showing that the claimant was baptized at Brownsville, Texas, in 1883, accompanies the Memorial. It is doubtless true that a birth certificate would have been more convincing evidence, in view particularly of the fact that the date of baptism is recorded as May 1, 1883, and the date of birth appearing in the certificate is September 13, 1882. To be sure, the claimant might have been born in one country and as an infant taken into another country and baptized there, but the Commission can not assume this to be a fact, and in the light of explanatory affidavits accompanying the Reply, the Commission is justified in reaching the conclusion that he was born in the country in which he was baptized. Irrespective of minute criticisms and speculations that might be made with regard to the affidavit of George Champion, a man 75 years of age, who swears that he is intimately acquainted with the family of the claimant, and that the claimant and his mother and father were born in Texas, there is no reason to disregard the testimony which he offers or to consider it to be unconvincing. The same is true with regard to the affidavit of J. A. Champion, who explains that he possesses similar knowledge concerning the Solis family. It is doubtless well known that birth certificates are often not available among official records in the United States.

A question has been raised with respect to dual nationality. The argument of counsel for Mexico on this point, involving a supposition that the claimant may possess Mexican as well as American nationality, apparently was predicated solely on the fact that claimant's name appears to be of Spanish origin. The prevalence of Spanish names in territories of the United States bordering on Mexico is probably a matter of very general information, and in any event, this fact is of course easily explainable when it is recalled that slightly more than a century ago Texas was Spanish territory, and within a somewhat less period it was Mexican territory. With respect to this point it may be significantly noted that from the certificate of baptism it appears that the names of the clergyman who baptized the claimant and of two sponsors are probably of Spanish origin, and evidently in any event, not of American origin. The same is true with regard to the name of the official who, on June 5, 1925, issued a copy of the certificate at Brownsville.

In the light of the evidence and applicable law, the Commission can not properly reject the claim on the ground of inadequate proof of nationality, or reject it on some theory that the United States is espousing a claim of a person possessing Mexican as well as American nationality.

In view of the nature of the evidence adduced by the United States in support of the claim for compensation for cattle said to have been taken by insurgent troops, the disposition of this item presents no considerable difficulty. To be sure, it is alleged in the Memorial that the cattle were taken by de la Huerta revolutionary forces, and that federal troops stationed in force in the locality of the claimant's ranch made no effort to capture or defeat the de la Huerta troops or to protect or to recover the property of the claimant. And there is some evidence to support these allegations, but that evidence is very general in terms and from the oral argument made by counsel for the United States, it appears that he was uncertain as to the character of the soldiers who took the property. The evidence presented as to the alleged failure of Mexican authorities to give protection to the property, is admitted by counsel to be scanty. With respect to a point of this kind the Commission has repeatedly made clear the obvious fact that it must have convincing evidence.

In the Mexican brief and in oral argument it was contended that Mexico can not be held responsible for the taking of cattle by revolutionary forces.

In the claim of the *Home Missionary Society* presented by the United States against Great Britain under an arbitral agreement signed August 18, 1910, the arbitral tribunal in its opinion discussed the principles applicable to responsibility for the acts of insurgents. In that case claim was made in behalf of an American religious body for losses and damages sustained during a native rebellion in 1898 in the British protectorate of Sierra Leone. It was contended that the revolt was the result of the imposition and attempted collection of a so-called "hut tax"; that it was known to the British Government that this tax was the object of native resentment; that in the face of danger the British Government failed to take proper steps for the protection of life and property; that loss of life and damage to property were the result of negligence and failure of duty; and therefore the British Government was liable to pay compensation. The British Government in defense of the claim stressed the unexpected character of the uprising and the lack of capacity on the part of British authorities to give protection in vast unsettled regions.

The tribunal declared that, whatever warning the British authorities may have had with regard to possible disturbances, it was not such as to lead to apprehension of a revolt such as occurred, and with respect to the law applicable to the case the tribunal said:

"It is a well-established principle of international law that no government can be held responsible for the act of rebellious bodies of men committed in violation of its authority, where it is itself guilty of no breach of good faith, or of no negligence in suppressing insurrection. (Moore's *International Law Digest*, Vol. VI, p. 956; VII, p. 957; Moore's *Arbitrations*, pp. 2991-92; British Answer, p. 1.)" American Agent's *Report*, p. 425.

The tribunal also referred to the difficulty of affording on a few hours notice "full protection to the buildings and properties in every isolated and distant village", and stated that there was no lack of promptitude or courage alleged against the British troops, but that on the contrary, evidence proved that "under peculiarly difficult and trying conditions

they did their duty with loyalty and daring". The claim of the United States was dismissed, but the tribunal recommended that as an act of grace some compensation be made to the claimants.

In the opinion of Mr. Plumley, Umpire in the British-Venezuelan arbitration of 1903, reference is made to the following provision, as declaratory of international law, found in a treaty concluded in 1892 between Germany and Colombia:

"It is also stipulated between the contracting parties that the German Government will not attempt to hold the Colombian Government responsible, unless there be due want of diligence on the part of the Colombian authorities or their agents, for the injuries, oppressions, or extortions occasioned in time of insurrection or civil war to German subjects in the territory of Colombia, through rebels, or caused by savage tribes beyond the control of the Government." *Ralston, Venezuelan Arbitrations of 1903*, p. 384.

Following the quotation of this provision, Mr. Plumley said:

"It is also held that the want of due diligence must be made a part of the claimant's case and be established by competent evidence. This is brought out in the treaty of Italy with Colombia in 1892, where the language is 'save in the case of *proven* want of due diligence on the part of the Colombian authorities or their agents,' and such a requirement is strictly in accord with the ordinary rules of evidence." *Ibid.*

It will be seen that in dealing with the question of responsibility for acts of insurgents two pertinent points have been stressed, namely, the capacity to give protection, and the disposition of authorities to employ proper, available measures to do so. Irrespective of the facts of any given case, the character and extent of an insurrectionary movement must be an important factor in relation to the question of power to give protection.

In the light of the general principles referred to above, the item of \$535.00 in the instant claim must clearly be rejected, in the absence of convincing evidence of neglect on the part of Mexican authorities.

The item of \$120.00 for the value of cattle said to have been taken by federal forces involves questions less simple.

In defense of the claim for this item, the Government of Mexico invokes the well-recognized rule of international law that a Government is not responsible for malicious acts of soldiers committed in their private capacity and, further, alleges that the taking of property by federal soldiers has not been adequately proved.

The allegation in the Memorial on this point is to the effect that federal troops were encamped on claimant's ranch, and while there, took, killed and used as food, the cattle for which compensation is asked. As was observed in the opinion rendered by this Commission in the claim of *Thomas H. Youmans*, Docket No. 271,¹ (*Opinions of the Commissioners, U. S. Government Printing Office, Washington, 1927*, p. 150, 158) certain cases coming before international tribunals may have revealed some uncertainty whether acts of soldiers should properly be regarded as private acts for which there is no liability on the state, or acts for which the state should be held responsible. In the absence of definite information concerning the precise situation of the troops, the Commission must consider whether it is warranted in assuming that the soldiers encamped on the claimant's ranch were a band of stragglers for whom there was no responsibility, or that they must have been under the direct command of some officer,

¹ See page 110.

or that responsibility for their location and activities rested with some officer, in the seemingly strange event that no responsible officer was in immediate command. I am of the opinion that it cannot reasonably be assumed that the soldiers were stragglers for whom there is no responsibility. I think it must be taken for granted that some officer was charged with responsibility for their station and acts. There is evidence in the record which has not been refuted that about 100 soldiers were camped on the ranch for about a month. Some light on a situation of this kind may, I think, be found in an analysis of cases made by the tribunal under the Special Agreement of August 18, 1910, between Great Britain and the United States, in the opinion written in the claim of the *Zufiro*, presented by the United States against Great Britain. American Agent's *Report*, pp. 583-84. The tribunal, after citing cases dealing with questions of responsibility for acts of soldiers, said:

"These cases draw a very clear line between what is done by order or in the presence of an officer and what is done without the order or presence of an officer. But it is not necessary that an officer be on the very spot. In Donougho's Case, 3 Moore, *International Arbitrations*, 3012, a Mexican magistrate called out a posse to enforce an order; but no responsible person was put in charge and the 'posse' became a mob so that damage to foreigners resulted. The Mexican Government was held liable. In Rosario & Carmen Mining Company's Claim, Id. 3015, growing out of the same occurrences, Sir Edward Thornton relied in part on the culpable want of discretion shown by the magistrate who called out the posse in not putting it in charge of a proper person or being present himself 'to restrain the violence of such an excited body of men.' In Jeanneaud's Case, 3 Moore, *International Arbitrations*, 3001, a cotton gin belonging to neutrals was burned by volunteer soldiers who were in a state of excitement after a battle. The officers did not use the ordinary means of military discipline to prevent it, and their government was held liable. In the Mexican Claims, 3 Moore, *International Arbitrations*, 2996-7, a government was held liable where the officers failed to restrain such actions after having had notice thereof. (See also Porter's Case, Id. 2998.) And in the Case of Dunbar & Belknap, Id. 2998, there was held to be liability where officers left the property of foreigners without protection when it was in obvious danger from their soldiers."

The difficulties confronting the Commission because of the nature of the records in this case are obvious. On the one hand, the evidence produced by the United States is properly referred to as scanty. On the other hand, no evidence at all accompanies the Answer of the Mexican Government in which appears the following paragraph:

"The Agency of Mexico has made any kind of efforts to obtain data in relation with the facts on which it is pretended to base this claim, concerning the stock that it is alleged was taken by Federal forces. The document filed as Annex to this Answer, shows the only result that said efforts have produced up to the present. If at a later time more information is obtained, the same will be placed in due time before the Honorable Commission, in case it be in accordance with the Rules."

It is asserted in the Mexican brief that the affidavits accompanying the Memorial on which allegations with respect to the action of federal soldiers are based are altogether too vague to warrant the conclusion "that the taking of the cattle was ordered by any commanding officer or even that the alleged soldiers at the time of taking the cattle were under the command of any officer." In the absence of any evidence from the civilian or military authorities of Mexico destroying the value of the

affidavits presented by the United States, the Commission would not be justified in considering them without evidential value. An affidavit is furnished by José T. Rivera, who states that while he was in the employ of the claimant and attending the latter's cattle about one hundred federal soldiers by force and threats carried away the animals for which compensation is sought. In the absence of impeaching testimony it seems to be proper to attribute reliability to a man who had, as he swears, for five years attended the ranch of his employer. The testimony given by Rivera was confirmed by an affidavit of Rosendo Jaramio, who swears that he lived at the Morales Ranch for the past fifteen years; that he is familiar with the brand Solis used on the stock at Morales Ranch which has been used there for many years and which is well known to the people of that vicinity; that federal soldiers encamped on the ranch about a month; that he talked to the soldiers and saw them take and kill cattle. The claimant himself swears that he verified the information concerning these occurrences which were communicated to him by his manager. It is not perceived that there is any good reason to believe either that for some reason the two Mexicans furnished false information, or that the claimant has fabricated a false claim for a comparatively small amount.

The values on which the item of \$120.00 was predicated have not been contested, and the claimant should therefore have an award for this sum with interest from November 24, 1924.

Decision.

The claim is disallowed with respect to the item of \$535.00.

The United Mexican States shall pay to the United States of America in behalf of G. L. Solis, the sum of \$120.00 (one hundred and twenty dollars) with interest at the rate of six per centum per annum from November 24, 1924, to the date on which the last award is rendered by the Commission.

BOND COLEMAN (U.S.A.) *v.* UNITED MEXICAN STATES

(*October 3, 1928. Pages 56-61.*)

RESPONSIBILITY FOR ACTS OF FORCES.—ACTS OF INSURRECTIONARY FORCES.—FAILURE TO APPREHEND OR PUNISH.—DUTY TO PROTECT IN REMOTE TERRITORY. Claimant was attacked and wounded by insurrectionary forces in remote region. Insufficient evidence was furnished that the military authorities were notified of the attack. No one was apprehended or punished for the injury. *Held*, responsibility of respondent Government not established.

REQUISITION BY MILITARY FORCES.—MEASURE OF DAMAGES.—PROXIMATE CAUSE. Boat was sent to injured claimant to bring him to point where he would receive proper medical care. Commander of Government forces seized and detained vessel for three days, using it to transport troops, but no imperative necessity for this act was shown. Claim for delay in getting medical aid *allowed*.

Cross-reference: Annual Digest, 1927-1928, p. 234.

Commissioner Nielsen, for the Commission:

Claim is made in this case by the United States of America in behalf of Bond Coleman to obtain an indemnity in favor of the claimant in the amount of \$4,000.00. The claim is predicated on two grounds: (1) failure of Mexican authorities to apprehend and punish persons who seriously injured the claimant, and (2) the action of Mexican military authorities in depriving the claimant of prompt means of conveyance which his employers had put at his disposal to enable him to receive urgently needed medical attention.

Briefly stated the facts in the case as set forth in the Memorial are as follows:

During the month of June, 1924, and for some time previous thereto, the claimant was employed by the Cía. Mexicana de Terrenos y Petróleo, S. A., of Frontera, Tabasco, Mexico, as a geologist. His work necessitated his going into unfrequented and sparsely populated sections of Mexico for the purpose of making geological surveys and investigations. During the first few days of the month of June, 1924, the claimant and three other men in his charge, namely, Bruce Harlton, an Englishman, and Rutilio Vengas and Pedro Carpio, both Mexicans, were travelling, in the conduct of their work, on horseback from Huimanguillo to Villa Hermosa, in Tabasco, Mexico. They carried with them necessary equipment on four pack mules.

On June 4, 1924, while in the performance of their work, the claimant and the men in his charge were unexpectedly attacked by a band of twelve or fifteen armed supporters of de la Huerta, near Soledad on the road between Huimanguillo and Villa Hermosa. The attack was made without warning and was explained by one of the attacking Mexicans as having been made on the assumption that claimant and his associates were members of federal forces.

As a result of the shots fired during the attack, a bullet lodged in the claimant's left wrist, fracturing the bone, and inflicting a painful wound.

After convincing the attackers that neither he nor his associates were in any manner connected with the federal military forces and had no knowledge of the whereabouts of certain Obregón forces, the claimant and his party were robbed of their equipment and pack mules and were thereupon permitted to continue on their way to Villa Hermosa.

The claimant was given medical treatment at Villa Hermosa and then sent to Galveston, Texas, and later to Kansas City, Missouri, for further necessary medical attention. In spite of the seriousness of the claimant's injury and the fact that his employers had chartered a boat and sent it to Villa Hermosa for the purpose of taking the claimant to Galveston, Texas, for medical treatment, General Gonzáles, Federal Commander in charge at Villa Hermosa and vicinity, detained for a period of three days for the purpose of transporting his troops and equipment the boat sent by the Cía. Mexicana de Terrenos y Petróleo, S. A. As a consequence of the resulting delay, the wound in the claimant's wrist, which still had fragments of the bullet therein, became infected, it is alleged, causing the claimant further pain, suffering and damage.

It is alleged that, as a result of the injuries received, the claimant was obliged to expend several hundred dollars for medical treatment and attention; that he has never regained the full use of his hand or arm;

and that he is even now suffering from the disability which has impaired his former earning capacity.

Upon arrival at Villa Hermosa, the claimant reported the entire matter to General González and to General Martínez, who were then in military charge of that city and the vicinity, and requested that proper steps be taken for the apprehension and punishment of the offenders. However, no endeavor was made, it is charged, to apprehend or to punish the attackers, who were a band of Mexicans, said to have been notoriously and openly violating the law in that vicinity.

The Commission is confronted with difficulties such as it encounters from time to time because of vagueness or lack of evidence. That which accompanies the Memorial of the United States is scanty on important points, and no evidence at all is presented with the Mexican Answer. The right is reserved in the Answer "to file evidence if it is deemed fit".

It is alleged in the Answer that "the claimant has no right to be heard, inasmuch as the acts of which he complains are not comprised within the Convention of 1923". And the question of jurisdiction is mentioned in the Mexican brief, but it was not raised in oral argument. It is not perceived how there can be any question as to the jurisdiction of this Commission to pass upon a claim involving a complaint against the conduct of Mexican federal military authorities in the month of June 1924.

There was considerable discussion by counsel on both sides whether the persons who wounded the claimant should be considered to be revolutionary soldiers or brigands. In the Memorial it is stated that the claimant and the members of his party were attacked by a band of armed supporters of de la Huerta, but it was contended in the written and the oral arguments by counsel for the United States that the territory in the vicinity of Villa Hermosa was not in control of the de la Huerta forces on June 4, 1924, and that Mexico was not without responsibility for failure to prosecute and punish wrong-doers for wrongs committed in that locality. There was considerable discussion by counsel on each side whether it could be considered that the so-called de la Huerta revolution had been suppressed at that time. It would probably be difficult or impracticable for the Commission to undertake to arrive at a definite conclusion with regard to that point, and it seems to be unnecessary to analyze the contentions made with respect to this matter.

In the opinion rendered in the claim of *G. L. Solis*, Docket No. 3245¹, the general principle with regard to responsibility of a government for the acts of insurrectionists was discussed. It was emphasized that in considering the question account must be taken of the capacity to give protection, and the disposition of authorities to employ proper measures to do so, and that in the absence of convincing evidence of negligence, responsibility could not be established.

In the Mexican Answer and in the brief no defense is made to the claim except the untenable objection to the jurisdiction of the Commission, and the contention that the Mexican Government can not be held responsible for acts of insurgents. However, the broad denial of complete non-responsibility for insurgents made in the Answer and brief apparently was not maintained in oral argument during the course of which counsel explained his view that a government might be held

¹ See page 358.

responsible for acts of insurgents, when it was chargeable with negligence. It is of course important to take cognizance of the precise charge made by the United States which is not a failure on the part of Mexican authorities to prevent the acts from which the claimant suffered, but a failure to apprehend and punish the wrongdoers.

It is alleged in the Memorial that the claimant reported the attack made on his party to General González and to General Martínez, and requested that proper steps be taken for the apprehension and punishment of the offenders. However, there is no evidence in the Memorial to support that allegation. Indeed there is no specific information accompanying the Memorial to show that the military authorities were notified of these deplorable occurrences. However, at the hearing of the case there was introduced an affidavit of the claimant in which he swears that General González was notified that the claimant had been shot, and that no action was taken either by General Martínez or by General González to punish the men who did the shooting. There is no information in the record regarding the nature of the region in which the occurrences in question took place except such as possibly may be inferred from the statements to the effect that the claimant's work necessitated his going into unfrequented and sparsely populated sections of Mexico. There is information that Mexican federal forces at the time of the attack were in the neighborhood of Huimanguillo, "a day and a half travel by mule from this place", and that the shooting took place about twenty-five miles from Villa Hermosa. There is no information as to the number of federal troops or as to the possibilities of apprehension. Whatever conclusions might be made as to a complete or substantially complete suppression of the de la Huerta revolution, the Commission, in the unfortunate state of the record, is constrained to hold that an indemnity can not be awarded on the ground of negligence with respect to the apprehension and punishment of the persons who injured the claimant. The same general principles with regard to proof of negligence in the prevention of wrongdoing is applicable to proof with respect to negligence in the matter of apprehension and punishment. And in giving application to those principles in the instant case it is not important that the persons who attacked the claimant's party should be placed under some precise category or designation.

On the other hand, responsibility must be fixed on the Mexican Government for action of General González in seizing the boat which was sent to enable the seriously wounded man to obtain medical assistance. No defense was made by the Mexican Government to this complaint with respect to this action. It is unnecessary to consider any legal questions with respect to the right of military authorities to requisition, conformably to law and on the payment of proper compensation, a vessel that may be needed for public purposes. This ship was seized without compensation, and at a time when the dictates of humanity should have prompted assistance to the claimant, measures taken for his relief were frustrated. No imperative necessity for taking the boat has been shown. The evidence may leave some uncertainty as to the length of time he was delayed in getting medical aid, and of course as to the precise consequences of the delay. But it may be taken as a certainty that his sufferings and injuries were aggravated by that delay, and it is clear that he was the victim of

wrongful action. It is believed that the claimant may properly be awarded the sum of \$1,000.00 for the injury inflicted upon him.

Decision

The United Mexican States shall pay to the United States of America in behalf of Bond Coleman the sum of \$1,000.00 (one thousand dollars.)

DANIEL DILLON (U.S.A.) *v.* UNITED MEXICAN STATES

(October 3, 1928, concurring opinion by American Commissioner, October 3, 1928.
Pages 61-65.)

DETENTION FOR UNREASONABLE PERIOD.—DETENTION “INCOMUNICADO”.—RIGHT OF ACCUSED TO BE INFORMED OF CHARGE AGAINST HIM.—EXPULSION OF ALIENS.—Claimant was imprisoned for at least fifteen days without being allowed to communicate with anyone in connection with his arrest for purposes of expulsion from Mexico. It was also asserted that he was not informed of the charge against him. Claim *allowed*.

CRUEL AND INHUMANE IMPRISONMENT.—INTERNATIONAL STANDARD. Evidence *held* insufficient to establish that conditions of imprisonment were below international standards.

Cross-references: Annual Digest, 1927-1928, p. 236; British Yearbook, Vol. 11, 1930, p. 225.

The Presiding Commissioner, Dr. Sindballe, for the Commission:

Claim is made in this case against the United Mexican States by the United States of America on behalf of Daniel Dillon, an American citizen, to obtain damages in the sum of \$15,000, U. S. currency, for alleged unlawful detention for a period of about fifteen days in June, 1916, and for alleged maltreatment during that time.

The claimant had in the summer of 1915 directed the press publicity of the Carranza government in Washington, D. C., and late in 1915 he went first to Vera Cruz and afterwards to Mexico City as an employee of the Mexican government. During several months he acted as press cable censor in Mexico City. In the spring of 1916, however, his connection with the Mexican government came to an end. At that time he accepted a position as representative of the International News Service in Mexico City.

During the early part of June, 1916, the claimant was arrested by two Mexican Federal officers. He was brought to the Federal Department of Gobernación, and placed in a small outhouse bordering the patio in the rear of the main building. After about three days detention there, he was taken to the penitentiary on the outskirts of Mexico City, and he alleges that there he was placed in a small cell with scant light and

bad ventilation, in which the floor was filthy and the sanitary installations long since out of order. After about twelve days of imprisonment in that cell he was taken to a small room on the top floor of the Municipal Palace, and the next day he was turned over to Mr. John L. Rodgers who was acting as Special Representative of the United States of America. Immediately afterwards the claimant left Mexico.

According to the affidavit of the claimant, and no evidence to the contrary having been produced, it is to be assumed that during all the time of his detention the claimant was kept *incomunicado*, i. e. without being allowed to communicate with anybody, and that no information was given him concerning the purpose of his arrest and detention. He alleges that he had no bed nor bed clothing, and that the food served him was insufficient and bad.

From the record it seems that the purpose for which the claimant was arrested was that the Mexican government intended to expel him from Mexico.

In the pleadings submitted by counsel of the United States of America, the right of the United Mexican States to expel the claimant, without informing his government or himself about the reasons why he was to be expelled, has been challenged. During the oral hearing, however, this part of the pleadings has not been touched upon by said Counsel, and the Commission takes it that the claim is now predicated on alleged mistreatment of the claimant in connection with his arrest and detention only.

With regard to the question of mistreatment the Commission holds that there is not sufficient evidence to show that the rooms in which the claimant was detained were below such a minimum standard as is required by international law. Also the evidence regarding the food served him and the lack of bed and bed clothing is scanty. The long period of detention, however, and the keeping of the claimant *incomunicado* and uninformed about the purpose of his detention, constitute in the opinion of the Commission a maltreatment and a hardship unwarranted by the purpose of the arrest and amounting to such a degree as to make the United Mexican States responsible under international law. And it is found that the sum in which an award should be made, can be properly fixed at \$2500, U. S. currency, without interest.

Nielsen, Commissioner:

I concur in the Presiding Commissioner's opinion, but I desire to make a few explanatory remarks.

The sovereign right of expulsion is not denied by the United States. Complaint is made against the methods used in connection with expulsion. In any event that seems to be the burden of the oral argument in behalf of the United States. Evidently counsel for both sides proceeded on the theory that expulsion may have been in the minds of the Mexican Authorities, although the claimant was detained in Mexico about 15 or 20 days and then appears to have left without being forcibly sent from the country.

The sovereign right of the harsh measure of expulsion being conceded, it might be considered, on the one hand, that in reality a complaint against harsh treatment in a given case is a matter entirely distinct from

expulsion. If this view be taken in the instant case we would have a case of imprisonment in connection with which no charges were made known to the claimant, and no opportunity was given to the claimant to defend himself, and sworn allegations not disproved, of mistreatment during a considerable period of incarceration are in the record. On the other hand, it would seem that in a case involving a complaint of arbitrary and harsh treatment in connection with expulsion, the fact that the measure of expulsion is invoked by a government is something of which account may be taken in appraising the nature of the harsh treatment. There may be no rule of international law or practice with regard to precise, proper methods of expelling an alien, such as those that have been suggested by writers, by conducting a man to an international border or by delivering him to a representative of his government. But when resort is had to a use of unnecessary force or other improper treatment there may be ground for a charge such as is made in the instant case, account being taken of the manner in which expulsion might have been effected.

Having in mind the difficulties frequently confronting the Commission in dealing with evidence, the present case may be said to be an interesting and particularly illustrative one. In the Mexican brief it is attempted to destroy the evidential value of the claimant's affidavit, first, because he was said to have made exaggerated and untruthful statements, and secondly, because his evidence is an unsupported statement in that it is not corroborated by the statements of others. The first charge was withdrawn in oral argument as based on an inaccurate copy of a communication accompanying the Mexican Answer, and it was shown by authentic documents that the claimant did not overstate but indeed underestimated the term of his imprisonment. On the other hand, counsel for the United States referred to the statement in the Mexican brief that "Arbitral commissions with obvious prudence refuse to hear the claimant when he alone speaks or to take his statements literally". (P. 14.) And he argued that, whatever might be said with respect to the unsatisfactory character of the record, nothing could be furnished in support of contentions but an affidavit of the claimant in the instant case, since all information regarding the treatment of Dillon was in the possession of the Mexican Government, and the claimant having been prevented from communication with other persons during his imprisonment, it had become impossible for the United States to submit further evidence. However, it may be observed with reference to this argument, to which there undoubtedly is considerable force, that the United States could have furnished with the Memorial or with the Reply convincing evidence with regard to the extremely important point of length of detention of claimant. Copies of telegrams produced at the hearing furnish not only proof confirming the statement of the claimant made in his affidavit, but proof that instead of over-stating he underestimated the period of his detention.

An arbitral tribunal can not, in my opinion, refuse to consider sworn statements of a claimant, even when contentions are supported solely by his own testimony. It must give such testimony its proper value for or against such contentions. Unimpeached testimony of a person who may be the best informed person regarding transactions and occurrences under consideration can not properly be disregarded because such a

person is interested in a case. No principle of domestic or international law would sanction such an arbitrary disregard of evidence.

It seems to me that whatever may be said with regard to the desirability or necessity of having testimony to corroborate the testimony of a claimant, a statement need not be regarded in the legal sense as unsupported even though it is unaccompanied by other statements. Statements of claimants may be impeached by information showing them to be incorrect, and they may be corroborated by statements showing them to be correct. Evidence produced by one party in a litigation may be supported by legal presumptions which arise from the non-production of information exclusively in the possession of another party, and this well-known principle of domestic law is one to which it seems to me an international tribunal is justified in giving application in a proper case. But few concise rules of adjective law have been developed in international practice, but it is proper for an international tribunal to give effect to certain elementary principles applied by domestic courts.

Decision

The United Mexican States shall pay the United States of America on behalf of Daniel Dillon \$2,500. (two thousand five hundred dollars) without interest.

A. L. HARKRADER (U.S.A.) *v.* UNITED MEXICAN STATES

(October 3, 1928. Pages 66-68.)

DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH.—INTERNATIONAL STANDARD. Evidence *held* not to show that measures taken to apprehend or punish persons guilty of murder of an American subject and wounding of another fell below international standard from a broad and general point of view.

Cross-reference: Annual Digest, 1927-1928, p. 226.

The Presiding Commissioner, Dr. Sindballe, for the Commission:

On Sunday, November 19, 1922, two Americans, Wert D. Harkrader and Dan McKinnon, who were visiting Calexico, California, for the purpose of obtaining employment at this place, went across the boundary between the United States and Mexico to Mexicali, Lower California. They arrived in this town between noon and one p. m. Having taken lunch and some drinks at various places, they started back in the direction of Calexico about two o'clock. They passed a Mexican cabaret where some dancing and music were going on, and Harkrader went into the cabaret, McKinnon waiting for him on the outside. At that time a Mexican addressed McKinnon suggesting that he and his friend take a drive to see the sights of Mexicali in his Ford car that was standing close by with a chauffeur sitting in it. When Harkrader came out of the cabaret, McKinnon told him of the proposal of the Mexican, and they agreed to accept it. Thereupon the four men started, the Mexican chauffeur

and McKinnon sitting in the front seat, Harkrader and the second Mexican in the rear seat. The chauffeur drove to a gasoline station where he took on oil and gasoline. Then he drove around the town, gradually working toward the outskirts, and finally he drove along a road leading from the town into the country. Having proceeded about a mile and a half along this road, the Mexican who was sitting in the rear seat drew his gun, ordered the driver to stop the car, and asked the two Americans to deliver up their money, which they did without making any resistance. Harkrader was then ordered into the front seat between McKinnon and the chauffeur, and the car drove farther into the country, the Mexican in the rear seat holding his gun upon the two Americans all the time. At a turn in the road a big wagon, drawn by six mules, was noticed approaching, and as the two vehicles met McKinnon leaped from the automobile. The armed Mexican fired two shots at him, both of them wounding him. He feigned death until the automobile with his friend and the two Mexicans had gone. Then he started back toward Mexicali. He overtook the mule-drawn wagon and was permitted to ride. Afterwards a Ford automobile came along the road and by that he was taken to the police station at Calexico. Here his wounds were dressed by a doctor called for the occasion, and afterwards he was conveyed by an ambulance to the hospital at El Centro where he remained until December 6.

In the evening of November 19, the lifeless body of Harkrader was found by two Mexicans at the roadside about five miles from Mexicali. The murderers have never been apprehended. The above statement of facts is taken from the affidavit of McKinnon.

Claim is now made against the United Mexican States by the United States of America on behalf of A. L. Harkrader, the father of the deceased and citizen of the United States, for damages in the sum of \$25,000, U. S. currency, for failure on the part of the Mexican authorities to take appropriate steps with a view to the apprehension and punishment of the murderers.

It appears from the record that the Chief of the Police at Mexicali was informed of the facts related by McKinnon by the American Chief of Police at Calexico on November 19, at 5 p. m., and that he immediately ordered a pursuit of the murderers. A commission of policemen departed in the evening of November 19, and another commission departed the following morning. The latter commission located the body of Harkrader, which, as mentioned above, had already been found in the evening of November 19 by two Mexicans, but none of the two police commissions succeeded in apprehending the murderers, and further investigations, including an examination of McKinnon, were equally unsuccessful. It is argued by Counsel of the United States that no endeavor seems to have been made to ascertain who the driver of the mule-drawn wagon was, and it is especially emphasized that McKinnon does not appear to have been questioned as to what persons he and Harkrader and the two Mexicans met with during their drive, although it would have been of the utmost importance for the investigation to have obtained the testimony of the man at the gasoline station who sold oil and gasoline to the car in question. It appears, however, that the record of the investigations submitted by the respondent government on which the criticisms of Counsel of the United States is based, is incomplete, so that it does not follow with certainty that negligence, such as contended by the claimants, actually has been shown. The Commission further is of the opinion that

its conclusion whether the investigation that took place was below the minimum standard required by international law must be based on a broad and general view of the steps taken rather than on a criticism of some particular point. And on the whole, it seems that in the present case considerable efforts were made. It is also stated in dispatches to the American Department of State from the American Consul at Mexicali that in his opinion the Mexican authorities were doing their best.

Decision.

The claim of the United States of America on behalf of A. L. Harkrader is disallowed.

G. W. McNEAR, INCORPORATED (U.S.A.) *v.* UNITED MEXICAN STATES

(October 10, 1928, concurring opinion by American Commissioner, October 10, 1928.
Pages 68-73.)

DENIAL OF JUSTICE.—ILLEGAL DETENTION OF PROPERTY. Claimant sold two carloads of wheat to a Mexican importer under bills of lading which were not to be delivered until payment of purchase price. Goods were seized by Mexican customs authorities on ground they were property of Mexican importer, who was charged with payment of import duties and fees. Claimant requested court to order return of goods, showing facts of his ownership, but court ordered goods to be released only on provisional payment of import charges. Goods were then sold to satisfy such charges and a surplus was realized. Claimant then requested Mexican authorities to pay him value of wheat seized and sold but this request was denied. Claim for value of wheat *allowed*.

Cross-reference: Am. J. Int. Law, Vol. 23, 1929, p. 461.

The Presiding Commissioner, Dr. Sindballe, for the Commission:

During May and June 1907 George W. McNear, an American citizen, now deceased, sent two carloads of wheat, sold to S. Montemayor, Ciudad Juárez, Mexico, on a cash basis, by the Southern Pacific Railroad, one, containing 610 sacks, valued at \$1124.90, U. S. currency, from Portland, Oregon, in car No. 83074, and the other, containing 479 sacks, valued at \$1019.90, U. S. currency, from Port Costa, California, in car No. 30758. The Southern Pacific Railroad issued bills of lading according to which the two shipments were consigned to the order of McNear, Ciudad Juárez, via El Paso, where S. Montemayor, care of J. T. Woodside, was to be notified. Sight drafts for the purchase price were sent to the Agency of the Banco Minero at Ciudad Juárez for collection. The bills of lading were attached to those drafts, and the Bank was instructed to deliver the bills of lading to Montemayor upon payment of the drafts only.

In El Paso the two cars with wheat were transferred to the Mexican Central Railway, by which they subsequently were taken to Ciudad Juárez. It seems that Montemayor or a representative of him took care

of having the necessary consular invoice issued, and that he had such an invoice covering besides the two carloads sold him by McNear a third carload of wheat sold him by the Nash-Ferguson Grain Company of Kansas City, Missouri, issued to himself.

At the time when the carloads in question arrived in Ciudad Juárez Montemayor was charged with having imported in a clandestine manner fourteen carloads of wheat without paying consular fees and customs duties thereon. Because of that charge he had fled from the town.

Acting on the belief that the two carloads shipped by McNear as well as the carload shipped by the Nash-Ferguson Grain Company were the property of Montemayor or in his possession, the Customs authorities in Ciudad Juárez requested the District Court to order a seizure of the three carloads in order to establish a security for the Treasury with regard to the pecuniary responsibility that might be imposed upon Montemayor. This request was complied with by the Court. Afterwards a representative of the Banco Minero as well as the American Consul at Ciudad Juárez tried to obtain the release of the goods by application to the court. They pointed to the fact that the bills of lading were in the possession of the bank and that according to a notation on the drafts, they should not be delivered to Montemayor until he paid the drafts, which he had failed to do. Their intervention, however, was opposed by the Administrator of the Customs House as well as by the Agent of the Ministerio Público at Ciudad Juárez, both of whom asserted that the carloads in question had been imported by Montemayor and that he would not have been able to dispose of them, as in fact he did, unless he had paid for them at El Paso. The decision of the Court was to the effect that no release could be ordered, but that a provisional delivery of the wheat could be made on payment of the duties and deposit of the value of the wheat, which amount in due time would have to be delivered to its legitimate owner. It is said in the decision that the proceedings which were being held were those of the summary character referred to in Article 608 of the Customs House Ordinance, and that the court was "unable at present to render any opinion as to the rights which may be had with regard to the attached property". The decision evidently implies, in accordance with Mexican law, that the shipper of the wheat, in order to protect his alleged right of property, would have to bring a formal action before the Court. McNear, however, did not adopt this course, but some years after he petitioned the Mexican government to order the Customs House in Ciudad Juárez to pay him \$2,426.57, U. S. currency, namely the value of the wheat owned by him and seized by said Customs House. At that time the wheat had long ago been auctioned, and the revenue, deduction having been made for import duties and freight due on the goods, had been deposited with the Court. The government rejected McNear's petition. It was argued that, according to Art. 2822 of the Mexican Civil Code, a thing sold belongs to the buyer as soon as there is an agreement between buyer and seller with regard to the sale, and that, according to Art. 657 of the Customs House Ordinance, McNear's right to claim the amount deposited with the court as the balance left from the revenue of the auction sale of the wheat was lost by prescription. At first it was further argued that a business transaction between McNear and Montemayor had taken place when the goods arrived at El Paso, but later on it was admitted that this supposition was erroneous.

Claim is now made against the United Mexican States by the United States of America on behalf of G. W. McNear, Incorporated, an American corporation, to which, prior to his death, George W. McNear assigned amongst other things, "all book accounts, debts, claims and demands" belonging to or pertaining to his business, for damages for wrongful seizure of the wheat in question in the sum of \$2,144.80, U.S. currency, with interest thereon at 6 per cent from July 25, 1907, the date when the seizure is alleged to have taken place.

In the opinion of the Commission there can be no doubt that the detention of the wheat was wrongful. The sale of the wheat to Montemayor was a conditional sale. The intention of the parties to the contract of sale was that the ownership and the possession of the goods should not pass to the buyer before payment of the purchase price had taken place. Upon such a case Art. 2822 of the Mexican Civil Code does not bear, this article being applicable only so far as the parties have not agreed otherwise, and the issuance of a consular invoice covering the goods in question could not alter the legal position of the parties with regard to the goods, as such a document does not confer any title to the goods in the person to whom it is issued. It is possible that the court was justified in ordering the seizure of the goods in the course of proceedings of a summary character, in which it was stated by the Customs authorities that the goods had been imported by Montemayor. But from the moment the Customs authorities were informed that the bills of lading were in the hands of the Banco Minero and could be delivered to the buyer on payment of the purchase price only, it ought to have been perfectly clear to those authorities that the wheat should be released. From that moment their retention of the wheat constitutes a violation of a rule that is of fundamental importance to commerce and with which they should have been familiar. For this violation the Commission holds that Mexico must be responsible under international law, notwithstanding that possibly McNear might have had his right recognized, if he had brought a formal action before the Court. The Commission further holds that the amount to be awarded must be the value of the wheat.

Nielsen, Commissioner:

I agree with the result that flows from the Presiding Commissioner's opinion, because to my mind the seizure and detention of the wheat, the property of the claimant, without compensation, was a confiscation of that property

It is clear, as stated in the Presiding Commissioner's opinion, that the transaction between McNear and Montemayor was in the nature of a conditional sale. Whatever justification there may have been for the seizure of the wheat on suspicion that it belonged to Montemayor, there was no warrant for the detention of the property when the facts of ownership, which were very simple, were made clear. I perceive no proper reason why the same authorities who initiated steps to have the wheat seized should not promptly have initiated steps to have it released, when the facts regarding ownership were made clear to them. Whatever may have been the view of the court whose process was invoked, the administrative authorities, consistently from the beginning of the proceedings up to the time of the last application made by McNear for compensation, continued to adhere to different arguments to my mind all unsound, to the effect that title to the property had vested in Montemayor.

There is not presented to the Commission any case of a seizure and sale of goods for non-payment of duties and the failure of the owner of the goods to apply within a prescribed statutory period for the proceeds of the goods less the amount of the import duties. The goods were seized on the theory that they belonged to Montemayor, and they were retained on that theory. There is no evidence to indicate that it was necessary to sell these goods for non-payment of duty. Had the wheat been seized and sold in accordance with Mexican law for non-payment of duties, and had McNear failed to apply for the proceeds less the amount of the duties, he would have no complaint, because obviously the execution of proper decrees or legislative enactments with respect to the sale of goods for non-payment of duties could result in no wrongdoing to an importer.

Whatever may be said with regard to the original seizure, it is clear that the continued detention without compensation was wrongful. I do not understand that the Mexican Government denied compensation to McNear on the ground that he did not resort to legal remedies. Clearly their denial was based on the ground that he was not the owner of the goods. And whatever legal remedies, if any, may have been open to him against wrongful seizure or detention or both, that point has been eliminated by Article V of the Convention of September 8, 1923. Citation was made in the written and the oral argument by counsel for Mexico to the *Canadian Claims for Refund of Duties* decided by the tribunal under the Agreement of August 18, 1910, between the United States and Great Britain. Those cases are not pertinent to the instant case. In those cases the United States made it clear to the tribunal, which sustained the argument of counsel for the United States, that the United States had not invoked the rule of international law with respect to the exhaustion of legal remedies. It was shown that neither the question of the application of that rule nor provisions of the arbitral agreement in relation thereto was pertinent to a decision of the case upon the law and facts thereof.

Decision.

The United Mexican States shall pay to the United States of America on behalf of G. W. McNear, Incorporated, \$2,144.80 (two thousand one hundred forty-four dollars and eighty cents) with interest at the rate of six per centum per annum from July 25, 1907, to the date on which the last award is rendered by the Commission.

DANIEL R. ARCHULETA (U.S.A.) *v.* UNITED MEXICAN STATES

(October 10, 1928. Pages 73-77.)

NATIONALITY.—EVIDENCE NECESSARY TO REBUT PROOF OF NATIONALITY.

When evidence was furnished that decedent was born in the United States and held legislative offices in the State of Colorado, fact that he was referred to as a person of Spanish-American parentage *held* not sufficient to rebut conclusion that he was an American national.

EFFECT OF RIGHT TO OPT FOR MEXICAN NATIONALITY UPON AMERICAN NATIONALITY. A person born in territory ceded by Mexico to the United States, who had a right to opt for Mexican nationality under the treaty of cession, considered to be an American national in absence of proof that he exercised such option.

EVIDENCE BEFORE INTERNATIONAL TRIBUNALS.—EVIDENCE NECESSARY TO ESTABLISH DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH.—DUTY TO PROTECT IN REMOTE TERRITORY.—EFFECT OF LACK OF RECORDS OF RESPONDENT GOVERNMENT. Allegations of denial of justice must be established by proof. Mere silence of Mexican records concerning killing of American subject *held* not sufficient to establish responsibility. Where American subject was killed at his mine in remote region and evidence was lacking as to failure to apprehend and punish those guilty, claim *disallowed*.

Cross-reference: Annual Digest, 1927-1928, p. 302.

Commissioner Nielsen, for the Commission:

Claim in the amount of \$30,000.00 is made in this case by the United States of America against the United Mexican States in behalf of Daniel R. Archuleta, son and sole heir of Antonio D. Archuleta, who was killed in 1918, in the vicinity of Pílares de Nacozari, Sonora, Mexico. The claim is grounded on an assertion of a denial of justice growing out of the failure of Mexican authorities to take adequate steps to apprehend and punish the slayer of the deceased.

The following allegations, briefly summarized, are made in the Memorial with respect to the death of the claimant's father and with respect to the negligence of which the Mexican authorities are said to have been culpable:

The deceased was the holder of patents to mining properties known as the Zulema and Zulemita mines located in the vicinity of Pílares de Nacozari, Sonora. At times previous to the year 1918, the deceased was accustomed to proceed from his home in the State of Colorado to Mexico for the purpose of working the aforesaid mines. About the month of November, 1917, he made his last visit to the mines, intending to return to his home in the United States about May, 1918.

On or about March 21, 1918, the claimant, then residing at Pagosa Springs, Colorado, received a telegram dated March 21, 1918, which was sent to him from Douglas, Arizona, informing him that his father had been murdered near his mine in Mexico, and that the body had been found on March 16, 1918, in a decomposed condition.

Some days after the murder of the claimant's father when the body was discovered, the authorities at Pílares de Nacozari visited the house of the deceased and there made a perfunctory investigation of the murder, ascertaining that the contents of the house were in a disturbed condition, which led to the conclusion that robbery had been the motive of the murder. It appeared that the murder occurred in the house, from which the body was dragged about 75 feet into a tunnel several hundred feet distant from the house, where it was found. Although the authorities arrested several persons suspected of the murder, including a young man about twenty years of age, they failed to continue a conscientious investigation of the murder, placed the "suspected criminals" at large, and

did nothing to clear up the crime with a view to apprehending and punishing the murderers.

In the Mexican Answer it is denied that the citizenship of the deceased is sufficiently proved "for the purposes of the present claim", since "the Memorial does not allege or prove the American citizenship of the parents of the deceased, but rather it appears from the annexes to the Memorial that they were Spanish-American (Mexican) and according to Mexican Law, the deceased was Mexican". Even though the parents of the deceased were Mexicans, that of course is not proof that the deceased was not himself an American. It might be supposed that possibly he possessed a dual nationality, but no contentions appear to be raised in the Mexican Answer or in the Brief that the United States is espousing a claim of a person with a dual allegiance.

The reference somewhere in the record to the deceased as a man of Spanish-American parentage casts no doubt on his American citizenship in the light of the evidence before the Commission. There is no reason why the Commission should question the American nationality of the deceased in the absence of evidence to rebut the evidence submitted to prove his nationality. There is evidence in the record that the deceased was born in the United States. Furthermore, there is pertinent evidence that he occupied important legislative offices in the State of Colorado which evidently he could not have lawfully held had he been an alien. Considerable weight has been given to evidence of this kind by courts of the United States and by international tribunals. On this point see the case of *Robert Eakin* under the convention of May 8, 1871, between the United States and Great Britain, *Hale's Report*, p. 15; *Canevaro Case* before the Permanent Court of Arbitration at The Hague, 1912, *Ralston, The Law and Procedure of International Tribunals*, p. 183; *Boyd v. Thayer*, 143 U. S. 135.

While no contention is made in behalf of the respondent Government with respect to the point of dual nationality, it may be observed that it seems to be clear that there can be no serious question as to the American nationality of the claimant's grandfather. There is evidence in the record that he was born in Colorado in 1836. He being born in territory ceded by Mexico to the United States, Article VIII of the treaty concluded February 2, 1848, between the United States and Mexico by which the territory was ceded, operated to sever his allegiance to Mexico, unless he elected within a year from the date of the exchange of ratifications of the treaty to retain his Mexican nationality. There is no evidence that he opted for Mexican citizenship, and there is some evidence to the contrary.

The instant case, while similar to numerous other cases that have come before the Commission as regards the complaint which it involves, possesses certain unusual difficulties in view of the character of the record.

Pertinent evidence in connection with the allegation of negligence on the part of Mexican authorities is unfortunately meagre. It appears that the death of the claimant's father did not come to the notice of the Department of State of the United States until the year 1922. Instructions to American consular officers in Mexico resulted in revealing very little information regarding the circumstances surrounding the death of the claimant's father. In a letter under date of August 15, 1922, signed by a Mr. R. Hilser and sent from Moctezuma to the American Consulate

in Nogales, Sonora, is found the following sentence: "The authorities had a boy about 20 yr old in jail one or two days after that nothing was done as there was no one to press the matter."

In behalf of Mexico it is alleged that Mexican authorities made every possible effort to clear up the facts in relation to the crime, but that this proved to be impossible in view of the absence of clues, and in view of the fact that the crime was committed in a lonely spot and was not discovered until a long time after it was committed. Certain court records of a local court at Pilares de Nacozari accompany the Mexican Answer to show the steps taken by the authorities.

It is contended in behalf of the United States that these records furnish evidence that no energetic action was taken by the authorities. It is true that the records contain but very scant information, and are not such as to create a definite impression that effective measures were employed by the authorities. However, the United States has produced practically nothing bearing on the question of negligence.

The Commission is not called upon to give effect to any rule of evidence with regard to the burden of proof. It must decide the case on the strength of the evidence produced by both parties. It should perhaps not assume, particularly in view of certain matters appearing in the record, that the copies of documents presented by the Mexican Government furnish a complete record of the steps taken to apprehend and punish the guilty person. It may be noted that in a communication signed by R. Hiler, which was furnished by the United States, reference is made to the arrest of a boy 20 years old. This is not recorded in the Mexican court records. The same is true with regard to the statement in the American Memorial that several parties suspected of murder were arrested and that "the suspected criminals" were placed at large. Indeed there is no indication of any evidence in the record on which this statement is based, and no such evidence has been found. When it is said that "suspected criminals" were released, it is presumably meant that certain persons arrested on suspicion of having committed murder were released. And if such arrests were made, it can not of course be assumed, in the absence of evidence showing probable cause why they should have been held for trial, that they were improperly released.

The Commission being guided by principles which it has frequently asserted with respect to the convincing character of evidence which is necessary to sustain a charge of an international delinquency such as is alleged in this case, is constrained to dismiss the claim in the absence of such evidence.

Decision.

The claim made by the United States of America in behalf of Daniel R. Archuleta is disallowed.

J. J. BOYD (U.S.A.) *v.* UNITED MEXICAN STATES*(October 12, 1928. Pages 78-80.)*

FAILURE TO PROTECT.—DUTY TO PROTECT IN REMOTE TERRITORY. When only minor crimes had taken place before murder of American subject, with the exception of a murder committed the day before, and territory was sparsely populated, Mexican authorities and forces being established at the nearest point fifty miles away, *held* failure to afford due protection not shown.

DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH.—LACK OF DUE DILIGENCE IN CAPTURING CRIMINALS. Where posses were not sent out in pursuit of bandits who murdered American subject for several days after authorities were notified of crime, and orders of arrest of criminal were delayed and not sufficiently distributed, claim for death of such American subject *allowed*.

Cross-reference: British Yearbook, Vol. 11, 1930, p. 226.

The Presiding Commissioner, Dr. Sindballe, for the Commission:

On the morning of August 18, 1921, a group of men, consisting of Bennett Boyd, Cecil Boyd, Wayne MacNell, and Sixto Yáñez, while taking part in a round-up of the cattle belonging to the Carretas Ranch, District of Galeana, Chihuahua, Mexico, were attacked by a party of at least five mounted bandits. Bennett Boyd was killed. His companions attempted to defend themselves, and after a considerable number of shots had been fired, the bandits withdrew. Before doing so they stripped Bennett Boyd's body of a revolver and a pair of spurs.

The murderers have never been apprehended by the Mexican authorities.

Claim is now made against the United Mexican States by the United States of America on behalf of J. J. Boyd, an American citizen and the father of Bennett Boyd, for damages in the sum of \$25,000, U. S. currency. The claim is predicated upon alleged failure on the part of the Mexican authorities (1) to afford due protection to the residents of the District of Galeana, and (2) to take appropriate steps with a view to apprehending the murderers.

With regard to the alleged lack of protection the record shows that the civil authorities nearest to the Carretas Ranch were the authorities at Janos, about fifty miles from the Ranch, and that the only military garrisons in the district were those at Casas Grandes and Ascension, both about seventy miles away. However, the district in question being sparsely populated, those facts cannot of themselves be sufficient to establish on the part of Mexico a responsibility for lack of protection. The record further shows several acts of banditry during the time after the death Bennett Boyd, but for the time prior to his death, with the exception of a murder committed on the day before, only minor crimes, especially theft of cattle from the Carretas Ranch are mentioned, and there is no evidence to show that complaint of lack of protection ever was made to the Mexican government by the residents of the District of Galeana. Therefore, the Commission is of opinion that no responsibility on the part of Mexico can be based on the charge of lack of protection.

With regard to the second point at issue in this case the record shows that some efforts have been made by the Mexican authorities with a view to apprehending the murderers. The authorities at Janos were informed about the murder on August 19, and the next day the personnel of the Court at Janos arrived at the place of the murder where some investigations were made and the testimony of Cecil Boyd, MacNell, and Yáñez was taken. Cecil Boyd testified that one of the bandits seemed to be Francisco González. On August 23 the governor of the State of Chihuahua was informed about the murder and he sent out two posses, one of which seems to have killed one of the bandits. On August 25 a warrant for the arrest of Francisco González was issued. On September 1 the judge at Janos closed the proceedings and sent the case to the judge of first instance at Casas Grandes. On September 8 the latter issued orders for the arrest of González to the municipal Presidents of Casas Grandes and Janos. On February 7, 1922, letters rogatory were issued to all the judges of first instance requesting them to arrest González and two other persons who were now assumed to have taken part in the assault that resulted in the death of Bennett Boyd. No evidence is submitted as to what efforts were made to carry out the orders of arrest.

The Commission is of opinion that the steps taken by the Mexican authorities cannot be considered as a fulfillment of the duty devolving upon Mexico to take appropriate steps for the purpose of apprehending the murderers. Ground for adverse criticism is found in the fact that posses were not sent out in pursuit of the bandits until several days after the authorities were informed about the crime that had been committed. And negligence is clearly evidenced by the fact that orders of arrest of González were not sent to the Judges of first instance of the State of Chihuahua before February, 1922, and that such orders were never sent to the Judges of the State of Sonora, although the district of Galeana is situated at the boundary of that State.

The Commission holds that the amount to be awarded the claimant can be properly fixed at \$5,000.00 (five thousand dollars).

Decision.

The United Mexican States shall pay the United States of America on behalf of J. J. Boyd \$5,000.00 (five thousand dollars), without interest.

JACOB KAISER (U.S.A.) *v.* UNITED MEXICAN STATES

(October 15, 1928. Pages 80-87.)

CONFLICTING JURISDICTION OF SPECIAL CLAIMS COMMISSION. Claimant was arrested during period of revolutionary disturbances on charge he was a seditious propagandist. Since claim was based on deficient administration of justice, rather than revolutionary acts, *held*, tribunal has jurisdiction.

DENIAL OF JUSTICE.—ILLEGAL ARREST. Facts *held* not to establish that claimant was arrested without probable cause.

CRUEL AND INHUMANE IMPRISONMENT. Claimant's unsupported statement *held* insufficient to establish charge of cruel and inhumane conditions of imprisonment.

DEFECTIVE ADMINISTRATION OF JUSTICE. Alleged defects in administration of justice *held* not established by the evidence.

CONFESSION OBTAINED BY FORCE. Evidence *held* insufficient to establish charge claimant's confession was obtained by exercise of force.

DETENTION "INCOMUNICADO". Holding of claimant's mail during period of twelve hours, pursuant to Mexican law, *held* not a violation of international law. Charges that claimant was unable to see friends or counsel *held* not supported by the evidence.

DELAY OR SUSPENSION OF LEGAL PROCEEDINGS. Since suspension of proceedings against claimant did not go beyond period permissible under Mexican law for closing investigation and was caused by fact his imprisonment was one of many such imprisonments of partisans of Madero, *held*, no violation of international law occurred.

RELEASE ON BAIL.—FAILURE TO TRY ACCUSED. Fact that claimant was released on bail and never tried *held* not a basis of claim.

Commissioner Fernández MacGregor, for the Commission:

This claim is presented by the United States of America on behalf of Jacob Kaiser, a naturalized American citizen, who, it is alleged in the Memorial, was without justification deprived of his liberty on February 4, 1911, *held incomunicado* under confinement in the prison of the city of Morelia, Michoacán, Mexico, for a period of five days and later in the Penitentiary of Mexico City for seventy-four days, and finally released on bail under obligation not to leave Mexico City. It is alleged that during the entire time of his confinement the claimant suffered harsh and oppressive treatment and that no judicial procedure was carried out against him to elucidate the acts charged against him. By virtue of the suffering to which he was subjected by the Mexican authorities, the United States claims on his behalf damages in the amount of fifteen thousand dollars with the corresponding interest thereon.

The Mexican Government has submitted as a primary defense against this claim that the case does not come within the jurisdiction of this Commission, as it appears from the evidence presented that the claim arose in the year 1911, having its origin in the revolutionary disturbances which took place in Mexico between November 20, 1910, and May 31, 1920. It alleges, therefore, that pursuant to Article I of the Convention of September 8, 1923, and according to Article III of the Convention of September 10, 1923, this case is beyond the jurisdiction of the Commission. The preamble of the General Claims Convention of September 8, 1923, says: "The United States of America and the United Mexican States, desiring to settle and adjust amicably claims by the citizens of each country against the other since the signing on July 4, 1868, of the Claims Convention entered into between the two countries (*without including the claims for losses or damages growing out of the revolutionary disturbances in Mexico which form the basis of another and separate Convention*), have decided to enter into a Convention with this object, etc., etc...." Article I of that Convention provides, in short, the submission to this Commission of all claims against Mexico or against the United States "*except those arising from acts incident to the recent revolutions.*"

The United States does not predicate this claim upon some loss or damage caused by revolutionists or resulting directly from some revolutionary act, but upon a deficient administration of justice by an established Government, which neither arises from nor may be attributed to revolutionary movements. The mere fact that the claim arose during the period beginning on November 20, 1910, and ending on May 31, 1920, does not preclude the jurisdiction of this Commission, provided that the damaging fact or act does not have its origin in the revolution itself. Therefore I believe that the claim presented comes clearly within the jurisdiction of this General Claims Commission.

With regard to the basic point of the matter, the first charge to be examined is that the claimant was arrested without cause by the authorities of Morelia. It appears from the evidence presented by the Mexican Government that a charge was brought before the Political Prefect of Morelia that Kaiser was a seditious propagandist. It appears that he made proposals to a certain Ernesto Ortiz Rodríguez (who was the accuser), formerly a lieutenant, to take part in an uprising, and that thereupon he repeated them before Police Commandant Camilo Martínez, who was present in disguise. It is not shown that Ortiz Rodríguez was a member of the police force of Morelia. After he was arrested his declaration was taken, in which he did not deny having offered the invitation imputed to him to raise men for the Madero revolution; but he added, first, that he had done so for the purpose of ascertaining the opinions of others in order to publish an article in some foreign periodical; and, later, that his object was to find out whether the individuals with whom he was talking were involved in any plot or conspiracy against the Government so that he might inform the Police Prefect of that place. In view of these declarations, the Police Prefect of Morelia arrested him, sending him temporarily to the Police Headquarters pending his being sent to the City of Mexico. The foregoing facts suffice, in my opinion, to establish that the Mexican authorities who brought about his arrest had sufficient cause, required by international law, as there were grounded suspicions that the claimant was committing a crime for which Mexican law provides a penalty.

It is alleged that Kaiser suffered inhumane treatment during his incarceration in the City of Morelia. In a letter which he wrote, from the Penitentiary of Mexico on March 25, 1911, to a friend of his, he says: "I was thrown in a cell dirty and filthy, in a manner indescribable, without a bed of any kind, on the bare stones, without bread or water for several days, except what little I could buy . . ." From the evidence presented by the Mexican Government it is gathered that Kaiser was not in the general prison at Morelia but in the Police Headquarters which, it is asserted, is a spacious, commodious and clean building, where sanitary conditions prevail, his being placed there having been a special mark of consideration; and that he received good treatment there, and that because he refused to eat the food intended for the prisoners he was furnished food from a restaurant as requested by him. It is probable that this food was paid for by the claimant. Kaiser's statement not being supported by evident proof, I do not believe that doubt should be cast on the declaration of the Mexican authorities as to the good treatment which the prisoner received.

On February 9 the claimant arrived in Mexico City, consigned to the Inspector General of Police of that city. This official consigned him

to the First District Judge of Mexico who was trying the case against Francisco I. Madero and associates for the crime of rebellion. This is proved because it is set forth in a document presented as Annex 3 to the Mexican Answer, which is a certification of the several pieces of evidence relating to Kaiser's case in the suit referred to. The Court headed the document in question saying: "that in Volume VIII of the case tried in this Court which then had only the designation of First District Court, in the month of April, 1911, *versus* Don Francisco I. Madero and Associates, on folio 1075, there is a document reading as follows:" and there are thereupon copied the pieces of evidence referring to Kaiser. Before the First District Judge of Mexico City Kaiser ratified the declaration he had given before the prefect of Morelia, and as that Judge found grounds for bringing him to trial, he issued orders for his formal commitment on February 10th, holding him accountable for the crime of rebellion, as defined in Chapter I, Title XIV, Book III of the Penal Code of the Federal District. The record does not show what the Judge did during this period.

With these facts as a basis, the American Agent contended (1) that the First District Judge did not issue the order of formal commitment within the period of seventy-two hours provided by Mexican Law, thereby incurring a denial of justice; (2) that moreover the order of formal commitment was given in the absence of any grounds for bringing the claimant to trial. The Mexican Agent argued, with regard to the first charge, that the order for formal commitment, according to Article 142 of the Federal Code of Criminal Procedure, should be issued within 72 hours, but counting from the time that the defendant is placed at the disposition of his judge, explaining that Kaiser's judge was the First District Judge of Mexico, as it was he who had jurisdiction over the entire proceedings against Don Francisco I. Madero and associates, because of which, as has been seen, according to Mexican law, Kaiser's case had to be incorporated with the principal case, he being charged with complicity with the rebels. Thus, although Kaiser was apprehended on February 4, as he did not arrive in Mexico City until the 9th of that month, the decree of formal commitment which was issued on the 10th was within the legal period. It seems to me that the reasoning advanced by the Mexican Agent is supported by the evidence offered and by Mexican jurisprudence, to which he referred in his pleading and that therefore no complaint can be predicated on a defective administration of justice on this point. Now, with regard to the District Judge not having sufficient ground to decree the formal commitment of Kaiser, the evidence submitted by Mexico shows that Kaiser confirmed to the Judge the conversations which he had had in Morelia with Ortiz Rodríguez, and with Camilo Martínez, conversations having to do with an invitation to join a revolutionary movement and therefore there was sufficient cause, as required by International Law, to consider that that invitation was a culpable act, it being in order to define it, according to Mexican law, after all the circumstances of the case were known, that is, upon the conclusion of procedure against Kaiser. It is reasonable that the Judge could not accept, *prima facie*, Kaiser's excuse for those conversations, attributing them to the desire to obtain reports for some definite purpose, inasmuch as his obligation was to investigate thoroughly the facts of the case, which he could only do by proceeding with the investigation. It is to be observed with regard to the charge under examination, that, as was pointed out

by counsel for Mexico, at that time this country was involved in a serious internal crisis and that the Government was struggling for its life. In such circumstances it had the right and even the duty to prevent and punish with greater severity than ever the attacks directed against it, it not being possible to take lightly the simple statements or excuses of suspects.

It was submitted in the American Memorial that Kaiser's confessions had been obtained by exercise of force. The charge is not repeated in any of the other documents presented by the complainant Government and I do not believe that the evidence presented supports such a conclusion. The report of the Mexican judge states that he ratified his declaration "spontaneously and without pressure of any kind having been exerted."

It is alleged that during Kaiser's confinement in the Penitentiary he received bad treatment and was held the entire time *incomunicado*. Regarding the first charge, the claimant says in a letter to a certain Wildermuth, that he "was taken to the Penitentiary and the treatment accorded him there was much better, with sufficient food, a fair bed, and that, except the food all is very clean . . ." Mexico presented a report of the Judge who tried the Kaiser case in which he says, "the defendant is being held at my disposition in the Penitentiary where he is accorded the same consideration and attention as all the others, being subject to the penitentiary regime and he is furnished with sanitary and abundant food, it being publicly and generally known that this is what the prisoners are given". In view of the foregoing evidence it would not appear that the charge of illtreatment in the Penitentiary of Mexico can be sustained.

The charge that Kaiser was held *incomunicado* during the entire period of his confinement is based on the following salient facts: During his detention in Morelia he wrote several letters, which were intercepted and held for the purpose of being added to the record; two friends of the claimant tried to see him in Mexico City at the Sixth Ward Police station and for three weeks they were unable to see him. Counsel for Mexico alleged that every defendant, according to Mexican law, may be held *incomunicado* for 72 hours and during that time his correspondence may be held; Kaiser's letters which appear in the record were written in Morelia during that period. The foregoing involves no violation of either Mexican or international law.

It furthermore appears, in a way, that Kaiser was sent to Mexico City expressly for the purpose of enabling him, through his friends, to clear himself, as the Prefect of Morelia says in a report: "In view of the circumstances stated, the German, J. A. Kaiser, brings suspicion upon himself; and moreover since he can not furnish any references and *inasmuch as he states that in that Capital (Mexico City) it will be easy for him to do so*, I have deemed it proper to send him, placing him at your disposition" etc. Still further, as early as February 13 he was interviewed by the German Chargé d'Affaires; according to the claimant's own statement, the American Ambassador had contact with him *a number of times* through two of the claimant's friends, he then reiterating that he was reached by his two friends. He affirms all this in a letter which he wrote in the Penitentiary on March 25 and which it appears reached its destination.

In that letter Kaiser affirms that he could not communicate even with a lawyer and the American Brief emphatically reiterates this charge, stating:

"In any event, it is clear that the Mexican authorities prevented the claimant from obtaining the evidence which he deemed necessary for his vindication" and later "it patently amounted to an act of injustice on the part of Mexican authorities in actively preventing the claimant from properly preparing his defense."

But the evidence submitted by Mexico shows that almost as soon as the defendant was brought before his judge he appointed defending counsel, this taking place on February 10th.

The plaintiff government also argues that after the judge had taken the first steps in the Kaiser process the trial was completely suspended. In this respect it is pertinent to observe: (a) that the evidence submitted by the Mexican Government does not purport to include all the procedure in the case of the claimant; (b) that the Mexican judge had before him, as has already been stated, a very complicated process against all the partisans of Madero and that that of Kaiser was incorporated with the principal case, on account of which any delay which might be involved probably should not be adjudged, criticizing parts of the case instead of the entire process as a whole. In a document from the Secretariat of Justice of Mexico, offered as evidence by the respondent Government, it is stated in this regard: "As the record is very voluminous and the personnel of the defendants very numerous, notwithstanding the preference which has been accorded in its handling, it has not yet been possible to put it into shape for submission to the Agent of the *Ministerio Público* and steps continue to be taken in the case because almost daily new defendants are arriving from different States of the Republic". In all events it appears that the judge did not, in so far as Kaiser was concerned, go beyond the period which Mexican law fixes for closing the investigation, a period which, for the reasons stated, this Commission has, on other occasions considered proper to bear in mind. (See *Roberts* case, Docket No. 185.)¹

The last charge brought against the Mexican authorities is that they released the claimant without ever showing by means of a trial that he had committed a crime. The record shows that Kaiser was released on bail on April 28th and counsel for Mexico argued that this was done as a special concession. It seems that Mexican law makes provision for bail for defendants who merit a penalty of less than five years' imprisonment and it may be assumed that that benefit could have been accorded to the defendant if he had requested it earlier.

Kaiser's release on bail does not indicate that the Mexican authorities considered him to be innocent; his trial would have been continued possibly if the triumph of the Madero revolution had not intervened less than a month after the claimant left the Penitentiary.

In view of the foregoing analysis I do not believe that Kaiser has suffered either a denial of justice or mistreatment.

Decision

The claim of the United States of America on behalf of Jacob Kaiser v. the United Mexican States is disallowed.

¹ See page 77.

NORMAN T. CONNOLLY AND MYRTLE H. CONNOLLY (U.S.A.)
v. UNITED MEXICAN STATES*(October 15, 1928. Pages 87-90.)*

DENIAL OF JUSTICE.—FAILURE TO PROSECUTE.—FAILURE TO PUNISH ADEQUATELY. Two American aviators were forced down on Mexican territory and there killed by two Mexican subjects. The latter were found in possession of objects belonging to the aviators. After trial, they were finally sentenced to five and five and one-half years' imprisonment, respectively, for homicide during a fight. Claim *allowed* on ground no prosecution had been brought by authorities for robbery.

Cross-references: Am. J. Int. Law, Vol. 23, 1929, p. 464; British Yearbook, Vol. 11, 1930, p. 226.

The Presiding Commissioner, Dr. Sindballe, for the Commission:

On the morning of August 16, 1919, the American Lieutenants, Cecil H. Connolly and Frederick D. Waterhouse, both of whom were attached to the Ninth Aero Squadron, stationed at San Diego, California, were detailed to field patrol. Owing to a mechanical defect or some mishap the aeroplane in which they were flying never returned to its base. It was later found on the open beach at Refugio de Guadalupe, and it was disclosed that the two lieutenants had spent about seventeen days at that place without food and that thereafter two Mexican fishermen, Calixto Ruiz, called La Changa, and Santiago Fuerte, had given them food and taken them to Los Angeles, Lower California, where they killed them on or about September 9.

On October 19, 1921, the Judge of the First District Court at Tijuana, Lower California, sentenced the two fishermen to six years' imprisonment for homicide during a fight. The case was appealed to the Fifth Circuit Tribunal at Hermosillo, Sonora, and on April 22, 1922, this Court substantially confirmed the judgment of the lower Court, only the terms of imprisonment were fixed at five years and six months for Ruiz, and five years for Fuerte.

Claim is now made against the United Mexican States by the United States of America on behalf of Norman T. Connolly and his wife Myrtle H. Connolly, American citizens and the parents of Lieutenant Cecil H. Connolly, for damages in the sum of \$60,000, U. S. currency. The claim is predicated on the allegations that (1) Mexican authorities sought to cover up all matters incident to the death of the two aviators and failed to take prompt measures to investigate the murder and bring about the apprehension of the criminals, that (2) the latter ought to have been prosecuted for robbery as well as for homicide, and (3) that the punishment meted out to the murderers was inadequate.

It seems impossible with any degree of certainty to reach a conclusion regarding the motive of the crime. The murderers pleaded that they had acted in self-defense, the aviators not having been satisfied with the food the murderers prepared for them, and one of the aviators having attacked one of the murderers, whereupon a fight followed. The United States alleges that this statement is in itself most improbable, and pointing

to the fact that the declarations of the two criminals were at variance in nearly all particulars they assert that no consideration ought to have been given to those declarations. It is further asserted that robbery no doubt had been the motive of the crime, as the criminals were in possession, after the murder, of several objects belonging to the aeroplane or to the aviators personally. The criminals, on the other hand, explained that the aviators had made them a present of the aeroplane because of their aid. Against the theory of robbery as the motive of the crime it might also be argued that at first the two fishermen had aided the aviators and given them food.

The Mexican Courts rejected the plea of self-defense, but, as already mentioned, they based their judgments on the supposition that the murder had been committed during a fight. The Commission is of opinion that those judgments cannot be considered as constituting a denial of justice.

It cannot but produce an impression of laxity, however, that no prosecution for robbery or theft was instituted. And this impression becomes stronger when some of the facts surrounding the discovery and the investigation of the crime and the apprehension of the murderers are examined. An American citizen, Joseph Allen Richards, who had found the dead bodies of the two aviators, and who at Santa Rosalía boarded an American steamer in order to inform the captain of his discovery, was arrested on—as it seems—rather specious charges of having molested corpses before an inquest had been held and of having robbed the dead bodies of some articles. On November 10, 1919, the First District Court of Lower California, having been requested by the Ministerio Público to issue warrants of apprehension against Ruiz and Fuerte, refused to issue such warrants, although it followed with great probability from testimony given by several persons during investigations undertaken by the United States with the cooperation of Mexican authorities that the said persons were the murderers. When later on, on February 17, 1920, Ruiz had been arrested by the police authorities, the same judge ordered his release, but Ruiz had then already confessed that he and Fuerte had murdered the aviators and therefore the order of the judge was not executed. A warrant for the arrest of Fuerte was not issued until January 13, 1921, at which time it appears that the record in the case, together with the prisoner Ruiz, had been transferred to the Second District Judge of Lower California. On April 12, 1921, Fuerte was arrested. It seems that he presented himself voluntarily.

For the laxity thus shown by some Mexican officials in the prosecution of the crime committed, Mexico must be responsible under international law, and as this laxity can only partly be considered as redressed by the arrest and sentence of the criminals, the Commission is of opinion that an amount of \$2,500, U. S. currency, should be awarded.

Decision

The United Mexican States shall pay to the United States of America on behalf of Norman T. Connolly and Myrtle H. Connolly \$2,500. (two thousand five hundred dollars), without interest.

LOUISE O. CANAHL (U.S.A.) *v.* UNITED MEXICAN STATES*(October 15, 1928. Pages 90-94.)*

DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH.—DILATORY PROSECUTION.—EFFECT OF CHANGE OF GOVERNMENT. Claimant's husband was murdered in territory then occupied by Villa forces. Shortly thereafter Carranza authorities took possession of the state. Orders for arrest of persons responsible were issued but no action to carry them out was taken for over seven years. Claim *allowed*.

Cross-references: Annual Digest, 1927-1928, p. 215; British Yearbook, Vol. 11, 1930, p. 225.

Commissioner Nielsen, for the Commission:

Claim in the amount of \$50,000.00, with interest, is made in this case by the United States of America in behalf of Louise O. Canahl, widow of Gilbert T. Canahl, an American citizen, who was killed in the vicinity of San Diego, near Charcas, State of San Luis Potosí, Mexico, in 1915. The claim is grounded on the contention that Mexican authorities failed to take proper steps to apprehend persons responsible for the death of Canahl, and that the negligence of the authorities constitutes a denial of justice.

Briefly stated, the following allegations are found in the Memorial with respect to the death of Canahl and the negligence of which Mexican authorities are alleged to have been culpable.

On the night of June 16, 1915, Gilbert T. Canahl attended a dance given at San Diego mine, situated about seven miles from Charcas. Late in the night several Mexican citizens who were attending the dance, engaged in a quarrel, which quickly reached a stage in which the participants were attacking one another with knives. Gilbert T. Canahl interfered as a peace-maker and attempted to restore peace. Thereupon the infuriated persons turned upon and attacked him, and while he made an effort to defend himself, he was overcome by them and brutally murdered, his head being crushed.

These facts were immediately brought to the attention of the appropriate authorities of the State of San Luis Potosí, with a view to having them apprehend and punish the persons responsible for the crime. Although these persons were known in the vicinity and to the Mexican authorities, or with due diligence might have been known to them, the authorities were dilatory in their efforts to apprehend the persons responsible for the death of Canahl, and those persons have not been punished for the crime.

In the Mexican Answer it is said that available evidence indicates that Canahl met his death as a result of a quarrel in which he took part. It is alleged that Mexican authorities immediately took steps to apprehend participants in the quarrel for the purpose of thoroughly investigating the facts and of punishing the guilty persons, if they should be found criminally responsible for the death of Canahl. It is asserted that measures taken by the authorities resulted in the apprehension of some persons; that disturbed conditions in the locality in question, due to a state of warfare, prevented further steps for a time; and that the proceedings

were resumed several years later and are still being continued. It is denied that any responsibility can be fixed on the Mexican Government "for the unfortunate death of Gilbert T. Canahl." Certain court records accompany the Answer.

In the Mexican Brief the defense is alleged that at the time Canahl was killed Francisco Villa, who was in arms against the Carranza Government, was in control of the State of San Luis Potosí, and that the Mexican Government can not be held responsible for the acts of the revolutionary faction headed by Villa. It is further said that the authorities of the Federal Government had no knowledge of the killing of Canahl, until the occurrence was brought to their attention in a communication addressed to them by the American Consul at San Luis Potosí some time in August of the year 1922, that is, about seven years after Canahl was killed.

Counsel for Mexico in oral argument analyzed the occurrences entering into the claim by grouping them for convenience under three periods.

The first period was stated to be one beginning with the date of the murder and continuing during a short space of time, when records show that investigation was made of the crime. A Mexican official determined that seven men should be arrested and arrests were made of three. Orders were given for the arrest of four other persons. It seems to have been admitted on the part of counsel for the United States that, irrespective of allegations made in the American Brief, the record does not contain evidence on which to predicate a complaint of serious neglect in this early stage of the proceedings.

There is more uncertainty with regard to the so-called third period, during which counsel for the United States contended there was evidence of neglect. It is true that no persons were apprehended. Occurrences upon which conclusions were predicated were analyzed differently by counsel, and it is difficult, if not impracticable, for the Commission to reach positive conclusions with respect to the nature of the proceedings that have been carried on.

However, the attitude of the Mexican authorities within the so-called second period is something upon which the Commission may predicate a decision. That period was said to be from the end of June, 1915, to the end of the year 1922. During this time the record is silent. After the steps which have been described were recorded the record, as was said by counsel for the United States, ends for a space of about seven years.

There was some discussion by counsel for each Government on the point whether, when Villa forces established themselves in San Luis Potosí they supplanted civilian Carranza authorities entrusted with the administration of justice, and whether when Carranza forces drove out the Villa forces the civilian authorities were again changed. There is no evidence in the record bearing on this point, which might appear to be of some importance in considering the question whether there was continuity in the administration of governmental functions, so that there could be no reason for interruption or delay or obstructions in connection with the discharge of those functions. However, this is not a controlling point in the light of facts developed by counsel for the United States with respect to the situation in the locality in which the crime was committed.

It is definitely established that Carranza authorities took possession of the State of San Luis Potosí approximately three weeks after they drove

out the Villa authorities, who had been in that region about six months. The broad contention advanced in the Mexican Government's Brief that there is no continuity between a mere revolutionary faction and the Government of a country, can not be sustained with respect to the application which it is sought to give to it in the instant case. The change of authority due to internecine disturbances may seriously interfere with the discharge of governmental functions, and doubtless the Commission may well take account of a situation of this kind in considering a complaint against lax administration of justice. But assuredly authorities responsible for law and order in a community could not properly ignore a murder just because it had been committed three weeks before rebel forces were driven from the locality in which the murder took place. A different situation could be conceived, if rebel forces had been in possession of a territory for years after a murder had been committed and if records in relation to the crime had in the meantime been destroyed, but no such situation is revealed in this case. Indeed it is shown that, when the investigation was resumed in March, 1923, and the prosecuting attorney petitioned the local Judge to issue an order for the apprehension of the persons responsible for the murder of Canahl, the Judge issued the following order under date of March 10, 1923: "Inform the prosecuting attorney that the order of apprehension which he requests was issued June 17, 1915." It will therefore be seen that the Judge recognized as valid and in force the order issued in 1915 by the so-called Villista authorities for the arrest of four suspects.

In view of the fact that it is clear that effective measures were not taken for the apprehension of the persons who killed Canahl, an award should be rendered in favor of the claimant.

In fixing the amount of this award account may properly be taken, as has already been observed, of the difficulties attending the administration of justice owing to the revolutionary disturbances. The sum of \$5,000.00 is deemed to be an appropriate indemnity.

Decision

The United Mexican States shall pay to the United States of America in behalf of Louise O. Canahl the sum of \$5,000.00 (five thousand dollars) without interest.

WILLIAM T. WAY (U.S.A.) *v.* UNITED MEXICAN STATES

(October 18, 1928. Pages 94-107.)

PROCEDURE.—RIGHT OF CLAIMANT GOVERNMENT TO RAISE DURING ORAL ARGUMENT A GROUND FOR CLAIM NOT THERETOFORE ADVANCED.—RIGHT OF RESPONDENT GOVERNMENT TO RAISE DURING ORAL ARGUMENT ISSUE NOT THERETOFORE SPECIFICALLY ADVANCED. Upon the oral argument the Agent for the United States contended that claim was founded upon direct responsibility as well as a denial of justice. At the same time the Mexican Agent raised an issue said to have been

included under a catch-all phrase in the answer. Each such new point *held* admissible, subject to right of adverse party to reply to new matter, for which additional time was allowed.

WRONGFUL DEATH.—COLLATERAL RELATIVES AS PARTIES CLAIMANT. Collateral relatives, namely, a half-brother and a brother, the latter by his estate, *held* entitled to claim for death of American subject, notwithstanding absence of proof they were dependent on him for support.

PURPOSE OF MEMORIAL. The purpose of the memorial is to acquaint the respondent Government with the nature of the claim.

PURPOSE OF ANSWER. The purpose of the answer is to acquaint the claimant Government with the defenses made to a claim.

RESPONSIBILITY FOR ACTS OF MINOR OFFICIALS.—DIRECT RESPONSIBILITY. —**FAILURE TO STATE GROUNDS FOR ARREST.** A Mexican Alcalde, who under Mexican law is classified as a part of the "judicial police" and has authority to issue proper warrants of arrest, issued a warrant for arrest of an American subject which was void on its face for failure to state any charge against the accused. The arresting officers were supplied with arms and warrant directed officers "to use such means as may be suitable" in order to bring in the prisoner. Evidence indicated that the Alcalde was motivated by personal pique and malevolence toward the American subject. The latter was killed during course of arrest. *Held*, direct responsibility of respondent Government established.

DENIAL OF JUSTICE.—FAILURE TO PUNISH ADEQUATELY. A minor official ordered arrest of American subject under such circumstances as to indicate that he may have desired the killing of the American during the course of the arrest, if the arrest were opposed. There were no legal grounds for the arrest and none was set forth in the order of arrest. The American was killed during the course of the arrest. Of the two arresting officers, one was thereafter sentenced to death, and one was sentenced to two and one-half years' imprisonment. The minor official was sentenced to imprisonment for one year and fifteen days. *Held*, denial of justice not established.

Cross-references: Am. J. Int. Law, Vol. 23, 1929, p. 466; Annual Digest, 1927-1928, p. 210; British Yearbook, Vol. 11, 1930, p. 224.

Commissioner Nielsen, for the Commission:

Claim in the amount of \$25,000.00 is made in this case by the United States of America against the United Mexican States in behalf of William T. Way, individually, and as guardian of the person and estate of John M. Way, Jr. The former is a half-brother and the latter a brother of Clarence Way, an American citizen, who was murdered at Aguacaliente de Baca, State of Sinaloa, Mexico, in 1904. The claim is based on an assertion of a denial of justice growing out of the failure of Mexican authorities adequately to punish one of the persons said to have been responsible for the murder of Way, and further based on the contention that Mexico is responsible for officials whose acts caused the death of Way. This contention was for the first time explicitly raised in oral argument.

The following allegations, briefly summarized, are made in the Memorial with respect to the death of Clarence Way and with respect to complaints made against Mexican authorities:

Clarence Way was employed as Superintendent of the Mescal Works of William V. Lanphar, located at Aguacaliente de Baca, State of Sinaloa, Mexico. On the evening of July 18, 1904, Hermolao Torres, Alcalde of Aguacaliente de Baca, mounted on a mule, approached the store operated by Way as Superintendent. As Torres drew near he pointed a pistol at Way, who was near enough to push it to one side. Torres then spurred his mule, and Way was compelled to release his grip on the pistol. Way then walked towards his house, followed by Torres, who kept shouting that he would shoot Way if the latter did not stop. The reason assigned by Torres for his conduct was that he had passed Way during the day and Way had not saluted him with the respect which was due him as an official. Torres, leaving Way, proceeded to the house of one Arcadio Uzarragui. Without any explanation he ordered Uzarragui and one Vicente Gil to go at once to the house of Way and arrest him and a man named Latimer, who was cooking for Way, telling them to hurry and go to Lanphar's house and bring those gringos to him (Torres) by such means as might be necessary to employ. These men, observing that Torres was under the influence of liquor, did not obey the order given them by Torres, but merely told Way that Torres wanted to see him. Torres was much incensed at the action of the men he had sent and said he would get men at Baca who would carry out his orders.

On the following morning, July 19th, about 5:30 o'clock, Diego Miranda, a clerk in the store conducted by Way, observed two men sitting at the gate in front of the store, one of whom was armed with a pistol and the other with a Winchester rifle. Soon thereafter Way came out of his house, partly dressed, carrying a feed bag in his hand. One of the men presented Way with a writing and informed the latter that it was from Torres. The order which had been issued by Torres and delivered to Castro and Carrasco was found in the pocket of Way, where he had placed it when it had been shown to him by the two men, and was as follows:

"To Messrs. Fidel Carrasco and Francisco Castro:
Proceed with this warrant to the Hacienda of Aguacaliente de Baca and by order of this court, under my charge cause to appear the representative of said Hacienda at this court, and I hereby instruct you, in case that person refuses to accompany you as you are ordered, to use such means as may be suitable in order that the mission with which you are charged may be fulfilled. Lib. and Const. July 18, 1904. Hermolao Torres, alcalde."

Way read the paper and remarked, "all right", further saying that he would return with them to Baca to see the Judge (Torres) just as soon as he could finish dressing and eat his breakfast. Fidel Carrasco, one of the men, replied that the Judge had given them orders to take Way at once and refused to permit him to go inside the house. Way repeated that he would accompany them, but that he wanted to finish dressing and have his breakfast before going. Carrasco then seized Way and began pulling him along towards the front gate, calling to Francisco Castro, his companion, to help him. Way called for help. Latimer, the cook, came out of the house, unarmed, and asked the men to desist, saying that Way would go with them as soon as he dressed. Latimer, anticipating no further trouble, went inside to finish preparing breakfast. Soon thereafter he again heard cries for help from Way, and immediately

returned, unarmed, as before. The two men were attempting to carry Way bodily. Latimer hurried up and grappled with Castro, who was armed with a rifle, and in the struggle they both fell to the ground. As they arose Castro shot Latimer in the back with his rifle and then shot Way, who was being held by Carrasco. Way implored Castro not to shoot and stated that he would go to the Alcalde. Castro shot a second time, and Way fell dead at Carrasco's feet. Latimer was removed to the house and died shortly afterwards.

About two hours after the shooting Torres arrived at the scene of the tragedy and proceeded to review the remains in his capacity as Judge for the purpose, he said, of making a report of the facts. A few hours after the arrival of Torres the *Síndico* from Baca also arrived, and in his official capacity undertook to make an investigation of the whole affair.

The Judge of the Court of First Instance, upon being officially advised of the facts connected with the murder, caused the arrest of Torres, Castro and Carrasco, and had them placed in confinement under a charge of having murdered Way and Latimer, and thereupon began an investigation of the facts for the purpose of a trial.

At the trial which was had soon after the killing, many witnesses appeared and gave evidence. All the material facts in connection with the entire affair were fully presented. It was contended by the prosecution that the person primarily responsible for the murder was Torres. It was shown that no offense of any kind had been committed by Way; that Torres had no legal authority to issue a warrant for the arrest of Way; that the warrant or order which he did issue was illegal in form; and that he was so advised by the *Síndico*. The order or warrant stated no offense on the part of Way and it was violative of Article 16 of the Federal Constitution which provides that "No person shall be molested in his person, family, domicile, papers or possessions, except by virtue of an order in writing of the competent authority, setting forth the legal grounds upon which the measure is taken."

A paper which was found on the person of Torres at the time of his arrest, and which was introduced at the trial, indicated that he desired to have it appear that the deputies, or persons to whom the order of arrest had been delivered, had killed Way in self-defense. The paper read as follows:

"If the Director requires or orders you to make an investigation and gives you particulars concerning the case, I recommend you to tell him that you know that the reason why I commissioned Fidel and Francisco to summon the Gringo to appear was because the latter failed to respect my authority, and that the said commissioned persons, upon the Gringo refusing to obey the summons and throwing himself upon them in order to disarm them, were compelled to make use of their weapons, for although only one of the persons had been summoned, the other Gringo, his companion, allied himself with the one summoned, and it was when they ran to get their weapons that they were fired upon, after a long and tiresome struggle, one of them (the commissioned persons) having received blows, as is known."

At the conclusion of the trial in the Court of First Instance, Torres was sentenced to ten months in jail and fined 500 pesos, or twelve months in jail in default of payment of the assessed fine. Castro was found guilty of murder and sentenced to death. Carrasco was found not guilty and released from custody.

An appeal was taken from the judgment of the Court of First Instance to the Supreme Court of the State of Sinaloa which rendered its final decree. Torres was sentenced to confinement in jail for a year and fifteen days, the period of confinement dating from the day of his arrest. Carrasco was sentenced to imprisonment for a period of ten years and six months. The death penalty on Castro was confirmed.

Some diplomatic correspondence was exchanged between the United States and Mexico regarding this case. Following the decision of the lower court, the Department of State of the United States sent an instruction to the American Ambassador at Mexico City in which he was authorized, in the exercise of his discretion, informally to bring the case to the attention of the Mexican Government and to say that, while the Department disclaimed the least desire to interfere in the internal administration of justice in Mexico, it would take the liberty to communicate the painful impression produced by an examination of the record in the case. It was stated that the evidence clearly showed that Torres, in issuing the order for the arrest of Way, put a revolver in the hands of Carrasco instructing him to lend his rifle to his companion, Castro, and gave the order that they should arrest Way in whatever manner they found suitable. It was observed that in such a case, in the courts of the United States, Torres would be considered jointly guilty with the other actors in the proceeding.

The conclusions submitted in this note and in the allegations made in the Memorial as to the guilt of Torres were not sustained by either the higher or the lower Mexican court which passed upon the charge made against Torres. The higher court held that for lack of evidence Torres should be acquitted of responsibility for the murder.

It was contended in behalf of the United States in the written and the oral argument that the sentence passed on Hermolao Torres, in whose mind the murder was premeditated and the punishment inflicted were wholly inadequate and not commensurate with his guilt, and that the decree as to him appears to have been rendered under circumstances that would indicate there had been a distinct denial of justice. Evidence in the record shows, it was asserted, that Torres had boasted that his political and his family connections would protect him from the infliction of any serious punishment. It was alleged that the sentence of the court with respect to Torres was not in accordance with the facts, and that it bears unmistakable evidence of intentional leniency towards him.

It was argued that Torres was the instigator and actual author of the crime; that those who did the killing were merely his tools for the consequences of whose acts he must be considered to be responsible; that he should therefore have been punished for the crime of murder; and that the failure so to punish him resulted in a denial of justice for which the Government of Mexico is responsible. The criticism of the action of the court was apparently centered on two principal points. It was contended that provisions of the applicable Penal Code would have justified a sentence of Torres either as perpetrator of the crime or in any event, as an accomplice. And it was further argued that, had the court not failed to give proper application and weight to testimony presented at the trial, it would have been established that Torres had, before the issuance of the void order of arrest, given vent to expressions of malevolence towards Way and had given oral instructions to the men who killed Way which it might have been expected would result in murder.

Among provisions of the Code, cited by counsel with respect to persons responsible as perpetrators of crime were the following:

(Article 49 of the Penal Code)

I. "Those who conceive, resolve to commit, prepare and execute same, either by personal act or through others whom they compel or induce to commit the crime, the former taking advantage of their authority or power, or availing themselves of grave warnings or threats, of physical force, of gifts, of promises, or of culpable machinations or artifices;"

II. "Those who are the determinate cause of the crime, although they may not execute it themselves, nor have decided upon it, nor prepared its execution, even when they avail themselves in ways other than those enumerated in the foregoing fraction of this article to cause others to commit same;"

V. "Those who execute acts which are the determining cause from which the crime results, or who direct themselves immediately and directly toward its execution, or who are so indispensable to the act necessary for the commission of the crime that without them such crime could not be committed;"

The following provisions among others were cited with respect to persons responsible as accomplices:

(Article 50 of the Penal Code)

I. "Those who aid the authors of the crime in the preparation of the same, furnishing them instruments, arms, or other adequate means for its commission, or giving them instructions to that end, or assisting in any other way its preparation or execution; provided that they know the use which is to be made of one or the other;"

II. "Those who, without availing themselves of the means spoken of in Paragraph I of the foregoing article, employ persuasion or incite passions for impelling another to commit a crime, if such provocation be one of the determining causes of the commission of the crime, but not the only one;"

III. "Those who in the execution of a crime take part in an indirect or accessory manner;"

Mexico produced the sentence of the Court of First Instance and the sentence of the Supreme Court of Sinaloa. It is contended in the Mexican Brief that these judicial pronouncements and the considerations of both law and fact which the Mexican courts had in mind in fixing the penalty imposed on Hermolao Torres are so clear that it is a waste of time to enter into a detailed analysis of the proofs; that the sentences reveal that there was no gross or palpable irregularity upon which an international delinquency could be predicated.

It was alleged that, whether Torres actually had in mind the desire or intention to cause the death of Way, which he possibly had, is immaterial; that the fundamental point in the case is that from the proofs in evidence before the courts, Torres could not have been found guilty of any offense other than the particular one for which he was finally sentenced in accordance with domestic law and procedure. These proofs, it is asserted, were wholly insufficient to establish that Torres had directed or aided in the murder of Clarence Way, and therefore it was the duty of the Mexican courts, in accordance with the provisions of Mexican law, to acquit Torres of the charge of murder, Article 175 of the Penal Code providing that an accused must be acquitted in case of doubt. There was nothing, it is asserted, in the proceedings before either the lower or the higher court to show that there was a manifest injustice in the trial and conviction of Torres, but that in the light of the evidence before the courts no greater conviction or penalty could have been imposed

on Torres. Mexico's international obligations were fully complied with, it was argued, by the arrest and trial of Hermolao Torres, by the passing of final judgment on him, and by imposing the penalties which according to the laws of Mexico were applicable to the particular offenses committed by him. The defense made by Mexico is further shown by the following passage from their Brief:

"The Court in passing judgment upon Hermolao Torres, found that there was no proof of any other order having been given by him to Castro and Carrasco, than the written order hereinbefore referred to. While Castro on the one hand accepted that he and Carrasco received verbal instructions to the effect that if Clarence Way opposed the arrest, they should bring him the best way they could, Fidel Carrasco, on the other, testified that they had not received any verbal instructions besides the written order. Consequently, the Court held that in view of the express text of the written order, Hermolao Torres could not be considered guilty of the crime of aggravated homicide because he was not embraced within any of the cases provided for in Article 49 of the Penal Code"....

Whatever may be said of some of the reasoning employed by the court, I am of the opinion that by a broad application of the principles which have guided the Commission in dealing with a charge of a denial of justice predicated on the decision of courts, the Commission may refrain from sustaining the charge in the instant case.

When counsel for the United States, at the outset of his oral argument announced that one of the grounds of the claim was based on the action of officials of the judiciary of the State of Sinaloa in committing acts to the injury of Clarence Way, counsel for Mexico objected that neither the Memorial nor the Brief mentioned this particular point, and he stated that therefore he had not been given a proper opportunity to meet it. The Agent of the United States contended that the Memorial filed by him which is the pleading in which the foundation of a claim is laid adequately furnished a basis for argument with respect to direct responsibility.

The position of counsel for Mexico was sound. Undoubtedly the allegations of the Memorial and the evidence accompanying it dealt not only with complaints with regard to the imposition of an inadequate sentence on Torres, but also with regard to his wrongful action in connection with the arrest of Way. However, in the Memorial it was specifically stated that Torres "should have been punished for the crime of murder and the failure so to punish him was a miscarriage and denial of justice for which the Government of Mexico is responsible". And the American Brief begins with the following sentence: "This claim is based upon the failure of authorities of the State of Sinaloa to punish one Hermolao Torres, Alcalde of Baca, Sinaloa, for complicity in the murder of Clarence Way, American citizen, at Aguacaliente de Baca, a place near Baca, on July 19, 1904." It seems to be clear therefore that counsel for Mexico had a right to assume that the United States had chosen to present a claim grounded merely on a charge of lack of proper prosecution, even though the Memorial contained sufficient allegations and facts upon which the other cause of action, so to speak, might have been based.

The point so clearly made by the able counsel for Mexico is obviously an important one. The rules with considerable detail specify the averments which the Memorial shall contain as the grounds of the claim. But obviously the sufficiency of a Memorial can not be solely determined

on the basis of some quantitative measure of the allegations. The allegations must make clear the complaint presented. This was very aptly clarified by the use by counsel for Mexico for purposes of illustration, of a term of domestic law when he stated that the Memorial must clearly reveal the "cause of action", or as may be said with reference to proceedings before an international tribunal, the precise character of the wrong of which complaint is made. The difficulty in the instant case is that the Memorial, so far from doing this with respect to the issue of direct responsibility, by the language employed indicated, as observed above, that the claimant Government had chosen to rely on the sole complaint of failure of adequate punishment of the wrongdoers, and counsel for Mexico was justified in making his defense on that theory.

The argument of counsel for the United States on the question of direct responsibility was deferred pending consideration of the objection made by counsel for Mexico. A proper solution of this unfortunate question of procedure was prompted by the action of counsel for Mexico, who, although objecting that he had been surprised by matters of which he had no notice, proceeded in his turn, to make a lengthy argument, for all of which he asserted there was foundation in the following allegation in the Mexican Answer: "It is expressly denied that William T. Way and John M. Way, Jr., have any standing to claim an award or indemnification for the death of Clarence Way." The Spanish text of this sentence is as follows: "Se niega la personalidad jurídica y el derecho que pretenden tener William T. Way y John M. Way, Jr., para pedir una indemnización por la muerte de Clarence Way." He explained that by legal standing he meant what is called in Spanish "the personality." Provisions of the rules with respect to the Answer contain the following requirements:

"The Answer shall be directly responsive to each of the allegations of the memorial and shall clearly announce the attitude of the respondent government with respect to each of the various elements of the claim. It may in addition thereto contain any new matter which the respondent Government may desire to assert within the scope of the Convention."

Technical rules of Mexican law with regard to "personality" of a claimant have no application in the present arbitration, and under the rules the meaning of words in Spanish is no more controlling than their meaning in English. The two parties to each case coming before the Commission are Mexico and the United States. The nationality of a claimant in any given case must be proved because that is determinative of the right of either Government to espouse his claim. The merits of a claim must be determined in the light of international law which governs the relations of the two contracting parties. The general allegation with regard to the standing or right of a claimant could not give notice to a claimant Government of any of the numerous arguments discussed in oral argument by counsel, any more than a broad allegation in a Memorial that a claimant has standing would afford a proper foundation for the discussion of a broad range of similar questions by a claimant Government. Under the general allegation that the claimant has no "standing to claim an award" counsel discussed questions relating to nationality; the right of a half-brother to claim indemnity; the theory that one of the claimants is illegitimate; the standing of an insane person; the character of injuries that might be suffered by an insane person; the amount of

the claim, including the subject of evidence bearing on the sum claimed; and other matters.

However, in the Brief it is asserted that it was not proved that the claimants were dependent for support on the decedent during his life time, and in connection with this allegation it is contended that therefore they are not entitled to claim indemnity on account of the death of Clarence Way. With respect to the propriety of awarding indemnity in favor of collateral relatives, it is argued that the instant case should be differentiated from the cases of *Connelly and Youmans*, Dockets Nos. 270¹ and 271.²

Procedure before the Commission does not permit the enforcement of the strictest kind of rules such as are applied by some domestic tribunals. Fair and efficient procedure is dependent in a considerable measure, as it should be, upon the conduct of counsel. A reasonable compliance with the provisions of rules with regard to the preparation of the Memorial can not fail satisfactorily to acquaint the respondent government with the nature of the claim. And a similar compliance with the provisions of the rules with regard to the Answer should undoubtedly result in fully informing the claimant government of the defenses made to a claim. The Commission has in the past endeavored to apply as rigidly as possible these rules to the end that all their advantages should be fully enjoyed by each party. Pertinent suggestions have been made by the Commission from time to time with this object in view.

Mention was made by counsel for Mexico of the *Massey* case, Docket No. 352.³ In that case Mexican counsel presented a detailed oral and written argument with regard to non-responsibility for so-called minor officers, although neither the Commission nor the claimant Government had notice of this argument until the filing of the Brief. The Commission gave thorough consideration to these arguments, pointing out, however, with a view to promoting compliance with the rules, that the defense had not been advanced in the Answer, and that it was questionable that it could properly have been advanced in the Brief and oral argument.

On June 29, 1927, the Commission called attention to the purpose of the rules that the Commission and each party to the arbitration should be fully informed at the proper time regarding contentions advanced and evidence on which they are based. This action was taken in relation to Answers filed by the Mexican Agent in two cases in one of which it was said:

" . . . no admission is made for the present, of any of the allegations contained in the several paragraphs of the Memorial and in due time the Mexican Agent will formulate the proper defenses or exceptions in consonance with the new evidence to be received."

In the instant case the Commission adopted a course obviously fair to both parties, namely, to allow each of them necessary time in which to reply to new matters. For irrespective of what might have been a proper disposition of the question arising out of the indifferent preparation of the American Memorial and Brief, the Commission could not properly ignore Mexican counsel's departure from the Answer and at the same

¹ See page 117.

² See page 110.

³ See page 155.

time refuse to give consideration to important evidence accompanying the Memorial and to applicable law.

The Mexican Agent declined to make a statement with regard to the time the Mexican Agency might require to present argument or evidence with respect to the question of direct responsibility, and stated he would be obliged before making any statement to the Commission, to consult his Government. Subsequently, after consultation with his Government, he refused to present anything further, and therefore no argument was presented in behalf of Mexico on the question of direct responsibility. Counsel for the United States contented himself with merely remarking with reference to this subject that it is well established that a Government is responsible for the acts of its officials.

The Commission has in other cases extensively considered cognate questions relating to responsibility of a Government for its officials, including such as are some times called "minor officials".

In the *Massey* case it was argued by counsel for Mexico that a minor official who had allowed a prisoner to walk out of jail had been apprehended and strong action had been taken against him, and that therefore no responsibility attached to the Mexican Government for his conduct. It was stated in the opinion written in that case that to attempt by some classification to make a distinction between "minor" officials and other kinds of officials must obviously at times involve practical difficulties. And it was said that in reaching conclusions in any given case with respect to responsibility for acts of public servants the most important considerations of which account must be taken are the character of the acts alleged to have resulted in injury to the persons or property, or the nature of functions performed whenever a question is raised as to their proper discharge. It was pointed out that the conduct of officials had been such that there had been no proper arrest and prosecution of a person who had committed murder, and that therefore there had been a failure of observance of the general rule of international law with respect to the proper action looking to the punishment of a person who injures an alien.

It is believed to be a sound principle that, when misconduct on the part of persons concerned with the discharge of governmental functions, whatever their precise status may be under domestic law, results in a failure of a nation to live up to its obligations under international law, the delinquency on the part of such persons is a misfortune for which the nation must bear the responsibility.

It appears from the record that the Alcalde of Aguacaliente de Baca exercised certain judicial functions. He is classified under the Code of Criminal Procedure of Sinaloa as a part of the "judicial police". Under international law a nation has responsibility for the conduct of judicial officers. However, there are certain other broad principles with respect to personal rights which appear applicable to the instant case. These principles are recognized by the laws of Mexico, the laws of the United States and under the laws of civilized countries generally, and also under international law. There must be some ground for depriving a person of his liberty. He is entitled to be informed of the charge against him if he is arrested on a warrant. Gross mistreatment in connection with arrest and imprisonment is not tolerated, and it has been condemned by international tribunals. It seems scarcely to be necessary to say that guarantees of this nature were violated when the Alcalde who, as it appears from the decision of the Sinaloa court, had authority to issue

proper warrants, issued a void warrant as the court held, a warrant stating no charge, and directed the execution of that so-called warrant by armed men who killed a cultured and inoffensive man, who evidently had sought to avoid trouble with the Alcalde. For this tragic violation of personal rights secured by Mexican law and by international law, it is proper to award an indemnity in favor of the claimants. The sum of \$8,000.00 may be awarded in the light of precedents which it is proper to consider in connection with the instant case.

Decision

The United Mexican States shall pay to the United States of America in behalf of William T. Way, individually, and as guardian of the person and estate of John M. Way, Jr., the sum of \$8,000.00 (eight thousand dollars), without interest.

C. E. BLAIR (U.S.A.) *v.* UNITED MEXICAN STATES

(*October 18, 1928, dissenting opinion by American Commissioner, undated.*
Pages 107-117.)

JURISDICTION.—CONFLICTING JURISDICTION OF SPECIAL CLAIMS COMMISSION.
—DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH. Claim based on failure to punish assailant of claimant, caused by release of such assailant from prison by Madero forces, *dismissed* for lack of jurisdiction.

Cross-reference: Annual Digest, 1927-1928, p. 475.

The Presiding Commissioner, Dr. Sindballe, for the Commission:

On January 19, 1911, C. E. Blair, an American citizen, who lived at Lagos, Canton of Cosamaloapan, Vera Cruz, Mexico, was assailed and treated in a cruel manner by a bandit named Manuel Gutiérrez. Some days after the assailant was arrested by the Mexican authorities and confined in the jail at Cosamaloapan. Before he was brought to trial, however, one of the leaders of the Madero revolution, José Santa Cruz, captured Cosamaloapan and released all the prisoners. Gutiérrez then joined the forces commanded by Santa Cruz, and afterwards he was killed in a battle.

Alleging that Mexico is responsible for the failure to punish Gutiérrez, resulting from his release by the Madero forces, the United States of America, on behalf of C. E. Blair, are now claiming damages in the sum of \$10,000, U. S. Currency, against the United Mexican States.

The respondent Government contends that the General Claims Commission has no jurisdiction in the present case, as the claim in question falls within the exclusive jurisdiction of the Special Claims Commission established by the Convention of September 10, 1923.

As the alleged responsibility of Mexico in the present case is based exclusively upon the failure to punish Gutiérrez resulting from his release by the Madero forces, the Commission is of opinion that the claim under

consideration belongs to the group of claims "arising from acts incident to the recent revolutions" which, according to Art. 1 of the General Claims Convention of September 8, 1923, is excepted from the jurisdiction of this Commission.

Decision

The claim of the United States of America on behalf of C. E. Blair is dismissed.

Commissioner Nielsen, dissenting.

The record in the instant case is extremely vague and confusing, and the argument made in behalf of the United States relating to jurisdictional matters was very meagre. I consider this to be very unfortunate in view of the great importance of the question of jurisdiction which has been raised. In my opinion, a proper disposition of the case requires that the Commission apply to the allegations of liability made by the claimant Government fundamental rules and principles with respect to jurisdiction which in my opinion are generally applicable to cases coming before domestic tribunals and to cases before international tribunals.

Jurisdiction may be defined as the power of a tribunal to determine a case conformably to the law creating the tribunal or other law defining its jurisdiction. *U. S. v. Arredondo*, 31 U. S. 689; *Rudloff Case, Venezuelan Arbitrations of 1903*, Ralston's Report, pp. 182, 193-194; *Case of the Illinois Central Railroad Company*, Docket No. 432,¹ before this Commission, pp. 15, 16.

Generally speaking, when a point of jurisdiction is raised, we must of course look to the averments of a complainant's pleading to determine the nature of the case, and they will be controlling in the absence of what may be termed colorable or fictitious allegations. Matters pleaded in defense with respect to the merits of the case are not relevant to the question of jurisdiction. *Odell v. F. C. Farnsworth Co.* 250 U. S. 501; *Smith v. Kansas City Title Co.* 255 U. S. 180; *Lambert Run Coal Co. v. Baltimore & O. R. Co.* 258 U. S. 377.

Arbitral tribunals seem occasionally to have fallen into some confusion with respect to this last mentioned point. Thus it appears that, when it has been pleaded in defense of a claim that a claimant has failed to resort to local remedies, the plea has been considered as one that raised a question of jurisdiction before an international tribunal. *Cook's Case*, Moore, *International Arbitrations*, Vol. III, pp. 2313, 2315. The proper view would seem to be that in such a case the issue is whether the claim is barred by the substantive rule of international law with regard to the necessity for recourse to legal remedies prior to diplomatic intervention.

So in reclamations involving alleged breaches of contractual obligations it seems that occasionally the insertion into contracts of stipulations designed to prevent a resort to diplomatic protection has been regarded as raising a question of jurisdiction. *Case of Flannagan, Bradley, Clark & Co.*, Moore, *International Arbitrations*, Vol. IV, p. 3564; *Turnbull, Manoa Company (Limited), and Orinoco Company (Limited) Cases, Venezuelan Arbitrations of 1903*, Ralston's Report, pp. 200, 245. Under international law a government has a right to protect the interests of its nationals abroad through diplomatic channels and through the instrumentality of

¹ See page 21.

an international tribunal. Whether according to that law that right may be restricted by contractual obligations entered into by the nationals of one country with the government of another country it is not necessary for me to discuss. The question appears clearly to be one of substantive law and not of jurisdiction. Tribunals that have proceeded as if a jurisdictional question were involved seem in reality to have decided the cases according to their views of the merits and then nominally to have based their decisions on a point of jurisdiction.

In the opinion of my associates it is stated that the United States is claiming damages "Alleging that Mexico is responsible for the failure to punish Gutiérrez resulting from his release by the Madero forces". It is further stated that the Commission considers that the claim is excepted from the jurisdiction of this Commission "As the alleged responsibility of Mexico in the present case is based exclusively upon the failure to punish Gutiérrez resulting from his release by the Madero forces". The allegations made by the United States appear to me to be given a somewhat inaccurate description in these statements, prompted perhaps by some allegations of defense made in the Mexican Answer and in the Mexican brief.

In considering, from the standpoint of jurisdiction, the case presented in behalf of the claimant, we must look first to the Memorial. It is unfortunately difficult to determine from that just what is the nature of the complaint or complaints underlying the claim.

In paragraph IV of the Memorial it is alleged that "an excited Mexican" (also called a "bandit") robbed the claimant of money, threw a lasso over his wrist and dragged the claimant across the prairie over rocks and through vines and bushes, leaving him finally for dead in a terribly weakened condition.

In paragraph V it is alleged that as a result of this outrage the claimant was incapacitated for months from attending to his growing crops, which in the meantime were pillaged, while many farm implements were stolen and destroyed.

In paragraph VI it is alleged that the bandit was arrested but was later paroled or dismissed and that no steps were taken towards apprehending and punishing him. It is also alleged that the judge before whom the offender was given a preliminary hearing, when informed that the claimant and other Americans were robbed on the night when the outrage took place, stated that "neither claimant nor any of the other Americans had any right in a Mexican court because they were Americans and they had no right in Mexico." It is further alleged that the claimant has been unable to obtain any redress whatever from the Mexican Government or authorities although he has made repeated efforts to do so.

Paragraph VII contains the following allegations :

"Because of these and similar acts and the general lack of protection afforded to Americans in that district by the Mexican Government and the constant fear of personal injury and even of death at the hands of the marauding Mexicans, claimant was compelled to return to the United States; and many other American settlers in that district similarly terrorized through the failure of the Mexican Government to afford them due protection and the failure of the authorities to prosecute the perpetrators of attacks and assaults, were compelled to return to the United States."

The following allegations are found in paragraph VIII:

"Since his return to the United States claimant has continued to suffer greatly from the injuries inflicted by his Mexican assailant and his physical condition has been permanently impaired. Said injuries consist of a severe shock to the nervous system and internal injuries to his left side. Being a farmer and having sustained serious and permanent physical disabilities, claimant's earning capacity has of necessity been reduced and damaged. By reason of his physical injuries and property losses he has been damaged in the total sum of \$10,000.00."

From the sentence last quoted above it would appear that the claim presented by the United States in the amount of \$10,000.00, which is the sum prayed for, is for *physical injuries and property losses*. On page 3 of the brief of the United States are similar allegations with respect to physical injuries and destruction and theft of property.

Whether direct responsibility for personal or property injuries could be established in the absence of allegations or proof with regard to warning or absence of proper preventive measures is of course a matter pertaining to the merits of a claim.

In the oral argument counsel for the United States apparently predicated liability on the non-prosecution of the person who outraged the claimant. He referred to the case of *Ida Robinson Smith Putnam*, Docket No. 354,¹ in which it was revealed by the record that a Mexican policeman named Uriarte killed an American citizen, George B. Putnam. The policeman, after having been imprisoned, was released. The Commission held the Mexican Government liable because of the non-prosecution of the offender. Counsel further stated that the claim was predicated upon a denial of justice resulting from the action of Madero forces in releasing the man who robbed and assaulted the claimant.

The Mexican Answer is concerned largely with an objection to the jurisdiction of the Commission, but it is also argued that, assuming that the Commission has jurisdiction, there is no responsibility in the case on Mexico under international law. It is alleged that Gutiérrez, the man who assaulted the claimant, was confined in jail at Cosamaloapan, and that one of the leaders of the Madero revolution, on capturing this town, set at liberty a number of prisoners, including Gutiérrez, who joined the revolutionary forces and was killed in battle. It is contended that the case "falls within the exclusive jurisdiction of the Special Claims Commission."

In the Mexican brief it is argued that, assuming the facts to be as alleged, it appears that the claim arose during the revolutions and disturbed conditions which existed in Mexico covering the period from November 20, 1910, to May 31, 1920, and that it was due to acts of bandits, which, according to Article I of the Convention of September 8, 1923, and under the express provisions of Article III of the Convention of September 10, 1923, fall within the exclusive jurisdiction of the Special Claims Commission. Consequently, it is said, the General Claims Commission has no jurisdiction to pass upon the claim. It is further argued that, apart from the fact that this claim arises from acts of bandits during the period stated in Article III of the Special Claims Convention, the claim is exempted from the jurisdiction of this Commission for the further reason that the United States bases its claim on acts of Madero revolutionary

¹ See page 151.

forces during that period. It is clear and manifest, it is said, that the claim should have been brought before the Special Claims Commission.

In the American brief it is alleged that clearly the assault on the claimant was made by a single person, and it is argued that the assailant was not a bandit "in the true sense of the word, or as used in the Special Claims Convention", Article III of which provides that the Commission thereby constituted shall pass upon certain claims, including acts of bandits. It is further argued that claims "for injuries done by a person not confederated with others are not excluded from the jurisdiction of the General Claims Commission by the provisions of the Conventions of September 8, and September 10, 1923." It is said that Article III of the Special Claims Convention when literally and technically construed relates to claims due to acts of bodies of men; that it is conceivable that the specific act causing the injury might be committed by an individual; but that to come within the provisions of Article III of the Special Claims Convention, such individual must be a member of one of the forces or bodies of men enumerated. By these contentions it would seem to be intended to maintain the jurisdiction of the Commission with respect to a cause of action predicated on responsibility of Mexico for the act of the so-called bandit. On the other hand, reference is made in the brief to the allegations in the Mexican Answer that the assailant was released by Madero forces, and it is asserted that the Government is responsible for the acts of revolutionists, who succeeded in their efforts to establish a government in accordance with their will. It is presumably largely, if not entirely, on this portion of the brief that the majority opinion justified statements to the effect that the claim of the United States is grounded on the failure to punish Gutiérrez resulting from his release by the Madero forces. Whatever uncertainty there may be with respect to this portion of the brief, it seems to me that it must be construed as an attempt to meet the Mexican Government's defense set up in the Answer to the effect that Gutiérrez was released by Madero forces. In other words, it was intended to maintain that, assuming the allegations in the Answer to be correct, Mexico would be responsible for the acts of successful revolutionists. And with respect to this portion of the brief it should be further noted that in a further section of the brief are additional allegations with respect to physical injury and loss of property, closing with an estimate of the value of the lost property at \$910.00 and with a prayer for an award of \$10,000.00.

In oral argument the American Agent took the position that in order that the question of the jurisdiction of the Commission could be raised it must appear on the face of the record that more than one man joined in inflicting the injury upon the claimant; that it should appear that the injury underlying the claim was inflicted by any one of the forces mentioned in the five classifications of forces stated in Article III of the so-called Special Claims Convention of September 10, 1923. And with respect to the jurisdictional point raised in connection with allegations in the Answer relative to the release of Gutiérrez by Madero forces, the Agent argued that, if the Mexican Government could establish that this release was an act perpetrated against the claimant by the Madero forces, causing the claimant personal loss or damage, then the question of jurisdiction might be considered to be raised, but that until this preliminary point was decided by the Commission, the question of jurisdiction was not before the Commission.

Since the Agent at this stage limited himself to an expression of views as to the way in which a question of jurisdiction could be raised, counsel for Mexico replied, stating that the question of jurisdiction had been raised in the Mexican Answer and in the Mexican brief in the only manner provided for by the Rules, and the Commission agreed with that view. With reference to the jurisdictional issues, the American Agent thereupon briefly argued, on the one hand, that, in order to have any claims fall within the jurisdiction of the Special Commission acts must be committed by more than one man, and on the other hand, that the claim was based on a denial of justice. And as regards the question whether the so-called General Claims Commission had jurisdiction, it was immaterial he said whether one or more men committed the act, because the claim was based on a denial of justice, the failure on the part of the Government to punish whomsoever committed the wrongful acts. If the claim was finally pressed as one based on a denial of justice growing out of the non-prosecution of the person who assaulted the claimant, then it would seem that all the allegations of the Memorial with respect to a claim based on direct responsibility for injuries to person and property were discarded, although the Memorial is the pleading in which the claim is presented and a claim of this character is dealt with in the brief and seemingly also to some extent in the oral argument. As has been shown, the Memorial also contains allegations with respect to lack of protection and with respect to improper action of a Mexican court during the administration of President Diaz.

With respect to the contentions made in behalf of Mexico that this claim is clearly within the jurisdiction of the Special Commission, and the contentions made in behalf of the United States that the claim is not within the jurisdiction of that Commission, it may be observed that obviously the fundamental question which this Commission must determine is whether the claim is embraced by the law, so to speak, which defines the jurisdiction of this Commission, that is, the Convention of September 8, 1923, which created this Commission and which by its Articles I and VII prescribes the Commission's jurisdiction.

While the Commission obviously has no power to decide that a claim is within the jurisdiction of some other Commission, it may be proper for this Commission, in construing the Convention of September 8, 1923, to consider provisions of the Convention of September 10, 1923, as the Commission previously has done. See the opinion in the *Home Insurance Company* case, Docket No. 73.¹ When there is need of interpretation of a treaty it is proper to consider provisions of earlier or later treaties in relation to subjects similar to those treated in the treaty under consideration. Pradier-Fodéré, *Traité de Droit International Public*, Vol. II, Sec. 1188, p. 895. And it is permissible to consider negotiations leading to the conclusions of a treaty. Crandall, *Treaties Their Making and Enforcement*, 2nd ed., pp. 377-386. This principle is one that may sometimes be given important application. It would have been desirable indeed if the representatives of either Government could have furnished the Commission with material of the latter kind, throwing light on the scope of the exception stated in Article I of the Convention of September 8, 1923, with respect to claims "arising from acts incident to the recent revolutions." No information

¹ See page 48.

has been given to the Commission whether or not such material is available—perhaps there is none.

In my opinion there is much need of interpretation of the jurisdictional provisions of Article I of the Convention of September 8, 1923. The jurisdictional provisions of the Convention of September 10, 1923, are more detailed and specific than those of the Convention of September 8, 1923. As stated in the opinion of the Commission in the case of *Jacob Kaiser*, Docket No. 1166¹, Article I of the Convention of September 8, 1923, confers jurisdiction on the Commission in all outstanding claims "except those arising from acts incident to the recent revolutions." The phrase "incident to the recent revolutions" is meagre and general language which must frequently require interpretation.

In the case of *Bond Coleman*, Docket No. 209², decided at the present session of the Commission, it was said in the opinion of the Commission with respect to a jurisdictional question raised by Mexico that it was not perceived how there could be any question as to the jurisdiction of this Commission to pass upon a claim involving a complaint against the conduct of Mexican federal military authorities in the month of June, 1924. In the *Kaiser* case, involving a complaint of mistreatment of an American citizen during the so-called revolutionary period, it was said by the Commission that the United States did not predicate its claim on some loss or damage caused by some revolutionists or resulting directly from some revolutionary act, but upon an improper administration of justice by an established government, and that the mere fact that the claim arose during the period from November 20, 1910, to May 31, 1920, does not exclude the jurisdiction of the Commission. The case of *Pomeroy's El Paso Transfer Company*, Docket No. 218³, which was argued in June, 1927, involved claims for compensation for services rendered to Mexican Federal authorities and to revolutionary forces in 1911. With respect to a question of jurisdiction raised by Mexico in that case counsel for the United States argued, as is clear, that the fact that a claim arises between 1910, and 1920, does not exclude it from the jurisdiction of this Commission. Further observations were made to the effect that the claim was of a contractual nature. In view of the meagre argument presented with respect to the point of jurisdiction the Commission, by an order of July 8, 1927, directed that the case be reopened for the purpose of further argument on that point.

Taking account of the similar meagre argument on the part of the claimant Government in the instant case, and of the uncertainty of the record as to what is the precise nature of the complaint or complaints underlying the claim made by the United States, I am of the opinion that, as stated at the outset, it is proper to look to the Memorial for a definition of the nature of the claim. If the claim is based, as stated in the Memorial, on physical injuries and property losses sustained during the administration of President Diaz, then the Commission has clearly, it seems to me, jurisdiction in the case. If the claim should be considered to be based on a denial of justice occurring during the same administration, as a result of non-prosecution of the person who robbed and assaulted

¹ See page 381.

² See page 364.

³ See page 551.

the claimant, then it seems to me the Commission likewise should take jurisdiction. Faulty governmental administration is the basis of each complaint. The decision in the case of *Ida Robinson Smith Putnam*, Docket No. 354¹, which was cited by counsel for the United States as bearing on the merits of the instant case seems to be very apposite. In the opinion rendered in that case it was said, after a reference to two escapes of the policeman, Uriarte, occurring, respectively, in 1911 and in 1913:

"The first escape surely does not give ground for imputing responsibility to Mexico, since she apparently did everything possible to find the prisoner and to inflict on him the remaining punishment imposed. Nothing further is known concerning the second escape except the facts given above; it is not known who Colonel Joaquín B. Sosa was, to what forces he belonged (although it can be supposed that he belonged to the forces of the Constitutionalist Army, which at that time controlled the northern part of the Mexican Republic). (See *George W. Hopkins* case, Docket No. 39², paragraphs 11 and 12.) In the light of these vague facts it is impossible to fix precisely the degree of international delinquency of the respondent Government; but there remain at least the facts that Uriarte escaped and that Mexico had the obligation to answer for Uriarte until the termination of his sentence, and she is now unable to explain his disappearance. In such circumstances it can not be said that Mexico entirely fulfilled her international obligation to punish the murderer of Putnam, as Uriarte remained imprisoned only thirty months, more or less, and therefore Mexico is responsible for the denial of justice resulting from such conduct."

The Commission entertained jurisdiction in this case, and while it was pointed out that there was some vagueness in the record, it seems to me to be clear that the facts are practically identical with those in the instant case, and that therefore the same principles of law are applicable to both. I am of the opinion that jurisdiction attached with the filing of the Memorial. At the present stage we are not concerned with matters of defense on the merits of the case pleaded in reply to allegations contained in the Memorial.

PETER KOCH (ALSO KNOWN AS HEINRICH KOCH) (U.S.A.) *v.*
UNITED MEXICAN STATES

(October 18, 1928. Pages 118-120.)

RESPONSIBILITY FOR ACTS OF MINOR OFFICIALS.—DIRECT RESPONSIBILITY.
—MISTREATMENT DURING ARREST. Mexican customs officials, without uniform, boarded American boat and brutally attacked claimant in course of arrest. Claim *allowed*.

DENIAL OF JUSTICE.—ILLEGAL ARREST. Though evidence as to whether there was probable cause for arrest of claimant was doubtful, *held*, no international delinquency established.

¹ See page 151.

² See page 41.

ILLEGAL DETENTION. Failure to release prisoner on bond *held* no international delinquency.

UNDUE DELAY IN JUDICIAL PROCEEDINGS.—DETENTION OF ACCUSED BEYOND REASONABLE PERIOD. Claimant was arrested on or about July 13, 1912, for suspected theft of guano from Mexican territory. Investigation of his case was completed in September, when it was recommended he should be discharged for lack of evidence. Claimant was released on February, 1, 1913. Claim *allowed*.

Cross-references: Annual Digest, 1927-1928, p. 237.

The Presiding Commissioner, Dr. Sindballe, for the Commission:

On July 10, 1912, after darkness had fallen, the power boat *Ella*, on board of which were the owner, Peter Koch, a naturalized American citizen, and a sailor, Albert Lundquist, was boarded by a Mexican customs official and the rowing crew of this official's boat in the bay of Ensenada, Lower California, off the coast of Todos Santos Islands. The Mexicans wore no uniform and Koch and Lundquist—believing they were robbers, it is alleged—resisted them, trying to start the engine of the boat. As a result hereof the Mexicans treated Koch so brutally that severe wounds and bruises were still to be seen nine days after. On board the *Ella* the Mexicans found a small quantity of guano.

The *Ella* was taken into the harbor of Ensenada. Koch was charged with having resisted the authorities and with having stolen guano from Todos Santos Islands, Lundquist with having resisted the authorities. They were detained under arrest until February 1, 1913, when they were released because of insufficient evidence.

Claim is now made against the United Mexican States by the United States of America on behalf of Peter Koch for damages in the sum of \$10,000, U. S. currency. The claim is based upon the allegations that (1) the brutal manner in which the claimant was treated when his boat was searched by the customs official constitutes an international delinquency, that (2) the arrest was illegal, that (3) the Mexican authorities illegally refused to grant the claimant his liberty on bond pending trial, and that (4) the rights guaranteed an accused by Mexican law were not granted the claimant.

The Commission is of opinion that there can be no doubt that the brutal manner in which the claimant was treated when the *Ella* was searched constitutes a delinquency for which Mexico must be responsible under international law.

Whether or not there was probable cause for the arrest of the claimant, is somewhat doubtful. With regard to the charge of resistance of the authorities the explanation of the claimant that he had no reason to believe that the persons boarding the *Ella* on July 10, 1912, were officials, seems probable. With regard to the charge of theft, his explanation was that he had taken the guano from the San Clementine Island, which belongs to the United States, and that his boat had drifted to the bay of Ensenada because the engine was disabled. This explanation was not believed. It appears that the Mexican authorities—wrongly—believed that there was no guano on the San Clementine Island. On the other hand, the American Consul at Ensenada states in a dispatch of August 8, 1912, that it "is probable that Koch will be convicted, at least on the charge of resisting the officers." And, on appeal, the formal order of

imprisonment of the judge of the First Court of the District of Lower California was confirmed by the Third Circuit Court. Under those circumstances, the Commission would not feel justified in basing an award on the supposition that the arrest in itself was illegal because of lack of probable cause.

Also the refusal of releasing Koch under bond pending trial was ratified by the Third Circuit Court, and the Commission is of the opinion that this refusal can hardly be said to constitute an international delinquency.

With regard to the question whether or not the rights guaranteed an accused by Mexican law have been granted the claimant, it has been argued by Counsel for the United States, that he was held under arrest for three days, namely from July 10 to July 13, before his case was presented to a Court for preliminary consideration, and that the formal order of imprisonment was not issued until July 16, while the Mexican Constitution of 1857 prescribed that a preliminary examination should take place within forty-eight hours from the time the accused was placed at the disposition of the judge, and that no detention should exceed three days unless warranted by a formal order of imprisonment. It seems doubtful, however, whether the arrest of the person of the claimant took place before July 13. Counsel for the United States has further pointed to the long period of time during which the claimant was detained, and the Commission is of opinion that in this respect a wrong has been inflicted upon the claimant, and that Mexico must be responsible for that wrong. It is argued by Counsel for Mexico that the time-limit fixed by Mexican law has not been exceeded. But this argument cannot be conclusive, since the meaning of provisions fixing a time-limit for the duration of a detention is to establish a guarantee for the accused, but not to authorize detention during the maximum period of time in any case, even in the smallest.

Now, the case in question was not very complicated and no evidence whatever has been produced to show what kind of investigations have been carried on during the detention of the claimant. It further positively appears from the record that the investigations before the Court were finished in September, and that at that time recommendation was made to the Mexican Government that the claimant should be discharged because of lack of evidence.

The Commission is of opinion that the amount to be awarded the claimant can be properly fixed at seven thousand dollars.

Nielsen, Commissioner:

I concur in the conclusion with respect to liability in this case.

Decision

The United Mexican States shall pay to the United States of America on behalf of Peter Koch (also known as Heinrich Koch) \$7000. (seven thousand dollars), without interest.

FRANCIS J. ACOSTA (U.S.A.) *v.* UNITED MEXICAN STATES

(October 18, 1928, concurring opinion by American Commissioner, October 18, 1928. Pages 121-123.)

OWNERSHIP OF CLAIM, PROOF OF.—IDENTITY OF CLAIMANT. Claim by Francis J. Acosta for non-payment of money orders issued to A. A. Acosta *allowed* in view of proof claimant had carried on business under trade name of A. A. Acosta.

APPLICATION OF DOMESTIC STATUTE OF LIMITATIONS. Domestic law requiring presentation of money orders within two years *held* inapplicable when such orders were not being paid by the Government when presented.

RESPONSIBILITY FOR ACTS OF *de facto* GOVERNMENT.—*Stare Decisis*. Claim for non-payment of money orders issued by Huerta regime *allowed* pursuant to prior rulings of tribunal.

CONTRACT CLAIMS.—NON-PAYMENT OF MONEY ORDERS.—COMPUTATION OF AWARD.—EFFECT OF DOMESTIC LAW GOVERNING PAYMENTS.—RATES OF EXCHANGE. Mexican law of payments of April 13, 1918, *held* inapplicable in computing the award. Award in claim for non-payment of money orders computed on basis of rate of exchange prevailing at time of their purchase.

(Text of decision omitted.)

SINGER SEWING MACHINE CO. (U.S.A.) *v.* UNITED MEXICAN STATES

(October 18, 1928, dissenting opinion (dissenting in part) by American Commissioner. October 18, 1928. Pages 123-126.)

RESPONSIBILITY FOR ACTS OF *de facto* GOVERNMENT.—*Stare decisis*. Claim for non-payment of money orders *allowed* pursuant to prior rulings of tribunal.

CONTRACT CLAIMS.—NON-PAYMENT OF MONEY ORDERS.—COMPUTATION OF AWARD.—RATES OF EXCHANGE. Award in claim for non-payment of money orders computed on basis of rate of exchange prevailing at time of their issuance.

(Text of decision omitted.)

L. J. KALKLOSCH (U.S.A.) *v.* UNITED MEXICAN STATES*(October 18, 1928. Pages 126-130.)*

DENIAL OF JUSTICE.—ILLEGAL ARREST.—CRUEL AND INHUMANE IMPRISONMENT. Without warrant or other legal authority, and without evidence indicating claimant may have been guilty of crime, claimant was arrested and, allegedly, imprisoned in filthy jail cell without bed, blanket or even a rag. *Held*, responsibility of respondent Government established as to illegal arrest.

EVIDENCE BEFORE INTERNATIONAL TRIBUNALS.—BURDEN OF PROOF.—EFFECT OF NON-PRODUCTION OF EVIDENCE AVAILABLE TO RESPONDENT GOVERNMENT. Where evidence is conflicting but evidence by claimant includes affidavits based on personal knowledge and corroborating report of American consul, while respondent Government has, without explanation, failed to produce official records presumably in its custody which would clarify the disputed facts, *held*, claim established by the evidence.

Cross-reference: British Yearbook, Vol. 11, 1930, p. 225.

Commissioner Nielsen, for the Commission:

Claim in the amount of \$12,500.00 is made in this case by the United States of America against the United Mexican States in behalf of L. J. Kalklosch. The claim is grounded on complaints made by the claimant that he was illegally arrested and imprisoned by Mexican authorities, and that he was mistreated in connection with his arrest.

The Memorial contains in substance the following allegations with respect to the occurrences out of which the claim arises:

On July 16, 1912, the claimant was arrested at Columbus, Tamaulipas, Mexico, by a lieutenant of the Mexican Army in command of Mexican forces. Without warrant or other legal authority and without just cause, the claimant was taken first to Los Esteros, Tamaulipas. He was 58 years old at the time and in delicate health, one of his legs being infirm from paralysis. Nevertheless he was required to march at a greater speed than was proper or necessary and was otherwise mistreated and humiliated by the soldiers. From Los Esteros he was taken to the town of Altamira, where he was imprisoned in a jail for three days and nights, in a filthy cell where he had to sleep on a cement floor without bed, blanket or even a rag. Although the claimant was arrested only 400 feet from his home at Columbus, he was refused permission to go there to provide himself with proper clothing for the confinement that he was to undergo. From Altamira he was taken to Tampico, where he was confined in jail for four days and nights, whereupon he was released upon order by the Court of First Instance, there being no evidence against him. It is understood that the claimant was suspected of participation in a mock or feint lynching of one J. W. Lindsay, a citizen of the United States, which took place at Columbus, Tamaulipas, on the night of July 15, 1912, an act with which the claimant had nothing to do.

The claimant, as a result of the treatment accorded him, was humiliated and was greatly injured in body and mind by unjust and unwarranted arrest and imprisonment.

Evidence accompanying the Memorial of the United States includes the following:

A lengthy despatch under date of July 25, 1912, sent by the American Consul at Tampico to the Department of State at Washington, regarding the arrest at Columbus, Tamaulipas, of seven Americans, including the claimant, Kalklosch; an affidavit made by the claimant on November 1, 1912, which he formulated at that time with respect to a claim against the Government of Mexico; an affidavit made on June 16, 1913 by C. R. Chase, who was a resident at Columbus, and one of the men arrested; an affidavit made on June 27, 1913, by J. T. Moore, a clergyman resident in Columbus, who was also arrested; an affidavit made on September 24, 1926, by F. B. Parker, who was engaged to act as interpreter for the arrested Americans by their lawyer in Tampico in 1912; a letter, under date of September 9, 1912, addressed by I. R. Clark, one of the men arrested, to the American Consul at Tampico, with respect to the occurrences out of which the claim arose.

In the Mexican Government's Answer denial is made of all the allegations in the American Memorial, and it is asserted that none of these allegations has been proved.

Accompanying the Answer is a statement of the Municipal President of Villa de Altamira in which it is stated that a Municipal Judge of the town who acted as Secretary of the Municipal Government and Director of Courts in the year 1912, made a sworn declaration that it was untrue that Louis J. Kalklosch was a prisoner in that year, or that he had been in that town, or in Columbus; and furthermore, that Kalklosch was never molested by Mexican authorities; that there were no police books or records to confirm his statements which could be proven, however, by testimony of well-known residents of the town of Altamira; and that the files of the town were burned by revolutionary forces which were quartered there during the last days of 1912. Pursuant to stipulations between the Agents, the Mexican Government further produced statements obtained from persons at Altamira in the month of March, 1927, to the effect that the claimant was never under arrest at that place.

The report of the American Consul and other evidence accompanying the American Memorial contain detailed information in relation to the occurrences out of which the claim arises. It appears that there was at Columbus an American settlement known as the American Colony, consisting of approximately 500 people. These people evidently entertained intensely religious views and were strongly opposed to intoxicating drinks or to the sale thereof in their midst. The presence in this colony of an American citizen by the name of J. W. Lindsay was very obnoxious to the other residents. Lindsay, it appears, made his living by begging to a large extent, and maintained or attempted to maintain a saloon and a house of vice.

In July, 1912, a masked party, consisting probably of seven or eight persons went to Lindsay's house, blindfolded him and conducted him to a tree where they put a rope around his neck and went through the motions of hanging him, evidently with the purpose of frightening him and causing him to leave the town. Doubtless he suffered some injury.

On the morning of July 16, 1912, the news of this outrage having been brought to the attention of the authorities of Altamira, a party of soldiers came from that town to the station of Los Esteros and proceeded to Columbus and there arrested seven men who were taken to Altamira

on the afternoon of that day and there confined in jail. At the end of three days they were committed to the Court of First Instance at Tampico, where they were again confined in a jail. Four days later Kalklosch and three other men were unconditionally released from that jail.

Obviously it was proper to take appropriate steps looking to the punishment of the perpetrators of the outrage on Lindsay. However, from the evidence in the record it appears that Kalklosch did not participate in the mock lynching; that he was in his home when this outrage occurred; and that Lindsay on more than one occasion made it known to Mexican authorities that Kalklosch had no part in this affair.

Unless the evidence accompanying the Memorial is to be rejected practically in its entirety, it must be concluded that Kalklosch was arrested without a warrant and without any cause. The statements that Kalklosch was not arrested and was not molested can only be accepted if the view is taken that in the affidavits accompanying the Memorial the affiants stated a mass of amazing falsehoods, and that the American Consul in 1912, produced out of his imagination, a lengthy report concerning arrests of Americans which never took place. Of course such things did not occur.

In the Mexican Brief it is said that of course the only evidence that could establish the disputed allegations in this case would be the court and police records, and that unfortunately, due to revolutionary troubles, the archives of the town of Altamira were destroyed in 1914. This is not a satisfactory explanation of the absence of evidence of this kind. The prisoners were taken from Altamira to Tampico, and there an investigation was conducted and formal imprisonment of the arrested men was decreed. Some, and perhaps all, of the official records relating to the arrest of the seven men were therefore in Tampico. There is nothing in the record with respect to the destruction of records at that place.

Counsel for the United States in argument called attention to Article 16 of the Mexican Constitution of 1857, in force in 1912, which provided that no one shall be molested in respect of his person, family, domicile, papers or possessions, except by virtue of an order in writing of the competent authority, setting forth the legal grounds upon which the arrest is made, an exception being made of course with respect to the arrest of persons taken in *flagrante delicto*. In the absence of official records the non-production of which has not been satisfactorily explained, records contradicting evidence accompanying the Memorial respecting wrongful treatment of the claimant, the Commission can not properly reject that evidence. The treatment of questions of evidence similar to those raised in the instant case was discussed in the case of *William A. Parker*, Docket No. 127,¹ and in the case of *Edgar A. Hatton*, Docket No. 3246.²

While the claim for damages in the sum of \$12,500.00 must be rejected, an award may be made in the sum of \$300.00.

Decision.

The United Mexican States shall pay to the United States of America in behalf of L. J. Kalklosch the sum of \$300.00 (three hundred dollars), without interest.

¹ See page 35.

² See page 329.

I. R. CLARK (U.S.A.) *v.* UNITED MEXICAN STATES*(October 18, 1928, Pages 131-132.)*

DENIAL OF JUSTICE.—ILLEGAL ARREST. Claim arose under same circumstances as those in *L. J. Kalklosch* claim *supra*, except that there may have been probable grounds for arrest. Claim *allowed*.

DAMAGES, PROOF OF.—PROXIMATE CAUSE. Where claimant was attacked by another prisoner during course of illegal imprisonment but medical testimony did not clearly establish that claimant's impairment of hearing resulted from such attack, evidence of injury *held* insufficient.

Cross-reference: Annual Digest, 1927-1928, p. 227.

Commissioner Nielsen, for the Commission:

Claim in the amount of \$25,000.00 is made in this case by the United States of America against the United Mexican States in behalf of I. R. Clark. The claim is grounded on complaints made by the claimant that he was illegally arrested and imprisoned by Mexican authorities, and that he was mistreated in connection with his arrest.

The occurrences upon which this claim is grounded are the same as those stated in the opinion rendered in the case of *L. J. Kalklosch*, Docket No. 708.¹

Although it was contended in the instant case that Clark was the victim of an illegal arrest without a warrant and of gross mistreatment in jail, the case was, to some extent, differentiated by counsel for the United States from the Kalklosch case, in that it was said that possibly there may have been some cause for the arrest of Clark.

An important point is raised in the instant case with respect to damages suffered by the claimant. It is alleged in the Memorial and there is evidence to support the allegation that when the claimant was in jail at Altamira, a drunken Mexican was placed in the cell with the claimant, and that the former, without provocation, and under encouragement of Mexican soldiers, dealt the claimant a very severe blow on the head which produced great pain and resulted in a permanent condition of deafness in both ears. Whatever may be the facts with respect to this particular matter, careful consideration must be given in connection therewith to what may be called expert testimony accompanying the Memorial. That is an affidavit of a physician made on May 18, 1921, in which he states that on April 28 of that year he made a thorough examination of the claimant Clark and found his hearing decidedly impaired and the tympanic membranes dull and retracted but otherwise apparently normal. He further says that he can not definitely state the exact cause of this condition which "might have occurred from a number of causes", but could have resulted from a sudden and violent blow on the ear.

There is not before the Commission evidence upon which to base a definite conclusion with respect to this particular item of damage claimed by the claimant. An award of \$200.00 may be rendered in his favor.

¹ See page 412.

Decision.

The United Mexican States shall pay to the United States of America the sum of \$200.00 (two hundred dollars) in behalf of I. R. Clark, without interest.

ALEXANDER ST. J. CORRIE (U.S.A.) *v.* UNITED MEXICAN STATES

(*March 5, 1929. Pages 133-135.*)

RESPONSIBILITY FOR ACTS OF MINOR OFFICIALS.—DIRECT RESPONSIBILITY.—WRONGFUL DEATH.—DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH. A Mexican Chief of Police, out of uniform, shot dead two American seamen during course of his efforts to quell a street disturbance. An investigation was promptly begun by the authorities and the police officer was arrested. Three days after his arrest he was released and resumed his duties as Chief of Police. A year later he was deported from the State of Sonora and was thereafter arrested in the United States. An American consul in Mexico suggested he be turned over to the Mexican Government for trial and possible punishment. Instead he was released. Claim *disallowed*.

The Presiding Commissioner, Dr. Sindballe, for the Commission:

In this case claim in the sum of \$50,000.00, United States currency, is made against the United Mexican States by the United States of America on behalf of Alexander St. J. Corrie, alleged to be the father and the heir or next of kin of William Wallace Corrie, a seaman of the United States Navy, who, on April 9, 1913, was shot by Cipriano Lucero, the Chief of Police of Guaymas, Sonora, Mexico. The claim is predicated, first, on the act of Cipriano Lucero, and secondly, on the alleged failure of the Mexican authorities properly to prosecute and punish Lucero for having shot Corrie.

It is contended by counsel for Mexico that neither the American nationality of Alexander St. J. Corrie nor his kinship to the deceased, William Wallace Corrie, has been adequately established by the proofs submitted by counsel for the United States. With regard to the question of nationality it is stated in an affidavit of the claimant himself that he is a citizen of the United States by birth, and this statement has been corroborated by affidavits of several of his relatives or acquaintances. Likewise, the kinship of the claimant to the deceased has been asserted by affidavit of the claimant himself, and corroborated by affidavits of several other persons as well as by the enlistment record of the deceased in the United States Navy, in which the claimant is mentioned as the "beneficiary or next of kin" of the deceased. The commission is of the opinion that the evidence thus submitted should be considered as sufficient.

With regard to the circumstances surrounding the shooting of William Wallace Corrie the following appears from the record:

On April 9, 1913, a liberty party from the *U. S. S. California*, including Corrie, went ashore at Guaymas. A number of the men visited saloons and

came under the influence of intoxicating liquor. They caused some disorder in the streets, and Cipriano Lucero interfered. He wore no uniform, but his capacity of policeman was known at any rate to some of the seamen. A struggle broke out between Corrie and Cipriano Lucero, the latter trying to take from Corrie a beer bottle which he had in his possession. During the struggle a number of beer bottles were thrown in the direction of the fighters by some of the seamen. At least one of those bottles hit Cipriano Lucero but without doing him any serious harm. Another bottle hit Corrie, who staggered back and was seized by the right arm by a member of the ship's patrol just reaching the scene of the disorder. Cipriano Lucero then drew his revolver and shot Corrie, and as some of the seamen and one Schlenther, belonging to the ship's patrol, attempted to disarm Lucero, the latter fired another shot which instantly killed one Klesow, master-at-arms, United States Navy, who was trying to push back sailors from the scene of the fighting.

The Commission does not think it proper, on the facts thus established, to regard the act of Cipriano Lucero in shooting Corrie as an act for which Mexico must be directly responsible under international law. On the other hand the event that had taken place certainly was of such a nature as to make it the duty of Mexico to institute a thorough investigation. What has been done in this respect is not quite clear. It appears that Lucero was arrested on April 10, 1913, the day after the killing of Corrie, and that the testimony of a number of witnesses, citizens of Guaymas, as well as persons from the *California*, was taken by the competent Mexican court. On April 13, however, Lucero was released and resumed his duties as Chief of Police of Guaymas. Certain court records are alleged to have been lost, which may be due to the disturbed conditions known to have existed in Sonora during the time subsequent to the killing of Corrie. The American Consular Agent at Guaymas reported to the State Department on April 10, 1913, that the proper authorities were making the strictest investigation, but he does not appear to have made any comment on the release of Lucero on April 13, nor does any action by American authorities appear to have been occasioned thereby. In 1914 Lucero was deported from Sonora, and it appears that he was arrested by the American authorities in Nogales, Arizona, and that the American Consul at Nogales, Mexico, suggested to the Arizona authorities the detention of Lucero until he, when a Mexican Government had been established, might be turned over to that Government for trial and possible punishment. However, this course of action was not adopted by the American authorities, but Lucero was released. In view of those circumstances, the Commission would not feel justified in giving an award in the present case, although, of course, a serious doubt remains as to the appropriateness of the procedure in question of the Mexican court.

Decision

The claim of the United States of America on behalf of Alexander St. J. Corrie is disallowed.

PARSONS TRADING COMPANY (U.S.A.) *v.* UNITED MEXICAN STATES.

(March 5, 1929. Pages 135-137.)

CONTRACT CLAIMS.—RESPONSIBILITY FOR ACTS OF *de facto* GOVERNMENT.—EFFECT OF DOMESTIC STATUTE OF LIMITATIONS.—*Stare Decisis*. Claim for goods sold and delivered to respondent Government during Huerta regime *allowed* pursuant to prior rulings. Defence based upon Mexican law requiring presentation of such claims to Mexican Government within fixed period *overruled* pursuant to prior rulings.

(Text of decision omitted.)

WALTER J. N. McCURDY (U.S.A.) *v.* UNITED MEXICAN STATES.

(March 21, 1929, concurring opinion by American Commissioner, March 21, 1929. Pages 137-150.)

DENIAL OF JUSTICE.—MISCONDUCT OF OFFICIALS.—MISCONDUCT OF AUTHORITIES DUE TO UNDUE INFLUENCE.—EVIDENCE BEFORE INTERNATIONAL TRIBUNALS.—QUANTUM OF PROOF. When charge of misconduct of officials due to undue influence is made, *held*, evidence of the highest and most conclusive character must be furnished to establish such a charge.

IRREGULARITIES IN JUDICIAL PROCEEDINGS.—FAILURE TO PROVIDE COUNSEL TO ACCUSED. Claim based on irregularities in judicial proceedings must rely on matters of substance rather than matters of form. Basic irregularities, including trial of accused without counsel, *held* not established.

TRIAL WITHOUT PROBABLE CAUSE. Evidence before Mexican authorities *held* sufficient to justify trial.

UNDUE DELAY IN JUDICIAL PROCEEDINGS. Eight months *held* not undue period in the circumstances for investigation of claimant's guilt by the courts.

CRUEL AND INHUMANE IMPRISONMENT. Claim that claimant received inadequate living allowance during imprisonment *held* not established by the evidence.

Cross-references: Annual Digest, 1929-1930, p. 165; British Yearbook, Vol. 11, 1930, p. 225.

Commissioner MacGregor, for the Commission:

Claim in the sum of \$50,000.00, United States currency, is made in this case by the United States of America against the United Mexican States on behalf of Walter J. N. McCurdy, a citizen of the United States, a victim, it is alleged, of illegal acts of the Governor and the Secretary of State of the State of Sonora, as well as of the courts of said State, in com-

mitting a denial of justice, and of the authorities that subjected him to maltreatment while he was in prison.

The American Agency states that McCurdy was a lawyer who for several years represented the Yaqui Copper Company, an American corporation, which owned mining properties in the districts of Sahuaripa and Ures, in the State of Sonora, Republic of Mexico. The President of the said Company, one W. P. Harlow, in the year 1902, presented to Rafael Izabal, Governor of Sonora, as a gift, 5,000 shares of the Yaqui Copper Company. During that same year of 1902, McCurdy denounced one thousand (1,000) mining claims in the District of Sahuaripa, adjoining the property of the Yaqui Copper Company, for which reason Harlow tried to purchase them from McCurdy. Both, discussed the matter during a trip especially planned by Harlow in that same year, and upon McCurdy's refusal to sell, bitter and violent discussions ensued. McCurdy returned to the United States, Nogales, Arizona, where he remained from November, 1902, to March, 1903, on which date he returned to the mines upon Harlow's request, in order to discuss further the sale of the mining claims. On his arrival at the mines he did not meet Harlow, and continued his journey to Hermosillo, Sonora, hoping to find him there. When he arrived at a small village called Suagui de Batuc he was arrested at the instance of Harlow who had complained that he (McCurdy) had made threats against him. The Court dismissed the case for lack of evidence; but following his discharge McCurdy was rearrested upon a warrant issued by the Court of First Instance at Hermosillo, Sonora, on the charge of an attempt to murder W. E. Pomeroy at the "Rancho de Calaveras" four months before, that is to say, on November 10, 1902. Consequently, McCurdy was conveyed to Hermosillo and confined in jail there.

It is alleged that the attempted murder did not take place and that the facts occurred as follows:

On the 10th of November, 1902, when Harlow and his companions visited the mines, the party stopped at the "Rancho de Calaveras" for a dinner that had been prepared by W. E. Pomeroy, who was Superintendent of the Yaqui Copper Company. Someone asked McCurdy to demonstrate his skill as a marksman; he drew his pistol and started to shoot against a wall in the patio. At that time Pomeroy entered; McCurdy ceased firing saying to the newly arrived: "What do you want, Bill?" Pomeroy replied: "Nothing now" and left; McCurdy resumed his shooting exercise. It is alleged that while McCurdy was in jail he was visited by one Charles R. Miles, agent and broker of Harlow, who told him, that he (McCurdy) would be liberated at once and paid \$5,000.00, if he would sign a deed to the mining properties. McCurdy refused the proposition. Soon afterwards, McCurdy, against whom, as it appears, jail regulations were not strictly enforced, accompanied the jailer to the railroad station. The following day, McCurdy was visited by Francisco Muñoz, Secretary of State of the State of Sonora, who, after reproaching him for having gone to the station, also offered to release him if he would comply with the terms submitted by Miles. Furthermore, after this alleged interview, it is said, McCurdy was conveyed by a Mexican Captain to the offices of Miles. Miles insisted in his offer and received another refusal from McCurdy. That same afternoon McCurdy was compelled to enter the jail proper, when he was informed by the jailer, that the Secretary of State of the State of Sonora, Muñoz, had ordered that he be held *incomunicado*, as Miles had complained that he (McCurdy) had threatened his life.

McCurdy was in jail from March 22, 1903 to January 22, 1904, during which time, he was subjected to several trials. McCurdy alleges that during the time the proceedings were conducted against him, the rights and privileges that the Mexican law grants were not accorded to him, and that he was maltreated during the entire time of his imprisonment, all due to the illegal influence exercised by the Governor and Secretary of State of the State of Sonora, instigated by Harlow.

The American Agency grounds its conclusions as to the responsibility of the Mexican Government for the aforementioned facts on the following considerations:

(a) There was collusion on the part of Harlow and the Mexican officials to entice McCurdy into Mexico and have him arrested making various unjustified charges against him for the purpose of forcing him to sell his mining properties. The participation of the Governor and Secretary of State of the State of Sonora in this conspiracy is an official act for which the Mexican Government must respond.

(b) The court proceedings instituted to elucidate the charges preferred were characterized by repeated acts of injustice and impropriety.

(c) The failure of the Mexican courts to try McCurdy promptly constitutes a denial of justice according to international law.

(d) McCurdy was ill-treated during his imprisonment.

The American Agency grounds the first assertion on the following evidence:

(1) An affidavit of the claimant himself, in which he states that the Governor of Sonora was presented by Harlow with a gift of 5,000 shares of the Yaqui Copper Company, and that Muñoz, Secretary of State of the State of Sonora, visited McCurdy at the jail in Hermosillo offering to release him if he would agree to sell his mining properties; in the same affidavit the claimant affirms that Harlow told him that the influence of the Governor and Secretary of State of Sonora had been secured, and that the former had full control over all other officials of the State of Sonora.

(2) An affidavit of one Starr K. Williams asserting that it was generally known that Harlow had important business with the Governor and Secretary of State and that they had full control over the actions of the Courts and judges of the State of Sonora; that several Mexican officials told him that McCurdy would be released as soon as he would sign the necessary papers for the sale of his mines; that he had been informed and believes that the Governor as well as the Secretary of State of Sonora were stockholders of the Yaqui Copper Company.

(3) Another affidavit made by Bim Smith who asserts more or less the same as stated by Starr K. Williams.

(4) An affidavit of one Win Wylie in which he affirms that Harlow was a man that would stop at nothing and had boasted of having considerable influence with the authorities of Sonora, which affiant believes to be true.

(5) An affidavit of W. E. Pomeroy in which affiant states that Harlow had a great deal of influence with Izabal and Muñoz.

(6) An affidavit of Marshall P. Wright in which he asserts that it was generally rumored at that time, that the Governor of the State of Sonora and other officials were interested in the Yaqui Copper Company and that the said Harlow had influence with the Mexican authorities of the aforementioned State of Sonora.

Regarding such an important point as this there is no other proof.

In view of the foregoing evidence in the record, the Commission can not attribute any undue influence to the Mexican authorities. Although, in other cases, (*William A. Parker*, Docket No. 127¹, and *G. L. Solis*, Docket No. 3245)², the Commission has stated that it would consider certain facts as proved, even if they were only supported by affidavits, it declared likewise, that in each case the value attached to such affidavits would be estimated in accordance with the circumstances surrounding the fact under consideration. In this case it is endeavored to prove misconduct, in a grave degree, of Mexican officials and therefore the Agency advancing the charge should submit evidence of the highest and most conclusive character. In the judgment of the Commission it is not proven that the Governor of Sonora received the 5,000 shares referred to by McCurdy.

McCurdy asserts in his affidavit that he wrote the letter dictated by Harlow, in which the latter presented Governor Izabal with the shares in question. Even though this fact might, for the sake of argument, be considered as established, it has not been proven before the Commission that said letter was received by its addressee, or if he received it, that he accepted the donation of the shares. Furthermore, even in the supposition that the shares might have been accepted by the Governor, it has not been fully established that such gift induced him to unduly intervene in the proceedings that McCurdy's associates started against him. The rest of the affidavits submitted by the American Agency for the purpose of corroborating McCurdy's assertion, only contain statements that the affiants heard a rumor to the effect that the Governor was a stockholder of the Yaqui Copper Company and that he had great influence over the authorities of Sonora. Affidavits constitute full proof either when stating acts of the affiant or acts that said affiant knew directly, but when they contain hearsay evidence or only refer to rumors, their value diminishes considerably, at times to such an extent as to become void. It must be presumed that in the books and other documents of the Yaqui Copper Company, the names of the stockholders appeared; copies or transcripts of these books' contents might have had great probative value before this Commission. But such proof has not been submitted and the vague considerations as to the possible loss of such books and documents due to the long time elapsed since the facts referred to took place, are not sufficient to justify its absence. In view of the foregoing, and, as the trial record submitted by the Mexican Agency as proof, as will be shown hereafter, does not substantiate the alleged undue influence of the Mexican authorities against McCurdy, the Commission rejects this phase of the claim.

In order to judge as to the propriety or impropriety of the proceedings instituted against McCurdy by the Mexican authorities, it should be borne in mind that in the present instance the case under consideration was decided in the first instance by a judge at Hermosillo, and reviewed on appeal by the Supreme Court of Sonora, whose decision must be considered, according to Mexican law as *res judicata*. The Commission in considering the alleged denial of justice must rely upon matters of substance rather than on matters of form, inasmuch as the existence of some irregularities in the proceedings against an offender does not necessarily constitute sufficient ground in itself to justify a declaration of such denial of justice.

¹ See page 35.

² See page 358.

The Commission on various occasions has expressed its opinion in this respect, following the well established international jurisprudence.

Briefly, three charges were preferred against McCurdy:

(a) Attempted homicide on the person of W. E. Pomeroy. (Proceedings initiated March 19, 1903.)

(b) Forgery of Harlow's signature on certain telegrams. (Proceedings initiated March 25 of the same year.)

(c) Fraud committed against Harlow, by means of a money order. (Proceeding initiated March 27 of the same year.)

The version of the claimant as to the charge of attempted homicide, has been hereinbefore set out. The facts established before the Judge differ from such version, as Pomeroy himself appeared accusing McCurdy of attempting to murder him at the "Rancho de Calaveras", after insulting him and firing at him four times with his pistol without hitting him. The eye witnesses that were duly examined by the Judge in the case corroborated the testimony of Pomeroy and though afterwards some of them modified their declarations to the effect that they did not believe that it was the intention of McCurdy to kill Pomeroy, inasmuch as they had later seen both to be on friendly terms, and even sleep together, but such assertion in regard to the opinion that the witnesses had as to McCurdy's action would not change the existence of the facts. The Judge ordered the examination of the witnesses introduced by McCurdy, among them two Americans who seemed important, residing in Washington, D. C., who were examined through letters rogatory, and these also, in general, corroborated the charges made by Pomeroy. The latter, in an affidavit now before the Commission affirms that the charge of attempted murder against McCurdy was false, that he and McCurdy never had any disagreement, that no bad feelings existed between them at any time, and that the said McCurdy did not, at the time stated, or at any other time ever make any malicious assault upon him. This surprising declaration was made in October 1926, and consequently it was never known by the Judge who was trying McCurdy.

In view of these facts, it appears that the Judge had sufficient grounds to try the claimant.

The same may be said as to the second charge, forgery. Upon receipt of Harlow's complaint the Judge ordered that the necessary investigations be made, requesting also an expert's report on the signature attributed to Harlow affixed to the two telegrams alleged to have been forged. The penmanship experts were both of the opinion that the signature was not Harlow's, but could not ascertain whether it was written by McCurdy. However, two employees of the telegraph office where the telegram had been deposited testified that McCurdy personally had delivered the telegrams in question.

With regard to the charge of fraud, it appears from the court records submitted by Mexico, that Charles R. Miles filed complaint before the Court of First Instance of Hermosillo accusing McCurdy of having addressed to him a telegram in November, 1902, stating that he had drawn against the said Miles, under instructions and on account of Harlow, for a certain amount of money, and in favor of the Banco de Sonora; that an employee of said Bank presented to Miles said draft for \$200.00 which was immediately paid, in the belief that Harlow had given instructions to McCurdy for that purpose. Thereafter, upon settling his accounts with Miles, Harlow denied having instructed McCurdy to pay the sum in question for his

account. McCurdy did not deny having sent the telegram. Harlow on his part declared that he had never authorized McCurdy to draw either in favor or against any person in his name, and with this information the Judge instituted the proceedings and rendered final judgment.

In the light of the foregoing facts, the Commission is of the opinion that the Mexican judicial authorities had probable or sufficient cause to prosecute McCurdy in view of the charges preferred against him by his associates.

The American Agency contended that according to Mexican laws, even if there were cause for the provisional detention of McCurdy, there were no grounds for his formal detention, as for such action it is required that the *corpus delicti* be established. In this respect, reference is made to Article 233 of the Code of Criminal Procedure of the Federal District, which reads:

"The formal or temporary arrest can only be decreed in the presence of the following requisites:

"1. That the existence of an illicit act deserving corporal punishment be fully established."

The Commission does not feel justified in accepting this argument, because as admitted by both Agencies, the Code of Criminal Procedure of the Federal District of Mexico is not applicable to a case tried in Sonora; besides, it considers that probably there is a difference between *establishing the Corpus Delicti* and "*proving the existence of an illicit act*", a consideration which is corroborated by the fact that it frequently occurs that the *corpus delicti* cannot be established at the outset of the preliminary judicial investigation, but only in the course of the trial, and in many cases not until the conclusion of it. If for the arrest of a criminal there were a requisite to the effect that the *corpus delicti* should be established from the very beginning, many crimes would perhaps remain unpunished, and furthermore, it could perhaps be said that a legislation containing such a provision would possibly violate international law, inasmuch as it would hinder the State in complying with its foremost duty of administering justice. In the judgment of the Commission the facts in the instant case as known by the Judge were sufficient to hold McCurdy guilty, even if the further actions and depositions of his associates, especially as are now known by the Commission, may give rise to a doubt as to the latter's culpability, and suggest the belief that perhaps McCurdy was a victim of the contrivances of his own associates.

The American Agency asserts that McCurdy was denied the right to appoint counsel during the trial and that the Judge accepted Miles as interpreter, though he appeared as McCurdy's accuser.

With respect to the lack of counsel, the fact does not appear sufficiently proved. After the initiation of the proceedings, (April 22, 1903), McCurdy applied for the examination of some witnesses in his favor, which is granted by the Judge; McCurdy writes in Spanish a petition to the Judge, quoting provisions of Mexican laws, which suggests that either he had a legal advisor who drafted such documents in his favor, or that he conducted his own defense in Spanish knowing also the Mexican laws; nothing else is required by the Mexican Constitution of 1857. (Art. 20, Par. V.) Furthermore, in the diplomatic and consular correspondence submitted by the American Agency, the following documents may be found: Note from the Chargé d'Affaires *ad interim* of the United States of America in Mexico addressed to the Consul of the United States in Nogales, dated April 14, 1903, acknowledging receipt of a representation *made by McCurdy and his attorneys* regarding his confinement in jail at Hermosillo; a note from the

Consul of the United States in Nogales, to the Assistant Secretary of State of the United States, dated April 18 of the same year, in which it is stated that McCurdy is not held *incomunicado*, and further that "able counsel has been employed in his behalf." The fact that it does not appear from the court record that counsel for McCurdy was not appointed until September 17, 1903, does not contradict the aforementioned trustworthy testimony of consular agents of the United States.

Regarding the fact that Miles was admitted as interpreter in the proceedings instituted against McCurdy, notwithstanding that Miles was his accuser, the Commission finds that Miles was introduced first by Pomeroy as his own interpreter, on preferring the charge of attempted homicide against McCurdy, and then by the latter when he rendered his preliminary depositions, in two of the proceedings instituted against him. The Commission is surprised by the act of the Judge accepting Miles as interpreter even though presented, as he was, by two of the parties in the proceedings, but does not consider such action of the Judge as seriously defective. It also bears in mind that when the Judge himself had to name an interpreter he appointed persons not interested in the cases referred to.

The American Agency also contends that after McCurdy's attorney had been appointed, the Judge ordered that the records be kept in the safe of the Court, disregarding the disposition of the Mexican Constitution providing that all proceedings must be public. The Commission observes that the translation made into English of the expression "*reservado del Juzgado*" as "safe of the Court", is not precise and may lead to a misinterpretation. But aside from this the Commission conceives that there may be periods in a proceeding during which the records cannot be delivered to the public, even if they are at the disposal of the interested parties; such action would not be contrary to international law, especially, bearing in mind that several countries follow in matter of criminal procedure, the so-called inquisitorial or secret method such as was established in the State of Sonora, no one having ever pretended to consider such procedure as below the normal standards of civilization. The Mexican Judge gave the order in question basing it on certain provisions of the Code of Criminal Procedure of the State of Sonora, and as the American Agency has not submitted the wording of such provisions in order to enable the Commission to ascertain whether the Judge disregarded them, it cannot consider that the Mexican authorities were in default on this account.

The American Agency also alleges that the decisions themselves rendered by the courts of Sonora show a defective judicial procedure. The judicial record submitted by the Mexican Agency as evidence reveals the following:

On November 5, 1903 the Judge declared that there were grounds for dismissal in connection with the charge of fraud, in view of the fact that the offended party, that is to say, Miles, did not ratify his accusation, which meant a condonation in favor of McCurdy. On the 11th of the same month and year the Judge rendered his sentence in regard to the other two offenses attributed to McCurdy, finding him guilty for the crime of attempted homicide and sentencing him to 10 months, imprisonment, effective from March 27, 1903; and acquitting him, on the contrary, of the charge of falsification of telegrams.

McCurdy appealed and the Supreme Court of Sonora declared that the lower court had unduly discontinued the charge of fraud, as it was not clearly shown that the accuser of McCurdy, Miles, had condoned the offense. Miles had been summoned without observing the formalities

required by Mexican law and the Supreme Court decided that under the circumstances the sole absence of Miles could not signify a condonation of the offense. Therefore, and as McCurdy, was being prosecuted for three offenses whose proceedings were consolidated, the Supreme Court considered inopportune the sentences that the lower court had rendered on the other two offences of attempted homicide and falsification of telegrams, and ordered the said lower court to restore the proceedings, that is to say, to summon Miles with the corresponding formalities in order to inquire of him, whether he would uphold his complaint against McCurdy or not. The Commission does not find any violation in this procedure which has been objected to by the American Agency, alleging that it signifies that McCurdy was tried two times for the same offense, in disregard of the provisions of the Mexican Constitution. There was not a new trial; the Judge of First Instance merely limited himself to perform a requirement that had been omitted; therefore he summoned Miles, and as said Miles withdrew his complaint; the lower court, on the 8th of January, 1904, rendered a second sentence, imposing on the defendant, for the crime of attempted homicide only, the penalty of ten months imprisonment, acquitting him of the charge of forgery as this offense had been pardoned by the offended Miles, and of the charge of falsification of telegrams, as the Judge declared: "though it is true that the circumstances of the proceedings create an indication and a very strong presumption against the innocence of McCurdy, but not in so plain and irrefutable a manner as to constitute the proof required by Article 210 of the law cited in order to render an impartial decision finding the defendant guilty." The defendant appealed again from this sentence and the Supreme Court of Sonora rendered its final judgment on March 5, 1904, declaring McCurdy guilty of an attempted crime, but without declaring whether this crime was attempted homicide or attempted assault, as it could not be ascertained which had been the intention of McCurdy in firing upon Pomeroy; thus the legal ground of the previous sentence was modified, but did not change the penalty imposed. However, as to the forgery of signatures, the Supreme Court not only found that it existed, but that there existed also a falsification of telegrams, deserving, according to the Penal Code of Sonora, a year's imprisonment. In view of this, the Court sentenced McCurdy to the penalty of 2 years' imprisonment for the crime attempted and for falsification of a telegraphic dispatch.

There is not sufficient proof to establish that either of the two tribunals misrepresented the facts brought before them, nor that they maliciously applied the Mexican law.

The attempted homicide on the person of Pomeroy was reasonably substantiated by the depositions of said Pomeroy and seven witnesses. The offense consisting of falsification of telegrams was also reasonably established through the accusation of Harlow, by the expert's report stating that the signatures appearing thereon were not affixed by Harlow, and by the testimony of two of the telegraph office employees who saw McCurdy when he deposited same.

It has not been alleged that, considering the offenses attributed to McCurdy, the corresponding penalties for the punishment thereof, as provided for by the Mexican laws, had not been applied; it has only been alleged that the offenses did not exist, but the Commission is of the opinion, that such offenses at least as they were known to the courts of Sonora, were reasonably established.

The American Agency alleges, that at any rate the trial was subjected to undue delays and that the Mexican courts could have rendered a decision sooner than they did. The American Agency has not referred to any adequate Mexican provisions that might have been violated in this respect. In other instances the Commission has deemed it appropriate to guide itself by provisions of domestic laws that may exist in this regard. Now, from a general viewpoint it considers that, even though it deems that the investigation of the charges preferred against McCurdy could have been carried out with more promptness, the time spent by the Mexican Judge (eight months) is not so much out of proportion as to constitute a denial of justice. Judging the case in general, it does not appear under the circumstances that the Mexican Courts can be charged with bad faith, negligence or gross injustice, and this opinion is corroborated by those of the American Consular authorities expressed at the time of the occurrences. It appears from the documents submitted by the American Agency as part of its evidence, that said authorities had intervened on behalf of McCurdy from the first days of the month of April. From the outset, the same authorities transmitted to the Embassy in Mexico, as well as to the Department of State McCurdy's complaints, and also from the outset said Consular authorities as well as the Mexican authorities, gave assurances to the effect that the proceedings were being conducted in accordance with the law and that all guarantees were being granted to McCurdy. The American Consul, Morawets, telegraphed to the American Embassy in Mexico as follows: "McCurdy having fair and speedy trial. Is not *incomunicado*. Have made him a personal visit." He further stated in a communication, confirming said telegram, that: "... his trial is progressing in due form under Mexican law. Able Counsel has been employed in his behalf and the executive officers of Sonora assure me that his trial shall be absolutely fair and speedy." (Note dated April 18, 1903.)

The last charge preferred against the Mexican Government is to the effect that its authorities treated McCurdy inhumanly during the time of his imprisonment. In this regard it is stated in paragraph 18 of the American Memorial that during the entire period of McCurdy's confinement in the prison at Hermosillo he received only twenty "centavos" daily for his support, equivalent to about eight cents U. S. currency, and that had he not received private assistance, he would not have had enough for his sustenance, so as to avoid serious impairment of his health. This assertion is supported only by the statement of the claimant himself. It is not shown that McCurdy filed such complaint with the American authorities at the time of his confinement and in the light of the opinions rendered by this Commission in similar cases, this charge cannot be considered as proven.

Nielsen, Commissioner:

I concur in the conclusions reached in Commissioner MacGregor's opinion that the record does not justify the Commission in predicating a denial of justice on the decision of the court in the conviction of McCurdy. However, in forming my opinion it is not necessary to reach the conclusion that McCurdy was clearly guilty of the charges brought against him by his associates. Indeed there is little doubt in my mind that he was the victim of a conspiracy on the part of those associates with whom he was at odds.

Pomeroy, who is said to have made the most serious charge against McCurdy before the court, has furnished for use in the case before the Commission an affidavit in which he states that Harlow "caused the arrest

of the said W. J. N. McCurdy" on a charge of assault with a deadly weapon with intent to commit murder on Pomeroy, and that "said charge was false." I am inclined to believe that Pomeroy is now telling the truth. He evidently desires to fix on Harlow the blame of making a false charge.

It was contended by the United States that it was doubtful that Pomeroy made a charge of attempted homicide before the court, and that possibly Miles, who was unfriendly to him and who served as interpreter before the court, misinterpreted Pomeroy. In my opinion the evidence does not warrant a definite conclusion to this effect. Of course the court had not before it the statement that Pomeroy now makes branding as false the charge the record shows he made against McCurdy.

It seems to me that it can scarcely be said that the testimony furnished by men of standing such as Thurston and Brown corroborates testimony of others given against McCurdy. But in any event, the testimony of these two Americans did not help McCurdy.

At this time the Commission can not, in my opinion, in the light of the record, reconstruct the numerous, varied and strange occurrences that enter into the difficulties between these Americans and into the trial of McCurdy in Mexico. In the main, if not entirely, we must be governed in reaching conclusions by the court record. In my opinion it seems odd and unfortunate that the judge who pronounced sentence on McCurdy had before him only that record. The judge who saw and probably questioned witnesses was supplanted before sentence was pronounced on McCurdy. Evidently the judge who sentenced McCurdy neither heard the testimony nor saw the witnesses, and in a serious case was guided merely by the meagre, summarized record which had been laid before him. If McCurdy attempted to kill Pomeroy, it is indeed strange that the latter should defer four months making his charge and in the meantime freely associate with the former. There is evidence that the two were frequently together; that they stayed in the same hotel; and some evidence that they slept together in this interval between the shooting and the time that the charge was preferred against McCurdy.

I do not understand that the United States undertakes to predicate a violation of international law or a denial of justice on any single, specific act, but rather that it is contended that a combination of improper acts resulted in a denial of justice. I presume that denials of justice growing out of judicial proceedings for the most part occur in that way.

Decision

The claim of the United States of America on behalf of Walter J. N. McCurdy is disallowed.

ETHEL MORTON (U.S.A.) *v.* UNITED MEXICAN STATES

(April 2, 1929, concurring opinion by Mexican Commissioner, April 2, 1929.
Pages 151-161.¹)

RESPONSIBILITY FOR ACTS OF SOLDIERS.—DIRECT RESPONSIBILITY. While off duty and drunk a Mexican army officer, without cause or provocation, fired upon and killed an American subject. *Held*, no direct responsibility of respondent Government will arise from such act.

DENIAL OF JUSTICE.—FAILURE OF AUTHORITIES TO CALL EYE-WITNESSES OF MURDER. Failure of authorities to call known eye-witnesses of murder *held* an improper discharge of judicial function.

FAILURE ADEQUATELY TO PUNISH. Sentencing to four years' imprisonment an officer who, while drunk and without provocation, killed American subject, no part of which sentence was ever served, since officer was allowed his freedom, *held* to justify award.

Commissioner Nielsen, for the Commission :

Claim in the amount of \$50,000.00 with interest thereon is made in this case by the United States of America against the United Mexican States in behalf of Ethel Morton, widow of Genaro W. Morton, an American citizen, who was killed in Mexico City in the year 1916. The claim is grounded on contentions to the effect that Mexican authorities conducted an improper prosecution of the person who killed Morton resulting in the imposition of an inadequate punishment on the murderer. The Memorial contains allegations with respect to the killing of Morton and the prosecution of his slayer, in substance as follows:

During and previous to the month of September, 1916, Genaro W. Morton resided at *Calle Mesones* No. 83, Mexico City, with his brother and an American named J. E. Landon. A *cantina* known as "La Hoja de Lata" was located in the immediate vicinity of Morton's home. Morton at times went to this place to play dominoes. During the early evening of September 20, 1916, he proceeded to the *cantina* and engaged in a game of dominoes with several friends or acquaintances. At the time Morton was thus quietly enjoying himself there were in the same *cantina* several Mexican army officers, including Lt. Col. Arnulfo Uzeta, a member of the staff of General Francisco Serrano, the latter being Chief of Staff of Gen. Alvaro Obregon, Minister of War. About 7:30 p. m. on the day just mentioned, J. E. Landon, with whom Morton was then living, entered the *cantina* to inform Morton that supper was ready. After conveying this message, Landon started to leave the *cantina* for his home, unaccompanied by Morton, who apparently tarried to finish the game of dominoes before proceeding to supper. Lt. Col. Uzeta, who was in a state of intoxication, thereupon ran to the door and dragged Landon back into the *cantina*, stating that he must take a drink

¹ References to page numbers herein are to the original report referred to on the title page of this section.

with him and his companions. Landon courteously asked to be excused, but Lt. Col. Uzeta insisted and Landon was obliged to drink with the Mexican officer and his party and took a glass of lemonade. Previous to this occurrence Landon had spoken to Morton in English, the latter's native tongue. Landon succeeded in leaving Lt. Col. Uzeta and his friends and thereupon proceeded to his home for supper. Within a few moments after the departure of Landon, Lt. Col. Uzeta approached the table where Morton was seated playing dominoes, and without cause or provocation deliberately fired upon and instantly killed Morton, the bullet penetrating the chin and neck, and also wounding one of Morton's companions.

The local police authorities entered upon the scene of the murder and took Uzeta into custody. He was subsequently brought to trial before the Fourth Court of Instruction in Mexico City. On or about February 6, 1917, the judge of that court found Uzeta guilty of the crime of homicide and imposed upon him the wholly inadequate sentence of four years. This sentence was affirmed by the Fifth *Sala* of the Superior Court of the Federal District of Mexico on March 17, 1917.

Notwithstanding the lenient and inadequate sentence thus imposed upon the murderer by the aforesaid Court of Mexico, it appears that the criminal did not serve such sentence, but on the contrary was allowed his freedom.

Allegations to the effect that the accused did not serve his sentence were not made in the American brief nor in the oral argument of counsel for the United States. They were supported solely by a statement contained in a letter written by the brother of Genaro W. Morton to the American Agency under date of October 30, 1926, and by a statement made by Balbino Arias, a Spaniard, who was an eye-witness of the killing of Morton made on January 18, 1917, this statement being to the effect that Arias heard that the assassin of Morton was free. This point may therefore be dismissed from consideration in formulating an award. The same is true of allegations contained in the American brief with respect to undue influence brought to bear on the court by Mexican military authorities. These allegations apparently are based solely on a letter written by a friend of Uzeta from which it appears that the former was interested in assisting the latter. Evidence adduced in regard to this point does not warrant a conclusion with respect to improper conduct such as is charged. But the Commission, in the light of the record before it, is constrained to sustain the contention of the United States that there was an improper prosecution of Uzeta culminating in a manifestly inadequate sentence.

In behalf of Mexico it was contended that Mexican authorities fulfilled all duties imposed on them by the penal laws of Mexico in prosecuting the person responsible for the crime in strict conformity with those laws. Denial was made of all allegations in the Memorial purporting to establish responsibility on the part of the Mexican Government.

It is unnecessary to discuss the principles of international law applicable to this case. The responsibility of a nation under international law for failure of authorities adequately to punish wrongdoers has frequently been discussed by this Commission. See the *Neer* case, *Opinions of the Commissioners*, U. S. Government Printing Office, Washington, 1927, p. 71; the *Swinney* case *ibid.* p. 131; the *Youmans* case, *ibid.* p. 150; and the *Roper* case, *ibid.* p. 205. And, specifically, the question of an inadequate sentence was discussed in the *Kennedy* case, *ibid.* p. 289. The failure to summon witnesses, a point which is given prominence in the record in the instant case, was considered

by the Commission in the *Chattin* case, *ibid.* p. 422, and in the *Swinney* case, *ibid.* p. 131.

Attention may briefly be called to portions of the evidence accompanying the Memorial. If it be considered that this evidence contains accurate information respecting the details of the killing of Morton, then the crime must be regarded as an utterly unprovoked murder.

Under date of September 26, 1916, Emilio Fernandez, proprietor of the saloon in which Morton was killed, made a statement before an American representative in Mexico City. Fernandez said in his statement that Morton and three other gentlemen were playing in a quiet and peaceful manner and that suddenly without any notice Uzeta left the counter in the saloon and when about a meter and a half from the table where the game of dominoes was being played pulled out his gun and shot, wounding one of the men, a Spaniard, and instantly killing Morton. Fernandez asserted that he considered it his duty to make it known that there was no motive for the killing. He explained that Morton spoke to a companion, J. E. Landon by name, but that Uzeta should not have been offended on this account, as the tragedy occurred some time after Morton had spoken in English. Fernandez closed his statement with the declaration that the killing of Morton was cold-blooded assassination and that there was absolutely no cause for the deed.

Under date of September 28, 1916, Daniel Sosa, a clerk in the saloon, also made a statement before the American representative. He confirmed the assertions contained in the statement made by Fernandez. He stated that one of Morton's companions (evidently Landon) left the saloon when Uzeta and his companions entered, and that Uzeta, possibly thinking that the Americans had talked about him, without meditation or saying a word, pulled his pistol, shot Morton and wounded one of his associates. He further asserted that he considered it his duty to say that from his own free will he made his statement concerning the tragedy, which appeared to him to be one of extreme criminality.

Another statement was made on January 18, 1917, by Balbino Arias, a Spaniard who was playing dominoes with the Americans when Morton was killed. Arias, who it appears was wounded by the bullet which killed Morton, stated that the persons engaged in playing dominoes were insulted in violent language by the officers; that he saw Morton, while seated, lift up his hands imploringly when he saw that a gun was pointed at him.

Under date of September 21, 1916, J. E. Landon made an affidavit containing allegations substantially the same as those made in the Memorial. Landon stated that when he re-entered the saloon he saw there ten or twelve policemen and that Morton was lying on the floor by the side of his chair; that he had been sitting in a chair behind a table in a little corner or nook in the wall with a man on each side of him, and the table over which he had been shot, in front; and that obviously there had been no struggle or encounter of any kind. He further stated that about an hour after the policemen took Morton's body away he went to the police station in company with a lawyer to view the remains of Morton, and at this time the authorities asked the two men to sign a statement of identification of the body of Morton, which they did.

The evidence which has been briefly described is not part of the record of the trial of Uzeta, except the statement made by Fernandez which after having been sent to the Mexican Foreign Office was from there sent to the Mexican judge and incorporated into the judicial record in the case.

Irrespective of the question of the accuracy of this and other evidence accompanying the Memorial, and irrespective of any question as to the conclusions which the Commission may be justified in drawing from it, the evidence has, as argued by counsel for the United States, an important bearing on the contention that an improper prosecution resulted in an obviously inadequate penalty. Statements embraced by this evidence emanate from persons who were eye-witnesses either to all or to some of the occurrences surrounding the tragedy. Yet the testimony of several such persons was not obtained by the *Ministerio Público* in court, nor were these persons summoned by any judicial officer. José F. Morton, J. E. Landon, Alejandro Anguiano and Balbino Arias did not testify. The record reveals that a summons was issued for Anguiano, but that he was not found.

It is contended in the American brief that the failure to summon eye-witnesses to the killing of Morton is responsible for an inadequate punishment of the murderer. Even though assertions to this effect may involve an element of speculation, assuredly the failure to take any steps to obtain the testimony of such witnesses justifies the conclusion that the appropriate authorities were wanting in a proper discharge of their solemn duties with respect to the tragic occurrences with which they were called upon to deal in their official capacity.

It need not be observed that obviously the argument made in behalf of Mexico to the effect that friends of Morton should have presented themselves spontaneously, and that the Mexican authorities can not be blamed for their non-appearance, is untenable. The authorities were charged with the prosecution of a grave crime which was an offense against the State as well as against the victim. Likewise the failure to summon these witnesses can not be explained by speculations such as are contained in the Mexican brief with respect to the uselessness of the evidence that might have been obtained from these witnesses. It can not be plausibly conjectured that testimony of eye-witnesses to a homicide would be useless. Even Landon who was present shortly before the shooting and shortly thereafter might have furnished very important evidence not only on the point whether Morton was, as stated in the sentence of the accused, the aggressor by word or by deed, but also on the important point of the location of the body immediately after the shooting, a fact from which important deductions might be drawn respecting the question whether Morton was the aggressor in a fight.

It is proper to give particular consideration to some parts of the record of the evidence on which the trial judge based his sentence of four years.

Sosa, the man who made a statement before an American representative, presented himself to the police authorities on September 20, and said among other things "that at one of the tables several men were seated playing dominoes, and Uzeta went toward them, and without the occurrence of any squabble pulled out his pistol and without the speaker noticing his act he heard a shot and saw an individual fall to the floor whom he afterwards learned was named Genaro Morton."

Sosa later appeared in court and ratified the statement given at the Commissary of Police, and further stated: "When Uzeta finished his drink he went to the table where Genaro Morton was seated and without any reason Uzeta pulled out his pistol and shot him in the forehead; that the declarant is not informed as to the reasons which Uzeta had for shooting Morton, but he believes that it was done without any reason whatever."

Subsequently, on November 27, in a military hospital in the presence of Uzeta and before a judicial officer, Sosa said: "When he gave his first

declaration he was very much excited, but that now he changes it and agrees to what Lopez Uzeta has stated, because the American certainly insulted Uzeta, laughing at him, together with his companions, and joking in English." He also stated that the men playing dominoes approached Uzeta who, when he saw he was about to be attacked, fired. He further stated that Morton was "very hot-tempered" because whenever he was playing he ended with a quarrel with those with whom he played. With respect to this last statement it may be of interest to note that Fernandez, the owner of the saloon, stated in court that Morton was not a customer of the saloon and had been there only two or three times.

Fernandez, who made a statement out of court before an American representative, which was later incorporated into the judicial record, appeared on November 21, and acknowledged this statement as his declaration, but changed it by adding the following:

"That he did not state that Lieut. Col. Uzeta was in an incomplete state of intoxication because he does not know what would be a complete or incomplete state of intoxication; that he also changes the statement which the American Legation makes to the effect that he had said that the act was a murder without any motive; because the truth of the affair is that Morton was speaking in English, a thing which the declarant did not understand, but that one of the companions of Uzeta did understand him, who told him what Morton had said and that then Uzeta, indignant, got up and fired at Morton; that the Spaniard who was wounded received the same bullet since Uzeta only fired once; that the Spaniard was called Arias whose residence the declarant does not know."

On December 11, Fernandez stated before a judicial officer that he did not see whether the attackers of Uzeta got up before or after the shooting and did not notice whether the men were quarreling. On December 16, Fernandez in court stated that the declaration which he had made before an American representative and which was incorporated into the judicial record was presented to him by a relative of Morton and that he (Fernandez) signed it without knowing what was stated in it. This last statement was made by Fernandez in response to an interrogatory submitted to him at the request of counsel for Uzeta. On November 21, Fernandez, as has been mentioned, acknowledged as his declaration the statement which he now repudiated.

Major Augustin Lopez, who accompanied Uzeta in the saloon, testified in court on December 9, 1916. He mentioned the men playing dominoes, observing that they were speaking English, and further said: "Uzeta assumed that they were talking of him and their companions, and going up to the table asked them why they did not talk Spanish. Mr. Anguiano got mixed up in the question as he spoke English, and he told Uzeta what they were saying; Uzeta became angry and pulled out his pistol and an individual of the four who were seated at the table stood up in an aggressive attitude, rolled up his sleeves and approached Uzeta, grabbing him by one hand; the other three individuals who were with the first mentioned stood up in the same attitude; Uzeta fired his gun, wounding two of his assailants".

On September 20, Uzeta stated before police authorities that he remembered absolutely nothing of what occurred in the saloon, being entirely intoxicated; that one of his friends committed the crime; and that they desired to make him appear as guilty, since he was the most intoxicated.

On September 23, the personnel of the court went to the district jail, and a statement was taken from Uzeta. Uzeta ratified his statement

made before the police authorities and he further said that he did not yet "recall killing any one, but if it was so that it must have been done because the latter said something to him". He remembered that he had been drinking a great deal on the day that he shot Morton, but he remembered nothing he said of acts which were said to have taken place in the saloon "La Hoja de Lata".

The personnel of the court again went to the district jail on October 2, 1916, and Uzeta amplified his previous statement. He then stated that he remembered "more clearly how the acts occurred at the saloon 'La Hoja de Lata' and that he will now relate the facts". During the course of his statement he said:

"that these parties were speaking in English and were casting glances at the table at which the declarant and his friends were seated, and particularly at the declarant; that for this reason the latter asked them what was the matter and why they were directing their glances towards him and his friends and if there was anything they had against the declarant and his friends, that they should repeat it in Spanish in order to receive an answer; that the individuals in question paid no attention, as if in contempt for the words of the declarant; that the five men stood up at the same time in an attitude of striking the declarant, and a gringo rolled up his sleeves as if about to throw himself upon the declarant; that all of them assumed the same attitude, and the declarant pulled out the pistol, at which moment his friends Anguiano and Lopez went away, that the declarant, with the pistol in his hand, and before giving time for them to strike him, since they were proceeding toward him, fired the pistol, killing a gringo; that the same bullet wounded another of those who accompanied him, that is to say, the gringo; that he does not know why the wounded person did not present himself; that the victim struck the declarant a blow and the latter faintly remembers that he grappled with him and for that reason he pulled out the gun and fired; but that when the gringo advanced upon him he gave the declarant a 'riñazo' on the little finger of his left hand, which wound is now healing."

On November 27, the personnel of the court went to a military hospital where there was a confrontation between Sosa and Uzeta. Uzeta then stated that "if he fired upon the American he did so because the latter addressed insulting remarks to him in English". Uzeta proceeded to state that he was about to be attacked and he therefore shot Morton. In one breath he stated that *if* he shot Morton it was because the latter made insulting remarks; in the next breath he explains that he shot because he was attacked. Uzeta could himself not understand English, and although other witnesses make reference to insulting remarks, nowhere does the record contain any specific information as to the nature of the remarks attributed to Morton.

On December 11, Uzeta, before the personnel of the court which had gone to the military hospital, stated that *if* he fired his pistol it was because the dead man had grabbed him by his left hand. Previously he had testified that "If he fired upon the American he did so because the latter addressed insulting remarks to him (Uzeta) in English."

The judge in sentencing Uzeta evidently accepted the latter's testimony. He found and declared that Uzeta was the person attacked. When the conflicting and vague record of testimony upon which the judge based his sentence is considered, it becomes obvious how important it was that eye-witnesses to the tragedy should have been summoned.

Even if we disregard the failure of the authorities to obtain important, available evidence, and even if the view be taken that the act of Uzeta was

not unprovoked, cold-blooded murder, as contended by the United States, punishable under Mexican law by death, and even if full credence is given to Uzeta's testimony and to all other testimony that could be considered most favorable to him, clearly the punishment inflicted on him must be considered to have been inadequate under Mexican law. If Uzeta was told that offensive remarks concerning him had been made by Morton or by his companions, the proper form of redress for any such offense would have been a resort to a civil or criminal action and not to homicide. And under Mexican law all acts of aggression do not justify the killing of an aggressor. With respect to this point attention may be called to the following provisions of the Mexican Criminal Code of 1871:

"Murder or Homicide:

ART. 560. *Homicidio calificado* is one committed with premeditation, with advantage, by stealth or by treachery.

ART. 561. Intentional homicide shall be punished by the death penalty in the following cases:

I. When executed with premeditation and not in a fight. If committed during a fight the penalty shall be twelve years of imprisonment.

II. When executed with advantage to the extent that the person committing the homicide does not incur any risk whatever of being killed or wounded by his adversary and when he is not acting in legitimate self-defense.

III. When executed by stealth.

IV. When executed by treachery."

In the light of the most favorable view that may be taken of Uzeta's act it appears that the sentence should have been considerably in excess of four years.

Having in mind the principles asserted by the Commission dealing with cases involving charges of improper prosecution and particularly the *Kennedy* case, *supra*, an award in favor of the claimant can properly be made in the sum of \$8,000.00.

Fernández MacGregor, Commissioner:

I concur with Commissioner Nielsen's opinion that in this case an award must be granted. Although I think that in some cases in which very important witnesses have not been summoned and examined a denial of justice can be predicated, my decision in this case is based, rather than in the failure of the Judge to receive some testimonies, in the consideration that the facts that the Mexican Judge considered as proven did not sustain his legal conclusions, which, I think, were widely at variance with the provisions of the Penal Code of the Federal District of Mexico.

As a matter of fact, in the decision rendered by the Court of Fourth Instruction of Mexico City, the Judge summarized the facts concerning the murder of Morton in the following manner:

"Whereas, Third: From the declarations of the accused and of Major Agustín Lopez, it appears that the facts in substance took place as follows: Morton made some remarks in English, addressed to Uzeta and his companions; Alejandro Anguiano informed Uzeta in Spanish what Morton had said, this being somewhat offensive to Uzeta; Uzeta requested Morton to state in Spanish what he had been saying in English. Morton instead of doing so, stood up in an aggressive attitude, rolling up his sleeves and advancing upon Uzeta, caught him by the left hand, and at the same time the companions of Morton assumed a similar aggressive attitude; Uzeta by reason of these

acts fired the pistol which he had shortly before pulled out and so killed Morton....”

On the basis of these facts, the Judge states in the Fourth whereas (*considerando*) :

“.... There was, therefore, on the part of both individuals acts of mutual contention, first by words and afterwards by deeds, aggressive acts on the part of Morton which Uzeta accepted and aided in assuming greater proportion, which constitutes the fight, which is defined in the latter part of article 553 of the Penal Code....”

The provision of the Penal Code to which the Judge refers in his last paragraph reads as follows:

“By fight is understood, the combat, the engagement or the physical struggle and not one of words between two or more persons.”

There is no doubt that the Penal Code of the Federal District requires a real struggle or in other words physical acts of aggression or defense between the two combatants. I do not think that either the aggressive attitude of Morton, to which the Judge refers, in rolling up of his sleeves and advancing towards Uzeta, or his holding him by the left hand, can be construed as a real struggle and therefore I do not think that Article 553 of the said Code should be applied. The assumption of a fight, on the part of the Judge, changed completely the aspect of the homicide perpetrated by Uzeta and, consequently, the penalty to which he was sentenced was widely and unwarrantedly different from the penalty he deserved for his brutal aggression on Morton. No appeal was entered against this decision by the Attorney for the State.

In view of the foregoing, I am of the opinion that an award should be made on behalf of the claimant in the sum of \$8,000.00 without interest.

Decision

The United Mexican States shall pay to the United States of America on behalf of Ethel Morton the sum of \$8,000.00 (eight thousand dollars) without interest.

AMERICAN BOTTLE COMPANY (U.S.A.) v. UNITED MEXICAN STATES

(*April 2, 1929, concurring opinion by American Commissioner, April 2, 1929. Pages 162-167.*)

CONFLICTING JURISDICTION OF SPECIAL CLAIMS COMMISSION. Fact that claim had been filed with Special Claims Commission, United States and Mexico, will not preclude the tribunal from exercising jurisdiction it possesses under the *compromis*. Since claim is a contract claim in nature rather than based on a revolutionary seizure, *held*, tribunal has jurisdiction.

CONTRACT CLAIMS.—CONTRACT WITH GOVERNMENT INTERVENTOR OR CUSTODIAN OF SEIZED PROPERTY. A brewery was seized by Carranza

Government and a Government interventor placed in charge. Latter, in his capacity as interventor, ordered and received from claimant a number of beer bottles for which payment was never made. Claim *allowed*.

INTEREST, RATE OF. Fact that claimant stated five per cent. interest would be charged on unpaid account for which claim is made will not preclude tribunal from allowing interest at the customary rate of six per cent.

The Presiding Commissioner, Dr. Sindballe, for the Commission:

After the Constitutionalist forces of General Venustiano Carranza had captured Monterrey in April, 1914, a brewery in this town, the Cerveceria Cuauhtemoc, S.A., was seized and taken over by the government of Carranza, and one Antonio Elosua was placed in charge of the brewery as "El Interventor del Gobierno Constitucionalista". It was alleged that the brewery was seized for the reason that it had taken sides against the Constitutionalist, and that it had failed to pay a fine of \$500,000, Mexican currency, imposed upon it as a punishment for its alleged crime. At the instance of an American citizen, who was a large shareholder in the brewery, the authorities of the United States interposed, but not until December 6, 1914, was the brewery turned back to its owner. The brewery company states that its property was in a depleted state at that time.

On July 2, 1914, Antonio Elosua ordered one million two hundred thousand beer bottles of The American Bottle Company, an American corporation, which for several years had been selling beer bottles in large quantities to Cerveceria Cuauhtemoc, S.A. The American Bottle Company offered to deliver the bottles ordered on condition that a balance due from the brewery company, amounting to \$6,263.89, United States currency, first be paid, and that the bottles ordered be paid for before shipment. With regard to the matter of the balance due from the brewery company, Elosua answered that he needed only the approval of the brewery company, wherefore he asked The American Bottle Company to correspond with the brewery company about the question. The American Bottle Company acted accordingly, and was informed by the brewery company that it would receive the balance due from Elosua. Subsequently Elosua remitted the balance in question to The American Bottle Company. He further remitted to The American Bottle Company \$10,100.00, United States currency, this being about half the purchase price of the bottles ordered by him, and he promised to send the balance, \$10,020.00, United States currency, within a few days. At the same time he asked for immediate shipment of the bottles ordered. Accordingly the bottles were shipped during the period from August 17 to September 4, 1914. The balance was, however, never paid by Elosua. From time to time he promised to pay, ascribing his failure to do so to the unsettled conditions existing in Mexico, and to his inability to make collection of accounts due him. Finally when the brewery property had been turned back to its owner, he informed The American Bottle Company that he had referred their last letter, urging payment, to the brewery company with instructions to give the most prompt attention thereto. The American Bottle Company requested the brewery company to pay the amount. The brewery company suggested, under date of December 24, 1914, that The American Bottle Company send a full statement of the amounts remitted and of the cars of bottles shipped, as accounts or other documents belonging to the brewery were not in the possession of the representatives of the brewery company. The

statement of accounts asked for was sent to the brewery company on December 29, 1914. On February 10, 1915, the brewery company acknowledged receipt of the statement of accounts and promised to forward this statement to the company's office in Monterrey for revision as soon as possible. The brewery company added that The American Bottle Company no doubt would understand that the brewery company had nothing to do with Elosua in connexion with his business or accounts with The American Bottle Company. The American Bottle Company urged payment by letters of February 13 and July 2, 1915, but the brewery company did not pay.

Claim is now made in the sum of \$9,985.62, United States currency, with interest thereon against the United Mexican States by the United States of America on behalf of The American Bottle Company. The amount claimed is the balance due for bottles delivered to Elosua minus the sum of \$34.48, which was paid by Elosua in excess of the actual amount due to the claimants at the time of the seizure of the brewery.

In view of the fact that the present claim has been filed by Memorial before the Special Claims Commission established under the Convention of September 10, 1923, between the United States and Mexico, prior to its having been brought before the General Claims Commission, Counsel for Mexico has submitted that the hearing of this case should be suspended until it be known whether or not the Special Claims Commission will be of the opinion that the present claim is within the jurisdiction of that Commission. There is, however, no rule in international law, nor no provision in the Conventions entered into between the United States and Mexico or in the rules of this Commission, that precludes the United States from presenting a claim to this Commission because of its having been previously filed by Memorial before the Special Claims Commission. And the Commission is of the opinion that the present claim is within its jurisdiction. Article I of the Convention of September 8, 1923, excludes from the scope of the Convention claims "arising from acts incident to the recent revolutions" in Mexico. Now, the seizure of the brewery may well be said to be an act incident to a revolution. This claim, however, is not for loss or damage arising out of the seizure of the brewery, but is made for the non-payment of an amount due under a contract entered into between Elosua and the claimants after the seizure of the brewery, and in the opinion of the Commission, such non-payment cannot be said to constitute an act incident to a revolution in the sense in which this term is used in the said Convention. In the Answer filed by the Mexican Agent with the Special Claims Commission it is also alleged that the claim is outside the scope of the Convention of September 10, 1923.

With regard to the merits of the claim it is contended by Counsel for Mexico that the claimants entered into a contract with the brewery and, therefore, should demand payment from the brewery company and not from the respondent Government. That the contract was entered into with the brewery, is correct. It appears from the record that Elosua signed letters to the claimants regarding the matter in his capacity of intervener of the Constitutionalist Government on behalf of the *Cerveceria Cuauhtemoc, S.A.*, and it further appears that the claimants, in a letter to a representative of the brewery company, dated July 17, 1914, state that it address him regarding the question of the old balance "as per the instructions of Mr. Antonio Elosua, Inspector of Constitutional Government, for and in behalf of *Cerveceria Cuauhtemoc*." It cannot be assumed, however, that the claimants can recover from the brewery company the balance due

to it for the bottles delivered. The seizure of the brewery was a revolutionary measure and not a legal act that could give Elosua authority to enter into a contract on behalf of the brewery company. And the respondent Government has submitted no proof to show that the brewery company ever consented to undertake the responsibility according to the contract. Further, it must be assumed that Elosua's management of the brewery had in view the exaction of the fine imposed upon it by the Constitutionalist and that the acquisition of the bottles has served this purpose. In these circumstances the Commission is of the opinion that the present claim should be allowed.

It appears that under date of December 29, 1914, the claimants informed the brewery company that it would charge the account with interest at the rate of five per centum per annum. Notwithstanding this fact the Commission is of the opinion that interest in this case as in similar cases already decided by the Commission should be awarded at the rate of six per centum per annum, as the present claim is against the United Mexican States, and not against the brewery company.

Nielsen, Commissioner :

I agree with the conclusion stated in the Presiding Commissioner's opinion that a pecuniary award should be rendered in this case, but I do not entirely concur in all the conclusions with respect to the law and the facts.

From the record in the case it appears that a revolutionary leader seized a brewery and certain other properties in Monterrey. It appears from evidence accompanying the Memorial that, when the brewery was first seized the purpose was to obtain a forced loan, but that subsequently the directors of the company were charged with having taken part in opposition to the so-called Constitutionalist cause and with maintaining armed forces. It further appears that it was explained to General Carranza that the so-called armed forces were a small guard of watchmen maintained on account of the existing disturbed condition.

I do not agree with the conclusion that the contract invoked in behalf of the claimant was a contract made with the brewery. When an insurgent leader seizes property and puts it in charge of some person acting under such leader's control I do not think that contracts made by such a person can properly be said to be contracts made by the Company whose property has been seized. In such a case the acts of the person placed in control of the property are not determined by the character of the stationery he may use, or by the title or designation given him, or by the fact that he may purport to act in behalf of the Company.

Responsibility is ultimately fixed on the Mexican Government in the instant case because the revolution initiated by General Carranza became successful, and an award can be made for unpaid contractual debts on the same principle that awards have been made in other cases for supplies furnished to the Mexican Government.

The point of jurisdiction raised in this case involves more difficult questions with respect to which there is in my opinion considerable uncertainty. In giving application to the principles of international law governing a claim growing out of contractual obligations an international tribunal is not concerned with a suit on a contract. There is no law of contracts in international law. In rendering an award in a case of this kind I think we must proceed on the theory that there has been a violation of property rights in the nature of a confiscation; it might be said either a

confiscation of the property purchased or of the purchase price. The claim does not grow out of the seizure of the brewery, a Mexican corporation, but it is nevertheless concerned with a complaint of a violation of property rights. It is therefore not altogether clear to me that the claim does not fall within that class of claims which is described in meagre and general language in Article I of the Convention of September 8, 1923, and more specifically described in Article III of the Convention of September 10, 1923. If a civilian acting under the express or implied authority of an insurgent leader commits some wrongful action, it is difficult to perceive that such action must be regarded exclusively as the acts of the civilian, particularly when responsibility for the act is fixed because the revolutionary leader ultimately becomes successful.

In considering the peculiar facts of this case, I think that the Commission may be justified in attaching considerable importance to the interpretation put upon both of the arbitration conventions by the two Governments in dealing with the particular case under consideration. The United States filed this claim before the Commission under the Convention of September 10, 1923. Mexico filed an answer before that Commission alleging among other things that the claim was not within the jurisdiction of the Commission. Thereupon the United States proceeded to bring the case to hearing before this Commission. Dr. Oppenheim, in a discussion of the interpretation of treaties, says:

"But it must be emphasized that the interpretation of treaties is, in the first instance, a matter of consent between the contracting parties. If they choose a certain interpretation, no other has any basis. It is only when they disagree, that an interpretation based on scientific grounds can ask a hearing." *International Law*, Vol. I, p. 700.

Possibly the seemingly sound principle underlying these statements may not be absolutely controlling with respect to the facts in the instant case, yet I think it is not altogether irrelevant. Article I of the Convention of September 8, 1923, confers jurisdiction on this Commission over all outstanding claims since July 4, 1868, "except those arising from acts incident to the recent revolutions". Claims incident to the recent revolutions are those more specifically described in Article III of the Convention of September 10, 1923. Mexico in a proceeding distinct from the instant case has contended that the claim is not within this jurisdictional Article of the Convention of September 10, 1923. The United States, by prosecuting the claim to a hearing before this Commission as the tribunal having jurisdiction instead of proceeding before the so-called Special Claims Commission, seems to have acquiesced in the Mexican Government's contention, that the Special Commission has not jurisdiction, which therefore must be vested in the General Claims Commission.

Decision

The United Mexican States shall pay to the United States of America on behalf of The American Bottle Company \$9,985.62 (nine thousand nine hundred eighty-five dollars and sixty-two cents), United States currency, with interest thereon at the rate of six per centum per annum from September 4, 1914, to the date on which the last award is rendered by the Commission.

LAURA A. MECHAM AND LUCIAN MECHAM, JR. (U.S.A.) *v.*
UNITED MEXICAN STATES

(April 2, 1929, concurring opinion by American Commissioner, April 2, 1929.
Pages 168-173.)

DENIAL OF JUSTICE.—REFUSAL TO ARREST CRIMINALS. Claimant's store was robbed, the guilty parties were pursued and found, but authorities at such place refused aid, in absence of formal order of arrest, and ordered attempts to apprehend guilty parties to cease. Mexican constitution permitted arrest without such order in urgent cases. Claim *allowed*.

FAILURE TO APPREHEND OR PUNISH.—INTERNATIONAL STANDARD. Claimant's husband was killed by bandits. A posse was immediately organized and went in pursuit but bandits escaped in the mountains. Investigation was made and orders of arrest issued. No one was ever arrested for the crime, reports indicating that guilty parties lived in United States. *Held*, steps taken did not fall below the international standard.

PERSONAL LOANS OR PAYMENTS TO OFFICIALS AND SOLDIERS. Claim for unpaid loans made to examining judge and soldiers *allowed* but not payment to doctor. Such payments *held* not an outrage under international law so as to establish responsibility by mere fact of payment.

MEASURE OF DAMAGES, THEFT AND DESTRUCTION. Claim for articles stolen *allowed*. Claim for property destroyed *disallowed*, since failure to arrest persons responsible for robbery and destruction would not have resulted in recovery of destroyed property.

Cross-reference: Annual Digest, 1929-1930, p. 168.

Commissioner Fernández MacGregor, for the Commission:

In this case claim is made against the United Mexican States by the United States of America on behalf of Laura A. Mecham and Lucian Mecham, Jr., wife and son of Lucian M. Mecham, for the sum of \$26,955.70, U. S. currency, for injuries sustained by the claimants as the result of a robbery suffered by them and of the murder of the said Lucian M. Mecham, crimes which were not duly punished by the Mexican authorities.

The facts of the first case are as follows: On the night of February 11, 1921, two individuals broke into a store owned by Lucian M. Mecham in Colonia Juárez, Chihuahua, Mexico, stealing and destroying merchandise to the value of \$1,955.70. The claimants requested assistance from the appropriate authorities of the State of Chihuahua. The Municipal President of Colonia Juárez, Nicolás Reyes, started out, with several men, in pursuit of the guilty parties, found traces of the fugitives, and followed them to a ranch near the town of Janos, where they sought the aid of the municipal authorities. These authorities refused to help them stating that they did not have a formal order of arrest. Reyes and his men returned to Colonia Juárez and from there went to Casas Grandes where they also sought assistance. The Municipal President of the latter place furnished some soldiers, and the entire group returned to Janos. The Municipal President there again refused to aid in the search and threatened to arrest Reyes and his men if they persisted in continuing the chase without due warrant of

arrest. However, he informed the minor judge of the facts, who did nothing because the pursuers could give no information about the guilty parties. The Mexican authorities did nothing more.

The Mexican Agency presented as evidence the record of the proceeding instituted because of the robbery of Mecham's store. The said record corroborates in general the evidence presented by the American Agency. If it is true that a Mexican official, Reyes, did everything that he possibly could to bring about the capture of the robbers, it is equally true that another Mexican official, the Municipal President of Janos, decidedly prevented that capture. The Mexican evidence contains an explanation of the conduct of the Janos authorities; namely, that as the pursuers brought no formal warrant, arrest could not be permitted without violating Article 16 of the Constitution of the Mexican Republic, the pertinent part of which says:

"No one shall be molested in his person, family, domicile, papers or possessions, except by virtue of an order in writing of the competent authority, setting forth the legal ground and justification for the action taken."

If this provision were without exception, then the blame for preventing the pursuit would be upon Reyes, who did not take the steps necessary to comply with that important requirement; but the Commission cannot cast that reproach on this efficient officer in view of the fact that that same Article 16 contains the following exception, which in its opinion applies to the case:

"Only in urgent cases instituted by the public attorney without previous complaint or indictment and when there is no judicial authority available may the administrative authorities, on their strictest accountability, order the detention of the accused, placing him at the disposition of the judicial authorities...."

In any event, the failure to arrest is imputable to a Mexican official. The Municipal President of Janos could have done what is prescribed by Article 199 of the Code of Criminal Procedure of the State of Chihuahua¹ to take the steps necessary for the protection of the injured and the arrest of the guilty, placing, for example, police around the place where it was believed they could be found. Moreover, while a court record is not in many cases proof of the measures which are taken to arrest a criminal, that presented by Mexico reveals palpable negligence. The Judge of First Instance of Casas Grandes, about the middle of March, reported to the Governor of Chihuahua that no proceeding had been instituted against the robbers of Mecham's store, and stated that neither had it been instituted by the Minor Judge, as the Municipal President had not made the assignment which he was under obligation to make. Such proceedings were begun on June 23; and there they ended; and, as, in order to arrest a criminal in a case *non flagrante delicto*, a warrant of arrest is necessary, it is clear that none having been issued in all this time, said arrest could not even be attempted.

¹ "ART. 199. When the denunciation is made before authorities who do not have jurisdiction over the case, the latter shall notify the proper authorities immediately, taking at once under their strict responsibility adequate measures for the protection of the injured parties, the apprehension of the guilty parties or those parties presumed as such, and all other measures which might be necessary."

In view of the above, and although it is not incumbent on this Commission to examine every single step taken by the judicial or police authorities in the prosecution of a crime, the general facts set forth are sufficient, in its opinion, to warrant the assertion that the Mexican authorities fell short of their duty to protect the claimants by providing appropriate means to prosecute and punish the offenders.

With regard to the complaint of a denial of justice for not punishing the murderers of Mecham, the facts are as follows: On the night of March 18, 1922, at about 9 P. M. several bandits entered Mecham's house in the place already described, asking the occupants for what money they had. Mecham's wife was able to get away to ask for help. Meanwhile the bandits so brutally struck Mecham, who was in bed convalescing from pneumonia, that his skull was broken, leaving him unconscious and in such bad shape that he died eleven days afterwards. The bandits escaped. The facts were reported to the said Reyes, Municipal President of Colonia Juárez, and also to the Judge at Casas Grandes. The former immediately organized a group which went in search of the bandits, who had left, it appears, in a wagon, overtaking them at the hacienda of San Diego, and demanding their surrender. This was not obtained and several shots were exchanged, one horse drawing the wagon being killed by the shooting, and the other wounded. The bandits escaped into the fastnesses of the mountains. Meanwhile, at daybreak on the 19th of March, the Judge of Casas Grandes had come to the scene of the crime, and carried out the first investigations, taking note of the condition of the wounded man, appointing medical experts, taking statements of eye-witnesses, of Reyes and his companions in the chase, etc. He provided immediately for an examination of the wagon and the horses which had been left on the scene of the affray with the bandits. Having observed from the brands on the horses that they belonged to one Guillermo Bueno, the Judge went to his house, not finding him. There he interrogated his father-in-law and his wife; he asked these witnesses for a description of Bueno, and of one of his companions, and in view of the fact that every suspicion rested upon these individuals, he issued an order of arrest against them. The said order was communicated to the Municipal President and to the Chief of Social Defense. On the 20th the medical experts rendered their report. On the 22nd of March the President of Casas Grandes advised that he had already ordered that the guilty parties be sought. On the 31st of the said month letters requisitorial for arrest were issued to all the judges of the State. Afterwards the statements were again taken of witnesses already examined. On August 3, 1922, the judges of first instances of Chihuahua were asked if they had procured the arrest of the guilty parties. It is also of record that the Governor urged the Rural Police of the State to cooperate specially in the arrest, adding that he did not have reports indicating that they would be found in that vicinity, but probably in New Mexico, U.S., as Bueno and his accomplice had lived there many years.

The American Agency complains that the Judge who began the investigation was reluctant in fulfilling his duty; that he collected \$55.00 from Mrs. Mecham to go and examine the witnesses at the house of the suspected Buenos; that she had to pay \$10.00 to the doctor who was brought by the Judge to examine the wounded man; and that she likewise had to pay \$20.00 to the soldiers who came to give her protection after the assault. It alleges as another important aggravating circumstance that the judge had within his power in making his investigation in San Diego, two individuals,

father and son, who were very suspicious and who were given their freedom, in spite of the opposition of Reyes, the Municipal President; that the Judge had intentions of abandoning the case; that there are no indications in the record that any search was made at the home of the suspected Bueno.

The truth in regard to the payments made by Mrs. Mecham seems established by the statements of several eye-witnesses who gave many details concerning them. Such an act is vituperable and certainly contrary to the Constitution of Mexico (Art. 17); nevertheless, the Commission could not call it an outrage in the sense which the Law of Nations gives to that word. It seems, furthermore, that the intention of the Judge, from what can be seen, was to return the money, which appeared necessary to pay for the automobiles to go to the investigation. With regard to the sum collected by the doctor, there is the question that, besides his medico-legal services, he may have given the wounded man some professional attention.

It does not seem corroborated by the judicial record that the Judge freed two suspicious persons whom he had in his power. The declarations of the witnesses presented by the American Agency seem to refer to two individuals, who were father and son, and these, according to the record presented by Mexico, are the ones called Mora and Bueno, (the owner of the wagon). The first did not appear suspicious; the second never was before the Judge, who thereafter issued a warrant of arrest for him and his companions.

With regard to whether the judge had intentions of dropping the case, the proceedings show that he positively pursued it as far as possible.

The Commission must, in the present case, as in other cases, adhere to the substance of the facts. Even though more efficacious measures might perhaps have been employed to apprehend the murderers of Mecham, that is not the question, but rather whether what was done shows such a degree of negligence, defective administration of justice, or bad faith, that the procedure falls below the standards of international law. The Commission is not prepared to say such a thing in this case.

From the foregoing it follows that the Commission must give satisfaction only for the denial of justice and lack of protection to the property of the Mechams, implied in the case of robbery. To fix the amount of such indemnity the Commission deems it expedient to consider in this case the value of the effects stolen and which might have been recovered if the immediate arrest of the robbers had been obtained, as appeared imminent. The claimants in their affidavits give a list of the goods stolen and their prices, but in this list are included several entries for items which could not have been recovered even if the arrest had been procured and others for damages to the house and for expenses of the men who went after the robbers. The items which, for this reason should be deducted, are:

1 ton of flour emptied on the floor	\$100.00
Medicines taken and destroyed	90.00
10 small sacks of flour wasted	25.00
Face powder taken and destroyed	25.00
Damages to the building on entering it	25.00
Expenses to the men who went after the robbers, furnished in provisions and salaries	120.00
Total	385.00

There are three other items which include expenses charged by the doctor and by the Judge and the amount paid to the soldiers. Of these

items the two last should be paid, (30 and 20 dollars, respectively) as it seems that they were loans made, but not the first as there is doubt regarding the purpose for which the doctor collected it.

Nielsen, Commissioner:

I agree generally with the conclusions expressed in the opinion written by Commissioner Fernández MacGregor.

I do not concur entirely in the computation of the amount of indemnity awarded. Evidence has not been adduced to refute the evidence submitted by the United States to support the items set forth in the Memorial. The general rule of international law in a case of this kind is, in my opinion, that relied upon by the Commission in the case of *Coatesworth & Powell* (Moore, *International Arbitrations*, Vol. II, p. 2050) in which the Commission awarded an indemnity of \$50,000.00 for property losses, responsibility being based by the Commission solely on the non-punishment of wrongdoers.

Decision

The Commission decides that the Government of Mexico must pay to the United States of America, on behalf of Laura A. Mecham and Lucian M. Mecham, Jr., the sum of \$1,510.70, without interest, plus the sum of \$50.00, with interest at the rate of six per centum per annum from March 19, 1921 until the date of the last award of the Commission.

KATE A. HOFF, ADMINISTRATRIX OF THE ESTATE OF SAMUEL
B. ALLISON, DECEASED (U.S.A.) *v.* UNITED MEXICAN STATES

(*April 2, 1929. Pages 174-180.*)

IMMUNITY OF FOREIGN MERCHANT VESSELS FROM LOCAL JURISDICTION.—

VESSEL ENTERING PORT UNDER DISTRESS. The *Rebecca*, an American schooner, sailed from the United States in January, 1884, with cargo consigned for a Texan port and also for Tampico, Mexico. While offshore the Texan port a strong adverse wind drove the vessel to sea until it found itself off Tampico in a damaged and leaking condition. The vessel accordingly entered the latter port and lodged a protest of distress. The Mexican customs officials seized the cargo destined for Texas, without giving any receipt therefor, and arrested the master on a charge of attempt to smuggle. He was tried, acquitted and released but was rearrested and held under bond for over two months. The *Rebecca* and its cargo were sold by order of court, part of the proceeds being paid over to the Federal Treasury and the rest being distributed among certain customs employees. *Held*, facts vessel entered port under its own power and that such port was a port of call did not deprive vessel of right to immunity from local jurisdiction arising out of distress. Claim *allowed*.

DAMAGES, PROOF OF. Damages allowed for value of vessel but not for cargo and for loss and expense, when no evidence to substantiate latter items was furnished.

Cross-references: Am. J. Int. Law, Vol. 23, 1929, p. 860; Annual Digest, 1929-1930, p. 129; British Yearbook, Vol. 11, 1930, p. 221.

Commissioner Nielsen, for the Commission:

Claim in the amount of \$10,000.00 with interest is made in this case by the United States of America in behalf of Kate Allison Hoff, Administratrix of the estate of Samuel B. Allison. The latter was the owner of a small American schooner called the *Rebecca*, which together with its cargo was seized by Mexican authorities at Tampico in 1884. Allegations with respect to the occurrences on which the claim is predicated are made in the Memorial in substance as follows:

The *Rebecca* was built in the United States and registered at Galveston, Texas. Its approximate value was \$5,000.00. In the month of January, 1884, Gilbert F. Dujay, the master of the vessel, loaded it at a small port called Patersonville, nine miles above Morgan City, in the State of Louisiana, with a cargo consisting of six cases of merchandise destined for Brazos Santiago, Texas, and of a consignment of lumber for Tampico, Mexico. The vessel cleared at Brashear City, now known as Morgan City, on the 30th day of January, 1884, bound for Santiago, Texas. When it reached a point off this port the wind and the tide were so high that it was unsafe to enter. While lying off Brazos Santiago, on the 13th of February, waiting for a favorable opportunity to enter the port, an adverse wind from the north became so strong and the sea so rough, that the vessel was driven to the southward before a furious wind and sea, and when the wind abated it was found that the vessel was in a disabled and unsafe condition off the port of Tampico. The master, realizing the dangerous condition of his vessel, entered the port of Tampico as the nearest place of safety for the vessel, cargo and crew. The crew concurred in and advised such action. When the *Rebecca* entered the port she was leaking badly. Her standing rigging had been torn away. The cabin windows were broken. The cooking stove was so badly broken it could not be used. While at sea the vessel began to leak so that the water reached the cases of merchandise, and the crew was compelled to break open the packages and store them so that they would not be ruined by the water.

When the *Rebecca* entered the port the master presented to the Mexican customs official a manifest for the goods destined for Tampico and a so-called "master's manifest" for the consignment for Brazos Santiago, Texas, which met the requirements of the law of the United States. As soon as the vessel reached Tampico, which was on Sunday afternoon, February 17th, it was anchored off the custom house and a protest of distress was immediately entered with A. J. Cassard, the American Consul at that port.

On the day following the arrival at Tampico, February 18, 1884, the Mexican custom house officials demanded from the master of the *Rebecca* the packages of merchandise on board the vessel. The demand was refused and thereupon the packages were taken by force and no receipt or other evidence of possession by the custom house authorities was given.

On the 21st of February the master was arrested on a charge of attempt to smuggle, was placed in the barracks with armed soldiers guarding him, was not permitted to speak to anyone, and was kept in close confinement until the day following, a period of 28 hours, when he was brought before the Judge of the District Court at Tampico, and without the privilege of having counsel, was tried and was acquitted and released. On the 23rd of February the master was again arrested by the Mexican authorities and

was required to give bond for his appearance before the Criminal Court at Tampico to answer a charge of bringing goods into a Mexican port without proper papers. While awaiting trial he remained under bond, but without permission to leave Mexico, until the 24th day of April, a period of over two months. On that date a decree was entered by the court which released the master from bail but assessed treble damages against the merchandise seized, and charged the master with the cost of revenue stamps used in the proceedings. Because of the refusal and inability of the master to pay the penalties thus assessed, the *Rebecca* and its cargo were sold by order of court, and the proceeds were applied to the Federal Treasury, a balance being distributed among certain customs employees.

On the 23rd of February, 1884, Dujay made before August J. Cassard, American Consul at Tampico, a protest against the action of the custom house officials in taking possession of the packages which the master of the *Rebecca* had engaged to deliver at Brazos, Texas, and on April 4, April 9, and April 16, 1884, other protests were made before the Consul against the acts of the Mexican officials.

In the light of the allegations briefly summarized above, the United States contends (1), that the decision of the judge in condemning the vessel and cargo was at variance with the Mexican law applicable to the case, and (2), that the vessel having entered Tampico in distress, was immune from the local jurisdiction as regards the administration of the local customs laws. On behalf of Mexico it was contended that the judge properly applied the local law, and that no fault can be found with his decision. With reliance on the opinion of the Mexican judge, it was argued that it could not be said that the law with respect to distress applied when a vessel entered the port for which it was bound, and that, in view of the character of the ship's papers, there was reason to suppose that the ship's voyage did not include the port of Brazos Santiago. It was also argued that evidence did not show the ship to be in such a condition that it could be considered to be a distress. It was further argued that, in the light of the evidence of international law, it could not be said that at the time of the seizure of this vessel there existed a rule of international law with respect to distress.

The Commission is fortunate in having before it an abundance of evidence from which it is possible to draw definite conclusions with respect to all pertinent considerations. The seizure of the vessel and the arrest of the captain were the subject of extended diplomatic correspondence between Mexico and the United States. Investigations were made by the authorities of both countries of these matters. Copies of the correspondence and records of the investigations have been produced as have also the ship's log and a copy of the court's decision upon which a denial of justice is predicated by the claimant Government.

It is of course well established that, when a merchant vessel belonging to one nation enters the territorial waters of another nation, it becomes amenable to the jurisdiction of the latter and is subject to its laws, except in so far as treaty stipulations may relieve the vessel from the operation of local laws. On the other hand, there appears to be general recognition among the nations of the world of what may doubtless be considered to be an exception, or perhaps it may be said two exceptions, to this general, fundamental rule of subjection to local jurisdiction over vessels in foreign ports.

Recognition has been given to the so-called right of "innocent passage" for vessels through the maritime belt in so far as it forms a part of the high seas for international traffic. Similarly, recognition has also been given—perhaps it may be said in a more concrete and emphatic manner—to the immunity of a ship whose presence in territorial waters is due to a superior force. The principles with respect to the status of a vessel in "distress" find recognition both in domestic laws and in international law. For numerous, interesting precedents of both domestic courts and international courts, see Moore, *Digest*, Vol. II, p. 339 *et seq*; Jessup, *The Law of Territorial Waters and Maritime Jurisdiction*, p. 194. *et seq*.

Domestic courts have frequently considered pleas of distress in connection with charges of infringement of customs laws. Interesting cases in which pleas of distress were raised came before American courts in the cases of vessels charged with violation of the interesting American so-called "non-intercourse" acts forbidding trade with French and British possessions. 1 Stat. 565; 2 Stat. 308. In these cases it was endeavored in behalf of the vessels to seek immunity from prosecution under these laws by alleging that the vessels had entered forbidden ports as a result of *vis major*. A Mexican law of 1880 which was cited in the instant case appears to recognize in very comprehensive terms the principles of immunity from local jurisdiction which have so frequently been invoked. *Legislación Mexicana*, Dublán & Lozano, vol. 14, p. 619. *et seq*.

The enlightened principle of comity which exempts a merchant vessel, at least to a certain extent, from the operation of local laws has been generally stated to apply to vessels forced into port by storm, or compelled to seek refuge for vital repairs or for provisioning, or carried into port by mutineers. It has also been asserted in defense of a charge of attempted breach of blockade. It was asserted by as early a writer as Vattel, *The Law of Nations*, p. 128. In the instant case we are concerned simply with distress said to have been occasioned by violent weather.

While recognizing the general principle of immunity of vessels in distress, domestic courts and international courts have frequently given consideration to the question as to the degree of necessity prompting vessels to seek refuge. It has been said that the necessity must be urgent. It seems possible to formulate certain reasonably concrete criteria applicable and controlling in the instant case. Assuredly a ship floundering in distress, resulting either from the weather or from other causes affecting management of the vessel, need not be in such a condition that it is dashed helplessly on the shore or against rocks before a claim of distress can properly be invoked in its behalf. The fact that it may be able to come into port under its own power can obviously not be cited as conclusive evidence that the plea is unjustifiable. If a captain delayed seeking refuge until his ship was wrecked, obviously he would not be using his best judgment with a view to the preservation of the ship, the cargo and the lives of people on board. Clearly an important consideration may be the determination of the question whether there is any evidence in a given case of a fraudulent attempt to circumvent local laws. And even in the absence of any such attempt, it can probably be correctly said that a mere matter of convenience in making repairs or in avoiding a measure of difficulty in navigation can not justify a disregard of local laws.

The *Rebecca* did sail into Tampico, as observed by the judge who condemned the vessel, under its own power. However, it did not enter the port until after it had for three days, in a crippled condition, been contending

with a storm in an attempt to enter the port at Brazos Santiago, Texas. It is therefore certain that the vessel did not by choice abandon its attempt to make port at that place, but only because according to the best judgment of the captain and his crew absolute necessity so required. In such a case a captain's judgment would scarcely seem subject to question. It may also be concluded from the evidence in the case that a well grounded apprehension of the loss of the vessel and cargo and persons on board prompted the captain to turn south towards Tampico. It was argued in behalf of the United States that under the conditions of the weather it could be assumed that no other port of refuge was available. And even if such were not the case, there would seem to be no reason why refuge should not have been sought at Tampico. The fact that the ship had cargo for that place in addition to that consigned to Brazos Santiago, did not make the former any less available as the port of refuge. It may be concluded from the evidence that the captain had no intent to perpetrate a fraud on Mexican customs laws. Indeed his acquittal on the criminal charge preferred against him appears to be conclusive on that point, even if there were no other evidence bearing on the matter which there is. It may also be concluded that the captain had no intent merely as a matter of convenience to flout Mexican laws. This very small vessel had been driven before a strong north wind; its cabin had been damaged; its pumps had been broken and repaired; the cooking stove on the vessel had been rendered useless; there were one and a half to two feet of water in the vessel; and it had been leaking.

It was argued by counsel for the United States forcefully and at considerable length that the Mexican judge in condemning the ship and cargo misapplied Mexican law. The nature of the ship's papers, provisions of Mexican customs laws, and their construction and application by the Mexican judge were discussed in detail. It was contended that there was no violation of those laws. Whatever may be the merits of the contentions advanced, it is unnecessary to discuss this aspect of the case in view of the conclusions reached by the Commission with respect to the conditions under which the vessel entered Tampico. The ship entered the port of Tampico in distress, and the seizure of both the vessel and cargo was wrongful.

Claim is made in the sum of \$10,000.00 with interest from April 24, 1884, until the date of payment of any award rendered in the case. The sum of \$10,000.00 is apparently made up of three items, namely, \$5,000.00 for the vessel; \$2,500.00 for the cargo; and the remainder, "the loss and expense incident" to the confiscation of the ship and cargo. The Memorial contains no allegations or proofs with respect to the ownership of the cargo, and no specific information or proof with respect to the vaguely stated item of "loss and expense incident" to the confiscation. In one place in the brief it is said that the owner of the vessel was also the owner of its cargo. The Mexican Answer contains no challenge with respect to the propriety of these items. However, since the ownership of the cargo is not even alleged in the Memorial and is not proven, and as no information is furnished with regard to the item of incidental losses, these two items must be rejected.

Decision

The United Mexican States shall pay to the United States of America on behalf of Kate A. Hoff the sum of \$5,000.00, with interest at the rate

of six per centum per annum from April 24, 1884, to the date on which the last award is rendered by the Commission.

FANNIE P. DUJAY, EXECUTRIX OF THE ESTATE OF GILBERT
F. DUJAY (U.S.A.) *v.* UNITED MEXICAN STATES

(April 8, 1929. Pages 180-192.)

DENIAL OF JUSTICE.—WRONGFUL IMPRISONMENT.—SURVIVAL OF CLAIMS FOR PERSONAL INJURIES. Claim for wrongful imprisonment of American master of vessel *Rebecca* under circumstances set forth in claim of *Kate A. Hoff, Administratrix of the Estate of Samuel B. Allison, supra*, presented by executrix of estate of such master, *allowed*.

Cross-references: Am. J. Int. Law, Vol. 23, 1929, p. 865; Annual Digest, 1929-1930, p. 174; British Yearbook, Vol. 11, 1930, p. 222.

Commissioner Nielsen, for the Commission:

Claim in the amount of \$15,000.00 with interest is made in this case by the United States of America in behalf of Fannie P. Dujay, Executrix of the estate of Gilbert F. Dujay, an American citizen who was wrongfully imprisoned in Tampico, Mexico, in 1884. The occurrences underlying this claim are set forth in the opinion of the Commission in the case of *Kate A. Hoff*, Docket No. 331.¹

As was stated in that opinion, it appears that Dujay was kept in close confinement for a period of twenty-eight hours, subsequently released, and then re-arrested on February 23rd, and while awaiting the second trial was held under bond but without permission to leave Mexico until the 24th of April of that year.

In behalf of Mexico it was contended that there was probable cause for the arrest of Dujay. It was alleged that this was shown by the fact that the *Rebecca* anchored at Tampico with an irregular manifest, which did not cover certain commodities on board, by unverified statements made concerning the weather and the forced arrival of the ship, and by other matters disclosed by the record.

Even if it be considered that there was probable cause for the first arrest of Dujay, for reasons indicated in the *Hoff* case, the treatment accorded to Dujay was clearly unjustifiable. Counsel for Mexico explained that Dujay was detained pending his second trial under a process of Mexican law termed "arraigo." This appears to be a precautionary measure which may be taken incident to a civil action to secure redress against a person pending such action by detaining such person within the jurisdiction of the court and rendering him subject to penalties if he disobeys the order of detention, such penalties being those prescribed by the Penal Code with respect to the offense of disobedience to the legitimate order of the public authorities. See Book V, Title I, Chapter 11 of the Commercial Code of Mexico relating to mercantile tribunals.

The right of the United States to obtain compensation in behalf of Mrs. Dujay was denied by Mexico, it being contended that any wrongs

¹ See page 444.

suffered by Dujay were of a personal nature. It is said in the Mexican brief that the claimant "has no legal personality to appear and to ask an award for personal injuries which were suffered by Captain Dujay," and that "the right to seek compensation for personal injuries such as the arrest suffered by the deceased, complained of in the Memorandum, and made the foundation of the claim in the Memorial, are personal."

With respect to this point it was contended by the United States that a claim on behalf of the executor or personal representative of a decedent to recover indemnity for personal injuries suffered by the latter during his lifetime is clearly recognized by international law. The issue raised is governed exclusively, it was argued, by that law. It was further contended that, if the question whether a claim such as that presented in the instant case survived to the executrix should be considered to be governed by a rule of domestic law, and specifically, the law of the domicile of the injured person, then the claim did survive under the law of the State of Texas which was the domicile of Dujay at the time of his death. However, the fundamental contention on which counsel relied is that the issue presented is governed by international law, and that under that law a claim can be maintained on behalf of the executrix. He argued that this contention was clearly supported by numerous precedents of international tribunals, and that a proper decision on the issue raised must be reached in the light of precedents of that character.

In searching for evidence of international law on the point at issue comparatively little information will be found outside of the pronouncements of international tribunals before which questions of the character under consideration have been raised. It therefore becomes pertinent carefully to examine the opinions of such tribunals.

In the Mexican brief reference is made to the maxim of the common law *actio personalis moritur cum persona*. And in connection with this reference citation is made of three English cases, namely, *Chamberlain v. Williamson*, 2 M. & S. 408; *Finlay v. Chirney*, 20 Q. B. D. 494; and *Quirk v. Thomas* (1916) 2 K. B. (A. C.) 515. While these cases of course support a general principle of the common law that certain actions of a personal character do not survive, they throw little or no light even by way of analogy on the precise issue under consideration.

Chamberlain v. Williamson, decided in 1814, involved an action for a breach of promise of marriage alleged to have been made by the defendant to a person who died intestate. *Finlay v. Chirney*, decided in 1888, was a case in which it was held that an action for breach of promise of marriage where no special damage was alleged did not survive against the personal representative of the promisor. *Quirk v. Thomas*, decided in 1916, was a proceeding somewhat similar to the two cases just mentioned.

From the standpoint of international law, it was contended in the Mexican brief that a claim for wrongful imprisonment can not be maintained in behalf of the heir or legal representative of the person who suffered the injury. It was argued that although such a claim might be maintained in behalf of the injured person himself, it should be distinguished from one involving the wrongful killing of a person, which might result in a pecuniary loss to persons dependent on the victim. With respect to the applicable principle of international law, the following citations were made in the Mexican brief:

"Borchard, *Dipl. Protec.* p. 632; Underhill's case, *Ralston's Rep.* 45 *et seq.*; wherein it is stated that 'Underhill's death puts an end to any claim

that could arise from personal injuries, insults, or other offenses'; Metzger vs Venezuela, Ralston, 580; Plumer vs Mexico, Op. 182; see Reglas de Procedimiento, Art. 11, de la Comisión de Reclamaciones entre los Estados Unidos Mexicanos y la Gran Bretaña, México, 1928."

The case of *George F. Underhill*, a claim presented in 1903 by the United States against Venezuela, was decided by the Umpire Barge, the American Commissioner and the Venezuelan Commissioner having disagreed. Claim was made in behalf of Jennie Laura Underhill on account of "personal injuries, insults, abuses, and unjust imprisonment as well as for forced sacrifice of a property" suffered by George Freeman Underhill. The Umpire stated that "whatever may be the law or the opinion as to the transition of the right to claims that arise from personal injuries, insults or other offenses", no proof was found in the record that Jennie Laura Underhill was entitled to administer upon her late husband's estate. The Umpire declared that it did not appear whether Underhill left a will, and furthermore that there was uncertainty in the record with respect to rights that might have resulted from a previous marriage of Underhill. The claim was dismissed both as regards personal injuries and the so-called "forced sacrifice of a property". *Venezuelan Arbitrations of 1903*, Ralston's Report, p. 45. It will readily be seen that this opinion furnishes no authority with respect to the standing of a legal representative in relation to a claim growing out of personal injuries.

In the *Metzger* case claim was made in 1903 by Germany against Venezuela in behalf of the heirs of Metzger for an amount including indemnity for personal injuries inflicted on Metzger by Venezuelan military officers. Umpire Duffield, in an opinion by which a pecuniary award in the case was rendered, said:

"A right of action for damages for personal injuries is property. *A fortiori* is the claim in this case which had been presented and proved before the death of Metzger."

The Umpire asserted that, Metzger being domiciled at the time of his death in Venezuela, his heirs would take according to Venezuelan law. He stated that under the laws of Venezuela the right of action for personal injuries survived and passed to the heirs of the deceased in so far as damages for corporeal injuries were concerned, and for such injuries an award was made. No award could be made he declared for damages to the "feelings and reputation" of Metzger. *Op. cit.* p. 578.

There are two interesting points in this opinion: (1) that an action for damages for personal injuries is property, particularly a claim presented and proved before the death of an injured person, and (2) that Venezuelan law was controlling with respect to the survival of the claim. Irrespective of the question of the correctness of this latter conclusion, it is pertinent to note that the Umpire rejected solely the item of damages for the injury to "feelings and reputation" and rendered an award in favor of the heirs on account of corporeal injuries inflicted on Metzger. It will readily be seen that this case in which a claim was successfully maintained by heirs for personal injuries to the deceased is not authority in support of any rule that claims can not be maintained by heirs or legal representatives in a case of this nature.

The *Plumer* case was decided by a Board of three American Commissioners established under an act of March 3, 1849, (9 Stat. 393) for the settlement of claims provided for in Article XV of the treaty concluded between

Mexico and the United States February 2, 1848. A claim was presented in behalf of Dorcas Ann Plumer, Administratrix of the estate of Robert Plumer. It arose out of a theft of personal property from Plumer in Mexico and personal injuries inflicted on him. The Board awarded damages for the loss of the personal property but rejected the item for personal injuries. The Board stated, evidently giving application to the principle of the old common law rule, that the "right of compensation in damage for personal injuries dies with the person and does not survive to the heir or administratrix". *Commissioners On Claims Against Mexico, Opinions*, Vol. I, p. 182.

Irrespective of the question as to the weight that should be given to this decision of a local tribunal when considered in connection with numerous other decisions of international tribunals, it is interesting to note that, shortly after the date of its rendition, on January 24, 1850, another award was rendered by the Board, on February 18, 1850, in which an indemnity of \$20,000.00 was made in favor of the Administratrix of George Hughes in satisfaction of a claim for damages for injuries inflicted on Hughes by troops under the command of General Santa Anna in Mexico. In the opinion in that case it is recited that Hughes was severely beaten and wounded and kept a prisoner for several weeks on a Mexican vessel, and that he was plundered of personal property. Moore, *International Arbitrations*, Vol. II, p. 1285; Vol. III, p. 2972. It would seem to be reasonably clear from the opinion that the common law rule that personal actions do not survive was not applied in this case the decision in which apparently was therefore at variance with that in the earlier case of *Plumer*.

The existence or non-existence of a rule of law is established by a process of inductive reasoning, so to speak; by marshalling the various forms of evidence of international law to determine whether or not such evidence reveals the general assent that is the foundation of the law of nations. It will be seen from an examination of the cases cited in the Mexican brief that, with the possible exception of the *Plumer* case, they furnish no authority in support of the contention that under international law claims can not be maintained in behalf of either representatives or heirs in cases growing out of personal injuries.

The rule in the Mexican-British arbitration to which reference is made in the Mexican brief reads as follows:

"Claims presented solely for the death of a British subject shall be filed on behalf of those British subjects considering themselves personally entitled to present them. Any claim presented for damage to a British subject already deceased at the time of filing said claim, if for damage to property, shall be filed on behalf of the estate and through his legal representative, who shall duly establish his legal capacity therefor." (Translation.)

Without discussion of the bearing of this rule on the question at issue, it may be observed that it does not seem necessarily to preclude the presentation of claims for personal injuries even though no specific reference is made to them.

Rule IV, paragraph 2, sub-section (i), prescribed by this Commission pursuant to Article III of the Convention of September 8, 1923, provides that a "claim arising from loss or damage alleged to have been suffered by a national who is dead may be filed on behalf of an heir or legal representative of the deceased". This rule appears to be in harmony with procedure sanctioned by international tribunals, numerous decisions of which are cited in the counter-brief of the United States. That this is so

can be shown by references to a few illustrative cases in which claims have been filed in behalf of heirs or legal representatives. Among the numerous cases cited are cases concerned with injuries that have resulted in death; cases in which it appears that injuries inflicted were of such a nature as to have contributed to death; cases involving both loss or destruction of property and physical injuries; and cases arising solely out of personal injuries. Reference may be made to a few of the last mentioned class of cases as most apposite to the instant case.

In the claim presented in behalf of V. Garcia, Administrator of the estate of Theodore Webster, Thornton, Umpire under the Convention of July 4, 1868, between the United States and Mexico, held that the Administrator had "a right to lay a claim before the Commission for injuries suffered by Webster." These injuries which severely impaired Webster's health resulted from a gunshot wound inflicted by a Mexican soldier. An award of \$10,000.00 was made in this case. The act of wounding Webster was, said the Umpire, a wanton outrage countenanced by an officer so that his Government became liable for it. Moore, *International Arbitrations*, Vol. III, p. 3004.

In the case of *De Luna*, which was decided under the Agreement of February 11-12, 1871, between the United States and Spain, the Umpire, Count Lewenhaupt, awarded \$3,000.00 in favor of the brother of the deceased as Administrator. In this case claim was made in behalf of the Administrator on account of the arrest of his brother in Cuba in 1880. *Op. cit.*, vol. IV, p. 3276.

In several interesting cases which came before the American-British Commission under the treaty of 1871, claims growing out of personal injuries were presented in favor of legal representatives. Demurrers filed by the American Agent in such cases setting forth that claims of this kind did not survive after death were overruled by a majority of the Commission who sustained the argument of British counsel that injuries to the person, whether resulting in death or not, were, in the diplomatic intercourse of civilized nations treated as a proper subject of international reclamation in behalf of the personal representatives of the person injured after his death. The same position was taken even when all connection between the injury alleged and the death of the intestate was disclaimed in the Memorial. See the claim of *Edward McHugh*, Administrator of the estate of James McHugh, arising out of imprisonment by American authorities; claim of *Elizabeth Sherman*, widow and Administratrix of Thomas Franklin Sherman, on account of injuries resulting from the forcible abduction of the latter by American authorities from Canada into the United States, and his imprisonment in Detroit; claim of *Elizabeth Brain*, widow of John Brain, for injuries sustained by the latter in connection with his imprisonment by American authorities in Washington. *British and American Claims Commission, Report of British Agent*, pp. 69-70; *Papers Relating to the Treaty of Washington*, Vol. VI, pp. 61-62; Ralston, *The Law and Procedure of International Tribunals*, p. 147.

In a reply filed by counsel for Great Britain to the demurrer of the United States, are found the following passages which are interesting, even though one may not agree with all details of the reasoning therein employed:

"This ground asserts a doctrine of the common law of England, which it is believed, is wholly unknown as a rule of international law, and is repugnant to those principles of equity and justice which underlie it. Even in the common

law this doctrine has been materially modified by statute both in England and this country, so that some actions which formerly died with the person, now survive to the widow or orphans.

"But it is not according to the common law that this Commission is to decide the questions brought before it, but according to the principles of equity and justice. This fourth ground of the demurrer is purely technical, and what is more, thoroughly repugnant to the public law, under which this claim arises, and by the principles of which it is to be decided....

"The widow and administratrix of the deceased claimant who, as she avers, left her nothing but this claim, presents it for satisfaction under the Treaty of Washington. The United States, who, under the rules of international law, had released the prisoner, and promised a consideration of his claim, which it never accorded, entered into a Treaty with Her Majesty's Government, which Treaty gave power to this International Tribunal to decide, according to the principles of equity and justice, '*all claims on the part of*' British subjects and American citizens 'arising out of acts committed against their persons and property' between certain dates. The learned Agent and Counsel for the United States now seeks to turn away a claim manifestly within the Treaty by means of a maxim of the common law, which, if admitted to apply to such cases as this, limits and restricts the broad words of the Treaty so as to change their power and scope. But, apart from the fact that this maxim is opposed to the spirit of the public law, the reason which gives the maxim force in the common law does not exist in international proceedings.

"The injuries to the subjects or citizens of one State by the Government of another, out of which arises an international claim, demand a national satisfaction to be accorded to the injured nation by the wrongdoer. Thus the claim is not a personal action, but an international proceeding, in which one Government demands satisfaction of the other, by presenting the claim of its subject or citizen. Nor is this satisfaction accorded until an award be made, or a thorough investigation proves the claim to be invalid. Surely it cannot be maintained that the death of the claimant satisfies his Government for the outrage committed on its territory and its subject, or that the Government which had done these acts, in violation of international law, can, before an international tribunal, deny that satisfaction which it was bound to afford before the Treaty was made, and which, by the terms of the Treaty, it is pledged to afford here, on the ground that this claim, being a personal action, died with the claimant.

"Let us consider this point in another light. There are two divisions in this claim: 1st. Two thousand dollars' damage for the abduction of the claimant, 'the deprivation of his liberty, pain of imprisonment in itself, and the material immediate and continuing injury to his health, from which he never recuperated.' 2nd. Five hundred and eighty-five dollars for damages to his personal estate, the items being two hundred and twenty-five dollars actually paid out for prison expenses, and three hundred and sixty dollars for loss of earnings. The first of these divisions is a claim arising out of acts committed against the person of a subject of her Britannic Majesty; the second, a claim arising out of acts committed against his property.

"The claimant is dead; his claim is presented by his widow and administratrix. Now, by the decisions and practice of this Commission, as administratrix, the memorialist may claim indemnification for the injuries to the property of the deceased; but the United States now maintain that the claim for personal injuries, which would have been valid for presentation under the provisions of the Treaty, which provisions are the same for both classes of injuries, died with the claimant.

"Now, it is submitted that a claim growing out of a personal injury is as much, if not more, an international claim than one growing out of an injury to the property of the claimant. The Treaty makes no distinction between these two classes of claims. According to the letter and spirit of the Treaty they are to be dealt with in the same manner." *Report of British Agent*, pp. 557-559.

In an arbitration conducted between the two Governments many years later under an Agreement concluded August 18, 1910, the Government of Great Britain also proceeded on the theory that claims for personal injuries could be presented in behalf of a legal representative or an heir. See claim on behalf of *Glenna Thomas*, heir of Edward Bedford Thomas, based on complaints of illegal imprisonment and mistreatment of the latter during such imprisonment; claim on behalf of the *Representatives of L. J. Levy*, based on the same grounds. American Agent's Report, pp. 154, 157. No contention was made by the United States in this arbitration that a claim could not be filed in behalf of an heir or a legal representative in cases concerned with personal injuries.

In the case of *Lucile T. Bourgeois*, Administratrix, before the French and American Claims Commission of 1880, under the Convention of January 15, 1880, a claim was made for \$20,000.00 on account of an arrest and imprisonment effected by Colonel Reith of the United States Army. The Commission entered an award in favor of the Administratrix in the sum of \$1,025.00. *Boutwell's Report*, p. 60.

Citation was made by counsel for the United States of numerous cases decided by the Commission under the Agreement of August 10, 1922, between the United States and Germany. In these cases substantial awards were made in behalf of the estates of deceased persons who suffered physical injuries at the hands of German authorities. Among these cases were claims growing out of injuries suffered by American citizens who were on board the steamer *Lusitania* when it sank in 1915. See among others the *Knox* case, *Consolidated Edition of Decisions and Opinions, 1925, Mixed Claims Commission, United States and Germany*, p. 495; the *Foss* case, *ibid.*, p. 512.

Responsibility in the cases coming before the American-German Commission was determined not in accordance with rules and principles of international law but under treaty stipulations. However, these cases are interesting in that it is clearly shown, since awards have been made in favor of estates, that claims growing out of personal injuries were regarded by the Commission as having the character of property rights. As has been pointed out, Umpire Duffield stated in the *Metzger* case, *supra*, that a right of action for damages for personal injuries is property. The same principle with regard to the character of international claims has been enunciated by the Supreme Court of the United States, although it may be noted that the cases in which this principle was asserted related to claims growing out of injuries to property. *Comegys v. Vasse*, 1 Peters 193; *Phelps v. McDonald*, 99 U. S. 298.

It is observed by Mr. Ralston, *International Arbitral Law and Procedure*, p. 180, that in the *De Luna* case, *supra*, an administrator was allowed to recover for wrongful imprisonment of his intestate in harmony with the rule often followed in the civil law as to the right of survivorship for personal damages rather than the rule of the common law. In the *Metzger* case, Umpire Duffield awarded damages for personal injuries on the ground that under Venezuelan law such a claim passed to the heirs of a deceased person. The impropriety of giving application to any rule or principle of domestic law in relation to a subject of this kind is readily perceived. An international tribunal is concerned with the question whether there has been a failure on the part of a nation to fulfill the requirements of a rule of international law, or whether authorities have committed acts for which a nation is directly responsible under that law. The law of nations is of course the same for all members of the family of nations, and redress for

acts in derogation of that law is obviously not dependent upon provisions of domestic enactments. Domestic law can prescribe whether or not certain kinds of actions arising out of domestic law may be maintained by aliens or nationals under that law, but it is by its nature incompetent to prescribe what actions may be maintained before an international tribunal. If domestic law should be considered to be controlling on this point we should have the *reductio ad absurdum* that redress for personal injuries conformably to international law might be obtained in a country like Venezuela in which the principles of the civil law with respect to the survival of actions may obtain, and no redress for the same violation of international law could be obtained in another country where the principles of the common law obtained.

An examination of domestic law may often be useful in reaching a conclusion with regard to the existence or non-existence of a rule of international law with respect to a given subject. But analogous reasoning or comparisons of rules of law can also be misleading or entirely out of place when we are concerned with rules or principles relating entirely or primarily to the relations of States towards each other. International law recognizes the right of a nation to intervene to protect its nationals in foreign countries through diplomatic channels and through instrumentalities such as are afforded by international tribunals. The purpose of a proceeding before an international tribunal is to determine rights according to international law; to settle finally in accordance with that law controversies which diplomacy has failed to solve. That is the purpose of arbitration agreements such as that under which this Commission is functioning. It would be a strange and unfortunate decision which would have the effect of precluding an international tribunal from making a final pronouncement upon the merits of any such controversy, because some rule of a particular system of local jurisprudence puts certain limitations on rights of action under domestic law. Arbitration as the substitute for further diplomatic exchanges or force would fail in its purpose. The unfortunate delays incident to the redress of wrongs by international arbitration are notorious. Injured persons often die before any redress is vouchsafed to them. A decision of this kind would seem to put a premium on such delays which would be conducive to the nullification of just claims.

It is unnecessary for the Commission in holding, as it does, that it may properly pass upon the merits of the instant claim presented by the Administratrix who is also the widow of Gilbert F. Dujay, to enter upon the entire, broad field of discussion covered by the briefs and oral arguments of counsel for each Government. This claim, that arose and was presented to Mexico many years ago, may well be regarded as a "property right". Had it been settled when presented, Dujay or his estate would have had the benefit of it. It is competent for this Commission to pass upon the merits of the claim in the light of the terms of submission stated in the Convention of September 8, 1923. It is a claim within the jurisdictional article of the Convention which provides among other things for the adjudication of claims for losses or damages suffered by persons or their properties, and in the language of the Convention, of "claims for losses or damages originating from acts of officials or others acting for either Government and resulting in injustice, and which claims may have been presented to either Government for its interposition with the other since the signing of the Claims Convention concluded between the two countries July 4, 1868, and which have remained unsettled".

In the case of *Jennie L. Underhill*, in which claim was made by the United States against Venezuela in 1903, "for personal injuries, insults, abuse, and false imprisonment", Umpire Barge dismissed the claim as regards unlawful arrest and imprisonment, but with respect to the detention of the claimant for a month and a half in Venezuela, the Umpire awarded an indemnity of \$3,000.00, saying with regard to this item:

"But as, furthermore, claimant claims award for damages on the charge of detention of her person;

"And whereas, without any arrest and imprisonment, detention takes place when a person is prevented from leaving a certain place, be it a house, town, province, country, or whatever else determined upon; and

"Whereas it is shown in the evidence that claimant wished to leave the country which she could not do without a passport being delivered to her by the Venezuelan authorities; and that from August 14 till September 27 such a passport was refused to her by General Hernandez, then chief of the Government of Ciudad Bolívar, the fact that claimant was detained by the Venezuelan authorities seems proved; and

"Whereas, whatever reason may or might have been proved to exist for refusing a passport to claimant's husband, no reason was proved to exist to withhold this passport from claimant; and

"Whereas the alleged reason that it would not be safe for the Underhills to leave on one of Mr. Mathison's steamers can not be said to be a legal reason, for if it be true that there existed any danger at that time, a warning from the Government would have been praiseworthy and sufficient. But this danger could not give the Government a right to prevent Mrs. Underhill from freely moving out of the country if she wished to risk the danger; whilst on the other hand it might have been said that the steamer being a public means of transfer, it would have been the duty of the Government to protect the passengers from such danger on the steamers when existing.

"Whereas, therefore, it is shown that Mrs. Underhill was unjustly prevented by Venezuelan authorities from leaving the country during about a month and a half, the claim for unlawful detention has to be recognized.

"And whereas for this detention the sum of \$2,000 a month—making \$3,000 for a month and a half—seems a fair award, this sum is hereby granted." (*Venezuelan Arbitrations of 1903. Ralston's Report*, pp. 49, 51.)

An indemnity of \$2,200.00 was paid by the United States to the Government of Norway on account of the detention of three seamen at Jersey City, New Jersey, for a few days in excess of a month in the year 1911. The men were detained as witnesses in connection with legal proceedings growing out of an explosion in the harbor which caused damage to a Norwegian vessel called *Ingrid*. In connection with the payment of this indemnity it was stated that it was made "without reference to the question of liability therefor" (42 Stat. 610).

In the instant case the claim of \$15,000.00 with interest must be rejected, but an award may properly be made in the sum of \$500.00.

Decision

The United Mexican States shall pay to the United States of America on behalf of Fannie P. Dujay \$500.00 (five hundred dollars) without interest.

CLYDE DYCHES (U.S.A.) *v.* UNITED MEXICAN STATES

(April 9, 1929, *concurring opinion by American Commissioner, April 9, 1929.*
Pages 193-198.)

NATIONALITY, PROOF OF. Affidavits of mother and older sister of claimant testifying as to his birth in the United States *held* sufficient proof of American nationality.

DENIAL OF JUSTICE.—DEFECTIVE ADMINISTRATION OF JUSTICE.—CORRECTION OF ERRORS OF LOWER COURTS BY COURT OF LAST RESORT. When any illegality of claimant's trial for theft and defects in administration of justice suffered by claimant in lower courts were finally corrected by the highest court of the nation, *held*, denial of justice not established.

UNDUE DELAY IN JUDICIAL PROCEEDINGS.—IMPRISONMENT BEYOND REASONABLE PERIOD.—ILLEGAL IMPRISONMENT. Claimant was imprisoned for over two years and seven months, when only crime committed by him was subject to maximum penalty of two months' to one year's imprisonment. *Held*, long and unjustified delay constituted a denial of justice. Claim *allowed*.

Cross-references: Annual Digest, 1929-1930, p. 159; British Yearbook, Vol. 11, 1930, p. 224.

Commissioner Fernández MacGregor, for the Commission:

The United States of America, on behalf of Clyde Dyches, an American citizen, claims from the Government of the United Mexican States the amount of \$25,000.00, United States currency, alleging that the claimant was subjected to undue, harsh and oppressive treatment while he was a prisoner in Mexico; that he was not accorded an impartial trial; that the latter was delayed for no cause whatsoever, and that such facts, together with the atmosphere of prejudice and of personal animosity existing against the claimant, resulted in a denial of justice against him.

The facts upon which the Government of the United States grounds its contentions are, briefly, as follows:

In February 1910 Dyches took to Monterrey, Nuevo León, Mexico, a blooded horse worth \$1,500.00, United States currency. In March of the same year the claimant entered into an agreement with a Mexican named Bruno Lozano, under which the latter agreed to pay for Dyches' board and lodging, as well as for the keeping of the horse, and to allow the said Dyches half of the profits obtained from the races in which the horse would enter. The horse lost all the races in which it ran, and Lozano had difficulty with Dyches, alleging that the latter had agreed to pay half of the losses on the races. Therefore, Dyches considered the agreement terminated and sold the horse to two men named Sepúlveda and Aguilar, stipulating, in addition, that he would retain the horse in order to continue racing it.

Lozano brought suit against Dyches in August, for the amount of \$1,500.00, Mexican currency, and the Judge who tried the case ordered the attachment of the animal, appointing as depositary a brother of Lozano who lived in a ranch called "Rinconada". It appears that Dyches finally won the suit; but before then, and while the horse was still in deposit, he wanted to get it back; the Judge allowed him only to go to see it in the

ranch where it was. In one of the inspections Dyches made of the horse—on May 8, 1911—he met Bruno Lozano and as he told Dyches that he would never again get the horse back, Dyches clandestinely returned during the night, seized the horse and rode him away with the intention of taking it to the United States. Three days later Dyches was arrested to answer the charge of theft of which he had been accused by Lozano.

The criminal procedure was carried out slowly, and finally Dyches was sentenced on May 31st, 1912, to the penalty of imprisonment for six years and nine months and to a fine of 1,000.00 pesos, as guilty of the theft of the animal. The claimant appealed from such a decision, and thus it was reviewed by the Supreme Court of the State of Nuevo León, which in April 28, 1913, affirmed the decision of the lower Judge but increased the penalty of imprisonment to eight years and five months, which should be counted from May 17, 1911. Dyches having appealed for protection (*amparo*) against this decision, the Supreme Court of Justice of Mexico, in the month of November, 1913, protected the claimant, stating that his act in having taken the horse from Lozano's stable did not constitute the crime of theft. In view of this decision, the Supreme Court of the State of Nuevo León amended its decision, finding Dyches guilty only of having entered the premises without the consent of the owner, and adding that the incarceration already suffered by Dyches was sufficient penalty for the offense he had committed.

It is alleged that, in being arrested by five Mexican rural guards, Dyches was beaten and abused, and that the rural guards enticed him to escape in order to kill him under that pretext; that he was firmly tied with his hands behind him while being taken to Monterrey by railroad, this causing him pain and discomfort; that on his arrival at the jail in Monterrey upon request of Lozano, the jailkeeper confined him in a dark cell where he was for 72 hours, without a bed, *incomunicado*, and suffering from a toothache which was driving him mad, without being given medical attention. It is alleged further that the Judge of First Instance at Monterrey and the police authorities were influenced by the Lozano brothers whose political connections were powerful.

As regards the judicial procedure, several rights granted by the Mexican Constitution were violated, it is alleged, to the prejudice of the accused; the formal commitment was decreed without the *corpus delicti* having been established, as required by the criminal laws of Mexico; several persons, incompetent and untrustworthy, were used as interpreters for Dyches, among them, two individuals who had been or were accused of some crime before the same Judge; and above all, the fact is emphasized that the period of investigation took longer than the Mexican law permits adding further that the proceedings of the criminal action resulted in the claimant, who, at the most, was liable of a slight offense, being imprisoned for more than two and one-half years, which fact constitutes a denial of justice.

The Mexican Agency, in defense of this claim, alleged: that the nationality of the claimant was not proved; that the Mexican law considers equal to theft the unlawful taking of a movable thing, even though executed by the owner himself, if the thing is in the possession of another as a deposit decreed by an authority, as happened with the horse in question, which had been taken from Dyches in order to turn it over to Lozano by virtue of the attachment decreed by the Judge; that although Dyches alleged the attachment of the horse was illegally decreed—since the horse no longer belonged to him but to Sepúlveda and Aguilar,—and furthermore, that

the attachment had already been lifted, the horse continued deposited under the law, in view of the fact that the decree of the Judge lifting the attachment was pending on appeal entered by Lozano; that the courts of the State of Nuevo León had reason to consider Dyches guilty; and finally that there is no proof of bad treatment inflicted on the claimant.

As regards the question of nationality, in the opinion of the Commission, there is sufficient evidence to prove that Dyches was a citizen of the United States. In the record there is an affidavit by the mother of Dyches stating that he was born in the city of Granger, Williamson County, Texas, on June 28, 1888; another affidavit by an older sister of the said claimant stating the same facts, and the statement of Dyches himself in this respect. Since the perfectly definite facts of date and place of the claimant's birth are established in these affidavits by persons who are in the best position to know them through their ties of relationship, and as there is no circumstance contradicting the same, the Commission adheres to its previous opinions with respect to the probative weight of affidavits and to the matter of nationality.

Moreover, in this case of an alleged illegal trial and defective administration of justice, the Commission finds itself confronted with a decision of the Supreme Court of Justice of Mexico,—the highest court in the nation, and in fact one of the three branches into which its Government is divided,—in which decision final justice is granted correcting the error that the local lower Courts may have made in finding the claimant guilty. Bearing this in mind, it might be said that there is no denial of justice in this case, but on the contrary, a meting out and fulfillment of justice. If the term within which all proceedings against Dyches were effected had been a reasonable one, it would be necessary to apply hereto the principle establishing the non-responsibility of a State for the trial and imprisonment of an alien, even though he is innocent, provided there has been probable cause for following such procedure. In this case, considering the facts stated, and since Article 349 of the Criminal Code of the State of Nuevo León considers equal to theft the unlawful taking of a thing, even though executed by the owner himself, if the said thing is in the possession of another as a deposit decreed by an authority, it appears that there was sufficient cause for proceeding against Dyches. The Supreme Court of Justice of the Mexican nation finally applied the law, conscientiously examining the charges made against Dyches and found him innocent, for which reason he would have no right to ask for indemnification for the deplorable error of the local courts which injured him. All the defects of procedure of which the claimant complains were, so to say, erased by the last decision which rendered justice to him. Thus, there is no need to consider the propriety or impropriety of the interpreters employed not meeting the requirements prescribed by the law, nor of taking into account that this or that legal step was not taken.

But the fact remains that the procedure was delayed longer than what it should reasonably have been, in view of the simple nature of the case. Counsel for the American Agency has pertinently observed that Dyches remained deprived of his liberty for a period of two years and seven months, having committed no other offense than that of entering into the house of a person without his consent, an offense which the Mexican law punishes with a maximum penalty of from two months, to one year's imprisonment; that the Supreme Court of the State of Nuevo León, in complying with the final decree of the Supreme Court of Justice of Mexico, stated that the

term of imprisonment which the claimant had suffered was sufficient penalty for the only offense of which Dyches was liable, therefore setting him free. The American Agency observed also that under the Code of Criminal Procedure of the State of Nuevo León the preliminary investigation in a criminal cause should be concluded, *at the latest*, within the term of three months, when dealing, as is the case here, with offenses which should be tried by minor judges, (Article 103 of the Code of Criminal Procedure), and that the preliminary investigation in this case undoubtedly exceeded this term.

The evidence submitted by both parties before the Commission is not sufficient for it to obtain an exact idea of the term in which such preliminary investigation was effected, but all the evidence, reasonably construed, shows that this term was exceeded; it readily appears that the decision in first instance was dictated on the 31st of May, 1912, that is, one year after Dyches was apprehended. In other cases the Commission has expressed its opinion that there is no rule of international law fixing the period in which an alien accused of an offense may be detained in order to investigate the charges made against him, adding that it was deemed convenient to consider the local laws in order to decide this question. Applying that test to the present case, and considering that the only offense attributable to Dyches, according to his own confession, merited a maximum penalty of one year, in case it had been of the most serious character, it seems reasonable to believe that within that period, or a little longer, the claimant should have been finally sentenced, thus resulting that he was unduly imprisoned for nearly 18 months. This long and unjustified delay constitutes a denial of justice, and taking into consideration the precedents established for these cases by other arbitral Commissions, as well as by this Commission, it appears that Dyches may be granted an award of \$8,000.00.

Nielsen, Commissioner:

Unfortunately the records before the Commission are so meagre that it is impossible to obtain satisfactory information regarding the strange proceedings in this case which resulted in the imprisonment for a period in excess of two and a half years for what at most was a very trifling offense, namely, entering premises without the consent of the owner.

No doubt it is a general rule that a denial of justice can not be predicated upon the decision of a court of last resort with which no grave fault can be found. It seems to me, however, that there may be an exception, where during the course of legal proceedings a person may be the victim of action which in no sense can ultimately be redressed by a final decision, and that an illustration of such an exception may be found in proceedings which are delayed beyond all reason and beyond periods prescribed by provisions of constitutional law. In my opinion that principle would be applicable in a case like the one before the Commission in which clearly unjustifiable delays took place in the proceedings before State courts which finally terminated with a sentence of eight years and five months for robbery of which Dyches was not guilty, following which sentence Dyches sought redress from the Supreme Court of the Nation by *amparo* proceedings.

Decision

The United Mexican States shall pay to the United States of America, on behalf of Clyde Dyches, the amount of \$8,000.00, (eight thousand dollars), United States currency, without interest.

W. C. GREENSTREET, RECEIVER OF THE BURROWES RAPID
TRANSIT COMPANY (U.S.A.) *v.* UNITED MEXICAN STATES

(April 10, 1929, concurring opinion by American Commissioner, April 10, 1929.
Pages 199-208.)

CORPORATE CLAIMS.—NATIONALITY, PROOF OF.—EFFECT OF CONFLICTING INSOLVENCY PROCEEDINGS UPON RIGHT TO CLAIM. Claim was filed by a receiver of a Delaware corporation appointed under the laws of Texas while bankruptcy proceedings in Mexico against such corporation were pending. *Held*, (i) while it is doubtful whether the Texan receiver is the proper party claimant, claim may be considered by tribunal since it was presented and espoused by the United States Government, (ii) nationality of receiver or of creditors of corporation need not be established, and (iii) pendency of Mexican bankruptcy proceedings does not *per se* preclude tribunal from exercising jurisdiction.

CONTRACT CLAIMS. Claim for hauling services under contract with National Railways of Mexico *disallowed* on ground such services were to be free of charge under the terms of the contract. Claim for undue delays by National Railways of Mexico in performing repair services under contract *disallowed* on ground it was not shown such delays were unreasonable under the unsettled conditions prevailing.

Cross-references: Annual Digest, 1929-1930, pp. 187, 452.

The Presiding Commissioner, Dr. Sindballe, for the Commission:

In this case claim in the sum of \$92,179.68, United States currency, is made against the United Mexican States by the United States of America on behalf of W. C. Greenstreet, Receiver of the Burrowes Rapid Transit Company, an American corporation. The claim is made up of two items, namely \$52,800.00 for services alleged to have been rendered by the Burrowes Rapid Transit Company to the National Railways of Mexico in 1921, when the said Railways were operated by the Mexican Government, and \$39,379.68 for loss alleged to have been suffered by the Burrowes Rapid Transit Company from wilfull and negligent failure of the National Railways of Mexico to fulfill certain contractual obligations.

The Burrowes Rapid Transit Company was organized and incorporated under the laws of Delaware, United States of America, in January, 1921, for the prime purpose of carrying on the business of "the rapid receiving, handling, shipping, forwarding and transporting of goods, wares, merchandise and all classes of freight and express over the railroads of the Republic of Mexico and elsewhere". It established various offices in Mexico as well as in the United States. In the United States its main office was in Laredo, Texas. On September 1, 1921, the company was decreed in a state of receivership by the District Court of the 49th Judicial District of Texas, and W. C. Greenstreet was appointed Receiver. Sixteen days later the company was declared bankrupt by the Civil Court of First Instance at Monterrey, Mexico.

The respondent Government contends that the claim should be dismissed, as the American nationality neither of W. C. Greenstreet nor of the creditors of the insolvent company has been established. The Commission is, however,

of the opinion that the question as to whether the claim presented in this case comes within its jurisdiction does not depend on the nationality of Greenstreet or of the creditors, Greenstreet being only a representative of the insolvent corporation, and the nationality of the creditors being just as immaterial as is that of the stockholders in case of a solvent company.

The respondent Government further contends that Greenstreet has no standing before this Commission, as, according to American law, his authority as a Receiver appointed by a Texas court is limited to the State of Texas. However, even if it be considered as doubtful whether, according to American law, Greenstreet has the authority to dispose of the present claim on behalf of the Burrowes Rapid Transit Company, which, from a legal point of view must be considered as still existing as a going concern in the State of Delaware, where it is incorporated, the Commission is of the opinion that from the point of view of international law the claim, as having been espoused and presented by the Government of the United States, is duly presented.

It is further argued by the respondent Government that the claim should be dismissed because of the bankruptcy proceedings that have been instituted against the Burrowes Rapid Transit Company at Monterrey, Mexico, and which are still pending. This argument would have been well founded, if the Mexican trustee in bankruptcy had tried to enforce the claim by bringing it before the Mexican courts. If that had been done, and even if the claim had been disallowed by the Mexican courts, no claim could have been made before this Commission, unless predicated upon a denial of justice. But no steps with a view to bringing the claim before a Mexican court have been taken by the Mexican trustee in bankruptcy. In view hereof, and in view of Article V of the Convention of September 8, 1923, between the United States and Mexico, the Commission is of the opinion that the present claim cannot properly be dismissed on the ground here mentioned.

With regard to the merits of the claim the following appears from the record:

Owing to a scarcity of rolling stock as well as of motive power a great congestion of unmoved freight had developed in Mexico during the year 1921 and the years immediately preceding. This led to a practice, on the part of the National Railways of Mexico, of concluding what were termed private freight contracts, according to which private companies were permitted to operate transportation business on the lines of the National Railways of Mexico by means of engines and other rolling stock to be imported into Mexico by the companies. Among the companies undertaking this kind of business was the Burrowes Rapid Transit Company.

The Burrowes Rapid Transit Company put its first engine into service in Mexico on February 19, 1921. In the course of the following months a number of other engines were put into service by the company. At first there was no written contract, but on April 13, 1921, a contract in writing was made. This contract was signed by F. Perez, the General Director of the National Railways of Mexico, on behalf of the National Railways of Mexico and connecting lines under Government control, and by a duly authorized attorney on behalf of E. S. Burrowes. The latter was President of the Burrowes Rapid Transit Company, but there was nothing in the contract to indicate that it was made by or on behalf of that company. That the signature of E. S. Burrowes was attached to the contract on behalf of the Burrowes Rapid Transit Company, was not indicated. Referring to this

fact, the respondent Government contends that no contractual relations have ever existed between the National Railways of Mexico and the Burrowes Rapid Transit Company. There is, however, ample evidence to show that the transportation business really was carried on by the Burrowes Rapid Transit Company, and that this fact was perfectly well known to representatives of the National Railways of Mexico. It must therefore be assumed that the contract entered into was intended to be a contract between the National Railways of Mexico and the Burrowes Rapid Transit Company.

According to the contract the National Railways of Mexico undertook (1) to furnish, free of cost, crews for the trains of the Burrowes Rapid Transit Company, certain overtime only to be paid for by the company, (2) to provide, free of charge, fuel, water, grease, lubricants and light fixtures for the service of the trains or to reimburse the charges incurred on account of the purchase of said articles, (3) to provide, free of charge, the services of the round houses to the locomotives, and (4) to give to engines and cars minor repairs, the company to pay only for overtime in certain cases and for replacements of parts to be made in the shops of the Railways. The Burrowes Rapid Transit Company undertook to pay to the National Railways of Mexico freight and other expenses for all shipments in accordance with the prevailing Mexican tariffs. When the company was unable to make up a train with 85% of the total capacity tonnage of the engine on a $1\frac{1}{2}\%$ grade, a five hours, notice in writing should be given to the Railways prior to the departure of the train and the Railways should then have the right to complete the train with loaded or empty cars.

In the prosecution of its business the Burrowes Rapid Transit Company required private shippers to pay an extra charge in addition to the amount to be paid by the company to the National Railways of Mexico. This extra charge was at the rate of \$200.00 or more per car on shipments other than oil between Tampico and Monterrey or points north of Monterrey, with a minimum of \$2,000.00 per train, and double those amounts on oil shipments.

The services alleged to have been rendered to the National Railways of Mexico by the Burrowes Rapid Transit Company and the amounts claimed in consideration of these services are as follows:

Hauling from Tampico to Monterrey or to the boundary line of the United States during the period from May to August, 1921, 19 trains and parts of trains containing a total of 211 empty cars at \$200 each	\$42,200
Hauling on March 26 and May 10, 1921, from Tampico to Monterrey five cars loaded with miscellaneous freight at \$200 each	1,000
Hauling on various dates on or after March 1, 1921, from Tampico to Monterrey 14 cars of oil at \$400 each	5,600
Hauling on June 13 and June 14, 1921, from Tampico to Monterrey two trains of oil at \$2,000 each	4,000
Total	52,800

Except for a few cars, there is evidence to show, and it is admitted by the respondent Government, that the alleged services have been actually rendered. The question is whether they should be paid for. The respondent Government points to the provision in the contract according to which the Railways should have the right to complete, with empty and loaded cars, every train containing less than 85% of the total capacity tonnage of the

engine on a 1¹/₂% grade, and, referring to a memorandum by the Chief Dispatcher of trains of the Railways at Monterrey, alleges that all the services rendered by the Burrowes Rapid Transit Company to the Railways have been pursuant to this provision. Counsel for the claimant argued that it was not the duty of the Burrowes Rapid Transit Company under the said provision of the contract to haul the cars of the Railways free of charge, but as the contract gives the Railways the right to have cars hauled without mentioning any payment to be made therefor, the Commission is of the opinion that the contract can only be construed to mean that the right to have cars hauled, together with other rights under the contract, was stipulated by the Railways in consideration of the rights accorded the Burrowes Rapid Transit Company. Counsel for the claimant further argues that the hauling of the cars of the Railways took place although freight of private shippers was available, and only on the order and demand of the officials of the Railways, and with the expectation that the services rendered would be paid for. Affidavits to this effect of the general traffic manager of the Burrowes Rapid Transit Company, of the manager and one of the employees of the Merchants Transfer & Storage Company, S. A. of Tampico, Mexico, which company had close business relations with the Burrowes Rapid Transit Company, and of one other person, have been submitted. On the other hand, the Chief Dispatcher of the Railways declares that the Burrowes Rapid Transit Company generally operated carrying freight to Tampico, but that there was not much return freight in that port. The Commission is of the opinion that it is not sufficiently proven that the Burrowes Rapid Transit Company has been ordered to haul cars in cases where no obligation so to do existed under the contract. In view of the period of time during which the hauling was done, the total number of cars hauled—211 empty and 27 loaded cars—would not seem exceedingly great. The large amount claimed is arrived at by charging for the hauling of an empty car the same extra charge as charged by the Burrowes Rapid Transit Company on shipments. Some correspondence had between the Burrowes Rapid Transit Company and the Merchants Transfer & Storage Company shows that in a number of cases the former company had agreed to haul cars for the Railways, and there is nothing in the correspondence to indicate that the company had the right to assume that the hauling would be paid for, it appearing on the contrary that at a certain time the company made an offer to the Railways to haul empty cars from Tampico to the border of the United States at a rate of \$50 per car, and that this offer was not accepted by the Railways. Finally, great weight must be attached to the fact, invoked by the respondent Government, that at no time during its business operations in Mexico did the Burrowes Rapid Transit Company present any claims for services rendered or any bill covering such services to the National Railways of Mexico, so that the Railways had no reason to secure evidence to show in detail that the services rendered were within the obligations of the company under the contract.

With regard to the second item of the present claim it is alleged that the locomotives of the Burrowes Rapid Transit Company lost 484 days, counted as for one locomotive, or more than 25% of all the time they were in Mexico, through various delays on the part of the Railways in fulfilling their duties of providing Round House service, including minor repairs, as well as furnishing crews and supplies, and the fact of these delays is, save for a few of them, admitted by the respondent Government. It is

further alleged that 70 locomotive-days would be a reasonable allowance of time for the services in question, and that, consequently, Mexico should be held responsible for a loss of 414 locomotive-days at a rate of \$95.12 a day, which, according to the accounts of the Burrowes Rapid Transit Company, was the average earning power of a locomotive per day. The Commission is of the opinion that there is not sufficient evidence to establish that the delays were due to such failure on the part of the Railways in fulfilling their duties as to make Mexico responsible. The Burrowes Rapid Transit Company could not reasonably expect, when entering into the contract, that repairs could be completed within such time as would be possible in countries where conditions are more settled than they were in Mexico at the time. From the above mentioned correspondence between the Burrowes Rapid Transit Company and the Merchants Transfer & Storage Company it also appears that the locomotives of the former company became "dead" more often than those of other companies, a fact which the general traffic manager of the company declares to be a mystery to him, and that the same general traffic manager, in a letter, dated May 17, 1921, expresses as his opinion that in case of presenting claims for delays "we will have to prove that the railroad company are holding our trains and delaying them, more than they are their own trains, which would be very hard to do, as I and everybody knows that their own trains suffer the same delays as those to which we are subjected, they of course being the losers in all cases." Finally, in this connection again great weight must be attached to the fact, that during their business operations in Mexico the Burrowes Rapid Transit Company never presented any claim for delays to the Railways, nor made any complaint when the delays occurred, so that the Railways have had no reason to secure evidence to show in detail what were the circumstances that led to each of the various delays that actually took place.

Nielsen, Commissioner:

I concur in the dismissal of the case, but not entirely in all the conclusions stated in the Presiding Commissioner's opinion.

I think that the claim should properly have been filed in the name of the Burrowes Rapid Transit Company, an American corporation. I do not believe that a receivership in Texas made it improper to file a claim in behalf of the corporation, which was created under the laws of the State of Delaware. There is involved in this question something more than a mere unimportant technicality. The status of claimants designated as the persons entitled to receive any pecuniary award that may be rendered is of course in every case an important matter. Greenstreet's appointment as Receiver by a local Texas court evidently conferred on him authority merely to take action to conserve assets of the company in Texas. I do not think it can be properly said that in that capacity he can be considered as standing in the shoes of the company, or as being in charge, under direction of a State court, of all the affairs of the Delaware corporation. A general receiver would have proper standing as a claimant. However, since evidently the company's affairs were substantially all transacted in Texas after operations in Mexico were abandoned, and in view of the control which the Government of the United States would have over any award rendered in the case, I do not believe that the Commission would be justified in dismissing the claim on the ground that it was not filed in a proper name.

Some issues raised in behalf of Mexico are not touched upon in the Presiding Commissioner's opinion, and it is my view that the interpretation of the contract upon which reliance is placed in this case, is the only important and difficult issue raised.

That the proceedings before the court at Monterrey which gave rise to the *Venable* claim, Docket No. 603, can in no way debar the United States from presenting the instant claim is, I think, very clear in the light of the nature of those proceedings as revealed by the opinions written in the *Venable* case. The contention that the real party in interest in the instant case is *Venable* who, through a disguise, is claiming once more what has already been granted by the Commission, is without foundation. The *Venable* case and the instant case are based on different and entirely unrelated facts. The *Venable* claim grew out of certain judicial proceedings in Monterrey; the instant case is based on an allegation of breach of contract.

I do not agree with the positive conclusion "that the contract can only be construed to mean that the right to have cars hauled, together with other rights under the contract, was stipulated by the Railways in consideration of the rights accorded the Burrowes Rapid Transit Company." In fact it seems to me to be a very plausible view that under the provisions of Article IX of the contract between the company and the Railways, the latter did not enjoy the very extensive privilege of having loaded or unloaded cars hauled for nothing. The company agreed to make up a "required tonnage" of 85% of the total capacity tonnage which the engines could drag. It was privileged under the contract to make certain charges on this required tonnage of 85% capacity. Sub-paragraph (c) of Article IX further provides that when the company "is unable to make up the required tonnage" notice should be given, and if a train did not make up the 85% tonnage the Railways might "complete the 85% tonnage". Nothing in the contract states that any portion of the required 85% tonnage shall be carried free.

However, I think that the provisions of the contract and the action taken by the contracting parties with reference thereto leave too much doubt to justify a pecuniary award in the light of the general principles which have governed the Commission's action in making such awards. The Commission is not concerned with a suit on a contract. It seems to me that in dealing with a case of this kind the Commission must be guided by the same general principles by which it is governed in other cases in determining whether or not authorities of a government can properly be charged with wrongful conduct.

It appears to me to be pertinent to consider the action of the parties to the contract which is touched upon in the opinion written by the Presiding Commissioner. It is not shown that the company treated tonnage carried in behalf of the Railways in the manner in which it dealt with other tonnage offered by private shippers. The company does not appear to have collected or attempted to collect accounts from the Railways as was done with respect to other tonnage hauled. There is no record of demands for freight charges or of presentation of accounts. To be sure, it is conceivable that difficult and delicate questions entered into the relations of the parties to the contract. But when the company has accepted tonnage from the Railways without asking compensation, it is difficult for the Commission to say that the hauling of such tonnage resulted in a breach of the contract, or that a breach was forced by the Railways.

An alternative claim which seems to have been presented in behalf of the claimant was based on a *quantum meruit* for services rendered, but such a claim was predicated only on an assumption that the Commission might find that the contract invoked in this case was a personal contract of Burrowes made with the Railways.

An item of the claim grows out of delays in making repairs and in furnishing supplies. Delays doubtless occurred, but it seems to be impossible to determine or to prescribe standards of efficiency by which negligence may be measured in the numerous instances asserted, and damages may be awarded for such negligence according to such standards. This item, therefore, in my opinion, presents too much uncertainty to be the basis of a pecuniary award.

The claim is well supported by convincing evidence which clarifies the facts and it was very forcefully presented in oral argument, but the language of the contract between the company and the Railways reveals uncertainties. These uncertainties, I think it may be said, are accentuated by the business relations of the parties which the Commission can not now reconstruct.

Decision

The claim of the United States of America on behalf of W. C. Greenstreet, Receiver of the Burrowes Rapid Transit Company, is disallowed.

F. M. SMITH (U.S.A.) *v.* UNITED MEXICAN STATES

(April 10, 1929. Pages 208-210.)

FAILURE TO PROTECT. Although disorders had previously taken place at mine where two American subjects were murdered, since no request for protection was made and authorities took prompt measures of protection after the murders, *held*, responsibility of respondent Government not established.

DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH.—DUTY TO PROTECT IN REMOTE TERRITORY. Delays in efforts to apprehend murderer of American subject, murder having taken place in a sparsely settled territory *held* not sufficient to establish a denial of justice.

The Presiding Commissioner, Dr. Sindballe, for the Commission:

At about five o'clock in the afternoon of September 24, 1921, George D. Kislingbury, who was employed as master mechanic at the Dolores mine, Chihuahua, Mexico, and Harry G. Smith, who was employed as superintendent of the milling plant at the mine, were working on some filters at the mine, together with two assistants. They were approached by a laborer, Eulalio Quezada, who asked Kislingbury for an increase in wages. Kislingbury refused his request. Quezada then drew his pistol and shot first Kislingbury, and then Smith. Both of them died instantly.

Claim in the sum of \$25,000, United States currency, is now made against the United Mexican States by the United States of America on behalf of F. M. Smith, an American citizen, the father of the deceased Harry G. Smith, for failure of the Mexican authorities (1) to afford protection to the people working at the Dolores mine, and (2) to apprehend and punish Quezada.

With regard to the question of lack of protection it is alleged by Counsel for the United States that the double murder was the climax of a series of disorders at the Dolores mine due in part to labor agitators, one of whom was an alderman of the municipality, and that in the course of these disorders an American employee at the mine on two occasions had been assaulted and beaten by Mexicans. There is, however, no evidence to show that any request for protection had been made to the Mexican authorities prior to the killing of Kislingbury and Smith. And it appears from the record that after the murders a special detachment of *rurales* was formed for the purpose of affording protection at Dolores, that certain agitators including the alderman were expelled, and that the General Manager of the mining corporation expressed himself as being fairly well satisfied with the measures thus taken. In view hereof, the Commission is of the opinion that no responsibility for lack of affording proper protection can be placed upon Mexico in the present case.

As to what was done in order to apprehend Quezada the evidence submitted is vague. The murder was immediately reported to the Municipal President at Dolores, and within half an hour he was on the scene. He took the testimony of four witnesses, each of whom testified that Quezada was the murderer. The mining company itself sent out armed men to capture Quezada. But it seems that several days elapsed—about six or eight days, it is alleged—before a detachment of *rurales* was formed and undertook the pursuit of the murderer. Once formed, it searched the district surrounding the place where the murder had been committed, and having done so, it returned, reporting that the criminal had fled to Sonora. The Governor of Chihuahua then sent descriptions of the murderer to the Sonora authorities, and it appears that later search was made at various points in Sonora. In a dispatch of August 31, 1922, the American Consul at Chihuahua states that while at the time of the murder he was informed that the local authorities at Dolores did not take the proper steps to apprehend the criminal, it is his belief that since then the officials have used all of the limited means at their command to locate Quezada. In view hereof, and taking into consideration the sparsely settled character of the region where the murder was committed, the Commission is of the opinion that the evidence submitted is insufficient to establish an international delinquency on the part of Mexico in the present case. That a record of some proceedings had at the Court of First Instance at Chihuahua submitted by Counsel for Mexico shows long delays in taking the testimony of witnesses to the murder and in issuing a court warrant for the arrest of Quezada as well as in other particulars, to a great extent in contravention of Mexican law, is in the opinion of the Commission not conclusive with regard to the international responsibility of Mexico, as it was perfectly well known who the murderer was, so that the question of the responsibility of Mexico in the present case must depend upon what was actually done in order to apprehend Quezada.

Nielsen, Commissioner:

I agree with the conclusion stated in the Presiding Commissioner's opinion with respect to the non-liability of Mexico, but do not concur entirely in

the reasoning on which the conclusion is based. In my opinion the fact that a request for protection is not revealed in the record of a case involving a complaint of lack of protection can have no important bearing on the merits of such a complaint under international law. The fact that a request for protection has not been made does not relieve the authorities of a government from protecting inhabitants. Protection is a function of a State, and the discharge of that function should not be contingent on requests of the members of a community. On the other hand, in determining whether adequate protection has been afforded in a given case, evidence of a request for protection may be very pertinent in showing on the one hand that there was necessity for protection and on the other hand that warning of possible injury was given to the authorities. Of course such warning may also come in other ways as through information with respect to illegal acts.

Decision

The claim of the United States of America on behalf of F. M. Smith is disallowed.

HAZEL M. CORCORAN (U.S.A.) *v.* UNITED MEXICAN STATES

(*April 13, 1929, concurring opinion by American Commissioner, April 13, 1929. Pages 211-213.*)

JURISDICTION. CONFLICTING JURISDICTION OF SPECIAL CLAIMS COMMISSION.

Fact that murderer of American subject escaped from jail at a time when revolutionary forces were approaching did not render claim based on failure to apprehend or punish him one within jurisdiction of Special Claims Commission, United States and Mexico.

DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH.—ESCAPE OF GUILTY PARTY FROM JAIL. Murderer of American subject escaped from jail on May 7, 1920, an order to arrest him was not made until on or about May 20, 1920, information as to his whereabouts was not acted on for a month, and he was never reapprehended. Claim *allowed*.

The Presiding Commissioner, Dr. Sindballe, for the Commission:

In this case claim in the sum of \$50,000.00, United States currency, is made against the United Mexican States by the United States of America on behalf of Hazel M. Corcoran, an American citizen, for alleged failure of the Mexican authorities duly to prosecute one Alfredo Ibarra, who on February 28, 1920, shot and killed the husband of the claimant, Raymond A. Corcoran.

The murder took place at the Santa Gertrudis Mine in the State of Hidalgo, Mexico. The deceased was the superintendent of the Santa Gertrudis Mining Company, and the murderer was an employee of that company. Immediately after the murder Ibarra was seized by the guards of the company and delivered to the appropriate Mexican authorities. He was committed to jail at Pachuca, Hidalgo, Mexico, and criminal proceedings were instituted against him. In the morning of May 7, 1920, however, all

the prisoners of the jail at Pachuca, some 150 men, including Ibarra, escaped. It is alleged that the Obregón revolutionary forces were approaching the town at that time, and that they entered the town on the same day. The warden of the jail has testified that the guard of the prison withdrew in the morning of the said day, that he then organised his employees into a guard and requested aid of the mining companies, but that he could not prevent the prisoners, who had broken some of the padlocks, from escaping. The personnel of Court at Pachuca also testified that the padlocks were broken by the prisoners. In the course of the following months some of the prisoners were reapprehended, but Ibarra was never reapprehended.

The respondent Government argues that the present case is not within the jurisdiction of this Commission, the release of Ibarra being due to the activity of the Obregón revolutionary forces. As it is not even alleged, however, that the release of Ibarra was due to a direct act of the Obregón forces, and as no connection between the failure to reapprehend Ibarra and revolutionary movements in Mexico has been shown, the Commission is of the opinion that the case is within its jurisdiction.

The circumstances surrounding the release of Ibarra would hardly justify the Commission in giving an award in the present case. But in view of the failure to reapprehend Ibarra the Commission is of the opinion that an award should be given. It appears that an order to arrest Ibarra was not issued until May 20, 1920, or one of the immediately preceding days. It further appears that on September 8, the American Chargé d'Affaires in Mexico City informed the Mexican authorities that the murderer was in Pachuca, but this communication was not brought to the knowledge of the local Mexican authorities until a month afterwards, and there is no evidence to show that steps, with a view to reapprehend Ibarra, were actually taken, although it would seem reasonable to assume that if serious efforts had been made, some report regarding the result thereof would have been given to the American Embassy, which made inquiries several times, and was promised information about the result of the proceedings.

The Commission is of the opinion that the amount to be awarded can be properly fixed at \$6,000.00, United States currency.

Nielsen, Commissioner:

I concur in the award of \$6,000.00. I should not want to be understood to take the view that the release of Ibarra is an immaterial point in the case. In my opinion that release and the absence of action to reapprehend and punish the murderer clearly revealed a situation with respect to the administration of justice that is below the standards prescribed by international law.

From records before the Commission it appears that some eighteen prisoners were reapprehended and tried on a charge of escape. The general tenor of the evidence given by these persons is that they walked out of jail freely, the doors being opened and there being no impediment to their departure. It appears that on motion of the *Ministerio Publico* persons who thus left the jail were acquitted by a judge of the charge of escape on the ground that they simply without restriction left jail.

For example, one prisoner, serving a sentence for the crime of homicide, testified that the vice president of the prison caused all the prisoners to enter into formation in the court yard and stated that orders had been received to open the doors of the jail for the purpose of releasing every one. He further testified that all the prisoners, leaving in an orderly manner,

passed through the warden's office where they found the warden who said nothing.

Decision

The United Mexican States shall pay to the United States of America on behalf of Hazel M. Corcoran \$6,000 (six thousand dollars) United States currency, without interest.

ADOLPH DEUTZ and CHARLES DEUTZ (A CO-PARTNERSHIP)
(U.S.A.) v. UNITED MEXICAN STATES

(April 17, 1929. Pages 213-216.)

NATIONALITY, PROOF OF. Evidence of birth, residence, voting and jury service in the United States *held* sufficient proof of American nationality.

CONTRACT CLAIMS.—NECESSITY OF TENDER OF DELIVERY. Refusal of delivery of part of order of goods by Mexican Government *held* sufficient basis for claim for refusal to accept entire order. When, however, no tender of delivery whatever of any part of an order of goods was shown, claim *disallowed*.

MEASURE OF DAMAGES. LOSS OF PROFITS. Claimants contracted to deliver certain merchandise to the Mexican Government and, although partial delivery was tendered, the latter refused to accept the same. Claimants thereafter sold such goods for less than cost and ceased further deliveries under the contract. *Held*, as to the delivered goods, claimants are entitled to the difference between the contract price and cost price of the goods plus the losses sustained on resale, and, as to the undelivered goods, their loss of profits measured by contract price less cost price less overhead.

The Presiding Commissioner, Dr. Sindballe, for the Commission:

In this case claim in the sum of \$103,540.32, United States currency, with interest thereon, is made against the United Mexican States on behalf of Adolph Deutz and Charles Deutz, a copartnership, doing business under the firm name of A. Deutz and Brother, for alleged failure of the Mexican Government to fulfill obligations arising out of four orders for textile merchandise placed with the claimants in 1920 by departments of the Mexican Government.

Both of the claimants stated in affidavits that they were born in the United States, and there is further evidence to show that during a long period of time they have been residents of the United States and that they have exercised the privilege of voting at various elections and of serving on several juries. The Commission is of the opinion that this sufficiently establishes the American citizenship of the claimants.

The orders placed were as follows:

Order No. 202

50,000 meters gray khaki at \$1.09 per meter	\$54,500.00
25,000 meters Oceanic duck at \$2.398 per meter	59,950.00
15,000 meters white duck at \$1.09 per meter	16,350.00

Order No. 1951,2506

30,000 yards navy blue twill at \$1.20 per yard	\$36,000.00
---	-------------

Order No. 261

50,000 meters gray khaki at \$1.09 per meter	\$54,500.00
--	-------------

Order No. 263

25,000 meters dyed duck at \$2.616 per meter	\$65,400.00
--	-------------

The merchandise, being of a special character, could not be purchased in the open market, but had to be manufactured. Partial delivery was made in the latter part of April and the first part of May 1920 of the orders for gray khaki, Oceanic duck and navy blue twill, by placing the goods, in accordance with the terms of the orders, at the disposal of the Mexican Government at Laredo, Texas, the proper authorities being informed of such delivery. They did not, however, receive the merchandise, and after several months they formally refused to accept it. The claimants themselves then disposed of the goods so delivered. None of the merchandise ordered has been paid for by the respondent Government and no reason justifying the cancellation of the orders has been given.

As the merchandise delivered, referred to in the preceding paragraph, was not accepted by the Mexican Government, the Commission is of the opinion that the claimants were justified in assuming that no merchandise of this character would be accepted and that, therefore, the claimants are entitled to recover the losses sustained by them in respect to both the delivered and undelivered goods of this character. In the case of that portion of the above-mentioned merchandise which was actually delivered, the loss may be computed by taking the difference between the contract price, (\$81,003.60), and the total cost of such goods to the claimants, (\$43,976.99), which is \$37,026.61, and adding thereto the loss sustained by the claimants in reselling the goods at a price below the cost price, which amounts to \$7,875.96, making a total loss of \$44,902.57 on this portion of the transaction.

As regards the undelivered portion of orders for merchandise of the above character the claimants' loss may be regarded as the loss of profits suffered by them as a result of the failure of Mexico to complete its contract. This loss of profits may be regarded as the difference between the contract price and the total amount which the claimants would have expended had they made delivery of the merchandise. In computing the loss of profits the Commission must therefore take into account an item of overhead expense of 18.49 per cent of the contract price, an item of expense which the claimants would have incurred had they made delivery of the merchandise. The total contract price of the undelivered portions of the orders for goods of the above-mentioned classes is \$123,970.38, from which must be deducted the claimants' cost price of \$64,283.65, and also an overhead expense of 18.49 per cent of the contract price, or \$22,922.13, leaving a balance of \$36,764.60, which represents the loss of profits on the undelivered portion of these goods. It should be stated that in making claim before this

Commission, the claimants, in computing their losses, deducted the overhead expenses from the amount of their claim.

With reference to the remaining goods covered by the orders, that is, the white duck and dyed duck, it appears that the claimants made no delivery of any merchandise of this character. Neither did they inquire of the Mexican Government whether it would accept delivery of merchandise of this character. The Commission is of the opinion that consequently the claimants are not entitled to be reimbursed on account of any loss sustained by them on this class of merchandise.

Decision

The United Mexican States shall pay to the United States of America on behalf of Adolph Deutz and Charles Deutz the sum of \$81,667.17 (eighty-one thousand six hundred sixty-seven dollars and seventeen cents) United States currency, with interest at the rate of six per centum per annum on the specifically stated loss of \$7,875.96 (seven thousand eight hundred seventy-five dollars and ninety-six cents) from May 1, 1920, to the date on which the last award is rendered by the Commission.

LOTTIE SEVEY (U.S.A.) *v.* UNITED MEXICAN STATES

(April 17, 1929. Pages 216-218.)

NATIONALITY, PROOF OF.—EFFECT OF CLAIMANT'S STATEMENTS CONCERNING HIS NATIONALITY. Fact that decedent testified he was born in Mexico *held* not sufficient to overcome other proof of American nationality.

FAILURE TO PROTECT. Fact that local authorities showed partiality to labourers in mine, of which decedent was superintendent, *held* not sufficient to establish a failure to protect against murder of decedent for which claim is made.

DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH.—UNDUE DELAY IN INVESTIGATION. Fact that authorities did not arrive on the scene of murder of American subject for approximately four hours *held* not to involve undue delay. Claim *disallowed*.

The Presiding Commissioner, Dr. Sindballe, for the Commission:

In this case claim in the sum of \$25,000, United States currency, is made against the United Mexican States by the United States of America on behalf of Lottie Sevey, an American citizen, for alleged failure to give adequate protection to Mose T. Sevey, the husband of the claimant, who on October 20, 1920, was shot and killed by one Ramon Navarro, and for alleged failure to take appropriate steps to apprehend and punish the murderer.

During oral argument Counsel for Mexico called attention to the fact that the American nationality of the deceased is not clearly established by the evidence before the Commission. He was registered as a voter in Arizona in 1916, and according to the entry on the register his place of birth was Utah. Before his death, however, he testified that he was born at Colonia

Juárez, Chihuahua, Mexico, and it appears that he had informed the company in the service of which he was at the time of his death to the same effect. In view hereof, some information regarding the nationality of his father ought to have been presented. Nevertheless, as there was submitted with the Memorial affidavits of four persons asserting that they knew that the deceased was an American citizen, and as his American nationality was expressly admitted in the Answer, the Commission is of the opinion that the present claim should not be rejected because of lack of proof with regard to the question here under consideration.

At the time of the murder Mose T. Sevey was superintendent of the Cananea-Duluth mine of the Cananea Consolidated Copper Company, State of Sonora, Mexico. The murderer had been an employee of the company until the day before the murder, when he applied to Sevey in order to obtain a new place to work, and, on being told that he could not have that immediately, declared that he would quit the work. There appears to have been troubles between the company and its laborers during the time preceding the murder, and the charge that the Mexican authorities failed to give proper protection to Sevey is based upon the contention that the Municipal President at Cananea was a weak character who in an improper manner took sides with the laborers, thereby causing the belief to arise among them that they did not need to fear the authorities, even if they behaved improperly. In this respect it is especially alleged that on October 6, 1920, representatives of the company were haled to the city hall, and in the presence of some 200 laborers were forced to sign an agreement for shorter hours of night work, the Municipal President and members of the town council taking part in the coercion. However, even if it be assumed that the officials of the town in an improper manner took sides with the laborers in questions regarding wages and working hours and the like, that would not justify the Commission in holding that the Mexican authorities were deficient in giving protection to the deceased so as to make them responsible for his death.

With regard to the failure to apprehend the murderer the following appears from the record:

The murder took place about 7.15 A. M. The local authorities were notified within a short time after the crime had been committed. The police arrived at the scene at 11 A. M. Judicial proceedings were instituted at Cananea, and in the course of these a suspected person was arrested, but he proved not to be the murderer. The Governor of Sonora was notified by the company shortly after the murder, and he immediately instructed the appropriate authorities of the State to try to apprehend the murderer. He further instructed the Municipal President at Cananea to send out descriptions of the murderer. Later, when the company heard that the murderer was in Chihuahua, President Obregón was requested to have the suspected person arrested. President Obregón also took action, and the suspected person was arrested, but he proved not to be Navarro.

No charge for failure to apprehend the murderer is made against the higher Mexican authorities. But it is contended that the local authorities were dilatory, and special attention is called to the fact that no police officer arrived at the scene of the crime until 11 A. M. on the day when the murder took place, although the police were notified immediately. The Commission, however, is of the opinion that no international delinquency on the part of the Mexican authorities can be established on the facts as above set forth.

Decision

The claim of the United States of America on behalf of Lottie Sevey is disallowed.

VICTOR A. ERMERINS (U.S.A.) *v.* UNITED MEXICAN STATES

(*April 18, 1929. Pages 219-220.*)

DENIAL OF JUSTICE.—FAILURE TO PROTECT.—DUTY TO PROTECT CONSULAR OFFICERS.—DIRECT RESPONSIBILITY.—RESPONSIBILITY FOR ACTS OF MINOR OFFICIALS. Claimant was American consular agent as well as customs inspector at Puerto Mexico, State of Vera Cruz, Mexico. At time of occupation of Vera Cruz by American naval forces, he was by cablegram instructed by the Department of State to proceed home with his family. A Mexican censor refused to permit delivery of cablegram but claimant was otherwise informed of its contents and he left. The next day his house was found looted of property for which claim was made. The claimant's house was situated just across the street from police headquarters and the Alcalde. Some evidence placed responsibility for the looting with the Alcalde and members of the police force but the grounds upon which such assertions were made were not stated. Claim *allowed* without interest.

The Presiding Commissioner, Dr. Sindballe, for the Commission:

In April, 1914, when the city of Veracruz was occupied by American naval forces, Victor A. Ermerins, an American citizen, was acting American Consular Agent as well as United States Customs Inspector at Puerto Mexico, State of Veracruz, Mexico. A hostile attitude on the part of the Mexicans towards Americans arose in the town and on April 23 the Department of State of the United States sent Ermerins a cablegram instructing him to proceed home with his family at his discretion. This cablegram was not delivered to Ermerins, because a censor who had been placed in the offices of the telegraph company of the town by the Mexican Government would not let it pass. In the afternoon of April 23, however, a friend of Ermerins, who had learned of the cablegram, urged him to leave the town, with his family, by one of the American vessels that were in the port about to depart, and Ermerins acted accordingly. The next day his house was found looted of property of the alleged value of \$1,464.05, United States currency.

In this case claim in the said sum, with interest thereon, is made against the United Mexican States by the United States of America on behalf of Victor A. Ermerins. The claim is predicated on the contention that not only did the Mexican authorities entirely fail to afford proper protection to the interests of Ermerins and to take appropriate steps to apprehend and punish the perpetrators of the robbery, but that the Alcalde and members of the police force of the town were themselves the robbers.

The contention that the Alcalde and members of the police force perpetrated the crime is based upon letters to Ermerins from the British Vice-Consul and the Agent of the Hamburg-America line at Puerto

Mexico, by which Ermerins was informed of the looting. It is mentioned in these letters that the authorities searched both the house and the office of Ermerins. The Agent of the Hamburg-America line mentions that he was present when the search of the office took place, and that the Alcalde took a map of Mexico from the office. Neither the British Vice-Consul nor the agent of the Hamburg-America line was present when the house was searched, and neither of them states the grounds upon which they base their belief that the authorities committed the robbery. The contention that the authorities did so must therefore be considered as unproven.

From the inventory of the articles stolen from Ermerins' house it appears that a regular looting took place. Especially in view of the fact that the house was situated just across the street from police headquarters and the Alcalde's office, the Commission is of the opinion that a crime of this nature could not have taken place, if the authorities of the town had properly fulfilled their duty to afford protection to the property of Ermerins, which they must have known would be exposed to danger under the circumstances prevailing at the time. An award in the sum claimed without interest should therefore be given in this case.

Decision

The United Mexican States shall pay to the United States of America on behalf of Victor A. Ermerins the sum of \$1,464.05 (one thousand four hundred sixty-four dollars and five cents), United States currency, without interest.

GEORGE M. WATERHOUSE and ANNIE B. WATERHOUSE (U.S.A.)
v. UNITED MEXICAN STATES

(*April 18, 1929. Page 221.*)

DENIAL OF JUSTICE.—FAILURE TO PROSECUTE.—FAILURE TO PUNISH ADEQUATELY. Claim arising under circumstances set forth in *Norman T. Connolly and Myrtle H. Connolly* claim *supra* allowed.

(*Text of decision omitted*)

HENRY W. PEABODY AND COMPANY (U.S.A.) *v.* UNITED MEXI-
CAN STATES

(*April 18, 1929. Pages 222-223.*)

TAXES UNLAWFULLY ASSESSED AND PAID UNDER PROTEST. Claim for taxes paid under protest, the decree under which such tax was assessed later being held unconstitutional by Mexican Supreme Court, *allowed*.

The Presiding Commissioner, Dr. Sindballe, for the Commission:

In this case claim in the sum of \$84,625.00, Mexican currency, or its equivalent in United States currency, with interest thereon, is made against the United Mexican States by the United States of America on behalf of Henry W. Peabody and Company, an American corporation.

On March 2, 1922, the claimant company, which had a branch office at Merida, State of Yucatan, Mexico, and which had in storage at Progreso 8903 bales of henequen awaiting shipment to the United States, made payment to the Treasury of the State of Yucatan which covered all taxes and imposts assessed on henequen under the laws then in force, and received permits to export 8200 bales of the said henequen. Nevertheless, when the henequen was to be embarked, the representative of the claimant company was informed by the authorities of the State that pursuant to a decree of the Legislature of the State of March 7, 1922, an additional tax would have to be paid. On March 9, the claimant company then paid under protest \$84,625.00, Mexican currency. Later, the said decree was declared unconstitutional by the Supreme Court of Mexico, but the amount paid under protest has never been returned.

In the Answer the Mexican Agent agrees that this claim be passed upon in accordance with the petition contained in the Memorial. An award in the sum claimed with interest thereon from March 9, 1922, should therefore be given.

Decision

The United Mexican States shall pay to the United States of America on behalf of Henry W. Peabody and Company \$42,185.56 (forty-two thousand one hundred eighty-five dollars and fifty-six cents), United States currency, with interest thereon at the rate of six per centum per annum from March 9, 1922, to the date on which the last award is rendered by the Commission.

JOHN O'BYRNE (U.S.A.) *v.* UNITED MEXICAN STATES

(April 20, 1929. Pages 223-224.)

MISTREATMENT DURING ARREST AND IMPRISONMENT.—EVIDENCE BEFORE INTERNATIONAL TRIBUNALS.—Claim for beating and mistreatment during arrest and imprisonment, with but slight evidence to support claimant's statement, *disallowed*.

(Text of decision omitted.)

S. J. STALLINGS (U.S.A.) *v.* UNITED MEXICAN STATES

(April 22, 1929. Pages 224-226.)

DENIAL OF JUSTICE.—FAILURE TO PROTECT.—FAILURE TO APPREHEND OR PUNISH. Claimant was kidnapped by armed Mexican force, robbed of

personal property to value of \$120.00, United States currency, and held for ransom for one day, when he was released on payment of \$10,000.00, Mexican currency, by his employer. Federal troops had been withdrawn from vicinity to quell a revolution. Other instances of criminal activities took place on day of claimant's abduction but not prior thereto. No action was taken by ordinary judicial or police authorities. About fifty mounted members of auxiliary military forces were about to start in pursuit when their Colonel refused them permission to do so. Claim *allowed*, on ground of failure to apprehend and punish, in sum of \$400.00, United States currency.

The Presiding Commissioner, Dr. Sindballe, for the Commission:

In this case claim in the sum of \$10,120.00, United States currency, is made against the United Mexican States by the United States of America on behalf of S. J. Stallings, an American citizen. The facts out of which the claim arises are as follows:

At about 5 P. M. on January 11, 1924, the claimant, who was employed by the American Smelting and Refining Company in the vicinity of Parral, Chihuahua, Mexico, was traveling in an automobile on the mainroad between the Veta Grande property and the Parral Consolidated property of the said company. He was then held up by a band of approximately twenty mounted and armed Mexicans. He was ordered out of the car, robbed of personal property of the alleged value of \$120.00, United States currency, forced to sign a note demanding the company by which he was employed to pay \$15,000, Mexican currency, for his release, and ordered to the nearby hills, where he was detained until the following morning when a messenger from the company arrived with \$10,000, Mexican currency.

The United States contends that Mexico is responsible for the hardship suffered by the claimant, first, because of failure properly to protect the residents of the district where the event took place, secondly because of failure to apprehend and punish the criminals.

The Commission is of the opinion that there is not sufficient evidence to establish a responsibility on the part of Mexico for failure to afford proper protection. It appears that Federal troops were withdrawn from the State of Chihuahua some time before the abduction took place, but, as mentioned in the opinion of the Commission in the case of *Charles S. Stephens and Bowman Stephens*, Docket No. 148,¹ this took place because the troops were needed farther south for the purpose of quelling the Adolfo de la Huerta revolution. Other instances of criminal activity are recorded to have taken place on the same day when the abduction occurred, but not prior to that day.

With regard to the question of failure to apprehend and punish the criminals the following appears: The local authorities of Parral were informed of what had taken place when Stallings had been released. No action was taken by the ordinary judicial or police authorities. Federal forces were, as stated above, withdrawn from Chihuahua. Auxiliary forces had been formed in Parral, and the day after the abduction the President of Mexico and the Secretary of War and Navy were informed by the Chief of Military Operations at Chihuahua that orders for the pursuit of the criminals had already been given by Col. Ortega of the auxiliary forces, and that it was expected that the criminals would be captured at any moment. It appears,

¹ See page 265.

however, that on January 17, 1924, when some fifty mounted men were ready to start in pursuit of the bandits, the Colonel refused them permission to do so. In view hereof, and since no other action to apprehend the criminals appears to have been taken, the Commission is of the opinion that a failure to take proper steps to apprehend the bandits such as to make Mexico responsible has been established in this case, and that therefore an award should be made in the sum of \$400, United States currency.

Decision.

The United Mexican States shall pay to the United States of America on behalf of S. J. Stallings, \$400 (four hundred dollars), United States currency, without interest.

DARDEN BLOUNT (U.S.A.) *v.* UNITED MEXICAN STATES

(April 22, 1929. Pages 226-228.)

DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH. On day following the discovery of the body of a murdered American subject the Mexican authorities began an investigation at the spot where the body lay and thereafter apprehended three suspects who were later released for lack of evidence. American Agent contended a more thorough investigation should have been had. Claim *disallowed*.

Commissioner Fernández MacGregor, for the Commission:

On February 13, 1918, there was found in the neighborhood of a ranch called Klein Ranch, situated in the vicinity of Ciudad Juárez, Chihuahua, Mexico, the body of John D. Blount, an American citizen, with indications of his having been murdered a few days previous thereto.

The Mexican authorities were notified, and on the day following the discovery, the corresponding investigation was initiated, the Court personnel proceeding to the spot where the body lay. Several proceedings were carried out; three men who appeared suspicious were apprehended, but they were later released for want of evidence of responsibility against them. After this, the Mexican authorities took no further steps to obtain the punishment of this crime.

The United States of America, on behalf of Adele Darden Blount, mother of the deceased, now claims from the United Mexican States, the amount of \$25,000.00, United States currency, alleging that the Mexican authorities refused or failed to apprehend the murderer or murderers of Blount, for which reason the claimant sustained a denial of justice on the part of the Government of Mexico.

The evidence produced by both Governments regarding the facts is very meagre; the American Agency presented only a few notes from the American Consul having jurisdiction at the place of the occurrence, reporting the facts and transmitting correspondence which contained promises made to him by Mexican judicial officials to investigate the matter with due care.

The Mexican Agent produced the judicial record compiled as a result of the investigation undertaken to ascertain who were responsible for the

crime, and the said record shows that the Mexican judges complied in general with the law, proceeding to examine all the witnesses who could furnish any information, and arresting three men who appeared suspicious, principally one named Santa María Carrasco, who was said to be resentful toward Blount, because the latter wanted to eject him from a house which he had built on the land in the ranch where Blount was working. It appears that the Mexican judge released the three men for want of evidence against them, and that after this, judicial action ceased. The American Agent stated during the hearing of the case that, in view of the mystery surrounding the crime, he did not think there was a deficiency in the proceedings carried out by the Mexican judge during the initial investigations, he contending only that the judge abandoned too soon, and without making careful investigations, the clues or suspicions existing against Santa María Carrasco. He stated that if the latter had been shadowed by a detective, or some other adequate means had been adopted, it would perhaps have been discovered that this man was really guilty, and it is mainly on the lack of such investigation, that he bases his conclusions of defective administration of justice on the part of Mexico.

In view of the foregoing facts, the meagreness of the evidence, and taking into account the Commission's previous opinions on the subject of denial of justice brought about by defective administration thereof, the Commission is unable to conclude that there is an international delinquency on which to ground the granting of an award.

Decision

The claim of the United States of America on behalf of Adele Darden Blount is disallowed.

MELCZER MINING COMPANY (U.S.A.) *v.* UNITED MEXICAN STATES

(April 30, 1929. Pages 228-234.)

CORPORATE CLAIMS.—PROOF OF EXISTENCE OF CLAIMANT CORPORATION.—

PROOF OF RIGHT TO DO BUSINESS IN MEXICO. A copy of certificate of incorporation and a certificate of Secretary of State of State of incorporation *held* sufficient proof of existence of claimant corporation. Fact that it had ceased to do business *held* not to operate as a dissolution of corporation or prevent its bringing claim.

ESPOUSAL OF CLAIM BY GOVERNMENT.—PROOF OF CLAIMANT GOVERNMENT'S AUTHORITY TO PRESENT CLAIM. Proof that claimant Government was authorized by claimant to present claim on its behalf *held* not necessary.

FAILURE TO PROTECT.—LOOTING.—HOSTILITY OF MEXICAN AUTHORITIES. Evidence *held* insufficient to establish charges of failure to furnish protection, looting, and hostility of authorities.

CONFISCATION OF PROPERTY. Claimant's pipe line and pumping system was confiscated by the government of the State of Sonora. Claim *allowed*.

EVIDENCE BEFORE INTERNATIONAL TRIBUNALS.—REQUIREMENT OF PROOF BY CLAIMANT GOVERNMENT.—EFFECT OF NON-PRODUCTION OF EVIDENCE AVAILABLE TO RESPONDENT GOVERNMENT.—MEASURE OF DAMAGES, SEIZURE OF PROPERTY. Claimant Government must produce concrete and convincing evidence and is not relieved of such requirement by fact that evidence submitted by respondent Government is meagre. In this instance evidence of claimant Government as to value of property taken is unsatisfactory but respondent Government could have furnished evidence as to amount and value of property taken and failed to do so. The measure of damages is the value of the property seized. Since such property would have depreciated considerably in value, award in sum of \$15,000.00 *held* justified in the circumstances.

Cross-references: Annual Digest, 1929-1930, pp. 193, 197.

Commissioner Nielsen, for the Commission:

Claim is made in this case by the United States of America in behalf of the Melczer Mining Company, an American corporation, in the sum of \$395,883.00, said to be the value of property some of which was stolen by Mexican private citizens and some of which was seized by Mexican authorities. The substance of the allegations in the Memorial is as follows:

Between January 22, 1900 and May 29, 1903, the claimant acquired title to a group of mining properties known as the Copete Mines which are located about thirty-five miles east of the town of Carbo, Sonora, Mexico. To carry out the plan of exploiting the mines, which were considered to be valuable elaborate preparations were made involving the expenditure of large sums of money. Buildings, smelters, necessary outhouses and sheds were constructed, tracks were laid and a water pipe line and a pumping equipment were installed to bring water from the San Miguel river over a mountainous stretch of territory which was approximately four and one-half miles in length and which in places rose to a height of eighteen hundred feet. These improvements cost the claimant in excess of \$375,684.00.

The mines were ready for operation and in good condition during the early part of 1912. The necessary equipment, machinery and supplies were on hand, and an extensive amount of underground work had been completed. Dr. Francis C. Nicholas was in charge of operations under a general power of attorney to act as the claimant's representative. About the end of January 1913, Mexican marauders in the neighborhood of the Copete mines began a series of lootings. Complaint was at once made to Manuel L. Canes, Commissary of Police, and protection was requested. The civil and judicial authorities refused to recognize the claimant's local representative because of a technical deficiency said to exist in the power of attorney issued to him. As a result of the public knowledge that the claimant was unable to resort to court action for redress and protection, the thefts and lootings increased. Detailed statements regarding these matters are set forth in the Memorial, and charges are made against both police and military authorities.

There was not sufficient water on or near the claimant's plant to operate the company's equipment, and this fact necessitated the construction of a pipe line from the San Miguel river about four and one-half miles distant from the plant. The intervening territory was mountainous, and high pressure pumping machinery was required to force the water through the three or four inch pipes. The installation of this expensive system costing \$176,283.25 was absolutely necessary for the operation of the plant. On

December 31, 1917, while the claimant's representative was in the United States on business he received word from Franco Tapia, the claimant's foreman in charge, that Manuel Cubillas, who was under contract with the then Governor of the State of Sonora, was about to remove claimant's pipe line which had been commandeered by the State Government, and that Cubillas had come to make arrangements for its removal. The Chief of Police of Horcasitas had been informed to the same effect and had been instructed to furnish an armed guard of soldiers or police to prevent any interference with the work. Despite protests, the work of tearing up the pipe line and dismantling of the heavy pumping machinery began about February 18, under the protection of a group of fifty soldiers acting under orders from the Government. The pumping plant, machinery, and water system were completely dismantled and removed.

The value of this pipe line is estimated at \$176,283.00. The remainder of the principal sum claimed is made up of items said to represent values of property lost as a result of lootings and illegal seizures.

In behalf of Mexico contentions were originally advanced to the effect that the Melczer Mining Company had no standing as a claimant. With respect to this point it was argued, first, that it had not been proven that the company was still in existence, even though it was shown that it had been chartered in the State of West Virginia on December 29, 1899; secondly, that it had not been shown that the company continued to have a right to do business in Mexico, even though that privilege might at some time have been granted; and thirdly, that the evidence in the case should have revealed a statement showing that the United States had been given authority to file the claim in behalf of the company. These contentions appear to have been largely abandoned in oral argument in the light of additional evidence filed by the United States subsequent to the filing of the Mexican Answer and the Mexican brief.

It was further contended in behalf of Mexico that the evidence submitted by the United States was insufficient to establish charges of lack of protection and of implication of Mexican authorities in the looting of the company's properties. Insufficiency of evidence was also asserted with respect to proof of the value of property alleged to have been lost through lootings and of the property said to have been confiscated.

The evidence produced by both Agencies is of a very unsatisfactory character. The record is such that it is impossible for the Commission to form any definite conclusions with respect to important issues of fact raised by the allegations in the Memorial and in the Answer. Numerous affidavits produced by the United States are wanting in specific information both as regards complaints against Mexican authorities and as regards losses said to have been sustained by the claimant. The Mexican Government produced nothing but copies of three brief communications written by Mexican officials in 1919, disclosing that the mine of the claimant company had been abandoned, and copies of two notes addressed by the American Chargé d'Affaires at Mexico City to the Mexican Foreign Office requesting protection for the company's property.

The existence of the Melczer Mining Company as a corporation under the laws of the State of West Virginia must be regarded as free from doubt. A copy of the certificate of incorporation accompanies the Memorial. There is evidence of the payment of the State corporation tax. The record contains a certificate from the Secretary of State of the State of West Virginia under date of July 22, 1927, that the company is "in good standing with the State

of West Virginia." It seems to be clear that over a long period of time little or no practical operations have been carried on by the company in Mexico. This fact, however, clearly did not result in the cancellation of the company's charter. The failure to do business did not operate as a dissolution of the corporation. See *Law v. Rich et al.*, decided by the Supreme Court of Appeals of West Virginia, 47 W. Va. 634. A claim can of course be presented in behalf of a corporation which is not doing business. Such a claim may be a valuable asset.

There is nothing in the record to show that the claimant company has been deprived of the right to carry on operations in Mexico. There is evidence of the payment of Mexican taxes. There is a copy of a communication addressed by the Mexican Foreign Office to the American Embassy at Mexico City in which it is stated that the company exists at a place near Rayón and possesses a mine which has been abandoned for a considerable period of time. There is a copy of a communication addressed to the company under date of March 1, 1928, in which information required by Mexican mining law is requested.

With respect to the argument that the record should contain some evidence that the claimant has invoked the assistance of the United States, it may be said that the Commission has repeatedly rendered awards in cases containing no evidence of this character. There can be no doubt that in international law and practice and under the terms of the Convention of September 8, 1923, either Government has a right to press claims before the Commission on proper proof of nationality. It may be assumed that it would be very unusual for a government to press a claim in the absence of any desire on the part of the claimant. There is a recorded precedent in which the claimant undertook to withdraw a case presented by Great Britain to an international tribunal, which held, however, that the claimant had no power to do so so long as the government espoused the claim. The tribunal in its opinion said that Great Britain derived its "authority to present" a claim not from the claimant or its representatives "but from the principles of international law" and presented the claim "not as the agent" of the claimant "subject to having its authority revoked, but as a sovereign, legally authorized and morally bound to assert and maintain the interests of those subject to its authority", and that how and when it should move to assert those interests was, so far as other States and the tribunal were concerned, "a matter exclusively for the determination of that sovereign." *Cayuga Indians case, American and British Claims Arbitration under the Special Agreement of August 18, 1910, American Agent's Report*, pp. 272-273.

The evidence produced by the United States in support of allegations with respect to looting, lack of protection, complaints against police authorities and military authorities, and the altercations which it appears Dr. Nicholas had with Mexican officials is too vague to be the basis of any pecuniary award. Looting probably did, as stated by counsel for Mexico, occur, but no definite conclusions can be reached with regard to the absence of protection. The difficulties which Dr. Nicholas is said to have had regarding a power of attorney and the particular use which it was desired to make of that power are not explained. No copy of the power is produced.

Even though justification for these several complaints of depredations and lack of protection had been conclusively established, the Commission would still be confronted by a lack of proper evidence to substantiate allegations with respect to the value of property said to have been stolen or

otherwise unlawfully seized. Numerous affidavits accompany the Memorial. Some of them contain conflicting as well as unexplained figures. In some of them there are general references to books, but there is no production of books or specific references to books. There is no specific reference to ledgers or to accounts. There are no certified statements from any books. There are assertions that some books could not be removed from Mexico because of prohibitions of Mexican law, and that books were destroyed during the progress of the looting. But there is no specific information as to what books were destroyed or which books are unavailable or what particular books were relied upon in formulating the statements purported to be based upon things revealed by books which are available. Some photographs are filed with the Memorial for the purpose of showing improvements erected on the premises of the company. These photographs would have been more useful had they been accompanied by authentications showing when and by whom they were taken. Doubtless very considerable sums of money were spent with a view to conducting extensive operations. The photographs contribute a little something towards showing that fact. But they are of slight value in forming a concise estimate of the amount of money put into the improvements.

The items of the claim with respect to alleged lootings and unlawful seizure of property must therefore be rejected because of the absence of convincing evidence both as to the occurrences on which these items of claims are predicated and as to the value of the property said to have been appropriated.

There is the same if not more uncertainty with respect to the value of the pipe line which it is alleged was seized by the authorities of the State of Sonora. However, the Commission in considering whether the item of the claim predicated on the seizure of this specific property should be dismissed for want of evidence is confronted by a situation somewhat different from that existing with respect to other properties for which indemnity is claimed. It is unnecessary to cite legal authority in support of the statement that an alien is entitled to compensation for confiscated property. As was stated in the opinion in the *Costello* case, Docket No. 3182,¹ the mere fact that evidence produced by the respondent Government is meagre, can not in itself justify an award in the absence of concrete and convincing evidence produced by the claimant Government. But it is not denied that this property was taken, and indeed it may be considered that the seizure is admitted. In these circumstances it may be taken for granted that Mexico could have furnished evidence with respect to the amount and value of the property taken. And it may therefore be assumed that such evidence as could have been produced on this point would not have refuted the charge in relation thereto which is made in the Memorial. However, even though this assumption be justified, the Commission would not be warranted in awarding the amount claimed for the pipe line. The evidence produced by the United States is altogether too uncertain. Varying estimates such as \$146,200.79, \$176,000.00 and \$200,000.00 are given with respect to the value of this property. There is considerable force in the argument advanced by counsel for Mexico in refuting the estimate submitted by the United States, but unquestionably he carries his argument too far when he asserts that the value of the property of the company is that of a scrap of old iron in Sonora. The claimant is entitled to indemnity for the injury

¹ See page 496.

which it has sustained. The measure of damages is the value of the property seized. The difficulties confronting the Commission in estimating that value have already been pointed out. The claimant Government has produced extremely unsatisfactory evidence, and the respondent Government, whose authorities are in possession of the property, have submitted no evidence. Counsel for the United States admitted in oral argument that account should be taken of depreciation. Such depreciation during a period of about eighteen years undoubtedly would be very considerable. The Commission considers that it is justified in awarding an indemnity of \$15,000.00 with interest at the rate of six per centum per annum from February 18, 1917, to the date on which the last award is rendered by the Commission.

Decision

The United Mexican States shall pay to the United States of America on behalf of the Melczer Mining Company the sum of \$15,000.00 (fifteen thousand dollars) with interest at the rate of six per centum per annum from February 18, 1917, to the date on which the last award is rendered by the Commission.

JAMES H. McMAHAN (U.S.A.) *v.* UNITED MEXICAN STATES
(*April 30, 1929, dissenting opinion by American Commissioner, undated. Pages 235-248.*)

RESPONSIBILITY FOR ACTS OF SOLDIERS.—DIRECT RESPONSIBILITY.—UNNECESSARY USE OF ARMS.—RIGHT OF NAVIGATION OF RIO GRANDE RIVER.—EXERCISE OF POLICE POWER AT INTERNATIONAL BOUNDARY.—LOSS AND CONFISCATION OF PROPERTY. Claimant and companions were floating down the Rio Grande River in boats on a trapping expedition in 1895, when they were ordered to halt by an officer in command of a force of six or eight Mexican soldiers. With little or no time to comply with the order, the Mexicans fired several shots upon the Americans. Some of the Americans abandoned their boats and swam toward the American shore. They were rescued from the water by claimant and all rowed ashore in the remaining boats, which were then abandoned, and the group proceeded overland with great hardship to a town two days distant. Report was made of the occurrence and the Mexican Government was advised thereof through diplomatic channels. The free navigation of the Rio Grande was assured by treaty to the vessels and citizens of both the United States and Mexico. Evidence was furnished that the Mexican soldiers had express orders to investigate the American group. Two boats and their contents were seized by the Mexican authorities and never returned. *Held*, (i) claim based on acts of force of Mexican soldiers disallowed, since, under the somewhat conflicting evidence, it may have been justified as an exercise of the police power, and (ii) claim for confiscation of property *allowed*.

Cross-reference: Annual Digest, 1929-1930, p. 85.

Commissioner Fernández MacGregor, for the Commission:

The United States of America, on behalf of James H. McMahan, an American national, claim of the United Mexican States the amount of \$5,000.00 in United States currency, on the grounds that he was unlawfully

assaulted by Mexican soldiers, under the circumstances hereinafter set forth. About the middle of December 1895, the claimant, accompanied by his son Ben B. McMahan and two other young men, Walter Strickland and A. J. Blevins, organised a trapping expedition and started from Del Rio, Texas. They had drifted about 250 miles down stream, approaching an island situated 30 or 40 miles below the town of Carrizo, (now Zapata). The main channel of the river passes between the said island and the Mexican bank, one of the ends of the island being at a distance of 50 yards from the Mexican shore. Before reaching the island they noticed that some Mexicans were watching and following them. The Americans camped on the American bank opposite the island, but fearing an attack by the Mexicans moved their camp to the island. On the following day, January 12, 1896, they boarded their boats in order to follow the main channel down stream, when suddenly a Mexican officer in uniform, accompanied by six or eight soldiers appeared on the Mexican bank. The officer ordered the travelers to halt and without giving them time to comply with the order, the Mexicans fired several shots upon the Americans. Some of the shots hit the water; others struck the boats. Three of the travelers becoming frightened, leaped into the water and swam toward the island. The claimant did not abandon his boat and was able to recover one of those belonging to his companions, but the other two boats however, were carried by the current, later being captured by the Mexican soldiers who carried them away with all of the objects and implements therein deposited. The Mexican soldiers continued shouting, and threatened to kill or capture the Americans later, stating that they had enough men with which to do it. McMahan rescued his companions, rowed them across to the American side in the two boats that were left, and which he subsequently abandoned after entering with his companions into territory of the United States. After journeying for two days over an almost uninhabited region, and having suffered greatly from cold weather and lack of food, they arrived at the town of Carrizo, (now Zapata), where they were given assistance. Then they continued their journey to Laredo, Texas, having reached the said town six days after the occurrences, (January 18, 1896). The four Americans crossed the Rio Grande to Nuevo Laredo, Mexico, and in that place, signed a statement before the American Consul in which they narrated the facts and complained of an unlawful assault as well as of a dispossession of their property. The Mexican authorities who took cognizance of these incidents shortly after this complaint, did not take any steps to punish the soldiers guilty of the outrage inflicted upon the four Americans.

The American Agency alleges that pursuant to the boundary treaties concluded between Mexico and the United States, the navigation on the Río Bravo del Norte, or Río Grande, is free to the citizens of both countries, and that, therefore, James H. McMahan and his companions were exercising a right, when the Mexican soldiers, for no reason whatsoever, ordered them to halt and proceeded to attack them. That as a result thereof, the Mexican Government is responsible for the outrage and for the physical and mental suffering that the act of the soldiers caused the claimant, as well as for the value of the effects confiscated without cause.

Mexico denied this claim, contending at the outset that the Mexican authorities never had knowledge of the facts hereinbefore referred to, and in order to prove this, introduced some evidence. However, this defense was later abandoned due to the fact that the American Agency presented a copy of the diplomatic correspondence exchanged at that time between

the two Governments, in connection with the facts herein stated. The Mexican Agency also alleged that the soldiers complied with their duty in ordering to halt, and, trying to intimidate, thus to enforce obedience to their command, the four Americans whose presence had been called to their attention as suspicious.

In view of the evidence filed by the American Agency, and since the Mexican Agency in order to uphold its contentions, did not introduce evidence other than the aforesaid, the Commission finds that the facts in general occurred as narrated by McMahan and his companions, with the following exceptions: (a) It appears that the soldiers had received orders from their superiors to exercise vigilance over the four Americans in question who had been pointed out, previous to their arrival near Zapata County, Texas, as suspicious; (b) It unquestionably appears that from the start the Americans could have realized that the Mexicans who were ordering them to halt, were soldiers of the Mexican Army; (c) It appears more probable that the said soldiers confined themselves at first to command the Americans to halt since the statement made by McMahan and his companions immediately after the occurrences, in this connection, literally reads: "They ordered us to halt, commanding us to land, *and almost* immediately, his men (the officer's) fired four shots at us." This statement is changed in the claimant's affidavit made in the year 1927 to the effect that "an officer with six or seven men appeared on the Mexican bank and ordered us to put in toward that side, *and immediately* after giving the order and without giving us a chance to comply with it, the men fired several shots at us". The report made to the Department of Foreign Affairs (Mexican) contemporaneous with the affair and introduced by the American Agency, states that Peña, a sergeant, "dismounted from his horse and from the shore ordered them to halt asking those conducting the boat to state what they carried and what was their purpose; and that the answer he received was a shot fired by one of the rowing men. Then the sergeant fired a shot in the air and at that moment three of the rowing men leaped into the water". Nor does it seem clear that the intention of the soldiers in firing the shots was to harm the claimant and his companions, in view of the fact that, as already stated, it is doubtful whether the shot or shots were fired in the air or upon the men, and particularly in view of the fact that, as soon as the companions of McMahan jumped into the river in order to swim toward the island, the soldiers did not fire again, confining themselves to making new threats against the fugitives, according to the latter's statement. It seems reasonable to believe that if the intention of the soldiers had been to inflict any harm upon the Americans, they would have had an excellent opportunity of doing so, while the fugitives were swimming, taking into account the slowness of swimming, and particularly the fact that the river branch, according to the statement made by the claimant and his companions was at the most fifty yards wide at the place of the occurrence. On the contrary, it seems reasonable to admit that it is improbable that McMahan and his companions fired at the Mexican soldiers, inasmuch as this act of provocation, would have placed them in a condition of danger which they had no need risking.

The main contention alleged by the American Agency, as it has been pointed out already, is that the Mexican soldiers had no right to fire upon McMahan and his companions, not even to order them to halt, inasmuch as they were navigating upon an international river, which under particular treaties, is the subject of free navigation to the citizens of both countries.

In the past this Commission has already taken cognizance of cases in which some individual has suffered damage as a result of shots fired, either by Mexican or by American citizens across the same Río Grande, while the victim was still navigating on it. (*Swinney* case, Docket No. 130¹; *Teodoro García* case, Docket No. 292².) In these cases, the question of defining whether or not such acts constituted a violation of the right of free navigation on the river by the citizens of both countries, was never squarely raised as an issue for decision. Therefore, without considering such question, in deciding those cases, the Commission applied a wider principle, namely, that it is unlawful to use against individuals, by way of coercion, measures out of proportion to the seriousness of the matter in which the use of force is required, such principle being but an obvious consequence of the respect that is due to human life. Applying this test, the Commission found that the reckless use of firearms upon persons who disobeyed an order of the police, in cases of slight importance, or in those wherein persons are suspected of small offenses, or in those of innocent persons, rendered a Government whose officials used firearms liable for the damage caused. But in the instant case the question is directly raised as to whether or not the act of the Mexican soldiers should be condemned, insofar as it was an unwarranted attack upon the right of free navigation on the Río Grande or Bravo del Norte.

The situation of this river in the year that this claim arose was as follows: The Treaty of Peace, Friendship, Limits and Settlement, concluded between the two nations on February the 2nd, 1848, after defining what part of the Río Grande should be the boundary limit between the two countries, provides in its Article VII, that "the navigation of the Gila and of the Bravo below said boundary shall be free and common to the vessels and citizens of both countries; and neither shall, without the consent of the other, construct any work that may impede or interrupt, in whole or in part, the exercise of this right; not even for the purpose of favoring new methods of navigation". The Treaty of Boundary concluded also between the two nations on December 30, 1853, which again includes a part of the course of the Río Grande as boundary between both countries, in its Article IV provides that "The several provisions, stipulations, and restrictions contained in the 7th article of the treaty of Guadalupe Hidalgo shall remain in force only so far as regards the Río Bravo del Norte, below the initial of the said boundary provided in the first article of this treaty". The Treaty signed November 12, 1884, relating to the boundary line between the two countries, in that part following the channel of the Río Grande and of the Río Gila, in its Article I provides:

"The dividing line shall forever be that described in the aforesaid Treaty and follow the center of the normal channel of the rivers named, notwithstanding any alterations in the banks or in the course of those rivers, provided that such alterations be effected by natural causes through the slow and gradual erosion and deposit of alluvium and not by the abandonment of an existing river bed and the opening of a new one."

Article II of this same Treaty provides:

"Any other change, wrought by the force of the current, whether by the cutting of a new bed, or when there is more than one channel by the deepening of another channel than that which marked the boundary at the time of the

¹ See pages 98 and 138.

² See page 119.

survey made under the aforesaid Treaty, shall produce no change in the dividing line as fixed by the surveys of the International Boundary Commissions in 1852, but the line then fixed shall continue to follow the middle of the original channel bed, even though this should become wholly dry or be obstructed by deposits."

In view of these provisions, there is no doubt but that McMahan and his companions were exercising a perfectly recognized right in navigating on a part of the Río Grande which serves as boundary between the two nations.

But, on the other hand, it is also necessary to take into account that the same Treaty of 1848 to which reference has been made above, in its Article VII further provides that:

"The stipulations contained in the present article shall not impair the territorial rights of either republic within its established limits."

The Treaty of 1853, as has been noted, leaves in force all of Article VII. in so far as it relates to all of that portion of the Río Grande which under this Treaty was established as boundary, and, consequently, leaves in force the reservation hereinbefore alluded to.

It appears that the reservation expressly made of the territorial rights of either Republic, within the limits which were established, covers the right of exercising the police power, inasmuch as it is one of the rights which the sovereign exercises over its territory. It is pertinent to recall at this point that the boundary or dividing line between both nations in reference to the Río Grande, is the middle of this river, following the deepest channel, which signifies that up to this point, the two nations may exercise their full territorial rights. But if this alone were not sufficient, by studying the subject of navigation on international rivers, whether they be boundary lines between two or more territories, and empty into the sea, it is found that the tendency is to establish the principle of free navigation, provided it be always limited by the right of the riparian States to exercise police rights in that portion of the course which corresponds to them. (See Oppenheim, *International Law*, Vol. 1, pp. 314-322, 3rd. Ed. 1920; Fauchille, *Droit International Public*, Vol. 1, 2nd Part. pp. 453 *et seq.* 8th Ed. 1925; Moore, *International Law Digest*, Vol. 1, pp. 616. *et. seq.*; J. de Louter, *Le Droit International Positif*, Vol. 1, p. 445; Oxford Ed. 1920.) The Congress of Vienna of 1815 fixed the free navigation of certain rivers, *subject to police regulations*. Since this date, the restriction appears in nearly all treaties, and has at times been accepted by the United States: Treaty of Washington of May 8, 1871, Article XXVI; Treaty of June 15, 1845, Article 11. It should also be observed that the Institute of International Law in its session at Heidelberg on September 9, 1887, adopted regulations for the navigation of international rivers, applicable to rivers separating two States as well as those traversing several States, in which the right of the riparians to exercise police power over the stream is recognized.

What extension this right of exercise of the police power may have, as confronted with the principle of free navigation, is a matter as yet not defined by theory or precedent. It is reasonable to think, however, that the right of local jurisdiction shall not be exercised in such a manner as to render nugatory the innocent passage through the waters of the river, particularly if it be established by treaty.

Therefore, it does not seem possible to deny that Mexico is entitled to exercise police powers, *some* police powers, at least, over the course of the Río Grande, and it does not appear excessive or contrary to the right of

free navigation, that jurisdictional action of the Mexican authorities, which in one specific occasion and for special causes bearing on its primary right of defense, was intended to ascertain what was being done and what objects were being carried by suspicious individuals who were travelling over deserted places in small crafts. In the instant case the soldiers had received express orders to investigate what McMahan and his companions were doing, and even though the grounds for the suspicions which the superior authorities had against these men are not exactly known, it appears they were afraid that smuggling would take place opposite the same island on which the Americans landed, a thing possible due to the proximity of the island to the Mexican shore. (Report of Pedro A. Magaña, in the evidence of the Mexican Agency.) An exceptional case was being dealt with, since although it appears that similar cases between the two nations had occurred before this instance, a note from the United States Consul to his Secretary of State, dated January 18, 1896, and referring to the same incident, reads:

"I am loathe, however, to believe that the miscreants were Mexican soldiers. Since the Mata incident, the Mexican military authorities along the border have shown a wholesome respect for boundary lines and due consideration of the rights of American citizens."

It remains only to be considered the manner in which the Mexican soldiers exercised that limited right of inspection, in order to know if there was an excess of force or of coercion. According to the facts already stated in this case, the Commission cannot arrive at definite conclusions in this respect. It is not clear whether the soldiers made use of their firearms upon McMahan and his companions without giving them time to answer their intimations to come close to the shore; it is not clear, either, that the shots were fired upon the Americans, much less whether they fired with the intention of wounding them. It appears that there was either fault or mistake on both sides. If they were innocent passengers, the Americans undoubtedly had no ground to believe that Mexican soldiers whose identity was apparent, would wish to harm them. Had they answered the intimation of the soldiers, the incident would not have occurred. As for their part, the soldiers resorted to the dangerous means of intimidating McMahan and his companions with too much haste. At least, this is the opinion which the Diplomatic Representative of the United States in Mexico appeared then to have had of the case; his note of April 30, 1896, to the Secretary of State, the Hon. Richard Olney, reads:

"Incidents at the border of the two countries are not as frequent now as they were a few years ago, and owing to the circumstance of a mistake being made in this case by both parties, it does not seem to me to be a matter demanding rigid action by our Government."

Under these circumstances, and even though the Commission condemns, as in other instances, the prompt and unwarranted use of arms, it does not find that there has been clear violation of any principle of international law, the only circumstance under which the responsibility of any of the two nations may be established.

But, on the other hand, it is proved that the Mexican soldiers seized two of the boats which McMahan and his companions had, with everything which was contained in them, and that the said boats were taken to a Mexican custom house, without an explanation ever having been forthcoming as to what became of this property. since, clearly it was not a case of

smuggling or of any other illicit act. The Commission is of the opinion that such an act constitutes a confiscation and that the Government of Mexico should answer for the same. The claimant gives in his affidavit a list of the articles which he lost with corresponding values, aggregating a total of \$1,000.00, United States currency. Among the items inserted there is one for the four boats, but it appears that it should be accepted only for two, since the other two boats were not seized by the Mexican soldiers, but abandoned by the claimant. There is another item of 30 beaver hides, but the list furnished by the customs house at Ciudad Mier refers only to five hides which appear in two items. This list furnished by the Mexican authorities to the diplomatic representatives of the United States at the time of the incidents, is very detailed and it appears to indicate that the value of the confiscated articles was somewhat exaggerated by the claimant. In view of the above, the Commission deems pertinent to award the lump sum of \$500.00 with interest.

Decision

The United Mexican States shall pay to the United States of America, on behalf of James H. McMahan, the amount of \$500.00 (five hundred dollars), United States currency, with interest at the rate of six per centum per annum from January 12, 1896, to the date on which the last award is rendered by the Commission.

Commissioner Nielsen, dissenting.

This case involves a comparatively small sum of money. I believe the amount claimed may properly be reduced, so that an award would be a rather inconsiderable sum. However the claim appears to involve important principles with regard to first, wrongful acts of soldiers and secondly, treaty rights securing freedom of navigation.

I am particularly impressed with the thought that the opinion of my associates is at variance with other opinions of the Commission dealing with what has been termed "reckless shooting"; indeed greatly at variance with one opinion (case of *Teodoro Garcia*, docket No. 292)¹ in which I did not concur and in which there is a discussion of a use of firearms which to my mind could be justified much better than can the action of the soldiers in the instant case.

In the *Swinney* case, docket No. 130, *Opinions of the Commissioners, Washington*, 1927, p. 131, the Commission dealt with the killing of a young man who, while engaged in a trapping expedition on the Rio Grande, was shot from the Mexican bank by two armed Mexicans. He died from the effects of the wounds inflicted on him. Swinney was discovered floating down the river in a boat which contained nothing but himself and his firearms. The armed Mexicans represented that they took him for a man who was on the river in contravention of law, which it was their duty to enforce. Evidence in the record did not disprove allegations made in behalf of Mexico that Swinney refused a summons to come closer to the Mexican bank to make explanations and instead of doing so rowed to the opposite bank. In an opinion written by Commissioner Van Vollenhoven and concurred in by Commissioner Fernández MacGregor it was said that the killing of Swinney was "an unlawful act of Mexican officials". In view of the innocent conduct of the men who figure in the instant case, the following

¹ See page 119.

extract from the opinion in the *Swinney* case seems to be pertinent with respect to the issues now raised:

"It is not clear from the record why Swinney looked like a smuggler or a revolutionary at that time and place, and how the Mexican officials could explain and account for their act of shooting under these circumstances, even when they considered him committing an unlawful act in crossing from one bank to another (a fact they did not see). Human life in these parts, on both sides, seems not to be appraised so highly as international standards prescribe."

By a unanimous decision an award of \$7,000.00 was made in this case.

The *Falcón* case, *ibid.*, p. 140, was concerned with the shooting of a Mexican citizen on the Rio Grande. Falcón and another Mexican named Félix Villarreal were seen in the river by American soldiers who it appears, believing that the men in the river were engaged in smuggling, approached them and directed them to halt. The Mexicans did not obey the order, whereupon a soldier fired a shot in the air. It appears that the soldiers were immediately fired upon from the Mexican side by mounted men, and that the soldiers returned the fire in self defense and also directed some shots at the men in the water. About fifty shots were exchanged while Falcón was approaching the Mexican shore. Falcón was hit and died from the effects of the wound. The Commission held that, even though it were assumed that Falcón was engaged in smuggling and that the American soldiers were fired upon from the Mexican side, the death of Falcón should be considered to be wrongful, since it seemed that the soldiers disregarded American military regulations forbidding the use of firearms against unarmed persons suspected of smuggling, and since it appeared that the soldiers fired on defenseless Mexicans in the river. In this case, it will be seen, not only was there firing from the Mexican side to the American side, but apparently also some reason for suspicion of unlawful conduct on the part of the unfortunate man who was killed. In this respect that case differs from the instant case. The Commission unanimously made an award in the sum of \$7,000.00 in favor of the widow of Falcón.

I think that it is particularly interesting to consider the case of *Teodoro García and M. A. Garza* in connection with the instant case. A little Mexican girl was shot in 1919 by an American army lieutenant while crossing the Rio Grande with a number of Mexicans on a raft which, in violation of the laws of the United States passed from the Mexican side to the American side and returned. The persons responsible for the crossing knew that they were acting in violation of law. The lieutenant was charged with enforcing legislation of various kinds relating to the entry into or departure from the United States of aliens in time of war; prohibition against the importation of arms and ammunition into Mexico; and matters relating to immigration and smuggling. The people propelling the raft refused to stop on being challenged by the lieutenant. The officer was tried by court-martial and sentenced to dismissal. The President of the United States as the court of last resort set aside the sentence apparently on the ground that the lieutenant had not committed manslaughter as defined by American law, and had not violated any army regulation. Two of the Commissioners undertook to define an "international standard of appraising human life", and said that this standard had been violated when the little girl was killed. They said in part:

"If this international standard of appraising human life exists, it is the duty not only of municipal authorities but of international tribunals as well to obviate any reckless use of firearms." . . .

"In order to consider shooting on the border by armed officials of either Government (soldiers, river guards, custom guards) justified, a combination of four requirements would seem to be necessary: (a) the act of firing, always dangerous in itself, should not be indulged in unless the delinquency is sufficiently well stated; (b) it should not be indulged in unless the importance of preventing or repressing the delinquency by firing is in reasonable proportion to the danger arising from it to the lives of the culprits and other persons in their neighborhood; (c) it should not be indulged in whenever other practicable ways of preventing or repressing the delinquency might be available; (d) it should be done with sufficient precaution not to create unnecessary danger, unless it be the official's intention to hit, wound, or kill. In no manner the Commission can endorse the conception that a use of firearms with distressing results is sufficiently excused by the fact that there exist prohibitive laws, that enforcement of these laws is necessary, and that the men who are instructed to enforce them are furnished with firearms."

An award of \$2,000.00 was made in favor of the parents of the girl.

I took the view in that case that the Commission was bound by the interpretation of American law given by the President, when he decided that the lieutenant had not violated that law; that clearly in the light of the record, the President's decision did not result in a denial of justice, and that therefore the question of responsibility on the part of the United States must be ascertained by determining whether American law sanctioned an act at variance with ordinary standards of civilization. It was not even attempted by comparing the law with the laws of other countries to show that the American law was of such a character, and I do not think it could have been shown. I expressed the view that to prescribe standards such as those formulated by the other Commissioners was in effect an attempt to frame an international code with respect to a very difficult subject of domestic penal legislation.

Lieutenant Gulley testified before the court-martial that he fired about twelve shots in the direction of the raft, and stated at the time he did so that he did not care to hit anyone but merely wanted to frighten the persons on it, so as to cause them to return to the American side in order that he might arrest them. He further testified that he could see no one on the raft when he fired and would not have fired in the direction of it, if he had known that women or children were on it. The court-martial found that the accused had no malice at the time of firing and no intention of killing anyone. A charge of wilfull killing was dismissed, and the accused was found guilty of manslaughter.

It will be seen that rules formulated by the two Commissioners are concerned with restrictions on the use of firearms in "preventing or repressing" some offense. In the instant case there was no occasion either to take steps to prevent or to repress wrong doing.

In the *Roper* case, *ibid.*, p. 205, claim was made in behalf of the mother of William Roper who was drowned in the Pánuco river at Tampico, as a result, as was alleged by the United States, of an assault on him and three American fellow seamen. There was some evidence indicating that Roper was wounded by a pistol shot. It was difficult to reach a definite conclusion with regard to the precise character of all the occurrences which took place. The Commission determined however that shots were fired by Mexican policemen, and that pistol fire was largely if not entirely responsible for the action of the men in leaping into the river where two of them met their death. Awards were unanimously made in this and in two other cases arising out of the same occurrences. *Brown* case, *ibid.*, p. 211; *Small* case, *ibid.*, p. 212.

These cases seem to be interesting in connection with the instant case, in that importance was attached to the element of fright resulting from an unnecessary use of firearms. Just what use of firearms was made by the Mexican soldiers in the instant case may be doubtful. There is testimony that bullets hit the boats. It is shown that the young men were badly frightened, as doubtless they had reason to be. Certainly the fact that all occupants of the boats, two of whom leaped into the water and swam to the shore, walked for days to get back to their starting place, is some evidence of actual danger. If they failed to obey a summons to come to the shore, it may be reasonably assumed I think that they apprehended something similar to what actually happened to them. The Mexican soldiers may not have shot with intent to kill, but I perceive no reason at all why they should have made use of firearms, particularly since obviously the persons in the boats were innocent of any offense or of any intent to commit an offense, and even if there had been some reason to suppose that these persons intended to engage in smuggling operations, which to my mind there was not, I perceive no justification for the use of firearms. I find it impossible to understand why the soldiers should have been instructed to keep a lookout for these boys and the man accompanying them as suspicious characters.

The *Stephens* case, *ibid.*, p. 397, involved the shooting of an American by the name of Edward C. Stephens by a Mexican soldier while passing in a motor car on a road near Villa Escobedo in the State of Chihuahua. In an opinion written in this case by Commissioner Van Vollenhoven and concurred in by Commissioner Fernández MacGregor, it was said:

"The excuse proffered by the killer that he merely intended to 'intimidate' Stephens would seem too trite to deserve the Commission's attention; see paragraph 3 of the opinion in the *Swinney* case (Docket No. 130), paragraph 3 of the opinion in the *Roper* case (Docket No. 183), paragraph 1 of the opinion in the *Falcón* case (Docket No. 278), and paragraph 6 of the opinion in the *Teodoro García* case (Docket No. 292)..."

An award of \$7,000.00 was unanimously made in this case.

Perhaps it may be said that navigation on the river in the locality where the occurrences in question took place is something almost negligible. Nevertheless the right of navigation was secured to these persons by treaty stipulations. Even though it be taken for granted that each Government has the right to exercise police authority on its side of the international boundary, the interference with the passage of boats without good cause is to my mind inconsistent with the right of free navigation. Evidence in this case leaves uncertain the precise location of the boats — whether they were on the Mexican or on the American side of the boundary line. However, that point seems to be immaterial. I think that the use of firearms and indeed any other means to arrest the progress of travelers against whom there can be no suspicion of wrongdoing, is inconsistent with the right of free navigation.

It is true that in former cases which I have cited loss of life resulted from use of firearms. Shooting that results in death or physical injury is a more serious offense than shooting which has no such fatal consequences. But shooting to be wrongful must not necessarily result in death. The unwarranted use of firearms is forbidden in order to prevent tragic occurrences.

I think that the claimant is entitled to the value of the property taken from him and interest and also some small compensation, considerably less than that claimed, for the loss of time and the very considerable hardships which he suffered in making his way back to the place from which

he started. He was deprived of his means of transportation, and even if such means had been available, it may be assumed that the occupants of the boats, in view of their experiences, would not have attempted to return by water. I of course am of the opinion that the claimant should have the sum awarded and, as I have indicated, something more.

BEN B. McMAHAN (U.S.A.) *v.* UNITED MEXICAN STATES

(April 30, 1929, dissenting opinion by American Commissioner, undated. Pages 249-250.)

RESPONSIBILITY FOR ACTS OF SOLDIERS.—DIRECT RESPONSIBILITY.—UNNECESSARY USE OF ARMS.—RIGHT OF NAVIGATION OF RIO GRANDE RIVER.—EXERCISE OF POLICE POWER AT INTERNATIONAL BOUNDARY.—LOSS AND CONFISCATION OF PROPERTY. Claim arising under same circumstances as those set forth in *James H. McMahan* claim *supra* allowed.

(Text of decision omitted.)

BARTHENIA STRICKLAND (U.S.A.) *v.* UNITED MEXICAN STATES

(April 30, 1929, dissenting opinion by American Commissioner, undated. Pages 250-252.)

SURVIVAL OF CLAIM FOR LOSS OF PROPERTY.—PROPER PARTY CLAIMANT. Claimant's son suffered loss of personal property in circumstances set forth in *James H. McMahan* claim *supra*. Such son died in 1917. Held, claimant entitled to present claim.

RESPONSIBILITY FOR ACTS OF SOLDIERS.—DIRECT RESPONSIBILITY.—UNNECESSARY USE OF ARMS.—RIGHT OF NAVIGATION OF RIO GRANDE RIVER.—EXERCISE OF POLICE POWER AT INTERNATIONAL BOUNDARY.—LOSS AND CONFISCATION OF PROPERTY. Claim arising under same circumstances as those set forth in *James H. McMahan* claim *supra* allowed.

(Text of decision omitted.)

LILY J. COSTELLO, MARIA EUGENIA COSTELLO and ANA MARIA COSTELLO (U.S.A.) *v.* UNITED MEXICAN STATES

(April 30, 1929, concurring opinion by Presiding Commissioner, April 30, 1929, concurring opinion by Mexican Commissioner, April 30, 1929. Pages 252-265.)

NATIONALITY.—NATURALIZATION OF CHILD THROUGH NATURALIZATION OF PARENT. Child born abroad and resident abroad at time of naturalization in the United States of his father, which child subsequently removed to and resided in United States, held American citizen.

NATIONALITY OF CHILDREN BORN IN MEXICO OF AMERICAN PARENTS.—DUAL NATIONALITY. Children born in Mexico of American father, which children left Mexico before coming of age and were then living in the United States, *held* American citizens and not Mexican citizens.

PRESUMPTION OF LOSS OF AMERICAN NATIONALITY UNDER ACT OF MARCH 2, 1907. A naturalized American citizen resident in Mexico for over seven years, against whom the statutory presumption of loss of citizenship under Act of March 2, 1907, had run, *held*, (by majority vote), to be presumed to have ceased to be an American citizen.

DENIAL OF JUSTICE.—FAILURE TO PROTECT.—FAILURE TO APPREHEND OR PUNISH.—REQUIREMENT OF PROOF BY CLAIMANT GOVERNMENT.—BURDEN OF PROOF. Where such evidence as was furnished by claimant Government indicated some efforts were taken by Mexican authorities to apprehend murderers of alleged American subject, but evidence was otherwise slight, claim *disallowed*. Fact that evidence furnished by respondent Government is meagre does not relieve claimant Government of obligation to furnish concrete and convincing evidence.

Cross-references: Am. J. Int. Law, Vol. 23, 1929, p. 875; Annual Digest, 1929-1930, p. 188; British Yearbook, Vol. 11, 1930, p. 223.

Commissioner Nielsen, for the Commission:

Claim in the amount of \$50,000.00 with interest is made in this case by the United States of America against the United Mexican States in behalf of Lily J. Costello, John Costello, William Costello, Theresa Costello Penico, Maria Eugenia Costello and Ana Maria Costello. The claim is grounded on an assertion of a denial of justice growing out of the failure of Mexican authorities to take adequate steps to apprehend and punish persons who killed Timothy J. Costello, an American citizen, in Mexico in the year 1922 and robbed his home.

During the course of oral argument the United States withdrew all claim in behalf of John Costello, William Costello and Theresa Costello Penico. The remaining claimants are therefore now Lily J. Costello, a sister of Timothy J. Costello, deceased, and Maria Eugenia Costello and Ana Maria Costello, two daughters of the deceased.

The substance of the allegations in the Memorial upon which the claim is grounded is as follows:

At the time this claim arose, and for some time prior thereto, Timothy J. Costello, an American citizen, was residing in the vicinity of Texcoco, State of Mexico, Republic of Mexico, where he was a joint owner of a ranch called La Blanca. He was engaged in the business of dairying and raising dairy cows. On several occasions previous to the time this claim arose depredations had been committed upon the ranch, and Costello had requested the appropriate authorities to furnish adequate police protection to the locality in which the ranch was located but no such protection was afforded. At about 6.30 o'clock in the afternoon of January 4, 1922, while Costello was seated in his home on the ranch, bandits entered the home without warning and brutally assaulted, shot and killed Costello. James Kelly, a partner of Costello, immediately fled from the house, and although pursued by a number of the outlaws, he escaped. The bandits remained in possession of the house for some time, appropriating to their own use valuable personal articles, money and firearms.

Immediately after the murder of Costello, local authorities at Texcoco were notified with a view to having the bandits apprehended and punished for the crime which they had committed. A small number of soldiers was sent to the scene of the crime where they remained throughout the night. No efforts were made by them to ascertain the whereabouts or the identity of the intruders, and on the following morning they returned to their quarters at Texcoco. The body of the deceased could not be cared for until the proper officials had taken due note of the tragedy. It was, therefore, allowed to remain where it fell from Wednesday until Friday afternoon, in a state of decomposition, when the administrative procedure for investigating such cases was finally completed and permission was given to inter the body. The local authorities were indifferent with respect to the apprehension of the intruders and were dilatory in acting. Although James Kelly was in the house with the deceased at the time the crime was committed, and notwithstanding the fact that the crime was committed on January 4, up to January 12, no one in authority had made inquiry of Kelly regarding the attack or the identity of the persons responsible for the crime. While some efforts on the part of the authorities were made to apprehend the persons responsible for the crime, it was not until after sufficient time had elapsed to enable them to escape. No persons have been apprehended or punished for the offense.

Questions were raised by Mexico with respect to the nationality of all persons appearing in the Memorial as claimants. In view of the fact that claim is now made in behalf of only three of these persons, questions of this character of course need to be considered with respect to those three only.

There is satisfactory evidence that Lily J. Costello was born in Philadelphia, Pennsylvania, in 1887. She is therefore a native citizen of the United States.

In reaching a determination with respect to the status of the children of Timothy J. Costello, it is necessary to begin with a consideration of the status of their grandfather, Michael Costello, the father of Timothy J. Costello. It is proved that Michael Costello, who was born in Ireland, was naturalized as an American citizen by a court in Philadelphia on September 19, 1888.

It is shown by sworn statements made by Timothy J. Costello before an American Consular Officer in Mexico and by an affidavit executed by his brother, William E. Costello, and his sister, Lily J. Costello, that Timothy J. Costello, a British subject by birth, arrived in the United States in 1896, and resided there about ten years. The evidence before the Commission justifies the conclusion that Timothy J. Costello acquired citizenship of the United States under the provisions of Section 2172 of the Revised Statutes of the United States which reads in part as follows:

"The children of persons who have been duly naturalized under any law of the United States, or who, previous to the passing of any law on that subject, by the Government of the United States, may have become citizens of any one of the States, under the laws thereof, being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof."

From an affidavit made by Lily J. Costello, and from baptismal certificates executed in Mexico, it may be concluded that Ana Maria Costello and Maria Eugenia Costello were born in Mexico in 1909 and 1912, respectively. They were, accordingly, born American citizens under the provisions of Section 1993 of the Revised Statutes of the United States which reads as follows:

"All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States."

Although these children were born in Mexico, it appears that their status involves no question of dual nationality in view of the provisions of Article 30 of the Mexican Constitution of 1917 from which it appears that persons born in Mexico of foreign parents in order to be regarded as Mexicans must declare within one year after they become of age that they elect Mexican citizenship, and must further prove that they have resided within the country during the six years immediately prior to such declaration. See also the Mexican law of 1886 relative to citizenship. Costello's children left Mexico before becoming of age and have been living in the United States since 1924.

In view of the facts and the applicable law which have been stated above, it appears that this claim is now made in behalf of three American citizens. According to the record they are all at the present time residing in the United States.

For the purpose of clarifying questions of nationality raised in the case, the Commission requested the American Agency during the course of oral argument to furnish further evidence. In response to this request there were produced copies of records showing that Timothy J. Costello had been registered in the American Consulate General at Mexico City in 1911 as an American citizen; that he was again registered there in 1920, and his registration was approved; but that subsequently in the same year, an instruction was sent to the Consul General disapproving the registration. Without entering into any discussion of the conclusion upon which the Department of State based its action in cancelling the registration of Costello, it may be said that the Commission feels constrained to accept that action as conclusive with respect to Costello's status under the applicable law and regulations. The statutory provisions under which that action was taken are found in Section 2 of the Act of March 2, 1907, 34 Stat. 1228, and read as follows:

"When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state, it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: *Provided however*, That such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe."

The Department of State decided that Costello had failed to overcome the presumption referred to in the above mentioned statute which was referred to by Attorney General Sargent in an opinion rendered February 8, 1928, as being "so loosely drawn that its operation and effect have been in doubt ever since its passage." As was pointed out in that opinion, questions have at times been raised whether the citizenship of a person who fails to rebut the presumption is terminated or whether merely the right of protection is withdrawn from such a person while resident abroad, although citizenship is retained.

It does not appear that the court of last resort has ever passed upon this point. The question of the effect of an un rebutted presumption was raised

in *Gay v. United States*, 264 U. S. 353, but in that case the court held that the presumption had not arisen against the particular person whose status was under consideration by the court because of protracted residence in the country of his nativity. The court therefore found it unnecessary to make a pronouncement with respect to the effect of the presumption.

In the light of what seems to be a reasonable interpretation of the language of the statute, it seems to be clear that the law should be construed simply to deprive persons of protection while residing abroad and not entirely to nullify their citizenship, and that this interpretation is well supported by the action of both judicial and administrative officials of the Government of the United States.

On December 1, 1910, Attorney General Wickersham rendered an opinion to the Secretary of Commerce and Labor, 28 Ops. Atty. Gen. 504, with respect to the case of a native of Syria who was naturalized in the United States and subsequent to his naturalization returned to his native country, where he married a Syrian woman and remained for more than two years and then returned to the United States bringing with him his wife. The Attorney General stated in his opinion that the man did not by his residence abroad cease to be an American citizen, and that his wife should also be deemed to be a citizen and not subject to exclusion under the immigration laws, although she was afflicted with trachoma, a contagious disease. Mr. Wickersham expressed the view that the Act of March 2, 1907, was limited to naturalized citizens while residing in foreign countries beyond the period stated in the Act, the object thereof being to relieve the Government from the obligation to protect such citizens after residence abroad of a sufficient time to raise the presumption that they do not intend to return to the United States, and that the Act did not apply to citizens who returned to the United States. This opinion of the Chief Law Officer of the Government appears to furnish the most reasonable interpretation of which this vague and uncertain language of the statute is susceptible.

It is, of course, well established that the Executive under the Constitution of the United States is charged with the protection of the lives and property of American citizens abroad. Under the Act of March 2, 1907, Congress has sanctioned action on the part of the Department of State, acting under the direction of the President, in prescribing certain rules under which naturalized citizens resident abroad for specified periods must bring themselves in order to receive the continued protection of the Government while so resident. In carrying out the statute and the rules prescribed pursuant thereto, the Department is performing executive functions in relation to the protection of citizens abroad, as it did prior to the enactment of the statute, in the exercise of a discretion not defined by these specific rules. The law provides for naturalization through judicial action and for the cancellation of naturalization through judicial proceedings. There appears to be no good reason to believe that any intent should be imputed to Congress to authorize the Department of State to cancel the citizenship of persons abroad by prescribing rules to which such persons must conform in order to prevent themselves from becoming denaturalized. The Act contains no such express authorization. It makes no mention of cancellation of citizenship. It does not seem to be reasonable to suppose that Congress intended to prescribe a forfeiture of citizenship through residence abroad in the absence of explicit language such as is used in the provisions of the law relating to expatriation by naturalization under the laws of a foreign country or by the taking of an oath of allegiance to a foreign Government.

When dealing with the specific subject of loss of citizenship Congress in clear terms prescribed the manner in which that takes place. The first paragraph of Section 2 of the Act of March 2, 1907, reads as follows:

"That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken on oath of allegiance to any foreign state."

It seems pertinent to note the title of the Act of March 2, 1907, which is "An Act in Reference to the Expatriation of Citizens and their Protection Abroad."

Presumably executive officials of the United States have been guided by Mr. Wickersham's opinion since the date of its rendition. The Department of State which has been so very largely concerned with the construction of these provisions, has evidently acted in accordance with Mr. Wickersham's opinion. See *Compilation of Certain Departmental Circulars Relating to Citizenship, Registration of American Citizens, Issuance of Passports, Etc.*, 1925, pp. 34, 45, 120.

On March 31, 1916, an opinion was rendered by Judge Hough of the District Court of the United States for the Southern District of New York from which it may appear that the Act of March 2, 1907, was given a construction at variance with that put upon it by Attorney General Wickersham. *United States ex rel. Anderson v. Howe*, 231 Fed. 546. A person named Anderson came to the United States from Sweden in 1891, was naturalized in 1905, and in the year following returned to Sweden, where he remained continually until 1915, when he again returned to this country. On his arrival in New York the immigration authorities found him insane and nearly penniless. He having been held as an alien within the prohibited classes, and ordered deported by the Secretary of Labor, a writ of *habeas corpus* was taken out in his behalf. The Court discharged the writ and remanded the relator. Anderson had not presented to any diplomatic or consular officer of the United States evidence to overcome the statutory presumption. Judge Hough stated that, although he thought that the presumption was rebuttable, Anderson was subject to exclusion as an alien. Without going into a discussion of the facts in the Anderson case, it may be observed that they differed considerably from the facts in the case dealt with in the opinion rendered by Attorney General Wickersham. If Anderson was an alien it would seem that he could have become an American citizen only through naturalization conformably to the provisions of the naturalization law, and it is not clear why or how he should rebut any presumption that had arisen against him in order again to obtain American nationality.

The view that a person who has not rebutted the presumption becomes an alien does not appear to be supported by other opinions rendered by Federal or State courts.

It is interesting to note that Judge Learned Hand, in *Stein v. Fleischman Company*, 237 Fed. 679, referred to the Anderson case and stated that it was one in which the treaty with the relator's country of origin, Sweden, was such that a renewal of residence in Sweden in itself repatriated the naturalized American citizen. As the case came before the court, said Judge Hand, the relator's residence, Sweden, had to be accepted as a fact, and "language regarding the Act of 1907 was therefore obiter."

In *Thorsch v. Miller*, 5 Fed. (2d) 118, Chief Justice Martin of the Court of Appeals of the District of Columbia stated that the court took judicial notice of the interpretation given the Act by the Department of State, that

the presumption "continues to exist only while the naturalized citizen continues to reside abroad, and that upon the return of the individual to the United States and upon his establishment there in good faith of a permanent residence the reason for the presumption disappears."

In *Nurge v. Miller*, 286 Fed. 982, a suit to recover property taken by the Alien Property Custodian of the United States from a man who went to Germany in 1909 and did not return until after the Armistice, Judge Campbell said:

"I have, however, examined all of the cases cited and believe that the presumption may be, and in the case at bar has been overcome by the return of the plaintiff and the proof of his intention during all of his absence to remain a citizen of the United States."

See also *United States v. Eliassen*, 11 Fed. (2d) 785; and *Banning v. Penrose*, 255 Fed. 159.

It is interesting to consider, in connection with the case before the Commission, the case of *Nelson v. Nielsen, et al.* decided by a State court, the court of last resort of Nebraska, on April 16, 1925, 113 Neb., 453. In May of 1908, Chris Nelson, a naturalized citizen of Danish origin, sailed for Denmark. On the 18th day of December of the same year he was married in that country to a subject thereof, and by her he had a daughter, Hertha Oman, born on the 28th day of May 1910. In 1913 he returned to Nebraska to attend to some legal business in connexion with his land, after which he went back to Denmark, where he died, November 21, 1915. Subsequently his estate was duly settled by proceedings before a probate court in the State of Nebraska, and his personal property was distributed to his widow and daughter, the court adjudging that these persons were his sole heirs, and were entitled to his real estate by descent.

Their title to the real estate was later contested by a brother of the deceased. The Supreme Court said that the statutory presumption which had arisen against the deceased on account of his protracted residence abroad was enacted to relieve the Government of the United States from the duty of protecting its citizens long abroad in certain cases, and that the presumption could be rebutted not only by the presentation of evidence to a diplomatic or consular officer but by other sufficient means and circumstances. In the light of the evidence before the court it was further said that there was no difficulty in deciding that Nelson was to his death a citizen of the United States. His daughter, whose nationality was determined by that of the father, was also a citizen, said the court. And it further stated that while it might be that the widow, as a naturalized citizen, should have registered before an American consul in Denmark in order to retain her citizenship, in the absence of proof that she had not done so, she would be considered a citizen, having become one by her marriage to Nelson.

In an Act approved March 4, 1923 (42 Stat. 1516) Congress made provision for the return in certain cases of property seized by the Alien Property Custodian during the war between the United States and Germany. By Section 21 of that Act it was provided that the claim for the return of property "of any naturalized American citizen" should not be denied on the ground of any presumption of expatriation which had arisen against him under the Act of March 2, 1907. The Act therefore refers to a person against whom a presumption had arisen as an "American citizen" and not as an alien.

Sufficient citations have been made to show that neither the executive

department of the Government nor the legislative department nor the judiciary, with the possible exception of a single judge, have construed the Act of March 2, 1907, to effect a cancellation of citizenship of persons against whom the presumption therein stated has run.

When it is considered that the status of a great number of parents and children, as well as property rights, the nature and extent of which can not be estimated, must have been affected by the interpretation given to the law by both administrative and judicial officials over a long period of time, it seems proper to assume that a reasonable construction such as that placed upon the Act by Attorney General Wickersham would not lightly be set aside by any court. See with respect to the principle of contemporaneous interpretation, *Stewart v. Laird*, 1 Cranch 299; *The Laura*, 114 U. S. 411.

If the view should be taken that residence abroad for specified periods, coupled with the failure to rebut the statutory presumption, results in loss of citizenship, it would be uncertain when citizenship is nullified—whether that takes place after the expiration of the statutory periods, or after a consular or a diplomatic representative has passed upon the evidence submitted by persons against whom the presumption has run, or after the Department of State has passed upon it, or after persons have been notified of rulings made in their respective cases. There appears to be nothing in the law of 1907 to justify the view that Congress intended to legislate in such uncertain terms with respect to such a serious question as the cancellation of American citizenship.

It also seems to be unreasonable to suppose that Congress enacted a measure which would seem clearly to be in derogation of the authority vested in it under the Constitution. By Article I, Section 8, of the Constitution Congress is empowered to establish a uniform rule of naturalization. It would seem to be obvious that just as naturalization takes place through the exercise of a legislative function, denaturalization can only be effected by the legislative department of the Government, and not by an executive department like the Department of State. In connection with both naturalization and denaturalization Congress has imposed certain functions on the judiciary.

Under authorization from Congress, the Department of State has prescribed certain rules with respect to the rebuttal of a presumption arising from protracted residence abroad. These rules require proof explanatory of such residence. They relate to residence abroad for business purposes, or for reasons of health, or because of unforeseen exigencies, or for other specified reasons.

Undoubtedly Congress would have the constitutional power to enact a law declaring that, whenever the Department of State shall ascertain that a naturalized citizen has lived abroad for any specified period, such citizen shall cease to be an American citizen. The denaturalization here would take place upon the simple ascertainment of a fact by the Department. In such a case the legislative department would not be delegating its power to make a law but merely the power to determine some fact or state of things upon which, according to the terms of the law, that Department's action should depend. Two outstanding points in *Field v. Clark*, 143 U. S. 649, one of the most interesting cases in which the subject of the delegation of legislative power has been discussed, seem to be that discretion must not be vested in the Executive authorizing him in effect to make law, and that such discretion as the Executive has must relate to the execution of the law.

Congress could probably itself prescribe rules similar to those framed by the Department and declare that, whenever a naturalized citizen failed, in the judgment of the Department, to rebut a presumption in accordance with such rules, he should cease to be an American citizen. While in such a case undoubtedly a considerable measure of discretion on the part of the Department of State would be involved in ascertaining whether a naturalized citizen brought himself within these rules, it would seem, in the light of decisions of the Supreme Court bearing on the subject of delegation of legislative power, that an Act might properly be framed within the limits of constitutional authority.

But it would seem to be clear that Congress could not properly say that a naturalized American citizen residing abroad should cease after certain specified periods to be an American citizen, unless he complied with certain rules prescribed by the Department of State to determine conditions under which he might remain a citizen or be denaturalized. Such a law would appear clearly to have the effect of delegating to the Department of State authority to prescribe rules with respect to the denaturalization of American citizens, and in effect to give judicial application to such rules. There seems to be nothing in the law of 1907 to justify the conclusion that Congress undertook to enact such a law.

According to a ruling of the Department of State, Timothy J. Costello evidently was not considered to be entitled to protection of his Government at the time he was killed in Mexico. But he was an American citizen at that time. He was not a Mexican. And he had not by any action of his Government been outlawed as a man without a country. There was nothing in any established rule of domestic policy that would have precluded his Government from extending protection to him at some future date after he had returned to his own country to reside.

But the precise case before the Commission is one in which complaint is made that proper steps were not taken to apprehend and punish the murderers of an American citizen. That the Department of State might have been unwilling to protect Costello had he sought its protection shortly before his death can in no way be determinative of the right of the United States at this time to invoke the rule of international law requiring effective measures with respect to apprehension and punishment of persons who injure an alien. That rule is invoked in this case with a view to obtaining compensation for three American claimants now resident in the United States.

One of the claimants, Costello's sister, is a native citizen. Costello's daughters were born American citizens. They are not naturalized citizens in the sense in which that term is generally used. The presumption referred to in Section 2 of the Act of 1907, applies to naturalized citizens only. It is possible that one of the daughters may have been born after the presumption arose against their father, but it is not at all certain that this is a fact. Even if it were and in some way that could affect her status as an American citizen, both daughters are now resident in the United States, and their citizenship seems to be unquestionable.

In passing upon the complaint of negligence with respect to the apprehension and punishment of the persons who participated in the killing of Costello and the robbery of his home, the Commission is confronted, as it has been repeatedly in other cases, with the difficulty of basing any conclusion on meager and vague evidence. Information in communications sent to the Department of State by American Consular and Diplomatic representatives

in Mexico City is of too general and meagre a character to furnish the basis of a pecuniary award. The most definite statements furnished are found in a brief letter of January 9, 1922, transmitted by the American Consular representative at Mexico City to the American Chargé d'Affaires in Mexico. It is stated in that letter that during the evening in which Costello was killed a small detail of soldiers went to his home, remaining there all night, but that they accomplished nothing and made no effort to find the robbers or to ascertain who they were or from whence they came. It is further stated that no one in authority made inquiry of Mr. Kelly regarding the circumstances; that as the body of Costello could not be cared for until the officials had taken due note of the tragedy, it was allowed to lie where it fell from Wednesday evening until Friday afternoon; and that no steps appeared to have been taken by the authorities other than the sending of the military detail. It is not explained in this letter what opportunities the Consul had to obtain information respecting the actions of the authorities. From copies of communications exchanged between Mexican officials which have been produced by the Mexican Agency it appears that some investigations were made; also that soldiers encountered the bandits and killed the leader because he resisted arrest.

As was pointed out in the opinion of the Commission in the *Archuleta* case, Docket No. 175,¹ the Commission must reach a conclusion on the strength of the evidence produced by both parties. Evidence furnished by the respondent Government must of course be considered both with respect to what it may show against contentions advanced in defense to the claim and with respect to what may be revealed in support of such contentions. But the mere fact that such evidence is meagre can not in itself justify an award in the absence of concrete and convincing evidence produced by the claimant Government. In the light of the unsatisfactory evidence before the Commission, the Commission is constrained to dismiss the claim.

Dr. Sindballe, Presiding Commissioner:

I concur in the conclusion reached by Commissioner Nielsen, but it does not seem to me that the authorities quoted by him warrant a deviation from the wording of Section 2 of the Act of March 2, 1907, according to which a naturalized citizen in certain cases shall be presumed to have ceased to be an American citizen, as long as he does not rebut the presumption by returning to the United States with the intent of establishing a permanent residence there or otherwise, and it does not appear that after the statutory presumption first arose against Timothy J. Costello, anything ever occurred which might have put him in a position to overcome the presumption.

Fernández MacGregor, Commissioner:

I concur in the opinion of the Presiding Commissioner. This Commission has jurisdiction over the instant case, since at least two of the claimants are American citizens, but in view of the fact that Timothy J. Costello died without overcoming the presumption of having lost his American citizenship, it could not be said that Mexico was in relation to the United States under an international obligation of punishing his murderers and thus, the alleged failure to prosecute does not constitute as to the United States an international delinquency.

¹ See page 376.

Decision

The claim made by the United States of America in behalf of Lily J. Costello, Maria Eugenia Costello and Ana Maria Costello is disallowed.

GEORGE W. COOK (U.S.A.) *v.* UNITED MEXICAN STATES

(April 30, 1929, dissenting opinion by American Commissioner, undated. Pages. 266-281.)

RESPONSIBILITY FOR ACTS OF *De Facto* GOVERNMENT. Contract for sale of school benches entered into with respondent Government during Huerta regime *held* a contract of an impersonal character for which respondent Government would be responsible.

CONTRACT CLAIMS.—EFFECT OF DOMESTIC LAW UPON RIGHT TO CLAIM.—

CONTRACT WITH AGENT. Claimant sold respondent Government 5,000 school benches, the delivery of 4,500 of which it admits, for which no payment was ever made. The contract therefor was entered into between the Ministry of Public Instruction and Fine Arts and claimant's agent in his personal capacity. *Held*, since claimant could not under Mexican law sue the respondent Government under contract made in the name of his agent, claim *disallowed*:

Cross-references: Am. J. Int. Law, Vol. 24, 1930, p. 398; Annual Digest, 1929-1930, pp. 177, 255.

The Presiding Commissioner, Dr. Sindballe, for the Commission:

In this case claim in the sum of \$ 13,750, United States currency, with interest, is made against the United Mexican States by the United States of America on behalf of George W. Cook, an American citizen, for non-payment of the purchase price of 5,000 school benches alleged to have been delivered to the Mexican Ministry of Public Instruction and Fine Arts during the period from December 1913 to February 1914 pursuant to a contract of August 9, 1913, said to have been entered into between the said Ministry and Mosler, Bowen & Cook, Sucr., of which business house the claimant was the sole owner.

The respondent Government denies that 5,000 school benches were delivered, but admits the delivery of 4,500 benches. It contends, however, that Mexico is not obligated to pay Cook for the benches, first, because the transaction in question took place with an illegitimate authority, the General Victoriano Huerta administration, and secondly, because the said contract of August 9, 1913, was entered into between the Ministry of Public Instruction and Fine Arts and Sr. José Solórzano, and not between the Ministry and the claimant. With regard to the first of these contentions the Commission refers to its decision in the case of *George W. Hopkins*, Docket No. 39,¹ and the case of the *Peerless Motor Car Company*, Docket No. 56.² With regard to the second contention the pertinent facts are stated in the Memorial to be as follows:

¹ See pages 41 and 218.

² See page 203.

In July, 1913, the Mexican Minister of Public Instruction and Fine Arts called a meeting of the representatives of various commercial houses in Mexico City, and informed those present that the Ministry desired bids for 30,000 school benches. At this meeting Mosler, Bowen & Cook, Sucr., was represented by José Solórzano, who was one of their salesmen. Some time after the meeting Mosler, Bowen & Cook, Sucr., was informed that the Ministry had decided to apportion the order for the 30,000 school benches among various houses, and that that firm would receive an order for 6,000 benches as its share of the business. A representative of the Ministry afterwards asked the firm to prepare a contract for the construction of the 6,000 benches and to present it to the Ministry for signature. Accordingly it prepared a contract, and the claimant and Solórzano took it to the Ministry for signature. They were informed that an official of the Ministry wished to confer with Solórzano privately. By this official Solórzano was told that the Minister desired that the contract be entered into between the Ministry and Solórzano personally and not between the Ministry and Mosler, Bowen & Cook, Sucr. Solórzano as well as the claimant agreed thereto, and the contract was executed accordingly. Solórzano immediately turned the document over to Mosler, Bowen & Cook, Sucr., in whose factory the benches were built, and to whose factory a representative of the Ministry came for the purpose of inspecting benches that had been completed. All correspondence with the Ministry regarding the matter took, for the sake of consistence, place in the name of Solórzano, and also the invoices were issued in his name.

The question before the Commission is whether or not the claimant himself could sue under the contract entered into between the Ministry and Solórzano. On principle, that must depend on the intention of the parties, or, if the intention of the parties be not clear, what must be presumed to have been the intention of the parties. From the works of various civil law authors it appears that in countries, and among these Mexico, where the civil law obtains, the sole fact of a contract having been entered into by an agent in his own name excludes the principal from right of action. Mexican law contains an exception to this rule in case the agent is a "factor", who, according to Art. 309 of the Mexican Code of Commerce, is a person who has the management of a manufacturing or commercial undertaking or establishment, or who is authorized to enter into contracts in regard to *all* matters in reference to such an establishment or undertaking, but this exception does not apply in a case like the present, Solórzano not being a "factor" of Mosler, Bowen & Cook, Sucr. In Anglo-Saxon law the sole fact of a contract having been entered into by an agent in his own name is not considered as establishing a conclusive presumption that the intention was to deal with the agent only, at any rate not if the principal is undisclosed, and, by the weight of authority, not even if, as in the present case, the principal is disclosed. But, of course, a conclusive presumption may be established where there are further facts that point in the direction of an intention to exclude the principal from a right of action. So in *Die Elbinger Actien-Gesellschaft v. Claye*, L. R. & Q. B. 313, the further fact that the principal was known to be a foreigner, was held to raise a presumption that the contract was with the agent only. Now, in the present case, the claimant was a foreigner, and, further, it was at the express demand of the Minister that the contract was entered into between the Ministry and Solórzano personally. It therefore seems at any rate doubtful, if, according to Anglo-Saxon law, a principal would have the right to sue in a case like

the present, and, as above stated, according to Mexican law, by which the contract in question is governed, it must be assumed that he would not.

It appears that on February 4, 1915, Solórzano transferred any right he might have had under the contract in question to the claimant. The Commission has, however, no jurisdiction to enforce the right obtained by the claimant in virtue of this transfer.

Decision

The claim of the United States of America on behalf of George W. Cook is disallowed.

Commissioner Nielsen, dissenting.

This is a claim to obtain compensation for a quantity of school benches delivered to and accepted by the Mexican Government. As stated in the opinion of my associates, it appears that Mosler, Bowen & Cook, Sucr., were informed that they would receive an order for 6,000 benches as that firm's share of a total number which it had been made known to commercial firms was desired by the Government. The firm was asked to prepare a contract for the construction of the number allotted to it. When Solórzano, a salesman for the firm, took such a contract to the Mexican Minister of Public Instruction and Fine Arts, the latter said that he desired that it should be entered into personally between the Minister and Solórzano, and it was so executed. It is stated in the majority opinion that the question before the Commission is whether or not the claimant himself could sue under the contract entered into between the Ministry and Solórzano. In my opinion the question is whether this Commission can, conformably to the terms of submission in the Convention of September 8, 1923, that is, "in accordance with the principles of international law, justice and equity", make an award to the effect that Cook shall be paid the contract price of the benches. The legal questions involved in that issue are different from the point whether a Government may be sued on a contract.

In this case, as it happens in many other international cases, the questions of domestic law are much more difficult than those involved in the application of the proper principles of international law. The situs of every element of the contract invoked is in Mexico. Therefore the contract is governed in all respects by the law of Mexico. Any rights Cook has under the contract are therefore determined by Mexican law. If he had no rights, it is of course unnecessary to proceed to the question whether in the light of any principle or rule of international law such rights were infringed.

In the ultimate determination of responsibility under international law I think an international tribunal in a case of this kind can properly give effect to principles of law with respect to confiscation. International law does not prescribe rules relative to the forms and the legal effect of contracts, but that law is, in my opinion, concerned with the action authorities of a government may take with respect to contractual rights. If a government agrees to pay money for commodities and fails to make payment, it seems to me that an international tribunal may properly say that the purchase price of the commodities has been confiscated, or that the commodities have been confiscated, or that property rights in a contract have been destroyed or confiscated.

I assume that it is generally recognized that confiscation of the property of an alien is violative of international law, just as it is generally forbidden

by domestic law throughout the world. See "*Basis of the Law Against Confiscating Foreign-Owned Property*" by Chandler P. Anderson, *American Journal of International Law*, 1927, Vol. 21, p. 525. The extent to which principles of international law have been applied to this subject is interesting. While generally speaking the law of nations is not concerned with the actions of a government with respect to its own nationals, we find in international law a prohibition against confiscation even with respect to the property of a nation's own nationals; a well recognized rule of international law requires that an absorbing state shall respect and safeguard rights of persons and of property in ceded or in conquered territory. See American Agent's *Report in the American and British Claims Arbitration under the Special Agreement of August 18, 1910*, pp. 107 *et seq.*; pp. 167 *et seq.*

If Cook had rights under this contract, then he was entitled under the terms of the contract to receive compensation for the benches which he manufactured and delivered and which Mexico accepted and received but did not make payment for to any one. The brief of the American Agency contains no citation of Mexican law throwing light on the peculiar contract signed by Solórzano with a Mexican official. The effect of this contract under that law is the only point of difficulty in this case. In the written and in the oral argument counsel appeared to rely principally on two international cases, the *Heny* case before the American-Venezuelan Commission of 1903, *Ralston's Report*, p. 14, and the *McPherson* case before this Commission, *Opinions of the Commissioners, Washington, 1927*, p. 325.

In the *Heny* case claim was made to obtain compensation for Heny because of damage inflicted by Venezuelan authorities on a plantation with respect to which Heny asserted some rights, although he evidently was not the owner of it. One of the Commissioners, Mr. Bainbridge, considered that Heny's right might be considered in the nature of an antichresis. With respect to the argument of counsel for Venezuela that a contract upon which Heny based his claim of rights was void, because under Venezuelan law record in a registry was indispensable to the validity of the instrument, Mr. Bainbridge said that the argument was untenable; that the contract was valid as between the parties whether recorded or not; and that, whatever might be the effect of the registration law with respect to the rights of innocent third parties, it could have no effect in excusing the acts of a trespasser or tortfeasor. The case having passed for a decision to the Umpire, Mr. Barge, he stated that the contract relied upon in behalf of Heny was not a mortgage or a sale of an estate, and also lacked the characteristics of an antichresis. He found, however, that Heny did have an interest in the estate and an award was made by the Umpire in Heny's behalf. The reasoning upon which the Umpire based his conclusion is indicated by the following passages from his opinion:

"Whereas, however—whatever may be the technical deficiencies of the instrument—whilst interpreting contracts upon a basis of absolute equity, what the parties clearly intended to do must primarily be considered;

"And whereas, it was clearly the intention of parties that no one but the claimant should have a right to expropriate anything belonging to this estate, nor to profit by the revenues, at all events so long as his interest in the estate should last, which interest the heirs wished to guarantee; and whereas this interest existed as well in the sum invested by him in the estate as in the debts he assumed and which he might pay out of the estate, the credits and debts of which were equally transferred to him by the owners; whereas, therefore, according to this contract at the moment the facts which obliged the Venezuelan

Government to restitution took place, the only person who directly suffered the 'detrimentum' that had to be repaired was the claimant E. Heny;

"Whereas, it being true that according to the principles of law generally adopted by all nations and also by the civil law of Venezuela; contracts of this kind only obtain their value against third parties by being made public in accordance with the local law—in this claim before the Commission, bound by the Protocol, to decide all claims upon a basis of absolute equity, without regard to objections of a technical nature or of the provisions of local legislation, this principle can not be an objection, and even when made this objection may be disregarded without impairing the great legal maxim, *locus regit actum*, as equity demands, that he should be indemnified who directly suffered the losses, and it not being the question here who owned the estate 'La Fundación', but who had the free disposition over and the benefit and loss of the values for which restitution must be made, and who, therefore, in equity, owns the claim for that restitution against the Venezuelan Government."

The *McPherson* case is more nearly in point with respect to the instant case. In the former, claim was made in behalf of J. A. McPherson to recover the aggregate amount of some postal money orders which were not paid upon presentation to Mexican postal authorities. In behalf of Mexico it was contended, among other things, that no claim could be maintained before the Commission in behalf of the claimant, since it was shown by the evidence that the money orders were not the property of the claimant, they having been issued in the name of John Davidson. This contention was met by the United States with the argument that Davidson was an agent and banker for McPherson, and that the former bought money orders with money belonging to the latter who could be regarded as an undisclosed principal. The Commission found that the evidence showed beyond a reasonable doubt that the money orders were bought by Davidson for McPherson with funds belonging to the latter, and it was not denied by Mexico that McPherson might have had an interest in the money orders. In the opinion of the Commission it was stated that an award in favor of the claimant could not result in the payment of money to any other than the one who lost as a result of the non-payment of the money orders. By this opinion which was unanimous an award was made in favor of the claimant.

Possibly money orders may more appropriately be regarded as the means employed in the exercise of a governmental authority for the public benefit rather than as contracts or commercial transactions. Nevertheless the relationship between the purchaser of a money order and the Government is certainly in a sense of a contractual nature. In the instant case we are dealing with the legal effect of a contract. Neither Cook nor Solórzano was paid. There is no doubt that the loss resulting from the failure of the Mexican Government to meet its contractual obligations falls on Cook, just as the failure to pay the money orders resulted in a loss to McPherson. However, in order to justify an award in favor of Cook, the possession by him of a legal interest must be shown.

It was recognized in the *Heny* case and in the *McPherson* case that the claimant had some interest, and that because of that interest and of the wrongful act of governmental authorities the claimant in each case suffered a loss. In the *Heny* case it appears that Umpire Barge attached considerable significance to the term "equity" appearing in the terms of submission in the arbitral agreement under which he functioned. The terms of submission in the Convention of September 8, 1923, requiring a determination of cases in accordance with the principles of international law, justice and equity,

are somewhat elaborate, especially when they are considered in connection with the jurisdictional provisions of the Convention which are concerned with claims described in part as claims "for losses or damages suffered by persons or by their properties", and for "acts of officials or others acting for either Government and resulting in injustice". I think that the Commission has generally proceeded on the theory that, in spite of the somewhat elaborate terminology of the Convention, it is simply required by the Convention that all cases shall be decided by a just application of law; that the Commission should not render awards based on some personal undefined theories of equity which may differ greatly in the minds of different people. Perhaps since clearly Cook only is the loser as a result of the failure of Mexico to pay for the benches, which the Mexican Government received and Cook manufactured and delivered, and since neither Agency has made clear in the proceedings before the Commission the legal effect under Mexican law of the contract invoked in this case, the Commission could properly, by taking an equitable view of the case, so to speak, render an award to compensate Cook for the loss suffered by him. However, I think it is possible, particularly in the light of the conduct of the parties revealing their construction of the contract, to conclude that Cook had legal rights which were ignored.

It is stated in the majority opinion that from "the works of various civil law authors it appears that in countries, and among these Mexico, where the civil law obtains, the sole fact of a contract having been entered into by an agent in his own name excludes the principal from right of action." No citation of any author or from any code is made to support this conclusion, except with regard to an exception in Mexican law, which, however, is said not to be pertinent to the instant case. The correctness of the above quoted conclusion with respect to an exception being assumed, it is conceivable that there may be another exception in Mexican law which is pertinent. Had it been possible to invoke some provision of Mexican law, which is the law with which we are concerned in construing the contract in question, a law clearly showing that Cook had no rights under the contract, then of course I could have no occasion to dissent from the conclusions reached by my associates, since, as I have pointed out, Mexican law is controlling with respect to the question of Cook's rights under the contract.

It is stated in the majority opinion that the question before the Commission is whether the claimant could sue under the contract entered into between the Ministry and Solórzano. In dealing with an international case it should be borne in mind that the right of a person to sue a government under domestic law is not conclusive with respect to rights that may be invoked in behalf of such a person under international law. For example, the Government of the United States and the Government of Great Britain, generally speaking, do not allow themselves to be sued in tort, nor do the tribunals of either of the two Governments pass upon political acts of the Government which created them. But redress guaranteed by international law for wrongful action can of course be obtained in behalf of aliens in other ways than by suits against the Government, as through diplomatic channels, or through the action of international tribunals. International reclamations for the most part grow out of what in terms of domestic law is described as tortious acts. So, likewise, in a case in which a government might not by its domestic law provide for suits in contract against itself, money due under a breach of contract could nevertheless be recovered in

a proceeding before an international tribunal. Prior to the year 1855, the Government of the United States did not allow itself to be sued in contract. Persons having private claims against the Government had recourse solely to applications to Congress. The right to bring an action in contract against the Government was granted by the Act approved February 24, 1855, 10 Stat. 612. *Court of Claims Reports*, Vol. 17, pp. 3 *et seq.* A petition of right lies before British courts with respect to matters of contract.

In the majority opinion there is some discussion of rights of action under Anglo-Saxon law. Since the contract invoked in the instant case is governed by Mexican law, the principles of the common law or statutory provisions obtaining in so-called Anglo-Saxon countries have no relevancy except possibly by way of analogy. Under Anglo-Saxon law it is of course well established that an undisclosed principal may sue on the contract.

The case of *Die Elbinger Actien-Gesellschaft v. Claye*, L. R. & Q. B. 313, cited in the majority opinion, can only be fully understood when account is taken of the fact that the decision therein is based on a long established English usage of trade. Cook's firm which carried on its manufacturing and commercial business in Mexico can seemingly not be regarded as a foreign merchant in Mexico in the sense in which a German corporation doing business in Germany is foreign to England.

The principle on which *Die Elbinger Actien-Gesellschaft v. Claye* was decided does not seem to have been fully accepted in the United States. In *Bray v. Kettell*, 1 Allen 80, Chief Justice Bigelow, in making reference to cases in which it had been stated that agents acting for merchants residing in a foreign country are held personally liable on all contracts made by them for their employers without any distinction whether they describe themselves in the contract as agents or not, said:

"We are inclined to think that a careful examination of the cases which are cited in support of this supposed rule will show that this statement is altogether too broad and comprehensive. Certain it is, that if it ever was received as a correct exposition of the law, it has been essentially modified by the more recently adjudged cases. It doubtless had its origin in a custom of usage of trade existing in England, by which the domestic factor or agent was deemed to be the contracting party to whom credit was exclusively given; and it was confined to cases where the claim against the agent was for goods sold, and was not extended to written instruments. But it is going quite too far to say that this usage or custom is so ingrafted into the common law as to become a fixed and established rule, creating a presumption in all cases that the agent is exclusively liable, to the entire exoneration of his employer."

As I have already observed, there is not in this important case any citation in the majority opinion of any provision of any Mexican Code or any other legal citation as a basis for the conclusion that under the law of Mexico the sole fact that a contract has been entered into by an agent in his own name excludes the principal from a right of action. In support of a contention to that effect counsel for Mexico cited Article 284 of the Mexican Code of Commerce of 1890, reading as follows:

"When the commission merchant contracts in his own name, he shall have cause of action and liability direct with the persons with whom he contracts, without being obliged to declare who his principal is, except in the case of insurances." (Translation.)

It is difficult to perceive that language of this provision excludes the idea of rights and obligations of a principal under a contract made in the name of the agent. Article 284 of the Mexican Code seems to confer a right of

action on an agent. It is also a general rule of the common law that where a contract entered into on account of the principal is in its terms made with the agent personally, the agent may sue upon it. At the same time a principal who is the real party in interest, though not named as such, has also a right of action upon the contract which usually is paramount to that of the agent, so that if the principal sues the agent may not. *The Law of Agency*, Mecham, Vol. 2, pp. 1592-93.

In considering the effect of Article 284 of the Mexican Code it is pertinent to determine whether Solórzano may properly be regarded in connection with the transaction under consideration as a commission merchant (*comisionista*). It seems to me very doubtful that he can be so considered. Reference is made in the majority opinion to provisions of the Commercial Code of Mexico with respect to *factores*. The Code contains the following Articles:

"ART. 314. When the factor contracts in his own name, but on account of a principal, the other contracting party can take action against either the factor or the principal.

"ART. 315. Whenever the contracts entered into by the factors affect any object included in the kind of business or trade in which they are engaged, such contracts shall be considered to have been made on account of the principal, although the factor may not have so stated on entering into same, or may have exceeded his authority or committed an abuse of confidence.

"ART. 316. The contracts of his factor shall likewise bind the principal, even when they may be foreign to the class of business with which the factor is entrusted always provided that he is working under the instructions of his principal, or that the latter has given his approval in express terms or by positive acts." (Translation.)

It is said that Solórzano was not a factor. Counsel for the United States argued that it might be just as proper to consider him to be a factor as to designate him as a *comisionista*. In my opinion he was probably neither in connection with the transaction under consideration, and the above quoted provisions from the Mexican Code are interesting merely in showing the principle of representation in Mexican law.

Counsel for Mexico perhaps did not rely fully in his contentions on the language of Article 284 of the Mexican Code, apparently considering that it might be interpreted in the light of Article 246 of the Code of Commerce of Spain reading as follows:

"Where the *comisionista* contracts in his own name, he shall not have to specify who the principal is, and he shall be liable in a direct manner, as if the business were his own, to the persons with whom he contracts, such persons to have no actions against the principal, nor the latter against them; without prejudice to the respective actions of the principal and the *comisionista* as between themselves." (Translation.)

This provision of the Spanish Code is quoted in Lozano's publication of the Mexican Code of Commerce for 1890, and also in the same author's publication of 1889, containing the Mexican Code of Commerce with citations by way of comparison of provisions of the codes of other countries. The latter contains certain comments by Lozano on Article 246 of the Spanish Code. Counsel for Mexico apparently argued that Article 284 of the Mexican Code could be construed to have the same scope as Article 246 of the Spanish Code. To my mind it would involve an extremely liberal construction to read into the meagre language of Article 284 of the Mexican Code the comprehensive provisions of Article 246 of the Spanish Code. As has been

heretofore observed, Article 284 of the Mexican Code states a rule that is elementary in the common law with respect to the right of an agent to sue.

Apparently the principle of agency was not found in the early Roman law of contract. Hunter's *Roman Law*, 4th ed., p. 609; Sohm's *Institutes of Roman Law*, Ledlie's translation, Oxford, 1907, p. 221. But the idea of representation has of course been largely incorporated into the modern law of countries governed by the principles of the civil law, and this seems clearly to be true with respect to the law of Mexico. See on this point *Código de Comercio de los Estados Unidos Mexicanos*, Séptima, Edición, por Jenaro García Núñez y Francisco Pascual García, 1921, Arts. 51-74, 273-331; *Código Civil vigente en el Distrito y Territorios Federales*, por Francisco Pascual García, 1911, Arts. 2342-2358.

The point with respect to the intent of a party to a contract to deal with another specified party is touched upon in the opinion of my associates, and apparently was considerably stressed in the argument of counsel for Mexico. The obvious fact that a man has a right to contract with whomsoever he pleases is not inconsistent with the common law principles that an undisclosed principal or a person in whose favor a contract is made may sue on it. A man can not make a contract in such a way as to take the benefit thereof unless he also takes the responsibility of it. Counsel for Mexico argued that possibly the Mexican Government intended to contract with a Mexican citizen rather than with an alien, with the idea of avoiding diplomatic intervention in behalf of Cook or the presentation of a claim such as is now before the Commission. In my opinion the Commission is precluded from approving of any such suggestion, since diplomatic intervention could only be apprehended in case it was intended not to pay for the goods manufactured, delivered and accepted.

It seems to be pertinent to consider the point of intent in a substantial way in dealing with questions under consideration. A government buying large quantities of supplies, it must be assumed would desire to deal with responsible persons or business concerns. The Mexican Ministry seemingly would not expect a salesman to manufacture and deliver a large quantity of benches; they desired to deal with a responsible manufacturing concern; they knew that Cook's firm manufactured the benches; a Mexican representative inspected the benches on Cook's premises.

Counsel for the United States suggested that, having in mind all the facts and circumstances in relation to the somewhat peculiar transactions in question, the view could properly be taken that the writing signed by the Mexican official and Solórzano did not represent the entire contract for the manufacture and delivery of the benches. There appears to be considerable plausibility in this argument. Generally speaking, when bids for commodities are asked for and made and accepted, a contract is complete. Of course laws and regulations may prescribe subsequent formalities.

In the absence of explicit information with respect to the transactions involved in the instant claim, it seems to me that the Commission is justified in resorting to conclusions based upon the actions of the two parties to the contract whatever may be its precise nature. In the extensive record in the case there is nothing to show that the Mexican Government in the past ever suggested that Cook had no rights because he did not sign the instrument signed by the Mexican Minister and Solórzano. In the *Greenstreet* case (Docket No. 2767)¹ the Commission was called upon to construe an

¹ See page 462.

important contract signed by the General Director of the National Railways of Mexico and by an attorney of E. S. Burrowes, President of the Burrowes Rapid Transit Company. There was nothing in the language of the contract to indicate that it was made on behalf of that company. In behalf of Mexico it was contended that no contractual relations had ever existed between the National Railways of Mexico and the Burrowes Rapid Transit Company. The Commission, in reaching a conclusion with respect to this point took account of the action of the parties. In the opinion written by the Presiding Commissioner it was pertinently said:

"There is, however, ample evidence to show that the transportation business really was carried on by the Burrowes Rapid Transit Company, and that this fact was perfectly well known to representatives of the National Railways of Mexico. It must therefore be assumed that the contract entered into was intended to be a contract between the National Railways of Mexico and the Burrowes Rapid Transit Company."

Clearly the Commission in reaching the conclusion that the Burrowes Rapid Transit Company had rights under a contract signed by a representative of the Railways and an attorney for the Burrowes Company grounded its action on the interpretation put upon the contract by the parties, particularly by the Mexican Government. I perceive no reason why a similar conclusion may not be reached in the instant case with equal or with greater propriety. Cook's firm offered to make a quantity of benches desired by the Mexican Government. The firm was asked to bring in a contract. A representative of the firm signed that contract. The Mexican Government inspected the benches on Cook's premises and accepted them on delivery.

But I think there are still more pertinent considerations of which account may be taken. It is shown by the record that from 1918 up to the latter part of the year 1926, repeated requests for payment were made in the name of the firm of Mosler, Bowen & Cook, Sucr., by a representative of the firm, and evidently not once did the Mexican Government deny liability to the firm on the ground that the contract was signed by some other party.

In reply to a communication of November 26, 1918, it was stated to the firm: "in order to settle this matter it is necessary for you to prove that the said furniture is in the possession of the present Government". In reply to a letter of December 14, 1918, from the firm, it was said: "It is not possible to order the payment which you request, unless you can prove that the said furniture is in the possession of the present government." In response to a request made under date of December 28, 1918, for permission to examine files pertaining to the transaction in question, with a view to locating the furniture, the firm was informed that permission could not be granted. In reply to a communication of April 25, 1921, with which the firm's representative sent to the Ministry information concerning invoices, the former was requested to call at the Department of Finance to make certain explanations. Under date of November 16, 1921, the firm was informed by the Ministry of Finance that the General Controller's Office had stated that only by an express order of the President of the Republic could this claim be accepted, since the transactions belonged to the period of Victoriano Huerta. In response to a communication of November 17, 1922, addressed to President Obregón, the President replied that "the nullity of all acts of the usurping government of Huerta was decreed by a law" which under no circumstances could be annulled by the Executive Office. Certain detailed information having been requested of the firm, it was sent to the Controller's Office, which it appears consulted the Consult-

ing Attorney of his Department for an opinion. Under date of October 16, 1925, the Controller's Office informed the firm that, as the credits contained therein belonged to the years 1913 and 1914, they were annulled in conformity with the provisions of the law.

It thus appears that after extended discussion between the firm and the appropriate Mexican officials, the latter grounded their refusal to pay Cook's firm for the benches not on any contention that no contract had been made with the firm, but on a declaration of nullity of the debt. The annulment of debts either in time of peace or in time of war is violative of international law, and such annulment as a ground of defense for the non-payment of debts has repeatedly been so treated by this Commission. In the instant case an interesting defense based on a construction of Mexican contract law is plausibly made by the Mexican Agency. However, it seems to me that the Commission, in dealing with the uncertainties confronting it, is justified in taking into account the attitude of the claimant and of the respondent Government up to the present time, showing explicitly the rights asserted by Cook and the grounds on which the Mexican Government based its denial of the rights asserted. I am therefore of the opinion that an award should be made in the present case for the contract price of the benches manufactured and delivered by Cook's firm and accepted by the Mexican Government, and for a proper allowance of interest.

On February 4, 1915, Solórzano, on departing from Mexico, made an assignment of all his rights under the contract to Cook. It is clear that this assignment was made solely for the purpose of assisting in any possible way to obtain compensation. Solórzano has furnished sworn testimony that it was thoroughly understood by all concerned that in signing this contract he acted simply as the agent, and that Cook's firm was the real party in interest. Others have furnished testimony to the same effect. In the American brief no reliance is placed on this assignment as an important element in the claim. Let it be assumed that an assignment was necessary in order that Cook might have rights under the contract. Then had this assignment been made prior to the time when the compensation for the benches became due, so that there would have been a breach of contractual rights of the firm, it may be that a claim could now be made in behalf of Cook, since in that situation the claim which accrued was that of an American citizen. However, it seems to be clear that the money was due prior to the time of the assignment. And in any event, according to the view which I have indicated, the Commission is justified in proceeding on the theory that Cook's rights vested under the contract prior to this assignment. The assignment might be considered to be of much importance if the view should be taken that it is important only with respect to the question of the right to sue in Mexican courts.

I regret the necessity of dealing with uncertainties such as are involved in this case. However, it is certain that from the practical standpoint a pecuniary award could only have the effect of granting compensation to a claimant for commodities which he furnished in good faith. And if compensation is not paid the claimant suffers a considerable loss, and the Mexican Government retains property for which it paid nothing. In justification for withholding payment Mexican authorities have asserted nothing from 1915 up to the time of the proceedings before the Commission, except that the debt had been cancelled by executive decree.

SAMUEL DAVIES (U.S.A.) *v.* UNITED MEXICAN STATES*(April 30, 1929. Pages 282-284.)*

AMENDMENT OF CLAIM. Claim was originally filed by memorandum in name of Samuel Davies and John W. Vincent, a partnership. Since American nationality of Vincent could not be established, memorial was filed in name of Davies for only half the amount. *Held*, such amendment not a late filing of a new claim requiring dismissal of claim.

PARTNERSHIP CLAIM.—NECESSITY OF ALLOTMENT. Claim for losses suffered by a partnership was presented by one of the two partners, other partner consenting thereto. *Held*, no allotment necessary.

CONFISCATION. Wood cut by claimant was seized by fiscal agent of State of Sonora and no payment therefor ever made. Claim *allowed*.

The Presiding Commissioner, Dr. Sindballe, for the Commission:

In this case claim in the sum of \$820.00, United States currency, with interest thereon, is made against the United Mexican States by the United States of America on behalf of Samuel Davies, an American citizen. The facts upon which the claim is based are alleged to be as follows:

A partnership, in which the claimant and one John William Vincent had each an undivided one-half interest, and the place of business of which was Douglas, Arizona, had entered into an oral contract with the Sonora Land and Timber Company, Fronteras, State of Sonora, Mexico, for the purpose of cutting wood on the lands of this company. The partnership was to pay to the company the sum of \$1.00, United States currency, per cord for all wood cut under the contract. The wood was imported into the United States and sold there by the partnership. During April, 1917, the partnership had cut and transported to a station now known as Vigia, on the railroad from Agua Prieta to Nacozari, 328 cords of wood. This wood was seized and confiscated by the State of Sonora through its fiscal agent, Jesús O. Cota, who previously had seized the ranch property of the Sonora Land and Timber Company. It is for the wood thus confiscated that compensation is now claimed.

A claim for the alleged full value of the confiscated wood was originally filed by Memorandum in the name of *Samuel Davies and John W. Vincent, a partnership*. However, as the American nationality of Vincent could not be established, the Memorial was filed in the name of Davies and only half the alleged value of the wood is claimed thereby. Counsel for the respondent Government contends that the claim filed by the Memorial is a new claim, and that this claim must be dismissed, as the Memorial was filed after the expiration of the period of time within which, according to the Convention of September 8, 1923, between the United States and Mexico, claims may be presented. The Commission is of the opinion that the claim as now presented must be considered to be in substance a claim reduced in amount to the proportional interest of the partner whose American nationality is proved, and that, therefore, the said contention of Counsel for the respondent Government is untenable.

During oral argument the question arose as to whether or not an allotment such as prescribed by Art. 1 of the Convention of September 8, 1923,

between the United States and Mexico, must be presented by the claimant to the Commission in a case like the present. The Commission deems it unnecessary to consider this question, as it appears that Vincent has agreed to the present claim being presented on behalf of Davies.

That Davies and Vincent were the owners of 328 cords of wood situated at the station of Vigia, and that the wood was taken from them, is admitted by the respondent Government, but, referring to a statement of the Municipal President at Fronteras to the effect that the wood was taken by unknown persons and not confiscated by the authorities, the respondent Government denies that the wood was taken by the fiscal agent of the State of Sonora. However, as the statement of the Municipal President contains no particulars with regard to the taking of the goods, and as there are submitted affidavits of Davies, of Vincent, and of four other persons setting forth detailed statements to the effect that the wood actually was seized by the fiscal agent of the State of Sonora, Jesús O. Cota, the Commission is of the opinion that the confiscation of the wood as alleged by the claimant is sufficiently proven.

It is stated by the Municipal President at Fronteras that the value of the wood at the Station of Vigia was \$2,664.00, Mexican currency. As the estimate of the claimant does not seem exaggerated, the Commission, however, is of the opinion that an award in the amount claimed should be rendered.

Decision

The United Mexican States shall pay to the United States of America on behalf of Samuel Davies \$820 (eight hundred twenty dollars), United States currency, with interest thereon at the rate of six per centum per annum from May 1, 1917, to the date when the last award is rendered by the Commission.

RICHARD A. NEWMAN (U.S.A.) *v.* UNITED MEXICAN STATES

(May 6, 1929. Pages 284-286.)

DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH. Claimant was kidnapped and held for ransom by Mexican bandits, necessitating considerable medical treatment by reason of hardships and injury suffered during his abduction. Dilatory efforts to apprehend the bandits were taken by Mexican authorities. About four years later leader of bandits surrendered to the military authorities but neither he nor his followers were ever tried or punished for abduction of claimant. Claim *allowed*.

Cross-reference: Am. J. Int. Law, Vol. 24, 1930, p. 411.

The Presiding Commissioner, Dr. Sindballe, for the Commission:

In this case claim in the sum of \$15,000.00, United States currency, is made against the United Mexican States by the United States of America on behalf of Richard A. Newman, an American citizen, alleged to have

been kidnapped by Mexican bandits, for failure on the part of the Mexican authorities to rescue Newman and to apprehend and punish the kidnappers.

The facts out of which the claim arises are alleged to be as follows:

During the early part of January 1923, the claimant went to Mexico and established a small farm on a rented plot of ground known as the Hacienda Guatimapé in the State of Durango, about sixty miles north of the City of Durango. On April 24, 1923, he went out on horseback to visit an old dam site located at the foot of a mountain range about three miles distant from his Hacienda, for the purpose of fishing in a river and of satisfying his interest in a certain engineering project. While in route he was accosted by four or five armed Mexicans, robbed of his horse, a pistol, a pocket knife, and some few pesos he had on his person, and taken into the mountains. The abductors proved to be under the leadership of General Juan Galindo, a well known rebel or bandit in the region. They told Newman that he would be released only on payment of \$30,000.00, Mexican currency, and they subjected him to various hardships. They kept him until October 29, 1923, when he was released on payment by a special representative of the American Government of \$300.00, United States currency. He was then in a miserable condition, infested with vermin and suffering with an infected leg, which had been injured during an attempt to escape, and which made treatment in a medical sanatorium necessary, causing him an expense of about \$1,000.00, Mexican currency.

The respondent Government alleges that Newman joined the bandits or remained with them from his own free will. It appears that certain rumors to that effect existed in the region, and such rumors are reflected in testimony given by military authorities of the State of Durango as well as by some other persons. It further appears that Newman was allowed to write a number of letters in English to representatives of the American Government. But these facts furnish no proof for the assumption that the case was one of self-abduction, and in the light of the content of Newman's letters, which are to the effect that he does not believe that Galindo will kill him, and that he does not want anybody to pay ransom for him, the assumption must be rejected.

As soon as the abduction of Newman was brought to the knowledge of the Mexican Government, orders to rescue Newman were issued to the military authorities of the State of Durango. But it must be assumed that these authorities were dilatory in the matter, possibly because they believed the case to be one of self-abduction, possibly because Galindo, although followed by a group of only a few men, had such relations with the population of the region as to make the authorities consider him not as a usual bandit but to some extent as a political factor. On May 30, 1927, Galindo surrendered to the military authorities, but neither he nor his followers were ever brought to trial or punished for the abduction of Newman. It appears that the surrender took place according to an arrangement previously arrived at, the terms of which are unknown.

The Commission is of the opinion that Mexico must be responsible for failure on the part of the Mexican authorities to take proper steps to rescue Newman and bring his abductors to trial, and that, therefore, an award in the sum of \$7,000.00, United States currency, should be rendered in the present case.

Decision.

The United Mexican States shall pay to the United States of America on behalf of Richard A. Newman the sum of \$7,000.00 (seven thousand dollars), United States currency, without interest.

JOHN I. HOWE (U.S.A.) *v.* UNITED MEXICAN STATES

(May 9, 1929. Pages 286-288.)

DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH. During course of insurrection claimant's cattle were driven off and claimant's store was robbed. Claimant later recognized leader of band which robbed his store and pointed him out to sergeant of government forces. Claimant also requested commander of government troops to arrest culprit. No action was taken. Claim *disallowed*, since it was not clear that information given by claimant was a sufficient basis for action.

The Presiding Commissioner, Dr. Sindballe, for the Commission:

In this case claim in the sum of \$647.47, United States currency, is made against the United Mexican States by the United States of America on behalf of John I. Howe, an American citizen, for alleged failure on the part of Mexican authorities to take proper steps to apprehend and punish some bandits or rebels responsible for the theft of property belonging to the claimant.

The facts out of which the claim arises are alleged to be as follows:

In October, 1923, Howe left the United States for the State of Veracruz, Mexico, with an emigrant car containing cattle, farm implements, household furniture and supplies. In the town of Lagos, a station on the Veracruz to Isthmus Railway, the cattle were unloaded and placed in the pasture of one E. D. Stone. Howe himself settled in the town of Isla, another station on the said Railway, and opened a store there. In December, 1923, at a time when, incident to the Adolfo de la Huerta insurrection, Government protection to the town of Lagos was withdrawn, a group of armed men, some fifty in number, drove off the cattle which Howe had placed in Stone's pasture, and during January and February, 1924, at a time when, incident to the same insurrection, Government protection was withdrawn from the town of Isla, and rebels were in possession of that town, a band of armed men came to Howe's store and robbed it of property of an alleged value of the sum claimed. In March, 1924, Government forces again came into possession of the town of Isla. Howe then informed the commander of the Government troops of the robbery of his property, and requested that steps be taken to apprehend the culprits, but no action was taken. A short time after, when Howe was travelling on a railway train, he recognized among the passengers the leader of the band which had robbed his store, and pointed him out to a sergeant who was stationed at Isla, and who, together with another soldier, was also on the train. But the sergeant took no action. Upon the arrival of the train at the next station, the soldiers and the culprit left the train. Howe also got off the train and applied to the

commander of the Government troops at that station, requesting him to have the culprit arrested, but no action was taken.

Originally compensation for the value of the cattle as well as of the merchandise was claimed, but now only the alleged value of the merchandise taken from Howe's store is claimed. It is not contended that the Mexican authorities were in a position to prevent the robbery of the store, but the contention is made that Mexico must be responsible, because the military authorities took no action when Howe requested them so to do. The Commission, however, is of the opinion that, in the light of the evidence submitted it is not clear whether the information given by Howe was of such a nature as to afford a sufficient basis for an action of the military authorities, and that, therefore, in the absence of more satisfactory evidence, no award can be rendered in the present case.

Decision.

The claim of the United States of America on behalf on John I. Howe is disallowed.

ESTHER MOFFIT (U.S.A.) *v.* UNITED MEXICAN STATES

(May 9, 1929. Pages 288-291.)

NON-PAYMENT OF MONEY ORDERS. Claim for non-payment of money orders allowed.

COMPUTATION OF AWARD.—RATES OF EXCHANGE. Award calculated on basis of payment in United States currency at rate of exchange as of date of breach of obligation, i.e., date when money orders were presented for payment and payment refused. Fact that claimant may have paid for such money orders in silver held immaterial.

Cross-reference: Annual Digest, 1929-1930, p. 199.

Commissioner Nielsen, for the Commission:

Claim is made in this case by the United States of America in behalf of Esther Moffit to recover the sum of \$146.97, gold currency of the United States, stated to be the equivalent of 293.94 Mexican pesos, the aggregate amount of two money orders which it is alleged were not paid on presentation to Mexican postal authorities. Interest from August 30, 1914, is also claimed on the sum of \$146.97.

The transactions on which the claim is based are described in the Memorial in substance as follows:

During the year 1914 the claimant conducted a store at Ensenada, Lower California, Mexico, and in the course of business sent the two money orders to Melcher & Company of Mazatlán, Sinaloa. The orders were returned to her by Melcher & Company with the information that they could not be cashed, as there was no money for that purpose at the post office in Mazatlán. The claimant thereupon endeavored to have the two money orders cashed at Ensenada, but her efforts were unavailing. The claimant on several occasions endeavored to cash the orders at post offices in Mexico

and offered to pay taxes with them, but at no time were the orders accepted in payment of taxes, nor could she obtain a refund of the money paid for them.

Perhaps it may be considered that the defenses to the claim made in the Answer were abandoned except with respect to the point of the rate of exchange at which the award should be computed. In any event, the Commission, in the light of the principles stated in connection with previous similar cases, considers that an award should be made for the value of the money orders, and that the only issue in the case which is not controlled by previous decisions relates to the question of exchange.

Accompanying the Memorial of the United States is a letter addressed by the claimant to the American Agent under date of May 9, 1927, from which it may probably be inferred that the claimant intends to convey the information that the money orders were paid for in silver. On the basis of that communication the United States contends that the award should be rendered in the amount of the value of the silver peso in 1914, which it is said was \$0.4985.

In behalf of Mexico it was contended that any award given should be in a sum smaller than that claimed, and a statement is produced giving rates of exchange on New York in the year 1914.

The subject of exchange was discussed in some detail in the case of *George W. Cook*, Docket No. 663. *Opinions of the Commissioners*, Washington, 1927, p. 318. Reference was made to decisions of domestic courts which have had occasion to deal with the translation into the currency of their own country of monetary judgments fixed in the terms of the currency of some other country, these courts being required to convert currency in view of the fact that they can render judgments only in the coin of the governments by which they are created. It was pointed out that some courts have held that, in the case of a breach of contractual obligations, the rate of exchange should be determined as of the date of the breach, others have held that the rate should be fixed as of the date of judgment; it has been held that the value of the coin should be fixed as of the time suit was brought; and in the absence of evidence as to the value of the coin it has been held that the par value should be taken.

In the *Cook* case, *supra*, there was not before the Commission the proper kind of evidence on which the Commission could determine the rate of exchange at the time when certain money orders were dishonored, and it was contended in that case by the respondent Government that an award should be rendered in terms of the Mexican so-called Law of Payments of April 13, 1918. That contention was not sustained by the Commission.

Whatever may be said of the principles underlying the decisions of domestic courts in cases in which the rates of exchange have been fixed as of the date of judgment or as of the date when suit was brought, those principles do not appear to be susceptible of logical application in a case such as that pending before the Commission. But the principle of applying the rate of exchange as of the date of the breach of an obligation appears to be one which the Commission can properly apply. The Commission has followed the practice of rendering awards in currency of the United States, having in mind the uncertainties with respect to the rate of exchange and, further, the provisions of the first paragraph of Article IX of the Convention of September 8, 1923. It is therefore proper that the award should be rendered in accordance with the rates prevailing at the time the money orders should have been paid; that was when they were presented for pay-

ment. By the application of that principle the award will be the equivalent value in gold which the claimant would have received had the orders been paid on presentation. The precise dates of presentation are not shown, but, in the absence of specific evidence on this point, it may be properly assumed that requests for payment were made shortly following the issuance of the orders.

In fixing the rate of exchange as of the time when the money orders should have been paid, the Commission does not need to concern itself with questions as to the precise meaning or evidential value that may be given to a letter such as that addressed by the claimant to the American Agent on May 9, 1927.

One of the orders is dated June 30, 1914; the other August 13, 1914. Adopting the rate of \$0.3075 stated in Annex 2 to the Mexican Answer to be the rate on June 30, 1914, an award should be rendered in the sum of \$90.38, with interest thereon.

Decision

The United Mexican States shall pay to the United States of America in behalf of Esther Moffit the sum of \$90.38 (ninety dollars and thirty-eight cents), United States currency, with interest at the rate of six per centum per annum from August 30, 1914, to the date on which the last award is rendered by the Commission.

ELVIRA ALMAGUER (U.S.A.) *v.* UNITED MEXICAN STATES

(May 13, 1929. Pages 291-299.)

FAILURE TO PROTECT.—EXISTENCE OF LAWLESSNESS. Mere fact that a large number of crimes may have taken place in the region where claim arose is not *prima facie* proof that State has failed in its duty to protect.

DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH.—RELEASE OF SUSPECTED CRIMINALS. Claimant's husband was killed as the result of a payroll robbery. A number of suspects were arrested but were released before trial on ground that evidence against them had ceased to exist. It appeared that such conclusion was unfounded in fact as to a number of important suspects. No explanation of such release was proffered from the judicial records by respondent Government. Claim *allowed*.

MEASURE OF DAMAGES. Rule in *Janes* claim *supra* followed, to the effect that different degrees of denial of justice would be taken into consideration in allowing damages.

Cross-references: Am. J. Int. Law, Vol. 24, 1930, p. 624; Annual Digest, 1929-1930, p. 170.

Commissioner Fernández MacGregor, for the Commission:

A claim in the amount of \$50,000.00, United States currency, is made by the United States of America, on behalf of Elvira Almaguer, against the United Mexican States, alleging that the claimant's husband, Toribio

Almaguer, an American citizen, was murdered in Mexico by a group of bandits, Mexican authorities having failed to extend adequate protection or to take steps to apprehend, prosecute and punish the persons responsible therefor.

It is alleged that prior to September 15, 1922, oil companies operating in the neighborhood of Tampico had sustained several losses incident to robberies of money which the said oil companies transported from the banks to the oil fields for the payment of the workmen; that due to the inactivity of the police in the prevention of these crimes, the companies had to resort to various means of safety, such as the employing of armed guards, automobiles, launches and aeroplanes; that shortly before eight o'clock, on the morning of September 15, of the same year, Frank L. Clark, Cashier of the Agwi Company, proceeded to a bank in Tampico, Tamaulipas, from which he withdrew 42,000.00 pesos, the said sum being placed in two leather bags for its transportation to the aviation field. Clark was carrying the said money in an automobile in charge of Toribio Almaguer and Macario Cano, and also having as passenger another employee of the Company named Rodolfo Saldaña Ruiz. Upon arrival at a certain place between the City of Tampico and the aviation field, this automobile was held up by another car containing bandits who assaulted Clark and his companions, shooting them with their firearms, as a result of which Toribio Almaguer was killed, Clark wounded in one arm, Cano bruised, and Saldaña alone remaining uninjured. The bandits seized the bags containing the money, boarded the automobile in which they had arrived to prepare their ambush, and departed towards the City of Tampico, following the direction of a point known as Cascajal. It appears that this group of bandits was composed of seven men. A few moments after the escape of the bandits, Saldaña, the only member of the Agwi party who had been left uninjured, hailed a passing automobile and immediately drove to the office of the Company, reporting the assault to the General Manager, and thereupon, both men went to the Police Headquarters to report the robbery and assault, and also the direction in which the bandits had escaped. The competent authorities began an investigation, and the following day they successfully apprehended not less than fifteen persons, who were questioned and detained on suspicion. Investigations were further continued, successfully resulting in the apprehension of a man by the name of Pedro Rojas who confessed to having been one of the assailants, and who furnished the names of the other participants to the crimes mentioned. Shortly thereafter, the said Pedro Rojas attempted to escape from jail and was shot by the police in an attempt to recapture him. This man died in the hospital as a result of his wounds. After the death of Rojas, the *Ministerio Público*, requested the release of all the other suspects, alleging that the clues which once existed as proof of their guilt, had vanished; consequently they were released on bond by the Judge with the exception of one named Nicolás Ramírez against whom there were also very strong suspicions. It appears that this man escaped from a hospital to which he had been confined during his imprisonment, and that he was not reapprehended until more than two years later, after having perpetrated other crimes. It also appears that a Military Judge, in order to perform certain judicial investigations in a certain trial which he was then conducting requested the civil judge who conducted the proceedings, to place Nicolás Ramírez under his charge, and that the said Ramírez in an attempt to escape while being taken from one court to the other, was shot and killed by the soldiers entrusted with his custody. Thereafter, no further steps were

taken in the proceedings started against the assailants of Almaguer, Clark and his companions, and therefore, as a result, no one was punished for the grave crimes herein set forth. The American Agency contends that this shows a serious negligence in the administration of justice by Mexico and thus renders its Government responsible for a denial of justice.

It is necessary first, to examine the alleged lack of protection in the region surrounding Tampico.

The American Agency has submitted the affidavits of several persons recording a list of robberies and assaults committed from 1918 until 1922, concluding therefrom that there were 28 cases of this nature in 1918, 20 in 1919, 8 in 1920, 9 in 1921, and 22 in the year 1922. There are statements in the aforesaid affidavits to the effect that the oil fields adjacent to Tampico were infested with outlaws, constituting a constant menace to life and property, and that the authorities did not take adequate steps to suppress this state of affairs; that while the Mexican Republic was practically at peace since 1921, the fields in the neighborhood of Tampico, however, were infested with marauders and bandits and that, although such facts could not have been unknown to the authorities in that region, the Federal Government did not take any practical steps to suppress this banditry. The respondent Government states that it was endeavoring to pacify the country after a revolt prolonged over a period of ten years, and that, in this connection it displayed unusual activity and diligence; that however, it was necessary to combat certain revolutionary groups as well as other small groups of outlaws and bandits; that the authorities, whenever the oil companies requested special armed guards in order to safeguard their money remittances, always were ready and willing to furnish, and did in a number of occasions furnish, said armed guards, and that particularly in the instant case, Rodolfo Saldaña, an employee of the Agwi Company, was, according to his own statement, warned by the police to give ample and timely notice concerning the day and hour in which the said transportation was to be effected, in order that full and adequate protection could be rendered.

In view of the meagerness of the evidence submitted regarding this point, the Commission is unable to conclude that Mexico is responsible for the failure to have rendered proper protection to the Tampico region in general, or to the deceased man in particular. The mere fact that in a certain nation or specific region thereof a high coefficient of criminality may exist, is no proof, by itself, that the government of such nation has failed in its duty of maintaining an adequate police force for the prosecution and punishment of criminals. In cases of this nature, it is necessary to consider the possibility of imparting protection, the extent to which protection is required, and the neglect to afford protection, and evidence as regards these elements is altogether lacking in the case under consideration.

In connection with the alleged negligence of the Mexican authorities in apprehending, prosecuting and punishing Almaguer's assailant the following facts mainly drawn from the evidence submitted by the Mexican Agency, are pertinent: the assault took place at about eight o'clock in the morning of September 15, 1922; the Police Headquarters at Tampico were notified shortly after the occurrences, and began to make the necessary investigations, in turn notifying the Second Court of First Instance of Tampico at 9.30 A. M. of the same day. The personnel of the said Police Headquarters proceeded to the scene of the crime, in order to obtain a view of the *locus*, and started to apprehend and examine several

suspicious persons and these by September 17 were sixteen in number. On September 19 the Court received from Police Headquarters the duly drawn preliminary declarations, and the persons who had been arrested. The Court also began an investigation on September 15, immediately taking the deposition of Clark and ordering the autopsy of Almaguer's body to be performed. From this moment, the Court diligently continued to act, and duly obtained the testimony of the persons arrested by the police and of others as well who appeared as suspicious to the said Court. On October 2, the detention of one of the guilty principals had already been effected, one Pedro Rojas, who confessed his guilt. From his statement it appeared that besides himself, Filiberto Lechuga, Eulalio Prieto, Pedro Díaz, Nicolás Ramírez, Pedro Rodríguez and Manuel Mora, were responsible for the assault, and that Julio Jeffries, Maurilio Rodríguez, Gerónimo Gutiérrez and Pío Gutiérrez were the concealers or the accessories. Three of these men named, Pedro Rojas, Julio Jeffries and Maurilio Rodríguez had already been arrested and declared to be formally imprisoned, the Judge hence issued a warrant for the apprehension of the others. Of these individuals, Eulalio Prieto, Nicolás Rodríguez, Manuel Mora, Gerónimo Gutiérrez and Pío Gutiérrez, were eventually apprehended, while Filiberto Lechuga, Pedro Díaz and Pedro Gutiérrez, the three principals, as well as Gabriel Martínez whose responsibility was secondary, were never apprehended.

It appears that after the death of Pedro Rojas resulting from his attempted escape, the *Ministerio Público*, representing the interests of society in the prosecution of crime, requested the release of all those held, alleging that the clues which existed as proof of their guilt had disappeared. It is shown that these requests were made before the Judge, the accused and their respective counsels being present. The Prosecuting Attorney vehemently expressed himself at the time of making these requests, in fact stating in one instance: "even though the public, once it has learned the facts through the exaggerated gossip of the court room loiterers, may accuse me as a faithless official. I shall face such criticism with a clear conscience, possessing as I do the certainty that the accused is innocent". Pedro Rojas apparently, died on December 23, 1922, and between January 12, and March 26, 1923 Gerónimo Gutiérrez, Martín Rodríguez, Pío Gutiérrez, Manuel Martín Mora, Vicente Rodríguez, Julio Jeffries, Marcial Godoy, Maurilio Rodríguez and Eulalio Prieto, were released on bond, Nicolás Ramírez, whose fate has been described, alone remaining on trial.

The American Agency has laid great stress on the release of the individuals above-mentioned, alleging that under every consideration such release was improper, inasmuch as sufficient circumstances existed to consider them guilty and inasmuch as they could not fall under the provisions of Article 20, sub-paragraph I of the Mexican Political Constitution of 1917, which in connection with the guarantees of the accused states the following:

"I.—He shall be set at liberty on demand and upon giving a bond up to ten thousand pesos, according to his personal resources and the seriousness of the offense charged, provided, that the said offense may not be punishable with penalty of more than five years, imprisonment; and without any further requisite than the placing of the stipulated sum at the disposal of the authorities or the giving of a mortgage bond or personal security sufficient to guarantee it."

The American Agency alleges that in accordance with the provisions of the Penal Code of Tamaulipas, the men who were accused of these criminal acts either as principals or as accessories, merited a penalty much

greater than five years. inasmuch as the case was one of highway robbery accompanied by violence, resulting in murder, with all of the aggravating circumstances, and that therefore, the Judge who granted liberty under bond, disobeyed the fundamental law of Mexico on this point. On the other hand, counsel for Mexico referred to Article 360 of the said Penal Code, which literally reads as follows:

"At whatever stage of the trial in which the grounds serving for decreeing detention of the preventive imprisonment, vanish, the accused or detained person shall be released, after he has been given a hearing, should he exist or be present; reserving the possibility to issue a new warrant of arrest, if there should later appear sufficient grounds therefor in the course of the trial. In this case the release shall be granted under a bond of not less than 20 and not over 100 pesos, except in the case of indigents who shall be released on parole."

It is not for this Commission to decide whether or not Article 20, Section I, of the Mexican Political Constitution of 1917 was or was not violated. Inasmuch as this article is concerned with a guarantee, it is conceivable that it fixes only the minimum guarantee which shall be granted the accused in connection with this release on bond. Therefore, a minimum guarantee alone being involved, it is doubtful whether or not a state statute of the Mexican Federal Union more extensively granting the accused a release on bond, that is to say, in those cases in which the penalty is greater than five years, is or is not unconstitutional. But aside from this it appears that this question need not be decided in the instant case inasmuch as in order to decide whether or not the Mexican Judge acted lawfully, it is sufficient to refer exclusively to the provisions of Article 360 mentioned above. Indeed, under this article, the accused may be released whenever the grounds for ordering the detention or the preventive imprisonment may have vanished, and therefore the pertinent thing is to ascertain whether or not, in the case of the persons accused of the assault which resulted in Almaguer's death, the grounds did or did not vanish. Maurilio Rodríguez was declared formally imprisoned inasmuch as from the statements of some of the witnesses it was established that he was possessed of information concerning the contemplated assault prior to its commission, and also that he had even entrusted his own brother with the delivery of certain suspicious messages; above all, because after the occurrences, although apparently knowing that "El Pericón" was one of the accused, he, even being a soldier, did not make the proper denunciation and thus constituted himself an accessory. According to the confession of Pedro Rojas, Maurilio Rodríguez was the person who invited him to be a participant in the assault, thus rendering him an intellectual perpetrator thereof. Maurilio Rodríguez in his confession admitted that he knew of the assault twenty days before it occurred, and that he had duly communicated this information to Comandante Benavides. The *Ministerio Público* in applying for the release of this person on bond, stated that the only reason that existed for the detention of Rodríguez was a number of contradictions occurring between his own declarations and his brother Vicente's, but that these however, were soon harmonized, and that therefore, except for the sole statement of the witness Gabriel Martínez, nothing had been left pending against this man. Inasmuch as the grounds existing against Maurilio Rodríguez have already been mentioned, the contention of the *Ministerio Público* appears wholly unwarranted by the facts, nor is there any evidence in the whole record submitted by the Mexican Agency to show that such grounds did in fact vanish. Therefore,

it is reasonably apparent that the release of Maurilio Rodríguez was unlawful.

The same may be said in regard to Eulalio Prieto, alias "El Tejano". There exists against this individual the confession of Rojas, pointing to him as the other principal in the assault. Rojas was living in the house of the mother-in-law and the wife of "El Pericón". It is true that "El Pericón" altered his first confession with respect to "El Tejano", by denying that his preliminary statement was true, but the Judge observed that this denial made in the presence of "El Tejano", was accompanied by visible signs of fear, and that obviously, he only tried to save the latter exactly as he had tried to do with the others who had been detained. A witness named Licona testified that "El Tejano" slept in the house in which the assault was planned on the night previous thereto, and that furthermore, "El Tejano" had been subsequently apprehended in that very same house. The *Ministerio Público*, in requesting "El Tejano's" release on bond, alleged that all these suspicious circumstances had been contradicted by the testimony of several other witnesses who declared that "El Tejano" had been ill for several days prior to the assault at another place which he had never left. There is no record of the testimony of these witnesses referred to by the *Ministerio Público* or of any confrontation of them with "El Tejano", or of any confrontation of the latter with the other defendants.

Manuel Martín Mora, another suspect, according to Rojas' confession, was formally imprisoned and upon confrontation with Rojas himself, the latter ratified his statement to the effect that the said Mora was in the automobile of the assailants. There is no record to show that these clues vanished, and the same conclusion may be reached as regards Julio Jeffries, Gerónimo Rodríguez, Pío Rodríguez and Gabriel Martínez who were released, as already stated, shortly after the death of Rojas in a certain hearing in which no record exists as to what other evidence could have destroyed the strong suspicions existing against the individuals mentioned. As already stated, the record submitted by Mexico discloses a number of deficiencies after the death of "El Pericón", occurring on December 23, 1922. The releases on bond, based upon the lack of evidence were granted beginning on January 12, but between these two dates, it seems that no proceedings were carried on to obtain further evidence. During this period there were a large number of persons detained against whom weighty suspicions existed, and there is no evidence to show that the Judge undertook to make among them the confrontations which under Mexican law are necessary for the investigation of the actual responsibility falling upon each of them.

Counsel for Mexico argued that the judicial record filed by his Government in this case is not complete being solely a digest of the outstanding steps of the trial. Such assertion is well founded, but the Commission should consider that since the allegation of the American Agency was to the effect that in certain important matters the proceedings revealed either negligence or a violation of Mexican law, the proper thing for the Mexican Government was to show by adequate evidence that such was not the case. As disclosed by the digest in question submitted as evidence, the judicial proceedings are in existence, and the Mexican Agency could have introduced evidence tending to show the disappearance of the suspicious grounds, existing in the said proceedings, against the suspected principals and accessories of the crimes. The Commission is constrained to conclude as to the questions of legality of the release of the prisoners on bond and the investiga-

tion of the delinquency itself that a culpable negligence has been shown to exist.

Under the conditions above stated, it may be said that there was no complete prosecution and punishment of Almaguer's assailants, but taking into account that the proceedings in their initial stage up until the date of Pedro Rojas' death do not disclose any deficiency; and that at least two of those appearing as principals responsible for the crimes were seriously prosecuted, as shown by the fact of their death as a result of an attempted escape, and also taking into account that the Commission has expressed in the case of *Laura M. B. Janes*, Docket No. 168,¹ its opinion to the effect that in cases of denial of justice it would take into account the different shades thereof, ["more serious ones and lighter ones (no prosecution at all; prosecution and release; prosecution and light punishment; prosecution, punishment, and pardon)"] it deems that the claimant may properly be awarded in this instance the sum of \$7,000.00, inasmuch as there was a certain serious prosecution of some persons, while as regards others there was a negligent prosecution and no punishment.

Decision.

The United Mexican States shall pay to the United States of America on behalf of Elvira Almaguer, the amount of \$7,000.00 (seven thousand dollars), United States currency, without interest.

FRANK L. CLARK (U.S.A.) *v.* UNITED MEXICAN STATES

(*May 13, 1929. Pages 300-301.*)

FAILURE TO PROTECT.—EXISTENCE OF LAWLESSNESS.—DENIAL OF JUSTICE.
FAILURE TO APPREHEND OR PUNISH.—RELEASE OF SUSPECTED CRIMINALS.
—MEASURE OF DAMAGES. Claim arising under same circumstances as those set forth in *Elvira Almaguer* claim *supra* allowed.

Cross-reference: Am. J. Int. Law, Vol. 24, 1930, p. 631.

(*Text of decision omitted.*)

GENIE LANTMAN ELTON (U.S.A.) *v.* UNITED MEXICAN STATES

(*May 13, 1929. Pages 301-308.*)

JURISDICTION. Jurisdiction is the power of a tribunal to determine a case in accordance with the law creating the tribunal.

CONFLICTING JURISDICTION OF SPECIAL CLAIMS COMMISSION.—RESPONSIBILITY FOR ACTS OF MILITARY FORCES. Claimant's husband was tried by an extraordinary court-martial, was sentenced to death for crime of aiding

¹ See page 82.

and abetting a rebellion, and was executed by Carranza forces. At the time in question neither the Federal courts nor the Congress functioned. Claimant Government contended constitutional guarantees were ignored by military court. *Held*, claim not within the jurisdiction of tribunal.

Cross-references: Annual Digest, 1929-1930. pp. 380, 386.

Commissioner Nielsen, for the Commission:

This is a claim in the amount of \$100,000.00 made by the United States of America against the United Mexican States in behalf of Genie Lantman Elton, widow of Howard Lincoln Elton, who was shot in the State of Oaxaca, Mexico, in 1916, in accordance with the sentence of an extraordinary court-martial.

In behalf of Mexico it is asserted that the Commission has no jurisdiction in this case. Pleas to the jurisdiction of this Commission have often been invoked; they have seldom been sustained. The contentions now made with respect to this point probably raise questions more doubtful than any presented in any other case in which the jurisdiction of the Commission has been challenged. A claim involves the assertion of rights under international law or under stipulations of treaties and a denial of rights so asserted. Without entering at length into the very considerable amount of detail found in the Memorial, the Answer and the Briefs, it is possible to indicate the nature of this claim by a brief summary of the salient contentions advanced by each Government.

Elton was a mining engineer residing at the city of Oaxaca in the State of Oaxaca. He was accused of furnishing secret information to General Reyes, the leader of a military movement against the government of General Carranza. It was also alleged that Elton was in correspondence with Guillermo Meixueiro, a so-called "rebel chief". The information before the Commission with respect to the nature of the proceedings against Elton is very incomplete. The record of the trial has not been produced by either Agency. Accompanying the Mexican Answer are copies of numerous communications exchanged by Mexican officials from which it appears that the record could not be found.

However, a copy of the sentence imposed on Elton accompanies the Memorial of the United States. In that sentence it is recited that Elton was convicted under the so-called "Juarez decree" of January 25, 1862. It would seem probable that this decree covers the offense with which Elton was charged, but the United States contends in its brief that this decree could not properly be invoked against Elton. It is asserted that the decree was promulgated by General Juarez with a view to dealing with the situation in Mexico growing out of the Maximilian invasion and could have no application to the case of an American citizen arising in 1916. It is further contended that the decree was in derogation of the Mexican Constitution of 1857. With respect to this point citation is made of Article 23 of that Constitution providing that capital punishment is abolished for political offenses, and also to Article 13 of the Constitution providing that military jurisdiction shall be recognized only for the trial of criminal cases having direct connection with military discipline.

It is pointed out that, although Article 29 of the Constitution might be considered to contemplate the suspension by the President of Mexico of constitutional guarantees, such action could be taken, conformably to that Article, only "with the advice of the council of ministers and with the

approval of the Congress, and, in the recess thereof, of the Permanent Committee"; that such suspension could be "only for a limited time"; and that there could be no suspension of guarantees "ensuring the life of man".

With respect to the action of General Carranza in issuing on May 14, 1913, a decree putting into effect the so-called Juarez decree of 1862, it is argued that this action evidences the non-existence of the Juarez decree, and that General Carranza had no right at this early stage of his revolutionary activities, in 1913, to make decrees for the whole of the Republic of Mexico, and what is more important, had no right to set aside the Constitution of 1857 by the promulgation of a decree nullifying guarantees of the Constitution with respect to human life. This point as to nullification of guarantees with respect to life was particularly stressed in oral argument, and it was pointed out that General Carranza had shown in several ways that he intended to uphold the Constitution of 1857 and to compel the observance of it. Citation was made to Article 128 of that Constitution providing that the Constitution should "not lose its force and vigor, even though its observance might be interrupted by rebellion".

While some argument was made in the brief of the United States with respect to possible irregularities and prejudice in connection with the trial of Elton, emphasis was laid in oral argument on the contention that neither President Juarez nor General Carranza had any right to suspend constitutional guarantees with respect to human life, and that therefore Elton was sentenced and executed in derogation of Mexican law. With respect to this point reference was made to an opinion rendered by the military counsel to the court, Colonel Aurelio M. Pena, in which it was recommended that the decision of the court be revoked. Reference was made in this opinion to Article 23 of the Constitution of 1857 abolishing the death penalty for political offenses, and also to Article 38 of the Mexican law with respect to foreigners, providing for the expulsion of foreigners participating in rebellion.

In behalf of Mexico it was contended that the crime with which Elton was charged was established beyond a doubt, and that there was no question with respect to the lawfulness of the arrest and trial of the accused. It was argued that, although Article 23 of the Constitution of 1857 did abolish capital punishment for political offenses, Elton's offense was not merely political, but a serious crime of a military nature for which the Constitution did not abolish the death penalty. It was contended that both the Juarez decree of 1862 and the Carranza decree of 1913 putting into effect the Juarez decree were legal and were unobjectionable from the standpoint of international rights. The opinion of the counsel to the court was merely legal advice, it was asserted, and in no way binding on the court.

Particular emphasis was placed on the disturbed conditions in Mexico in 1916, and it was argued that at the time Elton was tried Mexico was in an abnormal political situation—in the midst of civil war; that the country was not under a constitutional régime at the time, but under an extra-constitutional power, governed by a revolutionary, *de facto* government; that therefore the Constitution of 1857 and all its civil rights and guarantees were not in operation; and that Elton was lawfully tried under the Juarez decree of January 25, 1862, put into effect by a decree of General Carranza in 1913.

With respect to the question of jurisdiction which was raised for the first time in the Mexican brief, it was contended by counsel for the United States

in oral argument that, while by the so-called Special Convention of September 10, 1923, Mexico had undertaken to make compensation in satisfaction of certain claims *ex gratia*, the claims coming before the so-called General Claims Commission of September 8, 1923, must be determined in accordance with principles of international law; in other words, the General Claims Commission is a court of international law, while the Special Commission may consider claims outside of international law and decide them in accordance with its views of justice and equity. The instant claim, it was argued, is a claim predicated on a denial of justice growing out of an improper criminal trial. It is therefore a case, it was stated, which should properly be adjudicated by the General Claims Commission through the proper application of international law. Since Mexico has a right to have claims arising under international law adjudicated by the General Claims Commission, the United States must have that same right, it was said, or the General Claims Convention lacks mutuality.

The activities of military agencies were stressed in the argument made in behalf of Mexico with respect to the question of jurisdiction. The line of argument may be illustrated by the following extract from the Mexican Brief:

"From the allegations in the Memorial, in the Answer, in the Reply, in the Brief of the claimant Government and the proofs presented by both Governments the following fundamental facts appear:

"1.—That the crime for which Elton was tried and sentenced was that of spying against the Mexican *Federal forces*, and aiding or conniving directly with *revolutionary forces* which were in rebellion against the Federal Government.

"2.—That he was tried by a *Court Martial*, that is a military court, composed wholly of *military officers* of the *Federal Army*.

"3.—That the sentence imposed upon him was then reviewed and confirmed by the *Military Commander of the Federal Army at Oaxaca*.

"4.—That he was shot by a *military squad of federal soldiers*.

"5.—That all these facts occurred between the period of time from *August 1916, to December 1916*.

"The preamble of the General Claims Convention of September 8, 1923, expressly exempts from the jurisdiction of the General Claims Commission: 'the claims for losses or damages growing out of the *revolutionary disturbances in Mexico which form the basis of another and separate Convention*'.

"On the other hand, Article III of the Special Claims Convention of September 10, 1923, provides:

"The claims which the Commission shall examine and decide are those which arose during the revolutions and disturbed conditions which existed in Mexico covering the period from *November 20, 1910, to May 31, 1920*, inclusive, and were due to any act by the following forces:

"(1) *By forces of a Government de jure or de facto*'.

"It is *obvious, apparent and conclusive* therefore that the present claim does not belong to the jurisdiction of the General Claims Commission. The case accrued within the period of time between November 20, 1910 to May 31, 1920. It is founded by claimant government on acts executed by forces belonging to the Carranza Government, which was at that time a *de facto* government. Finally, it arose from acts done by Elton directly connected with the 'recent revolutions' to which Article I of the General Claims Convention refers."

The distinction which it was sought to make in the argument in behalf of the United States with respect to cases arising under international law and therefore cognizable by the General Claims Commission and other cases outside of international law which may be decided by the Special Claims Commission is not entirely clear. It would seem to be unnecessary

for the Commission to concern itself with political reasons or other reasons which may have prompted the two Governments to conclude the Special Claims Convention with the purpose of adjudicating certain claims on the basis of an *ex gratia* settlement and without the application of rules or principles of international law. But it seems to be clear that the jurisdiction of each Commission was not primarily defined on the basis of some grouping of claims from the standpoint of susceptibility of determination under international law. The claims generally described in the Special Claims Convention would be susceptible of determination by an international tribunal applying international law. Thus, it may be noted that the first category of claims mentioned in Article III of that Convention refers to claims due to acts of forces of a *de jure* government. It being assumed that this category covers claims growing out of the destruction or appropriation of property by soldiers, it is not preceived why such claims could not be submitted to an international tribunal applying international law. Claims of this kind which have frequently been passed upon by international tribunals involve the application of rules or principles of law with respect to wanton or unnecessary destruction of property, or the destruction of property incident to the proper conduct of military operations, or the taking of property with or without compensation. The second category of claims referred to in this Article relates to claims growing out of acts of revolutionary forces. Such claims, which also have often been submitted to international tribunals, raise legal issues with respect to the capacity and willingness of a government to give protection against depredations committed by forces of this character.

While it is somewhat difficult to follow the reasoning employed in the argument in behalf of the United States, it is at least equally difficult to follow the conclusions arrived at in the Mexican brief to the effect that it is obvious and conclusive that the instant claim is not within the jurisdiction of the General Claims Commission.

Jurisdiction is the power of a tribunal to determine a case in accordance with the law creating the tribunal or a law prescribing its jurisdiction *U. S. v. Arredondo*, 31 U. S. 689; *Rudloff Case, Venezuelan Arbitrations of 1903, Ralston's Report*, pp. 182, 193-194; *Case of the Illinois Central Railroad Company*, Docket No. 432,¹ before this Commission. By the Convention of September 8, 1923, which created this Commission and defined its jurisdiction, the two Governments agreed to settle all outstanding claims since July 4, 1868, that is, since the date of the last general arbitration treaty concluded between them, there being excepted, however, from this settlement claims "arising from acts incident to the recent revolutions". The claims excepted are described in very meagre and general language. When there is need of interpretation of a treaty it is proper to consider stipulations of earlier or later treaties in relation to subjects similar to those treated in the treaty under consideration. Pradier-Fodéré, *Traité de Droit International Public*, Vol. II, Sec. 1188, p. 895. By examining the Convention of September 10, 1923, it is found that excepted claims are there more specifically described. However, cases presented to the Commission have revealed much difficulty in arriving at definite, satisfactory conclusions with respect to the intent of the contracting parties. This fact is certainly amply illustrated by the presentation of conflicting views advanced by representatives of each Government in the presentation of cases. While it would seem to be clear that

¹ See page 21.

the distinction which it is undertaken to make in behalf of the United States in the instant case is not conclusive, it seems to be equally clear that it is not obvious as contended in behalf of Mexico that it was the intention of the contracting parties that Mexico should settle *ex gratia* a claim which appears to be in the nature of a case predicated upon allegations of a denial of justice by a Mexican judicial tribunal.

Counsel for Mexico in oral argument referred to the forces of General Carranza as the forces of a *de facto* government. From the standpoint of international law a government may be regarded as *de jure* by virtue of the fact that it is *de facto*. However, in the light of recorded historical facts it appears to be clear that in 1916 General Carranza, while he may have gained the mastery of practically all of Mexico, considered himself to be a *de facto* ruler and his government a *de facto* government. It is interesting to note that in a communication under date of October 19, 1915, Secretary of State Lansing informed a representative of General Carranza in Washington that the President of the United States extended "recognition to the de facto Government of Mexico, of which General Venustiano Carranza is the Chief Executive". *Foreign Relations of the United States*, 1915, p. 771. In a communication of August 31, 1917, President Wilson acknowledged receipt of a letter dated May 1st of that year in which General Carranza announced his assumption of the office of President of the United Mexican States. *Foreign Relations of the United States*, 1917, p. 943.

Whatever distinction it may have been desired to make by these different forms of recognition, so-called, it would appear that the Commission is justified in considering that the instant claim is predicated upon charges of wrongful action on the part of military authorities carrying on their activities in Mexico at a time when all the agencies of the Constitutionalist Government were not discharging their functions in a manner prescribed by the existing Constitution. Neither the Federal courts nor the Congress functioned. General Carranza still styled himself the "First Chief of the Constitutionalist Army in Charge of the Executive Power". See *Codificación de los Decretos del C. Venustiano Carranza, Primer Jefe del Ejército Constitucionalista Encargado del Poder Ejecutivo de la Unión*. Had the instant case been predicated on allegations with respect to wanton shooting of an American citizen by forces of General Carranza, it would seem to be clear that it would be excluded from the jurisdiction of this Commission. The Mexican Government contends that, since Elton was tried by a military court whose sentence was confirmed by a military commander, and since the accused was shot by soldiers, the situation is the same. The Commission, confronted by the uncertainty of the language found in the two Conventions which has never been clarified by any documents relating to the negotiation of the Conventions or other evidence which it is permissible to use in interpreting a treaty, is constrained to sustain that view.

Decision

The Commission is without jurisdiction in this case.

FRANK LAGRANGE (U.S.A.) *v.* UNITED MEXICAN STATES*(May 13, 1929. Pages 309-312.)*

CONFLICTING JURISDICTION OF SPECIAL CLAIMS COMMISSION.—CONFISCATION BY MILITARY FORCES. Claimant's goods stored in warehouse were lost as a result of the seizure of such warehouse by General under the direction of General Carranza at a time when latter was a revolutionary military leader. *Held*, tribunal has no jurisdiction, since claim is covered by Article III of the Special Claims Convention of September 10, 1923.

Commissioner Nielsen, for the Commission:

Claim in the amount of \$5,472.22, United States currency, is made in this case by the United States of America against the United Mexican States in behalf of Frank LaGrange, the sum claimed being the value, it is stated, of property of the claimant which it is asserted was confiscated by order of M. Chao, a former Governor of the State of Chihuahua.

It is alleged in the Memorial that in December, 1913, the claimant was engaged in business in Ciudad Juarez, State of Chihuahua, Mexico, and that on or about December 18 of that year he ordered the goods in question from Domingo Trueba of that city. It is further alleged that the goods were paid for and were placed in a warehouse for storage pending delivery to LaGrange; that the warehouse was confiscated under order of M. Chao, and that on January 14, 1914, the claimant was informed by Chao that the goods would not be delivered to the claimant, as they were stored in a confiscated house.

In behalf of Mexico it is alleged that as a result of an investigation conducted by the Attorney General of the State of Chihuahua, no proof was found of the transactions underlying the claim. Therefore the allegations of the Memorial are generally denied. It is contended that the Commission has no jurisdiction in the case.

In order to determine the question of jurisdiction it is of course important to determine the precise nature of the claim described in the Memorial. The information furnished to the Commission by each side is unsatisfactory.

The United States has produced a copy of a communication under date of January 14, 1914, addressed by M. Chao to Francisco LaGrange which reads as follows:

"Correspondencia Particular del Gobernador del Estado de Chihuahua,

CHIHUAHUA, *Enero 14 de 1914.*

SR. FRANCISCO LAGRANGE,

Presente.

MUY SEÑOR MÍO: Me permito manifestarle que por orden de este Cuartel General no serán entregadas las mercancías que ampara la factura adjunta No. 8064, por estar confiscada la casa de donde proceden.

Sin otro asunto, soy de Ud. afmo. atto. y S. S.

M. CHAO.

DIVISION DEL NORTE

Cuartel General."

Whatever may be the precise information which it was intended to convey by this communication, it seems to be certain that there was an interference with the claimant's property in the nature of a confiscation. However, it is not altogether clear whether such interference took place as a consequence of what might be called military activities, or whether it resulted from some action taken by the Governor entirely distinct from any military duties which he may have had. An affidavit made by LaGrange which accompanies the Memorial throws little light on this subject. It is said in this affidavit that the goods in question were confiscated during the incumbency of the Carranza-Villa faction in Mexico at the time when that faction had control of the Government, and that they were confiscated by General M. Chao who was recognized as Governor under that faction.

Mexico has thrown no light on the transactions in question either by testimony of Chao, who it appears died in 1923 or 1924, or the testimony of any one else possessing information regarding the matter. The evidence presented by the Mexican Agency relates to certain proceedings instituted before the Civil Court of First Instance of the District of Bravos, State of Chihuahua, with respect to the claim presented in behalf of LaGrange. From the records of these proceedings it appears that no record of the confiscation of the goods in question was found in the files of the military garrison of Ciudad Juarez or in the files of the office of the Municipal President. It further appears that three persons in Ciudad Juarez were asked certain questions to ascertain whether LaGrange had a business in Ciudad Juarez and whether Domingo Trueba had a business in that city and whether the Government had confiscated a warehouse in which the claimant's goods were stored. The answers given by each of these persons showed that they had no knowledge of any of the matters with respect to which they were questioned.

The objection to the jurisdiction made by Mexico is based on two grounds: (1) that the nationality of the claimant has not been proved, and (2) that, as stated in the Answer, the claim "is one of those claims expressly exempted from its jurisdiction and which, according to Article III of the Special Claims Convention of September 10th, 1923, must be submitted to the exclusive consideration of the Special Claims Commission created under the last mentioned Convention".

The objection with respect to the proof of nationality of the claimant which should have been raised in the Answer was first made in oral argument by counsel for Mexico. It is unnecessary to pass upon it in view of the conclusions of the Commission with respect to the other jurisdictional issue which has been raised. From historical information laid before the Commission it appears to be clear that Chao was an adherent of General Carranza. Evidently as such adherent he had the rank of a General. Doubtless as a so-called Governor he performed certain duties of a civilian character, but it may be assumed that as a supporter of the Carranza movement he was subject to the direction of General Carranza, who, in the early part of 1914, was styled by himself as "First Chief of the Constitutionalist Army". See *Codificación de los Decretos del C. Venustiano Carranza. Primer Jefe del Ejército Constitucionalista Encargado del Poder Ejecutivo de la Unión*. Whatever phraseology may be used to describe the status of General Carranza at that time, it would seem that he must certainly be regarded as having been a revolutionary military leader. The Commission is of the opinion that this claim based on an interference with property in the nature of a confiscation by one of General Carranza's subordinates falls within Article III

of the so-called Special Claims Convention, and that the Commission is therefore constrained to hold that the claim is not within its jurisdiction.

Decision.

The Commission is without jurisdiction in this case.

JOSEPH D. KNOTTS (U.S.A.) *v.* UNITED MEXICAN STATES

(May 13, 1929. Pages 312-314.)

DENIAL OF JUSTICE.—ILLEGAL ARREST. Claimant was arrested and imprisoned for short period of time for non-payment of taxes. Measures in question were not authorized by Mexican law. Claim *allowed*.

CRUEL AND INHUMANE IMPRISONMENT. Evidence *held* not to justify charge that claimant suffered great hardships during imprisonment.

MEASURE OF DAMAGES.—PROXIMATE CAUSE. Evidence *held* not to show that claimant's heart disease was permanently aggravated by arrest and imprisonment.

The Presiding Commissioner, Dr. Sindballe, for the Commission:

In this case claim in the sum of \$10,000.00, United States currency, is made against the United Mexican States by the United States of America on behalf of Joseph D. Knotts, an American citizen, for alleged illegal arrest and detention by Mexican authorities in the town of Guadalupe y Calvo, Chihuahua, Mexico, and for alleged harsh and humiliating treatment in connection with the arrest and during the detention.

Knotts was in possession of a tract of land situated in the Mina District of Chihuahua, which he, together with certain other persons had purchased in 1913 or 1914 and had paid for, without the necessary documents of title having been executed. Knotts had paid the taxes on the land from March, 1914, to April, 1919, amounting to some ten or fifteen pesos per month. On or about January 1, 1921, demand was made on Knotts by the Collector of Taxes at Guadalupe y Calvo for payment of the taxes then due. Knotts informed the Tax Collector that he could not pay until he had obtained the necessary money in Parral, that he could not go to Parral immediately, but that as soon as he could do so he would pay the amount due. He states that the Tax Collector agreed to a postponement of the payment.

In the morning of April 15, 1921, Knotts, while en route to Parral, made a stop at Guadalupe y Calvo and visited an American friend who lived there. Shortly after Knotts had entered the house of his friend, the officer in command of the rural forces at the town, accompanied by four or five armed soldiers, came and took Knotts to the military headquarters. Here Knotts was detained for three hours, and it is alleged that he was placed in damp and unsanitary quarters, and that he suffered severely from the intense cold. After three hours had elapsed he was conducted to the office of the Municipal President, by whom he was informed that he would not

be released until he had paid his taxes. He was, however, granted the freedom of a part of the city, and on the following day he obtained his freedom on giving bond for the payment of the amount of taxes due.

Knotts, who was some sixty years of age, was suffering from a heart disease, and it is alleged that this became aggravated as a result of the treatment he received at the hands of the Mexican authorities.

It is alleged in the Mexican Answer that the arrest of Knotts took place pursuant to an order of *arraigo* issued by the Municipal President. According to Mexican law, however, failure to pay taxes does not warrant the imposition of arrest or *arraigo*, and the imposition of an *arraigo* does not give a right to arrest the person upon whom it is imposed, an *arraigo* being only a precautionary measure to the effect of forbidding a person to leave a certain jurisdiction. Further, an *arraigo* cannot be imposed without the interposition of the judiciary. The treatment accorded Knotts was therefore clearly in contravention of Mexican law.

The evidence submitted does not show that Knotts suffered great hardships during his detention. Neither can it be considered as sufficiently proven that Knotts' heart disease was permanently aggravated by what happened, although, according to the statement of a medical expert, this may have been the case. The Commission is of the opinion that an amount of \$300.00, United States currency, may properly be awarded in favor of Knotts as compensation for the illegal treatment accorded him.

Decision

The United Mexican States shall pay to the United States of America on behalf of Joseph D. Knotts the sum of \$300.00 (three hundred dollars), United States currency, without interest.

MARY EVANGELINE ARNOLD MUNROE (U.S.A.) *v.* UNITED MEXICAN STATES

(May 17, 1929. Pages 314-317.)

AMENDMENT OF CLAIM. Claim for death of an American subject was originally filed in name of father of decedent. Later tribunal granted motion to substitute claimant in his place and stead, designating as claimant the sister and surviving next-of-kin of decedent. *Held*, such substitution of parties was proper and claimant entitled to present claim. No issue of late filing involved.

NATIONALITY, PROOF OF. Evidence of American nationality of claimant and her relationship to decedent *held* sufficient.

WRONGFUL DEATH, COLLATERAL RELATIVES AS PARTIES CLAIMANT. Sister of murdered American subject *held* entitled to present claim.

RESPONSIBILITY FOR ACTS OF FORCES.—MOB VIOLENCE.—DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH. Claim arising under same circumstances as those set forth in *Thomas H. Youmans* claim *supra* allowed.

Cross-reference: Annual Digest, 1929-1930, p. 178.

(Text of opinion omitted.)

MARY M. HALL (U.S.A.) v. UNITED MEXICAN STATES

(May 17, 1929, concurring opinion by American Commissioner, May 17, 1929.
Pages 318-324.)

DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH. A track motor-car operated by claimant's husband collided with rear of train and was thrown off the track. Some evidence indicated he was alive for a few moments after crash. Other evidence indicated a cause of or contributing factor to his death may have been stoning by a Mexican subject. It appeared that he had a weak heart. Investigation was made by authorities and some arrests were made. Two very young children were only witnesses of stoning. No one was ever tried or punished for the stoning. *Held*, denial of justice not established.

The Presiding Commissioner, Dr. Sindballe, for the Commission :

In this case claim in the sum of \$25,000.00, United States currency, is made against the United Mexican States by the United States of America on behalf of Mrs. Mary M. Hall, an American citizen, for failure on the part of the Mexican authorities to prosecute and punish one Remigio Ruelas, who is alleged to have stoned and killed the son of the claimant, Charles J. Hall.

The facts out of which the claim arises are the following:

On the morning of March 22, 1926, Charles J. Hall, who was employed in the engineering department of the Southern Pacific Railroad Company, was proceeding down the railroad from a station named Cutla toward the station of Ixtlán, State of Nayarit, Mexico, operating a track motor car and following up a train which had preceded him. The train arrived at the station of Ixtlán at eight o'clock in the morning, and stopped there. About half an hour later, Hall's car was seen coming down the railroad and approaching the caboose of the train, Hall lying motionless face down over the motor. In order to avoid a collision between the caboose of the train and Hall's car, signal was given for the train to go ahead, but before the brakes could be released and the train put in motion, Hall's car collided with the caboose and was thrown off the track. Hall was picked up by an American friend. An eye-witness later testified that he saw Hall gasp when he was picked up, but immediately after it appeared that Hall was dead.

The assumption arose among the onlookers that Hall had been stoned. Therefore, the train was immediately ordered to back up the track for the purpose of obtaining information with regard to Hall's death, and four soldiers were ordered to mount the caboose. At the town of Méxpan Hall's hat was turned over to the investigating party by one Florencio Carmona, who had picked it up. On a street corner of the same town two individuals, who later turned out to be Remigio Ruelas and Jesús Flores, were seen. One of the trainmen pointed at these individuals, who immediately started to run. The soldiers pursued them and fired two shots at them, but without hitting any of them, and without succeeding in capturing them. Later Ruelas was found hiding in a mill and was arrested.

Two boys were found who testified that Ruelas had thrown a stone at Hall when he passed Méxpan, and that Ruelas was accompanied by Flores at the time.

The Municipal President of Ixtlán went to the station of the town as soon as he learned of the incident. He informed the *Ministerio Público* of what had happened, stating that Ruelas was captured and mentioning the testimony of the two boys, one of whom was Jesús Machuca, it not being possible to ascertain the name of the other. Ruelas was brought before the judge of first instance. He denied having thrown a stone and endeavored to establish an alibi, involving himself in certain contradictory statements. Some witnesses testified as to the movements of Ruelas on the day in question and his character. The legal medical expert attached to the Court was ordered to make a description and autopsy of Hall's corpse. According to the opinion rendered by him Hall had a weak heart and his death was caused by heart failure. Besides two small excoriations on the left thumb Hall's body showed three wounds, one near the right temporal region, one on the left temporal region, and one on the upper part of the helix of the left ear. The three wounds were superficial, and not such as to endanger a normal man's life. Excepting the one first described, the wounds were produced after death. With regard to the first described wound, it could not be said whether it was produced during life or a short time after death. In case it was produced during life, it might have occasioned the heart failure.

Hall's body was also examined by the surgeon of the Southern Pacific Railroad Company, Dr. Fuller, who arrived at substantially the same conclusion as the medical expert of the court.

On March 26, 1926, at the recommendation of the *Ministerio Público*, Ruelas was released, as the Constitutional period within which to determine the release or the formal imprisonment of a prisoner was about to expire, and as it was found that there did not appear data sufficient to establish a *corpus delicti* of homicide or to indicate the probable guilt of the accused.

On March 27, Florencio Carmona, the man who picked up Hall's hat, and who had been arrested and turned over to the Court by the Chief of Military Operations of the State, was examined by the judge and confronted with several witnesses. On March 29, Carmona was released. No further action appears to have been taken by the Court. Flores was never captured, and the two boys who testified that they had seen Ruelas throw a stone were not brought before the Court.

The United States contends that the failure to take the testimony of the children and the finding that no *corpus delicti* of homicide had been established constitute a denial of justice for which Mexico must be responsible under international law.

The contention of the United States might be justified if it could be assumed that the court record reflects all the activity displayed by the Mexican authorities on the occasion of Hall's death. From a letter written by the Mexican Minister of Foreign Affairs to the American Ambassador at Mexico City it appears, however, that this is not the case. It appears that the authorities questioned both of the boys who had seen Ruelas throw a stone, and in view of the fact that the boys were very young—José Machuca, who made the most detailed statements, was 6 years of age—the taking of their testimony outside of the Court for the purpose of deciding whether or not a formal trial should be instituted can hardly be censured. It is mentioned in the said letter that José Machuca did not say "in any of his statements" that he had seen Ruelas hit Hall. It is further mentioned that the place from which the children claimed to have seen Ruelas throw a

stone was the top of an embankment, which was about three meters above the railroad track, that a wound produced by a rock thrown from this height would have certain characteristics, and that the medical expert verbally reported that the wound presented by Hall had different characteristics giving the appearance of having been produced by something sharp, and that individuals who saw Hall's motor collide with the caboose of the train had stated that Hall's head struck some metal. From these and certain other particulars regarding Hall's hat the conclusion is drawn that "even had Remigio Ruelas thrown a stone, it could not possibly have occasioned the death of Mr. Hall."

The Commission is not called upon to decide whether the conclusion thus arrived at by the Mexican authorities is right or wrong. At any rate, it is not so clearly wrong that a denial of justice can be predicated thereon. Neither can it be said that the failure to bring Ruelas to trial constituted a denial of justice. It would seem that, with the exception of Flores' testimony the authorities had such evidence of importance as might be expected to be available. The report of the medical expert tended to exculpate Ruelas. That the latter had fled and hid and afterwards tried to establish an alibi could hardly be conclusive against him, especially in view of the fact that he, who was only 18 years of age, was pursued and shot at by soldiers.

Nielsen, Commissioner :

While I am not disposed to dissent from the views of my associates to the extent of expressing the opinion that a pecuniary award should be rendered in this case, I do not agree with the conclusions expressed in the opinion written by the Presiding Commissioner.

It should be borne in mind that the claim is grounded on contentions that there was a failure of Mexican authorities to take proper steps to apprehend and punish the persons responsible for the death of the claimant's son. I think that there is strong evidence that some one was responsible for the death of Hall. In any event, although there was no trial of anyone against whom evidence directed suspicion, and therefore are no records such as a trial would develop, it seems to me that even the investigation conducted with respect to the tragedy strongly indicated that a crime had been committed. In the absence of a trial of anyone, it is useless in the light of the information now available to speculate as to what the precise character of the crime may have been—whether Hall was killed by a stone thrown at him or whether he was disabled, so that he lost control of the car which he was driving and consequently lost his life.

In a case of this kind I do not consider that a proper solution of issues can be reached by picking out this or that detail and formulating a conclusion as to whether some particular act resulted in a denial of justice as that term is understood in international law and practice. We must examine all the acts against which complaint is made and ascertain whether or not in the light of the record it may be concluded that there was a failure to meet the requirements of the rule of international law that prompt and effective measures shall be taken to apprehend and punish persons guilty of crimes against aliens.

Reference is made in the opinion of the Presiding Commissioner to a note addressed to the American Ambassador by the Mexican Foreign Office and to the conclusion therein stated that even if Ruelas had thrown a stone it could not possibly have occasioned the death of Hall. It is stated in the opinion that the Commission is not called upon to decide whether this

conclusion is right or wrong; that in any event it is not so clearly wrong that a denial of justice can be predicated thereon. In cases of this kind the Commission has applied the test whether there is convincing evidence of a pronounced degree of improper governmental administration. It may be true that we are not called upon to determine whether the conclusions set forth in the Mexican note are right or wrong; and also technically correct that no denial of justice can be predicated on those conclusions. But of course we are called upon to determine whether or not the action of the local Mexican authorities in this case was right or wrong. If we are of the opinion in the light of the evidence and the applicable law that it was obviously wrong, then we should render a pecuniary award, and if we reach a conclusion to the contrary, then the claim should be dismissed. However, it seems to me that an answer to the question whether a stone could have occasioned the death of Hall would be far from being conclusive with respect to the issues in the case. If a stone disabled Hall and was the primary cause of his death, then, I take it, a crime was committed by the person who threw the stone.

That an adequate investigation was not conducted seems to me to be revealed by the record of the investigation which did take place. That record was filed as Annex 1 with the Mexican Answer. That Ruelas sought to establish an alibi would of course not be "conclusive against him" as observed in the Presiding Commissioner's opinion. But the fact that he was only eighteen years of age would not in my opinion have any bearing on his guilt. That he clearly made conflicting statements, that he sought to escape capture, and that he hid are facts which to my mind create strong suspicion of guilt. According to the record the soldiers did not shoot until after he started to run when he saw them.

If Ruelas threw a stone at Hall, which it seems to me to be clear that he did, there evidently were three eye-witnesses to this act. From the record of investigation it appears that none of these three was called, and what seems to be more striking, it appears that not even an order of arrest was given for the apprehension of Flores who evidently accompanied Ruelas. The children, who it appears saw Ruelas throw a stone, may have been young, but it does not appear that the law prevented their giving testimony. And since besides them there evidently was but one eye-witness, their testimony was important. That they could give intelligible testimony can seemingly be inferred from the communication sent by the Municipal President to the *Ministerio Público*. Had the former not been convinced of this it would seem that he would not have communicated, as he did, to the *Ministerio Público* the positive information that Ruelas hit Hall "in the head with a rock, producing instant death". The information furnished by these children is borne out by the damaging conduct of Ruelas and by the disappearance of Flores whom the children evidently related they saw in company with Ruelas.

It is said in the opinion of the Presiding Commissioner that with the exception of Flores' testimony the authorities who made the investigation has such evidence as might be expected to be available. I do not think that we can reach any sound conclusion from the meagre record before us as to what evidence might have been produced at a trial conducted with energetic prosecution and defense. Moreover, it seems to me that even in the preliminary investigation clearly further facts might have been developed. And certainly the testimony of Flores, the young man who accompanied

Ruelas, would have been important both in the preliminary investigation and in any trial that might have been held.

Without undertaking to specify the precise nature of the charge that should have been made against Ruelas, I am of the opinion that it may be concluded from the record that he and probably Flores should have been tried on some charge.

Certain observations made in the unanimous opinion of the Commission in the *Roper* case, *Opinions of the Commissioners, Washington, 1927*, p. 205, pp. 209-210, seem to me to be very apposite to the instant case. After a reference in that opinion to a person said to have been an eye-witness to important occurrences it was said by the Commission:

"From testimony given by Mexicans it appears that the half-naked American who had so persistently sought to obtain the arrest of negroes who had assaulted him, suddenly disappeared at the time when his presence would have been most important for the consummation of his purpose of obtaining redress. It is strange that such an important witness should not have been located by Mexican authorities. There would seem to be good reason to suppose that he could easily have been found if he were a reality. He was strikingly identified by several persons who gave testimony before the Mexican Judge, and it was testified that he could speak some Spanish.

"The Commission believes that it has mentioned enough things shown by the record upon which to ground the conclusion that the occurrences in relation to the death of these American seamen were of such a character that the persons directly concerned with them should have been prosecuted and brought to trial to determine their innocence or guilt with respect to the death of the Americans. The conclusions of the Judge at Tampico with respect to the investigation conducted by him were treated in oral and in written arguments advanced in behalf of the Mexican Government as the judgment of a judicial tribunal. And the well-known declarations of international tribunals and of authorities on international law with regard to the respect that is due to a nation's judiciary were invoked to support the argument that the Commission could not, in the light of the record in the case, question the propriety of the Judge's finding. In considering that contention we believe that we should look to matters of substance rather than form. We do not consider the functions exercised by a Judge in making an investigation whether there should be a prosecution as judicial functions in the sense in which the term judicial is generally used in opinions of tribunals or in writings dealing with denial of justice growing out of judicial proceedings. It may readily be conceded that actions of the Judge should not be characterized by this Commission as improper in the absence of clear evidence of their impropriety. Obviously, however, the application of rules or principles asserted by this Commission in the past with respect to denials of justice will involve widely varying problems. To undertake to pick flaws in the solemn judgments of a nation's highest tribunal is something very different from passing upon the merits of an investigation conducted by an official—whether he be a judge or a police magistrate—having for its purpose the apprehension or possible prosecution of persons who may appear to be guilty of crime."

Decision

The claim of the United States of America on behalf of Mrs. Mary M. Hall is disallowed.

MRS. CLARA WILLIS (U.S.A.) *v.* UNITED MEXICAN STATES
(May 17, 1929. Pages 325-327.)

DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH.—BIAS OF INVESTIGATING OFFICIAL. American subject was killed during course of altercation with Mexican. Investigating official was brother of said Mexican. Investigating official was brother of said Mexican. Latter was arrested, tried, and acquitted, and proceedings were reviewed by an appellate court. Though preliminary investigation was improperly carried out, that fact and fact that it may have affected the final result of the judicial proceedings, *held* not a denial of justice.

The Presiding Commissioner, Dr. Sindballe, for the Commission :

On July 17, 1911, between ten and eleven o'clock, A. M., when Milton K. Willis and Jack Ricks, two employees of the California-Mexico Land and Cattle Company, had just returned from a trip to the camp where they were stationed, located near Mexicali, Lower California, Mexico, two persons, one Epifanio Gallegos and Regino Avilez rode up on horseback to the said camp. They were asked to dismount, which they did. They inquired about some horses. Willis questioned Gallegos about some vile language he was supposed to have used in speaking of the employees of the company, and after a wordy altercation between Willis and Gallegos some shots were exchanged between them, the result of which was that Willis was killed by Gallegos and that Gallegos was hit in the right hand and Avilez, who was unarmed, shot through the chest by Willis.

The Sub-Prefecture of Mexicali, which was informed of Willis' death on July 19, 1911, took the testimony of Ricks on July 23, and the testimony of Gallegos and Avilez on August 2. The record of the proceedings was submitted to the Court of First Instance of Mexicali on August 14. Pursuant to the order of the court Gallegos was arrested and prosecuted. On April 21, 1912, Gallegos was acquitted, it being assumed by the Court that he had acted in self-defense. In accordance with Mexican Law, the proceedings of the court were reviewed by the Superior Court, which, it appears, made no observations with regard to the decision.

The United States contends that the criminal proceedings undertaken by Mexican officials in the investigation of the death of Willis and the conduct of the trial of Gallegos resulted in a denial of justice according to established principles of international law.

Before the Sub-Prefecture Gallegos and Avilez both stated that Willis had fired two shots at Gallegos with a revolver, before Gallegos fired his shot, and that Willis fired a third shot at Gallegos at the same time when Gallegos fired at Willis. Ricks testified, according to the record of the Sub-Prefecture, that he went into a tent before the shooting began, that from inside the tent he heard two shots being fired almost simultaneously, that he then took a rifle, from under Willis' bed and that when he went out, he saw Willis, who was down on his knees, shoot Avilez through the chest and then fall forward. He added, according to the same record, that because of the confusion of the moment he could not tell how many shots were fired between Gallegos and Willis, who were the only ones who used their arms.

As to the procedure before the court very little is known, the court record having been destroyed by fire. In the decision of the court the following passage is found:

"Whereas; third, That in the presence of the court, Epifanio Gallegos, John B. Ricks and Regino Avilez, confirmed their declarations, deposing in fact as they had done before the secretary of the Sub-Prefecture, all of their statements being in accord, except with reference to the number of shots fired, as Ricks, in confrontation with the defendant, stated that he could not ascertain the exact number of them due to the excitement of the occasion."

On February 8, 1913, Ricks made a deposition before the American Consul at Mexicali. On this occasion he stated that when he went out of the tent with Willis' rifle, he found that the rifle was empty although it had been loaded in the morning, and that Gallegos, in leaving the camp on his horse, had pulled some cartridges out of his pocket, saying, "Here's your cartridges—the reason you could not shoot". He said that he had testified to the same effect before the court, but that this part of his testimony had not been taken down. He further stated that he had examined Willis' gun after the shooting and had found that only two shots had been fired by Willis, so that Willis could have fired only one shot at Gallegos.

According to the testimony of Gallegos and Avilez before the Sub-Prefecture the cartridges were taken from Willis' rifle during a struggle for possession of the rifle which took place when Ricks came out of the tent. That such a struggle took place, is testified to by Ricks also.

It is not possible for the Commission to arrive at a definite conclusion with regard to the question as to whether Gallegos or Willis shot first. In view of the short distance between the two persons, it seems improbable that the explanation of Gallegos and Avilez to the effect that Willis started the shooting by firing two shots at Gallegos without hitting him is correct, but it cannot be inferred with any degree of certainty from this, or from any of the evidence submitted, that Gallegos was the attacking party.

With regard to the procedure it appears that the Sub-Prefect was a brother of Gallegos, and in view hereof the preliminary investigation must be considered as having been improperly carried out. Whether or not this has been remedied during the court procedure, cannot be established with certainty. The court records are not available. It is explained by the Mexican Agency that the records were destroyed in connection with the burning of a building in which they were kept. It appears, however, from the above quoted passage of the court decision, that the testimony of the witnesses was taken by the judge, so that, in the light of the available evidence, the Commission would not be justified in assuming that the court proceedings were improper. It was argued by counsel for the United States that, in view particularly of the nature of the evidence taken before the Sub-Prefecture, further testimony should have been developed before the court. But it is impossible from the meagre record before the Commission to determine the precise nature of the proceedings which took place before the court. Even assuming that the court proceedings were properly carried out, the possibility exists that the improper preliminary investigation may have affected the final result of the proceedings, but, in the opinion of the Commission, the mere possibility hereof does not afford a sufficient basis for giving a pecuniary award.

Decision

The claim of the United States of America on behalf of Mrs. Clara Willis is disallowed.

SECTION III

SPECIAL AGREEMENT: September 8, 1923 as extended by the Convention signed September 2, 1929.

PARTIES: United Mexican States, United States of America.

ARBITRATORS: Horacio F. Alfaro (Panama), Presiding Commissioner from January 6, 1931, G. Fernández MacGregor, Mexican Commissioner, Fred K. Nielsen, American Commissioner.

REPORT: Opinions of Commissioners under the Convention concluded September 8, 1923, as extended by subsequent Conventions, between the United States and Mexico. October, 1930, to July, 1931. (Government Printing Office, Washington, 1931.)

Convention

CONVENTION FURTHER EXTENDING DURATION OF THE GENERAL CLAIMS COMMISSION PROVIDED FOR IN THE CONVENTION OF SEPTEMBER 8, 1923¹

Signed at Mexico City, September 2, 1929; ratified by the President, September 25, 1929, in pursuance of Senate resolution of May 25, 1929; ratified by Mexico, October 4, 1929; ratifications exchanged at Mexico City, October 10, 1929; proclaimed, October 16, 1929

Whereas a convention was signed on September 8, 1923, between the United States of America and the United Mexican States for the settlement and amicable adjustment of certain claims therein defined; and

Whereas under Article VI of said Convention the Commission constituted pursuant thereto is bound to hear, examine and decide within three years from the date of its first meeting all the claims filed with it, except as provided in Article VII; and

Whereas by a convention concluded between the two Governments on August 16, 1927, the time for hearing, examining and deciding the said claims was extended for a period of two years; and

Whereas it now appears that the said Commission can not hear, examine and decide such claims within the time limit thus fixed;

The President of the United States of America and the President of the United Mexican States are desirous that the time thus fixed for the duration of the said Commission should be further extended, and to this end have named as their respective plenipotentiaries, that is to say:

The President of the United States of America, Herschel V. Johnson, Chargé d'Affaires *ad interim* of the United States of America in Mexico; and

The President of the United Mexican States, Señor Genaro Estrada, Under Secretary of State in charge of Foreign Affairs;

Who, after having communicated to each other their respective full powers found in good and due form, have agreed upon the following Articles:

ARTICLE I. The High Contracting Parties agree that the term assigned by Article VI of the convention of September 8, 1923, as extended by Article I of the convention concluded between the two Governments on August 16, 1927, for the hearing, examination and decision of claims for loss or damage accruing prior to September 8, 1923, shall be and the same hereby is further extended for a time not exceeding two years from August 30, 1929, the day when, pursuant to the provisions of the said Article I of the convention concluded between the two Governments on August 16, 1927, the functions of the said Commission would terminate

¹ Source: Treaties, etc., 1923-1937, Vol. 4, p. 4458.

in respect of such claims; and that during such extended term the Commission shall also be bound to hear, examine and decide all claims for loss or damage accruing between September 8, 1923, and August 30, 1927, inclusive, and filed with the Commission not later than August 30, 1927.

It is agreed that nothing contained in this Article shall in any wise alter or extend the time originally fixed in the said convention of September 8, 1923, for the presentation of claims to the Commission, or confer upon the Commission any jurisdiction over any claim for loss or damage accruing subsequent to August 30, 1927.

ARTICLE II. The Present Convention shall be ratified and the ratifications shall be exchanged in the City of Mexico as soon as possible.

IN WITNESS WHEREOF the above mentioned Plenipotentiaries have signed the same and affixed their respective seals.

Done in duplicate in the City of Mexico in the English and Spanish languages this second day of September in the year one thousand nine hundred and twenty nine.

(Signed) Herschel V. JOHNSON. G. ESTRADA.

Decisions

POMEROY'S EL PASO TRANSFER COMPANY (U.S.A.) v. UNITED MEXICAN STATES

(October 8, 1930, dissenting opinion by American Commissioner, undated. Pages 1-20¹.)

CONFLICTING JURISDICTION OF SPECIAL CLAIMS COMMISSION.—RESPONSIBILITY FOR ACTS OF FORCES. Claim for services rendered a military hospital during period of revolutionary disturbances in Mexico *held* within jurisdiction of tribunal. Mere connexion with revolutionary disturbances is not enough to oust the tribunal from jurisdiction; claim must be due to revolutionary disturbances in order to fall within jurisdiction of Special Claims Commission. A military hospital, though part of an army, is not within the category of "forces".

EVIDENCE BEFORE INTERNATIONAL TRIBUNALS.—NECESSITY OF DETAILED STATEMENTS.—NECESSITY OF CORROBORATING EVIDENCE OR EXPLANATION OF FAILURE TO FURNISH SAME. An affidavit by a witness who had personal knowledge of events on which claim was based but who confined his testimony essentially to confirming the truth of statements made in memorial *held* insufficient. It appeared that only other affidavit submitted was by President of claimant company, who had no personal knowledge of facts stated. No explanation was offered of failure to submit copies of corporate books of account or evidence of submitting of original bills for services rendered respondent Government. Claim *disallowed* for lack of evidence.

BURDEN OF PROOF.—EFFECT OF NON-PRODUCTION OF EVIDENCE AVAILABLE TO RESPONDENT GOVERNMENT. Fact that respondent Government did not fulfil its duty to submit evidence which may have been available to it does not justify an award in favour of claimant Government when its evidence is scanty.

Cross-reference : Annual Digest, 1929-1930, p. 450.

Commissioner Fernández MacGregor, for the Commission :

Claim is made by the United States of America on behalf of an American corporation, known as "Pomeroy's El Paso Transfer Company" against the United Mexican States for the sum of \$223.00 United States currency, the value of certain services rendered by the claimant on several occasions to Mexican officials acting for Mexico, and which has not been paid.

The averments of facts are plain. Pomeroy's El Paso Transfer Company is a corporation, organized in the year 1888 under the laws of the state of

¹ References to page numbers herein are to the original report referred to on the title page of this section.

Texas, United States of America, and operated in the City of El Paso on the American side of the Rio Grande as a transfer company and livery stable. In the month of April, 1911, during the revolution headed by Madero which affected the whole Mexican Republic, and which was especially active in the State of Chihuahua, the claimant received for safe keeping for a period of four days four horses, belonging to the Mexican Postoffice at Ciudad Juárez, which were taken to the American side in order to prevent them from being confiscated by the revolutionary forces. For this service the claimant charges \$16.00 United States currency.

From January 1 to May 9, 1911, the claimant conveyed the mail for the Mexican Government for a period of 123 days, transporting it from Ciudad Juárez to several places in El Paso, Texas, where a Mexican Postoffice had been temporarily established. The claimant charges for this service the sum of \$123.00 United States currency.

Finally, the same claimant was employed by a military hospital, established in the same Ciudad Juárez, which was at that time (in August and September, 1911) under the control of the revolutionary Chieftain Don Francisco I. Madero, to perform certain livery work which amounted altogether to the sum of \$84.00 United States currency.

The claimant alleges that the bills pertaining to the 1st and 3rd items of this claim were sent by mail to the Mexican Postmaster and to the military authorities in Ciudad Juárez, respectively, but that the bills were never paid.

The Mexican Government has challenged the jurisdiction of this Commission to take cognizance of this claim because the facts upon which it is based, took place in Mexico during the period included between November 20, 1910, and May 31, 1920, and because the claims arising from those conditions are excluded from the competency of this Commission by the preamble and by Article I of the Convention of September 8, 1923; it also invites attention to the third item of this claim which refers to services rendered to a military hospital, adding that it seems to be included among those cases defined in Article 3 of the Special Claims Convention of September 10, 1923, which requires that the acts from which such claims arose be due to *forces*. In this regard the Mexican Agency has alleged that a military hospital is a dependent organization of the Army.

In my opinion this Commission has full jurisdiction to hear and decide this case. It is not sufficient that an act giving rise to a claim fall within the period included between November 20, 1910, and May 31, 1920, in order that the said claim necessarily be excluded from those covered by the General Claims Convention. It is essential, further, that they be for "losses or damages arising from revolutionary disturbances", (Preamble and Article VIII of the Convention) and, that they be due to "acts incident to the recent revolutions", (Article I). In order then, that this Commission may declare itself to be without jurisdiction it is not enough to demonstrate the existence of some connection between certain facts which took place during those nine and a half years and the several revolutions, but it is necessary to show that the loss or damage giving rise to the claim was due to revolutionary disturbances. This interpretation was maintained by the Mexican Agency itself in the case of the *Peerless Motor Car Company*, (Docket No. 56)¹, and in the case of the *United Dredging Company*, (Docket No. 483)².

¹ See page 203.

² See page 263.

The Commission has already rendered several opinions with respect to this point and reference is especially made to the cases of the *American Bottle Company*, (Docket No. 64)¹, and *Jacob Kaiser*, (Docket No. 1166)².

The facts upon which this claim is grounded have a certain connection with revolutions, but none of them arose or grew out of the disturbances of that period, or in other words, they are not direct consequences of revolutionary acts. The Mexican Agency invokes Article 3 of the Special Claims Convention and invites attention to the fact that a military hospital is a part of an army, and therefore a *force*. As to this, it is sufficient to mention that hospitals although integral parts of an army, have functions of such a special and humanitarian nature, that they cannot in any manner be regarded as included within the category of *forces*.

In order to determine the merits of the case, it is necessary then to consider the character of the evidence submitted giving to it its proper value.

The United States Government has filed (a) an affidavit executed by F. M. Murchison, who styles himself President of the claimant company; (b) simple copies of the bills for services rendered which the claimant states were presented to the Government of Mexico; and (c) an affidavit of W. W. Click who states that he was in charge of the affairs of the claimant company at the time the events upon which this claim is based took place.

The Government of Mexico filed as evidence only a statement of the Mexican Postmaster General in which he set forth that he had been unable to find any record of the services rendered by the claimant, and a transcript made by the Department of Foreign Relations of a report made by the office of the Postmaster General in which it appears that the records of that office are destroyed every two years.

I am of the opinion that the Mexican Agency has not fully complied, in regard to evidence, with the duties imposed upon it by this arbitration as defined by the Commission in paragraphs 5, 6, and 7 of its decision in the case of *William A. Parker*, (Docket No. 127)³. As it is alleged by the claimant in the instant claim that the matter of the services in question was arranged for by telephone, the Mexican Agency should have examined, with respect to the facts upon which the claim is grounded, the persons who in 1911 were in charge of the Mexican Consulate in El Paso, the post office in Ciudad Juárez, and the military hospital established in this latter named city during its occupation by the Madero forces. The reason for not making this examination is unexplained. It has been said only that the records of the Postoffice are destroyed every two years, a fact which excuses to a certain extent, the respondent from presenting the written evidence, which, it is presumed, remained of the said transactions, since with respect to transactions of public administration, it is a rule that certain formalities must be complied with.

This case, therefore, must be decided on the evidence submitted by the United States only. The affidavit of Murchison, who, it is said, without supporting evidence, is President of the claimant corporation, contains a statement of facts, but made by a person who had no direct knowledge thereof, since it appears that he did not become President of the corporation until after the events in question; and although it is to be presumed that the

¹ See page 435.

² See page 381.

³ See page 35.

President of a corporation is acquainted with its affairs, the knowledge that he may have had of those events which took place before he assumed office, is, so to speak, second hand. The testimony of Murchison, then, lacks the qualities of that of a qualified witness.

The affidavit executed by W. W. Click in the year 1926, is limited to an assertion that all of the facts set out in the Memorial are true; that there were no written contracts covering the different services mentioned and that the said services were rendered at the request of the Mexican Consul, or of the Consul and the Mexican Postmaster on various occasions, and by telephone; that the services were really rendered; that the bills were made at the proper time and a copy thereof sent to the Mexican Consul, the Postmaster at Ciudad Juárez, and to the American Consul in the City of Mexico. He adds that the horses referred to in the first item of this claim were delivered to him personally after the respective arrangement by telephone.

The copies of the bills filed are not duplicates or copies made in 1911, but in 1925 when Click himself made them out and swore to them from his knowledge of the vague facts which gave rise to each one, and which may therefore be considered as a part of Click's testimony.

From the foregoing it is seen that, in reality, the claim is supported by the statements of only one qualified witness, W. W. Click, the only person who had direct knowledge of the facts. But these statements are not in detail, but simply in confirmation of the facts set forth in the Memorial, which, were those taken from the affidavit of Murchison, who, as previously stated was not an eye witness thereof. It is not denied that the statement of a person who confirms what another states in detail may have some value, but it is unquestionably true that in order to form a definite opinion each witness must set forth in his own manner the things he saw or knew since the comparison of different statements throws a light upon the facts equivalent to a confrontation of witnesses.

Further, according to the statements of the claimant, certain essential facts are too vague: W. W. Click states in one place that the services were requested by the Mexican Consul, and in another that they were requested by the same Consul or by the Postmaster in charge of the office in Ciudad Juárez, without asserting precisely which one of two authorities made the requisition; he does not state, with respect to the services performed for military hospital, who made the request for such services but merely states that they were performed for the revolutionary government which promised to pay the claimant the sum of \$84.00 United States currency, without indicating the form of the promise nor the precise military authority with whom the matter was arranged. He asserts that copies of the bills were sent to the Mexican authorities, but there is no evidence that these bills were received; with respect to the second item which refers to the transportation of Mexican mail, it is not even alleged that a copy was sent. Above all, nothing is said as to whether the terms of the service to be performed were discussed and accepted, Click and the claimant now limiting themselves to making a charge of certain amounts, without further explanations, for the services they say were rendered.

It appears that this evidence is too scanty upon which to base an award in favor of the claimant. Better evidence should have been submitted. It is to be assumed that the claimant corporation kept books of account from which excerpts pertinent to this claim could have been furnished; contem-

poraneous copies of the bills and evidence of their mailing could have been, but were not, submitted. A copy of the bills which it is asserted was mailed to the American Consul in the City of Mexico shortly after the rendering of the services could also have been submitted.

It is possible that transactions of such slight importance might not have left in the records of the claimant very distinct traces, but it does not seem unreasonable to assume that at least a written order from the Mexican authorities requesting such services should have been required. A contractor cannot complain, when attempting to establish his rights, of his lack of precaution in making the contract and it should be borne in mind that the person with whom the claimant contracted was a Government. It is known that the same contracts which, when made between private persons, require little or no formality, upon being entered into with governments, require special formalities adapted to the character of the latter, which are that of entities exercising their functions through agencies. Such formalities are necessary as well for the transaction as for exacting from the Government compliance with its obligations. From the foregoing it is clear that to establish before any tribunal the existence of a contract with a government, the requirements are more rigorous and exacting than when the contract is between private persons.

The Commission has already given general rules regarding evidence and in its decision in the *Parker* case, (Docket No. 127) said, referring to the burden of proof and particularly to those cases in which the respondent Government remained silent when it should have spoken :

“On the other hand, the Commission rejects the contention that evidence put forward by the claimant and not rebutted by the respondent must necessarily be considered as conclusive. But, when the claimant has established a *prima facie* case and the respondent has offered no evidence in rebuttal the latter may not insist that the former pile up evidence to establish its allegations beyond a reasonable doubt without pointing out some reason for doubting.”

In this case it appears that the evidence submitted by the claimant Government is not sufficient to establish a *prima facie* case, since it consists of a simple vague statement of one witness only without any support from documents contemporaneous with the facts, such as those submitted in support of the *Faulkner* claim (Docket No. 47)¹, and of which reference is made in paragraph 4 of the decision.

The contention, under these conditions, of the existence of a debt against a government seems to me to be lacking in seriousness. It does not appear to be equitable or consistent with the organization of a State, that after many years of silence and based on a mere assertion a person shall collect a sum said to be due as the result of a contractual obligation, or for a service rendered, without proving beyond a reasonable doubt the existence of such legal obligation.

In virtue of the foregoing, the claim of Pomeroy's El Paso Transfer Company should be disallowed.

Decision

The claim of the United States of America on behalf of Pomeroy's El Paso Transfer Company is disallowed.

¹ See page 67.

Commissioner Nielsen, dissenting.

This case involves a very small amount, but some interesting questions of law have been raised during the course of lengthy arguments. I do not find myself entirely in agreement with conclusions of my associates. Our differences in views are probably concerned in the main with questions pertaining to evidence. It seems to me that the majority opinion goes too far in an attempt to destroy the evidential value of what has been presented in behalf of the claimant, particularly since no evidence from the persons with whom the claimant dealt has been produced by the respondent Government. Further, it appears to me that the majority opinion also excessively stresses the matter of formalities in connexion with contracts made by private citizens with authorities of a government. In any given case which is concerned with questions of contractual relations and in which it may appear that there has been an absence of formalities, it seems to me that the blame should not all be placed on private citizens, parties to a contract, whatever knowledge the law may presuppose on their part. Such persons should not be expected to have more information than the authorities themselves and should not be blamed for not seeking the execution of formalities which the authorities have not required. It seems to me particularly inapposite, in dealing with some small contractual arrangement with an insurgent force, to undertake to apply rules or principles of law with respect to legal formalities of contracts made with a government.

This is a claim in the amount of \$223.00 with interest, made by the United States of America against the Government of Mexico in behalf of Pomeroy's El Paso Transfer Company, an American corporation, to obtain compensation in satisfaction of certain contractual obligations said to have been entered into by the Company with Mexican authorities. The allegations of the Memorial of the United States are in substance as follows:

As a precautionary measure to prevent the confiscation by revolutionary forces of horses and vehicles used by the Mexican Government in transporting mail from Ciudad Juárez, Mexico, to El Paso, Texas, Mexican authorities in April, 1911, placed at El Paso for safe keeping four horses in charge and control of the claimant company, which was at that time operating a transfer company and livery stable. The claimant had possession of the horses for a period of four days and fed and cared for them at the rate of \$1.00 per day for each horse, in the aggregate the sum of \$16.00. The horses were put in charge of the claimant by the Postmaster at Ciudad Juárez, Mexico, and a bill showing the amount due for the care of the horses was mailed at the time to the Postmaster but was not paid by him, and it has not been paid by anyone connected with the Mexican Government.

During the time from January 1 to May 9, 1911, the claimant conveyed the mail for the Mexican Government from Ciudad Juárez to 109 Fisher Street, now known as Davis Street, in the City of El Paso, Texas, and from that address in El Paso to other places in that city. This service consisted in transporting mail to and from Ciudad Juárez, and to and from the Postoffice and other places in the City of El Paso, Texas. The service was performed by the claimant for the Mexican authorities for a period of 123 days at the rate of \$1.00 a day, a total of \$123.00, no part of which has ever been paid to the claimant either by the Mexican authorities then in charge at Ciudad Juárez or by others.

During the months of August and September, 1911, there had been established and was being operated at the time a military hospital in Ciudad Juárez, which was then in the control of Francisco I. Madero, who had captured and taken possession of Ciudad Juárez. The claimant was employed by authorities of the revolutionary government, which was subsequently successful, to perform certain livery work for the military hospital. A bill for the amount of \$84.00, the value of the services, was mailed at the time to the military authorities of Ciudad Juárez, Mexico, but was never paid by those authorities or by any others.

This case was heard in June, 1927, but in view of the meagre arguments presented with respect to the important question of jurisdiction, the Commission, by an order of July 8, 1927, directed that the case be reopened for further argument on that point. At the first hearing reliance was placed in the argument of the United States on the fact that the claim was of a contractual nature. In behalf of Mexico it was argued that the case was not within the jurisdiction of this Commission, because it arose between the years 1910 and 1920. At the second hearing of the case these arguments were somewhat amplified, and contentions with respect to the merits of the case were also presented in view of the change in the personnel of the Commission.

The Commission has taken jurisdiction in cases involving contractual obligations arising between 1910 and 1920 in numerous cases. See case of *William A. Parker*, *Opinions of the Commissioners, Washington, 1927*, p. 35; case of *Macedonio J. Garcia*, *ibid.*, p. 146; case of the *Peerless Motor Car Company* *ibid.*, p. 303; case of the *United Dredging Company*, *ibid.*, p. 394; case of the *National Paper and Type Company*, *Opinions of the Commissioners, Washington, 1929*, p. 3; case of *Parsons Trading Company*, *ibid.*, p. 135; case of the *American Bottle Company*, *ibid.*, p. 162; case of *George W. Cook*, *ibid.*, p. 266.

With respect to two items of the claim involving allegations concerning business transactions with authorities of the administration of President Diaz, there is clearly no doubt as to the jurisdiction of this Commission. The third item involving relations of the claimant with revolutionists who successfully established themselves as a *de jure* government is perhaps less clear.

Counsel for the United States stressed the contractual character of the claim and argued that such a claim was different from one arising out of injuries due to acts described in Article III of the so-called Special Claims Convention concluded between Mexico and the United States September 10, 1923. Unquestionably there is a distinct difference between damages caused by breaches of contracts and those resulting from personal injuries or seizure or destruction of property. However, it is pertinent to bear in mind the principles of law governing the action of an international tribunal in cases involving contractual obligations. Such cases are not suits on contracts such as come before domestic tribunals. They are concerned with the action of authorities of a government with respect to contractual rights, and in cases of breaches of contract it appears to be reasonable for an international tribunal to give effect to principles of law with respect to confiscation. In the instant case it might therefore plausibly be argued that, since there was a failure of payment, the claimant's loss could be dealt with in accordance with the principles applicable to the destruction of property rights by revolutionary authorities, and that consequently the claim might be considered to fall within the scope of Article III of the

Convention of September 10, 1923. Doubtless the Commission could take jurisdiction with respect to the two items of the claim as to which there is no question and decline to pass upon the third item. However, I am of the opinion that, under a proper construction of the jurisdictional provisions of the Convention of September 8, 1923, and of pertinent provisions of the Convention of September 10, 1923, it should take jurisdiction with respect to the item for services to Madero authorities. Such action I consider to be in harmony with past decisions of the Commission.

In the *Peerless Motor Car Company* case the Commission made an award for compensation for ambulances sold by the claimant in 1913, on an order from Mexican military authorities of the administration of General Huerta. In the *Macedonio J. Garcia* case the Commission took jurisdiction over a claim involving a loan of \$150,000.00 said to have been made by the claimant on or about March 30, 1920, to Adolfo de la Huerta, and a further loan of \$11,000.00 made in May, 1920, to certain military officers. In the case of the *United Dredging Company* an award was made for services performed for the administration of General Carranza in 1914 in an attempt to salvage a Mexican gunboat. In the *American Bottle Company* case the Commission made an award for supplies furnished to a brewery which was seized and taken over by General Carranza in 1914. The distinction which counsel for the United States made as to the nature of losses giving rise to claims appears also to be indicated in an opinion of two of the Commissioners in the case of the *American Bottle Company* in which it was said:

"This claim, however, is not for loss or damage arising out of the seizure of the brewery, but is made for the non-payment of an amount due under a contract entered into between Elosua and the claimants after the seizure of the brewery, and in the opinion of the Commission, such non-payment cannot be said to constitute an act incident to a revolution in the sense in which this term is used in the said Convention."

In the instant case, in which the facts are simple, the Commission heard extended oral argument.

It was contended in behalf of the United Mexican States that the claim was barred by principles of the law of prescription. Dr. Francis Wharton, in discussing what he calls a "stale claim" says:

"While international proceedings for redress are not bound by the letter of specific statutes of limitation, they are subject to the same presumptions as to payment or abandonment as those on which the statutes of limitation are based. A government cannot any more rightfully press against a foreign Government a stale claim, which the party holding declined to press when the evidence was fresh, than it can permit such claims to be the subject of perpetual litigation among its own citizens. It must be remembered that statutes of limitation are simply formal expressions of a great principle of peace which is at the foundation, not only of our common law, but of all other systems of civilized jurisprudence." *Digest*, vol. 3, p. 972.

International tribunals have occasionally dismissed cases by the application of principles in harmony with Dr. Wharton's views. Ralston, *International Arbitral Law and Procedure*, p. 265 *et seq.* Counsel for Mexico cited some of these cases. In the *Cayuga Indians* case in the arbitration between the United States and Great Britain under the Special Agreement of August 18, 1910, the United States invoked the principle of laches, contending that it was properly applicable in a case which arose more than a century before its presentation to an international tribunal. The

contention was not sustained by the tribunal. *Report of American Agent*, p. 203.

It seems to be clear that, without straining analogous reasoning or attempting too extensively to apply in international law principles of domestic law, evidential value may be given to facts in relation to delays in the presentation of claims. Such delays may assuredly raise presumptions as to the non-existence of a claim based on grievances, which had they existed, would have been called to the attention of the government on which it is sought to place responsibility. The fact that the Commission has jurisdiction over the claims of each Government against the other since 1868 would not necessarily render inappropriate the application of the principle of laches in an appropriate case. But there is clear reason why the United States cannot properly be debarred from maintaining this claim before the tribunal by any plea with respect to the principles of prescription or of laches. The situation as to claims on the part of each Government against the other during a considerable period prior to the establishment of this Commission is of course well known. Moreover, it would seem probable that the United States might never have seen fit to present the claim diplomatically even in an informal way, whatever its legal right to do so might be. There is abundant record of its general policy to consider claims based on breaches of contract as falling within a class of cases with reference to which no diplomatic action is taken, except in rare instances, save by the use of informal good offices in appropriate cases. Moore, *International Law Digest*, vol. VI, p. 705, *et seq.* This policy has previously been referred to by this Commission. Case of *William A. Parker*, *Opinions of the Commissioners*, Washington, 1927, p. 35.

With respect to the argument in relation to prescription, counsel for Mexico called attention to the disturbed conditions in Ciudad Juárez at the time of the transactions under consideration and pointed out that in all probability bills for the services said to have been rendered were never received by the Mexican authorities. The Commission has no information on this point. The bills may not have reached their destination. It was also argued that the claimant company had been guilty of laches in pressing its claim.

Irrespective of what evidential value might properly be given to the inactivity of the claimant, it might be concluded, considering the disturbed conditions from another point of view, that it was considered futile to do more than to mail the bills. Nor is it unnatural that the claimant should not see fit to bring a small matter of this nature to the attention of the Government of the United States with a view to diplomatic action prior to the time it was learned that a tribunal had been organized to consider all outstanding claims of each Government against the other. The claimant's conduct with respect to this matter cannot debar the United States from now maintaining a claim before this Commission. It may be further observed that, in any case in which an old debt is due under a contract, it is certainly not proper to place upon the creditor all the blame for the fact that the debt has become an old one. It would seem to be at least equally as appropriate to attribute a long lapse in payment to the failure of a debtor to pay what he owes rather than to the fact that the creditor may not have by persistent harassments prompted payment. Therefore so far as the claimant company is concerned the Commission cannot properly conclude that inactivity on the part of the company should preclude a recovery in its behalf.

Counsel for Mexico discussed the uncertainties with respect to a claim of this character in view of the lapse of time since the transactions in question took place and in view of political conditions during that period. It is easy to understand how under these conditions sight may be lost of small matters of this nature. However, since the claim has been presented and contested, the evidence must be weighed and valued in the light of common sense principles underlying rules of evidence applied by domestic courts.

The evidence on both sides is unsatisfactory. It was contended in behalf of Mexico that it is insufficient to establish any contract. In a claim involving an oral contract it is of course necessary that the Commission should have evidence with respect to the elements of an agreement entered into by a claimant with competent authorities. No issue has been raised in the present case as to the competency of the Mexican authorities with whom it is alleged the claimant dealt.

In determining the question of the existence or non-existence of an oral contract, it is of course proper to consider the testimony of those concerned with the transactions upon which it is sought to predicate an agreement importing legal obligations.

Accompanying the Memorial of the United States is a sworn statement by F. M. Murchison, President of the claimant company. It is asserted in this statement that the Company is a corporation organized under the laws of the State of Texas, and that it has its residence and place of business "on the opposite side of the Rio Grande from the City of Juárez, Mexico". A copy of the Articles of Incorporation dated November 15, 1888, also accompanies the Memorial. In this sworn statement the transactions under consideration are narrated in the sense in which they are alleged in the Memorial.

Another affidavit is made by W. W. Click, who states that "he was in personal charge of the business of the aforesaid claimant at the time of the accrual of the different items which compose the aforesaid claim, and has personal knowledge of the fact that the amount thereof is true and correct". The bills for services rendered which are referred to in Murchison's sworn statement were, it is asserted in Click's affidavit, "mailed to the aforesaid Mexican Consul and one to the Postmaster in Juárez, Mexico, and one to the American Consul in the City of Mexico".

Accompanying the Memorial are copies of bills dated May 1, June 1, and September 1, 1911, respectively. Each copy contains a sworn statement by Click that he was in the employ of the above named company at the time the bill was contracted and that the same is correct.

Having in mind among other things the comparatively small charges made for the services described in the Memorial and accompanying documents, I do not feel that the Commission would be justified in considering that an attempt had been made to fabricate a fraudulent claim. And considering further the available means open to the claimant of establishing its case, I am of the opinion that the evidence presented should not be rejected as insufficient to establish a *prima facie* case.

Accompanying the Mexican Answer is an annex quoting a communication from the Postmaster General of Mexico in which it is stated that it has been impossible to find "any proof that Pomeroy's El Paso Transfer Company of El Paso lent the services they claim to the Mexican Postoffice in the year 1911". It appears from another annex to the Mexican Answer

that the Postmaster General previously furnished the information that the files of former years were destroyed, only those of the past two years being in existence.

The statement as to the destruction of records is of no assistance to the Commission, especially since probably there were no records bearing on the transactions under consideration. And while nothing is said whether any attempt was made to consult consular records or the records of military authorities, it would seem to be probable that no pertinent information would be found among those records. It appears therefore that the best and probably the only available evidence would be such as might be furnished by the Postmaster or the Consul or the military authorities with whom the claimant company asserts it dealt. Certainly the Postmaster or the Consul could easily be identified. Presumably their testimony would have been important. Whether it was possible to reach them we do not know. There is nothing before the Commission to indicate whether any attempt was made to have them throw light on the transactions involved in this claim, or whether if information was sought from them, they furnished anything tending to destroy the evidential value of what has been produced in behalf of the claimant.

In the discussion of the sworn statement furnished by Murchison it is said in the majority opinion that there is no proof of the allegation that he was President of the claimant company. Better proof might have been presented, but it seems to me to be going a little too far to say that there is no proof, when he signs his statement as "President" and when a notary public in acknowledging the sworn statement identifies Murchison as President. I think it is too broad a statement to say that Murchison had no direct information with respect to the occurrences which are the basis of the claim. Written records such as bills sent to the Mexican authorities are certainly concrete information. Moreover, I do not think that we are warranted in reaching the conclusion that Murchison was not President of the claimant corporation when these transactions took place. The point is uncertain. It might even be inferred that he was President, since Click is described as an employee of the Company at that time.

I cannot concede the force of the objection made to the bills in the record that they are not copies made in 1911; that they are in a sense part of the testimony of Click; and that they are made and certified to under oath in connexion with uncertain things entering into the claim. The originals of the bills went to Mexican authorities. Copies were evidently retained by the company for its records. The copies made in 1925 were made for use before this Commission. The only question as to their value is whether they are accurate copies of the only records which the company could have, that is, copies of the originals sent to the Mexican authorities. Therefore when Click under oath testifies to the correctness of these copies, the fact that he in a sense makes them part of his testimony does not lessen their value but gives them value. If this had not been done they would surely have been lacking in the evidential value which they have as a result of the certification under oath.

The fact that Click under oath confirms testimony furnished by Murchison under oath to my mind in no way lessens the value of the affidavit furnished by Click. In addition to the confirmation by Click of Murchison's testimony we also have the former's authentication of the bills and further his relation of details of the transactions under consideration as he recalls them.

It is true, as observed in the majority opinion, that references to books of the company might have been desirable, for example, certified copies of statements from any books. There may be no such statements. A reasonably good substitute is certified copies of bills.

I do not perceive the force of the observation that copies made contemporaneously with the sending of the bills and proof of the mailing might have been presented. It seems to be doubtful that even in connection with extensive and carefully conducted business there is as a general rule any record of the mailing of a bill other than a copy of the bill itself. In this case we have in addition a sworn statement that bills were sent through the mails. Further copies of the bills would of course not be made until there was some use for such copies. There was no arbitration in progress in 1911.

Nor do I see any force in the statement to the effect that there might have been presented copies of the bills which it appears were sent by the claimant company to the American Consul General in Mexico City. The company evidently was not aware of the fact that the Consul General could render no assistance in this matter first, because the collection of claims of that kind would not be within the ordinary scope of his duties, and secondly, because the transactions in question occurred outside of his jurisdiction. The company sent bills and requested aid. If the copies sent to the Consul General were accurate copies of the company's records, they of course are copies identical with those which are now before the Commission. No greater significance can be attached to a copy made to no purpose under a misapprehension than to one made for the useful purpose of a proper presentation of a claim before the Commission.

It is stated in the majority opinion that the claimant company might at least have required a written order from the Mexican authorities, and there is a discussion of the differences between contracts made between private persons and those made by such persons with a government, the latter requiring prescribed formalities. Undoubtedly it would have been a proper precaution for the claimant in the instant case to have requested written orders. On the other hand, if the Mexican authorities considered such orders to have been necessary, it would have been equally and probably more appropriate for them to have given the orders. And certainly if there is any fault in this respect, the greater share should not be attributed to the claimant company to the end of defeating its claim. If there is any fault with respect to lack of formalities in connection with the agreements under consideration it would seem to me that the blame would fall more particularly on authorities who should have special information on these points rather than on the claimant company. Unquestionably a government in contractual matters generally protects itself cautiously by regulations as to the forms of agreements. And of course private citizens or corporations doing business with a government must comply with such regulations. Nevertheless there are times when it is proper in such matters to look to matters of substance rather than to matters of form. This principle, I think, has been given application by domestic courts. See for example *United States v. Purcell Envelope Co.*, 249 U. S. 313, and *Garfield v. United States*, 93 U. S. 242, in which it was held that where bids for supplies to be furnished the Government had been accepted, the Government was bound, even though formal contracts required in such cases had not been signed. In these cases even though the Government received no benefits, it was held liable for breach

of contract. In the instant case before the Commission the Government received the benefits of the contracts. The opinion of my associates should probably not be construed to be at variance with the view that the services in question were rendered, so that it seems to me that their reasons for rejecting the claim are concerned not merely with a rigid insistence on technicalities as to evidence, but also with technicalities as to forms of contracts. The Government of Mexico has made no contention touching this latter point.

Moreover, it seems clear that in international cases tribunals have not attached importance to formalities prescribed by local law, but have rather emphasized the representative character of persons who have made agreements and the benefits derived by a government from such agreements. See for example the case of *Hemming* under the Special Agreement of August 18, 1910, between Great Britain and the United States, and the case of *Trumbull* under the Convention of August 7, 1892, between Chile and the United States cited and discussed by this Commission in the *Davies* case. *Opinions of the Commissioners, Washington, 1927*, p. 197, 201. In the *Davies* case this Commission had before it what was described by the claimant Government as an oral agreement, the terms of which were, subject to the making of that agreement, embodied in writing in a letter written by a Financial Agent of the Government of Mexico in the United States to the claimant. It seems to me that where a government obtains advantages under certain agreements, questions of formalities in connection with the conclusion of these agreements should not be stressed too strongly against a claimant, especially if it is not shown that the authorities who entered into the agreements concerned themselves about formalities. This thought, in my opinion, is particularly pertinent to the instant case considering the conditions under which the agreements in question were concluded.

There certainly can be no relevancy of any question of formalities required by a government in connection with an agreement with military forces of General Madero at Ciudad Juárez. Those forces did not constitute a government when they entered and occupied that city. There was not even recognition of belligerency of those forces on the part of the Federal Government or by any other government. They obviously did not concern themselves much about legal formalities in connection with the making of contracts.

International tribunals have repeatedly held a government responsible for acts of successful revolutionists. With respect to acts of a tortious nature, responsibility is fixed upon those ultimately responsible. In cases in which revolutionists have made use of private property or have obtained the benefits of contractual agreements, compensation has been required from those who in reality obtained benefits. See Ralston, *The Law and Procedure of International Tribunals*, pp. 343-344; also the case of the *United Dredging Company* decided by this Commission, *Opinions of the Commissioners, Washington, 1927*, p. 394. It seems to me that in dealing with arrangements entered into with revolutionary forces as in the instant case, there can be no propriety in seeking to give application to any requirements of law with respect to formalities of a contract entered into with a government.

The situation may be somewhat different as to agreements with the postal authorities. Nevertheless I think it is proper to bear in mind the very disturbed conditions at Ciudad Juárez at the time these agreements were made. There is nothing to indicate that the authorities insisted on formalities, and the Mexican Government received the benefits of the services that

were rendered by the claimant company. In behalf of Mexico it was stated in argument that the Mexican Government would not for a moment refuse to pay the small amount of the claim were it not for the lack of evidence.

I cannot agree with the view that the record contains nothing but the testimony of a single witness. Moreover, it seems to me that the reference to contemporaneous documents in the *Faulkner* case is not pertinent. The Commission had before it in that case copies of communications that supported sworn statements which were prepared in connection with the presentation of the case. Those communications were contemporaneous with the occurrences which were the basis of the claim. In the instant case the Commission has before it copies of things that evidently were the only written documents contemporaneous with the occurrences with which we are here concerned.

Evidence more concrete and in better form generally might have been produced in behalf of the claimant. But in the existing situation it must be considered that the case is reasonably well established by the evidence, in view particularly of the fact that no doubt is cast upon that evidence by any evidence produced in behalf of the respondent Government, and that no information is given whether an attempt was made to obtain evidence from Mexican authorities concerned with the transactions under consideration. See case of *Kalklosch*, *Opinions of the Commissioners*, Washington, 1929, pp. 126, 129.

LOUIS CHAZEN (U.S.A.) v. UNITED MEXICAN STATES

(October 8, 1930, concurring opinion by American Commissioner, October 8, 1930.
Pages 20-35.)

DENIAL OF JUSTICE.—ILLEGAL ARREST.—CUSTOMS ZONE. Facts *held* sufficient to justify arrest by Mexican authorities by American subject within customs zone.

ILLEGAL IMPRISONMENT. Claim for unlawful detention beyond period permissible under Mexican law *allowed*.

CRUEL AND INHUMANE IMPRISONMENT.—MISTREATMENT DURING IMPRISONMENT. Charges of imprisonment under foul conditions and injury by guard *held* not sustained by the evidence.

CONFISCATION.—UNLAWFUL AUCTIONING OF PROPERTY TO SATISFY CUSTOMS DUTIES. Customs authorities *held* justified in sale of claimant's merchandise to satisfy import duties. Fact that such sale was delayed for a year and a half and not within time limit prescribed by Mexican law *held* not a denial of justice in absence of proof that delay caused injury to claimant. Claim for value of merchandise included in such sale on which import duties had been paid and in respect of which Mexican law had been complied with *allowed*.

Cross-reference: Annual Digest, 1929-1930, p. 163.

Commissioner Fernández MacGregor, for the Commission:

In this case claim in the sum of \$21,500.00 United States currency, is made against the United Mexican States by the United States of America on behalf of Louis Chazen, a naturalized American citizen. The claim is divided into two parts, the first being for \$6,500.00, the value of certain merchandise which was confiscated, and the second for \$15,000.00, as damages for arrest, unlawful imprisonment and ill-treatment received at the hands of the Mexican Authorities.

It is alleged in the Memorial that Louis Chazen, of Russian birth, was naturalized in the United States on September 6, 1912; that he is a travelling merchant who, between August of 1921 and December of the same year, shipped merchandise from a place in Texas (United States of America) to Matamoros (Mexico); that on November 5, 1921, he went to Matamoros to claim the merchandise and that the Mexican officials demanded of him a sum which he refused to pay; that he complained to the Mexican customs officials whereupon he was arrested on a charge of smuggling; that without a hearing or a trial of any kind he was kept in jail for eighteen days *incomunicado*; that the Judge at Matamoros refused to hear the case and that the officials then transferred it to Nuevo Laredo, Mexico, where the Judge directed the discharge of the claimant from custody and the return to him of his merchandise and money; that he was released from custody, but that the money and merchandise were never returned to him. Claimant further alleges that he was treated cruelly while in prison which he describes as unsanitary, dirty, inadequately ventilated, infested with vermin and rats, without furniture other than two long wooden benches, and which was filled with prisoners of the lowest class. He complains particularly that during his confinement a Mexican employee struck him over the head with the butt of a revolver inflicting a scalp wound which permanently affected his hearing.

The evidence adduced by both sides in this case is voluminous. The American Agency presented, in addition to the evidence necessary to establish the American nationality of Chazen, the affidavits of various witnesses to the events, and at least six affidavits of the claimant himself, executed on May 7, and July 1, 1925, February 17, and July 3, 1926, July 9, 1927, September 7, 1928, and June 22, 1929, respectively. Further, documentary evidence covering the payment of duties on certain merchandise imported into Mexico by Chazen and a number of transit permits for this merchandise have been submitted.

The Mexican Agency filed with its answer a report rendered by *Secretaria de Hacienda y Crédito Público* with a number of annexes, and later, as additional evidence, a complete record of the proceedings in the case against Chazen prosecuted in the Second Court of Tamaulipas, Mexico.

From the report submitted by the Mexican Authorities, it appears that the claimant was arrested December 7, 1921, in the railway station at Matamoros, by an Inspector of Customs and the Commander of the Customs Guard, on a charge that he had in his possession two trunks containing clothing and other effects, which he was endeavoring to ship into the interior of the Republic, under an importation permit granted by the Customs for one trunk only and covering merchandise weighing much less than that of either of the two trunks seized.

The Mexican Agent showed that Mexican law establishes, for the security of the revenue, a zone of vigilance extending twenty kilometers from the

boundary line, within which foreign merchandise cannot be transported without a special transportation permit, called *guía de internación*. (Art. 475, 476 and 496 of the General Customs Law of Mexico). Chazen had a permit of this kind covering only 38 kilos of merchandise, while that contained in the two trunks seized weighed 156 kilos. The arrest of the claimant and the seizure of his merchandise were effected in compliance with the provisions of Article 547 of the law referred to, which is as follows:

"In the event that merchandise is imported or exported without strict compliance with all the requirements of this law, the administrative authority will immediately institute summary proceedings in which he will set forth circumstantially the facts and the declarations of the necessary witnesses, and will determine whether the merchandise is subject to additional duties, and if it appears that any punishable act has been committed, he will impose the corresponding penalty".

The inquiry having been completed, and Chazen being unable to prove that the import duties relative thereto had been paid upon the seized merchandise, or that he had the *guía de internación* for its transportation, the Custom House applied Art. 520 of the Code referred to, which is quoted as follows:

"Merchandise which is found within the zone of vigilance and with respect to which the payment of duty cannot be shown, shall be considered as imported at places not designated for the purpose; and therefore subject to additional triple duties and the persons responsible shall suffer the penalties prescribed for smuggling."

Upon making an examination of the merchandise a Customs' employee appraised it as having a value of \$2,733.00. An assessment was made of the sum corresponding to the duty out of which the Government had been defrauded and of the sum equal to three times the duty which the goods should pay, showing that Chazen owed the sum of \$5,667.67. The administrative decision was communicated to Chazen in order that he might, in accordance with Mexican law, enter his objections before the same administrative authority, or before the corresponding judicial authority, but although Chazen selected the latter channel, he failed to avail himself of this right, for which reason the assessment became final and the merchandise subject to sale by auction in accordance with the provision of Article 564 of the law mentioned. The auction took place in the local Custom House at Matamoros on June 12, 1923, the sale producing the gross amount of \$2,056.00 which was insufficient to pay the penalties incurred by the merchandise.

The Mexican Agency stated that Mexican law provides that a violation of the General Customs Law gives rise to two proceedings: one of an administrative character, which is the one mentioned above, in order to determine the amount of the simple duty on the merchandise and that corresponding to the penalty for the violation; and the other judicial, because the infraction of the revenue law can also constitute a crime punishable with physical penalty in conformity with the provision of the Penal Code of the Federal District (Art. 514 of the Customs Law).

By virtue of the foregoing Chazen was turned over to the Judge of the Court of First Instance at Matamoros, there being no District Court in that place, and the said judicial official formally committed Chazen to jail, on the ground that he was probably guilty of the crime of smuggling. The

cause was then remitted to the District Judge of Nuevo Laredo, who had full jurisdiction thereof, and who discharged the commitment which had been issued by the auxiliary Judge, in the belief that the crime of smuggling was not present, but merely the offense of under declaration (*suplantación*) which was not punishable by physical penalty.

The prosecuting official who appeared for the Matamoros Collector of Customs, entered an appeal against this decision which was denied, whereupon the same prosecuting official pleaded a denial of appeal which was decided in his favor the record being remitted to the Fourth Circuit Court situated in the City of Monterrey, Nuevo Leon. This court after reviewing the case revoked the decision of the lower court, holding that the crime of smuggling was fully established, that the proceedings in the case instituted against Chazen should be continued and that an order for his arrest be issued.

According to the Mexican records Chazen, arrested on December 7, 1921, was kept a prisoner in the Custom House at Matamoros until December 13, when he was turned over to the Judge of the Court of First Instance, as previously stated, who directed his release on bail on the 16th of the same month. At the time when the Circuit Court ordered the prosecution against him continued, and his rearrest, Chazen had gone to the United States, and it has not since been possible to continue the proceedings.

In view of the additional evidence filed by both sides, but particularly by Mexico, the American Agency modified somewhat its averments of law which were expressed in the re-hearing of the case as follows: (a) Chazen was unlawfully detained by the administrative authorities for nearly seven or eight days before being placed at the disposition of the judicial authorities; (b) during the period of his detention he was kept in an inappropriate place and treated with unnecessary cruelty having been the victim of personal violence inflicted by his jailors; (c) Chazen was legally in possession of all the merchandise which was taken from him on December 7, 1921, and its illegal seizure by the Mexican Authorities constituted confiscation for which the respondent Government is liable; (d) assuming that the proceedings against the merchandise not covered by a *guía de internación*, were lawful, it is evident that with respect to at least 38 kilos of merchandise he had the required permit for which reason the seizure of that merchandise was unlawful, and gives the claimant the right to recover for the damages which he suffered in this regard; (e) the Mexican Government has not been able to demonstrate that the auction of the goods belonging to Chazen was conducted in accordance with the provisions of Mexican law, which invalidates the whole proceedings.

The grounds of complaint alleged by the American Agency will now be discussed:

It may be stated that the Commission finds that the Mexican Authorities had probable cause for the arrest of Chazen. Mexico, as a sovereign State can promulgate such rules as it may deem convenient in order to protect the revenue in its Customs houses and on its frontiers, and it has therefore the right to establish the zone of vigilance to which Article 496 of the General Customs Law refers. The section in question is as follows:

"The zone of vigilance extends from the East to the West, from the Gulf of Mexico to the Pacific Ocean, and from North to South, to a distance of 20 kilometers from the boundary line. The said zone will be under the supervision of the Gendarmerie Fiscal the duties of which is to prevent the importation of

foreign merchandise and the exportation of national products through places not authorized for international traffic."

Within the aforementioned zone, merchandise must be covered by the special permit provided for in Article 476 of the same law which is as follows:

"In order to facilitate the justification of the lawful origin of goods in transit within the zone of vigilance and which are not transported by railroad, the Custom Houses of the Northern border will issue to shippers upon their declaration of introduction of merchandise (*internación*), the documents prescribed by rules and regulations." Circular No. 133, Department of Finance, June 30, 1905 (see Appendix 48-A).

The evidence submitted shows that Chazen was found within this zone with merchandise of a weight in excess of that of the *guía de internación* which he exhibited, for which reason the officers, in the belief that Article 520 of the Customs Law, quoted above, had been violated, quite properly proceeded to make the arrest. It also seems that the American Agency no longer maintains the allegation of unlawful arrest.

The contention that Chazen was held in detention by the administrative authorities for a period of time longer than that permitted by Mexican law for the delivery of an accused to the judicial authorities, is fully supported by the evidence.

It is alleged that Article 16 of the Constitution of 1917, provides that a person arrested in *flagrante delicto*, or by authorities other than judicial or by private persons, must be placed *immediately* at the disposition of the judicial authorities. It is also alleged that Article 547 of the Customs Law provides that the Collector of Customs, in the case of a violation of the said law, must render a decision within 48 hours. Reference is also made to Article 133 of the Federal Code of Criminal Procedure which provides that the authorities who effect the arrest of an accused must immediately give notice thereof to the Judge having jurisdiction. Without passing upon the pertinency of the aforementioned references the Commission finds a more clearly defined disposition of the Political Constitution of the United Mexican States which may be applicable to the case. This is Article 107, Section XII, Paragraph 3:

"Any official or agent thereof who, having made an arrest does not place the prisoner at the disposition of the Judge, within the following 24 hours shall himself be turned over to the proper authority."

Now Chazen was detained on December 7, 1921; the customs authorities should have placed him at the disposition of the Judge of First Instance of Tamaulipas on the 8th of December at the latest, but as they did not do so until the 13th, Chazen was unlawfully detained, according to Mexican law, for 5 days. This certainly resulted in an injury to him for the reason that as he obtained his liberty on bail three days after being placed at the disposition of the Judge, he would have been released 5 days earlier had he been turned over to the Judge on the day following his arrest.

International law sets no time limit for the detention of an accused before being formally remitted to the Judicial Authorities; each case must be considered on its merits bearing in mind the lofty principle of respect for the personal liberty of the individual. The Commission sees no excuse for the delay in placing Chazen at the disposition of the Judge as the Customs

administrative proceedings against Chazen would not have suffered had the accused, immediately following his arrest, been placed at the disposition of the Judge who was to preside at his trial on a charge of smuggling, since in this event the Customs Authorities would have been able to continue to question him and to proceed with the investigation of the case. The Commission is of the opinion that with regard to the 5 days in excess of the legal period of detention, Chazen is entitled to an award.

In support of the charge of ill treatment suffered by Chazen while in prison, there are his repeated affidavits to the effect that during his detention he was guarded by Mexican soldiers who were rough and abusive, and who continually insulted him because of his American nationality; that the prison was unsanitary with a leaking roof and dirty floor; that it was inadequately ventilated and infested with vermin and rats; that it was in a foul condition owing to the particles of food on the floor, etc., etc. He asserts that he was left in the prison for a day and a half without food and that the food he was given afterwards was uneatable; that two days after his confinement, while being conducted by an officer to make a statement, he saw that the officer was wearing a shirt which had been taken from one of his trunks; that he reproached him whereupon the officer struck him on the head with the butt of his revolver inflicting a severe wound from which he has never recovered. He relates that he was placed with two low class Mexicans who had fought and who were covered with blood and that the guard pushed him against them as a result of which he also was covered with blood. He states, finally, that he was denied medical attention.

The averments relative to the conditions of the prison do not appear to be corroborated by the statements of the persons who made affidavits in this regard. S. Gerhart, who visited the claimant while he was a prisoner, states only that Chazen was confined in a dirty place, and that he was in a cell with several other prisoners nearly all of whom were *peones*, dirty in appearance and in their persons. The same witness in an affidavit made three years later, explains that he visited Chazen the third day of his detention and that he furnished him with a cot and covering and also with food. The complaints of Chazen do not appear to be sufficiently proven. It is probable that he suffered certain inconveniences but it cannot be concluded that there was inhuman treatment nor treatment not up to the standards of civilized nations.

The allegation that Chazen was wounded by a pistol in the hands of a guard is supported by two affidavits of Doctor Greenberg; one made in 1922 and the other in 1928. In the first one he testifies that he attended Chazen on January 25, 1922, (about 45 days after the day on which he received the wound) and that he found him in bed suffering from an unresolved "hematoma" on the left parietal side of the head with no other external evidence of "trauma" which induced him to make a diagnosis (from the symptoms, headache, etc.) of concussion of the brain. He adds that Chazen was in bed for two weeks but was unfit for the transaction of business for a month; that he had a relapse and that he was sufficiently recovered to transact his business by the 1st of April. In the affidavit of 1928, Dr. Greenberg testified that in September of that year when he examined Chazen he found his hearing to be defective in both ears, but worse in the left ear, with some evidence of trauma in the right drum membrane; and concludes by saying that the cause of the aforementioned condition could be the result of a severe blow on the head. It is worthy of

note that the witness Gerhart who visited Chazen three days after his detention and several times afterwards, makes no mention of the wound, which according to the claimant himself, was inflicted on the third day of his imprisonment. The doubt in this connexion expressed by the Mexican Agency, seems to be substantiated by the consideration that the unresolved hematoma which was treated by Dr. Greenberg 45 days after the blow which Chazen states he received, could not have been caused by such blow, since this opened the scalp producing a hemorrhage which is antithetical to a hematoma which is a bleeding within the tissues; that the hematoma disappears after three weeks; and that the concussion of the brain of which Chazen showed symptoms on January 25, 1922, could not have been caused by the blow he might have received between December 10, and 12, of 1921. It further appears in the judicial record filed by Mexico, that on January 26, 1922, Chazen, whom Dr. Greenberg saw the day previous on the American side of the boundary line in bed and in a nervous condition, appeared in court at Matamoros where he was given an official notice which he signed. The affidavit of Dr. Greenberg of 1928 does not prove that the deafness of Chazen is the effect of the blow which he alleges he received. The deafness is of both ears and Chazen was struck on one side only; the evidence of trauma of the tympanum is on the right side and Chazen states that he was struck on the left parietal region. Evidence of so flimsy a character cannot serve the Commission as a basis for conclusions as to the facts of a blow and of its effects.

The averments (c) and (e) of the American Agency as previously enumerated, are connected and may be examined together; both tend to demonstrate that the Mexican Authorities were without authority to auction the merchandise of Chazen and to appropriate the proceeds thereof.

It has already been said that there was probable cause for the arrest of the claimant for being found within the zone of vigilance in possession of merchandise not covered by the *guía de internación*. It is now necessary to ascertain whether during the course of the administrative proceedings instituted against him, which is the means established by Mexican law for the condemnation of merchandise, Chazen proved that he had lawfully imported it into Mexico, or in other words, whether he had paid the customs duty thereon.

When he was examined after his arrest by the Customs Authorities he stated in effect that he had imported from the United States between August and December, 1921, merchandise consisting of clothing and similar articles of the approximate value of \$8,000.00 United States currency; that a few days previously he had taken a part of his merchandise to Monterrey to sell it, being partially successful; that he returned to Matamoros personally carrying a part of his merchandise sending the rest by rail from Monterrey to Matamoros placing, upon his arrival at the latter place, in the same trunk all the merchandise which he had taken to Monterrey; that in the meantime he received from the United States another bundle containing merchandise on which he paid the duty and that at that time, being called to Tampico by a buyer, he intended to send by rail two trunks which contained, intermingled, the merchandise recently received and that already in Mexico; that upon his arrival at the railway station he was arrested for not having been able to show that the two trunks were covered by permits, but that he had paid the duty on all the merchandise.

No evidence was presented other than a permit for 38 kilos and the customs authorities handed down a decision on December 13, holding the

merchandise of Chazen responsible for the simple duties thereon, and, in conformity with Article 520 of the Customs law quoted herein, an additional sum corresponding to three times this amount since the merchandise was regarded as smuggled goods under Article 515 of the same law which provides that goods are smuggled when they are exported or imported through places not authorized for international traffic. Chazen appealed, as was his right, and selected, as previously stated, the judicial channel, but never perfected his appeal. The foregoing is sufficient to show that the Mexican administrative authorities were justified in selling by auction the merchandise of Chazen in order to satisfy the duties imposed by a sentence tacitly acquiesced in by the claimant.

When Chazen attempted to prove, not to the customs authorities, but during the course of his trial which was instituted in order to determine his criminal responsibility, that he had paid all customs duties, he was unable to do so satisfactorily. He presented several documents which showed that between August and December 1921, he had imported 221.50 kilogrammes of clothing of the value of \$8,000.00 United States currency upon which he paid \$1,034.16 duty; but it is impossible to identify the merchandise taken from him with that set out on the receipts submitted, since these are calculated upon the weight in kilogrammes without details which might assist in identifying the goods. It is further worthy of note that these receipts cover a period of four months, and it is doubtful whether the merchandise taken from Chazen was all, and the same, which he imported during that time, since it can be assumed that during the five months in question he would have sold more than he himself admits he sold on his last trip to Monterrey. There is still to be taken into consideration that many of the receipts submitted are in the name of Santillana, the broker, and not in the name of Chazen. All of this was probably appreciated by the American Agency when its counsel stated in the oral argument: "these official documents unfortunately do not permit the Commission, any more than they permitted the customs authorities at that time, to make a comparison item by item of the merchandise found in Chazen's possession with the merchandise which was represented by these permits, for the reason that the duties to which this merchandise was subject were not *ad valorem* duties but specific duties."

The Commission, in fact, has no evidence that Chazen paid the duty on the merchandise seized and the contention that he did so cannot be supported by certain alleged numerical coincidences in the total amount of merchandise imported by Chazen and in that found in his possession, since such presumptions are very weak. As the customs authorities, then, applied the law, in general, with justice, there was no confiscation in the international meaning of the word. The merchandise was taken and sold pursuant to Mexican law for non-payment of duty, and therefore, the execution of the legislative will cannot inflict an injury upon an importer.

It is also alleged that the auction sale of the merchandise subject to the payment of triple duties was not carried out in accordance with Mexican law. It is pointed out that the administrative decision was rendered December 16, 1921, and that the merchandise was not auctioned off until June 12, 1923, that is to say a year and a half later, the Mexican law providing that if within three days of the assessment of duties, payment has not been made, execution shall be levied upon property of the debtor sufficient to cover his indebtedness, unless the public treasury is in possession of the

merchandise or effects subject to the duties or has them on deposit, and in that case they shall be sold at auction in accordance with the provisions of the law. (Article 567 of the Customs Law.)

It is clear then, that in this case the auction sale did not take place within the time limit prescribed by law; but this delay cannot give rise to international responsibility, since in order that a particular formality of a proceeding which in general has been followed in strict accordance with the law, may cause such responsibility, it must be shown that it is cause of the failure of the general proceedings to do justice, or, that it be shown that such particular formality causes in itself an injury to the claimant.

In this case the delay in selling the merchandise of Chazen may have affected adversely its price, but there is no evidence to that effect. It seems rather that the product of the sale was more or less that of the value assigned to the merchandise by the Customs Inspector who made the examination when the goods were seized, that value being \$2,733.00 and the auction sale bringing \$2,056.00, amounts which are not very far apart. It must be borne in mind in this regard that judicial auction sales produce as a general rule a sum less than the value assigned to the merchandise.

With reference to this same auction sale it is alleged that the provisions relating thereto fixed by the General Customs law in its Article 656 were not complied with, and in particular that the prior appraisalment required by the said Article was not made thus annulling the proceedings and rendering the appropriation of the value of the merchandise unlawful. The Commission, unfortunately has no evidence upon which to base an unconditional opinion on this point because the Mexican Agency presented a certified copy of the Customs' proceedings only until the decision imposing triple duties on the merchandise; so that the Commission is unable to determine the propriety of the other proceedings. It seems, though, that there is evidence that the appraisalment was made pursuant to the provisions of Mexican law, since upon the initiation of the investigation made by the Customs, an inspector who examined the merchandise, appraised it. If this is related to Section I of Article 656 of the Law, which states, "The goods which pursuant to this law are to be sold at auction shall first be appraised by an expert, who may be one of the officers or employees of the office by which the seizure was effected", it seems plausible to conclude that the appraisalment was made in the beginning, and in view of possible auction sale for the purpose of expediting the distraint proceedings (*acción coactiva*).

Further, there is in the record a report of the highest treasury authority of Mexico, the Department of Finance, in which it is certified that the administrative decision was executed in accordance with the provisions of Article 564 of the said law on June 12, 1924, and there are also extracts from the proceedings had after the auction. There being, then, no evidence of unlawful procedure at the beginning, nor of error or improper application of the law in connexion with the auction sale, the presumption of the regularity of the acts of a government must be applied.

It is alleged, finally, that not all of the merchandise taken from Chazen was subject to the proceedings and penalties which the Mexican authorities applied in holding it to be smuggled. It is indicated that at least 38 kilos of this merchandise was covered by a permit and that this merchandise was separated by the arresting officers, according to their statement, and sent to the Collector of Customs for his disposition. These facts seem to be proven.

The Mexican Agency maintained the theory that all of the merchandise had been intermingled from the beginning and finally sold by auction; but it asserts further, that even assuming that the Mexican authorities had sold not only the merchandise subject to seizure, but also the 38 kilos of merchandise which had complied with the Mexican law, Mexico would not be responsible in view of the fact that the guilty merchandise, so to speak, was subject to the simple duty and to triple duty which amounted to the sum of \$5,667.67 and that, as the auction sale produced only \$2,056.00, Chazen was still a debtor to the Mexican Treasury for the difference. The American Agent on his part stated that the Mexican authorities undoubtedly had the right to embargo the property of Chazen to cover the debt but that there was no evidence that the proceedings had been conducted in this manner which is that strictly provided for by the Mexican law.

The Commission sustains the latter opinion, since with respect to that part of the property of an alien of which the Mexican authorities took possession without any apparent cause, no satisfactory explanation has been made and it has never been returned to the claimant.

Having in mind the foregoing it appears that Mexico is responsible for an excess of five days, imprisonment of Chazen and for the value of 38 kilos of merchandise the disappearance of which is unexplained. On the first count I believe that there may be allowed, in view of the nature of the imprisonment, the sum of \$500.00 without interest. (See *Faulkner* case, Docket No. 47, paragraph 11 for awards in similar cases). On the second count there may be allowed, having in mind that the 38 kilos confiscated are of the same character as the other merchandise appraised by the Mexican authorities at the time of the auction, the lump sum of \$350.00, with interest at 6 % upon this amount from December 7, 1921, the date of the seizure of the merchandise, until the date on which the Commission dictates its final decision.

Nielsen, Commissioner:

I concur in the award. However, I should not like to be understood to entertain the view that it is shown with certainty that Chazen was a smuggler, or the view that he was not the victim of improper treatment. Chazen produced considerable proof to show what goods he imported and what duties he paid, and it seems to me that he was substantially put in the position of a man on whom was imposed the burden of showing beyond a reasonable doubt that he had not been engaged in criminal practices. I do not understand that the United States contended that there was not proper cause for his detention in the first instance.

The uncertainty as to the nature and quantity of goods imported by Chazen is shown in the opinion written by Mr. Fernández MacGregor. That uncertainty is, I think, of such a nature that whatever the facts may be, the Commission, under general principles often asserted by it in the past, is precluded from rendering an award for all the damages claimed.

Counsel for the United States forcibly argued that Article 520 of the General Customs Ordinances if construed in the literal sense of the interpretation put upon it by the Mexican Agency is of such a character that its operation must result in wrongful action at variance with international

standards. However, there is not before the Commission any final, authoritative, judicial interpretation of that law. And even though it deals with property found within Mexican territory, it should probably be considered to be one concerned with the subject of importation—a so-called domestic matter. It is pertinent to bear in mind that with respect to questions of that kind international law recognizes the plenary sovereign right of a nation. Goods are imported into a country subject to the existing local law in relation to importation.

Counsel expressed the view that complete records of proceedings with respect to Chazen's goods were not before the Commission. Counsel also forcibly argued that in connection with the seizure, appraisal and sale of Chazen's goods there had not been a strict compliance with the forms of local law; that provisions of law of this kind are mandatory and cannot in any sense be regarded as directory; that therefore unless there is a strict compliance with the law, action at variance with it is void; that the disposition of Chazen's goods was void in the light of these principles; and that therefore Chazen was entitled to compensation for them. But whatever irregularities may have occurred, here again the Commission, in view of the nature of the record before it, is confronted with uncertainties.

Chazen undoubtedly was the victim of harsh treatment while he was in jail. A matter of that kind is always one of difficulty for an international tribunal. The fact may be simply illustrated by the testimony of Dr. Greenberg, who in an affidavit dated September 17, 1928, states with respect to Chazen's defective hearing that it is difficult to state the exact cause of the trouble, but that it could result from a severe blow on the head.

Of course international law does not fix the period for the detention of an accused person prior to his being given a hearing before a judge, since international law does not prescribe for the nations of the world any code of rules for the administration of criminal jurisprudence. But this Commission and other international tribunals have repeatedly awarded damages for illegal detention or excessive periods of imprisonment. International law does, generally speaking, require that an alien be given equality before the law with citizens, and equality is secured to aliens by the fundamental law of Mexico and of the United States. It is therefore of course pertinent in any given case of a complaint of unlawful detention to take account of provisions of local law.

I did not understand the argument of counsel for the United States to be that it is clearly shown that there could be justification for the sale of the separate item of 38 kilos for which Chazen had a permit. My understanding is that the argument was to the effect that, smuggling not having been proved, no goods should have been sold; that, if there were justification for the selling of any of the goods, a sufficient amount could perhaps have been obtained to satisfy the requirements of the customs laws had the goods all been properly sold at the appropriate time and not more than a year after that time; that in any event, this separate item could not properly be sold until it was shown that there was a deficiency after the sale of the other goods taken from Chazen; and that it was not shown that the item was ever by an appropriate procedure subjected to the satisfaction of any such deficiency.

Decision

The United Mexican States shall pay to the United States of America on behalf of Louis Chazen the sum of \$350.00 (three hundred fifty dollars)

United States currency, with interest thereon at the rate of six per centum per annum from December 7, 1921, to the date on which the last award is rendered by the Commission, and the sum of \$500.00 (five hundred dollars) United States currency, without interest.

LILLIE S. KLING (U.S.A.) *v.* UNITED MEXICAN STATES

(October 8, 1930, concurring opinion by Presiding Commissioner, October 8, 1930, concurring opinion by Mexican Commissioner, October 8, 1930, Pages 36-50.)

IDENTITY OF CLAIMANT. Claimant *held* entitled to present claim despite fact she retained her first husband's name after second marriage.

RESPONSIBILITY FOR ACTS OF SOLDIERS.—DIRECT RESPONSIBILITY.—RECKLESS USE OF ARMS. A group of American employees of an oil company was returning to the company's camp at 3.30 a.m., January 23, 1921, when several of them, who had permits to carry arms, in fun fired their revolvers in the air. A party of Mexican Federal soldiers which had been following the Americans, without the knowledge of the latter, then fired upon the Americans and killed claimant's husband. Evidence was conflicting as to whether such party was in command of an officer. No investigation thereof by the Mexican authorities was shown to have been made until 1927. Claim *allowed*.

EVIDENCE BEFORE INTERNATIONAL TRIBUNALS.—EFFECT OF NON-PRODUCTION OF EVIDENCE AVAILABLE TO RESPONDENT GOVERNMENT.—BURDEN OF PROOF. The mere fact that evidence submitted by respondent Government is meagre cannot justify an award in absence of satisfactory evidence from claimant Government. When, however, a *prima facie* case has been made by claimant Government, its case should not suffer from non-production of evidence by respondent Government. Moreover, in such circumstances account may be taken and certain inferences drawn from the non-production of evidence available to respondent Government.

RULES OF EVIDENCE. International tribunals must in matters of evidence give effect to commonsense principles underlying rules of evidence in domestic law.

DUTY OF AGENTS TO SUBMIT EVIDENCE. Agents have the duty to produce all possible evidence and arguments in defence of the Government which they represent.

CONSULAR REPORTS AS EVIDENCE. The tribunal will give weight to consular reports bearing on facts of claim according to the extent to which they are based on concrete information.

Prima Facie EVIDENCE DEFINED. *Prima facie* evidence is that which, unexplained or uncontradicted, is sufficient to maintain the proposition affirmed.

MEASURE OF DAMAGES, WRONGFUL DEATH. Age, character and earning capacity of decedent taken into consideration in determining amount of award for killing of American subject.

PROVOCATION AS AFFECTING MEASURE OF DAMAGES. Fact that acts of Americans in firing into the air led to attack by Mexican soldiers, resulting in death of claimant's husband, *held* to mitigate damages.

Cross-references: Am. J. Int. Law, Vol. 25, 1931, p. 367; Annual Digest. 1929-1930, pp. 87, 455; British Yearbook, Vol. 12, 1931, p. 168.

Comments: Edwin M. Borchard, "Recent opinions of the General Claims Commission, United States and Mexico", Am. J. Int. Law, Vol. 25, 1931, p. 735 at 736.

Commissioner Nielsen, for the Commission:

This claim, which is made by the United States of America in behalf of Lillie S. Kling in the sum of \$50,000.00 gold currency of the United States, with interest, is predicated on allegations with respect to the wrongful killing by Mexican soldiers of August Francis Kling, son of the claimant, and with respect to the failure properly to investigate the killing and to punish the wrongdoers. The case was heard in April, 1929, but was reopened for the production of further evidence. The substance of the occurrences on which the claim is based is stated in the Memorial as follows:

At the time this claim arose and for some time prior thereto, August Francis Kling was a resident of Chinampa, State of Vera Cruz, Republic of Mexico, where he was employed by the Texas Company of Mexico, S. A. At about 3.30 a.m. on January 23, 1921, Kling in company with M. C. Hancock, J. W. Schmuck, C. M. Maney, T. E. Goolsbee, A. G. Stribling, L. F. Knops and R. C. Knops, all American employees of that company, were returning on foot from Zacamixtle to the company's camp in the vicinity of Zacamixtle. When the party of which Kling was a member had reached the side road which turns into the camp and were standing or proceeding leisurely on the side road on property under lease to the Texas Company of Mexico, S. A. several of the companions of Kling, who had permits to carry arms, in fun fired their revolvers into the air. Immediately thereafter a party of Mexican Federal soldiers, consisting of a captain and several privates, who apparently had been following Kling and his companions, but whose presence was unknown to the Americans, deliberately discharged their firearms at the party of which Kling was a member. Kling received a shot in the back and fell immediately to the ground.

The Mexican soldiers, after firing several shots at the party of Americans, placed the companions of Kling under arrest and compelled them to proceed to Zacamixtle. There after some kind of a hearing heavy fines were imposed upon them and they were compelled under threats of indefinite imprisonment to make false statements to the effect that they were the instigators of the affair, and that they had first fired upon the Mexican Federal soldiers.

August Francis Kling, whose spinal column had been practically severed by the shot fired at him and who was completely paralyzed below the abdomen, was transferred with the greatest possible speed to the United States and placed in a hospital at Dallas, Texas, where he died on March 18, 1921, after lingering and suffering for a period of almost two months.

After the authorities of the Republic of Mexico had obtained the false statements from the companions of Kling as above stated, no further investi-

gation was made by either civil or military authorities. The Mexican Federal soldiers were relieved by the authorities of all responsibility for the death of August Francis Kling, and the soldiers have not been punished for the crime which they committed.

The evidence produced in behalf of the claimant Government supports such allegations of the Memorial as are vital to the establishment of the claim.

Objection is made in behalf of Mexico with respect to the sufficiency of the proof of the nationality of the claimant and of her identity. However, it is satisfactorily shown that she was born an American citizen and has remained so up to the present time. The uncertainty as to her identity probably arises mainly from the fact that she was twice married; that her last husband's name was T. A. Moross; and that she now is known as Lillie S. Kling. Her first husband's name was August Francis Kling. After his death she married T. A. Moross. If she chooses now to call herself Lillie S. Kling, that is a matter of no importance in the light of an abundance of evidence which identified her as the mother of August Francis Kling, the offspring of her first marriage. The evidence leaves no doubt as to identification of mother and son.

With respect to the killing of Kling by Mexican soldiers and the arrest and punishment of Kling's companions, there is before the Commission the affidavit of A. G. Stribling, one of the group of men upon whom the soldiers fired. Bearing on these matters, there is also a statement of all the members of the group with the exception of Kling made at the office of the Texas Company, evidently not long after the shooting.

Other important information is furnished by a letter written by C. S. Sheldon, an official of the Texas Company, to D. J. Moran, another official of that company. In this communication, dated the day on which the shooting occurred, Sheldon calls attention to information received by him on the morning of that day from H. W. Jennison, who was in the Company's camp when the shooting occurred. It is stated in this communication that after the shooting the soldiers went into the camp and raised a commotion and thereafter went to Zacamixtle, taking with them Schmuck, a member of the group upon which the soldiers fired.

It appears that on January 25, 1921, all members of the group with the exception of Kling, were taken as prisoners to a cuartel at Juan Casiano, where they were examined by military authorities, an officer by the name of Colonel Huerta presiding. Matters relating to proceedings before Colonel Huerta are stated in detail in the affidavit of Stribling. Accompanying the Memorial is also a report from J. S. Hain, an employee of the company, made to D. J. Moran. Mr. Hain had been detailed by Moran to follow the proceedings taken against the prisoners. In the report it is stated, among other things, that three men were refused bond and were retained in confinement for five days, the reason being given that they should be tried before General Martinez.

Copies of other correspondence and several affidavits are also presented by the United States.

The evidence adduced proves the substantial allegations of the Memorial. It shows that there were Mexican records of the proceedings taken against the men. It further shows that at least one officer, Colonel Huerta, and several Mexican soldiers were fully conversant with the details of the

occurrences described in connection with the presentation of the claim. This fact is of particular importance in view of the defense made by Mexico in the case as to lack of information concerning these matters.

In the Mexican Answer it is denied that Kling "was murdered by Federal forces of the Mexican Government". It is stated that no records have been found bearing on the averments contained in the Memorial, and further, that it has been impossible to find records of proceedings before Mexican military authorities. It is further stated that "even admitting for the sake of argument, that the version of facts contained in the Memorial and which is only corroborated by the claimant and by the affidavits of the companions of the deceased, is a true version, it appears clearly therefrom that the group of which the deceased August Francis Kling was a member, provoked a detachment of Federal troops and so it was declared by the members of said group before Mexican authorities, which, according to said version, in view of these statements exonerated the detachment from any fault or responsibility, and, therefore, abstained from imposing any punishment to the said soldiers".

In the Mexican brief the view is expressed "that the participation by Federal soldiers in the incident was a myth born in the imagination and for the purposes of Kling's companions". In the light of an analysis of the evidence it is asserted that it "is not true that August Francis Kling was wounded by Mexican Federal forces". The brief contains a discussion of conditions in the oil region, and it is said that in the early part of 1921 "the military authorities had to use firm measures to keep order and peace". The supposition is advanced that a group of men which may have included Kling, may have directed an attack at Federal forces, and it is said that even if they did not directly do so, their conduct was dangerous and imprudent, and that, assuming without admitting the correctness of allegations in the Memorial, the Federal forces acted "within their duty in repelling an aggression which, real or imaginary, had all the aspects of an attack by a party which, because of the hour and their behavior, might be considered as marauders". It is further asserted in the brief that, without conceding that Kling was shot by soldiers, the latter were not under the command of an officer, and that therefore Mexico is not responsible for their acts.

In the affidavit of Stribling it is stated that a captain was among the Mexican soldiers. Whether or not it be a fact that the soldiers were under the command of a captain is not a vital point in connection with the determination of the question of responsibility for the acts of soldiers. Men on patrol duty are not acting in their private capacity, even though an officer may not be present on the spot where acts of soldiers alleged to be wrongful are committed. See the *Solis* case decided by this Commission, *Opinions of the Commissioners, Washington, 1929*, p. 48, 53 *et seq.* Moreover, when account is taken of the visit of the soldiers at the camp of the Oil Company, the arrest of the Americans, and the proceedings before a Mexican officer at Juan Casiano, it can not be assumed that the soldiers were acting in their private capacity with respect to the occurrences under consideration.

Some of the employees of the company who were fired upon by the soldiers were carrying arms. Whether or not such action was a violation of the law in the locality in question may be uncertain. Although account may be taken of that matter in weighing the evidence with respect to the question of fault on the part of the soldiers, the point is not one from which it is proper to infer an excuse for reckless firing by soldiers. The conduct of the

Americans of course justified investigation and it might warrant an arrest. The men may have engaged in boyish hilarity; that was probably not a crime, and at most could seemingly be only mildly indiscreet.

The killing of an alien or of a citizen by soldiers is always a serious occurrence calling for prompt investigation. So far as the evidence shows that matter in the present case was ignored—at least for several years—but a great deal of attention was devoted to the conduct of the party fired upon by the soldiers. The unjustifiable use of firearms has frequently been dealt with in diplomatic exchanges between Governments and by international tribunals. This Commission has already decided numerous cases concerned with that serious question in various aspects. A few illustrations may be cited.

There have been cases of wanton, deliberate shooting resulting in death or injury.

Thus in the case of *José M. Portuondo*, which came before the Commission under the Convention of February 12, 1871, between the United States and Spain, \$60,000 was awarded for the killing of a naturalized American citizen of Spanish origin, Juan F. Portuondo. It was said in defense that he was shot while trying to escape. Moore, *International Arbitrations*, vol. 3, p. 3007. In the case of *Thomas H. Youmans*, this Commission awarded \$20,000 because soldiers had participated in the murder of Henry Youmans in 1880 in the State of Michoacán. *Opinions of the Commissioners, Washington, 1927*, p. 150.

Indemnities have been awarded in cases in which it has been considered that soldiers or police officials acted improperly in attempting to make arrests, when persons have failed to respond to a summons to halt. Domestic laws throughout the world seem none too certain with respect to the action of officers relative to such matters. It seems reasonable to suppose that such is the fact because it is considered to be inadvisable or impracticable to frame legislation tending on the one hand to tie too rigidly the hands of officials, or on the other hand, to give them too great latitude, and that therefore considerable discretion is left to them.

In the *Falcón* case before this Commission, an award of \$7,000 was made against the United States on account of the firing on Mexican citizens by American soldiers. *Ibid.*, p. 140. In the case of *Teodoro García and M. A. Garza*, before this Commission, an indemnity of \$2,000 was awarded against the United States because an American Army lieutenant had shot at a raft in the Rio Grande and one of the shots fired by him killed a Mexican girl. *Ibid.*, p. 163.

In 1915 Canadian soldiers shot two young Americans thought to be engaged in hunting ducks out of season in Canadian waters. One of them was killed and the other seriously injured. Indemnities were paid by Great Britain. *Foreign Relations of the United States*, 1915, pp. 415-423.

In cases of this kind it is mistaken action, error in judgment, or reckless conduct of soldiers for which a government in a given case has been held responsible. The international precedents reveal the application of principles as to the very strict accountability for mistaken action. This fact is well illustrated by the *Falcón* and *García and Garza* cases, *supra*, decided by this Commission.

In the *Falcón* case American soldiers, believing that certain men seen in the Rio Grande were engaged in smuggling, directed them to halt. The

order was not obeyed. The soldiers testified that they were fired upon from the Mexican side by mounted men and thereupon fired in self-defence. They further stated that they also directed some shots at the men who were in the water. Even in these circumstances the Commission made that act the basis of an award against the United States. In the *García and Garza* case the record revealed that the American army lieutenant, Gulley by name, shot at a raft which certain persons knowingly propelled in violation of the law of the United States in 1919. The lieutenant was on duty charged with enforcing legislation of various kinds relating to the entry into or departure from the United States of aliens in time of war, provisions against the importation of arms and ammunition into Mexico and matters relating to immigration and smuggling. Lieutenant Gulley testified before a court-martial to which he was subjected that he fired about twelve shots in the direction of the raft, and stated that at the time he did so he did not care to hit anyone but merely wanted to frighten the persons on it so as to cause them to return to the American side in order that he might arrest them. He further testified that he could see no one on the raft when he fired and would not have fired in the direction of it if he had known that women or children were on it. The court-martial found that the accused had no malice at the time of firing and no intention of killing anyone. Even in the light of evidence of such a situation so critical for the officer, two Commissioners were of the opinion that he was guilty of error of judgment justifying an award against the United States.

It is difficult to perceive that in the instant case there could plausibly be advanced any such excuses or explanations for shooting as were made with respect to the conduct of the soldiers whose acts were under examination in the *Falcón* and *García and Garza* cases.

It does not appear to have been contended by the United States in the instant case that the killing of Kling was a deliberate and wanton murder. Evidently it cannot properly be considered that the shooting was the result of any attempt to secure the apprehension of a person endeavoring to escape arrest. Whatever excuse might be made for the action of the Mexican soldiers, their conduct must be considered to have been indiscreet, unnecessary and unwarranted. There are also numerous international incidents of this kind, cases not concerned with attempted arrests, in which damages have been assessed for mistaken, unnecessary, indiscreet or reckless action.

Thus in the *Dogger Bank* case, Great Britain demanded indemnity from the Government of Russia, when during the course of the Russo-Japanese war in 1904, the Russian Baltic fleet fired into the Hull fishing fleet off the Dogger Bank in the North Sea. The British Government demanded an apology, ample damages and severe punishment of the responsible officer. The matter was submitted to an international commission of inquiry. The Russian Government maintained that the firing was caused by the approach of some Japanese torpedo boats. The commission of inquiry reported that no such boats had been present; that the firing was not justifiable; that Admiral Rojdestvensky was responsible for the incident, but that these facts were not of a nature to cast any discredit upon the military qualities or the humanity of Admiral Rojdestvensky or of the personnel of his squadron. Russia paid 65,000 pounds to indemnify the victims and families of two dead fishermen. Oppenheim, *International Law*, 3rd ed., vol. II, pp. 7-8. In the *Stephens* case decided by this Commission, the sum of \$7,000 was awarded against Mexico for the shooting of Edward C. Stephens, an

American citizen, on March 9, 1924, by a member of some Mexican guards of auxiliary forces in the State of Chihuahua. The following extract from the opinion of the Presiding Commissioner indicates the conclusion of the Commission with respect to the facts in that case:

"There should be no difficulty for the Commission to hold that Valenzuela when trying to halt the car acted in the line of duty. But holding that these guards were entitled to stop passengers on this road and, if necessary, to use their guns pursuant to Article 176 just mentioned, does not imply that Valenzuela *executed* this authorization of the law in the right way. On the contrary, the use he made of his firearm would seem to have been utterly reckless." *Opinions of the Commissioners, Washington, 1927*, p. 397, 399.

On September 26, 1887, a German soldier on sentry duty on the frontier near Vexaincourt, shot from the German side and killed a person on French territory. Germany disowned and apologized for this act and paid the sum of 50,000 francs to the widow of the deceased. The sentry, however, escaped punishment because he proved that he had acted in obedience to orders which he had misunderstood. Oppenheim, *International Law*, 3rd ed., vol. I, pp. 255-256.

The general rule as to the responsibility of a government for errors in judgment of its representatives was given application by M. Henri Fromageot, the distinguished French member of the Permanent Court of International Justice, in an opinion which he rendered in the case of *The Jessie, Thomas F. Bayard and Pescawha*, under the Special Agreement of August 18, 1910, between the United States and Great Britain. The case was concerned with a complaint against American naval authorities. M. Fromageot as arbitrator said:

"It is unquestionable that the United States naval authorities acted *bona fide*, but though their *bona fides* might be invoked by the officers in explanation of their conduct to their own Government, its effect is merely to show that their conduct constituted an error in judgment, and any government is responsible to other governments for errors in judgment of its officials purporting to act within the scope of their duties." *American Agent's Report*, pp. 479, 480-481.

Under date of June 4, 1921, the Department of State addressed a communication to the American Chargé d'Affaires at Mexico City, instructing him to bring the shooting of Kling to the attention of the appropriate authorities in Mexico City and to request a thorough investigation. The Mexican Foreign Office replied that full reports had been requested from the appropriate authorities. No further reply was ever made by the Mexican Government.

In connection with any investigation which the Government of Mexico might have desired to make at that time with respect to the killing of Kling there would have been available the testimony of Kling's seven companions, at least one or perhaps more than one person in the camp of the oil company, and at least four or five Mexican soldiers, including Colonel Huerta, who is mentioned in the evidence. No evidence was produced by Mexico at the first hearing of this case showing whether or not an investigation and report had been made by the appropriate authorities, of if they were made, what was developed by them.

The mere fact that evidence produced by the respondent Government is meagre cannot itself justify an award in the absence of satisfactory evidence from the claimant. On the other hand, a claimant's case should not neces-

sarily suffer by the non-production of evidence by the respondent. It was observed by the Commission in the *Hatton* case, *Opinions of the Commissioners, Washington, 1929*, pp. 6, 10, that, while it was not the function of a respondent Government to make a case for a claimant Government, certain inferences could be drawn from the non-production of available evidence in the possession of the former. See also the *Melzer Mining Company* case, *ibid.*, p. 228, 233. The Commission has discussed the conditions under which, when a claimant Government has made a *prima facie* case, account may be taken of the non-production of evidence by the respondent Government, or of unsatisfactory explanation of the non-production of evidence. Case of *L. J. Kalklosch*, *ibid.*, p. 126.

Little adjective law has been developed in international practice. International tribunals are guided to some extent by rules formulated in connection with each arbitration. With respect to matters of evidence they must give effect to common sense principles underlying rules of evidence in domestic law.

In the *Parker* case, *Opinions of the Commissioners, Washington, 1927*, p. 35, the Commission discussed at considerable length the position of the Agents with respect to the production of evidence. The principle which the Commission evidently had in mind is given effect in The Hague Convention of 1907, for the pacific settlement of international disputes to which a large number of nations, including Mexico and the United States, are parties. Article LXXV of that Convention reads as follows:

"The parties undertake to supply the tribunal as fully as they consider possible, with all the information required for deciding the case."

Other Commissions have often similarly dealt with the question of the application of principles of evidence. The subject is referred to by Ralston in his work. *The Law and Procedure of International Tribunals*, revised edition, as follows (p. 225):

"Many times commissions have invoked against a litigant party the legal presumption attaching to the nonproduction of evidence within its power to produce. Thus in the *Brun* case it was said :

"The umpire might hesitate to adopt these findings if it were not true, and had not been always true, that the respondent government could ascertain and produce before this mixed commission the exact facts regarding the positions and movements of its own soldiers, and the position and movements of the insurgent forces at the time in question. Especial force attaches to this when it is known that the respondent Government was asked and urged by the representatives of the French Company and by the representatives of the claimant government to permit the use of its judicial processes and functions, in order that the truth might be established, but the privilege was denied them."

"In the *De Lemos* case the umpire was influenced in his conclusions by the consideration that, were the statements made by the claimant false, the official particulars were undoubtedly with the Government of Venezuela, and, they not being furnished, though susceptible of production, he did not hesitate to make an award."

That a claimant should not be prejudiced by the non-production of evidence by a respondent Government is observed in an opinion rendered on January 22, 1930, by the Commission established by the Convention of March 16, 1925, between Mexico and Germany, in the case of *Laura Z. Widow of Plehn*. The case grew out of the killing of Hans Plehn, a German citizen, by revolutionists in the State of Hidalgo in 1916. An award of

\$20,000 national gold was made in this case. In the opinion written for the Commission by the President Commissioner, Dr. Cruchaga, and concurred in by the Mexican Commissioner and the German Commissioner, it is said:

"It is regrettable that the proceedings or copies of same do not appear in the proceedings as they would have given much light on these lamentable occurrences.

"The reasonable measures for punishing the bandits, referred to in No. 5 of Article 4 of the Convention, do not in my opinion consist alone in the instituting of a prosecution, but it is necessary to become acquainted with the prosecution itself in order to state whether they have such a character.

"The exhibition of the record would have made it possible to determine the steps employed by the authorities for the punishment of the guilty party, and the absence of this piece of evidence cannot damage the claimant, as it was not in her hands to present and appertained to the defendant Agency to show it in proof of its assertion that there was no lenity or lack of diligence on the part of the authorities."

Domestic courts may approach this subject from a somewhat different angle, but they of course also analyse the evidence in the light of what one party has the power to produce and the other the power to explain or to controvert. See *Mammoth Oil Co. v. United States*, 275 U. S. 13, and the cases there cited.

Counsel in an international arbitration are of course zealous in producing all possible evidence and argument in defense of the acts of a government which they represent. It is natural and proper that they should do so. That is of course their duty to their Governments and to themselves, and it is their duty to the tribunals before which they appear which should have all possible assistance in formulating sound judgments. It must be generally assumed that any available proof tending to support a government's contention will be produced.

On April 9, 1929, the Commission requested the Agents to submit further evidence, particularly the American Consular despatches and the records of any proceedings instituted by Mexican civil or military authorities regarding the incidents out of which the claim arose.

The United States produced copies of correspondence between the Department of State and the American Consul at Tampico. In a despatch of January 31, 1921, the Consul reported concerning the serious condition of Kling. He expressed the view that the wounding of Mr. Kling might be "classified as an accident". He said that Mexican soldiers "attempted to make capital out of this incident", and he narrated the facts with regard to the arrest of the seven employees of the company and the proceedings taken against them which he ascribed to what he called an "anti-American" feeling. The Department of State, in an instruction of March 21, 1921, directed the Consul to report whether the Americans fired first upon the soldiers and if not, what justification there was for the firing by the latter. The Consul was also directed to report why he called this affair an "accident", and he subsequently explained that he did so solely in the light of the facts stated in the correspondence, and that he did not intend to excuse the shooting, although he did not consider it to be unnatural that it had occurred. Evidently the Consul made no investigation at the scene of the occurrences under consideration and had before him considerably less evidence than has the Commission at the present time.

The Commission has frequently had occasion to consider testimony furnished by Consular officers. Generally speaking, such testimony should be valuable. It is the important duty of officials of this character to search out and report facts to their governments. However, their testimony must of course be considered in the light of tests applicable to witnesses generally, the tests as to a person's sources of information and his capacity to ascertain and his willingness to tell the truth. The Commission has considered reports of Consuls in the light of those tests, giving weight to those which have revealed the ascertainment of facts which opportunity and effort have made possible and of course attaching little importance to reports based on scanty information. See the opinions of the Commission in the cases of *Walter H. Faulkner, Opinions of the Commissioners, Washington, 1927*, p. 86; *Harry Roberts, ibid.*, p. 100; *Laura M. B. Janes, ibid.*, p. 108; *Thomas H. Youmans, ibid.*, p. 150; *L. J. Kalklosch, Opinions of the Commissioners, Washington, 1929*, p. 126; *Alexander St. J. Corrie, ibid.*, p. 133; *F. M. Smith, ibid.*, p. 208; *Lily J. Costello, ibid.*, p. 252.

In response to the request made by the Commission on April 9, 1929, the Mexican Agency has produced copies of two communications addressed by Mexican military authorities to the Mexican Foreign Office in 1927. In a communication of June 20, 1927, from those authorities it is stated that no information has been found with respect to the killing of Kling. In a subsequent communication of July 22, 1927, similar information is given, but it is observed that possibly ex-General Daniel Martinez Arera, whose address is given, and who at the time of the events was in command of the sector where they occurred, might furnish certain information. It is stated that such information had been requested from him and would be communicated when available. However, no report from General Martinez is included in the record before the Commission.

The Commission has dealt with cases in which the evidence revealed uncertainties as to the opportunities open to authorities to make investigations and as to methods which have been employed. The instant case is particularly free from uncertainty. Apart from the record showing lack of investigation, we have in oral argument the statement that the position of Mexico is that she is ignorant of the occurrences under consideration. The evidence reveals, on the one hand, that there were available records of proceedings against the Americans; also many persons as witnesses, and on the other hand, that no information was obtained or that in any event nothing has been laid before the Commission.

The investigation by the military authorities which produced no information concerning the occurrences in question was instituted in 1927. Kling was killed in 1921. On July 21, 1927, this Commission rendered a decision in the *Galvan* case, awarding \$10,000 in favor of Mexico on account of the non-prosecution of a person who killed a Mexican citizen in the State of Texas. *Opinions of the Commissioners, Washington, 1922*, p. 408. The Commission reached the conclusion that after the year 1927 the authorities had failed to take proper steps to try the person indicted for the killing. In the opinion of the Commission in an observation which seems to be pertinent to the instant case. It was said:

"If witnesses actually disappeared during the course of the long delay in the trial, then as argued by counsel for Mexico, that would be evidence of the evils incident to such delay."

Prima facie evidence has been defined as evidence "which, unexplained or uncontradicted, is sufficient to maintain the proposition affirmed". *Corpus Juris*, vol. 23, p. 9. In the absence of any proof on the part of Mexico to controvert the evidence which has been produced by the United States, the Commission is constrained to render an award in favor of the latter. Kling was 22 years old when he was shot. His associates and employers have furnished testimony describing him as a man of fine character, ability and promise. Evidence is furnished by officials of the company that at the time of his death he was receiving \$400 a month. In consideration of these facts and in the light of the principles applied by the Commission in fixing indemnities, the award should be in the amount of \$11,000. However, since my associates are of the opinion that the award should be \$9,000.00, and since I consider that the claimant is entitled to at least that much, I concur in that amount.

Dr. H. F. Alfaro, Presiding Commissioner:

I concur, in general terms, with the conclusions set forth in the opinion of the Honorable Commissioner Fred K. Nielsen concerning the international responsibility of the Mexican Government for the acts of the soldiers who caused the death of the North American citizen, August Francis Kling, but I do not agree with him in his valuation of some of the cases he quotes as precedents, nor in that of the very facts which give rise to the instant claim.

My learned colleague is of the opinion that whatever may be the excuse alleged in defense of the conduct of the Mexican soldiers, their behavior must be considered as indiscreet, unnecessary and unjustified. Nevertheless, it is impossible not to consider that the action of the soldiers was caused by the shots fired in the air, by some of Kling's companions, in a very imprudent manner in view of the hour and the conditions of constant alarm and insecurity which then prevailed in the theater of the events.

The cases of *José M. Portuondo*, *Thomas H. Youmans*, *Dolores Guerrero, viuda de Falcón*, *Teodoro García* and *M. A. Garza* and others cited by the Honorable Commissioner Nielsen, although growing out of acts executed by soldiers while on duty, differ from the instant case in one essential particular. In all of those cases the authors acted consciously and deliberately. In the deplorable incident under consideration, the soldiers who fired upon the group of which Kling was a member, did so in the darkness of the night, impelled by an apparent provocation or attack and in ignorance therefore whether they had to contend with individuals who were merely amusing themselves by discharging their firearms in the air or with bandits such as those who at that time infested the district.

These circumstances seem to explain—although they do not in any manner justify—the absence of any investigation subsequent to that made by the Military Authorities of these events, for which reason the responsibility of Mexico in this case is not of a more serious character.

In view of the foregoing, I believe that an indemnity of \$9,000.00 United States currency is proper in the instant case.

Fernández MacGregor, Commissioner:

I concur in the opinion of the Presiding Commissioner.

Decision

The United Mexican States shall pay to the United States of America on behalf of Lillie S. Kling the sum of \$9,000.00 (nine thousand dollars) without interest.

LOUIS B. GORDON (U.S.A.) *v.* UNITED MEXICAN STATES

(October 8, 1930, dissenting opinion by American Commissioner, undated.
Pages 50-60.)

RESPONSIBILITY FOR ACTS OF MILITARY OFFICERS.—DIRECT RESPONSIBILITY.

RECKLESS USE OF ARMS.—ACTS OUTSIDE SCOPE OF DUTY. While engaged in target practice on grounds of Mexican fort two Mexican military officers, one a captain and the other a doctor, wounded claimant with one of their shots. Claimant was on board an American vessel anchored below the fort. Apparently no effort was made by the officers to ascertain whether any vessels were behind the target wall. Daily target practice was mandatory under Mexican Army Regulations. Pistol with which shots were fired was one privately owned. *Held*, (i) act resulting in injury was a private act and not one in line in duty for which respondent Government was responsible, and (ii) act was not an act of official resulting in injustice within the terms of the *compromis*, since such acts must involve acts unjust according to international law and in the instant case there was no responsibility at international law.

DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH. One of two military officers who shot American subject during target practice was not arrested therefor until six months after the event. No one was ever punished in connexion with such shooting, the accused being discharged on the ground that it could not be ascertained which of the two officers had fired the shot in question. *Held*, denial of justice below international standard not established. With respect to delay in arrest, it appeared that political disturbances then existed throughout the Mexican Republic.

Cross-references: Am. J. Int. Law., Vol. 25, 1931, p. 380; Annual Digest, 1929-1930, p. 170; British Yearbook, Vol. 12, 1931, p. 168.

Comments: Edwin M. Borchard, "Recent opinions of the General Claims Commission, United States and Mexico", Am. J. Int. Law, Vol. 25, 1931, p. 735.

Commissioner Fernández MacGregor, for the Commission:

Claim is made in this case against the United Mexican States by the United States of America on behalf of Louis B. Gordon, an American citizen, to obtain damages in the sum of \$5,000.00 United States currency, for physical injuries received at the hands of two Mexican military officers, upon whom absolutely no punishment was imposed.

On November 23, 1912, the steamship *San Juan*, owned by an American company, was anchored about one half mile from shore in the Port of Acapulco, Guerrero, Mexico. Louis B. Gordon, who was first assistant engineer of the vessel, noticed at about 5.45 P. M. that the ship was being fired upon by some person or persons stationed on the nearby Fort San Diego, and reported the matter to the Captain who ordered him to warn the passengers and the officers to remain on the opposite side of the ship. While carrying out this order the claimant was wounded in the left side being totally incapacitated as a result of the injury for twenty-six days and unable fully to perform his duties as engineer for three months.

At the request of the American Vice Consul at Acapulco, the Mexican military authorities investigated the case, reporting that Dr. Juan Ávalos had fired the shots and that he had been immediately placed under arrest. The matter was referred to the District Judge of Acapulco who personally boarded the vessel prior to its departure to make the necessary investigation which showed that not only had Dr. Ávalos fired but also Captain Felix Aguayo, while both were engaged in target practice.

The proceedings followed the usual course, and finally the Judge rendered a decision acquitting the two persons accused of wounding Gordon on the ground that as it did not clearly appear which of the two individuals engaged in target practice had fired the shot causing the injury, the provision of the Mexican law directing that in case of doubt the accused must be acquitted, was applied.

The American Agency alleges in the first place that in view of the fact that the two Mexican military officers in question inflicted upon Gordon the physical injury of which complaint is made while engaged in target practice which is prescribed by the Mexican Army Regulations, the Mexican Government is directly responsible for the resulting personal damages. Reference was made in this regard to a number of provisions of the Mexican Army Regulations to show that daily target practice was mandatory from which it is to be presumed that Captain Aguayo and Dr. Ávalos were complying with a duty imposed upon them by law when they wounded the claimant. It was represented that soldiers are on duty 24 hours a day, and that as the target practice in question took place at five o'clock in the afternoon on the grounds of a Fort, the foregoing clearly demonstrated that Mexico is directly responsible according to the established principles of international law.

The foregoing reasoning tends to demonstrate a legal presumption that the Mexican officials were engaged in the performance of a military duty when they wounded Gordon. But the record of the proceedings does not sustain this presumption. Doctor Ávalos testified that he acquired a "Parabellum" pistol, and wishing to try it out, together with Captain Aguayo, set up a target and began firing. Aguayo confirms this version and even adds that the pistol was unfamiliar to him as he had never fired one of this make. It is also to be noted that the persons responsible for the crime were turned over to a civil Judge and not to the military authorities as would have been obligatory had they committed a crime while on duty. Colonel Gallardo, the Commandant of the Fort, told the Captain of the ship that the shots had not been fired by any of his men. In view of the preceding, it seems reasonable to assume that the target practice of the two officers was not that prescribed by Regulations, but of an absolutely different character instituted as the result of the private purchase of the "Parabellum"

pistol. It is not known on the other hand whether army doctors are required to perform target practice. Everything then leads to the belief that the act in question was outside the line of service and the performance of the duty of a military officer, and was a private act and under those conditions the Mexican Government is not directly responsible for the injury suffered by Gordon. (See Borchard, *Diplomatic Protection of Citizens Abroad*, par. 80, page 193, Ed. 1922; the case of *Youmans*, Docket No. 271; the case of *Stephens*, Docket No. 148, of this Commission).

The Commission likewise rejects the contention of the responsibility of Mexico founded upon the clause of the General Claims Convention under which the two contracting nations assume responsibility for claims arising from acts of officials or others acting for either Government and resulting in injustice. Not every act of an official is binding upon the Governments; it is necessary that it "result in injustice" and this phrase is merely another manner of saying that the act is unjust according to international law. The principle is that the personal acts of officials not within the scope of their authority do not entail responsibility upon a State. It has already been said that the Mexican officials in question acted outside the line of their duty. Therefore no responsibility attaches to the Mexican Government on this count.

The claimant also complains that the efforts made by the Mexican authorities to arrest and bring to trial the perpetrators of the crime, were lax and inadequate. The Commission finds that the preliminary proceedings were instituted immediately, since notwithstanding the fact that the Captain of the vessel and the American Vice Consul decided not to request the arrest of the guilty persons, so as not to delay the sailing of the said vessel, the case from the very day of the events was before the Judge who personally boarded the ship in order to make the preliminary investigation. Dr. Ávalos was arrested at once and his formal commitment to prison ordered on the second of December; the report of the expert on the wound suffered by Gordon was rendered on November 25, and although the Commission has not before it the whole judicial record, but only extracts thereof filed by the Mexican Agency, it is assumed that further investigation was made and other witnesses examined, as shown by the final decision of the case and the statement of the American Vice Consul, who on the 26th of November, addressed a letter to the Secretary of State reporting that the trial Judge had asked him that same day for the affidavits executed by the persons on the ship who had witnessed the events. Unfortunately, it seems that the arrest and examination of Captain Aguayo did not take place immediately. There is correspondence from the American Consulate addressed to the Judge and to the Military Commandant of Acapulco requesting information concerning the status of the proceedings and indicating the failure to arrest Captain Aguayo. The Mexican authorities replied (it appears with some delay because of the fact that the communications were written in English) that they had been unable to effect the arrest of Captain Aguayo for the reason that he had been assigned to field service, but that the proceedings were being followed and that letters rogatory had been sent to another Judge, (probably to examine or arrest Captain Aguayo). The fact is that he was not arrested until July 16, 1913, that is to say, six months after the events, and formally committed to prison on the 19th of the same month. The delay is evident and is not sufficiently explained; counsel for Mexico made reference to the then existing political

disturbances extending throughout the whole Mexican Republic, disturbances which are confirmed by history (the overthrow of President Madero by Victoriano Huerta in February of 1913) and corroborated to a certain extent by the correspondence of the American Consul addressed to the Secretary of State in Washington, which on April 24 states:

"Government is merely nominal and without adequate authority. The courts are paralyzed by fear". "Anarchy prevails throughout this region."

As to the remaining points, it does not appear so clearly that the Mexican authorities were disposed to treat Captain Aguayo with lenity, for although it is true that he was not arrested until July 16, 1913, he was not allowed his liberty on bail until the following 23rd of August, notwithstanding the fact, that under the provision of Mexican law, this could have been allowed much earlier. After the arrest of Captain Aguayo the proceedings continued their course until the rendering by the Judge of the final decision on October 2, 1913. It does not appear then that there has been in this case defective administration of justice so clear as to give rise to international liability.

The American Agency complains finally, that the decision rendered in the case constitutes a denial of justice, inasmuch as the two persons responsible for the physical injury suffered by Gordon were released without the imposition of any penalty. The facts proven before the Judge and upon which he based his decision, are the following: Doctor Ávalos and Captain Aguayo arranged to try out a small pistol belonging to the former on the covered way of Fort San Diego, setting up a target against a wall one meter in height which faced the sea; they did not take the precaution of ascertaining whether there were vessels of any kind behind the wall; they fired shots the number of which cannot be determined since the witnesses and the accused themselves do not agree on this point; the latter state that one shot only fired by Captain Aguayo passed beyond the wall into the sea; but the inspection of the said wall and of the *S.S. San Juan* shows that several shots passed beyond the wall, it not being possible to determine which one of the two accused fired the shots which struck the *S.S. San Juan*. The Judge drew the conclusion, based on the foregoing, that the act of the accused was not intentional, but that there existed carelessness, imprevision and lack of reflection or care on their part in firing the shots; that the *corpus quasi-delicti* is proven by the physical injury received by Gordon; but as the wound was caused by one shot only and being unable in any way to ascertain which one of the two accused fired it, neither of them could with certainty be declared to be the author of the physical injury in question, therefore, basing his action on a provision of the Mexican law which states that an accused cannot be convicted unless it is proven that he had incurred in the commission of the crime some of the penal responsibilities fixed by the law, and that in case of doubt he must be acquitted, he absolved the two accused in this case.

It is possible that the Judge could have imposed upon the accused a penalty based only on the carelessness of their act of discharging a firearm without taking the proper precautions. But it seems that the crime of which Ávalos and Aguayo were accused, that of physical injuries through negligence (*por culpa*) was a reasonable and adequate charge, when the events were recent, and the Judge was restricted to the complaint as presented. Apart from the injuries inflicted, the act of carelessness or imprevision on the part of the accused would have merited a very small penalty.

The decision was reviewed by the competent Superior Court and found to be in accordance with the law. The question then, is one of a decision of a court of last resort and in view of the circumstances, and of the opinions of this Commission in analogous cases, it cannot now be said that the said decision amounts to an outrage, or that it is rendered in bad faith, or shows a wilful neglect of duty or insufficiency of governmental action so far short of international standards as to constitute a denial of justice.

For the reasons stated, the claim of Louis B. Gordon must be disallowed.

Decision

The claim of the United States of America on behalf of Louis B. Gordon is disallowed.

Commissioner Nielsen, dissenting.

Contentions with respect to liability are predicated on two grounds: (1) direct responsibility for the action of Mexican military authorities in connection with the shooting of an engineer on an American vessel, and (2) non-punishment of the offenders.

I do not find myself in entire harmony with the conclusions of my associates nor with the arguments advanced by either Agency in its brief relative to the question of responsibility for the acts of soldiers, and specifically in this case, for the acts of officers. It seems to me that with respect to the majority of cases coming before international tribunals involving questions as to the responsibility for acts or omissions of agencies of functionaries of a government it is convenient and logical to make use of two general classifications.

On the one hand, a nation becomes responsible if there is a failure to live up to well defined obligations of international law. Thus for example, it is a requirement of international law with respect to injuries caused by private individuals to aliens that reasonable care must be taken to prevent such injuries in the first instance, and suitable steps must be taken properly to punish offenders. When conduct on the part of persons concerned with the discharge of governmental functions results in a failure to meet this obligation a nation must bear the responsibility.

On the other hand, there is what may conveniently be called a direct responsibility on the part of a nation for acts of representatives or agencies of government, such as liability under certain conditions, for acts of soldiers or damage caused by public vessels. A nation is not responsible for acts of soldiers committed in their private capacity, that is, when the soldiers are not under some form of authority. But it seems to me that it may be misleading to emphasize too much any idea as to reprehensible acts being within the competency or scope of duty of those guilty of misdeeds. There are of course private acts of malice that do not impose responsibility. But in connection with the question of direct responsibility it is assuredly important to take account of the nature of the agency or functionary that inflicts injury and of the element of control which the law presupposes in connection with this form of responsibility. Thus in the *Youmans* case, *Opinions of the Commissioners, Washington, 1927*, p. 150, the Commission expressed its views with respect to an argument made as to responsibility for acts of an official committed "outside the scope of his competency, that is to say, if he has exceeded his powers". It was observed in effect by the Commission that if there could be no responsibility for an act considered to be "outside

the scope of his competency" it would follow that generally speaking no wrongful acts committed by an official could be considered as acts for which his government could be held liable. Cases in which laws enjoin wrongful action on officials are undoubtedly exceptional. And it was further observed that soldiers inflicting personal injuries or committing wanton destruction or looting always or practically always act in disobedience of some rules laid down by superior authority, and that there could therefore broadly speaking be no liability whatever for such misdeeds if the view were taken that any acts committed by soldiers in contravention of instructions must always be considered as personal acts. Undoubtedly in the case of soldiers the distinction must be made between what have been called private acts and other acts. It is therefore proper to take account of conditions under which acts are performed. But it is equally important, if not more important, as I have suggested to take account of the principle of responsibility which has its justification in that control which a nation must exercise to prevent wrongful acts and which takes account specifically of the position of those committing such acts.

The element of control was interestingly emphasized in the case of the *Zafiro*, decided by the tribunal under the special Agreement concluded between the United States and Great Britain August 18, 1910, American Agent's *Report*, p. 478. In this case the United States was held responsible for looting committed by certain members of the crew of a vessel at a time when they were on shore leave and relieved from their duties. This decision may perhaps be considered to lose some of its force when account is taken of the fact that goods taken were returned by the Commander of the vessel, and that although the premises looted had been overrun prior to the arrival of the members of the crew, the tribunal held that, since the latter had participated in the wrongful act, the United States should be held liable for all losses sustained. However, the case has an interesting bearing on the element of control that it was considered the government was obliged to exercise.

In the instant case it would seem to be clear that if private soldiers had engaged in target practice from the fort or from environs belonging to the fort there would be responsibility on the part of the Government. And this would be so, even though the soldiers were engaged in target practice at some hour not specifically prescribed, or in some manner not precisely required by army regulations. The soldiers in this situation would be in the position in which it is considered responsibility would attach for their acts; they would be under some form of control or authority of officers. It therefore seems to me that if officers themselves engaged in some kind of target practice in the same circumstances there should be responsibility on the part of the Government for their acts. The instant case seems to me to present such a situation. The two accused men advanced the defense that they were engaged in target practice. The judge declared that this was in itself a licit act. But he found that the evidence established imprudence, improvisation, unskillfulness, negligence or lack of precaution and illicit consequence. Of course I do not mean that because of a man's official status a Government must be responsible for every wrongful act committed by an officer.

The element of uncertainty with respect to the question of direct responsibility does not appear, in my opinion, in connection with the phase of the case relating to non-prosecution. The record of course shows much delay.

It may seem a little strange that both officers should be found innocent. But for the purpose of rendering a decision it appears to be unnecessary to quarrel with the decision rendered by the judge. From the standpoint of the Commission it is not a vital point whether he properly weighed the evidence, or whether his decision was erroneous in the light of his conclusions, or whether he could reach no other decision with respect to the particular charge filed against the two defendants, an insufficient charge having been made by prosecuting authorities. The fact remains that the two men fired, as the judge states in his opinion, twelve to fifteen shots in the direction of the vessel. Several bullets struck the ship; the lives of passengers were endangered; the claimant was seriously wounded and incapacitated for virtually a month. The judge in his opinion stated that the evidence proved "the imprevision, the lack of judgment or care on the part of the authors who did not take any precaution, not even the precaution of looking beyond the wall which was only one meter high to ascertain that there were no vessels in sight, for if they had done so they could not have failed to notice that the *S.S. San Juan* provided such a large target", and he expressed the conclusion that the illicit consequences of the target practice was established by the evidence before him.

Such recklessness with such effect on a foreign vessel is assuredly not a matter of slight concern. The judge points out in his opinion how indifferent the defendants were to the possible consequences of their acts. Indeed if the officers had diverted themselves shooting at the ship, it would seem that they would not more greatly have endangered lives and property. From a communication written by the Commander of the vessel under date of November 25, 1912, it appears that he took it for granted at that time that the shots were aimed at the vessel.

There may be and probably is a distinction between the offense of such reckless action by itself and the offense of such action coupled with consequences such as the wounding of Gordon. For the latter the judge declared himself unable to inflict punishment, declaring that he could not determine from the evidence which of the defendants hit Gordon. But the utter recklessness which the judge describes undoubtedly is, and certainly should be, punishable under Mexican law, but through either the fault of the prosecuting authorities or through fault of the judicial authorities no punishment was inflicted.

I understand the reasoning of my associates, and I realize that in all countries there are errors and inadequacies at times in connection with the administration of criminal jurisprudence. However, it seems to me that, if the instant case is to be decided by strict application of law, it is not possible, in the light of the delayed and abortive proceedings against the defendants, to reject entirely the contentions of the United States with respect to non-prosecution. If there may appear to be some doubt on this point, it seems to me I have support in my view in a precedent furnished by the two Governments parties to this arbitration. The case interestingly illustrates the extent to which the Government of Mexico insisted on an indemnity for non-prosecution of an American who wounded a Mexican and the extent to which the Government of the United States acquiesced in the justness of the request for reparation.

A Mexican who had committed a theft in Brownsville in 1904 attempted to escape from arrest and was wounded by a Texas police official. It was explained that the latter ordered his prisoner to halt; that since the prisoner did not do so, the official, a so-called "ranger", being crippled in one leg,

knew that he could not make an arrest, and therefore fired first over the head of the fleeing man and later fired shots which took effect. The ranger surrendered himself to the authorities, and his case was investigated by a grand jury which, however, did not find an indictment against him. Mexico requested an indemnity because the ranger was not punished, and an indemnity was paid by the United States. *Foreign Relations of the United States*, 1904, p. 473 *et seq.*

Cases of shooting to prevent escape of wrongdoers almost invariably present difficult questions both from the standpoint of domestic law and from the standpoint of international law. Whatever may be the precise facts in connection with the case just mentioned, it would seem that the error of judgment or lack of discretion of the Texas ranger could certainly be no greater—and it appears to me to have been less—than that described by the judge with respect to the conduct of the two Mexican officers under consideration in the instant case.

GEORGE W. COOK (U.S.A.) *v.* UNITED MEXICAN STATES

(October 8, 1930, concurring opinion by American Commissioner, October 8, 1930.
Pages 61-68.)

ILLEGAL COLLECTION OF TAXES.—STATUTORY EXEMPTION FROM TAXATION.

Claimant erected a certain building on real estate owned by him on the understanding with the Governor of the State that it would be exempt from the payment of the corresponding real estate tax. A State Statute granting such an exemption for a period of twenty years was thereafter enacted in 1909. In 1917 the local municipality, pursuant to authorization of the State Legislature, collected a certain tax on claimant's premises, payment thereof being made by claimant under protest. Claim for refund of tax *disallowed*. The tax in question was not a general real estate tax of the nature referred to in the Statute of 1909. Moreover, no person can have a vested interest in an exemption from taxation.

Commissioner Fernández MacGregor, for the Commission:

In this claim filed by the United States of America on behalf of George W. Cook, an American citizen, it is sought to recover from the United Mexican States the sum of \$137.70 Mexican currency and interest thereon from June 7, 1918, on the ground that this sum which represents a tax upon property of the claimant, which was exempt from such taxation, was collected illegally by the Municipal Authorities of Guadalajara.

The facts upon which both Agencies agree are as follows:

In 1905, Mr. Cook, the owner of a parcel of real estate in the city of Guadalajara, in the state of Jalisco, having the intention of erecting a building thereon, obtained from the Governor of the State an offer to the effect that if he, the claimant, would erect a modern building, he would recommend to the state legislature that the said property be exempted from the payment of the corresponding real estate tax (*Contribuciones prediales*). The claimant, in the years 1906 and 1907, constructed the edifice in question and on April 29, 1909, the State Congress enacted the following legislation:

"Sole Article.—The building designated with numbers 172, 176 and 182 of the Calle de San Francisco situated on the east sidewalk of block number four, District I of this City is hereby exempted from the payment of the corresponding real estate tax (*Contribución predial*) for a period of twenty years."

Later by Act of December 29, 1917, the State Legislature of Jalisco added to the budget of the Municipality of Guadalajara by creating, for one semester, a tax of two per thousand annually upon urban property. This tax according to the said Act, was to be collected only for the first semester of the year 1918.

Pursuant to this later Act the Municipal Authorities proceeded to collect the tax upon the property of Mr. Cook, the payment of which being refused, the Agent of the Municipal Treasury placed an embargo upon the property, in view of which the claimant, under protest, paid the tax, \$137.70 Mexican currency, which is the amount of this claim.

The American Agency avers in its briefs: (a) that the exemption in the Act of 1909 was enacted as compensation for the obligation incurred by the claimant to construct an edifice which would constitute an improvement to the City; (b) that the said Act included all classes of taxes which could be imposed upon the said property whether by the State or Municipality, and finally, (c) that the Municipality of Guadalajara acted unlawfully in requiring the payment of the sum which is claimed herein, since the Act of 1909 could not have been repealed by the Legislative Act of 1917, in accordance with the principle that a general act cannot repeal a prior special act unless it is evident from the text of the act itself that such was the express intention of the legislature.

The Commission is of the opinion that the first argument presented by the Agency of the United States cannot be sustained since the claimant constructed the edifice prior to the Act of April 29, 1909 and, therefore, it cannot be said that the building was erected upon the basis of a legislative exemption which at that time did not exist. The mere promise of the Governor to recommend exemption to the local legislature cannot in itself be conceded to have the force of an exemption; neither can it be said to have created any right in favor of the claimant. Consequently the theory that the exemption granted by the Legislature in 1909 invested it with a contractual character cannot be accepted. It appears to the Commission that the said exemption was simply an act of liberality on the part of that branch of the State. In that connection it is proper to examine the essentials of the question which consist in the determination of the extent of the exemption granted to the claimant. To do this the language used in the Act must be clearly understood. It provides that the edifice in question is exempt "from the payment of the corresponding real estate tax". This phrase has been interpreted by the American Agency in the sense that it refers to all real estate tax, present and future, thus giving to it the greatest extension of which it is capable, and consequently, the greatest effect. Against that interpretation there is the employment of the definite article which precedes the words "real estate tax", and the addition of the adjective "corresponding" (*correspondiente*); the article limits, according to grammatical usage, the extension of the substantive to which it applies; the question is not one of any real estate tax or of all real estate tax, but one of a particular real estate tax. Of which? Of the "corresponding" (*correspondiente*). This adjective discloses the meaning of the phrase "real estate tax" (*contribución predial*) must be understood to include. It can be only one excluding naturally the idea of the general character of the exemption. The interpre-

tation would be different if the Act had stated "there is exempt from the payment of real estate tax" or "the real estate taxes" or even "of all real estate tax" or other equivalent phrases. It would then have been necessary to give to the Act a broader meaning. From the foregoing it will be seen that it is necessary to look for a definite real estate tax to which the said Act could refer, the solution being the fact that in 1909 real estate paid only a general percentage tax to the State, which is the "*correspondiente*"; from this tax and from this only is the edifice of the claimant exempt for twenty years. Therefore any other class of real estate tax was an incumbrance against the same property. Now the tax provided for by the same Congress of Jalisco on December 29, 1917, is of a different nature; in the first place it is for the Municipality of Guadalajara, and not for the State of Jalisco; in the second place it is a special tax,—one of emergency and not general. The text of the Act of 1917 is as follows:

"Number 1868—The Congress of the State decrees: Article 1—There is added to the estimate of revenues which shall be in force in the Municipality of Guadalajara from January 1 to June 30 of 1918, the following: I. Section 35—Tax of two per thousand on country and city property which will be in force only for the period of a semester within the months of January and March. II. Section 35 Bis. Tax on mercantile and industrial firms monthly, from 25 cents to 100 pesos. Article 2—Authorization is granted to the common council of Guadalajara to convert the tax mentioned in Article II of law 74 and the fines to which Articles 7, Sub-section 8 and 16 of law 93 refer, corresponding to the period from January to July, 1918, to meet the demands of the Public Service of the said Municipality.

"Chamber of Sessions of the State Congress, Guadalajara, December 29, 1917, Carlos Galindo, D. P.—Ramon Delgado, D. S.—V. L. Velardo, D. S."

It is clearly seen that this tax is not included in the exemption of 1909 and that the Municipality therefore, could collect it without infringing upon the privilege of the claimant who continued to enjoy his exemption, having to pay the special tax only, while other tax payers had to pay the two taxes.

Further the same conclusion is obtained by the application of legal principles.

In all cases relative to tax exemption it is necessary to bear in mind the generally accepted standards of construction. The right of the State to levy taxes constitutes an inherent part of its sovereignty; it is a function necessary to its very existence and it has often been alleged, not only in Mexico, but in the United States and other countries that legislatures, whether of states or of the Federation cannot legally create exemptions which restrict the free exercise of the sovereign power of the State in this regard. The Supreme Court of Mexico has held on several occasions this class of exemption to be illegal. (*Semanario Judicial de la Federación*, 5^a epoca, Vol. 4, pp. 982-987.) In the same sense, and in line with numerous decisions rendered at various times by courts of the United States of America, vigorous dissenting opinions to the doctrine approved by the majority have been filed in the highest court of this country. (*Corpus Juris*, Vol. 12, Par. 668.) And even in those cases in which the said majority of the Supreme Court of the United States has held that that right inherent to the sovereignty of a State might be the subject of a contract, it has also ruled that the exemptions should be strictly construed in favor of the State.

"If the point were not already adjudged it would admit of grave consideration, whether the legislature of a State can surrender this power, and make its

action in this respect binding upon its successors any more than it can surrender its police power or its right of eminent domain. But the point being adjudged, the surrender when claimed must be shown by clear, unambiguous language, which will admit of no reasonable construction consistent with the reservation of the power. If a doubt arise as to the intent of the legislature, that doubt must be solved in favor of the State." (*The Delaware Railroad Tax*, 18 Wallace, 226.)

Corpus Juris likewise sets forth the rule of construction generally accepted with regard to this point by American Jurisprudence.

"In determining whether there is a valid contract and whether by its terms an exemption from taxation is granted, every presumption will be indulged in favor of the power of the State to tax and against the existence of the exemption." (*Corpus Juris* Vol. 12, par. 607.)

It may be added as a corollary that the liberality of a State in granting an exemption is essentially revokable for the reason that it creates no vested rights in him who enjoys it. It is well established that an exemption granted merely for reasons of policy, where the state and the citizen have no agreement to their mutual advantage, must be regarded only as an expression of the pleasure of the said state and of the citizen; and the law which grants it, as all general laws, is subject to amendment or repeal at the option of the legislature, and it is immaterial whether during the time it has been in force the parties in interest have acted in reliance thereon (Cooley, *On Taxation*, p. 69).

"An exemption from taxation does not confer a vested right, and it may therefore be modified or repealed by the legislature unless it has been granted under such circumstances that its repeal would impair the obligation of a contract." (*Corpus Juris*, Vol. 12, Par. 536.)

For the reasons stated the Commission decides that the claim of George W. Cook must be disallowed.

Nielsen, Commissioner:

I agree with the conclusion to disallow this claim, although with respect to certain points I have not the same feeling of certainty that is expressed in the opinion written by Commissioner Fernández MacGregor.

I am in accord with the conclusion reached by Mr. Fernández MacGregor that no form of agreement secured to Mr. Cook an exemption from taxation for twenty years. The position of the United States on this point may have been a little uncertain. It is stated in the American brief that the exemption "was in return for an agreement to erect an expensive building of a permanent type". However, any argument along these lines seems to have been abandoned in oral argument, and the United States appears to have taken the position that by the imposition of a tax, Cook was deprived of certain rights secured to him by a State law granting him an exemption from taxes for a period of twenty years. We are therefore not required to pass upon any intricate question of law as to the conditions under which exemptions from taxes may properly be given by competent authorities, or as to the conditions under which an exemption once granted may of may not be revoked. We have not before us any case involving an agreement or some kind of a franchise conferring exemption from taxation.

It is argued in the American brief that "the municipal council of Guadalajara had no authority whatsoever to impose" the tax against which objection is made except such as is granted to it by the State of Jalisco.

Apparently the municipality has no autonomous power to levy taxes, that being a legislative function of the State. Nor does it appear that the municipality did levy the tax in question. I understand that the tax was levied by the Congress of the State for the benefit of the municipality. We therefore have before us no question whether a State law granting exemption was by implication repealed by authority given to a municipality to levy a tax.

The act of the State Congress of 1917 which imposed the tax in question did not in express terms repeal the exemption granted in favor of Mr. Cook by the law of 1909. It seems to me that therefore we have but the simple questions whether the law of 1909 conferred the broad exemption contended for by the United States, and if it did, whether the law of 1917 by implication repealed the law of 1909. It appears to me that, in the light of principles of interpretation generally obtaining under domestic laws of the United States and under the laws of Mexico and doubtless in other countries with respect to repeals by implication, the conclusion can not properly be reached that the law of 1917 effected a repeal.

I understand that the view expressed in the opinion written by Mr. Fernández MacGregor is that the law of 1909 did not confer a broad exemption such as that contended for by the United States; that the key to the interpretation of the law of 1909 is to be found in the word *la* and in the word *correspondiente*; that in these words we have a connotation of the kind of tax from which Cook was exempted; that these words reveal a limitation on the exemption provided for by the law of 1909; and that Cook could only have enjoyed complete exemption if the law had not contained the words *la* and *correspondiente*—if for example, the law had read *las contribuciones prediales*, or *de toda contribución predial* or some equivalent.

The Spanish word *correspondiente* is used at times in such broad and varied senses that there are no literal equivalents in English. But I take it that in the present instance it is used just as the adjective “due” or “payable” might be employed in English. In other words, that Cook was exempted from real estate tax due or payable on his premises; that the exemption was for real estate taxes corresponding to his property, or taxes pertaining to that property.

I could readily agree with the other interpretation in case it were shown that under the tax laws enacted by Congress *la contribución predial correspondiente* was some specific, well defined tax. There is nothing in the record indicating just how often or when the Congress of the State of Jalisco enacts laws with respect to taxation. But I take it that at any time it enacts a measure of taxation, whether it does it in the usual routine of legislation or for some special purpose to meet an extraordinary situation, the tax it imposes on property by such measure, special or general, is *la contribución predial correspondiente*. It would therefore seem that Cook was entitled to exemption from any such tax imposed during the period of exemption.

The important point to bear in mind is, it seems to me, that we are concerned with a tax on real estate within the meaning of the law of 1909. I think therefore that the words *contribución predial* are of more importance than the words *la* and *correspondiente*. If a measure of taxation had been enacted in 1910, or in any of the following years during the period of Cook's exemption, I do not think that the exemption would have been altered if the legislature had assessed taxes in amounts greater or less than those fixed by the law of 1909, or if any of such subsequent laws had made some new arrangement or application of taxes, either as regards the use by a muni-

pality of taxes or as regards other matters. In other words, whether the Congress considered that the State needed more or less taxes than previously or whether the provision made by the Congress affected a municipality, as in the case under consideration, would have no bearing on the benefits which Cook enjoyed under the law of 1909. Whatever tax was imposed on real estate, irrespective of the purpose for which the tax was to be used, would be at any given time *la contribución predial correspondiente*. However, I think that under the principles which have guided the Commission in the past, the respondent Government should be entitled to the benefit of any doubt as to interpretation.

Decision

The claim of the United States of America on behalf of George W. Cook is disallowed.

JESÚS NAVARRO TRIBOLET, *ET AL.*, NEXT OF KIN OF ROBERT TRIBOLET, DECEASED (U.S.A.) *v.* UNITED MEXICAN STATES

(October 8, 1930. Pages 68-72.)

NATIONALITY, PROOF OF.—EFFECT OF CLAIMANT'S STATEMENTS CONCERNING HER NATIONALITY. One of the claimants was a Mexican by birth but later married a person who became an American citizen by naturalization. Three years after such naturalization said claimant made a declaration before a Mexican consular officer that she was a Mexican citizen. *Held*, claimant's American citizenship, acquired through naturalization of her husband, established.

DENIAL OF JUSTICE.—ARBITRARY ACTS.—LACK OF DUE PROCESS.—SUMMARY EXECUTION BY MILITARY FORCES.—FAILURE ADEQUATELY TO INVESTIGATE. An American subject was arrested by military forces on charge of participation in robbery of stage coach in which driver was killed. Without trial, benefit of counsel or opportunity to defend himself, and no investigation of guilt, he was executed within less than forty-eight hours following his arrest. Claim *allowed*.

Cross-references: Annual Digest, 1929-1930, p. 160; British Yearbook, Vol. 12; 1931, p. 168.

Comments: Edwin M. Borchard, "Recent Opinions of the General Claims Commission, United States and Mexico", *Am. J. Int. Law*, Vol. 25, 1931, p. 735 at 737.

The Presiding Commissioner, Dr. H. F. Alfaro, for the Commission:

The instant claim has been presented by the Government of the United States of America, on behalf of Jesús Navarro Tribolet, Robert, Edward and Albert Tribolet, Louise Tribolet Stanton and Eline Tribolet Clark, the first named being the widow and the others the legitimate children of Robert Tribolet, deceased.

The claim is grounded, according to the Memorial, on the following facts;

That the late Robert Tribolet was a naturalized American citizen; that he was married to Jesús Navarro Tribolet, a Mexican by birth, who, by the fact of her marriage, acquired the nationality of her husband; that of the said matrimonial union there were born in Bisbee, Arizona, United States of America, three sons, Robert, Edward and Albert Tribolet, and two daughters, Louise Tribolet Stanton and Eline Tribolet Clark; that on June 12, 1895, at a point about three miles from the ranch "Cochuta", situated approximately twelve miles southeast of Fronteras, in the State of Sonora, Mexico, the stage coach known as the Bisbee Nacosari Stage, operated by the Nacosari Copper Company, and driven by a Mexican national named Moreno, accompanied by E. W. Woodruff of the aforesaid company and James Crowley, was attacked by several armed and masked men who shot and killed Moreno, the driver of the stage and robbed the passengers of an amount approximating \$6,000.00; that on and for some time previous to this date, June 12, 1895, Robert Tribolet lived with his family on the "San Antonio" Ranch, situated approximately three miles north of Fronteras; that on the day on which the robbery and murder were committed, a number of persons saw Tribolet at work on his ranch and at about the time of the commission of the crime, several of these persons conversed with him while he was attending to his duties; that on the morning of the 26th of June, 1895, Mexican authorities presented themselves at the "San Antonio" Ranch and arrested Tribolet on a charge of having participated in the robbery and murder, and took him under a guard of Mexican troops to Fronteras where he was lodged in jail; and that on the morning of the 28th, less than forty-eight hours after his arrest and without having been proven guilty of, or tried for, any crime, he was ordered to be executed and was shot to death by Mexican officials for participation in the crime; that during the short period of his imprisonment Tribolet was not accorded the right of being heard nor was he given at any time an opportunity to defend himself or to present evidence to establish his innocence. After his imprisonment, Jesús Navarro Tribolet, the widow of the deceased, and one of the claimants herein, made numerous requests upon the appropriate authorities of Fronteras that her husband be allowed the right of counsel to represent him, but each and every one of these requests was denied; and that at the time of his death Robert Tribolet was about 35 years of age, in excellent health, and engaged in the earning of a livelihood as a stock raiser and rancher, contributing liberally to the support of his wife and their minor children, the claimants herein, who were solely dependent upon him for support.

The United States of America on behalf of Jesús Navarro Tribolet, Robert, Edward and Albert Tribolet, Louise Tribolet Stanton and Eline Tribolet Clark, asks for an indemnity in the sum of \$25,000.00 United States currency, with interest.

The Mexican Agency in its answer to the Memorial, admits the American nationality of Robert Tribolet by naturalization as well as the marriage of Robert Tribolet (senior) to Jesús Navarro, but it invites the attention of the Commission to the statement made by this lady to the Mexican Vice Consul at Tucson, Arizona, on August 15, 1893, wherein she states that she is a Mexican citizen.

The Mexican Agency denies that it has been proven that the claimants are the legitimate heirs and nearest relatives of Robert Tribolet and that

they are in consequence the possessors of the rights which it is sought to obtain by means of this claim.

The Mexican Agency likewise denies that the following have any probative value: the sworn affidavit presented by Jesús Navarro Tribolet to prove her relationship to the other claimants herein, and the annexes of the Memorial of the American Agency presented for the purpose of establishing the American nationality of Robert, Edward and Albert Tribolet, Louise Tribolet Stanton and Eline Tribolet Clark.

This with reference to the personality of the claimants. As to the other facts alleged in the Memorial, the Mexican Agency admits some, denies the allegations and charges made in connection with others and finally, maintains that even assuming that the Commission is of the opinion that the claimants are entitled to an award, the amount claimed is exaggerated and that payment of interest should not be granted under any consideration.

With respect to the declaration made by Jesús Navarro Tribolet to the Mexican Vice Consul at Tucson, Arizona, August 15, 1893, wherein she states that she is a Mexican citizen, it may be said that the said declaration made two years before the events which gave rise to this claim and three years after Robert Tribolet, her husband, became by naturalization an American citizen, cannot be regarded as sufficient to destroy her American citizenship, which she acquired in conformity with the law then in force in the United States of America and in Mexico, with reference to the citizenship of a woman as a result of her marriage to an alien.

As to the American nationality of the other claimants and their relationship to the deceased, the Commission, in accordance with a number of its decisions, is of the opinion that the evidence filed with the Memorial is sufficient.

The claimant predicates the responsibility of the Mexican Government upon the following: (a) the arbitrary act of an official of the State of Sonora, and (b) the failure of the Mexican authorities to take steps to have an investigation made of the acts of the official in question for the purpose of exonerating him officially or of imposing upon him adequate punishment.

Although there is some difference between the brief and the oral argument of the American Agency with respect to the circumstances surrounding the arrest and the subsequent death of Robert Tribolet, it seems to be fully established that he was deprived of his life by individuals belonging to the armed forces of the State of Sonora, commanded and accompanied by an officer of the forces in question, the Commandante Jacobo Méndez. It appears clearly from the records of this case that Méndez arrested Tribolet by virtue of an order transmitted by the Secretary of State of the Government of the State of Sonora, Señor Ramon Corral, June 17, 1895, which order reads as follows:

"On the 13th instant the stage coach was attacked half way between Bisbee and Nacosari by six masked men. They killed driver Moreno and stole six thousand pesos. Please issue vigorous orders to all towns for the arrest of all suspicious persons, making investigation and prosecuting those who may be guilty. Send this message to the Prefect of Moctezuma by special messenger in order that he may comply with these instructions."

That Commandante Jacobo Méndez acted in compliance with orders received from the Prefect of Moctezuma is proven by the report he rendered to the said official on June 30, 1895, which appears as annex number 2 of the Answer of the Mexican Agent.

Admitting that in view of these orders and the special circumstances of the case, Commandante Méndez would have been justified in effecting the arrest of Tribolet without the formality of an individual warrant of arrest, it is unquestionable that the facts which developed afterwards are of such seriousness that even accepting the narration of events of Méndez as true, they called for an investigation in order either to establish clearly his justification or to impose upon him the legal penalty.

In cases analogous to the present one, concerning claims of Mexican nationals against the United States of America and vice versa, this Commission has recognized in accordance with International Law and in conformity with Article I of the General Claims Convention of September 8, 1923, that the defendant Government is responsible for the damages caused by the acts of an official of the State which has resulted in injustice.

For the foregoing reasons and having in mind the standard set by this Tribunal in determining the amount of the awards in the cases referred to, the Commission decides that the claimants should receive an award of \$12,000.00 United States currency, without interest.

Decision

The United Mexican States shall pay to the United States of America on behalf of Jesús Navarro Tribolet, Robert Tribolet, Louise Tribolet Stanton, Eline Tribolet Clark, Edward Tribolet and Albert Tribolet the sum of \$12,000.00 (twelve thousand dollars) United States currency, without interest.

OSCAR C. FRANKE (U.S.A.) *v.* UNITED MEXICAN STATES

(October 8, 1930, dissenting opinion by American Commissioner, undated. Pages 73-82.)

DENIAL OF JUSTICE.—ILLEGAL ARREST.—MISTREATMENT DURING ARREST.—

CRUEL AND INHUMANE IMPRISONMENT. Claimant was arrested by minor official without warrant of arrest and was compelled to walk to a town 28 kilometers distant in a pouring rain, without stopping for food or drink or being allowed to communicate with anyone, within a period of five hours. On his arrival he was confined in an open stock pen for one hour and then released. The minor official in question reported that he had found claimant and another individual, who was also arrested at the same time, engaged in shipping lumber in violation of a court order. Claim *disallowed*.

EVIDENCE BEFORE INTERNATIONAL TRIBUNALS.—UNCORROBORATED STATEMENTS AS EVIDENCE. Uncorroborated report of minor official accepted as sufficient proof of truth of statements therein made.

Commissioner Fernández MacGregor, for the Commission:

This claim is presented by the United States of America against the United Mexican States demanding from the latter, in behalf of Oscar C. Franke, an American citizen, the payment of \$5,000.00 United States currency, it being alleged that the claimant was arrested and detained

without justification by the Mexican authorities and subjected to cruel and inhuman treatment during the period of his detention.

The claimant and a companion of German origin, named Wolfgarten, on the morning of August 25, 1922, were in the town of Ciénega de los Caballos, State of Durango, Mexico, for the purpose of taking the passenger train to Empalme Purísima; they were arrested by a Mexican, Francisco Barbosa, *Jefe de Cuartel* of that place, searched and taken on foot, guarded by mounted men, over a mountain trail, to Empalme Purísima, a distance of 28 kilometres. They were not permitted to communicate with anyone or to stop for food and water and the journey was made in a heavy rain. Upon their arrival at Empalme Purísima, at about 3 o'clock in the afternoon, they were placed in a stock pen where they remained for nearly an hour when they were released without any explanation.

The claimant Government alleges through its Agency (a) that the arrest was unjustifiable and made without warrant of arrest from competent authority, (b) that Franke was subjected to unnecessarily harsh and inhuman treatment, and that as the acts of the Mexican *Jefe de Cuartel* resulted in an injustice to the American citizen in question, Mexico is directly responsible.

The Mexican Agency submitted a report from the same *Jefe de Cuartel*, who made the arrest, a minor official of little education, in which he stated not very clearly, that the German companion of Franke was employed by a lumber company which had a suit pending against another lumber concern, and that by virtue of this suit the Judge of the Civil Court of the City of Durango had issued an embargo against the lumber in the San Vincente Camp; that the Company's representative and the claimant had endeavored on a number of occasions to ship the embargoed lumber by railroad; that he, the *Jefe de Cuartel*, had warned them against such action; but that they disregarded his warning and that on August 24, 1922, he had discovered them while attempting to make another shipment for which reason he had arrested them.

Although the evidence filed by Mexico is scanty, it seems, nevertheless, to be worthy of credence on account of its frankness, it appearing from the report rendered by the *Jefe de Cuartel*, that there was reasonable ground for Franke's arrest, since he in company with Wolfgarten was violating an order of a Mexican Judge who had prohibited the removal of the lumber without his order. Whether it is considered, as maintained by the Mexican Agency, that the disposition or appropriation of embargoed property is equivalent to robbery under the Mexican penal law, or whether it is considered merely as a question of open and repeated disobedience of a judicial order, the act of Franke was punishable, and since the authority of the place, who was the *Jefe de Cuartel*, surprised Franke and his companion in the act of committing that punishable offense, a written order to arrest them was not necessary, inasmuch as the Mexican Constitution itself which requires this order as a general rule, makes the exception that it is not necessary in a case of *flagrante delicto*.

The allegation of cruel and inhuman treatment consists in denying to Franke all possibility of communicating with his friends, in compelling him to walk 28 kilometers in five hours in the rain, in denying to him during this time food and drink, and in confining him for an hour in a stock pen. It seems that the persons detained were able to communicate with their friends, since this is shown by the telegrams of complaint received by the Mexican Authorities and by the replies thereto received by the prisoners. Assuming the other circumstances of the arrest to be true, and without

considering the exaggeration with which claimants commonly relate their sufferings in these cases, it does not appear, nevertheless, that an award can be based upon a walk of 28 kilometers, nor upon a deprivation of food and drink for five hours (having in mind that the arrest was effected at about 10 o'clock in the morning and when the prisoners had certainly partaken of the first meal of the day) nor upon a detention of an hour in an inappropriate place, since none of these circumstances, nor all of them, although harsh in themselves, constitute treatment which may be considered below the standards of civilized nations.

The claim of Oscar C. Franke must therefore be disallowed.

Decision

The claim of the United States of America on behalf of Oscar C. Frank is disallowed.

Commissioner Nielsen dissenting.

This claim is made for a comparatively small amount, but cases of that nature of course may involve important principles of law, both substantive law and adjective law. And if it be proper to apply in what may be called a small case principles to which application is given in the opinion of my associates, it might be considered to be proper to give them application in like manner in other cases involving extensive property rights or serious questions of personal rights.

In the instant case I find myself in disagreement with the views of my associates first as to the propriety of the methods used to enforce a certain embargo which is supposed to have existed, and secondly as to the treatment of questions of evidence raised in the case. I am inclined to consider this latter point to be the more important one. In addition to reference to a litigation involving personal property we are concerned in the instant case with a considerable number of questions of a kind that, generally speaking, may perhaps be said to be of a difficult, technical nature, such as some kind of a court order placing an embargo on personal property; orders of a court with respect to the enforcement of the embargo and with respect to the violation of the embargo; acts violative of the court order; and finally, the methods employed to give effect to such orders.

It is difficult for me to conceive of the existence of things of this kind and at the same time of the complete non-existence of any written records respecting them. If such things had existed, I am constrained to conclude that they could not have been shown by written records, and moreover, that they would have been shown. In the Mexican Answer it is stated that the Mexican Agency "despite its efforts, has not been able to obtain a complete information regarding the facts on which this claim is pretended to be based". And in the Mexican brief reference is again made to "efforts of the Mexican Government to furnish the Commission with the greatest possible number of sources upon which to base its opinion" which it is said "have been of no avail". The evidence furnished to prove all these matters on which the defense is grounded with respect to a pending litigation, a violation of an embargo and the punishment of such violation consists of a copy of a brief communication written by the magistrate against whose action complaint is made by the claimant and the claimant Government.

It is stated in the opinion of my associates that this communication or report of the *Jefe de Cuartel*, in the light of which the claim is rejected,

appears to be worthy of credence on account of its frankness. But in view of the conduct of the man and in view of the fact that the Mexican Agency, after exhausting all sources of information has been unable to produce any record of litigation, court orders, and steps to enforce court orders which I have mentioned, it seems to me that a more reasonable inference would be that the letter of the *Jefe de Cuartel* is somewhat ingenious rather than frank.

The allegations of the Memorial on which the claim is based are in substance as follows:

At about 10 o'clock in the morning of August 24 or 25, 1922, the claimant, in company with one José or Joseph Wolfgarten, a German subject, arrived at the town known as Ciénega de los Caballos in the State of Durango, Mexico, with the intention of taking the regular passenger train to the town of Empalme Purísima. Durango, some 28 kilometers distant. Shortly before the train arrived the claimant and Wolfgarten were arrested by Francisco Barbosa, Chief Quartermaster and *Jefe de Cuartel* No. 37, and two federal soldiers, who accompanied this official and were acting under his orders.

No warrant of arrest was shown the claimant, nor was any reason given why the claimant and his companion were detained. In custody of the *Jefe de Cuartel* and the two soldiers, all of whom were mounted, the claimant was ordered to proceed on foot to Empalme Purísima. The claimant offered to pay his railroad fare in order that he might make this long and tiresome trip by the train which was then about to depart for that point, but this privilege was denied to him. The privilege of communicating with friends or the American Consul was likewise refused claimant. The reason assigned for the silence which was imposed on the prisoners was the declaration by the *Jefe de Cuartel*, in effect: "I am the law, and will not permit more".

The claimant and his companion likewise were not permitted to speak to one another and were marched between the two armed soldiers for a period of five hours for a distance of 28 kilometers in a drenching rain through wild country where at times there was no road. During the journey they were not permitted to pause for rest at any time, nor were they given food or even a drink of water.

At 3 o'clock in the afternoon they arrived at Empalme Purísima where they were thrown into a stock pen along with a number of goats and cows, at the rear of the home of the *Jefe de Cuartel*. In this foul place they were held prisoners for a further period of an hour, still without food or water and under the surveillance of armed soldiers. At about 4 o'clock in the afternoon the claimant and his companion were released from custody without having been charged with any wrong-doing or violation of law and without being examined in regard to any charge of wrong-doing. In their weakened and exhausted condition they were then obliged to walk two miles to reach the nearest railroad station.

At the time claimant and his companion were taken into custody at Ciénega de los Caballos, one of their friends who had seen the affair called the matter to the attention of certain authorities, and as a result thereof a telegram was despatched by one Juan Torres S., General of Brigade, Chief of Military Operations, to Francisco Barbosa, who had arrested the claimant and his companion. The telegram directed Barbosa to release the prisoners.

It is alleged that the arrest and detention of the claimant were entirely without justification and were, as shown, accomplished under such cruel,

inhuman and revolting circumstances as to cause the claimant to suffer great mental and physical pain and anguish, as well as gross indignity.

These allegations are supported by the affidavit of the claimant and of José Wolfgarten, a German national, who was arrested together with the claimant, also an affidavit of a Mexican citizen. Nothing has been brought forward that disproves the allegations with respect to the arrest and subsequent mistreatment of the claimant, and indeed these matters appear not only to be convincingly proved but also, I think, to be admitted.

In the opinion of my associates some effort apparently is made to minimize the grievances of which the two arrested men complained. It is said with respect to the allegations that the claimant and his companion were prevented from communicating with friends that they appear to have been able to have such communication, since that is shown by telegrams of complaint received by the Mexican authorities and by replies received by the prisoners. This point appears to be of no considerable importance. However, it may be observed that, in the affidavit of Wolfgarten it is stated that the men were not permitted at first to send telegrams, but that he secretly contrived to have an employee inform the authorities in Durango as to what was happening to him. Wolfgarten, after his release, also sent a telegram to a German Consular Officer at Ciénega Junction. In considering the propriety of the methods used to enforce a court order I regard as unimportant any speculation with respect to such a minor detail as the point whether the prisoners had partaken of breakfast prior to their journey.

In considering the value of the evidence upon which the defense in the case is grounded and in the light of which the conclusions of my associates are based, it may be noted that there is a reference in Wolfgarten's affidavit to some kind of litigation with which it is stated Franke had no concern. It is interesting to examine the evidence furnished by the *Jefe de Cuartel*—the letter sent by him to the Municipal President at Durango, in response to a request by the latter for information. It reads as follows :

"I beg to greet you respectfully and at the same time answer your telegram which I have just received, dated today the 25th instant, in which you ask for a report on the arrest of Mr. José Wolfgarten. Mr. President, said Mr. Wolfgarten and Mr. Franke were arrested because they are very abusive and at the same time disobey the orders of the Court and other authorities, as I have received orders from the Court and at the same time in accord with the Municipal President, and these gentlemen were set on shipping carloads of timber from the San Vicente Camp, which lumber is under attachment; the reason is that I could not stand them any longer, because I have many times warned them not to ship carloads of said attached lumber until I received new orders from the Court and the consent of the lumber mill's Superintendent, but as these gentlemen continued disobeying the orders I had to take action against them for not complying with the Court's orders, basing myself on orders which I have received from my superiors and the Municipal Presidency, for these gentlemen did not obey orders and the proof is that I have on several occasions prevented their shipping attached lumber from the San Vicente Camp, except upon presentation of an order from the First Civil Court and the consent of Mr. Guillermo Maldonado, Superintendent of the lumber company, which they never did but only stated that they had orders from Mr. Edward Hartman and from the *Asociación Exploradora de Bosques*; but, Mr. President, I told them from the very beginning that I was not obeying any orders from Mr. Edward Hartman, because they were not sufficient for me, and at the same time I can see that Mr. Hartman and his employees do not constitute any authorities, for which reason I disobeyed the orders of the 'Asociación' and of Mr. Edward Hartman; I also beg to advise you that when they began to ship the first carloads, I received

orders from the Court, in accord with the depositary of the property of Mr. Hartman under attachment and Mr. Fernando Doran and Mr. José Wolfgarten said that they were going to ship lumber on the cars no matter who was opposed to it, thereby trampling upon the orders of the authorities, but in spite of this I acted with prudence to see if, by polite gestures, I could make them obey the orders of the authorities, but it was in vain and they did not respect the orders which I received from my superiors; thus I was here only to be mocked by these gentlemen and it did not seem well to me; I therefore proceeded against them for being so abusive; in a few days we shall meet here to discuss the subject. Yours respectfully, The Chief of Precinct 37, at Empalme Purísima, Francisco Barbosa." (Translation)

As I have already observed, we have no information that throws any light on the scope and legal effect of the unrecorded judicial orders which are said to have been violated. There are many precedents illustrating the fact that lower courts have often been under a misconception as to what might constitute a violation of their own orders. In the instant case we have no record before us as to what any court may have said or done. Barbosa's word is accepted on that interesting point of a violation of a court order. Barbosa declares that the prisoners insisted on violating court orders. The nearest he comes to giving specific information on that point is by a statement that the men were determined to ship cargoes of timber from the San Vicente Camp. If, as I understand it is assumed in the opinion of my associates, it may be taken for granted that such action on the part of the men might be in the nature of robbery and that therefore the men may be considered to have been arrested in *flagrante delicto*, it seems to be proper to take note of the fact that when these men were arrested they were not at the San Vicente Camp. The evidence shows that on the day of the arrest they had come on a handcar from the camp to Ciénega de los Caballos where they were arrested when they were waiting to take a train. The Mexican citizen, R. Tovalín, testifies to having assisted the prisoners to make the journey on the handcar. The distance of this trip does not appear from the record. It is of course useless to speculate with respect to numerous, possible, unknown, interesting occurrences which are supposed to have entered into the case. However, it may be observed that it seems to be certain that the men were not caught in *flagrante delicto* in carrying lumber on the handcar to be taken on a passenger train.

In the *Pomeroy's El Paso Transfer Company*¹ case claim was made for the trifling amount of \$223.00 for services said to have been rendered by the claimant to Mexican authorities. The allegations with respect to performance of the services and the agreed compensation for them were supported by two detailed affidavits and copies of bills for the services, authenticated under oath by an employee of the claimant company. No doubt was cast upon that evidence by any evidence produced by the respondent government, and no satisfactory explanation was given as to the non-production of such evidence. Nevertheless my associates considered the unrefuted evidence produced by the claimant as insufficient to establish this small transaction. It was stated that the record really contained nothing but the testimony of a single witness. The treatment by my associates of matters of evidence in the instant case seems to me to fall far short of squaring with the conclusions reached in the *Pomeroy's El Paso Transfer Company* case. I think that it is interesting and pertinent to compare the rejection of the evidence of the claimant government in the latter to justify the dismissal

¹ See page 551.

of the claim, with the acceptance of the evidence (the Barbosa letter) of the respondent government in the instant case to warrant a dismissal here.

I have quoted in full the communication of the *Jefe de Cuartel*, Barbosa, on which the defense in the instant case rests and upon which the conclusions in the majority opinion are grounded with respect to all these things—litigation, a court order, violation of court orders, and this communication is described as one of frankness. It is accepted as controlling with respect to all of these things concerning which the Mexican Government, with all the resources at its command, informs us no record has been found. Barbosa is no doubt aptly referred to in the majority opinion as “a minor official of little education”. Evidently no importance is attached to the three affidavits which are not even mentioned. From them certainly nothing can be inferred in regard to arrests for crime in *flagrante delicto*. And at least two of them, unless they are utterly disregarded, contain a clear refutation of the idea that the claimant was properly arrested; that he had any connection with a pending litigation; and that he violated some court order.

I have indicated my view that the treatment of evidence is the question of main importance in this case. With respect to the occurrences on which the claim is grounded it is said in the opinion of my associates that “none of these circumstances, nor all of them, although harsh in themselves, constitute treatment which may be considered below the standards of civilized nations”. Conduct not at variance with what is sometimes roughly spoken of as ordinary standards of civilization or the standards of civilized nations must, I assume, be regarded to be proper conduct. Whatever may be said as to the actual sufferings endured by the claimant, I am in sympathy with the view expressed by counsel for the United States with respect to the injury and indignity suffered by a man as a consequence of an arrest and the humiliation resulting from treatment such as was accorded to the prisoners. They were marched for a very considerable distance in bad weather under guard of soldiers and finally deposited in a pen with goats and cows. It seems to me that Barbosa, prompted by a proper sense of property values and by natural humanitarian instincts, might have been reluctant to handle one of his cows in that manner—I refer now to the journey and not to deposit of the men in the pen. I am unable to take the view that this was an appropriate manner of enforcing an order of embargo. If it was proper under Mexican law then that could be shown, just as I assume that, had there been any order which was violated by the claimant, that could have been shown by official records.

I think it may be assumed that the release of the men from custody an hour after they had been deposited in the pen must have been directed by order of the Municipal President at Durango, who apparently earnestly interested himself in the occurrences under consideration. If the two prisoners were properly handled by Barbosa, subject to a court order for violation of an embargo then the Municipal President himself must have defied the court and have become an accomplice, in a sense, with the claimant and his companion. That I do not consider to be plausible.

E. R. KELLEY (U.S.A.) *v.* UNITED MEXICAN STATES

(October 8, 1930, concurring opinion by Mexican Commissioner, October, 8 1930.
Pages 82-93.)

CONTRACT CLAIMS.—EXERCISE OF SOVEREIGN RIGHTS.—DEFENSIVE MEASURES IN INTEREST OF PUBLIC SAFETY.—MEASURES OF SELF-PROTECTION IN TIME OF WAR.—EFFECT OF WAR ON CONTRACTS.—TRADING WITH THE ENEMY.—CONFISCATION OF ENEMY PRIVATE PROPERTY. Claimant was employed as division superintendent under a four-year contract with the National Railways of Mexico. In April, 1914, American military forces occupied the city of Vera Cruz, after a clash with Mexican forces. On May 1, 1914, when claimant's contract still had over two years to run, claimant was summarily discharged, in violation of the terms of his contract, by order of General Huerta, Provisional President of Mexico. Claim for subsequent earnings to accrue under contract, less amount earned during such period by claimant, *disallowed*.

Cross-references: Am. J. Int. Law, Vol. 25, 1931, p. 388; Annual Digest. 1929-1930, p. 480; British Yearbook, Vol. 12, 1931, p. 169.

Commissioner Nielsen, for the Commission:

This claim made in favor of E. R. Kelley, an American citizen, in the sum of 11,384 pesos, with interest, is predicated on allegations with respect to a breach of contractual obligations. The case was argued in May, 1927, in conjunction with the cases of *J. E. Dennison*, Docket No. 2332, *Belle M. Hendry*, Docket No. 2734, and *Halifax C. Clark and Olive Clark, joint executors of the estate of Alfred Clark, deceased*, Docket No. 2155. The aggregate of the principal sums of these claims is 177,404.08 pesos. All of these cases were reopened to afford the Agencies an opportunity to produce certain further evidence. The substance of the allegations set forth in the Memorial of the United States is as follows:

On June 1, 1912, claimant entered into a contract with the National Railways of Mexico whereby he became an employee of the railroad company. The terms of the contract stipulated that he should perform for a period of four years the duties of Division Superintendent of the Inter-oceanic Railways of Mexico, a line of railway operated by the National Railways of Mexico, and that the compensation for his services should be the sum of 600 pesos a month during the term of the contract.

On the execution of the contract the claimant entered upon the discharge of his duties and faithfully performed them until on or about March 30, 1914, when he left Mexico and went to the United States for a period of leave of absence of sixty or ninety days which had been granted to him. On or about May 1, 1914, he was, without fault on his part, and in violation of the terms of the contract, summarily discharged at the direction and by order of General Victoriano Huerta, Provisional President of Mexico. At the time of the discharge of the claimant there remained under the contract a period of two years and two months during which his employment should continue. No compensation was paid to him subsequent to April 1, 1914. The total amount of compensation due claimant for the period of time under the terms of the contract after his discharge is the sum of 15,600 pesos, Mexican currency.

As soon as the claimant was discharged from the services of said company he endeavored to obtain other employment but he was unsuccessful until on or about January 1, 1915, when he entered into an agreement of employment at a monthly salary of \$124.00, currency of the United States, with the Texas-Mexican Railway which operated a line of railway between Laredo and Corpus Christi, Texas. The total amount paid to him as salary under that employment up to the date of the expiration of the contract with the National Railways of Mexico was \$2,108.00, currency of the United States, or 4,216 pesos, Mexican currency, which should be deducted from the above stated sum of 15,600 pesos due to claimant.

Among the defenses advanced in behalf of Mexico in this case is the argument that the Government of Mexico is not responsible for the acts of General Victoriano Huerta.

But the contention is also made in the Answer that, even if such responsibility existed "taking into consideration that in April, 1914, American troops were landed in Vera Cruz, Mexico, and that the claimant, E. R. Kelley, says in his affidavit (Annex 3 of the Memorial) that 'All American employees of the National Railways of Mexico' (including himself) were ordered discharged at that time, such an order, if any, would have been a necessary and reasonable measure of public policy dictated by a government in the exercise of rights of sovereignty for the protection and safeguard not only of national integrity, which of itself would completely justify the act, but for the personal safety of all those American citizens who being engaged in the business of public transportation in Mexico at a time when there was great public excitement over the landing of American troops in Vera Cruz, were certainly exposed to grave and imminent danger as long as they continued in their respective employments". The Commission feels constrained to take a view of the case in harmony with the principal point of these contentions.

Without undertaking to classify all the incidents of 1914 at Vera Cruz in precise terms of international law pertaining to war, or measures stopping short of war, or something else, or to apply to such incidents concrete rules of that law, we are of the opinion that a proper disposition of the instant case may be found in principles of law to which proper application may be given in determining the question of international responsibility.

On April 20, 1914, the President of the United States appeared before the two Houses of Congress and detailed what he described as "wrongs and annoyances" suffered by representatives of the United States in Mexico, and he asked the approval of Congress to "use the armed forces of the United States in such ways and to such extent as may be necessary to obtain from General Huerta and his adherents the fullest recognition of the rights and dignity of the United States." *House Document No. 910, 63d Congress, 2d Session*. To be sure, the President expressed a "deep and genuine friendship" on the part of the American people for the people of Mexico, and he stated that he earnestly hoped that war was not at the time in question. However there was fighting between Mexican and American forces, and the city of Vera Cruz was occupied. *Foreign Relations of the United States, 1914, p. 477, et seq.* In whatever light the landing of American troops at Vera Cruz and the clash of military forces that followed may be viewed, it seems to be clear that when these occurrences took place, and when the order for the discharge of the claimant was given, hostilities of some considerable duration may reasonably have been anticipated.

There are well defined rules of international law for the safeguarding of rights of non-combatants. But there are of course many ways in which non-combatants may, without being entitled to compensation, suffer losses incident to the proper conduct of hostile operations. And a Government has recourse to a great many measures of self-protection distinct from actual military operations such as the segregation or internment of enemy nationals, the elimination of such persons from any positions in which they might be a source of danger, and their exclusion from prescribed locations. With respect to practices in Europe during the World War, see Oppenheim, *International Law*, Vol. II, 3rd ed., p. 149, *et seq.*, and as to action taken in the United States, see *United States Statutes at Large*, Vol. 40, Part II, p. 1716, *et seq.*

With reference to matters more directly connected with actual military affairs there are interesting illustrations of property losses for which those who have suffered such losses have not been considered to be entitled to compensation.

Thus it was held in the arbitration between the United States and Great Britain under the Special Agreement of August 18, 1910, that under certain conditions submarine cables might be cut without compensation being made for loss incident to the destruction of the physical property. In that case the British Government did not dispute the propriety of cutting the cables, a military measure, but argued that compensation should be made for the cost of repairing the cables. *Cuba Submarine Telegraph Co., Ltd., and the Eastern Extension, Australasia and China Telegraph Company, Ltd. cases*, *Report of the American Agent*, p. 40. In the same arbitration it was held that in time of war property may be destroyed in the interest of the preservation of the health of military forces and that compensation need not be made for the property. Case of *William Hardman*, *ibid.*, p. 495. It was said by the tribunal in that case that the presence of troops at a certain town where the property was located was a necessity of war, and the destruction required for their safety was consequently a necessity of war. In this case it was similarly argued in behalf of Great Britain that, while property might properly be destroyed for the purpose of preserving the health and increasing the comfort of troops, the right to destroy should be exercised subject to the payment of compensation.

It may also be observed that extensive pecuniary losses have of course occurred in various ways when the outbreak of hostilities has brought about the interruption of contractual relations, although rights established prior to such hostilities may in some measure have been preserved.

We do not agree with the Mexican Government's contention that the existence of a contract between the claimant and the National Railways of Mexico has not been proven. From the evidence it appears that the claimant had contractual rights and that he was prevented from the continued enjoyment of such rights. But in the light of principles which have been briefly discussed, the discharge of the claimant, an American citizen, holding a responsible position when these occurrences at Vera Cruz took place, could not be regarded as an arbitrary invasion of contractual property rights for which compensation should be made by the Mexican Government.

It was argued in behalf of the United States that if any rule or principle of international law in relation to war came into operation as a result of the situation which brought about the discharge of the claimant it would merely have the effect of suspending the claimant's contract and not of wiping it out entirely, and that the utmost that could have been justified

would have been a very short suspension of a long term contract. Counsel quoted several statements from writers on international law to the effect that contracts between nationals of belligerent states are necessarily suspended during war, also that there is a rule of international law that war suspends but does not annul such contracts.

When two nations are at war it may be possible for their respective nationals to carry on contractual relations, but as a general rule it is certainly not very convenient to do so, even if it be permitted by the Governments. In the consideration of the legal effect of such contracts it is necessary accurately to analyse the conditions under which such agreements are made and the nature of the authority that may prohibit or regulate them. And these matters can easily be analysed and understood, whatever statements of various kinds may have emanated from authors.

Belligerent nations at times enact laws forbidding or regulating intercourse of their nationals with the nationals of enemy countries. A nation may deem it proper to put into effect such legislation in one war in which it is engaged and to refrain from doing so during the course of some other war, and legislation may be enforced during a part of the period of hostilities. Laws of this nature enacted by Governments vary in form, scope and legal effect. In the light of an analysis of international practice, it seems to be clear that there never has been any general consent among the nations of the world binding themselves by rules or principles of international law to control the acts of their respective nationals in the making of contracts with enemy nationals. Dr. Oppenheim, with his usual clarity and exactness, deals with this subject as follows:

"Before the World War, following Bynkershoek, most British and American writers and cases, and also some French and German writers, asserted the existence of a rule of International Law that all intercourse, and especially trading, was *ipso facto* by the outbreak of war prohibited between the subjects of the belligerents, unless it was permitted under the custom of war (as, for instance, ransom bills), or was allowed under special licences, and that all contracts concluded between the subjects of the belligerents before the outbreak of war become extinct or suspended. On the other hand, most German, French, and Italian writers denied the existence of such a rule, but asserted the existence of another, according to which belligerents were empowered to prohibit by special orders all trade between their own and enemy subjects.

"These assertions were remnants of the time when the distinction between International and Municipal Law was not, or was not clearly, drawn. International Law, being a law for the conduct of States only and exclusively, has nothing to do directly with the conduct of private individuals, and both assertions are, therefore, nowadays untenable. Their place must be taken by the statement that, States being sovereign, and the outbreak of war bringing the peaceful relations between belligerents to an end, it is within the competence of every State to enact by its Municipal Law such rules as it pleases concerning intercourse, and especially trading, between its own and enemy subjects.

"And if we look at the Municipal Laws of the several countries, as they stood before the World War, we find that they have to be divided into two groups. To the one group belonged those States—such as Austria-Hungary, Germany, Holland, and Italy—whose Governments were empowered by their Municipal Laws to prohibit by special order all trading with enemy subjects at the outbreak of war. In these countries trade with enemy subjects was permitted to continue after the outbreak of war unless special prohibitive orders were issued. To the other group belonged those States—such as Great Britain, the United States of America, and France—whose Municipal Laws declared trade and intercourse with enemy subjects *ipso facto* by the outbreak of war prohibited, but empowered the Governments to allow by special license all or certain kinds

of such trade. In Great Britain and the United States of America, it had been, since the end of the eighteenth century, an absolutely settled rule of the Common Law that, certain cases excepted, all intercourse, and especially trading, with alien enemies became *ipso facto* by the outbreak of war illegal, unless allowed by special licence.

"When the World War came, the belligerents by statute or decree supplemented or varied their Municipal Law relating to trading with the enemy. Thus Great Britain, in September 1914, passed the Trading with the Enemy Act, 1914, forbidding (except under license) all transactions during the war which were prohibited by Common Law, statute, or proclamation, and among them were all that would improve the financial or commercial position of a person trading or residing in an enemy country: *e. g.* paying debts to him, dealing in securities in which he was interested, handling goods destined for him or coming from him, or contracting with him. By a decree of September 27, 1914, France, after a preamble reciting that war of itself prohibited all commerce with the enemy, expressly forbade all trade with enemy subjects or persons residing in an enemy country, all contracts (*tout acte ou contrat*) with such persons, and the discharge for their benefit of obligations, pecuniary or otherwise resulting from *tout acte ou contrat passé*. Germany, by an ordinance of September 30, 1914, prohibited all payments to persons resident in the British Empire, and the ban was extended later to persons resident in other enemy countries. But German law admits trading with the enemy which is not expressly forbidden, and legislation in Germany against such trading seems to have been less rigorous than in Great Britain or France. The United States, by the Trading with the Enemy Act of October 6, 1917, prohibited all trading or contracting with persons resident or doing business in an enemy country, all payments to such persons, and all business or commercial communication with them." *International Law*, vol. II, 3rd ed., pp. 152-156.

Finally, it may be noted with respect to this subject that legislation of the United States and of Great Britain such as is referred to by Dr. Oppenheim was not by its principal provisions concerned with contracts made between persons within the territorial jurisdiction of each country but with intercourse across the line, so to speak, or in other words, with contracts made by nationals with persons domiciled or resident in the enemy country. Therefore, it is clear that matters of this kind have no relevancy to the issue that is before this Commission. And furthermore it should be observed that, as regards the particular point of defense under consideration, the argument made in behalf of the Mexican Government with respect to the operation of principles of law in relation to war was not concerned with such matters. The discharge of the claimant and other Americans holding responsible positions with the railroad company was justified from the standpoint of national security, or as might be said, as a measure of defence.

When all intercourse between nationals of belligerent governments is forbidden, intercourse incident to contractual relations is of course suspended. Compensation is asked in behalf of the claimant from the date when he was discharged—very shortly after the landing of American troops which gave rise to the emergency. In connection with the consideration of contentions made with respect to the suspension and annulment of contracts in time of hostilities, we are not concerned with questions relative to remedies that may or should exist with regard to the preservations of pecuniary rights that have fully accrued under a contract prior to the outbreak of hostilities. See on this point *Neumond v. Farmers Feed Co. of New York*, 244 N. Y. 202. It is not contended that a debt due prior to the emergency which arose in April 1914, has been annulled. The argument in the instant case with respect to suspension of a contract as distinct from an annulment must evidently be predicated on the theory that an emergency could not justify a suspen-

sion of contractual relations in a manner that would have the effect either of rendering impossible the renewal of such relations after the cessation of the emergency or the realization of pecuniary benefits under the contract during the period of suspension.

With respect to the argument made in behalf of the United States relative to the destruction of contractual property rights, it was contended on the part of Mexico that, even if it were assumed that such rights had been destroyed, there was no consequent violation of international law. Touching this point citation was made of the *dictum* in the often quoted case of *Brown v. United States*, 8 Cranch 110, that the right to confiscate property of enemy nationals found within the jurisdiction of a belligerent government at the beginning of war is not forbidden by international law, even though the humane policy of modern times had mitigated the exercise of the right.

During the last century there has been a world wide effort to mitigate the horrors of war. The principle has been acknowledged more and more that the unarmed citizen shall be spared in person, property and honor, as much as the exigencies of war will permit. There may still be two theories with respect to this question: one that confiscation is forbidden; the other, that while the violation of private enemy property may be an obsolete practice of barbarism, the strict legal right of confiscation still exists. But it is unnecessary for us extensively to deal with this interesting subject, because the conclusion reached by the Commission and its disposition of the issues in the instant case are not at variance with the enlightened view aptly expressed by Dr. Oppenheim that "there is now a customary rule of International Law in existence prohibiting the confiscation of private enemy property and the annulment of enemy debts on the territory of a belligerent." *International Law*, 3rd ed., vol. 2, p. 158.

A question with respect to the confiscation of property might have arisen had the railroad company been forbidden to pay to the claimant any salary due to him prior to the occurrences at Vera Cruz in 1914. Evidently nothing of that kind took place. To be sure it is argued that property rights were destroyed or confiscated through the discharge of the claimant, as a result of which he lost what he might have earned had he been permitted to fulfill the terms of his contract. But in the argument of this case it was finally admitted in behalf of the United States that some kind of an emergency did exist in 1914 when the American troops landed at Vera Cruz, and that the emergency justified a temporary retirement of the claimant from the important position with the railroad company. It was argued, however, that there was no justification for dispensing with his services except during the period of the emergency. That period was estimated variously to be for a few days, or until the withdrawal of General Huerta from Mexico, or until the departure of American troops from Vera Cruz. The troops landed in April, 1914, and withdrew in November of that year. It does not appear from the record whether there were any negotiations between the parties with respect to re-employment.

The case becomes simplified when it is seen that it is common ground between the parties that an emergency arose in April, 1914, justifying the retirement of the claimant at that time. The question is then presented: What should subsequently be done? In the light of even a meagre knowledge of the serious occurrences under consideration it is clear that Mexican authorities would not reasonably anticipate some slight emergency prompting them merely to notify the claimant of a suspension from, but early resumption of, employment. Of course there could be no logical or indeed reasonable

speculation at that time as to the future. Another possible expedient might have been that the claimant could have been retired from service, and that when it was considered that the emergency had ceased, the railroad official who took his place could have been discharged and the claimant restored. One can imagine still another solution—in effect that apparently insisted upon by the claimant government at the present time—that the claimant, being permanently discharged, should be paid for what he lost, because he was not permitted to fulfill his contract. Happy suggestions, practical or impractical, may be made in retrospect as to methods by which unfortunate occurrences might have been avoided. The Commission must deal with the facts before it and apply to conflicting interests proper principles of law in the absence of concrete rules. The question before the Commission is whether the claimant, having been discharged as the result of a reasonable anticipation of a very serious emergency, should be paid the value of the unexpired term of his contract. Certainly if this admitted emergency had lasted throughout the period of the contract, the right to retire the claimant from service during that period being conceded, it is difficult to perceive the logic of an argument that he should be paid for services not rendered—services performed by some one else who was paid. Yet compensation is claimed from the date of the discharge of the claimant.

As is shown by precedents that have been cited and others that might be mentioned, there is a wide range of defensive measures in time of hostilities. Undoubtedly the justification of such measures must be found in the nature of the emergency in each given case and of the methods employed to meet the situation.

As bearing on this question as to the character of an emergency in the light of international precedents, citation was made in behalf of the United States by counsel in an elaborate argument solely of an extract from a note written by Secretary of State Webster in 1842 with regard to the so-called interesting *Caroline* incident. But the emergency with which Great Britain and the United States were concerned in the controversy with respect to the destruction of the *Caroline* and the incidental wounding and killing of some Americans within American jurisdiction by a Canadian force is not one that appears to be apposite to the instant case. To be sure, the destruction of the *Caroline* might be regarded as a defensive measure. It involved hostile operations and an invasion of American sovereignty which, however, did not prompt the United States to go to war. The precise question which was discussed in connection with these incidents evidently pertained to the justification for a violation of sovereignty. Great Britain invoked the so-called right of self defense, and Secretary of State Webster, while apparently conceding some such right, stated in effect that its exercise should be confined to cases in which the “necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation”. Moore, *International Law Digest*, Vol. II, p. 409, *et seq.*

Moreover, there has not been brought to our attention any case in which this right or so-called right has been exercised where compensation has been made for the damages inflicted as a result of the measures employed. This interesting historical episode appears to have little or no pertinency to the instant case even by way of analogy. And while the same is doubtless true of another related incident, it may be noted that the only case growing out of the *Caroline* incident which was presented to the Commission in the arbitration between the United States and Great Britain under the treaty

of 1853 was dismissed by the umpire. Case of *McLeod*, Moore, *International Arbitrations*, vol. 3, p. 2419.

Payment must be made for property appropriated for use by belligerent forces. Unnecessary destruction is forbidden. Compensation is due for the benefits resulting from ownership or user. In dealing with the precise question under consideration by such analogous reasoning as we consider it to be proper to employ, we must take account of things which in the light of international practice have been regarded as proper, strictly defensive measures employed in the interest of the public safety. Generally speaking, international law does not require that even nationals of neutral countries be compensated for losses resulting from such measures. In giving application to principles of law it is pertinent to bear in mind that it is rights of such persons with which international tribunals have generally been concerned in the disposition of claims arising in the course of hostile operations. Rights secured to nationals of enemy governments are generally dealt with in peace arrangements in a preliminary or final way. However the existence of such rights appears to be interestingly recognized in Article III of the Convention of The Hague of 1907 respecting the law and customs of war on land.

The loss sustained by the claimant is of course regrettable. The record reveals the high estimate put upon his services by the President of the railroad company. He was the victim of unfortunate occurrences, and in the light of the principles which have been discussed, the Commission is of the opinion that it cannot properly award him compensation.

Fernández MacGregor, Commissioner:

I agree that this case must be disallowed. The landing of American forces in Vera Cruz gave the right to any Government of Mexico to take defensive measures for its territory, sanctioned by international law, among which is certainly included the right to remove the North American citizens employed on the Mexican railways which were to be used for strategic purposes.

Decision

The claim of the United States of America on behalf of E. R. Kelley is disallowed.

HALIFAX C. CLARK and OLIVE CLARK, JOINT EXECUTORS OF
THE ESTATE OF ALFRED CLARK, DECEASED (U.S.A.) *v.* UNITED
MEXICAN STATES

(October 8, 1930, concurring opinion by Mexican Commissioner, October 8, 1930.
Pages 94-95.)

CONTRACT CLAIMS.—EXERCISE OF SOVEREIGN RIGHTS.—DEFENSIVE MEASURES
IN INTEREST OF PUBLIC SAFETY.—MEASURES OF SELF-PROTECTION IN
TIME OF WAR.—EFFECT OF WAR ON CONTRACTS.—TRADING WITH THE
ENEMY.—CONFISCATION OF ENEMY PRIVATE PROPERTY. Claim arising

under circumstances similar to those set forth in *E. R. Kelley* claim *supra* allowed.

NATIONALITY OF LEGAL REPRESENTATIVES.—CLAIM ON BEHALF OF ESTATE.

Nationality of legal representatives in claim on behalf of estate of a deceased American subject is immaterial.

(Text of decision omitted.)

J. E. DENNISON (U.S.A.) v. UNITED MEXICAN STATES

(October 8, 1930, concurring opinion by Mexican Commissioner, October 8, 1930.
Pages 96-97.)

CONTRACT CLAIMS.—EXERCISE OF SOVEREIGN RIGHTS.—DEFENSIVE MEASURES IN INTEREST OF PUBLIC SAFETY.—MEASURES OF SELF-PROTECTION IN TIME OF WAR.—EFFECT OF WAR ON CONTRACTS.—TRADING WITH THE ENEMY.—CONFISCATION OF ENEMY PRIVATE PROPERTY. Claim arising under circumstances similar to these set forth in *E. R. Kelley* claim *supra* allowed.

(Text of decision omitted.)

BELLE M. HENDRY (U.S.A.) v. UNITED MEXICAN STATES

(October, 8 1930, concurring opinion by Mexican Commissioner, October 8, 1930.
Pages 97-99.)

CONTRACT CLAIMS.—EXERCISE OF SOVEREIGN RIGHTS.—DEFENSIVE MEASURES IN INTEREST OF PUBLIC SAFETY.—MEASURES OF SELF-PROTECTION IN TIME OF WAR.—EFFECT OF WAR ON CONTRACTS.—TRADING WITH THE ENEMY.—CONFISCATION OF ENEMY PRIVATE PROPERTY. Claim arising under circumstances similar to those set forth in *E. R. Kelley* claim *supra* allowed.

NATIONALITY OF LEGAL REPRESENTATIVES.—CLAIM ON BEHALF OF ESTATE. Nationality of legal representatives in claim on behalf of estate of a deceased American subject is immaterial.

NATIONALITY, PROOF OF.—ADMISSION OF NATIONALITY BY RESPONDENT GOVERNMENT.—ESTOPPEL. Nationality of deceased American subject held established in light of evidence thereof furnished by claimant Government, admission thereof in brief a respondent Government, and estoppel of respondent Government to deny such nationality arising out of fact he was discharged by respondent Government because he was an American.

(Text of decision omitted.)

HARRY H. HUGHES (U.S.A.) *v.* UNITED MEXICAN STATES*(October 24, 1930. Pages 99-108.)*

CONTRACT CLAIMS.—TERMINATION OF CONTRACT BY RESPONDENT GOVERNMENT.—BREACH OF CONTRACT.—RIGHT TO SECURITY DEPOSIT. Claimant deposited Mexican national bonds of the value of 2,000 Mexican pesos with the National Bank of Mexico as security for the faithful performance of a contract with the Mexican Government. Such contract required claimant to take possession of a specified number of mining claims within the periods stipulated therein and in amendments thereof, failing which such contract was subject to forfeiture. The Department of Public Works declared the contract forfeited for failure to fulfil its obligations and refused to return either the deposited bonds or interest accrued thereon. Claim for return of bonds *disallowed*, since obligation to take possession of claims included the obtaining of title to mining claims and since claimant was so tardy in denouncing claims that title thereto could not have been obtained within the contract periods. Claim for value of interest coupons accruing on bonds *allowed*.

Commissioner Fernández MacGregor, for the Commission:

This claim is presented by the United States of America on behalf of Harry H. Hughes against the United Mexican States, demanding the amount of \$2,240.00, Mexican gold, with interest thereon, as indemnity for losses and damages suffered by the claimant as the result of the confiscation by the Mexican Government of a deposit to guarantee the fulfillment of a mining exploration contract.

On May 24, 1904, the Mexican Government entered into a contract with the claimant wherein the latter was obliged to explore under certain conditions gold placer lands in the State of Sinaloa, Mexico, and as a guarantee for the fulfillment of the contract he deposited in the National Bank of Mexico 2,000 Mexican pesos, in three per cent Mexican national internal debt bonds. On October 12, 1905, this contract was amended so as to obligate the claimant to take possession of one hundred and fifty mining claims during the first two years counting from May 23, 1904, and of one hundred and fifty more during the third and last year which terminated on May 23, 1907. The claimant maintains that he has complied with all of his obligations for which reason he asked for the return of the bonds deposited as a guarantee; but on July 13, 1908, the Minister of Public Works denied the application of the claimant, stating that Hughes had violated the terms of his contract, thereby forfeiting the said bonds.

The respondent Government through its Agency avers, in effect, that the claimant did not comply with the terms of the contract, since he failed to take possession of the 300 mining claims within the periods stipulated in the respective contracts and that, for this reason, in the international sense of the word, there is no confiscation.

Article 7 of the contract of 1904 reads as follows:

"The said Harry H. Hughes or the company which he may organize for that purpose, is under obligation, as to the lands of the zone of exploration, to take possession of fifty claims during the first year, one hundred the second and one hundred and fifty the third, at least."

The foregoing Article was amended by Article 2 of the contract of October 12, 1905, which reads as follows:

"The said Harry H. Hughes or the company which he may organize for that purpose, is under obligation, as to the lands of the zone of exploration, to take possession of at least one hundred and fifty claims during the period of two years counting from the date of the promulgation of the original contract, the two years to terminate on May 23, 1906, and of another one hundred and fifty within the third and last year which will terminate on May 23, 1907."

Article 9 of the first contract, left in force by the second contract, reads:

"Article 9.—This contract will be forfeited:

"I.—If the exploration is not begun within the time fixed in Article 5. II.—Through the development, without a legally obtained title, of any mine which may be located in the said zone. III.—Through failure to present the plans referred to in Article 6. IV.—Through failure to take possession of the number of claims referred to in Article 7, during any of the years referred to by that Article. In any of these cases of forfeiture the concessionaire shall lose the deposit made and also the right to continue the exploration, being subject in the second case of forfeiture, to the provisions of the respective laws.—The time limits given in this contract will be suspended in all fortuitous cases or those of *force majeure* duly proven, these time period extensions being understood to cover the entire time of the obstruction and for two months afterwards, but in order for this extension to be effective, the concessionaire shall file the notification and the proofs of the obstructing condition having taken place within the month following the date of its commencement."

Article 3 of the amended contract reads:

"Article 3.—In addition to the causes of forfeiture stipulated in paragraphs I, II and III of Article 9, this contract, as well as the one entered into on May 23, 1904, shall be forfeited as a result of failure to take possession of the number of mining claims referred to in the foregoing Article in either of the two periods to which that Article refers. The forfeiture shall be declared administratively by the Department of Public Works which in any case and before issuing the corresponding declaration, shall grant to the said Harry H. Hughes or to the company which he may organize, a period of not less than two months in which to present a defense."

In view of those Articles the determination of the case should not be very difficult, since it would be sufficient to ascertain whether the claimant in accordance with the contract had taken possession of the three hundred mining claims within the stipulated periods. But this question has become controversial inasmuch as while the claimant contends that in order to comply with the contract it was enough to denounce or to make application for the claims in question within the stipulated periods, the Mexican Government maintains through its Agency that that fact is not sufficient, since Hughes was obliged to take possession of such claims, and that, in conformity with Mexican law this could not be done until the title to each claim had been obtained. In view of this contention the claimant contends in addition, that this was not the reason given by the Mexican Government in its replies to him and that, even assuming this to be correct he could have received the titles to the three hundred mining claims within the indicated periods, but nevertheless, due to negligence attributable to the Mexican Government and not to the claimant, he did not receive them.

In order to prove the preceding the claimant alleges that his contract was a contract of exploration and not of exploitation; that in accordance therewith, he fulfilled his obligation by denouncing the claims as he had

bound himself to do, but that forfeiture was declared as a result of errors committed by the Department of Public Works in its several computations made to determine this question. He states that the first notice he received to the effect that the Mexican Government considered that he had not fulfilled his obligations is contained in a letter signed by Sr. O. Molina on June 13, 1908, and that in that letter the reason for the forfeiture was given that only two hundred and forty claims had been denounced since the mine called "Cuauhtemoc" embracing twenty-two claims could not be considered for the reasons that it had been applied for prior to the promulgation of the contract, and that, further, some of the claims had been declared forfeited because of the nonpayment of the mine tax; that the Decree of forfeiture itself which was issued two months later, on August 21, 1908, stated that he had denounced only two hundred and sixty-two claims; that Sr. Pani who represented the Government in 1922, stated that he had registered in his favor two hundred and eighty claims, but that twenty additional claims which formed the mining property called "La Conquista", could not be considered in his favor since the titles thereto had not been issued.

There is also an allegation on behalf of the claimant that the contract was not considered forfeited by the Mexican authorities inasmuch as after the three years of its duration and up till the year 1908 titles to the claims denounced were being issued under the terms of the contract.

Putting aside the secondary allegations, which will be examined later, it is pertinent to enter at once upon a study of what the contract required of Hughes. The terms of the respective contracts are clear: the contract of 1904 reads in its Article 7 quoted above: "... to take possession of fifty claims during the first year, one hundred the second and one hundred and fifty the third, at least". Article 2 of the contract of 1905, also quoted, required the claimant "... to take possession of at least one hundred and fifty claims during the period of two years counting from the date of the promulgation of the original contract."

It is necessary then to ascertain the meaning of taking possession of mining claims. This can be done only by a study of the contracts in the light of the mining legislation in force in Mexico at that time. The law is that of June 4, 1892, Article 18 of which reads:

"The approval of the proceedings having been obtained and the title to the property issued to the concessionaire, he enters in possession of the mining claims without the necessity of further formalities."

It is concluded from this provision that before receiving title, the concessionaire is not in possession of the claims covered thereby. It seems clear therefore that the claimant was obliged by the contracts in question not only to denounce or to make application for the claims, but to obtain the respective titles in order to acquire possession thereof, in compliance with the obligation he contracted and which is set forth in Articles 7 and 2 of the contracts of 1904 and 1905, respectively.

This opinion seems to be strengthened by the last part of Article 2 of the contract of 1904 which reads:

"... and if during the exploration any deposits of gold or any other metal be discovered, the concessionaire may at once, without waiting for the end of the term of exploration, apply for any claims on them that he may desire, under the terms and conditions established by the said law of June 4, 1892, not being permitted, however, to undertake any exploitation of those claims until he shall have obtained the title thereto."

The claimant undoubtedly made the denouncements or simple applications for title according to the terms of his contracts; but the titles themselves were issued in some cases subsequent to the period of three years mentioned in these contracts, as is seen in the following table:

Date of Application	Name of the Property	Area	No. and date of Title
		<i>Hectares</i>	
May 27, '05 . . .	"Cuauhtemoc" . . .	50	30214, Feb. 23, '06.
June 5, '05 . . .	"Lucky William" . . .	10	30579, Mar. 31, '06.
Jan. 13, '06 . . .	"Oro Escondido" . . .	70	32884, Nov. 7, '06.
Feb. 18, '07 . . .	"El Lucero" . . .	150	44251, Nov. 11, '08.
Dec. 21, '05 . . .	"La Conquista" . . .	20	Petition 551.
		<hr/> 300	

If then, the claimant had to obtain titles to the three hundred claims which he was obliged to apply for during the three years of his contract, and did not obtain them, it is necessary to ascertain whether this was due to the negligence of the claimant or to that of the Mexican Government.

The claimant obligated himself, as has been seen, to obtain his titles in conformity with the law. Chapter 3 of the mining law regulation of June 25, 1896, outlines the procedure to be followed in order to obtain mining concessions. The applications are filed with a special official called Agent of Public Works (*Agente de Fomento*) who, within the three days following such filing will appoint a surveyor to survey the claims and make the necessary plans, etc.; in case of acceptance the surveyor has sixty days to perform the work entrusted to him; at the time of fixing the term for the surveyor previously mentioned, the Agent of Public Works posts on the bulletin board which is required to be on the outside of all Agencies, an extract of the application for the mining concession, so that third persons who believe themselves possessed of a right may exercise it at once, and this notice must remain exposed to public view for one month; a like extract must be published in the newspaper three times; in the said extracts the public is advised that a fixed period of four months has been allowed during which the proceedings before the Agency will be heard. It is to be noted that that period cannot be decreased because it is in favor of third persons in general it is a necessary period which cannot be avoided. If at the end of the four months no one is opposed to the granting of the title, the Agency will make a copy of the proceedings within fifteen days thereafter and forward it to the Department of Public Works which in view of the record will issue the title.

It is perfectly clear, in view of the foregoing, that a title cannot be issued by the Mexican authorities until at least five months have elapsed from the date of the application. Now from the evidence submitted by both sides it appears that during the first two years Hughes obtained possession of only sixty claims of the mining properties, Cuauhtemoc (50) and Lucky William (10), since those corresponding to the mining property Oro Escondido (70) were applied for on January 13, 1906, that is to say, four months and some days before the expiration of the first period of two years, when the Mexican Government could not in any manner issue the titles during the lawful time; and that the last of the claimant's applications, although made within the time limit fixed in Article 2 of the contract of 1905, was also outside the period during which the title could have been lawfully issued, namely the application made on February 28, 1907, for the mining property named "El Lucero", which included one hundred and

fifty of the very claims, possession of which should have been taken during the third year of the contract. As the contract ended on May 23, 1907, and as there are only three months between the 23rd of February and the 23rd of May, the claimant by his own act made it impossible to receive within the time period of the contract the title to these claims, and consequently to take possession of them, since it was impossible to comply in those three months with the requisites of the Mining Law Regulation of 1892, which has been previously referred to. Assuming that the Agent of Public Works and that Department had acted with the greatest possible rapidity the title would have been issued at the very earliest on July 23, 1907, when the contract of the claimant had already lapsed.

It is clear, therefore, that the claimant did not comply with the terms of his contract and that the Government of Mexico was within its rights in declaring administratively the forfeiture of Hughes' contract and in applying to its benefit the deposit made as a guarantee for the fulfillment thereof. Article 9 of the contract of 1904 reads:

"This contract will be forfeited:—IV. Through failure to take possession of the number of claims referred to in Article 7 during any of the years referred to in that Article.—In any of these cases of forfeiture the concessionaire shall lose the deposit made and also the right to continue the exploration, being subject in the second case of forfeiture, to the provisions of the respective laws."

Article 3 of the contract of 1905 reads:

"In addition to the causes of forfeiture stipulated in paragraphs I, II, and III of Article 9, this contract, as well as the one entered into on May 23, 1904, shall be forfeited as the result of failure to take possession of the number of mining claims referred to in the foregoing Article in either of the two periods to which that Article refers. The forfeiture shall be declared administratively by the Department of Public Works which in any case and before issuing the corresponding declaration, shall grant to the said Harry H. Hughes or to the company which he may organize, a period of not less than two months in which to present a defense."

The discrepancies in numbers and in the estimate of the case appearing in the several replies made by the Mexican Government to the requests of the claimant for the return of the deposit are clearly evident. But the Commission thinks that as opposed to the precise facts set forth above, those discrepancies are unimportant since it appears that for some unexplainable reason the Mexican authorities were in error but only as to the number of mining claims credited in favor of the claimant, but that there was no error as to the circumstance of the failure of Hughes to comply with his contract. The first notice to the claimant that the contract was forfeited was given on June 13, 1908, by the Minister of Public Works, Sr. O. Molina. In that letter he was told first that he was obligated to take possession of three hundred mining claims during the stipulated periods, and then that he had filed only four denouncements embracing two hundred and forty claims since the denouncement of the mine "Cuauhtemoc" of twenty-two claims could not be considered, as application therefor had been made prior to the promulgation of the contract, but that even assuming the denouncement to be valid, "You still would not have complied with the stipulations". The other replies are likewise in error as to the calculations, but not as to the substance.

There is nothing in the foregoing in conflict with the view of the case taken by this Commission, since the statement of Sr. Molina with respect to the mining claims denounced, although erroneous numerically, was that which, the two months given to the claimant in which to present his defense having transpired, subsequently served as a basis for declaring the forfeiture and the loss of the deposit of 2,000 Mexican pesos.

The claimant further alleges, on the other hand, that if the titles to the "La Conquista" (20) were not issued until 1908, it was not due to any fault of his, but to the fault of the Mexican Government whose officials were negligent. The Commission has not before it sufficient evidence to determine this point; but even admitting negligence on the part of Mexican officials, this fact does not destroy the positive negligence in which the claimant incurred with respect to the mining properties "Oro Escondido" and "El Lucero" as previously stated, which are those which gave rise to the nonfulfillment of the contract.

It is proper to examine now whether the circumstances that the Mexican Government granted mining titles to the claimant even in 1908, a year and a half after the three years stipulated in the contract, means that it was or might be considered as being in force or that the Mexican Government had relinquished its right to enforce the stipulated guarantee in the event of non-compliance of the contract on the part of the concessionaire. According to the mining laws of Mexico exploration on national lands may be made freely by any person, but the Government can grant special permits securing for a fixed period the privilege that only the holder of the said permit may apply for mining concessions in certain zones. Through the contracts here in question, the Mexican Government secured to Hughes the right of being the only person who could make denouncements during three years. This was the only obligation of the contracting Government. The claimant, on his part, undertook the obligation of exploring the land and of obtaining mining titles to three hundred mining claims under penalty of losing the deposit made as a guarantee. But he clearly obligated himself (Art. 2 of the contract of 1904) to apply for the titles according to the procedure of the law then in force. The only thing the contract covered was the privilege of exploration; in respect to the matter of titles the claimant was on the same footing as any other person. Accordingly, even if the claimant did not explore and obtain his titles in three years, he could obtain those same titles at any time in the same manner as the other inhabitants of the Republic, inasmuch as the three years of the concession having transpired, the land was automatically declared open. (Articles 13 and 15 of the Law and 10, 11, 12, 13 and 14 of the Regulation). Therefore the fact that the Mexican Government granted titles to the claimant after the expiration of the three years, does not signify recognition of the continued existence of the contract, which moreover would have terminated automatically at the end of its period, since the contract in question had a fixed time limit.

With respect to the coupons of the deposited bonds, which matured prior to the date of the forfeiture of the contract, and which amounted to \$240.00 Mexican currency, the Mexican Government states that they always have been and are at the disposition of the claimant. That amount must therefore be delivered to the claimant.

In view of the foregoing the claim of Harry H. Hughes with respect to the return of the bonds must be disallowed, and an award entered for the return of the amount of the coupons expressed in United States currency.

Decision

The United Mexican States shall pay to the United States of America on behalf of Harry H. Hughes, the sum of \$119.64 (one hundred nineteen dollars and sixty-four cents) United States currency, with interest at six per centum per annum, from June 13, 1908 until the date on which this Commission shall render its final decision.

MARTHA ANN AUSTIN (U.S.A.) *v.* UNITED MEXICAN STATES

(October 24, 1930. Pages 108-112.)

NATIONALITY, PRESUMPTION OF. When evidence in support of claimant's nationality establishes a strong presumption of American nationality and respondent Government filed no evidence to the contrary, *held*, American nationality sufficiently proven.

DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH.—BURDEN OF PROOF.—EFFECT OF NON-PRODUCTION OF EVIDENCE AVAILABLE TO RESPONDENT GOVERNMENT. Claimant's husband was murdered in Mexico and murderer was reported to have escaped to the mountains in rebel territory. An American consular report made over a year later noted thirteen murders of American citizens, including instant case, in which no judicial proceedings had been instituted. No evidence to justify or explain such inaction of the authorities was produced by respondent Government. Claim *allowed*.

Cross-reference: British Yearbook, Vol. 12, 1931, p. 167.

Comments: Edwin M. Borchard, "Recent Opinions of the General Claims Commission, United States and Mexico", Am. J. Int. Law, Vol. 25, 1931, p. 735 at 739.

The Presiding Commissioner, Dr. H. F. Alfaro, for the Commission:

This claim is presented by the Government of the United States of America on behalf of Mrs. H. W. Austin, against the United Mexican States for the purpose of obtaining an indemnity for losses and damages arising from the murder of Samuel Alfred Austin, son of the claimant, at the hands of a Mexican national and from the failure of the Mexican authorities to take adequate measures for the apprehension and punishment of the person responsible for the death of Austin.

The claimant Government maintains that this omission constitutes a denial of justice which merits an indemnity of \$25,000.00 United States currency, or its equivalent, with interest.

Simultaneously with the filing of the Memorial a motion praying for the substitution of the name of Martha Ann Austin as the claimant in place of the name of Mrs. H. W. Austin, was filed. The Commission, following the practice already established in analogous cases, granted the motion by Order No. 116.

The facts upon which the claim is grounded occurred as follows: In the late afternoon of August 31, 1918, at the "Alamo" Camp of the Penn Mex

Fuel Company, near Tuxpan, State of Vera Cruz, Austin was accosted by a Mexican whom he did not know, and who, for no cause or reason known to him, cursed and insulted him. Austin immediately left the place where he had been so accosted and after walking a short distance heard someone call "look out". As he turned, the Mexican who had cursed and insulted him, struck him with a machete. As a result of the wound, Austin died almost instantly. Immediately after the commission of the crime the murderer fled, and the local authorities, who could easily have identified him, failed to apprehend and punish the murderer and no measures to this end have ever been taken.

In order to establish these facts there was filed with the Memorial only an affidavit of the claimant herself (Annex 6). Later, the American Agency filed with its reply further evidence consisting of several despatches from the American Vice Consul in charge at Tampico, addressed to the Department of State at Washington, and certified copies of letters exchanged between the American Consul at Tampico and the American Consular Agent at Tuxpan.

Attached to despatch number 538, dated October 1, 1918, appears the consular report of the death of Samuel Arthur Austin, an American citizen by birth, which occurred at the oil Camp "Alamo", Alamo, Vera Cruz, Mexico, on August 31, 1918, at 6.40 p.m., as the result of a fatal wound inflicted by a Mexican. According to the same report the body was embalmed and sent to the home of the deceased in Waco, Texas, aboard the oil tanker *H. H. Rogers* on the 1st of September. This report was rendered in Tampico by Willis A. Ward, American Vice Consul (in charge).

By virtue of a stipulation between the Agencies of Mexico and the United States, the Commission received certain additional evidence consisting of two letters and a certificate of George H. Clayton and a letter from W. E. Livingston and one from Russell F. Scott, respectively, subscribed to before a Notary Public and certified to by the latter.

The Mexican Agency has denied that for the purpose of international law and particularly for that of the Convention of September 8, 1923, the standing and the American nationality of the claimant and her relationship to Samuel Arthur Austin, have been duly established. The Commission is of the opinion that the evidence submitted with that end in view creates at least a strong presumption in favor of the claimant, and as the respondent Government has not filed any evidence to the contrary, it is held, in accordance with precedents already established in relation to this point, that those facts are sufficiently proven.

The affidavit of the claimant filed with the Memorial, as well as evidence submitted later by the American Agency, leaves no doubt as to the violent death of Austin caused by the fatal wound inflicted by a Mexican national in an oil camp belonging to the Company where the former was employed.

On the other hand, the evidence adduced by the claimant to determine the negligence of the Mexican authorities in the pursuit of the murderer in order to effect his apprehension and punishment, is quite deficient and even contradictory.

In the letter of Chas. R. Alder, of the Penn Mex Fuel Company to the American Consul at Tampico, of September 5, 1918, it appears that "After proper examination before the local authorities, the body was released and shipped to the United States in one of the oil boats, accompanied by R. T. Scott." Alder adds that as soon as he received the official report from the

Company he would transmit it to the Consul, but there is no record of his ever having done so.

In a letter dated September 2, 1918, addressed to the same American Consul at Tampico by the American Consular Agent at Tuxpan, this official states, after reporting the death of Austin, the following: "The Mexican escaped in the mountains and as it is in rebel territory nothing can be done to apprehend him. The body was embalmed and shipped to the United States on the tanker *H. H. Rogers*."

As may be seen, nothing is said about the authorities having been notified of the occurrence, to the contrary, the expression "nothing can be done to apprehend him" (the criminal), seems to indicate that from the first moment the American Consular Agent at Tuxpan, as well as the American Consul at Tampico, considered any effort in that direction to be useless, and hence abstained from making the necessary reports to the authorities. This supposition is confirmed by despatch number 178, dated February 9, 1927, of the American Consul at Tampico to the Secretary of State at Washington, wherein, after relating the facts as appearing in the records of the Consulate, he adds: "As hereinbefore stated, it was the opinion of the Consular Agent at Tuxpan at the time that, since the murderer had escaped to rebel territory, nothing could be done to effect his apprehension, and there is nothing in the records of this Consulate to show that any further action was taken in the matter."

In despatch number 868 dated December 19, 1919, the same American Consul at Tampico, in a report to the Secretary of State at Washington, relative to the murder of American citizens committed in the District since February of 1917, states that in thirteen cases, including that of Austin, no judicial proceedings had been instituted.

The additional evidence submitted by the American Agency is not sufficiently accurate and is lacking in corroboration. Nevertheless, it appears impossible that the Mexican authorities in the oil fields or in Alamo should have had no knowledge of the event, due to its serious character as well as to its having occurred in a public place. The Mexican Agency has not submitted any evidence to justify or even to explain this omission of the authorities, which constitutes a form of denial of justice.

The responsibility of the Mexican Government, although not a little attenuated by the deficiencies noted, is evident, for which reason an indemnity in favor of the claimant is justified.

The Commission having in mind the established precedents, is of the opinion that the amount of the award should be \$6,000.00 United States currency, without interest.

Decision

The United Mexican States shall pay to the United States of America, on behalf of Martha Ann Austin, the sum of \$6,000.00 (six thousand dollars), United States currency, without interest.

LILLIAN GREENLAW SEWELL, IN HER OWN RIGHT AND AS
GUARDIAN OF VERNON MONROE GREENLAW, A MINOR
(U.S.A.) *v.* UNITED MEXICAN STATES

(October 24, 1930. Pages 112-120.)

NATIONALITY, PROOF OF.—VOTING CERTIFICATE AS EVIDENCE OF NATIONALITY. Nationality of claimants *held* established. Certificate as a voter of city of Los Angeles, California, *held* material evidence of nationality.

CONFLICTING JURISDICTION OF SPECIAL CLAIMS COMMISSIONS. Two American subjects were killed by bandits during course of payroll robbery on May 1, 1920. Since denial of justice, if any, arose after May 31, 1920, final date of jurisdictional period of Special Claims Commission, *held*, claim for their death within jurisdiction of the tribunal.

EVIDENCE BEFORE INTERNATIONAL TRIBUNALS.—BURDEN OF PROOF.—EFFECT OF NON-PRODUCTION OF EVIDENCE AVAILABLE TO RESPONDENT GOVERNMENT. Unexplained failure of respondent Government to produce evidence particularly within its knowledge may be taken into consideration by tribunal in reaching a decision.

DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH.—UNDUE DELAY IN PROSECUTION. Two American subjects were murdered on May 1, 1920. Though investigation was promptly begun by Mexican authorities, it thereafter was allowed to lapse. Not until February, 1921, were efforts made to ascertain the names of the crew of the train in the robbery of which such murders took place. Approximately a year after the murders some arrests were made of persons who were not identified as the culprits. In July, 1921, four persons were arrested who confessed to participation in the robbery and implicated others as also responsible but not all of the associates so named were thereafter captured. No explanation of such failure to capture was offered. Lack of diligence in apprehending criminals *held* established.

FAILURE ADEQUATELY TO PUNISH. Commuting of death sentence to twenty years' imprisonment in accordance with Mexican law *held* not a denial of justice. Imposition of twelve and six years' imprisonment upon highwaymen participating in robbery, in which homicide occurred, *held* inadequate punishment under Mexican law, which provided for death penalty, and denial of justice under international law. Members of train crew *held*, under the facts of case, participants in robbery, and subject to corresponding punishment.

Cross-references: Am. J. Int. Law, Vol. 26, 1932, p. 419; Annual Digest, 1929-1930, p. 161; British Yearbook, Vol. 12, 1931, p. 167.

Comments: Edwin M. Borchard, "Recent Opinions of the General Claims Commission, United States and Mexico", Am. J. Int. Law, Vol. 25, 1931, p. 735 at 739.

Commissioner Fernández MacGregor, for the Commission:

The United States of America, on behalf of Lillian Greenlaw Sewell, in her own right and as guardian of Vernon Monroe Greenlaw, her minor son, claims from the United Mexican States the amount of \$40,000.00,

United States currency, alleging that the Mexican judicial authorities were remiss in the prosecution and punishment of the murderers of the American citizen Ralph Greenlaw, killed in Mexico.

On the 1st of May, 1920, Ralph Lynn Greenlaw and his father, Eban F. Greenlaw, residents of Mexico, employees of the Suchi Timber Company which operated in the State of Mexico, left Palizada on a railway train for Ponderaje for the purpose of taking to this place sufficient money to make the weekly payment to the workmen of the Company. The train was halted by a group of highwaymen who had previously conspired with the train crew; there was an exchange of shots and the father and son were killed, the money which they carried being taken from them. A report of the attack upon the train was made immediately, but the Mexican authorities did not succeed in apprehending the persons indicated as guilty until a year had passed; many of the highwaymen were not arrested; of those who were arrested, two were sentenced to death, two to twelve years, imprisonment and two to six years' imprisonment. The sentence of those condemned to death has not up to the present time been executed and those sentenced to six years' imprisonment were released after having served less than two years of their sentence.

Based on the foregoing facts, the United States asserts the responsibility of Mexico for not having apprehended and punished the majority of the culprits; for not imposing adequate punishment upon those who were tried; and for not having executed the sentence imposed upon four of the highwaymen.

The Mexican Agency asserts that the Commission lacks jurisdiction in the instant case because it treats of an act of bandits which occurred on May 1, 1920. It invites attention to the fact that the Special Claims Commission has jurisdiction over claims arising between November 20, 1910, and May 31, 1920, and that Article 3 paragraph 5 of the respective Convention confers upon that Commission jurisdiction over acts of bandits, provided that it be established that the authorities omitted to take reasonable measures to suppress the bandits or treated them with lenity or were in fault in other particulars.

The Commission in deciding questions involving jurisdiction in other cases has given due weight to the provisions relative to the General Claims Convention of September 8, 1923. The preamble to that Convention excludes from the jurisdiction of the Commission claims for losses or damages growing out of the revolutionary disturbances in Mexico; Article 1 likewise excludes claims arising from acts incident to the recent revolutions; Article 8 again excepts claims arising from revolutionary disturbances.

It does not seem that this claim based on a denial of justice is incidental, in the manner required by the Articles mentioned, to the revolutionary movements in Mexico, it being proper to observe, further, that as the murder of Greenlaw was committed on May 1, 1920, and as the period fixed for claims arising from the revolutions, coming under the Special Claims Commission, terminated on May 31, 1920, it appears that the denial of Justice here asserted as a basis of the claim, arose after the said 31st of May, 1920. For these reasons the Commission decides that it has jurisdiction over the instant case.

The Mexican Agency in its Answer admitted the nationality of the claimants; nevertheless, in its brief it challenged the nationality of one of the claimants stating that though it admitted that she was by birth an American citizen and had so remained during her first marriage, in view

of the fact that the nationality of her second husband had not been established, there was no way of proving whether the said claimant had continued to be an American citizen. It also challenged the legal standing of the minor claimant before the Commission on the ground that it had not been proven that he was the son of the late Ralph Greenlaw.

Considering that there is no doubt that the claimant is an American citizen by birth, and that it appears in her affidavit that her second husband was an American citizen, and the Mexican Agent not having presented any plausible argument or any evidence to show that the claimant lost her nationality by that second marriage, and considering finally that there has been submitted her certificate as a voter of the city of Los Angeles, California, in the year 1929, the Commission cannot but hold that she is an American citizen.

With respect to the capacity of the minor claimant, besides the evidence filed with the Memorial there has been submitted as additional evidence an affidavit of his paternal grandmother which presents elements of fact sufficient to warrant the admission that he is the legitimate son of Ralph Lynn Greenlaw.

Concerning the merits of the case the claimant Government asserts that the Mexican authorities did not properly investigate the murder of Greenlaw. The respondent Government has not submitted the full record containing the criminal proceedings in the case and the Commission is able to apply the doctrine set forth in the *Parker* case, Docket No. 127,¹ paragraph 7. reading:

"In any case where evidence which would probably influence its decision is peculiarly within the knowledge of the claimant or of the respondent Government, the failure to produce it, unexplained, may be taken into account in reaching a decision."

Nevertheless, as the extracts submitted show that the record is voluminous, since there are references to 169 sheets therein, and in view of the fact that there is evidence filed by both parties with respect to which definite steps in the proceedings were taken, the Commission in the impossibility of indicating with certainty all the deficiencies therein, limits itself to pointing out those which seem to be unquestionable. Thus, it seems that the investigation of the case was begun immediately, since, when the Company officials took the bodies from the scene of the crime, several hours afterwards, the Auxiliary Judge of Punderaje took cognizance of the crime, making the preliminary investigation a record of which he sent to the Judge of the Court of First Instance at Villa Victoria which had jurisdiction; an autopsy of the victims was made; the statements of a number of witnesses were taken; but after this, the judicial authorities took no further effective steps. Although there are indications that at that time a rebel faction had taken possession of the region and that railway and telegraphic communications were suspended, and although counsel for Mexico read certain historical notes from Galvan's Almanac which showed the disturbed conditions of Mexico about the month of May 1920, the Commission is unable to determine the duration of the disturbances or their influence upon the progress of the proceedings and it abstains from making a decision upon this point. However it appears from the evidence filed by the United States that its diplomatic and consular representatives were appealing to the

¹ See page 35.

appropriate Mexican authorities to act energetically, obtaining assurances that this would be done. But they did not take effective measures until February of 1921 when they endeavored to ascertain the names of the men comprising the crew of the train which had been robbed. It seems strange that this important measure should not have been taken sooner. Approximately a year after the murder several persons suspected of complicity in the crime were arrested but they were not identified as the culprits. Finally in July of 1921 the Mexican authorities at El Oro, Mexico, arrested four individuals who confessed to having formed part of the band of highwaymen and who were turned over to the Federal Judge having jurisdiction. The confessions of these men indicated as responsible eight other men, whose names were given, and two members of the train crew; the former were never captured, without any explanation being made as to the cause of this deficiency, but the latter, members of the crew of the attacked train, were arrested.

The prisoners Luis Tenorio and Aldredo Sánchez, confessed to having shot and killed the two Americans in question and were sentenced to suffer the death penalty; the prisoners called Pedro Moreno and Macedonio Iturbe confessed to having plotted the attack and to having participated therein and were sentenced to suffer a penalty of twelve years' imprisonment; the members of the train crew called Porfirio and Dionisi González, were sentenced as accomplices in the crime of robbery with violence, to suffer the penalty of six years' imprisonment. The sentence of the Court of First Instance was rendered on April 18, 1922; an appeal was taken and the First Circuit Court of Appeals handed down its decision on July 15 of the same year confirming in all of its parts the decision of the lower court.

The American Agency asserted in its first pleadings that, without any cause, the execution of the capital penalty upon the sentenced prisoners Sánchez and Tenorio had been postponed indefinitely. It appears from the evidence that these prisoners took out a writ of *amparo* to the Supreme Court of Mexico in July 1922 and that the case was retained there until January of 1928, when the Highest Tribunal of Mexico decided the writ of *amparo* against the accused, as was shown in the additional evidence submitted by Mexico on September 22, 1930. The Mexican Agency explained this delay of the Court stating that the organization thereof, under the constitution of 1917, had been the cause of a large accumulation of cases in that Tribunal, which being required to function in banc was unable promptly to dispose of matters before it. The American Agency in its oral argument did not insist upon this point of complaint in view of the last evidence submitted by Mexico with respect to the contents of the decision of the Supreme Court. Moreover, the Mexican Agency submitted, also in 1930, evidence showing that with respect to these two criminals the sentence of death had been commuted to twenty years, imprisonment in accordance with Article 241 of the Penal Code of the Federal District, which reads:

"The commutation of the death penalty will not be obligatory except in two cases: 1st—When five years have lapsed from the date of the official notice to the criminal of the final sentence imposed upon him; 2nd—When after the final sentence there has been promulgated a law changing the penalty and there concurs in the case of the criminal the circumstances required by the new law. In other cases commutation will be made by the Executive: I. When in his judgment public convenience or tranquillity require it; II. When the convict proves fully that he is unable to extinguish the penalty imposed or any of its

circumstances, through having arrived at the age of sixty years, or by reason of sex, physical condition or chronic state of health; III. In the case of Article 43."

The case of Sánchez and Tenorio is included in paragraph 1 of that Article. The Commission therefore finds nothing in this particular that is not legal.

Pedro Moreno and Macedonio Iturbe confessed that prior to the assault they had been invited to form a part of the band which was to attack the train in question, that they had accepted and had participated in the crime. The Mexican Courts held that the crime of these two individuals was that of robbery with violence, with attempt to wreck the train, for which reason the penalty corresponding to that crime, which is that of twelve years' imprisonment, must be imposed on them. The American Agency contends that as in the case of Tenorio and Sánchez there should have been applied the provisions of Article 404 of the Penal Code of the Federal District which reads:

"Capital penalty shall be imposed when the robbery is executed on a public road and homicide is committed, or a person is raped, or tortured, or violence through other means causes one of the physical injuries mentioned in paragraph II of Article 527, regardless of the number of the robbers and whether they be unarmed. If the violence produces a physical injury less serious than those expressed, the penalty shall be twelve years imprisonment."

The same Agency asserts that the two individuals formed part of a band; that they committed the robbery on a public road, since a railroad must be so considered; and that during the robbery two persons were murdered, thus meeting all the conditions required for imposing upon all the highwaymen the death penalty, since Article 404 quoted above stated that this should be imposed regardless of the number of the robbers and whether they be unarmed. The Mexican Agency on its part asserts that the capital penalty must be imposed only upon the highwaymen who, besides committing the robbery on a public road, are authors of the crime of homicide, of physical injuries, or of rape. The Mexican Agency did not submit to the Commission any jurisprudence bearing on this point; but it does not seem to present any difficulty. Of course, a reading of Article 404 appears to show clearly that when murder has been committed in an attack, capital punishment must be imposed upon all the highwaymen whether one or more committed the murder. Besides, this interpretation is sustained by the Constitution of 1857, under which the Penal Code of the Federal District was developed, as well as by the Constitution of 1917. The first, surely in view of the importance to the Mexican community of extirpating assaults on the public highways, established in its Article 23,

"The death penalty for political crimes is abolished. With regard to the others, it will be imposed only upon the traitor in a foreign war, the parricide, the murderer who commits the crime by treachery, premeditation and advantage, the incendiary, the kidnapper, the *highwayman*, the pirate and those guilty of serious crimes against military order."

In accordance with this provision capital punishment could be imposed upon the highwaymen for the sole fact of being one, and even though he has not committed robbery and much less homicide or other crimes against persons. The President of the Commission who drafted the Penal Code of the Federal District, says with respect to the crime which the highwaymen commits:

"I cannot fail to call the attention of the highest Governmental Authorities to the fact that although in accordance with Article 23 of the Federal Constitution, the extreme penalty can be imposed and is imposed at the present time upon all highwaymen and upon all incendiaries, the Commission cannot advise that it be applied except when the highwayman commit a homicide, rape or cause some of the more serious physical injuries, or when the fire is set with premeditation or causes a homicide."

It can be seen from the foregoing that although in accord with the Political Constitution of Mexico of 1857 capital punishment could be imposed upon all highwaymen, the authors of the Penal Code restricted the application of that penalty to the cases in which during an assault there is committed a homicide, rape, or torture is inflicted; but according to the philosophy of that precept, the penalty must be imposed upon all those who take part in an assault whether or not they have had direct participation in the crime against persons who may have been attacked. This participation is not in conflict with Article 22, last paragraph of the Mexican Constitution of 1917, which repeats the precept of that of 1857 in the following terms:

"There is also prohibited the penalty of death for political crimes, and with respect to the others it will be imposed only upon the traitor during a foreign war, the parricide, the murderer who commits the crime by treachery, premeditation and advantage, the incendiary, the kidnapper, the highwayman, the pirate and upon those guilty of serious crimes against military orders."

The Commission holds that, following its own precedents and the international precedents relating to the subject, the imposition of a penalty inadequate to the crime committed constitutes a denial of justice, and that this clear inadequacy exists in this case.

The American Agency also complains that the penalty imposed upon the González brothers is likewise inadequate for the crime, since they were sentenced as accomplices of the highwaymen and not as principals in the attack, which they were. It is to be noted that one of the criminals referred to was the engineer of the train attacked and that, in accordance with a previous understanding with the bandits, he stopped the train at the proper time and delivered the money guarded by the Greenlaws; that the other brother went beforehand to advise the band of the departure of the train, and also that his brother the engineer was prepared to do his part. It regards them therefore as members of the band of highwaymen, and deserving for that reason the death penalty. It bases itself in this regard on paragraphs 2 and 5 of Article 49 of the Penal Code of the Federal District, which reads:

"Those responsible as principals of a crime are: II. Those who are the determining cause of a crime although they do not execute it themselves, or decide or prepare its execution, availing themselves of means other than those enumerate in the preceding paragraph to make others enumerated in the preceding paragraph to make others commit it; V. Those who execute deeds which are the impelling cause of the crime or which lead immediately and directly to its execution or which are so necessary to its commission, that without them it could not be consummated."

The Commission is obliged to share this opinion since it appears that there is no logical or legal reason which permits the differentiation of the members of the band, who by previous agreement awaited the train to attack it, or of the two members of the train crew who likewise by previous agreement, and forming therefore a part of the group, lent a hand in the attack. The connivance and the cooperation with the other members of the band

of highwaymen, made highwaymen of the two members of the crew of the train referred to, and rendered them deserving of the extreme penalty. Notwithstanding, they were sentenced to six years' imprisonment only and released provisionally on March 6, 1924. The Mexican Agency explained that this liberty is granted to criminals sentenced to more than two years and whose conduct has been uniformly good, (Articles 74, 75 and 98 of the Penal Code of the Federal District); but that explanation would be acceptable only in the event that the penalty of six years had been legally applied.

Reviewing briefly the foregoing the Commission finds that there was some lack of diligence in the pursuit and apprehension of the culprits during the first year; that the penalties imposed upon four of the arrested criminals do not appear to be in accord with the provisions of the Penal Code of the Federal District; that there was negligence in the pursuit of the other individuals composing the band which made the attack, from all of which it is constrained to conclude that there was to a certain extent an insufficiency in the administration of justice, for which reason, it believes an award of \$7,000.00 must be allowed.

Decision

The United Mexican States shall pay to the United States of America on behalf of Lillian Greenlaw Sewell and Vernon Monroe Greenlaw the amount of \$7,000.00 (seven thousand dollars), without interest.

WILLIAM E. CHAPMAN (U.S.A.) *v.* UNITED MEXICAN STATES

(*October 24, 1930. Pages 121-132.*)

DUTY TO PROTECT ALIENS. While a Government is not an insurer of aliens it has a duty to use such means of protection as are within its capacity to protect them against apprehended illegal acts of which it has notice.

DUTY TO PROTECT CONSULS. Claimant was an American consul in Puerto México shortly prior to the execution of Sacco and Vanzetti in the United States. Threats of death to all American diplomatic and consular officials in Mexico, if such execution were carried out, were received by the American Embassy in Mexico City. Pursuant to instructions from the American Consulate General, claimant informed the Governor of the State of Vera Cruz, Chief of the State Police at Puerto México, and the Municipal President of Puerto México, of the apprehended danger and requested adequate protection. Only the Municipal President made any reply to such requests. The Municipal President requested the local chief of police to exercise active vigilance but no additional protection whatever was extended to claimant. Just before daylight a masked man entered his home and shot him through the chest. *Held*, in the light of the special protection due consular officers under international law, lack of protection by respondent Government established. Claim *allowed*.

DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH. When investigation of crime was promptly begun by Mexican authorities and some examination of witnesses place, *held*, denial of justice not established.

Cross-references: Am. J. Int. Law, Vol. 25, 1931, p. 544; Annual Digest, 1929-1930, p. 318; British Yearbook, Vol. 12, 1931, p. 168.

Comments: Edwin M. Borchard, "Recent Opinions of the General Claims Commission, United States and Mexico", Am. J. Int. Law, Vol. 25, 1931, p. 735 at 738.

Commissioner Nielsen, for the Commission:

Claim is made by the United States of America in this case in the amount of \$50,000 gold currency of the United States, with interest, on behalf of William E. Chapman who, on July 17, 1927, was shot and seriously wounded at Puerto México, Mexico, where he was at the time stationed as Consul of the United States. The claim is predicated on allegations with respect to the failure of the Mexican authorities to give proper protection to the claimant and the subsequent failure of the authorities to take proper steps to apprehend and punish the person who did the shooting. The substance of the allegations contained in the Memorial is as follows:

The claimant, William E. Chapman, during the year 1927 was assigned by his Government to the City of Puerto México, Mexico, as Consul and was recognized as such by the President of Mexico on May 4, 1927.

On June 29, 1927, the claimant received a communication dated June 27, 1927, from the American Consulate General at Mexico City containing the information that some unknown person or persons had transmitted to the American Embassy at Mexico City a threatening communication. The writer or writers of that communication declared the intention to effect the destruction by dynamite of all American Embassies and the death of all American principal diplomatic and consular officials, if two men, named respectively Sacco and Vanzetti, were executed as the result of a verdict against them in connexion with a charge of murder which was then pending in courts of the United States. The instruction from the American Consulate General directed the claimant and other consular officers stationed in Mexico to apprise the Mexican authorities in their respective districts of the receipt of this threat and to request such action on the part of the local Mexican authorities as might be necessary to insure the safety of American Consular personnel and property.

On June 30, 1927, the claimant addressed letters to the Governor of the State of Vera Cruz, the *Jefe de la Policia Judicial* at Puerto México, and the *Presidente Municipal* of Puerto México, furnishing the information that a threat had been made against the Consulate to which he had been assigned and requesting that adequate protection be granted to him and to the property of the Consulate.

The letters addressed to the Governor of the State of Vera Cruz and to the Chief of the State Police at Puerto México, were not answered. However, the *Presidente Municipal* at Puerto México transmitted to the claimant a carbon copy of a communication addressed to the Chief of Municipal Police. In addition to the letters addressed to these officers, the claimant on numerous occasions, spoke to the Chief of the State Police and to the *Presidente Municipal* in regard to the matter of the threats, but none of these authorities manifested more than a passing interest in the situation. No provisions of any nature were made to furnish the Consulate or the claimant with any protection other than that which had customarily been accorded previous to that time.

On July 17, 1927, just before daylight, a masked man entered the American Consulate and shot the claimant through the chest. Mr. Chapman immediately informed Dr. J. J. Sparks, a British Vice-Consul stationed in Puerto México, and also a practicing physician. Dr. Sparks immediately came to the claimant, rendered first aid and later treated the claimant for the wound which he had received. The bullet directed at the claimant entered his chest a few inches from the heart and pierced his lung, its exit being under the left arm about eight and a half inches from the point of entry. As a result of this wound the claimant constantly suffered great pain and discomfort for a period of three or four months, and ever since that time has experienced difficulty in taking a deep breath, and he is and will remain in a seriously weakened and permanently impaired condition. Prior to the time of the attack in question he enjoyed good health.

Within a period of fifteen minutes after the claimant was shot a police officer of Vera Cruz came to the claimant's residence and left within a few minutes apparently for the purpose of pursuing and apprehending the person who was guilty of the shooting and who had been described to the officer. Shortly thereafter the *Presidente Municipal* called on the claimant and was informed of all of the details with reference to the attack and the shooting. About three days thereafter two men identifying themselves as detectives from Mexico City called on the claimant and were shown all of the evidence which had been left by the criminal, but beyond mere investigations at the site of the crime no efforts were made by them to apprehend the person who had shot the claimant.

The Memorial also furnishes figures showing the expenses of medical attendance which the claimant incurred.

This Commission and other international tribunals have often given application to the general principles invoked in the instant case that a government is required to take appropriate steps to prevent injuries to aliens and to employ prompt and effective measures to apprehend and punish offenders who have committed such injuries. The Commission has also considered the subject of the special protection due to a consular officer. That matter is of some importance in the instant case, since it is contended that the claimant was entitled to such protection. However, the subject is presented in an aspect in which it reveals no real difficulties. Citation is made by the American Agency to statements found in numerous works on international law and in diplomatic correspondence to the effect that consular officers are entitled to special protection. But the argument particularly stressed in the instant case is that the claimant was entitled to such protection because serious threats had been made against his safety; that such threats had been brought to the attention of the appropriate Mexican authorities; and that the Consul had received assurances that protection would be given. Of course a request for protection in a case of threatened danger may be appropriate in any case involving the safety of an alien having no official status, and compliance with such a request will be prompted by the desire of authorities of a government to take action with a view to avoiding any just grounds for complaint by the government to which the alien belongs.

In the presentation of the instant case there was some discussion of the scope and application of the rule with respect to the protection of aliens. A government obviously is not an insurer of the safety of such persons, and the same may be said relative to the safety of a consular officer, even though due account be taken of his special position.

It of course is an important point whether authorities have been put on notice with respect to apprehended illegal acts. On June 29, 1927, the claimant received from the American Consul General in Mexico City, a communication dated June 27, 1927, which reads in part as follows:

"The Embassy has transmitted to the Consulate General a copy of an unsigned communication, dated June 23, 1927, at Mexico City, threatening the destruction by dynamite of American Embassies in Latin America and the death of principal diplomatic and consular officers if Sacco and Vanzetti are executed. The text of the communication is appended to this circular.

"The Foreign Office has been requested by the Embassy to take appropriate action here and in places where American consular offices are established in Mexico. You are directed to apprise the Mexican authorities in your respective district of the existence of this threat, the first of its kind to be received by the Embassy, in order that adequate measure may be taken for the protection of the consular personnel and property."

The threatening anonymous communication to which reference was made by the Consul General reads as follows:

"We make known to the personnel of that Embassy, that in case of the execution in Boston, Mass., of Sacco and Vanzetti, we have definite instructions in all our societies in Latin America to dynamite the buildings of the North American Embassies, including that in the Republic of Mexico, with the object of killing the principal representatives, Ambassadors and Consuls." (Translation from Spanish)

On June 30, 1927, the claimant took action in compliance with the instructions received from the Consul General. On that day the Consul wrote three letters: one to the Municipal President of Puerto México, another to the Chief of the Judicial Police at that place, and another to the Governor of the State of Vera Cruz. The Consul in his letter to the Municipal President referred to the Sacco and Vanzetti affair and to the instructions received from the Consul General and requested that provision be kindly made for effective protection in case the Governor of Massachusetts should allow the execution of the death sentence pronounced against the two convicted men. More specifically, the Consul said:

"According to my memory I saw a press despatch that the court had fixed the 9th of next July as the day of the execution, but on any day the Governor can make his decision to execute them or not, and in the event he does the danger will run from then, but naturally more immediately after the execution.

"As you know it will not be difficult to protect this Consulate against any attempt, but only by placing policemen in front and at the back of the house and in a case of such a strange nature as this one they should be men in whom is lodged the utmost confidence, ready to confront whoever dares to commit a crime of the category stated in the note which was received by the American Embassy at Mexico City."

The Consul in his letter to the Governor enclosed a copy of his communication to the Municipal President at Puerto México, and further said:

"Attentively I request you to issue your respectable orders for the purpose of guaranteeing the protection which with absolute certainty would be given by the American authorities to the Mexican Consuls and Consulates in the United States in a similar case.

"I know that the Mayor of Puerto México is considered kindhearted, but at the same time the town is poor he can not keep more than a few policemen to keep order and on some occasions he himself patrols at night to assure the town against bandits a thing which deserves much appreciation by the public.

So that in a crisis like this in which criminals plan to impose in the event of the execution of Sacco and Vanzetti I think it will be necessary to have the aid of the State police stationed at this port."

The Consul in his communication to the Chief of the State Police at Puerto México, said:

"Attentively I request of you the kindness to take the steps necessary to guarantee the protection which under definite instructions of my superior, the American Consul General at Mexico City, I am asking."

The Consul's action was justified and was in proper form. With respect to this point it is immaterial whether it may be considered that what the Consul requested was special protection due to the indication of unusual danger, or special protection required by the Consul's position. From the instructions given by the Consul General at Mexico City, it appears that the attention of the Mexican Foreign Office had been called to the threat against American representatives. It appears that the Consul received no acknowledgment from either the Governor or the Chief of the State Police. However, there was sent to him by the Municipal President what appears to have been a copy of instructions transmitted by the latter to the Chief of Police. These instructions read in part as follows:

"Mr. William E. Chapman, North-American Consul in this city, in his attentive note of June 30 past, tells me that, in compliance with instructions of the Consul-General of the United States in the City of Mexico, he calls to the attention of our authorities the fact that the Embassy of the United States in the Capital of the Republic, has received a threatening note, without signature, that is to say an anonymous communication, dated the 23rd of the same month of June ultimo, which textually is as follows:

"With a view to avoiding any attempt of the nature of that suggested against the person of the Consul of the United States at this port or against the interests which the said Consulate has in this port, please exercise active vigilance by day as well as by night at the Consulate of reference, establishing a secret service which can prohibit any danger which could be aimed at the edifice cited or the Consul."

The Municipal President therefore evidently recognized the propriety of the Consul's request and issued proper directions, as is shown particularly by the reference to use of "a secret service".

Some argument was advanced by counsel for Mexico with respect to the nature of the warning which the authorities received, and the extent of apprehension which it might naturally occasion. It was argued that imminent danger calling for immediate action was not necessarily prompted by what the Consul disclosed, and furthermore, that it was not conclusively shown that Chapman was shot by some Sacco-Vanzetti sympathizer, since he might have been wounded by some one who felt a personal grievance against the claimant.

As against contentions of this kind, counsel for the United States argued, among other things, that it could be reasonably assumed that, had protection been given the Consul would not have been injured. In a case such as that under consideration the matter of warning obviously is important in connexion with the question of responsibility. The arguments of counsel for Mexico would have force if it could be shown that there is a substantial basis for the views he expressed as to the nature of the warning communicated to the authorities. It seems to be clear from the evidence in the record that the person who shot the Consul did not enter the Consulate for the purpose

of robbery. And in the course of an investigation by Mexican authorities the Consul observed that he was on good terms with the people of Puerto México, and that he had no enemies among them. He referred to a business concern as probably being unfriendly to him. However, neither in what he says nor in anything said or done by the authorities is there a suggestion of suspicion that this concern employed an assassin. The Municipal President, in the course of the investigation, referred to the information he had received from the Consul as to threats to kill all diplomatic and consular representatives in Latin American countries as a reprisal for the sentences pronounced on Sacco and Vanzetti, and he further referred to instructions which he gave with regard to the protection of the Consular premises in response to the Consul's request.

With respect to the point as to the imminence of danger conveyed by the warning which the authorities received, it is pertinent to bear in mind that the Consul, in his letter to the Municipal President, stated that according to his (the Consul's) recollection "the court had fixed the 9th of next July as the day of the execution" of the two convicted men, and the Consul added "but on any day the Governor can make his decision to execute them or not, and in the event he does the danger will run from then, but naturally more immediately after the execution". This was certainly an explicit warning of possible immediate danger. It may not be altogether without bearing on this subject of warning that beginning as early as the spring of 1926 there had been serious activities directed against American representatives and American property in different parts of the world by sympathizers of the two convicted men. Considerable information on this subject is given in the record.

A point was raised in behalf of Mexico with respect to the capacity of authorities to give protection. Correlative rights and obligations on the part of each member of the family of nations are derived from international law. It would be difficult plausibly to contend that an unreasonable request was made by the Consul, or that the Mexican authorities would have found it impracticable to comply with it. The Consul's request and the instructions which it appears were given by the Municipal President really had the same purport. It may be concluded that there would have been no great inconvenience in stationing a small guard at the Consular premises for a while, until the Consul considered it to be unnecessary, or it might be said, until the authorities had good reason to assume that it was no longer required. In international practice use is undoubtedly frequently made of such a form of protection for foreign representatives as a matter of comity and with a view to meeting international obligations.

The question of capacity to give protection has been considered in different aspects. In the case of the *Home Missionary Society*, presented by the United States against Great Britain under an arbitral agreement signed August 18, 1910, the tribunal referred to the difficulty of affording on a few hours notice "full protection to the buildings and property in every isolated and distant village". In this case the tribunal considered principles applicable to the responsibility for acts of insurgents. This Commission in the *Solis* case, *Opinions of the Commissioners*, 1929, p. 48, and in the *Coleman* case, *ibid.*, p. 56, emphasized with respect to similar questions as to the responsibility for acts of insurrectionists "the capacity to give protection, and the disposition of authorities to employ proper measures to do so". Obviously, however, any question as to capacity to give protection in cases of this character

is very different from any question of this nature that might be raised in the instant case.

It seems clearly to be proper to take some account of the argument made with respect to the special position of a consular officer. Consular officers do not enjoy immunities such as are accorded to diplomatic officers with respect to matters pertaining to exemption from judicial process and from taxation. But undoubtedly international law secures to them protection against improper interference with the performance of their functions. And it is well recognized that under international law and practice they have a right to communicate with local administrative authorities with respect to protection of their nationals. Moore, *International Law Digest*, Vol. V, pp. 61, 101. Assuredly a Consul is privileged to communicate with such officials regarding the protection of himself and the property of his Government.

In the instant case we are concerned only with requests made to officials of this character. Apart from any question as to the propriety of communicating with military authorities, as it was suggested in argument in behalf of Mexico that the Consul should have done, it must be concluded that obviously, especially in times of peace in a community such as that at Puerto México, the Consul communicated with the proper officials.

Writers on international law have repeatedly stated that consular officers are entitled, to use the language of Phillimore, to "a more special protection of international law than uncommissioned individuals". *Commentaries upon International Law*, Vol. 2, 3rd ed., p. 270. See also Vattel, *Law of Nations*, Chitty's Edition, Chapter 6, Section 75; Oppenheim, *International Law*, Vol. I, 3rd ed., pp. 599-601. In a message sent to the Congress of the United States on December 2, 1851, President Fillmore, in referring to an attack on a Spanish Consular officer in New Orleans in 1851, interestingly mentioned the importance of consular officers in the relations of states, and observed that they as well as diplomatic officers "are objects of special respect and protection, each according to the rights belonging to his rank and station". Moore, *International Law Digest*, Vol. VI, p. 813.

It is unnecessary to give any detailed consideration to the appropriate application of generalities of this kind to individual cases. In the instant case the argument with regard to special protection is concerned with a situation in which there was a threat against the personal safety of a consular officer; some assurances of protection of that kind were received by the Consul; he was warranted in relying on them; but no such protection was given.

In the *Mallén* case decided by this Commission, *Opinions of the Commissioners*, Washington, 1927, p. 254, consideration was given to the special position of a consular officer and to the protection due to him because of his public character. Account was taken in this case of the element of warning of possible danger to a consular officer.

In behalf of Mexico it was contended that the United States was under obligation to give special protection to Mr. Mallén, Mexican Consul at El Paso, both because of his character of Consul and because protection had been asked for him by the Government of Mexico. In this case the Commission took into consideration, among other things, an act on the part of a deputy constable, Franco by name, which was considered to be a private act committed by this magistrate, who either slapped the Consul in the face or knocked off his hat. For this act Franco was fined \$5.00. No international delinquency was predicated on this occurrence, but the view was taken, in connection with a subsequent serious assault committed by

Franco on the Consul, that the authorities having had warning of Franco's animosity toward the Consul had acted imprudently and improperly in maintaining Franco in office and in not protecting the Consul by some proper method against the possibility of an assault such as occurred. Liability was also fastened on the United States on additional grounds.

A warning of imminent danger was communicated to Mexican authorities in the instant case. One official evidently took note of the warning and issued suitable instructions to meet the situation. These instructions were not carried out. Evidence in the record in connection with an investigation into the shooting of Mr. Chapman, including testimony given by the Municipal President himself, clearly shows that no such vigilance as that directed by the former was exercised. Perhaps less than what both of them suggested might have sufficed, but it appears from the evidence that no special precaution was taken.

In the light of the facts revealed by the record and in accordance with the applicable principles of law, the Commission is constrained to sustain the charge of lack of protection made by the United States in this case.

With respect to the second complaint set forth in the Memorial, there unfortunately is before the Commission but meagre information. We have only the sworn testimony of the Consul and a short record of investigations made by the Chief of the Judicial Police and by the Judge of First Instance in Puerto México.

It appears that the President of Mexico in communicating with military authorities who made some investigation in the town expressed the opinion that, in view of the smallness of that place, there seemed to be no reason why the criminal should not be apprehended. That is a reasonable conclusion, but of course the criminal may not have remained in the town. There is no record of any steps taken to capture him in any locality outside of the town where he may have gone. But it is difficult to form any conclusion as to the practicability of locating him if he left the town. The Consul emphatically expresses the view that local officials who came to the Consulate shortly after the shooting should have promptly undertaken or initiated measures of pursuit instead of lingering, as he said they did, in the Consular premises. He further expresses the confident belief that if a police officer who came to the Consulate had pursued the criminal the chances of capture would have been excellent. There seems clearly to be justification for the Consul's criticism. But conclusions of the Commission with respect to fault entailing international responsibility must be based on evidence of manifest wrong or error.

The Consul mildly criticized the inactivity of two men who he states came from Mexico City three days after the crime and represented themselves to be detectives. However, we have practically no information as to what they did.

The Consul speaks in complimentary terms of the activity of General Anayo, who it appears came to Puerto México about thirty-six hours after the shooting from San Geronimo and remained three or four days engaged in the work of investigation. The Consul speaks in similar terms about General Navarro, a local military commander. Unfortunately there is not before the Commission any record of the investigation made by the military authorities. It appears that the Judge of First Instance endeavored to obtain from General Anayo a copy of the record of that investigation, and that the General replied that it was not possible to put at the former's disposition the record of proceedings made by the office of the Chief of

Garrison at the port, since that record was of a purely military character and was made in secret. The record has not been produced by the Mexican Agency in the proceedings before the Commission. It is not clear why a report of this kind should be regarded to be of such a secret nature that it could not be produced in these proceedings for the purpose of throwing light on an important point.

From a record submitted by the Mexican Agency it appears that the crime came to the notice of the judicial police about six o'clock in the morning of July 17th, two hours after it had been committed. The Chief of the Judicial Police started to make an investigation. On the day of the crime, that is, July 17th, he took the statement of the Consul. On the following day he took a fuller statement from the Consul and also the statements of several other persons. On July 21 he turned his record over to the Judge of First Instance. The Judge of First Instance on July 25 ordered that an investigation be made with a view to apprehending and punishing the criminal. Pursuant to that order there was a re-examination of the witnesses who had already testified and of two additional witnesses. The witnesses who had previously testified merely reaffirmed their statements. The two additional witnesses contributed but slight information.

It seems to be clear that more effective measures could have been taken to apprehend the criminal, but in the light of the record before us we are not disposed to say that there was a manifest failure to meet the obligations of international law.

The Consul was seriously wounded, and it seems to be remarkable that he escaped death. His views as to the permanent character of his injuries are confirmed by his attending physician, Dr. Sparks, who, referring to the statements made by the Consul, says under oath that they are "but a mild manner of stating the facts, since manifestly a bullet could not pass through a human body as it did in this case without cutting through important tissues and leaving them in a weakened condition". The Commission considers that an award of \$15,000.00 should be made in this case.

Decision

The Government of the United Mexican States shall pay to the Government of the United States of America in behalf of William E. Chapman the sum of \$15,000.00 (fifteen thousand dollars), without interest.

SARAH ANN GORHAM (U.S.A.) *v.* UNITED MEXICAN STATES

(October 24, 1930. Pages 132-139.)

DEFINITION OF "BANDITS". There is no technical, legal definition of the term "bandits".

CONFLICTING JURISDICTION OF SPECIAL CLAIMS COMMISSION.—JURISDICTION OVER ACTS OF BANDITS. Denial of justice in respect of murder of American subject by bandits during period covered by Special Claims Convention of September 10, 1923, but not growing out of revolutionary disturbances or by groups of men operating in manner of organized banditry, *held*

within jurisdiction of tribunal. Suggestions not established by evidence that guilty persons may have been released from prison by revolutionists held not sufficient to oust tribunal from jurisdiction.,

DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH.—DILATORY INVESTIGATION. Mexican authorities were notified of murder of American subject and body was kept, at place where murder occurred, for their investigation. No official responded up to a late hour on the next day, when the body was buried. Little or no interest was manifested by the authorities. About two months later nine suspects were arrested but were released or allowed to escape. They were never apprehended and no one was ever punished for the murder. Claim *allowed*.

Comments: Edwin M. Borchard, "Recent Opinions of the General Claims Commission, United States and Mexico", Am. J. Int. Law, Vol. 25, 1931, p. 735 at 739.

Commissioner Nielsen, for the Commission:

Claim in the amount of \$25,000 with interest is made in this case by the United States of America against the United Mexican States on behalf of Sarah Ann Gorham, wife of Franklin Pierce Gorham, an American citizen, who was murdered in the State of Tamaulipas, Mexico, in 1919. The claim is predicated on allegations with respect to a denial of justice growing out of the failure of Mexican authorities to take suitable steps to apprehend and punish the slayers. The substance of assertions in the Memorial with respect to the occurrences on which the claim is based is, briefly stated, as follows:

From 1915 up to the time of his death, on April 29, 1929, Franklin Pierce Gorham was a peaceful and law-abiding resident of Mexico, conducting a farm and raising cattle on several acres of land, part of which he owned and part of which he rented, near Chamal, State of Tamaulipas. The claimant and her children lived with him on the farm, until conditions in and near Chamal became so turbulent and dangerous that she was obliged to leave for the United States.

On April 28, 1919, Franklin Pierce Gorham went to a neighbor's home to make a visit and to bring back to the farm, a hive of bees. He reached his destination, and left in time to have reached his home before dark. When he did not return by one o'clock of the next afternoon, a searching party started out to find him. His burro had previously wandered back alone, stripped of all but its halter. After a short search the dead body of Gorham was found by the side of the road, about one and a half miles south of Chamal, between the decedent's home and that of a neighbor.

From the condition in which the body was found it was evident that a brutal murder had been committed. Two or more persons had attacked Gorham, stabbing him with their knives, as was evidenced by eight gashes in his chest, and hacked open his skull with machetes. There were sixteen stab wounds in the body. The assailants, following the murder, then looted the decedent's clothing of everything they considered of value, turning the pockets inside out. The mutilated body was dragged to a point about thirty yards back from the road, and roughly covered with palms and foliage.

In accordance with Mexican law, the body was permitted to remain in the condition in which it was found until after the authorities, including the Municipal President at Ocampo, were notified. This was done imme-

diately and they were requested to make proper investigations. No official responded on the day when notice was given or up to a late hour the next day when the body was buried. Local Mexicans manifested no interest in the fact that Gorham had been brutally murdered. Appeals to the civil and military authorities evoked little, if any, assistance.

During the latter part of June, or the early part of July 1919, a group of nine Mexicans were arrested on the suspicion of being implicated in the murder, but were released or permitted to escape within a very few days. They were never reapprehended, although they had not been examined fully with reference to the murder.

Finally it is alleged in the Memorial that no sincere or conscientious efforts were ever made to afford proper protection to the residents of the vicinity or to punish violators for crimes which were committed from day to day.

In the Mexican Answer it is pointed out that in the Memorial and in certain accompanying annexes it appears that the crime was committed by two or more persons who in some instances are designated as "bandits". It is further pointed out that the crime occurred on April 29, 1919, that is, within the period referred to in Article III of the so-called Special Claims Convention concluded between Mexico and the United States on September 10, 1923. The opinion is expressed that these considerations would warrant the Commission to declare itself incompetent to take cognizance of the instant case. In the Mexican Brief it is argued that the case is similar to that of the *Blair* case, *Opinions of the Commissioners, Washington, 1929*, p. 107. It is pointed out that the *Blair* case involved a crime committed against an American citizen within the period between November 20, 1910, and May 1, 1920, and that some persons were apprehended and were subsequently released by revolutionary forces.

In behalf of the United States it is argued that, irrespective of the use of the term "bandit" in communications accompanying the Memorial, there is no information that the perpetrators were bandits, they being unknown. It is said that robbery was evidently the sole purpose of the crime. And it is contended that the evidence does not disclose that Gorham was murdered through the action of one of the forces enumerated in Article III of the so-called Special Claims Convention. Stress is laid on the point that the claim is predicated on allegations relative to the negligence of Mexican authorities with respect to the apprehension and punishment of the criminals.

In dealing with this difficult question of jurisdiction, it would seem to be desirable and indeed necessary to avoid any narrow construction taking too much account of terminology, in relation particularly to a point such as the definition or identification of a bandit. It can probably accurately be said that there is no technical, legal definition of a "bandit". In a despatch sent by the American Consul at Tampico to the Department of State at Washington reference is made to the slayers of Gorham as "bandits". However, the Consul also speaks of them as "bad men", and in another communication there is a mention of "renegades".

Of course it is proper to take account of the term bandit, since that is used in Article III of the so-called Special Claims Convention of September 10, 1923. Sub-paragraph (5) of that Article provides, among other things, that the Commission established by the Convention shall have cognizance of claims due to acts committed "by bandits, provided in any case it be established that the appropriate authorities omitted to take reasonable

measures to suppress insurrectionists, mobs or bandits, or treated them with lenity or were in fault in other particulars". It is stated in Article II of that Convention that Mexico desires that her responsibility shall not be fixed according to the generally accepted rules and principles of international law, but *ex gratia* feels morally bound to make full indemnification and agrees, therefore, that it will be sufficient that it be established that the alleged loss or damage in any case was sustained and was due to any of the causes enumerated in Article III of the Convention. The Convention contains this general stipulation with respect to the settlement of claims *ex gratia* and not according to principles of international law. However the language of sub-paragraph (5) of Article III would certainly appear to justify the construction that the Commission under that Convention, in dealing with this particular category of claims, must take account, at least to some extent, of general principles of evidence and of law that enter into the determination of such cases by a strict application of international law.

This Commission in previous cases has observed that, with respect to questions of jurisdiction, it is proper to consult the Convention of September 10, 1923. But the Commission must determine whether the cases presented to it come within the jurisdictional clauses of the Convention of September 8, 1923. Therefore, although Article III of the former contains detailed provisions of which it is important to take account, it is of course necessary that full effect be given to the jurisdictional provisions of the latter, and that none of them be ignored in the process of having recourse to another Convention for purposes of interpretation.

The Convention of September 8, 1923, confers on this Commission jurisdiction over claims by the nationals of each country against the other since July 4, 1868, with certain exceptions. The exceptions to be sure are specified in general terms. In the preamble they are described as "claims for losses or damages growing out of the revolutionary disturbances in Mexico". And in Article I they are described as those arising from "acts incident to the recent revolutions".

To attempt in the light of the record before us to ascribe the losses which it is alleged the claimant suffered as growing out of a revolutionary disturbance, or as incident to recent revolutions, would seem to be entering into a field of speculation and of strained reasoning which neither Convention requires or justifies. There appears to be some force in the argument of counsel for the United States to the effect that the acts of bandits referred to in the so-called Special Convention mean acts of groups of men operating, as it might be said, in the manner of organized banditry. With respect to this point, it may be noted that in the American Consul's despatch of July 2, 1919, it is stated that the men arrested are all "residents of the general vicinity of Chamal and Xicotencatl". The Consul also states that certain Americans "assisted in the arrest of the parties named through the medium of furnishing names and addresses". Moreover, irrespective of the exact meaning of the language of sub-paragraph (5) of Article III of the Convention of September 10, 1923, it is also proper to take account of the precise nature of the claims within our jurisdiction as distinct from claims in which Mexico has undertaken to make compensation *ex gratia* on the basis of a direct responsibility, so to speak. The instant case is based on contentions as to the failure of Mexico to live up to the obligations of the rule of international law with respect to punishment of persons who murdered the claimant's husband. Its merits must be determined by the application of the rule of international law pertaining to a complaint of that nature.

The argument on the part of Mexico with respect to the similarity of the instant case to the *Blair* case does not appear to involve any difficulties. That argument as presented involves a question of evidence. It is contended that, since certain persons were arrested for the murder of Gorham, and since they were released by revolutionists within the jurisdictional period fixed by the Convention of September 10, 1923, the claim made by the widow of Gorham is not within the jurisdiction of this Commission.

In passing on the question of jurisdiction in the instant case it is not necessary to consider the effect of any allegations with respect to the release of the prisoners by insurgents, because there is no evidence that the prisoners were released in that manner. Certainly when the decision on a plea to the jurisdiction is dependent upon a question of evidence, the party attacking the jurisdiction must produce evidence that is conclusive with respect to its contentions. Mexico has produced nothing. To be sure nothing might be necessary, if a sound conclusion could be based on evidence produced by the other party, but this is not the situation in the case before us.

The American Consul at Tampico reported in a despatch of July 2, 1919, to the Department of State at Washington that he had received information that certain persons were released or escaped from their cells when the revolutionists assaulted Ciudad Victoria. According to that information, which it appears reached the Consul just as he was writing his despatch, the men may have escaped and not have been released, and it is not stated that they were released by revolutionists.

The Judge of First Instance at Xicotencatl, Tamaulipas, refused to furnish the claimant a copy of the court record, and the Mexican Agency has produced no copy. It would seem that these records should throw light on the conditions under which the prisoners escaped or were released. When the allegations of the Memorial present a case within our jurisdiction, the Commission cannot properly refuse to take jurisdiction on the basis of some speculation as to things with reference to which there is no evidence.

On the merits of the case the following defense is made in the Mexican Answer:

"It is denied that the annexes submitted with the Memorial contain sufficient evidence to prove that the Mexican authorities were negligent in the persecution of the criminals and the attention of the Commissioners is called to the fact that in the said Memorial and in some of its annexes it is admitted that the authorities detained several suspects and it has not been proved that any or some of those detained were guilty and remained unpunished."

No evidence accompanies the Answer, and no legal defense was made in the Brief or in oral argument. As has been observed, a copy of the court record was refused to the claimant, and no record has been produced before the commission. The sole source of information to the effect that certain persons were arrested in a consular despatch accompanying the Memorial. In the same despatch it is stated that the prisoners were released or escaped. However, with respect to the merits of the case no difficulties are presented. There is no conflict of testimony, since no evidence has been produced by the respondent Government on this phase of the case.

In the *Chase* case, *Opinions of the Commissioners, Washington, 1929*, p. 17, it was said by the Commission:

"International justice is not satisfied if a Government limits itself to instituting and prosecuting a trial without reaching the point of defining the defendant's

guilt and assessing the proper penalty. It is possible that in certain cases the police or judicial authorities might declare the innocence of a defendant without bringing him to trial in the fullest sense of the word. But if the data which exists in a case indicate the possible guilt of a defendant, even in the slightest degree, it cannot be understood why he is not tried to the extent of determining his responsibility."

In the *Massey* case, *Opinions of the Commissioners, Washington, 1927*, p. 228, the Commission, after referring to the escape from prison of a person who killed an American citizen, said:

"With regard to the argument made with respect to the bearing on the question of Mexico's responsibility of the steps taken to apprehend Saenz, it may be concluded that there is no evidence in the record showing that any effective action has been taken by the appropriate authorities to apprehend the accused there is no specific evidence that police authorities took any steps to apprehend him and no evidence of any difficulties experienced by such authorities to locate this well-known fugitive."

In the *Richards* case, *ibid.*, p. 412, the Commission, after referring to certain judicial proceedings against a person charged with the killing of an American citizen, said: "the Court of Appeals revoked the decree of liberty and ordered the reapprehension of the accused on August 1, 1925, but Mexico has not presented any evidence of the continuation of the prosecution, or of their having been finally judged."

In the *Plehn* case, under the Convention of March 16, 1925, between Mexico and Germany, the President Commissioner, speaking in behalf of all three Commissioners in relation to a case growing out of the killing of a German subject by Mexican so-called bandits, said that the reasonable measures for punishing the bandits referred to in the Convention did not in his opinion "consist alone in the instituting of a prosecution, but it is necessary to become acquainted with the prosecution itself in order to state whether they have such a character". It was further said:

"The exhibition of the record would have made it possible to determine the steps employed by the authorities for the punishment of the guilty party, and the absence of this piece of evidence cannot damage the claimant, as it was not in her hands to present and appertain to the defendant Agency to show it in proof of its assertion that there was no lenity or lack of diligence on the part of the authorities.

"It does not appear in the proceedings that the competent authorities took reasonable measures to repress the act of banditry nor to punish those guilty. While there was instituted the appropriate prosecution, from the communication of the Agent of the Ministerio Público, submitted by the Mexican Agency, it appears that it was closed or withdrawn because no charge was made."

In the light of the record, the Commission is clearly constrained to hold that the complaint of the United States with respect to the failure of the Mexican authorities to take proper steps to investigate the murder of Gorham and to apprehend and punish the criminals is well founded.

Decision

The Government of the United Mexican States shall pay to the Government of the United States of America on behalf of Sarah Ann Gorham the sum of \$7,000.00, without interest.

MINNIE EAST (U.S.A.) *v.* UNITED MEXICAN STATES

(October 24, 1950. Pages 140-145.)

DENIAL OF JUSTICE.—INADEQUATE PENALTY.—FAILURE TO ARREST.—FAILURE TO PROVIDE TRIAL.—FAILURE TO PUNISH. On September 16, 1913, an American subject was struck by a Mexican during the course of a dispute and suffered such injuries that he died the following day. An investigation was begun on September 29, 1913, as a result of which the Mexican was committed to prison on a charge of physical injuries. This commitment was later revoked and a commitment of homicide issued. No arrest was made under the second commitment, even though it was for a crime not permitting of liberty on bail. Beginning April 17, 1914, further proceedings in the case lapsed until August 17, 1917, when it was discovered the record of the case was "mislaidd". The Mexican was never tried, sentenced or punished in connexion with his crime. and apparently died on March 14, 1917. Claim *allowed*.

UNDUE DELAY IN PROSECUTION.—SUSPENSION OF JUDICIAL PROCEEDINGS. An unexplained failure to prosecute for over three years *held* a denial of justice. Whether revolutionary disturbances, as alleged, suspended the administration of justice during this period must be established by trustworthy evidence.

Cross-references: Annual Digest, 1929-1930, p. 162; British Yearbook, Vol. 12, 1931, p. 167.

Comments: Edwin M. Borchard, "Recent Opinions of the General Claims Commission, United States and Mexico", Am. J. Int. Law, Vol. 25, 1931, p. 735 at 739.

Commissioner Fernández MacGregor, for the Commission:

The United States of America, on behalf of Minnie East, an American citizen, claims from the United Mexican States the amount of \$50,000.00. United States currency, alleging that Mexican authorities were negligent in the prosecution and punishment of the person guilty of the murder of Victor W. East, the husband of the claimant.

In the year 1913 Victor W. East, an American citizen, was in the State of Campeche, near Champotón, as the manager of the properties in that place of the International Lumber and Development Company. On September 16 of that year East, in celebration of the Mexican national holiday, gave a party during the course of which there was a great deal of drinking followed by a personal dispute between East and one Juan B. Pereyra, who struck East on the head, knocking him to the ground and inflicting injuries upon him. East was picked up and taken to his home where he died the following day.

The local Justice of the Peace upon learning of the death of East, immediately made the preliminary investigation sending, on September 29, 1913, the full record of the proceedings to the Judge of the Criminal Court at Campeche who had jurisdiction of the case and who continued the investigation. Pereyra was formally committed to prison on a charge of physical injuries and robbery (he had forcibly entered a store and taken a few bottles

of liquors). The proceedings were continued during the course of which, on November 10 of the same year, the trial Judge died. His successor, upon acquainting himself with the facts, was not satisfied with the condition of the proceedings and ordered another autopsy. Acting upon the report made by the medical experts the Judge revoked the former commitment against Pereyra and on January 7, 1914 issued another commitment against Pereyra on a charge of homicide and robbery. An appeal against this commitment was taken by the attorney of the accused which was granted January 9, 1914, under the understanding that the proceedings should not be suspended pending the appeal (*en el efecto devolutivo*). The proceedings were continued but Pereyra was not rearrested. On April 3, 1914 the Supreme Court of the State of Campeche handed down a decision sustaining the second commitment of Pereyra. As the appeal had been allowed only under the understanding that the proceedings would not be suspended (*en el efecto devolutivo*), the proceedings had continued and on the 12th of March the investigation was declared to be complete and the record referred to the Prosecuting Attorney and to the Attorney for the defense for the formulation of their respective legal conclusions. On April 3, 1914 the Prosecuting Attorney filed his conclusion which was that Pereyra was guilty of the crime of assault (*golpes*) only. On April 14, Pereyra's Attorney submitted his conclusion wherein he requested the acquittal of his client. From the last mentioned date until August 4, 1917 it does not appear that any further steps were taken in the proceedings.

On August 4, 1917 there appears in the records of the proceedings a notation which reads: "Today, August 4, 1917, I found the record of the proceedings mislaid. I so inform the Judge." It appears that at about the same time the Court had notice of Pereyra's death for which reason the Judge of Civil Registration at Champotón was requested to furnish information; but this official answered that the accused had not died in that town but on a country property in the Municipality of El Carmen. The evidence before the Commission shows that Pereyra died on March 14, 1917 as the result of wounds inflicted by some person.

The American Agency bases its allegation of defective administration of justice on the following grounds: (a) the first charge of physical injury made against Pereyra was inadequate; (b) upon the issuance of the second commitment on a charge of homicide, Pereyra should have been arrested immediately in spite of the provisional liberty which he enjoyed; (c) Pereyra was never tried on the first nor on the second charge.

The Commission is of the opinion that the Judge who issued the first commitment was in possession of sufficient facts to consider Pereyra responsible for a crime more serious than that of physical injuries. Pereyra confessed that he had struck East on the head; several witnesses saw Pereyra with the pistol in his hand striking East although they did not know whether he had struck him with his fist or with the pistol; other witnesses found East lying on the ground in a pool of blood where he had been left by Pereyra; and finally, the certificate of the doctors who made the autopsy describes a lateral wound two centimeters long in the middle of the second circle of the frontal region and two wounds in the left temporal region which had perforated the scalp and the cellular tissues of the muscle, the first one cutting the superficial temporal artery, and concludes that the cause of death was an alcoholic cerebral congestion provoked by the shock resulting from the blows received. It seems that all these elements together with the fact of the death of East, a few hours after receiving the blows, should have

caused the Judge to realize that he had before him a very serious case. This opinion is corroborated by the fact that the Judge, who succeeded the Judge who had died, immediately took this view of the case.

With respect to the contention that Pereyra should have been arrested after the issuance of the second commitment, the Commission is of the opinion that this is also well grounded. The appeal was granted in a *devolutivo* character only and this means according to Mexican law, that the proceedings must follow their regular course with the reservation that in the event of the appeal being sustained by the Appellate Court, these are to be considered as without effect. The second order of commitment did not direct the arrest of Pereyra, which was imperative, he being accused of a serious crime the penalty for which did not permit of his being granted liberty on bail or on his own recognizance. The arrest was never effected which constitutes a violation of Mexican Law and of International Law.

It is perfectly manifest, likewise, that Pereyra was never tried nor sentenced for either of the crimes with which he was charged. The proceedings lay dormant during three years without any explanation being given therefor by the Mexican Agency other than that during the period in question the Courts of the State of Campeche were suspended owing to the revolutionary conditions which extended throughout the Mexican Republic on account of the assassination of President Madero.

With relation to this point the American Agency refers to the treaty of Teoloyucan of August 13, 1914, between the constitutionalist forces, represented by General Obregón, and the federals represented by General Salas, which reads:

"The garrisons in Manzanillo, Córdoba, Jalapa and the federal forces in Chiapas, Tabasco, *Campeche* and Yucatán will be disbanded and disarmed in those places."

This seems to indicate that until August of 1914 there were federal forces in Campeche which were under the control of Huerta. Reference was also made that, in *Las Memorias de Don Venustiano Carranza*, which are being published, it is related that General Jesús Carranza was commissioned to muster out of service the federals who were in the region of the Isthmus of Tehuantepec and in the States of Chiapas, Tabasco, Campeche, and Yucatán and in the territory of Quintana Roo, in accordance with the treaty of Teoloyucan referred to, adding that the first Constitutionalist Governor of Campeche was Lieutenant Colonel Joaquín Musel, appointed during the same August of 1914. From these facts the Agency concludes that the State of Campeche passed from the absolute control of the federal forces to that of the constitutionalist forces, so that there is no reason for admitting that there were no Courts of Justice in that place.

The Mexican Agency, on its part, sustained that the change of control from the federal forces to the constitutionalist forces was not as simple as pictured, giving the following historical facts. The revolution did not end with the Treaty of Teoloyucan; in September of 1914 Francisco Villa disavowed Carranza basing his action upon a convention assembled at Aguascalientes which appointed General Eulalio Gutiérrez as President, as a result of which the two revolutionary factions opposed each other, the forces of Carranza having to withdraw from the City of Mexico and take refuge in Vera Cruz. In the capital of the Republic the judicial authorities were suspended, the administration of justice being placed in the hands of a single provost. It was argued that if this took place in the capital, certainly

conditions would be worse in Champotón and in Campeche; that order was not established until 1917; that on the 6th of February an edict was issued for the election of federal authorities; that on the 31st of March several provisional State Governors, being candidates in the coming elections, resigned their posts; that on the same date several States were authorized to issue edicts for the election of local authorities, among them *Campeche* and Tabasco; that on the 1st of May General Venustiano Carranza became the constitutional President of the United Mexican States; that on the 10th of June the military districts (*comandancias militares*) of the Republic were abolished; that on the 30th of June constitutional order was restored to the States of Campeche, Colima, etc.

All of the foregoing considerations do not serve, however, to prove to the Commission that the State of Campeche was without Courts of Justice for three years. Certainly there had been disturbances and difficulties; but this is not sufficient to justify the conclusion that there was a complete paralyzation of all justice in one of the federal entities of the Mexican Republic.

It is pertinent to observe with relation to this point that the Commission has heard other cases in which denial of justice on the part of Mexican authorities has been alleged, these having occurred precisely between the years 1914 and 1917, without there having been pleaded as an exemption from responsibility the disappearance of Criminal Courts. In the *Faulkner* case, Docket No. 86,¹ in which unlawful arrest was alleged, the events took place in September of 1915, in the City of Vera Cruz. The Mexican Agency asserted that it was unable to submit a record of the court proceedings because they had been destroyed in a subsequent revolution, and not because there had been no courts. In the *Irma Eitleman Miller* case, Docket No. 1984,² which treats of events happening in September of 1916, in the State of Chihuahua, the Mexican Agency filed a record of proceedings which were instituted by the judicial authorities. In the *Canahl* case, Docket No. 593,³ in which was alleged a failure to prosecute and punish the murderer of an American killed in San Luis Potosí in July of 1915, the judicial proceedings were likewise submitted. In the *Morton* case, Docket No. 2179,⁴ also for denial of justice, based on events which took place in the City of Mexico in the year 1906, Criminal Court proceedings were presented. All of this demonstrates that though a revolution, at certain times, can suspend the administration of justice, it does not necessarily produce this effect, for which reason it must be shown in each case by trustworthy evidence, that there was such suspension. In the instant case mere generalities have been adduced to establish that between 1914 and 1917 the State of Campeche was without courts. Further, it seems clear that the cause of the suspension of the proceedings against Pereyra was that the records of the case were mislaid as shown by the notation above quoted dated August 4, 1917. "Mislaid" means "lost", and that loss indicates why the trial of the cause against Pereyra was not continued.

In view of all the foregoing circumstances and having in mind the precedents followed by the Commission and by other arbitral commissions, it is held that in this case the prosecution of Pereyra was conducted negligently

¹ See page 67.

² See page 336.

³ See page 389.

⁴ See page 428.

with the result that he was never punished for the crime he committed, which constitutes in international law a denial of justice.

The claimant therefore must be awarded the amount of \$7,000.00.

Decision

The United Mexican States shall pay to the United States of America on behalf of Minnie East the sum of \$7,000.00 (seven thousand dollars). United States currency, without interest.

JANE JOYNT DAVIES and THOMAS W. DAVIES (U.S.A.) v.
UNITED MEXICAN STATES

(October 24, 1930, concurring opinion by American Commissioner, October 24, 1930.
Pages 146-150.)

DENIAL OF JUSTICE.—DUTY TO COMMIT INSANE CRIMINALS. An American subject was killed by a Mexican who, after due proceedings, was acquitted for lack of mental competency and was never committed either to prison or to an insane asylum. *Held*, no denial of justice existed in failure to commit to an insane asylum.

Cross-references: Am. J. Int. Law, Vol. 26, 1932, p. 630; Annual Digest, 1929-1930, p. 161.

Comments: Edwin M. Borchard, "Recent Opinions of the General Claims Commission, United States and Mexico," Am. J. Int. Law, Vol. 25, 1931, p. 735 at 739.

The Presiding Commissioner, Dr. H. F. Alfaro, for the Commission:

This claim is presented by the Government of the United States of America on behalf of Jane Joynt Davies and Thomas W. Davies, mother and brother of the late Aubert J. Davies, who was murdered by a Mexican national on September 5, 1916, in the State of Lower California, Republic of Mexico.

The facts upon which this claim is based, according to the Memorial, of the American Agency, are as follows:

In the year 1916, Aubert J. Davies was a resident of the State of Lower California, United Mexican States, where he and his brother, Thomas W. Davies, were interested in a stock ranch known as "El Topo" situated in the northern District of that State. On September 5, 1916, one Adrian Corona presented himself at what is known as the headquarters of the ranch and asked Aubert J. Davies for something to eat. The latter granted the request with pleasure and promptly and willingly provided him with food. After finishing the meal, Corona requested Davies to allow him to use his rifle saying that he wished to kill some crows which were perched on the top of a nearby tree. This request was likewise granted, but instead of shooting at the birds, Corona, after retreating a few steps, aimed the weapon in the direction of Aubert J. Davies, and without a word of warning of any kind, shot and instantly killed him.

Immediately after the shooting Corona seized a horse belonging to Davies and fled. He was later apprehended and after trial by the Court

of First Instance at Tia Juana, was sentenced to death. Upon appeal to the Supreme Court of the Northern District of Lower California, that tribunal held that while the existence of the crimes of homicide and robbery had been proven, Corona was not criminally responsible therefor having "acted in a state of mental alienation which prevented him entirely from knowing the wrongfulness of the acts committed by him". Notwithstanding that the appropriate authorities ordered Corona to be confined in the General Insane Asylum at Mixcoac, D.F., it does not appear and there is no record, that he was ever an inmate of that institution. Corona, therefore, was not imprisoned or punished in any manner for the crimes he committed.

In view of the facts set forth, the United States of America, in behalf of Jane Joynt Davies and Thomas W. Davies, mother and brother of the late Aubert J. Davies, seeks indemnity from the United Mexican States in the sum of \$25,000.00 United States currency or its equivalent, with interest.

The Mexican Agency in its answer, admits the American nationality of the claimants, and the murder of Aubert J. Davies at the hands of Adrian Corona, who executed the act while in a state of mental alienation; and maintains that the Mexican judicial authorities in everything appertaining to the proceedings instituted as a result of the murder, followed strictly the penal laws, and that their conduct cannot from any point of view be considered as being in violation of international law, justice, or equity.

The Agency also maintains, that the failure to confine Corona in some insane asylum after his acquittal, in compliance with the sentence of the Supreme Court, could not constitute an international delinquency on the part of Mexico, nor could it be considered as a cause for damages to the claimants either material or moral; and finally that even assuming that the Commission should decide that the claimants were entitled to an award, the amount claimed is exaggerated and the bases upon which it was calculated are erroneous, inasmuch as it is not a question of indemnifying them for direct damages resulting from the acts of a particular individual, but merely one of compensating them for a moral injury caused by an alleged but not substantiated denial of justice.

The Agency of the United States of America has not questioned the legality of the sentence of the Appellate Court which held that Corona was not responsible for the crimes committed by him while in a state of mental alienation. That decision was considered by counsel for the American Agency in his oral argument as absolutely correct.

It is alleged, however, as a basis for the claim that Corona was never imprisoned or punished in any manner for the crime he committed.

The acquittal of the accused excludes all idea of subsequent punishment. This acquittal was based upon Article 34 of the Penal Code of Mexico, which reads:

"Article 34.—The circumstances which exclude criminal responsibility for the infraction of penal laws are:

"1st. The violation of a penal law while the accused is suffering mental alienation which deprives him of volition, or completely prevents him from realizing the wrongfulness of the act or omission of which he is charged.

"Persons *non compos mentis* will be dealt with in the manner prescribed by Article 165."

Article 165 provides:

"Article 165.—Insane or decrepit persons who fall within the purview of sections I and IV of Article 34, shall be committed to the persons having them in charge, if by means of a solvent surety or real property they give bond,

satisfactory to the judge, for the payment of such sum as he shall designate as a penalty, before the execution of the undertaking, payable in the event that the accused shall again cause some other damage, due to the failure to take all the necessary precautions.

"If such security is not given, or if the judge considers that even with such security the interests of society would not be safeguarded, he shall direct that the accused be placed in the proper asylum, urgently recommending vigilance in their custody."

The provisions of the Article quoted exclude all idea of punishment. It is a question only of very natural measures of prevention for the purpose of preventing the insane person from causing further damage. But that same provision establishes different forms by means of which, according to circumstances, the authorities are able to comply with that duty of social protection.

Neither the Article referred to nor the sentence of the Supreme Court of Lower California, establishes, as the American Agency appears to believe, that Corona must be forcibly confined in an asylum in expiation of the crime he committed unconsciously.

The international duty of Mexico was fulfilled with the apprehension and trial of the accused and any failure or omission subsequent to the sentence which exempted him from criminal responsibility, even in the event of its being fully proven, would not involve the Mexican nation in any international responsibility. Those failures or omissions do not constitute a denial of justice such as that which results from those cases wherein, there existing a failure or omission punishable by law, the authorities of a country refuse to comply with their own legal provisions as interpreted by the courts.

The Commission, therefore, considers and so decides, that the claim of the United States of America on behalf of Jane Joynt Davies and Thomas W. Davies must be disallowed.

Nielsen, Commissioner:

I concur in the result. It is my understanding that the United States did not charge in this case any failure on the part of the Government of Mexico to take effective measures to punish the person who killed Davies. The argument of counsel evidently was that a denial of justice resulted from the failure on the part of the Mexican Government to give effect to its law and to a decision of a Mexican court, which conformably to the law had directed that the person who did the killing should be confined in an asylum. Justice required by international law is, it was argued, simply a due application of the local law, it being assumed that that law squares with international standards. The principle was invoked that a denial of justice may be predicated on the failure of the authorities of a government to give effect to the decision of its courts. The United States has a right, it was asserted, to insist that Mexican law be given application in a case involving an injury to an American.

Doubtless there is general recognition of the two principles relied upon by counsel which may perhaps be considered to be cognate principles. But it is not clear to me that contentions as to their non-observance can be sustained so as to justify a pecuniary award in the instant case. Of course one can conceive of a situation in which the failure to confine an insane person might have very grave results. For example, if Davies had been seriously wounded and not killed, his life might have been jeopardized if the insane man who shot him had been allowed to remain at liberty.

Decision

The claim of the United States of America on behalf of Jane Joynt Davies and Thomas W. Davies is disallowed.

MRS. ELMER ELSWORTH MEAD (HELEN O. MEAD) (U.S.A.) *v.*
UNITED MEXICAN STATES

(October 29, 1930. Pages 150-157.)

DUTY TO PROTECT ALIENS.—RELEVANCY OF REQUESTS FOR PROTECTION.—FAILURE TO PROTECT.—CAPACITY TO GIVE PROTECTION.—DUTY TO PROTECT IN REMOTE TERRITORY. Claimant's husband was murdered by bandits December 14 or 15, 1923, in a somewhat sparsely populated territory in which conditions of lawlessness had existed since 1910. The region was known to be infested with bandits and frequent acts of lawlessness occurred. It did not appear whether protection was requested of the authorities. *Held*, (i) whether or not requests for protection are made does not relieve authorities from their duty to protect, such requests are pertinent merely to the need for protection, and (ii) failure to protect for which respondent Government should be responsible was not established, in view of facts that place of murder was about eighty miles from Saltillo and that raiders, who committed a robbery three months previous to events complained of, were pursued into the hills and scattered.

DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH.—CURSORY INVESTIGATION.—FAILURE TO ARREST OR TRY KNOWN SUSPECTS. Following murder of claimant's husband a cursory search was made for assailants. Two members of searching patrol were indicated to have been engaged in previous robberies. Some arrests were made but no one was ever tried or punished for the crime. A voluntary witness reported to the authorities the name of the alleged criminal but no action thereon was ever taken by the authorities. Claim *allowed*.

EVIDENCE BEFORE INTERNATIONAL TRIBUNALS.—ADMISSIBILITY OF EVIDENCE OF FACTS OCCURRING SUBSEQUENTLY TO FILING OF CLAIM. Evidence of facts bearing on alleged denial of justice occurring after filing of claim *held* admissible and relevant.

Cross-references: Am. J. Int. Law. Vol. 26, 1932, p. 633; Annual Digest, 1929-1930, pp. 169, 455.

Comment: Edwin M. Borchard "Recent Opinions of the General Claims Commission, United States and Mexico", Am. J. Int. Law. Vol. 25, 1931, p. 735 at 738.

Commissioner Nielsen for the Commission:

Claim in the amount of \$25,000.00 gold currency, with interest, is made in this case by the United States of America against the United Mexican States on behalf of Mrs. Elmer Elsworth Mead (Helen O. Mead), widow

of Elmer Elsworth Mead, who was murdered in the State of Zacatecas, Mexico, in 1923. The claim is grounded on allegations relative to the failure of Mexican authorities to give proper protection to the claimant and the failure of the authorities to take suitable steps to apprehend and punish the persons who committed the crime. The allegations of the Memorial are in substance as follows:

At the time this claim arose Elmer Elsworth Mead was a resident of the State of Zacatecas, Republic of Mexico, where he was employed by the Santa Rosa Mining Company at or in the vicinity of Concepción del Oro. The locality in which the Santa Rosa mines were located was known to be infested with bandits who frequently committed acts of lawlessness including robbery. Although this situation was well known to the authorities they failed to suppress and to punish the bandits and to protect the residents of that vicinity from the acts of the bandits.

In September 1923, bandits entered and robbed stores belonging to the mining company. On the night of December 14, 1923, or in the early morning of December 15, 1923, bandits again entered the stores of the company and on this occasion assaulted and brutally murdered Elmer Elsworth Mead.

The facts relative to the murder of Mead were immediately brought to the attention of the appropriate authorities of the State of Zacatecas with a view to the apprehension and punishment of the persons responsible for the crime. On the day following the murder a representative of the American Consulate at Saltillo, called upon General Manuel López, *Jefe de Operaciones Militares*, and urged that energetic steps be taken to capture and punish the bandits. Instructions were given for a patrol to be sent from Concepción del Oro to pursue the criminals. This patrol returned within a few days with the report that no trace of the assailants could be found. Notwithstanding urgent representations made by officials of the Government of the United States in Mexico to the authorities of that Republic no further serious efforts on the part of the authorities looking to the apprehension and punishment of these bandits were made, and the persons responsible for the murder have not been apprehended or punished.

At the time of his death Elmer Elsworth Mead was 43 years of age, in the prime of life, in excellent health and actively engaged in the earning of a livelihood. He was receiving a monthly salary of at least \$200 United States currency, a large portion of which he contributed to the support of his wife, the claimant, who was entirely dependent upon him for support.

Evidence accompanying the Memorial and the Answer gives some support to the charge of lack of protection. That evidence includes reports of an American Consular officer at Saltillo, Mexico, communications written by E. Harris, Superintendent of the Santa Rosa mines, and Mexican records of proceedings in relation to the investigation of the killing of Mead.

There is information that an unfortunate condition of lawlessness, beginning in 1910, existed in the locality in question during a considerable period of time. It appears that a local military commander found himself unable effectively to combat these conditions because as he declared, his forces were diminished by the withdrawal of troops for military operations in another section of the country. The sparsely settled condition of this locality and military exigencies are emphasized in the Mexican Brief as a defense to the complaint of lack of protection.

The Commission has taken account of such matters in considering the subject of the capacity to give protection. But there are of course limits

to the extent to which they can justify a failure effectively to deal with lawlessness. And conditions such as it appears existed in this region may also reveal both the necessity for urgent measures as well as a censurable failure of efforts on the part of authorities to deal with lawlessness. The plea of the military commander as to the scarcity of soldiers under his command is not altogether convincing in view of the fact that it appears that he found himself able to send troops to the mines on one occasion prior to the murder of Mead and also subsequent to that tragic occurrence. And the statement of Harris in a communication accompanying the Memorial to the effect that persons in charge of the mine were given some rifles to form a guard of their own suggests at least that protection might have been furnished through agencies other than that of the army.

The subject of requests for protection was discussed by counsel on each side. It was said in the Mexican Brief that evidence was not produced on the point whether protection was demanded. In normal conditions, in the absence of untoward occurrences or unusual situations giving indication of possible illegal acts prompting precautionary measures for the prevention of such acts, requests of aliens to authorities for protection may obviously be very important evidence of warning as to the need of such measures. But the protection of a community through the exercise of proper police measures is of course a function of authorities of a State and not of persons having no official functions. The discharge of duties of this nature should not be contingent on requests of members of the community. And obviously the fact that requests for protection are not made in a given case does not relieve authorities from their solemn responsibilities. In the determination of questions of international responsibility, evidence in relation to requests for protection has a bearing merely on matters pertaining to the need for protection and the warning conveyed by such requests.

It would seem that the conditions existing in the locality in which the mines were located, and particularly the robbery committed in September 1923, may reasonably be considered as warning as to the need of protection, not only for the physical properties but for persons employed in the mines.

There is evidence of unusual difficulties confronting the authorities in the region in question. The mines were located approximately eighty miles from Saltillo. In the light of somewhat scanty evidence, it may be proper to take note of a statement contained in a communication sent by the American Consular officer at Saltillo to the Department of State at Washington in which it was said that the British Vice Consul at that place declined to act upon a request from Harris for protection for the British-owned mines. There is also evidence showing that the Mexican authorities were not utterly indifferent with respect to their duties to endeavor to give suitable protection. Harris states in a communication accompanying the Memorial that the raiders who committed the robbery in the month of September 1923 were pursued into the hills by soldiers and were scattered, and that the robbers abandoned their horses and threw away their rifles. The Commission, in view of the character of evidence which it has deemed to be necessary to justify pecuniary awards in cases of this nature, refrains from sustaining the charge of non-protection.

The complaint with respect to non-prosecution of the persons who killed Mead we consider is well founded.

From a despatch written by the American Vice Consul at Saltillo, it appears that after the murder of Mead the Vice Consul requested of General Manuel N. López, *Jefe de Operaciones Militares*, that steps be taken looking

to the capture and punishment of the assailants. It further appears that a patrol was sent and made what the Vice Consul calls "a make believe search", and that the patrol returned after two days and reported that no trace of the assailants could be found. There is unrefuted evidence in the record indicating very strongly that the persons relied upon to afford protection were of an unreliable character. Among such evidence is information that included in the patrol were two men who had been engaged in previous robberies.

A Memorandum with respect to this claim was filed by the United States on July 7, 1925, almost exactly a year and a half after the murder of Mead. The Memorandum states the bases of the claim as set forth in the Memorial, namely, lack of protection and the absence of suitable steps to apprehend and punish the criminals. From records presented by Mexico it appears that some time after September 25, 1925, which was shortly subsequent to the filing of the Memorandum, four men were arrested on suspicion of having been guilty of the murder of Mead and another man, C. D. Hudson by name, who it appears was killed in 1924. It appears that about this time a man by the name of Rodríguez came voluntarily before the authorities and furnished much information regarding lawlessness in the locality of the mines, and particularly regarding numerous criminal practices of one Adolfo Sánchez, who the witness testified, confessed his crimes, including that of the murder of an American mechanic in the Santa Rosa mines in connection with which he was assisted by three other men. Clearly it was the murder of Mead to which Sánchez referred. Rodríguez further testified that he had brought to the attention of local authorities crimes committed by Sánchez and one Manuel Herrera, and that the authorities took no action.

The Mexican Answer was filed July 19, 1927, but it contains no evidence indicating that the men arrested were ever tried.

The Commission has often pointed out that obviously the mere arrest of suspects either promptly after the commission of a crime, or as in the instant case, a long time afterwards, is not a defense to a charge of failure to meet international obligations. Situations of this kind are discussed in the Commission's opinion in the *Gorham* case, Docket No. 258,¹ and in the cases there cited.

Counsel for Mexico contended in oral argument that when the Memorandum of the United States was filed on July 7, 1925, the claim had been "crystallized"; that it could not be grounded on any facts developing subsequent to that date. He stated that in this view of the Mexican Agency was the explanation why the Agency had not presented evidence bearing on the punishment of the accused men, the absence of which evidence was emphasized by counsel for the United States.

A claim may be said to be something asked for or demanded on the one hand, and not admitted on the other hand. An international tribunal in dealing with a claim of course concerns itself with the assertion of legal rights by a claimant government, the denial of such assertions on the part of a respondent government, and the evidence and legal contentions presented by each party in support of its contentions. It is pertinent to note in this case that, although counsel for Mexico contends that the claim was crystallized with the filing of the Memorandum on July 7, 1925, and that therefore account should not be taken of facts brought forward by the American Agency subsequent to that date, all the evidence upon which the Mexican

¹ See page 640.

Agency relies for its defense, apart from a brief reference made in a communication to some unsuccessful steps taken to apprehend the murderers of Mead at the time the crime was committed, relates to occurrences subsequent to the filing of the Memorandum. It is obviously proper for the Commission to give all proper weight to that evidence. And in spite of any conclusions which the Commission might reach with respect to improper delays or negligence on the part of the authorities after the killing of Mead up to the date of the filing of the Memorial, it would seem to be very doubtful that it could properly make a pronouncement of the existence of a denial of justice, if the evidence which is produced with the Answer filed in 1927 had revealed proper punitive measures against the slayers of Mead.

The Commission has heretofore considered the question as to the relevancy of evidence respecting occurrences arising subsequent to the filing of a claim. Undoubtedly it is proper for the Commission to give due weight to all evidence properly presented to it with a Memorial, an Answer, and a Reply, or through a stipulation for additional evidence. The relevancy or weight of any evidence in matters of claims as well as in matters of defense, must of course be determined with respect to each case in which it is presented. Clearly on several occasions the Commission has been assisted in making a disposition of a case in the light of evidence of facts arising subsequent to the presentation of a claim.

In the *Galván* case, in which the Commission rendered an award against the United States because of the non-prosecution of a man who in 1921 killed a Mexican subject by the name of Galván, the United States produced evidence, including the statement of a prosecuting attorney to the effect that certain proceedings had been continued from time to time until April 1927. The Mexican Memorial in that case was filed August 24, 1925. The Commission's conclusions with respect to improper prosecution were grounded on delays covering a period of six years, that is, from the date of the killing to 1927, about two years after the filing of the claim by a Memorial. *Opinions of the Commissioners, Washington, 1927*, p. 408. If the Commission, instead of having evidence respecting a postponement, had had notice that the slayer of Galván had been sentenced to be executed in April, 1927, it would assuredly have been pertinent to take cognizance of such important information.

In the *Sewell* case, Docket No. 132,¹ a denial of justice was predicated in part on the failure of the court of last resort in Mexico to pass upon an *amparo* proceeding instituted on July 31, 1922. The Memorandum in this case was filed April 20, 1925. On September 22, 1930, the Mexican Agency introduced evidence showing that the *amparo* proceedings were decided by the court on January 18, 1928, and the United States withdrew this particular complaint.

In the *Charles Nelson Company* case, Docket No. 2309, in which the Memorandum was filed on August 29, 1925, and the Memorial on April 1, 1927, the Mexican Agency introduced evidence on October 1, 1930, showing a financial settlement which the claimant accepted on May 8, 1929, and the claim was withdrawn.

The point raised by counsel for Mexico is not without interest, but in the light of record in the instant case it has no bearing on the question whether a denial of justice has been clearly established.

¹ See page 626.

Decision

The Government of the United Mexican States shall pay to the Government of the United States of America on behalf of Mrs. Elmer Elsworth Mead (Helen O. Mead) the sum of \$,8000.00 (eight thousand dollars), without interest.

JOSEPH A. FARRELL (U.S.A.) *v.* UNITED MEXICAN STATES

(October 29, 1930. Pages 157-161.)

DENIAL OF JUSTICE.—CORRECTION OF ERRORS OF LOWER COURT BY COURT OF LAST RESORT.—ILLEGAL ARREST.—MISTREATMENT DURING IMPRISONMENT.—DETENTION *Incomunicado*.—INTERNATIONAL STANDARD. Claimant was arrested on several charges, convicted on one of these, but acquitted by Supreme Court of the State of Zacatecas and thereafter released. American Agency contended that such decision of the final court could not correct errors of arresting claimant without probable cause, mistreatment during imprisonment, and detention *incomunicado* for twenty days. *Held*, denial of justice not established in view of final acquittal of claimant, and errors referred to by American Agency not established. In so far as the detention *incomunicado* was concerned, since some communication was permissible subject to certain safeguards and since it did not totally prevent the accused from having an attorney to defend him, such detention did not fall below the international standard.

Cross-references: Am. J. Int. Law, Vol. 26, 1932, p. 639; Annual Digest, 1929-1930, p. 256.

Comments: Edwin M. Borchard, "Recent Opinions of the General Claims Commission, United States and Mexico", Am. J. Int. Law, Vol. 25, 1931, p. 735 at 738.

Commissioner Fernández MacGregor, for the Commission:

The United States of America, on behalf of Joseph A. Farrell, an American citizen, claims from the United Mexican States the amount of \$10,000.00, United States currency, alleging that he was unlawfully arrested and subjected to harsh and severe treatment during the period of his imprisonment by Mexican authorities.

The claimant was the master mechanic of the "La Fe Mining Company" which operated in Guadalupe, Zacatecas, Mexico. On October 22, 1910, the claimant was on duty inspecting the raising and lowering of a tank. One of the Mexican laborers named Calvillo executed his task improperly for which he was reprimanded by the claimant who also struck him on the shoulder; this resulted in a dispute which culminated in two consecutive physical encounters between the two men. On the following day Calvillo went to the Company's warehouse which was in charge of a French citizen named Langot, asking his permission to speak to the claimant, which Langot refused. Calvillo became threatening whereupon Langot went to the claimant and asked him for his revolver; Farrell advised him to call the police, which he did; but as the police did not arrive and as Calvillo's attitude

became more threatening, Langot again asked the claimant for his revolver, this time obtaining it, and went out again. Calvillo tried to enter at all costs rushing towards the door whereupon Langot fired five shots at him killing him instantly.

The Mexican authorities took cognizance of the crime instituting the corresponding proceedings during the course of which the claimant, on November 11, 1910, was arrested charged with (a) attempt to commit murder, (b) carrying prohibited weapons, and (c) being an accomplice to the murder of Calvillo. The Judge of the Court of First Instance, on February 16, 1911, rendered a decision acquitting the claimant of the crimes of attempted murder and carrying prohibited weapons, and sentencing him as an accomplice to the murder of Calvillo to the penalty of ten years' imprisonment. The claimant appealed from that sentence and the Supreme Court of the State of Zacatecas, on April 4 of the same year, handed down its decision acquitting him of all the charges which had been made against him, for which reason he was released. The decision of the Supreme Court was a majority opinion, since one of the Justices voted to confirm the sentence of the lower court.

The American Agency in its oral argument withdrew the imputation made in its brief that the Mexican Judge of the Court of First Instance harbored racial prejudice against American citizens which impelled him to convict Farrell.

In the same oral argument mention was made that the Commission has established the precedent that certain irregularities of procedure cannot be redressed even when a final sentence doing justice is rendered, referring especially to the *Dyches* case in which the following was said:

"Moreover, in this case of an alleged illegal trial and defective administration of justice, the Commission finds itself confronted with a decision of the Supreme Court of Justice of Mexico,—the highest court in the nation, and in fact one of the three branches into which its Government is divided,—in which decision final justice is granted correcting the error that the local lower Courts may have made in finding the claimant guilty. Bearing this in mind, it might be said that there is no denial of justice in this case, but on the contrary, a meting out and fulfillment of justice. If the term within which all proceedings against Dyches were effected had been a reasonable one, it would be necessary to apply hereto the principle establishing the nonresponsibility of a State for the trial and imprisonment of an alien, even though he is innocent, provided there has been probable cause for following such procedure..... The Supreme Court of Justice of the Mexican nation finally applied the law, conscientiously examining the charges made against Dyches and found him innocent, for which reason he would have no right to ask for indemnification for the deplorable error of the local courts which injured him. All the defects of procedure of which the claimant complains were, so to say, erased by the last decision which rendered justice to him. Thus, there is no need to consider the propriety or impropriety of the interpreters employed not meeting the requirements prescribed by the law, nor of taking into account that this or that legal step was not taken." (Majority opinion, *Opinions of Commissioners*, 1929.)

"No doubt it is a general rule that a denial of justice can not be predicated upon the decision of a court of last resort with which no grave fault can be found. It seems to me, however, that there may be an exception, where during the course of legal proceedings a person may be the victim of action which in no sense can ultimately be redressed by a final decision, and that an illustration of such an exception may be found in proceedings which are delayed beyond all reason and beyond periods prescribed by provisions of constitutional law." (Opinion of Commissioner Nielsen, *Op. cit.*.)

Based on this opinion the American Agency alleged that in the instant case, the Commission, in accordance with the principles of international law, could examine the final decision rendered by the Supreme Court of Zacatecas for the following reasons: 1, because the evidence submitted against the claimant in the Court of First Instance was so unsatisfactory as to warrant his immediate release; 2, because during the period of his detention the claimant was subjected to ill treatment; and 3, because he was held *incomunicado* for a period of twenty days.

The Commission finds at once that the instant case differs from the *Dyches* case, Docket No. 460, in the fact that in that case it was proven that the judicial proceedings were unduly delayed in violation of the Mexican law; in the instant case it appears that the proceedings were conducted entirely within the period designated by the law, the proceedings in both courts having lasted approximately five months. In this regard the Attorney of the American Agency stated:

"The proceedings, it would seem to me, were conducted with unusual celerity, There was no cause of complaint regarding delay. The case commenced October 23, 1910, and was finally disposed of by a decision of the Supreme Court on April 5, 1911. So I really think it was very quick action on the whole."

Entering upon an examination of the alleged injuries of the claimant, the Commission is of the opinion that there was probable cause for his arrest. Against him were the statements of several witnesses to the effect that they had seen him quarrel and struggle with Calvillo; the latter had been killed by Langot with the pistol of the claimant who had previously shown him how to use it. The Penal Code of Zacatecas considers as accomplices those who "furnish the instruments, arms or other means adequate for the commission of the crime if they know the use which is to be made of such instruments or means". The American Agency argues that the claimant did not know for what purpose Langot required his revolver. This was an essential fact which had to be established during the course of the proceedings. Now, if there was probable cause for the arrest, and if the proceedings were in accordance with the laws of Mexico, there is no violation of international law, since an alien is subject to all the penal laws of the country in which he lives, provided these are applied bona fide, and even though a charge is not proven.

As to the other part, there is not sufficient evidence to establish that the claimant was subjected to physical ill-treatment during his imprisonment, inasmuch as the affidavits on this point lack the precision required to sustain the allegation.

Finally, the charge against the respondent Government with relation to the holding of the claimant *incomunicado* for twenty days, must likewise be considered as not sustained. The American Agency even asserted that the Mexican law which permitted *incomunicación* for such a long period "is below the required standards with respect to the treatment to be accorded to aliens subjected to prosecution", insisting that prolonged *incomunicación* deprives the accused of the right of defense.

The Commission is not prepared to state that a law which permits the *incomunicación* of an accused in a manner implying neither cruelty nor interference with the right of defense, is in violation of international law. The *incomunicación* permitted by the Code of Criminal Procedure of Zacatecas (Article 340) must take place in such a manner as not to prevent the giving to the person so held all the assistance compatible with the object of that

measure; the person held *incomunicado* may speak to other persons or communicate with them in writing, in the discretion of the Judge, provided that the conversation takes place in the presence of this official or that the letters be sent through him unsealed. Under these conditions, and if it does not totally prevent the accused from having an attorney to defend him, *incomunicación* does not imply a violation of international law. In the instant case the *incomunicación* suffered by the claimant took place in accordance with the law during the first days of the proceedings, from November 11, to December 1, 1910. It is of record that the accused was able to defend himself fully from the beginning to the end of the proceedings, and that finally, by virtue of that defense, he was acquitted. There is, therefore, no cause for responsibility chargeable to the Mexican Government, on this ground.

In view of the foregoing, the instant claim must be disallowed.

Decision

The claim of the United States of America on behalf of Joseph A. Farrell is disallowed.

GEORGE W. COOK (U.S.A.) *v.* UNITED MEXICAN STATES

(November 5, 1930. Pages 162-167.)

CONTRACT CLAIMS.—COMPUTATION OF AWARD.—AWARD CALCULATED AS OF TIME CONTRACT DEBTS WERE PAYABLE.—RATES OF EXCHANGE.—PROOF OF FOREIGN LAW. Claim for goods sold and delivered to respondent Government. Latter produced evidence as to rates of exchange during period in question. Claimant Government contended goods were acquired and selling price computed on a gold basis. *Held*, award should be in amount of losses sustained by the claimant because of the non-fulfilment by respondent Government of its obligations when they arose.

INTEREST. Interest awarded from date of latest invoice in the record to the date on which the last award is rendered by the tribunal.

Commissioner Nielsen, for the Commission:

In the Memorial filed in this case it is stated that claim is made in the amount of \$11,782.95 gold currency of the United States, due to George W. Cook, for merchandise sold and delivered to Departments of the Government of Mexico by the mercantile house of Mosler, Bowen and Cook, Sucr., of the City of Mexico. However, the claim is made up of a large number of items, and among those listed and supported by evidence are some for services rendered at the request of Mexican authorities. The substance of the allegations of the Memorial with respect to the sums for which compensation is sought is as follows:

The invoices covering the merchandise sold and delivered were approved by the respective departments of the Federal Government, but the Government of Mexico has refused to pay the invoices, although repeatedly requested to do so. Much if not all of the merchandise, consisting almost entirely of office and household furniture, fittings, fixtures, equipment and utilities, is

still in use in the several departments of the Federal Government. Although payment of each item appearing in a Bill of Particulars annexed to the Memorial has been repeatedly demanded from officials to whom delivery was made, no payment has ever been made.

It was stated in the Memorial that original copies of the invoices showing receipt of articles appearing in the annexed Bill of Particulars were in the possession of the Agent of the United States and would be produced and filed with the Secretariat of the Commission if the Commission should so order. The necessity for their production to enable the Mexican Agency and the Commission to examine them was pointed out in the Mexican Answer, and they were subsequently produced.

Certain items of this claim were contested by the Mexican Agency for various reasons. However, the Commission is convinced, in view particularly of the fact that the Agency after careful examination of the transactions in question has produced no receipts from the claimant, that the amounts objected to are due to the claimant.

Apart from questions relating to these items, the only issue in the case remaining at the time of the oral argument pertained to the rate of exchange at which the award should be computed. Mexico introduced as evidence copies of communications addressed by the Department of *Hacienda Crédito Público* of the Mexican Government to banks in Mexico, requesting information with respect to "the rates of exchange on the national monetary unit" from July 30, 1913, to August 12, 1914, inclusive, and presented also copies of the replies furnishing the desired information. The United States in turn filed evidence showing that these rates were rates on bank bills or other paper money and not on the Mexican gold coin. It was asserted in behalf of the United States that during the period in question paper money, except bills which became so through the operation of laws put into effect November 5, 1913, and January 6, 1914, was not legal tender. These bills, it was pointed out, were made gold obligations by the Government, and their redemption in gold was guaranteed. It was argued that it was therefore immaterial, in fixing rates of exchange in relation to items of the claim, whether the bills circulated at their fixed par value. Some items became due while these bills were in circulation. It was contended that debts can only be liquidated in legal tender, unless there is some agreement to the contrary, and that an award, including all items, should be made on the basis of the gold peso as defined by the Mexican law of March 25, 1905.

It was further contended that evidence in the form of affidavits showed that the claimant procured his goods on a gold basis and based his selling prices on a profit computed on the cost of the goods in gold. This contention was advanced for the purpose of applying to the case the views expressed by two of the Commissioners in an opinion written in the *Cook* case, Docket No. 663, *Opinions of the Commissioners, Washington, 1927*, p. 323. Those views were to the effect that certain amounts which became due to the claimant in that case in the years 1913 and 1915, when a depreciated paper currency was in circulation throughout the country, should be awarded by the Commission in compliance with the monetary enactments of Mexico effective in those years, unless in any specific case it might be proven that such action would cause the claimant an unjust enrichment. It was stated by the Commissioners that there was no evidence in the record that such an unjust enrichment would result from an award based on the par value of the Mexican peso, namely, \$0.4985. Counsel for the United States argued that the evidence in that case was of the same general character as that

produced in the instant case. Counsel for Mexico took issue with the conclusions advanced in behalf of the United States with respect to the evidence in the present case. His argument was concerned but slightly with the contention that rates of exchange should be based solely on money that was legal tender.

This Commission has in the past pointed out the uncertainty and conflict of opinion appearing in the decisions of domestic courts which are required to translate currency in view of the fact that they render judgments only in the coin of the governments by which they are created. The subject was discussed in the *Cook* case, Docket No. 663, *supra*, in which the Commission was of the opinion that there was not before the Commission the proper kind of evidence to determine the rate of exchange at the time when certain money orders for which payment was sought were dishonored. The subject was also discussed in the *Moffit* case, *Opinions of the Commissioners, Washington, 1929*, p. 288, in which evidence with respect to rates of exchange was produced. In the instant case there is evidence of rates. But it is contended that the evidence is irrelevant, since it relates to rates on paper money.

The Permanent Court of International Justice has dealt with the question of the monetary basis on which payments should be made of the principal and interest of certain bonds. One case was concerned with Serbian bonds and another with Brazilian bonds. *Case Concerning the Payment of Various Serbian Loans Issued in France: Case Concerning the Payment in Gold of the Brazilian Federal Loans Issued in France: Publications of the Permanent Court of International Justice, Series A.—Nos. 20/21, Collection of Judgments*. However in those cases the principal issue related to the effect of the so-called "gold clause" contained in the bonds. The issues there presented appear much less difficult than the very complicated questions that grow out of the financial conditions existing in Mexico during the years in question. The Permanent Court of International Justice had occasion to consider the effect of the domestic law of France with respect to the payment of the interest and principal sums of the bonds. And relative to the functions of an international tribunal in dealing with questions of domestic law, the Court said:

"Though bound to apply municipal law when circumstances so require, the Court, which is a tribunal of international law, and which, in this capacity, is deemed itself to know what this law is, is not obliged also to know the municipal law of the various countries. All that can be said in this respect is that the Court may possibly be obliged to obtain knowledge regarding the municipal law which has to be applied. And this it must do, either by means of evidence furnished it by the Parties or by means of any researches which the Court may think fit to undertake or to cause to be undertaken."

The view here indicated seems to be in the sense that, just as when a foreign law is invoked before a domestic court it must be proved as matters of fact, so domestic law must be proved before an international tribunal—although not necessarily in the form in which proof is made before domestic tribunals, and that an international tribunal receives evidence of the law furnished it by the parties and may itself undertake researches. The Court based its conclusions with respect to French law on citations of publicists and judicial decisions of French courts.

Mexican law with respect to legal tender in Mexico and with respect to guaranteed paper obligations, was extensively discussed by counsel for the United States. However the Commission is not convinced that the contentions advanced were fully sustained. And although it is possible to deduce from the record fairly definite conclusions with respect to the dates

of delivery of the articles for which compensation is claimed, it is impossible to determine with absolute accuracy when compensation was due with respect to each of the very numerous items. Whatever may have been Mexican law with respect to the character of money a creditor might have refused to accept in payment of debts during the years when the items embraced by the claim became due, it seems to be clear that a debtor was not obliged to make payment in legal tender, or in other words, was not required to liquidate a debt in terms of legal tender unless a creditor demanded that form of liquidation.

With respect to paper money, it may be observed that although a legally fixed value of money and declarations as to a guaranty back of it may have a bearing on rates of exchange, these matters are not solely determinative of rates. And the ascertainment of a rate on some guaranteed obligation of a Government in relation to money of another kind is obviously something different from the matter of making effective the guarantee.

Some questions were raised in argument with respect to a circular issued by the *Secretaría de Hacienda y Crédito Público* relative to the application of the so-called Law of Payments of April 13, 1918, and also of a judicial interpretation of that decree. In the *Cook* case, Docket No. 663, *supra*, it was pointed out that it was not necessary in the disposition of that case to take account of economic conditions in Mexico which prompted the enactment of that law or of the standing of that law as regards its operation on the rights of aliens. The same situation exists now in the view we take of the instant case.

The award should be in the amount of the losses sustained by the claimant because of the non-fulfillment by the Mexican Government of its obligations when they arose. It seems to be clear from the evidence that when these obligations became due there was practically no gold in circulation in Mexico. Whether the claimant would have refused payments in money other than gold had they been tendered, is a matter of useless speculation. With respect to legal tender paper money, it must of course be borne in mind, as has been pointed out, that, when a claimant is awarded a sum in gold, the translation of that amount into the equivalent of what he would have received on the date an obligation was due in accordance with the evidence of rates existing at that time, does not involve a question of enforcing a payment in gold values of some paper obligations which the claimant never possessed, nor a question as to the propriety of the issuance of such money. The Commission is of the opinion that in the light of the record before it an award may be rendered in the sum of \$8,955.04 with interest from January 6, 1915, that is, the date appearing on the latest invoice in the record.

Decision

The Government of the United Mexican States shall pay to the Government of the United States of America on behalf of George W. Cook, the sum of \$8,955.04 (eight thousand nine hundred and fifty-five dollars and four cents) with interest at the rate of six per centum per annum from January 6, 1915, to the date on which the last award is rendered by the Commission.

GEORGE W. COOK (U.S.A.) *v.* UNITED MEXICAN STATES

(November 5, 1930. Pages 167-168.)

CONTRACT CLAIMS.—COMPUTATION OF AWARD.—AWARD CALCULATED AS OF TIME WHEN CONTRACT DEBTS WERE PAYABLE.—RATES OF EXCHANGE. Claim arising under circumstances similar to those set forth in *George W. Cook* claim *supra* allowed and reasoning of that case followed.

INTEREST. Interest awarded from date of latest invoice in the record to the date on which the last award is rendered by the tribunal.

(Text of decision omitted.)

SOPHIE B. STURTEVANT (U.S.A.) *v.* UNITED MEXICAN STATES

(November 5, 1930, Pages 169-174.)

FAILURE TO PROTECT. An American mine superintendent informed the Mexican authorities that his life had been threatened by a discharged employee. Said employee was arrested, but a few days later it was reported he was at liberty in Palmarito, where the mines in question were located. The superintendent protested to the authorities and stated that in the circumstances he was afraid to continue his work. The authorities advised that the former employee had been fined but refused to take further action. Two days later the superintendent was found dead in the mine, apparently having been shot from ambush. *Held*, in absence of evidence that discharged employee was guilty of attack, lack of protection by respondent Government not established.

DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH.—SUBSTITUTION OF TREASURY OFFICIAL FOR PROSECUTING ATTORNEY. Where investigation of crime was promptly begun and proceeded with reasonable diligence, *held*, denial of justice not established. Intervention of a Collector of Revenue as the representative of the Prosecuting Attorney *held* not an irregularity. Fact that only person arrested for crime was not the discharged employee suspected to be guilty and such person was thereafter released *held*, in the circumstances, not a denial of justice.

Comments: Edwin M. Borchard, "Recent Opinions of the General Claims Commission, United States and Mexico", *Am. J. Int. Law*, Vol. 25, 1931, p. 735 at 739.

The Presiding Commissioner, Dr. H. F. Alfaro, for the Commission:

This claim is presented by the United States of America on behalf of Sophie B. Sturtevant against the United Mexican States to obtain indemnification in the sum of \$100,000.00 (one hundred thousand dollars) United States currency, for losses and damages suffered as the result of the murder of her husband, Charles Ferris Sturtevant, an American citizen, which occurred on June 4, 1924, in Mocorito, State of Sinaloa, Mexico.

The facts which gave rise to this claim are related by the claimant in the following manner:

"From February 1, 1923, until his death on June 4, 1924, Charles Ferris Sturtevant was the Mine Superintendent of the Palmarito at Mocorito, Sinaloa, Mexico, operated by the Compania Minera de Palmarito, a subsidiary of the Barnsdall Corporation, an American corporation.

"On May 27, 1924, Sturtevant dismissed two machine men for sleeping while on duty and for bad work. On the following day, May 28, shortly after four o'clock, Ramón Cuadras, one of the dismissed machine men, met Sturtevant on the tramway between the mine and the mill at a point where he was free from observation from either the mill or the mine. He demanded to be put back to work, and pulling out a large knife attacked, abused, and threatened to kill Sturtevant. After some discussion, Sturtevant, being unarmed and in imminent danger of being instantly killed, told Cuadras to come out in the morning at his old job. Cuadras threatened to kill Sturtevant if he spoke of this meeting.

"Sturtevant promptly told Superintendent Cadagon about the attack, and that evening he had Cuadras arrested and placed in jail at Mocorito. The following morning Sturtevant and Cadagon informed Mabor Sanchez, Presidente Municipal of Mocorito, of the facts and circumstances of the attack made by Cuadras upon Sturtevant.

"On Monday, June 2, 1924, Sturtevant was informed by an American representative of another company operating in the same neighborhood that Cuadras was at liberty, and was at that moment in Palmarito, where the mines, of which Sturtevant was the superintendent, were located. Sturtevant, accompanied by W. D. Blackmer, Vice President and Manager of the Compania Minera de Palmarito, immediately went to Mocorito, and protested to the Presidente Municipal that Cuadras had not been sufficiently punished, and informed him that Sturtevant was afraid to continue his work with this man at large under the conditions then existing in that territory. The Presidente Municipal informed them that he had fined Cuadras 25 pesos, and gave them his assurance that he would immediately leave Palmarito, but refused to prosecute Cuadras further or to take any further or other action for the protection of Sturtevant, or to prevent injury of the employees or damage to the property of the Company.

"On Wednesday afternoon, June 4, 1924, at about 4 o'clock, Sturtevant left the office of the company and went to the mine in the discharge of his customary duties. At about 4.30 p.m. a workman notified W. D. Blackmer, the Manager of the Company, that Sturtevant had been killed at the mine.

"Manager Blackmer and Superintendent Cadagon went at once to the mine and found the dead body of Sturtevant lying in a pool of blood in one of the tunnels leading to the mine, and were informed that the body had been discovered by the shift boss, Miguel Arredondo.

"The local Mexican official was notified, and under his orders the body was left undisturbed until the arrival at about 8 p.m. of the *Ministro Publico* from Mocorito, who after making an official investigation turned the body over to the representatives of the Company.

"An examination of the body disclosed three (3) bullet holes, and the lead marks in the tunnel indicated that the shots were fired from ambush from the drift off the tunnel.

"The facts and circumstances hereinabove recited were promptly reported not only to the local Mexican authorities, but also to the Governor of the State of Sinaloa, and a detailed report was sent to the American Consul at Mazatlán, Sinaloa.

"Although the Mexican authorities were fully informed of the circumstances connected with the murder of Sturtevant, they neglected to take the necessary prompt measures to apprehend the person or persons responsible therefor. On account of this delay, the Government of the United States, through the American Embassy in Mexico City, and the American Consul at Mazatlán,

officially called the matter to the attention of the Mexican authorities, and requested the apprehension and punishment of the persons responsible for the crime. Finally, after these representations from the Government of the United States, on June 26, more than three weeks after the murder, one Andrés López, a former employee of the Compania Minera de Palmarito, was arrested and charged with having murdered Sturtevant.

"In January, 1925, however, the Mexican authorities released the said Andrés López, and he returned to the camp of the Compania Minera de Palmarito, where he has threatened and menaced the employees of that Company.

"The Mexican authorities have made no further efforts to apprehend and adequately punish the murderer of Sturtevant, and the person or persons responsible therefor remain at large, untried and unconvicted, and the Government of the United States, although making frequent and urgent representations, has never been able to obtain any proper or adequate action on the part of the Mexican authorities for the punishment of said murderer, or to the end that justice may be done on account thereof."

The Agency of the claimant Government alleges that the Government of Mexico has incurred international responsibility on three grounds, to wit:

First: Failure to give adequate protection to Charles Ferris Sturtevant when the Mexican authorities had notice that his life was in danger, and lenity in permitting one Ramón Cuadras, who, with intent to kill, assaulted Sturtevant, to go free on payment of an insignificant fine;

Second: Inadequacy of the criminal proceedings instituted against Andrés López; and

Third: Failure of the Mexican authorities to take reasonable, timely and adequate steps to apprehend and punish the persons responsible for the murder of Charles F. Sturtevant.

With respect to the first point the Commission is of the opinion that to establish the responsibility of the Government of Mexico there is lacking an essential element, that is, the evidence that Ramón Cuadras was guilty of the crime perpetrated on the person of Charles Ferris Sturtevant. If it had been possible to clear up this point, it is obvious that the respective authorities could have been properly accused of culpable negligence for not having taken preventive measures on behalf of Sturtevant after having been advised of the threats made against him by Cuadras.

As to the penalty imposed upon the latter by the Municipal President of Mocorito, it may be said that in the opinion of the Commission, the said official acted legally in assuming jurisdiction of the case, and that the penalty imposed upon Cuadras can not be deemed inadequate, although this point is really lacking in importance in view of what has been expressed in the preceding paragraph.

With regard to the second charge, the Commission finds in the instant record no conclusive evidence to justify it. On the contrary, a reading of the decision rendered by the Auxiliary Judge acting for the Judge of the Court of First Instance of the Municipality of Mocorito, a copy of which, duly authenticated, was attached to the Answer of the Mexican Agency, reveals that the authorities proceeded with reasonable diligence in the investigation of the crime, and especially in the inquiry as to the responsibility of Andrés López who was formally charged by the Attorney General of the State with the murder of Charles Ferris Sturtevant.

The Attorney General having been specially commissioned to investigate the facts, the proceedings were directed by that official. It appears in the aforementioned decision that these proceedings were begun on June 26th

and that on the 28th of the same month the Judge of the Court of First Instance formally committed López to prison.

From the 4th of June, the date on which the crime occurred until the 26th of the same month, the Prosecuting Attorney of Mocorito made the investigations necessary to establish the *corpus delicti* and to ascertain the identity of the persons responsible therefor. As can be seen, there was no unjustifiable delay.

Neither does there appear to have been any delay in the proceedings during the time included between the date on which the Judge of the Court of First Instance took cognizance of the case and the 13th of October when the investigation was concluded and the cause remitted to both parties for the purposes of Article 211 of the Code of Criminal Procedure of the State of Sinaloa.

The claimant Government objected in its oral argument, to the intervention of a Collector of Revenue as the representative of the Prosecuting Attorney and called the attention of the Commission to the fact that this official had asked for the acquittal of the accused. But the decision shows that the intervention of the Collector in question was in compliance with an order of the trial Court by reason of a legal excuse filed by the Prosecuting Attorney. With respect to the plea for acquittal made by the treasury employee acting as the Prosecuting Attorney it can be seen in the said decision that by order of the Judge, the plea in question was attached to the records of the case and these originals sent to the Attorney General of the State of Sinaloa for the purposes of Article 220 of the Code of Criminal Procedure. The Attorney General disapproved the non-accusatory plea of the subordinate and pleaded condign punishment for the accused, Andrés López.

The Judge rendered a decision of acquittal on January 21, 1925, leaving open the investigation to be continued against any person or persons who might be found responsible for the murder of Charles Ferris Sturtevant, basing his action upon the findings resulting from the proceedings and the provisions of the law applicable to the case.

It is a question of surmise, more or less, whether the judicial authorities omitted any effort to ascertain the identity of, and to punish, the guilty person; but it is clear that there is no evidence or record of any negligence so palpable as to constitute a violation of international law.

Counsel for the American Agency referred at considerable length to the fact that certain persons who might have been able to throw some light on the crime were not called upon to testify. That omission certainly would have been serious in its effect on the international responsibility of the Government of Mexico, if it had been established that the testimony of such persons was so important and decisive that its lack would have caused the failure of the investigation. But from the very evidence submitted by the American Agency it is deduced very clearly that the statements of those witnesses, owing to the fact that there were no eye-witnesses to the crime, would not have thrown any new light upon the profound mystery in which unfortunately the crime remained enshrouded from the moment of its execution.

As to the third point, the Commission has already stated, in its discussion of the previous charge, that it does not find that there was any unjustifiable delay in the proceedings followed in order to ascertain the identity of the person or persons responsible for the murder in question.

With regard to the complaint of the claimant Agency of the failure of the Mexican authorities to continue the investigation after having decreed the liberty of Andrés López, it is noted that the law imposes no obligation upon the judicial authorities to prosecute those investigations within any fixed period and consequently their action depends upon whether as the result of some unforeseen cause fresh clews are discovered which may lead to the clearing up of the facts.

By reason of the foregoing the Commission is of the opinion that this claim must be disallowed.

Nielsen, Commissioner:

I concur in the disallowance of the claim.

Decision

The claim of the United States of America on behalf of Sophie B. Sturtevant against the United Mexican States is disallowed.

DICKSON CAR WHEEL COMPANY (U.S.A.) v. UNITED MEXICAN STATES

(July —, 1931, dissenting opinion by American Commissioner, undated. Pages 175-206.)

CONTRACT CLAIMS.—CREDITORS CLAIMS.—SEQUESTRATION.—RESPONSIBILITY FOR DEBTS OF SEQUESTERED CORPORATION.—CLAIMS AGAINST GOVERNMENT-OWNED CORPORATION.—UNJUST ENRICHMENT AS A BASIS FOR INTERNATIONAL CLAIM. Claim was made for car wheels sold and delivered to National Railways of Mexico prior to date possession thereof was taken by Mexican Government. Said corporation retained its corporate existence from date of sequestration of its property in December, 1914, to date of return of such property in 1925. During such period the railways were operated by the Mexican Government and no part of the revenues therefrom was paid over to such corporation. Following such period the net revenues therefrom were distributed in accordance with a certain agreement between the Mexican Government and the International Committee of Bankers. Claim disallowed, since (i) injury, if any, was against a Mexican corporation, (ii) creditor of such corporation has no standing to present an international claim, (iii) suit in Mexican courts was at all times available to claimant for such debt, and (iv) no basis of claim for unjust enrichment lies, inasmuch as any obligation to compensate for use of car wheels would have been owed to Mexican corporation, whose property they became on sale and delivery.

PROCEDURE.—FORMALITIES IN RENDERING AWARD. Fact noted, in dissenting opinion of American Commissioner, that "Decision" signed by other two Commissioners was not rendered at "a public sitting" as required by rules of procedure.

Cross-reference : Annual Digest, 1931-1932, p. 228.

Commissioner Fernández MacGregor, for the Commission :

The facts which gave rise to this claim are the following:

By virtue of a contract entered into in April of 1912 between the National Railways of Mexico and the North American Corporation, the Dickson Car Wheel Company, the latter made several deliveries of car wheels to the former. The said deliveries were made on various dates between December 13, 1913 and January 6, 1914.

In accordance with a decree issued in December 1914, the Constitutionalist Government took possession of the railways of the National Railways, this possession being prolonged until December of 1925 when they were returned to private management.

During that period the Dickson Car Wheel Company addressed itself on various occasions to the National Railways Company requesting payment for the merchandise the price of which amounted to \$4,126.64, but the latter company never paid, alleging that owing to the seizure of the railways it received no revenue whatever for the operation of its lines for which reason it was unable at that time to meet its obligations.

The Government of the United States on behalf of the American company has filed this claim alleging that the Government of Mexico is internationally responsible for the amount of the obligation contracted by the Railways Company.

The Mexican Agency has not questioned the accuracy of the facts related by the American Agency, but it denies that they can create international responsibility on the part of Mexico.

The claimant Agency has adduced various reasons in order to establish the responsibility of Mexico, reasons which will be analysed in the order of their presentation.

In the American Brief it was attempted at first to maintain that Mexico contracted an obligation towards the claimant company from the moment the contract was entered into in 1912, by reason of the ownership by the Government of a majority of the capital stock of the Railways Company. (American Brief, p. 31.) However, this argument, which has very slight juridical value, was withdrawn by American Counsel in oral argument (Stenographic record of the American Agency, p. 1603) for which reason it is unnecessary to insist upon the fact that as the Mexican Government was not a party to that contract, notwithstanding that it held a majority of the capital stock of the Railways Company, it neither acquired of itself any right nor contracted responsibility of any kind as a result thereof. The problem consists then in determining whether the taking over of the lines of the Railways Company operated in any other way to transfer to the Government of Mexico the obligation contracted by the former.

The American Brief contends, in the first place, that the Government of Mexico became responsible for the obligation contracted by the Railways Company when it effected the seizure, since from that moment the said company ceased to have an independent existence, the Government having substituted it in its rights and obligations. In support of this argument the American Brief makes reference to a decision rendered by the Circuit Court of Appeals for the Second Circuit in the *Oliver Trading Company* case as well as to the decisions of this Commission in the claims of the *Home Insurance Co.*, Docket No. 73 (*Opinions of Commissioners*, 1927, p. 51), and of the *Illinois Central Railroad Co.*, Docket No. 432 (*ibid*, p. 15). Reference is also made

to Annual Reports of the Railways Company, and finally to the agreement between the Government of Mexico and the International Committee of Bankers in 1925. (American Brief, p. 30). As this agreement, in the part relative thereto, refers to the relations created between the Government and the Railways Company subsequent to the return of the lines, and in no wise appertains to the relations which existed during the period of possession by the Government, it appears to be expedient to postpone until later the study of this agreement.

With respect to the case of the *Oliver Trading Company*, it is sufficient to note that Counsel of the claimant Government admitted during the hearings that that decision could not really be considered as pertinent to the issues of the instant claim, since in the *Oliver* case, only the relations between the company and the Government of Mexico which arose during the period of possession by the Government were discussed. (Stenographic record of the American Agency, p. 1582.) The Judge of the Circuit Court of Appeals in saying that the National Railways of Mexico are "merely a name" referred to the denomination "National Railways of Mexico, Government Administration" which designated the system of railroads in the possession of the Government during the period of its control thereof, and not to the entity whose lines had been seized.

But as the Agency of the United States alleged that the respondent Government had assumed in the *Oliver Trading Company* case (5 Fed. Repl. 2nd Series 659) a position contrary to that assumed in the instant claim, it is necessary to examine that case more attentively. An analysis of the arguments presented by the Government of Mexico in each case demonstrates not only that there is no contradiction whatever between the averments maintained but that, on the contrary, the points of view adduced before the Circuit Court are in harmony with those set forth in this case.

The complaint which was filed before a New York court was based upon a contract entered into in 1921 between the Oliver Trading Company and the National Railways of Mexico, Government Administration. The plaintiff company alleged that the provisions of the said contract had not been properly fulfilled for which reason it instituted proceedings against the Government of Mexico and the National Railways Company jointly, obtaining a writ of attachment against certain funds which the said Government had in United States territory.

Counsel for the Government of Mexico demonstrated that beginning in 1914 the lines of the National Railways Company which had been seized at that time were under the administration of the Government, for which reason the said company had not had any participation in the contract of 1921. The argument adduced in this regard is reproduced in the Brief of the United States filed in this claim, and is as follows:

"We agree entirely with the Plaintiff's contention that the private corporation, National Railways of Mexico, which is one of the Defendants in this suit, has no connection with the operation, management or control of the Railways; and that it has no relationship whatsoever to any of the matters which are the basis of the alleged cause of action of the Plaintiff." (Brief of the United States, p. 36).

It having been established that the National Railways Company did not participate in the aforementioned contract and, consequently, that it did not assume any obligation with respect to the plaintiff company, counsel for Mexico proceeded to demonstrate that the designation *National Railways of Mexico, Government Administration* referred to no company or juridical

person other than to the Mexican Government itself, and in this connection set forth the following:

"As the Affidavit of Mr. de Hoyos, verified the 6th day of February, 1923, states, the Government of Mexico operates the Railways under the name 'National Railways of Mexico, Government Administration', as a matter of convenience and as a means of identification; and it does so *directly* without the interposition, means, aid or assistance of any factitious organization, corporate or otherwise." "there is no other organization, group, corporation or entity concerned in any way, manner or fashion with the operation of the National Railways of Mexico, other than the United States of Mexico itself, and can further state that the words 'National Railways of Mexico, Government Administration', is a mere description for the purpose of convenience and apt expression to cover the operation by the Mexican Government of the Railway properties, which it took over under governmental decrees, and which it operates directly. That they were not handed over or transferred to any group of individuals or to any single person as agent for the Government, but they are directly, immediately and personally run, operated and maintained by the United States of Mexico for public purposes." (Brief of the United States pp. 36-37).

The Government of Mexico, therefore, being alone responsible for the fulfilment of the contract with the Oliver Trading Company, the Circuit Court of Appeals dismissed the complaint on the ground that a sovereign State cannot be sued in the courts of another country.

In that case, then, it was established that the National Railways Company, not having been a party to the contract of 1921, did not contract any obligation with respect to the Oliver Trading Company, the Government of Mexico being alone responsible. The Agency of Mexico, in the instant claim, has therefore alleged, *in accordance with that viewpoint*, that the Government, not having been a party to the contract entered into between the National Railways Company and the Dickson Car Wheel Company, cannot be taxed with any obligation thereunder. It is obvious that there is no contradiction between the two contentions which were maintained to cover two completely different situations.

The argument presented in this case by the Government of Mexico is applicable to the similar situation created in the United States as a result of the seizure of the railways in its territory in 1917. In the case of the *Missouri Pacific Railroad Company v. Ault* (256 U.S. 554) the Supreme Court of the United States stated clearly:

"... if the cause of action arose prior to Government control, suit might be instituted or continued to judgment against the company as though there had been no taking over by the Government"

The foregoing observations are likewise applicable to the cases of the *Illinois Central Company* and to the *Home Insurance Company*. The relations between the said companies and the National Railways Company wherein the latter had been substituted by the Government, were not in issue in either of these cases. In both cases the relations had been formed directly between the Government of Mexico in its character of administrator of the lines taken over and the claimant companies.

Nor can the Annual Reports of the Railways serve as a basis for the contentions of the American Agency, since these documents show to the contrary that notwithstanding the fact that the Railways Company did not control its lines, it did not for that reason cease to have its own juridical existence, as an entity independent of the Government. From those reports it appears clearly that during the period of control by the Government meetings

were held and reports rendered as prescribed by the statutes. The company continued to receive income from sources other than those relating to the operation of its lines and specifically continued to recognize as its own, obligations contracted prior to 1914.

From the foregoing the contention advanced by the American Agency in the sense that the National Railways Company had disappeared, as a juridical entity, and that the Government had superseded it in the rights and obligations contracted by it prior to the seizure appears to be inadmissible.

Another of the contentions set forth in the Brief of the United States is that the Government in taking over the National Railways Company exercised an act of expropriation which conformably to Article 27 of the Constitution then in force, can be done only after payment of indemnification, and that in not doing so the Government had committed an unlawful act. (American Brief, p. 9.)

The refutation made by the Mexican Agency in this respect, in the sense that the application of the decree of December 1914 is not invested with the character of an expropriation, appears to be correct. The taking over was merely temporary in nature and the property rights of the National Railways Company were never disregarded. The said decree was issued in strict accord with Article 145 of the Law on Railways then in force which does not require the previous payment of indemnification. The Article referred to reads as follows:

"X. The Federal authorities are entitled, in the event that in their opinion the defense of the country requires it, to make requisitions on the railroads, their personnel and all their operating material and to make disposition thereof as they may consider advisable.

In this event the Nation shall indemnify the railroad companies. If no agreement is reached as to the amount of the indemnification, the latter shall be based upon the average gross earnings in the last five years, plus ten per cent, all expenses to be paid by the company."

It will be seen that although it is true that Mexican law requires the indemnification of the company it is likewise true that the indemnification may be made by agreement or upon the basis of the average gross earnings plus a fixed amount, the company paying all of the expenses of administering the lines during the period of possession. In the particular case of the National Railways Company the return of the lines was effected conformably to an agreement entered into between the Government of Mexico and the International Committee of Bankers in which the form of indemnification to the Company was stipulated. This agreement having been accepted by the Company it is impossible to conclude, as maintained by the American Agency, that the said Company has been the victim of an expropriation, violative of the laws of Mexico.

The Agency of the United States also maintained in its Brief that the car wheels having been sold to the Railways Company under a guarantee of four to five years, the Government could have invoked that guarantee, bringing suit thereunder in a proper case, against the vendor company, and that as a consequence since the Government enjoyed that right it was likewise obliged to make payment for the material.

This argument appears to merit little attention since the Government of Mexico, in the event of the car wheels being unsatisfactory could not have, either under the laws of Mexico or in accordance with North American law, secured judgment against the Dickson Car Wheel Company; it has

already been said that the Government was not a party to the contract of 1912 and that legally it had not superseded the purchasing company in its rights. The right of guaranty belonged solely and exclusively to the National Railways Company.

The arguments just examined are invested with a subsidiary character in the Brief of the claimant Government. The two fundamental arguments, which were the only ones sustained by Counsel of the United States during the hearings, are the following:

1. The taking over of the lines, together with its resultant consequences, has prevented the National Railways Company from fulfilling its obligation towards the Dickson Car Wheel Company, and that prevention constitutes an act destructive of its rights.

2. As a result of the taking over of the lines the Government of Mexico obtained an unjust enrichment, at the expense of the claimant company, which, in turn suffered an injury in its patrimony, as a direct result of the enrichment of the Government.

With respect to the first argument the Agency of Mexico sustained that the claimant Company could always bring suit against the Railways Company in the Mexican courts, during the period of possession and subsequent to the return of the lines in 1925. The Agency of the United States, on the other hand, denied that the creditor company could have sued the debtor company during the years included between 1914 and 1925, and maintained that even if it could have done so theoretically, subsequent to the return of the lines, in reality, it would not have obtained any practical result thereby, inasmuch as by reason of the Agreement of 1925 the Government has continued until the present day in control of the net revenues of the Company, as a result of which the Company continues as formerly without the funds necessary to pay the debt.

With relation to the first part of the argument, the objection adduced by the Mexican Agency is found to be correct, since the Railways Company never lost its own juridical identity during the period of possession. In a letter of March 14, 1919, from the Mexican Company to its American creditor (Annex No. 28 of the Memorial) the former recognizes the debt, but indicates that not being in receipt of any revenue from the operation of the seized lines, it was impossible for it *at that time* to make payment, for which reason it requested the American company to wait until conditions changed. It is to be noted that the Company in that letter put forward no reason of a legal nature as preventing it from making payment; and, with respect to the material impossibility, it limited itself to indicating that it was receiving no revenue *from the operation of its lines*.

There was no legal reason whatsoever to prevent the Dickson Car Wheel Company from bringing suit against the Railways Company if it had desired to do so, inasmuch as it continued to preserve its identity and recognized the debt as its own. In support of the contrary contention the American Agency made reference to the *amparo* interposed by José Barrios and decided by the Supreme Court of Mexico (*Semanario Judicial V Epoca*, Tomo XX, p. 1049). As that *amparo* was interposed on appeal, the decision of the Court contains no details of the facts upon which the decision was based; the decision itself does not determine whether the Railways Company could have been sued by the plaintiff, but simply holds that the action ought to be filed in the Federal Courts and not in the ordinary courts. The question decided, then, was one of jurisdiction only, and not one going to the merits of the case.

It having already been indicated that the Railways Company was in receipt of revenue other than that corresponding to the operation of its lines, and it not having been demonstrated that the Dickson Car Wheel Company could not have brought suit in the courts of Mexico against the Railways Company, during the period of possession, it clearly follows that this aspect of the argument of the Agency of the United States is not justified by the facts.

The claimant Agency also contends that subsequent to the return of the lines, the Dickson Car Wheel Company was deprived of all means of collecting its debt, inasmuch as the net revenue of the Railways Company was controlled absolutely by the Government, by virtue of the Agreement of 1925, which did not provide for the payment of obligations of this nature contracted by the Company prior to the seizure.

The argument and the evidence submitted by the Agency of Mexico refute that contention. During the hearings Counsel for Mexico read the Annual Reports of the National Railways Company, numbers XIX and XX, demonstrating that the Agreement mentioned did not create such impossibility, since, on the contrary, the Company has been liquidating its debts by degrees. American counsel bases his point of view on paragraph III of the Agreement. It reads as follows:

"3.—Beginning January 1, 1926, the total net revenue of the Railways as available shall be remitted each month by the Executive President of the Railways directly to the committee at its office in New York, for the purpose of paying cash warrants issued in respect of the Railways' debt subject to the Agreement, and any surplus over the amount thus required shall be utilized, as provided in sub-paragraph 5 of paragraph (c) of Section 4, as herein amended, in the discretion of the Committee, in paying overdue Cash Warrants or in retiring Current Interest Scrip issued under the Agreement."

The interesting part of this aspect of the problem does not consist in the analysis of the use which is to be made of the net revenue, but in knowing what is to be understood thereby; that is, to know what are the previous deductions made from the gross revenue. The Annual Reports aforementioned show that in addition to the deductions set aside for the rehabilitation of the Railways and for the expenses inherent to the operation of the lines, *there is an item destined by the Railways Company for the liquidation of its general obligations.*

As a practical demonstration that this item really is for the liquidation of obligations of the same nature as that contracted with respect to the Dickson Car Wheel Company, the Agency of Mexico filed as additional proof evidence of settlement of a debt of the Railways Company to the Charles Nelson Company, which debt was identically the same as the one in favor of the claimant company and which gave rise to a claim before this Commission.

There is no doubt that the Railways Company ceased to receive revenue *from the operation of the lines* which were in the possession of the Government, but this does not signify that the Company was deprived of all revenue. The funds necessary to attend to matters in the offices of Mexico, New York and London continued to be expended annually during all the period of possession. The Tenth Annual Report of the Company shows that during the year 1917-1918, those expenses amounted to the sum of 179,646.67 pesos (page 12), which compels the thought that there was revenue. This is corroborated by noting on the general balance sheet of June 1918, (page 28 of the said report) that the company had the sum of 538,637.51 pesos

in cash on hand and in the banks; these funds, according to page 35 of the Report, were derived from interest and dividends on securities susceptible of immediate negotiation and rents from lands situated in Tampico. In short, the income or the properties of the company during the period of possession would have sufficed fully to satisfy the amount owed to the Dickson Car Wheel Company which was only \$4,126.64.

The particular reasons of the National Railways Company for not liquidating the credit of the Dickson Car Wheel Company are immaterial to this Commission. With regard to the arguments adduced by the American Agency with respect to this claim, the only thing of interest is to determine whether there was available to the company a prompt legal remedy and whether the Railways are and have been in a position to meet their obligation. As these points must be answered in the affirmative, the contention of the United States to the effect that the claimant company was prevented from suing and obtaining payment of the amount of its credit during the period of possession or the reafter, must be dismissed.

The final argument developed by the claimant Agency has for its foundation the theory of unjust enrichment. It is maintained that the Government obtained an unjust enrichment at the expense of the Company. The enrichment consists of the use made by the Government of the material delivered by the claimant company to the Railways Company, and the detriment, in the destruction of the rights which the Dickson Car Wheel Company had against the Railways Company.

The interpretation of the theory of unjust enrichment has encountered serious difficulties in its practical application in municipal law. There is no doubt that at the present time that theory is accepted and applied generally by the countries of the world, even in the absence of a specific law, but the difficulty rests in fixing the limits within which it can and must be applied.

In order that an action *in rem verso* may lie in municipal law it is necessary that the following elements coexist:

1. That there be an enrichment of the defendant.
2. That this enrichment be the direct consequence of a patrimonial injury suffered by the plaintiff. That is, that the same causative act create simultaneously the enrichment and the detriment.
3. That the enrichment of the defendant be unjust.
4. That the injured person have in his favor no contractual right which he could exercise to compensate him for the damage. (See *Bonnecase. Sup. de Baudry. T. III, pages 216 to 372.*)

It is obvious that the theory of unjust enrichment as such has not yet been transplanted to the field of international law as this is of a juridical order distinct from local or private law. As will be shown further on it is necessary to establish the international illegality of the causative act, and that the injury suffered by the national of the claimant country be the result of that act. However, even omitting that circumstance, the theory of unjust enrichment is inapplicable to this case.

The claimant Agency has maintained, in effect, that the injury suffered by the Dickson Car Wheel Company consisted in the destruction of its rights acquired by virtue of the contract of 1912. Having already expressed the opinion that those rights, constituted by the possibility of bringing suit against the National Railways Company, were preserved intact in spite of the taking over of the lines, it is unnecessary to make further comments on this point.

The enrichment of the Government consisted, according to the claimant Agency, in having enjoyed the use and benefit of the car wheels during the period of possession. Now in accordance with Mexican law, which governs the contract of 1912, since its consummation took place in Mexico, the delivery of goods to the Railways operated to transfer to them property rights, the Dickson Car Wheel Company preserving a personal right, a credit against the said Railways. Therefore, upon taking over the lines of this company and in utilizing in their operation the car wheels delivered by the Dickson Car Wheel Company, the Government was making use of property belonging to the National Railways Company to which the American company no longer had any positive right. Consequently, the obligation of the Government to make compensation for that use arose solely and exclusively with respect to the Railways, the property of which was being utilized.

Conformably to the Agreement of 1925 the Government agreed to return the lines to the Railways Company in the same condition as when seized, and to this end, by virtue of paragraph 9 of the said Agreement appointed a commission of experts to determine the amount of physical damage sustained by the Railways during the period of Government possession. The paragraph is as follows:

"An appraisal commission to be composed of three experts, shall determine the physical damage sustained by the Railways during the period of government control and operation."

The Appraisal Commission, on May 29, 1929, rendered its decision conformably to which the Government agreed to the sum of \$15,000,000.00 for the physical damage.

With respect to damages, that is to the *lucrum cessans* the Railways Company was compensated therefor in the manner indicated by the Chief of Public Credit in an address given by him in the Treasury Department, and which is entitled the "Public Debt of Mexico":

"Now then, the Agreement provides for the payment of damages, although indirectly. This indirect method is the assistance which is given to them, the power granted to them to fix the necessary rates and to reduce expenses, so that the net income may be sufficient to satisfy the obligations accumulated during the period of possession."

It will be seen from the foregoing that the Government obtained no unjust enrichment at the expense of the Dickson Car Wheel Company.

Finally, as has been said, this company had at all times a speedy remedy in an action on its contract against the Railways Company, for which reason the action *in rem verso* is not applicable.

The reasons set forth above justify in themselves a decision adverse to the claimant company, but there are besides reasons of a more basic character which compel the dismissal of the claim.

In the preceding paragraphs an endeavor was made solely and exclusively to ascertain whether the Dickson Car Wheel Company really sustained an injury imputable to the Government of Mexico as a consequence of the taking over of the Railways, and the conclusion was in the negative. However, even in the supposition that the injury really existed, that fact, in itself, would not be sufficient to create responsibility on the part of Mexico. In effect, conformably to Article I of the Convention of 1923, all claims against Mexico of citizens of the United States for losses or damages

suffered by persons or by their properties shall be submitted to a Commission for decision *in accordance with the principles of international law*. This article on the one hand limits the acceptable claims to those based on losses or damages; and on the other hand it stipulates that the said claims shall be decided *in accordance with the principles of international law*.

Under international law, apart from any convention, in order that a State may incur responsibility it is necessary that an unlawful international act be imputed to it, that is, that there exist a violation of a duty imposed by an international juridical standard. The above cited Convention requires further the existence of damage suffered by a national of the claimant Government. It is indispensable therefore, in order that a claim may prosper before this Commission, that two elements coexist: an unlawful international act and a loss or injury suffered by a national of the claimant Government. The lack of either of these two elements must necessarily be fatal to any claim filed with this Commission.

Can it be said that these two indispensable elements exist in the claim of the Dickson Car Wheel Company?

The Agency of the United States has limited itself to alleging the existence of damage suffered by the American company. Conceding for a moment that this really exists as the result of damage suffered by the National Railways Company caused by the taking over of the lines, it would be necessary to establish further the international illegality of the original act. The problem in this case would consist in deciding whether damage caused directly to a company of Mexican nationality and which would recoil upon a company of North American nationality, remotely causing it an injury, constitutes an act violative of the Law of Nations.

The relation of rights and obligations created between two States upon the commission by one of them of an act in violation of international law, arises only among those States subject to the international juridical system. There does not exist, in that system, any relation of responsibility between the transgressing State and the injured individual for the reason that the latter is not subject to international law. The injury inflicted upon an individual, a national of the claimant State, which implies a violation of the obligations imposed by international law upon each member of the Community of Nations, constitutes an act internationally unlawful, because it signifies an offense against the State to which the individual is united by the bond of nationality. The only juridical relation, therefore, which authorizes a State to exact from another the performance of conduct prescribed by international law with respect to individuals is the bond of nationality. This is the link existing between that law and individuals and through it alone are individuals enabled to invoke the protection of a State and the latter empowered to intervene on their behalf.

A State, for example, does not commit an international delinquency in inflicting an injury upon an individual lacking nationality, and consequently, no State is empowered to intervene or complain on his behalf either before or after the injury. As Oppenheim well says referring to the *heimatlose*:

"But since they do not own a nationality, the link by which they could derive benefits from International Law is missing, and thus they lack protection as far as this law is concerned.... In practice, Stateless individuals are in most States treated more or less as though they were subjects of foreign States, but however much they are maltreated, international law cannot aid them." (Oppenheim, *International Law*, Par. 312.)

An act of a State against a *heimatlos* or against one of its own nationals may affect the domestic relations or the contractual relations which the latter may have with respect to the nationals of other countries. Would the loss or damage which these might suffer cause responsibility on the part of the actor State with respect to the States to which the injured individuals belonged?

The injury suffered by an individual linked by family relations to an individual of another nationality who has been the victim of an act of another State has been discussed only before the German-American Commission in the case of the Lusitania Death Claims. In that case the umpire, Judge Parker sentenced Germany to pay indemnification for damages suffered by American citizens as a consequence of the death of individuals of another nationality. The principles of international law, however, were not applied in this decision, as Judge Parker limited himself to making an interpretation of the Treaty of Berlin. The United States Commissioner in his opinion expressed himself in the following manner:

"Inasmuch, therefore, as these claims come within the terms of the Treaty of Berlin, it is unnecessary to consider whether or not Germany would be liable for them under any principles of international law independently of that Treaty, because Germany's liability under that Treaty is not limited to claims which can be supported by international law independently of that Treaty". (*Administrative Decisions and Opinions*, p. 198.)

Judge Parker concurring in this viewpoint expressed himself in the following words:

"In the group of cases here presented, Germany's obligation, as fixed by the Treaty of Berlin, is to make compensation and reparation, measured by pecuniary standards, for damages suffered by American survivors of civilians whose deaths were caused by Germany's acts in the prosecution of the war." (*Ibid*, page 209.)

In order to impose responsibility upon Germany, in accordance with that Treaty, it is not necessary to establish the existence of an unlawful act with respect to the United States, but only to prove that there is an injury suffered by American citizens as the result of the death of civilians irrespective of their nationality.

That view cannot be accepted by international law in the absence of a specific Treaty. I am of the opinion that the following observations of Mr. Borchard in this regard are correct:

"While it is true that surviving dependents have a right of action, especially preserved to them in the Treaty of Versailles, it is a question whether international law does not imply the condition that the decedent must have had the nationality of the claimant country. Both precedent and theory sustain the belief that citizenship of the decedent in the claimant country is always required as a condition of an international claim. Where heirs have been admitted to the jurisdiction of international claims commissions, doubts have arisen whether the heirs as well as the decedent must have the nationality of the claimant country some commissions dispensing with this necessity in the case of the heir but not in the case of the decedent. To be sure, practically none of these cases were actions for wrongful death of the decedent, but involved inherited claims. Yet it is not believed that this modifies the principle. In these Lusitania cases, the Department of State appears to have entertained considerable doubt whether it could press claims of American dependents arising out of the wrongful deaths of aliens. Theory justifies the doubt. When a state espouses the claim of its citizen, it is not merely prosecuting for its 'economic loss', but for the loss of

prestige and moral injury it has sustained and would sustain if it permitted its citizens to be injured without redress. Diplomatic protection is the sanction which insures a standard of treatment commensurate with international law. If states permitted their citizens to be killed abroad promiscuously or without redress by other states or their officials, the 'injured' state would soon lose prestige and its citizens that security which diplomatic protection is designed to afford. Rules of municipal law as to the survivorship of causes of action are likely here to confuse rather than aid. It has not heretofore been deemed a cause of international complaint, if national dependents sustain injury through the killing of an alien. Other nationals may also sustain 'economic loss' through such wrongful act, and if dependents, why not *creditors*, partners, and even insurers? Indeed, a state might thus have to pay damage to foreign countries for injuries inflicted, upon its *own citizens*. Surely this could not be good law. The reason for the rule that the killed or injured person must be a citizen of the claimant state is that the prestige of only one state has been deemed impaired by a wrongful assault, and that is the national state of the killed or injured person. As that state alone could have interposed to prevent the injury, how can another state, whose citizen merely suffers a resultant pecuniary loss, claim damages for an 'original' wrong?" (*American Journal of International Law*, January, 1926, page 70.)

This Commission without having specifically discussed the applicable theory, has already indicated in the Costello case that when an individual directly injured lacks North American nationality even though members of his family possess it, there is no claim. (*Opinions of Commissioners*, 1929, p. 265.)

The foregoing being noted, it will now be seen whether the principle varies when those relations are of a contractual nature.

This is not the first time that this problem has been studied by arbitral tribunals. In the Spanish American Commission of 1871 there were filed several claims on behalf of American citizens, creditors of Spanish subjects as the result of injuries to the properties of the latter caused by the Spanish Government. These claims were disallowed it being stated that internationally the creditor could not have greater rights than the debtor. (Moore's *Arbitrations*, pp. 2335 and 2336.)

Similarly, the Commission between the United States and Venezuela in the Bance case disallowed the claim of the creditors of a Venezuelan national. (*Arbitrations of 1903*, p. 172.)

In the so called "Life Insurance Claims" filed by American companies in the German American Commission, Judge Parker, referring to injuries suffered as a consequence of the contractual claims existing between the claimant companies and the persons originally injured, notwithstanding that the latter were North American nationals, resolved the problem in the following manner:

"The great diligence and research of American counsel have pointed this Commission to no case decided by any municipal or international tribunal awarding damages to one party to a contract claiming a loss as a result of the killing of the second party to such contract by a third party without any intent of disturbing or destroying such contractual relations. The ever increasing complexity of human relations resulting from the tangled network of intercontractual rights and obligations are such that no one could possibly foresee all the far-reaching consequences, springing solely from contractual relations, of the negligent or wilful taking of a life. There are few deaths caused by human agency that do not pecuniarily affect those with whom the deceased had entered into contractual relations; yet through all the ages no system of jurisprudence has essayed the task, no international tribunal or municipal court has essayed

the task, and law, which is always practical, will hesitate to essay the task, of tracing the consequences of the death of a human being through all of the ramifications and the tangled web of contractual relations of modern business". (Consolidated edition of *Decisions and Opinions of the Mixed Claims Commission, United States and Germany*, Washington, p. 137.)

Judge Parker in the preceding paragraph limited himself to applying under international law the same standard as governs in municipal law. This rule has been concisely stated by Sutherland in his work on damages as follows:

"Where the plaintiff is injured by the defendant's conduct to a third person it is too remote if he sustains no other than a contract relation to such third person, or is under contract obligation on his account, and the injury consists only in impairing the ability or inclination of such third person to perform his part, unless the wrongful act is wilful for that purpose." (Vol. I, Sec. 33.)

From the reasons set forth the following conclusions are reached:

I. A State does not incur international responsibility from the fact that a subject of the claimant State suffers damage as a corollary or result of an injury which the defendant State has inflicted upon one of its own nationals or upon an individual of a nationality other than that of the claimant country, with whom the claimant is united by ties of relationship.

II. A State does not incur international responsibility from the fact that an individual or company of the nationality of another State suffers a pecuniary injury as the corollary or result of an injury which the defendant State has inflicted upon an individual or company irrespective of nationality when the relations between the former and the latter are of a contractual nature.

This second conclusion recognizes one exception only within the Convention of September 8, 1923. Article I permits the filing of "All claims for losses or damages suffered by citizens of either country by reason of losses or damages suffered by any corporation, company, association or partnership in which such citizens have or have had a substantial and bona fide interest, provided an allotment to the claimant by the corporation, company, association or partnership of his proportion of the loss or damage suffered is presented to the Commission" That is, it is necessary that the individual or company claimant have a substantial and bona fide interest in the company *originally* injured, regardless of its nationality, which shall make an allotment of the proportional part of the loss or damage suffered by the individual or company claimant. It is obvious that the instant case does not come within the exception.

The damage that might have been suffered by the claimant company is not definite, but is of a provisional character. Even if it had not been able to collect its credit with the National Railways Company because for several years this company had been in a special condition, such condition was created by the fact that the Government of Mexico had to take over the management of the lines in order to face an emergency which put in serious danger the social order and even the independence of that Nation. Considering the matter even from this viewpoint, there would be no international responsibility on the part of the Government of Mexico for this act. States have always resorted to extraordinary measures to save themselves from imminent dangers and the injuries to foreigners resulting from these measures do not generally afford a basis for claims. Moratoriums imposed upon National Banks are measures of this character, and there

is no precedent showing that international indemnities have been awarded on this ground. The foreigner, residing in a country which, by reason of natural, social or international calamities is obliged to adopt those measures, must suffer the natural detriment to his affairs, without any remedy, since Governments, as expressed by a distinguished jurist, are not insurers against every event.

For the reasons set forth I am of the opinion that the claim of the Dickson Car Wheel Company must be disallowed.

Decision

The claim of the United States of America on behalf of the Dickson Car Wheel Company is disallowed.

Commissioner Nielsen, dissenting:

Claim in the amount of \$4,126.64, with interest, is made in this case by the United States of America against the United Mexican States on behalf of the Dickson Car Wheel Company. The principal sum claimed is for the price of car wheels furnished to the National Railways of Mexico (hereinafter called the Railways) between December 13, 1913, and January 6, 1914. The Company undertook to obtain compensation from the Railways and was informed that payment could not be made, since the Government was operating the Railways and the Company received no revenues whatever from their operation.

The principal contention of the United States was that the Government of Mexico stood, as stated in the American Brief, "in the place of the corporation", and that the corporation, during the period of Government control, "was in fact merely a name". It was argued that the Government was responsible for the payment of accounts, since it was in complete control of the Railways; did not even pay the Railways as Mexican law required for use of the properties; and finally, by certain arrangements entered into with bankers when the Railways were restored, provided for the disposition of future earnings of the roads, so that debts such as the one in question could not be paid. It was also contended that, since the Mexican Government had the use of the material supplied by the claimant, an unjust enrichment to the former resulted from such use and non-payment.

In behalf of Mexico, it was contended that there was no legal claim against the Mexican Government, and that the claimant Company's remedy was against the Railways.

No detailed discussion is necessary to show the correctness of the contention of the United States with respect to the complete control exercised by the Government over the Railways. A few brief citations to official records will suffice. On behalf of Mexico, the argument was stressed that the Government merely took over the lines. The fact that the Company's charter was not destroyed has no bearing on the contention made with respect to complete control of property and operations.

In a communication of March 14, 1919, addressed to the claimant Company, the acting auditor of the Railways excused non-payment by saying: "our properties have been operated by the Government and we are having no revenue whatever from the operation of same". In the Sixth Annual Report of the Railways, dated February 20, 1915, reference was made to difficulties encountered in the past year. It was stated that "the situation was such that the officers and employees were prevented access

to its offices and archives" (p. 3). In the Seventh Annual Report, dated October 6, 1915, reference was made to information which it was necessary to give to interested persons with respect to enormous amounts due from the Railroad company. They were informed, it was pointed out, that the company "was not receiving any revenue whatsoever, its properties being interfered with" (p. 4). This report contains a communication in which an official of the company states: "we lost control over our archives, and we were even prevented from entering the offices".

In the *Boletín de la Secretaría de Gobernación* of October, 1922, it appears that the Railways had attempted to obtain some compensation from the Government. Reference is made to enormous debts and to damages said to have been suffered, and this official document refers to "the truly terrible situation in which the railroads found themselves in June of this year" (Vol. 1, p. 353).

In a case instituted by José A. Barrios against the Railways, the Supreme Court of Mexico, in an *amparo* proceeding, stated that, while the National Railways of Mexico constituted a corporation in ordinary times and as such was represented by a Board of Directors, when in accordance with the Railway Law the Federal Government took them over, the Government itself assumed "*the representation and obligations of the Company*". (Italics inserted.)

In view of the contentions made in the instant case by the Government of Mexico, another litigation involving that Government is, in my opinion, still more interesting and more important with respect to the propriety of those contentions.

In *The Oliver American Trading Company, Inc., v. The Government of the United States of Mexico, et al.*, 5 Fed. (2nd) 659, an action was originally instituted against the Government of Mexico and the National Railways of Mexico, Government Administration, as defendants to recover the sum of \$1,164,348.90. Service was made by attaching tangible personal property and credits within the State of New York alleged to belong to the defendants.

The Court, speaking through three eminent Circuit Judges in the final decision in the case, held that the National Railways of Mexico was, quoting contentions made by the Government of Mexico, "merely a name" for the system of railroads in possession of the Mexican Government. There was in that situation only one defendant before the Court, namely the Government of Mexico. And the Court, further sustaining the Mexican Government, held that the Government was immune from suit in the courts of the United States.

It is very interesting to note the assertion in the Mexican Brief in the instant case before the Commission that the "statement made in the course of the decision to the effect that the 'National Railroads of Mexico is merely a name' is mere dicta, and with all due respect to Justice Rogers of the Circuit [Court] of Appeals the Mexican Agency submits that such statement is lacking of legal foundation". The statement which the Mexican Brief asserts to be *dictum* and without foundation is the Mexican Government's language approved by the Court in dealing with Mexico's contention in the *Oliver* case.

Mexico in a Brief filed in that case asserted that "the private corporation—National Railways of Mexico", named as defendant, had "no connection with the operation, management or control of the Railways". And it was further alleged that there was no reason for implying that there

existed "some other organization, roaming at large, which might be brought in as a Defendant".

Mexico in its Brief made numerous similar statements, one of which is particularly interesting. It was said: "the United States of Mexico itself has continued and still continues to operate and maintain the Railways, just as it operates and maintains the Customs and the Departments of Immigration, Treasury, Interior, and Education; as a purely governmental function carried on directly by government officers without the interposition of any agency" (p. 4).

The Circuit Court of Appeals, quoting the Mexican Brief and sustaining the Mexican Government's contentions, said:

"While the action is nominally against both the government of Mexico and the National Railways of Mexico, it is in reality a suit only against the Mexican government. For it appears that the National Railways of Mexico is 'merely a name' for a system of railroads in the possession of the Mexican government, and has been controlled and operated by Mexico since 1914 for national purposes, just as it operates the Post Office, the Customs Service, or any other branch of the national government."

If the allegations made in the Mexican Brief in the instant case were correct, then obviously Mexico submitted improper contentions before the Circuit Court of Appeals and the Judges made an incorrect statement of fact and an improper application of the law. This I do not consider to have been the situation.

It is interesting and important therefore to observe that Mexico came before the Circuit Court of Appeals and contended that, because of complete control of the Government over the Railways, there was no remedy against the Railway company. In my opinion, it is therefore clear that Mexico in the instant case repudiates its own contentions made before the Federal District Court and before the Circuit Court of Appeals and contends that, in spite of that complete control which the Mexican Government explained and which is shown by a mass of documents, some of which have been referred to, there is no remedy against Mexico in the instant case, but that the remedy was and is against the Railways.

It is stated in the opinion written by Mr. Fernández MacGregor that the Judge of the District Court in New York in stating that the National Railways of Mexico was "merely a name" referred to the designation, National Railways of Mexico, Government Administration, by which the railroad system which was under government administration was designated, and not to the moral entity whose lines were under control. A casual examination of the records in the case would I think reveal the incorrectness of this statement.

Indeed, it was the three Circuit Judges of the Circuit Court of Appeals of the Second Circuit, who, sustaining Mexico's contentions in the case, said "that the National Railways of Mexico is 'merely a name' for a system of railroads in the possession of the Mexican government".

The *Oliver* case was begun in a State court in New York. Summons was served on a man alleged to be the managing agent of the Mexican Government and also upon another man as the managing agent of the National Railways of Mexico, Government Administration. Action was promptly taken by the Government of Mexico to remove the case to a Federal District Court. It appears that the first step Mexico took was to eliminate the "National Railways of Mexico, Government Administration" as a defendant. In connection with the action taken to that end, it was alleged in behalf

of Mexico, as stated in the opinion rendered by Judge Knox of the United States District Court of the Southern District of New York on October 11, 1923, "that the suit was between plaintiff, a Delaware corporation, and aliens, to wit: The Government of the United States of Mexico, a sovereign State and National Railways of Mexico, a corporation organized under the laws of that country". In other words, Mexico succeeded at once in eliminating the designated Government Administration. The "National Railways of Mexico" are designated in this opinion as one of the parties defendant. In the Brief filed by Mexico before the Court, the Mexican Government's representatives, ignoring the Government Administration, designated also the National Railways of Mexico as a defendant. In the attempt utterly to eliminate the "National Railways of Mexico, Government Administration", to which reference is made in the opinion of my associates, the Mexican Government's Brief before the District Court began with the following paragraph:

"Plaintiff in its brief seeks to create the impression that the Defendant named in this action as the National Railways of Mexico is not the former corporation operating the Railways, but is some corporate or quasi-corporate body used by the United States of Mexico in the operation and administration of the Railways."

The plaintiff evidently thought that suit could be maintained against the "National Railways of Mexico, Government Administration". Mexico, speaking through its representatives, in ample language successfully combated that idea. It goes so far in its efforts as to state that it is strongly felt "that the Plaintiff is attempting to confuse the Court's mind on his question". And although the suit was instituted against the designated Government Administration, Mexico proceeded to treat the National Railways of Mexico as the defendant. After it was stated that the Railways were operated by the Government, it was asserted that there was "no other entity which the Plaintiff could implead". It was further stated that the National Railways of Mexico, Government Administration, was a designation for the purpose of "convenience and as a means of identification" and was "a mere description for the purpose of convenience and apt expression to cover the operation by the Mexican Government of the Railway properties". It was said that there was no entity or group in Mexico "such as was the Director General of Railways during the United States Government Administration 'conducting or maintaining the railroads of Mexico'".

Mexico, having successfully eliminated the designated Government Administration as a defendant, proceeded to eliminate the National Railways of Mexico. They were eliminated, because Mexico convinced the Court that the Mexican Government was in complete control of the Railways and managed them as any department of the Government was managed. Mexico having then successfully merged the Railways with the Government pleaded that the Government was immune. It was sustained by the Court.

In the *Oliver* case, Mexico successfully advanced the contention that no action would lie against the National Railways of Mexico because of complete government control. In the instant case before the Commission, Mexico states that the remedy is and was against the Railways.

In the instant case before the Commission, Mexico in its Brief refers to the opinion of the Circuit Court of Appeals, sustaining and quoting Mexico's own language in the *Oliver* case, and states that what the Court

said, although it was what Mexico contended, was "lacking of legal foundation".

Apart from the contentions effectively advanced by counsel for the United States in oral argument with respect to unjust enrichment, the fundamental contention made by the United States, found in its Brief, was that Mexico is liable in the instant case because the Mexican Government was, as was so fully and no doubt accurately described by Mexico in the *Oliver* case, in such complete control of the Railways that they could not settle the claim of the claimant Company against the Railways. That contention I consider to be clearly sound and to be sufficient to establish the claimant Government's case.

It is unnecessary to cite legal authority to support the statement that contractual rights are property. *Long Island Water Supply Company v. Brooklyn*, 166 U.S. 685. This Commission has been repeatedly concerned with rights of that nature, as have other international tribunals. The decision in the case of *Company General of the Orinoco* in the French-Venezuelan Arbitration of 1902, *Ralston's Report*, p. 244, is interesting in connection with the instant case. Umpire Plumley held that Venezuelan authorities made impossible a contract of a French concessionnaire to sell its rights to a British company, and that the Government of Venezuela became liable for the value of the concession, since the action on the part of the respondent Government resulted in practically a total loss. In the instant case obviously the Government of Mexico made it impossible for the Railway Company to fulfill its contractual obligations with the Dickson Car Wheel Company. There is no evidence to the contrary. Certainly the loss is not speculative.

I consider that, in view of the conclusion reached in the opinion of my associates, it is not unnatural that the opinion should contain certain statements which fall considerably short of accuracy and some wanting in relevancy. I shall briefly comment on some of these things.

It is stated at the outset that, as shown on page 31 of the American Brief, it was contended on behalf of the United States that Mexico incurred a contractual obligation toward the claimant Company because the Mexican Government was the principal stockholder in the Railway Company. From a reading of the Brief at the point mentioned, it will be seen that the contention there made was that after the taking over of the railroads they lacked "opportunity and capacity" for independent action and that "the Government of Mexico itself stood in the place of the corporation, and the corporation during that period was in fact merely a name". That contention I consider to be absolutely sound.

It is further stated by my associates that the Railway Company continued to receive income from sources distinct from the operation of the lines, and that therefore the argument of the American Agency that the Railway Company had disappeared as a juridical entity is not sound. No reference is made to any source of income which could have been applied to the claimant's debt. I am not aware of any contention made in the record or in oral argument to the effect that the Railway Company disappeared as a juridical entity. The Railway Company explained it could not pay the claimant Company. The reason was that the Government was in complete control; that the Company received no revenue; and that it received no compensation for the use of its property. A judgment against the Company, provided that could have been obtained, would of course have been no more valuable than the contractual obligation, unless such judgment could have been satisfied out of properties of the Railway Company. It is not to

be supposed that property under control of the Government during a so-called emergency could have been attached and sold to satisfy a judgment of a private creditor. As has been pointed out, Mexico contended before the Circuit Court of Appeals in New York that such property could not be attached, and that suit *in personam* could not be maintained against the Railway Company, the Company being the same as the Government in view of government control.

It is said in the opinion of my associates that the Railroads were not taken over by virtue of the right of eminent domain or expropriation, the control of the Government being merely temporary and the Railroads not being deprived of property rights. I am unable to perceive that a company deprived of the use of vast properties for more than a decade is not deprived of property rights. Of course, the appropriation of user, just as the taking of complete title, can properly be accomplished as an act of sovereignty in all civilized countries, including Mexico. I assume that throughout the world, whether user or title is taken, compensation is required, and the sovereign right exercised is the right of expropriation or eminent domain, the two terms being used synonymously. If Mexico takes property in some other way or by some other domestic right, the point is of course immaterial.

The only point of importance is that Mexico did take and control the properties and did prevent the Railways from discharging their obligations to the claimant Company. It further failed to pay compensation for user. It failed to pay estimated damages. It left the Railroads, as a Department of the Mexican Government said, "in a truly terrible condition". It entered into certain agreements with bankers for the disposition of the Railroad Company's revenues in the future. It is scarcely necessary to observe that the remedies of the claimant Company against the Railway Company may properly be described in the language employed by an eminent judge in speaking of obligations that cannot be enforced—"ghosts that are seen in the law but that are illusive to the grasp".

With respect to the *Barrios* case referred to in the opinion written by Mr. Fernández MacGregor, it is interesting to note that the Supreme Court of Mexico declared that the Mexican Government in taking control of the Railways "assumed the representation and obligations of the Company". It is further interesting to observe that the Court said that, if a decision should be rendered for the plaintiff against the Railway Company "the obligations would have to be paid from funds of the National Treasury, where all of the proceeds of the said railroads have been deposited during the period of seizure".

A speculation as to what would have happened had suit been brought in a Mexican Federal Court is of course useless. We do not know whether, in view of the Government's control, the action could have been maintained. But what seems to me to be reasonably certain is that a satisfaction of the judgment out of property employed by the Government in what has been described as an emergency would not have been permitted. Hence in that situation a judgment was no better than the original promise to pay the Dickson Car Wheel Company which the Government prevented the Railways from fulfilling and did not itself fulfil.

Reference is made in the opinion of my associates to the interesting production by Mexico of additional evidence in the form of a letter shortly before the beginning of the oral argument, showing that a claim of some other concern against the Railways had suddenly been settled by partial payment taken in a compromise. This interesting settlement of course had no value

to the claimant Company in the instant case. This case involves the question whether, when the claimant's original cause of action arose, the Government of Mexico prevented the settlement of the claim. I presume the cause of action arose either when the goods were delivered, or more likely, when payment was requested. That the Government prevented payment at that time is to my mind clear. This being the case, it seems to be equally clear that the government is responsible for the destruction of the claimant's property rights.

It appears to me that certain altogether too narrow views of responsibility under international law expressed by my associates in the opinion written by Mr. Fernández MacGregor may be responsible for the failure to find liability in the instant case.

It is said in the opinion that, in order that a government may incur responsibility, it is necessary that there should exist a violation of a duty imposed by some international law standard. It is true that, when conduct on the part of persons concerned with the discharge of governmental functions results in a failure to meet obligations imposed by rules of international law, a nation must bear the responsibility. But, on the other hand, of course there is what has been called a direct responsibility on the part of the nation for acts of representatives or agencies of governments. This evidently is overlooked by my associates. The wrong in this case arose out of the destruction of contractual rights which I have discussed. The loss is the price of the property the claimant sold, or, it might be said, loss of the property or the destruction of the rights growing out of the contract of sale.

A further seemingly strange conclusion expressed in the opinion with respect to responsibility presumably accounts for the somewhat lengthy discussion of questions pertaining to nationality. I do not perceive the slightest degree of relevancy of these matters.

It is said that the problem in the instant case is to determine if a damage caused to a Mexican national and which affects an American national, causing remote damage, constitutes an act violative of the law of nations.

This brief sentence to my mind is a total fallacy. In the first place, the United States has not complained of an injury to a Mexican national. It does not predicate its claim on any such ground. It might indeed be considered that the Mexican national was benefited in that it was not obliged to pay its debts, since the Mexican Government prevented the payment. The damage caused to the American national was not remote. It was a very specific loss directly consequent upon the action of the Mexican Government. The issue is whether acts of Mexican authorities in causing directly an injury, namely, the destruction of property rights, impose responsibility on Mexico. It will readily be seen, therefore, that the elaborate discussion of questions in relation to nationality can have no application to the instant case.

Reference to the *Costello* case, decided by this Commission, seems particularly inapt. In that case the Commission considered questions pertaining to the citizenship of several persons said by the United States to be American citizens, including Timothy J. Costello. The Commission found him to be an American citizen, in spite of the fact that during a certain period the Government of the United States did not consider him to be entitled to protection while resident abroad. The Presiding Commissioner made an observation supplementary to the opinion written for the Commission. He raised a question as to the application of certain cases cited in the opinion. These cases were undoubtedly properly cited to show

the views of certain courts. The Mexican Commissioner concurred in the views of the Presiding Commissioner. I believe that the most casual examination of the decisions cited will reveal the pertinency of the citations. The Mexican Commissioner added an observation with respect to international obligations of Mexico in view of the temporary status of Costello. I am utterly unable to see how the case can have any bearing on the instant case.

I likewise do not perceive the relevancy of the *Cisneros* case which dealt incidentally with the seizure of property of a Spanish subject in Cuba. The question decided was whether a daughter born in New York two years after the seizure could recover indemnity from Spain.

Also I do not perceive the relevancy of the *Bance* case in the Venezuelan-American Arbitration of 1903. The case dealt with certain funds which were involved in bankruptcy proceedings in Venezuela. The Commission declared that a Venezuelan receiver, who appeared as claimant to recover a credit in behalf of an American concern, acted only as administrator of the property of the bankrupt party, and that it was not possible to consider any individual credits from the total estate as the property of any one creditor. *Ralston's Report*, p. 172.

Possibly Mr. Fernández MacGregor had in mind, in making general reference to cases found in *Moore's Arbitrations*, the case of *Mora and Arango*. The decision mentioned there appears to lend some support to the conclusions of my colleagues. The case is very meagrely reported, and it seems to me that the soundness of the decision may be questioned. In any event, it involved the seizure of property and not a complete management of property such as we are concerned with in the instant case, involving of course questions as to proper treatment of business obligations. With reference to this point, I may observe that it seems to me unreasonable to suppose that the Mexican Government, after taking over the railroads, would have failed to pay salaries of employees earned in part, but coming due after, the assumption of control.

A brief generality such as that quoted in the opinion of my associates from Mr. Sutherland's work on damages may easily be misleading. The meagre language quoted may appear to lend support to the conclusion of my associates in the absence of further specific statements of the author illustrating what he had in mind. The remote character of the damages with which Mr. Sutherland deals may be illustrated by quoting the first case he cites following the quotation in the opinion written by Mr. Fernández MacGregor. Mr. Sutherland says:

"A., who had agreed with a town to support for a specific time and for a fixed sum all the town paupers, in sickness and in health, was held to have no cause of action against S. for assaulting and beating one of the paupers, whereby A. was put to increased expense."

It may further be observed, as has already been pointed out, that, entirely irrespective of the question whether the Government treated the Mexican National Railways kindly or ruthlessly, it did destroy the claimant's contractual property rights by preventing payment for the material which was sold to the Railways.

In the opinion of Umpire Parker in the so-called *Insurance* cases, decided under the Agreement to settle claims growing out of the World War, concluded between the United States and Germany on August 10, 1922, a statement may be found which may also appear to give some support to the conclusion of my associates. In addition to the quotations appearing

in their opinion it may, however, also be worth while to take note of the Umpire's observations to the effect that an insurance company, in issuing a policy without expressly excluding any risk, must have been impelled "to take into account every possible risk", including such as developed in these cases.

I cannot agree with the very general statements in the opinion of my associates with respect to the seizure or destruction of property in emergencies without compensation to owners. Nor do I see any relevancy to a reference to a moratorium, since none existed.

It would seem to be reasonable to suppose that long before the period of complete control of the Railroads ceased, the statute of limitation ran against the debt of the claimant company. Of course if control impeded action against the railroad company, as Mexico contended in the case of the *Oliver Trading Company* that it did, it may be that the statute could not be pleaded in defense, even if the railroad company desired to plead it. But in the instant case Mexico alleges that control did not interfere with remedies against the company.

Reference is made in the opinion of my associates to the form in which suit might be instituted in a case in which a cause of action arose prior to government control of the railroads in the United States during the World War. The action taken by the Government of the United States to meet obligations incurred by the railroads prior to government control, and obligations arising subsequent to control, is of some interest in considering the issues involved in the instant case. This is so because legislation, and proclamations issued pursuant to such legislation, were presumably framed with a view to the requirements of constitutional guarantees with respect to the protection of property rights, guarantees such as are found not only in the Constitution of the United States, but in the Constitution of Mexico, and in domestic law throughout the world, and, in my opinion, are secured by international law.

Provision was made for the payment by the Railway Administration of accounts accruing prior to control and of accounts subsequent to control. Provision was made for suits in which causes of action arose prior to control and for suits in which causes of action arose during control. The physical property under the management of the Government was, however, immune from levy. *Missouri Pacific Railroad Company, et al., v. Ault*, 256 U.S. 554; *United States Railroad Administration, Director General of Railroads, Bulletin No. 4 (revised)*, p. 64 *et seq.* Accounts were kept so that obligations arising prior to control were chargeable to the railroads, and those arising during the period of control were chargeable to the government. Under this system it was of course proper, and doubtless necessary, that a suit on a cause of action arising prior to control should be filed against the railroad company against which the cause of action arose in a given case. The properties of many hundreds of companies were under control. Payment was made by the government for the use of the railroads.

Action carefully taken to adjust claims in tort or claims in contract prior to control or after control is, of course, something very different from action preventing the payment of claims. It is the latter kind of action upon which the United States bases its claim in the instant case. The system of bookkeeping employed for purposes of a final accounting with the railroads with respect to railroad obligations and government obligations has no bearing on this point.

I consider that a clear injustice has been done to the claimant in the instant case.

I consider it to be important to mention an interesting point that has arisen since the instant case was argued. Rule XI, 1, provides:

"The award or any other judicial decision of the Commission in respect of each claim shall be rendered at a public sitting of the Commission."

The other two Commissioners have signed the "Decision" in this case. However, no meeting of the Commission was ever called by the Presiding Commissioner to render a decision in the case, and there has never been any compliance with the proper rule above quoted.

INTERNATIONAL FISHERIES COMPANY (U.S.A.) *v.* UNITED MEXICAN STATES

(*July —, 1931, concurring opinion by Presiding Commissioner, July —, 1931, dissenting opinion by American Commissioner, undated. Pages 206-286.*)

JURISDICTION.—CONTRACT CLAIMS.—CALVO CLAUSE. Claimant, an American corporation, as stockholder of a Mexican corporation, presented a claim for nine hundred and eighty-five thousandths of \$4,500,000.00, plus interest, said sum being alleged to be the value of a contract or concession held by the latter corporation with the Mexican Government. The concession was cancelled by the appropriate department of the Mexican Government on the ground of non-performance of the terms of the contract within the time stipulated. Said contract or concession contained a Calvo clause. Claim *disallowed* for lack of jurisdiction pursuant to decision in *North American Dredging Company of Texas claim supra*.

Cross-reference : Annual Digest, 1931-1932, p. 273.

Fernández MacGregor Commissioner:

This claim has been presented by the United States of America on behalf of a North American corporation known as the International Fisheries Company, which asserts that it has suffered damages as a result of the cancellation by the Government of Mexico of a contract or concession which it had granted to a Mexican Company called "La Pescadora, S.A." wherein the claimant possessed a considerable number of shares, for which reason it asks for an indemnity equal to nine hundred and eighty-five thousandths of the sum of \$4,500,000.00, which according to it, was the value of the cancelled contract or concession, plus interest.

There have been presented in the instant claim many very important points of law the study of which requires extreme care. But many of them can be set aside if it is true as contended by the Mexican Agency, that this Commission is without jurisdiction to hear the claim in question by reason of the contract-concession, which is said to have been annulled by the Government of Mexico, having a clause wherein the persons obtaining the concession agreed to submit themselves absolutely to the Mexican Courts in everything pertaining to the interpretation and fulfilment of the contract,

the concessionaires and their legal successors, in the event of their being foreigners, being unable with respect to the said interpretation or fulfilment of the concession, to invoke the protection of their Government.

In other words, there is submitted for the consideration of this Commission a contract containing a clause of a nature which has generally been classified as the Calvo Clause, a situation in which this same General Claims Commission found itself when it decided the claim of the *North American Dredging Company of Texas*, docket No. 1223.

It is necessary, then, before entering into a consideration of the other points of law in the claim to decide this point, inasmuch as if it really appears that the instant case is similar to that of the *North American Dredging Company of Texas*, the incompetency of this Commission to determine the matter will be clear and will result in its not having to occupy itself with the other juridical problems involved in the claim.

The American Agency has made strenuous efforts to induce the new members of this Commission to revoke the jurisprudence established by the decision of their predecessors rendered in the case of the *North American Dredging Company of Texas*. This decision was attacked at the time of its issuance by the same American Agency through a protest and a petition for its reconsideration, notwithstanding that Article VIII of the Convention of September 8, 1923, reads that "The High Contracting Parties agree to consider the decision of the Commission as final and conclusive upon each claim decided, and to give full effect to such decisions". It was not, therefore, strange that the opportunity presenting itself to deal with the same point of the validity of the Calvo clause in another claim, it should again discuss the matter fully.

After a full and careful examination, however, of the arguments of the American Agency, I am obliged to state that the opinion which I formed, also after mature deliberation, in the case of the *North American Dredging Company of Texas*, is not altered as to any of its points. The American Agency again expressed all the arguments submitted on the previous occasion, without the addition of new ones of any nature. Then, as now, there existed decisions of arbitral tribunals upholding each view, and the situation can be summed up in the words of Mr. Woolsey, a distinguished writer on International Law, who, commenting precisely upon the decision rendered in the case of the *North American Dredging Company of Texas*, said the following: "The Calvo clause has had an unusual history before claims commissions. In eight cases the validity of the clause, thus barring an international claim, has been upheld: in eleven cases, its efficacy to bar the jurisdiction of a claims commission has been denied, the tribunal dealing with the clause much as the common law courts did with a contractual stipulation for private arbitration, into which they read an unlawful effort to oust the courts of jurisdiction. (Authors note: For convenience, I refer to the analysis of the cases on the Calvo clause in Borchard, *Diplomatic Protection of Citizens Abroad*, pp. 800-810)". Taken from *The American Journal of International Law*, July 1926, Vol. 20, No. 4, p. 536.

This summary of the status of the question must now be modified, since to the number of decisions cited by Mr. Woolsey affirming the validity of the Calvo clause, there must be added the case of the *North American Dredging Company of Texas*, rendered by this Commission, and the one rendered by the Claims Commission between Mexico and Great Britain in the case of the *Mexican Union Railway Ltd.*, claim No. 36, wherein the validity of that clause was also affirmed.

It is proper to remark that with respect to the point under consideration, it is immaterial to know whether or not the application of the doctrine sustained in the case of the North American Dredging Company to the case decided by the British Mexican Commission was legitimate; it is sufficient to observe that the three Commissioners agreed to accept it as an applicable standard.

There are other circumstances favorable to the contention that the Calvo clause has already been accepted by the usage of nations. Both Agencies made reference to the research work conducted by the League of Nations with relation to the international law codification of the matter under discussion. The question submitted by the League of Nations to the chancelleries of the world was the following: What are the conditions which must be fulfilled when the individual concerned has contracted not to have recourse to the diplomatic remedy? Both Agencies agreed that the Government of Great Britain replied that His Majesty's Government accepted as good law and was contented to be guided by the decision of the Claims Commission between Mexico and the United States of America in the case of the *North American Dredging Company of Texas*, adding that it was laid down in that opinion that a stipulation in a contract which purports to bind the claimant not to apply to his Government to intervene diplomatically or otherwise in the event of a denial or delay of justice or in the event of any violation of the rules or principles of international law is void, and that any stipulation which purports to bind the claimant's Government not to intervene in respect of violations of international law is void; but that no rule of international law prevents the inclusion of a stipulation in a contract between a Government and an alien that in all matters pertaining to the contract the jurisdiction of the local tribunals shall be complete and exclusive, nor does it prevent such a stipulation being obligatory, in the absence of any special agreement to the contrary between the two Governments concerned, upon any international tribunal to which may be submitted a claim arising out of the contract in which the stipulation was inserted.

Without expressing an opinion upon the admissibility of the restriction made by Great Britain in referring to a special agreement between the Governments concerned to submit a claim arising from a contract containing the Calvo clause, to a particular international tribunal, it must be borne in mind that there is not before this Commission any special agreement of such nature. The point as to what claims fall within the jurisdiction of this Commission was discussed in the case of the *North American Dredging Company*, and reference is made to the pertinent part of the decision in that case for further light thereon.

With respect to the research work conducted by the League of Nations it may be observed that not all of the replies received from 19 States were unfavorable to the contention of the validity of the Calvo clause. The replies submitted by Germany, Australia, Bulgaria, Denmark, Great Britain, Hungary, Norway, New Zealand and the Netherlands, are in practical accord with the opinion expressed in the decision of the *North American Dredging Company of Texas*.

A study of basis of discussion No. 26, drawn up by the Committee for the Codification Conference, shows this similarity in points of view more clearly. The said Committee prepared the bases which it submitted, according to its own words, in the following manner:

"These bases of discussion are not in any way proposals put forward by the Committee. They are the result of the Committee's examination of the Government replies and a classification of the views expressed therein" (Vol. III page 7 of the work published by the League of Nations.)

Basis No. 26 reads:

"An undertaking by a party to a contract that he will not have recourse to the diplomatic remedy does not bind the State whose national he is and does not release the State with which the contract is made from its international responsibility.

"If in a contract a foreigner makes a valid agreement that the local courts shall alone have jurisdiction, this provision is binding upon any international tribunal to which a claim under the contract is submitted; the State can then only be responsible for damage suffered by the foreigner in the cases contemplated in Bases of Discussion Nos. 5 and 6." (*Op. cit.*, p. 135).

The last named bases refer only to what is properly called denial of justice in its most restricted acceptance, as may be seen from their provisions:

"Basis of Discussion No. 5.

A State is responsible for damage suffered by a foreigner as the result of the fact that:

1. He is refused access to the courts to defend his rights.
2. A judicial decision which is final and without appeal is incompatible with the treaty obligations or other international obligations of the State.
3. There has been unconscionable delay on the part of the courts.
4. The substance of a judicial decision has manifestly been prompted by ill-will toward foreigners as such or as subjects of a particular State." (*Op. cit.*, p. 43.)

"Basis of Discussion No. 6.

A State is responsible for damage suffered by a foreigner as the result of the courts following a procedure and rendering a judgment vitiated by faults so gross as to indicate that they did not offer the guarantees indispensable for the proper administration of justice." (*Op. cit.*, p. 851.)

It will be seen by the foregoing that such an authoritative international body as the Committee of the League of Nations, after presenting it to the principal States of the world, establishes a doctrine which can be reconciled in all of its parts to that laid down by this Commission in the decision of the case of the *North American Dredging Company of Texas*.

With respect to the opinion of the Spanish-American nations in this particular it is necessary to bear in mind that they have all maintained the validity of the Calvo clause and have continued to insert it into all contracts and concessions granted to foreigners, an unquestionable fact which demonstrates that their silence with regard to the inquiry of the League, cannot be construed as being adverse to the validity of the so often cited Calvo clause.

In my opinion then, the instant case must be determined in accordance with the doctrine established in the decision of the *North American Dredging Company of Texas* case.

In that decision, the Commission stated that it was impossible for it to announce an all-embracing formula to determine the validity or invalidity of all clauses partaking of the nature of the Calvo clause, and that each case of this nature must therefore be discussed separately.

Firstly, then, a study should be made of the clause which is in question in this case in order to determine exactly its meaning and extent.

Article 32 of the contract-concession of March 10, 1909 entered into between the Department of Fomento of the Mexican Republic and the company called "La Pescadora, S.A.", reads as follows:

"The Concessionary Company or whosoever shall succeed it in its rights, even though all or some of its members may be aliens, shall be subject to the jurisdiction of the courts of the Republic in all matters the cause and action of which take place within its territory. It shall never claim, with respect to matters connected with this contract, any rights as an alien, under any form whatsoever, and shall enjoy only the rights and the measures for enforcing them that the laws of the Republic afford to Mexicans, foreign diplomatic agents being unable therefore, to intervene in any manner with relation to the said matters."

The said article unquestionably contains, in its two grammatically separate paragraphs, two distinct stipulations, although closely related. The first part reads: "The Concessionary Company or *whosoever shall succeed it in its rights*, even though all or any of its members may be aliens, shall be subject to the courts of the Republic, in all matters the cause and action of which take place within its territory". This part contains nothing but the general principle of International Law that all aliens are subject to the jurisdiction of the country in which they reside and must therefore abide by all laws and decrees of the lawful authorities of the country. No stipulation can be found in this part of Article 32, contrary in the slightest degree to any principle of international law.

The second part of Article 32 reads:

"It shall never claim, with respect to matters connected with this contract, any rights as an alien, under any form whatsoever, and shall enjoy only the rights and the measures for enforcing them that the laws of the Republic afford to Mexicans, foreign diplomatic agents being unable therefore, to intervene in any manner with relation to the said matters."

The first requirement, in order to construe this second part, is to find the subject to which the prohibitions contained therein, apply. The solution is furnished by the first part of Article 32 which fixes and determines the subject or subjects to which the standards must be applied, to the first part as well as to the second which is being discussed. This, then, is the "Concessionary Company or whosoever shall succeed it in its rights, even though all or any of its members may be aliens". These are the persons who shall not claim, *with respect to matters connected with the contract-concession* in question, any rights as aliens, under any form whatsoever; the ones who shall enjoy only the rights and the measures for enforcing them that the Mexican Republic affords to Mexicans themselves; and on behalf of whom foreign diplomatic agents under whose protection they may be (the Concessionary Company or the successors of its rights) are unable to intervene in matters relating to the contract-concession.

The language of this second part of Article 32 is perfectly clear; it does not require interpretation of any nature. It is clearly for the purpose of establishing that the persons who derived rights from the contract-concession of March 10, 1909, shall not bring into question matters with respect to that contract except in the courts of Mexico and conformably to Mexican law, diplomatic intervention, on the other hand, being prohibited with respect thereto.

The contractual provision under examination does not attempt in any manner to impede or to prevent absolutely all diplomatic intervention, but tends to avoid it solely in *those matters arising from the contract* itself,

with its fulfilment and interpretation. It certainly comes, therefore, within the doctrine laid down in the decision rendered in the case of the North American Dredging Company of Texas; this may be seen more clearly by a comparison of Article 32 with the article containing the Calvo clause which was the subject of examination in the case of the *North American Dredging Company of Texas*.

That clause reads:

"Article 18. The contractor and all persons who, as employees or in any other capacity, may be engaged in the execution of the work under this contract either directly or indirectly, shall be considered as Mexicans in all matters, within the Republic of Mexico, concerning the execution of such work and the fulfilment of this contract. They shall not claim, nor shall they have, with regard to the interests and the business connected with this contract, any other rights or means to enforce the same than those granted by the laws of the Republic to Mexicans, nor shall they enjoy any other rights than those established in favor of Mexicans. They are consequently deprived of any rights as aliens, and under no conditions shall the intervention of foreign diplomatic agents be permitted, in any matter related to this contract."

The clause just quoted appears to cover much more ground than does the one now under consideration; therefore the argument holds with greater force, for if the clause contained in the contract of the *North American Dredging Company* was declared valid and perfectly in accord with the principles of international law notwithstanding its apparent latitude, the clause contained in Article 32 of the contract-concession in which the International Fisheries Company is interested and which is more limited, contains nothing contradictory of the Law of Nations.

The American Agency has sustained that in the instant case the stipulation contained in Article 32 lacks effect with respect to the claimant company because that stipulation was accepted solely by the concessionary company of the fishing rights in question, which was a Mexican company called "La Pescadora, S.A." The Agency claims in this regard that the International Fisheries Company is only the possessor of a certain number of shares in "La Pescadora" and that it cannot be said therefore that the first named company has relinquished in any manner diplomatic intervention in matters relating to the contract-concession.

It is necessary, in this connection, to recall that paragraph 22 of the opinion in the case of the *North American Dredging Company of Texas*, established that in order for a clause of this nature to prosper, it must be applied only to claims based on express contractual provisions in writing and signed by the claimant or by some person through whom the claimant derives title to the particular claim.

Now "La Pescadora S.A." was, as its name indicates, a stock company organized in accordance with Mexican law. But in accord with the present theory with respect to stock companies, I do not believe it to be debatable that the holder of shares of stock therein is in the last analysis the beneficiary of a fixed part of the rights of the company, with the limitation that they cannot be exercised directly at any time except through the procedure and in the words established by the company's constitution and by-laws. This being the case it is clear that the stockholder not only *derives*, but directly has, (subject to the aforementioned limitation) all the rights accruing to him as a stockholder therein. By virtue thereof, it must be recognized that the International Fisheries Company, a stockholder of the Mexican fishing company which owned the contract-concession of March 10, 1909,

had the same rights and obligations which are derived from the contract-concession granted to the "Pescadora S. A." itself, with the limitation that the exercise thereof appertained to the appropriate company authorities.

The "Pescadora S.A." was organized for the purpose, among others, according to Article 1 of its charter, to acquire, possess, administer, operate, sell and otherwise dispose of the following industries:

"(a) Concessions and other Government titles, rights, privileges and exemptions"

In accordance with that Article, "La Pescadora S.A." acquired the contract-concession of March 10, 1909, the operation of which was to be conducted conformably to the bases stipulated therein. On the other hand, a stockholder of a Mexican stock company who acquires a share therein, approves all of the acts executed by the Board of Directors, and consequently, by the Company in the general meetings which must take place at least once a year. (Code of Commerce, Art. 202.)

Now the International Fisheries Company had acquired the stock, which it states it had, from "La Pescadora S.A." at a time prior to the acquisition by the second company of the contract-concession made with the Mexican Government on March 10, 1909, and certainly approved such acquisition together with all of its obligations in the meeting in which this matter was submitted. It must further be borne in mind that the International Fisheries Company had, according to the evidence, at that time 985 parts of all the stock, or almost the total amount, from which it is clear that it planned, negotiated and really carried out on its own behalf, through the medium of "La Pescadora S.A." the contract-concession with the Mexican Government, in the full knowledge of the stipulation required by this Government in Article 32. It appears, from all of these reasons, that the contention is not acceptable that the International Fisheries Company must not be considered as deriving rights from the very contract-concession in question. This is seen with greater force in the fact that the International Fisheries Company in order to present itself before this Commission as a claimant, maintained the theory that it was the real party in interest, alleging that it was the party truly injured by the cancellation decreed by the Mexican Government; and it is not seen how it could have suffered the injury of which it complains had it not, through "La Pescadora S.A.", which was its instrument, enjoyed the privileges given by the same concession. So that the instant stipulation of Article 32 must be effective with respect to the International Fisheries Company.

Incidentally it may be remarked that, with respect to the manner in which the International Fisheries Company acquired the stock of "La Pescadora S.A.", the evidence in support thereof produces such confusion that an examination into the very heart of the matter, would not dissipate it. For instance, the affidavit executed by Félix James and Juan José Bárcenas, who are respectively President Director and Secretary Director of "La Pescadora S.A." states that on August 5, 1908, 975 shares of stock in the said company were issued to Aurelio Sandoval, by certificate number 1, and that the said Aurelio immediately transferred the said 975 shares to the International Fisheries Company by assignment duly executed on the reverse of the said certificate; for which reason the International Fisheries Company immediately became, and has continued to be from that time, the owner of those 975 shares. Now the articles of incorporation of the International Fisheries Company leave no room for doubt that the said

company was not organized until the 1st day of November 1908, for which reason it cannot be understood how that same company, which *did not exist on August 5, 1908*, could legally acquire an interest in the form of stock in the company "La Pescadora S.A."

The American Agency further maintains that the instant case is not one of a claim based upon non-compliance of a contract on the part of the Mexican Government, but of a claim based upon a denial of justice as the result of an act of the Government of Mexico in decreeing the cancellation of a contract. It cites with respect to this allegation the following words of the decision rendered in the case of the *North American Dredging Company of Texas* in determining what the clause then in question took or did not take away from the contractor with relation to diplomatic intervention:

"It did not take from him (the claimant) his undoubted right to apply to his own Government for protection if his resort to the Mexican tribunals or other authorities available to him resulted in a denial or delay of justice as that term is used in international law." (Paragraph 14) "What, therefore, are the rights which claimant waived and those which he did not waive in subscribing to Article 18 of the contract? (b) He did not waive any right which he possessed as an American citizen as to any matter not connected with the fulfillment, execution, or enforcement of this contract as such.

"(c) He did not waive his undoubted right as an American citizen to apply to his Government for protection against the violation of international law (internationally illegal acts) whether growing out of this contract or out of other situations." (Par. 15, Opinions of Commissioners, Convention of September 8, 1923, between Mexico and the United States, pages 27 and 28.)

In order to weigh this argument, it is necessary to mention briefly the facts of the case pertinent to this point.

The Mexican Government decreed administratively the cancellation of the contract-concession dated March 10, 1909, basing its action on Article 35 which reads:

"Cancellation will be by administrative decree, a reasonable time being granted to the concessionary company to prepare its defense."

The causes of cancellation are set forth in Article 34 of the same contract among which are the following:

"Article 34.—This contract will be cancelled: X. Through failure to establish the canning factories within the time and according to the conditions fixed by Article 11.

"XII. Though failure to establish the shops referred to in Article 21."

"Article 11. Within a period of two years counting from the date of the publication of this contract, the concessionary company agrees to establish, for the utilization of the fisheries products, at least three canning factories for food products to be packed in sealed receptacles, the said factories to be erected in the places deemed desirable within the zones of operation, it having the right, upon the authorization of the Department of Fomento, to occupy *gratis* for that purpose, during the life of the contract, the necessary national unsurveyed lands, with the understanding that in all cases the factories will be established under such conditions as not to be detrimental to the health of the communities. Upon the expiration of the two years mentioned in this article, the concessionary company may establish such canning factories as it deems desirable to its interests provided always that it be done within the period of the contract.

"Article 21. The concessionary company binds itself to establish within the two years following the date of the publication of this contract, at least one

shop for the disposal of the fisheries products in each one of the towns of Mexico, Puebla and Guadalajara, which shops shall be sufficiently supplied to meet the requirements of the public."

As can be seen, the establishment of the factories and of the shops for the sale of the products of the "Pescadora S. A.", was considered by the parties to be of such importance, that they specifically agreed that the failure to establish them within the time limits plainly fixed, would be cause for the cancellation of the contract. Now the appropriate Department of Mexican Government deemed, according to the evidence submitted, that the concessionary company had not fulfilled those obligations imposed upon it by the concession-contract, and by reason thereof, under the authority given to it by Article 35, it declared the cancellation of the concession.

The question, therefore, which arose between the Company and the Mexican Government, was that of ascertaining whether or not the concessionary had become liable to the cancellation provided for in Article 34, and this question must necessarily be considered as included within what this Commission understood by fulfilment or interpretation of the contract containing a Calvo clause, when it decided the case of the *North American Dredging Company of Texas*. The cancellation in question, in the case which must now be decided, was not an arbitrary act, a violation of a duty abhorrent to the contract and which in itself might be considered as a violation of some rule or principle of international law, requisites to be established in order that the Commission might take jurisdiction, notwithstanding the existence of a clause partaking of the nature of the Calvo clause in a contract subscribed by a claimant. (Par. 23 of the decision cited.)

Even treating of claims arising from a contract wherein there is no clause providing that the alien contracting party renounce the protection of his Government for the purposes of that same contract, there is no ground for an international claim if the annulment of the contract has been made in accordance with its express terms. The rule upon this point has been expressed in a note dated July 25, 1860, from Mr. Cass, Secretary of State, to Mr. Lamar, United States Minister to Central America:

"What the United States demand is, that in all cases where their citizens have entered into contracts with the proper Nicaraguan authorities, and questions have arisen, or shall arise, respecting the fidelity of their execution, no declaration of forfeiture, either past or to come, shall possess any binding force *unless pronounced in conformity with the provisions of the contract, if there are any*, or if there is no provision for that purpose, then unless there has been a fair and impartial investigation in such a manner as to satisfy the United States that the proceeding has been just and that the decision ought to be submitted to." Moore's *Digest*, VI, 723-724.)

Mr. Borchard in making this very citation says that the rule in the cases in question has probably been best expressed in this note of Mr. Cass.

In the instant case there were clearly stipulations respecting the declaration of cancellation, owing to reasons invoked by the Government, and it was provided that that cancellation could be declared administratively by the Government itself.

However, this administrative declaration was not in any way final, since in conformity with Article 32, the company, if not in agreement with the decision of the Government, had the right to appeal to the Mexican courts for justice, as the Government of Mexico, can, as a general rule, be sued in its own Federal tribunals, as was made known by the Mexican Agency, and,

above all, since the contract itself contained a stipulation that all questions relating thereto were to be submitted to that jurisdiction.

The declaration of cancellation in question is quite distinct from a decree of nullification as Counsel for Mexico stated during the hearing. It may be said that a declaration of cancellation similar to the one made in this case by the Mexican Government is nothing more than the use of the right which every party to a contract has of ceasing to comply therewith when the other party thereto fails in his obligations. It is a plain and simple notice given by the Government to the concessionary company that as the latter had not fulfilled its obligations to erect factories and establish shops, it (the Government) considers itself authorized not to continue fulfilling its own obligations. This is the situation which is always being aired by private parties before courts having jurisdiction, and no reason is seen why the same fact, for the sole reason that one of the parties to the contract is a government, can constitute an international delinquency.

If every non-fulfilment of a contract on the part of a government were to create at once the presumption of an arbitrary act, which should therefore be avoided, governments would be in a worse situation than that of any private person, a party to any contract. The latter could cease to fulfill his contractual obligations when he believed that his co-contractor had first violated the contract, in the expectation of being sued by him in the courts if he was not satisfied. In that case he assumes the role of defendant, which is the more advantageous position in a suit.

But according to the contention of the American Agency, Mexico could not cancel the contract for non-fulfilment on the part of "La Pescadora S. A.", without first having had recourse to the courts; which means that it would always have to continue fulfilling the contract and to assume the difficult role of plaintiff, never enjoying the advantage that a private person would have under the same circumstances.

In the instant case the Government made use therefore of a right given to it by the contract, and so any question as to the grounds which the Government of Mexico had for acting in that sense or as to the interpretation of the clause of the contract upon which it based its reason for acting in that manner, were the matters specially provided for by Article 32 of the contract-concession respecting which diplomatic agents could not intervene.

It is worthy of note that in this case as in that of the *North American Dredging Company*, the American Agency maintained that the question was not one of non-fulfilment of contract, but one of international delinquency incurred directly by the State, of a denial of justice, of a wrongful act, and thus the Memorial of said claim spoke of interruptions to the work owing to *arbitrary orders* given by Mexican Government officials, of the *wrongful detention* of a dredge and its accessories, and of two launches which were a total loss. Notwithstanding the aspect given to them by the American Agency, the facts were held by this Commission to be matters relating to the contract to which the North American Dredging Company of Texas was a party.

The American Agency has said that the claimant could not have resorted, even if it had desired to do so, to the Mexican courts, inasmuch as at the time when the cancellation was decreed, the Mexican courts were not open to the administration of justice. The Mexican Agency has made known in this regard, that from the year 1917, until the date of the filing of this claim, six years passed, during which Mexican courts were open to the administration of justice, continuing in the same manner from the date

of the filing of the claim until the present. This line of argument, therefore, cannot be considered, inasmuch as a similar one was made in the case of the *North American Dredging Company of Texas*, and disallowed by the Commission in paragraph 18 of the decision in the following words:

"While its behavior during the spring and summer of 1914, the latter part of the Huerta administration, may be in part explained by the unhappy conditions of friction then existing between the two countries in connection with the military occupation of Veracruz by the United States, this explanation can not be extended from the year 1917 to the date of the filing of its claim before this Commission, during all of which time it has ignored the open doors of Mexican tribunals...."

The same conclusion which is reached by the employment of the foregoing reasons is also reached by the employment of another line of argument.

This claim has been filed on behalf of the International Fisheries Company, by reason of the stipulation of Article I of the Convention of September 8, 1923, which says that among the claims which this Commission must decide are the claims of "citizens of either country by reason of losses or damages suffered by any corporation, company, association or partnership in which such citizens have or have had a substantial and bona fide interest, provided an allotment to the claimant by the corporation, company, association or partnership of his proportion of the loss or damage suffered is presented by the claimant to the Commission hereinafter referred to...."

In order to resolve the point of jurisdiction which is being examined, it is not necessary to know whether or not the allotment in question in this case is properly made. That allotment may be considered for the moment as in existence. But in a case of this nature it is not sufficient that the Company, a national of the respondent country has suffered a loss of any kind, and that it has made to the claimant of another country a proportionate allotment thereof; that would not be a cause for international action. It is necessary that the loss which the national entity of the respondent country has suffered be one of the kind which gives rise or ground to an international claim in the supposition that that entity were an alien and therefore had the right to make claim. States according to a thoroughly established rule of international law, are responsible only for those injuries which are inflicted through an act which violates some principle of international law.

In the instant case, therefore, it is necessary to study not only whether "La Pescadora S. A." suffered a loss wherein the International Fisheries Company might have had a proportionate part, but also whether that loss suffered by "La Pescadora S. A.", is of such nature that if the said "La Pescadora S. A." were a North American national it would give to it the right to formulate an international claim.

Now the loss suffered by "La Pescadora S. A.", is the result of an act executed by the Mexican Government in decreeing the cancellation of the contract-concession of March 10, 1909. But as it has already been established that by reason of Article 32 of that contract-concession "La Pescadora S. A.", could not have made claim, even though it had been an alien, it is clear that the International Fisheries Company is likewise prevented from making claim, because the act of the Mexican Government which caused the loss wherein the International Fisheries Company has a part, is not an act involving international delinquency of any kind.

The instant case is included in the principles fixed by the Commission in the decision of the case of the *North American Dredging Company*, and

is not therefore within the jurisdiction of the Commission, it being disallowed, without prejudice to the claimant to seek whatever legal remedies he may have elsewhere.

Dr. H. F. Alfaro, Presiding Commissioner:

I am in accord with the opinion of the Mexican Commissioner, Lic. Fernández MacGregor.

Notwithstanding the extensive discussion by the American Agency of the important question of the validity of the so-called Calvo clause, I do not find any ground for modifying or revoking the doctrine established by this Commission in the matter of the North American Dredging Company of Texas. That decision has received the approval of the highest authorities on international law and constitutes an appreciable contribution to the progress of this science. The decision in question was of material assistance in clarifying the opinions previously expressed on the validity or invalidity of the said clause.

The decision mentioned, establishes therefore a just and reasonable middle ground. It protects, in a measure, the defendant State, preserving at the same time the rights of the claimant in the event of a denial of justice or international delinquency.

The clause in question, as understood by this Commission in the decision cited is not violative of any canon of international law and appears simply to enunciate that which independently of the clause is the rule of international law in the premises.

In this sense modern writers like Mr. Edwin M. Borchard state:

"The weight of authority supports the view that the mere stipulation to submit disputes to local courts is confirmatory of the general rule of international law and will be so construed by the national government of concessionaries". (Borchard, *The Diplomatic Protection of Citizens Abroad*. p. 809.)

This principle has been incorporated into several Pan American conventions and into treaties between European and Latin American States as well as into the laws and constitutions of the latter. (See, for example, Articles 1 and 2 of the Convention upon Rights of Foreigners, subscribed in the second Pan American Conference, in Mexico, 1901-2 and the treaties between the republics of Latin America and Europe, which are contained in Marten's *Recueil des Traités*, Vol 59, p. 474; Vol. 63, p. 690; Vol. 65, p. 843 *et seq.*) The United States, on its part, has declared, in general, its adhesion to it. The Department of State has frequently had occasion to assert it, one of the best expositions of the rule being, perhaps, the one made by Secretary of State McLane in 1834 in these words:

"Although a government is bound to protect its citizens, and see that their injuries are redressed, where justice is plainly refused them by a foreign nation, yet this obligation always presupposes a resort, in the first instance, to the ordinary means of defense, or reparation, which are afforded by the laws of the country in which their rights are infringed, to which laws they have voluntarily subjected themselves, by entering within the sphere of their operation, and by which they must consent to abide. It would be an unreasonable and oppressive burden upon the intercourse between nations, that they should be compelled to investigate and determine, in the first instance, every personal offense, committed by the citizens of the one against those of the other." (*Mr. McLane, Secretary of State to Mr. Shain*, May 28, 1834, Moore's *Digest*, VI, 259.)

I do not find that the property rights of the International Fisheries Company to the 985 shares of stock which the "La Pescadora" Company is said to possess, have been duly established. The evidence submitted is deficient and in some respects contradictory. But admitting the ownership asserted by the claimant, I am of the opinion that he is bound by clause 32 of the Concession Contract of the "La Pescadora" Company.

Decision

The Commission decides that the claim of the International Fisheries Company does not come within its jurisdiction and therefore disallows it without prejudice to the right of the claimant to employ such other legal remedies as it may have elsewhere.

Commissioner Nielsen, dissenting.

Claim in the amount of \$4,500,000 with interest is made in this case by the United States of America against the United Mexican States in behalf of the International Fisheries Company, an American corporation. The claim is predicated on allegations with respect to the wrongful cancellation of a concession granted by the Government of Mexico to a Mexican corporation known as "La Pescadora, S.A.", in which the claimant possessed a beneficial interest as the owner of practically all of the stock. Conformably to provisions of Article I of the Convention of September 8, 1923, the claimant presented an allotment from the Mexican corporation covering 985/1000 of the loss suffered by reason of the cancellation of its concession.

The respondent government invoked in a plea to the jurisdiction the decision of this Commission in the case of the *North American Dredging Company of Texas, Opinions of Commissioners, 1927*, p. 21. In behalf of the claimant Government it was argued that the decision, irrespective of its correctness, which the United States did not concede, did not sustain the Mexican Government's contentions with respect to the bearing on the instant case of what the Commission held in the case of the *North American Dredging Company of Texas*. On the decision rendered in that case, my associates ground their decision in the instant case, and they reject the contentions of the United States that by the language of the opinion in that case the instant case is excluded from the operation of the decision in the former.

From some of the things said in the two opinions written in the dredging company case, particularly from the opinion written by the American Commissioner, it appears that the claim was rejected because claimant had not resorted to remedies afforded by Mexican tribunals. Counsel for the United States contended that the decision could have no bearing on the instant case, because, among other things, there were no judicial remedies open to "La Pescadora". The company's concession was cancelled by a Mexican military leader who undertook to combine in himself the exercise of military, executive, legislative and judicial power, and indeed no Federal courts functioned when General Carranza cancelled the company's concession. The only remedy open to the company was resort to the man who cancelled its concession. Clearly there was no remedy. The contentions of counsel I therefore consider to be obviously sound.

However, I was not a member of the Commission when the opinion in the *North American Dredging Company* case was rendered. I am constrained

to say that the opinion contains nothing of any consequence with which I agree. And therefore, since the opinion in the instant case is grounded upon the decision in the prior case, I must, in order to explain my views, indicate what I conceive to be the utter lack of any basis in law for any conclusion submitted in the former opinion.

The Commission's misconception of fundamental principles of law

I consider that the Commission construed the language of the contractual provisions involved in that case in such a way as to give them a meaning entirely different from that which their language clearly reveals—a meaning not even contended for by Mexico. In order to do that the Commission resorted to both elimination, substitution and rearrangement of language of the contractual provisions. These artifices were embellished by quotation marks. And the Commission went so far as to ground its interpretation fundamentally on the insertion in a translation of a comma, which does not appear in the Spanish text of the contract. It seems to me to be almost inconceivable that matters involving questions of such seriousness, not only with respect to important private property rights but with respect to international questions, should have been dealt with in such a manner. I am impelled to express the view that the Commission's treatment of matters of international law involved in the case did not rise above the level of its processes in arriving at its construction of the contractual provisions—a construction based on a non-existing comma.

The Commission's discussion of the restriction on interposition was characterized by a failure of recognition and application of fundamental principles of law with respect to several subjects. Principally among them are :

(a) The nature of international law as a law between nations whose operation is not controlled by acts of private individuals.

(b) The nature of an international reclamation as a demand of a government for redress from another government and not a private litigation.

(c) A remarkable confusion between substantive rules of international law that a nation may invoke in behalf of itself or its nationals against another nation, and jurisdictional questions before international tribunals which are regulated by covenants between nations and of course not by rules of international law or by acts of private individuals or by a contract between a private individual and a government.

International law recognizes the right of the nation to intervene to protect its nationals in foreign countries through diplomatic channels and through instrumentalities such as are afforded by international tribunals. The right was recognized long prior to the time when there was any thought of restrictions on its exercise. The question presented for determination in considering the effect of local laws or contractual obligations between a government and a private individual to restrict that right therefore is whether there is evidence of a general assent to such restrictions.

The Commission decided the case by rejecting the claim on jurisdictional grounds, although it admitted and stated that the claim was within the jurisdictional provisions of the Convention of September 8, 1923, which alone of course determined jurisdiction. Although the case was dismissed on jurisdictional grounds, the Commission made reference to international law but did not cite a word of the evidence of that law. A few vague references to stipulations of bilateral treaties have no bearing on the case, except

that possibly the language of those stipulations serves to disprove the Commission's conclusions. The most casual examination into abundantly available evidence of the law disproves those conclusions. The Commission did not concern itself with any such evidence.

The Commission seemed to indicate some view to the effect that the contractual stipulations in question were in harmony with international law because they required the exhaustion of local remedies, and that therefore the claim might be rejected. The Commission ignored the effect of Article V of the Convention concluded September 8, 1923, between the United States and Mexico, stipulating that claims should not be rejected for failure to exhaust local remedies.

The Commission found that the claim was within the language of jurisdictional provisions of the Convention but escaped the effect of that language by saying that the claimant could not "rightfully" present his claim to the Government of the United States. The claimant's right to appeal to his Government was of course determined by the law of the United States. There was no law declaring that the claimant could not "rightfully" present his claim to his Government for subsequent presentation to the Commission.

The Commission dismissed the case nominally on jurisdictional grounds, but did not concern itself with law pertaining to jurisdiction. The Commission nullified the jurisdictional provisions of the Convention, although the claim was obviously within the language of those provisions. It likewise nullified Article V.

The Commission stated repeatedly that contractual provisions could not bar the presentation of a claim predicated on allegations of "violations of international law" or of "international illegal acts". It also stated that the claimant did not waive his right to apply to his Government for protection against such acts. The claim of the North American Dredging Company of Texas was of course predicated on allegations of that nature. The Commission was authorized to consider such claims, yet it said that it was without jurisdiction in the case and threw out a case of the precise nature which it stated it was required by the Convention to adjudicate.

Typical of the Commission's processes of reasoning and its mental attitude is its discussion of "the law of nature", and "inalienable, indestructible, unprescriptible, uncurtailable rights of nations", and "policies like those of the Holy Alliance and of Lord Palmerston", and "world-wide abuses either of the right of national protection or of the right of national jurisdiction"—a severe indictment of the world—and "an inferior country subject to a system of capitulations" and similar matters.

The disregard of jurisdictional provisions of the Convention

The Commission in the dredging company case said that "the claim as presented falls within the first clause of Article I of the Treaty describing claims coming within this Commission's jurisdiction". That is, of course, true. But in spite of the fact that the two Governments framed a treaty giving the Commission jurisdiction over the case, the Commission decided that jurisdiction was determined by a contract signed between the company and Mexico in 1912 for the dredging of a Mexican harbor. It appears, therefore, that the Commission found that an American national could make a contract with the Mexican Government in 1912 which operated to destroy provisions of a treaty concluded between the United States and Mexico in 1923.

The instant claim, like the claim of the dredging company, is based on wrongful acts such as are referred to in the jurisdictional provisions of the Convention. More particularly, it is within the specific provisions stipulating jurisdiction when an allotment is presented, as was done in the present case. But my associates find that jurisdiction is determined by a contract with respect to rights to fish in Mexican waters made in 1909 *by a Mexican national* with the Mexican Government. So that in this case an American national did not even participate in the remarkable performance, which I do not understand, of wiping out the Commission's jurisdiction under a treaty made nearly a quarter of a century after the date of the contract with respect to fishing.

I shall discuss the two opinions in some further detail in connection with the consideration of other arbitral decisions.

The Presiding Commissioner in his concurring opinion states that the decision in the dredging company case had received the approbation of the highest authorities on international law. No authorities are mentioned. He says that he regards this opinion a notable contribution to the progress of the science of that law. He considers that the decision splendidly clarifies former concepts "with respect to the validity or invalidity" of the so-called Calvo clause. From the foregoing résumé of facts in relation to the much lauded opinion of the Commission and from some observations which I shall make hereinafter it will be seen that I do not agree with the views that the opinion is a splendid contribution clarifying former concepts.

I am unable to understand the Presiding Commissioner's statement that this decision in a certain manner protects a defendant State, leaving open methods of redress to a claimant in case of denial of justice or international delinquency. The Presiding Commissioner does not explain how the rights of a claimant are preserved by a decision which, in disregard of jurisdictional provisions of an arbitration treaty, throws a case out of court on supposed jurisdictional grounds and prevents any hearing on the merits to determine the question of international responsibility. It is true, as the Presiding Commissioner says, that the clause in question is not violative of any rule of international law. International law, which is a law for the conduct of nations, does not concern itself with contracts to dredge ports or to conduct fishing operations, or with any provisions of such contracts. On the other hand, it is equally clear that clauses in contracts of that kind cannot be declaratory of rules of international law.

Treaties between Latin American republics and European countries, to which the Presiding Commissioner refers, have no relation to the so-called Calvo clause. Moreover, it may be observed that European countries, practically without exception, deny the notion that a nation's rights under international law to protect its nationals or to have cases adjudicated under proper jurisdictional provisions of arbitration treaties can be nullified by a so-called Calvo clause.

The Presiding Commissioner quotes an excerpt from a communication addressed by Secretary of State McLane to Mr. Shain in 1834. In that communication, the Secretary of State called attention to the general rule of international law with respect to the exhaustion of local remedies by aliens in countries of their sojourn. Obviously, the advice given by the Secretary at an early day before the expedient of the Calvo clause had been invented had nothing to do with the effect of the so-called clause. Furthermore, it is specifically stipulated in the Convention of September 8, 1923, that this rule of international law shall not be given effect in the pending

arbitration. I am unable to perceive by what authority my associates may consider they have the right to ignore this important provision of the Convention.

With reference to the brief quotation which the Presiding Commissioner makes from Dr. Borchard's work, *The Diplomatic Protection of Citizens Abroad*, it may be interesting to call attention to brief portions of the draft convention with comments prepared by the Research in International Law, Harvard Law School, with respect to responsibility of states. Dr. Borchard was the Reporter.

"Article 2"

"The responsibility of a state is determined by international law or treaty, anything in its national law, in the decisions of its national courts, or in its agreements with aliens, to the contrary notwithstanding."

.

"Article 17"

"A state is not relieved of responsibility as a consequence of any provision in its own law or in an agreement with an alien which attempts to exclude responsibility by making the decisions of its own courts final; nor is it relieved of responsibility by any waiver by the alien of the protection of the state of which he is a national."

"Comment"

"This Article deals with the effect of the so-called Calvo clause, which has taken different forms, by constitution, law or contract, either to make the alien a national for a particular purpose (Article 16) or to make the decisions of national courts final and unchallengeable in the international forum, or to provide that the alien for the particular purpose waives the diplomatic protection of his national state. The Article would establish that such provisions in constitutions, laws or contracts cannot defeat the rights of states derived from international law. It is thus a specific application of Article 2." *Supplement to the American Journal of International Law*, April, 1929, pp. 142, 202, 203.

When the Presiding Commissioner goes so far as to say that the United States "on its part has declared in general its adhesion to it", he evidently means to say that the United States has adhered to the principle of the Calvo clause. An examination of a single declaration made in behalf of the Government of the United States with respect to this subject would of course show that it has done nothing of the kind. And a statement based on information—such as could be obtained by casual examination of a few among numerous recorded precedents—could only be to the effect that the United States has declared a consistent opposition to any such principle as underlies the so-called Calvo clause. On the same page of Professor Borchard's work, from which the Presiding Commissioner quotes, are found the following declarations by Secretary of State Bayard:

"The United States has uniformly refused to regard such provisions as annulling the relations existing between itself and its citizens or as extinguishing its obligations to exert its good offices in their behalf in the event of the invasion of their rights."

.

"No agreement by a citizen to surrender the right to call on his government for protection is valid either in international or municipal law." P. 809.

There is of course no uncertainty as to the attitude of the United States in objecting to the action of Commissions such as is taken in the instant case and such as was taken in the dredging company case, in refusing to hear on the merits, cases in which the jurisdiction was stipulated in jurisdictional provisions of arbitral agreements.

The Presiding Commissioner states that he does not find duly proved the rights of the International Fisheries Company with respect to the 985 shares of stock in the company "La Pescadora, S.A.," and that the proof is deficient and in some cases contradictory. No contradictions or deficiencies are mentioned. I am unable to perceive any connection of this point with the question of jurisdiction which Mexico contends may be raised by invoking the so-called Calvo clause.

It is said in Mr. Fernández MacGregor's opinion that the decision in the dredging company case was attacked by a protest and by a motion for re-hearing filed by the American Agency, in spite of the fact that Article VIII of the Convention of September 8, 1923, provides:

"The High Contracting Parties agree to consider the decision of the Commission as final and conclusive upon each claim decided, and to give full effect to such decisions."

I consider it to be regrettable that such statements should be made in a judicial opinion. The propriety of a respectfully presented motion for re-hearing is of course a matter properly to be determined when the motion comes before the Commission for decision. No "protest" was made. In that motion, now pending before the Commission, it is said:

"The Government of the United States of America, by its Agent, respectfully presents this Petition to the General Claims Commission for a re-hearing of the Motion of the Mexican Government to dismiss the case."

Motions for re-hearing have been presented to and entertained by other international tribunals. Such a motion of course in no way involves the repudiation by a Government of a final decision. And it may be observed that it is very different from a reservation such as is mentioned by Sir John Percival, British Commissioner in the Arbitration between Great Britain and Mexico under the Convention of November 19, 1926. In the dissenting opinion which he wrote in the case of the *Mexican Union Railway, Ltd.*, and which is mentioned in the opinion of my associates in the instant case, the British Commissioner said:

"During the hearing the Mexican Agent, evidently acting under direct instructions from his Government, stated that the question of the Calvo Clause was a vital one to the Mexican Government, and that if the Commission should take jurisdiction in this case, the Mexican Government would register a protest against such decision and would make a reservation as to its rights." *Decisions and Opinions of the Commissioners, London, 1931, p. 167, 173.*

Only one decision of this Commission (Order No. 120, of October 29, 1930) has been protested and repudiated. And repudiation in that instance did not come from the Government of the United States. There the Mexican Commissioner, acting as he explained under directions of his Government, made formal declarations in a dissenting opinion, as to the nullity of the majority ruling of the Commission. Minutes of October 29, 1930, with Annexes; Letter of November 29, 1930, from Señor G. A. Estrada, Mexican Secretary of Foreign Relations, to the Presiding Commissioner.

The nature of international law

International law is a law grounded on the general assent of the nations of the world. Its sources are treaties and customs, and the important sources of evidence of the law are judicial decisions of domestic and international tribunals, certain other kinds of public governmental acts, treaties and the writings of authorities. The existence or non-existence of a rule of international law is established by a process of inductive reasoning; by marshalling the various forms of evidence of the law to determine whether or not such evidence reveals the general assent that is the foundation of the law. No rule can be abolished, or amplified or restricted in its operation, by a single nation or by a few nations or by private individuals or by private individuals acting in conjunction with a government. No action taken by a private individual can contravene a treaty or a rule of international law, although it is the duty of a government to control the action of individuals with a view to preventing contravention of rules of international law or treaties.

The position of a nation as a member of the family of nations gives to it rights and benefits of international law and imposes on it the correlative requirement of complying with the duties of that law and of meeting all responsibilities which it imposes. Failure on the part of authorities of a nation to fulfil the requirements of a rule of international law is a failure to perform a legal duty, and as such an international delinquency, and a nation is responsible for acts of its authorities such as have been termed "internationally injurious". Oppenheim, *International Law*, Vol. I, p. 256, 3rd ed. In either case the responsible nation may properly be called to account by another nation.

The supreme law of all members of the family of nations is not its domestic law but is international law. Therefore, domestic law as well as the acts of officials must square with the law of nations. No domestic enactment of a nation can relieve that nation of any duty imposed upon it either by international law or by treaties, nor deprive any other nation of any of its rights. And assuredly no nation can by a contract with a private individual relieve itself of its obligations under international law nor nullify the rights of another nation under that law.

In a consideration of contractual stipulations in the nature of the so-called Calvo clause the question is presented whether such stipulations purport to limit rights accorded by international law. Obviously they do. Domestic laws have been enacted in certain countries to accomplish the same purpose. Thus by Article 38 of the Constitution of Ecuador of 1897, it was provided that every contract of an alien with the Government or with a citizen of Ecuador "shall carry with it implicitly the condition that all diplomatic claims are thereby waived". Article 149 of the Venezuelan Constitution of 1893, which was preceded by other Articles intended to restrict diplomatic intervention provided as follows:

"In every contract of public interest there shall be inserted the clause that 'doubts and controversies that may arise regarding its meaning and execution shall be decided by the Venezuelan tribunals and according to the laws of the Republic, and in no case can such contracts be a cause for international claims.'"

The right of intervention to protect nationals

Of course it is unnecessary to cite any legal authority to support an assertion that international law recognizes the right of a nation to intervene to protect its nationals in foreign countries, through diplomatic channels, and through instrumentalities such as are afforded by international tribunals.

Ignacio L. Vallarta, a distinguished Mexican lawyer, in an interesting report to his Government, said, in part, with respect to the right of protection:

"If there are truths which are universally accepted among Nations, one of these is that the State owes its protection to its citizens who are located in other countries. From Grotius to Bluntschli all publicists have taught that an offence to a citizen is indirectly an offence to the State whose duty it is to protect that citizen. The founder of international law has expressed in the following concise and vigorous phrase the importance of that duty of Nations: *Prima autem maximeque necessaria cura pro subditis . . . suis enim quasi pars rectoris*,' and the learned and contemporary German publicist epitomized thus, the doctrine which in our time governs this matter: 'A State has the right and the duty to protect its citizens who live abroad, by all the measures authorized by international law.' " *Exposición de Motivos del Proyecto de Ley sobre Etranjería y Naturalización*, p. 100.

A well known South American author, writing as early as 1832, has said with respect to this subject:

"The protection of its citizens is the unquestioned right of any sovereign State, whenever they have been damaged as to their persons or interests by the government of another State, and particularly in the event their pecuniary credits are not paid which arise from contracts entered into by the foreign sovereign State or through its legally authorized agents. Indemnities owed by the foreign sovereign, are reduced to the same case, when resulting from an injury perpetrated by it or by persons legally acting in its name." D. Andrés Bello. *Principios de Derecho Internacional*. Vol. 1, pp. 65-66.

The question presented for determination in considering the effect of local laws or contractual stipulations between a government and a private individual to restrict that right therefore is, whether there is evidence of a general assent to such a restriction, just as there unquestionably is evidence of a general assent to the right of interposition in behalf of nationals, a right recognized long prior to the time when there was thought of such a restriction—a right exercised by all nations.

Domestic laws can not destroy rights secured by international law. Since one nation's rights can not be extinguished by local laws of another nation, then if such rights can be destroyed by contracts made by a nation with a private individual, the capacity for such an accomplishment must be attributed, not to some authority possessed by the contracting nation, but to the potency of the individual, or to some alchemistic legal product resulting from a combination of both.

Domestic laws are not finally determinative of an alien's rights. Nations which have been accorded membership in the family of nations can not isolate themselves from the system of law governing that membership and deny an established right of interposition, a right secured by international law. It is very interesting to note that the distinguished protagonist whose name has been given to these contractual stipulations, which are intended to preclude diplomatic interposition, evidently formulated his views in the light of a concept that a nation fulfils its duties by according to aliens the same treatment as is accorded to nationals, and that no nation should

intervene to obtain for its nationals anything more, either as regards rights or remedies. In his work on international law he says:

"America as well as Europe is inhabited today by free and independent nations, whose sovereign existence has the right to the same respect, and whose internal public law does not admit of intervention of any sort on the part of foreign peoples, whoever they may be." (*Le Droit International théorique et pratique*, 5th ed., I, Sec. 204, p. 350.)

"It is certain that aliens who establish themselves in a country have the same right to protection as nationals, but they ought not to lay claim to a protection more extended. If they suffer any wrong, they ought to count on the government of the country prosecuting the delinquents, and not claim from the state to which the authors of the violence belong any pecuniary indemnity." (VI, Sec. 256, p. 231.)

"The rule that in more than one case it has been attempted to impose on American states is that foreigners merit more regard and privileges more marked and extended than those accorded even to the nationals of the country where they reside." (III, Sec. 1278, p. 140.)

It can scarcely be necessary to observe that such declarations do not define the character and scope of rights secured in favor of aliens by rules of international law or by stipulations of treaties. Conformity by authorities of a government with its domestic law is not conclusive evidence of the observance of legal duties imposed by international law, although it may be important evidence on that point. Acts of authorities affecting aliens can not be explained to be in harmony with international law merely because the same acts are committed toward nationals. There is of course a clear recognition in international law, generally speaking of plenary sovereign rights with respect to matters that are the subject of domestic regulation within a nation's dominions. But it is also clear that domestic law and the measures employed to execute it must conform to the supreme law of members of the family of nations which is international law, although there are certain subjects the domestic regulation of which can in nowise contravene that law.

Arbitral tribunals have repeatedly awarded indemnities in favor of aliens because of mistreatment in connection with imprisonment. It has been no defense in such cases that nationals suffered the same or similar mistreatment. Indemnities have been awarded because of lack of proper protection of aliens or of inadequate measures for the apprehension and punishment of persons who have committed wrongs against aliens. It has not been considered a proper defense in such cases that no better police or judicial measures were employed in cases affecting nationals. The question at issue in such cases is whether or not the requirements of international law have been met. Indemnities have been awarded because of injuries suffered by aliens as a result of the acts of soldiers or of naval authorities. It has been no defense in such cases that the government held responsible afforded no redress to nationals for tortious acts of authorities. Precedents of diplomatic and judicial action illustrating the general principle could of course be indefinitely multiplied.

The exhaustion of local remedies

It has been suggested that contractual stipulations and local legislation intended to preclude diplomatic interposition may be considered to be unobjectionable, if they are construed merely to mean that a person contract-

ing with a government binds himself to resort to local remedies and is not entitled to diplomatic intervention, unless he has suffered a denial of justice resulting from improper judicial action.

Apart from the question of the possibility of restricting by contractual stipulation rights secured by international law, it may be said that the effect of such stipulations or provisions of local laws so construed may not be essentially different from the effect of the rule of international law with respect to the requirement of a resort to local remedies prior to diplomatic intervention. That rule would seem clearly to make it unnecessary to attempt to limit interposition by contractual stipulations the scope of which is construed to be nothing more than a requirement that an alien must resort to local judicial remedies before diplomatic representation is permissible. Nations can by general assent thus restrict interposition. But individuals can not do so, nor can a nation do it through the means of a contract with an individual.

In connection with the narrow question of resort to local tribunals, it is well to bear in mind several pertinent considerations.

Denial of justice resulting from improper judicial procedure is not the only ground of diplomatic interposition. And of course, as is well known, the requirement with respect to resort to tribunals can have no application when remedies are wanting or are inadequate. Moreover, from a practical standpoint, much can be said in favor of the view that a denial of justice, broadly speaking, may properly be regarded as the general ground of diplomatic intervention. In other words, that on the basis of convincing evidence of a pronounced degree of improper governmental administration on the part of the legislative, executive or judicial branch of the Government, one nation may properly call another to account. The subject is interestingly treated by the distinguished jurist, Judge John Bassett Moore, in an address which he delivered before the American Society of International Law in 1915. In referring to the discussion of the phrase "denial of justice" at the Third International American Conference at Rio de Janeiro in 1906, and to a report adopted at that Conference with respect to the arbitration of cases having "an international character", Judge Moore said:

"This thought was most admirably elucidated by one of the delegates of Brazil, Dr. Gastao da Cunha, who, after expressing his concurrence in the view above stated, remarked that the phrase 'denial of justice' should, subject to the above qualification, receive the most liberal construction, so as to embrace all cases where a state should fail to furnish the guarantees which it ought to assure to all individual rights. The failure of guarantees did not, he declared, 'arise solely from the judicial acts of a state. It results,' he continued, 'also from the act or omission of other public authorities, legislative and administrative. When a state legislates in disregard of rights, or when, although they are recognized in its legislation, the administrative or judicial authorities fail to make them effective, in either of these cases the international responsibility of the state arises. In all those cases, inasmuch as it is understood that the laws and the authorities do not assure to the foreigner the necessary protection, there arises contempt for the human personality and disrespect for the sovereign personality of the other state, and, in consequence, a violation of duty of an international character, all of which constitutes for nations a denial of justice.' " *American Society of International Law, Proceedings, 1915-1919*, pp. 18-19.

It would seem well also to bear in mind that nations in their relations with each other are not constantly engaged in directing legal shafts at each other. Relative rights and duties are of course ultimately defined by international law. But international comity must always play an important

part in the proper intercourse of states. Nations can by friendly discussion, without invoking strict legal rights, pave the way for adjustments that avoid the necessity for invoking such rights. The purpose to preclude even such discussion would seem clearly to be evidenced by local laws or contractual stipulations prescribing that an alien may not invoke the assistance of his government; that indeed he shall have none of the rights of an alien; and that he shall be considered as a national of a country other than that to which he owes allegiance by virtue of a proper, applicable law.

With reference to the rule of international law with respect to the exhaustion of legal remedies, it is also interesting to bear in mind that there has in recent years been a tendency, seemingly a very proper one, to eliminate that rule in connection with the adjudication of international controversies. The plea that a claimant has not exhausted his legal remedies may perhaps not infrequently be regarded as somewhat technical. It is not concerned with the fundamental question whether a wrong was initially committed by authorities of a respondent government. Governments, including those of Mexico and the United States, have considered it to be advisable, when establishing international tribunals to deal with complaints of wrong-doing, that international controversies should by such action be finally settled; that the tribunals should be empowered to pass upon the question whether wrong was committed, to afford redress for improper action, and to ignore the subject of resort to local remedies. Thus the arbitral agreement concluded August 18, 1910, between the United States and Great Britain contained the provision that no claim should "be disallowed or rejected by application of the general principle of international law that the legal remedies must be exhausted as a condition precedent to the validity of the claim". And by Article V of the Convention concluded September 8, 1923, between the United States and Mexico, the high contracting parties agreed that "no claim shall be disallowed or rejected by the Commission by the application of the general principle of international law that the legal remedies must be exhausted as a condition precedent to the validity or allowance of any claim".

Decisions of international tribunals

It is interesting that a high international tribunal has expressed the view that a contractual stipulation intended to preclude diplomatic interposition was incompatible and irreconcilable with an arbitral agreement providing for the adjudication of a claim, and a decision of an international commission was declared void by this tribunal, partly on the ground that the commission had disallowed a claim because a claimant had failed to resort, conformably to the contractual stipulation, to local remedies. In the so-called *Orinoco Steamship Company* case, a claim presented by the United States against Venezuela before the Permanent Court of Arbitration at The Hague, the tribunal had under consideration the effect of a contractual stipulation in this language:

"Doubts and controversies which may arise regarding the interpretation and execution of this contract shall be decided by the Venezuelan courts in accordance with the laws of the Republic, and in no case shall they give rise to international claims."

With respect to this provision the tribunal, speaking through Dr. Lammasch, said:

"Whereas it follows from the Agreements of 1903 and 1909—on which the present arbitration is based—that the United States of Venezuela had by convention renounced invoking the provisions of Article 14 of the Grell contract and of Article 4 of the contract of May 10, 1900, and as, at the date of said Agreements, it was, in fact, certain that no lawsuit between the parties had been brought before the Venezuelan courts and as the maintenance of Venezuelan jurisdiction with regard to these claims would have been incompatible and irreconcilable with the arbitration which had been instituted;". For the text of the award see *American Journal of International Law*, Vol. 5, p. 230.

The United States and the countries of which my associates are respectively nationals, Mexico and Panama, are parties to the international covenant which established this high court at The Hague. Of course, as the tribunal pointed out, when a nation by a treaty has agreed to arbitrate a case it cannot properly refuse to do so. It is at least equally obvious that an international tribunal cannot exercise an arbitrary discretion whether it will or will not try cases within its jurisdiction.

Decisions of other international tribunals dealing with contractual stipulations intended to preclude diplomatic intervention have frequently been discussed by writers who have treated this subject. In reference to the construction of such provisions and local laws of similar import, Judge John Bassett Moore, in the address which has been mentioned, made the following summary:

"Clauses such as this, when actually embodied in contracts, have on several occasions been discussed by international commissions, with results not entirely harmonious. In some cases they have been regarded merely as devices to curtail or exclude the right of diplomatic intervention, and as such have been pronounced invalid. In other cases they have been treated as effective, to the extent of making the attempt to obtain redress by local remedies absolutely prerequisite to the resort to international action. Only in one or two doubtful instances does the view seem to have been entertained that they should be permitted to exclude diplomatic interposition altogether.

"On the whole, the principle has been well maintained that the limits of diplomatic action are to be finally determined, not by local regulations, but by the generally accepted rules of international law." *Op. cit.* pp. 22-23.

The theory that diplomatic action can be precluded has been generally rejected. Expositions of that theory in opinions of arbitral tribunals seem to reveal clearly in one form or another an erroneous conception of the nature and scope of international law, or of the nature of an international reclamation, and generally in addition, not only a confusion between rules of substantive international law and questions of jurisdiction, and in the case of opinions of arbitral commissions also a failure to give effect to jurisdictional provisions of arbitral agreements. That this conclusion is correct can probably be indicated by brief references to a few cases.

In the ultimate determination of responsibility under international law I think an international tribunal in a case grounded on a complaint of a breach of a contract can properly give effect to principles of law with respect to confiscation. International tribunals in dealing with cases growing out of breaches of contract are not concerned with suits on contracts instituted and conducted conformably to procedure prescribed by the common law or statutes in countries governed by Anglo-Saxon law, nor conformably to corresponding procedure in countries in which the principles of the civil law obtain. International law does not prescribe rules relative to the forms and the legal effect of contracts, but that law is, in my opinion, concerned with

the action authorities of a government may take with respect to contractual rights. If a government agrees to pay money for commodities and fails to make payment, it seems to me that an international tribunal may properly say the purchase price of the commodities has been confiscated, or that the commodities have been confiscated, or that property rights in a contract have been destroyed or confiscated. Claim is based in the instant case on allegations with respect to the confiscation of valuable contractual rights growing out of an arbitrary cancellation of a concession.

I assume that it is generally recognized that confiscation of the property of an alien is violative of international law, just as it is generally forbidden by domestic law throughout the world. See "*Basis of the Law Against Confiscating Foreign-Owned Property*" by Chandler P. Anderson, *American Journal of International Law*, 1927, Vol. 21, pp. 525 *et seq.* The extent to which principles of international law have been applied to this subject is interesting. While generally speaking the law of nations is not concerned with the actions of a government with respect to its own nationals, we find in international law a prohibition against confiscation even with respect to the property of a nation's own nationals. A well recognized rule of international law requires that an absorbing state shall respect and safeguard rights of persons and of property in ceded or in conquered territory. See American Agent's *Report* in the American and British Claims Arbitration under the Special Agreement of August 18, 1910, pp. 107 *et seq.*; pp. 167 *et seq.*

In the *Turnbull* case before the American-Venezuelan Commission of 1903, Umpire Barge construed the effect of a contractual stipulation reading as follows :

"Any questions or controversies which may arise out of this contract shall be decided in conformity with the laws of the Republic and by the competent tribunals of the Republic."

Dr. Barge declared that the claimants had "deliberately contracted themselves out of any interpretation of the contract". With respect to the opinion of this Umpire, Judge John Bassett Moore has observed :

"In a word, he declared in the *Turnbull* case that, as the claimants had 'deliberately contracted themselves out of any interpretation of the contract and out of any judgment about the ground for damages for reason of the contract, except by the judges designed (designated?) by the contract,' they had, in the absence of a decision by those judges that 'the alleged reasons for a claim for damages really exist,' 'no right to those damages, and a claim for damages which parties have no right to claim can not be accepted.' It may be superfluous to remark that, according to this view, there can be no room whatever for international action, in diplomatic, arbitral, or other form, where the renunciatory clause exists, unless indeed to secure the execution of the judgment of a local court favorable to the claimant; for, if the parties have 'no right to claim' damages which the local courts have not found to be due, it is obvious that international action of any kind would be as inadmissible where there had been an adverse judgment, no matter how unjust it might be, as where there had been no judgment whatever." *International Law Digest*, Vol. VI, pp. 306-307.

It will be seen that the Umpire dismissed this case on what he considered to be jurisdictional grounds. The claimants, in his opinion, had eliminated the case from the jurisdiction of the Commission. This is assuredly peculiar reasoning, since the jurisdiction of the Commission was defined by Article I of an arbitral protocol concluded between the United States and Venezuela,

February 17, 1903. The article embraced "All claims owned by citizens of the United States of America against the Republic of Venezuela which have not been settled by diplomatic agreement or by arbitration between the two Governments, and which shall have been presented to the commission" created by the protocol.

Jurisdiction may be defined as the power of a tribunal to determine a case conformably to the law creating the tribunal or other law defining its jurisdiction. *U. S. v. Arredondo*, 31 U. S. 689 ; *Rudloff Case, Venezuelan Arbitrations of 1903*, Ralston's *Report*, pp. 182, 193-194 ; *Case of the Illinois Central Railroad Company*, Docket No. 432, before this Commission, *Opinions of the Commissioners*, 1927, pp. 15, 16.

Generally speaking, when a point of jurisdiction is raised, we must of course look to the averments of a complainant's pleading to determine the nature of the case, and they will be controlling in the absence of what may be termed colorable or fictitious allegations. Matters pleaded in defense with respect to the merits of the case are not relevant to the question of jurisdiction. *Odell v. F. C. Farnsworth Co.* 250 U. S. 501 ; *Smith v. Kansas City Title Co.* 255 U. S. 180 ; *Lambert Run Coal Co. v. Baltimore & O. R. Co.* 258 U. S. 377.

There is of course no rule of international law that concerns itself with the jurisdiction of arbitral tribunals. Nations deal with that subject in arbitral agreements which they conclude for the purpose of creating arbitral tribunals to determine the rights of nations and of claimants. The claimants have nothing to do with the determination of the jurisdiction of such tribunals. Business arrangements which they may enter into from time to time with a government can not be invoked to nullify the jurisdictional provisions of international arbitral covenants concluded by nations. Contracts made by private persons to exploit lands or mines or to dredge a harbor or as in the instant case to conduct fishing operations do not determine the jurisdiction of arbitral tribunals. With respect to the contractual provision involved in the *Turnbull* case, Umpire Barge said that "the will of the contracting parties, which expressed will must be respected as the supreme law between parties, according to the immutable law of justice and equity ; *pacta servanda*, without which law a contract would have no more worth than a treaty, and civil law would, as international law, have no other sanction than the cunning of the most astute or the brutal force of the physically strongest".

It may be noted with reference to observations of this kind, making use of somewhat high-sounding relative terms, that a contractual stipulation drafted many years prior to an arbitration treaty should certainly not have, in determining the jurisdiction of an arbitral tribunal "more worth than a treaty" which created the tribunal and defined its jurisdiction. And it would seem that the failure to give the intended effect to a contractual stipulation designed to deprive a nation of its rights of interposition under international law would not be such a blow at that law as to put it in a condition in which it could "have no other sanction than the cunning of the most astute or the brutal force of the physically strongest".

It is interesting that in an earlier case in the same arbitration, the *Rudloff* case, decided by the same Umpire on November 4, 1903, Dr. Barge said that "absolute equity" permitted the commission to give relief in favor of a claimant, notwithstanding similar contractual provisions intended to limit diplomatic intervention, and notwithstanding the fact that at the time the decision was rendered a suit instituted by the claimant against the

Government of Venezuela was pending before local courts. The Umpire said:

"Now, whereas the Government of Venezuela, by its honorable agent, opposes that in article 12 of the contract entered into by the predecessor in interest of the claimants, the parties stipulated that the doubts and controversies which might arise by reason of it should be decided by the tribunals of the Republic, it has to be considered that this stipulation by itself does not withdraw the claims based on such a contract from the jurisdiction of this Commission, because it does not deprive them of any of the essential qualities that constitute the character which gives the right to appeal to this Commission; but that in such cases it has to be investigated as to every claim, whether the fact of not fulfilling this condition and of claiming in another way, without first going to the tribunals of the Republic, does not infect the claim with a *vitium proprium*, in consequence of which the absolute equity (which, according to the same protocol, has to be the only basis of the decisions of this Commission) prohibits this Commission from giving the benefit of its jurisdiction (for as such it is regarded by the claimants) to a claim based on a contract by which this benefit was renounced and thus absolving claimants from their obligations, whilst the enforcing of the obligations of the other party based on that same contract is precisely the aim of their claim;". *Venezuelan Arbitration of 1903*, Ralston's Report, p. 193.

On the other hand, in the *Orinoco Steamship Company* case in the same arbitration, decided February 20, 1904, Dr. Barge declared that the rule of absolute equity could not permit a contract containing the customary stipulation with respect to interposition to be made "a chain for one party and a screw press for the other". *Ibid.*, pp. 72, 91.

And in the *Woodruff* case in the same arbitration, decided October 2, 1903, Dr. Barge held that contractual stipulations purporting to confer exclusive jurisdiction on local courts deprived the arbitral tribunal of jurisdiction. *Ibid.*, p. 158. He said: "by the very agreement that is the fundamental basis of the claim, it was withdrawn from the jurisdiction" of the commission. He stated, however, that a citizen could not impede the right of his Government to bring an international claim in case of a denial of justice or undue delay of justice. Presumably he had in mind denial of justice resulting from wrongful action on the part of the local judiciary. In this case the Umpire had under consideration the following contractual provision:

"Doubts and controversies which at any time might occur in virtue of the present agreement shall be decided by the common laws and ordinary tribunals of Venezuela, and they shall never be, as well as neither the decision which shall be pronounced upon them, nor anything relating to the agreement, the subject of international reclamation;"

In a memorandum transmitted by Secretary of State Root to the President in 1908, and forwarded by the latter to the Senate, the following comment is made on the opinions of Dr. Barge which I have briefly discussed:

"The opinions of the learned umpire are absolutely irreconcilable and do not even show a consistent progression. It was at one time thought that equity varied with the length of the chancellor's foot. It is perhaps not entirely unfair to suggest that in this case 'absolute equity' seems to have varied with the seasons of the year." *Correspondence Relating to Wrongs Done to American Citizens by the Government of Venezuela*, pp. 83-84.

Mention may be made of another case coming before another tribunal. The opinion in that case apparently was grounded to some extent on views

similar to those expressed in opinions rendered by Dr. Barge. In the case of the *Nitrate Railway Co., Limited*, (cited in Ralston, *The Law and Procedure of International Tribunals*, p. 67) a claim presented by the Government of Great Britain against Chile, the arbitral commission considered the effect of a stipulation relating to the transfer of concessionary rights. It was provided in a concession that if a transfer granted by the Government of Chile should be made in favor of foreigners they should remain subject to the laws of the country without power to exercise diplomatic intervention.

A majority of the commission, the British Arbitrator dissenting, held that the commission was without jurisdiction. The Commission said with respect to contractual stipulations purporting to bind foreigners "to place themselves upon a footing of equality with nationals" and "not to invoke the intervention of the governments to which they belong", that "no principle of international law forbids citizens to agree personally to such contracts" but added "which furthermore do not obligate foreign Governments". It was further stated that the arbitral agreement stipulated that the claims to be arbitrated "should be countenanced by the Legation of His Britannic Majesty"; that it resulted from the nature itself of arbitrations as well as from the text and spirit of the convention, that the arbitral tribunal replaced, "in order to determine a given category of business, the diplomatic action existing on their account between both Governments"; that consequently the individuals or societies which had bound themselves by contract freely celebrated not to have recourse personally to diplomatic protection, likewise could not "invoke, directly or personally, the intervention of the British Legation, nor seek the jurisdiction of this tribunal". Such statements seem clearly to reveal a failure of the recognition of fundamental principles which have been mentioned, namely, the nature of international law, the nature of an international reclamation, and the difference between substantive rules of international law and the jurisdiction which two nations engaged in arbitration may prescribe for a judicial tribunal which they create.

It was said that no principle of international law forbade the contractual stipulations in question. But that statement had no bearing either on the question of the right of the British Government to present a case under the terms of an arbitral agreement, or on the question whether the claimant's property rights in a contract had been improperly violated by Chilean authorities. International law neither authorizes nor forbids aliens to make contracts with the authorities of a government. It is concerned with the action of authorities of a government with respect to contractual rights; with the question whether such rights have been confiscated. The Commission, having stated that the contractual stipulations intended to restrict diplomatic interposition "do not obligate foreign governments", proceeded, seemingly in a remarkable way, to negative its own declaration by refusing to consider the complaint of wrongful violation of contractual rights preferred by the British Government before the Commission. It stated that claims embraced by the arbitral treaty were such as "should be countenanced by the Legation of His Britannic Majesty" and that the Commission had replaced "the diplomatic action".

The British Government had a right to present this claim under the terms of the arbitral agreement which declared the purpose of both Governments "to put a friendly end to the claims brought forward by the British Legation in Chile". The reasoning of the tribunal does not seem to explain how contractual stipulations entered into between Chile and a concessionaire could operate to deprive the Commission of authority to pass upon the

the complaint of the British Government to the effect that they and the British subject had been wronged by action of Chilean authorities for which it was contended Chile was responsible.

An extract from an opinion of an international tribunal among those which have grounded their opinions on reasoning very different from that underlying the opinions to which reference has been made may be cited as evidence of correct statements of the law.

In the *Martini* case before the Italian-Venezuelan Commission of 1903. *Venezuelan Arbitrations of 1903*, Ralston's *Report*, p. 819, consideration was given to the effect of the following contractual stipulation:

"The doubts or controversies which may arise in the interpretation and execution of the present contract will be resolved by the tribunals of the republic in conformity with its laws, and in no case will be the ground for international reclamation."

Mr. Ralston, Umpire, declared that, even if the dispute presented to him could be considered to be embraced within the terms "*Las dudas ó controversias que puedan suscitarse en la inteligencia y ejecución del presente contrato*," in his judgment the objection might be disposed of by reference to a single consideration which he stated as follows:

"Italy and Venezuela, by their respective Governments, have agreed to submit to the determination of this Mixed Commission the claims of Italian citizen against Venezuela. The right of a sovereign power to enter into an agreement of this kind is entirely superior to that of the subject to contract it away. It was, in the judgment of the umpire, entirely beyond the power of an Italian subject to extinguish the superior right of his nation, and it is not to be presumed that Venezuela understood that he had done so. But aside from this, Venezuela and Italy have agreed that there shall be substituted for national forums, which, with or without contract between the parties, may have had jurisdiction over the subject-matter, an international forum, to whose determination they fully agree to bow. To say now that this claim must be rejected for lack of jurisdiction in the Mixed Commission would be equivalent to claiming that not all Italian claims were referred to it, but only such Italian claims as have not been contracted about previously, and in this manner and to this extent only the protocol could be maintained. The Umpire can not accept an interpretation that by indirection would change the plain language of the protocol under which he acts and cause him to reject claims legally well founded." *Ibid.*, p. 841.

Similar, sound views were expressed by Judge Little, American Commissioner, in a dissenting opinion in the *Flannagan, Bradley, Clark & Co.* case in the United States-Venezuelan arbitration under the Convention of December 5, 1885. He said:

"The majority of the commission express doubt whether that part of article 20 which binds the American concessionaries not to make a judgment, etc., the subject of an international claim is valid. I would go further, applying the objection to and holding invalid all that part inhibiting international reclamations. I do not believe a contract between a sovereign and a citizen of a foreign country not to make matters of difference or dispute, arising out of an agreement between them or out of anything else, the subject of an international claim, is consonant with sound public policy, or within their competence.

"It would involve *pro tanto* a modification or suspension of the public law, and enable the sovereign in that instance to disregard his duty towards the citizen's own government. If a state may do so in a single instance, it may in all cases. By this means it could easily avoid a most important part of its international obligations. It would only have to provide by law that all contracts made within its jurisdiction should be subject to such inhibitory condition.

For such a law, if valid, would form the part of every contract therein made as fully as if expressed in terms upon its face. Thus we should have the spectacle of a state modifying the international law relative to itself! The statement of the proposition is its own refutation. The consent of the foreign citizens concerned can, in my belief, make no difference—confer no such authority. Such language as is employed in article 20, contemplates the potential doing of that by the sovereign towards the foreign citizen for which an international reclamation may rightfully be made under ordinary circumstances. Whenever that situation arises, that is, whenever a wrong occurs of such a character as to justify diplomatic interference, the government of the citizen at once becomes a party concerned. Its rights and obligations in the premises cannot be affected by any precedent agreement to which it is not a party. Its obligation to protect its own citizen is inalienable. He, in my judgment, can no more contract against it than he can against municipal protection.

"A citizen may, no doubt, lawfully agree to settle his controversies with a foreign state in any reasonable mode or before any specified tribunal. But the agreement must not involve the exclusion of international reclamation. That question sovereigns only can deal with.

"So much of article 20 as refers to that subject I regard as a nullity, and therefore cannot, even if in harmony with my colleagues as to the comprehension of its terms, concur in the dismissal of the claims on that ground." Moore, *International Arbitrations*, Vol. 4, pp. 3566-3567.

In the *North American Dredging Company of Texas* case, *supra*, before this Commission, a motion filed by the Government of Mexico to dismiss the claim on the ground that the Commission had no jurisdiction in view of the contractual stipulations, to which I have already referred, was sustained by the Commission. The Commission's opinion contains the substance of all the odd declarations found in other opinions in which similar holdings have been made, and it may be said contains numerous more remarkable things. By a process of reasoning in generalities the Commission leads up to a specific interpretation of the contractual stipulations involved. The Commission defines the issues before it as follows:

"The problem presented in this case is whether such legitimate desire may be accomplished through appropriate and carefully phrased contracts; what form such a contract may take; what is its scope and its limitations; and does clause 18 of the contract involved in this case fall within the field where the parties are free to contract without violating any rule of international law?"

Generally speaking, the correct definition of the issues in the case would appear to be (1) whether the claim was within the language of the jurisdictional provisions of Article I of the arbitration convention as a claim of an American citizen arising since July 4, 1868, and (2) whether on the merits of the case there was a proper defense to the claim preferred by the United States that Mexican authorities had violated the claimant's rights in a contract with the Mexican Government, a contract the existence of which was not denied.

The inquiry propounded by the Commission whether the parties to this contract were free to contract without violating any rule of international law would seem to be easy to answer. International law being a law for the conduct of nations, did not operate on the *North American Dredging Company of Texas*, and it could not violate any rule of international law. Whether Mexico, on whom the law of nations is binding, could violate a rule of law by a contract with respect to the performance of some work of dredging is probably an uninteresting, academic question. As has been heretofore observed, violations of the law of nations occur by the failure of a nation

to live up to the obligations of the requirements of that law. While the signing of the contract with a private concern would scarcely in precise language be declared a violation of international law, certainly any attempt to frustrate another nation's rights of interposition secured by international law would not be in harmony with that law.

With respect to the construction of the so-called Calvo clause the Commission says:

"The problem is not solved by saying yes or no; the affirmative answer exposing the rights of foreigners to undeniable dangers, the negative answer leaving to the nations involved no alternative except that of exclusion of foreigners from business."

It may be true that if a nation were precluded from interposing in behalf of its nationals they would be subject to "undeniable dangers". But it is difficult to concede the other alternative that, if a nation is not accorded the right or indeed does not even desire the right to exclude interposition, it must exclude foreigners from business within its dominion. Most of the nations of the world do not insist on such rights but emphatically contend that those rights can not be extinguished by contractual stipulations. However, they have not as a result found themselves confronted by an inescapable alternative of excluding aliens from business. One of these nations is the United States within whose dominions there are a great many more aliens than can be found in any other country. Similar somewhat extreme expressions are found in the following passage:

"By merely ignoring world-wide abuses either of the right of national protection or of the right of national jurisdiction no solution compatible with the requirements of modern international law can be reached."

The Commission had before it the seemingly simple question whether there has been any general assent among the nations of the world to this peculiar expedient to restrict the well established rule with regard to the right of interposition for the protection of nationals. For that purpose, it would not seem to be necessary for the Commission to take account of "world-wide abuses either of the right of national protection or of the right of national jurisdiction", whatever may be the facts—not discussed in the opinion—with respect to such a severe indictment of the world.

It is "quite possible" said the Commission "to recognize as valid some forms of waiving the right of foreign protection without thereby recognizing as valid and lawful every form of doing so". It is difficult to perceive, however, since international law is a law made by the general consent of nations and therefore a law which can be modified only by the same process of consent among the nations, how the contract of a private individual with a single nation could have the effect either of making or modifying international law with respect to diplomatic protection.

But the Commission declares that it "also denies that the rules of international public law apply only to nations". The theory that the law of nations applies only to the conduct of nations is referred to as "antiquated", and it is said that:

"As illustrating the antiquated character of this thesis it may suffice to point out that in article 4 of the unratified International Prize Court Convention adopted at The Hague in 1907 and signed by both the United States and Mexico and by 29 other nations this conception, so far as ever held, was repudiated."

Just what language in this proposed treaty, which has never come into effect, the Commission relies upon to show a repudiation of the thesis that international law is a law for nations only is not indicated. If any rule of procedure which *nations* might agree upon as to the manner of presenting a case to the proposed international court could have any bearing on the nature of international law, paragraph two of Article IV permitting a neutral individual to present a case to the court "subject, however, to the reservation that the Power to which he belongs may forbid him to bring the case before the Court, or may itself undertake the proceedings in his place" might be considered to show the complete control which nations exercise in matters pertaining to international proceedings. And further, if such far-fetched illustrations may be employed, it may be noted with more pertinency that the court was obligated to decide cases conformably to rules of international law or of applicable treaty stipulations. And it may still further be noted that twelve powers in an additional protocol made it clear that the action of the international court should not be considered as an appeal from their respective domestic courts, but merely as "an action in damages for the injury caused by the capture", the question whether an injury had been committed being one of international law, to be resolved in accordance with the principles of that law with respect to denial of justice resulting from judicial proceedings. Charles, *Treaties, Conventions, International Acts, Protocols and Agreements between the United States and Other Powers, 1910-1913*, Vol 3, pp. 251, 262.

Rights inder international law may inure to the benefit of private individuals, but the guarantee of the observance of such rights is found in the conduct of the nations who have the legal authority to invoke the rights against each other. A nation can not call to account a private citizen of another nation on the ground that such citizen has violated international law. These exceedingly elementary principles which the Commission characterizes as "antiquated", may be illustrated by a few very brief passages from the notable work of the eminent authority, Dr. Oppenheim :

"The Law of Nations is a law for the intercourse of States with one another, not a law for individuals ...

" individuals belonging to a State can, and do, come in various ways in contact with foreign States in time of peace as well as of war. The Law of Nations is therefore compelled to provide certain rules regarding individuals ... Since... the Law of Nations is a law between States only and exclusively, States only and exclusively are subjects of the Law of Nations." *International Law*, Vol. I, pp. 2, 456, 3rd ed.

It may be interesting to observe the difference between Dr. Oppenheim's interpretation of the effect of the unratified convention of The Hague with reference to an international prize court and the Commission's interpretation. Dr. Oppenheim says:

"The assertion that, although individuals cannot be subjects of International Law, they can nevertheless acquire rights and duties from International Law, is untenable as a general proposition. International Law cannot grant *international* rights to individuals, for international rights and duties can only exist between States, or between the League of Nations and States. International Law cannot give *municipal* rights to individuals, for municipal rights and duties can only be created by Municipal Law. However, where International Law creates an independent organisation—for instance, the proposed International Prize Court at The Hague, or the European Danube Commission, and the like—certain powers may be granted to commissions, courts, councils, and

even to individuals concerned. These powers are legal powers, and are therefore justly called rights, although they are neither international nor municipal rights, but only rights within the organisation concerned. Thus the unratified Convention XII of the second Hague Peace Conference provided for an International Prize Court to which—see Articles 4 and 5—individuals could bring an appeal. Thereby a right would be given to individuals; but it would be neither an international nor a municipal right, but only a right within the independent organization intended to be set up by Convention XII.” *Ibid.*, pp. 459-460.

The Commission proceeds to state that there “was a time when governments and not individuals decided if a man was allowed to change his nationality or his residence”. And it is observed that to acknowledge that “a person may voluntarily expatriate himself” but that he may not by contract “to any extent loosen the ties which bind him to his country is neither consistent with the facts of modern international intercourse nor with corresponding developments in the field of international law and does not tend to promote good will among nations.” The subject of expatriation, is a domestic matter in no way governed by international law. Whether a nation shall through its domestic law adopt a liberal policy with respect to expatriation of its nationals as some nations do, or less liberal policy as other nations do, or shall from time to time make changes in that policy, as nations do, is a matter with which international law is not concerned, and certainly a matter which has no relevancy to the question whether a citizen of one country can by a contract with another country nullify the right of the former to seek redress for a wrong to itself and to its national.

The Commission then proceeds to a discussion under the caption “Lawfulness of the Calvo clause”. This caption seems to indicate again a failure of appreciation of the principles of law involved in the questions under consideration. There are of course no provisions of penal laws either of the United States or of Mexico that undertake to make a Calvo clause unlawful; and of course there is no rule of international law of that character.

The Commission further states:

“What must be established is not that the Calvo clause is universally accepted or universally recognized, but that there exists a generally accepted rule of international law condemning the Calvo clause and denying to an individual the right to relinquish to any extent, large or small, and under any circumstances or conditions, the protection of the government to which he owes allegiance.”

It would seem that, precisely contrary to what the Commission states, clearly the question for solution is whether the Calvo clause is universally accepted or universally recognized. The principle underlying it is one asserted by a few nations in comparatively recent times. The rule of international law with respect to the right of interposition for the protection of nationals abroad was recognized long before these nations became members of the family of nations. In an international arbitration two nations come before a tribunal to which they have agreed to submit a controversy or numerous controversies. A respondent government invokes as the basis of a jurisdictional plea, as some commissions conceive, or as a substantive defense, a Calvo clause restricting rights of interposition. It would be a curious burden to impose on the other nation, that it should prove that there existed a general rule of international law condemning the Calvo clause. It would seem that it might rely on the general rule of international law, recognized a century before the Calvo clause was thought of, and expect the respondent government to prove that the rule with respect to the right

of interposition had, by the general assent of the nations, been restricted by the operation of the Calvo clause. And with respect to jurisdiction over the case, it would of course rely on the jurisdictional provisions of the arbitral agreement and not on some rule of international law. There is no rule of international law, customary or conventional, prescribing for nations the jurisdiction of arbitral commissions which the nations may establish from time to time.

Touching this point the Commission further says:

"It is as little doubtful nowadays as it was in the day of the Geneva Arbitration that international law is paramount to decrees of nations and to municipal law; but the task before this Commission precisely is to ascertain whether international law really contains a rule prohibiting contract provisions attempting to accomplish the purpose of the Calvo clause."

Unquestionably the Commission is right in the view it indicates to the effect that municipal law must square with international law. It follows of course that, if acts committed pursuant to domestic law contravene international law to the injury of aliens, governments to which such aliens belong have the right of interposition. The task before the Commission therefore was to see whether by international law the effect sought to be attributed to the Calvo clause had been generally recognized; not to see whether there was in international law some specific provision condemning the Calvo clause. International law relates to conduct of states; it has nothing to do with the conduct of a dredging company in making an agreement to dredge a harbor or a river bed. A domestic law at variance with international law may be said to be in derogation of that law, although perhaps a nation could not be charged with a violation of international law until some action pursuant to the domestic law were taken.

The Commission states that the "right of protection has been limited by treaties between nations in provisions related to the Calvo clause". It observes that Latin-American countries are parties to most of the treaties, but that such countries as France, Germany, Great Britain, Sweden, Norway and Belgium and in one case the United States have been parties to treaties containing such provisions. No provisions are cited except in the case of the treaty concluded by the United States, so that it is inconvenient to discuss the legal effect of other treaties which the Commission may have had in mind. The Commission cites article 37 of the treaty concluded September 6, 1870, between the United States and Peru, which reads as follows:

"As a consequence of the principles of equality herein established, in virtue of which the citizens of each one of the high contracting parties enjoy in the territory of the other, the same rights as natives, and receive from the respective Governments the same protection in their persons and property, it is declared that only in case that such protection should be denied, on account of the fact that the claims preferred have not been promptly attended to by the legal authorities, or that manifest injustice had been done by such authorities, and after all the legal means have been exhausted, then alone shall diplomatic intervention take place."

When the Commission speaks of the "right of protection" it seems reasonable to suppose that it has in mind the right secured by international law. And therefore if the treaty stipulations cited by the Commission in no way limit rights accorded by international law, it can not properly be said that these stipulations have been "limited" by the treaties. Article 37 obviously

limits no such rights. It is declaratory of international law. It secures for the nationals of each country national treatment, so-called, in the other country. It recognizes the right of interposition if complaints have not been promptly attended to by the legal authorities, meaning presumably the judicial authorities, and likewise recognizes the right of interposition in a case of manifest injustice committed by authorities. It asserts the rule of international law with respect to the necessity for the exhaustion of local remedies prior to diplomatic intervention.

But even if two governments had by this article agreed to restrict their right of interposition secured by international law, no pertinent argument could be deduced from such an agreement. To provide for such restriction is of course something that sovereign nations have a right to contract to do. In the Convention of September 8, 1923, the two Governments agree not to invoke in defense of a claim the rule of international law just mentioned with respect to the exhaustion of legal remedies. In the Convention of September 10, 1923, Mexico stipulated that its responsibility in claims embraced by that Convention should "not be fixed according to the generally accepted rules and principles of international law". It need not of course be pointed out that the action of the United States and Peru in reciprocally limiting by a treaty the right of interposition would have been something very different from an attempt of one of these nations to take away from the other only a right of interposition and to undertake to do that by some contract with a private citizen, and not by a treaty between the two Governments.

It would seem to be fortunate for the Commission's line of reasoning with respect to the other treaties which it mentions that it did not quote any provision upon which it relies, or even furnish any citation where one may be found. As has been observed, obviously the action of two nations in reciprocally placing limitations upon rights of interposition could have nothing in common with an agreement between a government and an individual to limit another government's right of interposition. But furthermore, it will be seen from an examination of treaties of the character which the Commission mentions that they do not contain provisions which in any way restrict such rights possessed by each contracting party under international law to interpose in behalf of its nationals.

Article X of the Treaty of Amity and Commerce concluded between Bolivia and Germany July 22, 1908, reads as follows:

"As the result of legal claims or complaints of individuals in matters of a civil, criminal or administrative character, diplomatic representatives of the Contracting Parties shall not intervene, provided there be no denial of justice, abnormal or illegal judicial delay, or failure to execute a judgment which shall have attained legal force, or lastly if after all legal remedies have been exhausted there should exist a manifest violation of Treaties existing between the Contracting Parties or of the principles of international law or of private international law universally recognized by cultured nations." (English translation from Spanish text.)

It will be seen that this article recognizes the right of intervention on account of denial of justice, and more broadly, on account of certain delays in judicial proceedings which it is conceivable might not be serious enough to be a sound basis for a complaint of a denial of justice. The article further recognizes the right of interposition in case of failure to give effect to judgments—another form of denial of justice. The right of interposition is broadly recognized for violation of treaties and of principles of international law.

As a matter of fact, intervention or interposition as a matter of right to vindicate rights secured by international law of course covers all complaints with respect to which a nation properly may intervene to protect its nationals. Even the specifically mentioned interposition with respect to violation of treaties might be regarded as within that broad category, since a violation of a treaty is a violation of international law. But the article even adds a violation of "private international law". Obviously this article so far from limiting the right of protection under international law, is declaratory of that right and perhaps even broader in its scope.

To the same general effect is Article X of the Treaty of Commerce concluded between Great Britain and Bolivia July 5, 1912, which reads as follows:

"The High Contracting Parties agree that during the period of existence of this Treaty they mutually abstain from diplomatic intervention in cases of claims or complaints on the part of private individuals affecting civil or criminal matters in respect of which legal remedies are provided.

"They reserve however the right to exercise such intervention in any case in which there may be evidence of delay in legal or judicial proceedings, denial of justice, failure to give effect to a sentence obtained in his favor by one of their nationals or violation of the principles of International Law." (English text.)

Still another illustration may be quoted. In the *Solis* case, decided by this Commission, *Opinions of the Commissioners*, 1929, pp. 48, 52, the Commission referred to a specific provision relating to responsibility for acts of insurrectionists. It was observed that Mr. Plumley, Umpire in the British-Venezuelan arbitration of 1903, referred to the following stipulation found in a treaty concluded in 1892 between Germany and Colombia as declaratory of international law:

"It is also stipulated between the contracting parties that the German Government will not attempt to hold the Colombian Government responsible, unless there be due want of diligence on the part of the Colombian authorities or their agents, for the injuries, oppressions, or extortions occasioned in time of insurrection or civil war to German subjects in the territory of Colombia, through rebels, or caused by savage tribes beyond the control of the Government." Ralston, *Venezuelan Arbitrations of 1903*, p. 384.

The Commission's opinion in the dredging company case contains the following paragraph:

"What Mexico has asked of the North American Dredging Company of Texas as a condition for awarding it the contract which it sought is, 'If all of the means of enforcing your rights under this contract afforded by Mexican law, even against the Mexican Government itself, are wide open to you, as they are wide open to our own citizens, will you promise not to ignore them and not to call directly upon your own Government to intervene in your behalf in connection with any controversy, small or large, but seek redress under the laws of Mexico through the authorities and tribunals furnished by Mexico for your protection?' and the claimant, by subscribing to this contract and seeking the benefits which were to accrue to him thereunder, has answered, 'I promise'."

Perhaps the passage interpreting the contractual stipulations in question is not to be regarded as a paraphrase, since it is put in quotation marks. It seems to be a remarkable attempt to express the meaning of the contract

in language other than that which the contracting parties used. The Commission recites that the contract contained a query of the claimant company whether if all the "means of enforcing" its rights should be "wide open" to the claimant, would he promise not call directly on his own Government for assistance. And by signing, the Commission says, the claimant answered this query by the words "I promise".

The contract between the Mexican Government and the claimant, which was considered in the case of the *North American Dredging Company of Texas*, contained a provision which the Commission in the English text of the opinion written in that case translated freely as follows:

"The contractor and all persons who, as employees or in any other capacity, may be engaged in the execution of the work under this contract either directly or indirectly, shall be considered as Mexicans in all matters, within the Republic of Mexico, concerning the execution of such work and the fulfilment of this contract. They shall not claim, nor shall they have, with regard to the interests and the business connected with this contract, any other rights or means to enforce the same than those granted by the laws of the Republic to Mexicans, nor shall they enjoy any other rights than those established in favor of Mexicans. They are consequently deprived of any rights as aliens, and under no conditions shall the intervention of foreign diplomatic agents be permitted, in any matter related to this contract."¹

The contract recited that the contractor and persons associated with him should be considered as Mexicans in all matters within the Republic of Mexico concerning the execution and fulfilment of the contract and when the United States, speaking in behalf of the claimant, alleged non-fulfilment of the contract in a manner violative of international law, Mexico, under its interpretation of the legal effect of that contract, regards the claimant as a Mexican and therefore not entitled to assistance from the United States. The contract provided that, with respect to all matters connected with it, including "rights or means to enforce" it, the claimant should have only the rights granted by the Mexican Government to Mexicans. The United States asserted in its behalf and in favor of the claimant a right of redress under international law for violation of contractual rights by Mexico and a right secured by a claims convention to obtain a determination of the claim.

The contract recited that the claimant, that is, the contractor, and all connected with the claimant, were "deprived of any rights as aliens", and that under no conditions should the intervention of foreign diplomatic agents be permitted in any matter related to the contract. The United States contended that Mexico had not the authority under international law to deprive these Americans of rights secured to them as aliens.

The Commission propounds and answers a question which it evidently regards as fundamental. It says:

¹ "El contratista y todas las personas que, como empleados o con cualquier otro carácter, tomaran parte en la construcción de la gran obra objeto de este contrato, directa o indirectamente, serán considerados como mexicanos en todo lo que se relacione, dentro de la República, con la ejecución de tal obra y con el cumplimiento de este contrato; sin que puedan alegar con respecto a los intereses o negocios relacionados con éste, ni tener otros derechos ni medios de hacerlos valer, que los que las leyes de la República conceden a los mexicanos, ni disfrutar de otros más que los establecidos a favor de éstos; quedando, en consecuencia, privados de todo derecho de extranjería, y sin que por ningún motivo sea de admitirse la intervención de agentes diplomáticos extranjeros en ningún asunto que se relacione con este contrato."

"Under the rules of international law may an alien lawfully make such a promise? The Commission holds that he may, but at the same time holds that he can not deprive the government of his nation of its undoubted right of applying international remedies to violations of international law committed to his damage. Such government frequently has a larger interest in maintaining the principles of international law than in recovering damage for one of its citizens in a particular case, and manifestly such citizen can not by contract tie in this respect the hands of his government."

It is added that any attempt so to bind the Government is "void". It is an odd question to propound whether a private person or a corporation may under international law lawfully make a certain kind of contract. International law contains no penal provisions forbidding acts on the part of either individuals or corporations, and no rules of any kind imposing any obligations except obligations binding on states. It is in connection with the conscientious performance of international duties by governments that international law has its sanction.

The Commission declares that a nation can not deprive a government of invoking remedies to right wrongs under international law. The United States in behalf of the claimant alleged a violation of contractual rights. And it was the duty of the Commission to determine whether there had been any violation of international law by destruction of contractual rights. It is therefore not perceived why the Commission did not take jurisdiction in the case, when the Commission explicitly declared even with respect to the action of the claimant that he had not "waived" his undoubted right as an American citizen to apply to his Government for protection against the violation of international law (internationally illegal acts) whether growing out of this contract or out of other situations.

With respect to the object of the contract the Commission says:

"The obvious purpose of such a contract is to prevent abuses of the right to protection, not to destroy the right itself—abuses which are intolerable to any self-respecting nation and are prolific breeders of international friction."

Obviously the Commission, in speaking of a purpose to prevent "abuses of the right to protection" must have had in mind abuses in connection with protection with respect to the specific contract under consideration, because that contract could not prevent in connection with other transactions "abuses which are intolerable to any self-respecting nation" and "prolific breeders of international friction". The Commission here ascribes to Mexico an intent to fathom the general character of future, atrocious abuses on the part of the United States which did not take place, although the action of the Government of the United States was limited to the presentation of a claim to the Commission. Mexico undoubtedly attempted to forestall intervention, but when the Commission attempts to define a purpose to avoid abuses which have not taken place, it is perhaps not strange that fantasy should take such flights as to describe non-existent things as "intolerable to any self-respecting nation" and "prolific breeders of international friction".

There would seem to be a want of logic in the Commission's apparent desire to attribute a measure of viciousness to the assertion of legal rights as compared with the denial of rights. The United States asserted in this case a right of interposition secured by international law and a right of adjudication secured by an arbitration treaty, the jurisdictional provisions of which in explicit language covers, as the Commission states, the claim

presented by the United States. Mexico denied the rights asserted under international law and under the treaty. With the denial of the rights the Commission finds no fault, but the assertion of the rights evokes from the Commission remarkable expressions with regard to abuses of the right of protection and the impairment of the sovereignty of nations. With respect to the right of a nation to prefer a reclamation against another nation it is proper and useful to bear in mind that the right is fundamentally grounded on the theory that an injury to a national is an injury to the state to which the national belongs.

It is remarkable for the Commission to state that the contract was not intended to destroy the right of interposition, when the contract states that the claimant and those associated with him should be deprived of any rights as aliens. One of the methods of interpretation by which the Commission reaches this conclusion is interesting. As has been observed, it relies for construction on the use of punctuation. The opinion contains the following paragraph:

"What is the true meaning of article 18 of the present contract? It is essential to state that the closing words of the article should be combined so as to read: 'being deprived, in consequence, of any rights as aliens *in any matter connected with this contract*, and without the intervention of foreign diplomatic agents being in any case permissible *in any matter connected with this contract*'. Both the commas and the phrasing show that the words 'in any matter connected with this contract' are a limitation on either of the two statements contained in the closing words of the article."

The Commission at the outset of its opinion makes use of a translation of the contractual stipulations under consideration. It is exceedingly interesting to examine first, what the Commission has stated in quotation marks; next, the actual language of the contract, and finally, the translation which the Commission used.

The language appearing in the contract is:

".... quedando, en consecuencia, privados de todo derecho de extranjería, y sin que por ningún motivo sea de admitirse la intervención de agentes diplomáticos extranjeros en ningún asunto que se relacione con este contrato."

The translation of the above quoted portion of the contract used by the Commission is as follows:

"They are consequently deprived of any rights as aliens, and under no conditions shall the intervention of foreign diplomatic agents be permitted, in any matter related to this contract."

The Commission says:

"Both the commas and the phrasing show that the words 'in any matter connected with this contract' are a limitation on either of the two statements contained in the closing words of the article."

It may well be plausibly argued, as is done by the Commission, that with a comma after the word "aliens" in the first line of the translation, and a comma after the word "permitted" in the second line, the phrase "in any matter related to this contract" might well be considered to modify both the verb "are deprived" and the verb "shall be permitted". But it will be noted from the text of the contract that there is no second comma in that text. Article 18 clearly states that the contractor and persons associated with him are deprived "of any rights as aliens." Of course it would be fatuous to suppose that Mexico intended to do anything more than to deprive these

persons of their rights as aliens in all matters relating to the fulfillment of the contract. That it was intended to deprive them of those rights was not denied in argument by Mexico. The Mexican Government could have no purpose to deprive these Americans of rights of aliens for purposes other than those of preventing them from obtaining assistance from their Government with respect to the preservation of their rights under the contract, either through remedies that might be obtained diplomatically or from an international tribunal. The substance of the article being clear, the effect of an imaginary or even of a real comma might not be important. But when the Commission properly at the outset of its opinion refers to the question under consideration as one of much importance, it is assuredly worthy of note that the Commission's construction of Article 18 is based on a comma which does not appear in the text of that article.

The Commission states that the article "did not, and could not, deprive the claimant of his American citizenship and all that that implies". That is true, and for that reason the Commission should not have deprived the claimant of the rights secured to him and to his Government to have his case adjudicated conformably to the requirements of the Agreement of September 8, 1923.

The article, it is further said, "did not take from him his undoubted right to apply to his own Government for protection if his resort to the Mexican tribunals *or other authorities* available to him resulted in a denial or delay of justice as that term is used in international law". (Italics mine.) Since there is mention of "other authorities", it would appear from this statement that the Commission considered that a denial of justice could result from authorities other than those belonging to the Mexican judiciary. The foundation of the claim was that other authorities had deprived the claimant of his rights under the contract. He appealed unsuccessfully to such authorities that he be accorded what he considered to be his rights. The Commission added that under the conditions stated by it the basis of the claimant's appeal would be "an internationally illegal act", and mention is made of a possible denial of justice in case the claimant had resorted to Mexican courts. But the claim is based on a complaint of "an internationally illegal act"—an act in the nature of those for which the Commission repeatedly in cases growing out of violation of contracts has afforded redress.

The Commission after having stated, as has been previously pointed out, that the contract consisted in an inquiry of the claimant if he would promise not to ignore remedies "wide open" to him and an answer by him "I promise", proceeds to explain at some length things which it is said the claimant "waived" when he said "I promise". It is stated that the claimant "waived his right to conduct himself as if no competent authorities existed in Mexico; as if he were engaged in fulfilling a contract in an inferior country subject to a system of capitulations; and if the only real remedies available to him" were international remedies. It would seem that perhaps it was beyond the scope of the understanding of the claimant as well as beneath the dignity of the Government of Mexico to stipulate waivers of this kind from the claimant. The Commission does not cite the language of the article which is considered to embrace such waivers. It is further said that the claimant did not waive any right he possessed as an American citizen as to any matter not connected with the fulfillment, execution or enforcement of this contract as such. That seems to be obvious enough. It would seemingly be strange if it should ever have occurred to Mexico to denaturalize the claimant in every respect because he had entered into a

contract to perform some dredging work. The Commission proceeds to state that the claimant "did not waive his undoubted right as an American citizen to apply to his Government for protection against the violation of international law (internationally illegal acts) whether growing out of this contract or out of other situations". That of course is true; nor did he or could he waive in behalf of the United States its right to intervene in his behalf to assert a violation of international law. The Commission was created to hear complaints with respect to allegations of "internationally illegal acts". It has passed upon such complaints in cases of other allegations of breaches of contract, and since the Commission itself explains that the claimant did not and could not affect the right of his Government to extend to him its protection in general or to extend to him its protection against breaches of international law, no reason is perceived why his case should have been thrown out of court.

The Commission proceeds to declare that when a contractual provision "is so phrased as to seek to preclude a Government from intervening, diplomatically or otherwise, to protect its citizen whose rights of any nature have been invaded by another Government in violation of the rules and principles of international law, the Commission will have no hesitation in pronouncing the provision void". It may be misleading to use such expressions as "void" or "invalid" or "illegal" in referring to the so-called Calvo clause. An inaccurate use of terminology may sometimes be of but little importance, and discussion of it may be merely a quibble. But accuracy of expression becomes important when it appears that inaccuracy is due to a confusion of thought in the understanding or application of proper rules or principles of law. Thus reasoning in terms of domestic law with respect to matters governed solely by international law must necessarily lead to erroneous conclusions. Reasoning from principles of domestic law may often be useful in connection with the application of principles of international law, but analogous reasoning and comparisons of rules of law can also be misleading or entirely out of place when we are concerned with rules or principles relating entirely or primarily to relations of states toward each other. An act may be void under domestic law, either when it is so specifically declared, or though not so declared, is committed in violation of some legal enactment. Perhaps it is not very inaccurate to designate as void a contract by which a nation contracts with a private citizen to restrict another nation's right of interposition, although international law is not concerned with any action a private individual may take in connection with the making of some contract to sell goods or to perform services. This point with respect to the nature of international law becomes important when the fate of large property interests is decided on an issue raised by a tribunal whether international law prohibits an individual from making a contract that limits the nation's right of interposition.

A Government contracting with an individual to prevent him from appealing to his Government might presumably through local procedure, giving effect to local law, enforce the contract against the individual. The standing of such action on the part of a Government under international law is perhaps little more than an interesting academic question. It would seem not unreasonable to conclude that, since a Government and a private individual could not contract to destroy the right of interposition of another Government under international law, a Government might feel justified in objecting to any injurious measures directed against its national, because,

in derogation of the terms of his contract he had appealed to his own Government.

Except by expatriation a private person can by no act of his own forfeit or destroy his Government's right to protect him. His acts may of course give rise to considerations of policy which may influence the attitude of his Government with respect to his appeal for assistance.

If it was the view of the Commission that a contractual provision could not stand in the way of the protection of a citizen in connection with a complaint of "violation of the rules and principles of international law" then of course this case should not have been dismissed by the Commissioner. Similar statements are made by the Commission. Thus it is said:

"Where a claim is based on an alleged violation of any rule or principle of international law, the Commission will take jurisdiction notwithstanding the existence of such a clause in a contract subscribed by such claimant."

"It is clear that the claimant could not under any circumstances bind its Government with respect to remedies for violations of international law."

The Commission was created to hear cases based on complaints of violation of international law. The instant case was of course presented for an adjudication of such a complaint. Certainly the basis of the claim was not a complaint of a violation of some rule of etiquette.

The Commission proceeds to state that no "provision in any constitution, statute, law, or decree, whatever its form, to which the claimant has not in some form expressly subscribed in writing", will preclude the claimant from presenting his claim to his Government or the Government from espousing it and presenting it to this Commission for decision under the terms of the treaty. The Commission by this *dictum* with respect to some form of local law which is not involved in the case states that the right of the Government of the United States to have the case tried before an international tribunal conformably to the requirements of the arbitration treaty cannot be destroyed. It would therefore seem that, as has already been suggested, the capacity to have the case thrown out of court as was done must be attributed not to authority possessed by Mexico, but to that of the claimant or to some legal operation resulting from the combination of both.

In a concurring opinion by one of the Commissioners it is stated that Article 18 of the contract in question as construed by the two other Commissioners "in effect does nothing more than bind the claimant by contract to observe the general principle of international law which the parties to this Treaty have expressly recognized in Article V thereof". What was actually done in Article V of course was to stipulate that effect should *not* be given to the rule of international law with respect to the requirement of a resort to legal remedies. Certainly the elimination by the treaty of any application of that rule cannot be adduced as an argument that the rule should be applied.

It would seem to be a remarkably narrow construction of the sweeping language of Article 18 to say that its scope is merely to prescribe in substance the requirement of international law with respect to resort to legal remedies. The Mexican Government did not in argument contend for any such construction. The Commissioner in his separate opinion attributed such a construction to his associates. But let it be assumed that such an interpretation is proper, and that a nation and an individual may contract with respect

to another nation's right of interposition under international law. The Commission was still confronted with the provision of Article V of the arbitration agreement that no claim should be disallowed by the application of the rule of international law with respect to resort to local remedies. It is clear, therefore, that the Commission, in the light of its own narrow construction of the language of Article 18 as to its effect in precluding the United States from intervening should have ignored as of no effect a contractual provision construed merely to bind a claimant "to observe the general principle of international law". Of course the claimant was not bound by any such rule of international law, since neither that rule nor any other rule of international law is binding on the claimant. The Government of the United States might have been bound by that rule, and the Mexican Government might have invoked it, if the rule had not been eliminated by Article V of the arbitral agreement, as it was.

It was the duty of the Commission to give effect to the clearly expressed intent of Article V of the arbitration agreement. The intent and clear legal effect of that Article is that claims shall not be dismissed because of failure of claimants to resort to local remedies. Therefore, to reject the claim was to nullify the clear intent and legal effect of provisions by which the two Governments stipulated that claims should not be rejected on the ground that there had not been a resort to legal remedies. It is indeed interesting to perceive how the Commission deals with this question.

It is stated in the Commission's opinion that "the claim as presented falls within the first clause of Article I of the Treaty, describing claims coming within this Commission's jurisdiction". That is obviously true, and therefore the claim should not have been rejected by the Commission. But the Commission continues, stating that the claim is not one "that may be rightfully presented by the claimant to its government for espousal". In other words, even though the two Governments have agreed by language which the Commission states includes the claim as presented, the Commission concludes that the claimant could not rightfully present it to the claimant's Government. It follows that the logical conclusion of the Commission is that some contract made by the claimant with the Government of Mexico in the year 1912, operated to the future destruction of the effect of an international covenant made between the United States and Mexico 11 years later than the date of the contract between the claimant and Mexico. The Commission states that the claimant had not "the right to present" its claim to the Government of the United States. If it had not that right it must have been because some proper, applicable law denied it the right. The Commission did not cite any Mexican law which it considered had extra-territorial effect so as to operate on American citizens in their own country; it could of course not cite any law of the United States; and it is equally certain that international law, to which the claimant is not subject, contains no rule forbidding it to present to its government the claim which it did present. Even if there had been some Mexican law which the Commission might consider to be pertinent, such law could of course not override a treaty between the United States and Mexico concluded in 1923.

It is unlikely that in an arbitration such as that provided for by the Convention of September 8, 1923, either of the contracting parties would present a claim to the Commission unless it had been requested to do so by a claimant. The Claims Convention in the conventional way refers to claims presented to each Government since the signing of the Claims Convention of July 4, 1868. If it be accepted as a jurisdictional requirement that the

claim of the North American Dredging Company of Texas should have been presented to the United States and should not have been espoused by the later on its own initiative, we are confronted with the fact that the claim was so presented, and this was not contested.

But the Commission says that the claimant could not "rightfully present this claim to the Government of the United States for its interposition". The Commission's connotation of the term "rightfully" is not explained. It is certainly not derived from any rule or principle of law. Assuredly if an important claim involving a very considerable amount is to be dismissed on the ground that a thing has not been "rightfully" done the denial of rightful conduct should be grounded on some legal prohibition. As Dr. Borchard says with respect to the duty of protection, whether "such a duty exists toward the citizen is a matter of municipal law". *Diplomatic Protection of Citizens Abroad*, p. 29. A claimant's right to protection from his Government is determined by the law of that Government. The right of the Government to extend protection is secured by international law. And the merits of a complaint in any given case are determined by that law. The executive department of the Government of the United States which is charged with the responsibility of conducting the foreign relations of the Government, including the protection of lives and property of citizens abroad, knew that the claim had been rightfully presented to it. For the Constitutional function of the executive department to receive and present this claim the Commission substituted provisions of the contract to dredge the port of Salina Cruz as construed by the Commission.

The Commission under its remarkable interpretation of that contract evidently considered it had a right to use its discretion as to what kind of claims it would consider might be "rightfully" presented to the United States for interposition and what claims should be barred from presentation to the Government of the United States by the contract for dredging. It said that such a contract could not preclude the United States from receiving and presenting claims "for violations of international law". Of course a violation of that law was the basis of that claim, but in view of the contract, the Commission said, the claimant could not "rightfully" present his case to the United States, and the United States in its turn, in spite of international law and of the jurisdictional provisions of the Claims Agreement, could not "rightfully" espouse it. An imaginary claim involving a complaint of a violation of international law could, in the opinion of the Commission, be rightfully presented, but an actual claim of that nature concerned with allegations of confiscation of property and property rights could not be rightfully presented.

And with respect to a hypothetical case it is stated that, if the claimant had resorted to Mexican tribunals and had suffered a denial of justice he could have presented his claim to his Government, which in turn could have had its day before the Commission. That is a remarkable conclusion in view of the contractual provisions upon which the Commission relies to forbid the claimant from presenting his claim "rightfully" to the United States. They specifically forbid the claimant from having any recourse except the means "granted by the laws of the Republic to Mexicans", which course excluded any means secured by international law or by treaty arrangements—any means other than application to Mexican judicial or administrative authorities.

If one might allow himself to speculate as is done so freely in the Commission's opinion as to what might have happened had certain things happened

that never did happen, it would be interesting to conjecture what the Commission's decision would have been *if a claim had* been presented predicated on a denial of justice resulting from the acts of a Mexican tribunal in construing law and facts in connection with a suit for breach of contract. The contract clearly precluded resort to diplomatic redress with respect to such a complaint. And the Commission relied on the contract in throwing out the claim on the ground that it was not "rightfully" presented to the United States.

In discussing the "illegality" of the contractual provision in question under the Commission's theory that international law has some bearing on the standing of a contract of this kind, the Commission states that, since it is impossible to prove that illegality, "it apparently can only be contested by invoking its incongruity to the law of nature (natural rights) and its inconsistency with inalienable, indestructible, unprescriptible, uncurtailable rights of nations". "Inalienable rights" it is said, "have been the cornerstones of policies like those of the Holy Alliance and of Lord Palmerston; instead of bringing to the world the benefit of mutual understanding, they are to weak or less fortunate nations an unrestrained menace". Whatever these rights, which the Commission mentions, may be, it would seem to be unnecessary to discuss them, since the United States invoked none of them, nor any of the policies of the Holy Alliance and of Lord Palmerston.

A few other passages in the Commission's opinion may be referred to briefly to indicate its attitude with respect to this claim.

The Commission decided that the case was not within its jurisdiction, in spite of the fact that it stated that the clear language of the jurisdictional provisions of Article I of the Convention of September 8, 1923, embraced the claim. The question before the Commission was whether the United States had a right to press this claim before the Commission embraced by the jurisdictional article. That is all the United States undertook to do in this case and yet the Commission saw fit to cite the case apparently as a horrible example. It was said: "If it were necessary to demonstrate how legitimate are the fears of certain nations with respect to abuses of the right of protection and how seriously the sovereignty of those nations within their own boundaries would be impaired if some extreme conceptions of this right were recognized and enforced, the present case would furnish an illuminating example". Assuredly it seems to be strange that, with respect to the action of the United States in presenting a claim embraced by the jurisdictional article of an arbitration treaty, use should be made of language concerning abuses of the right of protection, the serious impairment of the sovereignty of nations, and extreme conceptions of the right of protection.

As has been said, the Commission dismissed the case because it declared it had no jurisdiction. In the American Memorial were allegations with respect to arbitrary interference with work to be performed under a contract; non-payment for work performed; and the seizure of property. Evidence accompanied the Memorial in support of such allegations. On the part of Mexico there was no denial of these allegations; no allegations that Mexico had observed the contract with the claimant; no evidence of any kind, merely a motion to dismiss on jurisdictional grounds. That motion the Commission granted on such grounds. Nevertheless the Commission proceeded, although questions of evidence bearing on the merits of the case were not involved in the jurisdictional point, to charge the claimant with having breached his contract, and with having forcibly removed a dredge to which under Article 7 of the contract the Government of Mexico

considered itself entitled as security for the proper fulfilment of the contract. Nothing was said in the opinion with respect to allegation supported by evidence that Mexico breached the contract.

Pertinent evidence of international law

As has been observed, the question presented for determination in considering the effect of contractual stipulations between a government and a private individual to restrict the right of interpretation is, whether there is evidence revealing a general assent among the nations to such a restriction, just as there is evidence of general assent to the right of interposition. There is no conventional international law effecting such a restriction. Is there any customary law?

In considering that simple problem in the light of discussions of arbitral tribunals such as have been referred to, it is essential to sweep aside a congeries of notions prompting such questions as whether any principles of international law, which is a law for nations and not for citizens, forbids citizens to enter into contracts intended to limit interposition, and whether a private person on whom international law imposes no obligations violates a rule of international law by making such a contract. It is of course necessary to recognize that the requirements of international law with respect to aliens is not met by the so-called "national treatment". It is likewise necessary to distinguish between jurisdiction to pass upon international reclamations—a subject determined by arbitral agreements—and international law determinative of the merits of such reclamations. It is important to understand that when an international tribunal is concerned with an international reclamation, whether such reclamation is predicated upon allegations of breach of contract or allegations of other wrongful action, the tribunal is called upon to determine whether authorities of a respondent government have committed acts rendering the government liable under international law. And it may be added that it should be borne in mind that the tribunal in dealing with such questions of law is not concerned with anticipated or imaginary "world wide abuses" or "undeniable dangers", or the "law of nature".

In examining the evidence of international law bearing on the question of assent to the particular form of restriction of interposition under consideration, the odd opinions of certain international tribunals which have been discussed furnish little evidence of any such assent, particularly when these opinions are compared with well reasoned opinions of other arbitral tribunals. See in particular the *Martini* case and other cases cited in Moore, *International Law Digest*, Vol. VI, p. 301 *et seq.*; Borchard, *Diplomatic Protection of Citizens Abroad*, p. 805 *et seq.*; Ralston, *The Law and Procedure of International Tribunals*, p. 58 *et seq.*

The appearance of these contractual stipulations in a few concessionary contracts can contribute but little to proof of convincing evidence of general assent.

Treaty stipulations referred to in the opinion of the Commission in the *North American Dredging Company of Texas* case, even if they limited intervention authorized by international law, which they clearly do not, would of course be no evidence of assent on the part of any nation to allow its rights of interposition to be destroyed by contract between some other nation and a private individual.

With respect to the connotation of "general assent" which is the foundation of international law, it is interesting to note that the eminent authority, Dr. Oppenheim, in spite of the very general assent given to the Declaration of Paris, does not affirm that this treaty has become international law. Many nations signed, others adhered subsequently to the signing of the treaty. The United States has observed the treaty in practice and affirmed that it should be regarded to be international law. Nevertheless Dr. Oppenheim conservatively says:

"The few States, such as the United States of America, Spain, Mexico, and others, which did not then sign, have in practice, since 1856, not acted in opposition to the declaration, and Japan acceded to it in 1886, Spain in 1908, and Mexico in 1909. One may therefore, perhaps, maintain that the Declaration of Paris has already become, or will soon become, universal International Law through custom." *International Law*, Vol. I, pp. 74-75, 3rd ed.

The position of the United States rejecting any idea of this limitation on interposition has been shown not only by contentions advanced before arbitral tribunals, but by repeated declarations in diplomatic correspondence. Moore, *International Law Digest*, Vol. VI, p. 293 *et seq.* The attitude of the Government of the United States may be illustrated by brief passages from memoranda transmitted by Secretary of State Root to the President of the United States in 1908, and by the latter forwarded to the Senate in relation to certain difficulties between the United States and Venezuela. Among other things it was said:

"The answer may be given in the words of Secretary Bayard to Mr. Scott, minister to Venezuela, June 23, 1887:

" 'This Government can not admit that its citizens can, merely by making contracts with foreign powers, or by other methods not amounting to an act of expatriation or a deliberate abandonment of American citizenship, destroy their dependence upon it or its obligation to protect them in case of a denial of justice. (Moore, *International Law Digest*, Vol. VI, p. 294.)'

"That is to say, it is not in the power of a private citizen by private contract to affect the rights of his Government under international law. The very greatest effect which can be conceded to such a contract is that noted in the reply of the English Government to the Orinoco Trading Company in this very case, quoted by the umpire on page 219 of his opinion:

" 'Although the general international rights of His Majesty's Government are in no wise modified by the provisions of this document, to which they were not a party, the fact that the company have so far as lay in their power deliberately contracted themselves out of every remedial recourse in case of dispute, except that which is specified in article 14 of the contract, is undoubtedly an element to be taken into serious consideration when they subsequently appeal for the intervention of His Majesty's Government. (Ralston's Report, p. 90.)'

"That is, the highest effect which can be given to such an agreement is to say that the fact of its existence is a matter fit to be addressed to the discretion of the intervening government. If, nevertheless, the Government sees fit to interfere, its rights are in no wise affected." *Correspondence Relating to Wrongs Done to American Citizens by the Government of Venezuela*, p. 79.

"To preclude the claimant in this case from relief, the Calvo clause—'All the doubts and controversies arising from the interpretation and wording of this contract shall be decided by the courts of the Republic of Venezuela in accordance with its laws, and in no case can they become the foundation for international claims'—is triumphantly invoked. It is true that the claimant company itself waived all rights of diplomatic intervention as far as it was concerned, but an unaccredited agent may not renounce the right or privilege of the Gov-

ernment, and for the purposes of this claim, and the company is nothing more than a private citizen. A citizen may waive or renounce any private right or claim he possesses; he may not renounce the right or privilege of this Government. It is not merely the right and privilege, it is the duty, of the Government to protect its citizens abroad and to see to it that the dignity of this Government does not suffer injury through violence or indignity to the private citizen. Take the case of an act which may at once be a tort and a crime: It is a familiar doctrine that the injured party may waive the tort; he can not waive the crime. The reason is that he may waive a right or privilege which he possesses in his private capacity; he can not waive the right of the public nor the interest of the public, because he is not the agent of the public for such purposes. It therefore follows that this Government may intervene with entire propriety to protect the rights of its citizens, even although such citizens have contracted away the right to diplomatic intervention in so far as it lay in their province." *Ibid.*, p. 116.

The following passage found in Moore's *International Law Digest*, may be quoted as illustrative of the attitude of the German Government as expressed in 1900:

"The position of the German Government with reference to the non-intervention clause in Venezuelan contracts was thus reported by the American minister at Caracas: 'I have had another talk with the German minister on the subject. He said: "I have under instructions notified the Venezuelan government that my government will no longer consider itself bound by the clause in most contracts between foreigners and the Venezuelan government which states that all disputes, growing out of the contract, must be settled in the courts of this country. Our position is that the German government is not a party to these contracts, and is not bound by them. In other words, we reserve the right to intervene diplomatically for the protection of our citizens whenever it shall be deemed best to do so, no matter what the terms of the contract, in this particular respect, are. It would not at all do to leave our citizens and their interests to the mercy of the courts of the country. The Venezuelan government has objected with very much force to this attitude on our part, but our position has been maintained". It is apparently not at this time the purpose of the German government to interfere diplomatically in all contractual claims, but rather to contend for its right to do so'. " Vol. VI, p. 300.

A short time ago a committee of the League of Nations addressed to governments the following inquiry:

"What are the conditions which must be fulfilled when the individual concerned has contracted not to have recourse to the diplomatic remedy?"

The replies may be quoted to show that obviously there has never been even an approach to a general assent to any rule or principle that the right of a nation under international law to interpose in behalf of its nationals may be restricted by a contract between a citizen and some other nation. The replies made by the Governments were as follows (*League of Nations, Conference for the Codification of International Law* Vol. III, pp. 133-135; *Supplement to Vol. III*, pp. 4, 22):

SOUTH AFRICA

An agreement between a national of a particular State and a foreign Government not to have recourse to the diplomatic remedy is, as regards his own Government, *res inter alios acta* and would therefore not debar his Government from maintaining the principles of international law if it felt so inclined. Such an agreement may also be considered void as being against *bonos mores internationales*, seeing that it would tend to relieve the State in question of its duty to live up to the precepts of international law.

GERMANY

In principle, the answer to the question whether an individual may contract not to have recourse to the aid of his State in defending his interests should be in the negative. In submitting such a claim, the State maintains its own right, of which no private individual can dispose. But it is possible to deduce from agreements of this kind that the individual foregoes his right to regard himself as injured by certain events, so that the State's claim would be devoid of any effective basis.

AUSTRALIA

A contract by the individual not to have recourse to the diplomatic remedy in case of denial of justice or violation of international law should be regarded as void.

AUSTRIA

Since the matter under consideration is not responsibility towards the injured private person, but international responsibility, renunciation of recourse to the diplomatic remedy on the part of the individual should not, in principle, affect the case.

BELGIUM

Renunciation of recourse on the part of the individual concerned does not affect the claim of the State, which he has no power to bind.

BULGARIA

When a State has acted in self-defence, even when the person concerned has contracted not to have recourse to the diplomatic remedy, the State is entitled to disclaim responsibility.

CANADA

Only when such a contracting out is allowed by the laws of the State of which the individual is a national.

DENMARK

.... No private individual however, can renounce the right of his State, in international law, to plead the violation of treaties or of international law itself.

FINLAND

Contracting not to have recourse to the diplomatic remedy should be regarded as admissible and valid at law provided the contract has been concluded freely and without constraint.

HUNGARY

In case (d), the individual concerned has only contracted not to enforce his claims by having recourse to a certain remedy—he has not relinquished the right itself; in such circumstances, therefore, he may cause the responsibility of the State to be established through some other channel.

JAPAN

Such "renunciation of protection" on the part of the individual is deemed to be ineffective in affecting the State's right to diplomatic protection of its citizens or subjects.

NORWAY

If the foreigner in question has contracted not to have recourse to action through the diplomatic channel, we presume that the State will nevertheless not be freed from its international responsibility in the cases mentioned in reply to point IV. This applies even if the renunciation expressly includes these cases, since such renunciation cannot be regarded as binding on the foreigner's country of origin.

NETHERLANDS

In this case responsibility may be disclaimed unless the contract was concluded under stress of physical or moral constraint.

POLAND

It is only as regards point (d) (Calvo clause) that an express reservation should be made—namely, that the renunciation by a private individual of diplomatic protection (both the renunciation and consequential exclusion of settlement by international arbitration of the question whether an international wrong has been committed) is not valid and remains without legal effect as regards the State defending the injured party.

SWITZERLAND

Renunciation of this kind by an individual would not necessarily bind the State of which he is a national; the latter would always be entitled to hold another State responsible for an act contrary to international law committed in respect of one of its nationals, even if the national in question decides not to complain or has given an undertaking not to do so. For, at international law, there is only one injured party and that party is not the individual, but the State. "In protecting its nationals against foreign States", as Anzilotti very rightly observes, "the State protects its own interests against all unlawful interference, that is to say, against all pretensions of a foreign State not based on international law." In other words, a State is not internationally responsible because an injustice has been committed against an individual, but because such injustice constitutes an act contrary to international law and injures the rights of another State. Conversely, we may agree with Anzilotti that, "as the State in this instance merely exercises its own right, it is never bound to take action against the State which has caused unlawful prejudice to its nationals; it simply possesses the right to do so and it may exercise this right or not as it prefers".

CZECHOSLOVAKIA

.... On the other hand, a renunciation of this kind should in no way prejudice the right of the country itself to intervene, if it holds that right independently of the desire of the person to be protected.

It will be noted that among the replies received only two, the very brief ones from Finland and The Netherlands, may perhaps be considered to give some support to the idea that contractual stipulations between a nation and a private citizen can have the effect of limiting the diplomatic interposition of another nation, although these two replies do not specifically discuss that subject.

The answer of Great Britain, in which India and New Zealand concurred, and which contains a reference to the case of the *North American Dredging Company of Texas*, is not altogether clear. The view of the British Government evidently is that "a stipulation in a contract which purports to bind the

claimant not to apply to his government to intervene diplomatically or otherwise in the event of a denial or delay of justice *or in the event of any violation of the rules or principles of international law* is void". (Italics inserted.) That view appears to be in harmony with the position maintained by the British Government in the past. But the opinion is further expressed that "no rule of international law prevents the inclusion of a stipulation in a contract between a government and an alien that in all matters pertaining to the contract the jurisdiction of the local tribunals shall be complete and exclusive". Presumably, however, the British Government, in spite of the use of the words "complete and exclusive", do not mean that the judicial proceedings growing out of a suit on a contract could not properly be the subject of diplomatic discussion or of a claim before an international tribunal, in connection with a complaint of a denial of justice predicated on such proceedings. It is evidently further the view of the British Government that contractual stipulations are not "obligatory" when there is a special agreement between the two governments concerned. From the standpoint of the British Government evidently there is no difference in the effect of such a contractual stipulation and the effect of the rule of international law with respect to the necessity for exhausting legal remedies.

The other nations all say that a contractual stipulation does not restrict a nation's right of interposition. Whether the British Government's position is different is probably nothing but a fanciful, academic question. From a theoretical, strictly legal standpoint a difference probably exists, since the meaning of the British reply seems to be that a contractual stipulation prevents interposition in behalf of a citizen, unless he has resorted to the courts and suffered a denial of justice. But diplomatic interposition is not justified under international law, generally speaking, unless there has been a resort to courts. So the sole point raised by the British reply as compared with the others is whether diplomatic interposition can, as a purely theoretical matter, be limited by a contract between a nation and an alien. This is particularly illustrated by the fact that the British Government evidently take the position that, in spite of contractual stipulations, diplomatic interposition is justified not only in cases of denials of justice predicated on judicial proceedings, but also on "any violation of the rules or principles of international law". The *North American Dredging Company of Texas* case was of course predicated on contentions with respect to violation of international law. The contract invoked in that case explicitly provided that the claimant should have no remedy except by application to Mexican authorities, thus excluding beyond any doubt all diplomatic interposition.

The reply of the United States to the Committee, consisting of quotations and citations, was in harmony with the position it has maintained over a long period.

As has been stated, the United States contended that the decision in the dredging company case, irrespective of its correctness, was not controlling in the instant case. It was pointed out that the Commission in its opinion in the former case concerned itself with matters relating to the performance of a contract and did not deal with an annulment of a contract such as is involved in the instant case. Reference was made in the dredging company case to the vital point as to the failure of the claimant to resort to local remedies. This point was emphasized by all the Commissioners, even though the Convention by its Article V forbids the dismissal of a claim on any such ground.

It would be a strange assumption that the Commission could properly disregard not only the jurisdictional provisions of the Convention of September 8, 1923, but also the provisions of Article V. But even if that assumption be indulged in, the Commission could not well undertake to impose on the claimant more than is required by the rule of international law with respect to the exhaustion of legal remedies. Judge John Bassett Moore lays down the following rule: "A claimant in a foreign state is not required to exhaust justice in such state when there is no justice to exhaust". *International Law Digest*, Vol. VI, p. 677. A claimant cannot be required to endeavor to exhaust non-existing remedies. The man who cancelled "La Pescadora's" concession for a long period combined in himself legislative, judicial and executive functions, including the military. The local remedies which the owner of the concession had were against General Carranza who cancelled the concession. His decrees have been upheld by the Mexican Government. At the time of cancellation no federal courts functioned. There were of course, therefore, no local remedies to which the company could have recourse. The rule as to the necessity for resort to local remedies has no application where remedies do not exist. It does not require the institution of a suit against the head of a State. But it is indicated in the opinion of my associates that there were remedies in 1917. I do not believe that the rule of international law that no attempt need be made to exhaust remedies which do not exist can be modified by my associates so as to be stated that a claimant to whom no remedies are open must anticipate that some might be open to him within three or more years. Moreover, since General Carranza's words and acts were law, it is difficult to perceive how they could be overthrown after 1917. And the contract of concession could not require the company to attempt to resort to non-existing remedies. *Elton case*, decided by this Commission, *Opinions of Commissioners*, 1929, p. 301, *La Grange case*, *ibid.*, p. 309.

Furthermore, it should be noted that in the instant case the concession cancelled belonged to a Mexican national and not to an alien. If the cancellation was wrongful, the American claimant company is not debarred from pressing its claim on the basis of the allotment made to it, irrespective of the conduct of the Mexican national in failing to seek redress against General Carranza's action. The rule of international law relates to aliens. The Mexican corporation was not an alien in Mexico and the claimant was not a party to the contract containing the Calvo clause, nor was it an assignee.

Had the claimant company been a party to the contract for the concession and had it in some way, according to the theory of my associates, been obligatory on it to anticipate that legal remedies might come into existence three years after the cancellation of the concession, it would be pertinent to bear in mind the provisions of the Federal Code of Procedure with respect to *amparos*. Article 779 of the Code of Federal Procedures of 1897 (Lozano, page 144) fixed a period of *fifteen days* within which *amparo* proceedings might be instituted to test the validity of "*actos del orden administrativo*". It is interesting in this connection to examine the comments of Dr. Emilio Rabasa on Article 14 of the Mexican Constitution of 1857 and his severe criticism of the effect thereon of the *amparo* law, establishing the presumption that unless an *amparo* is taken within fifteen days against violatory acts they are considered to be legalized by consent.

With respect to the question of resort to local remedies, it may be interesting to quote still further from the dissenting opinion of Sir John Percival in the case of the *Mexican Union Railway, Ltd.*, *supra*. He said:

".... I am unable to understand how the Mexican Government, after signing a Convention determining the powers of the Commission, can be justified in protesting against any decision at which they may arrive, unless, indeed, they suggest that the Commission has been acting corruptly.

"The Mexican Agent proceeded further and referred to the attitude which the Mexican Government would adopt in the event of a hostile decision in this case, both with regard to the renewal of the mandate of the Commission—which in the absence of renewal expires next August—and towards the various companies which, having signed the Calvo clause, had presented claims to the Commission. Such a communication might, perhaps, have properly been made privately to the British Agency, but I cannot see any object in making it publicly to the Commission except in the hope of influencing their decision by considerations entirely extraneous to the merits of the question in dispute.

"It is a well-known historical fact that the numerous international commissions that have been set up during the last hundred years have never allowed themselves to be intimidated or browbeaten by any Government, however powerful or influential.

"This Commission will certainly prove no exception to the rule. It is needless to add that any threat which may be thought to have been contained in the communication made to them has had no influence whatever upon the decision at which they have arrived. It might, therefore, be considered better to ignore the matter altogether, as was done by the President of the Commission at the time and by the British Agent in his reply.

"But I feel that the communication so made has a bearing on one aspect of the case. It was claimed by the Mexican Agency that the Mexican Union Railway Company should have submitted its case to the National Claims Commission referred to in paragraph 7 above. Seeing that Mexican Government has thought fit to take the course here referred to with regard to this International Commission set up under a treaty, it is reasonable to suppose that it would not have hesitated to adopt similar or even stronger measures towards a National Commission set up by itself. This conduct goes far to explain and excuse the reluctance of the Mexican Union Railway Company and other foreign companies in a similar position to have recourse to the National Commission. It appears, therefore, to me to form an additional ground why this Commission should hold that the omission of the Company to submit its claim to the National Commission is not a bar to its presenting it here."

Reference is made in the opinion of my associates to the provision in the contract of concession with respect to cancellation by administrative proceedings. The propriety of the cancellation would appear to be a matter pertaining to the merits of the case and not a jurisdictional point. I may observe, however, that I am unable to perceive that, because a contract contains provisions with respect to cancellation in case of breach, a cancellation must be regarded as proper irrespective of the question whether any breach was committed by the concessionnaire.

Mr. Fernández MacGregor's opinion contains a quotation from a brief article written by Professor Borchard [the article is erroneously attributed to Mr. Woolsey] in which it was said that "the validity" of the Calvo clause had been upheld and that in eleven cases "its efficacy to bar the jurisdiction of a Claims Commission has been denied".

It is interesting to have in mind that a considerable percentage of the decisions giving effect to the Calvo clause comprises decisions rendered by Dr. Barge in the American-Venezuelan Arbitration of 1903.

Of these opinions, to whose jurisdictional theory my associates adhere, Secretary of State Root, in an instruction of February 28, 1907, to the American Minister in Venezuela, said in part:

"And not only did the umpire, in disallowing these claims upon the ground of the Calvo clause, do violence to the terms of the protocol in the manner already stated, namely, by refusing to examine them on their merits, but also by disallowing these claims he violated the express provisions of the protocol that all claims submitted should be examined in the light of absolute equity 'without regard to objections of a technical nature, or of the provisions of local legislation.'" *Foreign Relations of the United States, 1908*, pp. 774-775.

It was said of these opinions in the memorandum Secretary Root sent to the President in 1908: "in these cases 'absolute equity' seems to have varied with the seasons of the year". I have quoted the views of the distinguished jurist J. B. Moore with respect to these opinions. It was of these opinions that a distinguished lawyer of New York, with much experience in international affairs, said in connection with an address delivered before the American Society of International Law in 1910:

"These contradictory decisions, absurdly reasoned, and resulting in mutually destructive conclusions, fit only for *opera bouffe*, would afford material for the gaiety of nations, were it not that the ripple of laughter dies on the lips when we consider the gross injustice thus perpetrated on private claimants. Decisions such as these have retarded the cause of international arbitration as a solvent for the disputes of nations beyond any possibility of computation. They deserve to be set in a special pillory of their own, so that international arbitrators shall know that however absolute their authority may be in the case in hand, there is a body of public opinion which will fearlessly criticize and condemn such absurd and despotic rulings, and so that at least the possibility of a just criticism shall have its full effect as a deterrent cause in preventing the repetition of such offenses." Mr. R. Floyd Clark, *American Journal of International Law, Proceedings 1910-1912*, p. 162.

I sympathize with Mr. Clark's views as regards the effect of such decisions both on private rights and on the cause of international arbitration. As the Protocols were ignored in these cases, so, as I have pointed out, the Convention of September 8, 1923, was ignored in the dredging company case and in the instant case before this Commission. There may be some room for condonement with respect to the action taken in the Venezuelan cases. And while I of course agree with the views of the distinguished gentleman I have quoted respecting Dr. Barge's opinions, I feel certain that it would be unfair to those opinions to compare them with that written in the dredging company case. No doubt Dr. Barge sincerely considered that he might in "equity" give or withhold jurisdiction as he saw fit, although of course jurisdiction was fixed by the agreement of arbitration, as was pointed out by the court at The Hague. However, the Commission in its opinion in the dredging company case, which is now the basis of the opinion of my associates in the instant case, declares that "the claim as presented falls within the first clause of Article I of the Treaty, describing claims coming within this Commission's jurisdiction". In the case of the *Illinois Central Railroad Company, Opinions of the Commissioners, 1927*, p. 16, the Commission in disposing of a motion to dismiss the case on jurisdictional grounds said: "The Treaty is this Commission's charter". The Commission discussed Article I of the Convention and held that the claim was within the language of that Article. That claim was based on allegations of a breach of contract as was the claim in the dredging company case. The United States had a right to have an adjudication of the latter case on its merits. And it has a right to have such an adjudication of the instant case. The only loophole which the Commission finally found to avoid the trial of these cases, for the

determination which the two governments had by agreement stipulated, was to become, so to speak, a lawmaking body for the United States. The Commission in effect undertook to decree retroactively the unlawfulness of the presentation by the dredging company of its claim to the Department of State and declared that claimant could not "rightfully" present its claim to its government. In throwing out the instant case, my associates ignore applicable jurisdictional provisions, including those pertaining to allotment, even more specific than those nullified in the dredging company case.

An analogy between domestic law and international law

An analogy drawn from domestic jurisprudence may be interesting and also useful in considering the relationship of governments to the law of nations, when the same principles of inescapable logic are applicable to the two legal situations compared. The States of the United States possess a considerable measure of sovereignty. Each has its own Constitution, statutes and judiciary, but the Constitution of the United States is the supreme law of all. The Constitution confers certain rights on citizens to resort to Federal tribunals. It has repeatedly been held by the Supreme Court of the United States that a State statute requiring certain actions to be brought in a State court does not prevent a Federal court from taking jurisdiction of such action. *Cowles v. Mercer County*, 7 Wall. 118; *Lincoln County v. Luning*, 133 U. S. 529; *Chicot County v. Sherwood*, 148 U. S. 529. And statutes requiring so-called foreign corporations, as a condition of being permitted to do business within a State, to stipulate not to remove into the courts of the United States suits brought against such corporations in the courts of the States have been adjudged unconstitutional and therefore void. Likewise contractual stipulations by which corporations agreed not to have recourse to the Federal courts instead of the State courts have been declared void. *Home Ins. Co. v. Morse*, 20 Wall. 445; *Barron v. Burnside*, 121 U. S. 186; *Southern Pacific Co. v. Denton*, 146 U. S. 202.

In other words, neither the law of a State nor a contract made by a State with a private citizen or a business concern can nullify the requirements of the supreme law of the United States. And so likewise, as has been pointed out, neither a nation's domestic legislation nor a contract it may make with a private individual or business concern can nullify another nation's right of interposition, secured by the supreme law of the members of the family of nations, nor nullify an international covenant. Whatever may be said of the ethical principles of an individual who takes action at variance with the terms of a contract he signs, his action can of course not result in setting aside either a nation's constitution or the law of nations.

In the dredging company case, the Commission concerned itself much with the ethical aspects of the presentation of the case, which the Commission stated came within the jurisdictional provisions of a treaty concluded by Mexico with the United States. Nothing was said with respect to the action on the part of Mexico to prevent the hearing of the case. Judicial tribunals, in dealing with legal questions, are not concerned with the ethics of attempts to nullify provisions of a nation's constitution or to nullify a nation's right under international law or under a treaty to protect its nations. Perhaps it may be said that it would scarcely be worth while to undertake to draw ethical distinctions between acts of parties concerned with any such transactions.

I consider it to be important to mention an interesting point that has arisen since the instant case was argued. Rule XI, 1, provides:

“The award or any other judicial decision of the Commission in respect of each claim shall be rendered at a public sitting of the Commission.”

The other two Commissioners have signed the “Decision” in this case. However, no meeting of the Commission was ever called by the Presiding Commissioner to render a decision in the case, and there has never been any compliance with the proper rule above quoted.

SECTION IV

**SPECIAL AGREEMENT: September 8, 1923, as extended by the
Convention signed June 18, 1932.**

PARTIES: United Mexican States, United States of America.

Convention

CONVENTION FURTHER EXTENDING THE DURATION OF THE GENERAL CLAIMS COMMISSION PROVIDED FOR IN THE CONVENTION OF SEPTEMBER 8, 1923¹

Signed at Mexico City, June 18, 1932; ratified by the President of the United States, January 14, 1935; ratified by Mexico, October 7, 1932; ratifications exchanged at Washington, February 1, 1935; proclaimed by the President of the United States, February 1, 1935

Whereas a convention was signed on September 8, 1923, between the United States of America and the United Mexican States for the settlement and amicable adjustment of certain claims therein defined; and

Whereas under Article VI of said Convention the Commission constituted pursuant thereto was required to hear, examine and decide within three years from the date of its first meeting all the claims filed with it, except as provided in Article VII; and

Whereas by a convention concluded between the two Governments on August 16, 1927, the time for hearing, examining and deciding the said claims was extended for a period of two years; and

Whereas by a convention concluded between the two Governments on September 2, 1929, the time for hearing, examining and deciding the said claims was extended for a further period of two years; and

Whereas it has been found that the said Commission could not hear, examine, and decide such claims within the time limit thus fixed;

The President of the United States of America and the President of the United Mexican States are desirous that the time thus fixed for the duration of the said Commission should be further extended, and to this end have named as their respective Plenipotentiaries, that is to say:

The President of the United States of America, J. Reuben Clark, Jr., Ambassador Extraordinary and Plenipotentiary of the United States of America to Mexico; and

The President of the United Mexican States, Manuel C. Téllez, Secretary of State for Foreign Affairs;

Who, after having communicated to each other their respective full powers found in good and due form, have agreed upon the following articles:

ARTICLE I. The High Contracting Parties agree that the term assigned by Article VI of the Convention of September 8, 1923, as extended by Article I of the Convention concluded between the two Governments on September 2, 1929, for the hearing, examination, and decision of claims for loss or damage accruing prior to August 30, 1927, and filed with the Commission prior to said date, shall be, and the same is hereby extended from August 30, 1931, the date on which, pursuant to the

¹ Source : *Treaties, etc.*, 1923-1937, Vol. 4, p. 4460.

provisions of the said Article I of the Convention of 1929, the functions of the said Commission terminated in respect to such claims, for a further period which shall expire in two full years from the date of the exchange of ratifications of this Convention.

It is agreed that nothing contained in this Article shall in any wise alter or extend the time originally fixed in the said Convention of September 8, 1923, for the presentation of claims to the Commission, or confer upon the Commission any jurisdiction over any claim for loss or damage accruing subsequent to August 30, 1927.

ARTICLE II. The present Convention shall be ratified and the ratifications shall be exchanged at Washington as soon as possible.

IN WITNESS WHEREOF the above-mentioned Plenipotentiaries have signed the same and affixed their respective seals.

Done in duplicate at the City of Mexico, in the English and Spanish languages, this eighteenth day of June in the year one thousand nine hundred and thirty-two.

(Signed) J. Reuben CLARK, JR. Manuel C. TÉLLEZ.

And whereas the said convention has been duly ratified on both parts and the ratifications of the two Governments were exchanged in the city of Washington on the first day of February, one thousand nine hundred and thirty-five;

Now, therefore, be it known that I, Franklin D. Roosevelt, President of the United States of America, have caused the said convention to be made public to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States of America and the citizens thereof.

In testimony whereof, I have hereunto set my hand and caused the seal of the United States of America to be affixed.

Done at the city of Washington this first day of February in the year
of our Lord one thousand nine hundred and thirty-five, and
[SEAL] of the Independence of the United States of America the one
hundred and fifty-ninth.

(Signed) Franklin D. ROOSEVELT.

By the President:

Cordell HULL, *Secretary of State*.

SECTION V

**PROTOCOL: April 24, 1934, concerning general claims, with an
exchange of notes relating thereto.**

PARTIES: United Mexican States, United States of America.

Protocol

PROTOCOL CONCERNING GENERAL CLAIMS WITH AN EXCHANGE OF NOTES RELATING THERETO¹

Signed at Mexico City, April 24, 1934; ratified by the President of the United States, January 14, 1935; ratified by Mexico, November 23, 1934; ratifications exchanged at Washington, February 1, 1935; proclaimed by the President of the United States, February 1, 1935

PROTOCOL RELATIVE TO CLAIMS PRESENTED TO THE GENERAL CLAIMS
COMMISSION, ESTABLISHED BY THE CONVENTION OF SEPTEMBER 8, 1923

Josephus Daniels, Ambassador Extraordinary and Plenipotentiary of the United States of America to the Government of Mexico, and José Manuel Puig Casauranc, Secretary for Foreign Affairs of the United Mexican States, duly authorized, have agreed on behalf of their two Governments to conclude the following Protocol:

Whereas, It is the desire of the two Governments to settle and liquidate as promptly as possible those claims of each Government against the other which are comprehended by, and which have been filed in pursuance of, the General Claims Convention between the two Governments, concluded on September 8, 1923;

Whereas, It is not considered expedient to proceed, at the present time, to the formal arbitration of the said claims in the manner provided in that Convention;

Whereas, It is considered to be conducive to the best interests of the two Governments, to preserve the *status quo* of the General Claims Convention above mentioned and the Convention extending the duration thereof, which latter was concluded on June 18, 1932, as well as the agreement relating to agrarian claims under Article I of the additional Protocol of June 18, 1932;

Whereas, It is advisable to endeavor to effect a more expeditious and more economical disposition of the claims, either by means of an *en bloc* settlement or a more simplified method of adjudication, and

Whereas, In the present state of development of the numerous claims the available information is not such as to permit the two Governments to appraise their true value with sufficient accuracy to permit of the successful negotiation of an *en bloc* settlement thereof at the present time;

Therefore, It is agreed that:

First. The two Governments will proceed to an informal discussion of the agrarian claims now pending before the General Claims Commission, with a view to making an adjustment thereof that shall be consistent with the rights and equities of the claimants and the rights and obligations of the Mexican Government, as provided by the General Claims Protocol of June 18, 1932. Pending such discussion no agrarian claims will be presented to the Commissioners referred to in Clause Third

¹ Source: Treaties, etc., 1923-1937, Vol. 4, p. 4489.

nor, in turn, to the Umpire referred to in Clause Fifth of this Protocol; but memorials of cases not yet memorialized may be filed in order to regularize the awards made upon the agreed adjustments.

Consequently, the subsequent provisions of this Protocol shall apply to agrarian claims only insofar as they do not conflict with the status thereof, as exclusively fixed by the terms of the agreed Article I of the additional protocol to the extension of the General Claims Convention, signed June 18, 1932.

Second. The two Governments shall proceed, in accordance with the provisions of Clause Sixth below, promptly to complete the written pleadings and briefs in the remaining unpleaded and incompletely pleaded cases.

Third. Each Government shall promptly designate, from among its own nationals, a Commissioner, who shall be an outstanding jurist and whose function it shall be to appraise, on their merits, as rapidly as possible, the claims of both Governments which have already been fully pleaded and briefed and those in which the pleadings and briefs shall be completed in accordance herewith.

Fourth. Six months before the termination of the period herein agreed upon for the completion of the pleadings and briefs referred to in Clause Sixth or at an earlier time should they so agree, the said Commissioners shall meet, at a place to be agreed upon by them, for the purpose of reconciling their appraisals. They shall, as soon as possible, and not later than six months from the date of the completion of the pleadings and briefs, submit to the two Governments a joint report of the results of their conferences, indicating those cases in which agreement has been reached by them with respect to the merits and the amount of liability, if any, in the individual cases and also those cases in which they shall have been unable to agree with respect to the merits or the amount of liability, or both.

Fifth. The two Governments shall, upon the basis of such joint report, and with the least possible delay, conclude a convention for the final disposition of the claims, which convention shall take one or the other of the two following forms, namely, first, an agreement for an *en bloc* settlement of the claims wherein there shall be stipulated the net amount to be paid by either Government and the terms upon which payment shall be made; or, second, an agreement for the disposition of the claims upon their individual merits. In this latter event, the two above-mentioned Commissioners shall be required to record their agreements with respect to individual claims and the bases upon which their conclusions shall have been reached, in the respective cases.

The report shall be accepted, by the convention to be concluded by the two Governments, as final and conclusive dispositions of those cases. With respect to those cases in which the Commissioners shall not have been able to reach agreements, the two Governments shall, by the said convention, agree that the pleadings and briefs in such cases, together with the written views of the two Commissioners concerning the merits of the respective claims, be referred to an Umpire, whose written decisions shall also be accepted by both Governments as final and binding. All matters relating to the designation of an Umpire, time within which his decisions should be rendered and general provisions relating to his work shall be fixed in a Convention to be negotiated under provisions of this Clause.

Sixth. The procedure to be followed in the development of the pleadings and briefs, which procedure shall be scrupulously observed by the Agents of the two Governments, shall be the following:

(a) The time allowed for the completion of the pleadings and briefs shall be two years counting from a date hereafter to be agreed upon by the two Governments by an exchange of notes, which shall not be later than November 1, 1934.

(b) The pleadings and briefs of each Government shall be filed at the Embassy of the other Government.

(c) The pleadings and briefs to be filed shall be limited in number to four, namely, Memorial, Answer, Brief and Reply Brief. Only three copies of each need be presented to the other Agent, but four additional copies shall be retained by the filing Agency for possible use in future adjudication. Each copy of Memorial, Answer and Brief shall be accompanied by a copy of all evidence filed with the original thereof. The pleadings and briefs, which may be in either English or Spanish at the option of the filing Government, shall be signed by the respective Agents or properly designated substitutes.

(d) With the Memorial the claimant Government shall file all the evidence on which it intends to rely. With the Answer the respondent Government shall file all the evidence upon which it intends to rely. No further evidence shall be filed by either side except such evidence, with the Brief, as rebuts evidence filed with the Answer. Such evidence shall be strictly limited to evidence in rebuttal and there shall be explained at the beginning of the Brief the alleged justification for the filing thereof. If the other side desires to object to such filing, its views may be set forth in the beginning of the Reply Brief, and the Commissioners, or the Umpire, as the case may require, shall decide the point, and if it is decided that the evidence is not in rebuttal to evidence filed with the Answer, the additional evidence shall be entirely disregarded in considering the merits of the claim.

The Commissioners may at any time order the production of further evidence.

(e) In view of the desire to reduce the number of pleadings and briefs to a minimum in the interest of economy of time and expense, it shall be the obligation of both Agents fully and clearly to state in their Memorials the contention of the claimant Government with respect to both the factual bases of the claims in question and the legal principles upon which the claims are predicated and, in the Answer, the contentions of the respondent Government with regard to the facts and legal principles upon which the defense of the case rests. In cases in which Answers already filed do not sufficiently meet this provision so as to afford the claimant Government an adequate basis for preparing its legal Brief with full general knowledge of the factual and legal defenses of the respondent Government, it shall have the right to file a Counter Brief within thirty days following the date of filing the Reply Brief.

(f) For the purposes of the above pleadings and briefs, as well as the appraisals and decisions of the two Commissioners and the decisions of the Umpire, above mentioned, the provisions of the General Claims Convention of September 8, 1923, shall be considered as fully effective

and binding upon the two Governments, except insofar as concerns the matter of procedure, which shall be that provided for herein.

(g) Whenever practicable, cases of a particular class shall be grouped for memorializing and/or for briefing.

(h) In order that the two Agents may organize their work in the most advantageous manner possible and in order that the two-year period allowed for pleadings and briefs may be utilized, in a manner which shall be most equitable to both sides, each Agent shall, within thirty days from the beginning of the two-year pleading period, submit to the other Agent a tentative statement showing the total number of Memorials and Briefs such Agent intends to file. Six months after the beginning of the two-year pleading period, the two Agents shall respectively submit in the same manner statements setting out definitely by name and docket number the claims in which it is proposed to complete the pleadings and briefs, indicating those in which they intend to combine cases in the manner indicated in paragraph (g) above. The number of pleadings and briefs so indicated shall not, except by later agreement between the two Governments, be exceeded by more than ten per cent.

(i) In order to enable the Agencies to distribute their work equally over the two-year pleading period, each Agency shall be under the obligation to file its Memorials at approximately equal intervals during the first seventeen months of the two-year period, thus allowing the remaining seven months of the period for the completion of the pleadings and briefs in the last case memorialized. The same obligation shall attach with respect to the filing of the pleadings and briefs referred to in paragraph (k) below.

(j) The time to be allowed for filing Answers shall be seventy days from the date of filing Memorials. The time to be allowed for filing Briefs shall be seventy days from the date of filing the Answers. The time to be allowed for filing Reply Briefs shall be seventy days from the date of filing the Briefs.

(k) In those cases in which some pleadings or briefs were filed with the General Claims Commission before the date of signature hereof, the Agency which has the right to file the next pleading or brief shall be allowed to determine when that document shall be filed, taking into consideration the necessity of complying with the provisions of paragraph (i) above.

(l) In counting the seventy-day periods mentioned in paragraph (j) above, no deductions shall be made for either Sundays or holidays. The date of filing the above described pleadings and briefs shall be considered to be the date upon which they shall be delivered at the Embassy of the other Government. If the due date shall fall on Sunday or a legal holiday, the pleading or brief shall be filed upon the next succeeding business day. The two Governments shall, for this purpose, instruct their respective Embassies to receive and give receipts for such pleadings and briefs any weekday between the hours of 10 and 16 (4 p. m.) except on the following legal holidays of both countries:

Of the United States.—January 1, February 22, May 30, July 4, first Monday in September, last Thursday in November, December 25.

Of Mexico.—January 1, February 5, May 1, May 5, September 14, September 15, September 16, October 12, November 20, December 25, December 31.

(m) In view of the herein prescribed limitations upon the time allowed for the completion of the work of the Agencies and the Commissioners, it is recognized that the success of this simplified plan of procedure depends fundamentally upon the prompt and regular filing of the pleadings and briefs in accordance with the provisions of this Protocol. It is agreed, therefore, that any pleading or brief which shall be filed more than thirty days after the due date for the filing thereof, shall be disregarded by the Commissioners and the Umpire, and that the respective case shall be considered by them upon the pleadings and briefs preceding the tardy pleadings and briefs, unless, by agreement of the two Governments, the continued pleading of the respective case shall be resumed.

(n) It shall not be necessary to present original evidence but all documents hereafter submitted as evidence shall be certified as true and complete copies of the original if they be such. In the event that any particular document filed is not a true and complete copy or the original, that fact shall be so stated in the certificate.

(o) The complete original of any document filed, either in whole or in part, shall be retained in the Agency filing the document and shall be made available for inspection by any authorized representative of the Agent of the other side.

(p) Where the original of any document or other proof is filed at any Government office on either side, and cannot be conveniently withdrawn, and no copy of such document is in the possession of the Agent of the Government desiring to present the same to the Commissioners in support of the allegations set out in his pleadings or briefs, he shall notify the Agent of the other Government in writing of his desire to inspect such document. Should such inspection be refused, then the action taken in response to the request to inspect, together with such reasons as may be assigned for the action taken, shall be reported to the Commissioners and, in turn, to the Umpire, mentioned in Clause Fifth of this Protocol, so that due notice thereof may be taken.

Done in duplicate in Mexico, D. F. in the English and Spanish languages this twenty fourth day of the month of April one thousand nine hundred and thirty four.

[Signed] Josephus DANIELS.

PURG.

And whereas the said protocol has been ratified on both parts and the ratifications of the two Governments were exchanged at the city of Washington on the first day of February, one thousand nine hundred and thirty-five;

Now, therefore, be it known that I, Franklin D. Roosevelt, President of the United States of America, have caused the said protocol to be made public to the end that the same may be observed and fulfilled with good faith by the United States of America and the citizens thereof.

In testimony whereof, I have hereunto set my hand and caused the seal of the United States of America to be affixed.

Done at the city of Washington this first day of February in the year of our Lord one thousand nine hundred and thirty-five, and [SEAL] of the Independence of the United States of America the one hundred and fifty-ninth.

Franklin D. ROOSEVELT.

By the President:

Cordell HULL, *Secretary of State.*

EXCHANGE OF NOTES

The Mexican Chargé d'Affaires ad interim at Washington (Campos Ortiz) to the Secretary of State (Hull)

[Translation]

EMBASSY OF MEXICO,
Washington, D. C., February 1, 1935.

Mr. Secretary: In conformity with the provision of paragraph (a) of clause six of the protocol relating to claims presented before the General Claims Commission, signed on April 24, 1934, which states: "The time allowed for the completion of the pleadings and briefs shall be 2 years counting from a date hereafter to be agreed upon by the two governments by an exchange of notes, which shall not be later than November 1, 1934" and taking into account that the extension of time granted by the Mexican Government to that of the United States in note no. 6509 of September 26, 1934, expires on the 1st of February, both governments, for the purposes of the clause above mentioned, consider as initiated as of this date and by means of the exchange of these identic notes the period of 2 years to which the said provision of the protocol refers.

I avail myself of this opportunity to renew to Your Excellency the assurances of my highest and most distinguished consideration.

(Signed) P. CAMPOS ORTIZ, *Chargé d'Affaires ad interim.*

His Excellency Mr. Cordell HULL,
Secretary of State, etc., etc., etc.

The Secretary of State (Hull) to the Mexican Chargé d'Affaires ad interim at Washington (Campos Ortiz)

DEPARTMENT OF STATE,
Washington, February 1, 1935.

Sir: In conformity with the provision of Paragraph (a) of Clause Sixth of the Protocol relating to claims presented before the General Claims Commission, signed on April 24, 1934, which states: "The time allowed for the completion of the pleadings and briefs shall be two years counting from a date hereafter to be agreed upon by the two Governments by an exchange of notes, which shall not be later than November 1, 1934", and taking into account that the extension of time granted by the Mexican Government to the Government of the United States in Note No. 6509 of September 26, 1934, expires on the first of February, both Governments, for the purposes of the clause above mentioned, consider as initiated as of this date and by means of the exchange of these identic notes the period of two years to which the said provision of the Protocol refers.

Accept, Sir, the renewed assurances of my high consideration.

(Signed) Cordell HULL.

Señor Dr. Don Pablo CAMPOS-ORTIZ,
Chargé d'Affaires ad interim of Mexico.

SECTION VI

CONVENTION: November 19, 1941.

PARTIES: United Mexican States, United States of America.

Convention

CONVENTION OF NOVEMBER 19, 1941 ¹

The United States of America and the United Mexican States, being desirous of effecting an amicable, expeditious and final adjustment of certain unsettled claims of the nationals of each country against the Government of the other country, without resort to methods of international arbitration for their adjudication, such as those established in prior agreements, have decided to conclude a Convention for that purpose, and to this end have named as their Plenipotentiaries:

The President of the United States of America:

Mr. Cordell Hull, Secretary of State of the United States of America; and

The President of the United Mexican States:

Dr. Francisco Castillo Nájera, Ambassador Extraordinary and Plenipotentiary of Mexico to the United States of America;

Who, after having communicated to each other their respective full powers, found to be in due and proper form, have agreed upon the following articles:

Article I

The Government of the United Mexican States agrees to pay, and the Government of the United States of America agrees to accept, the sum of \$40,000,000.00 (forty million dollars, currency of the United States of America), as the balance due from the Government of the United Mexican States in full settlement, liquidation, and satisfaction of the following claims:

(a) All claims filed by the Governments of the United States of America and of the United Mexican States with the General Claims Commission, established by the two countries pursuant to the Convention signed September 8, 1923;

(b) All agrarian claims of nationals of the United States of America against the Government of the United Mexican States, which arose subsequent to August 30, 1927 and prior to October 7, 1940, including those referred to in the Agreement effected by exchange of notes signed by the Government of the United States of America and the Government of the United Mexican States on November 9 and 12, 1938, respectively; and

(c) All other claims of nationals of either country, which arose subsequent to January 1, 1927 and prior to October 7, 1940, and involving international responsibility of either Government towards the other Government as a consequence of damage to, or loss or destruction of, or wrongful interference with the property of the nationals of either country.

Article II

The Government of the United States of America and the Government of the United Mexican States agree that the following claims are not extinguished in consequence of the stipulations of this Convention:

¹ Source: U.S. Treaty Ser., No. 980.

(a) Claims of nationals of the United States of America against the Government of the United Mexican States, which arose subsequent to August 30, 1927, and are predicated upon acts of authorities of the United Mexican States in relation to petroleum properties, which claims are the subject of a special agreement;

(b) Claims of nationals of the United Mexican States against the Government of the United States of America, which were formally presented to the Government of the United States of America by the Embassy of the United Mexican States in its note number 2705 of May 16, 1941;

(c) Claims of nationals of either country, predicated upon injuries essentially personal, which arose subsequent to January 1, 1927 and prior to the date of the signing of this Convention;

(d) Claims of the nationals of either country, of the character of those included in paragraphs (b) and (c) of Article I of this Convention, which arose subsequent to October 7, 1940 and prior to the date of the signing of this Convention; and

(e) Claims of nationals of the United States of America predicated upon default in the payment of the principal or of interest on bonds issued or guaranteed by the United Mexican States, which were not filed with the Commission established pursuant to the Convention signed September 8, 1923.

The claims included in paragraphs (b), (c), and (d) of this Article will be the subject of future agreements which the two Governments will conclude as soon as possible.

Article III

The United States of America and the United Mexican States, in virtue of the stipulations of this Convention, reciprocally cancel, renounce, and hereby declare satisfied all claims, of whatsoever nature, of nationals of each country against the Government of the other, which arose prior to the date of the signing of this Convention, whether or not filed, formulated or presented, formally or informally, to either of the two Governments, except those claims which are included in Article II of this Convention.

The two Governments agree that, with respect to international obligations and rights of each Government towards the other, the stipulations of this Convention supersede the stipulations of the General Claims Convention signed September 8, 1923, and those of the Protocol signed April 24, 1934, which refers to that Convention, and those of the Agrarian Claims Agreement effected by exchange of notes signed November 9 and 12, 1938.

Article IV

There is credited against the sum of \$40,000,000.00 (forty million dollars, United States currency) mentioned in Article I of this Convention the sum of \$3,000,000.00 (three million dollars, United States currency), the total sum of payments made, prior to the signing of this Convention, to the Government of the United States of America by the Government of the United Mexican States pursuant to the Agreement in relation to agrarian claims, effected by the exchange of notes signed November 9

and 12, 1938. There shall also be credited the additional sum of \$3,000,000.00 (three million dollars, United States currency) which will be paid on the date of the exchange of ratifications of this Convention.

The balance of \$34,000,000.00 (thirty-four million dollars, United States currency) shall be paid by the Government of the United Mexican States to the Government of the United States of America at Washington, in annual instalments, beginning one year after the date of the signing of this Convention, of \$2,500,000.00 (two million, five hundred thousand dollars, United States currency) until the complete liquidation of this debt. The Government of the United Mexican States may, in its discretion, for the purpose of reducing the period for complete liquidation of the balance due, increase the amount of any of the annual instalments, or pay any such instalment or instalments in advance.

In consideration of the stipulations of this Convention it is agreed that the United Mexican States is relieved of the obligation to make further payments pursuant to the provisions of the Agreement in relation to agrarian claims effected by the exchange of notes signed November 9 and 12, 1938.

Article V

In the event of failure to pay any annual instalment, or instalments, when due, the United Mexican States shall pay interest at the rate of one per centum per annum on the amount of each such instalment, or instalments, from the date when the instalment, or instalments, became due up to the date of the payment.

Article VI

This Convention shall be ratified and shall become effective upon the exchange of ratifications which shall take place at Washington as soon as possible.

IN WITNESS WHEREOF, the respective Plenipotentiaries have signed and affixed their seals to this Convention.

Done in duplicate, in English and Spanish, at Washington, this nineteenth day of November, 1941.

[SEAL] Cordell HULL

[SELLO] F. CASTILLO NÁJERA
