

REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

**General Claims Commission (Agreement of Sept. 8, 1923, as extended by the
convention signed September 2, 1929)(United Mexican States, United States of
America)**

8 October 1930 - July 1931

VOLUME IV pp. 547-746



NATIONS UNIES - UNITED NATIONS
Copyright (c) 2006

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 (*accion 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 Pescauha*, 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. Avalos 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.
