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SECTION I

PARTIES: Great Britain, United Mexican States.

SPECIAL AGREEMENT: November 19, 1926.

ARBITRATORS: Dr. A. R. Zimmerman (Netherlands), Presiding Commissioner, Artemus Jones, British Commissioner until December 6, 1929, Sir John Percival, British Commissioner after December 6, 1929, Dr. Benito Flores, Mexican Commissioner.

REPORT: Decisions and Opinions of the Commissioners in accordance with the Convention of November 19, 1926, between Great Britain and the United Mexican States, October 5, 1929, to February 15, 1930. (H.M. Stationery Office, London, 1931.)

Decisions

ROBERT JOHN LYNCH (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 1, November 8, 1929, dissenting opinion by Mexican Commissioner, October, 1929. Pages 20-32[1].)

NATIONALITY, PROOF OF. Nationality is a continuing legal relationship between a State and its citizen and not susceptible of proof in the same degree as a physical fact. Consequently, an international tribunal will merely require *prima facie* evidence of nationality sufficient to satisfy the tribunal and to raise the presumption of nationality, such presumption to be rebutted by the respondent State.

CONSULAR CERTIFICATE AS PROOF OF NATIONALITY. A consular certificate constitutes *prima facie* evidence of nationality and may even possess greater evidential value than a birth certificate.

BAPTISMAL CERTIFICATE AS PROOF OF NATIONALITY. A baptismal certificate showing baptism in Cape Town, Cape Colony, on June 21, 1868, of a child stated thereon to be born June 9, 1868, but apparently silent as to place of birth, will be accepted as further proof of nationality.

Cross-references: Am. J. Int. Law, Vol. 25, 1931, p. 754; Annual Digest, 1929-1930, p. 221.

Comments: G. Godfrey Phillips, "The Anglo-Mexican Special Claims Commission," Law Q. Rev., Vol. 49, 1933, p. 226 at 233.

1. In this case the respondent Government have lodged a demurrer to the claimant's memorial on the ground that it fails to establish the British nationality of the claimant in accordance with Rule 10, paragraph *(a)*, of our Rules of Procedure. According to the terms of that rule, every claimant must, as a condition precedent to the consideration of his claim, give proof of his British nationality in the memorial.

The British Agent relies upon two documents in support of the memorial. The first is a certificate of consular registration, delivered on the 25th May, 1916, by the British Vice-Consul at Tampico, stating that the claimant was duly registered in the register of British subjects of the British Consulate-General of Mexico. The second document (which was delivered after the memorial was printed) is a baptismal certificate to the effect that the claimant was baptized at St. Mary's Cathedral in Cape Town, Cape Colony, on the 21st June, 1868.

The submission of the Mexican Agent is that these documents, taken either singly or in combination, do not amount to sufficient proof of the claimant's nationality within the meaning of Rule 10, paragraph *(a)*.

The British Agent contends, on the other hand, that the consular certificate is sufficient to establish *prima facie* evidence of the claimant's British nationality

[1] References to page numbers herein are to the original report referred to on page 15.

and that the second document is strong corroboration of the statements contained in the first.

The question which the Commissioners have to decide is which of the two contentions is right.

2. The question whether a consular certificate constitutes proof of nationality is not a new problem. From the date when international commissions were first established right up to the present time, the question has engaged the attention of these tribunals from time to time. Respondent governments have often contested the point that consular certificates afford sufficient proof of nationality. Sometimes the question has been decided in the affirmative and at other times in the negative. Various decisions were relied upon by both Agents in the course of the argument, and in a recent decision of the Mexican-German Claims Commission *(Memoria de Labores de la Secretaría de Relaciones Exteriores de agosto de 1926 a julio de 1927, página 221-235*[1]*)* the conflicting authorities are reviewed at some length. It is common ground between both sides in this case that the point has been decided in different ways.

The fact that so many international commissions have failed to agree in the matter points to one conclusion, namely, that international jurisprudence has not yet established any firm criterion whereby the problem can be determined. Neither in the actual decisions of the Commissions nor in the practice observed by such bodies can one find any universally accepted rule upon the point. It is quite clear that any enactment on the part of the British Legislature on the subject of nationality is not enough and is certainly not binding on this Commission. It is equally clear that the same observation applies to any enactment on the part of the Mexican Legislature. In these circumstances the Commission is of opinion that they must consider themselves free in each case to form their own independent judgment on the evidence placed before them. In other words, the Commissioners must attach such weight to the documents as appears to them to be just and fair in the particular circumstances of each case.

3. In the course of the discussion between the Agents of the respective Governments a general proposition was advanced to the effect that nationality is an issue of fact which admits of the same degree of proof as any physical fact, such as birth or death, and that it ought to be proved in the same way. This view, in the judgment of the Commission, is erroneous. A man's nationality forms a continuing state of things and not a physical fact which occurs at a particular moment. A man's nationality is a continuing legal relationship between the sovereign State on the one hand and the citizen on the other. The fundamental basis of a man's nationality is his membership of an independent political community. This legal relationship involves rights and corresponding duties upon both—on the part of the citizen no less than on the part of the State. If the citizen leaves the territory of this sovereign State and goes to live in another country, the duties and rights which his nationality involves do not cease to exist, although such rights and duties may change in their extent and character. A man's nationality is not necessarily the same from his birth to his death. He may according to circumstances lose his nationality in the course of his life. He may elect to become a citizen of another sovereign State. Moreover, the country into which he has moved may, by its domestic laws, impose upon him the nationality of the new country and in this way a state of dual nationality may be created.

These considerations show clearly that it would be impossible for any international commission to obtain evidence of nationality amounting to certitude

[1] See below, page 579. (Klemp case.)

unless a man's life outside the State to which he belongs is to be traced from day to day. Such conclusive proof is impossible and would be nothing less than *probatio diabolica*. All that an international commission can reasonably require in the way of proof of nationality is *prima facie* evidence sufficient to satisfy the Commissioners and to raise the presumption of nationality, leaving it open to the respondent State to rebut the presumption by producing evidence to show that the claimant has lost his nationality through his own act or some other cause. In the same way the respondent State may show that the citizen's first nationality has come into conflict with its domestic laws and that the position has arisen which is described as dual nationality.

4. A consular certificate is a formal acknowledgment by the agent of a sovereign State that the legal relationship of nationality subsists between that State and the subject of the certificate. A Consul is an official agent working under the control of his Government and responsible to that Government. He is as a rule in permanent touch with the colony of his compatriots who live in the country to which he is designed, and he is, by virtue of his post as Consul, in a position to make inquiries with respect to the origin and antecedents of any compatriot whom he registers. He knows full well that the registration of a compatriot entitled to all the rights of citizenship is a step which imposes serious obligations upon the State which he serves. That circumstance in itself is an inducement to him to see that the registration must be attended to with great care and attention.

It is, of course, conceivable that the inclusion of a man's name in the consular register may be made carelessly or erroneously or under circumstances which later may give rise to serious doubts. It is no less true that consular registration does not in any way solve the problem of dual citizenship. In such circumstances as those, a consular certificate cannot be considered as absolute proof of nationality, and it will be competent for the agent of the respondent State to produce evidence in rebuttal. But when, as in this case, nothing is alleged which raises the slightest doubt as to the accuracy or *bona fides* of the entries in the register, a consular certificate ought to be accepted as *prima facie* evidence which does not in any way lose its force from the general objections taken by the respondent Government.

A consular certificate, originating as it does at a more recent date than a birth certificate, may even possess greater evidential value.

5. With regard to the baptismal certificate, it was signed by a Roman Catholic priest and shows that Robert John Lynch, born on the 9th June, 1868, was baptized on the 21st June, 1868, in St. Mary's Cathedral, Cape Town. In the judgment of the Commission, this is still further proof to show that Robert John Lynch was of British nationality. The original certificate has been produced, and in the opinion of the Commission must be accepted as an authentic and genuine document. In view of the date of compulsory birth registration in England, it can be safely assumed that compulsory registration of births was not in existence in Cape Colony in 1868. A baptismal register established both the date of birth and the place and date of baptism. The objection was taken on the part of the respondent Government that the most essential fact on the question of nationality was the place of birth, and that the best evidence of the place of birth was not a baptismal certificate. This objection, however, carries little or no weight in view of the circumstances that the geographical location of Cape Town and the state of the means of communication in 1868 render it extremely unlikely that a child baptized in Cape Town on the 21st June could have been born on the 9th June in any country other than Cape Colony.

6. On these various grounds the Commission rules that the claimant's nationality has been established and that the demurrer must be overruled.

The Mexican Commissioner does not agree with this judgment and expresses a dissenting view.

Dissenting opinion of Dr. Benito Flores, Mexican Commissioner

The Mexican Commissioner regrets to have to dissent from the opinions of his honourable colleagues, the Presiding Commissioner and the Commissioner for Great Britain, and, with all due respect, begs to give his vote in the form of the following opinion in regard to the demurrer interposed by the Mexican Agent, in the matter of Claim No. 32, presented by His Britannic Majesty's Government on behalf of Robert John Lynch.

The demurrer is based on failure to establish the British nationality of the claimant.

The Facts

I. This is a case of a claim for losses sustained at the hands of "Zapatistas" on the Puente de Garay Ranch, Ixtapalapa, Mexico, in the month of July 1914, and at the hands of Constitutionalist forces, which occupied the ranch shortly afterwards.

II. The claimant endeavours to establish his British nationality by means of a certificate issued by the British Consulate at Mexico City, in which it is stated that the said Robert John Lynch was registered at the said Consulate as a British subject, said certificate having been issued on the 25th May, 1916, by the Vice-Consul, R. C. E. Milne.

III. The Mexican Agent forthwith interposed a demurrer with the Mexican-British Claims Commission, which can only deal with the claims of British subjects, having argued that the consular certificate produced by the British Government was in this case insufficient to establish the nationality of the claimant.

IV. The British Agent replied to the effect that the consular certificate submitted for the purpose of proving the nationality of Robert John Lynch was *prima facie* evidence of his British nationality; but that for better proof of the nationality of the claimant he produced a certificate of birth and baptism of the said Robert John Lynch. This certificate of baptism was issued by a priest of the name of John Colgan, in charge of St. Mary's Cathedral, Cape Town, South Africa, and it appears from it that Robert John Lynch was born on the 9th June, 1868, and that he was baptized on the 21st June, 1868. The names of his parents appear in the said certificate, and that of the clergyman who baptized him.

V. On the 8th October, 1929, the demurrer was argued before the Commission. The Mexican Agent averred that the only way of proving the nationality of a person is by means of a certificate issued from a civil register, and that only in the event that the British Agency should fully be able to prove that it had been impossible to obtain that document, could a certificate of baptism be accepted.

On those grounds the Mexican Agent challenged the certificate issued by the British Consulate in Mexico to Robert John Lynch, as being insufficient proof of nationality.

VI. The British Agent answered that he agreed that in a majority of cases a consular register is not convincing proof of nationality, but that it had been

impossible to obtain any evidence other than the certificate of baptism of Robert John Lynch and that it, in his opinion, was sufficient to establish his nationality.

VII. The Mexican Agent, in order to show that consular registers are insufficient to prove the nationality of a person, cited the precedents laid down to that effect by various internationalists, among them Cruchaga Tocornal, Umpire, in the claim of Carlos Klemp *v.* the United Mexican States, and Thornton, Umpire, in the Brockway case, before the Claims Commission, Mexico and United States in 1868.

VIII. The Mexican Agent also challenged the certificate of baptism produced by Lynch, and added that it should be looked upon as a private document lacking authenticity, due to not having been legalized by any English authorities, and called attention to the fact that this document did not state where Robert John Lynch was born, nor that his parents were English.

IX. The British Agent, on his side, contended that there was as yet no uniform jurisprudence in regard to this case in international law, and to that end he cited the cases of William A. Parker and Willard Connelly, decided by the General Claims Commission, Mexico and the United States; that in the first case the nationality of the claimant had been held proved by mere affidavits, and in the Connelly case the nationality of the claimant had been held to have been proved by means of a certificate of baptism, and that in this last case the decision of the Commission had been a unanimous one.

X. This matter took up two meetings: those of the 8th and 9th. On this last day, the Mexican Commissioner asked certain questions of the British Agent, for the purpose of obtaining information about English law and practice in regard to proof of nationality, and as a result of the said questionnaire, the latter agreed to the following points:

(a) That the fact of registration in a British Consulate abroad was of no assistance to a person desiring to acquire British nationality, this being the answer to the following question:

In England, is insertion in British consular registers abroad included among the ways of acquiring British nationality?

(b) That British Consuls do not exercise judicial functions, except in those places where extraterritorial jurisdiction exists.

(c) That as a general principle he admitted that the impossibility of producing certificates from a civil register should, when secondary evidence, such as certificates of baptism, is furnished, be established; but that in the particular instance, as Lynch was born six years prior to the enactment of the statute which created Civil Registers in England, the certificate of baptism was in itself sufficient to establish nationality.

(d) That clergymen in charge of parishes in England are not considered as authorities, and that documents issued by them are not in themselves public proof.

(e) That when a certificate of baptism is produced as a proof of nationality, the law requires that such certificate be compared with the original by the judicial authorities of the Kingdom; in the event of controversy, proof of authenticity of the document is required.

The above in substance is how the argument on this case was closed.

Considerations of a Legal Order

I. The Mexican Commissioner holds that the certificate from His Britannic Majesty's Consulate-General in Mexico, issued by the Vice-Consul, to the

effect that the name of Robert John Lynch appears in its register as a British subject, is not in itself sufficient to establish the fact of his British nationality, for the following reasons:

(a) Because as it is the imperative duty of the Mexican-British Claims Commission to satisfy itself as to the nationality of a claimant, inasmuch as its jurisdiction only extends to claims of British subjects; the Commission itself is the only authority competent to decide upon the nationality of a claimant, not by inspection of a consular certificate only, but also with the data taken into consideration by the Consulate when registering Lynch as a British subject, as the Commission would otherwise delegate its powers to the Consuls, for decision on so important a point; and as the British Agent reported in the course of the above-mentioned argument, as the Government of Great Britain does not specify fixed and concrete rules for its Consuls, for registration of persons as British subjects, but leaves such registration to their own discretion, it is unquestionable that if the Commission held that the certificate in question was sufficient proof for establishing the fact of Lynch's nationality, the British Consul, and not the Commission, would practically be the person to decide in every case as to nationality; that is, by overriding the jurisdiction of the Commission itself, which would be highly dangerous to the interests of the respondent Government.

(b) Because under international law consuls are not judicial officers, but of a merely administrative and commercial character, and registration in consular registers only determines nationality for statistical purposes, for compliance with laws as to compulsory military service, for payment of taxes on income from property which a national residing abroad may have in his own country, for the acquisition of property, the receipt of inheritances or legacies, annuities or allowance, &c.

It was thus most properly laid down in the Mexican-German Claims Commission, by the distinguished Chilean jurist, in the matter of Carlos Klemp *v.* the United Mexican States, pp. 20 and 21 of the booklet in which the decision was published by the Ministry of Foreign Affairs in Mexico, in the year 1927.

(c) Because, according to the opinion of the learned jurist and British Agent, Mr. Montague Shearman, registration at a British Consulate would be of no assistance to a person desiring to acquire British nationality.

(d) Because, according to the selfsame learned British Agent, Consuls do not exercise judicial functions, except in cases where extraterritorial jurisdiction exists.

(e) Because in order to establish the fact of British nationality by birth in a legal and authentic manner, it is necessary to produce a copy or extract from the proper Register of Births and this would not in itself constitute proof of such birth unless bearing the name of a person authorized to declare, register, &c. (Lehr, *Eléments de droit civil anglais*, Paris, 1885, p. 17), (British Act, 1874, in the *Annuaire de législation étrangère).*

(f) Because proof of nationality by means of a consular certificate has been declared insufficient by Courts of Arbitration (Borchard, *Diplomatic Protection of Citizens Abroad*, p. 490, with reference to the following cases: Brickway, U.S. *v.* Mexico, the 4th July, 1868, *ibid*, 2534; Goldbeck, U.S. *v.* Mexico, *ibid*, 2507; *vide* also Gilmore, U.S. *v.* Costa Rica, the 3rd July, 1860, *ibid*, 2539).

II. In so far as concerns the probative value of Lynch's certificate of baptism, as issued by the parish priest of St. Mary's Cathedral, Cape Town, South Africa, as regards the nationality of the claimant, the Mexican Commissioner would accept it as being sufficient for the purpose, if said document had been duly authenticated, due to the fact that Lynch was born prior to

compulsory registration in that colony and as he would therefore not be obliged to establish his nationality by means of a certificate from a civil register; but said document having been taken exception to by the Mexican Agent, on the ground of the failure to legalize the signature of the priest who issued the certificate, it undoubtedly cannot be considered as authentic and genuine, for the following reasons:

(a) Because the parochial certificate produced is a private document issued by a person not endowed with public functions in England; because by it an endeavour is made to determine the nationality of the claimant, in full controversy with Mexico, for which reason the said document should have been authenticated so that it might constitute proof before this International Tribunal, of the facts therein set out.

(b) Because who can affirm that the Rev. Mr. Colgan actually exists? Who can affirm that he really is in charge of St. Mary's parish, at Cape Town? Who can affirm that he is, within his own special functions, authorized to issue the certificate in question? Who can affirm that the signature on the document is authentic?

Authentication of documents, not only private documents like Lynch's baptismal certificate, but also of those issued by authorities lawfully acknowledged, is a requirement that must be met, so that they may be accepted as proof by International Courts, according to the opinion of such learned jurists as M. Charles Calvo *(Le droit international)*, Title II, paragraph 885, which reads as follows:

"*Deux catégories d'actes*

"Section 885. On peut diviser ces actes en deux grandes catégories; les actes authentiques et les actes sous seing privé.

"*Actes authentiques*

"L'acte authentique est défini par l'article 1317 du Code civil français comme celui qui a été reçu par officiers publics ayant le droit d'instrumenter dans le lieu où il a été rédigé et avec les solennités requises. Cette définition s'applique aux actes notariés et, en général, aux actes de juridiction volontaire.

"*En France*

"Les actes notariés ont force exécutoire comme les jugements en France et dans les pays qui ont adopté la législation française sur la matière, tels que la Belgique, les Pays-Bas. Dans les autres pays, les actes notariés et même ceux qui sont reçus par les membres des tribunaux n'emportent pas l'exécution parée; ils n'obtiennent force exécutoire qu'en vertu d'un jugement. Les législations allemandes admettent, pour arriver à l'exécution des conventions constatées par actes publics, une procédure sommaire, plus expéditive que la procédure ordinaire, la procédure du *mandatum sine ou cum clausula*, ou le 'procès d'exécution'.

"Pour déterminer si l'acte fait dans un pays est authentique ou non, pour apprécier le degré de foi qu'on lui doit en justice, il est nécessaire de tenir compte de la loi du pays où l'acte a été passé, de s'assurer que l'acte a été reçu réellement dans le pays à la loi duquel on veut le soumettre.

"Pour cela, il suffit que la partie qui prétend que l'acte est authentique prouve que l'officier qu'il l'a reçu avait caractère pour lui conférer l'authenticité et que la forme de cet acte est attestée et légalisée par un autre officier public digne de foi pour le Gouvernement auprès duquel on veut faire valoir l'acte.

"En ce qui concerne les rapports internationaux sur ce point, on comprend qu'il ne saurait être question de l'exécution forcée des actes étrangers passés dans les États dont la législation n'admet pas *de plano* l'exécution forcée des actes reçus par les officiers publics des mêmes États.

"Pour être exécutés en France, les actes passés en pays étrangers doivent être déclarés exécutoires par un tribunal français (Code de procédure, article 546); mais ils font foi devant les tribunaux sans cette déclaration, pourvu que la signature de l'officier public soit légalisée et que les formalités prescrites par la loi étrangère aient été observées.

"Les actes authentiques passés à l'étranger, conformément à la règle *locus regit actum*, peuvent-ils recevoir la force exécutoire d'une autorité française?

"L'article 546 parle bien de ces actes, mais c'est pour renvoyer à l'article 2128, qui ne donne pas de solution. Aussi dans un premier système qui se subdivise en deux opinions, on répond affirmativement. Quelques partisans de ce système attribuent au président du tribunal du ressort dans lequel on sollicite l'exécution de ces actes, compétence pour leur donner la force exécutoire. [1] D'autres reconnaissent que le tribunal entier a seul qualité à cet effet. [2]

"Mais l'opinion générale se prononce dans le sens de la négative, on déclare que ces actes ne peuvent directement recevoir en France la force exécutoire, en conséquence on traitera ces actes comme des actes sous seing privé et le demandeur devra s'adresser aux tribunaux pour faire condamner son adversaire, ces actes ne serviront qu'à titre de documents et ce qui sera exécutoire sera le jugement français.

"En général, lorsqu'on veut rendre un acte exécutoire, il est nécessaire, pour le compléter relativement à la forme, d'observer toutes les dispositions en vigueur dans le pays où l'on demande l'exécution, quand même l'acte serait valable et complet, d'après la loi du lieu où il a été passé.

"C'est un principe généralement adopté par l'usage des nations que la forme des actes est réglée par la loi du lieu où ils sont faits ou passés. C'est-à-dire que, pour la validité de tout acte, il suffit d'observer les formalités prescrites par la loi du lieu où cet acte a été dressé; l'acte ainsi passé exerce ses effets sur les biens meubles aussi bien que sur les immeubles situés dans un autre territoire dont les lois établissent des formalités différentes.

"En d'autres termes, les lois qui règlent la forme des actes étendent leur autorité tant sur les nationaux que sur les étrangers qui contractent ou qui disposent dans le pays. C'est l'application de la règle *locus regit actum*.

"*Prusse*

"Le Code général de Prusse, part. I, tit. 5, § III, porte: 'La forme d'un contrat sera jugée d'après les lois du lieu où il a été passé.'

"Le § 115, part. I, tit. 10, du Code de procédure civile reproduit le même principe.

"Dans les traités relatifs à l'administration de la justice que la Prusse a conclus avec divers États allemands de 1824 à 1841, on lit, à l'Article 33 de chacun des traités, la disposition suivante: 'Lorsque, d'après les lois de l'un des États contractants, la validité de l'acte dépend uniquement de la circonstance qu'il a été reçu par une autorité spécialement désignée et établie dans le même État, cette disposition recevra son exécution.'

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[1] "De Belleyme-Demangeat sur Foelix," t. II, p. 220, note.

[2] Cass., 25 novembre 1879: "Journal du droit international privé," p. 583, année 1880; p. 428, 1881; Grenoble, 11 mai 1881.

"*Pays-Bas*

"L'article du Code des Pays-Bas dit que 'la forme de tous les actes est régie par la loi du pays ou du lieu où l'acte a été passé'.

"*Russie*

"On lit dans le *Digeste russe :* 'L'acte passé à l'étranger d'après les formes qui y sont en vigueur, bien que non conforme au mode adopté en Russie, sera néanmoins admis à faire preuve jusqu'à production de moyens propres à en infirmer l'authenticité' (lois civ., x. suppl., article 546).

"*Wurtemberg*

"Le projet de Code de commerce pour le royaume de Wurtemberg (article 999) porte: 'Les conditions exigées pour la validité d'un acte passé en pays étranger, en ce qui concerne la forme et la matière de cet acte, sont déterminées par la loi du lieu où il a été passé, et particulièrement par la loi du lieu de la date portée dans un acte écrit: toutefois un Wurtembergeois ne peut attaquer l'acte pour cause d'omission d'une de ces conditions, lorsque cet acte se trouve conforme aux lois du royaume.'

"*Louisiane*

"L'article 10 du Code de l'État de la Louisiane est ainsi conçu: 'La forme et l'effet des actes publics ou privés se règlent par les lois et les usages du pays où ces actes sont faits ou passés; cependant, l'effet des actes passés pour être exécutés dans un autre pays se règle par les lois du pays où ils ont leur exécution.'

"La règle *locus regit actum* admet toutefois certaines exceptions, dont les plus généralement admises sont celles qui se rapportent aux Ambassadeurs ou Ministres publics et à leur suite, qui ne sont pas soumis aux lois de l'État auprès duquel ils exercent leur mission diplomatique; et le cas où la loi du lieu de la rédaction de l'acte attribue à la forme qu'elle prescrit un effet qui se trouve en opposition avec le droit public du pays où l'acte est destiné à recevoir son exécution."

F. Surville (Cours élémentaire de droit international privé), paragraph 420, says:

"1° Preuve littérale. Le juge devant lequel une pareille preuve sera invoquée devra naturellement s'enquérir avant tout de l'origine de l'acte.

"Lorsqu'il s'agira d'un acte émané d'une autorité publique étrangère, cette preuve de l'origine se fera au moyen de légalisations émanées d'abord d'autorités publiques étrangères, et, en dernier lieu, d'un fonctionnaire auquel le Gouvernement français ajoute foi, tel qu'un Ambassadeur, un chargé d'affaires, un consul, &c.

"Quant aux actes sous signature privée, ce sera à celui qui produira l'acte à justifier qu'il a été passé en pays étranger et que la règle *locus regit actum* a été obéie.

"Faisons un pas de plus. L'origine de l'acte est constatée. Il est établi que celui-ci a force probante d'après la loi du pays où il a été rédigé. Quel va être en dehors de ce pays, particulièrement en France, le degré de cette force?

"D'abord, s'il s'agit d'un acte sous seing privé il ne saurait s'élever de difficulté: tout doit se passer comme pour celui rédigé en France. En d'autres termes, les articles 1322 et 1328 du Code civil, puis les articles 193 et suivants du Code de procédure civile recevront leur application.

"Mais arrivons aux actes authentiques. L'acte authentique dressé conformément à la loi étrangère, par l'officier compétent aura-t-il la même autorité en France qu'un acte authentique français? Fera-t-il foi jusqu'à inscription de faux ou seulement jusqu'à preuve contraire? On pourrait être tenté de dire qu'un pareil acte n'aura pas en France un degré de force probante plus grand que l'acte sous seing privé. En effet, l'officier public étranger n'a agi comme tel que parce qu'il avait délégation de la puissance publique de son pays, délégation qui expire à la frontière. Ce n'est pas là toutefois la solution à admettre. En matière d'actes authentiques, il faut en effet se garder de confondre deux choses; d'une part, la *force probante* attachée à l'acte [1] et, d'autre part, la *force exécutoire*. Les actes publics étrangers ne peuvent pas, en raison même du principe de la souveraineté respective des États, avoir force exécutoire en France: mais rien ne s'oppose, étant donné le caractère officiel de ceux qui les ont rédigés à l'étranger, qu'ils y aient une force probante analogue à celle des actes français de même nature. Le principe de souveraineté est ici hors de cause. Les actes publics seront donc crus jusqu'à inscription de faux, et c'est par la procédure édictée à cet égard dans notre Code de procédure civile français qu'ils seront susceptibles d'être attaqués.

"Quant à la foi à attacher aux livres des commerçants, elle sera déterminée par la loi du lieu où ces livres ont été tenus."

F. Laurent (Le droit civil international), t. VIII, paragraph 27, provides that:

"Celui qui produit en France un acte authentique reçu à l'étranger, doit en prouver l'authenticité. Les actes notariés passés en France font preuve par eux-mêmes, parce qu'ils portent la signature d'un officier public français, sauf à contester la validité de l'acte; mais rien ne prouve que l'acte étranger soit dressé par l'officier public dont il porte le nom.

"Il faut d'abord que la signature soit légalisée conformément aux usages diplomatiques. Puis le porteur de l'acte doit établir que l'écrit a été rédigé d'après les lois en vigueur dans le lieu d'où il est daté. Pour faciliter cette preuve, la loi hypothécaire belge dispose que l'acte établissant une hypothèque sur des biens situés en Belgique soit visé par le président du tribunal de la situation des biens. Ce magistrat, dit l'article 77, est chargé de vérifier si les actes réunissent les conditions nécessaires pour leur authenticité dans le pays où ils ont été reçus. Si le président refuse le visa, il peut être interjeté appel. L'acte n'a d'effet en Belgique, c'est-à-dire qu'il n'est considéré comme acte authentique que lorsqu'il a été revêtu du visa. Cette disposition est spéciale aux actes d'hypothèque. J'ai proposé, dans l'avant-projet de revision du Code civil, de la généraliser; je le préviendrai des contestations presque inévitables sur la validité des actes reçus en pays étranger. Quoi qu'il en soit, la loi hypothécaire consacre le principe que je viens d'établir. Un acte authentique dressé à l'étranger n'a par lui-même aucun *effet* en Belgique. C'est-à-dire qu'il n'existe pas aux yeux de la loi (comparez l'article 1131 du Code Nap.); pour qu'il ait effet et, par conséquent, une existence légale, il faut que la partie intéressée le soumette au visa du président, ce qui implique qu'elle doit prouver que l'acte est authentique d'après la loi du lieu où il a été reçu et qu'il est valable comme tel; à défaut de visa, l'acte n'aura d'effet que si la preuve de l'authenticité est faite en justice."

(c) Because the principle that a private document has no probative value, once same has been challenged by the opposite party, is laid down in article 338 of our Federal Code of Civil Procedure, which reads literally as follows: "Pri-

[1] Rapp. J. Clunet, 1910, p. 478 *et seq.*

vate documents shall constitute full proof against the person who wrote them, when not objected to or once they are legally acknowledged," the origin of which is the Law of Civil Procedure of Spain.

Zavala, the author of *Elements of Private International Law* (Conflict of Laws), lays down on p. 319: "All the inhabitants of Mexico must be presumed to be Mexican citizens, which is in accord with article 257 of the International Code of Dudley Field."

Furthermore, a presumption is not destroyed by another presumption, but by proof.

It is true that there are no restrictions on the Mexican-British Claims Commission as regards the admission and weighing of evidence; but this power is undoubtedly always limited by the principles of public international law, especially when it is a matter of determining its own jurisdiction.

The Commission may not, therefore, be satisfied with evidence unless it complies with the principles generally accepted by jurists to enable such evidence to be considered as authentic. In other words, the sovereignty of the Commission when weighing the evidence is not absolute; its limits will always be those imposed by law and by ethics. So that although when estimating a fact in accordance with the best knowledge and judgment of the Commissioners, neither the Convention nor the Rules of Procedure are infringed, the Commission will always be obliged not to depart from the fundamental principles of international law.

(d) Because it must not, although there is subjectively no reason for doubting the certificate of baptism produced by Lynch, be forgotten that the *onus probandi* in this case falls wholly upon the demandant Government, and that the Commission is not authorized to supply any deficiencies in the evidence produced by either party.

In view of the whole of the foregoing, the Mexican Commissioner holds that the demurrer should be allowed, on the ground that the nationality of the claimant has not been properly established.

VIRGINIE LESSARD CAMERON (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 2, November 8, 1929, concurring opinions by British and Mexican Commissioners, undated. Pages 33-50.)

EVIDENCE BEFORE INTERNATIONAL TRIBUNALS. In the absence of any express provisions in its *compromis* to the contrary, an international tribunal may permit any evidence whatever to be introduced before it.

AFFIDAVITS AS EVIDENCE. Affidavits will be admitted as evidence but will be weighed with the greatest caution and circumspection.

NATIONALITY, PROOF OF.—CONFLICTING STATEMENTS BY CLAIMANT CONCERNING NATIONALITY. Presumption of nationality raised by an affidavit as to nationality of decedent, together with a certificate of British consular registration of decedent, *held* rebutted by a document produced by Mexican Agent signed by decedent in which he described himself as an American citizen.

CLAIM IN REPRESENTATIVE CAPACITY. A claimant purporting to act on behalf of a decedent's estate must submit evidence of his legal representative capacity.

Cross-references: Am. J. Int. Law, Vol. 25, 1931, p. 757; Annual Digest, 1929-1930, p. 452.

1. In this case the demurrer filed by the Mexican Agent is based on two grounds: (1) that no reliable document has been produced by the British Government to establish the British nationality of either Dr. Murdock C. Cameron or of Mrs. Cameron, and (2) that the Memorial does not comply with article 11 of the Rules of Procedure, which requires an executor or administrator who claims on behalf of the deceased person's estate to give evidence of the legal representative capacity in which he or she is acting.

In the course of his argument the Mexican Agent raised other points. He contended, in particular, that the Commissioners were not entitled to accept affidavits, on the ground that Article 4 of the Anglo-Mexican Convention does not specifically mention affidavits. A further contention was that the third paragraph of Article 4 was governed by Mexican law and that documentary evidence as well as parole evidence given in examination before the Commission should be in accordance only with Mexican law. He relied in particular upon the fact that affidavits were a form of evidence which was unknown to the law of Mexico.

The Mexican Agent declined to attach any importance to an affidavit sworn by a brother of Dr. Cameron (annex 2 of the Memorial), dated the 25th August, 1909, in which it is declared that Dr. Cameron was born on the 9th May, 1855, as a British subject, and that he never lost that nationality. He submitted that the affidavit possessed no value, because it was sworn to by a near kinsman of the claimant, who was therefore not an independent witness and as to whose trustworthiness the Commission had no information.

Furthermore, the respondent Government produced a document signed by Dr. Cameron in 1896 in which he described himself as a citizen of American nationality.

Finally, the Mexican Agent submitted that Dr. Cameron must be considered a Mexican citizen under article 30 of the Mexican Constitution of 1857, because he had acquired land in Mexico and was the father of Mexican children.

2. Against these contentions the British Agent relied upon various points in the course of his argument. In the first place, the affidavit of Dr. Cameron's brother was the evidence of a person in a better position to know the facts of Dr. Cameron's nationality than anyone else. He produced a certified copy of entries in the register of the British Consulate at Tampico, showing that Dr. Cameron and his children were registered as British subjects on the 5th June, 1908. The fact that Dr. Cameron was born in Canada was, he suggested, an explanation why the deceased had described himself as being of American nationality. He relied upon the authorities set out on p. 186 of *Ralston*, that article 30 was to be construed in a permissive and not in an obligatory sense. With regard to Rule 11, he submitted that no letters of administration were required by the law of Texas to administer an intestate estate.

The British Agent contested strenuously the claim of the Mexican Government that affidavits were excluded by the treaty and that Article 4 was to be interpreted according to Mexican law. In the whole history of international commissions no treaty had ever been signed which permitted the law of one

sovereign State to determine disputes to the exclusion of the law of the other sovereign State. Affidavits were covered by the words "other evidence" and the application of the Mexican law related exclusively to the parole examination of witnesses before the Commission.

3. It is necessary that the Commissioners should make clear once and for all what their attitude is with regard to the claim that matters of evidence and procedure were to be governed by Mexican law and that affidavit evidence was excluded by the language of the treaty. This is a matter of great general importance which must be examined with care.

In the first place the Commissioners consider that there is no limitation in the terms of the treaty to restrict them in the evidence they receive. The Commission is independent of both the Mexican law and the British law and there is nothing in the treaty to suggest the contrary.

As an international tribunal the function of the Commission is fundamentally different from the function of a civil national tribunal. The Commission has been created by two sovereign States for the purpose of carrying out a determinate object and both States have selected experienced lawyers who possess their confidence. In signing the Convention the Governments have acknowledged that it is in the interest of both States that the claims should be disposed of once and for all. In the preamble to the treaty both Great Britain and the United States of Mexico express their desire "to adjust definitively and amicably all pecuniary claims arising from losses or damage suffered by British subjects".

By article 2 of the treaty a duty is imposed upon the Commissioners "to examine with care and to judge with impartiality in accordance with the principles of justice and equity all claims presented". In order to carry out the object of the treaty and the duty of the Commissioners it is necessary that this body should be equipped with more extensive powers than a domestic tribunal can enjoy so that the Commissioners can ascertain the truth in a manner which is not subject to any restriction.

It appears to us that the true principles to be observed are expressed in the following words taken from pp. 38-39 of the Report of the Mexican-American Claims Commission, dated the 8th September, 1928:

"For the future guidance of the respective Agents, the Commission announces that however appropriate may be the technical rule of evidence obtaining in the jurisdiction of either the United States or Mexico as applied to the conduct of trials in their municipal courts, they have no place in regulating the admissibility or the weighing of evidence before this international tribunal. . . . On the contrary, the greatest liberality will obtain in the admission of evidence before this Commission, with a view of discovering the whole truth with regard to each claim submitted."

4. It appears to the Commissioners that the reference to Mexican law in article 4 of the treaty applies only to the examination of witnesses. It would be a unique event in the history of international treaties if two sovereign States solemnly agreed that the law of only one should prevail. The true interpretation of article 4 of the treaty is quite clear. It is the only article in the treaty which made it necessary for the Mexican Government to safeguard the rights of their own subjects. It authorized the Commissioners to have Mexican citizens examined under affirmation, and signing the Convention the Mexican Government had to be careful that their citizens should not be subject to a system of interrogation more stringent and more oppressive to their consciences or less familiar to them than the system prevailing in the courts of their own country. For this reason it was stipulated that the Mexican law must be observed.

5. With regard to affidavits it appears to the Commissioners that they are bound to reject the view put forward by the Mexican Government. It is true, no doubt, that affidavits contain evidence which can be described as secondary evidence and is often of a very defective character. In many cases, it may be, affidavit evidence may possess little value, but the weight to be attached to that evidence is a matter for the Commissioners to decide according to the circumstances of a particular case. Affidavits must and will be weighed with the greatest caution and circumspection, but it would be utterly unreasonable to reject them altogether.

The evidence of which the Commission will be able to dispose is limited by the very nature of the claims.

Most of the claims originate in acts of violence, of which documentary evidence will seldom, if ever, be available. The most recent of the facts have been committed nearly ten years ago and the most remote nearly twenty years ago. It is clear that oral testimonial evidence in most cases cannot be obtained owing to the death or the disappearance of witnesses, and that, if available, one would hesitate to attach much weight to the evidence of witnesses who spoke of events which happened so many years ago.

If, the evidence already being so scarce, the Commissioners were to be deprived of the light of truth, dim as it may be, that may shine out of some affidavits, it would mean that their task would be attended by greater difficulties than seems unavoidable, and that the position of one party to the convention would be seriously prejudiced.

Finally, there is nothing in the language of the treaty to warrant the proposition put forward by the Mexican Government.

6. In this particular case, the affidavit sworn by Dr. Cameron's brother is, however, not a document which ought to carry great weight with the Commissioners. Nothing is known about him, whether he is trustworthy or whether he kept in touch with his brother, who left Canada in 1881. On the other hand, for the reasons set out in our judgment in the case of R. J. Lynch, the certificate of consular registration put in by the British Agent does raise a presumption of British nationality, though that presumption is rebutted by another document put in by the Mexican Government. This is the annex attached to the demurrer, in which in 1896 Dr. Cameron designated himself as *ciudadano americano*. It may be that this referred to his Canadian birth, but, even so, the document affords evidence that Dr. Cameron did not at that time consider himself a British subject or had reasons for not avowing himself as such. The signature of Dr. Cameron to this declaration weakens very considerably the evidence of the consular certificate and justifies the Commissioners in holding that the claimant has not established his British nationality.

This being the case, it is not necessary to consider the effect of article 30 of the Mexican Constitution.

7. As regards the right of claimant to represent her deceased husband's estate, the Commission must declare that article 11 of the Rules of Procedure has not been observed. According to this article, claims on behalf of an estate must be filed by the deceased's legal representative, who shall duly establish his legal capacity therefor. The law of Texas, to which the British Agent appealed, cannot be conclusive for the decisions of the Commission, but even if it could, the Mexican Agent has in his brief put forward arguments raising serious doubt as to whether the Texas Law would give claimant any right to appear before the Commission. The Commission is not in possession of any document showing that Mrs. Cameron has the capacity to appear in her own right and in that of her children, three of whom were of age at the time of

Dr. Cameron's death, and all of whom were of age at the time when claimant made her statement (annex 1).

8. The Commission declares that *(a)* the British nationality of neither Dr. Cameron nor of his widow, the claimant, has been sufficiently established, and that *(b)* claimant has not duly shown her legal capacity to act on behalf of Dr. Cameron's estate in accordance with article 11 of the Rules of Procedure.

The demurrer is allowed.

The judgment is unanimous, but the other two Commissioners desire to express separately their reasons for arriving at the same conclusion.

Separate opinion of Mr. Artemus Jones, British Commissioner

Before dealing with the arguments of the respondent Government in the Cameron case, I want first to dispose of a point of great general importance. This is the question whether the Commissioners are free to decide all matters of evidence and procedure independently of the domestic law of Mexico or of the domestic law of Great Britain. In approaching this problem it is necessary to bear in mind the fundamental differences which distinguish an international claims commission from a municipal or national tribunal. The chief of these lies in the nature of their powers. On the one hand, a municipal or national tribunal is vested with compulsory powers for the purpose of enforcing the attendance of witnesses to give evidence and compelling litigants to disclose facts and documents relevant to the dispute. On the other hand, an international commission is equipped with no such powers, but it is wholly dependent and limited by the terms of the treaty which creates it. For example, in the case of this Commission Article 4 of the Anglo-Mexican Convention lays it down in emphatic language that the procedure adopted by the Commission shall not depart from the provisions of the treaty. An agreement between two sovereign States whereby compensation is paid in certain circumstances, not as a matter of right or of international law, but as a matter of grace on the part of one of the two Powers, stands of necessity in an entirely different category from those municipal laws which control the evidence and govern the procedure of national tribunals. On principle it appears to me beyond challenge that an international tribunal such as this cannot be bound by the municipal law of either country. In the course of the argument I drew the attention of the Agents of the British and Mexican Governments to the case of William A. Parker, which is reported in the American official reports of the American-Mexican General Claims Commission, 1927 Volume, pages 35 to 40. This very question was discussed in the unanimous judgment which was arrived at by three Commissioners in that case. It is of some significance that the Commissioner for Mexico concurred completely in the views of the American Commissioner and the President. The considerations which ought to guide international tribunals with regard to the question are set out at length on page 38 under the heading of "Rules of Evidence." The substance of the judgment is that an international commission cannot be governed by rules of evidence borrowed from municipal procedure. This view is fully established by the conclusive reasons set out therein. In my judgment the reasons which are there advanced ought to be adopted without qualification both by this and every other international commission. In expressing this opinion, I am not overlooking the fact that the decision of one international tribunal is not binding upon another. It is no less true, however, that the general principles relating to evidence and procedure which should guide them ought to be the same.

The broad question raised by the demurrer may be put in these terms: Does the word "proof" in Article 10, paragraph *(a)*, mean absolute and conclusive

proof of British nationality, as the Mexican Agent contends? Or does it mean, as the British Agent contends, *prima facie* evidence sufficient to satisfy the Commissioners, and to raise a presumption calling upon the Mexican Government to rebut the Memorial if they have any rebutting evidence? The Mexican Agent's first proposition is that consular certificates and baptismal certificates are *ex parte* statements and only secondary evidence, and that they ought not to be admitted in evidence unless it be proved that birth certificates are not procurable. He admits that such evidence of nationality as would satisfy an English Court of Justice would be sufficient for the Anglo-Mexican Claims Commission. It is necessary therefore that I should explain what the law in England is. In England, as elsewhere, the rule requiring the best evidence of the fact to be proved prevails, and secondary evidence is only admissible where the primary or best evidence is inaccessible. If, for example, an agreement in writing, or an entry in a bank-book or birth register, has to be proved, copies of such agreement or entries are only admissible on showing that the original agreement or original bank-book or original register has been lost or destroyed. It sometimes happens that it is extremely difficult or highly inconvenient to produce either the original book or the original register, and so Acts of Parliament have been passed, declaring that copies of entries therein (certified as being correct copies by the persons having custody of such books or registers) shall be admissible in evidence. A birth certificate is thus an easy and cheap method of proving the birth of a person, just as a copy of an entry in a bank-book proves payment or the state of a person's bank account. A birth certificate proves British nationality because the place of birth and the parentage of the person are facts from which British nationality is inferred. The register of births is the primary (or best) evidence of a birth because it records the statements made to the registrar about the time of birth by the parents of the child, who alone know the true facts about the birth and parentage. A birth certificate is secondary evidence, for it is the register (in which the particulars are entered by the registrar) which is the primary evidence of the fact to be proved. The registrar is a municipal official who accepts the *ex parte* (or uncross-examined) statements of the parents, but who may never see the child personally. Two strangers, man and woman, may induce him to make an entry in the register of a purely fictitious birth, but if they do so they can be prosecuted and punished, for it is a criminal offence in England to cause false entries to be made in a birth or marriage register. A birth certificate is thus just as much secondary evidence of the fact to be proved as the certificate of a Consul registering a man as a British national or a person's baptismal certificate. As a mode of satisfying the rule which requires the best evidence, a baptismal certificate is superior evidence in one or two respects to a birth certificate. Both documents are secondary evidence but the original entry in a baptismal register, recording the statements of the parents, is made in a church to which they both belong, to a clergyman who actually sees and baptizes the child. The signature of a clergyman who signs a baptismal certificate does not require to be verified by an attestation clause, and the same is true of a birth certificate. Where the original or first written statements are destroyed or inaccessible, verbal evidence of reputation may be given by neighbours who know the facts of birth and parentage. Similarly, entries of a family Bible are admissible in English law to prove the birth of a person. It follows from these considerations that the first proposition of the Mexican Agent is fallacious, since it rests upon the assumption that a birth certificate is primary evidence whereas, in fact, it is but secondary evidence.

The second proposition was that documents put in under clause 4 of the Convention can be admitted only in accordance with Mexican Law. It is

argued that the words "according to Mexican Law" which appear in the third paragraph of the clause govern the whole sentence and apply to documents as well as to parole testimony. The soundness or unsoundness of this proposition depends upon the true construction of clause 4. Now the golden rule of construction is that words in a document must be given their plain and ordinary meaning. It is true that negotiations leading to a treaty may be looked at, but no evidence has been given to the Commission as to what was said during the Anglo-Mexican negotiations. No verbal explanation ought to be given of the intention of the parties as expressed in a document. Thus parole evidence to vary or contradict the terms of a written agreement is not admissible. If, for instance, any question arises as to the meaning of a section or a word in an Act of Parliament, advocates are not allowed to quote Parliamentary debates to show what was the intention of Parliament. In England, the Mexican Agent would not have been allowed to tell the Court what his Government had in mind when they signed the Convention. The words of the clause must be interpreted according to the recognized canons of construction. If the words are read in their plain and ordinary meaning, clause 4 is free from ambiguity. The initial paragraph of the Article allows the Commission to determine their own method of procedure, with the stringent qualification that the provisions of the treaty must not be departed from. The second paragraph then permits both Governments to appoint Agents for the purpose of presenting documentary or parole evidence to the Commission. The third paragraph deals first with documentary evidence and then with parole evidence. It declares, first of all, that the Agents may offer documentary evidence in support of or against any claim. It then deals with parole evidence (which means evidence of witnesses by word of mouth at the trial) and declares that the Agents shall have the right to examine witnesses under affirmation, in accordance with Mexican Law, and such rules of procedure as they may adopt (e.g., Rule 27). In Mexico evidence is given in Courts of Law under affirmation. In England a witness must give evidence under the sanctity of an oath sworn upon the Bible, although a witness who objects to an oath may choose to affirm. This difference in the two systems explains the presence of the words "in accordance with Mexican Law" in the sentence immediately after the phrase relating to witnesses who are examined before the Commission in Mexico. It is clear that the words have no application to the first clause of the sentence, and that the contention of the Mexican Agent has no foundation.

The third proposition advanced by the Mexican Agent was that the absence from Article 4 of the word "affidavit" prevents the Commission from receiving evidence in that form. This proposition is fraught with vital consequences to the future work of the Commission. The object of the Convention is to compensate persons who suffered loss and damage between 1910 and 1920, and, as a result, a large proportion of the documents in support of the claims are affidavits. It follows therefore that if the demurrer is upheld, a very large number of the claims presented must be excluded from consideration at the hands of the Commissioners. The contention rests not so much upon the language of Article 4 as upon the verbal statements made to the Commissioners by the Mexican Agent that his Government intended, when drafting the Convention, to exclude affidavits. Accordingly, the duty rests upon the Commissioners of examining closely the reasoning upon which the Mexican Government founds such a proposition. If, according to legal principles the contention is sound, the Commissioners must say so, irrespective of what the consequences may be. The *onus probandi* of establishing the demurrer being upon the Mexican Government, they have to satisfy the Commissioners that the language of the Convention excludes affidavits from being admitted in evidence. In my opi-

nion, little consideration should be given by the Commissioners to the personal explanations, given both by the Mexican Agent as well as the British Agent, as to what the intentions of their respective Governments were. The question which the Commissioners have to decide must be determined solely by the meaning of the language both parties have used in the document. If the language is plain, there is no need to apply those canons of interpretation which are resorted to in Courts of Justice. If, however, the words are susceptible of more than one meaning, those rules of construction must be applied to remove any ambiguity.

The question is, do the words "documents, interrogatories or other evidence" exclude affidavits from being admissible? Each of these terms must be examined. No ambiguity can be found in the first word "documents." It is a generic term comprehensive enough to include affidavits as well as every other form of written evidence. Under this term all documents which are relevant to the issues before the Court are admissible in evidence. It is by virtue of this term that the Mexican Government put in evidence the official report which is attached to the Cameron demurrer as an appendix (consisting to some extent of pure gossip and hearsay evidence). "Documents" is followed by the word "interrogatories." This is a specific term which describes a particular kind of written testimony common in Courts of Justice. This specific term is followed by the general words "or other evidence." What was the intention of the Mexican Government and the British Government as expressed in the words "or other evidence"? There can be no doubt as to the meaning of the word "other." It means documentary evidence of the same kind or class as that to which interrogatories belong. The term "evidence" standing alone would include parole as well as written evidence, but the generality of this meaning is cut down here to documentary evidence by reason of its association with the preceding word "interrogatories." Are affidavits documentary evidence of the same kind or class as interrogatories? The answer is in the affirmative, since, in nearly all material respects, affidavits are almost identical with interrogatories.

On the assumption, however, that the meaning of the words is not plain, let us see how the position stands. The case for the demurrer is that affidavits are excluded, because in the American General Claims Commission, the words of the Convention were "documents, affidavits, interrogatories or other evidence," whereas in the Anglo-Mexican treaty the word "affidavits" is omitted. In order to deal fairly with this contention, certain principles of interpretation must be borne in mind. In the first place, the language of the American General Claims Commission has nothing whatever to do with the Anglo-Mexican Treaty. The former document was never placed before the British Government at the time when the latter treaty was negotiated. The document must be construed without reference to anything outside it. The Mexican Agent's proposition is that the words "other evidence" do not include affidavits, because (1) there was an intention to omit it in the mind of the Mexican Government when they negotiated the Anglo-Mexican Convention, and (2) because the statements of a witness in an affidavit are what Mexicans call testimonial (or parole) evidence and, therefore, not included in the term "documentary evidence." The fallacy underlying the latter argument lies in assuming that statements of a witness taken down in writing place this evidence in the class of parole testimony. If the language of the article is susceptible of more than one meaning, we must fall back upon the recognized canons of interpretation. The words here are subject to the *ejusdem generis* rule, namely, that the word "other" can only mean the same kind or class of thing as the specific term preceding the word. Apart from this, however, there is another ground why the Mexican Government cannot

sustain their objection. On their own showing the words of the article are ambiguous. If it was their intention to exclude affidavits (as the Mexican Agent assures us), and if it was the intention of the British Government to include them (as the British Agent assures us), it follows that the words used by both parties are ambiguous in the sense that the treaty did not express their true meaning. Can the Mexican Government reap any benefit from an ambiguity for which they are to a certain extent responsible? According to the *contra preferentes* rule of interpretation, no party to an agreement can take advantage of an ambiguity to which he has contributed. That is to say, no contracting party can be allowed to take advantage of his own ambiguity to the prejudice of the other party to the contract. There is another objection to the proposition of the Mexican Government. The very rule upon which the Mexican Government rely in the Cameron demurrer, Rule 11, requires the claim of the deceased British subject to be put forward by his executor or administrator. The probate of a will, whereby the appointment of an executor is proved, or the grant of letters of administration by which an administrator is appointed by the Court to administer the estate, can only be obtained in England and her Dominions by means of affidavits. Such affidavits must be sworn and taken before Commissioners for Oaths, solicitors who are appointed Commissioners expressly by Act of Parliament in their capacity as officers of the High Court of Justice for that purpose. To authenticate the probate of any will Dr. Cameron may have made, or the grant of letters of administration to Mrs. Cameron for production to the Anglo-Mexican Commissioners, as well as to obtain them, an affidavit would have been necessary. It is impossible, to my mind, to reconcile this fact with the contention put forward by the Mexican Government.

Another contention was that "interrogatories" ought to carry greater weight with the Commission than *ex parte* statements such as affidavits, because in the former case they are the statements of a witness who has been subjected to cross-examination. As a general proposition it is true that the evidence of a witness who has been cross-examined may carry greater weight than the evidence of a witness who has not. This proposition, however, depends upon what is meant by the term "cross-examination." To make the position clear, it is necessary that I should describe what "interrogatories" mean in England. A party to a civil action has the right to facilitate the proof of his own case by getting the other party to the suit to admit, in answer to interrogatories, certain facts within his own knowledge relevant to the issues in the case. Accordingly he frames in writing certain questions which the person interrogated has to answer in writing upon oath. From the information supplied by the Mexican Agent, in answer to my questions, it appears that interrogatories in Mexico are something different. Here a plaintiff or defendant who wishes to interrogate a witness has the right to put to him certain questions in writing, and the questions are put and the answers given by the witness in the presence of a judge. A copy of the questions is furnished beforehand to the other side, who have the right, if they so choose, to frame certain cross-questions which are enclosed in a sealed envelope and handed to the judge, and the judge apparently puts these questions to the witness at the time when the interrogatories are taken. Is this cross-examination in the generally accepted sense of the term? Cross-examination is one of the salient features of most judicial systems, and it is a powerful weapon for getting at the truth. Cross-examination in the true sense of the word means that a witness has to face the ordeal of an open court in which he is verbally cross-questioned by counsel, both with regard to the facts of the case, and his own antecedents and credibility. The value of this method of ascertaining the truth lies in the personal contact between the witness, who has no idea of what questions may be asked him, and the personality of the

advocate who puts the questions to him. The effect of the evidence of a witness subjected to this ordeal may be completely destroyed. In this sense the evidence of a witness who has been cross-examined is of greater weight than an *ex parte* statement. It appears to me that interrogatories as administered in Mexico should carry not much more weight than the statements of a witness in an affidavit. In nearly all essential respects interrogatories as understood in Mexico and affidavits as understood in England are identical. (1) In both cases the statements of the witness are taken down in writing. (2) They are taken down in writing by officials authorized to do so. (3) Both are written evidence taken down for the information of the Court. (4) Both must be relevant to the issues in the case. The Mexican Agent, in depreciating the value of affidavits, overlooks the fact that they are made before a public official. In England no affidavit can be taken except by Commissioners for Oaths, who are appointed expressly for the purpose and who, as solicitors, are officers of the High Court of Justice. The different notaries public before whom the affidavits were taken in the Cameron case are public officials quite as much as Señor Sierra, who certifies the annex attached to the Cameron demurrer. If the statements contained in that document are admissible because Señor Sierra certifies them as an official of the Court, so likewise are affidavits because they are made before notaries public who are officers of the High Court of Justice. It was argued by the Mexican Agent that as the statement of a witness in an affidavit was not cross-examined to, the affidavit should not be produced before the Commissioners. Here again there is a fallacy. The fact of the statement not being cross-examined to, does not remove affidavits out of the kind or class of written testimony to which that form of evidence pertains; it merely goes to the weight which the statements ought to carry with the tribunal or their probative value. In other words, the circumstance does not render affidavits inadmissible, but is a matter which the Commissioners can take into account in deciding what weight to attach to them. The case for the British Government against the demurrer can be put into a sentence. You have first of all, in Article 4, a generic term "documents," then a specific term "interrogatories," and then follow general words which extend the meaning of the specific term to documents of the same class or kind. In my opinion, affidavits, being in the same class of written evidence as interrogatories, are thus included in the words of the article.

The next contention was that public documents are superior in weight to any other kind of evidence. For example, the annex attached to the Cameron demurrer is a report taken from the files of the Mexican Government, recording a dispute with regard to certain land which Dr. Cameron had acquired prior to 1896. The case for the Mexican Government rests upon the proposition that, as the statements are contained in an official document, they amount to conclusive evidence. It is necessary to examine the grounds upon which this proposition is founded. The basis of this contention is admittedly derived from the maxim *omnia praesemunter esse*, which is derived from the Roman law and is in operation in most systems of jurisprudence, including the British. The maxim simply means that public documents shall be admitted in evidence without question on the ground that the law presumes that all acts done by public officials are done regularly and in good faith. In other words, the maxim merely facilitates the mode of proof. The evidential value of the contents of such documents is not in any way affected by the application of the maxim. For instance, the annex referred to consists in part of hearsay evidence and partly of extracts from official documents. The fact that these extracts are contained in Government archives dispenses with the necessity of proving them in a formal way. Notwithstanding this fact, it is still for the Commissioners to decide for themselves what credence to attach to the statements. It was alleged by the Mexican

Government that Dr. Cameron was not a British subject, inasmuch as he had signed a document in which he had described himself as an American citizen. In support of this allegation, they produced an official copy of the document referred to. No reflection was cast in any way on the authenticity of this document, but the Mexican Government, in their anxiety to produce all the evidence at their disposal, put in evidence the original document bearing Dr. Cameron's signature. It appears to me that the demurrer is established beyond all doubt by means of this document. The claimant had produced *prima facie* evidence, in my judgment, of Dr. Cameron's British nationality, but this evidence is rebutted by a document bearing Dr. Cameron's own signature, describing himself as a citizen of American nationality. On this ground I agree with my brother Commissioners that the demurrer must be allowed. This unanimous decision of the Commissioners renders it unnecessary to consider the further question whether the claim is barred by the operation of paragraph 3 of article 30 of the Mexican Constitution.

The final submission made by the Mexican Agent was founded on clause 11 of the Rules of Procedure, which requires an executor or an administrator to establish his legal capacity before the Commissioners can entertain a claim on behalf of a deceased person's estate. It appears that when Dr. Cameron was forced to leave Mexico in July 1916 in the circumstances set out in the Memorial, he moved, with his family, into the State of Texas. They were resident there at the time of his death in 1918 and the claimant lives there now. The Mexican Agent contended that Mrs. Cameron could not, under Rule 11, bring the claim before the Commission until she had obtained letters of administration from the courts to administer the estate of her husband, who had died intestate. The Agent of the British Government relied on a letter, written by Mrs. Cameron's lawyer in Texas, that husbands and wives are virtually partners in the property accumulated during marriage under the laws of that State, and also that it was not considered necessary in Texas that an intestate estate should be administered under the authority of the court. This contention, however, is of no avail, as the Mexican Agent has filed in reply a copy of article 2859 of the Texas Civil Code. According to the Texas Civil Code, Dr. Cameron's marital rights are governed by the law of Canada. There is no evidence before the Commission to suggest that the law of Canada does not require the administration of an intestate estate under the authority of the court. In these circumstances, it appears to me that Mrs. Cameron's failure to comply with Rule 11 is fatal to the hearing of her claim.

Separate opinion of Dr. Benito Flores, Mexican Commissioner

The demurrer is based on failure to establish the British nationality of Dr. Murdock C. Cameron and of his widow, Mrs. Virginie Lessard Cameron; and on the fact that, the claim having been made for damage to the property of a person deceased, the said claim should, pursuant to article 11 of the Rules of Procedure, be preferred on behalf of the estate interested and through its legal representative, the claimant not having shown that she is the legal representative of her husband's estate.

The Facts

I. This is a claim for damages, and compensation for loss of property by reason of the confiscation of the Glen Urquhart Ranch, situated at Gomez Farias, by Carranza soldiers under the orders of Lieutenant-Colonel Rodrigo Flores Villarreal, in the month of July 1916.

II. The evidence of the British nationality of Mrs. Cameron is based on an affidavit (annex 2) relating to the British nationality of her husband, Murdock C. Cameron, made by Daniel Cameron before Chas. E. Tanner, Notary, on the 25th August, 1909, in the Province of Nova Scotia, Canada. In said affidavit Daniel Cameron declares that his brother, Murdock C. Cameron, was born at West River, Pictou County, Province of Nova Scotia, on the 9th May, 1855, and that he preserved such nationality until the 25th day of August, 1909, deponent having added that the name and birth of his brother were entered in his father's family Bible, which was in his possession. The claimant further produced a certificate of the marriage solemnized between herself and husband (annex 3).

III. The Mexican Agent forthwith entered a demurrer, which he based on two grounds:

1. That the British nationality of Murdock C. Cameron has not been established, nor that of his widow, Mrs. Cameron.

2. On the fact that the claim should, pursuant to article 11 of the Rules of Procedure, be filed on behalf of the estate of the said Murdock C. Cameron, and that the claimant has not proved that she is the legal representative of the said estate.

IV. The British Agent replied to the effect that the affidavit of Mr. Daniel Cameron is the best evidence available for proof of the British nationality of Dr. Cameron, as due to the fact that he was born on the 9th May, 1855, before civil registration was compulsory in England, it was impossible to produce a birth certificate; that proof of the marriage of the claimant to Dr. Cameron was furnished by annex 3 to the Memorial, and that as the nationality of a wife is the same as that of her husband, the British nationality of Mrs. Cameron had been properly established; and, lastly, the British Agent contended that the claimant did not need to prove by means of any document whatsoever that she is the legal representative of the estate of her husband, because he died in the State of Texas, United States of America, where he had resided for some time; that according to the laws of that State, husband and wife were virtually partners in so far as concerned property acquired during marriage, and that it was not held to be necessary when a person died intestate without leaving real property that his estate be administered by the Courts, and that Dr. Cameron had died intestate and had left no real property, for which reason no proceedings were instituted in the Courts for winding up the estate; that Mrs. Cameron considered herself as the surviving member of the partnership with her husband, in community, and he in this manner contended that the claimant was entitled to claim in her own right and as the legal representative of the late Dr. Cameron.

V. The Mexican Agent filed a brief in this matter, and in support of the grounds on which he based his demurrer, contended that citizenship was one of so many facts that have to be proved in the same manner as any other facts: that evidence taken *ex parte*, such as depositions in the form of affidavits, was wanting in probative value; that even in the contrary supposition, the evidence of witnesses might not be offered as proof of nationality, except when proof was shown that no better evidence, such as a birth certificate, certificate of baptism or family register, was available; that the testimony of a single witness was not admissible as proof; furthermore, that the deposition of Daniel Cameron, the brother of the person from whom the claim was derived was open to suspicion and should be struck out, due to the degree of their relationship, and that he had all the more reason for requiring authentic proof of the nationality of Dr. Cameron, and that this gentleman, in a document filed with Mexican

authorities, in connexion with a different matter, had stated that he was of American nationality. And he submitted a certified copy of the document to which he had referred.

VI. The said Mexican Agent contended in his brief that the claim ought to be filed on behalf of the estate of Dr. Murdock C. Cameron, and through his legal representative, pursuant to the terms of the Convention, and in accordance with the practice followed in Courts of Arbitration. He assailed the proposition of the British Agent, to the effect that as Dr. Cameron had died in the State of Texas, United States, where husband and wife are virtually partners as regards property acquired since marriage, he did not consider it necessary to establish her capacity as the legal representative of the estate of Dr. Cameron by means of any document, because if he accepted the principle that the law of the country of the husband governs the marriage contract, the law of England, and not that of Texas, would apply; and if the Anglo-Saxon principle, that the relations of husband and wife in so far as concerns personal property must be governed by the law of the first domicile of husband and wife, be accepted, then as this claim was personal property, the law of England would also apply.

VII. This case having begun to be tried at the meeting of the 10th October, 1929, arguing of the same was concluded on the 17th day of the said month of October, both Agents having defended their standpoints at length, as mentioned above, the learned British Agent having submitted a copy of entries in a register at the British Consulate at Tampico, relating to registration of the children of Dr. Cameron. The Mexican Agent referred very fully to the nature of *ex parte* evidence, not conceding that it has any value, especially for proof of nationality, and developed his proposition to the effect that affidavit evidence should not, under the Convention, be admitted, a proposition which was assailed by the British Agent.

Considerations of a Legal Order

I. This case gave rise to the problem of the interpretation of paragraph 3 of Article IV of the Mexican-British Convention and was the cause of serious discussion, in which the Mexican Agent contended that affidavits should not be admitted under that provision, and it was called in question whether the Commission was or was not at liberty to weigh the evidence submitted, independently of the laws of Mexico and of England.

The British Agent contended that the Commission was authorized to receive all kinds of evidence, even that known as affidavits, on the understanding that the question of the admissibility of any evidence should not prejudge its sufficiency, and that the Commission is only bound to comply with the Mexican laws, when it is a matter of examining witnesses produced by the agents or counsel of either Government, pursuant to that provision of the Convention.

The Mexican Commissioner holds that as the admission of affidavits as evidence is not forbidden by the Convention, the Commission is authorized to receive them and to weigh them in due course, in accordance with the rules universally accepted, both in Municipal and International Law, and holds that a Judge should not be hindered in any way from investigating the truth of the facts, on which foundation he will have to deliver his judgment.

II. As regards the probative value of the affidavit made by the brother of Dr. Cameron, the Mexican Commissioner holds that no probative value should be ascribed to it, for the following reasons:

(a) Because Daniel Cameron is the brother of the claimant, and naturally his testimony cannot be impartial and will always have a tendency to be favourable to the interests of that member of his family, an objection that may very justly be made, which deprives his deposition of all value.

(b) Because he is the only person testifying as to the fact of the claimant's birth, and as a general rule the testimony of a single witness, however honourable he may be, cannot constitute full proof.

(c) Because the testimony of Cameron's brother is in open contradiction to the deposition of the claimant himself, as the latter in 1896 stated before the Land Agency of the Ministry of Fomento that he was an American citizen, while his brother now asserts that the claimant always preserved his British nationality. The declaration made by Cameron in 1904 was laid before the Commission for inspection in a document issued from the above-mentioned Ministry, in the form of a certified copy, the authenticity of which is undeniable. That being the case, the affidavit of Daniel Cameron should be rejected.

(d) Because, although the Commission by a majority has declared that consular certificates as to registration of British subjects constitute *prima facie* evidence of nationality, and in this case a certificate from His Britannic Majesty's Consul at Tampico has been produced, in which six persons of the name of Cameron, among whom the name of Murdock Campbell Cameron is to be found, appear as having been registered as British subjects in 1908; this evidence, far from being corroborated by other evidence, is contradicted by the admission of the late Murdock C. Cameron himself, in the document of 1896, mentioned above; and that being the case, a declaration should be made to the effect that Mrs. Virginie Lessard Cameron has not established either the British nationality of her husband, or her own.

The principles on which the above arguments for the rejection of the affidavit of the claimant's brother as insufficient are based find their origin in the remotest antiquity, and are duly applied in all modern courts. In this regard, we may cite article 283 of the French Code of Civil Procedure; article 283 of the Belgian Code; the Civil Code of the Netherlands, articles 1942, 1945 and 1946 (sections 1 and 2); Spanish Civil Procedure, article 660 (sections 1, 2 and 3); the Italian Civil Code, article 327 (second part); and our Federal Code of Civil Procedure, articles 302 and 356.

III. The second ground on which the Mexican Agent founds his demurrer is that the claimant has not shown that she is the legal representative of the estate of Dr. Murdock C. Cameron, notwithstanding that she claims for damage to the property of a deceased person.

In effect, article 11 of the Rules of Procedure, approved by the Mexican-British Commission, reads:

"Any claims presented for damage to a British subject already deceased at the time of filing such claim, if for damage to property, shall be filed on behalf of his estate and through his legal representative, who shall duly establish his legal capacity therefor."

In the Cameron case, his widow has not shown that she is the legal representative of the estate of her husband; either under the laws of England, or under those of Texas, or in any other way, having pleaded that she was not, under the laws of the place where Dr. Cameron died, bound to obtain any letters of administration; but the unquestionable fact is that in the present case the only rule governing the claim under discussion is that laid down by article 11 of the Rules of Procedure approved by the Commission, the relevant part of which is transcribed hereinabove. The Mexican Commissioner holds that Mrs. Cameron has failed to comply with that provision, and that the demurrer

interposed by the Mexican Agent on the ground of such omission should therefore be sustained.

In view of the whole of the foregoing, the Mexican Commissioner, concurring with the learned opinion of the Presiding Commissioner and with that of the British Commissioner, although in the latter case on different grounds, holds that the demurrer interposed by the Mexican Agent should be sustained, and the Commission abstain from taking cognizance of the aforesaid claim.

ANNIE BELLA GRAHAM KIDD (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 3, undated, dissenting opinion by Mexican Commissioner, undated. Pages 50-54.)

NATIONALITY, PROOF OF.—BIRTH CERTIFICATE AS PROOF OF NATIONALITY. Proof of loss of a birth register will excuse a failure to submit a birth certificate of a British subject alleged to have been born in England at a time when compulsory registration of births was in operation.

CONSULAR CERTIFICATE AS PROOF OF NATIONALITY. Consular certificate, affidavit of a father, and corroborating evidence *held* sufficient to establish British nationality.

1. In this case the Mexican Agent has filed a demurrer on the ground that the British nationality of the late William Alfred Kidd (and therefore of his widow and children) has not been established. The claimant relies on an affidavit sworn by the late Mr. Kidd's father (annex 8) to the effect that his son was born and baptized at Arundel in Canada in 1877.

In addition to the general objections to affidavits which were pleaded in the case of Mrs. Cameron, the Mexican Agent pointed out that compulsory registration of births was in operation in England a few years before the late Mr. Kidd was born, and that in all probability it was also in operation in Canada. In these circumstances, he contended that a birth certificate could have been procured or a baptismal certificate, and that in any event evidence of a better quality was required than the affidavit of a near relation to the claimant's husband.

It appears, according to the information given by the British Agent, that the birth register had been lost, and he contended that secondary evidence of the birth by means of an affidavit was the best available evidence. The British Agent also put in evidence the birth certificates relating to the claimant's children, together with the declaration of the British Consul-General in Mexico City, dated the 27th December, 1916, to the effect that the claimant had been duly registered as a British subject.

2. It is not necessary, in the opinion of the Commissioners, to repeat their views on the question of the admissibility or the value of affidavit evidence generally; those views are fully set out in the judgment in the Cameron case. From one point of view, an affidavit sworn by a father concerning the birth of his child has more value than the statement he may make to the Registrar of Births, since the latter statements are not made upon oath. In this instance the affidavit is corroborated by other documents.

There is first of all the consular certificate, which was delivered a few months after the murder of the late Mr. Kidd and at a moment when the Consul-

General must have realized that he was imposing on his Government the serious obligation of protecting the interests of the widow and children. Furthermore, the day after Mr. Kidd's murder, there were proceedings before the Constitutionalist Court of First Instance, and in the course of the interrogatories all the witnesses described Mr. Kidd as a native of Canada. Two weeks after the murder of Mr. Kidd, the British Chargé d'Affaires at Mexico City reported to the Governor-General of Canada that "a Canadian, Mr. W. A. Kidd," had been killed. Moreover, there is the further fact that Mrs. Kidd returned to Canada after she lost her husband and that she was at once appointed as tutor of her minor children with the approval of the relatives on both sides.

On the one hand, there are all these facts corroborating the statements of the affidavit and helping to establish Mr. Kidd's British nationality. No evidence of any kind has been adduced by the respondent Government in rebuttal.

3. On these grounds the Commission is of opinion that the British nationality of the late W. A. Kidd (and, therefore, of his widow and children) has been duly established. The demurrer is overruled.

The Mexican Commissioner does not agree with this judgment and expresses a dissenting view.

Dissenting opinion of Dr. Benito Flores, Mexican Commissioner

The Mexican Commissioner regrets to have to dissent from the opinion of his distinguished colleagues, as regards the legal considerations taken into account by them for overruling the Demurrer entered by the Mexican Agent, in the matter of claim No. 29, presented by His Britannic Majesty's Government on behalf of Mrs. Annie Bella Graham Kidd; and bases his own opinion upon the following considerations in fact and in law.

The Facts

I. The British Government claims compensation amounting to $75,000.00, Canadian currency, for the murder of William Kidd at El Carrizal, near Zitácuaro, and for the theft of all his personal property, committed by a band of men on the 8th October, 1916.

II. The British nationality of the claimant is proved by an affidavit made under date of the 11th August, 1927, by William Kidd, the father of the decedent, before G. Valois, a Notary Public in and for the Province of Quebec, Canada, and by means of the certificate of the marriage of William Alfred Kidd and Annie Graham. The claim is preferred on her behalf and on that of her five minor children at the rate of $25,000.00 for the claimant and $ 10,000.00 for each one of her said children.

III. William Kidd, the father of the decedent, asserts in his deposition that his son, William Alfred Kidd, was born at Arundel, Argenteuil County, Province of Quebec, Dominion of Canada, on the 3rd April, 1877.

The said William Kidd declares that the birth of his son was entered in the register, but that the original register was lost many years ago; and that his son was baptized about the 10th September, 1877, by the Rev. Arthur Whiteside, the Pastor of the Methodist Church at Mille-Isles Township.

IV. The Mexican Agent forthwith interposed a Demurrer, alleging that the British nationality of William Kidd had not been established by the affidavit made by the father of the decedent himself; that as the nationality of the said William Kidd had not been established, that of the claimant, the fact of whose marriage has been proved, had not been established either. He alleged that the

nationality of the minor children had not been properly proved, because no birth certificates were attached to the Memorial, and consequently prayed that the Commission should, as a British subject was not involved, abstain from taking jurisdiction over the claim.

V. The British Agent replied by asserting that the entry of Kidd's birth had been lost; but that the affidavit made by his father in order to prove his British nationality was sufficient and therefore for that of his wife; that in connexion with the nationality of the minors he subjoined with his Reply five certificates issued by the Supreme Court of St. Jerome, Province of Quebec, District of Terrebonne, for each one of the five children; but said certificates refer not to the Civil Register, but to the baptism of the said minors. When the case had already come up for hearing, the said British Agent also produced a Certificate of Consular Registry of Mrs. Annie Bella Graham Kidd as a British subject, dated the 26th December, 1916.

Legal Considerations

I. The Mexican Commissioner does not accept the affidavit of the father of William Kidd, as to the British nationality of his son, as sufficient to establish that fact, because it is an *ex parte* deposition, submitted by the father of the victim, a deposition which was challenged by the Mexican Agent, by reason of the very close relationship existing between the interested parties, as although the Commission has decided by a majority that affidavits constitute *prima facie* evidence, susceptible of conversion into full proof, by means of corroboration by other elements, the Mexican Commissioner holds that the affidavit of William Kidd's father finds no direct corroboration to demonstrate its sufficiency.

II. The consular certificate in which the British nationality of Mrs. Kidd is recorded is positively of no value as proof concurrent with the affidavit of her father, for two reasons:

(a) Because such registration was effected subsequently to the death of her husband and cannot have any retrospective effect; and

(b) Because, even on the assumption that proper proof had been shown of the nationality of Mrs. Kidd, it would not, either logically or in law, follow therefrom that the nationality of her husband had been established. The true principle is the contrary one, i.e., that if the nationality of the husband had been proved, that of his wife would also have been proved; but what happens is that the only element of evidence to show the nationality of William Kidd is the affidavit of his father, which is null and of no value, according to article 283 of the French Code of Civil Procedure; 283 of the Belgian Code; articles 1942, 1945 and 1946, subdivisions 1 and 2, of the Civil Code of the Netherlands; article 660, sections 1, 2 and 3, of the Spanish Code of Civil Procedure; article 327, second part, of the Italian Civil Code, and articles 302 and 356 of our Federal Code of Civil Procedure, all of which provisions unanimously reject the depositions of persons in any way interested in a controversy, on the understanding that the said laws assume a witness to have testified under oath and before the Court which is to weigh such evidence. In the present case, not even that circumstance is present; it is a case of the testimony of William Kidd's father, by way of *ex parte* evidence.

III. The fact that the witnesses who deposed before the Court of First Instance as to the details of the murder of William Kidd, reputed him to be a British subject, and the circumstance that the British Legation at Mexico, when reporting the murder of William Kidd to their Government, described him as a Canadian, do not mean anything but that the decedent, William Kidd, was at the outside considered by reputation as a British subject; but

seeing that the birth of William Kidd had, by the admission of his own father, been registered; that such registration was effected in April 1877, when compulsory registration was already in force in Great Britain; that he was baptized in September 1877, and that the certificate of baptism was duly issued by the Rev. Arthur Whiteside, the British nationality of William Kidd should have been established: (1) by means of a certified copy of the entry in the Civil Register; (2) by means of the certificate of baptism; and (3) by the evidence of witnesses, and in any event proof should have been shown of the impossibility of producing the best of said evidence, in the order given, according to the universally accepted principle in England, which says: "None but the best evidence may be adduced, that which is of a secondary kind not being admissible for that which is of a primary kind, where the primary evidence is accessible." (*Stephen's Commentaries on the Laws of England*, Vol. II, p. 603.)

The British Statute of 1874, which declared civil registry compulsory, and the authority of Lehr (*Eléments de droit civil anglais*, Paris, 1885, p. 17) assist in demonstrating the insufficiency of the evidence produced by the claimant for the purpose of establishing the British nationality of William Kidd.

In view of the whole of the foregoing, the Mexican Commissioner holds that the Demurrer entered by the Mexican Agent should be sustained, and that the Commission should therefore abstain from taking cognizance of this claim.

CAPTAIN W. H. GLEADELL (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 4, November 19, 1929, dissenting opinion by British Commissioner, undated, concurring opinion by Mexican Commissioner, November, 1929. Pages 55-64.)

NATIONAL CHARACTER OF CLAIM.—CONTINUING NATIONALITY OF CLAIM.—CLAIM IN REPRESENTATIVE CAPACITY. An international claim must be founded upon an injury or wrong done to a citizen of the claimant government and must remain continuously in the hands of a citizen of such government until the time for its presentation before the tribunal.

A forced loan imposed by the Provisional Government of Yucatán upon real property owned by a British subject was a claim British in origin, but when such owner thereafter died and bequeathed her residuary estate to an American citizen, subject to a life estate in a British subject, *held* such claim lost its quality of a British claim.

Cross-references: Am. J. Int. Law, Vol. 25, 1931, p. 762; Annual Digest, 1929-1930, p. 190.

Comments: G. Godfrey Phillips, "The Anglo-Mexican Special Claims Commission," Law Q. Rev., Vol. 49, 1933, p. 226 at 231.

1. The respondent Government have lodged in this case a Motion to Dismiss the memorial on the ground that the right to claim the compensation for the loss which is the subject matter of the memorial is not vested in Captain Gleadell, a British subject, but in his stepdaughter, Mrs. Muse, who is an American subject.

Captain Gleadell was married in 1907 to Mrs. Katherine Baker de Gleadell, who was the owner of real property in Mexico. In 1914, when she was a British subject by reason of her marriage to the claimant, Mrs. Gleadell was compelled,

by means of a forced loan, to deliver the sum of ten thousand dollars to the Provisional Government of Yucatan. The memorial seeks to recover this sum from the Mexican Government on the ground that the right to it is vested in Captain Gleadell. In its origin the claim is undoubtedly British, but the contention of the Mexican Agent is that Mrs. Gleadell by her will bequeathed the right to claim the money to Mrs. Muse, who is her daughter by her first marriage and who was born in Mexico. In support of this contention the respondent Government relied upon the will of Mrs. Gleadell, executed in England on the 6th October, 1925 (annex 7 of the memorial), clause 5 of which reads as follows:

"I devise and bequeath all my real and personal property or share or interest in real and personal property which may be situate in Mexico at the time of my death unto my said daughter absolutely and beneficially."

The submission of the Mexican Agent is that this is a claim to recover money, that the right to claim money must be considered as a form of personal property, and that this right, according to English jurisprudence, is a right situated at the place where the debtor is domiciled.

On the other side it was contended by the British Agent that Mrs. Gleadell paid the forced loan from her general resources, which form no part in her Mexican estate. The testatrix nominated two executors under her will, namely, her husband, Captain Gleadell, and her daughter, Mrs. Muse, but the latter renounced probate and Captain Gleadell is now the sole executor. The British Agent contended that Captain Gleadell, under the terms of the will, possessed a life interest in the residuary estate of the late Mrs. Gleadell, and that the claim for the repayment of the forced loan was part of the estate.

2. In the opinion of the majority of the Commissioners, a long course of arbitral decisions has established the principle that no claim falls within a treaty which is not founded upon an injury or wrong done to a citizen of the claimant Government. According to *Ralston*, pages 161 and 163, and *Borchard*, pages 664, 666, such claim must have remained continuously in the hands of the citizen of such Government until the time for its presentation before the Commission.

It is admitted that the origin of the claim was British, and the contest between the two Governments is whether the claim has retained that British character until the present time.

This question cannot be solved by the fact that the deceased Mrs. Gleadell was a British subject at the time of her death and that her husband acts on behalf of her estate. The necessity of the continuous national character of the claim, as formulated above and as adhered to by the Commission, does not allow us to consider the estate as taking over and retaining the testatrix's nationality, as apart from the nationality of the heirs. It is essential to know in whose hands the assets of the estate have passed and whether this transition involved a change of nationality in the person entitled to the claim. These questions can only be answered by the will.

3. Mrs. Gleadell in her will divided her estate in two parts. The one was described in clause 5, quoted above, and the other in clause 6, reading as follows:

"6. I devise and bequeath the residue of my real and personal property (including any real and personal property to which I may be entitled or in which I may be interested in the United States of America or elsewhere out of Great Britain), not hereinbefore otherwise disposed of, unto my Trustees upon trust to sell, call in and convert the same into money (with full power to postpone such sale, calling-in and conversion for so long as my Trustees shall in

their absolute discretion think fit without being responsible for loss (Katherine Gleadell) caused by such postponement) and, out of the proceeds of such sale, calling-in and conversion and out of my ready money, to pay my debts and funeral and testamentary expenses and to stand possessed of the residue upon trust, to invest the same in manner hereinafter authorized, the said residue and the investments for the time being representing the same being hereinafter called 'my residuary estate.' "

It is quite clear that the testatrix disposed of all the assets of her estate, because she called the second part "my residuary estate." The title to claim the money paid unto the forced loan is, therefore, included either in clause 5 or in clause 6.

There can be little doubt that the right to claim falls under the definition of "personal property." Dicey (*Conflict of Laws, a digest of the Law of England*, p 313), when enumerating the kinds of goods which constitute personal property, mentions:

"*Chose in action.*—Personal property includes every kind of Chose in action, using that term in its very widest sense. It includes, that is to say, every movable which cannot be touched or intangible movable. Thus it includes 'debts' in the strict sense of the terms, and also everything (not an immovable) which can be made the object of a legal claim, as, for example, a person's share in a partnership property."

There is reason to identify this claim with a debt of which Mrs. Gleadell was the creditor, because the forced loan, raised by the Governor of Yucatán in 1914, was recognized by the Mexican Government and all holders of receipts were invited to submit their claims to a special Commission.

4. The question now to be answered is whether this part of Mrs. Gleadell's personal property was situate in Mexico (clause 5 of the will) or elsewhere (clause 6).

As the will was made in England by a British subject, the intention of the testatrix must be interpreted according to English law and jurisprudence.

In this connexion it is material to observe what Dicey says on pages 318 and 319:

"From these two considerations flows the following general maxim, viz., that whilst lands, and generally, though not invariably, goods must be held situate at the place where they at a given moment actually lie, debts, choses in action and claims of any kind must be held situate where the debtor or other person against whom a claim exists resides; or, in other words, debts or choses in action are generally to be looked upon as situate in the country where they are properly recoverable or can be enforced."

In this case the only country where the claim is recoverable is Mexico and, therefore, this personal property must be considered as situate in Mexico and to have been left to Mrs. Gleadell's daughter, an American citizen.

We are confirmed in this view by the circumstance that the burden of the forced loan was imposed among proprietors of real property in Yucatán, which property has been shown by the Mexican Agent in his brief to have belonged to Mrs. Gleadell jointly with her daughter.

As Mrs. Gleadell died before the Claims Convention was signed, the claim, although British in origin, has not retained that character until the time of its presentation. This fact cannot be modified by the circumstance that the executor of the estate is a British subject.

On these grounds the majority of the Commissioners take the view that the right to claim the money does not belong to a British subject and, therefore, falls outside the jurisdiction of the Court.

The motion to dismiss is allowed.

One of the Commissioners expresses a dissenting view.

Dissenting opinion of Artemus Jones, British Commissioner

In this case the claimant is Captain W. H. Gleadell, who is a British subject. In December 1907, he married a widow named Mrs. Katherine de Regil, who was the owner of some real property at Merida in the State of Yucatán. In September 1914, one Eleuterio Avila arrived at Merida and proclaimed himself the Military Commander of the State. He suspended the constitutional guarantees of the Republic, immediately declared martial law, and then issued a decree raising a forced loan of eight million pesos. The victims of the forced loan were citizens who possessed property above a certain amount, and the alleged objects of the loan were the pacification and the reconstruction of the country. Amongst those citizens was Mrs. Gleadell, who was absent from the State at the time. She was represented in the district by a lawyer, and A. P. Aznar, who held her power of attorney. The manner in which the alleged loan was enforced is described on page 12 of the memorial in Mr. Aznar's evidence. From this it appears that if any citizen refused to pay the sum which had been assigned to him or to her, violence was resorted to in order to obtain payment, e.g., the capture of the person who refused to make the advance. At this time all constitutional guarantees were suspended and therefore there could be no resort to legal redress, and in these circumstances a state of panic prevailed. It was in this situation that Mrs. Gleadell's attorney advanced the sum of ten thousand pesos to the Government. In 1917 all the holders of the receipts for the money contributed to the forced loan were enumerated in an official list issued by the Government, and Mrs. Gleadell's name appeared among them. The holders were invited to present their receipts to a Commission appointed by the Government, but Mrs. Gleadell did not do so. On the 28th October, 1925, Mrs. Gleadell died in Mexico, having about three weeks before that date executed a will at Northam, Devonshire, in England. As executors of the will, the testatrix nominated her husband, Captain Gleadell, and her daughter, Mrs. Muse, who is married to an American diplomatist and is not a British subject. Mrs. Muse renounced probate and Captain Gleadell is therefore the sole executor. Under the provisions of the will the real and personal property of the estate situated within Mexico at the time of her death was bequeathed to Mrs. Muse. After this provision came certain specific bequests, and then the residue of the estate was left to trustees upon certain trusts. Under the terms of the trusts, the income of Mrs. Gleadell's estate outside Mexico was left to her husband for life.

Upon these facts the Mexican Agent opposed the consideration of the memorial on the ground that the money contributed by Mrs. Gleadell to the forced loan formed part of her Mexican estate, which was bequeathed to her daughter, who is not a British subject. He argued that the money due to the estate from the Mexican Government was a debt or chose in action, which was only recoverable in Mexico (Dicey's *Conflict of Laws*, page 318). He founded this argument upon the fact that whilst the receipt for the money contained no promise to repay, there was a clause in Avila's decree stating that when constitutional rule was re-established, the Government would "agree to the form and dates on which the repayment of the amounts lent will be effected."

Moreover, Captain Gleadell claimed the money, not in his capacity of executor, but as a person who had a life interest in the residuary estate. To these contentions the British Agent replied that there could be no contract where money was raised under these circumstances. Debt could only arise out

of contractual relationships and the compulsion under which the money was admittedly taken was inconsistent with the consensual basis of contract. Dicey's dictum could not apply in this case as it was confined to contractual obligations. Moreover, the will and other documents produced in the memorial established the fact that the claimant was the sole executor of the will, although he was also a beneficiary of the residuary estate.

In my view it is impossible to dispose of the claim at this stage of the proceedings. The question whether the ten thousand pesos formed part of the Mexican estate cannot be determined until the circumstances attending the repayment of the money to Señor Aznar are ascertained. It is clear that the money was paid in the first instance by Señor Aznar, acting as agent for his principal, Mrs. Gleadell. It is not clear, however, how the agent was repaid the money by the principal. The crucial point of this case turns upon the particular source out of which the money was paid. All that is known is that Mrs. Gleadell's attorney paid it at a time when Mrs. Gleadell was in England. If the attorney sent in his bill of costs to his client in the ordinary way, including this sum, the cheque sent to him in payment would be drawn upon Mrs. Gleadell's general account. If these are the facts, Captain Gleadell is clearly entitled to claim an interest in the money on the ground that he has a life interest in the residuary estate out of which the ten thousand pesos came. It was suggested that Mrs. Gleadell's position was not unlike that of a debenture holder and the respondent agent argued that the contribution to the forced loan was a contract which could only be enforced in Mexico. Both analogies are fallacious. The essence of a debenture is the security it gives for the repayment of the money. Mrs. Gleadell possessed nothing except a receipt, which did not contain even a promise to repay and she entered into no contract. In view of these considerations I am of opinion that the demurrer should be rejected and the merits of the claim should be gone into.

Separate opinion of the Mexican Commissioner in the Motion to Reject Filed by the Mexican Agent, in the Matter of Claim No. 19, presented by the Government of His Britannic Majesty on behalf of Captain W. H. Gleadell. This opinion concurs with that of the Honourable Presiding Commissioner.

The Facts

I. The Government of His Britannic Majesty claims from the Government of Mexico the sum of $ 10,000.00, United States currency, with interest at the rate of 6 per cent per annum, counting from the 14th October, 1914, on behalf of Captain W. H. Gleadell, under the following heads:

II. Mrs. Katherine Baker de Gleadell, the wife of Captain W. H. Gleadell, a British subject, was in September 1914 subjected to a forced loan amounting to $10,000.00, United States currency, by the Governor of Yucatán, through a decree dated the 26th September, 1914, which established a forced loan of eight million pesos for the pacification and reconstruction of the country. Mrs. Gleadell received in exchange a receipt for the sum of $10,000.00, United States currency, issued by the Chief of the Revenue Department. The decree in article VI provides that the National Government would, on the re-establishment of constitutional order, determine the manner and dates on which repayment of the amounts loaned were to be effected.

III. Mrs. Gleadell died on the 28th October, 1925, leaving a will in which she appointed Mrs. Maria Beatriz Julia Muse, her daughter, and Mr. Gleadell, her husband, as executors.

IV. According to clause V of the said will, the Mexican properties were inherited absolutely by her daughter, who is now a citizen of the United States. Clause V, above mentioned, of the will executed by Mrs. Gleadell reads as follows: "V. I devise and bequeath all my real and personal property or share or interest in real or personal property which may be situate in Mexico at the time of my death unto my said daughter absolutely and beneficially."

V. The residue of her estate, both real and personal, wherever situated, and not otherwise disposed of in the said will, was to be applied in the following manner (clauses 6 and 7):

"6. I devise and bequeath the residue of my real and personal property (including any real and personal property to which I may be entitled or in which I may be interested in the United States of America or elsewhere out of Great Britain), not hereinbefore otherwise disposed of, unto my Trustees upon trust to sell, call in and convert the same into money (with full power to postpone such sale, calling-in and conversion for so long as my Trustees shall, in their absolute discretion, think fit without being responsible for loss (Katherine Gleadell) caused by such postponement) and, out of the proceeds of such sale, calling-in and conversion and out of my ready money, to pay my debts and funeral and testamentary expenses and to stand possessed of the residue upon trust, to invest the same in manner hereinafter authorized, the said residue and the investments for the time being representing the same being hereinafter called 'my residuary estate.'

"7. My trustees shall stand possessed of my residuary estate upon the following trusts:

(a) Upon trust to pay the income thereof (subject to the provisions of clause 4 hereof) to my said husband during his life.

(b) From and after his death to divide the same into two equal parts and to stand possessed of one such part as to both capital and income for my son Paul Gleadell on his attaining the age of twenty-one years.

(c) To stand possessed of the other of such parts (hereinafter called 'my daughter's share') upon trust to pay the income thereof to my said daughter during her life.

(d) From and after her death to stand possessed of my daughter's share as (Katherine Gleadell) to both capital and income upon trust for such one or more of her children as she shall by deed or will appoint.

(e) In default of such appointment, or so far as the same shall not extend, to stand possessed of my daughter's share upon trust for such of her children as being male attain the age of twenty-one years, or, being female, attain that age or marry under that age and, if more than one, in equal shares.

(f) If there shall be no such children, to stand possessed of my daughter's share upon trust for the said Paul Gleadell on his attaining the age of twenty-one years absolutely.

(g) If the said Paul Gleadell shall die under the age of twenty-one years, to stand possessed of his and my daughter's shares, but as to the latter subject as aforesaid upon trust as to both capital and income for my said daughter absolutely and beneficially."

VI. The British Agent contends that as payment of the forced loan had been made by Mrs. Gleadell out of her general resources, said resources had, on the date of her death, been reduced to the extent of $10,000.00, United States currency, from which he infers that although a citizen of the United States has an interest in the claim, there does exist at present a well-defined and ascertainable interest in favour of British subjects.

VII. The Mexican Agent, relying on article 3 of the Claims Convention, Mexico and Great Britain, prays that the claim be dismissed on the following grounds:

(a) That Mrs. Katherine Baker de Gleadell left all her property and rights, whether real or personal, and any interest she might have had in real or personal rights, situated in Mexico, to her daughter, Maria Beatriz de Regil y Baker, now the wife of Mr. Benjamin Muse, the Second Secretary of the American Embassy in Paris.

(b) On the fact that it is unquestionable that the right to prefer a claim for the above-mentioned loan is a right personal in character, for which reason it, after the death of Mrs. Baker de Gleadell, became the property of her daughter, the wife of Mr. Benjamin Muse, a Mexican citizen by birth, and now an American citizen, through her marriage to Mr. Muse.

(c) On the fact that, according to Article 3 of the Claims Convention, Mexico and Great Britain, the 19th November, 1926, the Commission only has jurisdiction to deal with claims against Mexico for losses and damages sustained by British subjects, and as the person who would in any event be entitled to claim would be a Mexican by birth and a citizen of the United States of America, through her marriage, it is undeniable that the Commission has no jurisdiction to take cognizance of this claim.

VIII. The British Agent contends in his Memorial that in the year of 1914 the Hacienda in respect of which the forced loan was exacted belonged exclusively to Mrs. Katherine Baker de Gleadell and that her daughter had absolutely no interest in the matter; that the right to claim did not pass to the daughter of Mrs. Katherine Baker de Gleadell, because the loan was paid out of the general resources of Mrs. Gleadell, and in his Reply the British Agent attributes that right to the Estate of Mrs. Gleadell, deceased, on whose behalf he now endeavours to prefer the claim.

Considerations of a Legal Order

I. The first point to be decided by the Commission is whether the British Government has preferred the claim on behalf of Captain W. H. Gleadell, as appears from the Memorial signed by the British Agent, or whether said claim should be understood to have been filed on behalf of the Estate of Mrs. Gleadell, through her executor, Captain W. H. Gleadell, as would seem to be the view of the British Agent, in his pleading in Reply.

In order to decide that point, which is to serve as the basis for the remaining legal considerations, it is sufficient to glance at the beginning of the Memorial from the British Agency, the title of which reads: "Claim of Captain W. H. Gleadell," while the last part of the said Memorial reads: "His Majesty's Government claim on behalf of Captain W. H. Gleadell the sum of 10,000.00 dollars . . .," without losing sight of the terms themselves of the Memorial, in which it is clearly stated that Captain Gleadell, in his capacity as holder of a life interest, asserts that he is entitled to the claim as coming within the terms of clauses 6 and 7 of the will of Mrs. Gleadell. It is then undeniable that the Memorial in question does not stand in need of any interpretation, but that it is self-explanatory to the effect that the claimant is Captain W. H. Gleadell and not the estate of Mrs. Gleadell.

II. The preceding point having thus been decided, it must in the second place be settled whether the right to claim for the forced loan imposed by the Governor of Yucatán, Mexico, belongs to Mrs. Maria Beatriz Julia Muse, the daughter of Mrs. Gleadell, or to the claimant, Captain W. H. Gleadell. And as under clause 5 of her will and testament Mrs. Gleadell bequeathed to her

daughter, Mrs. Muse, the whole of her real and personal property, choses in action or interest in such real or personal property situated in Mexico at the time of her death, it is unquestionable that the right to claim the loan under discussion falls within clause 5 of the said will, and is consequently vested in Mrs. Maria Beatriz Julia Muse, because it is a perfectly well-defined credit against the Mexican Government, created by the decree which created the said loan, and by the receipt executed to Mrs. Gleadell, as the lawful title for claiming same, inasmuch as said right was situated in Mexico at the time of the death of the testatrix. Dicey, on the *Conflict of Laws* (p. 247), "Situate" means locally situate, and the local situation of personal property must, it is conceived, be in the main decided in accordance with the rules for fixing the situation of personal property for the purpose of testamentary jurisdiction. (See chap. ix, comment on Rule (62, post.): "*Thus a debt, it is submitted, is situate in the country where the debtor resides.*" (Page 313.) "(iii) *Chose in action.*—Personal property includes every kind of chose in action, using that term in its widest sense. It includes, that is to say, every movable which cannot be touched, or intangible movable. Thus, it includes 'debts,' in the strict sense of the term, and also everything (not immovable) which can be made the object of a legal claim, as, for example, a person's share in a partnership property." (Page 318.) "(2) *As to the 'situation' of personal property. . . .* From these two considerations flows the following general maxim, viz., that whilst lands, and generally, though not invariably, goods, must be held situate at the place where they at a given moment actually lie, *debts, choses in action and claims of any kind must be held situate where the debtor or other person against whom a claim exists resides; or, in other words, debts or choses in action are generally to be looked upon as situate in the country where they are properly recoverable or can be enforced.*")

III. And as it is apparent from the Memorial itself that Mrs. Muse, the daughter of Mrs. Gleadell, is not of British nationality, but an American citizen, it is obvious that she is not entitled to claim the amount of the forced loan of $10,000.00, United States currency, before this Commission, as the right to do so is only under the Claims Convention, Mexico and Great Britain (article 3), granted to British subjects. The claim must arise as a British claim and not cease to be British until the date of filing; Borchard so lays it down, quoting sundry decisions of Arbitral Tribunals, pp. 664 and 665 of his work on *The Diplomatic Protection of Citizens Abroad.* In the present instance, the claim was British in origin; it ceased to be so, however, when it passed into the possession of Mrs. Maria Beatriz Julia Muse, pursuant to the will of her mother, Mrs. Gleadell.

In view of the foregoing, and concurring with the opinion of the Honourable Presiding Commissioner, the Mexican Commissioner holds that the Motion to Dismiss filed by the Mexican Agent should be sustained, and that the Commission should, therefore, abstain from taking cognizance of the claim in question.

EDWARD LE BAS AND COMPANY (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 5, November 22, 1929. Pages 65-66.)

PROCEDURE, MOTION TO DISMISS. A motion to dismiss raising issues as to ownership of claim and responsibility of respondent government *suspended* and the issues thus raised postponed until the examination of the claim on its merits.

(Text of decision omitted.)

ADA RUTH WILLIAMS (GREAT BRITAIN) *v.* UNITED MEXICAN STATES.

(Decision No. 6, November 22, 1929. Pages 67-68.)

NATIONAL CHARACTER OF CLAIM.—CLAIM IN REPRESENTATIVE CAPACITY.—SURVIVAL OF CLAIMS FOR WRONGFUL DEATH. Any claim by a parent arising out of the killing in Mexico of a child who is a British subject will not survive to the estate of such parent, even though the killing occurred during the lifetime of such parent and while he was dependent upon the child for support.

This is a claim for compensation for the murder of an Englishman named George Ernest Williams, who was killed at the El Favor Mines at Hostotipaquillo, near Guadalajara, in the State of Jalisco, on the 26th April, 1914. He was employed as cashier and accountant to the El Favor Mining Company, and he was engaged on these duties as the time he met his death. He was thirty-four years of age and unmarried. According to the facts set out in the memorial the mine was attacked by mutinous Mexican miners, when he and another Englishman had surrendered their arms and both were stabbed to death by the crowd.

Mr. Williams was the son of Major George Williams, living at Ingleside, Northam, in the County of Sussex, England. The latter had retired from the army on a pension of £ 200 a year, and it was alleged that the son had, prior to his death, contributed to the maintenance of his father at the rate of ten pounds a month. At the time of his son's death in 1914 the father was sixty-three years of age, and he was said to be partly dependent upon the remittances from his son. On the 17th April, 1920, Major Williams (who was then a widower) was married to a spinster named Ada Ruth Roe, who was fifty-five years of age. On the 11th August, 1925, Major Williams died, leaving a will under which his widow, according to the British Agent, became sole executrix. He left, however, no estate.

The claim is lodged by Mrs. Williams upon two grounds. She alleges (1) that her late husband was partly dependent for his support on the contributions of the son, which amounted to £ 120 0*s.* 0*d.* per annum, and she estimates an annuity on a life of 63 years in 1914 (which was then the age of Major Williams) at £ 971 12*s.* 7*d.*, together with the sum of £ 40 0*s.* 0*d.*, which the father spent in equipping the son to go abroad; (2) she further alleges in her affidavit that George Ernest Williams had promised her that he would continue the allowance to her on his father's death.

It was contended on behalf of the respondent Government that the memorial should be dismissed on the ground that there was no legal relationship or dependency between G. E. Williams and the claimant, Mrs. Williams, and that therefore there was no liability on the part of the Mexican Government to pay compensation to her. The contention put forward by the British Agent was that the estate of Major Williams from 1914 had been impoverished by the loss of the son's contributions until his death in 1925, and that Mrs. Williams, as the executrix of the estate, was entitled to recover the money.

The Commissioners are unanimously of opinion that the Motion to Dismiss must be allowed. In order to succeed in the claim, Mrs. Williams must establish legal relationship or dependency as between herself and the late Mr. G. E. Williams, and there is no evidence of this in the facts set out in the Memorial, or in the oral argument. No claim against the respondent Government could form part of the estate of Major Williams until the right to present it had accrued to him. That right did not arise until the Anglo-Mexican Treaty was signed in 1926 and ratified in 1928, whereas Major Williams died in 1925, and with his death all his personal rights expired.

In view of the foregoing, and, further, in reliance upon article 11, first part, of the Rules of Procedure, it is hereby decided:

That the Motion is allowed.

CENTRAL AGENCY (LIMITED), GLASGOW (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 7, November 29, 1929, dissenting opinion by Mexican Commissioner, November 29, 1929. Pages 68-74.)

CORPORATE CLAIMS.—AUTHORITY TO PRESENT CLAIM.—CORPORATION, PROOF OF NATIONALITY OF CORPORATION. A certificate of incorporation of a claimant British corporation, together with an affidavit of its secretary that it was incorporated in Great Britain and that the firm signing the memorial on behalf of the claimant was its agent and authorized to make the claim, and certain other corroborating documents, *held* sufficient to establish authority to present the claim to the tribunal.

1. This claim is presented by the British Government on behalf of a limited liability company, registered in England, called the Central Agency (Limited), Glasgow. In 1913 the claimant company forwarded a consignment of cotton thread to a firm of merchants at Chihuahua. According to the memorial it had reached the railway station of Monterrey, when the place was fired upon by a party of revolutionaries on the 23rd and 24th October, 1913. The result was that the consignment was destroyed in the fire caused by the revolutionary forces, and never reached its destination.

2. The respondent Government have lodged a motion to dismiss the claim mainly on this ground: The Mexican Agent says that the memorial fails to comply with article 10 of the Rules of Procedure, which provides that each Memorial shall be signed by the claimant or by his attorney in fact, as well as by the British Agent. The rule provides also that the memorial may be signed only by the British Agent, but in this event the memorial must include a signed statement by the claimant of his claim.

The memorial contains a statement of claim made by Diego S. Dunbar, Sucr., before the British Consul-General at Mexico City on the 18th January, 1921. It is signed by Robert Craig, with the words "Per pro Diego S. Dunbar, Sucr." just above the signature. The contention of the Mexican Agent is that the Memorial does not show that the firm of Diego S. Dunbar, Sucr., is the representative of the Central Agency, nor that Mr. Craig is authorized to sign on behalf of the firm. An affidavit sworn by Mr. William Simpson, Secretary to the Central Agency, Glasgow, is set out in annex 4 of the Memorial. Mr. Simpson swears that the Central Agency is a British company, incorporated at Edinburgh in 1896, and that Diego S. Dunbar, Sucr., was the Agent of the Central Agency in Mexico City and authorized to make the claim. A certificate of the incorporation of the company is set out in annex 5.

It was contended by the Mexican Agent that Article 10 should be strictly observed in order to ensure that the claimant really wished his claim to be preferred by his Government. He submitted that the affidavit sworn by Mr. Simpson did not establish the fact that he was the Secretary of the Company, nor did it prove that the company had authorized him to make the statement.

It was contended on behalf of the British Government, on the other hand, that Mr. Craig signed the statement of the claim in his capacity as attorney in fact of Diego S. Dunbar, Sucr. The British Agent submitted, secondly, that the affidavits sworn by the Secretary of the Company, in annex 4, proved his authority to act on behalf of the Company, because such a statement came within the ordinary scope of his duties and contained facts and details which could only come within his knowledge in his official position as Secretary of the Company. The British Agent also produced, for inspection by the Commissioners, the original document signed by Mr. Craig, and also the original of the affidavit set out in annex 4. In addition to these he has produced two further documents: (1) a power of attorney, executed on the 16th March, 1918, whereby Mr. Craig is appointed attorney for the firm of Diego S. Dunbar, Sucr., and (2) a document executed before a Notary Public in Glasgow on the 11th February, 1926, signed by Mr. Simpson in his capacity as Secretary of the Company and by two directors of the Company. In his affidavit of the 28th July, 1927, Mr. Simpson declares that the Agent of the Company in Mexico City, Diego S. Dunbar, Sucr., is authorized to make the claim and that all the particulars contained in the claim are true.

3. It is evident from this document that the claim signed by Mr. Craig had been examined by Mr. Simpson as Secretary and that he authenticated it as a document issued by the firm of Diego S. Dunbar, Sucr. The information contained in the affidavit relates to matters affecting the Company which could be known to one who had access to the documents and business papers of the concern.

The Commissioners agree that the object of article 10 of the Rules of Procedure is to ensure that those on behalf of whom the claimant Government is acting really desire their Government to present their claim. On the other hand, the majority of the Commissioners are satisfied beyond any doubt that Mr. Simpson is the Secretary of the Company, that the firm of Diego S. Dunbar, Sucr., is the Company's Agent in Mexico City and that Mr. Craig is authorized to sign on behalf of the firm.

There is no valid ground, in the judgment of the majority of the Commissioners, for disputing the fact that the Central Agency not only assumed the responsibility for the claim, but also authorized its duly accredited agent to present it. On these grounds the majority of the Commissioners are of the opinion that article 10 of the Rules has been complied with.

The motion to dismiss is overruled.

The Mexican Commissioner expresses a dissenting view.

Dissenting opinion of Dr. Benito Flores, Mexican Commissioner

I. The Government of His Britannic Majesty claims on behalf of the Central Agency (Limited), Glasgow, the sum of $ 1,568.00, Mexican gold, being the value as per invoice of two cases of cotton thread said to have been destroyed by revolutionaries at Monterrey, when said goods were in transit to Chihuahua, consigned to Messrs. Pinoncely.

II. The Memorial has been signed by the British Agent, and the facts purport to be narrated by one Robert Craig, who signs as follows: "p.p. Diego S. Dunbar, Sucr., as the Agent of the Central Agency (Limited), Glasgow, Scotland."

III. In order to establish the standing of the claimant, the British Government submitted annex 4, in which is set out the deposition of Mr. William Simpson, the Secretary of the Central Agency (Limited), as to the following points:

(a) That the Central Agency (Limited) is a Company incorporated under the Companies Acts, on the 24th day of December, 1896, at Edinburgh, and that it is an English Company.

(b) That the Central Agency (Limited) shipped a consignment of cotton to Chihuahua, Mexico, with two cases of thread which were destroyed in the railway station at Monterrey, Nuevo Leon, by a fire caused by the Revolutionary party.

(c) That the Agent of the Central Agency (Limited) at the City of Mexico, Mr. D. S. Dunbar, Sucr., was authorized to present the claim, and that all the particulars contained in the claim lodged by him on the 14th January, 1921, are true.

IV. The Mexican Agent filed a Motion to Dismiss, based on article 10 of the Rules of Procedure of the Claims Commission, Mexico and Great Britain, which provides that the Memorial shall be signed by the claimant or by his attorney in fact and further by the British Agent, or only by the latter; but that in this case a statement of the facts giving rise to the claim signed by the claimant shall be included in the Memorial; that in the present instance, there is only submitted a statement signed by Mr. Robert Craig as the attorney in fact of Diego S. Dunbar, Sucr., and no proof has been shown that the said Mr. Craig is the representative of the claimant, which is the Central Agency (Limited), Glasgow.

V. The British Agent replied by contending that Mr. Robert Craig signed the statement of claim in his capacity as attorney in fact of Diego S. Dunbar, Sucr., and that it was, therefore, only necessary to show that the said Diego S. Dunbar, Sucr., was the authorized representative of the claimant; and that annex 4 to the Memorial duly proves that Diego S. Dunbar, Sucr., is the authorized representative of the claimant.

VI. In the course of the oral argument the British Agent submitted to the Commission a power of attorney executed by the Central Agency (Limited) to a stranger in this case, from which document it may be seen that one William Simpson signed said power of attorney as the Secretary of the said Company, together with two of the Directors, and he further exhibited the power of attorney executed by Diego S. Dunbar, Sucr., to Mr. Craig.

VII. Both the Agents defended their respective standpoints.

Legal Considerations

I. It is unquestionable that article 10, paragraph 1, of the Rules of Procedure, approved by the Mexican-British Claims Commission, lays upon the British Agent the duty of signing the Memorial, and requires that a statement of the facts giving rise to the claim *has to be signed by the claimant*, when the Memorial has been signed by the British Agent only.

II. It is also a precept established by the Rules of Procedure of the Mexican-British Claims Commission, that the Memorial shall state by whom, and on behalf of whom, the claim is filed; and if the person filing same does so in a representative capacity, that *he must establish his authority*. (Article 10, subdivision *(e)* of the Rules of Procedure.)

III. In the claim under discussion the claimant is the Central Agency (Limited), Glasgow. Therefore, that Company or its representative should have signed the statement of the facts which gave rise to the claim, pursuant to the legal provisions cited above.

IV. In the opinion of the Mexican Commissioner, the standing of the Central Agency (Limited) has not been established because Diego S. Dunbar, Sucr., has not shown proof of being the attorney in fact of the claimant Company. The deposition of the Secretary, Mr. Simpson, to the effect that Diego S. Dunbar, Sucr., is authorized by that Company to file the claim in question, would only establish the fact that such authorization existed; but from that very admission it is obvious that said authority has not been laid before the Commission. And the Rules of Procedure for the Commission do not consider it sufficient to have information to the effect that one person is the attorney in fact of another, or that it be known, through a third party, that some one is authorized to file a claim on behalf of some one else, but it is necessary, it is imperative, that the fact itself of such representative capacity be established by showing the manner in which it was granted.

At what particular time did the Central Agency (Limited), Glasgow, authorize Diego S. Dunbar, Sucr., to lodge the claim on their behalf? In what manner was such authority granted? What was the extent of such authority? We do not know, for the very reason that the Commission has never had the fact itself of such authority established before it. We do know that such authority exists, because Mr. Simpson, as the Secretary of the Company, has assured us of that fact; but no document whatever establishing the standing of the claimant Company has been produced before the Commission.

V. Neither the Mexican Commissioner, nor the other two Commissioners, would be unduly exacting if they had before them the power of attorney under which Diego S. Dunbar, Sucr., make their appearance, so as to examine same and to decide whether such power of attorney is sufficient or not, according to law, for representing the claimant Company. Not only that, but the Commission would fulfil its duty by examining the power of attorney under which Diego S. Dunbar, Sucr., desires to be considered as the attorney in fact of the claimant Company; but it so happens that if he were called upon to produce said power of attorney, the British Agent would not be able to do so, because it does not exist, and the Commission would, therefore, not be able to perform its duty of examining said power either, because it is not included among the documents submitted by the British Government. That being so, it must be concluded that the standing of the claimant has not been established in the matter of this claim.

VI. Obviously, Mr. Simpson is not the organ through which the Company executes powers of attorney. Then some one else, and not Simpson, the Secret-

ary, is the legal representative of the Central Agency (Limited). It may possibly be the Manager; perhaps it is the Board of Directors; perhaps even the Secretary, Simpson, himself, together with the Directors of the said Company. This we do not know, because the claimant has not established its standing. Through what organ does the Central Agency (Limited) have itself represented in these cases. That we do not know either, because we are not acquainted with the By-laws of the said Company. And judging from the power of attorney produced at the last moment by the British Agent, to show that William Simpson is the Secretary of the claimant Company, it may be inferred that only two Directors and the Secretary himself, *acting jointly*, can grant powers of attorney on behalf of the Central Agency (Limited), and that being the case, the statement of the Secretary only in regard to the existence of authority granted to Diego S. Dunbar, Sucr., is of absolutely no value for establishing the standing of the Company.

VII. The Mexican Commissioner wishes to place on record once more, that in his opinion the Commission is not authorized to supply any deficiencies in the proofs submitted by the parties, in the name of equity, when it is a matter of technical questions going directly to the jurisdiction of the Commission itself, or to the standing of the parties, and more especially when, as happens in this case, the Commission has Rules to which to conform, for deciding the point under discussion.

VIII. And, lastly, considering that on the side of the Commissioners the unavoidable duty exists of complying with the Rules of Procedure approved by the Commission itself, and of seeing that they are complied with, the Mexican Commissioner, conformably to that opinion, and for the reasons stated, holds that the claimant Company has not established its standing before the Commission, and has thus failed to comply with the provisions of article 10, paragraph 1, subdivision *(e)* of the Rules of Procedure. The Motion to Dismiss filed by the Mexican Agent should, therefore, be allowed.

VERACRUZ TELEPHONE CONSTRUCTION SYNDICATE (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 8, December 6, 1929. Pages 74-78.)

PROCEDURE, MOTION TO DISMISS. A Motion to Dismiss raising issues as to ownership of claim, authority to present the same, nature of acts on which claim is based, agreement between Company and Member State, made previously to claim before Commission, and appeal to Mexican Courts, also made previously to this claim, *suspended* until the examination of the claim on the merits.

The Memorial sets out the following facts:

The Company was formed in 1910 to acquire and operate a concession, dated the 22nd October, 1906, for the installation of a telephone system at Veracruz, which was granted by the Government of the State of Veracruz to José Sitzenstatter and Manuel de Corbera, and a further concession, dated the 2nd January, 1911, which was granted by the Federal Government to the said José Sitzenstatter. In or about the month of January 1916 the Company was ordered by the Government of the State of Veracruz to make large increases in the wages of its employees. The Company's resident manager, Mr. Sitzenstatter, attended before the tribunals of the Government and attempted to satisfy them of the

absolute impossibility of compliance with these orders. They refused to entertain his protests and declined to examine the books of the Company. On the 13th May, 1916, an order was received signed by Gonzalo C. de la Mata, the President of the Civil Administration of the State of Veracruz, directing the Company to hand over its offices and all its effects to a commission. This commission took possession of everything, and the Government remained in possession until the 26th October, 1920, when the property was handed back to the Company. During the period of sequestration no materials or labour were expended on maintenance of the plant, no materials were purchased for new installation and the materials of the existing lines were used for other purposes.

By a decree of the 1st March, 1920, authorizing the retransfer of the concession to the company, the Government of Veracruz appointed a representative, and directed the company to appoint another representative, in order to examine the amount of the damages resulting from the intervention. A report was drawn up and the total of the damages was calculated at the amount of $100.824.95 Mexican gold. Although the Company took proceedings to recover the sum, the Veracruz Court declined to hear any evidence; the action was dismissed and no payment followed.

2. The arguments on which the Mexican Agent based his Motion to Dismiss are classified under three headings:

I. The Memorial does not comply with article 10 of the Rules of Procedure, because it is not shown that Mr. A. H. M. Jacobs, Secretary of the Company, really possesses that official character nor that he has been duly authorized to sign the statement of the claim (annex 1). Neither has the status of Mr. Sitzenstatter been established.

II. The Veracruz Telephone Construction Syndicate has no right to present the claim, because at the time of the sequestration the lines belonged to Mr. Sitzenstatter and not to the Company. Both concessions were in the name of Mr. Sitzenstatter, and there is no evidence that he transferred them to the Syndicate; on the contrary, annex 4 shows clearly that up to the 1st March, 1920, no transfer of the concession had taken place. Moreover, the concession provided that the lines could only be transferred to a Mexican company after the approval of the Government of the State of Veracruz had been obtained. If, in spite of this, the lines have been operated by the Syndicate, which is an English Company, the terms of the concession have been violated and the Company has no right to claim for damage, if suffered.

III. The Commission is not competent to decide the claim for the following reasons:

(a) The acts on which the claim is based are not covered by Article 3 of the Convention. It was a civil authority who ordered the sequestration and, according to the last paragraph of Article 3, losses or damages caused by acts of civil authorities must be due to revolutionary events and conditions, and the acts must have been committed by one of the forces specified in subdivisions 1, 2 and 3 of this Article.

In this case the order of the Governor of the State of Veracruz did not take its origin in revolutionary events but in the difficulties which had arisen between the enterprise and its workmen. It was, therefore, not a revolutionary movement but social and industrial discontent which led up to the sequestration. Furthermore, the sequestration was not executed by armed forces but by a commission which acted on behalf of a civil authority.

(b) As the memorial sets out, the lines were transferred in 1920, and at the same time the Company entered into an agreement with the Government of Veracruz whereby the consequences of the intervention were to be adjudicated

upon. By this arrangement the relations between the two parties became those of a contractual nature, and ceased to be of a nature which fell within the terms of the treaty.

(c) It is stated in the Memorial that the claimants, failing to receive the amount which in their opinion was due to them, appealed to the Mexican Courts. In the opinion of the Mexican Agent, this Commission is not a Court of Appeal from the judgments of the national Courts. Only in the event of there having been a denial of justice could there have been reason for intervention, but not in this case, where the Courts have given their decision.

3. The British Agent has filed copies of documents to the effect that the Board of Directors of the Veracruz Telephone Construction Syndicate have adopted the claim of Mr. Sitzenstatter, that he was a director and that Mr. Jacobs was the Secretary of the Company. The Agent drew the attention of the Commission to annex 7 of the Memorial, which shows that there was a decree of the Government of the State of Veracruz by which the formation of the Company was duly legalized and approved. The existence of this decree is denied by the Mexican Agent. In the view of the British Agent, the document reproduced in annex 4 only meant to regularize the actual form in which the lines were operated. The fact was that a British company carried out the concession and suffered the damages, which fact makes the question as to whether the concession had been legally transferred or not immaterial.

As to Article 3 of the Convention, the British Agent pointed out that there can be no doubt as to whether the confiscation found its origin in revolutionary events, which brought about the depreciation of the currency, the increase of prices and the consequent demand for higher wages. The official order to increase wages must be regarded as an act of force. Moreover, the order of sequestration was signed by an officer, Colonel de la Mata, who acted under the orders of General Jara, then Governor of the State of Veracruz. Behind the commission which executed the confiscation were the armed forces to which Article 3 of the Convention refers.

The British Agent denies that by the agreement between Mr. Sitzenstatter and the Government of Veracruz the right to claim has been extinguished. The damage has continued to exist, and there has never been an interruption of the responsibility which the treaty imposes upon the Mexican Government. Neither can the Company be made to suffer because it went to the Mexican Courts. The Convention in Article 6 provides that the Commission shall not set aside or reject any claim on the grounds that all legal remedies have not been exhausted prior to the presentation of the claim, but there is no clause in the Convention declaring the Commission incompetent to deal with cases where the claimants tried to assert their right before the national Courts.

4. The Commissioners are of opinion that, in order to do justice to the arguments brought forward by the Agents, the following questions must be answered:

I. Has it been established that Mr. A. H. M. Jacobs possesses a representative capacity and that he is empowered to prefer a claim? (Article 10 of the Rules of Procedure.)

II. Has the same been established as regards Mr. José Sitzenstatter?

III. Is the question as to whether the concession had, at the time of the sequestration, been duly transferred to the claimant, material to the decision of the Commission on the Motion to Dismiss?

or

IV. Is it sufficient for admission of the claim that operation was actually carried on by the claimant without opposition from the Mexican authorities?

V. If the answer to question III be in the affirmative, to whom did the concession belong at the time of the sequestration, and is the Veracruz Telephone Construction Syndicate entitled to claim?

VI. Were the losses for which compensation is claimed caused by any one or more of the forces enumerated under subdivisions 1, 2, 3, 4 or 5 of Article III of the Convention, or do they fall within the terms of the last paragraph of this Article? Was the confiscation ordered by a civil authority? Were the losses due to revolutionary events and disturbed conditions *(sucesos y trastornos revolucionarios)* and were the acts committed by one of the forces specified in subdivisions 1, 2 and 3 of Article III?

VII. Is the fact that in 1920 the claimant entered into an agreement with the Government of the State of Veracruz on the return of the property sufficient ground on which to allow the Motion to Dismiss?

VIII. Is the fact that the claimant, when no payment was received, resorted to the Mexican Courts, sufficient ground on which to allow the Motion to Dismiss?

5. The Commissioners have come to the conclusion that question VI, which perhaps is the most important of all, cannot be answered without entering an interpretation of Article 3 of the Convention.

In nearly all the answers of the Mexican Agent to the claims, it has been contended that the acts on which the claim is based are not covered by Article 3. This question will therefore have to be answered by the Commission in its judgment on nearly all the claims that have been filed. The Commissioners see no reason why only in this particular case this very important point should be decided by way of a motion to dismiss.

In their opinion, the question as to whether the losses or damages were due to revolutionary events and caused by the acts of forces specified in Article 3 cannot be decided without entering into an examination of essential facts, i.e., of the merits of the claim itself, and the question must therefore be suspended until the claim itself will be examined by the Commission.

Although the other questions enumerated can be answered in this stage of the procedure, the Commission prefers to deal with the Motion to Dismiss as a whole, and therefore postpones the decision until the claim be examined on its merits.

In the meantime, the Commission invites the Mexican Agent to file his answer on the claim.

PATRICK GRANT (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 9, December 7, 1929. Pages 78-79.)

PROCEDURE, MOTION TO DISMISS. A motion to dismiss raising issues as to the ownership of the claim *overruled*, and the questions thereby raised postponed to the examination on the merits, when it appeared that as to certain of elements of damage no question as to ownership existed on the face of the record.

(Text of decision omitted.)

F. W. FLACK, ON BEHALF OF THE ESTATE OF THE LATE D. L. FLACK (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 10, December 6, 1929, dissenting opinion by British Commissioner, undated, separate opinion by Mexican Commissioner, December, 1929. Pages 80-97.)

PROOF OF NATIONALITY OF CORPORATION. A certificate of incorporation in London, with evidence that corporation was domiciled in London, *held* sufficient evidence of British nationality.

CONTINUING NATIONALITY OF CLAIM.—CORPORATE CLAIM, OWNERSHIP OF—WHEN CORPORATION WAS DISSOLVED SUBSEQUENT TO LOSS. Demurrer to a Memorial *allowed*, without prejudice to further proof, when it appeared that the damages claimed were sustained by a British corporation, subsequently dissolved, and proof was lacking of the continuing British ownership of the shares of stock of such corporation during its existence and of the assets of such corporation, including the right to claim, following its dissolution.

CLAIM IN REPRESENTATIVE CAPACITY. It was established that all the shares of stock of such corporation were at one time held by a certain D. L. Flack, subsequently deceased. Proof of his nationality and of the nationality of his heirs *held* necessary.

Comments: G. Godfrey Phillips, "The Anglo-Mexican Special Claims Commission," Law Q. Rev., Vol. 49, 1933, p. 226 at 233.

1. According to the Memorial, the late Mr. Daniel Ludgate Flack carried on business in London, under the name of Daniel Flack and Son, and also in Mexico under the name of D. L. Flack and Son, Mexico (Limited). The latter, according to a certificate delivered by the Registrar of Joint Stock Companies, was incorporated in London under the Companies Acts, 1862-1907, as a Limited Company on the 19th February, 1909. The business of the company was the export from Great Britain of coal, patent fuel, coke and general merchandise. Compensation is claimed for the loss of stocks of coal belonging to the Company which were set on fire at Doña Cecilia during a battle between rebel and federal forces in April 1914. The claim stands in the name of Mr. Frederick William Flack, on behalf of the Estate of the late Mr. Daniel Ludgate Flack, who died on the 9th June, 1920, intestate. After his death letters of administration were given first to his widow and, after her death, to his son, Frederick William Flack. The Company has been dissolved, according to the Registrar's certificate, but the date of its dissolution is not known.

2. The Mexican Agent lodged a demurrer to the memorial on the ground that the certificate issued by a British authority is not sufficient proof of the British nationality of the Company, and also on the ground that it has not been established that Mr. F. W. Flack is, as Executor of the Estate of Mr. D. L. Flack, entitled to represent the Company of D. L. Flack and Son, Mexico (Limited). In his oral argument, and in a brief delivered on the 31st October, 1929 (the third day of the hearing), the Mexican Agent amplified his pleading with the further argument that, as the claim is preferred by F. W. Flack on behalf of the Estate of the late D. L. Flack, the following points should have been proved:

(a) That Daniel Ludgate Flack was a British subject when the damage was caused.

(b) That such and such persons were the heirs of the said Daniel Ludgate Flack.

(c) That the said persons inherited the right to prefer the claim.

(d) That the said persons were British subjects at the time of inheriting.

(e) That Mr. F. W. Flack is entitled to present the claim on behalf of the said persons.

He contended it was necessary to prove that the whole of the issued shares were held by D. L. Flack and that after the dissolution of the Company the right to present the claim was legally vested in him.

The British Agent argued, in reply, that the Registrar of Joint Stock Companies in London is a public official, appointed to register companies in London in accordance with the Companies Acts, and all companies registered by him must be presumed to have been formed in conformity with English law, and that the Certificate of Incorporation issued by him was sufficient proof of the British nationality of D. L. Flack and Son, Mexico (Limited). Moreover, the Company was domiciled in London and all the business was conducted from that place.

Secondly, the British Agent submitted that Mr. F. W. Flack is, as executor of the Estate of the late Mr. D. L. Flack, entitled to claim in respect of the deceased's interests in the firm of D. L. Flack and Son, Mexico (Limited). According to the British Agent, this Company had only one shareholder, Mr. D. L. Flack, to whose Estate all the assets of the Company (including the right to claim) were automatically transferred at the moment the Company ceased to exist.

3. In determining the issue before them the Commissioners must be guided by the rule laid down in the Gleadell case. When allowing the Motion to Dismiss in the claim of *W. H. Gleadell* (Claim No. 19), the Commission declared the principle by which it ought to be guided, namely, that a claim must be founded upon an injury or wrong to a citizen of the claimant Government, and that the title to that claim must have remained continuously in the hands of citizens of such Government until the time of its presentation for filing before the Commission. In the same judgment, the Commission laid down the rule that where the claim is preferred on behalf of an Estate, the nationality of the Executor is of less importance than the nationality of the heirs. Applying this principle to the case under consideration, the majority of the Commissioners are of opinion that in order to decide whether the nationality of the claim was originally British and remained so until the end, the following issues of fact must be determined:

I. Has it been established that the Company D. L. Flack and Son, Mexico (Limited) was a British Company?

II. Has it been established that at the time of the dissolution of this Company all the shares belonged to D. L. Flack?

III. If so, has it been established that D. L. Flack at the time of his death still held all the shares?

IV. If so, has it been established that D. L. Flack was a British subject?

V. Has it been established that F. W. Flack was the only heir of his father?

VI. If not, has it been established that there were other heirs who were British subjects?

4. The questions have been answered as follows:

Question I.—In the affirmative, by the majority of the Commissioners, because in their opinion the Certificate of Incorporation, combined with the fact that

the Company was domiciled in London and the affairs conducted from there, is sufficient proof of the British nationality.

Question II.—The date of the dissolution of the Company does not appear. The last annual return of the Company filed with the Registrar of Joint Stock Companies at Somerset House, London, proves that on the 13th January, 1919, all the shares issued, numbering 2,606, belonged to Mr. D. L. Flack, but there is no evidence as to what happened with regard to those shares between that date and the date of the dissolution, whenever that may have been. The answer to the question is in the negative.

Question III.—There is no evidence as to the ownership of the shares at the time of the death of Mr. D. L. Flack. Neither is there evidence as to the ownership of the assets of the Company, including the right to claim (assuming the latter was dissolved at the time of the death of Mr. D. L. Flack). The answer is in the negative.

Question IV.—The majority of the Commissioners answer this question also in the negative. There is evidence as to the nationality of the son, but not of the father.

Question V.—There is no indication whatever as to the existence or the number or the names of the heirs of the late D. L. Flack. The answer is in the negative.

Question VI.—The answer must necessarily be the same as to question V.

5. The majority of the Commissioners hold the view that the permanent British nationality of the claim has not been established, and that as long as this has not been done, the Mexican Agent is not bound to answer the Memorial.

The demurrer is therefore allowed, without prejudice to the right of the British Agent to furnish other proof.

The British Commissioner expresses a dissenting view, and the Mexican Commissioner also expresses a dissenting view, but only as regards the proof of the nationality of the Company.

Dissenting opinion of Mr. Artemus Jones, British Commissioner

This is a claim for compensation for the loss of stocks of coal which were set on fire at Doña Cecilia in April 1914 during a battle between rebel and federal forces. The claimant is Frederick William Flack, who was born at Christchurch in Monmouthshire, Great Britain, the son of Daniel Ludgate Flack. The latter carried on business in London under the name of Daniel Flack and Son. He carried on business in Mexico also in the form of a limited liability company registered in London under the title of D. L. Flack and Son, Mexico (Limited). The business of the Company was the export of coal and kindred merchandise from Great Britain to Mexico, and the stocks of coal to which the claim relates were on their way to Tampico when they were destroyed at Doña Cecilia. The nominal capital of the Company was £10,000 divided into £1 shares, but only 2,602 shares were issued. The date of the last annual return filed with the Registrar of Joint Stock Companies was the 13th January, 1919, and on that date all these 2,602 shares were in the name of Daniel Ludgate Flack. (The Company was dissolved at a date unknown.) A certified copy of the return has been produced and it shows that a certain number of these shares held by another person had been transferred to Daniel Ludgate Flack during the year and helped to make up the total of 2,602. On the 9th June, 1920, Daniel Ludgate Flack died intestate, and letters of administration were granted by the English Courts to his widow, Laura Ellen Flack, on the 8th October, 1920. On the 24th January, 1924, the said Laura Ellen Flack died, and at that date the estate of her late husband had not been fully administered. Accordingly on the

7th May, 1924, letters of administration *de bonis non* of the unadministered estate were granted to the claimant.

The Mexican Agent put in a demurrer raising two points. He contended, first, that the certificate issued by the Registrar of Companies, which declares that the Company was registered in England, is not sufficient proof of British nationality; secondly, that the memorial does not establish that the claimant, F. W. Flack, is entitled to represent the firm of D. L. Flack and Son, Mexico (Limited). In his reply to the demurrer the British Agent contended that the certificate of the Registrar of Companies is, under English law, conclusive proof of the fact and that the authority of Mr. F. W. Flack to represent the Company of which D. L. Flack was the owner, is covered by his appointment by the Courts as an administrator *de bonis non*. The demurrer occupied the attention of the Commission on the 29th, 30th and 31st October. On the 31st October the Mexican Agent supplemented his demurrer by a document which raised three fresh points: (1) there was no evidence that all the shares belonged to D. L. Flack, either at the dissolution of the Company or at the time of his death; (2) there was no evidence that D. L. Flack was a British subject; (3) there was no evidence that there might not be heirs, other than F. W. Flack, of D. L. Flack.

The issue which is presented for the determination of the Commissioners is whether the memorial establishes a *prima facie* case so that the claim can be gone into. With regard to the three points raised by the Mexican Agent in his further pleading, there is no difference of opinion among the Commissioners. The only ground on which I do not agree with my colleagues is with regard to the deductions to be drawn from the answers to those questions. Had the British Agent objected to the further pleading put in by the Mexican Agent during the course of the argument, these further questions of fact could not have been raised, but Mr. Shearman (as he has done throughout the work of the Commission) studiously refrained from raising any technical points, and allowed the further pleading to go in. In my judgment the demurrer ought not to be allowed, because these issues of fact raised at a late stage by the Mexican Agent, when the British Agent could not possibly obtain information with regard to them, are not necessary in order to determine the question whether a *prima facie* case for investigation of the claim has been made out. On the two points raised by the Mexican Agent in his demurrer there is sufficient evidence disclosed in the memorial to show that the claim ought to be investigated. The further issues of fact could be well gone into when the merits of the claim are dealt with. It is necessary, I think, that the Commissioners should not lose sight of the fact that the *prima facie* evidence which it is necessary for the memorial to show, stands in a different category from the evidence which the Commissioners may deem necessary to establish the claim when the facts are gone into. The certificate of the Registrar is conclusive of the first point. In the second place there is sufficient evidence in the information contained in the memorial to establish that the Courts who appointed the claimant as administrator *de bonis non* have authorized him to pursue the claim on behalf of the estate of his father. While I regret to differ from the conclusions at which my colleagues have arrived, I agree that the answers to the further questions set out in the President's judgment are in the negative.

Separate opinion of Dr. Benito Flores, Mexican Commissioner

I. The British Agent, on behalf of F. W. Flack, and the latter as the representative of the Estate of D. L. Flack, claim the sum of $52,225.88, on the strength of the following facts:

That Daniel Ludgate Flack was the owner of the whole of the issued shares of the firm of D. L. Flack and Son, Mexico (Limited); that on the 9th June, 1920, he died intestate and letters of administration were granted to his widow, Laura Ellen Flack; but that the latter, having died on the 24th January, 1924, without having fully administered the estate of the late Daniel Ludgate Flack, letters of administration *de bonis non* were granted to the claimant, F. W. Flack.

II. That the said Daniel Ludgate Flack carried on business under the name of Daniel Flack and Son, and also in Mexico under the name of D. L. Flack and Son, Mexico (Limited), which was a British Company; that the nominal capital of the said Company was £ 10,000.00, divided into £ 1 shares; that of the said capital only 2,602 shares were issued, and that on the 13th January, 1919, the date of the last return filed with the Registrar of Joint Stock Companies at Somerset House, London, these 2,602 shares stood in the name of Daniel Ludgate Flack.

III. That the business of the Company consisted of the export of coal from Great Britain; that in April 1914 the Company had stored on a wharf adjoining the River Panuco at the Town of Doña Cecilia 5,567,027 kilos. of coal, brought out from England.

IV. That early in 1914 the town was attacked and bombarded by rebel forces; that as a result of such bombardment the stocks of coal belonging to the Company were set on fire, only a small portion thereof having been salvaged.

V. The following documents have been submitted with the claim:

(a) Certificate of Incorporation.
(b) Certified copies of invoice and bill of lading.
(c) Translation of notarial act drawn up at request of Mr. J. Hermosillo.
(d) Translation of notarial act drawn up at request of Mr. R. Everbusch.
(e) Birth certificate of F. W. Flack.
(f) Letters of administration in favour of Mrs. L. E. Flack.
(g) Letters of administration in favour of Mr. F. W. Flack.
(h) Letter dated the 11th July, 1914, from His Majesty's Consul at Tampico.
(i) Letter dated the 3rd February, 1926, from Messrs. Deloitte, Plender, Haskins and Sells.
(j) Sworn statement of Frederick William Flack.

VI. The Mexican Agent entered a Demurrer, supported by the following pleas:

A certificate issued by British authorities is not proof sufficient of the British nationality of D. L. Flack and Son (Limited), and the claimant, Frederick William Flack, is not, as administrator of the estate of D. L. Flack, entitled to represent D. L. Flack and Son, Mexico, (Limited).

VII. The British Agent maintained the positions taken by him in the Memorial.

VIII. On the 29th October this Demurrer began to be examined by the Court, and during the discussion the Mexican Agent, with the assent of the British Agent, amended the Memorial corresponding to the said Demurrer, by laying down the following points:

(a) That it should be shown that Daniel Ludgate Flack was a British Subject at the time the damage was caused.
(b) That such and such persons were the heirs of Daniel Ludgate Flack.
(c) That those persons inherited the right to claim.
(d) That those same persons were British subjects at the time of inheriting.

(e) That Mr. F. W. Flack is the administrator, entitled to claim on behalf of the persons having actually inherited.

The Mexican Agent ended by contending in his amendment:

I. That no proof has been shown that the Company was an English Company.

II. That it has not been proved that the whole of the shares in the Company were allotted to Daniel L. Flack.

III. That no proof has been shown that after the dissolution of the Company the right to prefer the claim was allotted to Daniel Ludgate Flack.

All the above points were again submitted to discussion, and the hearing of the case once closed, the Presiding Commissioner laid before the Commissioners of Mexico and Great Britain the following six questions for decision:

I. Has it been established that the Company. D. L. Flack and Son, Mexico (Limited) was a British Company?

II. Has it been established that at the time of the dissolving of this Company all the shares belonged to D. L. Flack?

III. If so, has it been established that D. L. Flack, at the time of his death. still held all the shares?

IV. If so, has it been established that D. L. Flack was a British subject?

V. Has it been established that F. W. Flack was the only heir of his father?

VI. If not, has it been established that the other heirs were British subjects?

Questions II, III, IV, V and VI were answered in the negative by the three Commissioners.

Question I was answered affirmatively by the Presiding Commissioner and by the British Commissioner; the Mexican Commissioner answered said question I in the negative, contending that it has not been shown that D. L. Flack and Son, Mexico (Limited) was an English Company, and he for that reason expresses a concurrent opinion, so that the Demurrer entered by the Mexican Agent may be upheld, not only because of the negative answer to questions II, III, IV, V and VI, but also because it has not, in his opinion, been fully shown that D. L. Flack and Son, Mexico (Limited) was a Company of British nationality. He bases his opinion upon the following:

Considerations

I. The nationality of physical persons, i.e., the bond uniting a person to a particular nation, has never been laid open to doubt. On the contrary, doubt has arisen when the thought occurs that there may be a person without any nationality; in the case of artificial, or civil, or juridical persons, however, the problem is a different one. In the first case, the bond uniting the individual to the State consists in his submitting to its laws, so as to be able to appeal to the said State for protection in case of necessity. Rights and duties are correlative to one another. In the second case, artificial persons cannot always be considered as identical with physical persons; they cannot, for instance, at a given moment, render military service, as an individual can, or comply with any other similar requirement on the part of the Government to which they have submitted. And by reason of the lack of similarity between physical and artificial persons, and by the legal fiction upon which the latter rest, the opinions of jurists have become divided, especially after the World War, some of them contending that limited companies should have no nationality at all.

M. de Vareilles-Sommières; *Les Personnes Morales*, 2nd edition, No. 1503, says:

"La vérité, écrit cet auteur, est que la personne morale n'étant qu'un résumé et une représentation des associés, n'étant qu'eux-mêmes fondus par l'imagination en un seul être, elle n'a point de nationalité propre, elle n'a aucune autre nationalité que la leur, ou plutôt elle n'a aucune nationalité, car elle n'est qu'un procédé intellectuel, qu'une image dans notre cerveau. Seuls les associés ont une nationalité."

A. Pillet (*Des Personnes morales en droit international privé*, un vol., Paris, 1914, Nos 82 et suivants), eminent professor of the Faculty of Law in Paris, shares the opinion of M. de Vareilles-Sommières, criticizing the fact that the endeavour has been made to extend to artificial persons a notion above all intended for physical persons, and asks:

"Les sociétés ont-elles, de même que les individus, une nationalité?[1]

Lorsqu'il s'agit de personnes vivantes, les principaux points de rattachement de la personne à un droit déterminé sont la nationalité et le domicile, deux notions différentes l'une de l'autre, la seconde étant un pur fait, la première supposant une construction juridique. De ces deux notions on sait que la première est la plus récente et qu'autrefois le domicile seul était pris en considération; il était surtout un élément matériel, car il consistait dans un certain lieu, le centre des affaires.

"La réception de l'idée de nationalité qui, dans le plus grand nombre des pays, est venue réduire l'importance de la notion du domicile, peut être considérée comme un signe du triomphe d'un certain idéal sur les pures relations matérielles. L'acquisition de la nationalité ne dépend pas, en effet, d'un simple fait comme l'acquisition d'un domicile; elle résulte de la volonté du législateur et aussi un peu de celle du sujet; elle engendre un lien purement idéal sur lequel les diverses circonstances de la vie des nationaux peuvent n'exercer aucune atteinte.

"L'une des causes du succès de l'idée de nationalité et du recul de l'idée de domicile provient de la solidité plus grande que la nationalité confère à l'emprise exercée par l'État sur l'individu. L'État demeure le maître absolu des lois sur la nationalité. Il est maître de légiférer sur la nationalité comme il l'entend et, en particulier, soit de fortifier le lien national, soit aussi, dans les cas où la persistance de ce lien lui paraît nuisible, de le trancher, même dans les cas extrêmes, sans la participation de la volonté de l'individu.

"Quoi qu'il en soit, il est certain que la nationalité et le domicile sont les deux grands points de rattachement de la personne au droit. Dans les pays où la nationalité et le domicile exercent chacun leur influence, il s'est produit entre leurs domaines une certaine séparation et dans leur autorité respective l'établissement d'un certain ordre, l'empire de la nationalité concernant plutôt la loi applicable, celui du domicile, la compétence du juge. De telle sorte qu'en général, et sous réserve d'assez nombreuses exceptions, l'individu est soumis, dans les rapports internationaux, à la loi déterminée par sa nationalité, c'est-à-dire à sa loi nationale, et, au point de vue de la compétence judiciaire, à l'autorité du juge de son domicile.

"C'est cette méthode que l'on a voulu transporter de la condition des personnes physiques à celle des sociétés. Il fallait en effet également pour elles un principe de rattachement afin de déterminer la loi à laquelle chaque société est soumise.

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[1] C'est là ce que dit très nettement le tribunal de Lille, 21 mai 1908 (S., 1908, 2. 177); voir aussi trib. com. Liège, 1er fév. 1901 (Clunet, 1901, p. 367); et surtout Cass. Rome, 13 sept. 1887 (Clunet, 1889, p. 510). Ce dernier arrêt pousse l'assimilation au point de confondre le simple fait de la constitution à l'étranger, en matière de société, à la circonstance de la naissance hors d'Italie d'un enfant issu de parents italiens.

"On aurait pu créer de toutes pièces ce point de rattachement, en constituant une règle juridique nouvelle et particulière aux personnes civiles, par exemple, les obliger de se conformer, pour leur constitution, aux lois en vigueur au lieu du centre de l'exploitation de leur industrie ou de leur commerce. [1]

"On aurait pu sans doute suivre cette méthode. On ne l'a pas fait cependant. On a préféré le procédé plus commode de l'analogie; il a paru plus rapide et plus simple d'étendre purement et simplement aux personnes civiles les principes qui avaient été déjà dégagés pour la condition des personnes physiques.

"De là un premier inconvénient est venu, c'est la confusion des notions de nationalité et de domicile en ce qui concerne les personnes civiles. Il est, en effet, impossible de rattacher la nationalité des sociétés comme celle des personnes physiques au lieu où elles naissent, car une société ne naît pas matériellement comme une personne vivante. On ne fait donc que reculer la question et non la résoudre, puisqu'il faut alors se demander quel est le lieu de naissance de la société. Or, avec cette nouvelle question, toutes les difficultés ressuscitent. On ne peut pas davantage admettre la possibilité d'une naturalisation pour les personnes purement civiles.

"On a en réalité absolument confondu à l'égard des sociétés les deux notions de nationalité et de domicile; de telle sorte que ce que l'on appelle nationalité des sociétés n'est, en réalité, qu'une espèce de domicile. Cette nationalité découle de l'établissement de la société dans un lieu déterminé. Il a donc fallu donner ici à la notion de nationalité un sens qu'elle n'a nulle part ailleurs et qui la rapproche par trop de la notion de domicile.

"A vrai dire, on objectera peut-être que les navires ont bien, eux aussi, une nationalité. Et l'on serait tenté de la rapprocher de celle de sociétés. Mais, la nationalité des navires résulte d'une inscription sur les registres de la douane faite à certaines conditions; elle se rattache à l'accomplissement d'une formalité juridique déterminée, tandis que la nationalité des sociétés résulte du choix fait par ses fondateurs d'un certain lieu dans lequel ils l'établissent.

"Quel est ce lieu? Ou, en d'autres termes, quel est le pays dont la personne civile doit avoir la nationalité?

"C'est sur ce point que s'est produit, aussi bien dans la doctrine que dans la pratique, un très grave embarras qui dure depuis fort longtemps et qui n'est point encore résolu à l'époque actuelle. Ainsi que nous le verrons, il a son origine et son caractère inéluctable dans la mauvaise définition donnée à la question qu'il s'agit de résoudre."

The tendency of modern jurists is now that of laying down in positive precepts the principle that artificial persons should not be considered as entitled to have any nationality. This has already been contemplated by the jurists of the American continent, at the Conference of Rio de Janeiro, following the opinion of a notable internationalist, Mr. Irigoyen, in the case of the Rosario Bank, who said (Report of the Ministry of Foreign Affairs, Vol. i, p. 385, 1887):

[1] En République Argentine, ainsi que nous l'avons déjà indiqué (supra No. 66), l'idée de nationalité des personnes morales n'a pas été admise. M. Zeballos (Clunet, 1905, p. 606), en donne notamment pour raison que "le système de droit international privé codifié par la République Argentine élimine soigneusement de ces solutions tout élément politique. Il traite les questions d'après l'école de Savigny au point de vue absolument scientifique. En conséquence, les personnes vivantes ou juridiques n'ont pas de nationalité dans leur rapport avec le droit privé. Elles doivent être soumises à une législation privée certaine et permanente, et cette racine de leur vie juridique est celle du domicile. Il convient de remarquer cependant que cette façon de présenter les choses est nettement exagérée, puisqu'elle ne tient à rien moins qu'à exclure la notion de nationalité, même pour les personnes physiques. On peut se refuser à donner une nationalité aux personnes morales sans tomber dans cet excès.

"The Bank of London is a Limited Company; it is a juridical person, which exists for a particular purpose. Juridical persons owe their existence solely to the laws of the country authorizing them, and consequently are neither national nor foreign. A Limited Company is a juridical person distinct from the individuals which compose it, and is not, even when composed of aliens exclusively, entitled to diplomatic protection. It is not the individuals who are joined, but merely their investments, in an anonymous form, which signifies, according to the meaning of that word, that such companies have neither name, nor nationality, nor any individual responsibility."

The Mexican Delegation at Rio de Janeiro supported the principles announced by the Argentine Delegate, at the International Commission of Jurists in that city, and at the meeting of the 30th April, 1927, having sought their inspiration in the valuable opinion of Doctor Bernardo Irigoyen. It is since the Great War that the principle of whether artificial persons should or should not have a nationality has been most warmly discussed.

C'est surtout, says Georges Demassieux (*Le Changement de nationalité de sociétés commerciales*, page 28), depuis le début de la Grande Guerre que la notion de nationalité des sociétés a trouvé beaucoup d'adversaires. De la guerre naquit une préoccupation nouvelle, trop justifiée bien souvent et tout à fait légitime. Il existait, sur le territoire français, des sociétés à qui l'on avait jusqu'alors reconnu, sans conteste, la nationalité française. Les sociétés commerciales ayant leur siège social en France constituées d'après les règles de la loi française, étaient, en effet, regardées comme françaises. Lorsque survint la guerre, on s'aperçut que certaines d'entre elles étaient dirigées par des sujets allemands, que leur capital avait été, en majeure partie, fourni par des Allemands, en un mot, qui résume bien la situation, que ces sociétés étaient "contrôlées par des Allemands."

Des sociétés ayant leur siège social en France, constituées, d'après les dispositions de la loi française, par conséquent françaises aux yeux de tous, étaient en réalité entre des mains ennemies, servaient des intérêts ennemis: allemands, austro-hongrois ou turcs. Il y avait là une situation paradoxale qui amena de distingués juristes à douter sérieusement de la notion même de nationalité des sociétés, laquelle aboutissait, dans son application, à d'aussi déplorables contradictions. Il leur sembla que cette notion ne signifiait rien, qu'elle était fausse, et qu'attribuer une nationalité à des êtres moraux, à des êtres fictifs, était une conception non seulement inutile, mais dangereuse, puisque, en temps de guerre, les manœuvres de l'ennemi risquaient de pouvoir impunément se perpétrer à l'abri de l'étiquette: "société nationale."

En 1917, M. Thaller, Professeur à la Faculté de droit de Paris, écrivait, dans la *Revue politique et parlementaire*. [1] "Entre l'idée de nationalité et celle de personnes fictives ou abstraites, il y a une impossibilité d'adaptation, une antinomie. La nationalité procède de la famille agrandie. Pas plus qu'une société ne possède un statut de famille, pas plus elle ne saurait prétendre au statut sous lequel les individus d'une même nation sont placés. La nationalité est faite de traditions, de mœurs communes, d'un esprit propre aux hommes qui font partie de l'État, différent de l'espèce des autres États, des autres races. En l'absence de ces éléments constitutifs, peut-il être question de nationalité?"

Aux côtés de M. Thaller, M. Lyon-Caen, M. Landry, député, M. Camille Jordan, juriste très versé dans les questions de nationalité, combattirent vigoureusement la notion de nationalité des sociétés. [2] Dans son fort intéressant ouvrage

[1] *Revue politique et parlementaire*, année 1917, page 297.

[2] *Bulletin mensuel de la Société de législation comparée*, janvier-mars 1927, article de M. Lyon-Caen, p. 535 et suiv. Numéro d'octobre-décembre 1927, article de M. Jordan, p. 534.

sur la "*Nationalité des sociétés de commerce*,[1]" M. Pepy considère que la nationalité des sociétés, d'après les idées généralement admises, ne peut que consister dans la soumission aux lois d'un État sur la constitution et le fonctionnement des sociétés. La véritable nationalité, au contraire, que seule peuvent posséder les individus, consiste dans l'emprise d'un organisme politique sur une personne humaine. C'est cette emprise qui forme le fond, la substance même de l'idée de nationalité. La Français ne relève pas seulement de la législation française, il voit de plus son activité dirigée, absorbée même par les forces propres de la communauté française. Cette communauté ne s'occupe que des êtres vivants, qui, seuls, peuvent lui être unis par ce lien personnel intime qui constitue la nationalité. Mais ce lien ne peut se concevoir à l'égard d'une entité juridique qui ne peut en avoir d'autre avec la communauté nationale que le fait *d'avoir son fonctionnement régi par ses lois*. Les sociétés n'ont pas de véritable nationalité, et vouloir leur en donner une, c'est fort dangereux. "C'est entretenir l'équivoque dans les idées, la confusion dans les esprits," dit M. Pepy.

Par la thèse de M. Pepy, les mesures prises par le Gouvernement français, pendant la guerre, à l'encontre des sociétés contrôlées par l'ennemi, se trouvent parfaitement justifiées. Si les sociétés commerciales ne pouvaient avoir de nationalité, elles n'étaient pas plus françaises qu'allemandes, austro-hongroises ou turques. Que certaines d'entre elles fussent dangereuses, cela suffisait pour que, dans l'intérêt supérieur de la défense nationale, on agît de rigueur avec elles, et qu'on sequestrât leurs biens.

Les idées des détracteurs de la notion de nationalité des sociétés trouvèrent leur écho dans la jurisprudence. Un jugement du tribunal mixte franco-allemand de 30 novembre 1923, [2] dénie à une société la possibilité d'avoir une nationalité. Il s'agissait, en l'espèce, d'une société en commandite simple établie à Paris, qui demandait à être considérée comme ressortissant d'un pays allié ou associé, aux termes de l'art. 297 e. du traité de Versailles. Le tribunal mixte, adoptant les motifs d'une précédente décision qu'il avait rendue le 30 septembre 1920,[3] considère que les sociétés en commandite, en tant que personnes morales, n'ont pas de nationalité proprement dite, et que celle-ci dépend de la majorité des associés. Voici les termes dont il se sert: "Attendu que les sociétés en commandite n'ont pas de nationalité proprement dite, puisqu'une telle nationalité d'une part confère des droits (tels que le droit de vote, le droit d'être nommé à des fonctions publiques, la protection contre l'extradition, &c.), et d'autre part impose des obligations (telles que le service militaire), qui ne peuvent s'appliquer qu'aux personnes physiques." Plus loin, le même jugement proclame que "la nationalité de la majorité des associés détermine le caractère de l'entreprise qui forme l'objet de la société."

It is true that in this instance the question as to whether the artificial person under discussion has any nationality or not, is not being gone into, because the Mexican Government had already undertaken to pay compensation to *English Companies* having sustained damage, but if the renowned jurists to whom I have referred, are contending for the abolition of the principle of nationality in the case of artificial persons, international Tribunals, when called upon to solve the problem in a specific instance, should, with all the more reason, proceed with great care before upholding the nationality of a given person, if the facts serving as the ground for their decision do not conform exactly to universally recognized principles, and more especially to the laws of the country the protection of which is invoked.

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[1] *De la nationalité des sociétés de commerce*, par M. Pepy, un vol., 1920, p. 92 et suiv.
[2] D. Hebd., 1924, p. 131.
[3] J. Clunet, 1923, p. 600.

II. Nationality is a question which must be decided in accordance with internal law, as decided by the Permanent Court of International Justice, in various judgments. The Laws of England do not state when a Company is of British nationality, and the decisions of English Courts do not fix unvarying rules for determining when a Company is of such nationality. On the contrary, there are decisions of English Courts openly contradictory to one another, some of them admitting the principle that the nationality of a company should be determined by the laws under which it was organized and registered, while other courts have ruled that the nationality of a company should be determined by the place where its operations are carried on, i.e., its principal place of business.

III. The certificate of incorporation of the Company (annex 1) produced by the demandant Government, only shows that D. L. Flack and Son, Mexico (Limited) was organized under the Companies Acts, 1862 to 1907, as a Limited Company, on the 19th February, 1909, and that said Company was dissolved; but it cannot be inferred from this that the said Company is of British nationality. There is no law providing that a Company is an English Company through the mere fact of having been organized in accordance with the English laws. In the present case the doubt as to the British nationality of the Company arises out of the fact that D. L. Flack and Son, Mexico (Limited) had the Republic of Mexico as its only centre of operations, or at least the Company for Mexico, as the British Agent himself assures us in his Memorandum.

Georges Demassieux, in *Le Changement de Nationalité des Sociétés Commerciales*, p. 45, says:

"En Angleterre, nous le dirons plus loin, une société, pour être anglaise, doit avoir son siège administratif sur le territoire national. Mais une société 'limited' doit, pour avoir la personnalité, remplir la formalité de l'enregistrement *de ses statuts* sur un registre spécial tenu par un fonctionnaire appelé registrar. Une société 'limited' ne peut avoir la nationalité anglaise si elle n'a pas accompli cette formalité."

In this case all that we know is that D. L. Flack and Son, Mexico (Limited) was incorporated on the 19th February, 1909; but we do not know whether the articles of association of said Company were registered or not; we do not know either whether the said Company had its *siège social* in Mexico, and all that we know is that it was incorporated under the English law; but for the purpose of effecting all its transactions in Mexico. It would have been desirable that the British Agent had submitted a copy of the deed of incorporation with this Memorial. This would have saved time and argument; but the lack of that document, or rather the omission on the part of the demandant Government, cannot be transformed into an affirmative statement to the effect that the Company is a British Company, to the detriment of the interests of a sovereign nation, which has graciously acquiesced in the payment to *British subjects* of damage suffered by them, although not bound to do so under International Law.

IV. International Jurisprudence precedents differ too much to make it possible to decide with absolute exactness, without fear of error, as to the nationality of a company.

Borchard, "*The Diplomatic Protection of Citizens Abroad*," p. 617, paragraph 277, says:

"S 277. *Citizenship of Corporations.*

"The nationality of corporations is one of the most actively discussed questions of the law of continental Europe. While some writers dispute the possibility of corporate nationality, the fact that the legislation of practically all countries takes account of foreign corporations, has persuaded publicists to endeavour

to establish the criteria of a national corporation. In some countries, little help is obtained from positive legislation.

"A corporation may be attached to a territory by three elements. The first is the place where it is created or founded, where the legal formalities of its constitution, authorization and inscription have been carried out. The second is the place where the home office, the active management or centre of administration, or what the French call the *siège social* is located. The third is the place where it carries on the purpose of its organization, its actual operations, its centre of exploitation *(principale exploitation)*.

"When these three elements are combined in one country, it is hardly open to question that the corporation has the nationality of that country. But when the three elements or some of them are located in different countries, the nationality of the corporation is not always easy to determine. Taking into consideration the three factors mentioned and some others, the following systems as to the determinative criterion of the nationality of a corporation have all had their adherents: It is governed (1) by the nationality of the State which authorizes its existence (Fiore and Weiss); (2) by that of the State within whose jurisdiction it has been organized (Brunard and Cassano); (3) by the nationality of the stockholders (Vareilles-Sommières); (4) by that of the country of subscription of domicile of the majority of the stockholders at the time of subscription (Thaller); (5) *by that of the country where it has its principal place of business, a system followed, with variations, by the legislation of most countries;* (6) the jurisdictional judge may determine the nationality on all the facts. Other solutions have been offered, e.g., that the will of the corporation or of the state should alone determine its nationality.

"Leaving aside all theoretical arguments, it may be said that the majority of States in their legislation have accepted *the country of domicil (siège, Sitz)* as the nationality of the corporation. The question then arises, is the domicil the centre of administration, the 'home office', or is it the centre of exploitation, where the business is carried on? Among the countries of Europe with the exception of Spain, which attributes Spanish nationality to corporations incorporated in Spain or administered from, or doing business in Spain, *and of Italy, Portugal and Romania,* which consider as domestic corporations those doing business within their borders (centre of exploitation), the majority adhere to the system by which nationality follows the country in which the *centre of administration* (the *siège social*) is located."

Jackson H. Ralston, in *The Law and Procedure of International Tribunals*, p. 155, paragraph 278, says:

"278. The mixed commissions sitting by virtue of the Versailles and subsequent treaties have several times rendered decisions upon the general subject. Thus, for instance, it has been held that a corporation formed in Germany and controlled by Frenchmen can claim, as a victim of exceptional measures of war, a house which has its site for business affairs in Germany, but of which no associate is German, cannot be considered as a German subject; under the terms of the treaty of peace the nationality of a corporation is fixed for the purpose of the interests which these treaties have in view, not according to the law under which they were constituted nor according to the site of their principal establishment of business, but according to the interests controlling them; a corporation or association composed of individuals all of the same nationality cannot have a nationality different from theirs. *Where there is no question of custody or liquidation, but there are mere contract relations between private parties, a joint stock company's nationality is determined by the location of the principal place of business unless this is merely nominal.*"

V. The Anglo-Saxon system for determining the nationality of limited companies is not uniform either. Borchard, *op. cit.*, p. 619, paragraph 275, says:

"*Anglo-American Law.*

"In Anglo-American law no such theoretical conflicts as have prevailed in continental law appear to have found a place. The conception of domicil with respect to corporations has been applied in cases of taxation and of belligerent rights, and for these purposes the seat of the corporation has on occasion *been considered the place where the business is carried on.* For other purposes the question of domicil and nationality is decided by practical considerations, the most important of which is the place of incorporation.

"In the United States the citizenship of corporations is judged almost exclusively according to the place of incorporation, which involves, in most municipal cases, the determination of State citizenship. Only thirteen States even require residence on the part of any of the incorporators and only six require State citizenship. New York appears to be the only State demanding United States citizenship. While the courts have made numerous distinctions between natural persons and corporations in the matter of citizenship, they have held a corporation to be a citizen for the purposes of suit under the federal constitution, and under the Act to provide for the adjudication and payment of claims arising from Indian depredations. The Supreme Court, moreover, has held that for jurisdictional purposes there is a conclusive presumption of law that the persons composing the corporation are citizens of the same State with the corporation, and, 'although an artificial person,' a corporation is 'to be considered as a citizen of the State as much as a natural person.'

"While it has been held that a corporation could be an alien enemy as well as an individual, it has not been definitely established whether the place of incorporation governs enemy character, or whether this is determined according to each place where the corporation has a branch and does business. In earlier cases, the place of actual business has been held to control; more recently, however, it has been held in England that the place of incorporation and registration, and not the place of operation governs. The British proclamation of the 9th September, 1914, in regard to trading with the enemy, provides that in the case of incorporated bodies enemy character attaches only to those incorporated in an enemy country. On the other hand, for the purposes of the effect of war on patents, designs and trade-marks, a British corporation controlled by or carried on wholly or mainly for the benefit of subjects of an enemy State was to be deemed an alien enemy."

VI. The foregoing considerations at least serve to show that the problem of the nationality of a limited company under international law is not an easy one to solve, when, as in this case, the Company was incorporated under the Laws of England, but to operate in Mexico. If the claimant Company had had its domicile in Great Britain, if its shareholders had been British and its principal place of business had been in England, the Mexican Commissioner would have agreed with his colleagues in acknowledging its British character; but this last element is lacking and he does not, for that reason, accept that opinion.

VII. The Mexican Commissioner holds, furthermore, that it is not necessary to decide this first question of the interrogatory in either sense, because the Demurrer having been upheld on the strength of the other grounds proposed, said Demurrer would, on the assumption that a British Company were involved, also be sustainable.

The Mexican Commissioner bases his opinion on the foregoing considerations, dissenting from his estimable colleagues in regard to the nationality of

the claimant Company; but he concurs, however, in all the other points which gave rise to the decision of this Court upholding the Demurrer entered by the Mexican Agent.

CARLOS L. OLDENBOURG (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 11, December 19, 1929. Pages 97-99.)

NATIONAL CHARACTER OF CLAIM.—CONTINUING NATIONALITY OF CLAIM.—PARTNERSHIP CLAIM.—CLAIM IN REPRESENTATIVE CAPACITY.—DUAL NATIONALITY. Demurrer to a claim for damage to a partnership formed under Mexican law *allowed*, without prejudice to further proof, when evidence was lacking, as required by the *compromis*, that British subjects possessed an interest exceeding fifty per cent of the capital of the firm. Any interest in such partnership owned by persons of dual nationality, i.e., that of claimant and respondent Governments, *held* not the subject of an international claim.

Cross-reference: Annual Digest, 1929-1930, p. 189.

1. The claim is for losses suffered by Messrs. Jorge M. Oldenbourg, Sucs., at Colima (State of Colima), during the years 1914, 1915 and 1916. The Memorial divides the claim into three parts:

Part 1.—For 1,000.00 pesos, being a forced loan made by the Military Governor of the State of Colima;

Part 2.—For the value of two bundles of skins taken by order of the Military Governor of the State of Colima;

Part 3.—For the payment of a bill of 2,600.00 pesos issued by the Paymaster-General of the First Army Corps at Manzanillo (State of Colima) which the Treasury of the Federal Government refused to honour.

The Memorial states that the aforesaid Company was formed on the 20th July 1904, and, although Mexican, was composed entirely of British subjects. The partners were Mrs. Emeteria Oldenbourg, Mr. Carlos, Miss Martha, Miss Luisa, Miss Berta and Miss María Oldenbourg, the first being the widow and the others the children of the late Mr. Jorge M. Oldenbourg. By a deed dated the 6th August, 1925, the company was dissolved and Mr. Carlos L. Oldenbourg became sole owner, taking the responsibility of all present and past accounts.

Amongst the annexes is a certificate of the British Consul at Colima stating that in April 1908, Mrs. Emeteria, Miss Martha, Mr. Carlos, Miss Luisa and Miss María Oldenbourg were registered as British subjects.

2. The Mexican Agent lodged a demurrer on the two following grounds: The Consular certificate does not establish the British nationality of the members of the firm of Jorge M. Oldenbourg, Sucs., nor that of Mr. Carlos L. Oldenbourg, who presents the claim. The British Agent has not shown that the allotment referred to in Article III of the Convention was ever made to the claimant.

The British Agent has submitted a baptismal certificate and a certificate of the Secretary of State for Foreign Relations of Mexico as proof of the British nationality of the father, Jorge M. Oldenbourg. According to British law, his wife and his children possess the same nationality. The Company, when it was dissolved, was entirely formed by British subjects, and as the right to this claim,

by the deed of the 6th August, 1925, has passed to Carlos L. Oldenbourg, the allotment referred to in Article III is not required. Furthermore, the British Agent has filed copies of letters to the effect that Carlos L. Oldenbourg acted several times as British Consul at Colima and for that reason, according to the law of Mexico, is to be considered as a foreigner in that country.

3. In his oral argument the Mexican Agent has not contested the British nationality of the late Mr. Jorge M. Oldenbourg, nor of his widow, but as regards the nationality of their children he *first* drew attention to the fact that the Consular certificate does not mention Miss Berta Oldenbourg, and *second* maintained that according to article 2 of the Mexican "*Ley sobre Extranjería y Naturalización*," 1886 ("Law on Alienage and Naturalization," 1886), they must be regarded as Mexican subjects, because they were all born in Mexico and have not, when they became of age, declared before the competent authority that they opted for British nationality. For this last contention, he relied upon a telegram of the Governor of the State of Colima.

The Mexican Agent held therefore that, even if the British nationality of the claimant and his sisters were established, they possessed at the same time Mexican citizenship; in other words, that the Commission was faced by a case of dual nationality. In such cases, the principle generally followed has been that a person having dual nationality cannot make one of the countries to which he owes allegiance a defendant before an international tribunal. A person cannot sue his own Government in an international court, nor can any other Government claim on his behalf (Borchard: *The Diplomatic Protection of Citizens Abroad*, p. 587; Ralston: *The law and procedure of international tribunals*, p. 172).

As regards the second ground, upon which his demurrer is based, the Mexican Agent contended that at the moment when the company was dissolved and Carlos L. Oldenbourg became sole owner, the Convention was not yet signed and the partners of this Mexican firm had therefore not yet acquired the right to claim independently of the company. For this reason, Carlos L. Oldenbourg can only claim on his own behalf and he must prove which was his interest in the concern.

4. The British Agent observed that the question of the dual allegiance had not been raised in the written pleadings and he declared that the British Government, in cases of such duality, held the same view as expressed by the authors whom his Mexican Colleague had quoted. He pointed out, however, that the British nationality of the widow of Mr. Jorge M. Oldenbourg was not contested and that also the British nationality of Mr. Carlos L. Oldenbourg must be regarded as being recognized by Article 6 of the Mexican law of 1886, owing to the fact that he had held an office in the British public service. If therefore Mr. Carlos L. Oldenbourg and his mother could be proved to have possessed an interest exceeding fifty per cent of the total capital of the company (Article III of the Convention), the nationality of the other partners would be immaterial and the demurrer falls to the ground. He accordingly asked the Commission to postpone the further discussion in order to obtain evidence as to the proportional interest pertaining to claimant and his mother.

The Commission has allowed the postponement and in its meeting of the 5th December, 1929, the British Agent has declared that, having not been able to obtain the necessary evidence, he would not further oppose the demurrer.

5. The demurrer is allowed, without prejudice to the right of the British Agent to furnish other proof.

MEXICO CITY BOMBARDMENT CLAIMS (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 12, February 15, 1930, dissenting opinion (dissenting in part) by British Commissioner, undated, dissenting opinion (dissenting in part) by Mexican Commissioner, February, 1930. Pages 100-118.)

AFFIDAVITS AS EVIDENCE.—DAMAGES, PROOF OF. Only in rare instances will unsupported affidavits of a claimant be accepted as sufficient evidence. Affidavits of claimants made shortly after their losses, corroborating one another in their recitation of the facts, and supported by affidavits of other witnesses as well as certain historical facts, *held* sufficient proof of circumstances of loss. Affidavits of claimants as to amount of loss *held* not sufficient to establish damages to be allowed, damages instead allowed on basis of estimate of the tribunal. A statement neither signed nor sworn to by claimant held not sufficient evidence. A statement of a claimant supported by an affidavit of another person, which latter affidavit was executed more than fifteen years after the event, *held* not sufficient evidence.

PRIMA FACIE CASE.—BURDEN OF PROOF.—EFFECT OF NON-PRODUCTION OF EVIDENCE BY RESPONDENT GOVERNMENT.—RESPONSIBILITY FOR ACTS OF FORCES.—FAILURE TO SUPPRESS OR PUNISH. A *prima facie* case of liability will exist upon proof by the claimant Government that the existence of the insurrection, for acts of the forces of which claim was made, was known to the public authorities, when the respondent Government has failed to produce any evidence as to action taken by the authorities.

Cross-references: Am. J. Int. Law, Vol. 25, 1931, p. 765; Annual Digest, 1929-1930, pp. 166, 454.

Comments: G. Godfrey Phillips, "The Anglo-Mexican Special Claims Commission," Law Q. Rev., Vol. 49, 1933, p. 226 at 238.

1. The British Government have joined in a single Memorial, under the title "Mexico City Bombardment Claims," one group of similar claims and two individual claims, all of which originate in the events which took place in Mexico City in February 1913, during a period known as "the tragic ten days." They are the following:

A. The claims of Walter Ralph Baker, Archibald William Webb, Herbert John Woodfin and George J. W. Poxon, all residents in the Hostel of the Young Men's Christian Association, for having lost property when the Hostel was occupied by troops.

B. The claim on behalf of Daniel John Tynan for losses suffered when, as a result of a bombardment, a fire was started in his house and his property destroyed.

C. The claim of James Kelly for losses suffered through the killing of twelve of his cows by a shell.

The Commission has considered and decided the three parts of the Memorial separately.

A

The Claims of Messrs. Baker, Webb, Woodfin and Poxon

2. Their losses are alleged to have been due to the occupation of the Y.M.C.A. Hostel, where they resided in February 1913, by revolutionary troops belonging to the forces of General Felix Díaz, then in arms against the Administration of President Madero. Claimants were ordered to leave the building without delay, and when they returned to their rooms after hostilities had ceased, they found that their personal property had been either destroyed or looted by the revolutionaries. The building was, and is still, situated at the corner of Calle Dalderas and Avenida Morelos, close to the so-called "Ciudadela," being the Arsenal, then occupied by the Felicistas (troops under command of General Felix Díaz).

The documents on which the British Agent relies are: (1) An affidavit sworn by Mr. Baker before the British Consul-General at Mexico City on the 2nd April, 1913; (2) a statement made by Mr. Webb on the 1st March, 1913, registered on the 27th March, 1913, at the British Consulate-General at Mexico City, and affirmed by his affidavit sworn before the British Vice-Consul at Guadalajara on the 15th April, 1928; (3) a statement made by Mr. Woodfin on the 3rd April, 1913, and affirmed by his affidavit sworn before the British Consul at San Jose, Costa Rica, on the 1st March, 1928; (4) an affidavit sworn by Mr. Poxon before a notary public at Los Angeles (California) on the 28th November, 1927; (5) several certificates of the Secretary of the Young Men's Christian Association, to the effect that Messrs. Baker, Webb and Woodfin occupied rooms in the Hostel when the building was invested by revolutionary troops on the 11th February, 1913.

In the course of his argument the British Agent has filed an affidavit sworn before the Vice-Consul of the United States of America at Mexico City by Mr. Richard Williamson, now National Secretary, and, in February 1913, Associate General Secretary of the Young Men's Christian Association. In this affidavit Mr. Williamson deposes that during the "tragic ten days" the Hostel of the Association was occupied by one hundred soldiers under the general command of Felix Díaz; that he (Williamson) was on hand at the same building immediately after the hostilities ceased, and that he found the majority of the rooms had been sacked and robbed. He further states that none of the occupants of the rooms had an opportunity to remove their personal belongings because of the suddenness of the occupation of the building and the impossibility of getting access to it after the troops had occupied it, and that, during the time the robbing and sacking was done, no troops, forces or individuals had access to the building.

The British Government claims, on behalf of Mr. Baker, 997.00 pesos Mexican gold; on behalf of Mr. Webb, 275.50 pesos Mexican; on behalf of Mr. Woodfin, 621.10 pesos Mexican silver or £62 3*s*.; and on behalf of Mr. Poxon, 631.00 pesos Mexican gold.

3. The Mexican Agent has denied any value whatever to the affidavits of the claimants, because they have not been sworn publicly before a court, because there has been no cross-examination of the affiants, and because, in case of perjury, the affiants cannot be prosecuted.

In his opinion, the unsupported affidavits of claimants cannot be considered as evidence, and certainly not as evidence in their favour. He pointed out that articles 10, 28, 29 and 30 of the Rules of Procedure make a clear distinction between the parties and the witnesses, and that documents emanating from the former are not equivalent to documents emanating from the latter. The

fact on which the claims are based, i.e., the looting of the room in each individual case, has not been proved, neither have the pre-existence or the value been established of the objects, for the loss of which compensation is claimed. Even if the occupation of the building were ascertained, the losses of the claimants individually would not have been proved by their uncorroborated affidavits. In the view of the Mexican Agent, the claimants have omitted to collect the necessary outside evidence, which, if they had made an effort, would have been available, and this makes their statements still more objectionable to him.

Although the Mexican Agent did not deny that the Felicistas are included in the forces enumerated in Article 3 of the Convention, he contested that there was any proof that they were responsible for the losses on which the claims rest. But even if this had been shown, they could, as being rebels, only fall within subdivision 5 of Article 3, and the British Agent ought to establish that the competent authorities had been blamable in some way.

4. The British Agent held that to unsupported affidavits of claimants more weight is to be attached than his colleague was inclined to admit. According to the British law, affiants can be prosecuted and punished for perjury even if they swore and signed outside England. In this case, however, the affidavits cannot be considered as lacking support, because they corroborate each other, having been sworn by different persons, who all suffered similar losses at the same time and owing to the same occurrences.

He further argued that, whereas it is impossible to obtain corroborated evidence as to the objects robbed from a room, the statement of the owner has the value of *prima facie* evidence.

That those who occupied the building and looted the rooms were Felicistas was, according to the Agent, of public notoriety, and is, moreover, proved by the certificates of the Secretary of the Y.M.C.A. and by the affidavit of Mr. Richard Williamson.

In his view, the Felicistas were included in subdivision 2 of Article 3 of the Convention, because they aimed at the overthrowing of President Madero, an aim which at the end of the "tragic ten days" was reached by General Victoriano Huerta. As, in the conception of the British Agent, Huerta established a Government *de facto*, the cause, which was common to him and to General Felix Díaz triumphed and the Mexican Government is responsible for the damages caused by the forces of the one as well as of the other. If, according to the opinion of his Mexican colleague, subdivision 5 of Article 3 were to be applied, the British Agent maintained that it was well known that neither General Felix Díaz nor his soldiers were punished.

5. In its decision on the demurrer, filed by the Mexican Agent in the claim of Mrs. V. C. Cameron, the Commission has made known its attitude as to affidavits in general. The unanimous view of the Commissioners was expressed as follows:

"It is true, no doubt, that affidavits contain evidence which can be described as secondary evidence and is often of a very defective character. In many cases, it may be, affidavit evidence may possess little value, but the weight to be attached to that evidence is a matter for the Commissioners to decide according to the circumstances of a particular case. Affidavits must and will be weighed with the greatest caution and circumspection, but it would be utterly unreasonable to reject them altogether."

Acting on the principle laid down in this sentence, the Commission has considered the weight to be attached, *first* to unsupported affidavits of claimants in general, and *second* to the affidavits produced in this case.

It may be useful for the further guidance of the Agents, that the Commission announces that its majority has come to the conclusion, in general, that unsupported affidavits of claimants possess the very defective character of which the quotation speaks, and that only in cases of the rarest exception, they can be accepted as sufficient evidence. Such documents are sworn without the guarantee of cross-examination by the other party; in nearly all cases a false statement will remain without penalty, and, as they are signed by the party most interested in the judgment, they can not have the value of unbiased and impartial outside evidence.

As regards, however, the affidavits, on which the British Agent relies in this case, an otherwise composed majority of the Commission does not consider them as being unsupported, at least not as regards the affidavits of Messrs. Baker, Webb and Woodfin. Their statements have been made at nearly the same time and very shortly after the events. Their depositions are identical. Their falseness would be equal to a perjury of such a premeditated and concerted character as seems difficult to admit. Moreover, their declarations are strengthened by the certificates of the Secretary of the Y.M.C.A., who attests that the Hostel was occupied by revolutionaries, and by the affidavit of Mr. Richard Williamson, who, as an eye witness, swears that he knew that the soldiers, who invested the building, were Felicistas and that the majority of the rooms have been sacked and robbed. As moreover, the Hostel was situated in the immediate neighbourhood of the place where, as is widely known, General Felix Díaz had his quarters, there is every reason to admit that, by corroboration, the various affidavits and statements prove sufficiently the occupation of the building by Felicistas and the looting by them of the rooms of Messrs. Baker, Webb and Woodfin.

It is the unanimous opinion of the Commissioners that these considerations do not hold good for the claim of Mr. Poxon for the reasons *first* that his affidavit, having been sworn on the 28th November, 1927, can not be regarded as being corroborated by the simultaneous and contemporary statements drawn up a few days or weeks after the events; and *second* that there has not been shown any evidence as to his residing in the Hostel during the "tragic ten days."

6. The majority of the Commission being satisfied that the Hostel was occupied by soldiers of the Felix Díaz forces, and that the rooms of Messrs. Baker, Webb and Woodfin were looted by them, the next question which arises is whether the Mexican Government can, under Article 3 of the Convention, be held responsible for these acts, in other words, whether the Felicistas fall within any of the subdivisions of Article 3, and if so, within which of them.

It is again a majority of the Commission who answer this question in the affirmative and hold that subdivision 5 of article 3 applies to the case under consideration.

The Commissioners, whose views are here exposed, do not admit such a close co-operation and community of aim between General Felix Díaz and General Victoriano Huerta as to identify them both together as one revolutionary force, which, after the overthrow of President Madero, set up a Government *de facto*. In their opinion, the Felicista forces must be considered as separate forces and merely as troops having risen in arms against the then Government *de jure*, i.e., as rebels.

For their acts the Republic of the United Mexican States owes compensation, in case, to quote the last part of subdivision 5: "It be established that the competent authorities omitted to take reasonable measures to suppress the insurrections, risings, riots or acts of brigandage in question or to punish those

responsible for the same; or that it be established in like manner that the authorities were blamable in any other way."

In a great many cases it will be extremely difficult to establish beyond any doubt the omission or the absence of suppressive or punitive measures. The Commission realizes that the evidence of negative facts can hardly ever be given in an absolutely convincing manner. But a strong *prima facie* evidence can be assumed to exist in these cases in which *first* the British Agent will be able to make it acceptable that the facts were known to the competent authorities, either because they were of public notoriety or because they were brought to their knowledge in due time, and *second* the Mexican Agent does not show any evidence as to action taken by the authorities.

In the claims here dealt with both conditions seem to be fulfilled. The occupying and the looting of the building must have been known to the authorities obliged to watch over and to protect life and property; and, furthermore, the British Agent showed notes of sufficient authenticity, written in the British Legation in margin of the affidavits of the claimants, which notes satisfy the majority of the Commission that the events have been duly and without delay intimated to the public authorities.

On the other hand there is no evidence at all that the soldiers, who looted the Hostel, have been prosecuted.

7. It remains to be examined if any proof has been shown of the amount of the loss for which compensation is claimed, and which decision is to be taken in case such proof is lacking.

The Commissioners join in the view that the corroboration of the three affidavits, adopted in section 5 of this judgment, does not go further than the mere facts of the occupying of the building and the looting of the rooms, and that neither in the other documents, on which the majority relies, is to be found anything which can throw light on the figures of the loss. But the majority cannot concede that this constitutes a reason why no award at all should be granted.

The majority of the Commissioners are convinced that losses have been suffered and that, according to the Convention, they are to be compensated by the United Mexican States, and the mere fact that their amount has not been established cannot deprive the claimants of their right. Another view might be taken if the claimants could be blamed for having omitted to take such steps as could lead to showing what the damages were. But there can be no reasonable doubt that such steps were not within their power. After the soldiers invested the Hostel, the residents had no choice but to evacuate their rooms at once. There was no one inside or outside the building who could be expected to know which objects had to be left in the rooms. A comparison between the inventory before and after the occupation was therefore impossible. It would be in conformity neither with justice nor equity if for this reason all compensation was disallowed.

But it seems equally wrong to accept, in the absence of convincing evidence, the figures calculated by each of the claimants. The Commission cannot believe that it would act in accordance with the principles laid down in Article 2 of the Convention if it decided that the Mexican Government must pay the uncorroborated and perhaps exaggerated amounts which appear in the affidavit of the interested parties.

To this dilemma the Commission sees only one solution, i.e., to lay down its own rule for the adjudging of the award. This rule must be established independently of the individual claims. It cannot grant to the one more than to the other because it rejects the figures which each of the claimants puts forward.

It must constitute the nearest approach to justice and equity which the case admits.

This rule, adopted by the majority of the Commissioners, is that the Mexican Government, in the absence of clear evidence, cannot be obliged to pay more to each claimant than the amount representing the value of such objects as may be safely supposed to constitute the average portable property of young, unmarried men of the social class for which the Hostels of the Y.M.C.A. are particularly destined. Arbitrary as this amount may seem, it is more in conformity with the spirit of the Convention than either the denial of all award whatever or the granting of sums for which no reliable evidence exists.

8. The Commission decides that the Government of the United Mexican States shall pay to the British Government, on behalf of Messrs. W. R. Baker, A. W. Webb and H. J. Woodfin, each the sum of 275.00 (two hundred and seventy-five) pesos Mexican gold.

The Commission decides that the claim of Mr. G. J. W. Poxon is disallowed.

B

The Claim of Mr. Daniel John Tynan

9. The Memorial states that in February 1913 Mr. Tynan was residing at 5a. Balderas No. 74. On the 17th and 18th of that month, as a result of a bombardment between Felicistas and Federal troops, a fire was started in the house and Mr. Tynan's personal property was destroyed.

On behalf of Mr. Tynan the sum of 2,743.00 pesos, Mexican currency, is claimed.

10. Contrary to article 10 of the Rules of Procedure, the Memorial is not signed by the claimant nor is there a signed statement of the claim by the claimant included in the Memorial. The only document on which the British Agent relies is a "*statement of losses suffered by D. J. Tynan,*" at the foot of which appear several signatures. This statement has not been sworn, nor has any information been given as to the identity of the signatories or as to how they came to the knowledge which they profess.

The Commission cannot regard this paper as sufficient evidence of the facts alleged in the Memorial.

11. The Commission decides that the claim is disallowed.

C

The Claim of Mr. James Kelly

12. In the Memorial the following facts are alleged:

In February 1913 Mr. James Kelly was engaged in a milk business at No. 45, Calzada de Cuitlahuac, in the City of Mexico. He had approximately 150 Holstein cows on the premises. On the 12th of that month, during a battle which took place in Mexico City, a shell burst in the archway of the cowshed, killing twelve cows. As the cows were in a perfect state of health before they were killed, Mr. Kelly, with the permission of the police authorities of the Second Commissariat of Mexico City, sold the flesh to Señor Ruben Carrillo, who was at that time engaged in the cattle trade. The value of the cows alive was 275.00 pesos Mexican each, but Mr. Kelly was only able to secure the price of 50.00 pesos each for the flesh.

The amount of the claim is for 2,800.00 pesos, being the difference between the value of the twelve cows and the proceeds of the sale of the meat.

Mr. Kelly's estimate of his loss is confirmed by Señor Ruben Carrillo in an affidavit of the 8th May, 1928.

13. The Mexican Agent did not accept the affidavit of Señor Carrillo, who, being a Mexican subject, ought not to have made his deposition before the British Consul, but before the authorities of his own country. Moreover, the witness has not been cross-questioned and he does not explain how he came to know the facts.

Apart from that, the Mexican Agent held that the bombardment to which the Memorial refers was part of the defence of the lawful Mexican Government against forces who had risen against them. The Government acted according to their most essential duty, in order to uphold the constitutional régime. The bombardment, therefore, was an act of lawful warfare and not a revolutionary act. The Agent made a distinction between *damnum cum injuria* and *damnum sine injuria*. In this case, according to his view, the Commission had to deal with damage resulting from legitimate self-defence, i.e., from acts which did not constitute any injustice. The Convention did not make Mexico responsible for damage of this nature.

14. The British Agent has replied that Señor Carrillo's affidavit is a strong corroboration of the statement of Mr. Kelly, and that it is only natural that as the claims are prepared by British authorities, the affidavit is sworn before a British Consul.

He could not agree that the events of the "tragic ten days" were to be classified as lawful warfare. At that stage there was a revolt of insurgents against President Francisco Madero and no civil war. But even if the action which the Government took were identical with warfare, there was nothing in the Convention that justified his colleague's view that hereby the obligation of the Government to give compensation was eliminated. The second article of the Convention says that "it is sufficient that it be established that the alleged damage actually took place, and was due to any of the causes enumerated in Article 3 for Mexico to feel moved *ex gratia* to afford such compensation."

Those words did clearly show that even in cases where according to international law responsibility could not be admitted, still compensation would be given to the injured parties, when it could be established that they suffered losses or damages as a result of revolutionary acts.

15. The first question with which the Commission is faced is whether the facts, upon which the claim is based, are sufficiently proved by the affidavits of Mr. Kelly and of Señor Ruben Carrillo.

As regards the affidavit of the former, the majority of the Commissioners refers to section 5 of this judgment and can only repeat that this document could only be accepted as evidence if it were corroborated by reliable outside statements of one or more other persons not interested in the claim.

As such nothing has been presented but the affidavit of Señor Carrillo, who is said to have bought the flesh of the killed cows. The majority of the Commission cannot regard this document as possessing such a force as to support in a convincing manner the claimant's deposition. The affidavit of Señor Carrillo has been drawn up more than fifteen years after the events; the declarations have been made without interrogation by the other party, and he does not say how the many minute details, about which the affiant gives evidence, came to his knowledge.

This document seems the less acceptable as sufficient evidence, because an effort ought and could have been made to obtain proof of a better quality.

Mr. Kelly relates in his affidavit that, on the very day of the event, he reported to the Police Office of the Second Ward, from which a police officer and other persons were at once sent, and prepared a written report of the facts, which report was forwarded to the Office of the Public Prosecutor under No. 2250. The producing of this document would probably have assisted the Commission very effectively to establish the truth, but no endeavour has been made to procure it. In these circumstances the majority of the Commissioners object to rely on Señor Carrillo's affidavit as a sufficient support of the deposition of claimant.

16. The Commission decides that the claim is disallowed.

Dissenting opinion of Sir John Percival, British Commissioner

1. In regard to these claims so many different points have been raised that, although I am in agreement with both my colleagues on certain points, and with the President of the Commission on certain others, it is impossible to explain the points of agreement and disagreement except in a complete separate opinion.

2. In the first place, I am unable to assent to the general proposition laid down in paragraph 5 of the President's opinion, and concurred in by my Mexican colleague, with regard to the unsupported evidence of the claimants. As the question has not only been raised in this case, but will inevitably arise not infrequently in the circumstances in which claims have had their origin and have been presented to this Commission, I deem it essential to set out what appear to me to be the rules which should guide the Commission in dealing with such evidence.

3. The view propounded by the Mexican Agent is that the statements made by the claimant are merely claims, and not evidence of fact at all, and he relied on the maxim recognized in the domestic law of many countries that no one is witness in his own action. On the other hand, the British Agent contended that such statements establish a *prima facie* case and should be accepted by the Commission unless some evidence in rebuttal is produced.

I do not find myself able to accept entirely either of these theses. On the one hand, the maxim mentioned above is not universally accepted; in England, the United States of America and elsewhere a plaintiff or a defendant is allowed, and indeed, in the case of the plaintiff, is expected to give evidence exactly like any other witness. On the other hand, it is clearly most dangerous to rely on the uncorroborated statements of a single person, even though they are not rebutted, and this danger is, of course, greater when such person is the claimant himself.

Under the rules governing the procedure of the Commission we are not bound by the laws of evidence prevailing in Mexico or in England or in any other country. But it is our duty to apply general principles of justice and equity and to give to any oral evidence or document produced before us such evidential value as we consider in all the circumstances of the case it ought to carry.

Thus, in the case of a contract, there is a principle which is almost universally admitted and with which I am in entire agreement, that, in general, both the existence and the terms of the contract must be established by a written document signed by the parties, for in making a contract it should always be possible to reduce it to writing, and this, moreover, is the common practice of civilized mankind.

But in the case of a tort or a criminal matter it is obviously almost always impossible to have any document attesting the facts, and the victim of the

wrong himself is clearly the best-informed and often the only person who has a direct knowledge of what occurred, together with all its details. In these cases, therefore, in my opinion, the Commission should not reject, as unproved, an allegation of the plaintiff merely because its truth depends on his statement alone, even although it considers that it might have been possible for him to have obtained some sort of corroboration. In arriving at its decision, it should take into consideration all the circumstances of the affair, the inherent probability or otherwise of the alleged facts and the likelihood of, and opportunity for, fraud or exaggeration.

If, after giving due weight to all these considerations, it feels a reasonable doubt as to the truth of any alleged fact, that fact cannot be said to be proved. But if the Commissioners, acting as reasonable men of the world and bearing in mind the facts of human nature, do feel convinced that a particular event occurred or state of affairs existed, they should accept such things as established, regardless of the method of proof presented.

In this matter I am in agreement with the principles laid down by the General Commission of the United States and Mexico in the unanimous decision in the Parker case, *Report*, Vol. 1, pages 37, 39 and 40, and more particularly set out in the opinion of Mr. Commissioner Nielsen when concurring in the decision of the Dillon case, *Report*, Vol. 2, page 65, as follows:

"An arbitral tribunal cannot, in my opinion, refuse to consider sworn statements of a claimant, even when contentions are supported solely by his own testimony. It must give such testimony its proper value for or against such contentions. Unimpeached testimony of a person who may be the best-informed person regarding transactions and occurrences under consideration cannot properly be disregarded because such a person is interested in a case. No principle of domestic or international law would sanction such an arbitrary disregard of evidence. It seems to me that, whatever may be said with regard to the desirability or necessity of having testimony to corroborate the testimony of a claimant, a statement need not be regarded in the legal sense as unsupported even though it is unaccompanied by other statements."

A

Claims of Messrs. Baker, Webb and Woodfin

4. Apart from these general considerations, I concur with the President for the reasons set out in paragraph 5 of his opinion, that there is ample corroboration to satisfy the Commission that the rooms of Messrs. Baker, Webb and Woodfin were looted by Felicistas.

Claim of Mr. Poxon

5. The case of Mr. Poxon is rather different. The Commission was informed that he also presented a claim in 1913 and made an affidavit at that time. But these documents were not put in, and it was admitted by the British Agent that they differed in certain particulars from those in the present claim. These facts cannot but cast some doubt on Mr. Poxon's statements; and for this reason, as well as for those set out in paragraph 5 of the President's opinion, I concur—though with some hesitation—in the view held by both my colleagues, that this claim is not sufficiently established.

6. The next point to be examined is under which, if any, provision of the Convention are the Felicista forces to be regarded as falling in order to render the Mexican Government liable for robberies committed by them. I am inclined

to think that they should be included in Article 3, subsection 2, as General Díaz undoubtedly revolted against the established Government of President Madero, and the result of his action was the fall of the Government and the death of Madero; though it is true that this result was not due solely or even chiefly to his efforts, but to the fact that General Huerta, commanding the Maderista forces, turned traitor, caused the death of Madero and eventually set up a *de facto* Government of which he was virtually the head. Now this probably was not at all what Felix Díaz intended. But he accepted the situation, as is shown by the fact that he did not continue hostilities and that General Huerta took no steps to punish him or his adherents. In these circumstances, although it cannot be said that his forces, after the triumph of their cause, established a *de jure* or *de facto* Government, it seems to me that, in interpreting the Convention, the Felicistas should be included in Article 3, subsection 2; in which case there would be no question as to the responsibility of the Mexican Government.

7. But if I am mistaken in this view and my Mexican colleague considers that its adoption would constitute an historical error, there is no doubt that the Felicistas must be included in Article 3, subsection 5; and I agree with the President, for the reasons set out in paragraph 6 of his opinion, that the robberies were brought to the attention of the authorities acting under the Government set up by General Huerta; that no steps were taken to discover or punish the authors; and that, therefore, the Mexican Government is responsible for the losses.

8. It only remains to consider what sum should be allotted to Messrs. Baker, Woodfin and Webb, and here I regret to find myself in disagreement with my colleagues as to the basis upon which these damages should be assessed. It is true that, as stated by the President in his opinion in paragraph 7, the Commission is not bound to accept the figures calculated by the claimants. Values are matters of opinion and can, moreover, be checked by other evidence or even by the personal experience of the Commissioners. But the identity of the article said to have been lost is a matter within the personal knowledge of the claimant and probably of the claimant alone. The President, in his opinion in paragraph 7, rightly points out that in this case it was impossible for the claimants to obtain corroboration with regard to the objects lost. It seems to me, therefore, that the principles I have laid down above in paragraph 3 should here be applied.

Adopting them as my basis, I am of opinion that it has been sufficiently established that these three gentlemen lost the articles specified in their respective lists. These lists were made out by the claimants immediately after they discovered their loss. There is nothing in the case or in their affidavits casting doubt on their *bona fides* or accuracy and, in the case of Mr. Woodfin, he withdrew an item from his list as soon as he recovered it.

I agree that in scrutinizing the accounts of the claimants we should take into consideration the probable value of the portable property of a young unmarried man of the class likely to reside at a Y.M.C.A. hostel. But all such young men do not have identical wardrobes, and I confess that the method adopted by my colleagues of awarding to each claimant the amount asked for by the one who appears to have suffered the least loss strikes me as more arbitrary than the one I should propose to follow, namely, to examine each list, to ignore any items which seem obviously unreasonable or exaggerated, and to value the remainder as far as may be possible at the prices at the time of the loss; bearing in mind that the actual and not the replacement value of the articles should alone be awarded.

Following this method I agree with my colleagues in awarding $275.00 Mexican gold to Mr. Webb. To Mr. Woodfin, whose objects and values appear to be very reasonable, I should award $600.00, and to Mr. Baker, some of whose items seem exaggerated and whose values are also rather high, the same sum of $600.00.

Claim of Mr. Daniel J. Tynan

9. I agree that this claim should be disallowed for the reasons set out in the President's opinion.

Claim of Mr. James Kelly

10. In this case I find myself obliged to dissent from the opinion of the majority of the Commission, for it appears to me that the facts upon which this claim is based are quite adequately established.

The difference of opinion is, no doubt, primarily based on the conflicting views as to the value in general of a claimant's own affidavit which are set out in paragraph 3 above and in paragraph 5 of the President's opinion. But in this particular case there is much more than the bare allegation of the claimant. In the first place, he at once reported the facts to the Police Office of the Second Ward of the City of Mexico, and it was with the express consent of the said Police Office that he sold the flesh of the cows. The documents relating to these proceedings have not been produced, but it has not been denied that they took place. In the second place, the chief points of Mr. Kelly's affidavit are directly confirmed by the affidavit of an independent witness, Mr. Ruben Carrillo.

11. The majority of the Commission reject Mr. Carrillo's affidavit on three grounds:

(a) That it was made fifteen years after the events;

(b) That the declaration was made without interrogation by the other party; and

(c) That he does not explain how certain statements that he makes came to his knowledge.

As to *(a)*, this objection is inherent in the work of the Commission. When the claims were originally made, it was not known how they would be dealt with. If any tribunal competent to deal with them had been set up at the time, no doubt witnesses would have been forthcoming with memory of the events sufficiently fresh in their minds. But the Convention under which the Commission is working was not signed until November 1926, and it was not till then that the British Government realized that evidence in corroboration of the claimants' original claims should be obtained. It is clear, therefore that the evidence, whether oral or in the form of an affidavit, which will now be presented to the Commission, must depend on the witnesses' recollection of events long past, and, consequently, it seems to me that the Commission should not attach too much importance to the discrepancies in detail which must inevitably exist.

With regard to *(b)*, the Commission, in its unanimous decision on the demurrer in the Cameron case, admitted affidavit evidence, and must, therefore, have held that this defect, which is inherent in such evidence, cannot be considered as destructive of the evidential value of an affidavit, at any rate in the case of a person other than the claimant.

As regards *(c)*, it is a fact that Mr. Carrillo includes in paragraphs 1 to 5 of his affidavit statements, as if they were within his personal knowledge, of which he can only have been aware by hearsay. But this is a very natural error in the case of an ignorant person. If the affidavit had been drawn up for him by a

lawyer he would have distinguished between the facts of which he had been informed and believed to be true and those which he stated to be the case of his own personal knowledge.

In any case, the facts related in paragraphs 6 and 7 of this affidavit were undoubtedly within the knowledge of Mr. Carrillo, and the events were of so exceptional a character that he might well recollect them after fifteen years' interval.

12. The majority of the Commission also comment on the fact that no effort was made to produce the police report referred to in Mr. Kelly's affidavit. It would certainly have been better if the British Agent had given notice to the Mexican Agent to produce this document, or to allow him to inspect it, under rules 24 and 25 of the Rules of Procedure. But in my opinion the Commission should not allow this omission to prejudice Mr. Kelly when they are examining the truth of his claim. We are unaware whether this document is or is not now in existence. If it is not, the evidence which the majority of the Commission consider to be the best is not available, and the claimant is entitled to rely on the next best. If, on the other hand, the document still exists, it is in the possession of the Mexican Government, and I would refer to the unanimous opinion of the General Claims Commission of the United States and Mexico in the Parker case, *Report*, Vol. 1, pages 39 and 40, as follows:

"While ordinarily it is incumbent upon the party who alleges a fact to introduce evidence to establish it, yet before this Commission this rule does not relieve the respondent from its obligation to lay before the Commission all evidence within its possession to establish the truth, whatever it may be. For the future guidance of the Agents of both Governments, it is proper to here point out that the parties before this Commission are sovereign Nations, who are in honour bound to make full disclosures of the facts in each case so far as such facts are within their knowledge, or can reasonably be ascertained by them. The Commission, therefore, will confidently rely upon each Agent to lay before it all the facts that can reasonably be ascertained by him concerning each case, no matter what their effect may be. In any case where evidence which would probably influence its decision is peculiarly within the knowledge of the claimant or of the respondent Government, the failure to produce it, unexplained, may be taken into account by the Commission in reaching a decision."

I would not go so far as to say that it was the duty of the Mexican Government to produce this document when they had never been asked to do so by the other side, but I consider from the fact that they have not done so of their own initiative the Commission is entitled to draw the inference that it does not contradict, to any material extent, the allegations contained in Mr. Kelly's affidavit.

13. For the above reasons I am of opinion that the facts upon which this claim is based are sufficiently established. But the defence upon which the Mexican Agent chiefly relied was the argument relating to acts of lawful warfare referred to in paragraph 13 of the President's opinion. As the majority of the Commission rejected the claim on the facts, this point did not come up for discussion in our deliberations. I think, therefore, that all I should say is that I agree with the contention of the British Agent set out in paragraph 14 of the President's opinion, and consider that under the Convention the Mexican Government is responsible for this loss; and furthermore, that the damages claimed are not excessive.

Dissenting opinion of the Mexican Commissioner in regard to the decision taken by a majority composed of the other two Commissioners, but only as regards question nine, propounded by the learned presiding Commissioner, which reads literally as follows: "IX. If they were to be considered as falling under subdivision (5) of Article III, i.e., as rebels, has it been established that the competent authorities were blamable in any way?"

The Mexican Commissioner answers the question thus transcribed, in the negative, for the following reasons:

I. Article III, subdivision 5 of the Convention, Mexico and Great Britain, reads as follows:

". . . . The losses or damages mentioned in this article must have been caused during the period included between the 20th November and the 31st May, 1920, inclusive, by any one or any of the following forces: . . . . 5. By mutinies or risings or by insurrectionary forces other than those referred to under subdivisions 2, 3 and 4 of this article, or by brigands, provided that in each case it be established that the competent authorities omitted to take reasonable measures to suppress the insurrections, risings, riots or acts of brigandage in question, or to punish those responsible for the same; or that it be established in like manner that the authorities were blamable in any other way."

The three Commissioners being agreed upon the fact that the forces of Felix Díaz, which entrenched themselves in the Young Men's Christian Association building during the so-called tragic ten days, from the 9th to the 19th February, 1913, must be considered as rebel or insurrectionary forces, and as coming under subdivision 5 of Article III of the Convention, the text of which is above transcribed, it logically follows without the slightest effort, and from the terms themselves of said subdivision 5, that Mexico may only be declared liable for the losses sustained by Messrs. Baker, Webb and Woodfin, provided that it be proved that the competent authorities omitted to take reasonable measures to suppress the insurrection, or to punish the parties responsible therefore; or that it be shown, furthermore, that the authorities were to blame in some other manner.

Now, what should that proof consist of in this instance? The three Commissioners have with some difficulty, by a strong effort of goodwill, and by combining the depositions of the three claimants, reached the conclusion that the fact that the rooms respectively occupied by them in the Young Men's Christian Association were looted, can be considered as proved, although there is not a single declaration by any person other than the interested parties themselves, nor any other element of proof establishing the existence of that fact.

The fact of the looting of the rooms occupied by the claimants once established, *the obligation on the part of the British Government to demonstrate the fact of negligence on the part of the Mexican authorities in suppressing the insurrection or in punishing the guilty parties still stands.*

What proofs have the British Government submitted to establish the fact of such negligence? None whatever.

Did the claimants by any chance report the perpetration of the offence of theft, complained of by them, to the Mexican authorities? They did not do so, as admitted by the learned British Agent, when questioned upon this particular point by the Mexican Commissioner.

Have the British Government by any chance shown that the perpetration of the offence complained of by them came to the knowledge of the Mexican authorities in any other way? There is no evidence at all upon this point.

How can the Government of Mexico be accused of negligence in punishing the parties guilty of a theft, when the fact that the offence was committed has not been brought to their knowledge?

The Mexican authorities did have knowledge of the Díaz insurrection, and President Madero, and the Vice-President of the Republic in person combated that uprising, until they fell at the hands of the disloyal Huerta. What greater efficiency in suppressing that insurrection can be expected, than actually to lose life in defence of the institutions of Government?

Immediately after Huerta's defection, the Governor of the State of Coahuila, Venustiano Carranza, complying with the duty laid upon him by the Constitution, assumed the character of legal authority, by organizing a formidable army, effectively assisted by a public opinion, and he not only punished the insurrection, but Felix Díaz, the rebel, personally, having forced him to leave the country, and Huerta himself, by wresting from him the power he had usurped, and likewise forcing him to seek refuge in a foreign land. The remainder of the rebels either perished, or followed the fortunes of their leaders.

What more eloquent instance of the zeal and patriotism displayed by the Mexican authorities in suppressing the insurrection can be desired?

It is, however, asserted that Huerta should have punished the Díaz insurrection, and the parties guilty of the losses complained of by the claimants. (The Mexican Commissioner does not accept Huerta's authority as legitimate.)

That opinion is open to the objection that it involves a mistake in the construction of subdivision 5 of Article III of the Convention. The treaty does not provide that such and such authorities shall perform the duty imposed by the second part of said subdivision 5. It only mentions authorities in general, and this condition has been complied with. The authority of Carranza put an end to the insurrection and punished the parties responsible therefor. Mexico cannot then be liable for negligence in the performance of those duties.

It is necessary to draw a distinction between the insurrection of Felix Díaz and the looting of the Young Men's Christian Association, whether by the Felicista forces, or by the mob, as it certainly has not been shown just who was guilty of the said looting; but the fact of the looting cannot directly be inferred from that of the insurrection. The authorities punished the insurrection and not the looting, because the claimants did not report the latter fact, nor did it come to the knowledge of the Mexican authorities through any other channel.

Furthermore, this Commission has already, in various decisions, laid down the principle that the unsupported statement of the claimants cannot constitute proof of a claim. This has been expressly established by the learned President of this Court, and the Mexican Commissioner is in entire accord with his opinion. In this case, it has been said, and it is an absolutely true fact, that there is no evidence of negligence on the part of the Mexican Government, other than the claimants' own statement. The Commission will, if a decision is now rendered contrary to that principle, appear as acting inconsistently with their own ideas.

II. International Claims Commissions have always been very careful when it is a matter of declaring that a Government has been negligent in the performance of its international obligations, and have never done so without requiring proof conclusive of that fact. The charge is too serious a one to be founded on mere assumptions.

The General Claims Commission, Mexico and United States, dealt with the case of Charles E. Tolerton *v.* Mexico, in which the claimant sought to recover the sum of $50,000.00, United States currency, on the ground that he had, when attacked, on the afternoon of the 19th January, 1905, by a group of Yaqui Indians, sustained damage to that amount, by reason of the failure to protect said claimant, and the lack of prosecution and punishment of his assailants.

The three Commissioners, i.e., the United States Commissioner, the Mexican Commissioner, and the Presiding Commissioner, Dr. Van Vollenhoven, unanimously decided that the said claim should be dismissed, because they did not hold that the charge of negligence brought against the Government of Mexico had been sufficiently proven by means of the unsupported statement of Tolerton, the claimant. (*Opinions of the Commissioners under the Convention concluded the 8th September, 1923, between the United States and Mexico,* page 402, Vol. I.)

The American Government, on behalf of G. L. Solis, before the General Claims Commission, Mexico and the United States, claimed from the Government of Mexico the sum of $ 530.00, United States currency, for the theft of some cattle by revolutionary forces belonging to Huerta, having imputed to the Mexican Government lack of diligence in the pursuit and punishment of the parties responsible. The aforesaid Commission, presided over by their learned President, Kristian Sindballe, declared Mexico not liable for the said claim, by a unanimous vote, having founded their opinion on the fact that there was not, beyond the claimant's own deposition, proof sufficient of negligence on the part of the Mexican authorities. This decision is based on the opinions handed down in other International Commissions, also worthy of respect, such as those between Great Britain and the United States, and Great Britain and Venezuela. (*Opinions of the Commissioners under the Convention concluded the 8th September, 1923, between the United States of America and Mexico*, p. 48, Vol. II.)

The selfsame General Claims Commission, Mexico and the United States, reports (Vol. II, p. 56) the claim of Bond Coleman *v.* the Government of Mexico, which was espoused by the American Government, and in which the three Commissioners unanimously dismissed the claim on the ground that proper proof had not been shown of negligence on the part of the Government of Mexico.

As will thus be seen, all International Claims Commissions agree that negligence in punishing crime must be proved by the demandant Government, the alternative, in case of failure to do so, being that the claim must be dismissed.

In virtue of the whole of the foregoing, the Mexican Commissioner now expresses an opinion dissenting from that of his learned colleagues, to the effect that as no negligence on the part of the Mexican Government in punishing the parties responsible for the loss sustained by the claimants has been shown, and still less in suppressing the insurrection which gave rise to the said losses, the said claims should be dismissed.

NORMAN TUCKER TRACY (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 13, February 15, 1930, separate opinion by British Commissioner, undated. Pages 118-124.)

AFFIDAVITS AS EVIDENCE.—NECESSITY OF CORROBORATING EVIDENCE. Unsupported affidavits of claimant *held* not sufficient evidence. An affidavit of claimant supported by an affidavit of another person in a position to know the facts of loss, which was made shortly after loss, *held* sufficient evidence.

RESPONSIBILITY FOR ACTS OF FORCES.—SEIZURE OF PROPERTY. A seizure of a mine by the Constitutionalist Government held not to entrain responsibility under terms of *compromis*.

1. The facts on which the British Government in their memorial base the claim are the following:

Mr. Tucker Tracy was employed as manager of the Compañía Minera Jesús María y Anexas S.A. Mines and Hacienda at San José de Gracia, Sin., Mexico. On the 16th May, 1913, a .303 Winchester carbine with 100 cartridges and on the 30th May a .3 Luger automatic pistol with 100 cartridges were delivered personally to Melquides Melendez under threat of search and confiscation. It was impossible to obtain a receipt for them.

In May 1913 the Constitutionalist forces occupied the mine after the Federal forces which had been garrisoning the town had been dislodged, and disposed of a quantity of precipitate of cyanide, valued at $ 35,000. They were obliged by Federal troops to evacuate the place after a few days.

On the 3rd June, 1913, when the Federal garrison announced its intention of withdrawing from the town for the second time, Mr. Tracy considered it prudent to remove himself and his family to a place of greater safety. When he returned in January 1914 he discovered that a saddle mule, three horses and equipment, part of the household effects and almost all the clothing had been lost.

At the end of November 1913 the mine was seized with the aid of military forces by persons commissioned by the Constitutionalist Government of the State of Sinaloa and in February 1914 the administration was taken over by the Constitutional Federal Government. There was no reason in accordance with the civil laws operating at the time that might be offered as a pretext for the seizure of the Company's properties. There was no previous warning nor civil legal proceedings prior to the seizure. The property was returned to the Company on the 1st September, 1916. Mr. Tracy was refused permission to continue his employment as manager of the mine during the time the Government authorities had control. He consequently lost the salary which he would have earned during this period (annex 4). Information of the salary which Mr. Tracy would have earned is given in the affidavit signed by Miguel Tarriba, then president of the Company (annex 2).

The amount of the claim is 510 Mexican pesos for the objects and animals which he lost, plus 14,403.68 dollars, United States currency, for the loss of salary, and interest.

2. The evidence consists in three affidavits made by Mr. Tracy, the *first* on the 26th March, 1914, before the British Vice-Consul at El Paso (Texas), the *second* on the 20th September, 1916, before the British Vice-Consul at Mazatlán (Sinaloa), the *third* on the 30th September, 1927, before a notary public at Socorito (Sinaloa), and in an affidavit made by Señor Miguel Tarriba before the British Consul at El Paso (Texas) on the 15th December, 1914. Señor Tarriba was at that time the president of the Mining Company, which employed Mr. Tracy, and he supports the latter's claim for loss of salary.

3. The Mexican Agent pointed out that, as regards the claim of 510.00 pesos for the loss of property, there exists no other evidence than the affidavit of Mr. Tracy himself. The Agent has more than once argued that such uncorroborated statements cannot be accepted as proof.

In connexion with Señor Tarriba's affidavit he drew the attention of the Commission to the fact that the document had been sworn by a Mexican citizen before a British authority residing in the United States. He doubted whether this authority was in a posit on to know Señor Tarriba or to have information about his profession. In his opinion, the affidavit, drawn up without cross-examination, carried very little weight, if any.

He failed to see any evidence as to the nature of the confiscation of the mine. Nothing showed that this act was a military act, or a revolutionary act or an act committed by one of the forces falling within the terms of Article 3 of the Convention. But even if it had been satisfactorily proved that the mine was confiscated under the circumstances provided in that article, still the claim could not be allowed, because what Mr. Tracy asked was not the compensation of any direct loss or damage, but the indemnifying for the loss of prospective earnings. The Agent distinguished between *damnum emergens*, which in his opinion the Convention had solely in view, and *lucrum cessans*, which was outside the agreement between the two Governments. Mr. Tracy claimed for indirect damage, for speculative damage, for salary, which he had lost, which he might have earned, but just as well not have earned, because the duration of his employment was not guaranteed.

The Agent declined also any obligation on the part of his Government to pay interest on the sums awarded. The Convention does not speak of it and as Mexico only *ex gratia* undertook to compensate in certain cases the losses and damages suffered on account of civil war and revolutions, this country could never be deemed to be in delay, which would be the only ground on which the granting of interest could be based. Moreover, if the Commission were to decide that interest must be paid up to the date of payment of the award, it was obvious that such decision would exceed the life, and consequently the competence of this body.

4. The British Agent considered the statement of the losses suffered by Mr. Tracy, before he had to leave the mine, as a *prima facie* evidence, to which more value was to be attached than his colleague was inclined to do.

The affidavit of Mr. Tarriba was in his view a very important corroboration not only of the facts, which claimant alleges in the annexes 2 and 5 of the Memorial, but also of what he puts forward as to the character of the confiscation and of the forces who effected it.

The loss suffered by Mr. Tracy, because he lost his employment, was not prospective or speculative, but most real and direct, being the immediate consequence of the confiscation of the enterprise, where he earned his livelihood. Mr. Tracy's work was interrupted by revolutionary acts. His damage was similar to that of the Mining Company, both were involved in the same injury. He was General Manager, a man in control of the enterprise, and his prospects and future employment were so safely assured that his relation to the business had a permanent character. This was confirmed by the fact that he was restored in his function, when the mine was handed back.

The Agent could not see that the Convention excluded the awarding of interest, and the words *ex gratia* in Article 2 of the Convention could not be detached from the rest of this article, in which the principles of justice and equity are invoked, which principles in his opinion would not be complied with, if on the ascertained amount of the award no interest was accorded from the day of the presentation of the claim until the day of the final payment.

5. The views of the majority of the Commission in regard to uncorroborated affidavits of claimants are known from the decision in the claims of Messrs. Baker, Webb and Woodfin (Decision No. 12, section 5). Those views do not allow them to accept as sufficient evidence the statement of Mr. Tracy on his loss of property.

The affidavit of Señor Tarriba is accepted by the majority of the Commissioners, the Mexican Agent dissenting, as a corroboration of the statement of Mr. Tracy made on the 26th March, 1914. Señor Tarriba, as President of the Compañía Minera Jesús María y Anexas, was in a position to know exactly

what happened. He must have been in the closest touch with the events prior to the confiscation and with the confiscation itself. He swore his affidavit shortly afterwards, and there is no reason why his declaration should not be accepted as a sufficient proof of the seizure of the enterprise by public authorities.

This seizure in itself, however, does not make the Mexican Government liable according to the Convention. Property can be confiscated at all times, in all kinds of circumstances and on different grounds. To establish an obligation on the part of Mexico, it is necessary that it be proved that the act was committed by one of the forces enumerated in Article 3 of the Convention; in other words, the seizure must not have been an administrative act or an act ordered by purely civil authorities, but must have emanated from the elements which the article has in view, or, even if ordered by civil authorities, have been due to revolutionary events and disturbed conditions and committed by the forces already enumerated (last words of Article 3).

In examining whether in this case they had to deal with such circumstances, the Commissioners could not fail to remark a contradiction between the different statements.

On the 26th March, 1914, Mr. Tracy declared that the property had been confiscated by the Constitutionalist Government. On the 25th December of the same year Señor Tarriba said that the mine was seized by persons commissioned by the Governor of the State of Sinaloa and had been exploited since that date by order of and under officials appointed by that Governor, and afterwards by order of and under officials appointed by the Constitutionalist Government. On the 20th September, 1916, Mr. Tracy signed a statement, in which he declares that the mine was confiscated by the Government of Mexico.

In none of these documents the slightest indication is to be found that the confiscation was a military act or an act of violence or an act committed by forces. Only in his affidavit of the 30th September, 1927, drawn up after the terms of the Convention were known, Mr. Tracy amplifies his statements of 13 years ago and relates that the seizure and the administration of the Company's property were carried out with the aid and in the presence of military forces. He further mentions that a letter, sent by the Minister of Foreign Affairs of the Constitutionalist Government to the British Vice-Consul at El Paso (Texas), dated the 24th April, 1914, proved conclusively that the seizure and the administration of the properties of the Company was in accordance with the direct orders of the Chief of the Constitutionalist Arms.

Could this last document have been produced, it would probably have been of great assistance to the Commission, but it was not available, the archives of the Consulate of that period not having been preserved.

In these circumstances, the Commission must attach more value to the contemporary affidavits than to a document drawn up considerably later. In the former no mention is made of any forces, there is thrown no light on the nature of the confiscation, and there is nothing which prevents the Commission from regarding the measure as a civil act. Of the contrary, i.e., of the applicability of Article 3 of the Convention, which would be essential for the granting of an award, no convincing proof has been given.

6. The claim of the British Government on behalf of Mr. Norman Tucker Tracy is disallowed.

Separate opinion of Sir John Percival, British Commissioner

1. While I am prepared to concur in the opinion of my colleagues that this claim should be disallowed, I cannot entirely subscribe to the reasons set out in the opinion of the President.

2. With regard to the claim for $510.00 for objects belonging to the claimant which are said to have been stolen, appropriated or taken from him, I do not agree with my colleagues that the fact that this claim is based on the affidavit of the claimant alone is a sufficient ground for rejecting it, and this for the reasons set out in my opinion in the case of Messrs. Baker, Webb and Woodfin (Mexico City Bombardment Claims), paragraph 3. I do, however, consider that it has not been adequately established that the Mexican Government is responsible under the Convention for these losses for the following reasons:

(a) As regards the carbine and pistol said to have been taken by Melendez: this person must be presumed to be a bandit referred to in Article 3, subsection 5, of the Convention, and there is no proof of negligence on the part of the Mexican authorities in respect of this robbery; moreover, it is admitted that Melendez was afterwards executed, presumably for one of his misdeeds among which this may be included.

(b) As regards the mule, bridles and household effects, there is no evidence as to who were the persons who stole these articles nor in what circumstances they were taken, and consequently no proof that the Mexican Government is responsible for the loss.

(c) As to the three horses, it is stated in Mr. Tracy's affidavit that they were taken by Federal guerrillas, in which case the Mexican Government would be liable for the loss, but Mr. Tracy admits that he did not possess sufficient evidence to prove that they were his property.

For these reasons I do not consider that he has established this part of his claim to the satisfaction of the Commission.

3. Coming to the question of the claim for loss of salary, I agree with the President that it has been sufficiently proved that the mine was confiscated by certain Mexican authorities, which was the cause that Mr. Tracy lost his employment, and, furthermore, I also agree that there is not adequate proof to make the Mexican Government responsible for the losses caused by this confiscation under the last paragraph of Article 3 of the Convention.

But I arrive at this conclusion in view of the special circumstances of the evidence offered in this case and consider that it would be dangerous to treat the decision as a precedent for other cases. When property has been confiscated by civil authorities, the Mexican Government is only responsible for loss or damage caused by such action if two conditions exist:

1. That the acts were due to revolutionary events and disturbances, and
2. That the acts were committed—or, as it should better be translated, executed—by one of the forces specified in Article 3, subdivisions 1, 2 or 3 of the Convention.

Now the first of these conditions was undoubtedly, in my opinion, fulfilled in this case, and when this is so I do not consider that it is necessary for the British Government to establish that physical force was exercised by the agents referred to in the Article. It should be sufficient that the order emanated from a military chief or that the civil authorities were supported by a military force sufficient to overcome any justified resistance. In this case, for the reasons set out in the President's opinion, and more particularly as Mr. Tracy, who

alone alleges the presence of military forces at the time of the confiscation, was not himself on the spot at the time, I concur in the view of my colleagues that the existence of the second condition referred to above has not been established, and that, therefore, the claim must be disallowed.

FREDERICK W. STACPOOLE (GREAT BRITAIN) *v.* UNITED MEXICAN STATES.

(Decision No. 14. February 15, 1930, dissenting opinion (dissenting in part) by Mexican Commissioner, January 29, 1930. Pages 124-130.)

AFFIDAVITS AS EVIDENCE.—DAMAGES, PROOF OF. An affidavit of claimant, made shortly after the loss, suported by an affidavit of a companion, made seven years after the loss, *held* sufficient evidence of circumstances of loss. Such affidavits *held* sufficient evidence of items of property lost, even though supporting affidavit was not fully corroborative, when such items could reasonably in the circumstances have been possessed by claimant. Affidavit of claimant as to value of item lost *held* not sufficient evidence and excessive. Tribunal instead estimates damages to be awarded.

1. The Memorial, filed by the British Agent, sets out that on the 4th May, 1920, Mr. Stacpoole left the Hacienda de Guadalupe, near Sultepec, with Mr. R. J. H. Danley for Mexico City owing to the danger to person and property from the numerous soldiers in that neighbourhood. About 2.30 on the same day they were stopped near Sultepec by a number of Obregonistas. They were threatened and insulted by these men and ordered to proceed with them to headquarters. On the way there, Mr. Stacpoole's pack mule, together with all their baggage, was taken away. At the headquarters an officer demanded that they should hand over their animals, saddles and their belongings. They requested permission to retain them for riding to Sultepec, where they promised to arrange matters with the Obregonistas. This request was refused and they returned to Sultepec on foot. Every effort was made to obtain the return of this property, but the next day, the 5th May, Mr. Stacpoole recovered his mule and raincoat only. On the following days he made attempts to recover his property in Toluca, but without success. At the time of the robbery Mr. Stacpoole produced a safe-conduct signed by General Pablo Gonzalez, and a card from the Ministry of War authorizing him to carry arms. These documents were not respected.

The amount of the claim is for $475.50 (four hundred and seventy-five pesos, fifty centavos).

2. The British Agent produced an affidavit of Mr. Stacpoole before the acting British Consul-General in Mexico City, dated the 5th June, 1920, and an affidavit of the afore-mentioned Mr. Danley before the acting British Vice-Consul in Mexico City, dated the 14th July, 1927. Mr. Danley was at the time of the hold-up and at the time he signed his affidavit Vice-President and General Manager of the Sultepec Electric Light and Power Company, and lived at Toluca. He confirms the facts set out in the affidavit of Mr. Stacpoole.

3. The Mexican Agent contended that as Mr. Danley, being an American citizen, had sworn his affidavit before a British Vice-Consul in Mexico, and could accordingly not be prosecuted either in Mexico or in the United States

or in England, in case of his having made a false statement, his assertions could not be relied upon. He denied that Mr. Stacpoole or Mr. Danley could know that the men who stopped them were Obregonistas, in consequence of which it had not been proved that the facts fell within Article 3 of the Convention. Neither could the Agent see in Mr. Danley's statement any evidence as to the amount, of the loss for which Mr. Stacpoole claims.

4. The British Agent argued that the two affidavits corroborate each other and constitute at least a *prima facie* case, against which his colleague had failed to produce any rebuttal. He thought the statements worthy of acceptance, and the amount, which Mr. Stacpoole claims, fair and reasonable.

5. The Commission by a majority judges Mr. Danley's affidavit a sufficient support of the statements of claimant. Mr. Danley travelled with Mr. Stacpoole, when the events set out in the Memorial occurred. He is himself not interested in the decision on the claim, and it is difficult to see why he should have committed perjury. There is no conflict whatever between both statements, and the time elapsed since the events is not too long to assume that an eye witness could still remember them in 1927. It is equally comprehensible that men like Mr. Stacpoole and Mr. Danley, who lived in the part of the country where they met the troops, and who had left their homes in order to bring themselves into safety, were sufficiently informed about the state of affairs to be able to know to which of the contending forces the assailants belonged.

The majority of the Commission is the more inclined to admit the evidence that has been shown, because, as the Mexican Agent informed the Commission, it has not been possible to trace the declaration of Mr. Stacpoole, according to his statement, made on the 4th May, 1920, before the Municipal President of Sultepec, which declaration, if it could have been obtained, would possibly have been evidence of a stronger quality.

In these circumstances the majority of the Commission is convinced that on the 4th May, 1920, the claimant was met by Obregonistas and that they took part of his property. As the Obregonistas at the time of the occurrences were to be considered as "revolutionary forces, which, after the triumph of their cause, have established Governments *de jure* or *de facto*" (subdivision 2 of Article 3 of the Convention), the members of the Commission, whose view is here expressed, deem that the obligation of the Mexican Government to compensate the loss exists.

6. The last question to be answered touches the objects which were taken and the value that must be ascribed to them. There is no absolutely convincing evidence in this respect, as there will hardly ever be in similar circumstances. It cannot be expected that Mr. Stacpoole was able to establish the pre-existence of what he claims as lost, neither could his companion possess knowledge in this matter. Mr. Danley does not mention more than a revolver, a raincoat (which was afterwards recovered), cash and other articles.

As the majority of the Commission explained in the decision on the claims of *Messrs. Baker, Webb and Woodfin* (Decision No. 12), it does not admit that, once the facts having been admitted as proved, the mere absence of detailed evidence as to the exact amount of the loss, justifies to disallow the whole claim. In this particular case, the Commission cannot estimate the enumeration, given by Mr. Stacpoole of the articles which he had to surrender, as exaggerated. The objects which he mentioned are certainly not more than a man who tries to save himself and his property, is likely to carry with him. But the Commission holds another view as regards the value, which the claimant attributes to each of his belongings. This estimate is considered as being, for nearly all the

items, on too high a level, and the Commission does not feel at liberty to adopt it.

7. The Commission decides that the Government of the United Mexican States is obligated to pay to the British Government on behalf of Mr. Frederick W. Stacpoole the sum of 300.00 (three hundred) pesos Mexican gold.

Dissenting opinion of the Mexican Commissioner in the Decision rendered in this Claim only as regards the Probative Value of the Depositions of Claimant and those of the Witness, Robert J. Danley

I. Claimant avers in his affidavit that he left the "Guadalupe" ranch, near Sultepec, State of Mexico, for the City of Mexico, on the 4th May, 1920, accompanied by R. J. H. Danley, on account of the danger then existing for life and property on the part of the numerous soldiers marauding in that vicinity; that they were stopped at 2.30 p.m. by some Obregonist soldiers under the leadership of General Crisóforo Ocampo; that they were threatened and insulted by these men and ordered to go with them to headquarters; that on their way, some of the men took away Mr. Stacpoole's pack mule and his luggage; that, on reaching headquarters they were ordered by an officer to hand over their horses, saddles and all their belongings, which they did, notwithstanding the request made by Mr. Stacpoole himself to be allowed to keep his belongings in the hope of arranging the matter in Sultepec with the Obregonistas; that on the following day he recovered the mule and his water-proof, but not the other things, the list of which appears in the affidavit, with their respective values.

Mr. Stacpoole also mentions Mr. Hughes as a witness in connexion with his efforts to recover the articles taken away from him, stating that on the 4th May he made a deposition before the Mayor, Mr. Nicolás Loza, and several Government employees and officers, identifying the men who had robbed him.

Mr. Robert J. H. Danley, an American citizen, declared before the British Consul at Mexico City *on the 14th July*, 1927, under oath, that he left the "Guadalupe" ranch, for Mexico, on the 4th May, 1920, accompanied by Mr. Frederick W. Stacpoole and a servant; that, on their way they met Obregonista troops, who, pointing their rifles at them, ordered them to halt; that said troops informed them that they were under General Crisóforo Ocampo; that they were deprived of their cash and other belongings and then arrested by these soldiers and taken to headquarters; that on their way to headquarters they took from them a mule led by a servant and carrying Mr. Stacpoole's luggage; that, once at headquarters, the officers and other men took their saddles from them; that he cannot testify just what the losses sustained by Mr. Stacpoole were, but he did know that he lost his revolver, his water-proof, the cash he had with him and other articles.

The Mexican Commissioner considers that the evidence produced by the British Government to establish the claim is very deficient and does not warrant a judgment against the Mexican Government for the amount claimed.

The statement of the claimant, Mr. Stacpoole, can never be considered, by itself, as sufficient proof of his own claim. Claimant's deposition, called an *affidavit* in Anglo-Saxon technical terms, is the equivalent of what is known as "confession" in the legislation of all countries of Latin origin. Confession, as an element of proof, is always applied against, and never in favour of the person making it. The opposing party generally makes use of that proof to be able to demonstrate, thereby, the fact he wants to submit, in an irrefutable manner, to the consideration of the judge for, evidently, there cannot be stronger proof

against the person making it than his own confession. This proof generally relieves the person making use of it, from producing other proofs on the same fact, and thus they say in Law: an admission by the party himself dispenses with proof.

The difference between confession and testimonial evidence is that the person making it is always one of the contending parties. Testimonial evidence generally emanates from persons who are strangers to the suit. In either case, both the one answering an interrogatory and the one declaring as a witness must do so under affirmation as to speaking the truth. The purpose of such affirmation is to warn the person confessing or the one declaring, as to the commission of the offence known as perjury, in case they do not speak the truth. The deponent is thus constrained to speak nothing but the truth, knowing that he will otherwise be prosecuted. That is why the affirmation of the person testifying is indispensable, whether he is a witness or a party directly interested, and why it is necessary that it should be made before a competent authority so as to produce all the corresponding legal effects. The declaration or confession, thus taken, constitutes a guarantee for the judge as well as for the opposite party, because he knows that a witness testifying against him can be cross-examined in order to make sure as to the truth sought after.

The foregoing principles, governing confession and testimonial evidence, once laid down, we shall now endeavour to examine the affidavits of Mr. Stacpoole and Mr. Danley, in order to arrive at the conclusion contained at the beginning of this study to the effect that the facts asserted in the affidavit have not been established either by the sworn statement of Mr. Stacpoole or by that of Mr. Danley.

The sworn statement made by Mr. Frederick W. Stacpoole before the British Consul in Mexico City has not the necessary guarantee for it to be held valid, for it is the claimant himself, who, in his own interest, makes same, and it would only be valid in whatever could be detrimental to him. His confession should, therefore, be looked upon with distrust, and, in no way, as sufficient in itself to prove the fact dealt with.

Mr. Danley's affidavit, not contemporaneous with the events, is still in worse condition to be considered as sufficient proof than that of Mr. Stacpoole, because he, being an American citizen, made his deposition before a British Consul to whom he probably was not known. Consequently, Mr. Danley's affidavit has not the safeguard, for the judge, in case there should be a false declaration, of its being possible to prosecute him for perjury, because he is neither a British subject nor a Mexican citizen. In other words, this witness could knowingly have made a mis-statement, feeling sure he was not incurring real responsibility. And a witness in such a condition does not deserve to be looked upon as such before any authority. His testimony has not the slightest weight in the balance of justice.

The learned Presiding Commissioner called upon the British Agent to state Mr. Danley's address and asked him whether he could produce him before the Commission. The British Agent replied that he did not know Mr. Danley's address, and that he could not, therefore, produce him, adding that he considered Mr. Danley's affidavit as sufficient, and that only in exceptional cases would the witnesses be able to appear before the Commission. This admission by the British Agent further weakens the probative value of Mr. Danley's affidavit, for, as the proof devolves on the British Agent, he should do his utmost to grant the request of the Presiding Commissioner, and show, in the last event, that production of the witness was not feasible.

The Mexican Assistant Agent showed before the Commission that he had

endeavoured to identify General Crisóforo Ocampo, by writing to the proper authorities, without any result.

It is to be regretted that the British Agent did not produce the witness, Mr. Hughes; that he did not produce the report of the proceedings held before the Mayor of Sultepec, Mr. Nicolás Loza, and the Government employees and officials referred to by Mr. Stacpoole in his affidavit (annex 1). The statement made by the servant accompanying Messrs. Stacpoole and Danley, referred to in annex 2, could also have been produced as evidence. This omission on the part of the British Agent makes it necessary for the Commission to dismiss the claim for lack of proofs, which should have been, but were not produced, without explaining the reason for said omission, for, if it is true that Mexico's responsibility should be determined according to equity and justice, this circumstance does not relieve the British Government from proving the facts on which they base their claim.

To declare a Government liable on the strength only of the depositions of the claimant and of a single witness, open to the objections mentioned above, would constitute a disregard for the general principles of Law followed by all International Claims Commissions which have always required conclusive proof before pronouncing judgment.

II. In order to show that the forces to which is ascribed the wrongful withholding of the objects for which claim is made were Obregonistas, to show also that the objects so wrongfully withheld were those listed by Mr. Stacpoole; and, to establish the value of these objects, there are no proofs other than the claimant's deposition and that of the witness, Mr. Danley. The Mexican Commissioner again invokes the arguments already advanced to maintain that such elements of proof are not sufficient to enter judgment against the Mexican Government, and for this reason regrets that he does not agree with his colleagues as regards the estimation of that evidence and holds that the claim in question should be disallowed.

A. H. FRANCIS (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 15, February 15, 1930. Pages 131-132.)

DENIAL OF JUSTICE.—FAILURE TO PROTECT.—FAILURE TO SUPPRESS OR PUNISH. When murderers of British subject were apprehended and executed within two weeks of the commission of the crime and when no evidence was produced that the authorities had failed to take reasonable measures to protect the neighbourhood, claim *disallowed.*

Cross-reference: Am. J. Int. Law, Vol. 25, 1931, p. 773.

1. This is a claim on behalf of the widow of Mr. Thomas Francis, a British subject, who was murdered by a party of Mexicans on the 9th December, 1914, on the road about six miles north-east from the San José mining property in the State of Sonora.

2. There is no serious difference of opinion between the parties as to the facts, which may be summarized as follows: Mr. Thomas Francis, in the latter part of 1914, was working a mining property near the town of Nacozari, in the State of Sonora, on lease from the owner, Mr. Montgomery, and his family were residing at Douglas, in the State of Arizona, U.S.A. On the 9th December

Mr. Francis wishing to visit his wife, who was ill, started to ride across country to Douglas with two companions, it being necessary to go by road as the railway line had been cut during revolutionary hostilities. On the way they were ambushed by a party of Mexicans and all killed. The bodies were found the same day by a servant of Mr. Montgomery, who at once informed the authorities at Nacozari. The Commandant of that town, the local Judge and fifteen soldiers arrived that evening, proceeded next day to the place of the crime, found the bodies, which had been robbed and mutilated, and took them to Nacozari.

3. A judicial investigation was immediately commenced and on the 13th December two Mexicans, José Escalante and Estedin Cruz, were arrested in possession of some of the effects of the murdered men. The accused admitted their crime; were convicted, and, by order of General Benjamin Hill, were shot on the 21st December. There is some doubt as to whether the murderers were employees of the deceased and committed the murder for personal reasons, or whether they were bandits, and their object was robbery. But the Commission is of opinion that this point is immaterial, for, even on the latter assumption, the Mexican Government would only be liable in damages for the murder by virtue of Article 3, Subsection 5, of the Convention if the authorities omitted to take reasonable measures to suppress the acts of brigandage, or to punish those responsible for the same, or were blamable in some other way.

4. Now it is evident that the criminals were punished with exceptional promptitude, seeing that they were executed within a fortnight of the crime, and the only ground, therefore, upon which the British claim can be based is that the authorities omitted to take reasonable measures to suppress the offence or to protect peaceful citizens residing in the neighbourhood.

5. There is no direct evidence whatever of negligence on the part of the authorities, and the British Agent did not even suggest any specific measures that they should have taken. In no country in the world can isolated crimes of this nature be prevented, and even if, in view of the disturbed state of the country, the Mexican authorities had regularly patrolled the road, it cannot be said that this would necessarily have prevented the murder. Moreover, it is admitted in the claimant's affidavit that Mr. Francis had, on previous occasions, made trips between the mining property and the city of Douglas with perfect safety. The authorities, therefore, had no reason to anticipate that there was any special danger on the road which he took on this occasion.

6. The Commission consequently is of opinion that no omission or other fault has been established against the Mexican authorities and that the claim must be rejected.

Decision

The claim of His Britannic Majesty's Government on behalf of Mrs. A. H. Francis is disallowed.

MAZAPIL COPPER COMPANY (LIMITED) (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 16, February 15, 1930. Pages 132-136.)

EVIDENCE BEFORE INTERNATIONAL TRIBUNALS.—PROOF OF REPRESENTATIVE CAPACITY.—RECEIPTS FOR REQUISITIONED PROPERTY.—RESPONSIBILITY FOR ACTS OF FORCES.—SEIZURE OF PROPERTY. Power of attorney ratifying proceedings of representatives *held* sufficient evidence of representative capacity. Vouchers or receipts delivered by captain of armed forces seizing property, signature of which was shown to be valid, *held* sufficient evidence of loss.

Cross-reference: Am. J. Int. Law, Vol. 25, 1931, p. 775.

I. The British Agent, on behalf of the Mazapil Copper Company (Limited), claims from the Government of Mexico the sum of $7,002.64 Mexican gold, for losses sustained at the Company's mines, in the vicinity of Concepción del Oro, during the occupation of that place by revolutionary forces in the month of May 1911.

II. The said Company is represented by Messrs. John Blackett, Desiderio S. Galindo and Percy E. O. Carr.

III. The British nationality of the Company has been established by means of annex 6, and consists of a certificate of incorporation issued in London on the 21st April, 1896, under the Companies Acts, 1862 to 1890.

IV. The Mazapil Copper Company (Limited) owned and operated certain mines at Concepción del Oro, Naranjera, San Pedro de Ocampo, Aranzazu, Cata Arroyo and San Eligio. In the month of May 1911 the Concepción del Oro District was occupied by revolutionary forces. Said revolutionaries did, at various mines and camps of the Company, demand and take horses, rifles, saddles, provisions and other articles for the assistance of their cause. First, Captain G. G. Sanchez was in command of the revolutionary forces responsible for these demands. The said G. G. Sanchez gave receipts for all articles taken by his forces; the copies of these receipts are given in annexes 8 and 9, and the originals were produced before the Commission.

V. The Mexican Assistant Agent alleged in defence that the damage had not been proved, and still less that it had been caused by any forces within the meaning of subdivisions 1 to 4 of Article III of the Claims Convention, Mexico and Great Britain, and that, should said damage have been caused by insurrectionists, mutineers or mere brigands, the Government of Mexico had not been guilty of omission or negligence in suppressing the act or in punishing the parties responsible for the same. He further contended that it had not been shown that the damage amounted to the sum claimed.

VI. The Mexican Agent contended that Messrs. John Blackett, Desiderio S. Galindo and P. E. O. Carr had not shown that they were authorized to represent the Company, for which reason the Memorial should be dismissed.

VII. The British Agent filed a reply, stating that proof that Messrs. Blackett, Galindo and Carr were authorized to file claims on behalf of the Mazapil Copper Company (Limited) would later be filed with the Secretaries to the Commission; that the originals of the receipts given by Captain G. G. Sanchez had already been asked for; that the proof that the claimants had sustained the losses and damages for which they claim was contained in annexes 7, 8 and 9

to the Memorial from His Britannic Majesty's Government; that the proof that said losses and damages were caused by rebel forces was likewise contained in the aforesaid annexes; that it was public and notorious that on the date on which said losses took place there was a revolution against the Mexican Government, and that said forces came within the meaning of the first four subdivisions of Article III of the Convention; and, lastly, that the proof that the losses did amount to $7,002.64 Mexican gold was contained in annexes 8 and 9 to the Memorial, as also the original receipts signed by First Captain G. G. Sanchez.

VIII. A certified copy of a deed containing the statements made by Mr. Lewis Daniel Fry as the attorney in fact for the Mazapil Copper Company, ratifying the acts of Messrs. P. E. O. Carr, John Blackett and Desiderio S. Galindo, the first as the former Manager of the Company from the end of 1907 until the end of 1916, the second as Auditor-General of the Coahuila and Zacatecas Railway since 1910, and the third as Superintendent of the said Railway from 1918 to 1920, has been submitted to this Commission; the said Attorney in fact approves the acts executed by Messrs. Carr, Blackett and Galindo in connexion with the claims presented to the Government of Mexico. The said Mr. Lewis Daniel Fry established before Notary Eulegio de Anda the representative capacity in which he appears for the Mazapil Copper Company (Limited).

IX. The vouchers to which claimant refers and which are signed by G. G. Sanchez, First Captain, are the following:

Value of one roll of tricolour ribbon for the army, signed at Concepción del Oro, the 14th May, 1911; another receipt signed by the said Captain G. G. Sanchez for the value of	$ 11.30
Sundry articles; a further receipt signed the 20th May, 1911, for	43.72
Being the value of one pair of boots; a further receipt for . . .	17.50
Being a loan for payment of the troops, signed the 16th May, 1911, by the said Captain G. G. Sanchez; a further receipt, signed at Concepción del Oro, Zac., on the 14th May, 1911, by the said G. G. Sanchez for the amount of	3,000.00
Being the value of two horses ready saddled; a list of horses, saddles and other articles delivered to the self-same revolutionary leader, G. G. Sanchez, to the value of	200.00
Signed at Concepción del Oro, Zac., the 15th May, 1911, intended for the equipment and arming of the forces of the said Captain Sanchez; a further receipt, signed by the said Captain G. G. Sanchez, for	3,500.22
Being the value of one horse, one rifle, and one revolver, dated the 20th May, 1911	170.00
And, lastly, a further list of articles commandeered by the said Captain Sanchez on the 31st May, 1911, to the value of	59.90
TOTAL	$7,002.64

X. The Mexican Agent filed a Rejoinder maintaining the pleas contained in his Answer.

With this claim, numbered 34, there was also filed a second claim of the Mazapil Copper Company (Limited) for the amount of $56,739.41 Mexican gold, for damage sustained by the Coahuila and Zacatecas Railway during the years 1918 to 1920 inclusive; but this Commission will only, by agreement between the two Agents, and for the time being, adjudicate upon the claim

for losses sustained at the Company's mines at Concepción del Oro in 1911, leaving the second claim for damage to the Coahuila and Zacatecas Railway, pending decision, until such time as the Mexican-British Claims Commission shall decide other claims of the same nature.

XI. This claim was, on the 17th day of the present month of January, argued before the Commission. The British Agent stated his claim, and the Mexican Agent said that, as the British Agent had filed a deed of ratification of the claim from the attorney in fact of the Mazapil Copper Company (Limited), the Commission would decide what they thought right. And in regard to the authenticity of the various receipts signed by First Captain G. G. Sanchez, he submitted various official documents, the originals, signed by G. G. Sanchez, at one time Governor of the State of Michoacán, so that the Commission might, after the necessary comparison of the signatures on the receipts submitted by the claimant with the signatures on the official documents mentioned above, decide whether the signatures on the former were authentic or otherwise.

XII. The deed of power of attorney produced by Mr. Fry on behalf of the Mazapil Copper Company (Limited) is undoubtedly a public instrument which constitutes full proof, and as the proceedings carried out by Messrs. Blackett, Carr and Galindo, as the representatives of the said Company, are therein ratified, the Commission declares that the claimant Company has duly shown proof that they are its representatives, in accordance with Article 10 of the Rules of Procedure.

XIII. It is an historical fact that First Captain G. G. Sanchez operated as a Maderista leader against the Government of General Forfirio Díaz, in the Concepción del Oro District, State of Zacatecas, where the mines of the Mazapil Copper Company (Limited) are situated, on the very dates appearing on the receipts issued to the claimant Company. It is also an historical fact that Gortrudis G. Sanchez, a First Captain in the Maderista forces in 1911, subsequently became the Governor of the State of Michoacán with residence at Morelia, and as from a careful examination by the Commissioners of the signatures on the receipts upon which the Mazapil Copper Company bases its claim, and of the signatures upon the official documents produced by the Mexican Agent, there is no reason to doubt that they are the same, the Commission consider themselves authorized to declare that the receipts executed by First Captain G. G. Sanchez to the claimant Company are authentic.

XIV. Consequently, and as the First Captain G. G. Sanchez comes within the meaning of subdivision 2 of Article III of the Convention, as a Maderista revolutionary, it is unquestionable that the Government of Mexico is liable for the damage claimed for. In view of these considerations, the Commission, by a unanimous vote, hereby declare:

That the Government of the United Mexican States is bound to pay to the Government of His Britannic Majesty, on behalf of the Mazapil Copper Company (Limited), the sum of $7,002.64 Mexican gold.

JOSEPH SHONE (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 17, February 15, 1930. Pages 136-141.)

AFFIDAVITS AS EVIDENCE. Affidavit of claimant containing inconsistencies, obscurities and arithmetical errors, supported by sworn statement of brother-in-law that facts stated in such affidavit were true and correct, *held* not sufficient evidence when upon face of claimant's affidavit it appeared that such brother-in-law was not present at most of the material times.

(Text of decision omitted.)

WILLIAM E. BOWERMAN AND MESSRS. BURBERRY'S (LIMITED) (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 18, February 15, 1930, dissenting opinion by Mexican Commissioner, February 12, 1930. Pages 141-146.)

ASSIGNMENT OF CLAIM. A successor to claimant's business, who took over such business by instruments dated subsequent to loss but effective as of a date prior to loss, *held* entitled to present claim. In any event, the right to claim passed as an existing asset among the assets sold and transferred.

RESPONSIBILITY FOR ACTS OF FORCES.—FAILURE TO SUPPRESS.—EFFECT OF NON-PRODUCTION OF EVIDENCE BY RESPONDENT GOVERNMENT—PRIMA FACIE EVIDENCE. An assault on, and burning of, a train on line from Mexico City to Veracruz is an act of violence of such public notoriety as to entrain responsibility of respondent Government when it failed to show that it took any action whatever in the matter. *(Prima facie* evidence.)

DAMAGES, PROOF OF. Insurance value placed on trunk by claimant prior to loss *held* some evidence of value. Valuations of loss put forward by claimants accepted by tribunal to the extent reasonable.

EXECUTION OF DECISION.—EVIDENCE. Though there is no clear evidence of British nationality, decision not delayed, but right of execution made conditional on furnishing of such evidence. (See decision No. 25.)

Cross-reference: Am. J. Int. Law, Vol. 25, 1931, p. 778.

Comments: G. Godfrey Phillips, "The Anglo-Mexican Special Claims Commission", Law Q. Rev., Vol. 49, 1933. p. 226 at 238.

1. This case consists of two claims:

(1) A claim for £233 9*s.* 0*d.* put forward by Mr. Bowerman on behalf of Messrs. Burberry's (Limited) for the loss of a quantity of sample garments contained in a trunk which was despatched on the 6th December, 1919, by Mr. Bowerman from Tampico Station to Veracruz, and was destroyed *en route* by rebels who assaulted and burnt the train to Veracruz on the 10th December, 1919; and

(2) A claim by Mr. Bowerman himself for £16 11*s.* 0*d.*, the value of personal effects of his own contained in the same trunk.

2. To these claims the Mexican Agency, apart from a formal denial of the facts, opposed two principal defences:

(1) That Mr. Bowerman was not the Agent of Messrs. Burberry's (Limited), and was not authorized to put forward the claim on their behalf, as provided by article 10 of the Rules of Procedure; and

(2) That even assuming that the trunk was destroyed by rebels, they were not forces within the meaning of subdivisions 1-4 of Article 3 of the Convention, and if they were to be included in subsection 5 of this Article, the Mexican authorities were not to blame either in the matter of repressing the act or of punishing the parties responsible therefore.

3. To these defences the British Agency replied that they were prepared to furnish proof that Mr. Bowerman was the authorized Agent of Messrs. Burberry's (Limited), and that the persons responsible for the loss were forces included in one of the first four paragraphs of Article 3. At the hearing, however, the British Agent admitted that he was not able to establish the latter contention, and that therefore the forces referred to must be included in subsection 5 of Article 3, but he contended that the Mexican Government was liable for the losses as the competent authorities, with full knowledge of the facts, had taken no measures whatever to suppress the acts complained of or to punish those responsible for the same.

4. In his rejoinder the Mexican Agent contended that it lay with the British Government to establish the omissions or faults on the part of the Mexican authorities, and that of this no evidence had been given, and at the hearing he raised an additional defence, namely, that the loss claimed had been incurred by the partnership of Burberry's, and that the claimants, Messrs. Burberry's (Ltd.), who had purchased the business of the firm of Burberry's on the 12th January, 1920, i.e., after the events forming the subject of the claim, had suffered no loss and no *locus standi* to make the claim.

5. With regard to the first defence of the Mexican Government, which was really in the nature of a motion to dismiss, the British Agent put in a copy of the agreement dated the 12th January, 1920, between the firm of Burberry's and the Company of Messrs. Burberry's (Limited) whereby the latter purchased the business of the former.

From this document it appears that, although the agreement was made on the 12th January, 1920, it was provided by article 2 that the purchase and sale should take effect as on and from the 3rd April, 1919, and by article 9 it was provided that the vendors (i.e., the firm of Burberry's) should be deemed as from the same date to have been carrying on the business of Agents for the Company (i.e., the present claimants), and that the Company should assume all the transactions and acts done by the vendors as from the same date of the 3rd April, 1919.

Documentary evidence was also provided that Mr. Bowerman was, in December 1919, the travelling representative of the firm of Burberry's, who, as shown above, were acting as Agents at that time for Messrs. Burberry's (Ltd.), and that he is now the representative of Messrs. Burberry's (Limited) and authorized to make the claim on their behalf.

The majority of the Commission is therefore of opinion that the conditions of article 10 of the Rules of Procedure have been complied with, and that the objection of the Mexican Government must be overruled.

6. The Commission is of opinion that it has been sufficiently proved by the affidavit of Mr. Bowerman, dated the 6th May, 1921, and by the telegram dated the 18th December, 1919, from Mr. S. A. Orozco, Superintendent of

Express, Puebla, to Francisco R. Nino, Agent at Veracruz for the Constitutionalist Express, that the trunk containing the articles which are the subject of this claim, was destroyed in an assault on the south mixed train at Kilo 278 on the 10th December, 1919, and that this assault was committed by insurrectionary forces or brigands referred to in Article 3, sub-section 5 of the Convention.

7. With regard to the responsibility of the Mexican Government for the acts of these forces or brigands, the majority of the Commission would refer to the principles laid down in the opinion of the President in the decisions of the claims of Messrs. Baker, Woodfin and Webb (Mexico City Bombardment claims) Paragraph 6. Reference is there made to the difficulty of imposing on the British Government the duty of proving a negative fact such as an omission on the part of the Mexican Government to take reasonable measures, and it is stated that whenever an event causing loss or damage is proved to have been brought to the knowledge of the Mexican authorities or is of such public notoriety that it must be assumed that they had knowledge of it, and it is not shown by the Mexican Agency that the authorities took any steps to suppress the acts or to punish those responsible for the same, the Commission is at liberty to assume that strong *prima facie* evidence exists of a fault on the part of the authorities.

In this case Mr. Bowerman, who left Mexico almost immediately after the loss, did not call the attention of the authorities to the matter at the time, but an assault on, and the burning of, a train on the line from Mexico City to Veracruz was an occurrence of such importance that it cannot be supposed that the authorities were unaware of it, and the Mexican Agent has not shown that they took any action whatever in the matter.

For these reasons the majority of the Commission considers that the authorities were blamable in the matter, and that the Mexican Government is responsible in virtue of Article 3, subsection 5 of the Convention.

8. The final defence of the Mexican Government consists in the argument that the loss was suffered by the firm of Burberry's and could not have been taken over by Messrs. Burberry's (Limited) under the agreement of the 12th January, 1920, as one of the assets of the firm, as the right to claim for the loss did not exist at that time, but only came into existence on the signing of the Convention on the 19th November, 1926.

The majority of the Commission is, however, of opinion that the right to claim was not created by the signing of the Convention, but existed as a marketable asset from the time when the loss occurred, even although it might subsequently turn out to be worthless. This is shown by the fact that such rights may be assigned or inherited as appears from the decisions of numerous International Commissions, and the same principle is implicit in article 10 (paragraphs (*f*) and (*g*)) of the Rules of Procedure, which show that the eventuality of an assignment of the right to claim after the time when it had its origin, i.e., the date of the loss, has been taken into consideration.

The majority of the Commission is therefore of opinion that the right to make this claim existed in the firm of Burberry's at the date of the loss and was included in the assets sold by them to Messrs. Burberry's (Limited) on the 12th January, 1920, and that the latter are now entitled to make the claim on their behalf.

9. During the discussions of the Commission, it has been pointed out that there is no clear evidence that the firm of Burberry's, who suffered the original loss, was a British partnership. The probability of this being the case seems so high that the Commission does not consider it necessary to delay its decision,

but holds that before its execution evidence satisfactory to the Commission must be furnished upon this point.

10. The only remaining question is that of damages. No evidence is forthcoming except the affidavit of Mr. Bowerman as to the contents of the trunk, and no other evidence could possibly now be produced, but he insured the trunk for $2,000, which may be taken as some proof of its value.

The articles claimed by Mr. Bowerman as his own property appear to the Commission to be reasonable and the prices put upon them moderate, and they are prepared to accept this value of £16 11*s.* 0*d.*

With regard to the claim of Messrs. Burberry's (Limited) it must be remembered that these were sample garments and not really intended for sale, and, moreover, there is an item of £64 8*s.* 0*d.* for duty and agency fees, of which no proof has been given. The Commission is of opinion that £180 would be a fair sum to allow them for the loss sustained.

Decision

11. The United Mexican States shall, subject to the conditions set out in section 9, pay to the British Government on behalf of Messrs. Burberry's (Ltd.), the sum of £180, and on behalf of Mr. Bowerman, the sum of £16 11*s.* 0*d.*

Dissenting opinion of the Mexican Commissioner, in Claim No. 4, presented by His Britannic Majesty's Government on behalf of William Edgar Bowerman and Messrs. Burberry's (Limited)

1. The Mexican Commissioner does not agree with the opinion of his learned colleagues when deciding this case, upon the following points:

In considering Mr. Bowerman as *Attorney-in-fact* for Messrs. Burberry's (Limited), because only a commercial letter, signed by Murray Burberry, on behalf of Messrs. Burberry's (Limited), has been produced to prove it.

From said document it does not appear that the person signing it is authorized to execute said act on behalf of the company. It has not been shown either that the signer is actually the person whose name appears in the signature itself; that is, the letter in question is not authenticated. It is a private document that may or may not be authentic, but to which, at all events, objection was made by the opposing party.

The Mexican Commissioner has upheld this same principle respecting the probative value of private documents not acknowledged and presented before this Commission, to which objection was raised by the Mexican Commissioner in the case of Robert John Lynch, and, in order not to repeat the arguments therein invoked, he refers to them throughout: "Claim No. 32". Demurrer entered by the Mexican Agent.

2. The Mexican Commissioner does not agree either that any negligence on the part of the Mexican authorities in taking measures tending to suppress the act, or to punish those responsible for the same, have been proven, nor that the authorities were blamable in any other way.

The Mexican Commissioner has also upheld this principle in connexion with claims 2, 28, 40, 50, 55 and 58, referring to the bombardment of Mexico City, and it will therein be seen that the burden of proof, in the case specified in subdivision 5 of Article III of the Claims Convention, Mexico and the United States, always devolves on the claimant, and, therefore, the Mexican Government is not bound to prove its diligence, as maintained by his Honourable Colleagues.

3. The Mexican Commissioner is also of the opinion that this claim should be dismissed, because:

(a) The claimant company could not have obtained the right to claim, which is granted by the Convention only to those sustaining the damage or to their successors in interest by universal succession, but never to a third party through contract, if, when same was entered into, the predecessor in interest had not acquired the right to claim; and, in the present case it so happens that Thomas Burberry, Thomas Newman Burberry, Arthur Michael Burberry and Ralph Benjamin Rools, who were originally the injured parties, transferred all their rights to Burberry's (Limited) in 1920, that is, prior to the date of the Convention between Mexico and Great Britain, which is the only title conferring the right to claim for the acts in question, when heirs are not concerned, i.e., the *partnership* signed by those gentlemen could not transfer to Burberry's (Limited), in 1920, what it only acquired in 1926, when the Convention between Mexico and Great Britain was signed.

(b) The Mexican Commissioner is also of opinion that, even supposing it were declared that the claimant company is the one entitled to claim, and not Messrs. Thomas Burberry, Thomas Newman Burberry, Arthur Michael Burberry and Ralph Benjamin Rools, as maintained by the Mexican Commissioner, as it has not been shown that these last-mentioned gentlemen were British subjects, the claim would not be sustainable without proof of this last requirement, both because the Rules of Procedure (article X, Frac. *(a)*) so provide, and because this Commission has so laid it down in conformity with the jurisprudence generally established by the International Claims Commission in compliance with the principle that the claim must have the nationality of the claimant Government, from the beginning and until decided by the Commission.

SANTA GERTRUDIS JUTE MILL COMPANY (LIMITED) (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 19, February 15, 1930, dissenting opinion (dissenting in part) by Mexican Commissioner, February 11, 1930. Pages 147-154.)

RESPONSIBILITY FOR ACTS OF FORCES.—FAILURE TO SUPPRESS OR PUNISH.—EFFECT OF NON-PRODUCTION OF EVIDENCE BY RESPONDENT GOVERNMENT.—NECESSITY OF NOTICE TO AUTHORITIES. Forces constantly in opposition to any established Government *held* not to be considered revolutionary forces for whose acts direct responsibility under the *compromis* existed. An attack by them upon an important station on the railroad between Mexico City and Veracruz and the destruction of several railroad cars *held* an act of such public notoriety as to impute notice to the public authorities and accordingly to entrain responsibility on the part of the respondent Government when it failed to show that any action was taken against such forces. Absent circumstances of public notoriety, *held* claim must be disallowed when there was no proof that claimant advised competent authorities in due time of attack by rebels resulting in damage.

MEASURE OF DAMAGES.—EXPENSES INCURRED IN PREPARATION OF CLAIM. Expenses of public duties or charges incurred in preparation of claim *held* compensable.

INSURANCE, EFFECT OF UPON RIGHT TO DAMAGES. Opposition of Agent for respondent Government to payment of claim when it appeared that losses claimed may have been compensable in insurance *overruled* upon production of proof that efforts of claimant to obtain such compensation were unsuccessful.

Cross-reference: Am. J. Int. Law, Vol. 25, 1931, p. 782.

Comments: G. Godfrey Phillips, "The Anglo-Mexican Special Claims Commission", Law Q. Rev., Vol. 49, 1933, p. 226 at 238.

1. On behalf of the Santa Gertrudis Jute Mill Company (Limited), the British Government have filed in one memorial two claims. The first is for compensation for the loss of three cars of jute which were burnt at the Paso del Macho station on the 1st February, 1917, and the second is for compensation for damages done to the company's electric plant on the 30th March, 1919.

The facts are set out in the Memorial as follows:

First Claim

In November and December 1916 the Santa Gertrudis Jute Mill Company (Limited) shipped, under three bills of lading from London via New York by the steamship *Lancastrian,* steamship *Michigan* and steamship *Mongolia,* a consignment of 1,851 bales of jute. The whole consignment was shipped from New York to Veracruz by steamers of the Ward Line during the month of January 1917, and was sent on from there, under the supervision of the company's agent, by the Terminal Company of Veracruz (Limited) via the Mexican Railway. Only 1,477 bales arrived at various dates during the first fortnight of February, resulting in a shortage of 374 bales. From the markings of the bales received it was easily established that the missing bales were:

From steamship *Lancastrian*

7 bales Narayangang mixings.
69 bales Chittagong mixings.
81 bales Substitute M.D.E.

From steamship *Michigan*

48 bales H. 2.
77 bales H. 3.

From steamship *Mongolia*

57 bales D. T. D/E.
24 bales L. B 2.
11 bales L. B 3.

On the 12th February, 1917, the Mexican Railway Company officially informed the Santa Gertrudis Jute Mill Company (Limited) that on the 1st February, 1917, the station at Paso del Macho was attacked and taken by rebel forces, who set fire to all the wagons which were in the yard of that station, including three containing 372 bales of jute belonging to the company, and that the railway company declined to accept any responsibility. The two missing bales are accounted for in a letter from the railway company stating that one wagon contained 126 bales instead of 124 bales as stated on the waybill.

The amount of the claim is 27,921.42 Mexican pesos.

Second Claim

On the morning of the 30th March, 1919, a party of rebels entered the electric plant belonging to the Santa Gertrudis Jute Mill Company (Limited) at Orizaba and partially destroyed the generating pipe by exploding a dynamite bomb which they had placed there. As a result of the damage effected, the factory which took its power from this generating plant was paralysed and unable to function until the 14th April, when the work of repair had been completed.

The amount of the claim is 1,709.81 Mexican pesos, being the cost of the repair of the damage to the generating pipe.

2. The Mexican Agent has made a motion to reject the claim and at the same time has filed an answer to the Memorial in the event that his motion should not be sustained.

The Motion to Reject

3. The Mexican Agent held that the Memorial did not comply with article 10 of the Rules of Procedure, pursuant to which the Memorial should be signed by the claimant and by the British Agent, or by the latter only, but in that case a statement of the facts giving rise to the claim should be included in the Memorial.

In his oral argument the Agent pointed out that there is no document inserted in the Memorial showing that Mr. C. M. Hunter, the General Manager of the Company, was duly authorized to present the claim, and he, furthermore, raised doubt as to the British nationality of the company, which in some of the documents is styled as Santa Gertrudis Compañía Manufacturera de Yute and which, in his opinion, might well be a Mexican Company, to be distinguished from the British Company in London.

4. The British Agent drew the attention of the Commission to Annex 11 of the Memorial, which in his view left no doubt as to whether Mr. Hunter, when making his declaration before a notary public at Orizaba, had produced a deed showing that he was the legitimate representative of the company and authorized by the terms of his Commission to collect and receive all and whatsoever sums of money that may be owing to the company from whatever cause or pretence.

He further asserted that the Spanish name of the company was nothing but a translation of the name under which the Company is incorporated in England and indicated one and the same British Company.

5. The Commission is satisfied that the document, of which the Notary Public makes mention and which was shown to him, establishes that Mr. Hunter was duly authorized to present the claim.

The Commission is equally satisfied that the Mexican branch of the company does not constitute a separate concern but is part of the company at London, the British nationality of which is proved by the certificate of the incorporation, printed as annex 12 of the Memorial.

6. The Commission decides that the Motion to reject is overruled and that the claim must be decided on their merits.

The First Claim

7. The Mexican Agent said that it was common ground between his colleague and himself that the facts had been committed on the day and under the

circumstances as described in the Memorial. The witnesses whom he had caused to be heard at Orizaba all declared that they knew that the station of Paso del Macho had been attacked by armed forces on the 1st February, 1917, and that the railway wagons had been destroyed. It was also of public knowledge that the forces in question belonged to those commanded by General Higinio Aguilar, a man whom the Agent described as a permanent rebel, having been in arms against nearly every Government since 1910 and during the whole time of the *de facto*, and afterwards the *de jure*, Government of President Carranza. But the Agent differed from his colleague in the classification of the said forces into one of the subdivisions of Article 3 of the Convention.

At the time of the attack on the station of Paso del Macho there existed in the Mexican Republic a constitutional Government, of which President Carranza was the Chief. A man like General Higinio Aguilar, who did not fight for any revolutionary programme but simply was in antagonism to every established system of public administration, had to be considered as a rebel and, consequently, he fell within the terms of the fifth subdivision of Article 3. This being so, the responsibility of the Mexican Government could only be considered to exist in case the British Agent established that the competent authorities were blamable in any way. As long as that was not proved, it had to be assumed that the Government had acted with normal diligence, the more so because the railroad where the attack occurred was of such vital importance, being the main connexion between the capital and Veracruz, the principal port, that it could not be supposed that proper measures of protection had been omitted.

That Higinio Aguilar had not been arrested did not prove that the authorities were to blame, because the region where the events happened was so mountainous as to afford easy means of escape.

As to the value of the jute which was burnt, the Agent saw no other evidence than the statement of the claimant himself, i.e., the invoices of the London Office, and observing that amongst the items of the claim also appeared expenses for insurance and war risk insurance, he asked whether the claimant had not already been compensated for his loss and. if not, whether he ought not to have tried.

The claim also including the expenses made in its preparation, the Agent denied that his Government could be made liable for them, the more so as Mexico could not claim from the other party restitution of costs incurred by defending itself, in case a claim was disallowed.

8. The British Agent held a different view as to the classification of the forces, who were guilty of the attack. In his opinion the Government of President Carranza was a revolutionary force which after the triumph of its cause, had established a Government *de jure* or *de facto*, falling within the terms of subdivision 2 of Article 3. To this force, the forces of Higinio Aguilar, being revolutionaries as well, were opposed. Acts committed by them, made Mexico responsible according to the treaty, even when no evidence of omission or negligence was produced. The Agent contended that at the time, when the station was attacked, the Carranza Government was still a *de facto* Government, against which the revolutionary forces under Aguilar were in arms. This General aimed at the overthrow of Carranza and he therefore joined a few years later his forces with those of General Obregón who—if the Agent's information were correct—finally granted him a pension.

But even if it were true that Aguilar was only a rebel and that his forces therefore were to be classified within subdivision 5, the Agent held that it was established that the competent authorities had omitted to take the mea-

sures which could have been expected from them. The railroad in question was of such an essential importance, from a political as well as from an economic point of view, that a permanent and very close military supervision would have been natural. Instead of that, conditions were such that the line and the stations were repeatedly attacked. The Agent did not doubt that this could have been prevented if there had been more diligence, and the fact that, a few months after the attack on the station of Paso del Macho, the railway was taken over by the Government, showed that the Government previously had not sufficient control of the situation.

In regard to the amount of the loss, the Agent relied upon annex 11 of the memorial in connexion with the invoices reproduced in the other annexes, and he presented copies of letters, written by the underwriters to the London Office, showing that endeavours to obtain compensation from the insurance companies had been made, but had remained without result.

An award for the expenses of the claim had often been granted by international tribunals in similar cases, and the Agent thought the amount which was claimed the more reasonable because many of the expenses consisted in the payment of stamp duties, &c.

9. Where the Agents agree as to the facts and their authors, the Commission has to examine in the first place under which of the forces, enumerated in Article 3 of the Convention, the men commanded by General Higinio Aguilar are to be classified. A historical exposition of the facts which occurred during this part of the revolutionary period and of the role played therein by this General, has been given to the Commissioners and leads them to the belief that Aguilar could not be considered as heading or participating in a revolutionary movement. At no time his aims have been stated or his programme made known. It was never shown that his action was based upon ideal, political or social principles. He seems to have been a man whose hand was against every organized system of government, ready to side with any force opposed to it. The Commission is satisfied that it must consider him and the armed men who followed his orders as rebels or as insurrectionaries other than those referred to under subdivisions 2, 3 and 4 of Article 3; in other words, as one of the elements which the fifth subdivision of that Article has in view, and the question that arises is, whether in this case the Mexican Government must be held responsible.

The majority of the Commission answers this question in the affirmative. They cannot but realize that the attack on an important station of one of the main railroads of the country, and the destroying by fire of several wagons, are facts, which must have been of public notoriety and were sure to come at once to the knowledge of the authorities. The railway between the capital and Veracruz is of such a vital importance to Mexico that it was to be expected that measures would have been taken to prevent acts of this kind. That they could occur is already a strong presumption of the absence of sufficient watchfulness. The witnesses, who at the instigation of the Mexican Agent were heard at Orizaba, all knew that the attack was the work of General Aguilar's men. As the authors were known at the time of the facts, a prosecution would have been possible, but there had not been produced any evidence showing that action was taken, and the fact that a few years later General Aguilar was still in command of armed men and able to place them under General Obregon's banner shows that he was not interfered with and retained complete liberty of movement.

There has been an exposition in section 6 of Decision No. 12 *(Mexico City Bombardment Claims)* of the attitude which the majority of the Commission takes

as to how the omission or the absence of suppressive or punitive measures is to be established. Acting on that line, the Commissioners, whose views are here expressed, must hold the Mexican Government responsible for the damage suffered by the claimant.

10. For the amount of this damage there is no other evidence than the invoices sent by the London office of the Company to the General Manager in Mexico and the letters from the Agents in New York to the same. They indicate the value of the jute then under way to Orizaba. All these documents are anterior to the attack on the station and the majority of the Commissioners cannot see why they are not to be accepted as *bona fide* statements.

The same Commissioners are satisfied, by the letters of which copies were shown, that the Company tried in vain to make the insurance pay the damage, and as regards the expenses for the preparation of the claim, they are of opinion that restitution of what has been paid for public duties is rightly claimed.

11. The Commission decides that the Government of the United Mexican States shall pay to the British Government for the Santa Gertrudis Jute Mill Company (Limited), the amounts of: Mexican pesos 27,726.42 (twenty-seven thousand, seven hundred and twenty-six pesos forty-two centavos) for damage, and Mexican pesos 67.55 (sixty-seven pesos fifty-five centavos) for expenses.

The Second Claim

12. The Mexican Agent produced the testimony of several witnesses who had been heard at Orizaba and who all said that they ignored the facts on which the claim is based. Apart from the evidence given by the claimant and some of his employees, to which the Agent attached no value, there was only the statement of Señor Reyes, who repaired the pipe, but while he could be regarded as a judge on the damage done, he was not in a position to give reliable information on the cause of it. For these reasons the Agent thought the evidence insufficient.

13. The British Agent maintained that the facts were sufficiently established by the statements produced in the annexes to the Memorial and that Señor Reyes' evidence was very important.

14. As to the authors of the destruction, the same controversy arose between the Agents as when they discussed the attack on which the first claim is based.

15. The Commissioners, although not doubting that the generating pipe has been destroyed, have not found convincing evidence as to the authors of this act. They therefore do not feel at liberty to declare that those responsible for the destruction have belonged to one of the forces enumerated in Article 3 of the Convention. The evidence collected on the spot shows that in the immediate neighbourhood it was not known that anything had happened, and as claimant does not show that he advised the competent authorities in due time, there is no ground on which they could be blamed.

16. The Commission decides that the claim is disallowed.

Dissenting opinion of the Mexican Commissioner when rendering the decision in this case, solely as regards the question asked by the Honourable Presiding Commissioner as to whether it was proved that the authorities were blamable in any way

I. In point of fact, the Mexican Commissioner is of the opinion that subdivision 5 of Article III of the Claims Convention, Mexico and Great Britain, should be construed as meaning that it is the demandant Government that has

to prove that the competent authorities omitted to take the necessary measures to suppress the insurrections, risings, riots, etc., or that said authorities were blamable in any other way, once it has been shown that the case falls within subdivision 5 of Article III already mentioned.

II. In the present case it has not been shown that the Mexican authorities were to blame in any way whatsoever.

The Mexican Government is not bound to prove that it acted diligently. The Law presumes that the Government has to act diligently, not only to protect other persons' interests, but also to safeguard its own existence. Both Governments being convinced of this legal presumption, the Convention imposed the burden of proof of negligence on the demandant Government. If this be difficult it only means that it is also difficult to give judgment against Mexico for mutinies or upheavals, or for acts committed by insurrectionary forces other than those referred to under subdivisions 2, 3 and 4 of Article III of the Convention, or for the acts of brigands. Said subdivision 5 of Article III of the Convention, thus construed in the light of the principles of international law, there is no reason why it should be inverted, and thus impose the burden of proof on the Government against whom claim is made, as his learned colleagues endeavour to do.

III. In order to maintain his viewpoint as regards this claim, the Mexican Commissioner refers, in every respect, to the dissenting opinion expressed by him on the same point of law in connexion with claims 2, 40, 58, 50, 55 and 28, relating to the bombardment of Mexico City, which were decided by this Commission. In that opinion, said Commissioner states that International Claims Commissions have always been very careful whenever it is a matter of declaring that a Government has been negligent in the fulfilment of its international obligations, and they have never done so without requiring conclusive proof, because it is too serious a charge to base on mere presumption. In this connexion, the cases of *Charles E. Tollerton*, vs. *Mexico*, decided by the General Claims Commission, Mexico and the United States of America, p. 402, Volume I; *Boni Coleman*, page 56, volume II; *G. L. Solis*, before the same General Claims Commission, Mexico and the United States of America, page 48, volume II, were cited, and, in these three cases that Commission uniformly upheld the principle that the obligation of fully proving negligence devolves on the claimant Government and not on the Government against which claim is made, and, that, to prove that fact, mere presumption and the assertions of the claimant Government are not sufficient.

It may well be agreed, in the present case, that the attack on Paso del Macho by rebel forces under Higinio Aguilar, was a most scandalous affair; it may well be wondered, and no doubt justly, why the Mexican Government did not suppress that act with the energy that Justice demands; it may well be established, as a basis on which to arrive at the conclusion reached by the Mexican Commissioner, that the Government itself had knowledge of those acts and that there is no proof in the record that the culprits were ever prosecuted and punished with all the severity of the law. Nevertheless, the Mexican Commissioner maintains that the Mexican Government is not responsible, for no other reason than because the claimant Government has not produced any evidence either sufficient or insufficient to comply with the obligation of proving that the Mexican Government was negligent. President Carranza's Government must certainly have suppressed the act of the attack or assault on the Mexican Railway at Paso del Macho station, and, had the Mexican Government been obliged to prove this fact, it would most certainly have complied with that obligation; but, relying on the fact that the burden of

proof did not devolve upon it, according to the Convention, no proof whatever was produced to establish the fact. The bare principle contained in section V of Article III of the Convention, is this: "The British Government is obliged to prove the Mexican Government's negligence in all cases included in subdivision 5 of Article III of the Convention." In the present case the British Government has not complied with that obligation. Therefore, the Mexican Government should be held not liable for the acts committed by Higinio Aguilar.

C. E. McFADDEN (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 20, February 10, 1930. Pages 155-156.)

DIRECT SETTLEMENT OF CLAIM BETWEEN AGENTS. A claimant whose coal had been requisitioned by the Huerta Government for public use but who had never been paid for the same by any Mexican Government, despite repeated requests for payment, settled by agreement between British and Mexican Agents, approved by the tribunal.

(Text of decision omitted.)

MEXICAN UNION RAILWAY (LIMITED) (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 21, February , 1930, dissenting opinion by British Commissioner, undated. Pages 157-175.)

CALVO CLAUSE.—RESPONSIBILITY FOR ACTS OF FORCES. Claims by a British corporation, owner of a railroad in Mexico operated under a concession from the Mexican Government in connexion with which claimant had agreed to a Calvo Clause, for damages resulting from acts of Indian, rebel, revolutionary and State government forces, *held* not within the jurisdiction of tribunal.

EXHAUSTION OF LOCAL REMEDIES. The responsibility of a State under International Law is subordinated to the exhaustion of local remedies. Article VI of *compromis*, setting aside this rule, does not deprive Calvo Clause of its effect as long as there has been no denial or undue delay of justice or other international delinquency.

Cross-references: Am. J. Int. Law, Vol. 24, 1930, p. 388; Annual Digest, 1929-1930, p. 207.

Comments: Clyde Eagleton. "*L'épuisement des recours internes et le déni de justice, d'après certaines décisions récentes*", Rev. de Droit Int. L. C., 3d Ser., Vol. 16, 1935, p. 504 at 519; Sir John H. Percival, "International Arbitral Tribunals and the Mexican Claims Commissions", Jour. Compar. Legis. and Int. Law, 3d Ser., Vol. 19, 1937, p. 98 at 103; G. Godfrey Phillips, "The Anglo-Mexican Special Claims Commission", Law Q. Rev., Vol. 49, 1933, p. 226 at 236; Lionel Summers, "*La clause Calvo: tendances nouvelles*", Rev. de Droit Int., Vol. 12, 1933, p. 229 at 230.

1. According to the Memorial of the British Government, the Mexican Union Railway (Ltd.), constructed and operated for several years under a concession, dated the 9th March, 1897, granted by the Mexican Government, which was based on an earlier concession, dated the 30th April, 1896, from the State of Sonora, a railway from Torres to Campo Verde in the State of Sonora.

In connexion with this undertaking the company owned and possessed under lawful title various works, buildings, rolling-stock, fittings, rails, chattels and other property and effects, the whole of which has been entirely lost or destroyed by revolutionary acts, during the period the 20th November, 1910, and the 31st May, 1920. The principal business of the railway was provided by the Creston Colorado Mining Company. For this mining company the railway company carried the usual supplies needed for a mining business, fuel for machinery, and also supplies for the needs of the employees of this mining company. Owing to the unsettled conditions in Sonora through revolutionary activities, the mining company was forced to close down and consequently the railway was deprived of most of its normal business. When the Mexican Government granted rates for passengers and freight it was understood that these were to be in pesos Mexican valued at 2 pesos for 1 dollar (U.S.). During the above-named period, as each fresh Government was formed, an issue of paper money was put into circulation. The example of the Government was followed by the military chiefs of all parties, and the railway was obliged to charge for fares and freight on the basis of this paper money. The railway was unable to induce business men to accept this paper money unless some Mexican official was present to punish them for their refusal. On the other hand, the Mexican Government insisted on the payment of taxes in Mexican gold. These taxes were paid by the railway during the whole of the years covered by this claim. In addition to these difficulties, the railway was subjected to constant attacks by revolutionaries, chiefly Indians. Up to February 1912, when Mr. L. Reed left for England, two trains had been held up by rebels, and Mr. Reed and Engineer Page were held prisoners for a time at Colorado.

A chronological survey of events is given in John Symond's affidavit of the 17th April, 1923 (annex 2).

The following is a short account of the principal losses suffered by the company during the years covered by the claim, taken from Mr. Symond's chronological survey (annex 2).

1912. The company was harassed by Indian rebels. Four bridges and a crib were burnt and two camps were looted. Work was constantly held up by the presence of rebels.

1913. During this year practically all work ceased owing to the revolution.

1914. During this year an escort bringing ore to Represo station was attacked by Indians, but with the help of Government forces they were driven off. Torres was attacked and looted by Indians. There was no Government protection for Torres.

1915. Telephone wire was constantly cut; the station and warehouse at Represo were looted and trains were constantly fired on by Indians. The Government was advised of these outrages, but did nothing to protect the railway. Owing to the lack of protection it was impossible to repair the track and bridges. Later in the year, Represo was again attacked; trains were derailed and another bridge was burnt. On the 16th October, State troops, under Colonel Fortunato Tenorio, took charge in Torres. This colonel ran trains night and day in the greatest disorder. The troops took over the manager's house and destroyed everything that they did not steal. The outside of

the station and the manager's house was torn down and burnt by them. In November, Sancho Villa and his defeated troops, returning from an attack on Hermosillo, held Colorado under the greatest disorder for two days, killing, looting and destroying property.

1916. After asking for State protection, the company's manager was ordered to go to Hermosillo by the State Governor, who informed him that if construction was not under way within sixteen days the concession would be annulled. It was not possible to do any ordinary railway business, but trains were run at all hours for the Government without payment. The company, however, were obliged to pay the employees, purchase wood, water and oil and do such repairs for the trains as they were able. The orders for these trains on behalf of the Government were invariably given by telephone or verbally; the only written orders obtained by the company for moving troops were signed by General A. R. Gómez for 372.49 pesos and General A. Mange, 1,124.20 pesos. The manager was forced to forward these orders to Mexico City for payment and to make a receipt duly stamped for the full amount. No money, however, was ever paid to the company.

1917. Three box-cars, loaded by and for General A. R. Gómez, were completely destroyed by explosion and fire in Torres. General Gómez refused to give the company any kind of receipt for these cars.

1918. A bridge at K. 47 was destroyed by fire and telephone wire was continually cut and carried away.

1919. Indians were again very troublesome, attacking trains and trucks. The inspector sent by the State Government to investigate conditions could not understand that the railway could continue to run at all under such conditions.

1920. The Government again threatened to cancel the concession as the railway had not complied with the contract. By this time the company was entirely without funds and running into debt and has since been forced to abandon entirely the railway.

The amount of the claim is £200,000 sterling. This sum represents the value of the property of the Mexican Railway at the time the outrages commenced and is less than the value of the property, viz., £219,476 8*s*. 0*d*., given in the balance-sheet of the company dated the 30th September, 1911. A part of the sum claimed is the value of the property mentioned in Mr. Symond's affidavit as having been destroyed by rebel forces.

2. This case is before the Commission on a Motion of the Mexican Agent to dismiss, based on article 11 of the Concession, reading as follows:

"La empresa será siempre mexicana aún cuando todos o algunos de sus miembros fueren extranjeros y estará sujeta exclusivamente a la jurisdicción de los Tribunales de la República Mexicana en todos los negocios cuya causa y acción tengan lugar dentro de su territorio. Ella misma y todos los extranjeros y los sucesores de éstos que tomaren parte en sus negocios, sea como accionistas, empleados o con cualquier otro carácter, serán considerados como mexicanos en todo cuanto a ella se refiera. Nunca podrán alegar respecto de los títulos y negocios relacionados con la empresa, derechos de extranjería bajo cualquier pretexto que sea. Sólo tendrán los derechos y medios de hacerlos valer que las leyes de la República conceden a los mexicanos, y por consiguiente no podrán tener ingerencia alguna los Agentes Diplomáticos extranjeros." [1]

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[1] *English translation from the original report.* "The Company shall always be a Mexican Company even though any or all its members should be aliens, and it shall be subject exclusively to the jurisdiction of the Courts of the Republic of Mexico in all matters whose cause and right of action shall arise within the territory of said Republic. The said Company and all aliens and the successors of such

In the opinion of the Mexican Agent this article renders the Commission incompetent to take cognizance of the damage sustained by the Company in question, which consented to be considered as Mexican in everything connected with any acts relating to the operation of the railway for which it had acquired a concession.

3. It is clear that the Mexican Government meant through this article to insert in the concession what is generally known in international law as the Calvo Clause.

4. Many international tribunals have had to deal with this clause, and it has recently been the subject of a decision of the General Claims Commission, Mexico and United States of America (Pages 21-34, *Opinions of Commissioners*, Vol. 1). In this decision, which was taken unanimously, our Commission concurs, and as it adopts the considerations, which led to the conclusion, it refers to them, not thinking it necessary to repeat them, or possible to express them better. This decision has been accepted by the British Government as good law, and they declared that they were content to be guided by it (p. 184 of the *Bases of Discussion for the Conference for the Codification of International Law).*

5. The Commission is, however, aware that in the case before the General Claims Commission the scope was narrower than in the case now under consideration. In the former it was limited to the *execution of the work, to the fulfilment of the contract, to the business connected with the contract, and to all matters related to the contract,* whereas, in the concession granted to the Mexican Union Railway (Ltd.), it includes *all matters whose cause and right of action shall arise within the territory of the Republic, everything relating to the said company, and all titles and business connected with the company.*

While all the Commissioners are prepared to agree with and to follow the decision rendered by the General Claims Commission, only two of them are of opinion that the same considerations also apply to the claim of the *Mexican Union Railway,* and that article 11 of the concession is not invalidated because the words, in which it is expressed, comprise more than in the other case.

6. In the view of the majority of the Commission the difference between the two stipulations is not so important as to make the Calvo Clause in this concession null and void. They fail to see any very marked and essential divergence between the words *the business connected with the contract* in the first case, and the words *titles and the business connected with the company* in the second. They are of opinion that the intention of the Mexican Government, in inserting article 11 in the contract, was clear and did not go further than the legitimate protection of the rights of the country.

States possessing great natural resources which they are desirous to see developed, or wishing to improve the means of communication between the different parts of the country, or to promote the exploitation of public services, may follow different methods.

They can, when faced with a decision as to what persons or concerns a concession is to be given, make no discrimination whatever between aliens and their own nationals, and impose no special conditions when dealing with

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aliens having any interest in its business, whether as shareholders, employees or in any other capacity, shall be considered as Mexican in everything relating to said Company. They shall never be entitled to assert, in regard to any titles and business connected with the Company, any rights of alienage under any pretext whatsoever. They shall only have such rights and means of asserting them as the laws of the Republic grant to Mexicans, and Foreign Diplomatic Agents may consequently not intervene in any manner whatsoever."

the former. They may also reserve the exploitation of the wealth of the country and of public services for their own subjects and decline to give interests of vital national importance into the hands of the subjects of foreign Governments. And they may in the third place consider that they must not deprive their country of the advantages accruing from the investment of foreign capital and from foreign technical knowledge, and yet at the same time see to it that the presence of huge foreign interests within their boundaries does not increase their international vulnerability.

7. It is this third method which has been chosen by the Mexican Republic. It has accepted foreign co-operation in the economic development of the country, but has realized that this might expose the State to collisions and interventions of which its own history and the history of countries in similar circumstances has shown examples. In other words, the Government wanted to avoid the possibility that measures intended to promote economic prosperity might become a source of diplomatic friction or even international danger.

This aim seems completely legitimate, and does not in itself present any conflict with the acknowledged rules of international law.

How was this aim achieved in this case?

By inserting in the concession an article by which the foreign concern put itself on the same footing as national corporations, by which it undertook to consider itself as Mexican, to submit to the Mexican courts, and not to appeal to diplomatic intervention.

8. The Company accepted this stipulation for all matters whose cause and right of action should arise within Mexican territory. This covers a great deal, but does not exceed the limits of the legitimate guaranteeing of national interests because all that it means is that the fact of having granted the concession to an alien lessor, that such concern resides in the country as a result of the concession, and the operation of the concern under the terms of the concession must not create difficulties which would not have arisen had Mexico refused to accord privileges of this nature to others than Mexicans.

Onerous as this obligation may seem, it was the *conditio sine qua non* of the contract, which the Mexican Government would otherwise not have signed. It was accepted by persons who certainly realized the weight of contractual engagements. It cannot be considered as a unilateral clause, it cannot be detached from the rest of the contract; it is part of a whole and indissoluble system of rights and duties so balanced as to make it acceptable to both parties.

9. The advantages which the Company received in exchange for what it undertook were considerable; by the same deed the Government transferred to the Concessionnaire, without any consideration, ownership of all lands and supplies of water belonging to the State and required for the track, the stations, the sheds and other appurtenances. The concessionnaire was authorized for construction, operation and maintenance of the lines, to dispose of all materials afforded by the lands or the rivers owned by the State. In case ores, coal, salt or other minerals were found during the construction of the line, they were to become the property of the company.

It does not seem surprising that such far-reaching rights, including even the free disposal of national resources, were not granted to a foreign corporation until it had bound itself, in words allowing of no misunderstanding, always to act as a Mexican Company and, instead of invoking diplomatic intervention on the part of its own Government, to appeal to the means of redress open to Mexican citizens. This was the object of article 11, and it was article 11 upon

which the Mexican Government relied and which they thought would always be complied with.

Such was the contract under which the railroad was built and the concession carried out during a period of more than a quarter of a century; such the relation between the State and the Railway company. The contract may have been a source of profit or a source of loss, but it existed, it had been signed and it had to be taken as a whole.

If the Commission were to act as if article 11 had never been written, the consequence would be that one stipulation, now perhaps onerous to the claimant, would cease to exist and that all the other provisions of the contract, including those from which claimant has derived or may still derive profit, would remain in force.

The majority of the Commissioners deems that a decision leading to such a result could not be considered as based upon the principles of justice or equity.

10. In holding that under the rules of international law an alien may lawfully make a promise, as laid down in the concession, the majority of the Commission holds at the same time that no person can, by such a clause, deprive the Government of his country of its undoubted right to apply international remedies to violations of international law committed to his hurt. A Government may take a view of losses suffered by one of its subjects different to that taken by such subject himself. Where the Government is concerned, a principle higher than the mere safeguarding of the private interests of the subject who suffered the damage may be involved. For the Government the contract is *res inter alios acta*, by which its liberty of action cannot be prejudiced.

But the Commission is bound to consider the object for which it was created, the task it has to fulfil and the treaty upon which its existence is based. It has to examine and to judge the claims contemplated by the Convention. These claims bear a mixed character. They are public claims in so far as they are presented by one Government to another Government. But they are private in so far as they aim at the granting of a financial award to an individual or to a company. The award is claimed *on behalf* of a person or a corporation and, in accordance therewith, the Rules of Procedure prescribe that the Memorial shall be signed by the claimant or his attorney or otherwise clearly show that the alien who suffered the damage agrees to his Government's acting in his behalf. For this reason the action of the Government cannot be regarded as an action taken independently of the wishes or the interest of the claimant. It is an action the initiative of which rests with the claimant.

That being the case, the Commission cannot overlook the previous engagements undertaken by the claimant towards the respondent Government. A contract between them does not constitute *res inter alios acta* for the Commission. They are both, the Mexican Government and the claimant, standing before the Commission, and the majority is of opinion that no decision would be just or equitable which resulted in the practical annulment of one of the essential elements of their contractual relation.

By this contract the claimant has solemnly promised not to apply to his Government for diplomatic intervention but to resort to the municipal courts. He has waived the right upon which the claim is now presented. He has precluded himself by his contract from taking the initiative, without which his claim can have no standing before this Commission and cannot be recognizable. Quite apart from the right of the British Government, his claim is such that it cannot be pursued before a body with the jurisdiction intrusted to this Commission and circumscribed in Articles I and III of the Convention.

11. It has been argued that the view set out in the preceding paragraph conflicts with Article VI of the Convention, which provides that no claim shall be set aside or rejected on the ground that all legal remedies have not been exhausted prior to the presentation of such claim.

The Commissioners who are responsible for this decision cannot see that this provision applies to the case here dealt with.

The same argument was put forward before the General Claims Commission, Mexico and the United States, in the case quoted in section 4, and had the same strength there that it has here, because in that regard the two Conventions are identical and the difference in scope between the two clauses has no effect.

The General Claims Commission met the argument in question in the following words:

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

The majority of the Commission concurs in this opinion.

12. The question may arise whether the view expressed in this judgment does not lead to the ultimate conclusion that the Mexican Union Railway has, by signing article 11 of the concession, divested itself of its British nationality and all that it implies, to such a degree as to waive the right to appeal to its Government even in cases of violation of the rules and principles of international law.

It is obvious that there could only be grounds for this question if the Calvo Clause in this case were construed as intended to prevent the other party from applying for the diplomatic support of his Government in any circumstances whatsoever. Had that been the scope of the provision the Commissioners would unanimously have been of opinion that the clause was to be considered as null and void. Redress of internationally illegal acts and protection against breaches of international law are regarded by the Commission as being of such high importance to the community of civilized States that their preclusion would invalidate the stipulation. But the majority of the Commission cannot see that article 11 of the concession aims so far. The claimant has not, by subscribing to it, waived its undoubted right as a British corporation to apply to its Government for protection against international delinquency; what it did waive was the right to conduct itself as if not subjected to Mexican jurisdiction and as possessing no other remedies than international remedies. What the claimant promised was to apply to the courts and to resort to those means of redress which are, according to the Mexican constitution and laws, open to Mexican citizens. The contract did not take from claimant the right to apply to its Government if its resort to the Mexican tribunals or other authorities available resulted in a denial or undue delay of justice. It only took away the right to ignore them.

This was, however, just what the claimant did. It behaved as if article 11 of the concession did not exist. Although the most recent of the events upon

which the claim is based occurred in 1920 and the Convention was signed in 1926, it took no action at all. The claimant never sought redress by application to the local courts or to the National Claims Commission, which was created to adjudicate upon claims, similar to that now submitted, which has been in operation since the 17th June, 1911, and whose functions have subsequently been transferred to the Comisión Ajustadora de la Deuda Pública Interior.

If by taking the course agreed upon by both parties, the claimant would have been unable to obtain justice, no international tribunal would have denied it access, on the ground of the engagement subscribed to by it. But the claimant omitted to pursue its right by taking that course, and acted as if said course had never been indicated by the State and accepted by it, and as there can be no question of denial of justice or delay of justice, as long as justice has not been appealed to, the majority cannot regard the claimant as a victim of international delinquency.

13. The majority does not deny that one or more of the acts or omissions, alleged to have caused the damage set out in the Memorial, may in themselves constitute a breach of international law. But even if this were so, the Commissioners cannot see that it would justify the ignoring of article 11. It is one of the recognized rules of international law that the responsibility of the State under international law can only commence when the persons concerned have availed themselves of all remedies open to them under the national laws of the State in question.

In the Bases of Discussion for the Conference for the Codification of International Law, drawn up by a preparatory Committee of the League of Nations, the following request for information, addressed to the Governments, can be found (p. 137):

"Is it the case that the enforcement of the responsibility of the State under international law is subordinate to the exhaustion by the individuals concerned of the remedies afforded by the municipal law of the State whose responsibility is in question?"

Most of the Governments have answered in the affirmative, among them the British Government, which replied in the following words:

"In general the answer to point XII is in the affirmative. As was said by His Majesty's Government in Great Britain in the memorandum enclosed in a note to the United States Government, dated the 24th April, 1916:

" 'His Majesty's Government attach the utmost importance to the maintenance of the rule that when an effective mode of redress is open to individuals in the courts of a civilized country by which they can obtain adequate satisfaction for any invasion of their rights, resource must be had to the mode of redress so provided before there is any scope for diplomatic action' " (*American Journal of International Law*, 1916, Special Supplement, page 139),

and the note goes on to point out that this is the only principle which is correct in theory and which operates with justice and impartiality between the more powerful and the weaker nations.

"If a State complies with the obligations incumbent upon it as a State to provide tribunals capable of administering justice effectively, it is entitled to insist that before any claim is put forward through the diplomatic channel in respect of a matter which is within the jurisdiction of these tribunals and in which they can afford an effective remedy, the individual claimant (whether a private person or a Government) should resort to the tribunals so provided and obtain redress in this manner.

"The application of the rule is thus conditional upon the existence of adequate and effective local means of redress. Furthermore, in matters falling within the classes of cases which are within the domestic jurisdiction of the State the decisions of the national courts in cases which are within their competence are final, unless it can be established that there has been a denial of justice (see answer to point IV)."

It is this rule which made it necessary to stipulate expressly in Article VI of the Convention that no claim should be set aside or rejected on the grounds that all legal remedies had not been exhausted prior to the presentation of the claim. But the rule must apply to those claims which do not fall within the terms of the Convention because they can not be rightfully presented.

14. For the reasons developed in the preceding paragraphs the majority of the Commission holds the view:

(a) That the Anglo-Mexican Claims Convention does not override the Calvo Clause contained in article 11 of the concession.

(b) That the fact, that this article includes more than the interpretation and the execution of the contract does not bring it into conflict with international law and invalidate it.

(c) That the concession would not have been granted without incorporating the substance of article 11 therein.

(d) That article 11 must be respected as long as there has been no denial of justice, undue delay of justice or other international delinquency.

(e) That the claimant never made any attempt to comply with the terms of article 11 and that, therefore, there can be no question of denial of justice nor of undue delay of justice.

(f) That it is one of the accepted rules of international law that the responsibility of a State under international law is subordinated to the exhaustion of local remedies.

15. The Commission decides that the case as presented is not within its jurisdiction. The motion to dismiss is sustained and the case is hereby dismissed without prejudice to the right of the claimant to pursue his remedies elsewhere.

Dissenting opinion of British Commissioner

1. The question of the legality of what is known as the Calvo Clause has been long discussed by international lawyers and a number of rather conflicting decisions have been given upon it by various international commissions, which decisions have been cited and debated before us by the Agents of both sides. It is, however, not necessary for me to refer to these decisions (except to remark that there is not one of them which has approved so extensive a clause as the one in this case), for the whole present legal view on the subject has been admirably set out in the lucid and fair judgment in the case of the *North-American Dredging Company of Texas*, pronounced by Dr. Van Vollenhoven, President of the General Claims Commission of the United States and Mexico, and concurred in by both his colleagues. See *Report*, Vol. 1, pages 21 to 34.

Not only would this opinion be worthy of the highest respect in itself, but the Agents of both parties have specifically stated before us that they agree in general with what is laid down therein as being a correct statement of the law in the matter. Moreover, the British Government has replied to the question put by the League of Nations on the subject of the codification of international law as follows:

Question.—"What are the conditions which must be fulfilled when the individual concerned has contracted not to have recourse to the diplomatic remedy?"

Reply of Great Britain.—"His Majesty's Government in Great Britain accept as good law and are content to be guided by the decision of the Claims Commission between the United States of America and Mexico in the case of the North-American Dredging Company of Texas of the 31st March, 1926, printed in the volume of the *Opinions of the Commissioners*, page 21. It is laid down in this 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."

The Commission, therefore, has no hesitation in accepting the decision referred to above as a guide to the determination of the present motion to dismiss, and it only remains to apply the principles there laid down to the facts of the present case.

2. The first point raised by the British Agency was that the effect of article 11 of the contract was cancelled or overruled by Article 6 of the Convention, which provides that the Commission shall not set aside or reject any claim on the grounds that all legal remedies have not been exhausted prior to the presentation of such claim.

I am not prepared to dissent from the view held by my colleagues that this defence to the motion to dismiss fails. It is quite true that a stipulation in a contract between the Mexican Government and a private party could be overruled by an agreement between the Mexican Government and the Government of which the private party is a citizen. But I think that it would have to be done in express terms. I agree with the opinion of the Commissioners in the Texas Dredging Company's case quoted in paragraph 11 of the majority opinion in this case, that the object of Article 6 was to relieve claimants entitled to present their claims to the commission from a general principle of international law, but not to grant jurisdiction to the Commission in respect of cases which they would otherwise not have power to hear. If the latter had been the intention of the British and Mexican Governments it would have been easy to add to Article 6 some such phrase as "Even when the claimant has expressly agreed to have recourse to such remedies." When a claim can properly be presented to the Commission in virtue of Article 3, full effect must be given to Article 6, but this latter would not render a claim cognizable which the Commission could not otherwise entertain.

3. Admitting, therefore, in principle, the validity of a clause of the nature of that contained in the contract of the present claimants, we must next consider the scope of the particular clause in question and the nature of the claim. Throughout the decision in the Texas Dredging Company's case and particularly in paragraphs 11, 22 and 23, it is stated that no general rule can be laid down as to the validity or invalidity of a clause partaking of the nature of a

Calvo Clause. It is the duty of the Commission to endeavour to draw a reasonable line between the sovereign right of national jurisdiction on the one hand and the sovereign right of national protection of citizens on the other. Each case involving application of a Calvo Clause must be considered and decided on its merits.

4. If a distinction is to be drawn between the Texas Dredging Company's case and this one, it can only be on one of two grounds—

(1) The difference in phraseology between the clauses in the two contracts; and

(2) The difference between the grounds on which the claims are based.

Dealing first with (1) it is necessary carefully to compare the two clauses. That in the Texas Company's case runs 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 favour 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."

In the present case the clause is as follows: [1]

"The Company shall always be Mexican, even though some or all of its members may be foreigners and it shall be exclusively subject to the jurisdiction of the courts of the Republic of Mexico in all matters whose cause or action may take place within the territory of the said Republic. The Company itself and all foreigners and successors of such foreigners, having an interest in its business either as shareholders, employees or in any other capacity, shall be considered as Mexicans in everything relating to the Company. They shall never be allowed to assert, with respect to the securities or business connected with the Company, rights of foreign status, under any pretext whatever. They shall only have the rights and means of asserting them which the laws of the Republic grant to Mexicans, and in consequence foreign diplomatic agents will not be allowed to intervene in any manner."

A careful comparison of the two clauses shows that the latter is much wider and more stringent than the former. The words "In any matter related to this contract" and "In all matters concerning the execution of such work and the fulfilment of this contract", on which Dr. Van Vollenhoven lays much stress in paragraphs 13 and 14 of his opinion, are not to be found in the clause in this case. They are replaced by the phrases "In everything relating to the Company" and "With respect to the securities and business connected with the Company", while, most important of all, the prohibition of intervention by foreign diplomatic agents is not confined as in the earlier case to "Any matter relating to the contract", but is absolutely general.

5. I am quite unable to agree with the opinion of the majority of the Commission expressed in their paragraph 6, that there is no very marked and

[1] The translation is mine and differs slightly both from that in the copy of the contract presented by the British Agent and that contained in the Mexican motion to dismiss, which do not entirely agree with each other. (Note by British Commissioner.)

essential divergence between the two clauses, and I also find myself bound to dissent from the view expressed in paragraph 12 of the majority opinion as to the intention of the Calvo Clause in this case.

It appears to me impossible to doubt, from the terms of article 11 of the contract, that it was the intention of the Mexican Government to prevent the claimant's Government from intervening diplomatically or otherwise in any case in which the Company might have suffered loss in relation to its existence, business or property, even though such loss had arisen through a breach of the rules and principles of international law. This is precisely the object which, in Dr. Van Vollenhoven's opinion, as stated in paragraph 22, would render the provision void. The same point is still more emphasized in Mr. Commissioner Parker's concurring opinion and indeed is admitted by my colleagues in their paragraph 12.

I am therefore forced inevitably to the conclusion that article 11 of the Mexican Union Railway Company's contract is repugnant to the general principles of international law and is void *ab initio*. The Mexican Government had only itself to blame for this result when it insisted on the insertion into the contract of a provision, the object of which could not be justified under international law.

This conclusion is in some ways unfortunate, and it is doubtless this consideration which induced the United States and Mexican General Commission to make the suggestion contained in paragraph 17 of their opinion, of which the intention evidently was that a sort of standard clause should be drafted "Frankly expressing its purpose with all necessary limitations and restraints", so that it could only be in the case of a departure from such a clause that a difficulty would arise. With this desire I am in hearty sympathy.

6. But I do not wish to base my opinion solely on the considerations set out in the preceding paragraph. It appears to me to be the only conclusion consistent with the strict rules of international law. But in our decisions we are bound by the terms of the Convention and under it the Mexican Government has agreed to accept liability beyond that strictly laid down by international law in respect of all claims justified by the principles of justice and equity. It may therefore, I think, fairly expect to be treated in the same way and it seems to me consistent with these principles that when a particular clause in a contract purports to bind a party in a manner which would be illegal, the Commission need not consider such a provision absolutely void, but might hold that it still retains its force to the extent of its legal limits.

I should therefore be prepared to recognize the clause as binding the parties in the manner and to the extent laid down in paragraphs 15 and 20 of Dr. Van Vollenhoven's opinion, i.e., the Mexican Union Railway Company would possess only the same rights as a Mexican Company in all matters arising from the fulfilment and interpretation of the contract and the execution of the work thereunder, and the British Government would only be entitled to intervene in the case of denial of justice, delay of justice, gross injustice or any other violation of international law.

7. Having laid down these principles, it remains to apply them to the facts of the present claim. When confronted with propositions *(c)* and *(d)* of paragraph 15 of the decision in the Texas Dredging Company's case, the Mexican Agent admitted that when a Calvo Clause existed, a foreign Power might be entitled to intervene in the case of a denial of justice, but he contended that where an appropriate tribunal existed (and the Mexican Government has set up a National Commission with power to deal with claims of the nature of this one whether put forward by Mexicans or foreigners), no breach of inter-

national law could exist until the claimant had applied to the tribunal in question and failed to obtain justice there.

This somewhat novel view of international law I am unable to accept. It appears to confuse principles of law with methods of procedure. Both international law authors and commissions have given many examples of international wrongs, such as failure to protect lives and property of foreigners from violence, arbitrary proceedings of public authorities, illegal acts of public officials, &c., which constitute breaches of international law having no connexion with denial of justice, which may constitute a breach in itself, as, for example, if a court refused to hear and determine a claim of a foreigner against a local citizen.

It is true that in any of the above cases of international wrong it is laid down that where "adequate and effective local means of redress exist" the claimant must have recourse to them before asking his Government to put forward his claim through the diplomatic channel. See answer of His Majesty's Government to point 12 of the questions in The Hague Conference on the codification of international law. But this does not mean that the wrong does not exist *ab initio*.

The theory also is quite inconsistent with the decision in the Texas Dredging Company case, which refers, in paragraph 20 and elsewhere, to denials of justice and *any other* violation of international law, and states definitely in paragraph 23 that the Commission will take jurisdiction "where a claim is based on an alleged violation of any rule or principle of international law." The adoption of the Mexican theory would in fact render any form of the Calvo Clause legal however extensive, and that is precisely what Dr. Van Vollenhoven's decision declares must not be allowed.

8. This brings me to the only remaining point of divergence between my view and that of the majority of the Commission. They admit in paragraph 13 that some of the acts and omissions alleged to have caused the damage set out in the Memorial might in themselves constitute a breach of international law. This fact in itself appears to me to justify the intervention of the British Government and its presentation of this claim to the Commission. My colleagues, however, still consider that their jurisdiction is ousted by the failure of the claimants to avail themselves of the remedies open to them under the national law of the Republic of Mexico. To this view Article 6 of the Convention seems to me a complete answer. As stated above in paragraph 2, this Article cannot be used to grant jurisdiction to the Commission in respect of claims which could not properly be presented to them. But once it has been admitted that the British Government is entitled to espouse a particular claim and present it to the Commission, the article is intended to prevent a revival of the argument of the Mexican Government based on the admitted general principle of international law. This is evidently the meaning and intention of paragraph 21 of the decision in the Texas Dredging Company's case.

9. There is also a matter of practical importance that should be referred to. It is admitted by all parties that the rule that local means of redress must be utilized, whether arising from express contract or from the general principles of international law, is conditional upon their being adequate and effective. In the *Robert E. Brown* case it was stated that "a claimant in a foreign State is not required to exhaust justice in such State when there is no justice to exhaust". *(Ralston*, page 88, paragraph 117. Moore 3129.) Consequently this and every other international commission would have to assume the odious task of deciding whether the machinery set up in the defendant State was really capable of remedying the wrong done and whether any

particular decision could be reconciled with the principles of international law. A procedure of this kind would inevitably cause far more international friction than the assumption of jurisdiction by the Commission in respect of the claim itself. In this case no evidence has been offered as to whether the National Commission mentioned in paragraph 7 above during the eighteen years of its existence, has provided claimants with adequate and effective redress.

10. The conclusion, therefore, at which I arrive is that this claim being based on the violation of certain recognized principles of international law, the British Government is entitled to present it to the Commission and the latter has jurisdiction to determine it, provided the losses claimed do not arise solely from the fulfilment or interpretation of the contract or the execution of the work thereunder.

11. This brings us to the consideration of question (2), mentioned in paragraph 4 above, and again a very wide difference appears between the facts alleged in this case and those in that of the *Texas Dredging Company*.

In that case the claim was for breaches of the contract itself and the dispute was concerned with the interpretation of certain articles of the contract. Here the claim is chiefly based on tortious acts of revolutionary forces; on wilful destruction of the Company's property; on assaults on its employees and passengers; on commandeering of trains, &c. It appears to me impossible to consider these to be matters arising out of the execution of the contract. They cannot have been in the anticipation of the parties when they drafted the clause during the peaceful days of President Porfirio Díaz.

It is, of course, necessary to examine the facts and decide whether or not the allegations are proved before we can say whether the condition mentioned at the end of the preceding paragraph does or does not exist.

12. I cannot help feeling—though I say it with all respect—that my colleagues have been too much inflenced by what may be called the ethical aspect of the matter. They point out in paragraphs 8 and 9 of their opinion that it would be contrary to the principles of justice and equity to allow a claimant to appear before the Commission and ask for an award when he has definitely waived such right and has obtained a valuable concession by such waiver. This view is most reasonable and even laudable, but, in deciding this motion to dismiss, the Commission is dealing with an important principle of abstract international law affecting the rights of the Sovereign States who are the parties appearing before it and it seems to me, therefore, that we should not be influenced by the considerations mentioned above.

13. There is one other matter to which I feel it my duty to refer. 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. 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 the 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.

14. The majority of the Commission have summed up their views in paragraph 14 of their opinion, and it may be convenient similarly to summarize the points on which I agree with them or dissent from them.

I agree with proposition *(a)* that Article 6 of the Convention does not cancel article 11 of the contract.

I also agree with propositions *(c)* and *(e)*, which are questions of fact.

I disagree with proposition *(b)* and consider that the terms of article 11 of the contract are repugnant to the principles of international law.

Alternatively, I consider that article 11 should be respected only in the manner and to the limits indicated in paragraph 6 of my opinion, and to that extent I disagree with proposition *(d)*.

I agree with the general proposition stated in *(b)*, but consider that it has no application in this case in virtue of Article 6 of the Convention.

Conclusion

15. I am of opinion that the Commission has jurisdiction to decide any part of the claim which does not arise from the fulfilment and the interpretation of the contract or the execution of the work thereunder, and does not, therefore, accept the motion to dismiss, but will examine the merits of the claim on the basis laid down in this opinion.