

**REPORTS OF INTERNATIONAL
ARBITRAL AWARDS**

**RECUEIL DES SENTENCES
ARBITRALES**

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Mexico (United States of America/Mexico)**

Award rendered by Don Vicente G. Quesada, envoy extraordinary and minister plenipotentiary of the
Argentine Republic, on 19 November 1897

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PART XVI

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MESSENGER CONTRE LE GOUVERNEMENT DU MEXIQUE (ÉTATS-
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Challenge to the legality of an American deputy sheriff's arrest in Mexican territory—compensation for the arrest should be sought before Mexican courts—the failure to bring criminal and civil actions before the courts of Mexico implies renunciation of the right to ask for an indemnity.

Indemnification of individuals for harm caused by agents of another State—personal responsibility of agents acting beyond their powers—legal right of harmed individuals to appeal for compensation through the executive or judicial channels—purely moral responsibility of the State—responsibility can be made direct and effective only in case of complicity or denial of justice by that State.

Res judicata—the decision of Mexican courts is valid in the territory of the United States—no diplomatic claim has the power to revise the decision—statements of witnesses made in foreign countries and not guaranteed by procedures in courts of justice cannot be accepted as having the extraterritorial legal force to annul the legal validity of *res judicata*—incompetence of witnesses with interest in the case.

Diplomatic claims—only two categories of cases can form the basis of international claims on the ground of an injury done to a citizen—case of injury done by so high an authority that no remedy is provided in the laws of the State—case where existing remedy has been tried and has produced no effect—no ground for an international claim if no sovereign and irresponsible action by the supreme power nor any denial of justice occurred—established precedents in the United States to reject diplomatic claims on behalf of foreigners demanding indemnity should now be enforced against the United States.

* Reproduced from *Foreign Relations of the United States*, 1897, p. 382.

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Contestation de la légalité d'une arrestation sur territoire mexicain d'un sheriff adjoint américain—l'indemnisation de cette arrestation doit être poursuivie devant les tribunaux mexicains—l'omission d'intenter des actions civiles et pénales devant les tribunaux du Mexique équivaut à une renonciation au droit de demander une indemnité.

Indemnisation d'individus pour des préjudices causés par les agents d'un autre État—responsabilité personnelle des représentants du gouvernement ayant agi au-delà de leurs compétences—droit des individus lésés de faire appel par les voies exécutives ou judiciaires—responsabilité purement morale de l'État—responsabilité directe et effective uniquement en cas de complicité ou de déni de justice par cet État.

Res judicata—la décision des tribunaux mexicains est valide sur le territoire des États-Unis—aucune réclamation diplomatique n'est à même de réviser cette décision—les déclarations de témoins faites à l'étranger et ne bénéficiant pas de la garantie des procédures judiciaires ne peuvent être acceptées comme produisant l'effet juridique extraterritorial d'annuler la validité juridique de la *res judicata*—incompétence des témoins ayant des intérêts dans l'affaire.

Réclamations diplomatiques—seules deux catégories d'affaires peuvent former la base de réclamations internationales en raison d'une violation commise à l'encontre d'un citoyen—cas d'un dommage infligé par une autorité si élevée que la législation de l'État ne prévoit aucun recours—cas dans lequel un recours a été tenté, sans produire de résultat—aucune base pour une réclamation internationale si aucune action souveraine et irresponsable n'a été commise par l'autorité suprême, et si aucun déni de justice ne s'est produit—les précédents établis par les États-Unis de rejeter les réclamations diplomatiques au nom d'étrangers demandant une indemnité doivent leur être opposés dans le cas présent.

I, Don Vicente G. Quesada, envoy extraordinary and minister plenipotentiary of the Argentine Republic, having been appointed sole arbitrator by the high Governments of the United States of America and the United States of Mexico, as appears from the agreement concluded in the city of Washington on the 2d day of March, 1897, by their representatives, Hon. Richard Olney, Secretary of State of the United States of America, and Don Matias Romero, envoy extraordinary and minister plenipotentiary of the United States of Mexico, by which agreement the high contracting parties define the matter which is to be submitted to arbitration and the course to be pursued by the arbitrator in the discharge of his functions in passing a final decision concerning the claims presented by Mr. Charles Oberlander and Mrs. Barbara M. Messinger against the Government of Mexico through the Secretary of State of the United States of America and through the diplomatic channel:

Being actuated by a sincere desire to acknowledge, by an impartial and unbiased decision, the great honor that has been conferred upon me;

Having duly examined and carefully studied the documents and statements which have been laid before me by the legations of those high Governments at this capital which is the place designated for the rendering of my award within the time fixed, which time has been extended by agreement of the high contracting parties;

Whereas it appears, as regards the facts:

That Charles Oberlander, in the memorial which he addressed to the President of the United States of America on the 10th of January, 1893, presented as a document in support of his claim, among others, the statement made by him before a notary public of the United States of America, whereby he confesses that his object, when he crossed over into the territory of Mexico, was to procure evidence for use in a criminal case, *i.e.*, that of *Crossthwaite v. The Mexican Cruz*, who was charged with kidnapping, and consequently for the furtherance of a private interest;

That he was arrested on the 20th of May, 1892, at Tijuana, in Mexican territory, as is admitted by Mr. Ryan, United States minister in Mexico by a telegram addressed to Mr. Blaine, Secretary of State, on the 24th of May of that year;

That the vice-consul of the United States at Ensenada, Mexico, under date of May 27 of the aforesaid year, in an official note, reproduces the telegram sent by him to the United States minister in Mexico, informing him that Oberlander has been arrested in Mexican territory, without any doubt whatever, which assertions are of an official and conclusive character;

That Oberlander held, at that time, the office of deputy sheriff at San Diego, and was a police officer of Upper California, and had in his pocket the warrant of arrest issued by the township judge in the case of the Mexican Donaciano Cruz, who was accused by the very person in whose interest Oberlander had gone to Mexico in quest of evidence;

That he was arrested by the Mexican authorities in Mexican territory, for having endeavored, it is said, to effect the arrest of Cruz, in obedience to the warrant of which he was the bearer;

That when he was arrested and searched by the territorial authorities, the aforesaid warrant of arrest; a pistol and cartridges were found in his possession;

That the nickel handcuffs which are put upon the hands of prisoners, both in Mexico and in some States of the American Union, are used by police officers to secure persons under arrest, but in nowise for the purpose of torturing them;

That Oberlander, if he thought his arrest illegal, ought to have brought a criminal and civil charge before the territorial courts, asking for the punishment of the guilty parties, and for indemnity on account of the injuries done him, having failed to do which, he renounced his right;

That instead of taking legal steps before the courts of the country, he admitted, in the declaration made by him at Tijuana May 25, 1892, before the Mexican judge, which declaration, in view of the nature of the facts, was a charge or

accusation, "that on the night of Saturday, between 7 and 8 o'clock, he sent a man named Melon Santos, whom he did not know, and who was acting as his custodian or guard, to buy some cigars, he remaining with a Frenchman who also guarded him, and availing himself of that opportunity he ran out of the room, giving the Frenchman a push and thus making his escape toward the line; that owing to the precipitancy of his flight he fell on the road and received the scratches which he has on his body." Second, as to his capture, he said "that they seized him and brought him back under arrest;" "that they maltreated him in prison;" "that in addition to the aforesaid scratches he hit his head in trying to get out of a window of the room in which he was imprisoned;"

That the escape by means of force and violence used against the guard set over him by the judicial authorities of Mexico constitutes in itself an additional crime which aggravates the offense for which he was arrested, even if his arrest was originally unjust and illegal.

That this declaration of Oberlander was made subsequently to the issuance of the permit to absent himself, which was given him by the judge of first instance of Ensenada, on his mere promise that he would return to make his declaration, he crossing to the Territory of California, where he remained for twenty-four hours, and thence returned to that of Mexico, as he had promised to do, without compulsion or fears that his life would be threatened by those who arrested him, and made his declaration before the territorial judge;

That a man who was at liberty to make his declaration before the territorial judge and who could do so in safety was also at liberty to bring criminal and civil action against those who had arrested him;

That before the territorial judge, who was the only magistrate competent to take cognizance of and decide concerning the arrest and the matters connected therewith, he did not specify the acts of violence to which he had been subjected, or state who had tortured him, as he has since endeavored to show by unofficial specific charges, or designating any persons, he rendered it impossible to elicit the truth and to punish the guilty parties, if any such there were;

That he claims that, on the night of his escape, he reached the territory of the United States of America, and that there, in Messenger's house, "his pursuers entered and took him prisoner," which facts it was incumbent upon him to prove (and this proof was admissible and legal before the Mexican judge only who had charge of the case against his captors), since there was no impossibility or force that prevented him from doing so;

That before said judge, and in the same declaration which recognizes as "the true declaration" because "he could tell the truth without danger." (Mr. Olney to Minister Ransom, November 23, 1895), the aforesaid Oberlander adds, "that on the way they took him in a carriage and he suffered no ill treatment;"

That he stated, in the same instrument, "that Messenger's wife did not see the way in which they took him;"

That the witness Joseph Messenger is not a competent witness, owing to the interest which he has in the case, since his wife and he, as the owners of the house, claim an indemnity of \$50,000; that his statement is liable to exception for that legal reason, according to the laws of Mexico, and that it is, moreover, of no value, since he states "that he does not know in what way Oberlander was arrested, or for what reason;"

That the witness Mrs. Messie Mosser says that "Oberlander spoke with a son of deponent at the door; that she does not know at what hour or in what way the aforesaid Oberlander was arrested."

That the witness Sirl states "that he saw some men nearby, whom he did not know, coming down the hill; that he saw their figures only; that he does not know how the occurrence took place or in what way Oberlander was arrested."

That the judge of Ensenada de Todos Santos thought that there was no reason why Oberlander should be detained any longer, and from the evidence obtained on the occasion of the preliminary examination he ordered the preliminary arrest of the persons who were charged with arresting Oberlander in United States territory, turning them over to the district judge of Lower California, as being presumably guilty of the offense against the external security of Mexico.

That a warrant of arrest is, in its nature, a document that is not final, and that an appeal may be had from it.

That, it having been affirmed by the circuit court of Mexico, the accused parties availed themselves of the right granted them by the laws of the country to apply for release on bail, while the criminal case was continued;

That, the case being continued in the second district court of Lower California, the judge ordered a discontinuance of proceedings in the case of the first one of those accused, and acquitted the four others;

That this decision was affirmed by the circuit court of Mexico, after the proceedings had been held which are provided for by the law of the country;

That, Oberlander being charged by Donaciano Cruz with an attempt to kidnap in Mexican territory, and Cruz and others being charged by Oberlander with kidnaping in the territory of the United States of America, the territorial judge received the evidence in both cases, the same Oberlander making his statement or charge, and the judge decided and enforced the territorial law according to what had been alleged and proved, and this decision was affirmed and remained valid;

That, finally, it is alleged on the part of Mexico that Charles Oberlander was arrested in pursuance of a judicial warrant at Brewerton, eight years ago, being charged with the crime of robbery, whereupon he fled to California;

That he was afterwards accused of endeavoring to obtain the consent of two young girls named, respectively, Katie Kehse and Louisa Hawing, for an

immoral purpose, and of outraging a girl named Nellie Dagwell, all of whom were inmates of the orphan asylum at Mount Tabor;

That in that criminal case, application was made judicially for the appointment of a commission of physicians, it being supposed that Oberlander had lost his reason;

That Judge Row, of New York, appointed three physicians, and Drs. Kauffman and Walsh, as witnesses, stated that they had known Oberlander since his childhood; that he was not in his right mind, and that his conduct had always been that of a person whose mental faculties were unsound;

That in virtue of the evidence furnished in the aforesaid case, the district attorney and Oberlander's counsel held that Oberlander's insanity began in his childhood, it having been observed while he attended school, and having afterwards continued without interruption; that the form of insanity from which he suffered was the persecution monomania;

That the conclusions reached by the experts in their report were that "Oberlander is suffering from a mental disease which is specially developed in persons who inherit a disordered mind, and which continues during their lifetime, it being known as a form of dementia called paranoia;"

That, in view of these antecedents, Judge Row declared that Oberlander was not responsible for the offenses with which he was charged, and ordered that he should be removed to the insane asylum at Utica, and not to the asylum for insane criminals at Matteawan.

Whereas it appears, in respect to Mrs. Barbara M. Messenger, that, by a note from the United States legation in Mexico, bearing date of April 9, 1895, addressed by Mr. Butler to the minister of foreign relations of the United States of Mexico, it is positively declared that "the Department of State is prepared to admit the correctness of the opinion expressed by the Mexican Government that, as to the illness of Mrs. Messenger, it was caused not so much by the forcible entrance of her house as it was by her own conduct in pursuing the kidnapers, and that she is therefore probably not entitled to the large indemnity that she claims; but it (the Department of State) considers it certain that the fact that her house, or that of her husband, was forcibly entered, and that her guest was removed therefrom by force, undoubtedly entitles them to demand an adequate indemnity."

That, in view of the foregoing limitation of the demand, it is not pertinent to examine the statements made with regard to Mrs. Messenger's alleged illness;

That, in the statement made by the department of foreign relations of Mexico, July 15, 1895, and officially sent to the United States legation with a note of July 16, of the same year, it is said, in connection with this claim :

As regards Barbara Messenger's demand, it is a subject of satisfaction that the United States Government has agreed with that of Mexico that the illness of this woman was caused not so much by the alleged forcible entrance of her house as it was by her own conduct in pursuing the so-called kidnapers,

and that she is consequently not entitled to the indemnity which she claims. It then states, however, that the fact that her house or that of her husband was forcibly entered and her guest removed therefrom by force entitled them to demand an adequate indemnity;

That the Government of Mexico denies that the house was forcibly entered, and therefore this fact, which is differently stated by the two high parties, is fundamental, and should be juridically appreciated in the award;

That Mr. Ransom, United States minister in Mexico, in a note addressed to Mr. Mariscal, minister of foreign relations of the United States of Mexico, dated December 11, 1895, positively states that the demand of his Government is based upon the aforesaid note of Mr. Butler, and, that sent by him with its inclosure; consequently, the basis of the two claims, on the merits of which the award is to be pronounced, is clearly established;

That it is a doctrine of international law that: "within the jurisdictional limits of every sovereign State, the representatives of authority are personally responsible to the extent established by the internal public law of each State. When they fail to perform their duty by going beyond their powers or violating the law they create, according to the circumstances, for those whose rights have been disregarded, a legal right of appeal through the executive or judicial channels; but, with respect to third parties, whether native or foreign, the responsibility of the Government that has appointed them is a purely moral one, and can only be made direct and effective in case of complicity or denial of justice." (Calvo, International Law, Vol. III, p. 120.)

That in the present case the demanding Government has declared "that it has no complaint to make of the proceedings taken against those who arrested Oberlander, if such proceedings are considered as a purely domestic matter" (Mr. Richard Olney, Secretary of State, to Mr. Ransom, United States minister in Mexico, Washington, Nov. 30, 1895); that, in view of this recognition of the demanding Government, there was no complicity or denial of justice, and therefore the decision of the territorial judges which declares that it has not been shown that Oberlander's arrest took place in territory belonging to the United States, was legal and valid in Mexican territory, in virtue of such being the legal truth, against which neither the executive nor the legislative branch of a government can take action without committing an outrage upon the independence of the judicial branch;

That, although the demanding government denies that the claim of *res judicata*, raised by that against which the demand is made, has no extraterritorial power to exclude a civil action, in the present case it is not questioned that that decision of the Mexican courts is valid in the territory of the United States, but, on the contrary, that there is no diplomatic claim having annulling power to revise that decision and to claim, diplomatically, that, within the sphere of the sovereignty of the courts, information must be accepted that is designed to overthrow the juridical effect of the *res judicata*, and to dispose of the taxes paid by the inhabitants (which is a "domestic matter" in its very nature) for the

benefit of foreigners who have been unwilling, through bad faith, or owing to ignorance or what they consider expediency, to have recourse to the courts of the country in order to assert their alleged rights, as it was their duty to do;

That, it would be offensive to the independence and sovereignty of nations if the statements of witnesses made before notaries in a foreign country, without being subject to any of the guaranties and safeguards established by the laws of procedure in courts of justice, such statements being freely produced at different times, the husband declaring in favor his wife, the son in favor of his mother, the servant of her mistress, and the interested parties themselves in their own favor, could be presented, diplomatically, as a basis to give them extra-territorial legal force, annulling the legal validity of the *res judicata*;

That, it is a doctrine of international law "that all that other nations can ask of a government is that it shall show that it is actuated by a deep feeling of justice and impartiality; that it shall remind its subjects, by all the means in its power, of the respect which they owe to international obligations, and that it shall not leave unpunished such transgressions as may have been committed by them; finally, that it shall act in everything with good faith and in accordance with the precepts of natural law; to go farther than this would be to raise a private injury to the height of a public offense, and to impute to a whole nation an offense committed by one of its members"; (Calvo, *op. cit.*, p. 134, Vol. III);

That, it is a doctrine of international law "that the moral bounds which unite nations are of the same order, and imply an absolute character of solidarity; a State could legitimately neither claim among others a privileged situation which it was not prepared to allow foreigners to enjoy, nor could it claim for its own subjects advantages greater than those allowed by the common law of the inhabitants of the country" (*op. cit.*);

That the high contracting parties have recognized as principles of international law those clearly stated by the mixed commission which sat at Washington in pursuance of the treaty of July 4, 1868, which, in deciding the case of the town (people?) of Cenecu, laid down as a doctrine of conventional law between the United States and Mexico the following:

The following matters can alone form the basis of a claim of one nation against another: Offenses or acts of injustice committed by the supreme authority of a country against which no recourse can be had to any other authority of the same country; or such as, having been originally committed by subordinate authorities, have not been made good by the superior authority whose duty it was to do so when so requested, in the manner provided by the local laws. The cases in which an injury done to a citizen of a country may furnish grounds for an international claim are, then, reduced to two categories: either the injury has been done by so high an authority that there is no remedy provided in the laws of the country to furnish redress for its acts, or to prevent the damage that may arise therefrom; or the remedy exists, it has been tried and has produced no effect, because those who ought to correct the error affirm it or refuse to correct

it, thereby making it irremediable. Where there has been no sovereign and irresponsible action in the country of the supreme power, nor any denial of the justice for which application has been diligently made, there is no ground for an international claim.

That, in the present case, both Oberlander, who complained of the act by a statement made before the territorial judge, and Mrs. Messenger, whose husband made, freely and spontaneously, a statement before the same judge, did not bring the criminal and civil actions which they had a right to bring before the courts of the country, but had recourse to diplomacy without any good cause to do so, and without having any privilege or right to claim that exceptional proceedings should be taken in their cases, in violation of the doctrines of international law above quoted;

That the demanding Government has established precedents in this matter by rejecting the claims of foreigners who demanded indemnity, being protected and supported by a diplomatic claim, as appears in the case of President Cleveland in his message to Congress of May 6, 1886, relative to the claims presented by the legation of Great China. Mr. Cleveland refused to accept diplomatic intervention, although he admitted that "scandalous occurrences had taken place at Rock Springs, in Wyoming Territory," and added that the facts in evidence were: "That a number of Chinese subjects in September last (1885) were murdered at Rock Springs, that many others were wounded, and that all were robbed of their property, after the unfortunate survivors had been driven from their homes;"

That in that document President Cleveland declared that the United States Government was not under obligations to pay an indemnity for the losses caused by these crimes, thus disregarding the claim of the Chinese legation;

That the words of President Cleveland in his message are clear and decisive, where he says:

When the Chinese minister, in virtue of his instructions, shall make these the basis of an appeal to the principles and convictions of humanity, there is no ground for any redress. But when he goes further, and, taking as a precedent the action of the Chinese Government in past cases, in which the property of American citizens in China has been injured, maintains that there is a reciprocal obligation on the part of the United States to indemnify the Chinese subjects who were injured at Rock Springs, it becomes necessary to refute this argument, and most emphatically to deny the conclusions which the minister seeks to reach with respect to the existence of similar responsibility and to the right of the Chinese Government to insist upon it.

That, in view of what has been officially stated by the President of the United States, and in the foregoing considerations, that is the doctrine of international law which should be enforced in the present case; on these grounds, finally deciding;

I declare that the Government of the United States of Mexico is under no obligation to pay indemnity of any kind to Mr. Charles Oberlander or to Mrs. Barbara M. Messenger.

Done at Madrid, this 19th day of November, 1897, in two copies, the contents of which are the same.

Vicente G. Quesada