

**REPORTS OF INTERNATIONAL
ARBITRAL AWARDS**

**RECUEIL DES SENTENCES
ARBITRALES**

H. G. Venable (U.S.A.) v. United Mexican States

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3. The other three orders were made payable to the *Banco Germánico de la América del Sur*, and were indorsed to The Davidson Co., S. A. In view of the uncertainty in the record with respect to the circumstances surrounding the purchase of these orders, I am of the opinion that no award should be made in favor of the claimant for the value which they represent. They are mentioned in a long list of orders contained in a letter sent by the *Banco Germánico de la América del Sur* to Davidson in which the latter is notified that the orders listed could not be collected. The necessity for certainty in the evidence in a case of this character was discussed in connection with the decision of the Commission in the case of *John A. McPherson*, Docket No. 126.¹ It would seem that it should have been possible for the claimant to produce evidence of his relations with Davidson and with the *Banco Germánico de la América del Sur* such as copies of communications establishing the relationship of agency, copies of instructions by the principal to the parties acting for him, and certified copies of entries in the books of any or all of the parties to the transactions in question which might have served to clarify the important point which is presented to the Commission.

Van Vollenhoven, Presiding Commissioner :

I concur in Commissioner Nielsen's opinion.

Fernández MacGregor, Commissioner:

I concur in Commissioner Nielsen's opinion.

Decision

The Commission decides (1) that the claim must be disallowed with respect to the three money orders issued in the name of the *Banco Germánico de la América del Sur* of Mexico City, totaling the amount of 590 pesos; and (2) that with respect to the three other money orders the Government of the United Mexican States shall pay to the Government of the United States of America on behalf of George W. Hopkins the total amount of the orders, namely, \$211.06 (two hundred and eleven dollars and six cents) with interest at the rate of six per centum per annum from June 6, 1914, to the date on which the last award is rendered by the Commission.

H. G. VENABLE (U.S.A.) *v.* UNITED MEXICAN STATES.

(July 8, 1927, concurring opinion of American Commissioner computing damages in a different amount, July 8, 1927, concurring opinion of Mexican Commissioner, July 8, 1927. Pages 331-392.)

INTERFERENCE WITH CONTRACTUAL RELATIONS.—WRONGFUL DETENTION OF PROPERTY.—RESPONSIBILITY FOR ACTS OF RAILWAY SUPERINTENDENT.—PROXIMATE CAUSE. The National Railways of Mexico, under government control, granted the use of its tracks to four locomotives owned by Illinois Central Railroad Company and leased to two American companies, of one of which claimant was president. Superintendent of said National Railways of Mexico by wire ordered that such locomotives

¹ See page 218.

be not permitted to leave Mexico, thereby preventing their return to owner in accordance with provisions of lease. Such locomotives thereafter remained in Mexico and became substantially valueless, despite efforts of claimant to procure their return. *Held*, respondent Government was responsible for such losses and damages as were an immediate and direct result of superintendent's order.

DETENTION OF PROPERTY NOT A PART OF BANKRUPTCY ESTATE.—INTERNATIONAL STANDARD. Facts *held* not sufficient to establish a failure to meet international standards when locomotive engines not belonging to debtor were attached for debts.

RESPONSIBILITY FOR CARE OF PROPERTY IN CUSTODY OF BANKRUPTCY COURT OR OFFICIALS.—OBLIGATION TO RELEASE PROPERTY NOT PART OF BANKRUPTCY ESTATE. When it was apparent to bankruptcy court and officials that property in their custody was rapidly deteriorating through theft, complete inaction on the part of the court will entrain the responsibility of respondent Government.

MEASURE OF DAMAGES, INDIRECT RESPONSIBILITY. Where Mexican court and railway officials stood passively by while railway locomotives leased by claimant's company were being dismantled by thieves, resulting in their destruction, respondent Government will not be held accountable for full value of each engine thus destroyed, since engines were not in its personal custody, but only for a lesser sum, since respondent Government was only indirectly responsible.

RAILWAY COLLISION.—RESPONSIBILITY FOR LOSSES SUFFERED DURING OPERATION OF TRAINS BY NATIONAL RAILWAYS OF MEXICO. Evidence *held* insufficient to establish fault on part of crews of National Railways of Mexico in connexion with a wreck of a railway locomotive in a collision.

CLAIM FOR EXPENSES. Claim for attorneys' fees and travel expenses, incurred after deterioration of locomotives, in custody of bankruptcy court, was discovered, *allowed*.

Cross-references: Am. J. Int. Law, Vol. 22, 1928, p. 432; Annual Digest, 1927-1928, pp. 229, 279.

Comments: Joseph Conrad Fehr, "International Law as Applied by the U.S.-Mexico Claims Commission," A.B.A. Jour., Vol. 14, 1928, p. 312 at 315.

Van Vollenhoven, Presiding Commissioner:

1. This claim is asserted by the United States of America on behalf of H. G. Venable, an American national. On April 18, 1921, a company of which Venable was president had, together with a company of which one E. S. Burrowes was president, entered into a contract with the Illinois Central Railroad Company at Chicago, Illinois, U.S.A., for the rental of some locomotives to them for use in Mexico, and a few days before, on April 13, 1921, Burrowes in his personal capacity had entered into another contract with the Mexican National Railways allowing him to use the Mexican tracks with these locomotives. About April 20, 1921, four locomotives were delivered, and in May they entered Mexico. On July 22, 1921, however, the Central Company under the contract requested the return of these four engines; in case of failure to do so either Burrowes' company

or Venable's company—the choice between them to be made by the Central Company in its discretion—would be subject to a high penalty. When, for this reason, Venable tried to have the engines leave Mexico, a Mexican railway superintendent by name of C. C. Rochín intervened, at Burrowes' request, by a telegram of September 3, 1921, which forbade his railway personnel to allow these engines and ten other ones to leave Mexican territory and from September 3 to 7, inclusive, 1921, the four locomotives were several times attached by the Court at Monterrey, Nuevo León, Mexico, for liquidated debts of Burrowes' company. On September 17, 1921, Burrowes' company, at Venable's request, was declared a bankrupt, the attachments then being consolidated for the benefit of the bankruptcy proceedings. Repeated demands made by Venable failed to effect the release of the engines; on the contrary, they were retained in the railway yard at Monterrey, where, after a few months, three of them appeared to have been deprived of so many essential parts as to have become practically useless. Even before these occurrences, on August 21, 1921, one of the four engines had been wrecked in a railway collision for which, it is alleged, Mexico is liable. Since finally Venable had to indemnify in the sum of \$154,340.10 the National Surety Company, which had secured the Central Company against its losses; and since he had incurred other expenses in connection with the facts which constitute the basis of this claim, the United States alleges that Mexico is liable to him in the amount of \$184,334.84, with interest thereon, on account of direct responsibility for Rochín's injustice, direct or indirect responsibility for the Court's action, direct responsibility for three engines having been destroyed in the railway yards, and direct responsibility for one engine having been destroyed in a collision.

2. As to the nationality of the claim, which is challenged, reference may be made to the principles asserted in paragraph 3 of the Commission's opinion in the case of William A. Parker (Docket No. 127), rendered March 31, 1926. On the record as presented, the Commission should hold that the claimant was by birth, and has since remained, an American national.

3. In order successfully to analyze the facts in this case, it is indispensable to establish first the contents of three contracts. The first one, a railway traffic contract of April 13, 1921, between, on the one part, the National Railways of Mexico (under government control) and, on the other part, Burrowes, was the contract under which the railway company was to use its tracks for the transportation of merchandise of Burrowes and to this end to use the locomotives imported or otherwise controlled by Burrowes. By the second contract, that of April 18, 1921, the Illinois Central Railroad Company agreed to lease, for use in the handling of freight traffic on certain lines of the National Railways of Mexico, six locomotives, to a combination of two companies, (a) the Burrowes Rapid Transit Company (Burrowes, president) and (b) the Merchants Transfer and Storage Company (Venable, president). In fact, as stated before, only four engines were delivered. The third contract is that of the same date of April 18, 1921, between the Illinois Central Railroad Company on the one part and, on the other part, Burrowes' company, Venable's company, and the National Surety Company, in which the three companies severally obligated themselves to a penalty of \$150,000.00 in case of nonfulfillment or improper fulfillment of the return of the engines under the contract.

4. About April 20, 1921, four locomotives were delivered by the Central Company to Burrowes' company and Venable's company at New Orleans, Louisiana, U.S.A.; and from the middle of May, 1921, to July 22; 1921, they apparently operated in Mexico without any occurrence or accident.

Burrowes and Venable

5. Before examining the details of this complicated case it may be prudent to make a preliminary remark. The record before the Commission doubtless reveals a series of acts on the part of Burrowes which attempted to injure Venable's business interests; acts in which Burrowes saw fit to involve Mexican authorities, either with or without fault on their part. The record, however, does not disclose Burrowes' motives and views. Apparently between May, 1921, and August, 1921, a serious friction had developed between the two men. Was Burrowes the first of them to attempt measures against the other? There is something quite enigmatic in the position taken by the Illinois Central Railroad Company. On July 22, 1921, it forwarded to Burrowes' company a *telegram* demanding the return of the four locomotives *within fifteen days*, i.e., on or before August 7; but in the fall of 1921, when it was advised that it could receive these engines from Monterrey if only it applied to the Court, it declared that it had no interest in doing so; and even as late as the first part of November, 1921, it did not show anxiety to have them. It would, therefore, seem to be not altogether improbable that the Central Company had not in July, 1921, requested the engines on its own initiative and from its own desire, but on the instigation of some one else. The locomotives were indispensable for the private freight transportation business Burrowes was conducting in Mexico; in a telegram of August 29, 1921, Burrowes contended: "Rapid Transit blown up action Venable and Waldrop" (Waldrop was the vice president both of Burrowes' company and of Venable's company); and it is clear from the record that late in August Venable was trying to have the engines returned to the United States without consulting Burrowes or informing him. In the same way Burrowes' instigating executory processes and attachments *in Mexico* against his own corporation may have been a counter act against Venable's request of a receivership before the *Texas* court. This means that it is not for this Commission—and that, on the record as it stands, it could not even do so with knowledge of facts—to consider whether Venable is justified to complain of Burrowes' attitude, or whether Burrowes might have been justified to complain of Venable. The Commission should eliminate all considerations of moral approbation or disapprobation of what either American citizen planned and did, and merely inquire whether Burrowes, in the course of execution of his scheme, induced Mexican authorities or others acting for Mexico to perform on their part acts resulting in injustice toward an American citizen, or even whether these authorities did so spontaneously.

Rochín's telegram

6. The first question before the Commission is that concerning Rochín's telegram of September 3, 1921; whether he was obliged or entitled to send it. It was argued by Mexico before the Commission, on the one hand, that Rochín in forwarding this telegram had in view the safeguarding of interests and rights of the National Railways of Mexico; that he did so under the

provisions of the railway traffic contract of April 13, 1921; and that in doing so he executed a *right*, not a duty. On the other hand, however, it was alleged by Mexico that Rochín merely acted under instructions from the owner of the locomotives or the man whom he might consider to be so (Burrowes), that he only meant to safeguard interests and rights of this private American citizen, and that it was his *duty* to do so, since a refusal on his part to act would have amounted to an interference in Burrowes' private affairs quite as much as his action did. There has not been alleged that Rochín acted under the emergency provision of Article XXI of the railway traffic contract, nor that he acted in connection with temporary exportation permits granted Burrowes' company by Mexico.

7. It would seem untenable to maintain that Rochín in sending his telegram acted under Article VI and VII of the contract providing that no Burrowes cars should be removed or rebilled until such unpaid freight charges as were due to the National Railways of Mexico should have been liquidated. If this had been the motive for his action, the evidence doubtless would have shown (*a*) that he had personal knowledge of the existence of unpaid charges in a sum of some importance, (*b*) that the order purported to prevent the "removing or re-billing" of the cars, (*c*) that the order would be canceled after payment of said charges, and (*d*) that, when the Burrowes Rapid Transit Company was declared a bankrupt, he (Rochín) joined the other creditors and presented his claim. For none of these contingencies is there proof or even probability. As to non-payment of due charges, there is nothing in the record except one Toussaint's statement of September 2, 1921, to Rochín's assistant Carpio that Burrowes' company was on the verge of bankruptcy, that he advised him to protect the interests of the National Railways with respect to unpaid freights, and that he did not know the amount due. A statement made by Venable to the District Court at Laredo, Texas, U.S.A., on September 1, 1921, that Burrowes had collected freights in advance on property being transported by Burrowes' company "and not paid same to cooperating railway lines, as he should have done", can not possibly have been known to Rochín on September 3, 1921, and neither contains the necessary elements for any governmental action. In the second place: Rochín's order did *not* prevent "removing or re-billing" of the cars, but exclusively their leaving Mexican territory. In the third place: the telegram did *not* establish that it would lose its effect once the charges would be paid, but it merely referred to an ulterior authorization by Ocaranza Llano, who was director general of the National Railways of Mexico and Rochín's chief in the railway management. In the last place: no claim in the bankruptcy proceedings against Burrowes' company was filed by the National Railways until some time between 1922 and March, 1926, and then for an amount of 12,957.63 Mexican pesos, for the payment of which sum it would not have been necessary to retain fourteen locomotives. From all of this there can only be one conclusion, to wit, that Rochín's telegram did not purport to protect any claim of the National Railways as against Burrowes' company.

8. There remains the other possibility: that Rochín acted under instructions from the man who apparently controlled the locomotives and whom he may have considered to be the owner, and that he even was obliged to obey these instructions. The evidence before the Commission would seem to render this second explanation improbable. If Rochín had acted

with this purpose, it would have been but natural for him to wire "do not permit the engines to cross the border unless Mr. Burrowes authorizes it", but he did so only on or about September 23, 1921, even then not saying "Burrowes" but "the owner". Instead of that, he ordered on September 3. not to release them "unless Mr. Ocaranza authorizes it". If Rochín had wired on behalf of the owner, there might have been expected some explanation by Burrowes regarding the reason why he could not act himself, and what was the name of the Mexican railway official who disobeyed his legitimate orders, and on what ground he disobeyed. Instead of that, Toussaint's letter of September 2, 1921, only establishes that the Mexico office of Burrowes's company had been the victim of some undisclosed frauds on the part of their managers at the boundary. If Rochín had wired on behalf of the owner, there might have been expected the production of some evidence which locomotives were either owned by Burrowes or under his control; instead of that, there is nothing except a unilateral statement in Toussaint's letter of September 2, 1921, designating the four locomotives rented from the Central Company and ten other engines. If Rochín had wired under instructions of the owner, he could only have ordered a measure the owner was entitled to order; and there can be no doubt but that a prohibition to let movable property leave the country except by authorization of a high Government official (Ocaranza Llano) was a remedy which could not have been applied by Burrowes himself. Rochín certainly was under no duty to comply with Burrowes' demand. There is no provision whatsoever in the contract either obliging the National Railways to act for the interests of Burrowes' company (apart from allowing them to use their tracks), or authorizing the National Railways to apply in behalf of Burrowes any remedy which Burrowes could not apply himself. Rochín being an official in an important and responsible position should have understood, supposing even that he was entirely unaware of Burrowes' intentions, that it might be dangerous for him to act as he did without having acquired sufficient information as to the reasons for Burrowes' request, at first sight inexplicable; the more so as he was advised that Burrowes was on the verge of being declared a bankrupt (as a matter of fact not bankruptcy, but receivership had been ordered on September 1. 1921), and as he should have realized the uncertainty as to Burrowes' rights to dispose of his effects at the time he applied to Rochín. If Burrowes some day had cabled to Rochín "see to it that fourteen locomotives in which my company is interested immediately leave Mexico", is it thinkable that Rochín would have used his official power to obey this command, or would he not have left this affair entirely to the activity and responsibility of Burrowes himself?

9. It is true that Rochín under the contract was not obliged to consider other American contract rights than those of Burrowes' private freight transportation business. But acting outside of the contract, he should take care not to violate other contract rights vested in any national or foreigner. If, acting without right or authorization, he damaged any such contract right—in the present case: Venable's—his being unaware of its existence would not exclude or diminish Mexico's liability for what this official of the National Railways (under government control) illegally did. Direct responsibility for acts of executive officials does not depend upon the existence on their part of aggravating circumstances such as an outrage, wilful neglect of duty, etc.

10. What was the damage caused by Rochín's telegram? Linked up with subsequent occurrences, his telegram may have been the cause of all the mishap of the claimant relative to the three engines which on September 3, 1921, were in good condition, and of part of the mishap with the fourth engine which had been wrecked in August; though it is uncertain where the three engines were on September 3, and whether they might not at the time of the attachment by the Court have been on Mexican territory even without Rochín's telegram. It is clear, however, that only those damages can be considered as losses or damages caused by Rochín which are immediate and direct results of his telegram; see the award in the *Lacaze* case between Argentine and France under the decree of December 17, 1860 (De Lapradelle et Politis, II, 298), and paragraphs 13 and 14 of the first opinion in the *Francisco Mallén* case (Docket No. 2935). Every day of delay in returning the four engines to the Illinois Central Railroad Company might have caused the claimant's company a loss of \$140.00 and, apart from that, obstacles against his returning them after August 7, 1921, might have resulted in imposing on the said company an obligation to pay the \$150,000.00 due under the contract in case of nonfulfillment or improper fulfillment of the duty to return the engines in good condition and in time. An element of uncertainty, however, proceeds from the fact that the Illinois Central Railroad Company never claimed any amount of \$140.00 per day for the period elapsed after August 7, 1921; and that it was not until November 15, 1921, after all of the important events subsequent to Rochín's telegram had occurred, that the Central Company really claimed the contractual penalty for the four engines. It is difficult, therefore, to make the money value of the damage caused by Rochín's act the object of a precise calculation.

The bankruptcy proceedings

11. The second problem before the Commission is that concerning the attitude of the State Court at Monterrey, Nuevo León, in its bankruptcy proceedings against Burrowes' company.

12. On July 22, 1921, the Central Company had requested the return of the four engines, a request which if complied with (as was Burrowes' duty) apparently would have destroyed an important part of Burrowes' transportation business. On August 1, 1921, Burrowes' company had taken over the similar business of the Brennan, Leonard and Whittington Transportation Company, including the use of ten more engines. On September 1, 1921, Venable, before the 49th Judicial District Court of Texas at Laredo, Texas, had requested the appointment of a receiver for Burrowes' company, and this request had been granted the same day. On September 1 and 2, 1921, one R. L. Bateman, a creditor of Burrowes' company, requested the said Court at Monterrey to attach the property of Burrowes' company for a liquidated and unpaid debt. Bateman's request appears to have suited Burrowes' plans; instead of opposing it, he recognized at his earliest opportunity—on September 3, 1921, late in the afternoon—that indeed he had discontinued paying his debts. The relation between the requests made at Laredo and at Monterrey has been touched upon in paragraph 5. On September 15, 1921, Venable demanded the Court at Monterrey to adjudicate the bankruptcy of Burrowes' company; the Court granted this request on September 17, 1921, appointing a lawyer, Leal Isla by name,

provisional *síndico* (trustee) and one Morales Gómez *interventor* (controller or supervisor). Leal was the Monterrey lawyer of the National Railways of Mexico.

13. The legal difficulties had begun when on September 3 to 7, inclusive, 1921, goods belonging to the debtor company had been attached by the clerk of the Court. Under Mexican law creditors are entitled to point out which effects they desire to see attached, and the debtor has the right to present objections. In the present case Burrowes as president of the debtor company designated for attachment "the entire business represented by him" (*toda la negociación por él representada*); whereupon Bateman and, after him, some other creditors demanded that, apart from a few goods of minor importance, out of the fourteen locomotives controlled by Burrowes' company—see paragraph 7—either the four engines leased by the Central Company or the three undamaged ones should be attached. The clerk of the Court did not inquire whether they were part of "the entire business" of the debtor company, but merely established that Burrowes had three days to object to said execution. Burrowes never objected, but, on the contrary, requested that "the properties designated by the parties and which are enumerated in the foregoing writ of attachment" be declared "to be formally attached". So the Court did on September 3, 1921, and following days. On September 17, 1921, these several attachments were consolidated into one attachment for bankruptcy.

14. In attaching the four engines for the debts of a company which did not own them the clerk of the Court may have made the slight oversight indicated in paragraph 13; but the mistake is entirely due to an unreliable statement of Burrowes. No fault can be imputed to the Court, and certainly not a defective administration of justice amounting to an outrage, bad faith, wilful neglect of duty, or apparently insufficient governmental action (see paragraph 4 of the Commission's opinion in the *Neer* case, Docket No. 136, rendered October 15, 1926).

15. The present claimant, Venable, then began his determined efforts to get these four engines free from the attachment. In order to be represented among the creditors and to be entitled to request bankruptcy proceedings, he bought, on the advice of his Mexican lawyer, the claim of one of the company's creditors, the firm of A. Zambrano e Hijos. It has been argued by Mexico that, acting on the advice of his Mexican lawyer, he failed to take the steps required by Mexican law in the forms required by Mexican law, and took other steps which according to the laws of procedure and bankruptcy never could make him attain his end. It is most unsatisfactory to state that he was the victim of either lack of knowledge or of application on the part of his lawyer; but Mexico can not be held liable on that ground. He moreover was the victim of the fact that the Illinois Central Railroad Company, which successfully could have required the release of the engines in the Monterrey Court, was unwilling to act (see paragraph 5).

16. Of these court proceedings four parts would seem open to criticism. When Venable instituted a suit against the *síndico*, the Court, instead of clinging to the periods of the law, accepted an answer filed by this *síndico* fifteen days late. In the second place: the Judge in the court room had private conversations on the case with Venable, his lawyer, and the *síndico*, in which he indulged in making a kind of informal ruling as to the party authorized to claim release of the engines (the Central Company only),

but in which he never told the claimant that he did not live up to the forms of Mexican law and that there lay his trouble. It would seem more appropriate for a Judge not to allow such interviews; but once he does, he should not be silent on a vital point which he might have indicated without committing himself. In the third place: a request of the Court itself addressed to the Mexican Land Registration Office on October 28, 1921, was allowed to remain unanswered, though a reply was indispensable for the continuation of the suit filed by Venable against the *sindico*. In the fourth place: the Court did nothing to bring the bankruptcy proceedings to an end, allowed them to remain at a standstill, did not direct the *sindico* to account for his acts nor for the custody of the goods trusted to his care. The first of these four objectionable acts can not be said to amount to so serious a deviation as to constitute a mal-administration of justice as mentioned at the end of paragraph 14. Nor can the second and third acts. The fourth act will be considered under paragraph 23. As to the details of the court proceedings, I refer to paragraphs 4 to 13, inclusive, of Commissioner Fernández MacGregor's opinion, in which I concur.

17. Supposing the choice of Leal as *sindico* was not a happy one, the Court can certainly not, on the record, be blamed because of the mere fact that a lawyer of the most important railway corporation was chosen as trustee in the bankruptcy proceedings against a company doing business relative to railways. Leal's proposal of October 4, 1921, temporarily to lease the engines to one of two applicants both alien to the National Railways can not be represented as meaning a prejudiced act intending to promote, not the interests of the estate, but of his railway corporation.

18. Since for those parts of Mexican law which are involved in the present case much depends upon the knowledge and trustworthiness of lawyers, satisfactory results of the administration of justice are not to be expected if, indeed, as it would appear from the record, even in important centres of Mexican life lawyers of good standing are not or were not up to the usual standards. Statutes following the type of French law, as it was adopted in Napoleon's day, can not work well unless the lawyers in the country where such statutes are in force correspond to what lawyers were and are in France and similar countries; and if a nation can not feel sure of that, it should in its legislation grant a larger power to its Judges, even in civil suits, as has been done in the legislations of parts of Asia, where the same difficulty existed.

19. The conclusion should be that the court proceedings at Monterrey, though presenting an unattractive picture of how legal provisions were allowed to be misused in support of bad intentions, do not show a defective administration of justice such as might give ground for their being stigmatized by an international tribunal.

The destruction of the three engines

20. On September 3, 1921, the four locomotives, three of which had continued to be in good operating condition, were attached for debts of Burrowes' company; on September 17, the attachments were consolidated and the engines were given in custody to a *sindico* or bankruptcy trustee. From September 3, 1921, until further provision to the contrary, the owners and other private persons interested in the engines lost their power over them. It is established by the record that the engines at all times were left

in an unprotected position, exposed to the weather; that up to October, 1921, they had been well preserved; but that before June, 1922, and particularly before June, 1925, so many parts of prime importance had been removed or injured that the engines had been reduced to a practically worthless condition. The question before the Commission is whether under international law these circumstances present a case for which a government must be held liable.

21. There could have been no hesitation to answer in the affirmative if the goods had been taken into custody by Mexican officials or other persons "acting for" Mexico. Then a direct responsibility of the government would have been involved. In paragraph 4 of its opinion in the *Nick Cibich* case (Docket No. 14)¹ the Commission held that Mexican police officers having taken a man's money into custody must account for it and would, apart from further complications, render Mexico liable if they did not. In paragraph 3 of its opinion in the *Quintanilla* case (Docket No. 582)² the Commission held that, once a government has taken into its custody war prisoners, hostages, interned soldiers, or ordinary delinquents, it is obliged to account for them. The opinion in the *Toberman, Mackey & Company* case (Docket No. 17) has no bearing on the present problem, since a real custody of imported goods in the hands of customhouse officials was held not to have existed in that case. In the *Lord Nelson* case before the British-American arbitral tribunal the United States was held responsible for the embezzlement of funds in custody of the clerk of a federal court (Nielsen, *Report*, 433-434).

22. The present situation, however, is different. When a court places a bankrupt estate in the custody of some kind of trustee (in Mexico; a *sindico* and an *interventor*), it does the same thing for an estate that it does for specific goods of a debtor when allowing a plaintiff to attach them in order to preserve for his benefit property on which eventually to execute a future award rendered in his favor. Such goods are not taken into custody by the courts themselves; a private citizen is appointed trustee, acting for the benefit of the plaintiff, or the plaintiff himself is appointed for this purpose. Likewise, in many countries a bankruptcy trustee, such as the Mexican *sindico*, can not be considered as an official, or as one "acting for" the government; he acts "as representative of the creditors" (Ralston, *Venezuelan Arbitrations of 1903*, 172). The *Institut de droit international*, in the rules on bankruptcy law it adopted in 1902 in its session of Brussels, styled persons like this Mexican *sindico* "the representatives of the estate" (*les représentants de la masse*; Articles 4 and 5). The draft convention on bankruptcy law inserted in the final protocol of The Hague conference on private international law of October-November, 1925, attended by delegations from twenty-two states (including Great Britain), established in its Article 4 that the syndic can take all conservatory measures or administrative measures and execute all actions "as representative of the bankrupt or of the estate" (*comme représentant du failli ou de la masse*). It is true that the British delegation left this conference before its close, but not because of any difference of views as to the position of the trustee; and, moreover, in the present case the position of the bankruptcy trustee should be considered in the light of Mexican, not of Anglo-Saxon, law. In countries with bankruptcy legisla-

¹ See page 57.

² See page 101.

tions such as the Mexican code contains, direct responsibility for what happens to the bankrupt estate lies not with the government. In the present case it rested either with Familiar, a railway superintendent at Monterrey, under whose care the engines had been placed at the time of their attachments and under whose care they had been left on October 4, 1921, by the *sindico* Leal; or the responsibility rested with this *sindico*, appointed by the Court on September 17, 1921, or with the combination of *sindico* and *interventor*. Laws like that of Mexico intentionally refrain from laying the heavy burden of these responsibilities on personnel of the courts. I concur with respect to the problem of the position of the Mexican *sindico* in paragraph 16 of Commissioner Fernández MacGregor's opinion.

23. Though the direct responsibility for what befalls such attached goods does not rest with the courts and the government they represent, because these are not the custodians, a heavy burden of indirect responsibility lies upon them. The Government obligates owners and other persons interested in certain goods to leave the care of these goods entirely to others; it temporarily excludes these owners or other persons interested from interference with their goods; it constrains them to allow custodians to handle them as these custodians think legal and fit. Here, conformably to what was held in the *Quintanilla* case, a Government can not exculpate itself by merely stating that it placed the goods in someone's custody and ignores what happened to them. The Court at Monterrey had "to provide for the preservation of the bankrupt estate", and the appointment of a provisional *sindico* and of an *interventor* had this special purpose (Article 1416, Mexican Code of Commerce of 1889). Through the *interventor* the Court could execute its control on the acts of the *sindico*. Through the prosecuting attorney the Court had to be vigilant against crimes. It had to see to it that the bankruptcy proceedings went on regularly and were brought to a close within a reasonable space of time. The Court at Monterrey seems not to have realized any of these duties. At a time when everybody could see and know that the three engines were rapidly deteriorating because of theft in a most wanton form, the less excusable since it could not have been accomplished unless by using railroad machinery specially adapted for such purposes as the dismantling of locomotives, no investigations were made by any prosecuting attorney, no prosecutions were started, no account was required from the custodian appointed by the *sindico*, nor from the *sindico* himself, and nothing was done to have the bankruptcy proceedings wound up. Even if, here was not wilful neglect of duty, there doubtless was an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. Whether this insufficiency proceeded from the law or from deficient execution of the law is immaterial. The Court at Monterrey can not plead innocence; having constrained private individuals to leave their property in the hands of others, having allowed unknown men to spoil and destroy this property, and not having taken any action whatsoever to punish the culprits, to obtain indemnification, to have the custodians removed and replaced, or to bring the bankruptcy to an end, it rendered Mexico indirectly liable for what occurred. Nor can the Court exculpate itself by alleging that no American citizen has applied to it in order to have these wanton acts investigated and to have the necessary action both against the perpetrators of crimes and the unreliable custodians started; to do such things is an essential part of proper governmental action and can not be made dependent upon private initiative.

24. The three engines according to the contract of April 18, 1921. between the Central Company, Burrowes' company, and Venable's company were valued at \$37,500.00 each. In October, 1921, an American expert calculated their value somewhat higher, to wit, at \$40,000.00 each. A proposal of the *síndico* to have the engines rented out (paragraph 17) was opposed by Venable and was never allowed by the Court; being kept unused in the railway yards, even when well protected, their value must have somewhat decreased, the custodians not being obligated to spend money in order to keep them in a first-class condition. It would seem proper, therefore, to consider the loss sustained because of the destruction of the three engines as amounting to the original valuation of \$37,500.00 each, or a total of \$112,500.00. In case of direct responsibility for engines under its own custody, Mexico should have had to indemnify in this sum, unless the occurrences could be ascribed to an irresistible calamity. Here indirect responsibility only can be fastened upon Mexico. The engines, however, were destroyed not by an act of God, but by criminal acts of men. The results of the acts were not secret or hidden; they were under the eyes of all the railway officials at Monterrey, who at the time were government officials. The crimes must have been committed not by private means, but by using railway machinery, which at the time was government machinery. It is not for the Commission to investigate who had the benefit of these removals; but there is high probability that the valuable parts of the engines were added to other engines proceeding from the same plants, as where the ninety-one locomotive engines sold by the Central Company to Mexico on April 23, 1921, and gradually delivered at New Orleans from shortly thereafter to June 28, 1921 (record of Docket No. 432). Considering all these points, the amount due because of this indirect government responsibility may be fixed at \$100,000.00 without fear of being unjust or unequitable.

25. The respondent Government has not denied that, under the Convention of September 8, 1923, acts of courts of Nuevo León may give rise to claims against the Government of Mexico. The Commission has repeatedly held that claims may be predicated on acts of state authorities.

The wrecking of the fourth engine

26. On August 21, 1921, one of the four engines had been wrecked in a collision on the railway track between Saltillo, Coahuila, and Monterrey, Nuevo León. Both colliding trains were operated by crews of the National Railways of Mexico (under government control); it is, therefore, irrelevant which crew was at fault. But were the National Railways liable for the accident? Article XXIII of the railway traffic contract of April 13, 1921, establishes that "the Railways will not be responsible for the damage suffered by locomotives, the cars or their contents by reason of accidents, fire—or for any other cause of superior force, the Second Party Contractor waiving for this effect the Articles Nos. 1440, 1442, and 2512 of the Civil Code of the Federal District". It is difficult to consider as convincing evidence of fault a mere statement proceeding from one of the mechanics that the other train was running without, or contrary to, orders. I therefore concur on this point, in paragraphs 19 to 21, inclusive, of Commissioner Fernández MacGregor's opinion.

27. The impossibility to return this engine in good condition to the owner (the Central Company) made the lessees liable, under their contracts of April 18, 1921, to an indemnification of \$37,500.00, which was actually paid. An expert estimate made on September 15, 1921, on behalf of the National Railways of Mexico stated that to put the engine in good condition would need repairs in the approximate cost of 21,000.00 Mexican pesos. It therefore would seem proper to consider the value of the engine after the collision as having amounted to \$37,500.00 minus the approximate equivalent of 21,000.00 pesos (viz, \$10,500.00), resulting in \$27,000.00. There is no evidence that, while in the Monterrey yard, this wrecked engine had some of its parts removed. Instead of ordering, under Article IX of the Convention of September 8, 1923, that this fourth engine be restored to Venable, it would seem in keeping with the interests of both parties to award on its account an amount in money representing its value (\$27,000.00) increased with a sum representing interests from the uncertain date on which, if the bankruptcy proceedings had been terminated in due time (see paragraph 23), the status of this engine would have been decided.

Venable's present rights in the four engines

28. Since there is no controversy between the two Governments that rights in the engines are vested exclusively in Venable at the present time and that they were so at the time he filed his claim, it is only necessary to indicate how he acquired them. The ownership of the engines was from the beginning in the Illinois Central Railroad Company. On August 15, 1922, it passed to Venable because of their transfer to him by the National Surety Company, which had paid \$154,340.10 to the Central Company under the bond proceeding from the third contract mentioned in paragraph 3 above. Venable, however, did not pay in 1922 to the National Surety Company more than \$50,780.65. was sentenced on March 6, 1923, to pay to this corporation an additional sum of \$111,743.83, and satisfied this judgment on December 7, 1926. Potential rights of three insurance companies in the engines were surrendered to Venable in contracts of July 7, 10, and 11, 1922, between them and the claimant.

Other items claimed

29. Venable, moreover, claims an amount of \$1,250.00, representing the sum paid by him for the claim of one of the creditors of Burrowes' company (A. Zambrano e Hijos), bought in order to enable him to request bankruptcy proceedings. Mexico can in no manner be held liable for this expense.

30. Venable claims fees of attorneys whose services he engaged either in Mexico or in the United States, in the total sum of \$20,294.74. In as far as these expenses are merely consequences of the attachments directed against Burrowes' company, they can not be linked with any illegal act of Mexico; but he should be compensated for them in as far as they relate to action taken after the deterioration of the three engines in the Monterrey railway yard had been discovered. The amounts claimed for such action of attorneys correspond with items 11 and 12 of Venable's list concluding

the Memorial, and with part of the amount under 10, in the sums of \$648.52, \$797.79, and \$2,000.00 (four monthly payments), in total, \$3,446.31.

31. Venable claims expenses for several trips, made by himself and others, in the amount of \$8,450.00. The trips made since the deterioration of the three engines was discovered caused the expenses under items 6 and 7, in the sums of \$2,200.00 and \$2,200.00, in total, \$4,400.00. The trips made in September-October, 1921, by Mims, in June, 1922, by Greenstreet, and in June, 1925, by Greenstreet and Mims, in order to establish the deterioration of the four engines, have also a bearing on facts for which Mexico should be held liable; but no indemnification is claimed on these counts.

Interest

32. The amount of \$100,000.00 for which Mexico is responsible on account of the destruction of the three engines (paragraph 24) is a lump sum for injustice inflicted and should bear no interest. Nor should any of the other amounts, apart from what has been suggested at the end of paragraph 27.

Conclusion

33. In conclusion, taking account of what has been said in the foregoing paragraphs, it would seem proper to award the claimant the sum of \$140,000.00, without interest.

Nielsen, Commissioner:

Claim is made in this case by the United States of America in behalf of H. G. Venable, in the sum of \$184,334.84. The claim is predicated, as stated on page 1 of the American brief, "on the wrongful detention and destruction of four (4) railway locomotives by the employees, agents, representatives, and officials of the 'National Railways of Mexico and Connecting Lines under Government Control', in conjunction with the Civil Court of First Instance at Monterrey, Mexico, and the Receiver and Superintendent in Bankruptcy of the Burrowes Rapid Transit Company [an American corporation, doing business in Mexico], who were serving under appointment by that Court".

The record in the case is a long one, embracing numerous copies of contractual arrangements and judicial proceedings. However, the most salient matters underlying the claim preferred by the United States can be somewhat briefly summarized from the allegations contained in the Memorial and the brief.

In 1921 E. S. Burrowes, an American citizen, entered into a contract with F. Perez, General Director of the National Railways of Mexico, under which the former obtained certain rights to use the tracks of the Railways in connection with the business of the Burrowes Rapid Transit Company, an American corporation, engaged in the transportation of freight. In carrying on this enterprise Burrowes obtained the cooperation and assistance of the claimant, Venable, who was the owner of the property of a Mexican corporation called the Merchants Transfer and Storage Company. This Company and the Burrowes Rapid Transit Company jointly leased

four locomotives from the Illinois Central Railroad Company, an American corporation. The lessees agreed to pay the Illinois Central Railroad Company \$35.00 in American currency per engine for each day while the lease was in force, and further agreed that in case the engines or any one of them should not be returned conformably to the terms of the lease, or if all or any of them should be injured so as to become unserviceable, the sum of \$37,500.00 should be paid to the lessor for each engine. The lease was subject to termination on fifteen days' notice on the part of the lessor. The two lessees, in conjunction with the National Surety Company, another American corporation, executed a bond to guarantee the proper performance of the terms of the lease, and by another undertaking the lessees pledged themselves to the National Surety Company to indemnify that company for any loss it might sustain in consequence of having executed the bond by which all the three companies pledged themselves to the Illinois Central Railroad Company.

On or about July 22, 1921, the Illinois Central Railroad Company gave notice of the termination of the lease. Difficulties evidently arose between Burrowes and Venable during the course of their business relationship. On or about August 25, 1921, Venable, having been informed of the notice of termination of the lease, took steps to return the locomotives. He was in New York City during the months of July, August, and September, 1921. Pursuant to his directions, A. G. Wittington, General Traffic Manager of the Burrowes Rapid Transit Company, sent a telegram on August 25, 1921, to P. E. Martinez, who was in charge of the office of that company at Monterrey. In this message the latter was directed to return the engines to Brownsville as quickly as possible. Martinez received the telegram and took steps to carry out the instructions therein contained, but was prevented from making delivery of the engines at Brownsville because of an order given by C. C. Rochín, Superintendent of Transportation of the National Railways of Mexico. On August 29, 1921, C. M. Hammeken, who was in charge of the Burrowes Company's offices in Mexico City, received at that place the following telegram from Burrowes:

"Rapid Transit blown up action Venable and Waldrop stop Quick have proper authorities prohibit engines leaving Republic until all freights which have been collected are paid protecting my name and yours stop Protect yourself by attaching anything on sight stop Don't draw Zambrano no funds available at all. My license still good and if freights are taken care of we can still make some money for you and I. I can get some power myself advise Ancira Hotel personal."

Hammeken explains in an affidavit accompanying the Memorial that on receipt of this telegram he went to Monterrey to confer with Burrowes, who urged Hammeken to persuade the Railway authorities to issue orders which would prevent the locomotives from leaving Mexico, so as to give time and opportunity to embargo them for debts of the Burrowes Rapid Transit Company; that to aid him (Hammeken) to have such orders issued he was given a letter addressed to an official of the Mexican National Railways; that this letter was presented to Rochín with whom Hammeken states he "had good relations"; and that thereupon Rochín sent his telegram directing the stopping of the locomotives.

Under date of September 3, 1921, Rochín sent to P. S. Alvares, Superintendent of the Northern Division of the National Railways of Mexico at Monterrey, the following telegram:

"11.05 A. M. As per instructions from General Superintendent you will not permit the following engines to cross border: Burrowes 2280, 2281, 2282, 2283, M.K.T. 502, 506, 598, 411, 413, ING 205, 229, 221 SA & AP 170 and 247 unless Mr. Ocaranza authorizes it. Please acknowledge receipt if understood."

The locomotives having been detained by the order of Rochín, the Judge of the First Court of Civil Letters at Monterrey, on September 3, issued an order of embargo on all four locomotives in connection with a proceeding instituted by R. L. Bateman, an employee of the Burrowes Rapid Transit Company, to recover a debt in the amount of 1,950 pesos alleged to be due to him from the Company.

It is alleged by counsel for the United States that Burrowes fraudulently took advantage of Hammeken's close relationship with Rochín to undertake to persuade the Mexican National Railways that the stopping of the engines would be a protection to the interests of the railways. And with reference to Rochín's order it is contended that his act in stopping the engines was illegal, extrajudicial, and improper; that Rochín clearly had notice with respect to the right of control over the locomotives and with respect to fraudulent purposes of Burrowes to prevent his co-lessee from returning the locomotives in accordance with the terms of the lease under which they had been obtained from the Illinois Central Railroad Company; and that Rochín's action resulted in a breach of the lease contract, entailing great financial loss on Venable for the consequences of which the Mexican Government is responsible in damages.

Counsel for Mexico in argument expressed the opinion that Burrowes used the court for the purpose of ruining Venable. It is undoubtedly clear from the evidence that the attachment of the locomotives was instigated by Burrowes. But counsel for Mexico differs from counsel for the United States with regard to the propriety of the action of the court in directing the seizure of the property. The latter contends that to direct execution on approximately \$200,000 worth of property for a debt of 1,950 pesos was manifestly improper; that it is clearly the purpose of provisions of the Mexican Commercial Code that property shall be seized only in sufficient quantity to satisfy a debt; and that the Code carefully guards against unnecessary seizure.

Following the seizure of the locomotives by order of the court, it appears that it was made known to the judge by Lic. Salome Botello, Mexican counsel for Venable, in a manner which is described in the Memorial and accompanying Annexes as "unofficial", that the locomotives were not the property of the Burrowes Rapid Transit Company, and that their return had been demanded by the Illinois Central Railroad Company pursuant to the terms of the lease of the locomotives. It further appears that the liability of the claimant as a joint lessee was explained to the judge, but that the judge refused to release the embargo and to permit the reexportation of the locomotives to the United States, and entered several additional orders of embargo.

Botello thereupon advised Venable that, as an expedient to meet the attitude taken by the judge that the locomotives could be released only on the demand of the Illinois Central Railroad Company, application could be made to the judge for a declaration of bankruptcy against the Burrowes Rapid Transit Company. For this purpose Venable, on the advice of counsel, purchased a draft, which had been drawn by the Burrowes Rapid Transit

Company at Monterrey on that company at Laredo, Texas, and discounted by a bank at Monterrey and had not been taken up and paid at Laredo. Application was made to the judge of the First Court of Civil Letters at Monterrey for a declaration of bankruptcy, and this application was granted by the court.

Carlos Leal Isla was appointed provisional *sindico* and Antonio Morales Gómez interventor, and the former apparently left the property in the direct charge of Francisco G. Familiar. No bond was required from any of these men to protect persons interested in the property seized.

The idea underlying the legal strategy advised by Botello in obtaining a declaration of bankruptcy against the Burrowes Company evidently was that it would be the duty of the judge under Mexican law promptly to release seized property which did not belong to the estate of the bankrupt; and furthermore, that a proper conservation of the estate of the bankrupt would make such release imperative, in view of the fact that, under the lease from the Illinois Central Railroad Company to which the Burrowes company was a joint party with the Venable Company, the Burrowes company was jointly liable with the Venable company for the entire value of all the locomotives, if delivery was not made conformably to the notice of the termination of the lease.

Venable called a meeting of creditors with the idea of effecting an arrangement for the release of the locomotives. He pointed out to the creditors that the further retention of the locomotives could be of no advantage to them, since they were not assets of the bankrupt; that, on the other hand, such retention was contrary to the interests of the Burrowes Company which was legally bound to return the locomotives. All efforts made by Venable to induce the creditors to act were fruitless. From a petition filed by Venable with the court at Monterrey it appears that the indifference of the creditors was explained as due to a feeling on their part that they could lose nothing by what might happen to an estate such as that actually possessed by Burrowes. In that petition it is further alleged that the creditors, knowing the liability of Venable towards the Illinois Central Railroad Company, hoped that he would settle their claims against the Burrowes Company in order to bring about the release of the locomotives. Venable in his petition stated that rather than submit to tactics of that kind he appealed to the court for the release of the locomotives as property which was no part of the estate of the bankrupt Burrowes company.

On September 22, 1921, the Merchants Transfer and Storage Company filed suit against the *sindico*, the court's appointee, to obtain the release of the locomotives. This suit was instituted by a pleading fully describing the ownership of the locomotives, the conditions under which they had been leased to the Venable company and the Burrowes company, the obligation of the lessees to return the locomotives to the owners, and the losses which would be sustained if delivery to the owners was not made. Copies of documents showing all these things which have been heretofore described were made part of this pleading. The court entered an order to give the *sindico* five days in which to make a reply. The *sindico* answered by filing a pleading of a technical character praying that Venable should be obliged to furnish a bond or surety, proof of the character in which he claimed the return of the property, proof of his legal representation of the Merchants Transfer and Storage Company, and an exact statement of what he prayed for. The pleading contained a long explanation of the legal basis of the so-called

dilatory exceptions interposed by the *sindico*. Counsel for Venable in turn made answer to these exceptions. These dilatory pleas were criticized by counsel for the United States as attempts to bring about delay and to harass Venable. In this connection it is pointed out that, although under the rules governing procedure before the court the *sindico* had five days from September 22nd in which to make reply, he did not file such reply until October 9th. The court thereupon allowed a period of ten days for receiving evidence. The *sindico* answered that there was no evidence to produce, and he requested the court to ask the register of the Land Office whether Venable or the Merchants Transfer and Storage Company possessed any real estate. On October 28th the court entered an order directing that inquiry be made of the Land Office regarding real estate. The record does not disclose that a report respecting that inquiry has been received up to the present time.

In September, 1921, Venable applied to a court in Texas for a receiver to take charge of the assets of the Burrowes Rapid Transit Company, which also did business in Texas with its principal office and place of business in Laredo and working offices in other places in the state. The petition filed by Venable recited the difficulties between himself and Burrowes with regard to the return of the locomotives obtained under the lease from the Illinois Central Railroad Company and contained allegations with respect to debts owing by the defendant company to the Merchants Transfer and Storage Company, liabilities which Burrowes had created against Venable and acts of the former in a reckless disregard of the interests of the latter. A copy of the lease was presented to the court. The court granted Venable's petition and appointed W. C. Greenstreet receiver. Subsequently the court issued an order reciting that the engines embargoed at Monterrey were the property of the Illinois Central Railroad Company.

Greenstreet, following his appointment as receiver, made application to the court reciting that since his appointment he had diligently endeavored to collect and preserve the records of the Burrowes Rapid Transit Company, and to obtain possession of the locomotives, but had been unable to do so because, as he believed, they were being held first, by an order of one of the officials of the National Railway Lines of Mexico, and second, by embargo proceedings in the court at Monterrey. The receiver prayed that he be authorized by the judge to make proper representations to the court and authorities in Monterrey or elsewhere in Mexico for the purpose of having the locomotives delivered conformably to the terms of the lease under which the use of the locomotives had been obtained from the Illinois Central Railroad Company. Such authority was granted by the court to the receiver. The receiver thereupon proceeded to Monterrey with Venable and Mexican and American counsel and attended a hearing at that place before the judge of the First Civil Court and the *sindico*, Isla, and presented to the court orders of the Texas court establishing that the engines were owned by the Illinois Central Railroad Company. Information was also given to the court respecting the authority conferred by the Texas court on Greenstreet to request the Monterrey court to release the locomotives, the demand of the Illinois Central Railroad Company for the delivery of the locomotives, and the relations between the Merchants Transfer and Storage Company and the Burrowes Company.

In an affidavit which is found in the record, Greenstreet stated that he heard the judge of the First Civil Court at Monterrey state that he was convinced that the locomotives belonged to the Illinois Central Railroad

Company and were not liable for the debts of the Burrowes Company; that he recognized that the detention of the locomotives in Monterrey was a great injustice to Venable and the Merchants Transfer and Storage Company, which would result in serious loss; but that he could not enter an order for the release of the locomotives, but indicated he would do so on a request from Isla. In the same affidavit it is stated that Isla declared that he also was convinced of these same facts with regard to the ownership of the locomotives, and the responsibility on the part of Venable for their return; that should the judge of the First Civil Court at Monterrey direct the release of the engines, he, Isla, would carry out the order; but that he would not ask for it.

On December 26, 1921, Botello filed another petition calling attention to the status of the locomotives and to the expiration on December 31st of that year of a permit for the reexportation of the locomotives without the payment of duties, so that this information might be brought to the attention of the *sindico* and the supervisor, with a view to the release of the locomotives. It does not appear that any action was taken with respect to this petition.

The locomotives having been received by Isla, who was appointed *sindico*, and who was a legal representative of the Mexican National Railways at Monterrey, they were in turn by him placed in the hands of Francisco G. Familiar, a superintendent of the Mexican National Railways. It is shown by evidence in the record that the locomotives, while so held, were dismantled. The record contains an affidavit made by Greenstreet giving details of his examination of the engines, and incorporating statements of approximately 15 pages of itemized articles that had been stolen. The record contains other sworn testimony of a similar nature. Greenstreet in his affidavit states that during the occasions of his inspection of the locomotives he heard conversations among the employees of the National Railways of Mexico, and was told by them that the parts of the locomotives which were missing had been removed by them and other employees of the National Railways of Mexico and used by the Railways. It is represented by counsel for the United States that such was obviously the fact; that the parts removed were of such a character that they could only have been taken by persons in control of apparatus for handling locomotives such as mechanism that could lift a locomotive; that obviously the parts removed were taken to be used in repairing other similar locomotives owned by the Mexican National Railways, and that, the Railways being under Government control, the Mexican Government profited greatly by the dismantling of the locomotives. It is not denied in behalf of Mexico that the locomotives were dismantled, but it is stated that there is no evidence proving that the Railways were responsible for the damages inflicted. It seems to be impossible to escape the conclusion that the parts removed were used in repairing other locomotives. Moreover, it would of course have been a very simple matter to obtain evidence on this point from persons connected with these serious matters, and assuredly that would have been a logical and very important thing to do. The locomotives were in such a condition that American insurance companies which had insured them against theft, destruction, and detention adjusted their risks without any contest with respect to liability.

The contentions advanced by the United States appear to involve three fundamental points: (1) The propriety of Rochin's order in stopping the

movement of the locomotives, (2) the propriety of the judicial proceedings before the court at Monterrey, (3) the theft and destruction of the locomotives. Wrongful action on the part of Mexican authorities resulted, it is alleged, in an interference with contractual rights of the claimant and consequent great financial loss.

I am of the opinion that the action of Rochín must be regarded as illegal and improper, irrespective of what may be the information or motive that prompted it. Mistaken action can not properly be asserted as a legal defense against liability predicated upon what Rochín did. See the case of the *Costa Rica Packet*, Martens, N.R.G., 2d Ser. XXIII (1898), pp. 48, 715, and 808; case of the *Union Bridge Company* under the Special Agreement of August 18, 1910, between the United States and Great Britain, *American Agent's Report*, p. 376; cases of the *Jessie*, *Thomas F. Bayard*, and *Pescawha*, *ibid.*, p. 479. Rochín's action was an interference with the rights of Venable and the rights of the Illinois Central Railroad Company. In matters pertaining to the contract made by Burrowes with the Mexican National Railways, officials of the latter would naturally deal with Burrowes or his agents. However, when Rochín was requested to prevent the engines from leaving Mexico, it does not seem to be conceivable that he should not have appreciated that he was dealing with a most unusual situation which required caution and full information as to the facts in relation thereto. That he had such information is to my mind made clear by the evidence. Testimony of Rochín on this point was not produced by Mexico. C. M. Hammeken, in an affidavit, swears that he explained to Rochín that it was desired to have the engines held on the latter's order, so that they might be attached by the court. There appears to be no provision in the Burrowes-Perez contract under which Rochín had either the right or the duty to stop the locomotives. It is not shown by any record in the case that the court at Monterrey gave effect to any rights asserted by the Railways under the contract. And, in any event, the seizure of the locomotives by administrative officials does not appear to be a proper assertion of such rights. It may be observed, although the point is not a material one, that it would seem that Rochín must have known that Burrowes was merely a lessee. It would be a most unusual state of affairs if Burrowes or his company had been a private owner and manufacturer of locomotives in Mexico. It would likewise seem that Rochín was informed concerning the rights of both Venable and the Illinois Central Railroad Company.

From the hands of the administrative officials of the Railways under Mexican control the locomotives passed under the control of Mexican judicial authorities. Whatever may be said of the standing of the attachment proceedings in international law, they seem clearly to have been of an unusual character. Bateman brought proceedings to collect approximately \$900.00 from the Burrowes company, who admitted the debt. Burrowes designated for attachment "the entire business represented by him". The court thereupon authorized the seizure of approximately \$200,000 worth of property, not belonging to that company, to secure a debt of \$900.00. Article 1395 of the Mexican Commercial Code which designates the kinds of property and the order in which such property may be taken to satisfy debts seems clearly to contemplate that property shall be seized only in sufficient quantity to satisfy the debt claimed. No examination appears to have been made with regard to the ownership of the property seized. No reasons such as prior liens or attachments were given for the seizure of this large amount of property. No bonds were given to

indemnify anyone for losses that might be sustained as a result of the attachment.

The bankruptcy proceedings which followed the attachment proceedings are to my mind likewise of a most unusual character. It happens occasionally that possession is taken of property which is not part of the assets of a bankrupt. This occurs when among property in the custody of a bankrupt are found things which may not have passed to the actual legal ownership of a bankrupt, or things concerning which the legal title may not be clear. It seems to be obvious that, from the time that the bankruptcy was declared, the judge at Monterrey and those acting under his direction and all creditors were aware of the fact that the locomotives did not belong to Burrowes or to his company. They were not part of the assets of the bankrupt. They were property which, conformably to the provisions of Articles 998 and 999 of the Mexican Commercial Code should be returned to the owner. These Articles provide in part that certain described property, including property which a bankrupt may have leased, shall be considered as belonging to others and shall be placed at the disposition of their legitimate owners.

The judge, in granting the petition for a declaration of bankruptcy, refers to a letter which he states creates a very strong presumption that the railroad equipment of the Burrowes Rapid Transit Company is not the property of the company and gives this as a reason for his decree of bankruptcy. It may probably be inferred from this that under Mexican law a business concern could not be forced into bankruptcy because of the nonpayment of a relatively small amount of debts when a creditor had a great many times more property than was necessary to satisfy such debts, and that in a case of that kind a creditor would be remitted to a suit, a monetary judgment in which could be satisfied out of a small proportion of the assets of the debtor. All the records of the Burrowes Rapid Transit Company were taken into custody when bankruptcy was declared, and they of course revealed clearly that the Burrowes Company was not the owner of the locomotives, and also that Venable was a joint lessee; and that the Illinois Central Railroad Company was the owner. The representations made to the judge by Botello and by Greenstreet, the receiver appointed by the court in Texas also made known to the judge and to the *sindico* the status of these engines.

That the locomotives were not part of the assets of the bankrupt, and therefore could not properly and legally be treated as such, was evidently clear to all persons who had any connection with the bankruptcy proceedings. It appears that the sole reason assigned for the failure to release the locomotives was that they would be released only to the owner directly, and not to a lessee having rights of possession. Counsel for Mexico declared in argument that this attitude on the part of the court and of the *sindico* was consistent with Mexican law, and that if the owner should not apply the property would be auctioned and sold. It seems to me to be inconceivable that it is a correct interpretation of the law of Mexico that in connection with drastic proceedings such as bankruptcy proceedings are, in which an individual or a business concern is wiped out and the owner's property is applied to the satisfaction of the claims of creditors, the law provides that property belonging to third parties—property the title to which is clear—may be seized, held, and sold at auction to satisfy the debts of a creditor to whom such seized property does not belong, simply because the party asking for the release of the property is one having a possessory right, or, as in the instant case, the owner of property represented by a lease.

Article 1416 of the Commercial Code of Mexico provides that "the judge who has cognizance of the bankruptcy shall provide for the conservation of the property of the estate and appoint for the purpose a provisional syndic and an interventor".

Article 998 of the Code contains the following provision with regard to the release of property which may have been seized and which does not belong to a bankrupt:

"The merchandise, effects, and every other species of property which exist in the estate of the bankrupt whose ownership has not been transferred to the bankrupt by a legal and irrevocable title shall be considered belonging to others, and shall be placed at the disposition of their legitimate owners, their rights being acknowledged by a meeting of creditors or by a final judgment, the estate retaining the rights in said properties which belonged to the bankrupt, in whose place such estate shall always be substituted, provided it fulfill the obligations annexed to the said rights."

Under Article 999 of that Code property which the bankrupt may have leased is included "within the principle" of the foregoing Article.

It is contended in behalf of the United States that the locomotives, being clearly property of the Illinois Central Railroad Company, the possessory right of which was in lessees at the time of the seizure, should have been released by an order of the court made on its own initiative, when the court was undoubtedly aware of the fact that the property did not belong to the bankrupt, or in any event, should have been promptly released when suit to recover it was instituted against the *sindico*, or following the hearing attended by Greenstreet. Counsel for Mexico contends on the other hand that under the law the property may be released only to the owner directly and that, failing an application from the owner the property must be sold to satisfy claims against the bankrupt. When the Mexican Code of Civil Procedure provides that property not belonging to a bankrupt shall be released to the owners, it seems to me that it is a common-sense interpretation that property under a lease shall be released to the owner of the lease, or in other words, to the owner of the property represented by that lease.

The Civil Code of the Mexican Federal District and Territories contains several chapters devoted to leases, which are defined as contracts by which one cedes to another the use or enjoyment of a thing for a certain time and in virtue of a certain price. When property under lease is seized under governmental authority the owner of a lease is, of course, deprived of the use of his property. This simple point is aptly illustrated by the case of the *Modern Transport Company, Ltd., v. Buneric Steamship Company*, Law Reports, King's Bench Division, vol. 1, 1916, p. 726, in which it was held in a case concerned with the requisition of a ship by the British Admiralty that the interest which was affected by the requisition was that of the *charterer* and not that of the owner. From the standpoint of international practice it is interesting to note the following definition of owner in the British Prize Court Rules and Orders:

"'Owner' shall include any person to whom by operation of law the property in a ship seized or taken as prize shall, in whole or part, have passed, and shall also include any person intervening in a cause on behalf of an owner, or intervening and claiming or alleging an interest in such ship." *Twerton's Prize Law*, "Rules and Orders", p. 1.

A rule which would deprive a lessee from any standing in court to recover the use of his property and which would recognize only an owner not in possession would appear to be an arbitrary rule, the effect of which would be to destroy the contractual relations between the lessee and lessor, since property would be taken from him who has the right of possession and delivered to one who for a valuable consideration had sold that right to another. No citation of legal authority was made by Mexican counsel to support such an interpretation of the Mexican Commercial Code.

It was argued, with considerable reason, it seems to me, by counsel for the United States that the denial by the judge at Monterrey and by the *sindico*, Isla, of any standing on the part of Venable as a lessee to apply for the release of the locomotives was a denial of justice under well-known principles of international law securing to an alien the right to be heard in the courts. A denial of justice, as that term is understood in international law, of course can not be predicated upon the refusal of a court to hear a cause because a court has no jurisdiction, as when a nation does not allow itself to be sued in tort, or when the courts have no jurisdiction to pass upon questions of a political nature. But it seems clearly to be an established principle of international law that a foreign litigant should have the same opportunity to establish his case as a citizen has. On this point see Ralston, *International Arbitral Law and Procedure*, p. 47; *Revue Générale de Droit International Public*, Volume XIII, pp. 22-23; case of *Duthil and Faisans*, under the Convention of January 15, 1880, between the United States and France, Boutwell's Report, p. 91. It seems to be clear that both the judge and the *sindico* took the position that the one obstacle to the release of the engines was that the owner should apply and did not apply. This position, counsel for Mexico contended, was properly grounded on Mexican law. If that be a correct construction of Mexican law, then of course the court would not by a refusal to deliver to a lessee be denying Venable remedies granted by Mexican law to Mexican nationals, and if he suffered a denial of justice, that was inherent in the law.

Counsel for the United States discussed very fully the point that evidently both the judge at Monterrey and the *sindico*, Isla, knew that property not part of the assets of the Burrowes Company had been seized. The fact that documentary evidence so obviously established the ownership of the locomotives, the rights of the lessees, and the consequent nonliability of the locomotives to seizure as part of the assets of the Burrowes Company, furnish, I think, a satisfactory explanation of the character of the proceedings which took place when the receiver, Greenstreet, accompanied by Mexican counsel, undertook to obtain the release of the locomotives from the judge at Monterrey and the *sindico*, Isla. Counsel for Mexico discussed different kinds of proceedings which he stated could properly have been employed. To my mind there is nothing in the Mexican Commercial Code indicating that procedure with regard to the release of property which for some reason has been taken possession of, although not a part of the assets of a bankrupt, is not similar to procedure under the bankruptcy law of the United States and doubtless the laws of other countries. Such property naturally is generally promptly released by proceedings of an informal character. Obviously no other form of proceedings would be proper, except in a case in which contentious questions are raised with regard to ownership, in which case, of course, formal litigation becomes necessary. No proper law could permit an unnecessary despoiling of an owner of property against which there is no claim. And undoubtedly it is incumbent on officials to

take precaution against the seizure of such property. In the United States officials acting under the direction of the court may release property; under the Mexican Commercial Code it would appear that property must be released on an order of the judge, unless creditors effect an agreement. There appears to be nothing in the Code from which it may be inferred that property clearly not part of the assets of the bankrupt could not be released by the judge acting even on his own initiative. As bearing on Mexican law and procedure it is interesting to note from the record that two tank cars under lease to the Mexican National Railways were seized in connection with the proceedings against the Burrowes Company. A communication was addressed to the *síndico*, Isla, setting forth the fact with regard to the ownership and the lease, and asking for the release of the cars, whereupon Isla promptly recorded an expression of opinion to the effect that the cars were not subject to detention by the judge in bankruptcy.

Counsel for Mexico criticized Botello for the advice which he gave to Venable, and criticized the court for conducting proceedings that are called "informal". I am unable to perceive that the criticism is deserved in either case. Botello was selected as counsel, it is explained in the Memorial, because of his distinction as a lawyer. It seems incomprehensible to me that a lawyer of standing in Monterrey should not be familiar with such a simple question of proper practice as the application to the appropriate authorities in a bankruptcy proceeding for the release of property clearly no part of the assets of a bankrupt. Furthermore, the hearing which the judge at Monterrey conducted when Greenstreet, the receiver appointed by the Texas court, appeared with counsel before the judge seems to me to be a kind of simple proceeding one should expect in a matter of that kind. At that hearing there was, very appropriately, it seems to me, laid before the judge an abundance of documents revealing the ownership of the engines and the situation of the lessees. It was not a proceeding to give effect to a foreign judgment. It is pertinent to bear in mind that the judge found no fault with this procedure, which I think therefore we must assume is a perfectly regular one in Mexico. In reaching these conclusions I naturally have in mind the particular functions of the judge in dealing with the release of property clearly no part of a bankrupt's assets. Of course, generally speaking, proceedings before judicial tribunals are of a formal character.

The principles with respect to the reserve with which an international tribunal should deal with the examination of proceedings of domestic courts against which complaint is made have repeatedly been discussed before the Commission. To my mind it would be a strange process of reasoning by which the Commission would undertake, on the one hand, to regard as improper action of the judge in giving a hearing of this kind, having the purpose of affording to an alien the opportunity to present by ample proof matters such as were laid before the court, and, on the other hand, to regard as proper a ruling on the part of the judge that a lessee had no standing in court and that the locomotives could only be returned to an owner in a foreign land, a company which for obvious reasons made known to the court, such as the complete protection which it had in a bond and other practical reasons, would not appear and ask for the release of the locomotives.

At the point where Venable found himself baffled in all efforts to avoid being subjected to a loss of \$150,000, and being prevented from carrying out his contractual obligations toward the Illinois Central Railroad Com-

pany, the situation which he had to face may be briefly indicated. At the instigation of Burrowes the locomotives were seized on the order of Rochín. Within a short time, apparently about six hours after the seizure became effective, the property was attached to satisfy a debt of about \$900.00, and efforts to obtain the release of the property not belonging to the debtor resulted in failure. Bankruptcy was declared, and all efforts to obtain the release of property, clearly no part of the bankrupt's assets, likewise resulted in failure. The judge would render no judgment for release on his own initiative or in response to the representations made to him "informally" by Botello or those made to him by Greenstreet, the receiver appointed by the Texas court, although it was obviously clear to the judge that property not part of the bankrupt's assets was being held to the great loss of an interested person. The *síndico* would not release the property, although he likewise knew that he was holding property not the assets of the bankrupt, and he met a proceeding to obtain a release by a series of dilatory pleas. Evidently no rights of anybody were adjudicated by the court. See American Memorial, p. 18; Mexican Brief, p. 99.

An action of involuntary bankruptcy is a very serious and drastic proceeding. A bankrupt is deprived of his business assets and they are applied to debts of creditors. The general purpose of proceedings of this kind are probably very similar under domestic laws throughout the world. In the United States a bankruptcy proceeding is regarded as similar in principle to a proceeding in equity. In all countries unquestionably it is the duty of officials acting in a bankruptcy case to conduct proceedings with the utmost expedition consistent with a proper course of procedure and with the greatest possible care to safeguard the rights of the bankrupt and the rights of the creditors. The court once having declared bankruptcy and initiated the proceedings, it was obviously the duty of all functionaries connected with these proceedings to carry them through in this manner and to dispose of the relative rights of all parties. Apparently the rights of nobody have been settled. The proceedings seem to be at present in the situation they occupied when they were instituted, and property worth approximately \$200,000 which was seized and held, although not the property of the bankrupt, has been stolen or destroyed. The action of administrative and judicial authorities responsible for this situation constitutes, the United States contends, a denial of justice.

All questions discussed in connection with this claim with respect to Mexican law and procedure in relation to the disposition of the assets of a bankrupt in satisfaction of claims of creditors are entirely irrelevant to a proper disposition of the case. The Commission is not called upon to reach conclusions with regard to such matters. There is not before the Commission any question with regard to the duties of a judge or a *síndico* or an interventor in dealing with the assets of a bankrupt. The fundamental point in the case before the Commission obviously is whether there is responsibility on the Mexican Government because of the treatment of property which was not part of a bankrupt's estate and which was taken possession of by Mexican authorities and stolen after it was seized. It can obviously not be denied that the intermeddling of Rochín effectively deprived Venable from control over his property. Likewise Venable was of course absolutely deprived of control over the property when the court decreed attachment and later decreed bankruptcy. It seems to me that it can not be plausibly urged that when authorities of a government, judicial,

administrative or military, take possession of the property of an alien, and no safeguards are provided against loss through destruction or theft, it can properly be alleged in defense of allegations of responsibility for such action that the property, after having been taken, was turned over to persons for whom the government assumes no responsibility, and that therefore there can be no liability for destruction or theft of such property.

It would seem to me strange if counsel for Mexico is correct in his contention that the *sindico* can not be regarded under Mexican law as an official of the court, and that he is merely a representative of the estate of the bankrupt, a "private person", as he was called, for whom there is no responsibility on the part of Mexico. The *sindico* under Mexican law besides being a custodian of property subject to direction of the judge having jurisdiction in the bankruptcy proceedings seems also to perform in a measure duties such as are performed by the referee under the bankruptcy law of the United States, who in a sense might be called a sub-judge. On this point see Articles 1442, 1489, and 1490 of the Commercial Code of Mexico. The determinations of such a sub-judge with regard to the nature of claims presented by creditors against a bankrupt, the property that is subject to the payment of debts, the debts that are due, preferences of claims, are all questions of a judicial character which may ultimately come before the court for final action. But if it is a fact that such judicial questions are not dealt with in any way by the *sindico*, they, of course, are handled by the judge. Surely it can not be said that under Mexican law property may be seized by order of a court and that thereupon all the important proceedings with regard to the disposition of property not belonging to a bankrupt and with regard to the proof of debts and the distribution of property to satisfy those debts are entirely left by the judge to creditors to be adjusted as private, nonjudicial matters, the creditors being turned loose to help themselves to the estate of the bankrupt. Nor can it be plausibly maintained that in a case in which the property of an alien is involved there is no responsibility on the part of Mexico for anyone whatever may happen to the property.

It is shown by the Mexican Commercial Code that the judge has jurisdiction in the matter of release of property not part of the assets of a bankrupt and it is shown by the record in the case that the *sindico* took some action in matters of this kind subject to the control of the judge. It seems to me that the language of the Code does not lend itself to an interpretation sustaining such a view of the private character of the duties of a *sindico* and the nonresponsibility of a judge who has jurisdiction in a case of bankruptcy. But even if this were the situation with respect to Mexican law, I am of the opinion that the existence of Mexican law of this nature would not relieve the Mexican Government from responsibility for the deprivation of property during the course of bankruptcy proceedings, and more particularly with regard to property, *such as is involved in the instant claim which was not part of the assets of a bankrupt.*

Under the law of the United States the receiver and trustee and other persons connected with bankruptcy proceedings are officers of the court. Under international law a nation has responsibility for the conduct of judicial officers. It was suggested by counsel for the United States that, if in connection with a bankruptcy proceeding, or as distinguished from the disposition of assets of a bankruptcy, a proceeding to obtain the release of property not part of the assets of a bankrupt, such officials of a court.

were guilty of gross misconduct, the United States could not deny responsibility for their acts in the light of Article I of the Convention of September 8, 1923, under which the contracting parties are responsible for the acts of officials or others acting for either Government. And I am of the opinion that the Government of Mexico can not be without responsibility for persons performing the same kind of duties in Mexico merely by the fact, if it be a fact, that such persons are not designated or considered as officers under Mexican law. Mexican law requires them to conserve property seized in bankruptcy proceedings. It is the character of functions which persons perform and the manner in which those functions are discharged that determine the question of responsibility.

In connection with the decision in the claim of *Massey*, Docket No. 352,¹ the Commissioners expressed the view that it is a sound principle that whenever misconduct on the part of persons engaged in governmental functions, whatever may be their particular status under domestic law, results in the failure of a nation to perform its obligations under international law, the nation must bear the responsibility for the wrongful acts of such persons. In my opinion the same general principle of responsibility is applicable to conduct resulting in a direct injury to an alien—to his person or his property. Counsel for Mexico asserted that legal action might be taken against the persons responsible for the theft and destruction of the locomotives. Undoubtedly that is a proper provision of Mexican law. But under Article V of the Convention of September 8, 1923, it can not be pleaded in defense of a claim that the claimant has failed to resort to local remedies. The two Governments deemed it to be desirable to eliminate any such defense. I understand that the Mexican Government allows itself to be sued in tort; the United States does not. But even in the United States there would perhaps be at least what might be called a theoretical remedy in all cases in which claims are made against the Government of the United States, because actions could be maintained against the persons directly responsible for alleged wrongful acts upon which claims are predicated.

I do not mean to imply that a government must be regarded for every purpose as an insurer of property in custody of its representatives, as to be responsible, for example, for property taken by professional highwaymen against whose acts reasonable police measures could not have been effective. Such a situation is not presented by the record in this case, which shows that the property was directly in charge of a lawyer for the Mexican National Railways under governmental control, and of Familiar, one of the superintendents of the Railways, and further shows the manner in which the locomotives were dismantled to which reference has heretofore been made. In the instant case responsibility for the theft and destruction of the property seems to me to be obviously clear, unless we take the view, to my mind clearly unsound, that Mexico is responsible for neither the judge nor the *sindico*.

There is another aspect of the case which to my mind clearly reveals the responsibility of the Government of Mexico. It appears to be a well-established principle of international law that a denial of justice may be predicated on the failure of the authorities of a government to give effect

¹ See page 155.

to the decisions of its courts. See the *Putnam* case, Docket No. 354;¹ the *Youmans* case, Docket No. 271;² and the *Mallén* case, Docket No. 2935.³ decided by this Commission; also the *Montano* case, Moore, *International Arbitrations*, vol. 2, p. 1630; the *Fabiani* case, *ibid.*, vol. 5, p. 4878; and the case of *W. R. Grace & Co. against Peru*, *Foreign Relations of the United States*, 1904, p. 678. The *Lord Nelson* case, decided under the Special Agreement of August 18, 1910, between the United States and Great Britain, interestingly illustrates the point. American Agent's *Report*, p. 432. Claim was made in this case by the British Government on account of the seizure of the British schooner *Lord Nelson* shortly before the declaration of war between the United States and Great Britain in 1812. An American court pronounced the seizure of the vessel to be illegal, directed the vessel to be sold and the proceeds of the sale to be paid to the owner. The court's direction with regard to the payment to the owners was not complied with, because the funds were embezzled by the clerk of the court. In the proceedings before the Arbitral Tribunal the American Agent admitted liability in the claim for \$5,000.00, the principal amount claimed, and left to the consideration of the Tribunal the question whether interest should be included in the award. The Tribunal rendered an award in the case which included the principal sum of \$5,000.00 and interest amounting to \$18,644.38.

Venable originally had a possessory right with respect to the seized locomotives. Later he obtained a complete title to them. No matter how long or before what courts, or by what methods, Venable had prosecuted litigation for the recovery of the locomotives, he could never have obtained justice through the return of the locomotives, because they were stolen and destroyed while in custody of persons who obtained control over them by legal processes—whatever may be their nature. Neither the Mexican court at Monterrey nor any other court could ever have given effect to a decision restoring the engines to Venable or to anybody else. The record discloses that the remnants of the engines are now junk. They were not auctioned to satisfy debts of creditors.

Questions were raised in the Answer with regard to the standing of Venable as claimant. There is no doubt with regard to the American citizenship of Venable. If it should be considered that, in spite of his ownership of all interest in the claim there was any necessity for the allotment from the Merchants Transfer and Storage Company, a Mexican company, which accompanies the Memorial, there can be no doubt as to the satisfactory character of an allotment executed by the Board of Directors of the company in favor of the owner of all the property of the company.

Irrespective of what may be said with regard to all other points in the case, I am of the opinion that it is clear that Mexico must be held liable on two points, both directly concerned with the destruction and theft of the locomotives. Is Mexico responsible for the seizure of property by administrative and judicial action, the continued detention of the property, and the destruction and theft of property following such seizure? It is clear that, on one hand, no court could ever render a judgment restoring the locomotives which are ruined and worthless, and certainly that fact is as

¹ See page 151.

² " " 110.

³ " " 173.

determinative of responsibility as the failure of Mexican authorities to give effect to a judgment for restoration would have been if such a judgment had been rendered and the property had been destroyed and stolen after rendition of the judgment so as to render impossible the execution of the judgment. Certified copies of the court records in the proceedings before the judge at Monterrey were filed by the Government of Mexico, and copies of some of these records accompany the American Memorial. No record is revealed of any decision of the court finally adjudging the property rights of anybody in any of these proceedings. The situation about six years after proceedings were begun is assuredly significant of their character. It is equally clear, on the other hand, that compensation must be made for property of which possession was taken by Mexican judicial authority after seizure by administrative action and which was destroyed and stolen with the acquiescence or cooperation of someone appointed by the court to cooperate with the court, in accordance with the requirements of Mexican law, to safeguard it.

In 1922 a judgment was rendered against the National Surety Company in favor of the Illinois Central Railroad Company for the value of the four locomotives, namely, \$150,000, together with interest and costs, amounting in all to \$153,725.00. Venable, being liable to the Surety Company in that amount, a judgment was rendered against him therefor with interest, in all \$154,340.10. This entire sum he paid to the Surety Company. See Memorial, pp. 365, 356, 360 and evidence filed by the United States March 8, 1927. The Railroad Company assigned all its interest in the locomotives to the Surety Company which in turn assigned its interests to Venable. By the terms of the arrangement which Venable made with the insurance companies which had insured the engines, all their rights to the property were assigned to Venable. By an order of the Texas court which decreed a receivership for the Burrowes company, Greenstreet, the receiver in that proceeding, was directed to execute and deliver to Venable an assignment and transfer of all the interests of the Burrowes Rapid Transit Company in the locomotives and any and all claims which the company might have or assert against any person, firm, partnership, corporation, or government arising from injury to or detention of the locomotives. The items of damages stated in the Memorial are as follows:

| | |
|---|--------------|
| (1) To amount of the principal of this claimant's confession of judgment to the National Surety Company | \$154,340.10 |
| (2) To amount of personal expenses of H. G. Venable in Monterrey, Mexico, in September, 1921, for himself, C. L. Eddy, Duke Oatman, and Mrs. Kathleen Hull Harvey | 4,050.00 |
| (3) To amount paid A. Zambrano e Hijos, September 15th, 1921, for draft | 1,250.00 |
| (4) To amount paid Lic. Salome Botello prior to January 1st, 1923 | 750.00 |
| (5) To amount paid Lic. Salome Botello between January 1st, 1923, and August 1st, 1925 | 500.00 |
| (6) To amount of personal expense of H. G. Venable in seeking collection of claim in November and December, 1922 . | 2,200.00 |
| (7) To personal expenses of H. G. Venable in seeking collection of claim in January, February, and March, 1923 . . | 2,200.00 |

| | |
|---|------------|
| (8) To total amount paid to and through Hicks, Hicks, Dickson & Bobbitt to August 1st, 1925 | 4,227.14 |
| (9) To expense obligation to Winston, Strawn & Shaw | 3,654.63 |
| (10) To expense to and through O. M. Fitzhugh prior to October 1st, 1922 | 9,166.66 |
| (11) To expenditure to O. M. Fitzhugh in February, 1923 | 648.52 |
| (12) To expense to O. M. Fitzhugh in March, April, July, and August, 1924, in seeking payment of claim from Mexican officials | 797.79 |
| (13) To expense of O. M. Fitzhugh in preparing proof of claim from January 1st, 1925, to August 1st, 1925 | 550.00 |
| | 184,334.84 |
| Total on August 1, 1925 | |

I am of the opinion that the award in favor of the claimant should include the value of the four locomotives fixed in the aforesaid lease, namely, \$150,000, less 21,000 Mexican pesos or \$10,468.50, the amount which the Mexican Government has stated it would take to repair one of the engines which was wrecked while in charge of employees of the Mexican National Railways. For those damages it would seem Mexico became liable to the Burrowes Company or to Burrowes under the terms of the Burrowes-Perez contract. However, the damages were not adjusted or liquidated at the time when all rights of Burrowes with respect to the locomotives became vested in Venable. I think the Government of Mexico may properly be given the benefit of the doubt with regard to any rights the Burrowes company may have had against the Mexican Government for damages for the destruction of this locomotive. The sixth, seventh, and twelfth items of the claim for expenses in seeking a collection from the Mexican authorities totalling \$5,197.79 may properly be included in an award, the total sum of which should be \$144,729.29. I am of the opinion that interest should clearly be included in the award. Venable has been deprived of property and subjected to large financial loss, and the amount of damages is a sum of money fixed with absolute precision. The following extract from the opinion of the Tribunal in the *Lord Nelson* case in the arbitration under the Special Agreement of August 18, 1910, between the United States and Great Britain, *supra*, is pertinent to the instant case:

"In international law, and according to a generally recognized principle, in case of wrongful possession and use, the amount of indemnity awarded must represent both the value of the property taken and the value of its use (Rutherford's Institutes, Bk. 1, ch. XVII, sec. V; VI Moore's International Law Digest, p. 1029; Indian Choctaw's Case, Law of Claims against Governments, Report 134, 43 Cong., 2nd sess., House of Representatives, Washington, 1875, p. 220, *et seq.*)." American Agent's *Report*, p. 434.

The practice of international tribunals with respect to the inclusion of interest in pecuniary awards is discussed at some length in the decision rendered by the Commission on December 6, 1926, in the *Illinois Central Railroad Company* case, Docket No. 432.¹

¹ See page 134.

Fernández MacGregor, Commissioner:

1. I concur with the statements of the Presiding Commissioner in paragraphs 1 to 5, 24 and 28 to 32 of his opinion, and I dissent with him in regard to his views on the question of the responsibility of Mexico for Rochín's telegram. I set forth below some private views regarding the questions in which I concur, as, agreeing on the grounds of international law on which they are predicated, I believe that they explain themselves by means of a more minute, although unnecessary, consideration of Mexican law. I also give the reasons for my dissent in the points to which I refer above.

Telegram of Rochín

2. The first act of the Mexican Government which, according to the Government of the United States, implies the responsibility of Mexico is that committed by C. C. Rochín in his capacity of Superintendent of Transportation of the National Railways of Mexico and Connecting Lines Under Government Control, when he sent telegraphic instructions to prevent the Burrowes locomotives Nos. 2280, 2281, 2282, and 2283 from leaving Mexican territory. It is affirmed that such an act is illegal, because it put an obstacle to the legitimate right which Venable had, as joint lessee of the Illinois Central with Burrowes, to comply with the contract for the lease of the locomotives, which required the lessees to return same fifteen days after the lessor gave written notice for that purpose. To judge this responsibility attributed to the Mexican Government it is necessary to establish the juridical condition of the locomotives in question, Burrowes and Venable, respectively, in relation to the officials of the National Railways of Mexico. Burrowes was the only person that the National Railways of Mexico recognized and the only one with whom they had contracted, as proven by the contract of April 13, 1921. According to this contract Burrowes obtained the privilege of using the tracks of the National Railways of Mexico to carry freight with the rolling stock furnished by himself. The National Railways of Mexico obtained on their part, in addition to the stipulated profit for the use of their tracks, the possibility of filling, by using the rolling stock of Burrowes, the scarcity of such material from which the Railways were suffering. Venable entered into the contract made by him and Burrowes with the Illinois Central on a date subsequent to the signing of Burrowes' contract with the Railways. It is logical to suppose that he knew of this contract, and, therefore, that he agreed even to the possibility of not being able to perform his contract with the Illinois Central, inasmuch as, surely, by this contract the locomotives had to be returned fifteen days after the Illinois Central asked for them; and, on the other hand, the contract of Burrowes with the Railways gave the latter (Clauses VI and VII) the right to retain the locomotives if there were any unpaid freight. Moreover—and this has to be taken into account very much—Venable gave material possession of the locomotives to Burrowes, who always appeared juridically before the National Railways as the legal possessor of the rolling stock through some title or other. But he did not make known before any authority of Mexico his interest in the locomotives or in the contract of Burrowes with the Railways, before difficulties arose, and he did so, when they arose, only in an indirect way. For this reason, when Burrowes, through his agents Hammeken and Toussaint, went to Rochín explaining that he was having trouble with the agents in charge of the offices of the Burrowes Rapid

Transit Co. in the frontier; that the locomotives were going to leave the tracks of the National Railways and Mexican territory by order of Wittington (who was not subordinated, surely in this case to Burrowes, but to Venable); Rochín, Superintendent of Traffic, as already stated, could legally render aid to Burrowes, helping him to maintain a possession from which some persons who, like Venable, had in no way made known their interest in the locomotives, were endeavoring to remove him *without bringing any judicial action in Mexico*. It is not necessary to admit that Rochín as alleged by the Mexican Agency, may have only wished to safeguard the interests of the Railways, making use of the power given him by articles VI and VII of the contract of April 13, 1921; it suffices that Rochín may have considered that Burrowes, who was the party asking for the detention of the locomotives, *was, in Mexico and to the National Railways, the legal possessor of said locomotives*; and, further, that said Railways were connected by contract with Burrowes for the use of all the latter's rolling stock. If in the absence of a contract between Burrowes and the Railways Rochín had interfered for the purpose of detaining the locomotives in his mere capacity of a Mexican authority, then, perhaps, he could have been considered responsible, on account of intermeddling administratively in a matter which might be litigious. But, as already said, Rochín was not acting for the Railways as an authority, but in so far as they were moral persons who had contracted with Burrowes, and on this ground Rochín's action does not appear improper from an international point of view. The National Railways furnished the personnel that handled all the rolling stock of Burrowes; this personnel was at the orders of Rochín in his capacity of Traffic Superintendent; Rochín, then, could, by merely withdrawing such personnel, stop the locomotives, which would have meant, perhaps, a failure to perform their contract with Burrowes, for which failure only the latter could have sued the said Railways, to the exclusion of Venable, who never dealt with them.

3. There is another aspect of this fact, which it is very important to take into account. It is alleged that, without Rochín's telegram, the locomotives would not have been attached; that it would not have been necessary to ask for an adjudication of the bankruptcy of the Burrowes Rapid Transit Company; and, finally, that the locomotives in question would not have been lost. It must be noted in this respect, that Bateman had commenced an executory process against Burrowes since September 1st, and that such executory process was at the stage of an attachment since September 2nd, attachment which could be executed at any moment, even without Rochín's intervention. The evidence in the record says only that, on September 3rd, the locomotives in question were running towards the frontier between Mexico and the United States, but nothing is said as to where they were before eleven o'clock in the morning of that day, at which time Rochín sent his disputed telegram. In any manner, it appears that this telegram could detain the locomotives in Monterrey, which is situated at least eight hours by train from the frontier, and this supposing that the locomotives were to have free use of the tracks and did not have to await the movements of the other trains which ran in that section. In those eight hours available, during which the locomotives were in Mexican territory, Bateman could well have secured the attachment in any place other than Monterrey, by the use of telegraphic warrants, and, therefore, it appears that it is not established that Rochín's act may have been the cause and origin of the total loss of the locomotives or of any other loss or damage which may be attributed to the Mexican Government.

Judicial Procedure

4. The American Agency has alleged that the Mexican Courts which had cognizance of this case in different ways, carried out the proceedings improperly, giving cause for the imputation of a mis-administration of justice on the part of Mexico. The proceedings which were instituted in the courts of Mexico can be divided into two parts: (a) Those instituted in the First Civil Court of Letters of the city of Monterrey, Mexico, on the motion of R. L. Bateman, to obtain the attachment of three of the locomotives, Nos. 2280, 2281, and 2282, and other property alleged to belong to the Burrowes Rapid Transit Co., and (b) those instituted subsequently by H. G. Venable before the same Judge, to obtain an adjudication of the bankruptcy of said company, and the return of said locomotives to their owner.

5. The record of this claim shows that R. L. Bateman had been an employee of the Burrowes Rapid Transit Company, and that the latter owed him the amount of 1,950 pesos, covering salaries due. On September 1, 1921, Bateman appeared in Court with the document in which Burrowes as representative of said Company, acknowledged the indebtedness, and he asked that said Burrowes be summoned in Court to ratify his signature, so as to prepare the executory process. On September 2nd, the Judge ordered that Burrowes be summoned in Court in order to ratify his signature, within three work days after said Burrowes had been served with the summons. On that same date, at 4 p.m., Burrowes appeared in Court and ratified as his signature, that which was on the bottom of the document in question. The American Agency holds that the fact that Burrowes hastened to ratify his signature before the term fixed by the Judge for his doing so, reveals bad faith on the part of Burrowes and improper action on the part of the Court that consented to such a thing, for it can be inferred that the Court was in connivance with the parties in the action, to precipitate the events. The so-called annotated irregularity does not involve a violation of either the domestic law or international law. The term fixed by the Judge for the ratification of signature by Burrowes was a period of time allowed in his favor, and it is a principle recognized by all systems of law, that a party may waive the rights and terms which the law grants him if no third party suffers. Even on the supposition that the term were obligatory also for the Judge, it could not be shown that his failure to avail himself of such term constitutes the violation of a principle of international law, as it has been repeatedly held that judicial proceedings cannot be passed on by arbitral tribunals except when they may reveal a notorious injustice or wide deviation from standards generally accepted by nations.

6. The moment Burrowes ratified his signature, his indebtedness to Bateman filled the necessary requisites to institute an executory process with prompt results. (Articles 1391 and 1392 of the Code of Commerce of Mexico.) The Judge, therefore, ordered that such proceeding be held on September 3, 1921, at the petition of Bateman filed on the 2nd. The Executor of the Court, in compliance of this order, asked Burrowes to pay the debt to Bateman, and as he could not do so, it was proceeded with an attachment at 5 p.m., a regular hour according to Mexican law. (Articles 1064, 1392, 1393, 1394, 1395, and 1396 of the Code of Commerce.) The American Government alleges, that property was attached in an amount many times greater than that sufficient to cover the indebtedness to Bateman,

contrary to provisions of Art. 1392 of the Code of Commerce, which provides "that property be attached in amount sufficient to cover the debt and costs", and that this also constitutes a misadministration of justice. Mexican law (Art. 1392 cited) does not say clearly that only the property strictly necessary to cover the amount claimed must be attached; and it must be repeated here that, as in this case the protection which could arise from the limitation on the attachment is also given in favor of the debtor. the latter could waive it, as he did when he consented to the attachment of everything which was pointed by Bateman, who, on the other hand, did nothing more than specify the general designation made first by Burrowes of the entire business. Moreover, Mexican law grants to any interested person the right to oppose an attachment, alleging in Court the pertinent reasons therefor. (Articles 1394 and 1395 of the Code of Commerce and Title XII of the Code of Civil Procedure of the Federal District, supplementary to the Code of Commerce.)

7. With respect to the attachment proceeding, it is also alleged that it was carried out at an unusual hour in the afternoon of September 3rd. Mexican law is the only law that could determine in this case the working days and hours for the carrying out of such a proceeding, and, as a matter of fact, Articles 1064 and 1065 of the Mexican Code of Commerce solve this question and even authorize the Judge to avail himself of other than working days and hours when, in his judgment, there is necessity for it. An international tribunal, even in case that there should be a violation of provisions of this nature, could not, perhaps, hold that there is a misadministration of justice, except in very special cases.

8. The most serious charge made against this attachment is that it was decreed by the Judge on things which were not the property of Burrowes, since the locomotives belonged to the Illinois Central Railroad Company. There is no evidence that during the attachment proceedings instituted by Bateman the Judge may have had official knowledge of the fact that the locomotives were property of a third party and not of Burrowes. The Executor of the Court who carried out the attachment did not have the duty to know or attend to this question, for an attachment is always placed on property that is in the possession of the debtor, without prejudice to the right of the true owner to appear in Court and establish his ownership, exercising the legal acts which correspond to him. (Articles 1394 and 1395 of the Code of Commerce and Title XII of the Code of Civil Procedure of the Federal District cited.) It has not been proved that such provisions of Mexican law are a deviation from those which are contained, with respect to the same matter, in the codes of other nations, and they do not violate any principle of international law, in view of the fact that they do not ignore the rights of the true owner but merely set down the manner in which said owner must exercise them, which is well within the sovereign rights of a State. The Illinois Central Railroad Company, or any representative of its right, had always available the means of taking action against such attachment; and if they did not take such action in the manner prescribed by Mexican laws, their fault, ignorance, or negligence can not be laid on the authorities or on the Government of Mexico.

9. It is established in the record, that several other persons who had claims against the Burrowes Rapid Transit Company, followed the same procedure as that of Bateman, instituting executory proceedings and obtaining the attachment of the same locomotives and of some other things belonging to the insolvent company. Seeing the lack of success of his

extrajudicial representations and upon advice of Salomé Botello, a Mexican lawyer, Venable thought that the best method of obtaining the return of the locomotives in question was to appear as a direct creditor of the Burrowes Rapid Transit Company, endeavoring to have the bankruptcy of said company declared. He, therefore, purchased the credit of Messrs. Zambrano e Hijos, who had already obtained an attachment in their favor, in one of the executory proceedings instituted, as stated above, and as assignee of such credit, he asked, on September 15th, and obtained, on September 17th, from the First Judge of Civil Letters of the City of Monterrey, an adjudication of bankruptcy of the Burrowes Rapid Transit Company.

10. It has been alleged that the Mexican judge who appointed Isla as Trustee of the bankruptcy of the Burrowes Rapid Transit Company, committed a serious violation of international law by not requiring from said Trustee any kind of bond or security before receiving the property of the bankrupt. It has also been alleged that if Mexican law does not contain provisions to such effect, it reveals an insufficiency which may involve a misadministration of justice. Mexican law does not require that the appointed Trustee furnish security. (Article 1417 of the Mexican Code of Commerce.) Several systems of municipal law of other countries are in the same condition, although practice and publicists may show the inconvenience of the Assignee not giving security for the fulfillment of his commission. (See *Cyclopedia of Law and Procedure*, Vol. 34, pp. 150 and 250; Percerou, *op. cit.*, pp. 228, *et seq.*) There is no violation, on this ground, of municipal law or international law.

11. At the beginning Venable and Lic. Botello attempted to obtain the return of the locomotives by making unofficial representations before the Judge of the bankruptcy, to whom they explained the way in which they looked at the matter, alleging that said locomotives did not belong to Burrowes Rapid Transit Company, but to the Illinois Central Railroad Company. Both the Assignee of the bankruptcy and the Judge paid no attention to the verbal requests made by claimant, and this is the basis of another allegation of misadministration of justice made by the American Agency. Steps of similar character were taken by Mr. W. C. Greenstreet, Receiver in another bankruptcy of the same Burrowes Rapid Transit Company, adjudicated by the 49th Judicial District Court of Texas on September 1st, as a result of action taken by Venable before this Court since the latter part of August, 1921. The question then arises as to whether a judge has the obligation of considering petitions or motions made before him in a manner different from that prescribed by his law of procedure. The answer is simple, for international theory and practice are in accord, that every State has the right to set down the rules according to which actions may be brought in its courts. Mexican law establishes that all mercantile suits shall be prosecuted in writing. (Article 1055 of the Code of Commerce.) The Judge could not therefore enter a petition made in an appearance—that is, made verbally in any manner—conformably with article 126 of the Code of Civil Procedure of the Federal District, supplementary to the Code of Commerce. For such reason the Mexican judge could consider the unofficial petitions of Venable and of Greenstreet as nonexistent, without this involving the laying aside of any right existing under his domestic law or under international law.

12. Venable saw, then, that his unofficial representations did not produce, as they could not produce, any effect, and he then addressed himself to

the Judge in writing, asking from the Assignee the return of the locomotives in question, basing his petition on the provisions of Articles 998 and 999 of the Code of Commerce. The Judge submitted this petition to the Trustee, so that the latter would answer it as he thought advisable, which he did, filing, for the time being, so-called dilatory pleas, which pleaded chiefly lack of juridical capacity of Venable to demand the locomotives and vagueness of the petition he had presented. The American Agency contends that, in view of the terms of Art. 998 of the Mexican Code of Commerce, which provides that property which may exist in the estate of bankrupt, ownership of which has not been transferred to the bankrupt, by a legal and irrevocable title, shall be considered as of outside ownership and shall be placed at the disposition of its legitimate owners, the locomotives should have been placed immediately at Venable's disposition. It overlooks the fact that the same article cited provides that this return can be made only (a) upon previous confirmation of the right of the owner in a meeting of creditors, or (b) through a final decree. In the present case, Venable himself chose the second method, and in order to have a final decree in his favor, it was necessary that there should be a suit with all necessary proceedings. The action brought by Venable was an ordinary mercantile suit which had to be prosecuted in accordance with the provisions of Articles 1377 to 1390 of the Code of Commerce. In such a suit, dilatory pleas may be filed according to Art. 1379. Upon the filing of such pleas, the Judge could open, according to the same article, a period of ten days for the presentation of evidence, as he did. Mexican laws of procedure were, therefore, not violated, as alleged by the American Agency, and it is evident that if this suit was not decided by a final decree—which might have placed the locomotives in Venable's possession, if he had succeeded in proving his capacity—it was due to the fact that he abandoned the proceedings prematurely and without any reason, which makes him unentitled to complain before this Commission on account of the results of his own negligence. It has also been alleged with regard to this point, that the Judge allowed Leal Isla to answer the suit of Venable beyond the term set down for it. According to Mexican law, Venable should have charged the other party with contempt of court (Art. 1078 of the Code of Commerce), and then the proceedings would have continued on, Leal Isla losing the right to answer. Venable can not now complain of his own negligence.

13. Severe criticism has been made of the attitude of the Mexican Judge and Trustee in refusing to return the locomotives (a refusal which, on the other hand, was only extrajudicial and in answer to unofficial representations made by claimant, as proven) to any person other than their legitimate owner—the Illinois Central Railroad Company. It is contended that Art. 998 of the Code of Commerce provides that, in case of a bankruptcy, all the property, ownership of which has not been transferred to the bankrupt by legal and irrevocable title, must be returned to its owner; it is further alleged that Art. 999 of the Code of Commerce, Section IV, provides that property and merchandise which the bankrupt may have on lease, be considered as included in this provision, which was the case with the locomotives in question, as acknowledged by the Judge and the Trustee in their conversations with Botello and with Greenstreet. A long commentary on the two cited articles has been presented in an effort to show that the word "owner" must be interpreted in a broad sense, that it must include any person who may have any right on the property in question other than the right of ownership, provided there is no possibility

of the bankrupt himself having the right of ownership over the thing claimed. All the reasons adduced in support of this argument may be acceptable in Anglo-Saxon law, but, in the first place, there exists a principle that something which is clear according to the law does not have to be interpreted, and in the instant case Mexican law provides that the things covered by Art. 998 of the Code of Commerce be returned to their legitimate owners. In the second place, the theory which is the basis, in cases of bankruptcy, for the need of returning *only to its legitimate owners* the property found in the bankrupt's possession, over which he may not have an ownership title, has for its object avoiding difficulties in the bankruptcy, which might arise if property were returned to other persons, as errors might be committed, for which the owner would later have the right to complain against the bankrupt estate. By returning the things to the owner, all complications are avoided; once he is in possession of the property, the legitimate owner can return it to a third party interested therein, where there is some contract between the owner and such third party. Such, it appears, is the theory followed by Mexican law¹, by French law, and by other systems of law. (Percerou, *Faillites et Banqueroutes*, Ed. 1913, Vol. II, pp. 146, *et seq.*; Lyon Caen et Renault, *Manuel de Droit Commercial*, Ed. 1924, pp. 1075, *et seq.*) These authors take up and comment on this power which an owner has, to withdraw from the bankrupt mass the property title to which has not passed irrevocably to the bankrupt, calling such power and giving it the effects of a "right of revindication".

Now, then, according to Roman law, which is the basis of practically all the systems of law of Latin countries, the action of "revindication" can be brought only by the owner or his representative. (See Maynz, *Droit Romain*, ed. 1891, Vol. I, p. 773.) All the cited laws further impose on the owner who claims any property that may be in the bankrupt's possession the indispensable annoyance of instituted proceedings which may establish the right of ownership before the Trustee and the Judge of the bankruptcy. It is not here attempted to determine in what way provisions of the nature of those here considered may violate international law.

Destruction of the locomotives

14. The principal point in this claim is to determine the participation and responsibility of the Mexican authorities in the deterioration and almost total loss of the locomotives while the latter were in the possession of the Assignee of the bankruptcy, Leal Isla, who, in turn, had delivered them to Familiar, Terminal Superintendent of the National Railways in Monterrey. It is evident, of course, that the latter was charged with the care and material conservation of the locomotives. The evidence presented by the Mexican Agency proves that Leal delivered them to Familiar "in his capacity of Superintendent". The question arises, therefore, as to whether Familiar could perform that act in representation of the National Railways. A Superintendent is an agent; hence, he cannot bind his principal (in this case the National Railways, and through them the Mexican Government) except within the scope of his agency. It has not been proven that a Superintendent of the Railways can receive as a deposit rolling stock belonging

¹ (Vide *Diario de Jurisprudencia*, Vol. IX, No. 46. Decision of the 2nd Sala del Tribunal Superior. *Korff Honsberg y Cia. vs. Ingenio Constanca.*)

to private persons, under the responsibility of the Railways. A Superintendent has generally only administrative duties relative to the traffic of the trains. No one can believe that a Superintendent may have universal powers, specially outside of matters which concern the movement of trains. The resulting conclusion is that Familiar received the deposit of the locomotives in his private capacity and not in his official character, not being able, therefore, to bind Mexico with his private acts or omissions.

15. Leal Isla was also an official of the Railways (Consulting Attorney), and the same problem arises in regard to him. The Mexican Government alleges that a Consulting Attorney has no other duties than solving the legal questions presented to him; that, for the rest, he can exercise his profession freely just like any other lawyer. It seems, then, that Leal participated in the bankruptcy proceedings as a mere private person, and not as an official, for which reason his acts in this respect do not imply the responsibility of Mexico.

16. It has been insistently alleged, that the Assignee of a bankruptcy is an official of the government, basing such allegation on various provisions of Mexican law (Articles 1416 and 1417 of the Code of Commerce). Without going into a discussion of the laws of all countries, it may be affirmed that in many of them assignees do not have an official character. Thus, for instance, in French law: "Les syndics ne sont ni des fonctionnaires publics, ni des officiers ministeriels". (Lyon-Caen et Renault, Manuel de Droit Commercial, ed. 1924, p. 1010.) This is the case in Mexican law (Art. 972 of the Code of Commerce), as it has been alleged by the Mexican Agent. Therefore, the acts or omissions of assignees can not be directly imputed on the court that appoints them, nor on the government of which it is a dependency.

17. It has also been alleged that, according to Mexican law (Art. 1416 of the Code of Commerce), the judge having cognizance of the bankruptcy "shall provide for the conservation of the estate, appointing to such effect a provisional assignee and a supervisor". From this provision it is endeavored to deduce that the judge is directly in charge of the conservation and care of said estate, being responsible for any deterioration or loss thereof. Such is not the case, in the first place, on account of a merely grammatical interpretation of the cited article. It is stated therein that the judge *shall provide for* the conservation of the estate; not that he *shall have* the conservation of it. To provide means to facilitate what is necessary or convenient for an end. The judge then has to issue dispositions or make necessary preparations for the conservation of the estate, but not conserve it directly. The same article says what is convenient or necessary for the end of conserving the estate—to wit, the appointment of a provisional assignee and a supervisor, to that effect. Articles 1418, 1419, 1420, 1422, and others of the Code of Commerce of Mexico corroborate this grammatical interpretation in providing that the management, administration, and care of the estate belong to the provisional assignee. This theory is further supported by the general theory of the duties of a government. Such an entity is instituted to watch over the general interest of the community, and not to care for the private interests of individuals. Bankruptcy proceedings, it is true, are of general order, but the estate of a bankrupt is conserved for the benefit of a certain group of private persons, comprised of the creditors. No governmental dependency is empowered or organized to manage an estate as if it were a private person. In a bankruptcy, as already stated, the bankrupt

loses the possession and administration of his estate, which goes over to the mass of creditors, represented by the assignee who exercises both functions. But while the court having cognizance of a bankruptcy does not have itself the possession and administration of the estate, but delivers it to the assignee, it does have the important and very serious duty to see that the assignee is a fit person and performs his duties faithfully and honestly. A court failing to do this would incur international responsibility if property of foreigners were involved, because it is the duty of the judicial power of a nation to prevent and punish attacks on private property. Mexican law establishes peremptory terms within which the assignee must perform his duties, and the judge must order the different proceedings of the bankruptcy. Some of these terms are obligatory for the judge without the necessity of a petition from one of the parties, as, for instance, the term fixed by Art. 1437 of the Code of Commerce, which provides that upon the conclusion of the inventory, without the need of a petition by the assignee, the judge shall issue a decree ordering that the vouchers of the credits be presented to him within specific terms. Art. 1442 of the same Code contains a similar provision, and there are other articles of Mexican law (1486, 1487, etc.) which, correctly interpreted, provide that the bankruptcy proceedings must be terminated within a definite period of time. Moreover, the supervisor appointed must watch that the assignee never allows the lapse of the terms which may be established by law for any of his duties (Art. 1422). There is another provision which obliges the assignee to present a project of privileged creditors, at the latest six months after the first meeting of creditors is held (Art. 1489). The State Attorney, on the other hand, must represent the absent creditors and exercise their rights (Art. 1439 of the Code of Commerce). All this shows that Mexican law was careful to watch that an abnormal condition, which involves the dispossession of the bankrupt's property and the administration thereof and the nonliquidation and nonpayment of the creditors, may be as brief as circumstances may permit, with the object that none of the parties interested in the bankruptcy may suffer. In the instant case it is in no way established that the assignee and the supervisor may have fulfilled their duties, neither is it established that the judge or State Attorney may have shown surprise or taken steps to put an end to this irregularity which, on account of its prolongation, gave rise to the almost total deterioration of the locomotives in the possession of the assignee. This responsibility weighs on the Mexican court that did not apply its law, to the detriment of the interests of foreigners.

18. However, while the negligence of the judge is obvious, one must not fail to take into account that there was also inexplicable negligence on the part of the interested parties. The judge extended himself to the point of unofficially explaining to Venable and to Greenstreet (appointed by the courts of Texas) that, according to Mexican law, the locomotives in question could be delivered only to the Illinois Central, their legitimate owner. The latter company knew very well this decision unofficially, as proven in the documents filed as evidence; (it seems, moreover, that it was officially notified, at the petition of the Mexican State Attorney, that it ought to press such rights formally), and due to an entirely selfish motive, it refused to press its rights, conformably with Mexican law, before the Mexican court. The Illinois Central, to a certain extent, abandoned its property in the possession of the assignee. Were the Illinois Central to appear directly before this Commission as a claimant, doubtless the Commission would have to take into account the negligence of said Company,

as it has already been established by arbitral practice among nations. Hence, Venable, who is the cessionary of the negligent owner, must suffer the consequences of the negligence. Furthermore, Venable himself, personally, showed inexplicable negligence in the case; knowing that the locomotives could not be returned without bringing formal action in the court with jurisdiction over the bankruptcy, he instituted such action and abandoned it immediately after the assignee filed certain dilatory pleas and the judge opened a term for the filing of evidence to clear that point. Both the assignee and the judge had the right to act in such a manner, according to Mexican law, as already stated. Had Venable continued the proceedings which he chose himself (he could have formally asked for the locomotives from the assignee without suing him, Art. 998 of the Code of Commerce) and proven his capacity before the Court, he would have obtained the return of the locomotives, as it is proven that Gimble did, representing companies which were in the same circumstances as the Illinois Central. Venable also showed negligence in another respect; the assignee attempted to enter into a contract with him which would place the locomotives in his hands, as the assignee contended that no one would have taken better care of them than the person who claimed to be entitled to them. But, unfortunately, Venable was not able to furnish the security required from him, and the transaction was not carried out. Finally, the assignee attempted to lease the locomotives in question to Daniel Flores or to F. Z. Westrup—and not to the Railways, as alleged (page 65 of the Brief of the United States)—upon payment of a rental which, although admittedly low, at least secured the care of the locomotives and guaranteed their return in good condition. Venable opposed himself to this transaction and the locomotives remained in the hands of the assignee of a bankrupt estate which did not have the funds to cover the necessary expenses for watching and preserving the said locomotives. All these facts which reveal negligence on the part of the Illinois Central and Venable, while they do not entirely prevent these parties from claiming damages before this international tribunal, can, at least, induce the Commission to take them into account when determining the amount of damages.

Collision of Locomotive No. 2283

19. This claim includes the value of a locomotive, which, together with others, was leased by the Illinois Central to the Burrowes Rapid Transit Company and to the Merchants Transfer & Storage Company, and which became practically useless as a result of a collision that occurred on August 21, 1921, while running from Saltillo to Monterrey, operated by employees of the National Railways. The train with which this locomotive collided was equally operated by employees of said Railways. International tribunals do not award damages except in cases where the facts appear clear and proven. But in this case there is, further, a perfectly legal and unequivocal agreement which throws the burden of proof of the negligence on the party that suffered the damage. Clause XXIII of the Burrowes contract stipulates that the Railways shall not be responsible for the damage suffered by the locomotives by reason of accidents, and to such effect Burrowes waives Articles 1442 and 2512 of the Mexican Civil Code, which establish the presumption of guilt of the debtor or the bearer in case of loss of the thing involved. Clause XXIV of the same Burrowes contract provides that the

Railways shall consider claims for damages to the locomotives, etc., when it is shown in an evident manner that they are liable through imprudence or neglect of its employees. In view of the foregoing, claimant or its assignee ought to have explained all the circumstances regarding the collision, which has not been done. In fact, the evidence relative to this point is indeed insufficient; there is an affidavit of the engineer who was driving the locomotive in question and who deposes, briefly, that locomotive No. 2283 was running from Saltillo to Monterrey, pulling train No. 23; that this train was due to meet train No. 24 at Kilometer No. 950; that said train No. 24 failed to make the meeting and lost its rights, giving to No. 23 the right of way; that upon reaching Kilometer 952, train No. 23 met train No. 24 on a sharp curve which made it impossible for him to see this train, for which reason the collision became inevitable. There are two other documents which contain the damages suffered by locomotive No. 2283 and an estimate of the cost of repairs which had to be done to it, said estimate amounting to a total of 21,000 pesos. The American Agency alleges that it is wholly unnecessary to determine which of the crews of the two trains was responsible for the accident, inasmuch as both trains were operated by crews furnished by the National Railways of Mexico, which fact makes the latter, in any event, responsible for the collision. The Mexican Agency alleges that it belonged to claimant to prove in an evident manner the liability of the Railways, conformably with clause XXIII of the contract, already quoted, adding that the accident could have well been caused through no fault of any of the two crews of the trains, thus bringing to light a third proposition in the dilemma set forth by the American Agency. As a matter of fact, it is possible that the accident may have occurred through no fault or negligence of either crew. It seems established that engineer Lozano, who was driving the Burrowes locomotive, acted in accordance with his instructions and with due precaution; that is to say, with no fault; but this does not necessarily prove that the engineer of the other locomotive was at fault. Many facts are lacking, to judge the acts of this engineer; the direction in which the two locomotives in question were going is not known; whether there was a station or employee of the Railways at Kilometer 950 to give an order to the trains is not known; the cause of the failure of train No. 24 to make due connections at Kilometer 950 is not known; it is not known whether the fact of not making that connection gave to train No. 23 the right to continue on a clear track; the traffic rules applicable to the case are not known. Under such circumstances, I believe that no liability can be imputed on the National Railways for the collision.

20. But while it is true that in view of the vagueness of the facts this Commission can not consider Mexico responsible for the collision that destroyed locomotive No. 2283, it is also true that the National Railways should have returned to Burrowes or his assignees the remains of the locomotive which suffered the damage. The value of the locomotives leased by the Illinois Central to Burrowes was stipulated in the corresponding contract at the sum of \$37,500; the estimate made of the approximate cost of the repairs to locomotive No. 2283 is, as already stated, 21,000 pesos. The difference between these two amounts is, in my opinion, the value of the remains of the locomotive in question, which Mexico would be obliged to return; for this reason I believe that Mexico must pay, on this ground, the sum of \$27,000.00.

21. The Government of Mexico, on its part, alleges, in regard to the point under consideration, that from the sum which may be paid to claimant as damages, there must be deducted the sum of 11,117.63 pesos and \$920, which the Railways have a right to collect from Burrowes and from his firm for freight and other expenses due. I believe that such a contention must be rejected, because the Burrowes Rapid Transit Co. had become bankrupt; the credit which the Railways had against it had to be included among the claims of the other creditors, and in no manner would it have been guaranteed by the four locomotives, which belonged to the Illinois Central and which, according to Article 998 of the Code of Commerce, could have been recovered by the latter company.

Collusion of Officials

22. After examining each of the acts of the Mexican officials who took part in this case, to determine the responsibility that the Government of Mexico may have, it remains established that there is no conspiracy as alleged by the American Agency in such categorical terms. In more than one place in its pleadings and its briefs, the theory is advanced that, beginning with Rochín's telegram, followed by the last term allowed by the Department of Hacienda for the re-exportation of the locomotives, the attachment executed by the First Court of Letters of Monterrey, the refusal of this Court to deliver the locomotives to Venable, insisting that only the Illinois Central, which was their owner, could receive them, and coming finally to the unfortunate destruction of such locomotives in the possession of Assignee Leal Isla, one can perceive the desire of the Mexican Government and of all its authorities to appropriate illegally the locomotives, instead of obtaining them through lawful means (Pages 138, 139, 140, 158, and 159 of the Brief of the United States). Such a serious imputation is not supported by evidence and is merely based on the frail inference that, as the Mexican Government forms one whole, it is to be supposed that what one department of the Government does is immediately known by all the other departments. This method of reasoning seems absolutely venturesome and opposed by the reality of things. A government is a complicated mechanism of agencies which operate in the most widely separated portions of a given territory; it is illogical to suppose that an act of one of these agencies, performed in the farthest corner of the state may be immediately known and taken into account by the other agencies or departments of the government. A single matter always has various aspects, and each of them is known and handled by a separate department, without having any connection with the other departments, as only this makes possible the division of labor. In the instant case, the Department of Hacienda, which had cognizance of the exportation of the locomotives in question, had in mind only that aspect of the matter and decided it conformably with its own laws. The National Railways, on their part, only had to know those circumstances which referred to the contract entered into with Burrowes. The Court of Monterrey, in effecting the attachment petitioned by Bateman, could not take cognizance—nor did it have the duty to do so *ex officio*—of all the other circumstances of Burrowes or his locomotives, for, as already stated, Mexican courts only take into consideration the facts and petitions which are officially presented to them, and, moreover, it has not been proven that the First Court of Letters of Monterrey knew at the beginning, even unofficially, that the

locomotives belonged to the Illinois Central or to Venable. The same Court, although it later knew unofficially the juridical position of the locomotives in Mexican territory in compliance of its own law, could not return them except to their owner, the Illinois Central. Finally, the deterioration of the locomotives is directly imputable on the Assignee of the bankruptcy of the Burrowes Rapid Transit Company, who is a private party personally responsible for his acts or omissions. The Mexican Judge, it has already been proven, was responsible for the noncompliance of his law which obliged him to terminate the bankruptcy proceedings within a certain period, a fact which implied that he ought to have ordered the Assignee, also within a certain period, to render a report on his work as Assignee. The charge made to the effect that the locomotives in question were used by the National Railways, has not been proven; this charge is made in two affidavits (those of W. C. Greenstreet and Ed Mims), in which the affiants do not refer to facts in which they took part, but to facts which they allege to know by hearsay, and, there is to be noted, further, the identity of the terms in which they make such affirmations. Aside from this, it is established in the record that the National Railways were suffering from a scarcity of rolling stock; that various companies, in addition to the Burrowes Rapid Transit Company, were running their trains on the tracks of the Railways of Mexico, so that, even admitting that the missing parts of the locomotives were removed using the apparatus and tools of said Railways, this would only reveal lack of watchfulness, but not that the removal was made in order that the Railways would use such parts, for they could well have been used by the other companies that were doing the same business as the Burrowes Rapid Transit Co. I do not believe, therefore, that there has been proven the collusion alleged to have existed among all the authorities of Mexico for the detestable purpose of larceny.

23. In view of all the above stated circumstances, I consider that the sum of \$140,000.00, at which the Presiding Commissioner estimates the damages suffered by the claimant, is the proper amount that the Mexican Government must pay.

Decision

All of the Commissioners are of the opinion that a pecuniary award should be rendered in favor of the claimant. Two of the Commissioners compute the damages to the claimant in the amount of \$140,000.00. The other Commissioner computes the damages in the amount of \$144,729.29. The sum of \$140,000.00 must therefore be the award of the Commission. Two of the Commissioners are of the opinion that interest should not be included in the award, and interest must therefore be disallowed. The Commission accordingly decides that the Government of the United Mexican States must pay to the Government of the United States of America on behalf of H. G. Venable, the sum of \$140,000.00 (one hundred and forty thousand dollars) without interest.

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