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James H. McMahan (U.S.A.) v. United Mexican States

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which it has sustained. The measure of damages is the value of the property seized. The difficulties confronting the Commission in estimating that value have already been pointed out. The claimant Government has produced extremely unsatisfactory evidence, and the respondent Government, whose authorities are in possession of the property, have submitted no evidence. Counsel for the United States admitted in oral argument that account should be taken of depreciation. Such depreciation during a period of about eighteen years undoubtedly would be very considerable. The Commission considers that it is justified in awarding an indemnity of \$15,000.00 with interest at the rate of six per centum per annum from February 18, 1917, to the date on which the last award is rendered by the Commission.

Decision

The United Mexican States shall pay to the United States of America on behalf of the Melczer Mining Company the sum of \$15,000.00 (fifteen thousand dollars) with interest at the rate of six per centum per annum from February 18, 1917, to the date on which the last award is rendered by the Commission.

JAMES H. McMAHAN (U.S.A.) *v.* UNITED MEXICAN STATES
(*April 30, 1929, dissenting opinion by American Commissioner, undated. Pages 235-248.*)

RESPONSIBILITY FOR ACTS OF SOLDIERS.—DIRECT RESPONSIBILITY.—UNNECESSARY USE OF ARMS.—RIGHT OF NAVIGATION OF RIO GRANDE RIVER.—EXERCISE OF POLICE POWER AT INTERNATIONAL BOUNDARY.—LOSS AND CONFISCATION OF PROPERTY. Claimant and companions were floating down the Rio Grande River in boats on a trapping expedition in 1895, when they were ordered to halt by an officer in command of a force of six or eight Mexican soldiers. With little or no time to comply with the order, the Mexicans fired several shots upon the Americans. Some of the Americans abandoned their boats and swam toward the American shore. They were rescued from the water by claimant and all rowed ashore in the remaining boats, which were then abandoned, and the group proceeded overland with great hardship to a town two days distant. Report was made of the occurrence and the Mexican Government was advised thereof through diplomatic channels. The free navigation of the Rio Grande was assured by treaty to the vessels and citizens of both the United States and Mexico. Evidence was furnished that the Mexican soldiers had express orders to investigate the American group. Two boats and their contents were seized by the Mexican authorities and never returned. *Held*, (i) claim based on acts of force of Mexican soldiers disallowed, since, under the somewhat conflicting evidence, it may have been justified as an exercise of the police power, and (ii) claim for confiscation of property *allowed*.

Cross-reference: Annual Digest, 1929-1930, p. 85.

Commissioner Fernández MacGregor, for the Commission:

The United States of America, on behalf of James H. McMahan, an American national, claim of the United Mexican States the amount of \$5,000.00 in United States currency, on the grounds that he was unlawfully

assaulted by Mexican soldiers, under the circumstances hereinafter set forth. About the middle of December 1895, the claimant, accompanied by his son Ben B. McMahan and two other young men, Walter Strickland and A. J. Blevins, organized a trapping expedition and started from Del Rio, Texas. They had drifted about 250 miles down stream, approaching an island situated 30 or 40 miles below the town of Carrizo, (now Zapata). The main channel of the river passes between the said island and the Mexican bank, one of the ends of the island being at a distance of 50 yards from the Mexican shore. Before reaching the island they noticed that some Mexicans were watching and following them. The Americans camped on the American bank opposite the island, but fearing an attack by the Mexicans moved their camp to the island. On the following day, January 12, 1896, they boarded their boats in order to follow the main channel down stream, when suddenly a Mexican officer in uniform, accompanied by six or eight soldiers appeared on the Mexican bank. The officer ordered the travelers to halt and without giving them time to comply with the order, the Mexicans fired several shots upon the Americans. Some of the shots hit the water; others struck the boats. Three of the travelers becoming frightened, leaped into the water and swam toward the island. The claimant did not abandon his boat and was able to recover one of those belonging to his companions, but the other two boats however, were carried by the current, later being captured by the Mexican soldiers who carried them away with all of the objects and implements therein deposited. The Mexican soldiers continued shouting, and threatened to kill or capture the Americans later, stating that they had enough men with which to do it. McMahan rescued his companions, rowed them across to the American side in the two boats that were left, and which he subsequently abandoned after entering with his companions into territory of the United States. After journeying for two days over an almost uninhabited region, and having suffered greatly from cold weather and lack of food, they arrived at the town of Carrizo, (now Zapata), where they were given assistance. Then they continued their journey to Laredo, Texas, having reached the said town six days after the occurrences, (January 18, 1896). The four Americans crossed the Rio Grande to Nuevo Laredo, Mexico, and in that place, signed a statement before the American Consul in which they narrated the facts and complained of an unlawful assault as well as of a dispossession of their property. The Mexican authorities who took cognizance of these incidents shortly after this complaint, did not take any steps to punish the soldiers guilty of the outrage inflicted upon the four Americans.

The American Agency alleges that pursuant to the boundary treaties concluded between Mexico and the United States, the navigation on the Río Bravo del Norte, or Río Grande, is free to the citizens of both countries, and that, therefore, James H. McMahan and his companions were exercising a right, when the Mexican soldiers, for no reason whatsoever, ordered them to halt and proceeded to attack them. That as a result thereof, the Mexican Government is responsible for the outrage and for the physical and mental suffering that the act of the soldiers caused the claimant, as well as for the value of the effects confiscated without cause.

Mexico denied this claim, contending at the outset that the Mexican authorities never had knowledge of the facts hereinbefore referred to, and in order to prove this, introduced some evidence. However, this defense was later abandoned due to the fact that the American Agency presented a copy of the diplomatic correspondence exchanged at that time between

the two Governments, in connection with the facts herein stated. The Mexican Agency also alleged that the soldiers complied with their duty in ordering to halt, and, trying to intimidate, thus to enforce obedience to their command, the four Americans whose presence had been called to their attention as suspicious.

In view of the evidence filed by the American Agency, and since the Mexican Agency in order to uphold its contentions, did not introduce evidence other than the aforesaid, the Commission finds that the facts in general occurred as narrated by McMahan and his companions, with the following exceptions: (a) It appears that the soldiers had received orders from their superiors to exercise vigilance over the four Americans in question who had been pointed out, previous to their arrival near Zapata County, Texas, as suspicious; (b) It unquestionably appears that from the start the Americans could have realized that the Mexicans who were ordering them to halt, were soldiers of the Mexican Army; (c) It appears more probable that the said soldiers confined themselves at first to command the Americans to halt since the statement made by McMahan and his companions immediately after the occurrences, in this connection, literally reads: "They ordered us to halt, commanding us to land, *and almost immediately*, his men (the officer's) fired four shots at us." This statement is changed in the claimant's affidavit made in the year 1927 to the effect that "an officer with six or seven men appeared on the Mexican bank and ordered us to put in toward that side, *and immediately* after giving the order and without giving us a chance to comply with it, the men fired several shots at us". The report made to the Department of Foreign Affairs (Mexican) contemporaneous with the affair and introduced by the American Agency, states that Peña, a sergeant, "dismounted from his horse and from the shore ordered them to halt asking those conducting the boat to state what they carried and what was their purpose; and that the answer he received was a shot fired by one of the rowing men. Then the sergeant fired a shot in the air and at that moment three of the rowing men leaped into the water". Nor does it seem clear that the intention of the soldiers in firing the shots was to harm the claimant and his companions, in view of the fact that, as already stated, it is doubtful whether the shot or shots were fired in the air or upon the men, and particularly in view of the fact that, as soon as the companions of McMahan jumped into the river in order to swim toward the island, the soldiers did not fire again, confining themselves to making new threats against the fugitives, according to the latter's statement. It seems reasonable to believe that if the intention of the soldiers had been to inflict any harm upon the Americans, they would have had an excellent opportunity of doing so, while the fugitives were swimming, taking into account the slowness of swimming, and particularly the fact that the river branch, according to the statement made by the claimant and his companions was at the most fifty yards wide at the place of the occurrence. On the contrary, it seems reasonable to admit that it is improbable that McMahan and his companions fired at the Mexican soldiers, inasmuch as this act of provocation, would have placed them in a condition of danger which they had no need risking.

The main contention alleged by the American Agency, as it has been pointed out already, is that the Mexican soldiers had no right to fire upon McMahan and his companions, not even to order them to halt, inasmuch as they were navigating upon an international river, which under particular treaties, is the subject of free navigation to the citizens of both countries.

In the past this Commission has already taken cognizance of cases in which some individual has suffered damage as a result of shots fired, either by Mexican or by American citizens across the same Río Grande, while the victim was still navigating on it. (*Swinney* case, Docket No. 130¹; *Teodoro Garcia* case, Docket No. 292².) In these cases, the question of defining whether or not such acts constituted a violation of the right of free navigation on the river by the citizens of both countries, was never squarely raised as an issue for decision. Therefore, without considering such question, in deciding those cases, the Commission applied a wider principle, namely, that it is unlawful to use against individuals, by way of coercion, measures out of proportion to the seriousness of the matter in which the use of force is required, such principle being but an obvious consequence of the respect that is due to human life. Applying this test, the Commission found that the reckless use of firearms upon persons who disobeyed an order of the police, in cases of slight importance, or in those wherein persons are suspected of small offenses, or in those of innocent persons, rendered a Government whose officials used firearms liable for the damage caused. But in the instant case the question is directly raised as to whether or not the act of the Mexican soldiers should be condemned, insofar as it was an unwarranted attack upon the right of free navigation on the Río Grande or Bravo del Norte.

The situation of this river in the year that this claim arose was as follows: The Treaty of Peace, Friendship, Limits and Settlement, concluded between the two nations on February the 2nd, 1848, after defining what part of the Río Grande should be the boundary limit between the two countries, provides in its Article VII, that "the navigation of the Gila and of the Bravo below said boundary shall be free and common to the vessels and citizens of both countries; and neither shall, without the consent of the other, construct any work that may impede or interrupt, in whole or in part, the exercise of this right; not even for the purpose of favoring new methods of navigation". The Treaty of Boundary concluded also between the two nations on December 30, 1853, which again includes a part of the course of the Río Grande as boundary between both countries, in its Article IV provides that "The several provisions, stipulations, and restrictions contained in the 7th article of the treaty of Guadalupe Hidalgo shall remain in force only so far as regards the Río Bravo del Norte, below the initial of the said boundary provided in the first article of this treaty". The Treaty signed November 12, 1884, relating to the boundary line between the two countries, in that part following the channel of the Río Grande and of the Río Gila, in its Article I provides:

"The dividing line shall forever be that described in the aforesaid Treaty and follow the center of the normal channel of the rivers named, notwithstanding any alterations in the banks or in the course of those rivers, provided that such alterations be effected by natural causes through the slow and gradual erosion and deposit of alluvium and not by the abandonment of an existing river bed and the opening of a new one."

Article II of this same Treaty provides:

"Any other change, wrought by the force of the current, whether by the cutting of a new bed, or when there is more than one channel by the deepening of another channel than that which marked the boundary at the time of the

¹ See pages 98 and 138.

² See page 119.

survey made under the aforesaid Treaty, shall produce no change in the dividing line as fixed by the surveys of the International Boundary Commissions in 1852, but the line then fixed shall continue to follow the middle of the original channel bed, even though this should become wholly dry or be obstructed by deposits."

In view of these provisions, there is no doubt but that McMahan and his companions were exercising a perfectly recognized right in navigating on a part of the Río Grande which serves as boundary between the two nations.

But, on the other hand, it is also necessary to take into account that the same Treaty of 1848 to which reference has been made above, in its Article VII further provides that:

"The stipulations contained in the present article shall not impair the territorial rights of either republic within its established limits."

The Treaty of 1853, as has been noted, leaves in force all of Article VII. in so far as it relates to all of that portion of the Río Grande which under this Treaty was established as boundary, and, consequently, leaves in force the reservation hereinbefore alluded to.

It appears that the reservation expressly made of the territorial rights of either Republic, within the limits which were established, covers the right of exercising the police power, inasmuch as it is one of the rights which the sovereign exercises over its territory. It is pertinent to recall at this point that the boundary or dividing line between both nations in reference to the Río Grande, is the middle of this river, following the deepest channel, which signifies that up to this point, the two nations may exercise their full territorial rights. But if this alone were not sufficient, by studying the subject of navigation on international rivers, whether they be boundary lines between two or more territories, and empty into the sea, it is found that the tendency is to establish the principle of free navigation, provided it be always limited by the right of the riparian States to exercise police rights in that portion of the course which corresponds to them. (See Oppenheim, *International Law*, Vol. 1, pp. 314-322, 3rd. Ed. 1920; Fauchille, *Droit International Public*, Vol. 1, 2nd Part. pp. 453 *et seq.* 8th Ed. 1925; Moore, *International Law Digest*, Vol. 1, pp. 616. *et. seq.*; J. de Louter, *Le Droit International Positif*, Vol. 1, p. 445; Oxford Ed. 1920.) The Congress of Vienna of 1815 fixed the free navigation of certain rivers, *subject to police regulations*. Since this date, the restriction appears in nearly all treaties, and has at times been accepted by the United States: Treaty of Washington of May 8, 1871, Article XXVI; Treaty of June 15, 1845, Article 11. It should also be observed that the Institute of International Law in its session at Heidelberg on September 9, 1887, adopted regulations for the navigation of international rivers, applicable to rivers separating two States as well as those traversing several States, in which the right of the riparians to exercise police power over the stream is recognized.

What extension this right of exercise of the police power may have, as confronted with the principle of free navigation, is a matter as yet not defined by theory or precedent. It is reasonable to think, however, that the right of local jurisdiction shall not be exercised in such a manner as to render nugatory the innocent passage through the waters of the river, particularly if it be established by treaty.

Therefore, it does not seem possible to deny that Mexico is entitled to exercise police powers, *some* police powers, at least, over the course of the Río Grande, and it does not appear excessive or contrary to the right of

free navigation, that jurisdictional action of the Mexican authorities, which in one specific occasion and for special causes bearing on its primary right of defense, was intended to ascertain what was being done and what objects were being carried by suspicious individuals who were travelling over deserted places in small crafts. In the instant case the soldiers had received express orders to investigate what McMahan and his companions were doing, and even though the grounds for the suspicions which the superior authorities had against these men are not exactly known, it appears they were afraid that smuggling would take place opposite the same island on which the Americans landed, a thing possible due to the proximity of the island to the Mexican shore. (Report of Pedro A. Magaña, in the evidence of the Mexican Agency.) An exceptional case was being dealt with, since although it appears that similar cases between the two nations had occurred before this instance, a note from the United States Consul to his Secretary of State, dated January 18, 1896, and referring to the same incident, reads:

"I am loathe, however, to believe that the miscreants were Mexican soldiers. Since the Mata incident, the Mexican military authorities along the border have shown a wholesome respect for boundary lines and due consideration of the rights of American citizens."

It remains only to be considered the manner in which the Mexican soldiers exercised that limited right of inspection, in order to know if there was an excess of force or of coercion. According to the facts already stated in this case, the Commission cannot arrive at definite conclusions in this respect. It is not clear whether the soldiers made use of their firearms upon McMahan and his companions without giving them time to answer their intimations to come close to the shore; it is not clear, either, that the shots were fired upon the Americans, much less whether they fired with the intention of wounding them. It appears that there was either fault or mistake on both sides. If they were innocent passengers, the Americans undoubtedly had no ground to believe that Mexican soldiers whose identity was apparent, would wish to harm them. Had they answered the intimation of the soldiers, the incident would not have occurred. As for their part, the soldiers resorted to the dangerous means of intimidating McMahan and his companions with too much haste. At least, this is the opinion which the Diplomatic Representative of the United States in Mexico appeared then to have had of the case; his note of April 30, 1896, to the Secretary of State, the Hon. Richard Olney, reads:

"Incidents at the border of the two countries are not as frequent now as they were a few years ago, and owing to the circumstance of a mistake being made in this case by both parties, it does not seem to me to be a matter demanding rigid action by our Government."

Under these circumstances, and even though the Commission condemns, as in other instances, the prompt and unwarranted use of arms, it does not find that there has been clear violation of any principle of international law, the only circumstance under which the responsibility of any of the two nations may be established.

But, on the other hand, it is proved that the Mexican soldiers seized two of the boats which McMahan and his companions had, with everything which was contained in them, and that the said boats were taken to a Mexican custom house, without an explanation ever having been forthcoming as to what became of this property. since, clearly it was not a case of

smuggling or of any other illicit act. The Commission is of the opinion that such an act constitutes a confiscation and that the Government of Mexico should answer for the same. The claimant gives in his affidavit a list of the articles which he lost with corresponding values, aggregating a total of \$1,000.00, United States currency. Among the items inserted there is one for the four boats, but it appears that it should be accepted only for two, since the other two boats were not seized by the Mexican soldiers, but abandoned by the claimant. There is another item of 30 beaver hides, but the list furnished by the customs house at Ciudad Mier refers only to five hides which appear in two items. This list furnished by the Mexican authorities to the diplomatic representatives of the United States at the time of the incidents, is very detailed and it appears to indicate that the value of the confiscated articles was somewhat exaggerated by the claimant. In view of the above, the Commission deems pertinent to award the lump sum of \$500.00 with interest.

Decision

The United Mexican States shall pay to the United States of America, on behalf of James H. McMahan, the amount of \$500.00 (five hundred dollars), United States currency, with interest at the rate of six per centum per annum from January 12, 1896, to the date on which the last award is rendered by the Commission.

Commissioner Nielsen, dissenting.

This case involves a comparatively small sum of money. I believe the amount claimed may properly be reduced, so that an award would be a rather inconsiderable sum. However the claim appears to involve important principles with regard to first, wrongful acts of soldiers and secondly, treaty rights securing freedom of navigation.

I am particularly impressed with the thought that the opinion of my associates is at variance with other opinions of the Commission dealing with what has been termed "reckless shooting"; indeed greatly at variance with one opinion (case of *Teodoro Garcia*, docket No. 292)¹ in which I did not concur and in which there is a discussion of a use of firearms which to my mind could be justified much better than can the action of the soldiers in the instant case.

In the *Swinney* case, docket No. 130, *Opinions of the Commissioners, Washington*, 1927, p. 131, the Commission dealt with the killing of a young man who, while engaged in a trapping expedition on the Rio Grande, was shot from the Mexican bank by two armed Mexicans. He died from the effects of the wounds inflicted on him. Swinney was discovered floating down the river in a boat which contained nothing but himself and his firearms. The armed Mexicans represented that they took him for a man who was on the river in contravention of law, which it was their duty to enforce. Evidence in the record did not disprove allegations made in behalf of Mexico that Swinney refused a summons to come closer to the Mexican bank to make explanations and instead of doing so rowed to the opposite bank. In an opinion written by Commissioner Van Vollenhoven and concurred in by Commissioner Fernández MacGregor it was said that the killing of Swinney was "an unlawful act of Mexican officials". In view of the innocent conduct of the men who figure in the instant case, the following

¹ See page 119.

extract from the opinion in the *Swinney* case seems to be pertinent with respect to the issues now raised:

"It is not clear from the record why Swinney looked like a smuggler or a revolutionary at that time and place, and how the Mexican officials could explain and account for their act of shooting under these circumstances, even when they considered him committing an unlawful act in crossing from one bank to another (a fact they did not see). Human life in these parts, on both sides, seems not to be appraised so highly as international standards prescribe."

By a unanimous decision an award of \$7,000.00 was made in this case.

The *Falcón* case, *ibid.*, p. 140, was concerned with the shooting of a Mexican citizen on the Rio Grande. Falcón and another Mexican named Félix Villarreal were seen in the river by American soldiers who it appears, believing that the men in the river were engaged in smuggling, approached them and directed them to halt. The Mexicans did not obey the order, whereupon a soldier fired a shot in the air. It appears that the soldiers were immediately fired upon from the Mexican side by mounted men, and that the soldiers returned the fire in self defense and also directed some shots at the men in the water. About fifty shots were exchanged while Falcón was approaching the Mexican shore. Falcón was hit and died from the effects of the wound. The Commission held that, even though it were assumed that Falcón was engaged in smuggling and that the American soldiers were fired upon from the Mexican side, the death of Falcón should be considered to be wrongful, since it seemed that the soldiers disregarded American military regulations forbidding the use of firearms against unarmed persons suspected of smuggling, and since it appeared that the soldiers fired on defenseless Mexicans in the river. In this case, it will be seen, not only was there firing from the Mexican side to the American side, but apparently also some reason for suspicion of unlawful conduct on the part of the unfortunate man who was killed. In this respect that case differs from the instant case. The Commission unanimously made an award in the sum of \$7,000.00 in favor of the widow of Falcón.

I think that it is particularly interesting to consider the case of *Teodoro García and M. A. Garza* in connection with the instant case. A little Mexican girl was shot in 1919 by an American army lieutenant while crossing the Rio Grande with a number of Mexicans on a raft which, in violation of the laws of the United States passed from the Mexican side to the American side and returned. The persons responsible for the crossing knew that they were acting in violation of law. The lieutenant was charged with enforcing legislation of various kinds relating to the entry into or departure from the United States of aliens in time of war; prohibition against the importation of arms and ammunition into Mexico; and matters relating to immigration and smuggling. The people propelling the raft refused to stop on being challenged by the lieutenant. The officer was tried by court-martial and sentenced to dismissal. The President of the United States as the court of last resort set aside the sentence apparently on the ground that the lieutenant had not committed manslaughter as defined by American law, and had not violated any army regulation. Two of the Commissioners undertook to define an "international standard of appraising human life", and said that this standard had been violated when the little girl was killed. They said in part:

"If this international standard of appraising human life exists, it is the duty not only of municipal authorities but of international tribunals as well to obviate any reckless use of firearms."

“In order to consider shooting on the border by armed officials of either Government (soldiers, river guards, custom guards) justified, a combination of four requirements would seem to be necessary: (a) the act of firing, always dangerous in itself, should not be indulged in unless the delinquency is sufficiently well stated; (b) it should not be indulged in unless the importance of preventing or repressing the delinquency by firing is in reasonable proportion to the danger arising from it to the lives of the culprits and other persons in their neighborhood; (c) it should not be indulged in whenever other practicable ways of preventing or repressing the delinquency might be available; (d) it should be done with sufficient precaution not to create unnecessary danger, unless it be the official's intention to hit, wound, or kill. In no manner the Commission can endorse the conception that a use of firearms with distressing results is sufficiently excused by the fact that there exist prohibitive laws, that enforcement of these laws is necessary, and that the men who are instructed to enforce them are furnished with firearms.”

An award of \$2,000.00 was made in favor of the parents of the girl.

I took the view in that case that the Commission was bound by the interpretation of American law given by the President, when he decided that the lieutenant had not violated that law; that clearly in the light of the record, the President's decision did not result in a denial of justice, and that therefore the question of responsibility on the part of the United States must be ascertained by determining whether American law sanctioned an act at variance with ordinary standards of civilization. It was not even attempted by comparing the law with the laws of other countries to show that the American law was of such a character, and I do not think it could have been shown. I expressed the view that to prescribe standards such as those formulated by the other Commissioners was in effect an attempt to frame an international code with respect to a very difficult subject of domestic penal legislation.

Lieutenant Gulley testified before the court-martial that he fired about twelve shots in the direction of the raft, and stated at the time he did so that he did not care to hit anyone but merely wanted to frighten the persons on it, so as to cause them to return to the American side in order that he might arrest them. He further testified that he could see no one on the raft when he fired and would not have fired in the direction of it, if he had known that women or children were on it. The court-martial found that the accused had no malice at the time of firing and no intention of killing anyone. A charge of wilfull killing was dismissed, and the accused was found guilty of manslaughter.

It will be seen that rules formulated by the two Commissioners are concerned with restrictions on the use of firearms in “preventing or repressing” some offense. In the instant case there was no occasion either to take steps to prevent or to repress wrong doing.

In the *Roper* case, *ibid.*, p. 205, claim was made in behalf of the mother of William Roper who was drowned in the Pánuco river at Tampico, as a result, as was alleged by the United States, of an assault on him and three American fellow seamen. There was some evidence indicating that Roper was wounded by a pistol shot. It was difficult to reach a definite conclusion with regard to the precise character of all the occurrences which took place. The Commission determined however that shots were fired by Mexican policemen, and that pistol fire was largely if not entirely responsible for the action of the men in leaping into the river where two of them met their death. Awards were unanimously made in this and in two other cases arising out of the same occurrences. *Brown* case, *ibid.*, p. 211; *Small* case, *ibid.*, p. 212.

These cases seem to be interesting in connection with the instant case, in that importance was attached to the element of fright resulting from an unnecessary use of firearms. Just what use of firearms was made by the Mexican soldiers in the instant case may be doubtful. There is testimony that bullets hit the boats. It is shown that the young men were badly frightened, as doubtless they had reason to be. Certainly the fact that all occupants of the boats, two of whom leaped into the water and swam to the shore, walked for days to get back to their starting place, is some evidence of actual danger. If they failed to obey a summons to come to the shore, it may be reasonably assumed I think that they apprehended something similar to what actually happened to them. The Mexican soldiers may not have shot with intent to kill, but I perceive no reason at all why they should have made use of firearms, particularly since obviously the persons in the boats were innocent of any offense or of any intent to commit an offense, and even if there had been some reason to suppose that these persons intended to engage in smuggling operations, which to my mind there was not, I perceive no justification for the use of firearms. I find it impossible to understand why the soldiers should have been instructed to keep a lookout for these boys and the man accompanying them as suspicious characters.

The *Stephens* case, *ibid.*, p. 397. involved the shooting of an American by the name of Edward C. Stephens by a Mexican soldier while passing in a motor car on a road near Villa Escobedo in the State of Chihuahua. In an opinion written in this case by Commissioner Van Vollenhoven and concurred in by Commissioner Fernández MacGregor, it was said:

"The excuse proffered by the killer that he merely intended to 'intimidate' Stephens would seem too trite to deserve the Commission's attention; see paragraph 3 of the opinion in the *Swinney* case (Docket No. 130), paragraph 3 of the opinion in the *Roper* case (Docket No. 183), paragraph 1 of the opinion in the *Falcón* case (Docket No. 278), and paragraph 6 of the opinion in the *Teodoro Garcia* case (Docket No. 292)..."

An award of \$7,000.00 was unanimously made in this case.

Perhaps it may be said that navigation on the river in the locality where the occurrences in question took place is something almost negligible. Nevertheless the right of navigation was secured to these persons by treaty stipulations. Even though it be taken for granted that each Government has the right to exercise police authority on its side of the international boundary, the interference with the passage of boats without good cause is to my mind inconsistent with the right of free navigation. Evidence in this case leaves uncertain the precise location of the boats — whether they were on the Mexican or on the American side of the boundary line. However, that point seems to be immaterial. I think that the use of firearms and indeed any other means to arrest the progress of travelers against whom there can be no suspicion of wrongdoing, is inconsistent with the right of free navigation.

It is true that in former cases which I have cited loss of life resulted from use of firearms. Shooting that results in death or physical injury is a more serious offense than shooting which has no such fatal consequences. But shooting to be wrongful must not necessarily result in death. The unwarranted use of firearms is forbidden in order to prevent tragic occurrences.

I think that the claimant is entitled to the value of the property taken from him and interest and also some small compensation, considerably less than that claimed, for the loss of time and the very considerable hardships which he suffered in making his way back to the place from which

he started. He was deprived of his means of transportation, and even if such means had been available, it may be assumed that the occupants of the boats, in view of their experiences, would not have attempted to return by water. I of course am of the opinion that the claimant should have the sum awarded and, as I have indicated, something more.

BEN B. McMAHAN (U.S.A.) *v.* UNITED MEXICAN STATES

(April 30, 1929, dissenting opinion by American Commissioner, undated. Pages 249-250.)

RESPONSIBILITY FOR ACTS OF SOLDIERS.—DIRECT RESPONSIBILITY.—UNNECESSARY USE OF ARMS.—RIGHT OF NAVIGATION OF RIO GRANDE RIVER.—EXERCISE OF POLICE POWER AT INTERNATIONAL BOUNDARY.—LOSS AND CONFISCATION OF PROPERTY, Claim arising under same circumstances as those set forth in *James H. McMahan* claim *supra* allowed.

(Text of decision omitted.)

BARTHENIA STRICKLAND (U.S.A.) *v.* UNITED MEXICAN STATES

(April 30, 1929, dissenting opinion by American Commissioner, undated. Pages 250-252.)

SURVIVAL OF CLAIM FOR LOSS OF PROPERTY.—PROPER PARTY CLAIMANT. Claimant's son suffered loss of personal property in circumstances set forth in *James H. McMahan* claim *supra*. Such son died in 1917. Held, claimant entitled to present claim.

RESPONSIBILITY FOR ACTS OF SOLDIERS.—DIRECT RESPONSIBILITY.—UNNECESSARY USE OF ARMS.—RIGHT OF NAVIGATION OF RIO GRANDE RIVER.—EXERCISE OF POLICE POWER AT INTERNATIONAL BOUNDARY.—LOSS AND CONFISCATION OF PROPERTY. Claim arising under same circumstances as those set forth in *James H. McMahan* claim *supra* allowed.

(Text of decision omitted.)

LILY J. COSTELLO, MARIA EUGENIA COSTELLO and ANA MARIA COSTELLO (U.S.A.) *v.* UNITED MEXICAN STATES

(April 30, 1929, concurring opinion by Presiding Commissioner, April 30, 1929, concurring opinion by Mexican Commissioner, April 30, 1929. Pages 252-265.)

NATIONALITY.—NATURALIZATION OF CHILD THROUGH NATURALIZATION OF PARENT. Child born abroad and resident abroad at time of naturalization in the United States of his father, which child subsequently removed to and resided in United States, held American citizen.