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**RECUEIL DES SENTENCES
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Genie Lantman Elton (U.S.A.) v. United Mexican States

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tion of the delinquency itself that a culpable negligence has been shown to exist.

Under the conditions above stated, it may be said that there was no complete prosecution and punishment of Almaguer's assailants, but taking into account that the proceedings in their initial stage up until the date of Pedro Rojas' death do not disclose any deficiency; and that at least two of those appearing as principals responsible for the crimes were seriously prosecuted, as shown by the fact of their death as a result of an attempted escape, and also taking into account that the Commission has expressed in the case of *Laura M. B. Janes*, Docket No. 168,¹ its opinion to the effect that in cases of denial of justice it would take into account the different shades thereof, ["more serious ones and lighter ones (no prosecution at all; prosecution and release; prosecution and light punishment; prosecution, punishment, and pardon)"] it deems that the claimant may properly be awarded in this instance the sum of \$7,000.00, inasmuch as there was a certain serious prosecution of some persons, while as regards others there was a negligent prosecution and no punishment.

Decision.

The United Mexican States shall pay to the United States of America on behalf of Elvira Almaguer, the amount of \$7,000.00 (seven thousand dollars), United States currency, without interest.

FRANK L. CLARK (U.S.A.) *v.* UNITED MEXICAN STATES

(*May 13, 1929. Pages 300-301.*)

FAILURE TO PROTECT.—EXISTENCE OF LAWLESSNESS.—DENIAL OF JUSTICE.
FAILURE TO APPREHEND OR PUNISH.—RELEASE OF SUSPECTED CRIMINALS.
—MEASURE OF DAMAGES. Claim arising under same circumstances as those set forth in *Elvira Almaguer* claim *supra* allowed.

Cross-reference: Am. J. Int. Law, Vol. 24, 1930, p. 631.

(*Text of decision omitted.*)

GENIE LANTMAN ELTON (U.S.A.) *v.* UNITED MEXICAN STATES

(*May 13, 1929. Pages 301-308.*)

JURISDICTION. Jurisdiction is the power of a tribunal to determine a case in accordance with the law creating the tribunal.

CONFLICTING JURISDICTION OF SPECIAL CLAIMS COMMISSION.—RESPONSIBILITY FOR ACTS OF MILITARY FORCES. Claimant's husband was tried by an extraordinary court-martial, was sentenced to death for crime of aiding

¹ See page 82.

and abetting a rebellion, and was executed by Carranza forces. At the time in question neither the Federal courts nor the Congress functioned. Claimant Government contended constitutional guarantees were ignored by military court. *Held*, claim not within the jurisdiction of tribunal.

Cross-references: Annual Digest, 1929-1930. pp. 380, 386.

Commissioner Nielsen, for the Commission:

This is a claim in the amount of \$100,000.00 made by the United States of America against the United Mexican States in behalf of Genie Lantman Elton, widow of Howard Lincoln Elton, who was shot in the State of Oaxaca, Mexico, in 1916, in accordance with the sentence of an extraordinary court-martial.

In behalf of Mexico it is asserted that the Commission has no jurisdiction in this case. Pleas to the jurisdiction of this Commission have often been invoked; they have seldom been sustained. The contentions now made with respect to this point probably raise questions more doubtful than any presented in any other case in which the jurisdiction of the Commission has been challenged. A claim involves the assertion of rights under international law or under stipulations of treaties and a denial of rights so asserted. Without entering at length into the very considerable amount of detail found in the Memorial, the Answer and the Briefs, it is possible to indicate the nature of this claim by a brief summary of the salient contentions advanced by each Government.

Elton was a mining engineer residing at the city of Oaxaca in the State of Oaxaca. He was accused of furnishing secret information to General Reyes, the leader of a military movement against the government of General Carranza. It was also alleged that Elton was in correspondence with Guillermo Meixueiro, a so-called "rebel chief". The information before the Commission with respect to the nature of the proceedings against Elton is very incomplete. The record of the trial has not been produced by either Agency. Accompanying the Mexican Answer are copies of numerous communications exchanged by Mexican officials from which it appears that the record could not be found.

However, a copy of the sentence imposed on Elton accompanies the Memorial of the United States. In that sentence it is recited that Elton was convicted under the so-called "Juarez decree" of January 25, 1862. It would seem probable that this decree covers the offense with which Elton was charged, but the United States contends in its brief that this decree could not properly be invoked against Elton. It is asserted that the decree was promulgated by General Juarez with a view to dealing with the situation in Mexico growing out of the Maximilian invasion and could have no application to the case of an American citizen arising in 1916. It is further contended that the decree was in derogation of the Mexican Constitution of 1857. With respect to this point citation is made of Article 23 of that Constitution providing that capital punishment is abolished for political offenses, and also to Article 13 of the Constitution providing that military jurisdiction shall be recognized only for the trial of criminal cases having direct connection with military discipline.

It is pointed out that, although Article 29 of the Constitution might be considered to contemplate the suspension by the President of Mexico of constitutional guarantees, such action could be taken, conformably to that Article, only "with the advice of the council of ministers and with the

approval of the Congress, and, in the recess thereof, of the Permanent Committee"; that such suspension could be "only for a limited time"; and that there could be no suspension of guarantees "ensuring the life of man".

With respect to the action of General Carranza in issuing on May 14, 1913, a decree putting into effect the so-called Juarez decree of 1862, it is argued that this action evidences the non-existence of the Juarez decree, and that General Carranza had no right at this early stage of his revolutionary activities, in 1913, to make decrees for the whole of the Republic of Mexico, and what is more important, had no right to set aside the Constitution of 1857 by the promulgation of a decree nullifying guarantees of the Constitution with respect to human life. This point as to nullification of guarantees with respect to life was particularly stressed in oral argument, and it was pointed out that General Carranza had shown in several ways that he intended to uphold the Constitution of 1857 and to compel the observance of it. Citation was made to Article 128 of that Constitution providing that the Constitution should "not lose its force and vigor, even though its observance might be interrupted by rebellion".

While some argument was made in the brief of the United States with respect to possible irregularities and prejudice in connection with the trial of Elton, emphasis was laid in oral argument on the contention that neither President Juarez nor General Carranza had any right to suspend constitutional guarantees with respect to human life, and that therefore Elton was sentenced and executed in derogation of Mexican law. With respect to this point reference was made to an opinion rendered by the military counsel to the court, Colonel Aurelio M. Pena, in which it was recommended that the decision of the court be revoked. Reference was made in this opinion to Article 23 of the Constitution of 1857 abolishing the death penalty for political offenses, and also to Article 38 of the Mexican law with respect to foreigners, providing for the expulsion of foreigners participating in rebellion.

In behalf of Mexico it was contended that the crime with which Elton was charged was established beyond a doubt, and that there was no question with respect to the lawfulness of the arrest and trial of the accused. It was argued that, although Article 23 of the Constitution of 1857 did abolish capital punishment for political offenses, Elton's offense was not merely political, but a serious crime of a military nature for which the Constitution did not abolish the death penalty. It was contended that both the Juarez decree of 1862 and the Carranza decree of 1913 putting into effect the Juarez decree were legal and were unobjectionable from the standpoint of international rights. The opinion of the counsel to the court was merely legal advice, it was asserted, and in no way binding on the court.

Particular emphasis was placed on the disturbed conditions in Mexico in 1916, and it was argued that at the time Elton was tried Mexico was in an abnormal political situation—in the midst of civil war; that the country was not under a constitutional régime at the time, but under an extra-constitutional power, governed by a revolutionary, *de facto* government; that therefore the Constitution of 1857 and all its civil rights and guarantees were not in operation; and that Elton was lawfully tried under the Juarez decree of January 25, 1862, put into effect by a decree of General Carranza in 1913.

With respect to the question of jurisdiction which was raised for the first time in the Mexican brief, it was contended by counsel for the United States

in oral argument that, while by the so-called Special Convention of September 10, 1923, Mexico had undertaken to make compensation in satisfaction of certain claims *ex gratia*, the claims coming before the so-called General Claims Commission of September 8, 1923, must be determined in accordance with principles of international law; in other words, the General Claims Commission is a court of international law, while the Special Commission may consider claims outside of international law and decide them in accordance with its views of justice and equity. The instant claim, it was argued, is a claim predicated on a denial of justice growing out of an improper criminal trial. It is therefore a case, it was stated, which should properly be adjudicated by the General Claims Commission through the proper application of international law. Since Mexico has a right to have claims arising under international law adjudicated by the General Claims Commission, the United States must have that same right, it was said, or the General Claims Convention lacks mutuality.

The activities of military agencies were stressed in the argument made in behalf of Mexico with respect to the question of jurisdiction. The line of argument may be illustrated by the following extract from the Mexican Brief:

"From the allegations in the Memorial, in the Answer, in the Reply, in the Brief of the claimant Government and the proofs presented by both Governments the following fundamental facts appear:

"1.—That the crime for which Elton was tried and sentenced was that of spying against the Mexican *Federal forces*, and aiding or conniving directly with *revolutionary forces* which were in rebellion against the Federal Government.

"2.—That he was tried by a *Court Martial*, that is a military court, composed wholly of *military officers* of the *Federal Army*.

"3.—That the sentence imposed upon him was then reviewed and confirmed by the *Military Commander of the Federal Army at Oaxaca*.

"4.—That he was shot by a *military squad of federal soldiers*.

"5.—That all these facts occurred between the period of time from *August 1916, to December 1916*.

"The preamble of the General Claims Convention of September 8, 1923, expressly exempts from the jurisdiction of the General Claims Commission: 'the claims for losses or damages growing out of the *revolutionary disturbances in Mexico which form the basis of another and separate Convention*'.

"On the other hand, Article III of the Special Claims Convention of September 10, 1923, provides:

"The claims which the Commission shall examine and decide are those which arose during the revolutions and disturbed conditions which existed in Mexico covering the period from *November 20, 1910, to May 31, 1920*, inclusive, and were due to any act by the following forces:

"(1) *By forces of a Government de jure or de facto*'.

"It is *obvious, apparent and conclusive* therefore that the present claim does not belong to the jurisdiction of the General Claims Commission. The case accrued within the period of time between November 20, 1910 to May 31, 1920. It is founded by claimant government on acts executed by forces belonging to the Carranza Government, which was at that time a *de facto* government. Finally, it arose from acts done by Elton directly connected with the 'recent revolutions' to which Article I of the General Claims Convention refers."

The distinction which it was sought to make in the argument in behalf of the United States with respect to cases arising under international law and therefore cognizable by the General Claims Commission and other cases outside of international law which may be decided by the Special Claims Commission is not entirely clear. It would seem to be unnecessary

for the Commission to concern itself with political reasons or other reasons which may have prompted the two Governments to conclude the Special Claims Convention with the purpose of adjudicating certain claims on the basis of an *ex gratia* settlement and without the application of rules or principles of international law. But it seems to be clear that the jurisdiction of each Commission was not primarily defined on the basis of some grouping of claims from the standpoint of susceptibility of determination under international law. The claims generally described in the Special Claims Convention would be susceptible of determination by an international tribunal applying international law. Thus, it may be noted that the first category of claims mentioned in Article III of that Convention refers to claims due to acts of forces of a *de jure* government. It being assumed that this category covers claims growing out of the destruction or appropriation of property by soldiers, it is not perceived why such claims could not be submitted to an international tribunal applying international law. Claims of this kind which have frequently been passed upon by international tribunals involve the application of rules or principles of law with respect to wanton or unnecessary destruction of property, or the destruction of property incident to the proper conduct of military operations, or the taking of property with or without compensation. The second category of claims referred to in this Article relates to claims growing out of acts of revolutionary forces. Such claims, which also have often been submitted to international tribunals, raise legal issues with respect to the capacity and willingness of a government to give protection against depredations committed by forces of this character.

While it is somewhat difficult to follow the reasoning employed in the argument in behalf of the United States, it is at least equally difficult to follow the conclusions arrived at in the Mexican brief to the effect that it is obvious and conclusive that the instant claim is not within the jurisdiction of the General Claims Commission.

Jurisdiction is the power of a tribunal to determine a case in accordance with the law creating the tribunal or a law prescribing its jurisdiction *U. S. v. Arredondo*, 31 U. S. 689; *Rudloff Case, Venezuelan Arbitrations of 1903, Ralston's Report*, pp. 182, 193-194; *Case of the Illinois Central Railroad Company*, Docket No. 432,¹ before this Commission. By the Convention of September 8, 1923, which created this Commission and defined its jurisdiction, the two Governments agreed to settle all outstanding claims since July 4, 1868, that is, since the date of the last general arbitration treaty concluded between them, there being excepted, however, from this settlement claims "arising from acts incident to the recent revolutions". The claims excepted are described in very meagre and general language. When there is need of interpretation of a treaty it is proper to consider stipulations of earlier or later treaties in relation to subjects similar to those treated in the treaty under consideration. Pradier-Fodéré, *Traité de Droit International Public*, Vol. II, Sec. 1188, p. 895. By examining the Convention of September 10, 1923, it is found that excepted claims are there more specifically described. However, cases presented to the Commission have revealed much difficulty in arriving at definite, satisfactory conclusions with respect to the intent of the contracting parties. This fact is certainly amply illustrated by the presentation of conflicting views advanced by representatives of each Government in the presentation of cases. While it would seem to be clear that

¹ See page 21.

the distinction which it is undertaken to make in behalf of the United States in the instant case is not conclusive, it seems to be equally clear that it is not obvious as contended in behalf of Mexico that it was the intention of the contracting parties that Mexico should settle *ex gratia* a claim which appears to be in the nature of a case predicated upon allegations of a denial of justice by a Mexican judicial tribunal.

Counsel for Mexico in oral argument referred to the forces of General Carranza as the forces of a *de facto* government. From the standpoint of international law a government may be regarded as *de jure* by virtue of the fact that it is *de facto*. However, in the light of recorded historical facts it appears to be clear that in 1916 General Carranza, while he may have gained the mastery of practically all of Mexico, considered himself to be a *de facto* ruler and his government a *de facto* government. It is interesting to note that in a communication under date of October 19, 1915, Secretary of State Lansing informed a representative of General Carranza in Washington that the President of the United States extended "recognition to the de facto Government of Mexico, of which General Venustiano Carranza is the Chief Executive". *Foreign Relations of the United States*, 1915, p. 771. In a communication of August 31, 1917, President Wilson acknowledged receipt of a letter dated May 1st of that year in which General Carranza announced his assumption of the office of President of the United Mexican States. *Foreign Relations of the United States*, 1917, p. 943.

Whatever distinction it may have been desired to make by these different forms of recognition, so-called, it would appear that the Commission is justified in considering that the instant claim is predicated upon charges of wrongful action on the part of military authorities carrying on their activities in Mexico at a time when all the agencies of the Constitutionalist Government were not discharging their functions in a manner prescribed by the existing Constitution. Neither the Federal courts nor the Congress functioned. General Carranza still styled himself the "First Chief of the Constitutionalist Army in Charge of the Executive Power". See *Codificación de los Decretos del C. Venustiano Carranza, Primer Jefe del Ejército Constitucionalista Encargado del Poder Ejecutivo de la Unión*. Had the instant case been predicated on allegations with respect to wanton shooting of an American citizen by forces of General Carranza, it would seem to be clear that it would be excluded from the jurisdiction of this Commission. The Mexican Government contends that, since Elton was tried by a military court whose sentence was confirmed by a military commander, and since the accused was shot by soldiers, the situation is the same. The Commission, confronted by the uncertainty of the language found in the two Conventions which has never been clarified by any documents relating to the negotiation of the Conventions or other evidence which it is permissible to use in interpreting a treaty, is constrained to sustain that view.

Decision

The Commission is without jurisdiction in this case.
