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Pomeroy's El Paso Transfer Company (United States.) v. United Mexican States

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Decisions

POMEROY'S EL PASO TRANSFER COMPANY (U.S.A.) *v.* UNITED MEXICAN STATES

(October 8, 1930, dissenting opinion by American Commissioner, undated. Pages 1-20[1].)

CONFLICTING JURISDICTION OF SPECIAL CLAIMS COMMISSION.—RESPONSIBILITY FOR ACTS OF FORCES. Claim for services rendered a military hospital during period of revolutionary disturbances in Mexico *held* within jurisdiction of tribunal. Mere connexion with revolutionary disturbances is not enough to oust the tribunal from jurisdiction; claim must be due to revolutionary disturbances in order to fall within jurisdiction of Special Claims Commission. A military hospital, though part of an army, is not within the category of "forces".

EVIDENCE BEFORE INTERNATIONAL TRIBUNALS.—NECESSITY OF DETAILED STATEMENTS.—NECESSITY OF CORROBORATING EVIDENCE OR EXPLANATION OF FAILURE TO FURNISH SAME. An affidavit by a witness who had personal knowledge of events on which claim was based but who confined his testimony essentially to confirming the truth of statements made in memorial *held* insufficient. It appeared that only other affidavit submitted was by President of claimant company, who had no personal knowledge of facts stated. No explanation was offered of failure to submit copies of corporate books of account or evidence of submitting of original bills for services rendered respondent Government. Claim *disallowed* for lack of evidence.

BURDEN OF PROOF.—EFFECT OF NON-PRODUCTION OF EVIDENCE AVAILABLE TO RESPONDENT GOVERNMENT. Fact that respondent Government did not fulfil its duty to submit evidence which may have been available to it does not justify an award in favour of claimant Government when its evidence is scanty.

Cross-reference: Annual Digest, 1929-1930, p. 450.

Commissioner Fernández MacGregor, for the Commission:

Claim is made by the United States of America on behalf of an American corporation, known as "Pomeroy's El Paso Transfer Company" against the United Mexican States for the sum of $223.00 United States currency, the value of certain services rendered by the claimant on several occasions to Mexican officials acting for Mexico, and which has not been paid.

The averments of facts are plain. Pomeroy's El Paso Transfer Company is a corporation, organized in the year 1888 under the laws of the state of

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[1] References to page numbers herein are to the original report referred to on the title page of this section.

Texas, United States of America, and operated in the City of El Paso on the American side of the Rio Grande as a transfer company and livery stable. In the month of April, 1911, during the revolution headed by Madero which affected the whole Mexican Republic, and which was especially active in the State of Chihuahua, the claimant received for safe keeping for a period of four days four horses, belonging to the Mexican Postoffice at Ciudad Juárez, which were taken to the American side in order to prevent them from being confiscated by the revolutionary forces. For this service the claimant charges $16.00 United States currency.

From January 1 to May 9, 1911, the claimant conveyed the mail for the Mexican Government for a period of 123 days, transporting it from Ciudad Juárez to several places in El Paso, Texas, where a Mexican Postoffice had been temporarily established. The claimant charges for this service the sum of $123.00 United States currency.

Finally, the same claimant was employed by a military hospital, established in the same Ciudad Juárez, which was at that time (in August and September, 1911) under the control of the revolutionary Chieftain Don Francisco I. Madero, to perform certain livery work which amounted altogether to the sum of $84.00 United States currency.

The claimant alleges that the bills pertaining to the 1st and 3rd items of this claim were sent by mail to the Mexican Postmaster and to the military authorities in Ciudad Juárez, respectively, but that the bills were never paid.

The Mexican Government has challenged the jurisdiction of this Commission to take cognizance of this claim because the facts upon which it is based, took place in Mexico during the period included between November 20, 1910, and May 31, 1920, and because the claims arising from those conditions are excluded from the competency of this Commission by the preamble and by Article I of the Convention of September 8, 1923; it also invites attention to the third item of this claim which refers to services rendered to a military hospital, adding that it seems to be included among those cases defined in Article 3 of the Special Claims Convention of September 10, 1923, which requires that the acts from which such claims arose be due to *forces*. In this regard the Mexican Agency has alleged that a military hospital is a dependent organization of the Army.

In my opinion this Commission has full jurisdiction to hear and decide this case. It is not sufficient that an act giving rise to a claim fall within the period included between November 20, 1910, and May 31, 1920, in order that the said claim necessarily be excluded from those covered by the General Claims Convention. It is essential, further, that they be for "losses or damages arising from revolutionary disturbances", (Preamble and Article VIII of the Convention) and, that they be due to "acts incident to the recent revolutions", (Article I). In order then, that this Commission may declare itself to be without jurisdiction it is not enough to demonstrate the existence of some connection between certain facts which took place during those nine and a half years and the several revolutions, but it is necessary to show that the loss or damage giving rise to the claim was due to revolutionary disturbances. This interpretation was maintained by the Mexican Agency itself in the case of the *Peerless Motor Car Company*, (Docket No. 56) [1], and in the case of the *United Dredging Company*, (Docket No. 483) [2].

[1] See page 203.
[2] See page 263.

The Commission has already rendered several opinions with respect to this point and reference is especially made to the cases of the *American Bottle Company*, (Docket No. 64) [1], and *Jacob Kaiser*, (Docket No. 1166) [2].

The facts upon which this claim is grounded have a certain connection with revolutions, but none of them arose or grew out of the disturbances of that period, or in other words, they are not direct consequences of revolutionary acts. The Mexican Agency invokes Article 3 of the Special Claims Convention and invites attention to the fact that a military hospital is a part of an army, and therefore a *force*. As to this, it is sufficient to mention that hospitals although integral parts of an army, have functions of such a special and humanitarian nature, that they cannot in any manner be regarded as included within the category of *forces*.

In order to determine the merits of the case, it is necessary then to consider the character of the evidence submitted giving to it its proper value.

The United States Government has filed (a) an affidavit executed by F. M. Murchison, who styles himself President of the claimant company; (b) simple copies of the bills for services rendered which the claimant states were presented to the Government of Mexico; and (c) an affidavit of W. W. Click who states that he was in charge of the affairs of the claimant company at the time the events upon which this claim is based took place.

The Government of Mexico filed as evidence only a statement of the Mexican Postmaster General in which he set forth that he had been unable to find any record of the services rendered by the claimant, and a transcript made by the Department of Foreign Relations of a report made by the office of the Postmaster General in which it appears that the records of that office are destroyed every two years.

I am of the opinion that the Mexican Agency has not fully complied, in regard to evidence, with the duties imposed upon it by this arbitration as defined by the Commission in paragraphs 5, 6, and 7 of its decision in the case of *William A. Parker*, (Docket No. 127) [3]. As it is alleged by the claimant in the instant claim that the matter of the services in question was arranged for by telephone, the Mexican Agency should have examined, with respect to the facts upon which the claim is grounded, the persons who in 1911 were in charge of the Mexican Consulate in El Paso, the post office in Ciudad Juárez, and the military hospital established in this latter named city during its occupation by the Madero forces. The reason for not making this examination is unexplained. It has been said only that the records of the Postoffice are destroyed every two years, a fact which excuses to a certain extent, the respondent from presenting the written evidence, which, it is presumed, remained of the said transactions, since with respect to transactions of public administration, it is a rule that certain formalities must be complied with.

This case, therefore, must be decided on the evidence submitted by the United States only. The affidavit of Murchison, who, it is said, without supporting evidence, is President of the claimant corporation, contains a statement of facts, but made by a person who had no direct knowledge thereof, since it appears that he did not become President of the corporation until after the events in question; and although it is to be presumed that the

[1] See page 435.
[2] See page 381.
[3] See page 35.

President of a corporation is acquainted with its affairs, the knowledge that he may have had of those events which took place before he assumed office, is, so to speak, second hand. The testimony of Murchison, then, lacks the qualities of that of a qualified witness.

The affidavit executed by W. W. Click in the year 1926, is limited to an assertion that all of the facts set out in the Memorial are true; that there were no written contracts covering the different services mentioned and that the said services were rendered at the request of the Mexican Consul, or of the Consul and the Mexican Postmaster on various occasions, and by telephone; that the services were really rendered; that the bills were made at the proper time and a copy thereof sent to the Mexican Consul, the Postmaster at Ciudad Juárez, and to the American Consul in the City of Mexico. He adds that the horses referred to in the first item of this claim were delivered to him personally after the respective arrangement by telephone.

The copies of the bills filed are not duplicates or copies made in 1911, but in 1925 when Click himself made them out and swore to them from his knowledge of the vague facts which gave rise to each one, and which may therefore be considered as a part of Click's testimony.

From the foregoing it is seen that, in reality, the claim is supported by the statements of only one qualified witness, W. W. Click, the only person who had direct knowledge of the facts. But these statements are not in detail, but simply in confirmation of the facts set forth in the Memorial, which, were those taken from the affidavit of Murchison, who, as previously stated was not an eye witness thereof. It is not denied that the statement of a person who confirms what another states in detail may have some value, but it is unquestionably true that in order to form a definite opinion each witness must set forth in his own manner the things he saw or knew since the comparison of different statements throws a light upon the facts equivalent to a confrontation of witnesses.

Further, according to the statements of the claimant, certain essential facts are too vague: W. W. Click states in one place that the services were requested by the Mexican Consul, and in another that they were requested by the same Consul or by the Postmaster in charge of the office in Ciudad Juárez, without asserting precisely which one of two authorities made the requisition; he does not state, with respect to the services performed for military hospital, who made the request for such services but merely states that they were performed for the revolutionary government which promised to pay the claimant the sum of $84.00 United States currency, without indicating the form of the promise nor the precise military authority with whom the matter was arranged. He asserts that copies of the bills were sent to the Mexican authorities, but there is no evidence that these bills were received; with respect to the second item which refers to the transportation of Mexican mail, it is not even alleged that a copy was sent. Above all, nothing is said as to whether the terms of the service to be performed were discussed and accepted, Click and the claimant now limiting themselves to making a charge of certain amounts, without further explanations, for the services they say were rendered.

It appears that this evidence is too scanty upon which to base an award in favor of the claimant. Better evidence should have been submitted. It is to be assumed that the claimant corporation kept books of account from which excerpts pertinent to this claim could have been furnished; contem-

poraneous copies of the bills and evidence of their mailing could have been, but were not, submitted. A copy of the bills which it is asserted was mailed to the American Consul in the City of Mexico shortly after the rendering of the services could also have been submitted.

It is possible that transactions of such slight importance might not have left in the records of the claimant very distinct traces, but it does not seem unreasonable to assume that at least a written order from the Mexican authorities requesting such services should have been required. A contractor cannot complain, when attempting to establish his rights, of his lack of precaution in making the contract and it should be borne in mind that the person with whom the claimant contracted was a Government. It is known that the same contracts which, when made between private persons, require little or no formality, upon being entered into with governments, require special formalities adapted to the character of the latter, which are that of entities exercising their functions through agencies. Such formalities are necessary as well for the transaction as for exacting from the Government compliance with its obligations. From the foregoing it is clear that to establish before any tribunal the existence of a contract with a government, the requirements are more rigorous and exacting than when the contract is between private persons.

The Commission has already given general rules regarding evidence and in its decision in the *Parker* case, (Docket No. 127) said, referring to the burden of proof and particularly to those cases in which the respondent Government remained silent when it should have spoken :

"On the other hand, the Commission rejects the contention that evidence put forward by the claimant and not rebutted by the respondent must necessarily be considered as conclusive. But, when the claimant has established a *prima facie* case and the respondent has offered no evidence in rebuttal the latter may not insist that the former pile up evidence to establish its allegations beyond a reasonable doubt without pointing out some reason for doubting."

In this case it appears that the evidence submitted by the claimant Government is not sufficient to establish a *prima facie* case, since it consists of a simple vague statement of one witness only without any support from documents contemporaneous with the facts, such as those submitted in support of the *Faulkner* claim (Docket No. 47) [1], and of which reference is made in paragraph 4 of the decision.

The contention, under these conditions, of the existence of a debt against a government seems to me to be lacking in seriousness. It does not appear to be equitable or consistent with the organization of a State, that after many years of silence and based on a mere assertion a person shall collect a sum said to be due as the result of a contractual obligation, or for a service rendered, without proving beyond a reasonable doubt the existence of such legal obligation.

In virtue of the foregoing, the claim of Pomeroy's El Paso Transfer Company should be disallowed.

Decision

The claim of the United States of America on behalf of Pomeroy's El Paso Transfer Company is disallowed.

[1] See page 67.

Commissioner Nielsen, dissenting.

This case involves a very small amount, but some interesting questions of law have been raised during the course of lengthy arguments. I do not find myself entirely in agreement with conclusions of my associates. Our differences in views are probably concerned in the main with questions pertaining to evidence. It seems to me that the majority opinion goes too far in an attempt to destroy the evidential value of what has been presented in behalf of the claimant, particularly since no evidence from the persons with whom the claimant dealt has been produced by the respondent Government. Further, it appears to me that the majority opinion also excessively stresses the matter of formalities in connexion with contracts made by private citizens with authorities of a government. In any given case which is concerned with questions of contractual relations and in which it may appear that there has been an absence of formalities, it seems to me that the blame should not all be placed on private citizens, parties to a contract, whatever knowledge the law may presuppose on their part. Such persons should not be expected to have more information than the authorities themselves and should not be blamed for not seeking the execution of formalities which the authorities have not required. It seems to me particularly inapposite, in dealing with some small contractual arrangement with an insurgent force, to undertake to apply rules or principles of law with respect to legal formalities of contracts made with a government.

This is a claim in the amount of $223.00 with interest, made by the United States of America against the Government of Mexico in behalf of Pomeroy's El Paso Transfer Company, an American corporation, to obtain compensation in satisfaction of certain contractual obligations said to have been entered into by the Company with Mexican authorities. The allegations of the Memorial of the United States are in substance as follows:

As a precautionary measure to prevent the confiscation by revolutionary forces of horses and vehicles used by the Mexican Government in transporting mail from Ciudad Juárez, Mexico, to El Paso, Texas, Mexican authorities in April, 1911, placed at El Paso for safe keeping four horses in charge and control of the claimant company, which was at that time operating a transfer company and livery stable. The claimant had possession of the horses for a period of four days and fed and cared for them at the rate of $1.00 per day for each horse, in the aggregate the sum of $16.00. The horses were put in charge of the claimant by the Postmaster at Ciudad Juárez, Mexico, and a bill showing the amount due for the care of the horses was mailed at the time to the Postmaster but was not paid by him, and it has not been paid by anyone connected with the Mexican Government.

During the time from January 1 to May 9, 1911, the claimant conveyed the mail for the Mexican Government from Ciudad Juárez to 109 Fisher Street, now known as Davis Street, in the City of El Paso, Texas, and from that address in El Paso to other places in that city. This service consisted in transporting mail to and from Ciudad Juárez, and to and from the Postoffice and other places in the City of El Paso, Texas. The service was performed by the claimant for the Mexican authorities for a period of 123 days at the rate of $1.00 a day, a total of $123.00, no part of which has ever been paid to the claimant either by the Mexican authorities then in charge at Ciudad Juárez or by others.

During the months of August and September, 1911, there had been established and was being operated at the time a military hospital in Ciudad Juárez, which was then in the control of Francisco I. Madero, who had captured and taken possession of Ciudad Juárez. The claimant was employed by authorities of the revolutionary government, which was subsequently successful, to perform certain livery work for the military hospital. A bill for the amount of $84.00, the value of the services, was mailed at the time to the military authorities of Ciudad Juárez, Mexico, but was never paid by those authorities or by any others.

This case was heard in June, 1927, but in view of the meagre arguments presented with respect to the important question of jurisdiction, the Commission, by an order of July 8, 1927, directed that the case be reopened for further argument on that point. At the first hearing reliance was placed in the argument of the United States on the fact that the claim was of a contractual nature. In behalf of Mexico it was argued that the case was not within the jurisdiction of this Commission, because it arose between the years 1910 and 1920. At the second hearing of the case these arguments were somewhat amplified, and contentions with respect to the merits of the case were also presented in view of the change in the personnel of the Commission.

The Commission has taken jurisdiction in cases involving contractual obligations arising between 1910 and 1920 in numerous cases. See case of *William A. Parker*, *Opinions of the Commissioners*, *Washington, 1927*, p. 35; case of *Macedonio J. Garcia*, *ibid.*, p. 146; case of the *Peerless Motor Car Company ibid.*, p. 303; case of the *United Dredging Company*, *ibid.*, p. 394; case of the *National Paper and Type Company*, *Opinions of the Commissioners*, *Washington, 1929*, p. 3; case of *Parsons Trading Company*, *ibid.*, p. 135; case of the *American Bottle Company*, *ibid.*, p. 162; case of *George W. Cook*, *ibid.*, p. 266.

With respect to two items of the claim involving allegations concerning business transactions with authorities of the administration of President Diaz, there is clearly no doubt as to the jurisdiction of this Commission. The third item involving relations of the claimant with revolutionists who successfully established themselves as a *de jure* government is perhaps less clear.

Counsel for the United States stressed the contractual character of the claim and argued that such a claim was different from one arising out of injuries due to acts described in Article III of the so-called Special Claims Convention concluded between Mexico and the United States September 10, 1923. Unquestionably there is a distinct difference between damages caused by breaches of contracts and those resulting from personal injuries or seizure or destruction of property. However, it is pertinent to bear in mind the principles of law governing the action of an international tribunal in cases involving contractual obligations. Such cases are not suits on contracts such as come before domestic tribunals. They are concerned with the action of authorities of a government with respect to contractual rights, and in cases of breaches of contract it appears to be reasonable for an international tribunal to give effect to principles of law with respect to confiscation. In the instant case it might therefore plausibly be argued that, since there was a failure of payment, the claimant's loss could be dealt with in accordance with the principles applicable to the destruction of property rights by revolutionary authorities, and that consequently the claim might be considered to fall within the scope of Article III of the

Convention of September 10, 1923. Doubtless the Commission could take jurisdiction with respect to the two items of the claim as to which there is no question and decline to pass upon the third item. However, I am of the opinion that, under a proper construction of the jurisdictional provisions of the Convention of September 8, 1923, and of pertinent provisions of the Convention of September 10, 1923, it should take jurisdiction with respect to the item for services to Madero authorities. Such action I consider to be in harmony with past decisions of the Commission.

In the *Peerless Motor Car Company* case the Commission made an award for compensation for ambulances sold by the claimant in 1913, on an order from Mexican military authorities of the administration of General Huerta. In the *Macedonio J. Garcia* case the Commission took jurisdiction over a claim involving a loan of $150,000.00 said to have been made by the claimant on or about March 30, 1920, to Adolfo de la Huerta, and a further loan of $11,000.00 made in May, 1920, to certain military officers. In the case of the *United Dredging Company* an award was made for services performed for the administration of General Carranza in 1914 in an attempt to salvage a Mexican gunboat. In the *American Bottle Company* case the Commission made an award for supplies furnished to a brewery which was seized and taken over by General Carranza in 1914. The distinction which counsel for the United States made as to the nature of losses giving rise to claims appears also to be indicated in an opinion of two of the Commissioners in the case of the *American Bottle Company* in which it was said:

"This claim, however, is not for loss or damage arising out of the seizure of the brewery, but is made for the non-payment of an amount due under a contract entered into between Elosua and the claimants after the seizure of the brewery, and in the opinion of the Commission, such non-payment cannot be said to constitute an act incident to a revolution in the sense in which this term is used in the said Convention."

In the instant case, in which the facts are simple, the Commission heard extended oral argument.

It was contended in behalf of the United Mexican States that the claim was barred by principles of the law of prescription. Dr. Francis Wharton, in discussing what he calls a "stale claim" says:

"While international proceedings for redress are not bound by the letter of specific statutes of limitation, they are subject to the same presumptions as to payment or abandonment as those on which the statutes of limitation are based. A government cannot any more rightfully press against a foreign Government a stale claim, which the party holding declined to press when the evidence was fresh, than it can permit such claims to be the subject of perpetual litigation among its own citizens. It must be remembered that statutes of limitation are simply formal expressions of a great principle of peace which is at the foundation, not only of our common law, but of all other systems of civilized jurisprudence." *Digest*, vol. 3, p. 972.

International tribunals have occasionally dismissed cases by the application of principles in harmony with Dr. Wharton's views. Ralston, *International Arbitral Law and Procedure*, p. 265 *et seq.* Counsel for Mexico cited some of these cases. In the *Cayuga Indians* case in the arbitration between the United States and Great Britain under the Special Agreement of August 18, 1910, the United States invoked the principle of laches, contending that it was properly applicable in a case which arose more than a century before its presentation to an international tribunal. The

contention was not sustained by the tribunal. *Report* of American Agent, p. 203.

It seems to be clear that, without straining analogous reasoning or attempting too extensively to apply in international law principles of domestic law, evidential value may be given to facts in relation to delays in the presentation of claims. Such delays may assuredly raise presumptions as to the nonexistence of a claim based on grievances, which had they existed, would have been called to the attention of the government on which it is sought to place responsibility. The fact that the Commission has jurisdiction over the claims of each Government against the other since 1868 would not necessarily render inappropriate the application of the principle of laches in an appropriate case. But there is clear reason why the United States cannot properly be debarred from maintaining this claim before the tribunal by any plea with respect to the principles of prescription or of laches. The situation as to claims on the part of each Government against the other during a considerable period prior to the establishment of this Commission is of course well known. Moreover, it would seem probable that the United States might never have seen fit to present the claim diplomatically even in an informal way, whatever its legal right to do so might be. There is abundant record of its general policy to consider claims based on breaches of contract as falling within a class of cases with reference to which no diplomatic action is taken, except in rare instances, save by the use of informal good offices in appropriate cases. Moore, *International Law Digest*, vol. VI, p. 705, *et seq.* This policy has previously been referred to by this Commission. Case of *William A. Parker*, *Opinions of the Commissioners*, *Washington, 1927*, p. 35.

With respect to the argument in relation to prescription, counsel for Mexico called attention to the disturbed conditions in Ciudad Juárez at the time of the transactions under consideration and pointed out that in all probability bills for the services said to have been rendered were never received by the Mexican authorities. The Commission has no information on this point. The bills may not have reached their destination. It was also argued that the claimant company had been guilty of laches in pressing its claim.

Irrespective of what evidential value might properly be given to the inactivity of the claimant, it might be concluded, considering the disturbed conditions from another point of view, that it was considered futile to do more than to mail the bills. Nor is it unnatural that the claimant should not see fit to bring a small matter of this nature to the attention of the Government of the United States with a view to diplomatic action prior to the time it was learned that a tribunal had been organized to consider all outstanding claims of each Government against the other. The claimant's conduct with respect to this matter cannot debar the United States from now maintaining a claim before this Commission. It may be further observed that, in any case in which an old debt is due under a contract, it is certainly not proper to place upon the creditor all the blame for the fact that the debt has become an old one. It would seem to be at least equally as appropriate to attribute a long lapse in payment to the failure of a debtor to pay what he owes rather than to the fact that the creditor may not have by persistent harassments prompted payment. Therefore so far as the claimant company is concerned the Commission cannot properly conclude that inactivity on the part of the company should preclude a recovery in its behalf.

Counsel for Mexico discussed the uncertainties with respect to a claim of this character in view of the lapse of time since the transactions in question took place and in view of political conditions during that period. It is easy to understand how under these conditions sight may be lost of small matters of this nature. However, since the claim has been presented and contested, the evidence must be weighed and valued in the light of common sense principles underlying rules of evidence applied by domestic courts.

The evidence on both sides is unsatisfactory. It was contended in behalf of Mexico that it is insufficient to establish any contract. In a claim involving an oral contract it is of course necessary that the Commission should have evidence with respect to the elements of an agreement entered into by a claimant with competent authorities. No issue has been raised in the presen case as to the competency of the Mexican authorities with whom it is alleged the claimant dealt.

In determining the question of the existence or non-existence of an oral contract, it is of course proper to consider the testimony of those concerned with the transactions upon which it is sought to predicate an agreement imposing legal obligations.

Accompanying the Memorial of the United States is a sworn statement by F. M. Murchison, President of the claimant company. It is asserted in this statement that the Company is a corporation organized under the laws of the State of Texas, and that it has its residence and place of business "on the opposite side of the Rio Grande from the City of Juárez, Mexico". A copy of the Articles of Incorporation dated November 15, 1888, also accompanies the Memorial. In this sworn statement the transactions under consideration are narrated in the sense in which they are alleged in the Memorial.

Another affidavit is made by W. W. Click, who states that "he was in personal charge of the business of the aforesaid claimant at the time of the accrual of the different items which compose the aforesaid claim, and has personal knowledge of the fact that the amount thereof is true and correct". The bills for services rendered which are referred to in Murchison's sworn statement were, it is asserted in Click's affidavit, "mailed to the aforesaid Mexican Consul and one to the Postmaster in Juárez, Mexico, and one to the American Consul in the City of Mexico".

Accompanying the Memorial are copies of bills dated May 1, June 1, and September 1, 1911, respectively. Each copy contains a sworn statement by Click that he was in the employ of the above named company at the time the bill was contracted and that the same is correct.

Having in mind among other things the comparatively small charges made for the services described in the Memorial and accompanying documents, I do not feel that the Commission would be justified in considering that an attempt had been made to fabricate a fraudulent claim. And considering further the available means open to the claimant of establishing its case, I am of the opinion that the evidence presented should not be rejected as insufficient to establish a *prima facie* case.

Accompanying the Mexican Answer is an annex quoting a communication from the Postmaster General of Mexico in which it is stated that it has been impossible to find "any proof that Pomeroy's El Paso Transfer Company of El Paso lent the services they claim to the Mexican Postoffice in the year 1911". It appears from another annex to the Mexican Answer

that the Postmaster General previously furnished the information that the files of former years were destroyed, only those of the past two years being in existence.

The statement as to the destruction of records is of no assistance to the Commission, especially since probably there were no records bearing on the transactions under consideration. And while nothing is said whether any attempt was made to consult consular records or the records of military authorities, it would seem to be probable that no pertinent information would be found among those records. It appears therefore that the best and probably the only available evidence would be such as might be furnished by the Postmaster or the Consul or the military authorities with whom the claimant company asserts it dealt. Certainly the Postmaster or the Consul could easily be identified. Presumably their testimony would have been important. Whether it was possible to reach them we do not know. There is nothing before the Commission to indicate whether any attempt was made to have them throw light on the transactions involved in this claim, or whether if information was sought from them, they furnished anything tending to destroy the evidential value of what has been produced in behalf of the claimant.

In the discussion of the sworn statement furnished by Murchison it is said in the majority opinion that there is no proof of the allegation that he was President of the claimant company. Better proof might have been presented, but it seems to me to be going a little too far to say that there is no proof, when he signs his statement as "President" and when a notary public in acknowledging the sworn statement identifies Murchison as President. I think it is too broad a statement to say that Murchison had no direct information with respect to the occurrences which are the basis of the claim. Written records such as bills sent to the Mexican authorities are certainly concrete information. Moreover, I do not think that we are warranted in reaching the conclusion that Murchison was not President of the claimant corporation when these transactions took place. The point is uncertain. It might even be inferred that he was President, since Click is described as an employee of the Company at that time.

I cannot concede the force of the objection made to the bills in the record that they are not copies made in 1911; that they are in a sense part of the testimony of Click; and that they are made and certified to under oath in connexion with uncertain things entering into the claim. The originals of the bills went to Mexican authorities. Copies were evidently retained by the company for its records. The copies made in 1925 were made for use before this Commission. The only question as to their value is whether they are accurate copies of the only records which the company could have, that is, copies of the originals sent to the Mexican authorities. Therefore when Click under oath testifies to the correctness of these copies, the fact that he in a sense makes them part of his testimony does not lessen their value but gives them value. If this had not been done they would surely have been lacking in the evidential value which they have as a result of the certification under oath.

The fact that Click under oath confirms testimony furnished by Murchison under oath to my mind in no way lessens the value of the affidavit furnished by Click. In addition to the confirmation by Click of Murchison's testimony we also have the former's authentication of the bills and further his relation of details of the transactions under consideration as he recalls them.

It is true, as observed in the majority opinion, that references to books of the company might have been desirable, for example, certified copies of statements from any books. There may be no such statements. A reasonably good substitute is certified copies of bills.

I do not perceive the force of the observation that copies made contemporaneously with the sending of the bills and proof of the mailing might have been presented. It seems to be doubtful that even in connection with extensive and carefully conducted business there is as a general rule any record of the mailing of a bill other than a copy of the bill itself. In this case we have in addition a sworn statement that bills were sent through the mails. Further copies of the bills would of course not be made until there was some use for such copies. There was no arbitration in progress in 1911.

Nor do I see any force in the statement to the effect that there might have been presented copies of the bills which it appears were sent by the claimant company to the American Consul General in Mexico City. The company evidently was not aware of the fact that the Consul General could render no assistance in this matter first, because the collection of claims of that kind would not be within the ordinary scope of his duties, and secondly, because the transactions in question occurred outside of his jurisdiction. The company sent bills and requested aid. If the copies sent to the Consul General were accurate copies of the company's records, they of course are copies identical with those which are now before the Commission. No greater significance can be attached to a copy made to no purpose under a misapprehension than to one made for the useful purpose of a proper presentation of a claim before the Commission.

It is stated in the majority opinion that the claimant company might at least have required a written order from the Mexican authorities, and there is a discussion of the differences between contracts made between private persons and those made by such persons with a government, the latter requiring prescribed formalities. Undoubtedly it would have been a proper precaution for the claimant in the instant case to have requested written orders. On the other hand, if the Mexican authorities considered such orders to have been necessary, it would have been equally and probably more appropriate for them to have given the orders. And certainly if there is any fault in this respect, the greater share should not be attributed to the claimant company to the end of defeating its claim. If there is any fault with respect to lack of formalities in connection with the agreements under consideration it would seem to me that the blame would fall more particularly on authorities who should have special information on these points rather than on the claimant company. Unquestionably a government in contractual matters generally protects itself cautiously by regulations as to the forms of agreements. And of course private citizens or corporations doing business with a government must comply with such regulations. Nevertheless there are times when it is proper in such matters to look to matters of substance rather than to matters of form. This principle, I think, has been given application by domestic courts. See for example *United States* v. *Purcell Envelope Co.*, 249 U. S. 313, and *Garfielde* v. *United States*, 93 U. S. 242, in which it was held that where bids for supplies to be furnished the Government had been accepted, the Government was bound, even though formal contracts required in such cases had not been signed. In these cases even though the Government received no benefits, it was held liable for breach

of contract. In the instant case before the Commission the Government received the benefits of the contracts. The opinion of my associates should probably not be construed to be at variance with the view that the services in question were rendered, so that it seems to me that their reasons for rejecting the claim are concerned not merely with a rigid insistence on technicalities as to evidence, but also with technicalities as to forms of contracts. The Government of Mexico has made no contention touching this latter point.

Moreover, it seems clear that in international cases tribunals have not attached importance to formalities prescribed by local law. but have rather emphasized the representative character of persons who have made agreements and the benefits derived by a government from such agreements. See for example the case of *Hemming* under the Special Agreement of August 18, 1910, between Great Britain and the United States, and the case of *Trumbull* under the Convention of August 7, 1892, between Chile and the United States cited and discussed by this Commission in the *Davies* case. *Opinions of the Commissioners, Washington, 1927,* p. 197, 201. In the *Davies* case this Commission had before it what was described by the claimant Government as an oral agreement, the terms of which were, subject to the making of that agreement, embodied in writing in a letter written by a Financial Agent of the Government of Mexico in the United States to the claimant. It seems to me that where a government obtains advantages under certain agreements, questions of formalities in connection with the conclusion of these agreements should not be stressed too strongly against a claimant, especially if it is not shown that the authorities who entered into the agreements concerned themselves about formalities. This thought, in my opinion, is particularly pertinent to the instant case considering the conditions under which the agreements in question were concluded.

There certainly can be no relevancy of any question of formalities required by a government in connection with an agreement with military forces of General Madero at Ciudad Juárez. Those forces did not constitute a government when they entered and occupied that city. There was not even recognition of belligerency of those forces on the part of the Federal Government or by any other government. They obviously did not concern themselves much about legal formalities in connection with the making of contracts.

International tribunals have repeatedly held a government responsible for acts of successful revolutionists. With respect to acts of a tortious nature, responsibility is fixed upon those ultimately responsible. In cases in which revolutionists have made use of private property or have obtained the benefits of contractual agreements, compensation has been required from those who in reality obtained benefits. See Ralston, *The Law and Procedure of International Tribunals*, pp. 343-344; also the case of the *United Dredging Company* decided by this Commission, *Opinions of the Commissioners, Washington, 1927,* p. 394. It seems to me that in dealing with arrangements entered into with revolutionary forces as in the instant case, there can be no propriety in seeking to give application to any requirements of law with respect to formalities of a contract entered into with a government.

The situation may be somewhat different as to agreements with the postal authorities. Nevertheless I think it is proper to bear in mind the very disturbed conditions at Ciudad Juárez at the time these agreements were made. There is nothing to indicate that the authorities insisted on formalities, and the Mexican Government received the benefits of the services that

were rendered by the claimant company. In behalf of Mexico it was stated in argument that the Mexican Government would not for a moment refuse to pay the small amount of the claim were it not for the lack of evidence.

I cannot agree with the view that the record contains nothing but the testimony of a single witness. Moreover, it seems to me that the reference to contemporaneous documents in the *Faulkner* case is not pertinent. The Commission had before it in that case copies of communications that supported sworn statements which were prepared in connection with the presentation of the case. Those communications were contemporaneous with the occurrences which were the basis of the claim. In the instant case the Commission has before it copies of things that evidently were the only written documents contemporaneous with the occurrences with which we are here concerned.

Evidence more concrete and in better form generally might have been produced in behalf of the claimant. But in the existing situation it must be considered that the case is reasonably well established by the evidence, in view particularly of the fact that no doubt is cast upon that evidence by any evidence produced in behalf of the respondent Government, and that no information is given whether an attempt was made to obtain evidence from Mexican authorities concerned with the transactions under consideration. See case of *Kalklosch, Opinions of the Commissioners, Washington, 1929*, pp. 126, 129.

LOUIS CHAZEN (U.S.A.) *v.* UNITED MEXICAN STATES

(October 8, 1930, concurring opinion by American Commissioner, October 8, 1930. Pages 20-35.)

DENIAL OF JUSTICE.—ILLEGAL ARREST.—CUSTOMS ZONE. Facts *held* sufficient to justify arrest by Mexican authorities by American subject within customs zone.

ILLEGAL IMPRISONMENT. Claim for unlawful detention beyond period permissible under Mexican law *allowed*.

CRUEL AND INHUMANE IMPRISONMENT.—MISTREATMENT DURING IMPRISONMENT. Charges of imprisonment under foul conditions and injury by guard *held* not sustained by the evidence.

CONFISCATION.—UNLAWFUL AUCTIONING OF PROPERTY TO SATISFY CUSTOMS DUTIES. Customs authorities *held* justified in sale of claimant's merchandise to satisfy import duties. Fact that such sale was delayed for a year and a half and not within time limit prescribed by Mexican law *held* not a denial of justice in absence of proof that delay caused injury to claimant. Claim for value of merchandise included in such sale on which import duties had been paid and in respect of which Mexican law had been complied with *allowed*.

Cross-reference: Annual Digest, 1929-1930, p. 163.