

**REPORTS OF INTERNATIONAL
ARBITRAL AWARDS**

**RECUEIL DES SENTENCES
ARBITRALES**

Lillie S. Kling (U.S.A.) v. United Mexican States

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United States currency, with interest thereon at the rate of six per centum per annum from December 7, 1921, to the date on which the last award is rendered by the Commission, and the sum of \$500.00 (five hundred dollars) United States currency, without interest.

LILLIE S. KLING (U.S.A.) v. UNITED MEXICAN STATES

(October 8, 1930, concurring opinion by Presiding Commissioner, October 8, 1930, concurring opinion by Mexican Commissioner, October 8, 1930, Pages 36-50.)

IDENTITY OF CLAIMANT. Claimant *held* entitled to present claim despite fact she retained her first husband's name after second marriage.

RESPONSIBILITY FOR ACTS OF SOLDIERS.—DIRECT RESPONSIBILITY.—RECKLESS USE OF ARMS. A group of American employees of an oil company was returning to the company's camp at 3.30 a.m., January 23, 1921, when several of them, who had permits to carry arms, in fun fired their revolvers in the air. A party of Mexican Federal soldiers which had been following the Americans, without the knowledge of the latter, then fired upon the Americans and killed claimant's husband. Evidence was conflicting as to whether such party was in command of an officer. No investigation thereof by the Mexican authorities was shown to have been made until 1927. Claim *allowed*.

EVIDENCE BEFORE INTERNATIONAL TRIBUNALS.—EFFECT OF NON-PRODUCTION OF EVIDENCE AVAILABLE TO RESPONDENT GOVERNMENT.—BURDEN OF PROOF. The mere fact that evidence submitted by respondent Government is meagre cannot justify an award in absence of satisfactory evidence from claimant Government. When, however, a *prima facie* case has been made by claimant Government, its case should not suffer from non-production of evidence by respondent Government. Moreover, in such circumstances account may be taken and certain inferences drawn from the non-production of evidence available to respondent Government.

RULES OF EVIDENCE. International tribunals must in matters of evidence give effect to commonsense principles underlying rules of evidence in domestic law.

DUTY OF AGENTS TO SUBMIT EVIDENCE. Agents have the duty to produce all possible evidence and arguments in defence of the Government which they represent.

CONSULAR REPORTS AS EVIDENCE. The tribunal will give weight to consular reports bearing on facts of claim according to the extent to which they are based on concrete information.

Prima Facie EVIDENCE DEFINED. *Prima facie* evidence is that which, unexplained or uncontradicted, is sufficient to maintain the proposition affirmed.

MEASURE OF DAMAGES, WRONGFUL DEATH. Age, character and earning capacity of decedent taken into consideration in determining amount of award for killing of American subject.

PROVOCATION AS AFFECTING MEASURE OF DAMAGES. Fact that acts of Americans in firing into the air led to attack by Mexican soldiers, resulting in death of claimant's husband, *held* to mitigate damages.

Cross-references: Am. J. Int. Law, Vol. 25, 1931, p. 367; Annual Digest, 1929-1930, pp. 87, 455; British Yearbook, Vol. 12, 1931, p. 168.

Comments: Edwin M. Borchard, "Recent opinions of the General Claims Commission, United States and Mexico", Am. J. Int. Law, Vol. 25, 1931, p. 735 at 736.

Commissioner Nielsen, for the Commission:

This claim, which is made by the United States of America in behalf of Lillie S. Kling in the sum of \$50,000.00 gold currency of the United States, with interest, is predicated on allegations with respect to the wrongful killing by Mexican soldiers of August Francis Kling, son of the claimant, and with respect to the failure properly to investigate the killing and to punish the wrongdoers. The case was heard in April, 1929, but was reopened for the production of further evidence. The substance of the occurrences on which the claim is based is stated in the Memorial as follows:

At the time this claim arose and for some time prior thereto, August Francis Kling was a resident of Chinampa, State of Vera Cruz, Republic of Mexico, where he was employed by the Texas Company of Mexico, S. A. At about 3.30 a.m. on January 23, 1921, Kling in company with M. C. Hancock, J. W. Schmuck, C. M. Maney, T. E. Goolsbee, A. G. Stribling, L. F. Knops and R. C. Knops, all American employees of that company, were returning on foot from Zacamixtle to the company's camp in the vicinity of Zacamixtle. When the party of which Kling was a member had reached the side road which turns into the camp and were standing or proceeding leisurely on the side road on property under lease to the Texas Company of Mexico, S. A. several of the companions of Kling, who had permits to carry arms, in fun fired their revolvers into the air. Immediately thereafter a party of Mexican Federal soldiers, consisting of a captain and several privates, who apparently had been following Kling and his companions, but whose presence was unknown to the Americans, deliberately discharged their firearms at the party of which Kling was a member. Kling received a shot in the back and fell immediately to the ground.

The Mexican soldiers, after firing several shots at the party of Americans, placed the companions of Kling under arrest and compelled them to proceed to Zacamixtle. There after some kind of a hearing heavy fines were imposed upon them and they were compelled under threats of indefinite imprisonment to make false statements to the effect that they were the instigators of the affair, and that they had first fired upon the Mexican Federal soldiers.

August Francis Kling, whose spinal column had been practically severed by the shot fired at him and who was completely paralyzed below the abdomen, was transferred with the greatest possible speed to the United States and placed in a hospital at Dallas, Texas, where he died on March 18, 1921, after lingering and suffering for a period of almost two months.

After the authorities of the Republic of Mexico had obtained the false statements from the companions of Kling as above stated, no further investi-

gation was made by either civil or military authorities. The Mexican Federal soldiers were relieved by the authorities of all responsibility for the death of August Francis Kling, and the soldiers have not been punished for the crime which they committed.

The evidence produced in behalf of the claimant Government supports such allegations of the Memorial as are vital to the establishment of the claim.

Objection is made in behalf of Mexico with respect to the sufficiency of the proof of the nationality of the claimant and of her identity. However, it is satisfactorily shown that she was born an American citizen and has remained so up to the present time. The uncertainty as to her identity probably arises mainly from the fact that she was twice married; that her last husband's name was T. A. Moross; and that she now is known as Lillie S. Kling. Her first husband's name was August Francis Kling. After his death she married T. A. Moross. If she chooses now to call herself Lillie S. Kling, that is a matter of no importance in the light of an abundance of evidence which identified her as the mother of August Francis Kling, the offspring of her first marriage. The evidence leaves no doubt as to identification of mother and son.

With respect to the killing of Kling by Mexican soldiers and the arrest and punishment of Kling's companions, there is before the Commission the affidavit of A. G. Stribling, one of the group of men upon whom the soldiers fired. Bearing on these matters, there is also a statement of all the members of the group with the exception of Kling made at the office of the Texas Company, evidently not long after the shooting.

Other important information is furnished by a letter written by C. S. Sheldon, an official of the Texas Company, to D. J. Moran, another official of that company. In this communication, dated the day on which the shooting occurred, Sheldon calls attention to information received by him on the morning of that day from H. W. Jennison, who was in the Company's camp when the shooting occurred. It is stated in this communication that after the shooting the soldiers went into the camp and raised a commotion and thereafter went to Zacamixtle, taking with them Schmuck, a member of the group upon which the soldiers fired.

It appears that on January 25, 1921, all members of the group with the exception of Kling, were taken as prisoners to a cuartel at Juan Casiano, where they were examined by military authorities, an officer by the name of Colonel Huerta presiding. Matters relating to proceedings before Colonel Huerta are stated in detail in the affidavit of Stribling. Accompanying the Memorial is also a report from J. S. Hain, an employee of the company, made to D. J. Moran. Mr. Hain had been detailed by Moran to follow the proceedings taken against the prisoners. In the report it is stated, among other things, that three men were refused bond and were retained in confinement for five days, the reason being given that they should be tried before General Martinez.

Copies of other correspondence and several affidavits are also presented by the United States.

The evidence adduced proves the substantial allegations of the Memorial. It shows that there were Mexican records of the proceedings taken against the men. It further shows that at least one officer, Colonel Huerta, and several Mexican soldiers were fully conversant with the details of the

occurrences described in connection with the presentation of the claim. This fact is of particular importance in view of the defense made by Mexico in the case as to lack of information concerning these matters.

In the Mexican Answer it is denied that Kling "was murdered by Federal forces of the Mexican Government". It is stated that no records have been found bearing on the averments contained in the Memorial, and further, that it has been impossible to find records of proceedings before Mexican military authorities. It is further stated that "even admitting for the sake of argument, that the version of facts contained in the Memorial and which is only corroborated by the claimant and by the affidavits of the companions of the deceased, is a true version, it appears clearly therefrom that the group of which the deceased August Francis Kling was a member, provoked a detachment of Federal troops and so it was declared by the members of said group before Mexican authorities, which, according to said version, in view of these statements exonerated the detachment from any fault or responsibility, and, therefore, abstained from imposing any punishment to the said soldiers".

In the Mexican brief the view is expressed "that the participation by Federal soldiers in the incident was a myth born in the imagination and for the purposes of Kling's companions". In the light of an analysis of the evidence it is asserted that it "is not true that August Francis Kling was wounded by Mexican Federal forces". The brief contains a discussion of conditions in the oil region, and it is said that in the early part of 1921 "the military authorities had to use firm measures to keep order and peace". The supposition is advanced that a group of men which may have included Kling, may have directed an attack at Federal forces, and it is said that even if they did not directly do so, their conduct was dangerous and imprudent, and that, assuming without admitting the correctness of allegations in the Memorial, the Federal forces acted "within their duty in repelling an aggression which, real or imaginary, had all the aspects of an attack by a party which, because of the hour and their behavior, might be considered as marauders". It is further asserted in the brief that, without conceding that Kling was shot by soldiers, the latter were not under the command of an officer, and that therefore Mexico is not responsible for their acts.

In the affidavit of Stribling it is stated that a captain was among the Mexican soldiers. Whether or not it be a fact that the soldiers were under the command of a captain is not a vital point in connection with the determination of the question of responsibility for the acts of soldiers. Men on patrol duty are not acting in their private capacity, even though an officer may not be present on the spot where acts of soldiers alleged to be wrongful are committed. See the *Solis* case decided by this Commission, *Opinions of the Commissioners, Washington, 1929*, p. 48, 53 *et seq.* Moreover, when account is taken of the visit of the soldiers at the camp of the Oil Company, the arrest of the Americans, and the proceedings before a Mexican officer at Juan Casiano, it can not be assumed that the soldiers were acting in their private capacity with respect to the occurrences under consideration.

Some of the employees of the company who were fired upon by the soldiers were carrying arms. Whether or not such action was a violation of the law in the locality in question may be uncertain. Although account may be taken of that matter in weighing the evidence with respect to the question of fault on the part of the soldiers, the point is not one from which it is proper to infer an excuse for reckless firing by soldiers. The conduct of the

Americans of course justified investigation and it might warrant an arrest. The men may have engaged in boyish hilarity; that was probably not a crime, and at most could seemingly be only mildly indiscreet.

The killing of an alien or of a citizen by soldiers is always a serious occurrence calling for prompt investigation. So far as the evidence shows that matter in the present case was ignored—at least for several years—but a great deal of attention was devoted to the conduct of the party fired upon by the soldiers. The unjustifiable use of firearms has frequently been dealt with in diplomatic exchanges between Governments and by international tribunals. This Commission has already decided numerous cases concerned with that serious question in various aspects. A few illustrations may be cited.

There have been cases of wanton, deliberate shooting resulting in death or injury.

Thus in the case of *José M. Portuondo*, which came before the Commission under the Convention of February 12, 1871, between the United States and Spain, \$60,000 was awarded for the killing of a naturalized American citizen of Spanish origin, Juan F. Portuondo. It was said in defense that he was shot while trying to escape. Moore, *International Arbitrations*, vol. 3, p. 3007. In the case of *Thomas H. Youmans*, this Commission awarded \$20,000 because soldiers had participated in the murder of Henry Youmans in 1880 in the State of Michoacán. *Opinions of the Commissioners, Washington, 1927*, p. 150.

Indemnities have been awarded in cases in which it has been considered that soldiers or police officials acted improperly in attempting to make arrests, when persons have failed to respond to a summons to halt. Domestic laws throughout the world seem none too certain with respect to the action of officers relative to such matters. It seems reasonable to suppose that such is the fact because it is considered to be inadvisable or impracticable to frame legislation tending on the one hand to tie too rigidly the hands of officials, or on the other hand, to give them too great latitude, and that therefore considerable discretion is left to them.

In the *Falcón* case before this Commission, an award of \$7,000 was made against the United States on account of the firing on Mexican citizens by American soldiers. *Ibid.*, p. 140. In the case of *Teodoro García and M. A. Garza*, before this Commission, an indemnity of \$2,000 was awarded against the United States because an American Army lieutenant had shot at a raft in the Rio Grande and one of the shots fired by him killed a Mexican girl. *Ibid.*, p. 163.

In 1915 Canadian soldiers shot two young Americans thought to be engaged in hunting ducks out of season in Canadian waters. One of them was killed and the other seriously injured. Indemnities were paid by Great Britain. *Foreign Relations of the United States, 1915*, pp. 415-423.

In cases of this kind it is mistaken action, error in judgment, or reckless conduct of soldiers for which a government in a given case has been held responsible. The international precedents reveal the application of principles as to the very strict accountability for mistaken action. This fact is well illustrated by the *Falcón* and *García and Garza* cases, *supra*, decided by this Commission.

In the *Falcón* case American soldiers, believing that certain men seen in the Rio Grande were engaged in smuggling, directed them to halt. The

order was not obeyed. The soldiers testified that they were fired upon from the Mexican side by mounted men and thereupon fired in self-defence. They further stated that they also directed some shots at the men who were in the water. Even in these circumstances the Commission made that act the basis of an award against the United States. In the *García and Garza* case the record revealed that the American army lieutenant, Gulley by name, shot at a raft which certain persons knowingly propelled in violation of the law of the United States in 1919. The lieutenant was on duty charged with enforcing legislation of various kinds relating to the entry into or departure from the United States of aliens in time of war, provisions against the importation of arms and ammunition into Mexico and matters relating to immigration and smuggling. Lieutenant Gulley testified before a court-martial to which he was subjected that he fired about twelve shots in the direction of the raft, and stated that at the time he did so 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. Even in the light of evidence of such a situation so critical for the officer, two Commissioners were of the opinion that he was guilty of error of judgment justifying an award against the United States.

It is difficult to perceive that in the instant case there could plausibly be advanced any such excuses or explanations for shooting as were made with respect to the conduct of the soldiers whose acts were under examination in the *Falcón* and *García and Garza* cases.

It does not appear to have been contended by the United States in the instant case that the killing of Kling was a deliberate and wanton murder. Evidently it cannot properly be considered that the shooting was the result of any attempt to secure the apprehension of a person endeavoring to escape arrest. Whatever excuse might be made for the action of the Mexican soldiers, their conduct must be considered to have been indiscreet, unnecessary and unwarranted. There are also numerous international incidents of this kind, cases not concerned with attempted arrests, in which damages have been assessed for mistaken, unnecessary, indiscreet or reckless action.

Thus in the *Dogger Bank* case, Great Britain demanded indemnity from the Government of Russia, when during the course of the Russo-Japanese war in 1904, the Russian Baltic fleet fired into the Hull fishing fleet off the Dogger Bank in the North Sea. The British Government demanded an apology, ample damages and severe punishment of the responsible officer. The matter was submitted to an international commission of inquiry. The Russian Government maintained that the firing was caused by the approach of some Japanese torpedo boats. The commission of inquiry reported that no such boats had been present; that the firing was not justifiable; that Admiral Rojdestvensky was responsible for the incident, but that these facts were not of a nature to cast any discredit upon the military qualities or the humanity of Admiral Rojdestvensky or of the personnel of his squadron. Russia paid 65,000 pounds to indemnify the victims and families of two dead fishermen. Oppenheim, *International Law*, 3rd ed., vol. II, pp. 7-8. In the *Stephens* case decided by this Commission, the sum of \$7,000 was awarded against Mexico for the shooting of Edward C. Stephens, an

American citizen, on March 9, 1924, by a member of some Mexican guards of auxiliary forces in the State of Chihuahua. The following extract from the opinion of the Presiding Commissioner indicates the conclusion of the Commission with respect to the facts in that case:

"There should be no difficulty for the Commission to hold that Valenzuela when trying to halt the car acted in the line of duty. But holding that these guards were entitled to stop passengers on this road and, if necessary, to use their guns pursuant to Article 176 just mentioned, does not imply that Valenzuela *executed* this authorization of the law in the right way. On the contrary, the use he made of his firearm would seem to have been utterly reckless." *Opinions of the Commissioners, Washington, 1927*, p. 397, 399.

On September 26, 1887, a German soldier on sentry duty on the frontier near Vexaincourt, shot from the German side and killed a person on French territory. Germany disowned and apologized for this act and paid the sum of 50,000 francs to the widow of the deceased. The sentry, however, escaped punishment because he proved that he had acted in obedience to orders which he had misunderstood. Oppenheim, *International Law*, 3rd ed., vol. I, pp. 255-256.

The general rule as to the responsibility of a government for errors in judgment of its representatives was given application by M. Henri Fromageot, the distinguished French member of the Permanent Court of International Justice, in an opinion which he rendered in the case of *The Jessie, Thomas F. Bayard and Pescauha*, under the Special Agreement of August 18, 1910, between the United States and Great Britain. The case was concerned with a complaint against American naval authorities. M. Fromageot as arbitrator said:

"It is unquestionable that the United States naval authorities acted *bona fide*, but though their *bona fides* might be invoked by the officers in explanation of their conduct to their own Government, its effect is merely to show that their conduct constituted an error in judgment, and any government is responsible to other governments for errors in judgment of its officials purporting to act within the scope of their duties." *American Agent's Report*, pp. 479, 480-481.

Under date of June 4, 1921, the Department of State addressed a communication to the American Chargé d'Affaires at Mexico City, instructing him to bring the shooting of Kling to the attention of the appropriate authorities in Mexico City and to request a thorough investigation. The Mexican Foreign Office replied that full reports had been requested from the appropriate authorities. No further reply was ever made by the Mexican Government.

In connection with any investigation which the Government of Mexico might have desired to make at that time with respect to the killing of Kling there would have been available the testimony of Kling's seven companions, at least one or perhaps more than one person in the camp of the oil company, and at least four or five Mexican soldiers, including Colonel Huerta, who is mentioned in the evidence. No evidence was produced by Mexico at the first hearing of this case showing whether or not an investigation and report had been made by the appropriate authorities, of if they were made, what was developed by them.

The mere fact that evidence produced by the respondent Government is meagre cannot itself justify an award in the absence of satisfactory evidence from the claimant. On the other hand, a claimant's case should not neces-

sarily suffer by the non-production of evidence by the respondent. It was observed by the Commission in the *Hatton* case, *Opinions of the Commissioners, Washington, 1929*, pp. 6, 10, that, while it was not the function of a respondent Government to make a case for a claimant Government, certain inferences could be drawn from the non-production of available evidence in the possession of the former. See also the *Melzer Mining Company* case, *ibid.*, p. 228, 233. The Commission has discussed the conditions under which, when a claimant Government has made a *prima facie* case, account may be taken of the non-production of evidence by the respondent Government, or of unsatisfactory explanation of the non-production of evidence. Case of *L. J. Kalklosch, ibid.*, p. 126.

Little adjective law has been developed in international practice. International tribunals are guided to some extent by rules formulated in connection with each arbitration. With respect to matters of evidence they must give effect to common sense principles underlying rules of evidence in domestic law.

In the *Parker* case, *Opinions of the Commissioners, Washington, 1927*, p. 35, the Commission discussed at considerable length the position of the Agents with respect to the production of evidence. The principle which the Commission evidently had in mind is given effect in The Hague Convention of 1907, for the pacific settlement of international disputes to which a large number of nations, including Mexico and the United States, are parties. Article LXXV of that Convention reads as follows:

“The parties undertake to supply the tribunal as fully as they consider possible, with all the information required for deciding the case.”

Other Commissions have often similarly dealt with the question of the application of principles of evidence. The subject is referred to by Ralston in his work. *The Law and Procedure of International Tribunals*, revised edition, as follows (p. 225):

“Many times commissions have invoked against a litigant party the legal presumption attaching to the nonproduction of evidence within its power to produce. Thus in the *Brun* case it was said :

“The umpire might hesitate to adopt these findings if it were not true, and had not been always true, that the respondent government could ascertain and produce before this mixed commission the exact facts regarding the positions and movements of its own soldiers, and the position and movements of the insurgent forces at the time in question. Especial force attaches to this when it is known that the respondent Government was asked and urged by the representatives of the French Company and by the representatives of the claimant government to permit the use of its judicial processes and functions, in order that the truth might be established, but the privilege was denied them.”

“In the *De Lemos* case the umpire was influenced in his conclusions by the consideration that, were the statements made by the claimant false, the official particulars were undoubtedly with the Government of Venezuela, and, they not being furnished, though susceptible of production, he did not hesitate to make an award.”

That a claimant should not be prejudiced by the non-production of evidence by a respondent Government is observed in an opinion rendered on January 22, 1930, by the Commission established by the Convention of March 16, 1925, between Mexico and Germany, in the case of *Laura Z.. Widow of Plehn*. The case grew out of the killing of Hans Plehn, a German citizen, by revolutionists in the State of Hidalgo in 1916. An award of

\$20,000 national gold was made in this case. In the opinion written for the Commission by the President Commissioner, Dr. Cruchaga, and concurred in by the Mexican Commissioner and the German Commissioner, it is said:

"It is regrettable that the proceedings or copies of same do not appear in the proceedings as they would have given much light on these lamentable occurrences.

"The reasonable measures for punishing the bandits, referred to in No. 5 of Article 4 of the Convention, do not in my opinion consist alone in the instituting of a prosecution, but it is necessary to become acquainted with the prosecution itself in order to state whether they have such a character.

"The exhibition of the record would have made it possible to determine the steps employed by the authorities for the punishment of the guilty party, and the absence of this piece of evidence cannot damage the claimant, as it was not in her hands to present and appertained to the defendant Agency to show it in proof of its assertion that there was no lenity or lack of diligence on the part of the authorities."

Domestic courts may approach this subject from a somewhat different angle, but they of course also analyse the evidence in the light of what one party has the power to produce and the other the power to explain or to controvert. See *Mammoth Oil Co. v. United States*, 275 U. S. 13, and the cases there cited.

Counsel in an international arbitration are of course zealous in producing all possible evidence and argument in defense of the acts of a government which they represent. It is natural and proper that they should do so. That is of course their duty to their Governments and to themselves, and it is their duty to the tribunals before which they appear which should have all possible assistance in formulating sound judgments. It must be generally assumed that any available proof tending to support a government's contention will be produced.

On April 9, 1929, the Commission requested the Agents to submit further evidence, particularly the American Consular despatches and the records of any proceedings instituted by Mexican civil or military authorities regarding the incidents out of which the claim arose.

The United States produced copies of correspondence between the Department of State and the American Consul at Tampico. In a despatch of January 31, 1921, the Consul reported concerning the serious condition of Kling. He expressed the view that the wounding of Mr. Kling might be "classified as an accident". He said that Mexican soldiers "attempted to make capital out of this incident", and he narrated the facts with regard to the arrest of the seven employees of the company and the proceedings taken against them which he ascribed to what he called an "anti-American" feeling. The Department of State, in an instruction of March 21, 1921, directed the Consul to report whether the Americans fired first upon the soldiers and if not, what justification there was for the firing by the latter. The Consul was also directed to report why he called this affair an "accident", and he subsequently explained that he did so solely in the light of the facts stated in the correspondence, and that he did not intend to excuse the shooting, although he did not consider it to be unnatural that it had occurred. Evidently the Consul made no investigation at the scene of the occurrences under consideration and had before him considerably less evidence than has the Commission at the present time.

The Commission has frequently had occasion to consider testimony furnished by Consular officers. Generally speaking, such testimony should be valuable. It is the important duty of officials of this character to search out and report facts to their governments. However, their testimony must of course be considered in the light of tests applicable to witnesses generally, the tests as to a person's sources of information and his capacity to ascertain and his willingness to tell the truth. The Commission has considered reports of Consuls in the light of those tests, giving weight to those which have revealed the ascertainment of facts which opportunity and effort have made possible and of course attaching little importance to reports based on scanty information. See the opinions of the Commission in the cases of *Walter H. Faulkner*, *Opinions of the Commissioners, Washington, 1927*, p. 86; *Harry Roberts*, *ibid.*, p. 100; *Laura M. B. Janes*, *ibid.*, p. 108; *Thomas H. Youmans*, *ibid.*, p. 150; *L. J. Kalklosch*, *Opinions of the Commissioners, Washington, 1929*, p. 126; *Alexander St. J. Corrie*, *ibid.*, p. 133; *F. M. Smith*, *ibid.*, p. 208; *Lily J. Costello*, *ibid.*, p. 252.

In response to the request made by the Commission on April 9, 1929, the Mexican Agency has produced copies of two communications addressed by Mexican military authorities to the Mexican Foreign Office in 1927. In a communication of June 20, 1927, from those authorities it is stated that no information has been found with respect to the killing of Kling. In a subsequent communication of July 22, 1927, similar information is given, but it is observed that possibly ex-General Daniel Martinez Arera, whose address is given, and who at the time of the events was in command of the sector where they occurred, might furnish certain information. It is stated that such information had been requested from him and would be communicated when available. However, no report from General Martinez is included in the record before the Commission.

The Commission has dealt with cases in which the evidence revealed uncertainties as to the opportunities open to authorities to make investigations and as to methods which have been employed. The instant case is particularly free from uncertainty. Apart from the record showing lack of investigation, we have in oral argument the statement that the position of Mexico is that she is ignorant of the occurrences under consideration. The evidence reveals, on the one hand, that there were available records of proceedings against the Americans; also many persons as witnesses, and on the other hand, that no information was obtained or that in any event nothing has been laid before the Commission.

The investigation by the military authorities which produced no information concerning the occurrences in question was instituted in 1927. Kling was killed in 1921. On July 21, 1927, this Commission rendered a decision in the *Galvan* case, awarding \$10,000 in favor of Mexico on account of the non-prosecution of a person who killed a Mexican citizen in the State of Texas. *Opinions of the Commissioners, Washington, 1922*, p. 408. The Commission reached the conclusion that after the year 1927 the authorities had failed to take proper steps to try the person indicted for the killing. In the opinion of the Commission in an observation which seems to be pertinent to the instant case. It was said:

"If witnesses actually disappeared during the course of the long delay in the trial, then as argued by counsel for Mexico, that would be evidence of the evils incident to such delay."

Prima facie evidence has been defined as evidence "which, unexplained or uncontradicted, is sufficient to maintain the proposition affirmed". *Corpus Juris*, vol. 23, p. 9. In the absence of any proof on the part of Mexico to controvert the evidence which has been produced by the United States, the Commission is constrained to render an award in favor of the latter. Kling was 22 years old when he was shot. His associates and employers have furnished testimony describing him as a man of fine character, ability and promise. Evidence is furnished by officials of the company that at the time of his death he was receiving \$400 a month. In consideration of these facts and in the light of the principles applied by the Commission in fixing indemnities, the award should be in the amount of \$11,000. However, since my associates are of the opinion that the award should be \$9,000.00, and since I consider that the claimant is entitled to at least that much, I concur in that amount.

Dr. H. F. Alfaro, Presiding Commissioner:

I concur, in general terms, with the conclusions set forth in the opinion of the Honorable Commissioner Fred K. Nielsen concerning the international responsibility of the Mexican Government for the acts of the soldiers who caused the death of the North American citizen, August Francis Kling, but I do not agree with him in his valuation of some of the cases he quotes as precedents, nor in that of the very facts which give rise to the instant claim.

My learned colleague is of the opinion that whatever may be the excuse alleged in defense of the conduct of the Mexican soldiers, their behavior must be considered as indiscreet, unnecessary and unjustified. Nevertheless, it is impossible not to consider that the action of the soldiers was caused by the shots fired in the air, by some of Kling's companions, in a very imprudent manner in view of the hour and the conditions of constant alarm and insecurity which then prevailed in the theater of the events.

The cases of *José M. Portuondo*, *Thomas H. Youmans*, *Dolores Guerrero*, *viuda de Falcón*, *Teodoro García* and *M. A. Garza* and others cited by the Honorable Commissioner Nielsen, although growing out of acts executed by soldiers while on duty, differ from the instant case in one essential particular. In all of those cases the authors acted consciously and deliberately. In the deplorable incident under consideration, the soldiers who fired upon the group of which Kling was a member, did so in the darkness of the night, impelled by an apparent provocation or attack and in ignorance therefore whether they had to contend with individuals who were merely amusing themselves by discharging their firearms in the air or with bandits such as those who at that time infested the district.

These circumstances seem to explain—although they do not in any manner justify—the absence of any investigation subsequent to that made by the Military Authorities of these events, for which reason the responsibility of Mexico in this case is not of a more serious character.

In view of the foregoing, I believe that an indemnity of \$9,000.00 United States currency is proper in the instant case.

Fernández MacGregor, Commissioner:

I concur in the opinion of the Presiding Commissioner.

Decision

The United Mexican States shall pay to the United States of America on behalf of Lillie S. Kling the sum of \$9,000.00 (nine thousand dollars) without interest.

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

(October 8, 1930, dissenting opinion by American Commissioner, undated.
Pages 50-60.)

RESPONSIBILITY FOR ACTS OF MILITARY OFFICERS.—DIRECT RESPONSIBILITY. RECKLESS USE OF ARMS.—ACTS OUTSIDE SCOPE OF DUTY. While engaged in target practice on grounds of Mexican fort two Mexican military officers, one a captain and the other a doctor, wounded claimant with one of their shots. Claimant was on board an American vessel anchored below the fort. Apparently no effort was made by the officers to ascertain whether any vessels were behind the target wall. Daily target practice was mandatory under Mexican Army Regulations. Pistol with which shots were fired was one privately owned. *Held*, (i) act resulting in injury was a private act and not one in line in duty for which respondent Government was responsible, and (ii) act was not an act of official resulting in injustice within the terms of the *compromis*, since such acts must involve acts unjust according to international law and in the instant case there was no responsibility at international law.

DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH. One of two military officers who shot American subject during target practice was not arrested therefor until six months after the event. No one was ever punished in connexion with such shooting, the accused being discharged on the ground that it could not be ascertained which of the two officers had fired the shot in question. *Held*, denial of justice below international standard not established. With respect to delay in arrest, it appeared that political disturbances then existed throughout the Mexican Republic.

Cross-references: Am. J. Int. Law., Vol. 25, 1931, p. 380; Annual Digest, 1929-1930, p. 170; British Yearbook, Vol. 12, 1931, p. 168.

Comments: Edwin M. Borchard, "Recent opinions of the General Claims Commission, United States and Mexico", Am. J. Int. Law, Vol. 25, 1931, p. 735.

Commissioner Fernández MacGregor, for the Commission:

Claim is made in this case against the United Mexican States by the United States of America on behalf of Louis B. Gordon, an American citizen, to obtain damages in the sum of \$5,000.00 United States currency, for physical injuries received at the hands of two Mexican military officers, upon whom absolutely no punishment was imposed.