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**Lillian Greenlaw Sewell, In Her Own Right and As Guardian of Vernon Monroe
Greenlaw, a Minor (U.S.A.) v. United Mexican States**

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LILLIAN GREENLAW SEWELL, IN HER OWN RIGHT AND AS
GUARDIAN OF VERNON MONROE GREENLAW, A MINOR
(U.S.A.) *v.* UNITED MEXICAN STATES

(October 24, 1930. Pages 112-120.)

NATIONALITY, PROOF OF.—VOTING CERTIFICATE AS EVIDENCE OF NATIONALITY. Nationality of claimants *held* established. Certificate as a voter of city of Los Angeles, California, *held* material evidence of nationality.

CONFLICTING JURISDICTION OF SPECIAL CLAIMS COMMISSIONS. Two American subjects were killed by bandits during course of payroll robbery on May 1, 1920. Since denial of justice, if any, arose after May 31, 1920, final date of jurisdictional period of Special Claims Commission, *held*, claim for their death within jurisdiction of the tribunal.

EVIDENCE BEFORE INTERNATIONAL TRIBUNALS.—BURDEN OF PROOF.—EFFECT OF NON-PRODUCTION OF EVIDENCE AVAILABLE TO RESPONDENT GOVERNMENT. Unexplained failure of respondent Government to produce evidence particularly within its knowledge may be taken into consideration by tribunal in reaching a decision.

DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH.—UNDUE DELAY IN PROSECUTION. Two American subjects were murdered on May 1, 1920. Though investigation was promptly begun by Mexican authorities, it thereafter was allowed to lapse. Not until February, 1921, were efforts made to ascertain the names of the crew of the train in the robbery of which such murders took place. Approximately a year after the murders some arrests were made of persons who were not identified as the culprits. In July, 1921, four persons were arrested who confessed to participation in the robbery and implicated others as also responsible but not all of the associates so named were thereafter captured. No explanation of such failure to capture was offered. Lack of diligence in apprehending criminals *held* established.

FAILURE ADEQUATELY TO PUNISH. Commuting of death sentence to twenty years' imprisonment in accordance with Mexican law *held* not a denial of justice. Imposition of twelve and six years' imprisonment upon highwaymen participating in robbery, in which homicide occurred, *held* inadequate punishment under Mexican law, which provided for death penalty, and denial of justice under international law. Members of train crew *held*, under the facts of case, participants in robbery, and subject to corresponding punishment.

Cross-references: Am. J. Int. Law, Vol. 26, 1932, p. 419; Annual Digest, 1929-1930, p. 161; British Yearbook, Vol. 12, 1931, p. 167.

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 739.

Commissioner Fernández MacGregor, for the Commission:

The United States of America, on behalf of Lillian Greenlaw Sewell, in her own right and as guardian of Vernon Monroe Greenlaw, her minor son, claims from the United Mexican States the amount of \$40,000.00,

United States currency, alleging that the Mexican judicial authorities were remiss in the prosecution and punishment of the murderers of the American citizen Ralph Greenlaw, killed in Mexico.

On the 1st of May, 1920, Ralph Lynn Greenlaw and his father, Eban F. Greenlaw, residents of Mexico, employees of the Suchi Timber Company which operated in the State of Mexico, left Palizada on a railway train for Punderaje for the purpose of taking to this place sufficient money to make the weekly payment to the workmen of the Company. The train was halted by a group of highwaymen who had previously conspired with the train crew; there was an exchange of shots and the father and son were killed, the money which they carried being taken from them. A report of the attack upon the train was made immediately, but the Mexican authorities did not succeed in apprehending the persons indicated as guilty until a year had passed; many of the highwaymen were not arrested; of those who were arrested, two were sentenced to death, two to twelve years, imprisonment and two to six years' imprisonment. The sentence of those condemned to death has not up to the present time been executed and those sentenced to six years' imprisonment were released after having served less than two years of their sentence.

Based on the foregoing facts, the United States asserts the responsibility of Mexico for not having apprehended and punished the majority of the culprits; for not imposing adequate punishment upon those who were tried; and for not having executed the sentence imposed upon four of the highwaymen.

The Mexican Agency asserts that the Commission lacks jurisdiction in the instant case because it treats of an act of bandits which occurred on May 1, 1920. It invites attention to the fact that the Special Claims Commission has jurisdiction over claims arising between November 20, 1910, and May 31, 1920, and that Article 3 paragraph 5 of the respective Convention confers upon that Commission jurisdiction over acts of bandits, provided that it be established that the authorities omitted to take reasonable measures to suppress the bandits or treated them with lenity or were in fault in other particulars.

The Commission in deciding questions involving jurisdiction in other cases has given due weight to the provisions relative to the General Claims Convention of September 8, 1923. The preamble to that Convention excludes from the jurisdiction of the Commission claims for losses or damages growing out of the revolutionary disturbances in Mexico; Article 1 likewise excludes claims arising from acts incident to the recent revolutions; Article 8 again excepts claims arising from revolutionary disturbances.

It does not seem that this claim based on a denial of justice is incidental, in the manner required by the Articles mentioned, to the revolutionary movements in Mexico, it being proper to observe, further, that as the murder of Greenlaw was committed on May 1, 1920, and as the period fixed for claims arising from the revolutions, coming under the Special Claims Commission, terminated on May 31, 1920, it appears that the denial of Justice here asserted as a basis of the claim, arose after the said 31st of May, 1920. For these reasons the Commission decides that it has jurisdiction over the instant case.

The Mexican Agency in its Answer admitted the nationality of the claimants; nevertheless, in its brief it challenged the nationality of one of the claimants stating that though it admitted that she was by birth an American citizen and had so remained during her first marriage, in view

of the fact that the nationality of her second husband had not been established, there was no way of proving whether the said claimant had continued to be an American citizen. It also challenged the legal standing of the minor claimant before the Commission on the ground that it had not been proven that he was the son of the late Ralph Greenlaw.

Considering that there is no doubt that the claimant is an American citizen by birth, and that it appears in her affidavit that her second husband was an American citizen, and the Mexican Agent not having presented any plausible argument or any evidence to show that the claimant lost her nationality by that second marriage, and considering finally that there has been submitted her certificate as a voter of the city of Los Angeles, California, in the year 1929, the Commission cannot but hold that she is an American citizen.

With respect to the capacity of the minor claimant, besides the evidence filed with the Memorial there has been submitted as additional evidence an affidavit of his paternal grandmother which presents elements of fact sufficient to warrant the admission that he is the legitimate son of Ralph Lynn Greenlaw.

Concerning the merits of the case the claimant Government asserts that the Mexican authorities did not properly investigate the murder of Greenlaw. The respondent Government has not submitted the full record containing the criminal proceedings in the case and the Commission is able to apply the doctrine set forth in the *Parker* case, Docket No. 127,¹ paragraph 7. reading:

“In any case where evidence which would probably influence its decision is peculiarly within the knowledge of the claimant or of the respondent Government, the failure to produce it, unexplained, may be taken into account in reaching a decision.”

Nevertheless, as the extracts submitted show that the record is voluminous, since there are references to 169 sheets therein, and in view of the fact that there is evidence filed by both parties with respect to which definite steps in the proceedings were taken, the Commission in the impossibility of indicating with certainty all the deficiencies therein, limits itself to pointing out those which seem to be unquestionable. Thus, it seems that the investigation of the case was begun immediately, since, when the Company officials took the bodies from the scene of the crime, several hours afterwards, the Auxiliary Judge of Punderaje took cognizance of the crime, making the preliminary investigation a record of which he sent to the Judge of the Court of First Instance at Villa Victoria which had jurisdiction; an autopsy of the victims was made; the statements of a number of witnesses were taken; but after this, the judicial authorities took no further effective steps. Although there are indications that at that time a rebel faction had taken possession of the region and that railway and telegraphic communications were suspended, and although counsel for Mexico read certain historical notes from Galvan's Almanac which showed the disturbed conditions of Mexico about the month of May 1920, the Commission is unable to determine the duration of the disturbances or their influence upon the progress of the proceedings and it abstains from making a decision upon this point. However it appears from the evidence filed by the United States that its diplomatic and consular representatives were appealing to the

¹ See page 35.

appropriate Mexican authorities to act energetically, obtaining assurances that this would be done. But they did not take effective measures until February of 1921 when they endeavored to ascertain the names of the men comprising the crew of the train which had been robbed. It seems strange that this important measure should not have been taken sooner. Approximately a year after the murder several persons suspected of complicity in the crime were arrested but they were not identified as the culprits. Finally in July of 1921 the Mexican authorities at El Oro, Mexico, arrested four individuals who confessed to having formed part of the band of highwaymen and who were turned over to the Federal Judge having jurisdiction. The confessions of these men indicated as responsible eight other men, whose names were given, and two members of the train crew; the former were never captured, without any explanation being made as to the cause of this deficiency, but the latter, members of the crew of the attacked train, were arrested.

The prisoners Luis Tenorio and Aldredo Sánchez, confessed to having shot and killed the two Americans in question and were sentenced to suffer the death penalty; the prisoners called Pedro Moreno and Macedonio Iturbe confessed to having plotted the attack and to having participated therein and were sentenced to suffer a penalty of twelve years' imprisonment; the members of the train crew called Porfirio and Dionisi González, were sentenced as accomplices in the crime of robbery with violence, to suffer the penalty of six years' imprisonment. The sentence of the Court of First Instance was rendered on April 18, 1922; an appeal was taken and the First Circuit Court of Appeals handed down its decision on July 15 of the same year confirming in all of its parts the decision of the lower court.

The American Agency asserted in its first pleadings that, without any cause, the execution of the capital penalty upon the sentenced prisoners Sánchez and Tenorio had been postponed indefinitely. It appears from the evidence that these prisoners took out a writ of *amparo* to the Supreme Court of Mexico in July 1922 and that the case was retained there until January of 1928, when the Highest Tribunal of Mexico decided the writ of *amparo* against the accused, as was shown in the additional evidence submitted by Mexico on September 22, 1930. The Mexican Agency explained this delay of the Court stating that the organization thereof, under the constitution of 1917, had been the cause of a large accumulation of cases in that Tribunal, which being required to function in banc was unable promptly to dispose of matters before it. The American Agency in its oral argument did not insist upon this point of complaint in view of the last evidence submitted by Mexico with respect to the contents of the decision of the Supreme Court. Moreover, the Mexican Agency submitted, also in 1930, evidence showing that with respect to these two criminals the sentence of death had been commuted to twenty years, imprisonment in accordance with Article 241 of the Penal Code of the Federal District, which reads:

"The commutation of the death penalty will not be obligatory except in two cases: 1st—When five years have lapsed from the date of the official notice to the criminal of the final sentence imposed upon him; 2nd—When after the final sentence there has been promulgated a law changing the penalty and there concurs in the case of the criminal the circumstances required by the new law. In other cases commutation will be made by the Executive: I. When in his judgment public convenience or tranquillity require it; II. When the convict proves fully that he is unable to extinguish the penalty imposed or any of its

circumstances, through having arrived at the age of sixty years, or by reason of sex, physical condition or chronic state of health; III. In the case of Article 43.¹

The case of Sánchez and Tenorio is included in paragraph 1 of that Article. The Commission therefore finds nothing in this particular that is not legal.

Pedro Moreno and Macedonio Iturbe confessed that prior to the assault they had been invited to form a part of the band which was to attack the train in question, that they had accepted and had participated in the crime. The Mexican Courts held that the crime of these two individuals was that of robbery with violence, with attempt to wreck the train, for which reason the penalty corresponding to that crime, which is that of twelve years' imprisonment, must be imposed on them. The American Agency contends that as in the case of Tenorio and Sánchez there should have been applied the provisions of Article 404 of the Penal Code of the Federal District which reads:

"Capital penalty shall be imposed when the robbery is executed on a public road and homicide is committed, or a person is raped, or tortured, or violence through other means causes one of the physical injuries mentioned in paragraph II of Article 527, regardless of the number of the robbers and whether they be unarmed. If the violence produces a physical injury less serious than those expressed, the penalty shall be twelve years imprisonment."

The same Agency asserts that the two individuals formed part of a band; that they committed the robbery on a public road, since a railroad must be so considered; and that during the robbery two persons were murdered, thus meeting all the conditions required for imposing upon all the highwaymen the death penalty, since Article 404 quoted above stated that this should be imposed regardless of the number of the robbers and whether they be unarmed. The Mexican Agency on its part asserts that the capital penalty must be imposed only upon the highwaymen who, besides committing the robbery on a public road, are authors of the crime of homicide, of physical injuries, or of rape. The Mexican Agency did not submit to the Commission any jurisprudence bearing on this point; but it does not seem to present any difficulty. Of course, a reading of Article 404 appears to show clearly that when murder has been committed in an attack, capital punishment must be imposed upon all the highwaymen whether one or more committed the murder. Besides, this interpretation is sustained by the Constitution of 1857, under which the Penal Code of the Federal District was developed, as well as by the Constitution of 1917. The first, surely in view of the importance to the Mexican community of extirpating assaults on the public highways, established in its Article 23,

"The death penalty for political crimes is abolished. With regard to the others, it will be imposed only upon the traitor in a foreign war, the parricide, the murderer who commits the crime by treachery, premeditation and advantage, the incendiary, the kidnapper, the *highwayman*, the pirate and those guilty of serious crimes against military order."

In accordance with this provision capital punishment could be imposed upon the highwaymen for the sole fact of being one, and even though he has not committed robbery and much less homicide or other crimes against persons. The President of the Commission who drafted the Penal Code of the Federal District, says with respect to the crime which the highwaymen commits:

"I cannot fail to call the attention of the highest Governmental Authorities to the fact that although in accordance with Article 23 of the Federal Constitution, the extreme penalty can be imposed and is imposed at the present time upon all highwaymen and upon all incendiaries, the Commission cannot advise that it be applied except when the highwayman commit a homicide, rape or cause some of the more serious physical injuries, or when the fire is set with premeditation or causes a homicide."

It can be seen from the foregoing that although in accord with the Political Constitution of Mexico of 1857 capital punishment could be imposed upon all highwaymen, the authors of the Penal Code restricted the application of that penalty to the cases in which during an assault there is committed a homicide, rape, or torture is inflicted; but according to the philosophy of that precept, the penalty must be imposed upon all those who take part in an assault whether or not they have had direct participation in the crime against persons who may have been attacked. This participation is not in conflict with Article 22, last paragraph of the Mexican Constitution of 1917, which repeats the precept of that of 1857 in the following terms:

"There is also prohibited the penalty of death for political crimes, and with respect to the others it will be imposed only upon the traitor during a foreign war, the parricide, the murderer who commits the crime by treachery, premeditation and advantage, the incendiary, the kidnapper, the highwayman, the pirate and upon those guilty of serious crimes against military orders."

The Commission holds that, following its own precedents and the international precedents relating to the subject, the imposition of a penalty inadequate to the crime committed constitutes a denial of justice, and that this clear inadequacy exists in this case.

The American Agency also complains that the penalty imposed upon the González brothers is likewise inadequate for the crime, since they were sentenced as accomplices of the highwaymen and not as principals in the attack, which they were. It is to be noted that one of the criminals referred to was the engineer of the train attacked and that, in accordance with a previous understanding with the bandits, he stopped the train at the proper time and delivered the money guarded by the Greenlaws; that the other brother went beforehand to advise the band of the departure of the train, and also that his brother the engineer was prepared to do his part. It regards them therefore as members of the band of highwaymen, and deserving for that reason the death penalty. It bases itself in this regard on paragraphs 2 and 5 of Article 49 of the Penal Code of the Federal District, which reads:

"Those responsible as principals of a crime are: II. Those who are the determining cause of a crime although they do not execute it themselves, or decide or prepare its execution, availing themselves of means other than those enumerated in the preceding paragraph to make others enumerated in the preceding paragraph to make others commit it; V. Those who execute deeds which are the impelling cause of the crime or which lead immediately and directly to its execution or which are so necessary to its commission, that without them it could not be consummated."

The Commission is obliged to share this opinion since it appears that there is no logical or legal reason which permits the differentiation of the members of the band, who by previous agreement awaited the train to attack it, or of the two members of the train crew who likewise by previous agreement, and forming therefore a part of the group, lent a hand in the attack. The connivance and the cooperation with the other members of the band

of highwaymen. made highwaymen of the two members of the crew of the train referred to, and rendered them deserving of the extreme penalty. Notwithstanding, they were sentenced to six years' imprisonment only and released provisionally on March 6, 1924. The Mexican Agency explained that this liberty is granted to criminals sentenced to more than two years and whose conduct has been uniformly good, (Articles 74, 75 and 98 of the Penal Code of the Federal District); but that explanation would be acceptable only in the event that the penalty of six years had been legally applied.

Reviewing briefly the foregoing the Commission finds that there was some lack of diligence in the pursuit and apprehension of the culprits during the first year; that the penalties imposed upon four of the arrested criminals do not appear to be in accord with the provisions of the Penal Code of the Federal District; that there was negligence in the pursuit of the other individuals composing the band which made the attack, from all of which it is constrained to conclude that there was to a certain extent an insufficiency in the administration of justice, for which reason, it believes an award of \$7,000.00 must be allowed.

Decision

The United Mexican States shall pay to the United States of America on behalf of Lillian Greenlaw Sewell and Vernon Monroe Greenlaw the amount of \$7,000.00 (seven thousand dollars), without interest.

WILLIAM E. CHAPMAN (U.S.A.) *v.* UNITED MEXICAN STATES

(*October 24, 1930. Pages 121-132.*)

DUTY TO PROTECT ALIENS. While a Government is not an insurer of aliens it has a duty to use such means of protection as are within its capacity to protect them against apprehended illegal acts of which it has notice.

DUTY TO PROTECT CONSULS. Claimant was an American consul in Puerto México shortly prior to the execution of Sacco and Vanzetti in the United States. Threats of death to all American diplomatic and consular officials in Mexico, if such execution were carried out, were received by the American Embassy in Mexico City. Pursuant to instructions from the American Consulate General, claimant informed the Governor of the State of Vera Cruz, Chief of the State Police at Puerto México, and the Municipal President of Puerto México, of the apprehended danger and requested adequate protection. Only the Municipal President made any reply to such requests. The Municipal President requested the local chief of police to exercise active vigilance but no additional protection whatever was extended to claimant. Just before daylight a masked man entered his home and shot him through the chest. *Held*, in the light of the special protection due consular officers under international law, lack of protection by respondent Government established. Claim *allowed*.

DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH. When investigation of crime was promptly begun by Mexican authorities and some examination of witnesses place, *held*, denial of justice not established.